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CLEMENCY FOR KILLERS? PARDONING BATTERED WOMEN WHO STRIKE BACK

I. INTRODUCTION

Brenda Aris met her husband, Rick Aris, when she was sixteen years old, and he was in his mid-twenties.¹ They were married by the time she was seventeen.² Soon after they were married, Rick began to abuse Brenda, and at one point broke both her jaw and her ribs.³ Brenda repeatedly attempted to leave her husband, but was always drawn back by Rick's threats that he would kill either her or her family.⁴ It became harder and harder for Brenda to escape since the family had no car and no telephone, and Brenda was rarely allowed out of the house alone.⁵ In addition, Rick told Brenda that he would kill her if she ever went to the police.⁶

The situation finally climaxed. During a four to six week period Rick beat Brenda on a daily basis and threatened her life with a gun or a knife at least four times a week.⁷ Whenever Rick left the house he locked Brenda in her bedroom so she could not escape.⁸ One summer night,⁹ after consuming large amounts of drugs and alcohol, Rick beat Brenda severely and told her that "he didn't think he was going to let [her] live until morning."¹⁰ Convinced that he would kill her when he woke up, Brenda waited until Rick passed out from the combination of drugs and alcohol, and then shot him five times, killing him immediately.¹¹

1. Courtroom, Code and Clemency: Reform in Self-Defense Jurisprudence for Battered Women, Panel Discussion at Golden Gate University School of Law (Jan. 1993), in 23 GOLDEN GATE U. L. REV. 829, 842 (1993) [hereinafter Courtroom].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See, e.g., Virginia Ellis, *Battered Wife Who Killed Husband Gets Early Release*, L.A. TIMES, Aug. 24, 1994, at A1, A19.

10. Courtroom, *supra* note 1, at 842.

11. *Id.*; Ellis, *supra* note 9, at A19.

During Brenda's trial the jury was allowed to hear testimony about the years of abuse Brenda suffered.¹² In fact, members of Rick's immediate family testified on Brenda's behalf as to the extent and severity of the beatings.¹³ Additionally, the trial court allowed expert testimony regarding battered woman syndrome,¹⁴ a psychological theory that attempts to explain the actions of battered women who kill so as to satisfy the requirements of a self-defense claim.¹⁵ However, Brenda was not allowed a jury instruction on self-defense.¹⁶ As a result, there was no way the jury could have concluded that Brenda's actions were legally justified. Several members of the jury cried as they returned the verdict,¹⁷ but Brenda was convicted of second degree murder and sentenced to fifteen years to life.¹⁸

Brenda Aris's case is an example of the failure of our criminal justice system to adequately address the particular situation of battered women who strike back at their abusers. Many battered women are denied any sort of expert testimony on battered woman syndrome at their trial.¹⁹ Even when expert testimony is allowed, such as in Brenda Aris's case, the battered woman may still not be allowed a self-defense instruction.²⁰ Finally, when a battered woman is allowed expert testimony on battered woman syndrome and a self-defense instruction at her trial but is still convicted of homicide, there are various reasons why society may want to take a second look at

12. Courtroom, *supra* note 1, at 842.

13. *Id.*

14. *Id.* at 843. The expert testimony was provided by Dr. Lenore E. Walker, a clinical and forensic psychologist, who actually developed the theory of battered woman syndrome and is widely recognized as its foremost authority. *People v. Aris*, 215 Cal. App. 3d 1178, 1194, 264 Cal. Rptr. 167, 177 (1989).

15. *Developments in the Law—Legal Responses to Domestic Violence: Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574, 1579-80 (1993) [hereinafter *Developments*]. However, the jury was not allowed to hear any testimony as to whether Brenda herself was actually suffering from the syndrome. Courtroom, *supra* note 1, at 843. In fact, the jury later stated that since they were not told that Brenda was suffering from battered woman syndrome, they thought they were prohibited from concluding that she did. *Id.*

16. Courtroom, *supra* note 1, at 843.

17. *Id.*

18. Ellis, *supra* note 9, at A1, A19.

19. *Developments*, *supra* note 15, at 1588. A recent study of 100 trials of battered women found that expert testimony on battered woman syndrome was offered in 44 cases but admitted in only 26. Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 585 (1990).

20. Courtroom, *supra* note 1, at 843; *Developments*, *supra* note 15, at 1584-85.

her case to ensure that justice has been done.²¹ Executive clemency, more commonly known as pardoning, presents a viable and essential supplement to the often flawed substantive law methods of dealing with such women.²²

Pardoning is already used to remedy extreme sentences for some battered women who kill.²³ However, the current structure of executive clemency is flawed, largely because pardoning is exercised at the whim of the executive, with political considerations often outweighing concerns of justice.²⁴ Until problems with the substantive law treatment of battered women who kill are resolved, pardoning is and should continue to be utilized.

This Comment argues that substantive law methods currently fail to fully address the situation of battered women who kill their abusers. In order to fill this gap, I propose that executive clemency presents a viable and necessary approach, and should supplement current substantive law to ensure that justice is done in every case. This Comment concludes that battered women who have killed their abusers may be particularly suited for the principled exercise of executive clemency, as they often fulfill both its justice-enhancing function and its justice-neutral function. Finally, this Comment proposes changes in the procedural structure of the clemency process that will work to ensure justice, particularly for battered women who have killed.

II. THE BACKGROUND OF BATTERED WOMAN SYNDROME AND EXECUTIVE CLEMENCY

A. *Substantive Law Methods of Dealing with Battered Women Who Kill*

Currently, most jurisdictions that use substantive law methods to address specifically the problem of battered women who kill do so

21. See *Developments*, *supra* note 15, at 1591; see *infra* part III.A.

22. During May, 1993, California Governor Pete Wilson commuted Brenda Aris's sentence from 15 years to life to 12 years to life, making her eligible for parole in less than a year. Ellis, *supra* note 9, at A1, A19. Aris is the first woman in California who has successfully earned executive clemency by arguing that she killed her abuser because she was a battered woman. *Id.* at A1. Wilson commuted the sentence only after extensive testimony by witnesses as to the abuse Brenda suffered, including testimony by Rick Aris's own family. *Id.* at A19. For instance, Rick's own sister stated: "I loved my brother and I always will, but I believe he was the meanest person I've ever known." *Id.*

23. *Developments*, *supra* note 15, at 1589-90.

24. *Id.* at 1590-91.

through the admission of expert testimony on battered woman syndrome.²⁵ Battered woman syndrome is a psychological theory that may enable the battered woman to claim self-defense as a justification for her actions.²⁶ This section presents a brief overview of battered woman syndrome, its relevance to self-defense claims, and the current state of the law as to admission of expert testimony regarding the syndrome.

1. Battered woman syndrome

The effect of continuous physical or psychological abuse on many women has come to be known as "battered woman syndrome."²⁷ Two of the main components of the syndrome have been described as the "cycle theory of violence" and the "theory of learned helplessness,"²⁸ which together assist in explaining the behavior of battered women to juries and judges.²⁹

The cycle theory of violence explains why many battered women do not leave their abusers. This theory suggests that abuse often occurs in a cyclical pattern.³⁰ The first stage of abuse is described as the "tension building" phase, during which abuse occurs in various "mild" forms, such as pinching, slapping, or verbal and psychological abuse.³¹ This phase may last up to ten years before progressing.³² During this stage the woman often attempts to prevent the violence from escalating and may even attempt to escape from the abuser.³³

The second stage is termed the "acute battering" phase, during which severe abuse occurs and tension climaxes.³⁴ This may last

25. *Id.* at 1575-78.

26. *Id.* at 1578. Before the mid-1970s battered women who killed their abusers usually either pled guilty or claimed insanity, temporary insanity, or diminished capacity. *Id.* at 1577-78.

27. *Id.* at 1578; LENORE E. WALKER, *THE BATTERED WOMAN* (1979). The syndrome has been defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." *State v. Kelly*, 478 A.2d 364, 371 (N.J. 1984).

28. WALKER, *supra* note 27, at 42-71.

29. Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 368 (1992).

30. See LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 42 (1989) [hereinafter *TERRIFYING LOVE*]; Lenore E. Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 6 (1982).

31. *TERRIFYING LOVE*, *supra* note 30, at 42.

32. WALKER, *supra* note 27, at 42, 58.

33. *Id.* at 56-60; *TERRIFYING LOVE*, *supra* note 30, at 42-43.

34. *TERRIFYING LOVE*, *supra* note 30, at 43-44.

from anywhere between two and twenty-four hours, and can be distinguished from the previous tension building stage in that the abuse is far more violent and vicious.³⁵

The final stage is the "contrition stage," during which the batterer becomes loving and remorseful, and attempts to make up for the pain he has caused.³⁶ The abuser promises that the battering will never occur again, and his behavior during this phase often brings back pleasurable memories of better times for the battered woman.³⁷

However, the cycle eventually renews itself as the tension again builds up.³⁸ The cyclical nature of the violence explains why many battered women do not leave the abusive relationship; the period of contrition keeps the woman emotionally attached and rekindles hope that the relationship will return to its pre-battering contours.³⁹

The second theory comprising battered woman syndrome is termed learned helplessness.⁴⁰ Because the battered woman is often subjected to "random, variable abuse with or without provocation,"⁴¹ she comes to believe that she has no control over the situation and becomes passive, demoralized, and paralyzed, effectively unable to leave the abusive relationship.⁴² In addition, "[b]ecause the battered woman is unable to predict the effect her actions might have on her battering spouse, she eventually learns that she has no control over the situation or escape from the pain. Reacting with passivity becomes her best defense."⁴³

35. *Id.* at 43. During this stage the battered woman may receive injuries such as bruises, broken bones and internal injuries, and may also be raped. Andersen & Read-Andersen, *supra* note 29, at 369.

36. TERRIFYING LOVE, *supra* note 30, at 44-45.

37. *Id.*

38. Andersen & Read-Andersen, *supra* note 29, at 370-71.

39. *See Kelly*, 478 A.2d at 371-72.

40. WALKER, *supra* note 27, at 42-55. Courts have described learned helplessness in various ways, such as "psychological torpor," *Kelly*, 478 A.2d at 386, and "a condition in which the woman is psychologically locked into her situation due to economic dependence on the man, an abiding attachment to him, and the failure of the legal system to adequately respond to the problem." *State v. Allery*, 682 P.2d 312, 315 (Wash. 1984).

41. Andersen & Read-Andersen, *supra* note 29, at 371.

42. TERRIFYING LOVE, *supra* note 30, at 37. Learned helplessness may be the result of earlier abuse or socialization. *Id.* "The earlier a person falls into a pattern of learned helplessness, the more difficult it is for that person to terminate a violent relationship." Andersen & Read-Andersen, *supra* note 29, at 371 n.49.

43. Andersen & Read-Andersen, *supra* note 29, at 371 (footnote omitted).

2. Why battered woman syndrome is relevant to a claim of self-defense

Self-defense is the legal justification for the use of force in response to an imminent threat of unlawful physical force.⁴⁴ Generally, deadly force may be used only in response to a threat of death or serious bodily harm.⁴⁵ However, battered women are often treated unequally when they make self-defense claims.⁴⁶ Two reasons are generally suggested for such unequal treatment.

First, feminist scholars argue that there is an inherent gender bias in the law of self-defense, rendering it unable to deal fairly with the situation of battered women who kill their abusers.⁴⁷ This inherent bias in the law unfairly prevents battered women from presenting a self-defense claim.⁴⁸

Second, other scholars argue that it is not the law itself that is biased, but rather the way the law is applied and interpreted.⁴⁹ Thus, bias against women prevents judges and juries from seeing battered women's actions as reasonable.⁵⁰

Therefore, battered women who kill their abusers often have difficulty making successful self-defense arguments due to bias in either the law itself, or in its application. As a result of this bias, battered women are often unable to convince the trier of fact that they had a reasonable belief in the imminence of the danger and that deadly force was necessary, both of which are required elements for a successful self-defense claim.⁵¹ Expert testimony on battered woman syndrome provides an explanation of the "reasonableness" of

44. "[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." MODEL PENAL CODE § 3.04(1) (Official Draft 1985).

45. *Id.* § 3.04(2)(b). "The use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat." *Id.*

46. *Developments, supra* note 15, at 1575.

47. *Id.* Feminist scholars argue that battered women are often excluded from the two "paradigms" in which the law imagines self-defense—the sudden attack by a stranger and the dispute between two equals which gets out of hand. *Id.* at 1576.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See Kelly*, 478 A.2d at 377.

the battered woman's belief in both the imminence of danger and the necessity of using deadly force.⁵²

In a majority of jurisdictions, the reasonable person standard is a combination of objective and subjective analysis.⁵³ The trier of fact must consider the reasonableness of the defendant's actions under the circumstances, taking into account the defendant's experience and perceptions.⁵⁴ Therefore, expert testimony on battered woman syndrome is relevant to a claim of self-defense in that the trier of fact must first understand the syndrome before it is possible to determine whether a particular defendant was acting like a "reasonable" battered woman.⁵⁵

Battered women on trial for killing their abusers often require expert testimony on the battered woman syndrome in order to convince the trier of fact that they had a reasonable belief of imminent danger.⁵⁶ For example, the batterer may be sleeping or resting, yet still pose a threat of imminent danger to the battered woman, perhaps because of her previous experience with the "subtle gestures or threats that distinguish the severity of attacks."⁵⁷

Expert testimony on battered woman syndrome is also admitted for the purpose of explaining the reasonableness of a battered woman's belief that deadly force was required.⁵⁸ Often the trier of fact refuses to believe that deadly force was justified when the batterer is not using a weapon.⁵⁹ Expert testimony on battered woman syndrome can convince the jury of the reasonableness of the battered woman's belief that the threat of death or severe bodily

52. *Developments, supra* note 15, at 1580.

53. *Id.*

54. *Id.*; Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 409 & n.105 (1991).

55. *Developments, supra* note 15, at 1580. Professor Holly Maguigan argues that a majority of jurisdictions use a combined objective/subjective reasonableness standard, even though this is often obscured by an objective label. Maguigan, *supra* note 54, at 409-14. Her survey of battered woman cases reveals that whether a jurisdiction labels its test a "reasonable prudent battered woman" test, a "subjective" test, or a "combined subjective and objective" test, the actual operation of the test differs very little. *Id.* at 409 n.106.

56. *Developments, supra* note 15, at 1582. For example, "although a sleeping or resting batterer may not seem to pose a threat, [expert] testimony can establish that a battered woman who kills her abuser in such situations may have reasonably believed that she was in imminent danger." *Id.*

57. *Id.*

58. *Id.* at 1581-82.

59. *Id.* at 1581.

injury did indeed exist, regardless of whether a weapon was present.⁶⁰

A final purpose for which expert testimony on battered woman syndrome is admitted pertains to the defendant's duty to retreat. Generally, a defendant is not justified in using deadly force if the necessity of using such force can be avoided with complete safety by retreating.⁶¹ Therefore, expert testimony is relevant to prove the reasonableness of the battered woman's belief that retreat could not be made with complete safety.⁶²

3. Admissibility of expert testimony on battered woman syndrome

The current trend in most states is toward admitting expert testimony on battered woman syndrome so long as it is relevant.⁶³ Holly Maguigan, associate professor of law at New York University, performed a survey of all published battered woman cases, and discovered that

[t]he existing evidentiary law in every jurisdiction provides that testimony about a defendant's history of abuse by the decedent is admissible. Expert testimony regarding the effects of a history of abuse, usually in the form of testimony about the "battered woman syndrome," is admissible in the overwhelming majority of the states In all but two of these states, the testimony has been ruled admissible on the basis of existing evidentiary provisions, without the necessity of special legislation.⁶⁴

However, in application, expert testimony on battered woman syndrome is still excluded for various reasons, including that it does

60. *Id.* at 1582.

61. MODEL PENAL CODE § 3.04(2)(b)(ii).

62. Andersen & Read-Andersen, *supra* note 29, at 378-79. *But see* Maguigan, *supra* note 54, at 385-86 (arguing that expert testimony relating to the issue of the duty to retreat is not necessary because "[o]nly a minority of jurisdictions impose a duty to retreat . . . and most of that minority exempt a person attacked in her home from the duty to retreat").

63. *Developments*, *supra* note 15, at 1582.

64. Maguigan, *supra* note 54, at 386 (footnotes omitted).

not aid the jury,⁶⁵ it is irrelevant to the stated claim,⁶⁶ or it is prejudicial.⁶⁷

Although the admissibility of expert testimony on battered woman syndrome has remained a matter of judicial discretion in most states, some legislative attempts to codify its admissibility have succeeded.⁶⁸ Since 1990, nine states have passed legislation allowing the use of expert testimony on battered woman syndrome.⁶⁹ For example, a 1992 amendment to the California Penal Code provides that expert testimony on battered woman's syndrome is scientifically valid and should be admitted so long as it is relevant and witnesses can demonstrate their qualifications.⁷⁰

Additionally, one can argue that when expert testimony on battered woman syndrome has been excluded at trial, the defendant may appeal an unfavorable decision based upon the denial of her constitutional right to present a defense.⁷¹ The right to present a defense at a criminal trial, protected by the Due Process Clause of the Fourteenth Amendment⁷² and the Compulsory Process Clause of the Sixth Amendment,⁷³ requires admission of evidence critical to a fair trial.⁷⁴ Although this issue has not yet been decided, appellate courts have stated in dicta that these constitutional provisions may

65. *Developments, supra* note 15, at 1583-84; *see, e.g.,* *Buhrle v. State*, 627 P.2d 1374, 1378 (Wyo. 1981).

66. *Developments, supra* note 15, at 1584; *see, e.g.,* *People v. White*, 414 N.E.2d 196, 200 (Ill. App. Ct. 1980) (barring expert testimony based on irrelevancy, immateriality, and the fact that it would "serve no useful purpose").

67. *Developments, supra* note 15, at 1584; *see, e.g.,* *Tourlakis v. Morris*, 738 F. Supp. 1128, 1140 (E.D. Ohio 1990).

68. *Developments, supra* note 15, at 1585.

69. *Id.* Nancy Gibbs, *'Til Death Do Us Part*, TIME, Jan. 18, 1993, at 43. States that have passed such legislation include California, Louisiana, Maryland, Missouri, and Ohio. *Developments, supra* note 15, at 1585 n.79.

70. CAL. EVID. CODE § 1107(b) (West Supp. 1995).

71. *Andersen & Read-Andersen, supra* note 29, at 363.

72. *Id.* at 385 n.143 (citing *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Webb v. Texas*, 409 U.S. 95, 98 (1972)).

73. *Id.* at 385-86 (citing *Michigan v. Lucas*, 500 U.S. 145 (1991); *Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *Washington v. Texas*, 388 U.S. 14, 19 (1967)). In their article, *Andersen and Read-Andersen* state that the right to present a defense is guaranteed by the Compulsory Process Clause of the Sixth Amendment because, "the right to compel the appearance of witnesses has meaning only if it includes the right to present the testimony of these witnesses." *Id.* at 386.

74. *Developments, supra* note 15, at 1586 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *Fennell v. Goolsby*, 630 F. Supp. 451, 460 (E.D. Pa. 1985)).

force the admission of expert testimony on battered woman syndrome in order to prove the material elements of self-defense.⁷⁵

Finally, the use of battered woman syndrome has been extended recently to cover a wide variety of situations where a battered *woman* is not necessarily involved. Perhaps the term should be changed to "battered person syndrome" because the admission of expert testimony on the theory has been used to bolster self-defense claims by battered males who killed their wives or lovers,⁷⁶ by gay men and lesbians who killed their partners,⁷⁷ and by children who killed a parent or parents.⁷⁸ In addition, expert testimony on battered woman syndrome has been used by the *defense* in a homicide suit for the murder of a woman by her husband!⁷⁹

B. *Pardoning as a Current Procedural Method of Dealing with Battered Women Who Kill*

Executive clemency is a developing procedural alternative or supplement to substantive law methods of dealing with battered women who kill their abusers.⁸⁰ The most widely publicized examples of executive clemency for battered women who killed their abusers include the granting of clemency to twenty-seven women by former Ohio Governor Richard Celeste in December, 1990,⁸¹ and the

75. *Id.* at 1587.

76. *See, e.g.*, State v. Feltrop, 803 S.W.2d 1 (Mo. 1991) (en banc).

77. *See generally* Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379 (1993) (arguing for the use of expert testimony on battered woman syndrome in trials of males and females who kill their abusive homosexual lover).

78. *See, e.g.*, State v. Janes, 850 P.2d 495, 501-03 (Wash. 1993) (en banc).

79. *See* Bettina Boxall, *Abuse Expert Stirs Uproar With Simpson Defense Role*, L.A. TIMES, Jan. 29, 1995, at A1. Dr. Lenore Walker was scheduled to testify for the defense in the O.J. Simpson murder trial. *Id.* Dr. Walker defended herself by saying

"[t]here's no question I'm an advocate for battered women. But I'm also a scientist. Because I will advocate for battered women doesn't mean I will not tell the truth about science . . . I am not saying O.J. Simpson is not a batterer. What I am saying is because you are a batterer that does not make you a murderer."

Id. at A30. Dr. Walker's intent in testifying for the defense in this case is to "ensure that the psychological data about domestic violence is not misrepresented by either side in the case." *Id.*

80. *See supra* notes 22-23 and accompanying text. *See generally* Courtroom, *supra* note 1 (discussing recent clemency movements).

81. *E.g.*, Gibbs, *supra* note 69, at 44; *Celeste Discusses Clemency Issue on Talk Show*, UPI, Dec. 26, 1990, available in LEXIS, Nexis Library, UPI File [hereinafter *Celeste*].

pardoning of eight Maryland women by Governor William Donald Schaefer in February, 1991.⁸² In order to understand more fully the applicability of pardoning as a postconviction remedy for battered women who kill their abusers, it is necessary to examine the history and purposes of executive clemency within the United States.

1. What is executive clemency?

Clemency has been defined as "an official act by an executive that removes all or some of the actual or possible punitive consequences of a criminal conviction."⁸³ While executive clemency appeals do not affect a substantial portion of criminal cases,⁸⁴ all the constitutions in the world, except China's, provide for a pardoning power.⁸⁵ In addition, in the United States the constitutions of forty-eight of the fifty states also include some form of executive clemency.⁸⁶

There are several different types of clemency.⁸⁷ This Comment is concerned primarily with pardons and commutations. The executive pardon can take many forms, as evidenced by the following description:

[The pardon] can be a full pardon; fully pardoned offenders simply walk away from jail as if they had never been tried and sentenced. It can be partial, relieving the offender of some but not all of the legal consequences of conviction. It can be absolute, freeing the criminal without any conditions whatever. Or it can be conditional, dependent on the performance or nonperformance of acts specified by the executive.⁸⁸

Commutation, on the other hand, is a more limited form of clemency, which merely substitutes a lesser punishment for the one imposed by

82. *E.g.*, Laura K. McFadden, *A Matter of Murder and Survival*, *NEWSDAY* (Nassau and Suffolk Edition), Mar. 7, 1991, at 64.

83. KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 4 (1989).

84. SAMUEL P. STAFFORD II, *NATIONAL CTR. FOR STATE COURTS, PUBLICATION NO. R0035, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE* *xvi* (1977).

85. MOORE, *supra* note 83, at 7.

86. *Id.*

87. Other types of pardons include "amnesty," which is usually granted to a group of people before a trial takes place and "reprieves," which merely postpone punishment for a certain length of time. *Id.* at 5.

88. *Id.*

the court.⁸⁹ Both pardons and commutations have been utilized in granting clemency to battered women who have killed their abusers.⁹⁰

2. A brief history of pardons in the United States

The inception of the executive pardoning power in the United States was based largely on the English version of clemency.⁹¹ The early colonists were apprehensive of an executive pardoning power patterned after the royal pardoning power of the British monarchy.⁹² Thus, at the time the Constitution was drafted in 1787, few state constitutions vested the pardoning power in the executive alone.⁹³ However, despite this early distrust of vesting the pardoning power in the executive, the 1787 draft of the U.S. Constitution did just that and was agreed upon by the Framers after relatively little discussion.⁹⁴ Thus, Article II of the Constitution states that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."⁹⁵

In 1833 *United States v. Wilson*⁹⁶ was the first Supreme Court case to discuss the presidential pardoning power.⁹⁷ At this point the Supreme Court looked toward British pardoning practices in order to determine that pardons were acts of grace.⁹⁸ Chief Justice John Marshall defined a pardon as follows:

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate⁹⁹

89. *Id.*; Daniel Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 577 (1991).

90. For example, former Ohio Governor Richard Celeste granted full pardons to 27 battered women who killed or assaulted their abusers. *E.g.*, *Celeste*, *supra* note 81. However, California Governor Pete Wilson chose instead to commute the sentences of two battered women, which merely allowed a reduction in the amount of time served. *E.g.*, *Ellis*, *supra* note 9, at A19.

91. Kobil, *supra* note 89, at 589.

92. MOORE, *supra* note 83, at 25.

93. Kobil, *supra* note 89, at 590.

94. MOORE, *supra* note 83, at 25.

95. U.S. CONST. art. II, § 2, cl. 1.

96. 32 U.S. (7 Pet.) 150 (1833).

97. *Id.* at 160; Kobil, *supra* note 89, at 594.

98. MOORE, *supra* note 83, at 50-51.

99. *Wilson*, 32 U.S. (7 Pet.) at 160.

This definition of the pardon as a personal gift from a God-like executive paved the way for the broad interpretation of the executive clemency power that has persisted in the United States until today. Although the Supreme Court later rejected the "act of grace" theory of executive pardons for a public welfare centered theory,¹⁰⁰ the Court continues to interpret the President's pardoning power broadly.¹⁰¹

3. Current exercise of the executive pardon

Today the President's pardoning power is not limited in any meaningful sense by either the legislative branch or the judicial branch.¹⁰² In *Ex parte Garland*¹⁰³ the Supreme Court held that "[t]his [pardoning] power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."¹⁰⁴

The judicial branch may have slightly more power to regulate the exercise of the presidential pardon, as "courts have gradually developed a bifurcated approach to evaluating exercises of clemency that treats the President's reasons for using the power as sacrosanct, but recognizes that courts may review and invalidate some pardons because of their impermissible effect."¹⁰⁵ Thus, although some cases support the theory that the judiciary may review exercises of the executive pardoning power for constitutional violations, the courts have rarely used this power.¹⁰⁶

The executive pardoning power granted to governors through state constitutions is roughly analogous to that of the President. Generally, the states place full clemency authority in the hands of the governor, with or without special clemency boards to provide

100. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). In *Biddle* Justice Holmes wrote that [a] pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.

Id.

101. Kobil, *supra* note 89, at 594 (citing *Schick v. Reed*, 419 U.S. 256, 266 (1974)).

102. *Id.* at 595.

103. 71 U.S. (4 Wall.) 333 (1866).

104. *Id.* at 380.

105. Kobil, *supra* note 89, at 598.

106. *Id.* at 601.

recommendations.¹⁰⁷ Except in a few states, there are generally no statutory or administrative standards to guide the executive in the use of the pardoning power.¹⁰⁸

Thus, the clemency power in both the federal and state governments is vested largely in the executive branch and is not significantly limited by the other coequal branches of government. The above-described procedural context of executive clemency largely defines its use and underlying rationales.

4. The use of the executive clemency power

The use of the presidential clemency power in the United States has declined precipitously in the last twenty years.¹⁰⁹ This decline has been traced to various causes, including changing trends in the philosophical purposes for punishment during the last century¹¹⁰ and a "lack of consistent, principled standards governing [its] exercise."¹¹¹ Thus, pardoning has played a minimal role in the presidential experience for at least the last five administrations, with the possible exception of President Ford's pardon of Richard Nixon.¹¹²

However, the pardoning power has played a more significant role for the political lives of state governors.¹¹³ For instance, one governor has been removed from office and another indicted for

107. As of 1977, 31 states gave the governor full clemency power, 10 states gave clemency power to special pardoning boards, seven states provided that the governor may grant clemency only after recommendation by the pardoning board, and two states had original systems vesting the pardoning power in the governor with some limitations. STAFFORD, *supra* note 84, at 1.

108. Kobil, *supra* note 89, at 605. Compare CAL. PENAL CODE § 4801 (West Supp. 1995), which states that the Board of Prison Terms may report to the Governor those prisoners who "ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of battered woman syndrome, which, in its opinion, should entitle the prisoner to a pardon or commutation of sentence." Thus, California does present some guidance to the executive and even singles out battered women as particularly eligible for pardons.

109. See MOORE, *supra* note 83, at 82-84; Kobil, *supra* note 89, at 602.

110. MOORE, *supra* note 83, at 83-84. Moore posits that the decline in pardons can be traced to the shifting focus of the criminal justice system this century—first on the rehabilitative purposes for punishment, then moving towards retributive justifications. *Id.* She argues that the rehabilitative focus eliminated the need for pardons through indeterminate sentencing and parole. *Id.* at 83. Subsequently, the shift back to retributive principles of justice has fostered public criticism of any type of leniency towards criminals. *Id.* at 84.

111. Kobil, *supra* note 89, at 602.

112. *Id.* at 603 & n.221.

113. *Id.* at 607.

improprieties committed while in office, based upon alleged abuse of the pardoning power.¹¹⁴ Additionally, the particular exercise of the pardoning power by certain governors has seriously affected their political careers.¹¹⁵

As criminal law was not designed with the particular situation of battered women in mind, judicial discretion and flexible sentencing have played important roles in ensuring that they were treated justly.¹¹⁶ However, the trend in today's criminal justice system toward inflexible sentencing guidelines and stricter enforcement of criminal sentences creates an increasing necessity for clemency in order to ensure that battered women are treated fairly by the criminal justice system.¹¹⁷ It is against this backdrop of the current state of pardoning in the United States that battered women who have killed their abusers are considered for clemency today.

III. PARDONING BATTERED WOMEN WHO KILL

A. *The Failure of Substantive Law to Fully Deal with Battered Women Who Have Killed Their Abusers*

Domestic abuse is a widespread problem in our culture, with researchers estimating that between 1.6 and 4 million women suffer abuse by their husbands or boyfriends each year.¹¹⁸ Although a majority of states currently allow the admission of expert testimony on battered woman syndrome in cases of battered women who have killed their abusers, either through judicial discretion or statutory enactments,¹¹⁹ many women are convicted of first or second degree murder even with such expert testimony.¹²⁰ Aside from various substantive critiques of battered woman syndrome itself and its use in

114. *Id.* Oklahoma Governor J.C. Walton was impeached in 1923 for selling pardons. *Id.* Tennessee Governor Ray Blanton was indicted for conspiring to take kickbacks for liquor store licenses following a scandal involving the sale of pardons in the early 1980s. *Id.*

115. *Id.* Kobil discusses the effect various pardons have had on the political success of various governors, from an Illinois governor in 1893 to former California Governor Pat Brown. *Id.* at 606-11.

116. *See id.* at 611-12 (discussing the trend toward removing flexibility and discretion in sentencing).

117. *Id.* at 611.

118. Andersen & Read-Andersen, *supra* note 29, at 366 & n.15.

119. *See supra* part II.A.3.

120. Courtroom, *supra* note 1, at 833; Ewing, *supra* note 19, at 580; *see also* Maguigan, *supra* note 54, at 432 (demonstrating that battered women have a higher reversal rate on appeal, which suggests they are sometimes deprived of fair treatment at their trials).

the courtroom,¹²¹ many battered women currently serving long prison terms were convicted before expert testimony was admissible, while others were convicted in spite of such testimony being admitted at their trial.¹²²

1. Justification for specially tailored treatment of battered women who kill

While there is no unanimous agreement that battered women who kill are, or should be, legally justified in their actions,¹²³ one must admit that such women are in a different position with relation to justice than are other classes of homicide defendants.¹²⁴ The fact that a woman was battered, and the extent and duration of such abuse, is so relevant that it demands that such a woman receive some sort of specially tailored treatment from the criminal justice system.¹²⁵ The admission of battered woman testimony itself is one such specifically tailored treatment that demonstrates "an underlying discomfort with not treating battered women who kill in a manner different from other homicide defendants."¹²⁶

The justifications for tailored treatment of battered women who kill include the fault of society itself in the creation of the problem of battered women¹²⁷ and the historic discrimination against women claiming self-defense in the criminal justice system.¹²⁸ Of course,

121. See, e.g., Maguigan, *supra* note 54 (arguing that the present state of substantive law is more than adequate for dealing with battered women who kill); Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253 (1987) (arguing that expert testimony should not be used in battered woman trials because of danger to the judicial system and society in general); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993) (arguing for elimination of the imminence requirement from successful self-defense claims in certain cases).

122. Courtroom, *supra* note 1, at 833.

123. See *infra* part III.B.3.

124. See *Developments, supra* note 15, at 1591.

125. See *id.*

126. See *id.*

127. Societal negligence for the problem of battered women who kill is often based on the failure of law enforcement or governmental agencies to protect battered women. See Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 233 (1986).

128. According to Michael Dowd, director of the Pace University Battered Women's Justice Center, the average sentence for a woman who kills her intimate partner is 15 to 20 years, while the average sentence for a man who does the same is two to six years. Gibbs, *supra* note 69, at 42. Many believe that battered women's claims are routinely treated unfairly by the criminal justice system, leading to disproportionately unfavorable

while not all battered women act in self-defense when they kill their abusers, a substantially higher reversal rate on appeal is an additional indicator that they are often deprived of a fair trial.¹²⁹ Advocates for battered women are not asking for leniency or a lowered standard, but rather for equal treatment under the law, which can only be achieved through specialized treatment.¹³⁰ While substantive law methods attempt to address this need for a specialized, tailored treatment, there are many flaws with current methods that can actually work against the women they purport to help or exclude various classes of women from just treatment.

2. The law itself—criticism of admission of expert testimony on battered woman syndrome

a. *the creation of negative stereotypes of women*

Attacks upon the admission of expert testimony in the trials of battered women who kill their abusers have focused recently upon the negative stereotypes of women that the syndrome perpetuates.¹³¹ It has been argued that the syndrome reinforces and perpetuates stereotypical views of women as irrational and helpless. “The more the existing social reality of inequality is reflected in the law—the more accurate the rule—the more the inequality is reinforced.”¹³²

The concept of learned helplessness has been specifically attacked as portraying women as passive, vulnerable victims, requiring a different and more lenient set of laws.¹³³ The present system of excusing battered women who kill their abusers has been denounced as “incapable of accommodating women’s experiences without judging

results in comparison with the treatment of male criminals. CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW* xiii (1989); see also Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 636 (1980) (arguing that as a result of sex-based bias and stereotypes, judges are less likely to excuse a woman under a self-defense claim than under a claim of incapacity).

129. *Developments*, *supra* note 15, at 1591.

130. *Id.*

131. E.g., Laura E. Reece, *Women’s Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN’S L.J. 53 (1991).

132. *Id.* at 53.

133. *Id.* at 53-55.

women to be deviant from and inferior to the model human actor."¹³⁴

b. problems with statutes

Nine states have passed specific laws allowing expert testimony on battered woman syndrome in cases where the battered woman kills her spouse or lover.¹³⁵ However, in most jurisdictions the question remains an issue for judicial discretion.¹³⁶ While these developments appear to represent an advance toward equitable treatment for battered women who kill their abusers, there are many problems with the codification of expert testimony on battered woman syndrome.

First, statutes allowing expert testimony often sharply restrict such testimony to battered woman syndrome itself and exclude any testimony on the experiences of domestic violence victims.¹³⁷ This narrow construction of expert testimony serves to exclude the experiences of battered women who do not fit the "paradigmatic battered woman"¹³⁸ or "good battered woman" stereotypes.¹³⁹

Second, there is a tendency among legislators to assume that once such a statute is enacted into law, the problem of battered women who kill their abusers has been fully addressed.¹⁴⁰ Legislators often assume that once expert testimony on battered woman syndrome is statutorily allowed at trial, deserving victims will be acquitted.¹⁴¹

134. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 1 (1994). In this article Coughlin argues that the only way to address this problem is to revise the theory of responsibility presently endorsed by the criminal law system to "include characteristics traditionally associated with and internalized by women." *Id.* But see Maguigan, *supra* note 54 (arguing that the current system is fully capable of embracing the problem of battered women who kill).

135. Gibbs, *supra* note 69, at 43.

136. *Id.*

137. See Courtroom, *supra* note 1, at 832-33. For example, California enacted § 1107 of the California Evidence Code on January 1, 1992. This law allows expert testimony on battered woman syndrome in a criminal action. CAL. EVID. CODE § 1107 (West Supp. 1995). However, the statute excludes some of the original language of Assembly Bill 2613, which did not mention battered woman syndrome per se, but allowed expert testimony on the "nature and effect of physical, sexual and emotional abuse on the behavior, beliefs or perceptions of persons in a domestic relationship including descriptions of the experiences of battered women." Courtroom, *supra* note 1, at 832. Additionally, an attempt was made to amend the statute to allow evidence of "the experiences of victims of domestic violence," but this attempt was unsuccessful. *Id.*

138. See *infra* part III.A.3.a.

139. See *supra* part II.A.3; *infra* part III.A.3.b.

140. Courtroom, *supra* note 1, at 832.

141. *Id.*

However, this is often not the case, as many battered women are convicted even when expert testimony is admitted during their trial.¹⁴²

Thus, the passage of statutes allowing expert testimony on battered woman syndrome in the trials of battered women who kill their abusers is a double-edged sword. The admission of such testimony may limit the expert testimony in a manner that may serve to exclude many battered women from its embrace.¹⁴³ Additionally, these statutes codify a presentation of women as helpless, pathological, and passive, under the guise of favoring them.¹⁴⁴ While many of these statutes are beneficial to battered women, the fact remains that, at best, they do not entirely solve the problem of battered women and, at worst, they may actually harm those women whom they purport to help.

These arguments regarding the effectiveness of admitting expert testimony on battered woman syndrome and the wider social results of such testimony often advocate a variety of reforms to deal with flaws in the present system. Such reforms range from a complete abandonment of any differential treatment of battered women in substantive law¹⁴⁵ to the reorganization of the basic theory of responsibility that composes our criminal justice system.¹⁴⁶

While it is hoped that substantive reforms will reduce the number of battered women erroneously convicted for the killing of their abusers, this Comment addresses the problem of women who are not, for various reasons, adequately and fairly served by substantive law. While a substantive legal theory that effectively deals with every battered woman who kills her abuser is ideal, clemency must be utilized as a viable and necessary remedy until that ideal is reached.

142. *Id.* at 833. Of course, not every battered woman who kills is entitled to an acquittal. However, the large number of battered women who are denied fair trials suggest the probability of erroneous convictions in at least some cases. See Maguigan, *supra* note 54, at 386-87; *infra* part III.B.2.a.

143. See *supra* note 137 and accompanying text.

144. See *supra* part III.A.1.

145. *E.g.*, Mihajlovich, *supra* note 121, at 1253-54.

146. *E.g.*, Coughlin, *supra* note 134, at 1.

3. Application of the law—criticism of the misuse of expert testimony on battered woman syndrome by judges, attorneys, and juries

There are various reasons why certain classes of battered women who kill their abusers “slip through the cracks” of the present substantive criminal justice system. Battered women who do not fit perfectly into the stereotype of the “battered woman” may be denied fair treatment. In addition, battered women who belong to certain classes often do not receive fair treatment at trial, or at least treatment equivalent to that of other battered women who kill their abusers, because of prejudice or discrimination.¹⁴⁷ Thus, clemency presents a necessary alternative that should be utilized in order to ensure just treatment for such women.

a. *the “paradigmatic battered woman”*

The increasing use of expert testimony on battered woman syndrome to address the problem of battered women who kill has actually resulted in some women being harmed and their legal options restricted.¹⁴⁸ The intense focus on battered woman syndrome has created a “paradigmatic battered woman” who embodies *all* of the characteristics typically associated with battered women.¹⁴⁹ Characteristics of the stereotypical battered women include never previously fighting back, never attempting to leave the batterer, and never calling the police or notifying other authorities.¹⁵⁰ Of course, it is practically impossible for any one battered woman to fit perfectly into the stereotype of a battered woman, but courts have created a “rigidly-defined and narrowly-applied definition,”¹⁵¹ excluding many women who may suffer from the syndrome. “Some courts seem to treat battered woman syndrome as a standard to which all battered women must conform rather than as evidence that illuminates the

147. See *supra* part II.A.3.

148. *Developments, supra* note 15, at 1593.

149. *Id.*

150. See Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 148-50 (1985); see, e.g., *Mullis v. State*, 282 S.E.2d 334, 337 (Ga. 1981) (excluding expert testimony in a case where the battered woman routinely fought back against her abuser); *State v. Williams*, 787 S.W.2d 308, 310 (Mo. Ct. App. 1990) (excluding expert testimony because the battered woman and her abuser were not married at trial court but reversed at appellate court).

151. Crocker, *supra* note 150, at 144.

defendant's behavior and perceptions."¹⁵² Women who do not fit into the exact stereotype of a battered woman may not receive expert testimony or a jury instruction on self-defense at trial.¹⁵³

Courts may restrict the use of expert testimony on battered woman syndrome to those women who fit the strict paradigm of the battered woman.¹⁵⁴ This restriction can create a catch-22 for some battered women.¹⁵⁵ For example,

[i]f the defendant has tried to resist in the past, the court accepts this as evidence that rebuts her status as a battered woman. On the other hand, if the defendant has never attempted to fight back, the prosecution argues that the defendant did not act as a "reasonable man."¹⁵⁶

In addition, courts may define battered woman so strictly that near irrelevant characteristics may exclude certain battered women from the definition, denying them expert testimony, a self-defense claim, or both. One characteristic that prosecutors may utilize to exclude a battered woman from fitting into the paradigmatic battered woman stereotype is the economic status of the woman.¹⁵⁷

Joyce Steiner's case provides an example of a woman's economic status being used as a stereotype. Joyce was seriously abused by her husband for many years before she finally shot him, but at her trial the prosecution emphasized that she was a successful business manager who "surely would not have tolerated years of abuse."¹⁵⁸ However, battered woman syndrome "is something that happens to even a middle-class person, . . . you don't have to be poor or illiterate to get the crap beat out of you."¹⁵⁹

Courts have also emphasized factors such as the battered woman's knowledge and previous use of guns in order to exclude

152. *Id.*

153. *Developments, supra* note 15, at 1593.

154. *See supra* note 150.

155. Crocker, *supra* note 150, at 144-50.

156. *Id.* at 145.

157. *See* McFadden, *supra* note 82, at 64 (prosecution emphasizing battered woman's professional status).

158. *Id.* Prosecutors argue that economic status is relevant to whether a woman fits the battered woman paradigm because it can show why the woman was unable to leave the abuser. *See id.* However, this argument ignores the fact that women in higher economic classes may be just as unable to leave their husbands due either to threats or the feeling that the abuse is all their fault. *See id.* "Women with absorbing, successful jobs are especially vulnerable to feeling they are failures if their marriages don't work out." *Id.*

159. *Id.* (quoting Joyce Steiner).

certain women from the battered woman paradigm. If a woman can use a gun competently, then she cannot possibly be a "helpless" battered woman, but if she uses the gun "like a woman," in that she is unable to aim or takes more than one shot, then she fits the paradigm.¹⁶⁰ Such adherence to outward manifestations of the paradigmatic battered woman obscures the fact that the underlying focus should be on the particular situation of the battered woman herself.¹⁶¹

The consequences of the judicial creation of a paradigmatic woman can be dire.

The result is that the claims of the individual woman get caught between two conflicting stereotypes: the judicial construct of the battered woman based on the syndrome testimony, and the prosecutorial model that uses myths about battered women to prove their unreasonableness. Neither of these stereotypes allows a battered woman to portray the reasonableness of her actions accurately to the jury.¹⁶²

Of course, just because a woman was battered does not mean she is entitled to a self-defense claim, but "circumstances at variance with the traditional paradigm" should not be conclusive evidence that the battered woman did not have a reasonable fear of imminent harm.¹⁶³ However, because many judges have construed battered woman syndrome in this manner, women have been unfairly convicted.¹⁶⁴

The creation of this paradigmatic battered woman in the minds of the legal system serves to exclude certain battered women who do not fit the paradigm from meaningful treatment by the criminal justice system.¹⁶⁵ Until the battered woman paradigm is destroyed, such battered women have a particular need for clemency.

160. Crocker, *supra* note 150, at 145 n.106; *see, e.g.*, *Smith v. State*, 277 S.E.2d 678, 679 (Ga. 1981) (noting that battered woman testimony should have been admitted in situation where defendant shot with eyes closed and failed to aim carefully); *Commonwealth v. Shaffer*, 326 N.E.2d 880, 884 (Mass. 1975) (noting that battered woman's prior knowledge of guns and the fact that the killing took only one shot helped convict her).

161. Crocker, *supra* note 150, at 144-50.

162. *Id.* at 144.

163. *Developments, supra* note 15, at 1593-94.

164. Crocker, *supra* note 150, at 144-50.

165. *See id.*; *Developments, supra* note 15, at 1593-94.

b. *the "good battered woman" theory*

Similar to the paradigmatic battered woman, the "good battered woman" theory focuses on the misuse of expert testimony on battered woman syndrome due to prejudice.¹⁶⁶ However, this theory encompasses prejudice not only against women in general, but also particular prejudice against certain classes of women based on characteristics such as race.¹⁶⁷

The very characteristics that make up the conception of battered woman syndrome—weakness, passivity, and fearfulness—can also be said to be those associated with the stereotype of the "good" woman.¹⁶⁸ The good woman stereotype is based on the historic stereotype of the ideal woman—that is, a passive, heterosexual, helpless, white woman.¹⁶⁹ Correspondingly, women who do not fit the stereotype of the good woman may not fit the stereotype of the battered woman.

For example, black women have long been stereotyped as the "bad" woman, and thus as not conforming with the stereotype of the good battered woman.¹⁷⁰ As a result, black women are less likely to benefit from admission of testimony on battered woman syndrome.¹⁷¹ The following explanation describes this process:

Race certainly plays a major role in the cultural distinction between the "good" and "bad" woman. The passive, gentle white woman is automatically more like the "good" fairy tale princess stereotype than a Black woman, who as the "other" may be seen as the "bad" witch If a woman is perceived as being a "good" woman, she can expect greater protection, while Black women are seen as "bad" and as deserving victims.¹⁷²

166. See Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991).

167. *Id.* at 194. The good woman and the bad woman stereotypes were developed by feminist scholars in the context of gender stereotypes. See, e.g., ANDREA DWORKIN, *WOMAN HATING* 48-49 (1974). These stereotypes pervade our society, and thus play a role in the use of battered woman syndrome in the criminal justice arena. *Id.*

168. See *id.* at 23, 42, 48.

169. *Id.*

170. See Allard, *supra* note 166, at 193-94.

171. *Id.* at 193-94, 200-05.

172. *Id.* at 194.

In addition to the perception of black women as bad women, thus not deserving of any special treatment, black women may not fit into the stereotype of a battered woman due to society's perception of them as possessing certain characteristics absent from the white woman model. For example, some of the stereotypical perceptions of black women in our society that may serve to exclude them from the traditional battered woman stereotype include being domineering, assertive, hostile, strong, matriarchal, and emasculating.¹⁷³

Thus, the particular situation of women of color, especially black women, may not be adequately addressed by the substantive law regarding battered women who kill their abusers. This inadequacy serves to heighten the importance of clemency in dealing with battered women, as its use may serve to remedy some of the gaps in substantive law.

B. Battered Women Who Kill Are Particularly Suited for the Exercise of Executive Clemency

This section sets forth a principled basis for the application of executive clemency to battered women who have killed. Once this Comment establishes that battered women are often particularly qualified for clemency or a pardon, it will go on to propose a procedural structure through which such pardoning can be exercised.¹⁷⁴

1. Principled rationales for the exercise of the pardoning power

Various rationales have been postulated for the use of the pardoning power, depending in large part upon the prevailing view of the purposes of punishment. These rationales represent principled alternatives to the exercise of clemency merely at the executive's whim or as a discretionary act of grace, two rationales that have apparently prevailed throughout American history.¹⁷⁵ In order to ensure that battered women receive pardons when, and only when, they are justified, a principled structure must be developed through which executives may exercise their power. This section attempts to lay out such a structure.

173. *Id.* at 203-05.

174. *See infra* part III.C.

175. *See supra* part II.B.2.

a. retributive theory of punishment and pardoning

A retributive theory of punishment asserts that people should get what they deserve.¹⁷⁶ Translating the retributive theory of punishment to the pardoning arena is simply to state that since punishment is justified only when it is deserved, so should pardons be granted only when they are deserved.¹⁷⁷

Based upon the retributive theory of punishment, the basic justifications for pardoning can be stated as follows:

[P]ardons are required when a convicted person is not liable to punishment on retributivist grounds; . . . pardons are justifiable when a convicted person is liable to punishment, but not morally deserving of punishment; and . . . pardons are unjustifiable when a convicted person is both liable to punishment and morally deserving.¹⁷⁸

Under this analysis questions of mercy and pity are irrelevant to the exercise of the pardoning power.¹⁷⁹ Other improper uses of the pardoning power include pardons for the public welfare,¹⁸⁰ pardons to promote the private welfare of the pardoner,¹⁸¹ pardons to reward past action,¹⁸² and pardons based on the respectability of the criminal's family.¹⁸³

Therefore, under a retributivist theory of pardon, all persons should get their just deserts. Any pardon that is not based solely on what that person deserves is improper and thus should not be granted.

176. MOORE, *supra* note 83, at 10-11. Moore's theory of retributive justice is a combination of "legalistic" retributivism and "moralistic" retributivism. *Id.* at 11. Legalistic retributivists state that punishment is justified based on the act committed, while moralistic retributivists argue that punishment is justified based upon the moral character of the person committing the act. *Id.*

177. *Id.* at 89.

178. *Id.* at 11.

179. *Id.* at 205-07.

180. *Id.* at 199. Some examples of pardons for the public good include pardons to quell insurrections, the pardons of Confederate soldiers following the Civil War, and perhaps even pardons increasing the popularity of the ruler. *Id.* at 199-202.

181. *Id.* at 202.

182. *Id.* at 204-05. The basis for this argument is that the pardon is not properly utilized as a reward, but only for giving people what they deserve as a result of their criminal actions. *Id.* Therefore, acts benefiting the state that a convicted person performs while in jail or before they were convicted should not constitute a legitimate basis for pardon under the retributivist theory. *Id.*

183. *Id.* at 209.

b. criticism of a purely retributive theory of pardoning

There are several criticisms of a purely retributivist theory of pardon. However, the purely retributivist theory of pardon, which asks only that justice be served, with no mercy and pity, has traditionally been one of the primary considerations used by executives in determining whether or not to pardon.¹⁸⁴

One objection to the retributive theory of pardoning is that it "dehumanizes the one last American institution with any heart, the only institution that can cut through harsh and unbending rules, responding to pain with a simple act of kindness, human being to human being."¹⁸⁵ Such criticism recognizes the human element that pervades concepts of punishment, a recognition that is particularly on point in the case of battered women who kill.

A second criticism of the retributivist theory is that it is not always possible to determine what exactly are the just deserts for a particular crime.¹⁸⁶ Reasonable people may differ as to what constitutes moral blameworthiness, and even perhaps as to what constitutes legal blameworthiness. However, our criminal justice system does seem to presume that "it is possible to establish the particular punishment deserved by each offender based on the nature of [the] crime."¹⁸⁷ Therefore, since we largely base the dispensation of punishment on retributivist principles, it is reasonable to also base the remission of punishment on such principles.¹⁸⁸

One final problem with a purely retributivist approach to pardoning is found in the very nature of the approach itself: It is *purely* retributivist. In reality, societal concerns other than retribution play a role in our criminal justice system, including the principles of deterrence, incapacitation, and rehabilitation.¹⁸⁹ Our society has

184. Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 283, 285 (1993).

185. MOORE, *supra* note 83, at 227.

186. Kobil, *supra* note 89, at 579-80; see also Hugo A. Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 608-11 (1978) (stating the impossibility of determining either what "desert" means or the particular level of punishment deserved for certain acts); Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1013-15 (1985) (stating even proponents of retributivist pardoning are unable to match offenses with the appropriate punishments).

187. Kobil, *supra* note 89, at 580.

188. *Id.*

189. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 5-7 (1987). For example, a criminal may have already completed a punishment that society has determined to be

based its system of punishment on a combination of rationales; thus, the remission of punishment also should be based upon some amalgamation of retributivist and other concerns, with "deserts provid[ing] only a starting point, [and] utilitarian and other societal concerns establishing secondary limits on the remission of punishment generally, and in individual cases."¹⁹⁰

Because of the importance of the retributivist theory of justice in our criminal justice system and without ignoring the other societal concerns that also play an important role, the best approach to pardoning would be one that combines all of these concerns.

c. the justice-enhancing and justice-neutral approach to pardoning

A division of the exercise of the pardoning power into its justice-neutral and justice-enhancing goals will serve battered women by removing many of the pressures that cause the clemency power to be exercised randomly or subjected to political whim.¹⁹¹ All uses of the pardoning power may be divided into justice-enhancing uses and justice-neutral uses.¹⁹² Daniel Kobil, assistant professor of law at Capital University Law School, bases this theory on the view that the criminal justice system may be understood only through the combination of a retributivist view of justice with utilitarian and other social concerns.¹⁹³ Justice-enhancing uses of the pardoning power are those that satisfy the retributive goal of matching up each criminal with their just deserts,¹⁹⁴ while justice-neutral goals are those unrelated to the individual offender but concerned more with societal issues and welfare considerations.¹⁹⁵

Justice-enhancing uses of the pardoning power encompass the various rationales for pardoning laid out under the retributivist theory

"what he deserves," according to retributivist goals of justice, yet society may decide not to release that criminal for various reasons. It may be determined that the criminal needs to be punished more for the purpose of deterring others from committing the same crime, that the criminal should be incapacitated so he or she cannot commit the same crime again, or that principles of rehabilitation demand that the criminal remain in prison.

190. Kobil, *supra* note 89, at 581; *see also* Gale, *supra* note 186, at 1005-11 (stating that utilitarian and retributive goals often conflict).

191. *See infra* part III.C.1.

192. *See* Kobil, *supra* note 89, at 579, 582-83.

193. *Id.* at 581.

194. *Id.* at 579.

195. *Id.* at 613-14.

of pardoning.¹⁹⁶ The concepts of pardoning to satisfy retributive goals of criminal justice and justice-enhancing uses of clemency are the same. Accordingly, the main categories of retributivist pardoning are labeled as follows in this Comment in order to demonstrate when pardoning is proper for justice-enhancing purposes.

The first area in which pardoning is justified by retributivist principles is factual or legal innocence,¹⁹⁷ or substantial doubt of guilt.¹⁹⁸ The second area is technical guilt with mitigating circumstances, such as mental impairment or persons whose age or health warrant a reduced sentence.¹⁹⁹ The third category in which clemency should be exercised is technical guilt with moral innocence.²⁰⁰ The final category is pardoning to remedy disparities in punishment or sentencing unrelated to deserts.²⁰¹ Each of these areas represents distinct situations where pardoning would be justified under retributivist principles.

Justice-neutral uses of the pardoning power have been used throughout history to further utilitarian goals.²⁰² Today we would view these justice-neutral uses of the pardoning power as flagrant abuses. For example, the executive often used the pardoning power to further personal political goals, such as enhancing his own wealth or power.²⁰³ However, justice-neutral uses of the pardoning power can still play a valuable role when they are justified by public welfare considerations.²⁰⁴

196. Although various different subdivisions of justice-enhancing uses of the pardoning power may be found, they generally seem to apply different labels to the same categories of cases. See generally MOORE, *supra* note 83, at 11 (positing innocence, excusable crime, justified crime, and adjustments to sentences as justifications for pardons); STAFFORD, *supra* note 84, at xvi (citing frequently used grounds for granting clemency); Kobil, *supra* note 89, at 624-33 (proposing seven different categories where pardoning should be granted under a justice-enhancing method).

197. See Courtroom, *supra* note 1, at 837-38.

198. Kobil, *supra* note 89, at 624.

199. Courtroom, *supra* note 1, at 837-38.

200. *Id.* at 838-39.

201. Kobil, *supra* note 89, at 627-30.

202. *Id.* at 582-83.

203. *Id.* at 588, 592-93.

204. *Id.* at 613-14. For example, the pardoning of Confederate soldiers following the war may have been justified in that it promoted the harmony necessary to reunite the nation. MOORE, *supra* note 83, at 201-02.

2. Battered women often satisfy the justice-enhancing goals of pardoning

In order to satisfy the justice-enhancing goals of pardoning, a battered woman who has killed her abuser must fit into one of the four categories outlined above: factual/legal innocence, technical guilt with significant mitigating factors, technical guilt with moral innocence, or disparities in punishment and sentencing.²⁰⁵ Many battered women who are convicted of homicide fit into one of these four categories, and thus deserve a pardon according to the justice-enhancing goals of pardoning.²⁰⁶

a. *factual/legal innocence or substantial doubt of guilt*

Several categories of battered women who have killed their abusers fit the classification of factual or legal innocence. Factual innocence represents the rare case where the battered woman in question did not actually commit the actus reus,²⁰⁷ but rather somebody else did. Legal innocence, however, covers the more common situation wherein the battered woman was legally justified in committing the act of killing. Furthermore, in situations where innocence is not positive, there may still be substantial doubt of guilt, which may also justify executive clemency.²⁰⁸

The main category of battered women who fit this classification includes those who were unjustly convicted because they did not receive a fair trial for various reasons.²⁰⁹ This category can be subdivided into two areas: those women who were denied a proper jury instruction on self-defense and those women who were denied a

205. See *supra* notes 197-201 and accompanying text.

206. Of course, battered women are not the only convicted persons who would be entitled to executive clemency under the categories set out below. See generally Kobil, *supra* note 89, at 624-33 (providing a general discussion of the types of persons entitled to pardons based on the justice-enhancing theory of clemency).

207. An actus reus is the physical act which, when combined with intent, renders an actor criminally liable. See BLACK'S LAW DICTIONARY 36 (6th ed. 1990).

208. Kobil, *supra* note 89, at 624. Substantial doubt of guilt "may be the result of new evidence, information suppressed at trial or withheld by the prosecution, incompetence of defense counsel, coercion of a guilty plea, or any other reason that seriously undermines . . . confidence in the integrity of the judicial determination." *Id.* at 624-25.

209. Courtroom, *supra* note 1, at 840. Of course, the fact that the main category of battered women who are factually innocent are those who did not receive a fair trial does not exclude the possibility that there are some women in prison who did not even commit the act of killing.

fair trial due to the exclusion of expert testimony on battered woman syndrome.²¹⁰

Before the admission of expert testimony became widespread in the mid-1970s, many battered women who killed their abusers were unable to claim self-defense due to the narrow judicial interpretation of the defense.²¹¹ Many battered women were forced to plead insanity, temporary insanity, or diminished capacity because no jury would find a woman's actions in murdering her husband "reasonable."²¹² In fact, defense attorneys used to plead one of these diminished capacity defenses almost every time a woman committed a homicide, no matter what the situation.²¹³ In addition, defense lawyers would "routinely" plead women to a lesser charge, believing that, due to negative stereotypes of women, a jury would never find that the reasonableness requirement of a self-defense claim was satisfied.²¹⁴

It is likely that jury instructions on self-defense were unfairly denied to many battered women due to misapplication of the law of self-defense by the trial court because of negative stereotypes about women.²¹⁵ Battered women who kill continue to be denied jury instructions on self-defense because the judge believes that one of the components of the claim is not present when the woman kills in a "nonconfrontational" situation.²¹⁶ Because these women were denied the opportunity to establish their self-defense claim, it is likely that they did not receive a fair trial, and thus were unjustly convicted and are proper subjects for the exercise of the pardoning power.

In addition, bias against female defendants by the judge and/or jurors may also have wrongly convicted battered women, if expert

210. *Id.* at 839-40.

211. *See Developments, supra* note 15, at 1577-78. Even when a claim of self-defense could be raised, it was considered bad strategy to do so in the case of battered women because the consensus was that no juror would find that the battered women met the reasonableness requirement of the self-defense claim. *Courtroom, supra* note 1, at 840.

212. *Developments, supra* note 15, at 1577-78.

213. Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 *WOMEN'S RTS. L. REP.* 149, 159 (1978).

214. *Courtroom, supra* note 1, at 840.

215. *See Maguigan, supra* note 54, at 384 (stating that 70% to 90% of battered women who kill do so when faced with either an ongoing attack or the imminent threat of death or serious bodily harm).

216. *See, e.g., People v. Aris*, 215 Cal. App. 3d 1178, 264 Cal. Rptr. 167 (1989).

testimony on battered woman syndrome was not allowed at trial.²¹⁷ Before the admission of expert testimony on the psychological effects of battering, juries were often unable to understand battered women's actions.²¹⁸ For example, jurors commonly can not comprehend why battered women stay in abusive relationships, do not report the previous abuse if it really happened, and perceive the threat of death or severe bodily harm as being imminent.²¹⁹

The increasing prevalence of statutes allowing the admission of expert testimony on battered woman syndrome has helped to ensure that jury misunderstanding and bias do not create an unfair trial.²²⁰ However, studies show that the admission of such expert testimony is still denied in many cases.²²¹ The admission of expert testimony on battered woman syndrome evens the playing field to some degree by granting jurors some insight into the experiences and psychological condition of battered women, since "the use of expert testimony on the battered woman syndrome bolsters a traditional self-defense claim by countering potential judicial misapplication of the law and by refuting juror misconceptions about domestic violence that might prevent triers of fact from viewing battered women's actions as reasonable."²²²

Finally, battered women may be denied either a self-defense instruction or expert testimony on battered woman syndrome based upon their nonconformance with the paradigmatic battered woman or the good battered woman stereotypes.²²³

Therefore, women who were not allowed to present expert testimony on battered woman syndrome or the psychological effects of battering, or who were denied a jury instruction on self-defense,

217. Courtroom, *supra* note 1, at 839-40.

218. *Id.* at 840-41. A survey by Charles Ewing and Moss Aubrey, published in the *Journal of Family Violence*, found that "most people do not understand the psychology of battered women and domestic violence" and that "women were even more likely than men to harbor misconceptions." Laura A. Kiernan, *Battered Women Use Their Fear as a Defense*, BOSTON SUNDAY GLOBE, Oct. 16, 1988, at 1, 22. The survey asked 216 potential jurors to respond to a hypothetical situation in order to measure public opinion as to commonly held myths about battered women. *Id.*

219. Courtroom, *supra* note 1, at 840-41.

220. See *Developments*, *supra* note 15, at 1585.

221. *Id.* at 1587. For example, one study of 85 cases showed that expert testimony on battered woman syndrome was offered in 44 cases, but admitted in only 26. Ewing, *supra* note 19, at 585.

222. *Developments*, *supra* note 15, at 1578 n.22.

223. See *supra* part III.A.3.

may have been wrongly convicted due to bias in the trial court, and thus may be entitled to a justice-enhancing pardon.²²⁴

b. technical guilt with significant mitigating factors

The second classification where pardons are justified according to a justice-enhancing view of the pardoning power is technical guilt with significant mitigating factors.²²⁵ This situation is most often found when the defendant suffered from some sort of reduced ability at the time of the crime.²²⁶ Although battered women who kill their abusers do not necessarily suffer from any sort of reduced ability, there are situations in which such mitigating circumstances are present.²²⁷ When such circumstances are present, the pardon of battered women on justice-enhancing grounds is justified.

In addition to reduced ability issues, sociological and cultural factors may also be taken into account as significant mitigating factors.²²⁸ Within this category it may be correct to evaluate past abuse as a sociological or cultural component that should be considered as a mitigating factor.

224. See Courtroom, *supra* note 1, at 841 (“[I]n many of these cases, the defendant, even under existing law, should have been acquitted outright, but instead faces a lengthy prison sentence because of the inability of the criminal justice system to address these issues fairly.”). This basis for pardoning is one that has been recognized by state governors when they present justifications for the pardons of particular battered women. See, e.g., Celeste, *supra* note 81. In an interview with Joan Lunden on ABC’s Good Morning America on December 26, 1990, former Ohio Governor Richard Celeste stated that his primary criteria in granting clemency to 25 battered women who had killed their abusers was that

All of these women had been denied the opportunity to use the fact that they had been battered, that they experienced the battered woman syndrome, as any part of their defense in their hearing before a judge or jury. So they were victims before we changed our law in the state of Ohio.

Id.

225. Courtroom, *supra* note 1, at 841.

226. See, e.g., *id.* at 838, 841. Kathleen Moore places the situation of reduced-ability offenders into the factual innocence classification. MOORE, *supra* note 83, at 138-41. Moore states that “the judicial system is generally set up to protect [reduced-ability offenders] from punishment. When the system malfunctions and the protection is imperfect, the use of the pardon is an important safeguard.” *Id.* at 141.

227. Courtroom, *supra* note 1, at 841. The example Professor Ridolfi uses is the case of Jean Harris in New York. *Id.* After convicting Harris of second degree murder in the death of her lover, the trial judge publicly admitted that the murder conviction was too severe, based on the “defendant’s emotional condition, a condition that was at least in part caused by the prescription medication [her lover] had prescribed for her.” *Id.*

228. Kobil, *supra* note 89, at 625 n.338.

c. *technical guilt with moral innocence*

The third category in which pardons are justified on justice-enhancing grounds is technical guilt with moral innocence.²²⁹ Because principles of retributivist justice propose that a person's just deserts can be determined based on their *moral* guilt, as well as their *legal* guilt,²³⁰ technical guilt with moral innocence is a proper category for the exercise of justice-enhancing pardons. The reason this category is necessary can be expressed as follows: "If the law is a reliable measure of human goodness, so that every crime is a moral failing, then pardon is never justified. But the law and morality can fail to coincide, defeating the moralistic-retributivist justification for punishment. In such cases pardons are justified."²³¹

Professor Ridolfi suggests that many battered women who kill their abusers can be considered morally innocent and thus should be subjected to the exercise of the pardoning power.²³² There would seem to be a combination of factors by which battered women may be judged morally innocent, including the severity and longevity of the abuse, the threat to unprotected loved ones, often children, and the repeated failure of the law to provide any meaningful protection.²³³ In situations involving the above elements, battered women

229. Courtroom, *supra* note 1, at 838-39, 841-42. Kathleen Moore also suggests that pardons are justified on retributivist or justice-enhancing grounds in cases where a person is "liable to punishment but not morally deserving of punishment." MOORE, *supra* note 83, at 95.

230. See *supra* note 176 and accompanying text.

231. MOORE, *supra* note 83, at 155.

232. Courtroom, *supra* note 1, at 841-44.

233. *Id.* at 844. Professor Ridolfi uses the case of Brenda Aris as an example of a battered woman who may be considered morally innocent. *Id.* at 842. As discussed in the Introduction to this Comment, Aris was married at the age of 17 and suffered severe physical and verbal abuse on a daily basis throughout her marriage to Rick Aris, much of which was testified to by members of Rick's own family. *Id.* Her husband refused to let her leave the house, often locking her in her room, and she had no access to a car or telephone. *Id.* Finally, after a particularly severe beating and the threat that she would not be alive until morning, Brenda Aris shot her husband while he was passed out from a combination of drugs and alcohol. *Id.* Aris was denied any self-defense instruction at her trial. *Id.* at 843. Professor Ridolfi states that

[t]he long abuse [Aris] suffered, the failure of the law to provide meaningful protection, and a full understanding of Battered Woman's Syndrome—including appreciation for the likely accuracy of Brenda's perception of danger—all suggest that she is not morally guilty of murder in very much the same sense that the child who accidentally pushed another child into a vat of boiling water wasn't guilty either.

who have killed their abusers may be seen as morally innocent, if not legally innocent, in the eyes of society.

One additional situation where technical guilt with moral innocence is present is when the offender has already suffered enough to atone for their crime.²³⁴ “In these cases, ‘poetic justice’ can be said to make further punishment by society superfluous,” and pardons granted on these grounds are consistent with principles of retributive justice.²³⁵ Battered women who kill may fit into this category if they have suffered enough through all the years of beating, or if they have already served enough time to atone for the crimes.

d. disparities in punishment and sentencing unrelated to deserts

Pardons granted due to disparities in punishment are necessary corollaries of a retributivist theory of punishment.²³⁶ Since the underpinning of retributivist theory is that the just deserts for any particular crime can be objectively determined, disparities in sentencing among individuals who have committed the same crime attack the validity of retributivist justice. Pardons may be granted to battered women who have killed their abusers based on sentencing disparities among those convicted of the same crime within the same jurisdiction.²³⁷

A closely related justification for pardoning is sentencing that is unrelated to just deserts.²³⁸ Unrelated sentencing may be based on factors such as the race or gender of the accused, as opposed to the actual punishment deserved.²³⁹ Battered women who have killed their abusers suffer from unrelated sentencing based on both of the above factors.

Battered women who kill often receive harsher sentences than men who murder their wives or lovers.²⁴⁰ This demonstrates that

Id. at 844. Governor Pete Wilson has commuted Brenda Aris’s sentence from 15 years to life to 12 years to life. Ellis, *supra* note 9, at A19. She will now probably serve a total of eight and a half years for second degree murder, as the only battered woman to whom Governor Wilson has granted clemency. *Id.* at A1, A19.

234. Kobil, *supra* note 89, at 633.

235. *Id.*

236. *Id.* at 627.

237. *Id.*

238. *Id.* at 629.

239. *Id.*

240. See *supra* note 128 (stating that the average sentence for a woman who kills her intimate partner is 15 to 20 years, while the average sentence for a man who does the same is two to six years).

the sentences that battered women who kill their abusers receive are not always based on just deserts, but may instead be based on factors such as their gender. Such unrelated sentences justify the exercise of executive clemency.

Battered women of color, particularly black women, who kill their abusers may suffer a form of double jeopardy in sentencing. Not only may they receive greater sentences based upon their gender, but they may also receive sentences unrelated to their crimes based upon their race.²⁴¹ Such unrelated sentences are also contrary to a retributivist theory of justice, and thus these battered women should be attractive subjects for the exercise of executive clemency.

The fact that a particular battered woman fits into any one of the above categories is alone enough to justify the exercise of the pardoning power. A battered woman who fits into a combination of the categories presents an even stronger case for a pardon.²⁴² Thus, many battered women would be eligible for executive pardons if pardoning was always predicated upon the justice-enhancing rationale of retributive justice.

3. A license to kill?

The justice-enhancing rationale for pardoning apparently justifies pardoning battered women who kill their abusers. However, there are serious arguments that such a use of the pardoning power creates a license to kill.²⁴³

In *People v. Aris*²⁴⁴ the court eloquently sets forth the argument against specialized treatment for battered women.²⁴⁵ The court begins by stating, "Any civilized system of law recognizes the supreme value of human life, and excuses or justifies its taking only in cases of apparent absolute necessity."²⁴⁶ The court then goes on to say that although it

241. Lenore E.A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 329-30 (1992); cf. TERRIFYING LOVE, *supra* note 30, at 206 ("The ratio of Black women to white women convicted of killing their abusive husbands is nearly two to one.").

242. See Courtroom, *supra* note 1, at 843-44.

243. See, e.g., *Celeste*, *supra* note 81; *Larry King Live: Clemency For Battered Women*, available in LEXIS, Nexis Library, UPI File (CNN television broadcast, Jan. 2, 1991) [hereinafter *Larry King*].

244. 215 Cal. App. 3d 1178, 264 Cal. Rptr. 167 (1989).

245. *Id.* at 1187-89, 264 Cal. Rptr. at 173-74.

246. *Id.* at 1188, 264 Cal. Rptr. at 173 (quoting *People v. Jones*, 191 Cal. App. 2d 478, 482, 12 Cal. Rptr. 777, 780 (1961)).

recognize[s] that applying [a strict definition of self-defense] is difficult because of our sympathy for the plight of a battered woman and disgust for the batterer, it is fundamental to our concept of law that there be no discrimination between sinner and saint solely on moral grounds. Any less exacting definition of imminence fails to protect every person's right to live.²⁴⁷

In conclusion, the court states that the battered woman's problem must be resolved by

other means provided by her family, friends, and society in general such as restraining orders, shelters, and criminal prosecution of the batterer. While these means have proved tragically inadequate in some cases, the solution is to improve those means, not to lessen our standards of protection against the unjustified and unexcused taking of life.²⁴⁸

The court in *Aris* presents a compelling argument against the special treatment of battered women in the criminal justice system. However, this argument tends to avoid discussion of the blame that may be placed on society for the prevalence of battered women,²⁴⁹ as well as the various arguments supporting the fact that most battered women cannot receive a fair trial without the admission of expert testimony on battered woman syndrome.²⁵⁰

The argument against clemency for battered women takes the above propositions a step further. A woman who has been convicted of homicide has already had at least one chance to tell her story to a jury of her peers. Why should she get another?

Not surprisingly, many prosecutors are opposed to clemency for battered women.²⁵¹ The prosecutor in the *Aris* case, Riverside County Deputy District Attorney Barbara Hayden Marmor, believes that "battered women's syndrome" should not become a license to kill, and . . . women share some responsibility if they remain with spouses who abuse them."²⁵² After former Ohio Governor Richard Celeste's grant of clemency to twenty-five battered women, the head

247. *Id.* at 1189, 264 Cal. Rptr. at 174.

248. *Id.* at 1190, 264 Cal. Rptr. at 174.

249. *See supra* part III.A.1.

250. *See supra* part III.B.2.a.

251. *See Developments, supra* note 15, at 1591; *Celeste, supra* note 81; *Ellis, supra* note 9, at A19.

252. *Ellis, supra* note 9, at A19.

of the Ohio Prosecuting Attorneys Association stated that battered women do not have a license to kill, and that clemency for convicted battered women could encourage other battered women to attempt to kill their own abusers.²⁵³

There is also a fear among prosecutors and others that women who were not battered are attempting to use battered woman syndrome as a fake defense.²⁵⁴ For example, Orlando prosecutor Dorothy Sedgwick is certain that Rita Collins was attempting to use battered woman syndrome as a fake defense after she killed her husband and feels sure that justice was done in denying Rita clemency.²⁵⁵ Rita argued that she was the victim of years of physical and mental abuse before she filed for divorce and got a restraining order against her husband, and that he continued to abuse her until she shot him.²⁵⁶ However, prosecutors "played tapes of [Rita] threatening her husband over the phone and portrayed her as a bitter, unstable woman who had bought a gun, lured him to the house and murdered him out of jealousy and anger over the divorce."²⁵⁷ In addition, recent investigations into the cases of the twenty-five women former Ohio Governor Richard Celeste pardoned raise doubts as to whether some of the women were actually battered at all.²⁵⁸ This fear of abuse of battered woman syndrome presents a convincing argument against clemency for battered women, yet it does not justify excluding all battered women from the exercise of executive clemency.²⁵⁹

It has also been alleged that pardoning battered women who kill sends the wrong message to a society that already seems to endorse violence.²⁶⁰ Lawrence Sherman, professor of criminology at the University of Maryland and president of the Crime Control Institute of Maryland believes that

253. *Id.*

254. Gibbs, *supra* note 69, at 40.

255. *Id.*

256. *Id.* at 39-40.

257. *Id.* at 40.

258. Robin Yocum, *Womens' Clemency Angers Prosecutors*, COLUMBUS DISPATCH, Jan. 27, 1991, at 5F.

259. In addition, the proposed clemency commission may be even better adapted than a jury to determine whether a particular woman is "faking it." Such a commission would be made up of professionals not as prone to sympathy as juries, and since rules of evidence would not bar their ability to obtain information, they would have access to more information regarding the circumstances of the case.

260. Larry King, *supra* note 243.

[t]his country has an epidemic of homicide. Kids under age 10 are starting to kill each other. The rate of murder by young people has doubled in the last five years. Any message from somebody of the stature of the governor of Ohio that says a whole class of killers should be forgiven without having to do their jail time is just one more way that society says it's OK to kill people.²⁶¹

Although Professor Sherman agreed that battered women often deserve better treatment by the courts, he believes that once they are convicted they should serve their time.²⁶²

Many of these arguments against granting clemency for battered women who have killed are convincing, yet they often seem to reflect a vision of what should be, instead of what is. They often ignore the arguments that society is somewhat responsible for the situation of battered women,²⁶³ and that battered women often do not receive fair trials for various reasons.²⁶⁴ In addition, even while advocating that battered women should turn to various alternative sources for help, as opposed to letting the situation continue until it gets out of hand, most critics recognize that alternatives for battered women are woefully scarce.²⁶⁵ The response of police and law enforcement officials to battered women often leaves something to be desired,²⁶⁶

261. *Id.*

262. *Id.*

263. *See supra* part III.A.1.

264. *See supra* part III.B.2.a.

265. *Larry King, supra* note 243.

266. For example, Shalanda Burt, who is currently serving 17 years in a Florida prison for shooting her boyfriend, repeatedly faced ambivalence from police and law enforcement officials. Gibbs, *supra* note 69, at 42. A week after she had her first baby, her boyfriend raped her and ripped out the stitches, yet the police replied by giving her a card with a deputy's name on it and telling her that it was just a "lovers quarrel." *Id.* Two weeks before the shooting Shalanda threw a bottle at her boyfriend's truck following a particularly vicious beating. *Id.* Her boyfriend was arrested for aggravated assault because she was pregnant, but released on \$3,000 bail, while Shalanda was arrested for assault with a deadly missile and violently resisting arrest, and her bail was set at \$10,000. *Id.*

shelters are few and far between,²⁶⁷ and court restraining orders are a "makeshift shield at best, often violated and hard to enforce."²⁶⁸

Perhaps a portion of the criticism of clemency for battered women is based upon the arbitrary and capricious way it has been exercised in the past.²⁶⁹ It is obvious why critics would object to a pardon that was based mainly on executive whim or political expediency.²⁷⁰ However, if the pardoning of battered women was based solely on the justice-enhancing goals set out above,²⁷¹ it is possible that much of the current criticism will be addressed.

C. *Proposed Changes in the Exercise of Executive Clemency to Create a Principled System to Address the Needs of Battered Women Who Kill*

Since many battered women who kill their abusers should be eligible for pardons under a justice-enhancing theory,²⁷² what can be done to change the procedural manner in which pardons are exercised in order to encompass more fully these women? How do we decide which battered women are eligible for pardons? And how do we implement a system of pardoning in which justice is ensured?

1. Current problems with pardoning battered women

Recently, clemency movements have sprung up throughout the country, submitting petitions to governors asking for executive

267. Lawrence Sherman admits that "[e]very shelter in this country is overwhelmed with far more demand for their limited space than they can possibly meet, and there's no federal funding to speak of to provide temporary shelter from the kind of threat to their life and safety that [battered women] are facing." *Larry King, supra* note 243. The appalling inadequacy of shelter facilities is illustrated by the following facts: "New York has about 1,300 beds for a state with 18 million people . . . [In] 1990 the Baltimore zoo spent twice as much money to care for animals as the state of Maryland spent on shelters for victims of domestic violence." Gibbs, *supra* note 69, at 42. In addition, the National Domestic Violence Hotline was disconnected in July of 1992. *Id.*

268. Gibbs, *supra* note 69, at 42. For example, Patricia Kastle, an Olympic skier, was shot by her former husband even though she had a restraining order against him. *Id.* Shirley Lowery was stabbed by her former boyfriend 19 times with a butcher knife in the corridor of the courtroom where she went to get a restraining order. *Id.* Finally, Lisa Bianco was beat to death with the butt of a shotgun by her husband when he was out of jail on an eight-hour pass. *Id.*

269. See *infra* part III.C.1.

270. See *infra* part III.C.1.

271. See *supra* part III.B.2.

272. See *supra* part III.B.2.

clemency for battered women.²⁷³ Such movements have been successful in some states in that a considerable number of battered women have been pardoned or have had their sentence commuted.²⁷⁴ However, as the history of pardoning in America exemplifies,²⁷⁵ governors often base their pardoning decisions on political pressures, rather than justice-enhancing goals.²⁷⁶ The dependency of pardoning on political tides has also created long periods where the clemency power is rarely, if ever, exercised, followed by sudden bursts of its use.²⁷⁷

Battered women have suffered from this "atrophy" of the pardoning power. The few times governors have pardoned or granted clemency to battered women, the political backlash has been tremendous.²⁷⁸ For example, when former Ohio Governor Richard Celeste granted clemency to twenty-five battered women who had either killed or assaulted their abusers he was "vilified" by some and faced a "tide of public dissatisfaction."²⁷⁹ One newspaper editorial criticized Celeste's actions, calling them, "a sad and sorry performance, an exercise of arrogance, if not outright contempt."²⁸⁰ Indeed, Celeste's grants of clemency to these battered women, as well as to various other prisoners, prompted an unprecedented legal suit by Ohio Attorney General Lee Fisher, who attempted to invalidate the commutations.²⁸¹ It is also interesting to note that Celeste granted these pardons at the close of his second term, when he was not facing the political pressures surrounding reelection.²⁸² Gover-

273. See Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 657 (1991); see, e.g., Courtroom, *supra* note 1, at 836 (highlighting the focus of the California Coalition for Battered Women in Prison); Geraldine Baum, *Should These Women Have Gone Free?*, L.A. TIMES, Apr. 15, 1991, at E1 (stating that House of Ruth, a Baltimore battered woman's advocacy group, requested the clemencies of eight battered women from Maryland Governor William D. Schaefer); Gary Spencer, *Legislators Seek Release of Women Prisoners*, N.Y. L.J., Mar. 5, 1991, at 1 (noting Brooklyn Assemblywoman Helene E. Weinstein urged former New York Governor Cuomo to recommend pardons for battered women in a resolution).

274. For example, 25 women were granted clemency by former Ohio Governor Richard F. Celeste, and the sentences of eight women were commuted by Maryland Governor William D. Schaefer. Baum, *supra* note 273, at E1; Celeste, *supra* note 81.

275. See *supra* part II.B.2.

276. See Kobil, *supra* note 273, at 672.

277. Kobil, *supra* note 89, at 614.

278. See, e.g., Baum, *supra* note 273, at E1.

279. Kobil, *supra* note 273, at 656, 658.

280. *Id.* at 657 n.14 (citing *Killers Spared*, COLUMBUS DISPATCH, Jan. 14, 1991, at 8A).

281. *Id.* at 656.

282. See Kobil, *supra* note 89, at 656.

nor William D. Schaefer of Maryland also received a "political pounding" for his grants of clemency to eight battered women who had either killed or assaulted their mates.²⁸³ Finally, when Illinois Governor Jim Edgar granted clemency to four battered women out of the ten petitions presented to him, it was suggested that the grants of clemency were merely an effort to lure voters.²⁸⁴

The political backlash felt by these governors may prevent other governors from granting clemency to battered women, even when justice-enhancing purposes would be served by such grants. For example, as of August 1994, Governor Pete Wilson of California had commuted the sentence of only one battered woman, Brenda Aris, out of the nineteen petitions he reviewed in 1993.²⁸⁵

Despite its long history in the United States, clemency should not be utilized at the whim of political tides, but rather upon principled standards and for justice-enhancing purposes.²⁸⁶ Clemency is vital

[d]espite [its] politically explosive nature . . . [as] it is an integral part of our system of justice, and hence governors should exercise the power in a fair and principled manner Yet owing to the potential repercussions for granting clemency, the temptation has been, and will continue to be, for governors to use the power infrequently, and in all likelihood, injudiciously.²⁸⁷

Thus, many battered women who deserve clemency, based upon the justice-enhancing goals of the pardoning power, will be denied due to the political pressures inherent in the exercise of that power. In order to treat battered women with justice and equality, some change in the structure of the pardoning power is called for in an effort to distance it somewhat from the direct weight of political pressure.

283. Baum, *supra* note 273, at E1.

284. Susan Kuczka, *4 Who Killed Mates Freed; Women Abused, Edgar Says*, CHI. TRIB., May 13, 1994, at 1, 9.

285. Ellis, *supra* note 9, at A19.

286. See Kobil, *supra* note 89. One central criticism supporters of battered women syndrome have regarding clemency as a method of dealing with battered women is that "clemency petitions do not require judicial proceedings. A governor has broad discretion to grant or deny the claims; thus, such decisions tend to be completely ad hoc." *Developments, supra* note 15, at 1590-91. A principled system of pardoning based on justice-enhancing goals would address this concern.

287. Kobil, *supra* note 273, at 699.

2. The proposed clemency commission

To ensure that justice-enhancing uses of the pardoning power are kept free from political pressures²⁸⁸ and the whim of the executive,²⁸⁹ a separate clemency commission should be established that is free from "the political pressures which inevitably distort the decisions of elected officials."²⁹⁰ This commission would be responsible solely for determining whether the use of the executive pardon is justified under justice-enhancing rationales. "Such a board could . . . be appointed during good behavior, and be selected based on expertise in various areas relevant to assessing the fairness of the punishment imposed."²⁹¹ The membership of the board should also include minorities, "who traditionally have made up a large percentage of those incarcerated or sentenced to death,"²⁹² and "[r]epresentatives of the citizenry, victims of crime, and perhaps philosophers or clerics."²⁹³ Finally, "the process for selecting members of the commission would need to be insulated from

288. See *supra* notes 275-77 and accompanying text.

289. See *supra* part III.C.1.

290. Kobil, *supra* note 89, at 622. As of 1977, 10 states had already vested full clemency authority in special boards, including Alabama, Connecticut, Georgia, Idaho, Minnesota, Nebraska, Nevada, North Dakota, South Carolina, and Utah. STAFFORD, *supra* note 84, at 1. Additionally, seven other states allow the governor to grant clemency only upon the recommendation of a special board. *Id.* However, the bifurcation of justice-enhancing and justice-neutral uses of the pardoning power is not present in any of these systems, nor do they insulate clemency decisions from political pressures, since in many cases the ultimate decision rests with the governor alone. See *id.*

291. Kobil, *supra* note 89, at 622-23. Kobil suggests four possible sources of principled standards to govern pardoning decisions: the legislative branch, the judicial branch, the people themselves, and the executive branch. *Id.* at 614-15. However, due largely to the separation of powers problems inherent in vesting any sort of pardoning power in alternative branches of government, Kobil determines that "the executive branch remains the most logical choice to pursue refinement of the clemency power." *Id.* at 622. Thus, "[a] chief executive who wished to dispense clemency in a principled fashion could do so by implementing by executive order [the proposed Clemency Commission]." *Id.* Of course, the executive would still retain power to pardon, but just delegate to the Commission the power to make justice-enhancing decisions.

292. The inclusion of minorities and women is particularly vital when dealing with battered women who have killed. For instance, minorities are often denied the benefit of expert testimony on battered woman syndrome in their trials, and thus are particularly suitable for exercise of the pardoning power. See *supra* notes 169-73 and accompanying text. Additionally, since women of color often do not fit the stereotype of the battered woman, it is particularly necessary to have other minority women on any clemency commission to offer insight into the situations of these women. See *supra* notes 169-73 and accompanying text.

293. Kobil, *supra* note 89, at 623.

politicization as much as possible,” and the members should be appointed by the executive in conjunction with some other branch of government “to ensure that the appointees do not reflect a single political persuasion and are not beholden to a particular individual or faction.”²⁹⁴

Ideally, any battered woman who has been convicted of homicide—and presumably any other criminal as well—would be able to apply to the commission for a review of their case. Although it could be argued that such a procedure would absorb too many limited administrative resources, at least seventeen states already operate special commissions, or boards, which examine cases for the exercise of executive clemency.²⁹⁵

The creation of such a clemency commission would benefit battered women who have killed by providing them with the chance to retell their story to a group more focused on justice and less susceptible to the biases of many trial courts and juries.²⁹⁶ The diverse membership of the commission would ensure that the abuse and history of every woman is taken into account and not just those who fit into the paradigmatic or good battered woman stereotype.²⁹⁷ Finally, this commission would be able to assess the punishment meted out to a particular battered woman and determine if it was fair in relation to other punishments given for similar crimes.

3. Splitting justice-neutral and justice-enhancing uses of the pardoning power will allow principled decisions to be made regarding the pardoning of battered women who kill

A bifurcation of the clemency power between its justice-enhancing uses and its justice-neutral uses²⁹⁸ is essential for a principled consideration of the pardon petitions of battered women

294. *Id.* at 624.

295. STAFFORD, *supra* note 84, at 1. Ten states already vest full clemency authority in special boards, while seven more provide that governors may only pardon after an affirmative recommendation of a special board. *Id.* However, such boards do not operate under the restrictions set out in this Comment.

296. *See supra* part III.A.1. Battered women are particularly auspicious subjects for the exercise of the executive pardoning power, based on societal fault and unfair trials. *See supra* parts III.A.1, III.B.2.a. However, there is no reason why such a pardoning board should not be established to administer *all* justice-enhancing uses of the pardoning power, regardless of the identity of the criminal. *See generally* Kobil, *supra* note 89 (arguing for the establishment of a clemency commission to administer pardons in all situations).

297. *See supra* parts III.A.3.a-b.

298. Kobil, *supra* note 89, at 622.

who kill. This bifurcation is essential because the two types of exercises of the pardoning power serve two distinct purposes, as [d]ifferent considerations underlie these two types of clemency and they must be applied discretely, with a view to the function each serves. Justice-enhancing acts of clemency have a single purpose: they ensure that our penal system operates fairly, so that each person is rendered her due. Justice-neutral acts of clemency can serve a variety of ends, ranging from preserving the unity of the state to advancing the political or financial aims of those granting clemency.²⁹⁹

Daniel Kobil posits the theory that the clemency process should be split between the executive and a "professional board that is independent of . . . political pressures."³⁰⁰ Additionally, such a bifurcation would serve to create the particular environment necessary to make truly justice-enhancing decisions, unhampered by political pressures.³⁰¹

Battered women would be particularly well-served by such a division of the two types of executive clemency. First, many executive decisions to pardon or not to pardon battered women who have killed are currently based upon political pressures and not on the actual punishment the woman deserves.³⁰² A split between the exercise of justice-enhancing pardons and justice-neutral pardons would allow the clemency petitions of battered women to be reviewed free from political pressure, and thus on truly justice-enhancing grounds. Since many battered women should be subject to pardons or clemency on justice-enhancing grounds,³⁰³ this bifurcation would allow for a politically neutral consideration of justice for those women.

Additionally, battered women could still be pardoned for principled justice-neutral reasons such as mercy.³⁰⁴ Since pardons

299. *Id.*

300. *Id.* at 622-23.

301. *Id.* at 622.

302. *See supra* notes 275-85 and accompanying text.

303. *See supra* part III.B.2.

304. *See Kobil, supra* note 89, at 636-37. Daniel Kobil states, "I do not believe that it is necessary to find a justice-enhancing element in every clemency decision. Notwithstanding the philosophical inconsistency that results, some justice-neutral acts of clemency are desirable elements of our justice system." *Id.* *But see* MOORE, *supra* note 83, at 196, 199 (stating that "genuine mercy is out of place in the institutions of a legal system" and that "the pardoning power is abused when a pardon is granted for any reason *other than* that punishment is undeserved"). Additionally, Kobil states that "[r]etributivists [such as Moore] believe that neither [justice-neutral nor justice-enhancing pardons] should be

for justice-neutral reasons would remain under the exclusive control of the executive,³⁰⁵ such pardons would still be highly subject to political pressures. However, justice-neutral pardons often play a desirable role in our society as well.³⁰⁶ Specifically in the case of battered women who kill, justice-neutral pardons may play a vital role in pardoning women who do not fit perfectly into the categories in which pardons are justified on justice-enhancing grounds, yet whom the executive still feels do not deserve the punishment they received.

The fact that justice-neutral pardons are often politically motivated will not be harmful to battered women once they are segregated from justice-enhancing pardons because those women who deserve clemency based on principles of retributivist justice will not be subject to those political pressures. The bifurcation of justice-neutral and justice-enhancing uses of the pardoning power serves to ensure justice for those battered women who deserve it and allow mercy for many others.

IV. CONCLUSION

Clemency, properly exercised and freed of political pressures, represents a viable vehicle for remedying many of the problems inherent in an imperfect, overloaded, and increasingly rigid system of criminal justice. The extrajudicial corrective of clemency provides a safety valve for our criminal justice system, another opportunity for an offender to tell her story more thoroughly, or at least differently, than she could at trial.³⁰⁷

Male violence against women in intimate relationships is the cause of more injuries to American women than car accidents, muggings, and rapes combined.³⁰⁸ In fact, it is estimated that fifty percent of all women will be abused by their husbands at some

granted unless the executive determines that the pardon will also serve a justice-enhancing function." Kobil, *supra* note 89, at 636.

305. Kobil, *supra* note 89, at 622.

306. *Id.* at 636-37. "Although such pardons cannot be justified retributively, the Framers evidently were convinced that the benefit to the nation as a whole outweighed the potential harm which would result from these pragmatic exceptions to principles of justice." *Id.* at 637.

307. *Id.* at 613.

308. Gibbs, *supra* note 69, at 41.

time,³⁰⁹ and twenty-two to thirty-five percent of all emergency room visits by women are the result of domestic abuse.³¹⁰

Despite such widespread abuse, a very small percentage of battered women actually kill their abusers.³¹¹ And despite rampant media images to the contrary, battered women who kill their abusers are rarely acquitted and generally are sentenced to long prison terms.³¹² Given the prevalence and far-reaching effects of domestic abuse in our society and the repeated failure to adequately address the problem, either socially or judicially, executive clemency presents a necessary and viable approach to ensure that justice is done.

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309. *Id.*

310. *Id.*

311. *Developments, supra* note 15, at 1574.

312. *Id.* at 1574-75.

* This Comment is dedicated to Oscar Hermosillo, my rock in the river of life. In gratitude for their continuing love and support, I would also like to thank my parents, Raymond and Lynnellen Becker, my aunt, Diana Sims, and my friend and confidante, Kimberly Rosanski.