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# Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power int he Cases of Incarcerated Battered Women

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# DISCRETIONARY JUSTICE: A LEGAL AND POLICY ANALYSIS OF A GOVERNOR'S USE OF THE CLEMENCY POWER IN THE CASES OF INCARCERATED BATTERED WOMEN

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> One's notion of justice will be strongly influenced by political ideology. If you are acutely sensitive to the wretchedness of poverty or to dehumanizing effects of racial discrimination, you are likely to disfavor all outcomes adverse to a disadvantaged person. If you believe that officials do most things badly, that political "solutions" are often worse than the disease, you will be inclined to minimize the role of government, to let "free market" forces operate, to be skeptical of legal innovations. Your attitude towards law and justice will be affected by your belief or disbelief in God, progress, original sin, dialectic materialism, Darwinian natural selection, quietism, existentialism . . . .[1]

## INTRODUCTION

On December 21, 1990 and January 11, 1991 Richard F. Celeste, then-governor of the state of Ohio granted twenty-eight Ohio women clemency.[2] Twenty-seven women had their sentences

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[1] Louis B. Schwartz, *The Mind of a Liberal Law Professor: Selections from the Writings of Louis B. Schwartz*, 131 U. PA. L. REV. 847, 886 (1983).

[2] Because this set of clemencies was announced a few weeks before Governor Celeste left office, these cases are often confused with a group of death row clemency petitions that were later granted by Governor Celeste and were subsequently challenged by the Director of Rehabilitation and Corrections, the chairman of the Ohio Adult Parole Authority, the incoming Governor George Voinovich and newly elected Attorney General, Lee Fisher. The clemencies for the twenty-eight women were never challenged in court.

The tradition of governors granting clemency on or near major holidays may have started in the Roman era. *See* KATHLEEN DEAN MOORE, PARDONS, JUSTICE, MERCY AND THE PUBLIC INTEREST 16-17 (1989). Moore says that the Romans were accustomed to both pardoning and executing criminals on coronation days and local holidays, like Passover, to subdue crowds. *Id.*

reduced and would be released from prison.[3] One woman already on parole was granted a pardon.[4] These women were either serving time or had been incarcerated for crimes, primarily homicide, that they committed in connection with domestic violence.

This unprecedented act reverberated from coast to coast.[5] Shortly after Governor Celeste's announcement, Governor William Donald Schaefer of Maryland also used his clemency powers to

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[3] The author served as Executive Assistant to Governor Richard Celeste from 1988-1991 and was the point person responsible for implementing this clemency project.

[4] Interviews with Kathy Thomas (June 29, 1990 and June 9, 1993) [hereinafter Thomas Interviews]. These women were also required to perform 200 hours of community service related to domestic violence as a condition of their release. *Id.*

[5] *See* Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, at 1. Talk show programs, including *Donahue* and *The Oprah Winfrey Show,* debated the issue and interviewed some of the women involved. The CBS news magazine show *48 Hours* interviewed Governor Celeste and spotlighted the case of Janet Abbott of Cincinnati, Ohio, one of the 28 women given clemency. *See also* Tamar Levin, *More States Study Clemency for Women Who Kill Abusers*, N.Y. TIMES, Feb. 21, 1991, at A19. The author and Governor Celeste received letters from across the country from persons who had read news accounts of the impending clemencies. The overwhelming majority of the correspondence was positive. One letter came from a juror who had voted to convict one of the women being considered for release. The juror stated regret for the conviction of the woman and asked that we do whatever we could to set the woman free. Letters on file with the author. One newspaper took the lead in criticizing the governor's actions. *See Celeste Defends Commutations*, CLEV. PLAIN DEALER, Dec. 27, 190, at 2B; Mary Ann Sharkey; *O, My Darling Clemency*, CLEV. PLAIN DEALER, Dec. 26, 1990, at 8B. Most of the negative press was centered around prosecution statements. For a discussion of the prosecutor's point of view, *see infra* pp. 53-61. *See* Jane Prendergast, *Reactions Mixed to Freeing Women*, CINCINNATI ENQUIRER, Dec. 23, 1990, at B-1; *see also Celeste Aide Claims Most Calls Favor Clemency*, NEW JOURNAL, Dec. 25, 1990, at 3a; *Celeste Applied New Law To Women Who Needed It*, DAYTON DAILY NEWS, Dec. 26, 1990, at 14A; *Give Cuomo Clemency Advice*, DAYTON DAILY NEWS, Jan. 3, 1990, at 10A; *Celeste Pardons Trigger Request in Washington*, CLEV. PLAIN DEALER, Dec. 26, 1990, at 11a; *Clemency? Governor Has Some Tough Calls To Make*, COLUMBUS DISPATCH, Dec. 11, 1990, at 10A.

reduce the sentences of eight Maryland women.[6] As in Ohio, these women were imprisoned for murdering their spouses or lovers.[7] Other states have expressed interest in trying to persuade governors to consider granting clemency for similarly situated battered women.[8] Just recently, Governors Jim Edgar of Illinois, Lawton Chiles of Florida and Pete Wilson of California have commuted the sentences of incarcerated battered women.[9]

Reviewing and either granting or denying requests for clemency are routine in penal governance. This Article addresses the legal and public policy question of whether executive clemency is an appropriate means of redressing wrongful convictions or too severe penalties imposed on women who defended themselves against their batterers. It is this author's position that when a state's constitution

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[6] Janet Naylor, *Schaefer to Free 8 Battered Women Who Fought Back*, WASH. TIMES, Feb. 20, 1991, at A1.

[7] *Eleventh-Hour Clemency*, TIME, Dec. 31, 1990, at 17; Alan Johnson, *25 Women Granted State's Clemency*, COLUMBUS DISPATCH, Dec. 22, 1990, at 1A; Carolyn Pesce, *Inmates Hope for Freedom to Start Over*, USA TODAY, Oct. 4, 1990, at 1; Kathleen Sylvester, *Ohio Courts Acknowledge Battered Woman Syndrome*, GOVERNING, Dec. 1990, at 18.

[8] *See* Nancy Gibbs, *'Til Death Do Us Part*, TIME, Jan. 18, 1993, at 38. When a woman kills an abusive partner it is an act of revenge or self-defense. A growing clemency movement argues for a new legal standard. *Id.* Fifteen states have set up committees to review similar cases and Florida's Parole Board has adopted a new rule that recognizes the battered woman's syndrome as a significant factor for consideration of clemency. *See* Rita Thaemert, *Till Violence Do Us Part*, STATE LEGISLATURES, Mar. 1993, at 26. Since 1990, the author has consulted with advocates, legal counsel and government officials from the states of Florida, New York, California, Texas, Michigan and Illinois. *See* Patt Morrison, *Legislators Listen to Women Who Kill*, L.A. TIMES Sept 18, 1991, at A3.

[9] *See* Virginia Ellis, *Two Women Given Clemency In Killings; Prison: Wilson Considers Battered Spouse Syndrome as Mitigating Factor*, L.A. TIMES, May 29, 1993, at A1; Ray Long, *4 Go Free in Abuse Cases; Each Killer Was A Victim Herself Governor Declares*, CHI. SUN PRESS, May 13, 1994, at 5; Diane Rado, *Abused Wife Who Killed Is Set Free*, ST. PETERSBURG TIMES, Mar. 11, 1993, at 1B. Governor Jim Edgar of Illinois granted Debra Babula clemency in February, 1993. Former Governor James Thompson of Illinois had also granted clemency to incarcerated battered women. *See* Bob Korwath & Hanke Gratteau, *Edgar Frees Woman Who Killed Lover, Ex-Convict Boyfriend Was Abusive*, CHI. TRIB., Feb. 4, 1993, at 1N.

gives a governor plenary discretionary clemency authority, he may use that power to examine the cases of incarcerated battered women who have killed their abusers in self-defense and grant relief. A governor can be legally and morally justified in undertaking such an initiative. However, political pressure and public opinion can inhibit the exercise of this power despite the fact that violence against women is pervasive and until recently neither legal nor physical protection for battered women has been adequate.

This Article examines the role of the chief executive in the criminal justice system, the need for the discretionary power of clemency, how beliefs about justice, mercy, crime and punishment can constrain clemency and the plight of battered women at law and in society. Part I of the Article, will survey and discuss the national statistics on domestic violence. Part II provides the Ohio background as a case study on the clemency for battered women issue. Part III discusses the brief history of the clemency power and its legal significance. Part IV presents an analysis of theories on criminal punishment and public reactions to clemency. Part V focuses on the historical treatment of women in general, the relationship of that legacy to battered women and clemency as it has been and should be applied in the cases of battered women.

## I. THE AMERICAN EPIDEMIC OF DOMESTIC VIOLENCE

In 1992, a congressional report indicated that the most dangerous place in the United States for a woman to be is in her home.[10]

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[10] In 1991, Senator Joseph Biden, Chairman of the Senate Judiciary Committee, sponsored S. 15, The Violence Against Women Act. S. 15, 102d Cong., 2d Sess. (1991). The bill's stated purpose is to combat violence and crimes against women on the streets and in homes. *Id.* The proposed statute failed to pass the 102d Congress. It was reintroduced in the 103d Congress. S. 11, 103d Cong., 1st Sess. (1993). The law would federalize violent crimes against women as hate crimes and authorize civil rights remedies for violations. *Id.* at § 302. There are also provisions which would provide funding for shelters and assistance to U.S. Attorneys for the prosecution of sex crimes and domestic violence crimes. *Id.* at § 241. Rep. Patricia Schroeder introduced H.R. 1133, which is similar to Biden's bill, on February 24, 1993. The House passed this legislation on November 20, 1993 and it has now been included in the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong., 1st

In fact, according to the National Coalition Against Domestic Violence ("NCADV"), every fifteen seconds a woman in America is abused, and each day at least four women are killed by their batterers.[11] Former Surgeon General Antonia Novello has labeled domestic violence an epidemic.[12] Studies show that up to 80% of wives suing for divorce cite physical abuse by their husbands and nearly 50% of all homeless women and children report facing domestic violence at some point.[13]

The June 17, 1991 edition of the *Journal of the American Medical Association* ("*JAMA*") included several articles devoted to the topic of domestic violence.[14] *JAMA*'s studies stated that the

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Sess. § 3201 (1993), which amended the Omnibus Crime Control and Safe Streets Act of 1968.

[11] The National Coalition Against Domestic Violence ("*NCADV*") calculated this figure by taking a 1986 Department of Justice statistic of two million women abused each year, and dividing this number into the number of seconds in a year. Telephone interview with NCADV spokesperson (July 2, 1993). A 1994 Justice Department Report indicates that annually, as compared to males, females experience over 10 times as many incidents of violence by an intimate. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, VIOLENCE AGAINST WOMEN 6 (1994) [hereinafter JUSTICE STATISTICS VIOLENCE].

[12] *See* Antonia C. Novello, *A Message From the Surgeon General: Women and Hidden Epidemics: HIV/AIDS and Domestic Violence*, 17 FEMALE PATIENT 17, 23 (1992).

[13] Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide To Custody Decisions When Spouse Abuse Is Charged*, 10 JUDGES J. 9 (1988). The divorce of John and Charlotte Fedders was highly publicized because of allegations of repeated abuse. The press became interested in this story because John was the Chief of Enforcement for the Securities and Exchange Commission during the Reagan administration. He was also being considered for an appointment to assistant attorney general under Edwin Meese. *See* Charlotte Fedders & Laura Elliott, SHATTERED DREAMS, THE STORY OF CHARLOTTE FEDDERS (1987); Brooks Jackson, *Storm Center, John Fedders of SEC is Pummeled by Legal and Personal Problems*, WALL ST. J., Feb. 25, 1985, at 1. The intractability of the problem is discussed in an article on a Duluth, Minnesota program that deals with batterers and is considered one of the best in the nation. However, this project's success in stopping the violence is limited. *See* Jan Hoffman, *When Men Hit Women*, N.Y. TIMES, Feb. 16, 1992, at 23.

[14] Council on Scientific Affairs, *American Medical Association, Council Reports, Violence Against Women; Relevance for Medical Practitioners*, 267 JAMA 3184-95 (1992) [hereinafter *Council Reports*]. The Council reported that

leading cause of injury for women, ages fifteen to forty-four is domestic violence.[15] Physical injuries of approximately one in five women who go to emergency rooms are caused by spouse abuse.[16] The pattern of reporting domestic violence incidents is similar to that of rape incident reporting. Both categories of crimes are usually underreported.[17] In fact, JAMA stated that its figure of

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studies on prevalence suggest that "from one fifth to one third expected to be abused during their lifetime. Further, victims of violence by intimates are much more likely to be reassaulted within six months than those attacked by non-intimates." *Id.* at 3185. The American Psychiatric Association ("APA") released its official position on battered women late last year. The APA stated: "Domestic violence against women is an extensive and pervasive problem in our society . . . . Victims are found in all age, ethnic, religious, socioeconomic, sexual orientation and educational groups . . . . [Domestic violence] leads to serious psychological consequences, including anxiety, depression, suicide, traumatic stress disorder and substance abuse . . . . Because the American Psychiatric Association (APA) recognizes the major psychological sequence of domestic violence against women, APA strongly advocates prevention and better detection of domestic violence . . . the improved treatment of victims, offenders and children . . . ." *See* American Psychiatric Association, *Position Statement on Domestic Violence Against Women*, 151 AM. J. PSYCHIATRY 630 (1994).

[15] Antonia Novello, *From the Surgeon General U.S. Public Health Services*, 267 JAMA 3132 (1992). The debate in Congress over whether to spend nearly $1.4 billion to fund the Violence Against Women Act has led to questions concerning the accuracy of the statistics. There is some question as to whether the sample relied on by Novello is too small to represent the general population. *See* Joe Hallinan, Oppression & Abuse: Fact and Fiction, CLEV. PLAIN DEALER, July 7, 1994, at 1a.

[16] C. Everett Koop, *Violence Against Women a Global Problem-Address at the Pan American Health Organization* (May 1989) *in International Human Rights Abuses Against Women: Hearings Before the Subcomm. on Human Rights and International Organization of the House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. 99 (Mar. 21 and July 26, 1990). The *Journal of the American Medical Association* also cites research that indicates that 61% of the persons killed by partners from 1976-1987 were women. *See* Council Reports, *supra* note 14, at 3186; *see also* Jacquelyn Campbell, *Misogyny and Homicide of Women*, 3 ADVANCES IN NUR. SCI. 67, 67-86 (1981). A national study of 1,000 women found that even though medical personnel were consulted by battered women, health professionals were less effective than any other group (i.e., social services, clergy, police, lawyers, shelters, etc.). *See* Lee H. Bowker & Lorie Maurer, *The Medical Treatment of Battered Wives*, 12 WOMEN & HEALTH 25 (1987).

[17] MAJORITY STAFF OF THE SENATE COMM. ON THE JUDICIARY, 102D CONG.

two million women severely assaulted is probably underestimated by two million.[18]

The public's interest in domestic violence is too often only aroused and sustained in the glare of the sensational case such as the John and Lorena Bobbitt[19] and the Orenthal James (O.J.) Simpson trials.[20] Media coverage of their shocking episodes is intense.[21] However, while there is much scrutiny of the high

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2D SESS., VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 2 (Comm. Print 1990) [hereinafter Senate Report].

[18] *See Council Reports, supra* note 14, at 3185.

[19] Lorena Bobbitt was charged in August, 1993 with malicious wounding when she cut off her husband's penis. The penis was reattached after a nine-hour surgery. Mrs. Bobbitt pleaded not guilty by reason of insanity and told the court that she had been a battered wife. She claimed that John had raped her on the night the incident happened. John was charged with marital sexual assault. Both Bobbitts were acquitted of the charges against them, however, Lorena spent five weeks in a mental ward. *See Man Whose Penis Was Cut Arraigned on Sex Charge,* ORLANDO SENTINEL, Aug. 6, 1993, at A16; Eric Wee *et al., A Year Later, The Bobbitts Are No Longer On The Cutting Edge,* WASH. POST, June 23, 1994, at B1. Since the trials, John Bobbitt has been arrested twice for assaulting his fiancee, Kristina Elliott. *See* Paul Leavitt, *New Domestic Trouble for Bobbitt, Fiancee,* USA TODAY, July 5, 1994, at 3A.

[20] O.J. Simpson, the Hall of Fame football star, movie actor and sports commentator, was charged with the murder of his ex-wife, Nicole Brown Simpson, and her friend Ronald Goldman. Mrs. Simpson and Mr. Goldman were found stabbed to death outside her home on June 12, 1994. *See D.A.'s Complaint Against Simpson,* RECORD, June 18, 1994, at A12. The Simpsons' marriage has been characterized as stormy. According to police records, on January 1, 1989, Mr. Simpson beat his wife so badly that she had a split lip, a blackened eye, a bruised cheek and a hand imprint on her neck. When police arrived at the scene, they reported that she was hiding in the bushes. The police record quoted O.J. as saying, "[T]he police have been out here eight times before, and now you are going to arrest me for this." *See* Sara Rimer, *The Simpson Case: The Marriage, Handling of 1989 Wife-Beating Case Was a Terrible Joke, Prosecutor Says,* N.Y. TIMES, June 18, 1994, at 10. Four months later, Simpson pleaded no contest to a charge of spouse abuse. He was sentenced to 120 hours of community service, two years probation, fined $200 and had to give $500 to a battered women's shelter. *See also* Jane Gross, *Simpson Case Galvanizes Us About Domestic Violence,* N.Y. TIMES, July 4, 1994, at 6. Simpson has maintained that he is innocent of the murder charges.

[21] The networks' prime time coverage of O.J. Simpson being pursued down a Los Angeles freeway by police on Friday, June 17, 1994 is unprecedented.

profile cases and discussion about guilt, innocence, causation and blame, women are still being beaten in their homes.[22] Only recently has systematic data been kept on domestic violence. Historically, battered women have been caught in a nonresponsive or even hostile criminal justice system, with sometimes either death or prison as the alternatives. Until the late seventies, women who killed their abusers faced almost insurmountable obstacles at trial in getting their stories told. The following cases provide a historical and legal setting for the development of the right to have testimonial evidence on battering presented at trial. Introduction of this evidence will help explain the social context and mindset of some battered women who kill. These cases will serve as reference points for the discussion of clemency that follows.

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More than 95 million viewers are said to have watched some part of the freeway chase. *See* John Lafayette, *Chasing the Juice, O.J. Saga Throws Media Into Overdrive*, ELECTRONIC MEDIA, June 27, 1994, at 1. The major news magazines, newspapers and talk shows have devoted considerable time to this story. For example, the cover story of the July 4, 1994 *Time* magazine was entitled, *When Violence Hits Home, The Simpson Case Awakens America to the Epidemic of Domestic Abuse.* The same week, *Newsweek* had a photograph of Simpson on the cover and the title read, *Living in Terror, Who is at Risk, The Warning Signs.* A telephone poll of 751 adults conducted by Princeton Survey Associates found that 8 in 10 persons believed that the media has paid too much attention to the case. *See O.J. Poll Study in Black and White*, S. D. UNION-TRIB., July 10, 1994, at A-3.

[22] *See* Jonathan Freedland, *O.J. Simpson Case Throws Light on 3,000 Wife Killings A Year,* GUARDIAN, July 23, 1994, at 15. The murder of Nihalla Abekwa of Morris County, New Jersey by her husband Mohammed Abekwa received international attention when King Hussein of Jordan was asked to intervene in the situation. Mohammed is in Juweideh Prison in Jordan and has confessed to the crime. New Jersey prosecutor W. Michael Murphy, Nihalla's sister Asimi Dapour and President Bill Clinton wanted Mohammed extradited to the United States. While King Hussein was in the United States to sign a Jordan-Israel peace agreement, the king was questioned about this case. King Hussein said, "Certainly we'll do everything we can to resolve this problem." Jordanian officials will allow Murphy to participate in Mohammed's trial in Jordan. Mohammed says that he is sorry for the killing, but he will not return the couple's children, Lisa and Simi. *See Prime Time Live* (ABC television broadcast, July 28, 1994). Mrs. Dapour has stated that Mohammed often beat her sister, Nihalla, and his children. *Id.*

## II. THE PLIGHT OF BATTERED WOMEN WHO DEFENDED THEMSELVES IN OHIO: A CASE STUDY

Twenty-three year old Kathy Thomas,[23] an African-American female from Cleveland, Ohio, had lived with her boyfriend Reuben Daniels for almost four years. On the evening of January 12, 1978, while preparing dinner, Reuben became agitated with Kathy and began striking her. This was not the first time that Kathy had been severely beaten by Reuben.[24] As the beating escalated, Reuben, according to Kathy, pushed her from the kitchen into the living room. She fell on the couch, where she picked up Reuben's gun and fatally shot him.

Kathy's legal options were dire. They included accepting a plea of seven to twenty-five years for involuntary manslaughter, pleading insanity, because in Ohio there is no diminished capacity defense, or going to trial with a self-defense claim for which she would have the burden of proof.[25] She received some legal advice to accept the pleas, which was not uncommon in these kinds of cases. Many attorneys had believed that this kind of homicide was an open and shut case. A young attorney, however, convinced her to go to trial. He believed, as Kathy did, that her actions were justified because her life was in danger at the very moment that she shot Reuben.

Kathy was convicted of first-degree murder and sentenced to fifteen years to life. On appeal, her attorneys raised the issue that the trial judge had wrongly refused to allow two experts to testify on the battered woman syndrome. The attorneys contended that this evidence would have proved that Kathy had reasonably feared

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[23] *See* State v. Thomas, 423 N.E.2d 137 (Ohio 1981); *see* Thomas Interviews, *supra* note 4.

[24] *Thomas*, 423 N.E.2d at 138.

[25] These alternatives were similar to those faced by battered women in other jurisdictions before courts allowed battered women expert testimony at trial. Most women who claimed insanity were convicted. *See* 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, 149 (1978).

imminent danger of death or great bodily harm and, therefore, had acted in self-defense in killing Reuben. The Cuyahoga County Court of Appeal agreed and remanded for a new trial. The Ohio Supreme Court reversed the lower court's decision, citing eight separate reasons from Court of Appeals Judge Blanche Krupansky's dissenting opinion against allowing such evidence to be admitted.[26] Kathy served nine years and eight months before she was paroled.

The battered woman syndrome at that time was novel. Dr. Lenore Walker, a clinical psychologist, developed this theory to explain why women often remain in abusive relationships.[27] The

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[26] Ohio Court of Appeals Judge Blanche Krupansky set forth eight reasons for the proper exclusion of expert testimony about the "battered wife syndrome":

1. There was no proper proffer of expert testimony.
2. Appellant's [Defendant's] expert had no personal contact with appellant.
3. No hypothetical question was propounded to appellant's expert witness.
4. There was no determination that appellant was in fact a battered woman.
5. Analysis of the issues raised was within the realm of the jury.
6. The trial court's jury charge more than adequately covered the situation.
7. There was no prejudice to appellant.
8. The trial court did not abuse its discretion.

*Thomas*, 423 N.E.2d at 138 n.1.

The court said that the testimony was irrelevant and immaterial to the issue of whether Kathy acted in self-defense, and that the battered wife syndrome was not sufficiently developed as a matter of commonly accepted scientific knowledge to warrant expert testimony. *Id.*

The Wyoming Supreme Court in *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981) also refused to allow expert testimony in a battered woman's case because the state of the art was not adequately demonstrated. *Id.* at 1377; *see also* Mullis v. State, 282 S.E.2d 334 (Ga. 1981) (holding that exclusion of testimony on battered woman syndrome not error).

[27] *See* LENORE G. WALKER, THE BATTERED WOMAN (1979); THE BATTERED WOMAN SYNDROME (1984); *Battered Women, Psychology and Public Policy*, 39 AM. PSYCHOLOGIST 1179, 1179-82 (1984). A number of psychologists and sociologists also contributed to this area of research. *See* JULIE BLACKMAN, INTIMATE VIOLENCE (1989); ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987); CHARLES EWING, BATTERED WOMEN WHO KILL (1987); RICHARD J.

battered woman syndrome describes a pattern of severe physical and psychological abuse in an intimate relationship, usually inflicted by the man upon the woman.[28] Often a three-phase cycle occurs, resulting in the woman's learned helplessness, and her inability to make or execute the decision to leave. First, there is the tension building phase, when the batterer is usually in an agitated state. This is followed by the explosion phase, when the abuser beats the victim and finally, the cooling off or honeymoon phase; the batterer is remorseful at this phase, promising not to repeat his actions. In fact, the batterer may try to buy back the affections of his victim through romance.[29] While some feminists, legal advocates and other clinicians have begun to question the adequacy of Walker's theory in capturing a full range of reasons for why

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GELLES, THE VIOLENT HOME: A STUDY OF PHYSICAL AGGRESSION BETWEEN HUSBANDS AND WIVES (1971); DEL MARTIN, BATTERED WIVES (1976).

[28] While it must be acknowledged that some men are battered and others in same sex relationships are also abusive, the evidence shows that the majority of battering cases are men beating women. Dr. Walker describes the battered woman as follows: "A battered woman is a woman who is repeatedly subjected to any forceful physical and psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights." WALKER, THE BATTERED WOMAN, *supra* note 27, at XV. The battered woman syndrome is not a defense, but evidence admitted to show that a woman killed in self-defense or committed some other crime because of the fear of being beaten. However, the New Hampshire Legislature is debating whether the battered woman's syndrome should be a separate defense. *See* John Milne, *Abuse As Defense Being Mulled*, BOSTON GLOBE, Mar. 6, 1994, at 43; *see also* Charles J. Aron, *In Defense of Battered Women, Is Justice Blind?* 4 HUM. RTS. 14 (1993). Aron raises the issue of coercion and proffers of battered woman syndrome testimony at the federal level. Seventy-two-year-old Faye Copeland, the oldest woman on death row, has appealed to the Missouri Supreme Court for a new trial based on the battered woman's syndrome. Mrs. Copeland and her husband, Ray, were sentenced to death in 1991 for the murders of five transient workers. *See Death Row*, COM. APPEAL, Feb. 5, 1994, at 2A. The Copelands would lure the drifters to their farm house, open up checking accounts for the men and would write bogus checks at cattle auctions. Ray Copeland would then kill the men before anyone had discovered the bad checks. *See Ray Copeland, 78, Oldest Death Row Inmate*, CHI. TRIB., Oct. 22, 1993, at 11.

[29] LENORE G. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 42 (1989).

battered women often do not leave their abusers,[30] the battered woman syndrome is now recognized in most jurisdictions as a scientifically acceptable theory.[31] The challenge to the exclusiveness of this theory is not at issue in this Article.

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[30] *See* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 207 (1986). While Schneider acknowledges that the battered woman syndrome does not mean that battered women are "passive, sick, powerless and victimized," she states that the syndrome terminology can stereotype women in these situations as acting abnormally. *Id.* at 207, 214; *see also* Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227 (1986). Blackman provides guidance on how battered women experts can be used at various stages of a case. *Id.* She also criticizes what she calls the singular image of "the battered woman" or the classic battered woman as helpless, white and middle class. *Id.* She points to how the criminal justice system fails to deal appropriately with women who do not fit a certain stereotype. *Id.* This analysis is significant because it raises questions about how women of color or women of other classes and ethnic groups may be treated by the system. *See* Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991); Julie Blackman, *Emerging Images of Severely Battered Women and the Criminal Justice System*, 8 BEHAV. SCI. & L. 121, 121-130 (1990); Michael Dowd, *Battered Women: A Perspective on Injustice*, 1 CARDOZO WOMEN'S L.J. 1, 13-21 (1993).

Walker has defended her terminology as a way of drawing cognitive corrections to an existing database for clinical professionals. However, she also warns that her research and terminology be used with "great caution." *See* WALKER, THE BATTERED WOMAN, *supra* note 27, at XI. For examples of how prosecutors can use this theory at the trials of batterers, *see* Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Testimony of the Common Experiences of Battered Women*, 2 SO. CAL. REV. L. & WOMEN'S STUD. 219 (1992); Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553 (1991).

[31] *See infra* note 36 and accompanying text and discussion at pp. 16-17. On November 2, 1992, President George Bush signed into law H.R. 1252, the Battered Women's Testimony Act of 1992. This law authorized a study on the admissibility of expert testimony regarding battered women in the defense of criminal cases under state law; set aside $600,000 for the State Justice Institute to disseminate training materials for attorneys and advocates. *See Statement By President Bush On Signing The Battered Women's Testimony Act of 1992*, Oct. 27, 1992, 1992-93, II PUB. PAPERS 2028 (1993).

Kathy Thomas's attorney tried to submit testimony to the jury on battered woman syndrome before it decided Thomas's fate. Other jurisdictions had begun to allow this kind of expert testimony and had also recognized the impact of gender bias in applying the traditional self-defense rule.[32]

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[32] Even before the battered woman syndrome theory was developed, some courts acknowledged that certain types of evidence should be admissible to explain a woman's self-defense claim. *See* People v. Glacalone, 217 N.W. 758 (Mich. 1928) (reversing lower court because it would not admit certain evidence concerning shooting death of defendant's husband). In 1954, an Oklahoma appeals court reversed a decision because the jury was not given a self-defense instruction when a battered woman used a knife to protect herself against her unarmed attacker. *See* Easterling v. State, 267 P.2d 185 (Okla. Crim. 1954).

*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. 625, 636 (1980). The law of self-defense is an exception to the principle that it is immoral to kill. *See* Deborah Kochan, *Beyond the Battered Woman Syndrome: An Argument for the Development of New Standards and the Incorporation of a Feminine Approach to Ethics,* 1 HASTINGS WOMEN'S L.J. 89 (1989). Self-defense rules evolved based on the concept of two men of equal strength engaged in a violent encounter. *See* BROWNE, *supra* note 27, at 172. The law had not anticipated a situation where a woman would have to defend herself, especially against the man who was her husband and her lord. Killing a husband in medieval England, where the self-defense doctrine developed was not only punishable as a homicide, but a woman could be tried for treason as well. *See* CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE 37 (1989).

One of the main issues concerning self-defense and the battered woman is the requirement that the threat of bodily harm or death be immediate or imminent and that the woman's actions be reasonable. Imminent is defined as "[s]omething which is threatening to happen at once." BLACK'S LAW DICTIONARY 75 (6th ed. 1990). The definitions for immediate include: "present; without delay; not deferred by any interval of time." *Id.* The one-time, sudden, violent episode between strangers is the scenario most easily understood. Even when violence among acquaintances occurs, if the person who is not responsible for starting the incident repels a present attack with deadly force to save his or her life or to avoid great bodily harm, a self-defense claim is appropriate. Most battered women who kill do so in the midst of a one-on-one encounter. *See* discussion *infra* p. 57. However, there are situations where the traditionally accepted definitions of "imminence" or "immediate" may not match the defendant's perception. For example, if an abuser beats his wife and tells her that he is going to kill her when he wakes up, the threat of death may be imminent in the mind of the abused woman, and she may resort to a preemptive strike,

fearing that if she does not attack, she will die. The obvious question is, why does she stay with the batterer? This simplistic solution may be apparent to persons not trapped in such a circumstance. However, a battered woman may or may not fully appreciate this option for a variety of reasons. An expert on battering can explain why a battered woman chooses one response as opposed to another. *See* discussion *supra* pp. 10-13.

*See* Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993). Rosen analyzes the principles of proportionality, fault and necessity and proposes that a necessity self-defense instruction may be more appropriate in some cases. This different approach on the imminence requirement in self-defense claims by battered women who kill temporarily incapacitated abusers is similar to the German Theory of the Necessity Approach. *See* B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach To Justifying Lethal Self-Defense By Battered Women*, 1991 DUKE J. COMP. & INT'L L. 169, 206 (1991). Byrd suggests that self-defense could apply in cases where there is "imminent danger" as distinguished from the "imminent attack" requirement in many U.S. jurisdictions. If there were imminent danger, a rule of defensive necessity would operate as follows:

> An actor is justified in causing harm to another individual if
>
> 1) the harm is necessary to protect the actor or any other party from imminent danger unjustifiably caused by the individual harmed;
> 2) the harm caused by the act is not (considerably) greater than the harm would thereby be, and;
> 3) the harm avoided was not avoidable through an otherwise available less harmful alternative.

A New Mexico Court of Appeals has already used an expanded definition of imminence. *See* State v. Gallegos, 719 P.2d 1268, 1270 (N.M. Ct. App. 1986) (the danger of death and bodily harm must appear imminent to the defendant).

The reasonableness requirement is based on the perspective of a reasonable man and some argue disadvantages battered women when they are held to that standard. *See* Phyliss L. Crocker, *The Meaning of Equality for Battered Women Who Kill in Self Defense*, 8 HARV. WOMEN'S L.J. 121, 123-25 (1985); *see also* Lawrence S. Lustberg & John V. Jacobi, *The Battered Woman as a Reasonable Person: A Critique of the Appellate Division Decision in* State v. McClain, 22 SETON HALL L. REV. 365 (1992). The Ninth Circuit has adopted a reasonable woman standard for sexual harassment cases. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). For a discussion on the problem of justifying rather than excusing killing in self-defense by battered women because of fears of self-help, *see* Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting A Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11 (1986); *see also* Marilyn Hall Mitchell, *Does Wife Abuse Justify Homicide*, 24 WAYNE L. REV. 1705, 1731 (1978) (discourages establishment of a "battered wife" defense comparable to self-defense because of vigilante concerns).

For example, in 1977, a Washington state court acknowledged the need for more subjective consideration of the self-defense claims made by women when their alleged assailants are men.[33] In the 1979 landmark case of *Ibn-Tamas v. United States*,[34] the D.C. Court of Appeals held that the trial court had failed to state an appropriate ground for refusing to allow a clinical psychologist to testify as to whether the defendant, a battered woman, reasonably believed that she was in imminent danger of being killed when she killed her batterer.[35]

During the 1980s, a few jurisdictions began to admit expert testimony on the battered woman syndrome.[36] Petitioners objected

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[33] State v. Wanrow, 559 P.2d 548 (Wash. 1977). The *Wanrow* court said:

> [T]he persistent use of the masculine gender leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men . . . . Until such time as the effects of that history [sex discrimination] are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.

*Id.* at 558-59.

[34] 407 A.2d. 626 (D.C. 1979).

[35] *Id.* at 631.

[36] *See* Smith v. State, 277 S.E.2d 678 (Ga. 1981); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Baker, 424 A.2d 171 (N.H. 1980); State v. Hodges, 716 P.2d 563 (Kan. 1986); State v. Kelly, 478 A.2d 364 (N.J. 1984); People v. Torres, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985); State v. Allery, 682 P.2d 312 (Wash. 1984). *But see* State v. Norman, 378 S.E.2d 8 (N.C. 1989) (overturning appeals court decision to allow expert testimony in case where abuser was asleep). In *People v. Aris*, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989), the California Court of Appeals held that although Brenda Aris should have been allowed to present expert testimony, the error was harmless. *See also* Alan Dershowitz, *The Abuse Excuse*, S.F. EXAMINER, Jan. 16, 1994, at A-15. Dershowitz uses the trials of the Menendez brothers and Lorena and John Bobbitt as examples of how he feels that the integrity of the legal system is being threatened by persons who commit a violent crime and then rely on self-defense because of abuse claim. *See also* Stephanie Goldberg, *Fault Line*, A.B.A. J., June 1994, at 36. Judging from the daily tales of rage and forgiveness on the television talk shows, it appears that the nation has turned from punishing crimes to excusing them. But perception is not reality. *Id.*

to the exclusion of expert testimony on constitutional grounds. These battered women defendants questioned the fairness of their trials based on the issue of the right to present a defense. Because expert testimony on battered woman's syndrome was not admissible, defendants could not adequately explain their self-defense claim. These challenges were not successful.[37] However, Judge Jones of the Sixth Circuit Court of Appeals criticized trial courts for not allowing use of this evidence. He questioned the fairness of such trials in *Thomas v. Arn.*[38]

### *A. Legislative and Gubernatorial Initiatives*

Ohio was one of the last states to allow testimony regarding battered woman syndrome at trial. Between 1989 and 1991, all three branches of government would come to the conclusion that

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[37] *See* Thomas v. Arn, 728 F.2d 813, 815 (6th Cir. 1984) (Jones, J., concurring); Tourlakis v. Morris, 738 F. Supp. 1128 (S.D. Ohio 1990); Fennell v. Goolsby, 630 F. Supp. 451 (E.D. Pa. 1985); State v. Minnis, 455 N.E.2d 209 (Ill. App. 1983); State v. Burton, 464 So.2d 421, 428-29 (La. App. 1985); *see also* Erich D. Anderson & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363 (1992).

[38] In my view, the trial court's exclusion of expert testimony on the "battered wife syndrome" impugned the fundamental fairness of the trial process thereby depriving [the defendant] of her constitutional right to a fair trial. There is sufficient literature which suggests that the public and thus, juries, do not understand the scope of the problem concerning battered women. Furthermore, they tend to be unsympathetic toward battered women. They fail to understand, for instance, why battered women do not leave their partners. Ascertaining a battered woman's state of mind is crucial to a determination of this and other aspects of her behavior. It may bear on the responsibility or lack of it, for her response. In my opinion the expert testimony could have clarified the unique psychological state of mind of the battered woman and should have been admitted by the trial judge. The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight.

*Arn*, 728 F.2d at 815 (Jones, J., concurring).

battered women who killed their abusers needed to be able to better explain their situations by introducing expert testimony. In 1989, Representative Joe Kozuria of Lorain, Ohio introduced House Bill 484 in the Ohio House of Representatives.[39] This bill would take various forms before it was passed and signed into law by Governor Richard Celeste on August 6, 1990. Ohio is one of a few states that has such a law.[40]

Before the bill was passed in the Ohio General Assembly, the governor decided that, before he left office, he wanted to do

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[39] (A) The general assembly hereby declares that it recognizes both of the following, in relation to the "battered woman syndrome":

(1) That the syndrome currently is a matter of commonly accepted scientific knowledge;

(2) That the subject matter and details of the syndrome are not within the general understanding or experience of a person who is a member of the general populace and are not within the field of common knowledge;

(B) If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the "battered woman syndrome" and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question.

OHIO REV. CODE ANN. § 2901.06 (Anderson Supp. 1990) (enacted).

The legislature also amended the law on insanity to allow the admission of battered woman syndrome expert testimony. *See* OHIO REV. CODE ANN. § 2945.392 (Anderson 1990).

[40] Missouri passed a similar law to Ohio's in 1987. MO. REV. STAT. § 563.033(1) (Supp. 1988); *see also* Kathee R. Brener, Note, *Missouri's New Law on "Battered Spouse Syndrome" A Moral Victory, A Partial Solution*, 33 ST. LOUIS U. L.J. 227 (1988). Professor Holly Maguigan takes issue with proposals to require both a different self-defense standard and changing evidentiary rules to explicitly allow "battered woman syndrome" testimony at trial. She indicates that existing rules should in most cases be sufficient, if applied properly. *See* Holly Maguigan, *Battered Women and Self-Defense Myths and Misconceptions in Current Reform Proposals*, 140 U. PENN L. REV. 379, 420-424. (1991).

something to redress what he perceived to be an unjust result of the law in the cases of battered women who, while defending themselves against abusive companions by striking back at their abusers, had committed a felony and were, therefore, in Ohio prisons. Governor Celeste made a policy decision that a systemic solution was required to compensate for the systemic legal defect. In November 1989, he told his executive assistant responsible for criminal justice that he wanted to review the cases of battered women incarcerated for crimes against their batterers for possible grants of clemency.[41] As the result of a two-phase study, 97 women out of approximately 400 were identified, who were in prison for violent crimes were identified as eligible for consideration.[42]

The data gathered for the governor from the Ohio women's prisons reflected national trends. Women are the fastest growing segment of the prison population. According to a 1991 Bureau of Justice Statistics report, from 1980 to 1991 the number of females incarcerated increased by 202%.[43] Most women are in prison for nonviolent, property-related crimes.[44] Over the past few years, the dramatic increase in female incarcerations has been directly linked to drug-related offenses.[45] Nationwide, one-quarter of the women in prison for violent crimes were convicted of the homicide of a relative or an intimate.[46] Sixty percent of these women were likely to have committed their offense against a male.[47] Forty-one percent of these women have been victims of either physical or

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[41] While the author dealt with numerous other issues primarily of a regulatory or administrative nature, the author was also the point person on prison issues.

[42] OHIO DEPT OF REHABILITATION & CORRECTIONS, REP. AND RES. ON BATTERED SPOUSAL/WOMAN SYNDROME AS IT AFFECTS THE OHIO DEPT. OF REHABILITATION & CORRECTIONS, Columbus, Ohio (Apr. 1990) [hereinafter OHIO REHAB. & CORRECT. REP.].

[43] BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, WOMEN IN PRISON 1 (1991).

[44] *Id.* at 4.

[45] *Id.*

[46] *Id.* at 3.

[47] *Id.*

sexual abuse, or both.[48] There are thirty-three women on death row in state prisons.[49] Eighteen of these women received the death penalty for killing males.[50] Of the eighteen, ten were married to or were in a live-in relationship with the deceased.[51]

Prison terms for women convicted of violent crimes tend to be long. Nationally, women convicted of murder have the longest sentences serving just over 16½ years.[52] In Ohio, eighty-three percent of the women surveyed, who had seriously assaulted or killed their abusers, received sentences ranging from twenty-five years to life.[53]

After the initial results of the prison surveys evaluated in April, 1990, Governor Celeste's aide recommended that the usual process for clemency be followed.[54] However, the eligible women would

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[48] *Id.* at 6.

[49] *See* Victor L. Streib, Capital Punishment for Female Offenders: Present Female Death Row Inmates and Death Sentences and Execution of Female Offenders January 1, 1973 to May 1, 1993 (May 18, 1993) (unpublished manuscript, on file with the *Journal of Law and Policy*).

[50] *Id.* at 10-13.

[51] *Id.*

[52] *Id.* at 1.

[53] OHIO REHAB. & CORRECT. REP., *supra* note 42.

[54] The author felt that the procedures in place for review were adequate, knowing that any inmate could petition and that each case would be scrutinized on its own merits. In Ohio, the Adult Parole Authority ("Parole Board") has the statutory power to recommend a pardon, commutation, reprieve or parole to the governor if "such action would further the interests of justice and be consistent with the welfare and security of society." *See* OHIO REV. CODE ANN. § 2967.03 (Baldwin 1992). The Ohio Revised Code and the administrative rules which govern the Parole Board's release procedures require that notice be sent to the prosecuting attorney, judge of the common pleas court and in some circumstances the victim or victim's representative. *See* OHIO REV. CODE ANN. § 2967.12 (Baldwin 1992). The administrative rules require that all applications for a pardon, reprieve, or commutation be made in writing. There is no stipulation as to who can make the application. Therefore, the inmate, her attorney or even a family member could request review by the Parole Board. *See* OHIO ADMIN. CODE § 5120:1-1-15 (1992). Among the discretionary factors that the Parole Board can consider are: the inmate's conduct during her term of imprisonment; the nature of the offense for which the inmate was convicted; the inmate's pattern of criminal or delinquent behavior prior to the current term of imprisonment; any recommendations made by the staff of the Department of

receive assistance in preparing their petitions if they so desired. Over the next eleven months, the Ohio Parole Board and the governor's office reviewed 123 cases.

An important aspect of the clemency process was the time spent by the governor's staff educating the parole board on the battered woman syndrome and the recent change in Ohio law allowing expert testimony on the syndrome. At the onset of this initiative, the law in Ohio had not changed to admit expert testimony at trial on battered woman syndrome. However, the debate about this issue had begun in the Ohio legislature. As a result of receiving this new information, the parole board modified its procedure to facilitate the clemency process. The board had a practice of not hearing a petition if an inmate had been denied a request for parole or clemency within the previous two years.[55] This policy had been adopted internally and was later changed. There were several battered women who were in that category. The parole board decided that it would waive that rule,[56] so that it would not be an obstacle in completing this project.

In the first round of reviews, the Ohio Parole Board recommended that seventeen women be granted clemency. The governor reduced the sentences of twenty-five women, sixteen of the seventeen that the parole board had approved and nine other petitioners, as well.[57] The second round of reviews by the parole board included one recommendation. The governor granted three, including a pardon to Kathy Thomas, and the reduction of a death

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Rehabilitation and Correction and any factors which the board determines to be relevant. *Id.* There are also mandatory considerations, including: reports by institutional staff members, the inmate's official prior criminal record, pre- and post-sentencing reports, physical mental examinations and written or oral statements by the inmate. OHIO ADMIN. CODE § 5120:1-1-09 (1992).

[55] Telephone interview with Raymond Capots, Chairman, Ohio Parole Board, Columbus, Ohio (Apr. 1990).

[56] Interview with Raymond Capots, Chairman, Ohio Parole Board, Columbus, Ohio (Apr. 1990).

[57] This means that there were differences of opinion on ten women. Three of the board's unfavorable recommendations were actually close five-to-four votes. Ninety-five other women did not receive favorable responses either from the board or the governor.

penalty sentence to life in prison.[58] Each case was reviewed on its own individual basis.

As this process was taking place, and while the Ohio legislature debated the admissibility of battered woman expert testimony, the Ohio Supreme Court decided the Brenda Koss case. *Koss*[59] overruled *State v. Thomas*. Brenda Koss, like Kathy Thomas, was a resident of Cleveland, Ohio.[60] She was married to Michael Koss and had been battered for years. She testified at trial that at different times Michael had tried to smother her and once had put a radio in the tub to electrocute her.[61] On May 2, 1986, Michael was found dead in the front bedroom with a single gunshot wound to the head. Brenda initially denied shooting her husband. She said to police that around 1:00 a.m., while undressing to go to bed her husband beat her, and the next thing she remembered was a noise.[62] Brenda was indicted for the murder of her husband and, at trial, tried to introduce evidence regarding battered woman syndrome. The court excluded that testimony.[63] Brenda was found guilty of voluntary manslaughter and sentenced to eight to twenty-five years in prison.[64]

Justice Alice R. Resnick had joined the court between the time of the *Thomas* decision and the *Koss* appeal.[65] The Ohio Supreme Court uses a lottery system in deciding who in the majority writes the opinions. Justice Resnick drew the lot for the *Koss* case.[66]

In *Koss*, the court recognized that the battered woman syndrome had "gained substantial scientific acceptance to warrant admissibility";[67] a defendant would have to offer evidence which

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[58] Beatrice Lumpkin was removed from death row.

[59] State v. Koss, 551 N.E.2d 970 (Ohio 1990); *see also* Laura Huber Martin, Note, *Ohio Joins the Majority and Allows Expert Testimony on the Battered Woman Syndrome:* State v. Koss, 60 CINN. L. REV. 877 (1992).

[60] *See Koss*, 551 N.E.2d 970.

[61] *Id.* at 971.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Justice Resnick was elected to the bench in 1988.

[66] Telephone interview with Alice Robie Resnick, Justice, Ohio Supreme Court (June 16, 1993).

[67] *Koss*, 551 N.E.2d at 974.

establishes that she is a battered woman in order for that expert testimony to be admitted;[68] and the admission of expert testimony regarding battered woman syndrome does not establish a new defense or justification.[69] The testimony assists the trier of fact in determining "whether the defendant acted out of a [sic] honest belief that she was in imminent danger of death or great bodily harm and that the use of such force was her only means of escape."[70]

Before *Koss* and the legislative change allowing expert testimony on the battered woman syndrome, the defendant was handicapped in presenting her claim of self-defense. A number of battered women were incarcerated after being unable to present evidence and expert testimony on battering. Some entered pleas of guilty and accepted long sentences because they knew that they had little chance of acquittal. The courts would not hear their stories. For these women, the only means of relief was executive clemency.

## III. CLEMENCY

Clemency is a discretionary executive power.[71] It is both legal and political in nature: legal because this authority comes from a constitution[72] and political because an executive can consider

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] "The President . . . shall have Power to grant reprieves and pardons for offenses against the United States, except in Cases of Impeachment." U.S. CONST. art. II, § 2 Cl. 1.

[72] The Ohio Constitution contains a provision typical of states authorizing clemency:

> [The Governor] shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, *upon such conditions as he may think proper;* subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the general assembly, at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the

factors that judges and juries cannot.[73] Unlike other administrative

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general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefore.

OHIO CONST., art. III, § 11 (emphasis added).

Thirty-six states which authorize capital punishment also have clemency provisions. ALA. CONST., amend. 38; ALA. CODE § 15-18-100 (1982); ARIZ. CONST., art. V, § 5; ARIZ. REV. STAT. ANN. §§ 31-443, 31-445 (1986 and Supp. 1992); ARK. CONST., art. VI, § 18; ARK. CODE ANN. §§ 5-4-607, 16-93-204 (Michie Supp. 1991); CAL. CONST., art. VII, § 1; CAL. GOV'T. CODE § 12030(a) (West 1992); COLO. CONST., art. IV, § 7; COLO. REV. STAT. §§ 16-17-101, 16-17-102 (1986); CONN. CONST., art. IV, § 13; CONN. GEN. STAT. § 18-26 (1988); DEL. CONST., art. VII, § 1; DEL. CODE ANN. tit. 29, § 2103 (1991); FLA. CONST., art. IV, § 8; FLA. STAT. ANN. § 940.01 (West Supp. 1991); GA. CONST., art. IV, § 2, para. 2; GA. CODE ANN. §§ 42-9-20, 42-9-42 (1991); IDAHO CONST., art. IV, § 7; IDAHO CODE §§ 20-240 (Supp. 1992), 67-804 (1989); ILL. CONST., art. V, § 12; ILL. REV. STAT. ch. 38, para. 1003-3-13 (1991); IND. CONST., art. V, § 17; IND. CODE §§ 11-9-2-1 to 11-9-2-4, 35-38-6-8 (1988); KY. CONST., § 77; LA. CONST., art. IV, § 4-513 (1990); MISS. CONST., art. V, § 124; MISS. CODE ANN. § 47-5-115 (1981); MO. CONST., art. IV, § 7; MO. ANN. STAT. § 217.220 (Vernon Supp. 1992), 552.070 (Vernon 1987); MONT. CONST., art. VI, § 12; MONT. CODE ANN. §§ 83-1, 127 to 46-23-316 (1991); NEB. CONST., art. IV, § 13; NEB. REV. STAT. §§ 83.1, 127 to 83-1, 132 (1987); NEV. CONST., art. V, § 13; NEV. REV. STAT. § 213.080 (1991); N.H. CONST., pt. 2, art. 52; N.H. REV. STAT. ANN. § 4:23 (1988); N.J. CONST., art. V, § 2, para. 1; N.J. STAT. ANN. § 31-21-17 (West 1990); N.C. CONST., art. III, § 5(6); N.C. GEN. STAT. §§ 147-23 to 147-25 (1987); OHIO CONST., art. III, § 11; OHIO REV. CODE ANN. §§ 2967.1 to 2967.12 (Anderson 1987 and Supp. 1991); OKLA. CONST., art. VI, § 10; OKLA. STAT. tit. 21, § 701.11a (Supp. 1990); OR. CONST., art. V, § 14; OR. REV. STAT. §§ 144.640 to 144.670 (1991); PA. CONST., art. IV, § 9, 61; PA. STAT. ANN. tit. 61, § 2130 (Supp. 1992); S.C. CONST., art. IV, § 14; S.C. CODE ANN. §§ 24-21-910 to 24-21-1000 (Law. Co-op. 1977 and Supp. 1991); S.D. CONST., art. IV, § 3; S.D. CODIFIED LAWS ANN. §§ 23A-27A-20 to 23A-27A-21, 24-14-1 (1988); TENN. CONST., art. III, § 6; TENN. CODE ANN. § 40-27-101 to 40-27-109 (1990); TEX. CONST., art. IV, § 11; TEX. CODE CRIM. PROC. ANN. § 48.01 (West 1979); UTAH CONST., art. VII, § 12; UTAH CODE ANN. § 77-27-5.5 (Supp. 1992); VA. CONST., art. V, § 12; VA. CODE ANN. § 53.1-230 (Michie 1991); WASH. CONST., art. III, § 9; WASH. REV. CODE § 10.01.120 (1992); WYO. CONST., art. IV, § 5; WYO. STAT. § 7-13-801 (1987).

[73] The Supreme Court in *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833), acknowledged the limitations of the justice system when it stated the

decisions which may be delegated to bureaucrats in the executive branch, clemency decisions are made personally by the president or by a governor. Clemency is an instrument of equity in the criminal law designed to promote the general welfare by preventing injustice.[74]

The word clemency is derived from two Latin words: *clemens*, meaning merciful and *clementia*, meaning mildness. Our modern day concept of justice tempered by mercy has its roots in the Judeo-Christian ethics of both punishment and forgiveness. Little is known about the practice of clemency in the Greek era except that to obtain a pardon in Athens, the applicant had to have the signature of 6,000 citizens.[75] The New Testament story of Pontius Pilate, Jesus and Barabbas illustrates how an early century Roman authority exercised that power.[76]

There are several forms of clemency, including amnesty, commutations, pardons, remissions of fines and forfeitures and reprieves. Amnesty is an act of forgiveness given by the government to a class of persons guilty of political offenses. A commutation reduces the original sentence to a lesser degree of punishment. Pardons can be either absolute or conditional, and will either completely forgive the offender of the crime and all consequences of conviction or there may be requirements the grantee must fulfill either before or after the pardon is granted. The remission of fines and forfeitures releases a person from indebtedness. Finally, a reprieve postpones a scheduled execution.

Clemency, in the English system, is traced back to the Teutonic

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following: "It is a constituent part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting a particular case of which he is not judicially informed." *Id.* at 161.

[74] *In re* Flourney, 1 Ga. 606, 607 (1846). Justice Oliver Wendell Holmes recognized that legal decisions and justice are not synonymous. He said "Of relative justice law may know something; of expediency it knows much; with absolute justice it does not concern itself." *See* OLIVER WENDELL HOLMES, VII *The Works of Oliver Wendell Holmes; Pages From an Old Volume of Life*, CRIME & AUTOMATISM 324 (1891).

[75] MOORE, *supra* note 2, at 16; *see also* Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 139 (1964).

[76] *See Matthew* 27:15-23.

peoples.[77] During the Saxon rule, kings granted clemency for offenses committed by members of their own household.[78] The laws of Aethelberht, the first Christian Saxon King, made reference to clemency.[79] Historically, there have been struggles over who should be able to grant mercy. William the Conqueror of Normandy wanted to strengthen the view that clemency was the exclusive power of the King.[80] However, the church could also claim the "benefit of clergy" exemption in criminal matters and therefore lessened the Kings absolute clemency power.[81]

In 1536, Henry VIII was more successful at possessing the exclusive right of clemency—that authority would remain with the monarch through the reigns of the Tudors and Stuarts.[82] As the English criminal common law developed, the right and tradition of clemency continued to be exercised.[83]

When the American colonies were formed, the monarch delegated his power of clemency in the colonial charters.[84] In the English colonies, the chief colonial officer, usually a governor, could obtain leave from the crown to exercise the prerogative of mercy.[85]

During the revolutionary period, newly formed states and the

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[77] CHRISTEN JENSEN, THE PARDONING POWER IN THE UNITED STATES 1 (1922).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] 27 Henry VIII, c. 24, *cited in* Stanley Grupp, *Some Historical Aspects of Pardon in England*, 7 AM. J. LEGAL HIST. 51, 55, 66 (1963):

> That no person or persons, of what estate or degrees soever they be . . . shall have any power or authority to pardon or remit any treasons, murders, manslaughter or any felonies whatsoever they be . . . but that the King's highness, his heirs and successors, Kings of the realm, shall have the whole and sole power and authority thereof united and knit to the Imperial crown of this realm, as of good right and equality it appertaineth; any grants, usages, prescriptions, act or acts of parliament, or any other thing contrary notwithstanding.

[82] JENSEN, *supra* note 77, at 2.

[83] JENSEN, *supra* note 77, at 3.

[84] WILLARD HUMBERT, THE PARDONING POWER OF THE PRESIDENT 12 (1941).

[85] *Id.*

framers of the Constitution for the federal government agreed that there was both room and need for pardoning power in a democracy. Alexander Hamilton said that such a power is required "by considerations of justice, of humanity and of public policy."[86] The constitution of the colonies included the pardoning power.[87] However, the authority to grant clemency was not necessarily the exclusive right of a governor.[88]

In most states today the governor has primary authority to grant clemency.[89] In thirty-five states, the governor may either make clemency decisions directly or exercise this power in conjunction with an advisory board.[90] Five states have boards that make clemency decisions, and in sixteen states this power is shared between the governor and a board.[91] The mayor of the District of Columbia also has clemency powers.[92]

The need for a clemency power is now recognized in international law. The International Covenant on Civil and Political Rights, ratified in 1992 by President George Bush, contains a provision that states that anyone sentenced to death shall have the right to seek pardon or commutation of sentence.[93]

### *A. Courts and the Clemency Power*

Courts have recognized both the importance and the operation of the clemency power. Chief Justice John Marshall, in *United*

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[86] THE FEDERALIST NO. 74 (Alexander Hamilton).

[87] JENSEN, *supra* note 77, at 10-11.

[88] JENSEN, *supra* note 77, at 10-11.

[89] *See* NATIONAL CENTER FOR ST. CTS., CLEMENCY LEGAL AUTHORITY, PROC., AND STRUCTURE 1 (1977) [hereinafter NATIONAL CENTER FOR ST. CTS.]; NATIONAL GOVERNORS' ASSN. CENTER FOR POL. RES., GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES 15 (1988) [hereinafter NATIONAL GOVERNORS' ASS'N].

[90] NATIONAL GOVERNORS' ASS'N, *supra* note 89, at 54.

[91] NATIONAL GOVERNORS' ASS'N, *supra* note 89, at 54.

[92] NATIONAL GOVERNORS' ASS'N, *supra* note 89, at 54.

[93] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; *see also* John Quigley, *Little Known Treaty May Afford Greater Rights*, CHI. DAILY L. BULL., May 5, 1993, at 6.

*States v. Wilson*,[94] described the clemency power as "an act of grace, proceeding from the power intrusted 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 magistrate."

In *Biddle v. Perovich*,[95] the Supreme Court further clarified the law on pardons:

> A pardon in our day is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflictions less than what the judgment fixed.[96]

Disparities in punishment due to the rigidity and flexibility inherent in a discretionary penal system can be mitigated by clemency. It is one of the ways of bringing law and justice into harmony.

Judicial review of clemency actions has been limited in scope. While courts have adjudicated issues including the refusal to accept pardons,[97] legislative limits on clemency[98] and due process claims,[99] courts will not analyze the executive's rationale in granting a clemency. Using both the separation of powers and the political question doctrines, courts have considered most challenges to the executive's use of discretionary power unreviewable. Granting clemency is a discretionary act.[100] The Supreme Court in

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[94] 32 U.S. (7 Pet.) 150, 160 (1833).

[95] 274 U.S. 480, 486 (1927).

[96] *Id.*

[97] *See* United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833).

[98] *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

[99] Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (holding that there is no liberty interest in pardon).

[100] The language of the constitution sets the limits and legal standards for the governor. For example, the Ohio Constitution requires that a person must be convicted and allows clemency to be granted by a governor for any crime except treason and cases of impeachment. The standard that is required is "upon such conditions as he [the governor] may think proper." *See supra* note 72. A governor is to use her judgment as to which petitions for relief are valid, appropriate and in the public interest.

Other jurisdictions have agreed that a governor's use of the clemency power

in *Baker v. Carr*[101] articulated its nonjusticiability test:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[102]

The broad language authorizing clemency in the U.S. Constitution and in most state constitutions is "a textually demonstrable constitutional commitment of [the] issue to a coordinate political [the executive branch] department." [103]

The law on clemency is settled. Regardless of the reasons an executive may have for granting clemency, the scrutiny of this discretionary act will be left to the political process rather than to the courts.[104]

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is discretionary. *See* Eacret v. Holmes, 333 P.2d 741, 744 (Or. 1958); *Ex parte* Crump, 135 P. 428, 431 (Okla. Crim. App. 1913). However the Oklahoma court did state that a governor could not legally commute a death sentence because of his conscientious objection. *See* Henry v. State, 136 P. 428, 431 (Okla. Crim. App. 1913). *See also* discussion *infra* pp. 33-37; JOEL SAMAHA, SOME REFLECTIONS ON THE ANGLO-SAXON HERITAGE OF DISCRETIONARY JUSTICE IN SOCIAL PSYCHOLOGY AND DISCRETIONARY LAW 4 (Lawrence E. Abt & Irving R. Stuart eds., 1979).

[101] 369 U.S. 186 (1961).

[102] *Id.* at 217.

[103] *Id.*

[104] The Ohio Supreme Court is clear about not violating the separation of powers doctrine by examining the governor's use of clemency. In *Knapp v. Thomas,* 39 Ohio St. 377 (1883), the Ohio Supreme Court said:

> [A]ny attempt of the courts to interfere with the Governor in the exercise of the pardoning power, would be manifest usurpation of

### *B. The Need for Clemency*

The fallibility and inflexibility of the legal system are justifications for the clemency power. In the eighteenth century, William Blackstone commented on the need for clemency to mitigate the harshness of English law.[105] The founding members of this republic also recognized how the strict rule of law could sometimes work a hardship. Alexander Hamilton gave this rationale for the clemency power, "The criminal law code of every country partakes so much of necessary severity that without an easy access to exception in favor of unfortunate guilt justice would mean a continuance too sanguinary and cruel."[106] Chief Justice William Howard Taft succinctly articulated the necessity of the clemency power:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly

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> authority. The nature of our government forbids it. The long contest as to the rightful authority of government is in some respects ended. In our national and state constitutions the powers of the three branches of government, the legislative, the executive and the judicial, are clearly defined and limited, and the important truth is at length understood, that each can best preserve the jurisdiction and power confided to it, by carefully abstaining from all interference with the rightful authority of the others. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by constitution, are of equal dignity, and within their respective spheres of action equally independent.

*Id.* at 391-392.

In the recent challenge to commutations of death penalty sentences by former Governor Celeste, the court for the 10th appellate district of Ohio once again explained its position on judicial review, stating, "[I]t is not this court's function to inquire into the wisdom or merit of the former governor's actions." *See* Wilkinson v. Maurer, Nos. 92AP-674, 92AP-675, 92AP-677, 92AP-678, 92AP-680, 92AP-1297, 1993 Ohio App. LEXIS 2045 (Apr. 8, 1993).

[105] 4 WILLIAM BLACKSTONE, COMMENTARIES 387 (1769).

[106] THE FEDERALIST No. 74, at 16 (Alexander Hamilton).

> considerate of circumstances which may properly mitigate guilt. To afford remedy it has always been thought essential in popular governments . . . to vest in some authority other than the courts power to ameliorate or avoid particular criminal judgments.[107]

Chief Justice Taft, who had been president, understood that this power was to be used as a check on the judicial system.

Mistakes (particularly the conviction of an innocent person), the rigidity of the law and the unfair application of the law are but three reasons for a process in which a decision maker can consider as much information as necessary to modify a prison sentence or free a person from punishment. Clemency is the fail-safe in our criminal justice system.

The possibility of mistake is not as infrequent as one would suppose. Scholars and advocates who specialize in death penalty litigation routinely make this complaint. Radlet, Bedau and Putnam have identified 416 such cases of erroneous convictions from the years 1900-1991.[108] In the last few years, the media has told numerous stories about innocent persons wrongly convicted. For example, the film documentary, *The Thin Blue Line* by Errol Morris detailed the Texas death row incarceration of Randall Dale Adams, who was subsequently set free.[109] Adams had been convicted of killing a Dallas police officer on a Dallas road after he hitched a ride with sixteen year-old David Ray Harris on a Thanksgiving weekend in 1976. Adams spent 12½ years in prison. *The Thin Blue Line* is credited with Adams' release. A state court overturned the conviction in 1989. Three prosecutors connected with the trial were either dismissed or left the Dallas District Attorney's office. Several witnesses in the original trial admitted that they had given perjured testimony.[110] In February, 1993 Walter McMillian, who spent six years on death row in Alabama, was set free by prosecutors. The prosecutors finally admitted that

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[107] *Ex parte* Grossman, 267 U.S. 87, 120-21 (1925).

[108] MICHAEL L. RADLET *et al.*, IN SPITE OF INNOCENCE, Preface (1992).

[109] THE THIN BLUE LINE (Miramax Films 1988)

[110] *See Milestones*, TIME, Apr. 17, 1989, at 69; *see also* Donald P. Myers, *The Next Life of Randall Dale Adams,* NEWSDAY, May 8, 1989, at 2-1.

they had the wrong man.[111] It took five appeals and a *60 Minutes* investigation to free him.[112] McMillian had a one and a half-day trial. The story of Clarence Chance and Benny Powell of Los Angeles, California is similar.[113] Powell and Chance had been convicted of killing Los Angeles Deputy Sheriff David Andrews. Although these men were not facing the death penalty, they both served seventeen years in a California prison after being wrongly convicted of murder.[114] This case was overturned because the police withheld evidence that the jailhouse informant who testified against the men had also implicated others.[115]

While none of these persons was granted clemency, it is clear that mistakes were made and they were innocent. Being innocent, however, is not necessarily enough to save a person from the full penalty of the law, once she is convicted of a capital crime. According to *Herrera v. Collins*,[116] the Supreme Court refused to hear a habeas claim based on innocence. However, the Court recommended that the Texas death row inmate apply for a pardon or commutation, since clemency is the historical, legal mechanism for such relief. Despite the fact that pardons or commutations based on innocence are rare,[117] even parole board officials recognize the need for these procedures.[118]

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[111] Christopher Colford, *Cruel, But Not Usual Mistakes,* CLEV. PLAIN DEALER, Mar. 7, 1993, at 3C.

[112] *Id.*

[113] *See* Michael A. Kroll, *Facing Death After Tainted Prosecution; Looking at the Chance-Powell Case, How Often Does Sordid Misconduct Occur?*, L.A. TIMES, Apr. 2, 1992, at B7.

[114] *Id.*

[115] *See* Sheryl Stolberg, *Probe Shows Men Unjustly Convicted: Judge Frees Pair After 17 Years In Prison*, HOUS. CHRON., Mar. 26, 1992, at A2. On June 28, 1993, the *Washington Post* reported that Kirk Bloodsworth, who was twice convicted of murder and rape of a nine year-old girl would be released because DNA evidence concluded that Bloodsworth was not the perpetrator. At one time he had been sentenced to death. *See* Amy Goldestein, *DNA Test May Free Man Once Sentenced to Death*, WASH. POST, June 28, 1993, at D1.

[116] 113 S. Ct. 2325 (1993).

[117] *See* Kevin Krajick, *The Quality of Mercy*, CORRECTIONS MAG., June 1979, at 47, 50.

[118] Parole Board officials acknowledge the fact that the criminal justice system can sometimes be arbitrary and that there is a need for a mechanism to

Just as convicting an innocent person is not the only example of the miscarriage of justice, innocence is not the sole justification for clemency. The reasons for granting clemency include doubt as to guilt, changes in the political climate and laws that reflect societal enlightenment concerning the nature of certain offenses.[119]

As discussed in parts IV and V, the rationale for clemency for battered incarcerated women should fall well within acceptable societal criteria based on justice, mercy and fairness. However, governors must first be persuaded that they should use this power.

### *C. The Role of Governor*

A governor is the highest authority in the executive branch of state government.[120] She serves as administrative head, commander-in-chief, legislative leader and party chief. She may even enter into relationships with foreign jurisdictions.

Modern American governors are primarily concerned with three broad areas of operations: policy formation, public relations and management.[121] A governor is perceived by citizens as someone responsible for running government, getting highways built, supporting education, keeping a state's economy sound and insuring

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compensate for that flaw. The chairperson of the Ohio Parole Board called clemency "a great procedure." Telephone Interview with Margarette Ghee, Chairperson, Ohio Parole Board, Department of Rehabilitation and Correction, State of Ohio, in Columbus, Ohio (June 10, 1993).

[119] *See* NATIONAL CENTER FOR ST. CTS., *supra* note 89, at xvi. Presidents Abraham Lincoln and Andrew Johnson pardoned the confederate soldiers after the civil war in an attempt to heal the nation. *See* JONATHAN T. DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953).

[120] For example, the Ohio Constitution provides, "[T]he Supreme executive power of this state shall be vested in the governor." OHIO CONST. art. III, § 5. When a governor is one of several directly elected members of the executive branch, he is part of the plural executive. *See* JOHN A. STRAAYER ET AL., STATE & LOCAL POLITICS 125 (1994). Other members of the plural executive could include the lieutenant governor, secretary of state, attorney general, treasurer, etc. *Id.* at 126.

[121] COLEMAN B. RANSONE, JR., THE OFFICE OF GOVERNOR IN THE UNITED STATES 115 (1970).

that there is employment.

The chief executive has both formal and informal powers. Formal powers consist of messages, vetoes, the formulation and execution of the budget, control over state agencies, appointments and the overall administration of state programs.[122] Among the informal powers are: the skills of bargaining and persuading prestige of office, popular and political party support and the mass media.[123]

While a governor has certain mandated functions based on the constitution and statutes, she still has considerable discretion in deciding which of the various functions will receive the most emphasis. The citizenry expects that a governor will perform those mandated responsibilities.[124] Citizens also know that she is expected to use her best judgment in matters that require discretion because it is neither judicious nor practical to come to the people on every matter that must be decided. A government run by referendum is just not efficient.

The policymaking and administrative roles of a governor are generally accepted as the normal course of business. However, a governor is also an actor in the criminal justice system. The prisons are under her control as the chief executive.[125]

Additionally, when all other avenues have been exhausted, the clemency power gives a governor the final word as to whether a convicted person will remain incarcerated, for how long, or whether the death sentence will be carried out. In fact, before parole boards became the administrative bodies to oversee the early release of prisoners, the only appeal was to a governor.[126]

Because state constitutions grant a range of clemency powers

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[122] ALAN ROSENTHAL, GOVERNORS & LEGISLATURES CONTENDING POWERS 5 (1990); *see also* STRAAYER, *supra* note 120, at 135. Straayer refers to a National Governors' Association Study that evaluates the above mentioned levels of formal gubernatorial authority. STRAAYER, *supra* note 120, at 135.

[123] STRAAYER, *supra* note 120, at 135.

[124] *See* STRAAYER, *supra* note 120, at 124.

[125] Prisons are a part of the executive branch of government and are therefore subject to the control of the chief executive.

[126] EDWARD RHINE ET AL., PAROLING AUTHORITIES, RECENT HISTORY AND CURRENT PRACTICES 9 (1991).

from plenary to limited, the role of a governor in the process will vary. A chief executive's exercise of this power will be influenced by her personal philosophy about crime and punishment and perhaps, to a greater extent, the political realities of being tarnished with the label of being "soft on crime." For this reason, during the 1970s the National Governors' Association counseled newly elected governors to use the clemency power sparingly.[127]

In recent years, it has been politically risky to show any consideration for convicted criminals, especially those who have committed capital offenses. Politicians now feel compelled to pass the death penalty litmus test when running for office, even though they do not have to make the ultimate decision as to whether an inmate should live or die.[128]

However, a few modern governors have felt compelled to exercise their constitutional authority, especially in death penalty cases, despite the contrary mood of the public. California Governor Edmund G. (Pat) Brown in his book, *Public Justice, Private Mercy,* explains his rationale for granting clemency:

As I understood it, the section of the California

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[127] *See* LEGAL ADVICE FOR THE GOVERNOR, NAT. GOVERNOR'S CONF. CENTER FOR POL. RES. AND ANALYSIS, GOVERNOR'S OFFICE SERIES 4 (1976). The legal advisor offers this caution:

> Executive clemency should be extended to inmates serving their sentences (usually in the form of a commutation) *only* after a careful review of all relevant information and *only* where the sentence is clearly inappropriate and can be shown to be so to any reasonable person. The same caution applies to clemency decisions concerning persons discharged from their sentences and to extradition decisions. Cautiousness, deliberateness, and restraint are required to overcome public and local anxiety about the Governor's alleged "interference" with the judicial system and to allow the Governor to feel confident about making those clemency and extradition decisions which justice requires.

*Id.* (emphases added).

[128] *See* William Schneider, *Attack Politics; Running to Win on the Low Road,* L.A. TIMES, Apr. 1, 1990, at M1; *see also* Kenneth Bresler, *Seeking Justice, Seeking Election, Seeking the Death Penalty: The Ethics of Prosecutorial Candidate Campaigning on Capital Conviction,* 7 GEO. J. LEGAL ETHICS 941 (1994).

> constitution that granted the governor the power of clemency—defined in my dictionary as "a disposition to be merciful"—had little to do with guilt or innocence, or even with the finer points of the law. The first was for a jury and the original judge to decide; the second was the job of the appellate courts. What I as governor had to look for was some extraordinary reason why the defendant should not be executed.[129]

Former Governor Michael DiSalle of Ohio, who was also an opponent of the death penalty for moral reasons,[130] granted clemency to twelve persons, including one woman on death row. DiSalle felt that the fate of those who would be executed was often decided by "men influenced more by public climate and public clamor than by abstract justice."[131]

Theoretically, when governors grant clemencies they have made the decision that the public welfare and justice are better served by either reducing the sentence, delaying an execution or totally forgiving the convicted person. However, some chief executives' actions have been attacked for granting clemencies with questionable motives.[132] Some segments of the public do not want mercy granted to a petitioner, regardless of the merit of the case. Others may feel that a governor should only grant a pardon when innocence has been proven.[133] While it might not be a violation of the law per se to go beyond this criterion, in some minds it is an abuse of discretion. In recent years, there have been attempts to modify the clemency power because some lawmakers have disagreed with the chief executive's clemency decisions.[134] Some

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[129] EDMUND G. (PAT) BROWN & DICK ADLER, PUBLIC JUSTICE, PRIVATE MERCY 10 (1989).

[130] MICHAEL D. DiSALLE & LAWRENCE G. BLOCHMAN, THE POWER OF LIFE AND DEATH (1965). DiSalle said, "I believe human life is a divine gift and deliberately to destroy it is as much a crime for the State as for the individual." *Id.* at 6.

[131] DiSALLE & BLOCHMAN, *supra* note 130, at 4.

[132] *See* discussion *infra* pp. 48-53.

[133] *See* discussion *infra* pp. 44-48.

[134] When Governor Celeste commuted the death sentences of eight persons just before leaving office, Ohio State Senator Gary Suhadolnik sponsored a resolution to amend the Ohio Constitution to prevent an outgoing governor from

legal scholars have also opined that an executive's power should be curtailed and political accountability could be insured by establishing clemency boards or employing other mechanisms of control.[135]

### D. *Executive Discretion*

Understanding the relationships of executive power, discretion and constitutional conventions is important in analyzing how a governor can use the clemency power. This section examines how these concepts can impact the decision-making processes of a governor who contemplates granting a clemency. Most governors do have full legal authority to pardon or commute sentences; however, this discretionary act may be restrained by political forces

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granting a pardon to a death row convict during the ninety-day period prior to the end of the governor's term. *See* S.J. Res. 1, 119th Ohio Gen. Ass. (1991). State Representative Suzanne Bergansky introduced H.B. 212, which would require that the governor give a three-day notice to various interested persons of his or her intention to grant clemency. Neither of these proposals became law. Ohio Attorney General Lee Fisher, along with newly elected Governor, George Voinovich, challenged the commutations on procedural grounds. However the appellate court has upheld the Celeste clemencies. *See supra* text accompanying note 104. These cases are now pending before the Ohio Supreme Court.

[135] *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569 (1991). Although this is a recurrent theme in some legal scholarship, the author has grave reservations about this approach because the author is not convinced that two or more heads are better than, or less political than, one. However, whether to encumber the use of the clemency power by governors is not the focus of this Article. The scope of this Article assumes that if governors have the virtually unfettered discretionary power to grant clemency, how should their actions be judged? Christopher E. Smith and Scott P. Johnson question whether there are enough checks and balances on the presidential pardoning power in their article, *Presidential Pardons and Accountability in the Executive Branch*, 35 WAYNE L. REV. 1113, 1124 (1989). They suggest one mechanism for limiting the president's power would be requiring that no pardon could be granted until after a criminal trial to allow for thorough investigations by counsels and publication of the facts. This aspect of the presidential power is distinguished from the gubernatorial exercise of clemency in that in most jurisdictions, conviction has to take place before a clemency can be granted.

such as public opinion. The public's views on crime and punishment and their expectation of how the executive will exercise her clemency power form an unwritten code of conduct for governors, known as constitutional conventions.[136] The discussion that follows explains how these three factors affect clemency.

Executive power is rarely defined in state constitutions. However, the power that a chief executive exercises is controlled in at least four ways. The formal constraints are the constitution, statutes and, to some extent, the common law. Laws provide express boundaries of the limits of power. The fourth restraint on an executive's use of authority is informal. Tradition or conventions are the nonlegal parameters within which the executive will usually attempt to stay in order to be within the good graces of her constituency. Public opinion is a check on discretionary power.

There are various definitions of discretion: "the liberty or power of deciding or acting without other control over one's own judgment,"[137] "the space between legal rules in which legal actors may exercise choice,"[138] "an express grant of power conferred on officials where determination of the standard according to which power is to be exercised is left largely to them"[139] and an action "which requires exercise in judgment and choice and involves what is just and proper under the circumstances."[140] Professor Kenneth C. Davis describes discretion as not being limited to what is authorized or what is legal; it includes all that is within the effective limits on the officer's power.[141] Davis has argued that while decision makers need to be able to exercise discretion, there is also

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[136] *See* discussion *infra* pp. 41-44.

[137] WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 522 (2d ed. 1978).

[138] *See* KEITH HAWKINS, THE USE OF LEGAL DISCRETION: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE IN THE USES OF DISCRETION 12 (1992).

[139] *See* DENIS JAMES GALLIGAN, DISCRETIONARY POWERS, A LEGAL STUDY OF OFFICIAL DISCRETION 1 (1986). Galligan theorizes that discretionary power is important "in any system of authority, that there are good reasons for having discretion and that discretionary powers are neither necessarily nor typically in some way arbitrary and beyond the law." *Id.* at 2.

[140] BLACK'S LAW DICTIONARY 467 (6th ed. 1990).

[141] KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1980).

an equal need to control discretion in an effort to see that it is used wisely.[142] Keeping equilibrium between law and discretion is not an easy task. Roscoe Pound wrote that all legal systems have had to develop principles of the exercise of discretion and that a balance between rules of law and discretion is perhaps one of the most difficult problems in the science of law.[143]

Abuse of discretion is often difficult to define because its meaning is contingent upon the facts and the particular circumstances. This term has various meanings, including failure to exercise the granted power conscientiously and advisedly, without considered judgment, offhandedly, carelessly, hastily, or with bad motives,[144] effecting an injustice or exceeding the bounds of reason.[145] Abuse of discretion, in conjunction with the executive branch, is not typically a standard to judge the constitutionally based execution of power by the chief executive himself. However, this term generally refers to the characterization of an administrative agency decision that has been found unreasonable, arbitrary or capricious, or in error as a matter of law.[146] However, as with judicial discretion, executive discretion is expected to be guided by principles, grounded in some combination of ethics, experience and justice.[147]

When a governor uses the power of discretion through clemency to modify the result of law, as in the cases of battered incarcerated women, there is always the possibility that some may feel that the executive has ceased to govern in an appropriate manner and has betrayed the public trust. This opinion is not totally without justification because, historically, rule by discretion can be dictatorial and arbitrary. As a result, society is more comfortable with the idea that following specific rules will ameliorate the chance of abuse or an inequitable application of the law.[148]

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[142] *Id.* at 26.

[143] Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Special Code*, 35 N.Y.U. L. REV. 925, 927-28 (1960).

[144] *Id.* at 932.

[145] 1 C.J.S. *Abuse* (1985).

[146] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[147] *See* Pound, *supra* note 143.

[148] Pound quotes Lord Camden, who reportedly said, "The discretion of a

Discretionary power is exercised not only by the chief executive in the civil affairs of state, but she, along with numerous other actors, are authorized to use discretion in criminal justice matters.

> An element of administrative discretion is operative at five levels of the criminal process. Initially, the policeman must decide whether or not to arrest the suspect; the commonwealth's attorney must determine whether to prosecute the suspect; the trial judge decides whether to modify or to suspend the jury's determinations of punishment; the appellate court must decide whether to grant a writ of error. Finally at the terminal release stage, the parole board decides whether to parole the prisoner and the governor decides whether to grant a pardon.[149]

The fact that the there may be tension between power of discretion and the rule of law, particularly in the criminal justice context, is not a modern concept. Joel Samaha's essay on the Anglo-Saxon heritage of discretionary justice gives examples of how this conflict dates back at least to 600 A.D. in Anglo-Saxon criminal law.[150] He explains how the laws of the kings, which often called for arbitrarily administered judgments, could be modified and tempered by the administration of church penitentials and how the Archbishop used his discretion in meting out sentences.[151] While the aim of the secular authority was to see

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judge is the law of tyrants: It is always unknown; It is different in different men; It is casual and depends upon constitution, temper and passion. In the best it is often caprice; in the worst it is every vice, folly and passion to which human nature is liable." Pound, *supra* note 143, at 926. Judges are given the discretion to modify the result of law. For example, the Federal Rules of Civil Procedure allow a judge to grant relief from judgment of an order under for "any other reasons justifying relief from the operation of judgment." *See* FED. R. CIV. P. 60. Jury nullification is an accepted part of the Anglo-American jurisprudence. Jury nullification occurs when the jury in a criminal case will not find guilt because they believe that the application of the law would be an injustice. *See* United States v. Krzyske, 852 F.2d 1089 (6th Cir. 1988) (discussing history of jury nullification).

[149] William F. Stone, Jr., *Pardons in Virginia*, 26 WASH. & LEE L. REV. 307 (1969).

[150] *See* SAMAHA, *supra* note 100, at 4.

[151] *See* SAMAHA, *supra* note 100, at 6.

that the law's penalty was administered (punishment), the goal of Canon law was also to save the soul and reconcile the sinner to the church.[152]

The priest's exercise of discretion was generally attacked for three reasons: favoring special interests, promoting the priest's own personal welfare (i.e., accepting a bribe), or indirectly encouraging an increase in violations by arbitrary, capricious and corrupt administration of rules and standards (i.e., the rich receiving a different standard of justice than the poor).[153]

The criticisms of the criminal justice system have not changed much over time, despite the fact that the rationale for imprisonment and the severity of punishment has vacillated in each era. Samaha explains the need for discretion:

> The fundamental urge to ensure equality before the law—that is, to administer justice consistently and objectively—has been tempered with the basic necessity that the law be sensitive to individual differences that the punishment fit not only the crime but the criminal.[154]

There will be disagreement from time to time about the reasonableness of a governor's discretionary action. Our expectations of how a chief executive should function within the discretionary realm is often dictated by constitutional conventions. These conventions, as will be explained below, are shaped by public opinion. Attitudes about women, punishment and the right to defend oneself from a violent intimate partner directly affect a governor's use of clemency.

### *E. The Role of Constitutional Conventions and the Clemency Power*

Constitutional conventions are judicially unenforceable, unwritten rules that are based on political traditions and public opinion, which regulate the political behavior and provide for the

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[152] *See* SAMAHA, *supra* note 100, at 7.
[153] *See* SAMAHA, *supra* note 100, at 11-14.
[154] *See* SAMAHA, *supra* note 100, at 4.

political accountability of politicians.[155]

In a recent article concerning political behavior, Professor James Wilson adopted the concept of constitutional convention from the British. According to British legal scholars, conventions are "customs practices, maxims or precepts" that are at the core of "constitutional or political ethics."[156] In the British system, conventions are unwritten grants of constitutional power because "they are neither codified by statute nor part of the English common law."[157] These conventions work to "prevent tyranny, constrain discretion and generate an internal political morality."[158]

Wilson points out the distinctions between the American and British systems by emphasizing that the former is more complex. The American system is more complex because it has written constitutions (federal and state) and the English system does not.[159] Therefore, whereas the English Parliament has sovereign power to make any convention law, American constitutions limit the Congress (and state legislatures) as to which conventions can become statutory law.[160]

The application of pardoning power in Wilson's inventory of American textual constitutional conventions helps describe the presidency.[161] As previously discussed, the courts have considered decisions made pursuant to this power nonjusticiable.[162] However,

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[155] The use of this term is distinguished from the constitutional conventions that amend the U.S. Constitution in Article V. *See* James Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645, 647 (1992). This section of the Article relies heavily on Professor Wilson's work. Wilson's thesis is that the courts should not hear cases that involve constitutional conventions, rather it is the body politic that should resolve the dispute.

[156] *Id.* at 658. Wilson provides a summary of the British characteristics of constitutional conventions taken from Professor Geoffrey Marshall's work, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 210-11 (1984).

[157] *See* Wilson, *supra* note 155, at 647.

[158] Wilson, *supra* note 155, at 651.

[159] Wilson, *supra* note 155, at 667.

[160] Wilson, *supra* note 155, at 668.

[161] Wilson, *supra* note 155, at 673.

[162] *See* discussion *supra* pp. 27-29.

that legal conclusion does not end the constitutional controversy. The way in which a chief executive uses this discretionary power can be greatly influenced by public opinion, which may be steeped in tradition, custom and practices. Violating a convention (i.e., acting in a way that is nontraditional or offends basic constitutional norms) could be considered the functional equivalent of abusing discretionary power.[163] The penalty for such an action can be as extreme as defeat at the ballot box. What constitutes a breach of the constitutional convention regarding the use of the clemency power is not necessarily clear or consistent. Our views on crime and punishment give some indication of our expectations regarding the disposition of criminals.[164] The discussion which follows

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[163] *See infra* pp. 48-51 for examples of clemencies that were criticized.

[164] *See* Richard LaCaup, *Lock 'Em up! . . . With Outraged Americans Saying Crime Is their No. 1 Concern, Politician are again Talking Tough. But Are They Talking Sense?*, TIME, Feb. 7, 1994, at 50. LaCaup points out that while violent crime was down by 3% in the first six months in 1993, and most crime is leveling out, the public is preoccupied with crime. *Id.* According to the F.B.I. statistics, over the past 10 years incidences of crime have risen by 23%. *Id.* President Bill Clinton's "Three Strikes and You're Out" proposal in the Omnibus Crime Bill, is indicative of the political climate. *See* Leslie Phillips, *Clinton Pitch: Hardball/'Three Strikes' Plan Targets Repeat Felons*, USA TODAY, Jan. 26, 1994, at 49. H.R. 3355 is a compilation of 34 anti-crime bills introduced or approved by the House of Representatives during the last year. The "three strikes" provision mandates life in prison for any person who is convicted of a third violent crime when the last crime was a federal crime. *See* Holly Idelson, *Highlights of House Crime Bill*, CONG. Q., Apr. 23, 1994, at 1004. A special report by *Money* magazine provides a reality check on the issue of crime. *See* Walter L. Updegrave, *As Grim Crime Scenes Fill Our Newscasts And Nightmares, But the Surprising Truth For Most People Is That . . . You're Safer Than You Think*, MONEY, June 1994, at 114. Updegrave makes the following conclusions:

1) "Violent crime is not at an all-time high," because 90% of Americans are safer today than in the past two decades. *Id.* at 115. However, 88% of persons polled for the article believed just the inverse. *Id.* at 116.

2 "Violent crime is not a equal-opportunity offender;" the risk of being a victim is four times higher if you are 16 to 19 years old if you are Black. *Id.*

3) Eighty-two percent of the poll respondents also said that a woman is more likely to be victimized by a stranger than a man. Again, the inverse is true. "A woman victim is twice as likely to be injured 59% vs. 27% if her assailant is a spouse, ex-spouse or boyfriend rather than a stranger." *Id.* at 119.

analyzes these beliefs and how they affect the decision to grant clemency to battered women and the public's response to such an action.

## IV. CRIME AND PUNISHMENT, MERCY OR JUSTICE AND THE CLEMENCY POWER

*Justice (jus'tis)* - *the quality of conforming to principles of reason, to generally accepted standards of right and wrong and to the stated terms of laws, rules, agreements in matters affecting persons who could be wronged or unduly favored.*[165]

*Mercy (mûr'sē)* - *A refraining from harming or punishing offenders, enemies, persons in one's power etc.; kindness in excess of what may be expected or demanded by fairness; forbearance and compassion.*[166]

Theories of morality, crime and punishment directly impact our attitudes on how justice and mercy ought to be administered. Exercising the executive prerogative of clemency requires an understanding of the competing values of punishing the guilty and providing relief from the "[u]ndue harshness . . . of the criminal law."[167] This section focuses on the central tensions between the principles of justice and mercy and how the rationales for punishment shape our notions of fairness and forgiveness and affects grants of clemency for battered women. The application of these theories in individual cases will be further discussed in part V.

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*See also* Henry J. Reske, *Throwing Away the Key*, A.B.A. J., Apr. 1994, at 66. Reske cites three jurisdictions, Washington, New York and California, that have either instituted some form of a "three strikes" policy or are debating the issue. *Id.*

[165] RANDOM HOUSE COLLEGE DICTIONARY 727 (Revised ed. 1988).

[166] BLACK'S LAW DICTIONARY 987 (6th ed. 1990).

[167] *Ex parte* Grossman, 267 U.S. 87, 120-21 (1925).

Eighteenth and nineteenth century philosophers, such as Kant,[168] Hegel,[169] Bentham,[170] Rawls[171] and others have influenced Western thought on punishment. Their theories, outlined in Kathleen Moore's *Pardons, Justice, Mercy and the Public Interest,*[172] range from retribution—the requital according to

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[168] *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie tr. 1887). Kant stated that it was the right of the sovereign as the supreme power to inflict pain upon a criminal. He believed that public justice was a principle of equity and that retaliation is a just penalty for wrongdoing. Therefore, capital punishment is the appropriate penalty for a murderer. Unless execution in such a case is carried out, the people would be regarded as participants in the murder as a public violation of justice. Kant was generally opposed to pardoning as being unfair to society because, in his opinion, it allows criminals to enjoy an advantage unfairly won and undeserved. However, Kant did provide for exceptions to his prohibition of pardons: Kant would not consider a clemency unjust if the person who broke the law did not enjoy equal liberty under the law. *See* MOORE, *supra* note 2, at 33.

[169] Hegel's theory of punishment was grounded in the concept of treating the person as a rational human being, who chose to break the law and therefore chose to be punished. When society decides not to sanction criminals, those persons are being treated as objects rather than humans. According to Hegel, lawbreakers have a right to be penalized and clemency denies them that right. MOORE, *supra* note 2, at 46-47.

[170] *See* JEREMY BENTHAM, THE UTILITARIANS 162, 166 (Dolphin Books 1961). Utilitarianism suggests the general object of all laws is to augment community well-being. Punishment is considered evil and should only be administered to exclude a greater evil. This is the principle of deterrence. *Id.*; *see also* MOORE, *supra* note 2, at 37. Moore summarizes Bentham's utilitarian justification for punishment as follows:

1. The state has the duty to achieve a specified object.
2. Laws are the instruments by which the state is to reach its object.
3. Infractions of the law frustrate the achievement of the object.
4. The state has the right to punish infractions of the law so far as this is necessary to achieve its object and within limits established by the nature of its object.

Utilitarians rarely make exceptions for the penalty inflicted to account for individual differences, because the good of the community is the goal of punishment. Therefore, clemency is not an appropriate action once the sentence has been determined.

[171] JOHN RAWLS, A THEORY OF JUSTICE (1971).

[172] *See* MOORE, *supra* note 2.

merits or deserts especially for evil[173]—to revenge—retaliation for injuries or wrong,[174] which can be more severe than what may be actually deserved. Deterrence—the prevention of crime and rehabilitation—and restoring the person to society via isolation for moral improvement are also rationales for punishment.

The criminal law institutionalizes specific passions (anger, resentment, etc.) that are directed at wrongdoers.[175] The eye for an eye, just deserts, retributionist principles may sometimes clash with values that would promote absolution in certain cases. The debate of whether clemency is an aspect of justice or whether mercy is truly unmerited and therefore a gift is ageless and unresolved.[176] Theorists like Moore have determined that retribution provides a principle for equity in that similar persons ought to be treated similarly, and that "any difference in the way people are treated ought to be based on significant differences . . . ."[177]

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[173] RANDOM HOUSE COLLEGE DICTIONARY 1128 (Rev. ed. 1988).

[174] *Id.* at 1129.

[175] *See* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS & MERCY 2 (1988). U.S. citizens say that crime is among their top concerns. *See* Richard L. Berke, *Crime Joins Economic Issues as Leading Worry Poll Says*, N.Y. TIMES, Jan. 23, 1994, at A1. Berke indicates that this preoccupation with crime will be a "front-line issue in this election year." *Id; see also* discussion *supra* note 164.

[176] Justice and mercy are concepts that can be considered mutually exclusive. For example, Jeffrie Murphy promotes the idea that in the criminal law, there is little room for mercy, because mercy and justice are irreconcilable. He states:

> If we simply use the term "mercy" to refer to certain of the demands of justice (e.g., the demand for individuation, then mercy ceases to be an autonomous virtue and instead becomes a part of (is reducible to a part of) justice. If this becomes obligatory, and all the talk about gifts, acts of grace, supererogation and compassion becomes quite beside the point. If on the other hand, mercy is totally different from justice and actually requires (or permits) that justice sometimes be set aside, it then counsels injustice. In short, mercy is either a vice (injustice) or redundant (a part of justice).

MURPHY & HAMPTON, *supra* note 175, at 169.

On the other hand, Christian philosophers have taught that mercy is a separate consideration, which has little to do with fairness or even justice. *See Nehemiah* 9:17; *Psalm* 30:26; *Psalm* 119:76; *Matthew* 5:7; *Luke* 6:35-36.

[177] *See* MOORE, *supra* note 2, at 93. Moore's work is a philosophical analysis of the pardoning power of presidents. Using a retributionist framework (wrongdoers deserve punishment), she finds that even retribution will allow for

forgiveness to "achieve the highest justice." Moore suggests four criteria for an adequate theory of pardons. She states that 1) there should be room for criticism of pardons (i.e., that it is possible to abuse the pardoning power); 2) this theory should make clear the justification for punishing and the justification for pardoning; 3) it should be grounded in a general moral and political philosophy (i.e., what is right for the state to do); and 4) the theory should have a practical application. MOORE, *supra* note 2, at 9.

Moore attempts to articulate rules (conventions) that should govern the clemency power. For example, she postulates that pardons can be justified when:

1. The offender has already suffered enough;
2. The offender stands to suffer too much because of special circumstances;
3. Relieving any punishment that is too severe; and
4. Relieving the lingering consequences of criminal conviction.

MOORE, *supra* note 2, at 168-77.

Moore also lists six general types of pardons that she considers abusive:

1) Pardons to promote the public welfare (i.e., granted to persuade a person to turn state's evidence);
2) Pardons to promote the private welfare (of the pardoner);
3) Pardons to reward past actions (i.e., stopping a prison riot);
4) Pardons for pity sake (to relieve suffering);
5) Pardons on recommendation of judge, jury or district attorney; and
6) Pardons based on sex or family status.

MOORE, *supra* note 2, at 209.

In applying Moore's disjunctive test of justified clemency to the circumstance of battered incarcerated women who strike back at their abusers, a reasonable person could conclude that these women (accounting for individual differences) pass three, if not all four of the criteria. If the facts show that a woman has been beaten by the abuser and cannot leave the relationship or if she is in the midst of a confrontation that could cause her great bodily harm or death and she defends herself, has she not suffered enough? Does she not stand to suffer too much if the criminal justice system fails to take into account her special circumstance through the introduction of exculpatory expert evidence or through an appropriate self-defense instruction? Considering the fact that these women receive very long sentences even when the cases are disposed of through plea bargaining, a clemency action could relieve punishment that is too severe and as a result relieve the lingering consequences (felony status, separation from children who often end up in the public care) of conviction.

None of Moore's abusive criteria is relevant to legitimate cases of battery. While some might argue that granting battered women clemency resembles an act of pity or an action based on sex, neither pity nor the femaleness of the petitioner is at issue. The clemency is being requested to compensate for or to mitigate the harshness of the result caused by any number of factors. *See* Linda

Moore's analysis makes room for the notion that there is not only a view of justice that includes deserved punishment, based on wrongdoing and legal requirements, but that there is also a need to incorporate other moral factors that may not be a part of the legal system.[178] However, she prefers to characterize a pardon in such a circumstance as an act of justice, rather than an act of mercy, in that pardons should ensure that people suffer only those punishments that they deserve.[179]

Whatever the characterization, Moore's philosophy on the application of the pardon power is echoed by certain segments of society. The notion is that clemency, or forgiveness must be deserved by the grantee because of some extraordinary circumstance. The moral and political ideology concerning what is right for a state to do to and for convicted felons is at the core of the response that will be generated when clemency is granted. These beliefs form the basis for judging when the constitutional convention concerning the exercise of clemency power has been violated.

### *A. Violated Conventions: Contemporary Criticisms of the Discretionary Grant of Clemency*

Criticisms of clemency have often been in connection with shielding those with privilege and influence from accountability under the law (i.e., partisan pardons or pardons to promote the private welfare).[180] Recently, President George Bush's pardons of the six Iran Contra figures raised objections from the public, press and politicos about the propriety of those commutations.[181]

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L. Ammons, *Clemency: A Post Conviction Remedy for Women Who Kill Their Abusers, in* AMERICAN BAR ASSOCIATION, DEFENDING BATTERED WOMEN IN CRIMINAL CASES F1-10 (Linda L. Ammons & Mario Conti eds., 1993) and discussion *infra* pp. 74-78. The petition for clemency is not based solely on the fact that these persons are women, but the plea is based on how unjustly these women were treated by the system.

[178] MOORE, *supra* note 2, at 196.

[179] MOORE, *supra* note 2, at 11-12, 196.

[180] *See* discussion on pardons *infra* pp. 48-51.

[181] In his proclamation, President Bush said that his reason for pardoning Caspar Weinberger, Elliott Abrams, Duane Clarridge, Alan Fiers, Clair George and Robert McFarlane was because the motivation of their actions was patriotism

Except for President Gerald Ford, President Bush granted fewer clemencies than any other president in the past twenty-five years.[182] President Richard Nixon's pardon by President Gerald

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and their prosecutions were the criminalization of policy differences. *See Bush Cites Policy Differences in Granting Six Pardons*, CONG. Q., Jan. 2, 1993, at 37; *see also* David Johnston, *The Iran-Contra Report: The Overview; Walsh Criticizes Reagan and Bush Over Iran-Contra*, N.Y. TIMES, Jan. 19, 1994, at A1. Johnson quotes Special Prosecutor Walsh, "I think President Bush will always have to answer for his pardons . . . I think that it was the most unjustifiable act. There was no public purpose served by that." *Id.*

[182] President Bush granted 62 pardons. *See Iran Contra Bush Ethic Probe*, SACRAMENTO BEE, Dec. 26, 1992, at A1. Richard Nixon granted 863 pardons and 63 commutations, including a commutation to labor leader Jimmy Hoffa. President Carter pardoned G. Gordon Liddy and 533 other persons and commuted the sentence of heiress Patty Hearst. In 1977, Carter also provided amnesty for Vietnam-era draft dodgers. *See Proclamation Granting Pardon for Violations of the Selective Service Act August 4, 1964-March 28, 1973*, CONG. ALMANAC, 1977, at 7-E. President Reagan granted 393 pardons, including the petition of George Steinbrenner. Reagan was also under considerable pressure from Sen. Orrin Hatch and others to pardon Oliver North. *See* Owen Ullmann, *Pardon Would Mean Political Knot for Bush*, AKRON BEACON J., May 5, 1989, at A14. A *Newsweek* Poll showed that 51% of persons surveyed favored a pardon for North. *See The Verdict on the Verdict: A Newsweek Poll*, NEWSWEEK, May 15, 1988, at 37.

On March 23, 1994 President Clinton turned down the clemency request of convicted spy Jonathan Jay Pollard. Pollard was a former naval intelligence analyst who had sold over 1,000 classified documents concerning Arab military information to Israel. Israeli Prime Minister Yitzak Rabin was among those who lobbied President Clinton for the release of Pollard. Upon the advice of Attorney General Janet Reno, President Clinton declined Pollard's request. *See* Paul Richter and Ronald J. Ostrow, *Clinton Denies Clemency Appeal in Pollard Case*, L.A. TIMES, Mar. 24, 1994, at A1.

A group of approximately 500 persons marched down Pennsylvania Avenue on June 27, 1994 calling on President Clinton to free Leonard Peltier, the 49-year-old Native American who was convicted 18 years ago of killing two F.B.I. agents during a gun battle on the Pine Ridge Reservation in South Dakota. After Peltier's trial, the prosecutors admitted that they could not prove that Peltier fired the shots that killed the agents. *See* Debbi Wilgoren, *White Horse Echoes To Drumbeat Of Protest; Clemency Sought For Imprisoned Indian*, WASH. POST, June 27, 1994, at A11. President Clinton recently appealed to the Singapore government for clemency in the caning case of Dayton, Ohio teenager Michael Fay. Fay was found guilty of vandalism and was to have received six lashes from a cane. The president's intervention reduced the strikes to four. *See* William

Ford was perhaps the most controversial pardon in recent times.[183] Ford's stated rationale in granting the Nixon pardon was to insure that the tranquility of the nation was not sacrificed by bringing a former president of the United States to trial.[184]

There have also been examples at the state level where governors have been sanctioned or criticized for using the clemency power in an arbitrary manner or for what some would consider improper motives. In 1926, the Oklahoma legislature impeached Governor J.C. Walton for selling pardons to hundreds of persons.[185] When former Governor Ray Blanton of Tennessee granted fifty-two clemencies during his final week in office,

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Branigan, *Singapore Reduces American's Sentence; Teens Parents Still Angry at 4-Lash Edict*, WASH. POST, May 5, 1994, at A33.

President Clinton is also being lobbied by several Congress members to grant amnesty to 50 African-American seamen who were convicted of mutiny during World War II for refusing to load munitions at Port Chicago in San Francisco after a blast from similar munitions killed 320 people, including 200 African-American seamen and injured 390. The explosion was so powerful that it destroyed two ships, injured sailors in their barracks and broke windows in a hotel 35 miles away. *See* Richard C. Paddock, *A Question of Honor; Survivors of a 1944 Naval Tragedy Say They Were Wrong By Court Martials—and Racism of the Era*, L.A. TIMES, July 17, 1994, at B16. As governor, President Clinton never granted clemency for a death row inmate. *See Court Album Not Obscene*, ST. PETERSBURG TIMES, May 8, 1992, at 8A.

[183] Not only was there a great outcry on this issue by politicians, *see* Harold M. Schmeck, Jr., *Reaction to Pardon Nixon Is Divided, But Not Entirely Along Party Lines*, N.Y. TIMES, Sept. 9, 1974, at 25, but President Ford's press secretary, J.F. ter Horst, resigned as a matter of conscience in protest. *See* Clifton Daniel, *A Resignation for Conscience*, N.Y. TIMES, Sept. 9, 1974, at 25. A White House deputy press secretary stated that as of September 11, 1974, there had been 5,700 calls supporting Ford and 3,900 opposing him; 16,000 telegrams had been received by that date and the opinions were six to one against the pardon. *See* David E. Rosenbaum, *Plan is Assailed in Both Parties, Rhodes, Albert and Byrd Lead Attack-Pardon for Nixon Still Under Fire*, N.Y. TIMES, Sept. 11, 1974, at 1. Then-Sen. Walter Mondale proposed a bill to amend the Constitution to give Congress the power to disapprove a presidential pardon within 180 days of its issuance. This bill never made it to the Senate floor. *See* S.J. Res. 241, 93d Cong., 2d Sess. (1974).

[184] Proclamation No. 4311, 39 Fed. Reg. 32,601 (1974).

[185] *See* 3 U.S. DEP'T OF JUST., ATTORNEY GENERAL'S SURV. OF RELEASE PROC. 150-53 (1939).

Democratic Senator James Sasser called Blanton's action "the grossest breach of a chief executive's discretionary power perhaps in the history of the State of Tennessee."[186] The incoming governor, Lamar Alexander, went to court to have the clemencies overturned. However, the courts upheld Blanton's decision.[187] In 1986, New Mexico's outgoing Governor, Tony Anaya, commuted the sentences of all five death row inmates just before leaving office. Governor Anaya was harshly criticized, especially by his successor, Governor Gary Carruthers.[188] Governor Mario Cuomo's release of Jean Harris came after years of lobbying by advocates on her behalf. Cuomo is said to have granted the request because of her above average behavior in prison. Harris had also suffered three heart attacks.[189]

Most governors are conservative in their use of the discretionary power of clemency.[190] Whenever an inmate petitions a governor for a grant of mercy and she has the sole discretion to make that decision, she must decide whether the case before her warrants

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[186] *See* Larry Sabato, *Gubernatorial Clemency: A Time of Trial?*, 42 STATE GOV'T 40 (1980).

[187] *Id.* at 41.

[188] On a television news program, Governor Anaya said that he was commuting the sentences because putting the prisoners to death would be "inhuman, immoral and anti-God." He also based his decision on what he called the disproportionality of how the death penalty had been applied in that state. *McNeil-Lehrer Newshour* (PBS television broadcast, Nov. 27, 1986). While a Sante Fe newspaper called Anaya's action abusive, a *Washington Post* editorial characterized the decision as "courageous." *See Reprieve on Death Row*, WASH. POST, Dec. 4, 1986, at § 4.

[189] *Jean Harris is Freed,* WASH. POST NAT'L WKLY., Jan. 11-17, 1993, at 27. Harris was convicted of killing Dr. Herman Tarnower, also known as the Scarsdale Diet Doctor, after a 14-year relationship.

[190] When Governor Richard Celeste was contemplating the decision of clemency for incarcerated battered women, he said to the author, "I want to treat them like anything else. I will respect the input from the Parole Board." In a November 1990, interview with *48 Hours* reporter Erin Moriarty, the governor, responding to a question about a hypothetical case said, "I want to make that judgment based on a very careful examination of that person's very specific circumstances." Transcript on file with the author. Finally, in the December 21, 1990 press conference announcing the first set of clemencies, Celeste said, "My goal has been to be cautious in granting commutation."

clemency. Among the facts that a governor will weigh are: the facts about the crime and the petitioner, public opinion and what she feels about how the criminal justice system should have responded.

Any two governors faced with the same petition can come to different conclusions as to whether clemency should be exercised. On the rare occasion where two successive governors are faced with the same clemency petition, they may agree that the prisoner should be relieved of the burden of the sentence.[191] There are also circumstances where a state's public policy and the law either contributed to an unfair result for a class of persons in the criminal justice system or a change in the law comes too late to assist those who might have benefited from it. When a person affected by such circumstances says to the governor, the final arbiter in the criminal justice system, reconsider the circumstances of my case in light of the changes in the law and public policy and extend your power of mercy to me on behalf of the state, is it then an abuse of discretion for a governor to do so, even if she decides that not only will she review the one case, but any others that come before her that are similarly situated?

Posing this question another way—are battered women who commit a homicide, while arguably defending themselves, the types of persons who should be considered for clemency in light of changing societal and scientific attitudes about the effects of battering and the corresponding changes in the law? If these women's punishments are undeserved or too extreme, why are governors hesitant to review these cases? Fear of being accused of violating a constitutional convention regarding clemency, which can provoke adverse public reaction, may certainly be a deterrent. Whether public opinion, will be *a* factor or *the* factor is a critical element in most gubernatorial decisions. After all, positive public opinion propels a candidate into office, and keeps him or her in

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[191] A pardon granted by former Governor Celeste to Freddie Moore and the commutation of sentences of Saram Bellinger and John Salem were challenged by Governor Voinovich soon after he succeeded Governor Celeste. *See* MOORE, *supra* note 2. Voinovich decided to no longer pursue having these clemencies overturned by the courts and granted the men the same relief. See Mary Beth Lane, *Voinovich Oks Clemency Celeste Gave*, CLEV. PLAIN DEALER, Aug. 21, 1992, at 1.

office. Further, a governor has a duty to balance the ability to lead and represent the constituency. In the clemency process, this weighing is most deliberate and sometimes calculated to avoid opposition. The balancing of public opinion will be determined by the executive's personal sensibilities and his views on leadership, justice, crime, punishment and reelection.

## V. CLEMENCY IS APPROPRIATE FOR BATTERED WOMEN WHO DEFENDED THEMSELVES AGAINST THEIR BATTERERS

### *A. A Remedy for Undue Harshness or an Abuse of Discretion? Clemency for Ohio's Battered Women*

Criticism of executive action is to be expected. Dissent is central to the American political system. However, not all criticism is constructive, objective, nonpartisan, or valid. Therefore, the appropriate analysis regarding criticism is to ask whether the objections that have been raised are justified, not whether an action is improper because objections are expressed.

When the initial twenty-five women were granted clemency in Ohio, prosecutors were among those who expressed the loudest disapproval. In a *New York Times* article, subsequent articles and media statements, representatives from that group complained that the clemencies were improperly granted.[192] Prosecutors also said that they had not been consulted about the propriety of granting the clemencies.[193] While other states may have different procedures, in Ohio, at the parole or clemency hearing stage before the Ohio Parole Board, input from the prosecutors is sought through a systematic process,[194] and in all the cases that came before

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[192] *See* Wilkerson, *supra* note 5. However, for a different point of view *see also* Lawrence Grey, *Celeste's Grants of Clemency Brought Law, Justice Into Accord*, COLUMBUS DISPATCH, Dec. 30, 1990, at 3D. Judge Grey serves on the 4th District Court of Appeals of Ohio.

[193] Grey, *supra* note 192, at 3D.

[194] *See* OHIO REV. CODE ANN. § 2967.12(A) (Baldwin 1992); *see also* OHIO ADMIN. CODE § 5120:1-1-15(C) (1993). Ohio prosecutors are not alone in objecting to the use of clemency or battered women. *See, e.g.*, Tim Novak, *When*

Governor Celeste, this procedure had been followed.

In addition to the prosecutor's statements, the trial judge's opinion and community sentiments were taken into consideration. Rarely before had prosecutors as a group decided to challenge the propriety of an Ohio governor's decision to exercise his discretionary authority in commuting the sentences of inmates.[195] Comparing Celeste's record with that of his predecessor, Governor James Rhodes, it is clear that Celeste was conservative in his use of the clemency power.[196] Celeste had not acted ultra vires, according to the law, so why did the prosecutors act so vituperatively?

Among the arguments prosecutors made were the following: the Ohio Supreme Court did not make the *Koss* ruling retroactive; that the inmates' claims of abuse are no guarantee that they would have been acquitted of the charges had such evidence been permitted at

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*Criminals Beg His Pardon, Edgar Takes It Case By Case*, ST. LOUIS POST-DISPATCH, May 19, 1994, at 1A. Novak quotes Ray Nash, Chief of the Criminal Division of the Will County, Illinois State's Attorney, "If we went through the expense, the trouble and the toil to put someone in prison, that's where we think they belong! I haven't seen a clemency petition that I've liked yet. That's the opinion of most prosecutors." *Id.*; *see also* Gina Boubion, *Women Who Killed Their Mates Seeking Clemency In California*, HOUS. CHRON., Mar. 8, 1992, at A4. Boubion states that the strongest opposition to the clemency proposals in California came from prosecutors. *Id.* The U.S. Supreme Court in *Berger v. United States*, 295 U.S. 78 (1935), stated that prosecutors have an obligation to "govern impartially" and "[w]hose interest, therefore, in a criminal prosecution is not that it should win a case, but that justice be done." *See also* Bresler, *supra* note 128, at 943.

[195] Former Ohio Governor Mike DiSalle was criticized by the state house press corps for granting clemency to six death row inmates. He was told that he sacrificed his chance of a second term. The comments by the press included: "So you saved the lives of six nonentities . . . ," and "[W]ho cares? If you'd kept your mouth shut, the world would be no poorer, and you'd be around for another four years to fight for the underdog." DISALLE & BLOCHMAN, *supra* note 130, at 204.

[196] From January 1, 1983 to January 10, 1991, Governor Celeste granted 115 clemencies. In this time period, the governor received 2,300 petitions from inmates and the parole board. From January 10, 1983 through October 15, 1990, Governor Celeste granted 65 clemencies out of 2,249 requests, or 2.8%. Former Governor James A. Rhodes granted 145 clemencies out of 660 requests in his final four-year term, or 21.9%. *See* Governor Announces Clemency Decisions, Office of Governor's Press Secretary, Dec. 21, 1990 (on file with author).

trial; that there is the concern that there will be many women in the future claiming to be battered; and some of the women were making up these claims.[197] These types of charges are not exclusive to Ohio prosecutors. These accusations are what governors potentially face when considering battered women's clemency petitions.

While prosecutors, however partisan they may be, have the right to express their opinion about an issue like clemency, the above arguments have no basis in law, and little or no merit as it relates to the discretionary exercise of a governor's power of clemency. The analysis below addresses each of the prosecutors' arguments.

*1. The Ohio Supreme Court did not make the* Koss *ruling retroactive.*[198]

There is, by implication, the opinion either that the governor cannot grant clemency to persons who may have been similarly situated as a defendant who is granted relief by a court or that unless a court makes a ruling retroactive, a governor is without authority in acting on her own to grant relief to a petitioner. As previously discussed, a governor's power to commute sentences is plenary and is not contingent upon other factors.[199]

*2. There is no guarantee that they would have been acquitted of the charges had such evidence been admitted at trial.*[200]

While this statement is true on its face, it is a fallacious argument for several reasons. First, comparing the act of clemency to acquittal is not legitimate. Clemency in Ohio cannot be granted until after a person has been convicted.[201] Guilt has already been established. The question is whether this person will be granted total forgiveness or a qualified mercy by reducing the sentence. Of

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[197] Wilkerson, *supra* note 5.
[198] Wilkerson, *supra* note 5.
[199] *See* clemency discussion in part III, *supra* pp. 23-44.
[200] Wilkerson, *supra* note 5.
[201] *See* OHIO CONST., art III, § 11.

the twenty-eight women granted clemency, only one received a pardon, and she had already been released on parole. All of the women had to serve at least two years in prison and all were subjected to conditions upon their release. Being acquitted means that the indicted person did not commit a crime. A grant of commutation is not a declaration that no crime took place, but only that the sentence will be reduced and, in the case of a pardon, the results of conviction will no longer be in effect.

Second, there is never any guarantee that a defendant will be acquitted. However, our system of justice purports to insure that defendants receive a fair trial. A fair trial includes presenting evidence that would exculpate or mitigate the charges against the defendant. Until recently, because of the way rules of evidence have been construed by judges, vital evidence has been excluded in battered women cases.[202] Additionally, the bias against women in the self-defense rule has contributed to an inequity at trial.[203] Without the evidence of battering and a modification of the traditional self-defense jury instruction, the guarantee has been that battered women would most likely be convicted. Likelihood of acquittal is, thus, not necessarily a reflection of the fairness of the trial.

Third, and more importantly, a guarantee of acquittal is not a prerequisite for granting clemency. While other states may vary, the only prerequisites for an Ohio governor exercising this power are outlined in the Ohio Constitution.[204]

The first two reasons given by the prosecutors for opposing clemency for battered women who are convicted of a felony are based on incorrect understandings of the governor's clemency powers. The remaining two arguments are so unsubstantiated that they appear to be grounded in ignorance of the facts, mythology, or at worst, misogyny.

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[202] *See* GILLESPIE, *supra* note 32, at 170-71.

[203] *See* GILLESPIE, *supra* note 32, at 4-5, 182-83.

[204] *See* OHIO CONST., art III, § 11.

*3. There is the concern that there will be a lot of women in the future, claiming to be battered. In our view, it is not a proper defense to murder.*[205]

There are many women being battered in the United States.[206] Not all or even many of these women are forced to defend themselves by killing the batterer. However, the law does provide for self-defense. Surely, prosecutors are not suggesting that in the case of a woman who kills an abuser to defend herself, there is strict liability. In addition to this "not a proper defense" argument, the closely connected and often cited "license to kill" myth[207] promotes the "burning bed"[208] stereotype of the battered woman who kills while her husband is asleep. In the years since the courts first started to admit evidence of battering to prove self-defense, there has been no wholesale killing of husbands or lovers. Many of these types of killings occur in the heat of a confrontation.[209] With the increased awareness of the plight of battered women and the increase in shelters and other programs, the percentage of women killing their partners has decreased.[210]

*4. Some of these women are making this up.*

This claim that women have lied about the type of abuse that they have suffered when the facts overwhelmingly demonstrate that abuse, like rape, is consistently underreported, makes this argument

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[205] Wilkerson, *supra* note 5.

[206] *See* discussion *supra* pp. 5-9.

[207] *See* Andy Rooney, *Celeste Declares Open Season On Ohio Men*, COLUMBUS DISPATCH, Dec. 28, 1990, at 11a.

[208] *See* Maguigan, *supra* note 40, at 396-97.

[209] Maguigan found that out of 223 incidents analyzed, 75% were confrontational. This data is consistent with the statistics generated in the review of the Ohio cases. Ninety-two of the files reviewed indicated that the homicide occurred while the batterer was awake, alert and beating the woman. Maguigan, *supra* note 40, at 396-97.

[210] *See Council Reports, supra* note 14, at 3186.

incredible.[211] This type of reasoning further underscores the ignorance, hostility and resistance that women face when having to deal with some prosecutors. It is possible in battering cases, just as in every other criminal case, that the accused may lie or exaggerate her position. Thus, prosecutors need not fear this possibility any more than they do in other cases. The adversarial process will allow the court and the jury to find the truth.

None of the above arguments are valid legal or nonlegal criticisms of granting clemency to battered women forced to defend against their abusers. Rarely will a prosecutor support a clemency petition.[212] Some prosecutors may take the position that they have no legitimate role in the clemency process and make no recommendation.[213]

Prosecutors know and understand discretionary power. They are among the law enforcement officials who repeatedly and systematically exercise discretion. For example, in the areas of charging, plea bargains and retrials, prosecutors have broad discretion in handling cases.[214] The district attorney determines what charge he will pursue against the defendant, how that case will be presented before the grand jury for the bill of indictment and in the case of a homicide, if a capital specification will be added. The prosecutor can decide if a case should go to trial or if she is willing to accept a plea bargain. Finally, if a case can be retried, the prosecutor uses his discretion in determining whether or not he should pursue that course.

Prosecutors have often been singled out for not being aggressive

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[211] *See* MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY 103D CONGRESS, The Response to Rape: Detours on the Road to Equal Justice (1993), at 11; *see also* Senate Report, *supra* note 17.

[212] Abramowitz & Paget, *supra* note 75, at 156.

[213] Abramowitz & Paget, *supra* note 75.

[214] More than one-third to one-half of all felony cases are dismissed by the prosecution prior to a determination of guilt or innocence. *See* Cassia Spohn *et al.*, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIM. 175, 177 (1987) (citing Barbara Bland, *The Prosecution of Felony Arrests*, BUREAU OF JUST. STAT. (1983)); Kathleen B. Brosi, *A Cross-City Comparison of Felony Case Processing*, INSTITUTE FOR LAW & SOCIAL RES. (1979).

in prosecuting the claims of battered victims.[215] Advocates have blamed prosecutors for being as much at fault as police in being barriers to abused women getting relief in the courts. However, like the clemency power, the enforcement power is also deemed to be discretionary and courts are reluctant to interfere with the exercise of that authority. In *United States v. Cox*,[216] the court stated that the discretion to charge or not is unfettered.[217]

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[215] *See* Margaret Gates, *Victims Rape and Wife Abuse, in* WOMEN IN THE COURTS 195 (Winifred Hepperle & Laura Crites eds., 1978); *see also* Elizabeth Anne Stanko, *Would You Believe This Woman? Prosecutorial Screening for Credible Witnesses and a Problem of Justice, in* JUDGE, LAWYER, VICTIM, THIEF 63 (Nicole Hahn Rafter *et al.* eds., 1982); Jane W. Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. L. & CRIM. 56 (1984). In recent years, some prosecutors and city attorneys have established policies on domestic violence prosecutions. For example, the Los Angeles City Attorney considers domestic violence cases a top priority. *See* OFFICE OF THE CITY ATTORNEY, LOS ANGELES COUNTY, DOMESTIC VIOLENCE DOMESTIC PROSECUTION UNIT, MISDEMEANOR DOMESTIC VIOLENCE PROSECUTIONS (6th ed. 1993). The San Diego City Attorney's Domestic Violence Unit considers itself the largest specialized prosecution unit in America. San Diego investigates approximately 500 cases a month and has thirty full time and volunteer staff members. *See* Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297 (1993). The San Diego office became more aggressive after failing to get a conviction in the Judge Joseph Davis domestic violence case. Judge Davis was tried for allegedly beating his pregnant girlfriend. The girlfriend recanted her story and disappeared shortly before trial. The city attorney decided to pursue the case, but at trial, Judge Davis would not admit the 911 call, evidence of the girlfriend's pregnancy, or the existence of a domestic violence restraining order.

[216] 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *see also* Powell v. Katezbach, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966).

[217] *Cox*, 342 F.2d at 171. However, courts will question a prosecutor's discretion if justice and constitutional or federal rights are being denied. *See* NAACP v. Levi, 418 F. Supp. 1109 (D. D.C. 1976). Professor Davis points out the potential for abuse in an unchecked prosecutorial power of discretion:

> All along the line an enormous discretionary power is the power to do nothing for instance, the power not to prosecute may be of greater magnitude than the power to prosecute and it certainly is much more abused because it is so little checked. The power to do nothing or almost nothing or something less than might be done seems to be the omnipresent power . . . .

It is inconsistent for prosecutors to challenge the use of the unfettered, constitutionally granted, discretionary power of clemency exercised by a governor, when they have the similar authority in the enforcement area. A prosecutor grants mercy each time she uses her discretion to reduce or drop a charge when she feels the accused should not be prosecuted to the fullest extent of the law. Prosecutors know, perhaps better than anyone, how the system can be manipulated for wins and losses as opposed to insuring that the whole truth is revealed. How does one explain the vehemence expressed by those who oppose clemency for battered incarcerated women? Perhaps, it is the honest articulation of moral indignation at taking a life, and the disapproval of letting "murderers" go free. Or perhaps by releasing these women, the professional pride of some of those who had a vested political interest in "putting people in prison" has been bruised because the validity of the original prosecutions are called into question. If the motivations were that simplistic, why do these parties not rally whenever a commutation is granted? It seems to be true that death penalty commutations raise the ire of some in law enforcement. However, only one of these women was on death row. Additionally, most of the commutations granted to non-death row inmates have been to men.

This leads the author to believe that the cause for this kind of adverse reaction by some prosecutors is more deep-seated and complex than what appears on the surface. An alternative

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*See* DAVIS, *supra* note 141, at 39. Outside forces have challenged the discretion and bias of a local prosecutor, resulting in the selection of a special prosecutor. The Howard Beach case illustrates the political power a community has in getting prosecutions. Because of the lack of confidence in Queens District Attorney John J. Santucci, a group of African-Americans called for a special prosecutor to investigate the racial assault of young black men who were attacked by young white men in the Howard Beach Community. One of the victims, Cedric Sandiford refused to testify unless a special prosecutor was named. Governor Cuomo appointed now-Brooklyn District Attorney Charles J. Hynes to the case. *See* Michael Oreskes, *Why Howard Beach? Notoriety of Queens Attack Builds on Anger Left from Earlier Assaults*, N.Y. TIMES, Jan. 15, 1987, at B4; Ronald Smothers, *Black Officials Praise Governor on Hynes Post*, N.Y. TIMES, Jan. 15, 1987, at B4.

explanation which examines this issue from the perspective of how male supremacy, female domination and battering are interrelated may provide insight.

### B. *Principled, Reasoned Decision Making: Justifications for Using the Clemency Power to Assist Battered Incarcerated Women*

> A Spaniel, a woman and a hickory tree; the more you beat them, the better they be.[218]

> A wife isn't a jug—she won't crack if you hit her a few times.[219]

The inhumanity of domestic violence is an idea whose time has come. At the June, 1993 U.N. World Council of Human Rights in Vienna, petitions signed by 500,000 women in 124 countries demanded that violence against women be considered a violation of human rights. This declaration, which includes nine paragraphs on women's rights, was adopted by 171 United Nations members.[220]

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[218] Old English Rhyme.

[219] Russian Proverb; *see* SHEILA ROWBOTHAM, WOMEN, RESISTANCE AND REVOLUTION: A HISTORY OF WOMEN AND REVOLUTION IN THE MODERN WORLD 138 (1974).

[220] *See* Anne Reifenberg, *UN Adopts Wide-Ranging Human Rights Declaration*, DALLAS MORNING NEWS, June 26, 1993, at 1a; *see also* 14 HUM. RTS. L.J. 301, 359 (1993). Sections 38 and 39 of the *Vienna Declaration and Programme of Action* call for the elimination of violence against women in public and private life, and the eradication of all forms of discrimination against women, both hidden and overt. International law scholars proffer that the definition of refugee should be expanded to include persons with a well-founded fear of persecution because of their gender. *See* Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511 (1993). Canada is now considering violence against women a factor in application for refugee status. *See also* Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125 (1994); Katie Sherrod, *Hate Crime: Treaty Should Protect Women*, DALLAS MORNING NEWS, Dec. 12, 1993, at 6J.

In part I, this Article cited the statistics on domestic violence in United States, as well as the development of the law as it related to admitting evidence of battering at trial. Further, this Article has already explained that until recently in Ohio the common law prohibited expert testimony on battering at trial.[221]

Today, there is little debate about whether domestic violence occurs. However, the law, courts and certain segments of society have been slow to recognize and admit that relief for battered women is inadequate, and therefore some battered women are forced to kill or be killed. In order to analyze the law's response to these women, it is necessary to understand the historical, legal and cultural positions on violence to women in the home.

Discussions of race and sex discrimination have primarily focused on the concept of equal opportunity. Justice issues are broader than questions of economic distribution. Sex discrimination must be understood as a form of oppression. While violence is typically an individual act, it has also a systemic character and exists as a social practice.[222]

Historically, women have lacked economic, legal and physical autonomy. Despite our pronouncements about equality, liberty and justice for all,[223] women have been marginalized and dominated

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[221] State v. Koss, 551 N.E.2d 970 (Ohio 1990)

[222] *See* IRIS MARION YOUNG, THE POLITICS OF DIFFERENCE 62 (1990). Violence against women is a universal phenomena. A U.N. expert group defines violence as "[a]ny act, commission, controlling behavior or threat in any sphere, which results in or is likely to result in physical, sexual or psychological injury to women." *See* VIOLENCE AGAINST WOMEN, U.N. FOCUS, U.N. DEP'T OF PUB. INFO., DP1/1174-92071, Jan. 1992, at 1; *see also* Lori Heise, *International Dimensions of Violence Against Women*, 12 RESPONSE 3 (1989). Wife beating is just one type of brutality that is used to either keep a woman in her place or to benefit from her exploitation. Other coercive customs include, dowry burnings, genital surgeries, forced or prohibited abortions and rape. For the first time, the U.S. State Department is reporting on the treatment of women in its 1994 Human Rights annual. The document details the abuse of women in 193 countries. *See* Steven Greenhouse, *State Dept. Finds Widespread Abuse of World's Women*, N.Y. TIMES, Feb. 3, 1994, at A1.

[223] Abigail Adams was among the colonial women who tried to convince the founding fathers to include women's rights in the constitution. She wanted the new laws to recognize and outlaw the customs that abused women and treated them "only as vassals of [the male] sex." *See Letter from Abigail Adams to John*

by their male counterparts. The Court in *Frontiero v. Richardson* acknowledged "[o]ur nation's long and unfortunate history of sex discrimination."[224] Female subordination is the objective of male supremacy.[225] Domination seeks to accomplish that goal. The systemic dominance and acceptance of male supremacy, a tradition or convention, has been reflected in society's public policies, private practices and in the law. A U.N. report characterized violence against women in their homes as "a reflection of the broad structure of sexual and economic inequality in society."[226] Violence against women is a form of sex discrimination, a symptom of social injustice.[227]

Terrorism in the home has been considered a private affair

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*Adams* (Mar. 31, 1776), *reprinted* in 1 ADAMS FAMILY CORRESPONDENCE 370, 382 (L. Butterfield, ed., 1963).

[224] Frontiero v. Richardson, 411 U.S. 677, 684 (1973). Equal protection analysis based on gender was not adopted by the Court until the 1970s. The Brennan decision stated that sex, like race was an immutable characteristic. *Id.* at 686. The majority of the Court seemed inclined to use a higher standard of scrutiny (e.g., compelling state interest test), than the test that would be applied in subsequent cases that challenged gender discrimination. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court articulated the intermediate standard of review for gender cases. The Court said that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. *Id.* at 197. It is interesting to note that *Craig* concerned a gender-based state classification that was challenged because of its harm to men. The early landmark sex discrimination cases were dominated by male plaintiffs. *See* David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. 33, 34 n.4 (1984).

[225] *See* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 40 (1987) MacKinnon's approach to analyzing the relationship between inequality and gender is to examine the question of the distribution of power. One of the criticisms of the traditional theories of violence against women is that the role of misogyny has been missing. *See* Campbell, *supra* note 16, at 68.

[226] *Violence Against Women in the Family*, U.N. DEPT. OF PUB. INFO., DP1/1174-92071, Jan. 1992, at 25.

[227] *See* YOUNG, *supra* note 222. Young states:

> What makes violence . . . oppression is less the particularized acts themselves, than the social context around them . . . which makes them possible and even acceptable.

YOUNG, *supra* note 222, at 61.

because traditionally, "a man's home is his castle."[228] Through the doctrine of coverture, upon marriage, two persons became one, the one being represented by the husband.[229] A woman belonged to the man and her legal status was nonexistent during the course of the marriage. She became his property. Slave women, married or not, were dejure chattel of their masters.[230] Wife beating was considered a right of a husband. Women, like children needed to be chastised in order not to bring shame upon the household.[231] Blackstone commented on the need for such discipline:

> For as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds . . . .[232]

The "rule of thumb" expression is believed to refer to the right of

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[228] SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OLD ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN AND CRIMINAL CASES 161 (1817)

[229] 4 WILLIAM BLACKSTONE, COMMENTARIES 442-43 (1769). Advocates of the First Woman's Movement of the mid-1840s were able to persuade various state legislatures to pass Married Women's Property Acts to allow women to own property and enter into contracts. *See* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK 42-69 (1982).

[230] A young African-American slave, Celia was executed for killing her master, Robert Newsom. One night when Celia refused to be further sexually exploited (she had been raped by Newsom since the age of 14 and already had two children by him) a fight between Celia and Newsom resulted in his death. Celia disposed of his body in the fireplace. Celia's defense was based on the legal principle that a slave in extreme circumstance could use deadly force to protect her life. *See* MELTON A. MCLAURIN, CELIA, A SLAVE 86 (1991). A jury instruction on self-defense would have "interfered to some degree with what owners saw as a property right." *Id.* at 100.

[231] 4 WILLIAM BLACKSTONE, COMMENTARIES 445.

[232] *Id.; see also* MAEVE E. DOGGETT, MARRIAGE, WIFE-BEATING AND THE LAW IN VICTORIAN ENGLAND (1993).

a husband to beat his wife with a stick no thicker than his thumb.[233]

The common law in the United States recognized the right of husbands to beat their spouses. In 1824, in *Bradley v. State,* the Mississippi court said that a husband had this right of chastisement "without subjecting himself to vexatious prosecution for assault and battery . . . ."[234] A North Carolina court held that the standard for determining if a man could be convicted of assault against his wife was the effect produced, meaning the seriousness of the injury.[235] The court also said, "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy to punish the lesser evil of trifling violence."[236] In *State v. Oliver*, the North Carolina court had this to say about intervening in cases of wife abuse: "It is better to draw the curtain, shut out the public gaze and leave the parties to forget and forgive."[237]

The privacy doctrine and distinctions between private and public spheres were used as an excuse for the legal and cultural subordination of women.[238] The preservation and inviolability of

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[233] WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 136 (4th ed. 1971).

[234] 2 Miss. (Walker) 156, 158 (1824). This principle was later repudiated in *Harris v. State*, 71 Miss. 462, 464 (1894).

[235] State v. Rhodes, 61 N.C. 349, 353 (1868).

[236] *Id.*

[237] State v. Oliver, 70 N.C. 60, 62 (1874). Interspousal tort immunities prevented civil suits between husbands and wives. Conjugal disputes, such as domestic violence claims, were not to be litigated because courts did not want to interfere with marital harmony by hearing these cases.

[238] The private-public distinctions divide reality into two separate spheres. The private being identified with seclusion, the nuclear family, non-interference by government entities and a right to be left alone. *See* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The public sphere is that reality which is secular, civic and inhabited by men. These distinctions are not exclusive to American jurisprudential thought. In Western philosophy, the idea of separation of private and public, can be traced to Aristotle and Plato. Contemporary philosophers and jurists have developed a concept of privacy that is rooted in the liberal political tradition of autonomy or individualism. The nineteenth century industrial revolution created greater separations between the worlds of men and women. Men's work took them away from home and the home was seen as the proper place for women. *See* Nadine Taub & Elizabeth M.

Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 117 (David Kairys ed., rev. ed. 1990). Denying women the right to vote until the passage of the Nineteenth Amendment was an obvious example of making sure that women had no voice in public affairs. When a woman challenged a state's authority to deny her franchise under the Fourteenth Amendment, the Supreme Court said that the privileges and immunities clause would not be extended to the question of who could vote. The court held that while women were persons and therefore citizens, citizenship and suffrage could be mutually exclusive. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

In an earlier case denying a woman the right to practice law, Justice Bradley explained the proper place and role of a woman:

> The Constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . [t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872).

There is no specific textual grant of a right to privacy in the U.S. Constitution. However, in a contraception case, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that a right of privacy does exist based on a penumbra of constitutional amendments. The right of privacy, although fundamental, is not absolute. If the state has a compelling interest in regulating the most private of acts, the courts can uphold that interference. *See* Roe v. Wade, 410 U.S. 113, 162 (1973) (determining that after viability, state has compelling interest in the fetus); Bowers v. Hardwick, 478 U.S. 186 (1986) (refuting a claim that consensual, adult, homosexual sodomy is a fundamental right); *see also* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980). The Constitution is silent concerning private action and the inequity of women in the home. One scholar suggests that a traditional construction of the liberty interest provides no constitutional protection for battered women, and therefore liberty needs to be redefined. *See* Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 (1992).

The lines of demarcation between the private and public have not been clear. Feminists have challenged those distinctions, as being a form of oppression. *See* CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191 (1989); SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 110-133 (1989). Okin and others do not deny that there should be "reasonable" distinctions between the public and the domestic, however, they do point out how what is considered personal is actually political when analyzed. Okin talks about the dynamics of power in the family and, historically legally sanctioned violence. The state's regulation of family life regarding marriage,

the family unit were to be maintained, even if the woman's safety was jeopardized. Therefore, if a woman experienced abuse in her home, the criminal justice system and other agencies of government either denied that the abuse took place or told her that it was a personal problem and she needed to find her own solution. Criminal assault statutes were not aggressively used to protect women from the assailants with whom they lived. In some cases, women were made to feel responsible for their beatings because of their alleged shortcomings.[239]

Women began to lobby their legislatures in the 1970s to pass domestic violence statutes.[240] However, laws do little to protect

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child custody and divorce illustrates how conceptually private behavior is controlled by public law. In *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992), Ruth Gavison states that the real issue is not that line drawing occurs, but how the distinctions harm women:

> In private, women may be vulnerable in ways that are beyond the scrutiny and censure of the public. Does it follow, then, that women have no interest in the values of privacy and intimacy, or that there are no contexts in which women would want to keep the state out of their lives? We must differentiate between good arguments, derived from the values associated with privacy, and bad arguments, in which reference to the same values is used to mask exploitation and abuse. This distinction is not a matter of language, but a matter of the features of the specific situations involved.

*Id.* at 36-37.

[239] A questionnaire sent to 216 members of the general public in a 1987 study documented the belief that battered women are to blame for their predicament. *See* Charles Patrick Ewing & Moss Aubrey, *Battered Women and Public Opinion: Some Realities about the Myths*, 2. J. FAM. VIOLENCE 257 (1987). Ewing and Aubrey state, "More than one-third of those surveyed seem to believe that a battered woman is at least partially responsible for the battering she suffers and if she remains in a battering relationship, she is at least somewhat masochistic and probably emotionally disturbed." *Id.* at 263.

[240] *See* Linda B. Lengyer, *Survey of State Domestic Violence Legislation* 10 LEGAL REF. SERV. Q. 59 (1990). As of 1991, 17 states (Alabama, California, Connecticut, Delaware, Florida, Maine, Maryland, Michigan, Montana, New Jersey, New York, Oklahoma, South Carolina, Vermont, West Virginia, Wisconsin, Wyoming) collected domestic crime information. These states account for 43% of the population of the United States. *See* MAJORITY STAFF OF THE SENATE COMM. ON THE JUDICIARY, 102D CONG. 2D SESS., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 53 (1992). This Senate Report was

citizens from the unlawful unless they are enforced. Even after laws were passed, the law enforcement response to complaints was abysmal. Numerous studies and official government reports show how police departments have been either negligent or hostile to pleas for help from women who wanted their battering spouse to be taken away from the premises.[241] If a woman convinced the

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a survey from a cross section of America for one week in September, 1992. The 200 incidents of violence against women were said to represent less than 1/100 of the violent attacks against women reported to the police each week. *Id.* at 4

[241] *See* Kathleen J. Ferraro, *The Legal Response to Woman Battering in the United States*, *in* WOMEN, POLICING AND MALE VIOLENCE INTERNATIONAL PERSPECTIVES 155 (Jana Hanmer *et al.* eds., 1989); *see also* MARTIN, *supra* note 27, at 92. Martin cites various examples from police department training manuals and guidelines of nonintervention policies for domestic violence calls. The U.S. Civil Rights Commission made the following findings in a 1982 report on domestic violence:

> Finding 3.1 Police decisions, including departmental policies and the practices of individual officers, affect the justice systems ability to protect the legal rights and physical safety of battered women.
>
> Finding 3.2 Police traditionally have viewed most incidents of spouse abuse as private matters that are best resolved by the parties themselves without resort to the legal process . . . .
>
> Finding 3.6 Instead of taking appropriate police action, officers frequently recommend that domestic assault victims seek civil legal remedies or file private criminal complaints.

*See* U.S. Commission on Civil Rights, *Under the Ruling of Thumb: Battered Women and the Administration of Justice,* Jan. 1982 at 21 [hereinafter Civil Rights]. A recent government survey of over 400,000 women indicated that the police were more likely to respond within five minutes if the offender was a stranger than if offender was known to the female victim. *See* JUSTICE STATISTICS VIOLENCE, *supra* note 11, at 8; *see* also Joan Zorza, *Must We Stop Arresting Batterers? Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929 (1994). Zorza reviews arrest data in Omaha, Milwaukee, Colorado Springs, Metro Dade County and Charlotte. Zorza concludes that arrests deter battering.

A Chicago study indicated that 40% of the 132 women incarcerated were serving time for killing an abusive mate. All of these women had called for help from police at least five times during prior confrontations. *See* Angela Browne & Kirk R. Williams, *Exploring The Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 L. & SOC'Y REV. 75, 78 (1989).

justice system that her abuser should be brought to trial and he was convicted, the courts failed to punish appropriately.[242]

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Not only are some police officers reluctant to enforce the law in domestic violence situations, but sexist attitudes toward women both on the force and in the field are prevalent. Transcripts of radio transmissions of the Los Angeles Police Department illustrate such sexism:

> "U [sic] won't believe this . . . that female call again said susp [sic] returned . . . I'll check it out then I'm going to stick my baton in her."
> "[N]o but I left a 14 year-old girl that I yesterday handcuffed naked on my chin up bar wearing nothing but a blind-fold and salad oil . . . I'd like to check on her."
> "415 [sic] female huh . . . well just slap that silly broad senseless."

*See* REP. OF THE INDEPENDENT COMM'N ON THE L.A. POLICE DEPT., July, 1991, at 87-89.

[242] The Civil Rights Commission has also made a finding that judges seldom impose sanctions commensurate with the seriousness of the offense or comparable with sanctions for similar violence against strangers. *See* Civil Rights, *supra* note 241, at 59. As of 1991, 36 state supreme courts and bar associations have established gender bias in the courts commissions. Many of these committees have cited the deficiencies of the courts in dealing with domestic violence. For example, a report from the Florida task force said: "In too many instances, judges minimize or do not recognize victims' rights. This problem is compounded by a lack of training and a reluctance to appreciate the significant impact that these attitudes have on the outcome of many domestic violence cases." *See* REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, 42 FLA. L. REV. 870 (1990); *see also* VERMONT SUPREME COURT AND THE VERMONT BAR ASS'N: GENDER AND JUSTICE, REPORT OF VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM 1 (1991). A 1985 Hamilton County, Ohio court study showed that a year after a new domestic violence law was in effect 64% of the convicted batterers did not spend one day in jail, and less than 10% were sentenced to alternative programs. *See* Daisy Quarm & Martin D. Schwartz, *Domestic Violence in Criminal Court: An Examination of New Legislation in Ohio, in* 4 WOMEN & POL. 29 (1984).

Los Angeles Municipal Court Judge Ronald Schoenberg has been criticized in the media for the sentence that he gave O.J. Simpson after Simpson pleaded no contest to the 1989 misdemeanor charge of spousal battery. Simpson served no time in jail. *See* Rimer, *supra* note 20. The prosecutor said that he had requested jail time. The judge also allowed Simpson to be treated by a psychiatrist of his choice over the telephone. *See* Tamar Lewin, *The Simpson Case: The Syndrome; Case Might Fit Pattern of Abuse, Experts Say*, N.Y. TIMES, June 19, 194, at 21. Judge Schoenberg has told reporters that he imposed a sentence agreed upon by the prosecutors. A release of partial transcripts seem to support the judge's position that the prosecutor did not request jail time.

When all else failed and a battered woman finally had the courage to leave, unless she were self-sufficient or had contacts that could first secure her safety and then support her and perhaps her children for a period of time,[243] she would run the risk of experiencing greater harm by the batterer, if he pursued her.[244]

Women established shelters to assist homeless battered women in the mid-1970s. According to former Surgeon General C. Everett Koop, it took 100 years to create the first shelter, after Congress passed a law to prevent cruelty to animals.[245] Even today, with

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However, prosecutors have rebutted the judge's statement. The District Attorney said that in open court proceedings, not reflected in the transcripts, he argued that Simpson should be jailed. *See* Sheryl Stolberg & Josh Meyer, *Judge Defends Simpson's '89 Sentence*, RECORD, June 23, 1994, at A16.

Judge Cindy Lederman of the Dade County Circuit Court presides over a domestic violence court. The issuance of protective orders have increased from 4,000 to 9,000 a year under Judge Lederman's administration. Convicted batterers must attend a six-month counseling program and make court appearances every two-months for a year. The family of the abusers also receive services. *See* Gross, *supra* note 20.

[243] A study on treatment for batterers cautions courts to be careful of counseling to minimize the fact that a crime has been committed. *See* Adele Harrell, *Evaluation of Court-Ordered Treatment for Domestic Violence Offenders*, STATE JUSTICE INST. 99 (1991). A 1986 New Jersey poll on domestic violence revealed that the respondents agreed that the "[s]ingle most important reason why battered women do not leave is that they have no alternative." Forty-five percent of those questioned said that not having a place to go was the most important reason for staying with a batterer. *See* Cheryl Edwards, *Public Opinion on Domestic Violence, A Review of the New Jersey Survey*, 10 RESPONSE 6 (1987); *see also* Dowd, *supra* note 30, at 28-31 for examples of the fiscal practical problems of leaving.

[244] Browne & Williams, *supra* note 241, at 79.

[245] Koop, *supra* note 16, at 97. The first known battered woman's shelter was established in England in 1971. *See* ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1977). The haven, known as Chiswick, is scheduled to close in September, 1994 if operators cannot find 50,000£ to keep it open. The refuge can house up to 45 women and 120 children at a time and counselors receive around 10,000 calls a year.

In 1984, Congress passed the Family Violence Prevention and Services Act, which authorized monies for shelters. In 1992, President George Bush signed the Child Abuse, Domestic Violence and Family Services Act of 1992. This law provides funding to states for domestic violence projects, including shelters. *See* 42 U.S.C. § 10401 (1988 & Supp. IV 1992). The need for safe havens is further

approximately 1,200 shelters nationwide, the demand far exceeds the need for safe havens for women and children. The public policy priority of providing assistance is dramatized by the following comparison. There are 2,600 animal shelters nationally as compared with the 1,200 battered women shelters.[246]

In short, domination of women by men, even with the use of force, until recently had been sanctioned, first explicitly then implicitly by most, if not all, of our major social and legal institutions.[247]

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dramatized by the following illustration: From 1991-1993 in Minnesota, more than 13,000 women and children required housing in battered women's shelters. Three times that number sought shelter. Daniel Anderson, *To Understand and Stop Men's Violence Means a Hard Look at Home*, STAR TRIB., Jan. 5, 1993, at 3E.

[246] S. REP. NO. 102, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 133, 137. In 1992, the National Domestic Violence hotline, which received up to 10,000 calls a month, was disconnected because funding was inadequate. Joan Ryan, *Super Sunday Has Dark Side*, ARIZ. REPUBLIC, Jan. 31, 1993, at 1.

[247] Religious institutions have been very slow to become involved in this issue. The U.S. Catholic Church made its first official statement on battered women in 1992. *Women Need Not Submit To Abuse, Bishop's Declare: Priests Are Told To Be Ready With A 'Safe Place' for Battered Wives Needing Help*, L.A. TIMES, Oct. 31, 1992, at B4. This statement to Catholic believers is most important, considering the church's views on the family and divorce. A women who was granted clemency in Ohio told this author that one of the reasons why she did not leave her husband was that she was "a good Catholic girl and the church frowned on divorce." Other women have felt compelled to remain with abusive husbands for similar religious reasons.

The memoirs of Abigail Abbott Bailey tell of how an 18th century New England Congregationalist woman suffered violence at the hands of her husband, Asa Bailey. Abigail stated that less than a month after her wedding day in 1767, her mate became very violent. She would be repeatedly abused by Asa, until she secured divorce from him in 1793 because of his incestuous relationship with their daughter. Abigail stayed with her husband because of her belief that God was testing her. *See* RELIGION AND DOMESTIC VIOLENCE IN EARLY NEW ENGLAND (Ann Taves ed., 1989). Protestant denominations who use the writings of St. Paul concerning marriage and the submission of women to justify wife abuse, are being criticized for suspect interpretations and unjustified reliance and application of Biblical texts to the marriage relationship. *See* JAMES ALSDURF & PHYLLIS ALSDURF, BATTERED INTO SUBMISSION, THE TRAGEDY OF WIFE ABUSE IN THE CHRISTIAN HOME (1989); *see also* JOHN TEMPLE BRISTOW,

Second, the credibility of women has always been at issue. Whether it is an accusation of sexual harassment as in the Anita Hill-Clarence Thomas hearings, a rape trial, or getting the police and the courts to believe that a partner is violent, women do not have the same credibility as their male counterparts.[248] The history of this inequality and second-class status can be traced to ancient civilizations.[249] Studies have shown that jurors often just do not believe that a battered woman felt she could not leave her volatile home or that the abused victim feared death by the abuser before killing him.[250]

Society considers killing, in certain contexts, a heinous crime. We are morally outraged when a person of value is killed for no apparent good reason. The death penalty in this nation is indicative of our belief that retribution should be carried out for the deliberate

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WHAT PAUL REALLY SAID ABOUT WOMEN (1988).

One woman, responding to a national survey on battering, told researchers that her doctor used his religious beliefs to try to persuade her to return to an abusive marriage. Her letter to surveyors stated:

> After we separated I told him if we were to get back together he had to get counseling. He went three times to our family doctor (who is Baptist) who told him to read the Bible and pray to God and I would come back to him. Our doctor told me I should have stayed in the marriage and I was rebelling at God by leaving the marriage.

*See* Bowker & Maurer, *supra* note 16, at 41-42.

[248] *See* Kimberle Crenshaw, *Race, Gender and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992); Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992).

[249] Aristotle believed that both men and women had "excellence character, but that the courage and justice of the sexes were different." He said that "[t]he courage of a man is shown in commanding, of a woman in obeying." *See* 2 THE COMPLETE WORKS OF ARISTOTLE 1999 (Jonathan Barnes ed., rev. Oxford ed. 1984). In *Politics*, Aristotle explained that because women are the weaker sex, the man's role is to acquire possessions outside the home and the woman would preserve those possessions as well as provide the offspring. *Id.* at 2131.

[250] *See* Mary Dodge & Edith Green, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE & VICTIMS 271 (1991); Regina A. Schuller, *The Impact of Battered Women Syndrome Evidence on Jury Decision Processes*, 16 L. & HUM. BEHAV. 597 (1992). For an analysis on how society has responded to wife abuse, *see* REBECCA EMERSON DOBASH & RUSSELL P. DOBASH, VIOLENCE AGAINST WIVES (1979).

taking of a valued life.[251] Further, neither the reasonable man standard nor the law of self-defense was designed to excuse or justify the female killer of the crime of homicide when protecting herself from an aggressor,[252] especially when the assailant is an intimate partner.

These three elements: the historical sanctioning of wife abuse, the lack of credibility of the female witness and gender bias in the law of self-defense, while not exclusive in explaining the plight of battered women, illustrate the social and legal obstacles that she would face when trying to prove that the killing of her mate was

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[251] Justice Blackmun has added his voice to the opposition of the death penalty because of the way it is applied. Generally, a White life taken is considered more serious and therefore a greater loss and can result in the death penalty, particularly if the perpetrator is Black. *See* Callins v. Collins 114 S. Ct. 1127 (1994) Blackmun cites the Baldus study used in *McCleskey v. Kemp*, 481 U.S. 279 (1987), which showed that blacks who kill whites are sentenced to death at 22 times the rate of blacks who kill blacks and more than 7 times the rate of whites who kill blacks. *Id.* at 327 (Brennan, J., dissenting).

Whiteness is highly valued. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1758-61 (1993); *see also* ANDREW HACKER, TWO NATIONS, BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992). Hacker relays a parable to his students in which they lose their whiteness. The students respond that they do not think it out of place to be compensated $50 million for becoming black or $1 million dollars per year for each year that they remain black. *Id.* at 32. Maleness is also a valued commodity. *See* Streib, *supra* note 49. The power of a distinctively male body part can mesmerize a nation for weeks. The sensational trials of Lorena and John Wayne Bobbitt illustrate the point.

Had Lorena cut off John's arm, leg, fingers, etc., this story would probably never have been heard beyond the Virginian community. Millions of American women are beaten, tortured, mutilated and killed each year and yet the media and public interest in these stories are not sustained very long and these crimes rarely get national and international publicity. One reporter has suggested that because of Lorena's act and the use of battered woman's syndrome testimony, prosecutors concerned about vigilante justice could seek to limit such evidence. *See* Jan Crawford, *Jury Still Out on Strategy in Bobbitt Case*, CHI. TRIB., Jan 22, 1994, at A-1. The comparison of one detached penis with the millions of brutalized female bodies is a startling juxtaposition.

[252] *See* State v. Wanrow, 559 P.2d 548 (Wash. 1977); Crocker, *supra* note 32; GILLESPIE, *supra* note 32, at 93-122; *see also* Deborah Ann Klis, Note, *Reforms to Criminal Defense Instructions: New Pattern Jury Instructions Which Account for the Experience of the Battered Woman Who Kills Her Battering Mate*, 24 GOLDEN GATE U. L. REV. 131 (1994).

either justified or excusable by custom and tradition.

The law and society have been gender-biased when dealing with battered women who kill their abusers. Thus, a governor should consider the impact of custom and tradition when reviewing a petition for clemency and decide whether these and other additional factors merit her active participation in the criminal justice system to compensate for a harsh result of the law. Granting this type of relief is a reasonable, compassionate and justified use of the clemency power! While a woman's crime may not have been specifically contemplated by the framers, the language of the grant of power is usually broad enough to cover a multitude of situations, including killing an abuser in self-defense.

### *C. Criteria for Commutations*

> [T]he law is not merely logic, it's a reflection of societal values. Those values don't always lend themselves to what we used to say 50-30 years ago . . . . The law is life and life ain't precise.[253]

Governors should first educate themselves and their staffs responsible for criminal justice, public health and human services policy on this issue. The mythology and biases concerning battered women are so pervasive that, unless there is a proper orientation, personal perceptions could distort the reality of these situations and blind decision makers to appropriate action. Then the chief executive should decide to what extent granting clemency is a matter of justice, mercy, or both. Being clear on this issue will facilitate explaining her actions to various constituencies. A governor's definition of justice can be broader than just what the law requires and under such circumstance she could use her power of clemency to reflect a justice as fairness stance.[254] However, if

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[253] Statement by Senator Joseph Biden, Supreme Court Confirmation Hearing for Judge Stephen G. Breyer Before the Senate Judiciary Committee, 104th Cong., 2d Sess. (1994), *reprinted* in FEDERAL NEWS SERVICE, July 13, 1994, at 39.

[254] History is replete with examples of unjust, unfair laws. The laws that sanctioned slavery and Jim Crow segregation statutes are two examples of legal

a governor's position is that clemency is a merciful act, and mercy is separate and distinct from justice, granting clemency to women, who often have survived inexplicable brutality and a system of justice that has ignored them, is warranted. Even if a governor's traditional view has been not to grant clemency at all, these types of cases are so compelling, that she could justify a departure from that position. While a governor may have an overall philosophy regarding clemency, the rationales of why a specific individual is granted relief can be dictated by the facts.[255]

Because battered women cases are highly profiled and engender questions concerning the propriety of setting a "killer" free, governors will need to explain to the media and their constituents how they came to their conclusions. One of the advantages of reviewing a number of battered women's cases at the same time is that the reviewer can often see recurrent themes, (e.g., isolation, sexual abuse, etc.) and the systemic neglect of these women by the governmental agencies whose purpose is to serve and protect the public. Engaging in a review of several of these types of cases may appear to be a "class action," but ultimately the chief executive must decide whether the actions of the individual before him were justifiable, or should this person be simply forgiven. This type of analysis is not just specific to battered incarcerated women who seek clemency but can be applied to a variety of applications for clemency.

A governor needs to decide the relevant criteria for granting clemency. The inability to introduce evidence of battering at trial may in itself be sufficient. However, there are additional reasons

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injustice. Courts and legislatures have had to respond to pressure to change these laws. Although a governor cannot unilaterally change a law, the state's constitution does give him power to modify the result of the application of the law in specific cases.

[255] For example, a governor might decide that a woman was properly convicted but that based on the facts of the case, her sentence was too harsh. Her grant of clemency to reduce the sentence could be construed as an act of mercy. On the other hand, a woman who did not receive a fair trial or clearly acted to defend herself or another could be given clemency under the theory that her conviction was unjust, and therefore justice is the basis for the clemency. These two illustrations should not be taken as the only approaches to the justice or mercy, justice and mercy analysis.

why governors would use this power. For example, the fact that a plea bargain was arranged is significant in that facts and issues that may have been raised at trial were not heard. The following list should not be considered exhaustive, but are further examples of lifestyle and systemic factors that could persuade a governor or others responsible for review to take action: ineffective assistance of counsel, prosecutorial misconduct, prejudicial pretrial publicity, dissents and inferences of court opinions in the case, physical illness, prior record of arrests of the batterer in conjunction with battering, geographic disparity of sentencing, innocence, race, cultural differences, institutional record, religious affiliations, the likelihood of rehabilitation and the risk of harm that she poses to the community.[256] Each case may have some or few of the elements listed above. Depending upon the details, one of the above facts may either be enough to grant clemency or a governor could engage in a cumulative approach by applying a "totality of the circumstances" test that would take into account any number of issues.

While courts are limited in considering some types of evidence, a governor is not bound by these rules. The history of the batterer can be most illuminating in trying to reconstruct the social context and the mindset of the woman. Looking for a "classic" battered woman may not be a thorough inquiry. However, there are factors that are considered typical abusive physical and psychological episodes. Isolation from family and friends, humiliation, rape, bizarre sexual demands, beatings, death threats, miscarriages, or injuries to the abdomen (particularly during pregnancy) and breasts are not unusual. Threatening the woman with guns and other weapons is also common. A study by Anson Shupe and William Stacey of 542 women in battered women's shelters in the Dallas-Fort Worth area revealed how creative batterers can be in selecting their instrument of torture.

> There were of course, many women who had been stabbed, cut, shot and pistol-whipped. But in family violence the

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[256] *See supra* note 177 (criteria listed above were among factors considered in Ohio cases); *see also* Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding A Just Forum*, 4 HASTINGS WOMEN'S L.J. 1 (1993).

> definition of a weapon embraces a virtual inventory of household objects that otherwise might seem perfectly harmless. During our research we began keeping an unofficial tally of the weapons that women reported their men had used. This list, which obviously does not exhaust all the possible weapons in a household "arsenal" that could be used to hurt included pistols, shotguns, knives, machetes, golf clubs, baseball bats, electric drills, high-heeled shoes, sticks, frying pans, electric sanders, toasters, razors, silverware, ashtrays, drinking glasses and beer mugs, bottles, burning cigarettes, hair brushes, lighter fluid and matches, candlestick holders, scissors, screwdrivers, ax handles, sledgehammers, chairs, bed-rails, telephone cords, ropes, workboots, belts, door knobs, doors, boat oars, cars and trucks, fish hooks, metal chains, clothing (used to smother and choke), hot ashes, hot water, hot food, dishes, acid, bleach, vases, rocks, bricks, pool cues, box fans, books, and, as one woman described her husband's typical weapons, "anything handy."[257]

A governor can use the resources of state government to collect data about the abuser or if necessary reinvestigate the case. State bureaus that maintain files from police departments on felony or misdemeanor violent acts can be consulted to determine if incidents of abusive behavior by the batterer had been reported. Other types of documentary and testimonial evidence that may be helpful include: hospital and court records, newspaper accounts, statements from co-workers, clergy and neighbors. This archaeological approach to uncovering the truth may still prove to be insufficient in some cases because the very nature of the worst of abusive relationships is that they are extremely private and women fear revealing the horrors of their domestic situation could endanger either their or their children's lives.[258] Consulting with an expert

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[257] GILLESPIE, *supra* note 32, at 57-58.

[258] The Justice Department has established that nearly two in three female victims of violence were related to or knew their attacker, and that victim's may be reluctant to report it because of shame or fear of reprisals. *See* JUSTICE STATISTICS VIOLENCE, *supra* note 11, at 1, 6. The battered woman might also decline to seek health care when injured, either because of a fear that someone

who understands the battering phenomenon may assist in deciding the credibility of the difficult cases.

## CONCLUSION

> Justice is the end of government. It is the end of a civil society.[259]

> Therefore justice is far from us . . . . We wait for Justice, but there is none . . . . Justice is turned back and righteousness stands at a distance for truth stumbles in the public square.[260]

The clemency power exists because the strict or misapplication or inadequacy of the law can bring harsh, unfair and unjust results. Governors take an oath to uphold the law and the constitutions of their various states, and to promote the general welfare of all of the citizens of those jurisdictions. While there is no express mandate to ever grant a clemency, and this power is and should remain discretionary, it is difficult to understand how the public interest can be served by not, at the very least, reviewing those cases where women claim that they responded to annihilation in the most fundamental, basic, human and instinctive way. They fought for their lives.

What to do about incarcerated battered women who strike back at their abusers in self-defense points to more than just a question of why she did not leave, or the proportionality of her response.

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might discover the abusive relationship, or because such services might not be available where she lives. *See also* Lynne A. Foster *et al.*, *Factors Present when Battered Women Kill*, 10 ISSUES IN MENTAL HEALTH NURSING 273 (1989); Bowker & Mauer, *supra* note 16, at 36. Even when injured battered women have sought out medical professionals, physician's privacy beliefs have impeded their response to domestic violence. *See* Nancy S. Jecker, *Privacy Beliefs and the Violent Family; Extending the Ethical Argument for Physician Intervention*, 269 JAMA 776 (1993).

[259] THE FEDERALIST NO. 51, at 352 (James Madison) (Jacob E. Cooke ed., 1961).

[260] *Isaiah* 59:9, 11, 14.

The larger issue is how is it that half of humanity can be vulnerable to violence because of their sex and a society can continue to consider itself just? I suppose that it depends upon one's theory of justice.