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WHY DO YOU DO THE THINGS YOU DO? CLEMENCY FOR BATTERED INCARCERATED WOMEN, A DECADE'S REVIEW

LINDA L. AMMONS*

INTRODUCTION

You don't throw the pardon and commutation powers out of the window just because you are tough on crime.[1]

The American people have given the President of the United States and the governors of states the constitutional authority to reduce a prison sentence, remove disabilities and stigma of having served prison time, eliminate fines, penalties or otherwise forgive infractions of the law and to intervene to stop an execution.[2] This power is

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1. Toni Locy, *Weld Backs Commutation for 4 Inmates: One Man Says She Killed was Her Batterer*, BOSTON GLOBE, Jan. 21, 1993, at 29.

2. *See* Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 429 (1999).

called clemency.[3] Twelve years ago, Ohio Governor Richard F. Celeste assigned me the responsibility of reviewing cases and making clemency recommendations to him concerning battered incarcerated women in Ohio prisons who claimed they killed their abusers in self-defense. I have written about this process in several law review articles, most recently in the *Buffalo Criminal Law Review*.[4] Clemency, a legal and political power, is a most controversial and misunderstood executive power.

Public scrutiny, primarily by other politicians and the media, of the presidential or gubernatorial use of this constitutionally derived act of grace[5] has intensified over the past thirty years. While most clemencies do not make the front pages of newspapers, some are more celebrated or criticized than others. Margaret C. Love, the lawyer responsible for pardons at the Justice Department from 1990 through 1997, had this comment about clemency at the Presidential level: "It had been very much an operational part of the criminal justice system. Now clemency has been taken hostage in the war on crime."[6]

In her masterfully articulated jurisprudential and historical chronicle on domestic violence, *Battered Women and Feminist Lawmaking*, Elizabeth Schnieder briefly discusses clemency for

3. U.S. CONST. art. II, § 2, cl. 1. "The President . . . shall have Power to grant reprieves and pardons for offenses against the United States, except in Cases of Impeachment." State constitutions contain similar provisions.

4. *See* Linda L. Ammons, *Dealing with the Nastiness: Mixing Feminism and Criminal Law in the Review of Cases of Battered Incarcerated Women– A Tenth-Year Reflection*, 4 BUFF. CRIM. L. REV. 891 (2001) [hereinafter Ammons, *Dealing with the Nastiness*]. I was Executive Assistant to Governor Richard F. Celeste from 1988-1991, and chaired the Governor's Task Force on Women in Ohio Prisons.

5. *See* Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 43 (1994) [hereinafter Ammons, *Discretionary Justice*] (discussing the role of the chief executive in the criminal justice system and the need for the discretionary power of clemency); *see also* Dorne & Gewerth, *supra* note 2, at 417-20 (discussing clemency power as executive gifts and useful political tools to achieve political goals); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 574 (1991) (indicating that the article examines the theoretical origins of the clemency power and considers its proper role in the American justice system, while arguing for a principled use of the power in the modern political climate). *See generally* Elizabeth Rapaport, *Symposium on Law, Psychology and the Emotions: Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501 (2000) (raising doubts about doing away with executive discretion in favor of more normative standards for clemency review); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST (1989) (discussing the historical and philosophical role of the pardoning power).

6. David Johnston, *Pardons: Having to Say You're Sorry*, N.Y. TIMES, Sept. 12, 1999, § 4, at 6 (discussing Republicans' and Democrats' negative reactions to Clinton's last-minute pardons).

battered women who have killed their abusers.[7] Chapter Eight of Schneider's book includes a section on post-conviction problems.[8] She states: "One of the major arguments advanced by proponents of clemency for battered women has been that clemency is necessary and will continue to be necessary as long as individuals are denied rights to present an adequate defense at trial and until society responds adequately to the problem of woman abuse."[9] As will be discussed *infra*, many battered women and advocates for battered women have petitioned their governors to use the clemency power to provide relief.

This Article critiques the recent actions of chief executives granting clemency to offenders of the law, primarily battered women. Part I is a brief review of the most recent national example of the use of the pardoning power by former President William J. Clinton and the legal/political ramifications of those actions. Part II begins with a summary of the actions of an Ohio governor who granted twenty-eight clemencies to battered women in the 1990s, just before ending his two terms in office.[10] Part III examines other governors' uses of the clemency power in the 1990s in granting relief to battered incarcerated women. In part IV, the governors' reasons for their actions are explored. Part V concludes the article with a discussion on recidivism among the battered incarcerated women released in Ohio.

I. TO GRANT OR NOT TO GRANT: YOU MAY ASK, BUT NOW RARELY RECEIVE

> *One might predict that the reduced likelihood of favorable action on a clemency petition since the mid-1980s would be reflected in a corresponding reduction in the number of annual clemency filings. However, it appears that seekers after clemency remain ever hopeful.*[11]

There is nothing unusual about prisoners requesting some form of clemency.[12] However, obtaining relief from a chief executive is an

7. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).

8. *See id.* at 144-46.

9. *Id.* at 145.

10. *See* Ammons, *Discretionary Justice*, *supra* note 5, at 2-3; *see generally* Ammons, *supra* note 4 (tracing the development of the law to deter violence against women at the hands of their spouses).

11. Margaret Cole Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1493 (2000).

12. *See* Ammons, *Discretionary Justice*, *supra* note 5, at 23-37 (engaging in a discussion of all facets of clemency power, including the need for clemency, the role of the governor, executive discretion, and the role of constitutional conventions).

extraordinary feat.[13] How the clemency power, granted to the President and to governors, is used can be a contentious political issue.[14] On his last day in office, President William Jefferson Clinton used his Article II power to grant clemency to 176 persons.[15] Thirty-

13. *See* Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981) (indicating that an appeal for clemency is a unilateral hope on the part of the petitioner and a past practice of granting clemency does not amount to a constitutionally protected liberty interest). The Supreme Court stated in finding that there was not a right to clemency: "The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency." *Id.*; *see also* Mike Ward, *A Life and Death Debate, Tucker Case Raises Concerns about Clemency*, AUSTIN AM.-STATESMAN (Tex.), Feb. 1, 1998, at A1. Richard Dieter, Director of the Death Penalty Information Center, noted the decline in the granting of death penalty petitions for clemency and remarked, "Years ago, it used to be that clemencies were granted in about 20 percent of death cases, but they are rare now everywhere." *Id.* However, on January 11, 2003, Governor George Ryan of Illinois emptied his state's death row. *See* Jodi Wilgoren, *Systemic Problems Compel Illinois Governor to Commute Remaining Death Sentences: Clemency Decision Reflects Growing National Concern about innocence and Unfairness in Capital Punishment*, Jan. 11, 2003, *available at* http://www.tcask.org/IllinoisCommute1i.htm. The lives of 163 men and four women were spared. *Id.* Ryan is the fourth governor to take such an action. Governor Lee Cruce of Oklahoma (1915), Arkansas Governor Winthrop Rockefeller (1970), and Governor Toney Anaya of New Mexico (1986) also commuted the sentences all of death row prisoners before leaving office. *Id.* Ryan expressed his distress with the death penalty in his state: "The legislature couldn't reform it. Lawmakers won't repeal it. But I will not stand for it." *Id.* "As I prepare to leave office, I had to ask myself whether I could really live with the prospect of knowing that I had the opportunity to act, but that I had failed to do so because I might be criticized." *Id.* Ryan also stated that even his wife, Lura Lynn, was angry with him about the decision. Ryan declared a moratorium on the death penalty in 2000. Since 1973, thirteen people on death row have been freed due to actual innocence. *See* Senator Russ Feingold, Speech on National Death Penalty Moratorium Act of 2000 to the United States Senate (Jan. 9, 2003), *available at* http://senate.gov/~feingold/speeches/senfloor/moratoriumintroduction.html.

14. *See* Ammons, *Discretionary Justice*, *supra* note 5, at 23-24 (commenting that the clemency power is both a legal and political power); *see also* Evelyn Nieves, *Granting Clemency, Being in the Wrong Place at the Right Time*, N.Y. TIMES, May 5, 1999, at A9 (discussing clemency for death row prisoners).

15. The List of President Clintons' clemencies is as follows:

COMMUTATIONS:

Benjamin Berger, Ronald Henderson Blackley, Bert Wayne Bolan, Gloria Libia Camargo, Charles F. Campbell, David Ronald Chandler, Lau Ching Chin, Donald R. Clark, Loreta De-Ann Coffman, Derrick Curry, Velinda Desalus, Jacob Elbaum, Linda Sue Evans, Loretta Sharon Fish, Antoinette M. Frink, David Goldstein, Gerard A. Greenfield, Jodie E. Israel, Kimberly Johnson, Billy Thornton Langston Jr., Belinda Lynn Lumpkin, Peter MacDonald, Kellie Ann Mann, Peter Ninemire, Hugh Ricardo Padmore, Arnold Paul Prosperi, Melvin J. Reynolds, Pedro Miguel Riveiro, Dorothy Rivers, Susan Rosenberg, Kalmen Stern, Cory Stringfellow, Carlo Anibal Vignali Jr., Thomas Wilson Waddell III, Harvey Weinig, Kim Allen Willis.

PARDONS:

Verla Jean Allen, Nicholas M. Altiere, Bernice Ruth Altschul, Joe Anderson, Jr., William Sterling Anderson, Mansour Azizkhani, Cleveland Victor Babin Jr., Chris Harmon Bagley, Scott Lynn Bane, Thomas Cleveland Barber, Peggy Ann Bargon, David Roscoe Blampied, William Arthur Borders Jr., Arthur David Borel, Douglas Charles Borel, George Thomas Brabham, Almon Glenn Braswell, Leonard Browder, David Steven Brown, Delores Caroylene Burleson (aka Delores Cox Burleson), John

six persons had their prison sentences commuted and 140 other Americans were given pardons. The former President, as most presidents since George Washington,[16] used this legal authority to provide relief to incarcerated persons, or forgive the wrongdoing of those who have either already served their sentence or might be facing criminal or civil sanctions. The firestorm raised by political opponents and the media in reaction to the Clinton pardons was rooted in allegations that the presidential acts of grace were induced by monetary bribes, cronyism and/or other political payoffs. A Department of Justice probe is underway to determine if President

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H. Bustamante, Mary Louise Campbell, Eloida Candelaria, Dennis Sobrevinas Capili, Donna Denise Chambers, Douglas Eugene Chapman, Ronald Keith Chapman, Francisco Larois Chavez, Henry G. Cisneros, Roger Clinton, Stuart Harris Cohn, David Marc Cooper, Ernest Harley Cox Jr., John F. Cross Jr., Reickey Lee Cunningham, Richard Anthony De Labio, John Deutch, Richard Douglas, Edward Reynolds Downe, Marvin Dean Dudley, Larry Lee Duncan, Robert Clinton Fain, Marcos Arcenio Fernandez, Alvarez Ferrouillet, William Dennis Fugazy, Lloyd Reid George, Louis Goldstein, Rubye Lee Gordon, Pincus Green, Robert Ivey Hamner, Samuel Price Handley, Woodie Randolph Handley, Jay Houston Harmon, John Hummingson, David S. Herdlinger, Debi Rae Huckleberry, Donald Ray James, Stanley Pruet Jobe, Ruben H. Johnson, Linda Jones, James Howard Lake, June Louise Lewis, Salim Bonnor Lewis, John Leighton Lodwick, Hildebrando Lopez, Jose Julio Luaces, James Timothy Maness, James Lowell Manning, John Robert Martin, Frank Ayala Martinez, Silvia Leticia Beltran Martinez, John Francis McCormick, Susan H. McDougal, Howard Lawrence Mechanic, Brook K. Mitchell Sr., Samuel Loring Morison, Charles Wilfred Morgan III, Richard Anthony Nazzaro, Charlene Ann Nosenko, Vernon Raymond Obermeier, Miguelina Ogalde, David C. Owen, Robert W. Palmer, Kelli Anne Perhosky, Richard H. Pezzopane, Orville Rex Phillips, Vinson Stewart Poling Jr., Norman Lyle Prouse, Willie H.H. Pruitt Jr., Danny Martin Pursley Sr., Charles D. Ravenel, William Clyde Ray, Alfredo Luna Regalado, Ildefonso Reynes Ricafort, Marc Rich, Howard Winfield Riddle, Richard Wilson Riley Jr., Samuel Lee Robbins, Joel Gonzales Rodriguez, Michael James Rogers, Anna Louise Ross, Gerald Glen Rust, Jerri Ann Rust, Bettye June Rutherford, Gregory Lee Sands, Adolph Schwimmer, Albert A. Seretti Jr., Patricia Campbell Hearst Shaw, Dennis Joseph Smith, Gerald Owen Smith, Stephen A. Smith, Jimmie Lee Speak, Charles Bernard Stewart, Marlena Francisca Stewart-Rollins, John Fife Symington III, Richard Lee Tannehill, Nicholas C. Tenaglia, Gary Allen Thomas, Larry Weldon Todd, Olga C. Trevino, Ignatious Vamvouklis, Patricia A. Van De Weerd, Christopher V. Wade, Bill Wayne Warmath, Jack Kenneth Watson, Donna Lynn Webb, Donald William Wells, Robert H. Wendt, Jack L. Williams, Kavin Arthur Williams, Robert Michael Williams, Jimmie Lee Wilson, Thelma Louise Wingate, Mitchell Couey Wood, Warren Stannard Wood, Dewey Worthey, Rick Allen Yale, Joseph A. Yasak, William Stanley Yingling, Phillip David Young.

See Clinton's Late Pardons, Commutations, BOSTON GLOBE, Jan. 24, 2001, at A9 (stating that these pardons included his brother Roger Clinton, convicted of selling cocaine, Heiress Patty Hearst, and Susan McDougal); *see also* Peter Slevin & George Lardner Jr., *Key to Presidential Pardon is Access: Many Forgiven by Clinton had Political or Personal Ties*, WASH. POST, Jan. 22, 2001, at A1 (reporting that McDougal spent time in prison for her refusal to cooperate with the Independent Counsel investigating the Clintons for the Whitewater affair).

16. *See* 1 ANNALS OF CONG. 1411-13 (noting that President Washington granted pardons to the Whiskey Rebels of 1794 and that President Jefferson granted pardons to men convicted of violating the Sedition Act during James Madison's presidency); *see also* Merrill D. Peterson, *Alien and Sedition Acts*, *in* THE FIRST AMENDMENT 94 (Leonard Levy et al. eds., 1990).

Clinton or any persons associated with him acted illegally.[17] The most criticized clemency was President Clinton's pardon of Marc Rich, a fugitive businessman exiled in Switzerland.[18] Some congressmen demanded that Clinton appear before a congressional body on Capitol Hill to explain his decision.[19] The President did not appear before Congress,[20] but he did make the following comment regarding the Rich pardon,

> There were substantial 'legal and foreign policy reasons' for the pardon. 'I want every American to know that, while you may disagree with this decision, I made it on the merits as I saw them, and I take full responsibility for it' . . . 'there was absolutely no quid pro quo.'[21]

Clinton also pardoned former Arizona Governor, John Fife Symington, III.[22] Symington resigned from office when he was convicted of fraud by a federal grand jury.[23] The ex-governor's crime was similar to Rich's, but his receipt of a pardon was not criticized in

17. *See Investigating Roger Clinton; U.S. Probing whether he Solicited Money for Help on Pardon*, NEWSDAY, Mar. 9, 2001, at A05 (asserting that the Justice Department's inquiry began with the investigation of fugitive Marc Rich and broadened to include allegations of improper influence with the granting of pardons by President Clinton).

18. *See* Joseph Kahn, *Clinton's Defense of Pardons Brings even more Questions*, N.Y. TIMES, Feb. 19, 2001, at A1 (reporting that Rich's ex-wife donated funds to the Clinton Library and that because of this gift, Clinton was accused of giving Rich a pardon as a quid pro quo); *see also* Bob Dart, *House Panel Probes Pardon,* TIMES UNION (Albany, N.Y.), Feb. 9, 2001, at A1 (asserting that recipients of pardons, from other presidents, have been generous to partisan political causes). For example, Armand Hammer, convicted of making an illegal contribution to the Nixon campaign and pardoned by former President George H.W. Bush, contributed heavily to the GOP. *See* David Dahl et al., *Soft Money: a Big Boost in Politics,* ST. PETERSBURG TIMES, Dec. 17, 1990, at 1A.

19. *See* Elaine S. Povich, *Clinton's Testimony on Pardons Sought, But Specter Wary of a 'Circus' in Senate,* NEWSDAY, Mar. 1, 2001, at A05 (reporting that Senator Arlen Specter of the Senate Judiciary Committee sent the President a letter requesting his testimony on the pardons). According to the article, Specter said that he would "like to find a professional way for the president to say his side of the matter." *Id.*

20. *See President Clinton's Eleventh Hour Pardons: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Roger C. Adams, Pardon Attorney, U.S. Dep't of Justice).

21. *See* Kahn, *supra* note 18.

22. *See* Stephanie Shapiro, *Helping a School Chum who Needed a Pardon; Loyalty: Baltimore Resident Asks President a Simple Question to Help a Classmate and Friend from Baltimore*, BALT. SUN, Mar. 3, 2001, at 1E. John Fife Symington, III, a Republican governor of Arizona, granted a clemency to a battered woman in 1997 and in 2001, he was granted a pardon by President Clinton. *See* Robbie Sherwood, *Why a Pardon? Symington Saved Clinton's Life, Story Goes*, ARIZ. REPUBLIC (Phoenix), Jan. 21, 2001, at A22 (reporting that Symington resigned as governor after he was convicted of fraud by a federal jury).

23. *See* Pat Flannery, *Boyhood Pal Helped Symington Get Pardon*, ARIZ. REPUBLIC (Phoenix), Feb. 25, 2001, at A1.

the same way.[24]

This was not the first time during the Clinton administration that the President's pardoning decisions were criticized. President Clinton and his wife Hillary publicly disagreed over whether Puerto Rican nationalist members of a group known as Armed Forces of National Liberation (F.A.L.N.), should have been granted clemency.[25] This group was responsible for terrorist activities during the 1970s and 1980s, including bombings that killed six persons.[26] President Clinton granted relief to members of this group who had been convicted of firearms violations and/or robbery.[27] Among the supporters of clemency for these persons were President Jimmy Carter and Archbishop Desmond Tutu.[28] In response to Clinton's decision, the Senate Judiciary Committee passed the Pardon Attorney Reform and Integrity Act aimed at allowing victims of crime to affect the clemency power.[29]

President Clinton granted 400 pardons during his two terms in office.[30] Ronald Reagan's clemency record is similar for the two terms

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24. *See How About Fife's Pardon*, ARIZ. REPUBLIC (Phoenix), Feb. 24, 2001, at B7.

25. *See* Johnston, *supra* note 6 (noting that former President Clinton justified his decision by explaining that the sentences would have been much shorter had they been given under the recently enacted Federal Sentencing Guidelines applicable to crimes committed after 1987).

26. *See id*

27. *See id.*

28. *See id.*

29. *See Clemency Reform Bill Passed*, AP ONLINE, Feb. 24, 2000, *available at* 2000 WL 14323793; *see also* Kenneth R. Bazinet, *GOP Seeks Limit on Prez Pardons*, N.Y. DAILY NEWS, Feb. 9, 2000, *available at* 2000 WL 4596148 (explaining that the bill was placed on the Senate Legislative Calendar, but no other action was taken). In summary, this law would have required the following: if the President delegates to the Pardon Attorney ("PA") the responsibility for investigating a potential grant of executive clemency, the PA shall prepare and make available to the President a written report that includes any written statement submitted by a victim and that describes the PA's efforts to: (1) inform the victims of each offense that is the subject of the potential grant of clemency that they may submit written statements for inclusion in the PA's report; (2) determine the opinions of law enforcement and judicial personnel involved as to the efficacy of granting a person clemency; (3) determine the opinions of Federal, State, and local law enforcement officials as to whether the person involved may have information relevant to any ongoing investigation or prosecution or effort to apprehend a fugitive; and (4) determine the opinion of Federal, State, and local law enforcement or intelligence agencies regarding the effect that such grant of clemency would have on the threat of terrorism or other ongoing or future criminal activity. *See id.* The law further requires notification to the victims of: (1) the possible grant of clemency; and (2) the granting of such clemency and the person's release from custody. *See* Pardon Attorney Reform and Integrity Act, S. 2042, 106th Cong. § 1(b)-(d) (2000) (recording that the U.S. House of Representatives voted 311 to forty-one to condemn the President's action and that ninety-three members of his own party crossed party lines in support of that vote). *Id.*

30. *See* Slevin & Lardner, *supra* note 15.

he served in office.[31] President George H.W. Bush pardoned seventy-seven persons, and Jimmy Carter pardoned 544 during each of their respective terms in office.[32] When reporters questioned President Clinton about his actions, he responded:

> You're not saying that these people didn't commit the offense . . . You're saying they paid, they paid in full, and they've been out long enough after their sentence to show they're good citizens, so they ought to have a chance to get full citizenship.[33]

News commentators and political rivals of the President made a great deal of the fact that high profile, political,[34] and otherwise well connected persons sought to use their influence to secure forgiveness for themselves or for certain offenders with whom they had some relationship[35] or vested interest.

There is no laundry list of criteria that a President must use when granting clemency.[36] The power is discretionary. Former Florida

31. *See id.*

32. *See id.*

33. *See* Byron York, *The McDougal Pardon: If You Knew Susan Like he Knows Susan*, 53 NAT'L REV. 18, 20 (2001).

34. *See* Peter M. Shane, *Presidents, Pardons and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 401-02 (1993) (stating that when former President George H.W. Bush pardoned six of the Iran-Contra figures, Weinberger, Abrams, Clarridge, Fiers, George, and McFarlane, the President offered five reasons for his actions). According to Shane, the President:

> asserted that (a) all the asserted individuals were motivated by patriotism, not by hope of private gain, in any alleged malfeasance; (b) their prosecutions were tantamount to the 'criminalization of policy differences'; (c) pardons are often used to put national political traumas to rest; (d) all of the pardoned had been punished enough by the criminal process for any wrongdoing in which they might have been involved, and (e) Weinberger, at least, is so distinguished a public servant that his prior record alone argues for leniency.

Id. Critics of the President's actions countered that the Iran-Contra pardons were not grounded in charity, but self-interest. *See* Charles R. Bobcock, *Among Bush's Final Acts: 12 Pardons and 2 Commutations*, WASH. POST, Jan. 22, 1993, at A6 (asserting that many thought the President acted to pay off the alleged conspirators and to keep them silent about any role he may have had in the scandal); *see also* Walter Pincus, *Bush Pardons Weinberger in Iran-Contra Affair, 5 Others also Cleared; Angry Walsh Indicates a Focus on the President.* WASH. POST, Dec. 25, 1992, at A1 (describing how Lawrence Welsh, the special prosecutor investigating Iran-Contra, compared Bush's pardons to the "Saturday Night Massacre" of Watergate and states, "[i]n that situation (Saturday Night Massacre), the President removed the prosecutor from the case. In this one . . . the President has removed the cases from the prosecutor.").

35. *See* Slevin & Lardner, *supra* note 15 (noting that pardons do not erase convictions, but rather they restore some rights denied to the pardoned individuals, such as the right to vote).

36. *See* OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, FOIA (last updated June 18, 2002) (explaining that the Office of the Pardon Attorney ("OPA") is the administrative office that handles requests for clemency and was established by Executive Order on June 16, 1893), *available at* http://www.usdoj.gov/pardon/pardon_foia.htm. Among other functions, the office advises the President about

Governor Lawton Chiles described his gubernatorial authority this way: "This is as close to being the king as anything else, where I had the right to give absolute pardon. I can turn any of them down . . . You've played God almost."[37]

The debates continue to rage over issues such as when clemency should be granted, who is a more deserving[38] recipient, and whether this Constitutional power should be reserved for only the exceptional cases. Morality[39] and the public welfare are always at issue when clemency is considered.[40] While Clinton's pardons involved persons whose guilt was not necessarily at issue, innocence[41] is among one of the politically acceptable reasons for providing relief to a prisoner. Most citizens will agree that when an injustice has been uncovered, the wrong ought to be corrected. For example, when a person has been mistakenly imprisoned for a wrong she did not commit, reasonable persons want that person to be made whole.[42] However,

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clemency issues. *See id.* Under Department rules, a person is not eligible for a pardon until five years after they have been released from prison. *See* 28 C.F.R. § 1.2 (2000) (revealing that these rules are not binding on the President and that he may grant clemency to anyone at any time). During the year 2000, the DOJ implemented new rules regarding victim-notification and for persons on death row seeking executive clemency. *See* Rules Governing Petitions for Executive Clemency, Victim Notification and Comment, 65 Fed. Reg. 58223-24 (Sept. 28, 2000); *see also* Rules Governing Petitions for Executive Clemency: Capital Cases, 65 Fed. Reg. 48379-81 (Aug. 8, 2000) (asserting that having connections does not disqualify a person from seeking a clemency for herself or on behalf of anyone else).

37. *See* Julie Hauserman, *Search for Mercy*, ST. PETERSBURG TIMES, July 13, 1997, at 1B (remarking that these statements were made in connection with battered women's cases Chiles was reviewing).

38. No one deserves clemency, in the sense that it can be earned. It is a gift.

39. *See* MOORE, *supra* note 5, at 9 (enumerating four criteria for her theory of pardons, which include specific grounds for the pardon, justifications that are clear about the reasons for punishing and pardoning, consistent theories about what actions are right for the state, and a system for discovering the flaws in the process of pardoning); *see also* Kobil, *supra* note 5, at 622-24 (presenting a prescriptive theory of pardons that describes appropriate clemencies as either "justice-enhancing," which ensure that the legal system is operating fairly, or "justice-neutral," which serve other purposes, including promoting unity in the state and other political goals).

40. *See* MOORE, *supra* note 5; *see also* Love, *supra* note 11, at 1500 (noting that in the past, courts have viewed pardons as a "part of the Constitutional scheme to be exercised for the public welfare").

41. *See* Herrera v. Collins, 506 U.S. 390 (1993). Herrera petitioned the Supreme Court to vacate his death sentence because he claimed innocence. *See id.* The court denied the request, remarking, "History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id.* at 416-17.

42. Many states and the federal government provide compensation for victims of wrongful incarceration. *See* Michael Higgins, *Tough Luck for the Innocent Man*, 85 A.B.A. J. 46, 47 (1999) (observing that California, Illinois, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, North Carolina, Ohio, Tennessee, Texas, West Virginia, Wisconsin, the Federal Government, and the District of Columbia have compensation statutes); *see also* 28 U.S.C. §§ 1495, 2513 (1998) (enacted 1948);

short of innocence, today's public is not very hospitable to mercy, especially when pleas for forgiveness in criminal cases are involved.

The clemency power is one of the checks and balances provided in federal and state constitutional schemes. It allows the Chief Executive to mitigate when the legislative process has produced laws that result in inflexibility and harshness. A clemency can send a message to lawmakers that perhaps new laws are needed.[43] Clemencies correct the mistakes of a trial or respond to the inadequacy of an appeals court because of rules concerning evidence or procedure. Accusations that governors and presidents act in an extra-legal capacity when bestowing constitutional grace to offenders through pardons reflect, at best, a misunderstanding of the law and why the clemency power exists. A president or governor is both a legal and political actor and constitutions grant the executive the authority to act in both capacities concurrently when considering petitions for clemency.

It is interesting to note that even governors and their aides misstate their authority under the law to correct an injustice or provide mercy. For example, recently, William Klatt, the chief legal counsel for Ohio Governor Robert Taft, explained Taft's mindset when reading clemency petitions: "He is not substituting his judgment for that of a judge or jury. . . . It is a power that he is careful about exercising."[44] While carefulness and prudence are to be applauded, Klatt's statement implies that it would be inappropriate for Taft to second-guess the jury or judge. However, when someone sends a clemency petition to a chief executive, that is exactly what the person asks the official to do— second-guess a jury's verdict, the court's ruling or a sentencing decision and provide her with another chance at freedom.

CAL. PENAL CODE § 4900 (West 2000) (enacted 1941); 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2001) (enacted 1945); IOWA CODE ANN. § 663.A.1 (West 2001) (enacted 1997); ME. REV. STAT. ANN. tit. 14, § 8241 (West 2000) (enacted 1993); MD. CODE ANN., art. 78(a), § 16(a) (1998) (enacted 1963); N.H. REV. STAT. ANN. § 541-b:14 (2000) (enacted 1977); N.J. STAT. ANN. § 52:4C-1 (West 2001); N.Y. CT. CLMS. LAW § 8-b (McKinney 2001) (enacted 1984); N.C. GEN. STAT. § 148-82 (2001) (enacted 1947); OHIO. REV. CODE ANN. § 2743.48 (West 2001) (enacted 1986); TENN. CODE ANN. § 9-8-108 (a)(7) (2000) (enacted 1955); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (Vernon 2001) (enacted 1965); W. VA. CODE § 14-2-13a (2000) (enacted 1987); WIS. STAT. ANN. § 775.05 (West 2001) (enacted 1943); D.C. CODE ANN. § 1221-1225 (1998) (enacted 1981).

43. *See* Love, *supra* note 11, at 1506 (commenting that several states have attempted to change their evidence laws to allow testimony on battering, as a result of requests for clemencies for battered women).

44. *See* Alan Johnson, *Like Predecessors, Taft Grants Few Clemency Requests*, COLUMBUS DISPATCH, Jan. 14, 2001, at 5C. Governor Taft refused the clemency request of Wilford Berry, the first Ohioan to be executed in thirty-six years, on February 19, 1999. *See id.* Berry, a suicidal volunteer because he voluntarily waived his death penalty appeals, died by lethal injection. *See id.*

The Constitution provides a governor the right to honor that request. Although the President and governor also have the option of not granting mercy, some would argue that being merciful and correcting injustice are constitutional requirements. There is a duty to see that the laws are "faithfully executed."[45] The adverb "faithfully" places a burden on the Chief Executive to insure that the laws are implemented fairly and do not impose an unnecessary hardship.

The "law and order" politic constrains the clemency power more than ever.[46] Governors and presidents use this power at their political peril. The politics, judgment and morality of a governor who gives clemency to a battered woman can be subjected to intense scrutiny. The following section provides a brief recounting of the reactions of the media and others to such grants of grace. The framers of our Constitution were aware of political dynamics.

II. PARDONING THE POWERLESS: BATTERED INCARCERATED WOMEN PETITION FOR RELIEF

Lizzie Borden took an axe
An' gave her mother forty whacks
When she saw what she had done
She gave her father forty one,
Not to worry, she was blest.
Her hide was saved by Dick Celeste.[47]
If all the women in America who
have murdered their husbands
are released from prison, there could
be several thousand of them capable
of mayhem, back on the streets . . .

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45. *See* Love, *supra* note 11, at 1507. She explains:

> [a] pardon can play an important role in carrying out the President's obligation to take care that the laws are faithfully executed in two ways. First, it enables the President to intercede directly to change the outcome of a case that he believes was wrongly handled by his subordinates, where no judicial remedy is available. Second, it permits him to send a very direct and powerful message to his subordinates about how he wishes the law to be enforced in the future, including in particular the manner in which they should exercise their discretion.

Id. at 1507-08.

46. *See id.* at 1495 (examining the decline in the grants of pardons for federal prisoners since 1985).

47. *See* PLAIN DEALER (Cleveland, Ohio), Jan. 13, 1991, at 2E (cartoon).

how would you like to get one of them for a loving wife?[48]

A decade ago, Richard F. Celeste, the governor of a large Midwestern state, used his Constitutional power to grant clemency to twenty-eight incarcerated women who petitioned for relief.[49] These women were in prison because they killed their abusive intimates. When the Ohio women were granted clemency, most of the statewide and national newspaper response was positive.[50] Predictably, prosecutors were among the most vocal detractors.[51] There were also media critics who questioned the morality and integrity of the governor.[52] Andy Rooney, the CBS *Sixty Minutes* commentator, stated that the governor had given all women the license to kill their abusive partners.[53] Rooney's column included the following statement, "In releasing these women, Celeste effectively declared open season on husbands in his state."[54]

When a case involves a homicide, the political stakes are high, and the scrutiny by media and others can be intense. A politician smeared with being soft on crime either by the media or by his or her political opponents is not considered to be worthy of holding office.[55]

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48. *See* Andy Rooney, *Celeste Declares Open Season on Ohio Men*, COLUMBUS DISPATCH, Dec. 28, 1990, at 11A.

49. *See* Editorial, *Justice and Battered Women*, CHI. TRIB., Dec. 27, 1990, at 18C (observing that all of the women pardoned had to have served at least two years of their sentence and perform at least 200 hours of community service after their release). One woman remains in prison because she was on death row and her sentence was reduced to life in prison. *See id.*

50. *See, e.g.*, *id.*

51. *See* Ammons, *Discretionary Justice*, *supra* note 5, at 52 (discussing the prosecutor's reaction). Some prosecutors claimed that they had not been consulted about the justness of the clemencies, a process that was an Ohio procedural requirement. *See id.*

52. *See* Johnson, *supra* note 44 (noting that, while granting sixty-eight clemencies during his last year in office, Governor Celeste's clemency record was nonetheless conservative when compared to those of other Ohio governors). Governor James Rhodes, Celeste's predecessor, granted 17.5% of the petitions he received. *See id.* Celeste's successor, George Voinovich, approved 128 clemencies during his eight years, which is less than 3% of requests. *See id.* During his first two years in office, Bob Taft, the current governor, rejected the recommendation for clemency by the Ohio parole board thirty-four out of forty-nine times. *See id.*

53. *See* Rooney, *supra* note 48.

54. *Id.*

55. *See* John Goldman, *Judge Bows to Pressure, Changes Ruling on Drug Seizure; Law: Federal Jurist Holds Second Hearing after Clinton and Dole Castigate Him. White House Spokesman had Threatened to Demand Resignation*, L.A. TIMES, Apr. 2, 1996, at 8 (citing an instance where a judge was criticized for being soft on crime because he invalidated a confession and seizure of eighty pounds of drugs, a decision that he later reversed); *see also* United States v. Bayless, 201 F.3d 116 (2d Cir. 2000). *Bayless* is an appeal from the conviction that resulted once the federal judge referred to above reversed the previous decision, and allowed the admission of the narcotics. *Id.* The

During the 2000 Presidential primary season, then Governor George W. Bush of Texas, the Republican contender, was faced with the decision of whether he would intervene in the case of sixty-two-year-old Betty Lou Beets, a woman given the death penalty for killing her husband.[56] Her appeals lawyers argued that she had been a victim of domestic abuse.[57] When asked by a reporter how he would review the case, Bush answered, "We've had a lot of controversial cases come across my desk, and each time, I've asked the question of innocence and guilt, and each time I've asked the question, has the person had full access to the courts? And so, I'm going to wait to see what the . . . Board of Pardons and Parole says first . . . before I make a decision on this case."[58] Beets died by lethal injection on February 24, 2000, and became the second woman from Texas to be executed since the Supreme Court allowed state executions to resume and the fourth woman in the United States to be executed.[59] Bush stated his reason for not reducing her sentence, "After careful review of the evidence of the case, I concur with the jury that Betty Lou Beets is guilty of this murder."[60] In an interview with Mike Von Fremd of ABC News, just days before her scheduled execution, Beets denied her guilt. The exchange between Beets and the reporter is as follows:

Von Fremd: Did you kill your husband?

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conviction was affirmed. *Id.*

56. *See* Sarah Chalmers, *Death Row Case may End Bush's Shot at the Presidency*, DAILY MAIL (London), Feb. 24, 2000, *available at* 2000 WL 14014644; *see also* Michael Graczyk, *Bush Reviews Woman's Execution*, AP ONLINE, Feb. 24, 2000, *available at* 2000 WL 14323767 (reporting that Beets, who alleges she was the victim of domestic abuse, shot her husband in the early 1980s and buried him in her flower garden).

57. *See* Michael Graczyk, *Woman Executed for Shooting Husband*, CHI. SUN TIMES, Feb. 25, 2000, at 1 (noting that Beets' lawyers asked the U.S. Supreme Court to consider the case, but that the high court rejected the matter without comment).

58. *See Texas' Death-Row Inmate Called Black Widow, Still Claiming Innocence, Pleads for her Life* (ABC News television broadcast Good Morning America, Feb. 18, 2000) (documenting that in Texas, the governor is limited to granting clemency when the Board of Pardons and Paroles recommends it). The governor, however, retains the ultimate authority to grant a reprieve in a death penalty case. *See id.*

59. *See* R.G. Ratcliffe, *The Execution of Karla Faye Tucker; Bush Prayed for Guidance before Denying Tucker's Appeal,* HOUS. CHRON., Feb. 4, 1998, at 10 (discussing Karla Faye Tucker, who was executed for a heinous murder and whose case became a cause celebre as a result of the campaign by Pat Robertson of the Christian Broadcasting Network). Tucker became a born-again Christian and begged for her life. The parole board voted 16-0 against her petition. *See id.* Bush refused her reprieve and she was the first woman to be executed in Texas since the Civil War. *See* Mary Dejevsky, *Killer Executed as Bush Ignores Plea for Mercy,* INDEP. (London), Feb. 25, 2000, at 15 (commenting that Beets and Tucker became friends in prison).

60. *See* Graczyk, *Woman Executed for Shooting Husband*, CHI. SUN TIMES, Feb. 25, 2000, at 1; *see also Betty Lou Beets Executed in Texas*, AP ONLINE, Feb. 24, 2000, *available at* 2000 WL 14323487; *see also* Dejevsky, *supra* note 59 (revealing that under Texas law, Bush only had power to grant a thirty-day reprieve because the Texas parole board voted against commuting her sentence to life in prison).

Beets:	No. No Sir, I didn't.
Von Fremd:	But can you understand why people look at your case and just say 'There's no way that she's innocent'?
Beets:	If they had all the facts, they would. They don't have it all.
Von Fremd:	So right to . . . your last breathing moment you're going to be saying?
Beets:	I'm not guilty. I'm not guilty.[61]

During the Presidential campaign, Bush further explained his reluctance to use his power of clemency[62] in death penalty cases. He said, "I am a person of faith. And I happen to believe that if the death penalty is administered swiftly, surely, and justly, it will save lives. Second . . . I am sworn to uphold the laws of the land and I do. Thirdly, I don't believe—I'm confident we have never executed anybody who was not guilty of the crime charged. . . . There's no question in my mind that we have administered the death penalty in my state fairly and justly."[63] According to his statements, the former governor's standard for intervention was that he had to be completely convinced of innocence. While Bush was governor from 1995 to 2000, 120 persons were executed in Texas.[64]

Why would a governor risk negative political fallout to intercede on behalf of a convicted murderer? The following section provides some insight to the decision-making of Governor Celeste of Ohio. Part IV expands this discussion to other governors who have used the clemency power similarly.

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61. *See* Good Morning America, *supra* note 58.

62. *See* Jennifer L Harry, *Death Penalty Disquiet Stirs Nation*, CORRECTIONS TODAY, Dec. 1, 2000, *available at* 2000 WL 16239777 (remarking that for the first time during the course of his administration, George W. Bush granted a reprieve to Ricky Nolen McGinn, who was convicted of murder and rape in 1993). Bush granted the reprieve so that DNA testing could be done. *See id.*; *see also* Jonathan Alter, *The Death Penalty on Trial: Special Report: DNA and Other Evidence Freed 87 People from Death Row; Now Ricky McGinn is Roiling Campaign 2000. Why America's Rethinking Capital Punishment*, NEWSWEEK, June 12, 2000, at 24; Christopher Lee, *McGinn set for Execution this Evening: DNA Tests had Failed to Clear Man in Girl's '93 Rape, Murder*, DALLAS MORNING NEWS, Sept. 27, 2000, at 21A. Bush also commuted the death sentence of Henry Lee Lucas, a man who had a pattern of confessing to crimes that he did not commit. Bush stated, "I am reluctant to second-guess a verdict of a jury and the courts. However, the clemency process is intended as a fail-safe for unusual or exceptional circumstances." *Id.*; *see also* Kathy Walt, *Execution Foes Rally in Capital; Death Penalty Opponents take Case to Bush's House,* HOUS. CHRON., June 4, 2000, at A37.

63. *See* Michael Tackett, *Bush Chats On-Line in Virginia: During a 45-Minute Session at AOL Headquarters the Texas Governor Fields Questions Ranging from Serious to Silly*, CHI. TRIB., Feb. 26, 2000, at 3 (noting that Bush made these statements two days after Beet's execution during the contested Republican primary).

64. *See id.*

III. MERCY OR MADNESS: MAKING SENSE OF MURDERERS SET FREE

It falls to the Governor to blend mercy with justice, as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.[65]

I know what people think; they don't like it.[66]

The wisdom of bestowing constitutional grants of grace to offenders can be questioned in perpetuity.[67] For example, years after Ohio Governor Celeste left office, when political pundits were speculating whether he might run for the U.S. Senate, one newspaper raised the issue of his use of the clemency power for eight death row prisoners, which ended in a court fight.[68] The article also questioned the clemencies of the incarcerated battered women who were not the subject of the controversial commutations. The implication of the article was that Ohioans might not want a Senator who was "soft on crime."[69]

What is considered criminal behavior and how the state must respond to it evolves over time.[70] Twenty years ago, state courts began to allow the admission of expert testimony in battered women's criminal trials to help the jury understand why a battered woman did not leave an abusive relationship or why she thought she was in

65. *See* MESSAGES, ADDRESSES AND PUBLIC PAPERS OF TERRY SANDORD, GOVERNOR OF NORTH CAROLINA, 1961-65 552 (Memory F. Mitchell ed., 1966).

66. Alan Johnson, *Clemency and Celeste: Will Voters be as Forgiving if he Tries a Comeback?*, COLUMBUS DISPATCH, July 28, 1996, at 04B (reporting the statement of former Ohio Governor Richard F. Celeste to a reporter concerning whether public sentiment about his grants of clemency while governor will affect a political comeback).

67. *See id.*

68. *See* T.C. Brown & Barry Kawa, *Death-Sentence Commutations Upheld by Court,* PLAIN DEALER (Cleveland, Ohio), Dec. 31, 1994, at 1A; *see also* Maurrer v. Sheward, 71 Ohio St. 3d 513 (1994).

69. *See id.*

70. *See* Goldberg v. State, 395 A.2d 1213, 1219-20 (Md. 1979) (demonstrating the former requirement that women resist rapists in order to prove that they did not consent); *see also* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998) (commenting that scholars are currently proposing that rape occurring by coercion should also be punished as criminal behavior); Linda L. Sharp, *Homicide: Duty to Retreat where Assailant and Assailed Share the same Living Quarters,* 67 A.L.R. 5th 637, 653-57 (1999) (explaining how jurisdictions have also changed laws that at one time required a victim to retreat if an attack occurred in the home).

imminent danger of death.[71] This type of evidence was novel, but was proven to meet the requirements for admission of scientific evidence in some jurisdictions. Other state courts treated the theories and experts with suspicion and derision.[72] Ohio was one of those states. While state of mind evidence was admissible in criminal trials in Ohio,[73] the Ohio Supreme Court held that admission of "battered woman syndrome" testimony by experts to support a claim of self-defense was "irrelevant and immaterial to the issue . . . of self-defense,"[74] and "not sufficiently developed as a matter of commonly accepted scientific knowledge to warrant expert testimony."[75] For a decade, this ruling would stand as a barrier to defending women who killed their abusive partners while trying to save their own lives.[76] The main reason why Governor Celeste took the initiative to give twenty-eight incarcerated battered women a new lease on life was because at the time they were charged with felonies, Ohio courts were hostile to the admission of expert testimony on "battered woman syndrome" at trial.

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71. For examples of cases in which the court admitted expert testimony on battered woman syndrome, *see generally* Smith v. State, 277 S.E.2d 678 (Ga. 1981); State v. Hodges, 716 P.2d 563 (Kan. 1986); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Baker, 424 A.2d 171 (N.H. 1980); State v. Kelly, 478 A.2d 364 (N.J. 1984); People v. Torres, 488 N.Y.S.2d 358 (Sup. Ct. 1985); State v. Allery, 682 P.2d 312 (Wash. 1984); *see also* LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 281 (1989) (remarking that Battered Woman's Syndrome is considered a type of post-traumatic stress). This psychosocial theory, first introduced by Dr. Lenore Walker to explain why women are often trapped in abusive relationships, has been criticized for stigmatizing battered women. *See* SCHNEIDER, *supra* note 7, at 124-25.

72. *See* State v. Norman, 378 S.E.2d 8, 14-15 (N.C. 1989) (indicating that the Court is not persuaded by the argument that the imminence requirement does not apply when there is evidence of battered women syndrome); *see also* State v. Thomas, 423 N.E.2d 137, 138 (Ohio 1981) (refusing to allow expert testimony concerning battered women syndrome because this theory does not have sufficient scientific acceptance, would be prejudicial, and is irrelevant).

73. *See* OHIO R. OF EVID. § 803(3) (Anderson 2002) ("The following are not excluded by the hearsay rule . . . a statement of the declarant's then existing state of mind . . .").

74. *Thomas*, 423 N.E.2d at 138.

75. *Id.*

76. *See* State v. Koss, 551 N.E.2d 970 (Ohio 1990) (reversing *Thomas* and holding that battered woman syndrome had gained substantial scientific acceptance to be admitted as evidence); *see also* OHIO REV. CODE ANN. § 2901.06 (1990) (amending the evidence code to expressly recognize battered woman syndrome testimony). For further discussion on *Thomas*, *Koss*, and the evidentiary issues regarding self-defense and expert testimony in Ohio, *see* Ammons, *Discretionary Justice*, *supra* note 5, at 10-14, 17-23. In the intervening years, the utility of battered woman's syndrome has been questioned. *See id.* However, battered woman's syndrome is now a part of the Diagnostic and Statistical Manual of Mental Disorders (known as DSM IV-R) of the American Psychiatric Association. *See id.*

On November 5, 1990,[77] a few weeks before the Ohio women received clemency, Governor Celeste gave Erin Moriarity of CBS' *48 Hours* the following answer in response to her question of why a governor would want to get involved in an issue that was already decided by the courts. He responded:

> It is our responsibility under the Constitution, mine as the governor of Ohio and my successors as governors in the future to exercise a judgment on behalf of all the citizens of the state where we think there is a reason to believe they (juries) were wrong; this time in the course of sentencing or we believe there are other factors that justify some intervention in the process. I believe that power to commute was designed wisely by early generations for precisely a situation like this, where women find themselves in prison under circumstances where had they been given the chance to defend themselves with the facts, brutal, shocking facts about their life experiences, they almost certainly would not have been convicted or would have been convicted of a lesser crime.[78]

In short, Governor Celeste felt that these women had been treated unjustly by the justice system because the full stories about domestic terrorism they suffered had not been told. Therefore, deliberating juries[79] had heard only part of the truth. Women were also (figuratively) coerced into plea bargains because they knew and/or were advised that juries would not believe them, and it would be hard, if not impossible to get jury instructions on self-defense. The criminal justice process for these women was fatally flawed. According to Celeste, the governor, on behalf of the entire state, had the responsibility to review what had happened and mitigate the injustice done. The governor's statement also mentioned "other factors" that were relevant in determining a grant of mercy. Those issues will be discussed later.

CBS columnist Andy Rooney made a prediction in his column that was partially correct: "If Celeste's popularity increases among women in Ohio because of this decision, you can bet the other governors are going to give some thought to pardoning the women husband-murderers in their prisons."[80] Immediately after Governor Celeste took this action, battered women's advocates around the country began to look to their governors for similar relief for incarcerated

77. *See* Ammons, *Dealing with the Nastiness*, *supra* note 4, at 893 (stating that the reviewing process began in 1989).

78. *48 Hours* (CBS television broadcast, Nov. 5, 1990) (transcript on file with author).

79. Often these cases never got to court.

80. *See* Rooney, *supra* note 48.

battered women.[81] Since 1990, twenty-eight governors representing both political parties have reviewed the cases of scores of similarly situated women and have granted clemency to sixty-nine of them.[82] The dominant form of clemency used has been commutation, i.e., a reduction in the time to be served. Pardons are rarely granted.[83] Unlike a pardon, a commutation does not restore all the rights and privileges one had prior to being incarcerated. Governors used a variety of processes. Some conducted reviews using their parole and pardons boards, along with in-house staff to assist in providing information and counsel. The late Governor Lawton Chiles of Florida established special hearing panels composed of public officials to scrutinize petitions. Other governors had boards consisting of various cabinet members.[84]

Being perceived as too lenient towards killers can mean political suicide. If a governor is going to consider clemency cases, he or she must carefully craft the rationale for the decision to assist "criminals."[85] Lifestyle and systemic factors (some of the "other factors" referred to by Celeste and used by other governors when

81. *See* Deborah Sharp, *Battered Women who Killed Mates Fight for Freedom*, USA TODAY, Dec. 7, 1992, at A12 ("The trend toward absolving battered women began in 1990 in Ohio, when ex-governor Richard Celeste granted clemency to 26 women. The movement has since gained momentum with a growing recognition of domestic violence as a national crisis."); *see also Celeste Pardons Trigger Request in Washington*, PLAIN DEALER (Cleveland, Ohio), Dec. 26, 1990, *available at* 1990 WL 4632491 (reporting on an anti-domestic violence coalition in the Washington area urging Governor Booth Gardner to free women imprisoned for assaulting or killing abusive husbands).

82. *See* NAT'L CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, DATA (2000) [hereinafter NAT'L CLEARINGHOUSE DATA] (on file with author). According to the National Clearinghouse for the Defense of Battered Women ("Nat'l Clearinghouse"), the following governors have provided relief for battered incarcerated women: Fife Symington (Ariz.), Donald Schaefer (Md.), Roy Romer (Colo.), Terry Brandstad (La.), Jim Edgar (Ill.), Brereton Jones (Ky.), Charles Roemer (La.), William Weld (Mass.), John Ashcroft (Mo.), Steve Merrill (N.H.), Lawton Chiles (Fla.) and Richard Celeste (Ohio). *Id.*

83. Kathy Thomas, the woman who was the subject of the landmark Ohio Supreme Court case *Thomas v. Arn*, 474 U.S. 140 (1985), in which battered woman expert testimony was prohibited, was granted a pardon. She had already been released from prison when the clemency project was completed in Ohio.

84. In many states, groups of advocates for battered women often provided information to state officials about individual cases, including the Women in Prison Committee of the Florida Coalition Against Domestic Violence, the University of Denver's Battered Women's Clemency Reform Project, Columbia University's Prisoners and Families Clinic, the California Coalition for Battered Women in Prison, the Clemency Project of Oregon, and the Northwest Battered Women's Legal Defense Coalition. The spouses of the governors, including Dagmar Celeste and Libby Pataki, were advocates and supporters of reviewing battered women cases.

85. *See* Ammons, *Discretionary Justice*, *supra* note 5, at 74-76 (discussing the range of reasons why a Governor might grant clemency to a woman who claims she was attempting to save her own life when she killed her abuser).

granting clemency to all types of petitioners) that should be considered when reviewing these kinds of cases include 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[86] the woman poses to the community. In the following section, governors' rationales for granting the petitions of battered incarcerated women are examined and compared to the above list.

IV. MODELS OF JUSTICE, MERCY, GRACE?

Justice — When you get what you deserve

Mercy — When you don't get what you deserve

Grace — When you get what you don't deserve[87]

Probing the mind of a governor for his or her rationale in making a clemency decision is not an easy task. There may be various motivations for action or inaction ranging from self-interest (in re-election or a legacy) to a conviction that is based on personal moral or ethical considerations. The chief executive may also take on an initiative because of a belief in what is best for the constituency. One of the most important aspects of having a plan successfully implemented is the strategic spin that is crafted for the media and, subsequently, the citizens in that jurisdiction.[88] It is often important that the official tell the story first, as opposed to letting the story be told by those who may not fully understand the issue or have some ulterior motives for not getting the facts straight. Governors hold press conferences, make themselves available to the media, or release official statements when they want to ensure that their point of view is accurately articulated.

I decided to inquire into the stated reasons why other governors granted clemency to incarcerated battered women during the past decade.[89] In Ohio, governors are required by law to report to the

86. *See id.* at 76 (explaining that while courts are limited in considering some types of evidence, the rules of the courtroom do not bind governors and they may use the resources of the state to perform additional investigation to gain a broader picture of the facts).

87. Anonymous E-mail to Linda L. Ammons, Associate Professor of Law, Cleveland-Marshall College of Law (2001) (on file with author).

88. There are times when a story is leaked to see how it will be reported and responded to by the public before a politician makes an official statement.

89. Richard Celeste was not the first governor to grant battered women

legislature on their clemency grants.[90] Although one cannot always be certain that the stated position is the reason for political action, the released statements of the official are the most reliable documentation. When this information is not readily available, newspaper accounts can serve as records.[91]

Shortly after the Celeste commutations, Governor William Schaefer of Maryland commuted the sentences of eight women.[92] Schaefer gave this explanation to the press: "First of all you think: They committed murder. And as a lawyer you think: All the evidence was there; what else could happen?"[93] However, Schaefer also concluded that because the evidence of abuse was not admissible as a mitigating factor in their criminal trials, "the women have served enough time."[94] When Missouri Governor (now U.S. Attorney General) John Ashcroft reduced the sentences of two battered women in 1992, he said, "In both of these women's cases, the law prohibited juries from hearing about the severe abuse and trauma they had endured . . . In the interest of justice, I am commuting the sentences to life with the possibility of parole."[95] Governor Terry Brandstad of Iowa also commuted the sentence of a battered woman in 1992. His reason was

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clemency. *See* NAT'L CLEARINGHOUSE DATA, *supra* note 82. Governors Jim Thompson (Ill.), John Sununu (N.H.), Edwin Edwards (La.), William Weld (Mass.), Robert Miller (Nev.), Lamar Alexander (Tenn.), Mills Goodwin (Va.), and Booth Gardener (Wash.) are also listed among those who provided relief to a battered woman. *See id.* What distinguishes Celeste is his systematic approach to looking at all claims of battered women at the same time and the number of women given clemency based on this initiative.

90. *See* OHIO CONST. art. III, § 11 (amended 1996). The same is true in Alabama, Arizona, Arkansas, California, Idaho, Kansas, Nevada, New York, North Dakota, Oklahoma, Oregon, Virginia, West Virginia, Wisconsin, and Wyoming. *See* ALA. CONST. art. V, § 124; ARIZ. REV. STAT. § 31-446 (2001); ARK. CONST. art. VI, § 18; CAL. CONST. art. IV, § 8; IDAHO CONST. art. IV, § 7; KAN. STAT. ANN. § 22-3703 (2000); NV. CONST. art. V, § 13 (2001); N.Y. EXEC. LAW § 17 (2001); N.D. CONST. art. V, § 6; OKLA. CONST. art. VI, § 10; OR. REV. STAT. § 144.660 (1999); VA. CONST. art. V, § 12; W.V. CONST. art. VII, § 11; WIS. CONST. art. V, § 6; WYO. CONST. art. IV, § 5.

91. The statements of sixteen governors were located in various local and national media sources. The roster is as follows: Pete Wilson (Cal.), Gray Davis (Cal.), Roy Romer (Colo.), Lawton Chiles (Fla.), Jim Edgar (Ill.), Brereton Jones (Ky.), Donald Schaefer (Md.) Charles Roemer (La.), William Weld (Mass.), John Ashcroft (Mo.), Terry Brandstad (Iowa), Steve Merrill (N.H.), Gary Locke (Wash.), George Pataki (N.Y.), Barbara Roberts, (Or.), and Richard Celeste (Ohio).

92. *See* Howard Schneider, *Maryland to Free Abused Women; Schaefer Commutes 8 Terms, Citing Violence*, WASH. POST, Feb. 20, 1991, at A1 (explaining that domestic violence groups praised Schaefer's decision as another step in their campaign to highlight the role of physical abuse in some violent crime and to persuade state legislators to account for it in court proceedings).

93. *Id.*

94. *Id.*

95. Virginia Young, *Sentence Cut for 2 Who Killed Husbands*, ST. LOUIS POST-DISPATCH, Dec. 17, 1992, at 1A.

to the point. He stated, "I have concluded that Katherine Sallis was an abused woman who feared her husband."[96] Governor Pete Wilson of California granted clemency to Frances Mary Caccavale and Brenda Aris. Wilson released Caccavale because of her age (seventy-eight years old), medical condition, and because she had been battered for over fifty years before she stabbed and killed her husband. Wilson stated that "he felt compassion for the 'pain and terror' she endured from her husband over the years."[97] Brenda Aris' sentence was reduced from "fifteen years to life" to "twelve years minimum." While the law in California changed because of Aris' case, she did not benefit from it. She was paroled a year and a half before her sentence would have been completed.[98] When commuting the sentence of Jeanette Crawford, a third battered woman, Governor Wilson made it clear that his decision was not based on "battered women's syndrome," but on "ineffective assistance of counsel."[99] He was presented with several other cases of battered women, but he declined their requests. Wilson told the press that in making his decision:

> The question is not whether victims of domestic violence have suffered . . . The question is whether it is the function of either the criminal law or the clemency process to absolve them of personal responsibility if they choose to take a human life—even the life of a vicious abuser—when there is available the option of taking another course to escape the abuse.'[100]

Wilson further elaborated:

> The test of whether clemency should be considered in cases where the request is based on [battered women syndrome] must be: Did the petitioner have the option to leave her abuser, or was the homicide realistically her only chance to escape? The test is a narrow one . . . and must be . . . to avoid the manipulation of [battered women syndrome] as a rationalization for cold-blooded, premeditated murder.[101]

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96. USA TODAY, Feb. 13, 1992, at 5A.

97. *See* Maura Dolan, *Court Ruling Aids Women Who Kill Batterers; Trials: By Clearing Way for Expert Testimony on Syndrome, Jurists Make it Easier for Domestic Violence Victims to Win Acquittals*, L.A. TIMES, Aug. 30, 1996, at A1 (citing Governor Wilson reporting that the California Supreme Court decision was a victory for domestic violence victims who fight back, by making it easier for battered women who kill their abusers to prove they acted in self-defense and to win acquittals at trial).

98. *See* Greg Lucas & Teresa Moore, *Wilson Grants Clemency to 2 Battered Women: Petitions Denied for 14 Other Female Petitioners*, S.F. CHRON., May 29, 1993, at A1.

99. *Wilson Commutes Sentence of Woman Who Killed Husband*, ORANGE COUNTY REGISTER (Cal.), Nov. 7, 1998, at A04.

100. *See* Lucas & Moore, *supra* note 98..

101. *See* Seth Mydans, *Clemency Pleas Denied in 14 Abuse-Defense Cases*, N.Y. TIMES,

Governor William Weld of Massachusetts commuted the sentence of Eugenia Moore, one of the "Framingham Eight," in 1993.[102] Speaking on behalf of the governor, Weld's chief counsel, Robert Cordy, said that Weld made his decision because the pardon board had voted unanimously in her case and because "the evidence supporting her was strong and clear cut."[103] Governor Romer of Colorado provided relief for four women: Gertrude Reed, Debra Muniz, Hope Gudowski, and Catherine Laughlin. Explaining his power to commute, Romer commented "it allows us to consider mercy for those women trapped in abusive and life-threatening relationships who reasonably believed they had no way out."[104] When Florida Governor Lawton Chiles commuted the sentence of Kimberly Soubielle, the first battered woman in his administration to receive clemency, he asserted, "This action is a recognition that battering of women is a tragic reality that affects women in every walk of life. And the circumstances of this particular case indicate it played a considerable role in the actions of Kimberly Soubielle."[105] Chiles was also clear that he was not promoting self-help: "We certainly don't condone acts or crimes of violence, just as we do not condone crimes of domestic violence."[106] Chiles' general counsel stated that the governor did "recognize the syndrome could be a significant

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May 30, 1992, at 21 (stating that Governor Gray Davis, Wilson's successor, permitted the parole of a woman convicted of killing her abusive boyfriend). Davis was known for his 'no parole' position. *See id.*; *see also* Hallye Jordan, *Gov. Davis Revising 'No Parole' Policy as Public Opinion Relaxes*, SAN JOSE MERCURY NEWS, Oct. 28, 2000, *available at* LEXIS K1077 (quoting Davis as stating that, "On rare occasions, a case arises in which we must give weight not only to extraordinary and compelling circumstances, but to legal defenses adopted in law since the original jury verdict.").

102. *See Women's Group to Show Film on Framingham Eight*, PATRIOT LEDGER (Quincy, Mass.), Oct. 14, 1994, at 10F (emphasizing the importance of educating men and women in the community that domestic violence is wrong and that victims are not responsible for their partners' violence). The "Framingham Eight" were a group of eight women sent to state prison after killing their abusers. *Id.*

103. *See* Fox Butterfield, *Parole Advised for Woman who Killed Abusive Partner*, N.Y. TIMES, Jan. 21, 1993, at A18. In 1991, Governor Weld changed commutation guidelines so that the Pardons Advisory Board would consider petitions from women claiming abuse. *See* Toni Locy, *Commutation Vote Due for Governor's Council*, BOSTON GLOBE, Apr. 28, 1993, at 25. Seven of the eight women known as the Framingham Eight had their sentences commuted. *See* Francie Latour, *Happy Endings Elude the Framingham Eight: After Celebrity Glare, They Run into New Walls*, BOSTON GLOBE, Feb. 15, 1998, at A1 (discussing the difficulties encountered by the Framington Eight in striking a balance between self-forgiveness and taking responsibility after their sentences were commuted).

104. Kirk Mitchell, *4 Killers Win Clemency: Romer Cites Abuse they Endured*, DENV. POST, Jan. 12, 1999, at A01.

105. *See* Debbie Salamone & Diane Sears, *Husband's Killer Regains Her Freedom; Soubielle said a New State Policy gives Hope for Women Imprisoned for Killing Abusive Mates*, ORLANDO SENTINEL TRIB., Mar. 11, 1993, at B1.

106. *Id.*

factor . . . it's a very complex one."[107] In 1996, Governor Brereton Jones of Kentucky explained to a national television audience that he had commuted the sentences of nine Kentucky women because "[t]hese people were unjustly incarcerated."[108] That same year New Hampshire Governor Steve Merrill granted June Briand a conditional pardon and remarked: "She's a different person than she was when she committed the crime."[109] He also noted, "There is sufficient evidence of physical and emotional abuse to constitute a finding of what is commonly known as battered women's syndrome."[110] Two days before Christmas of the same year, Governor George Pataki of New York shortened the sentence of Charlene Brundidge from "fifteen years to life" to the ten years she had already served.[111] Pataki's remarks included the following: "The extraordinary powers of clemency allow me to exercise compassion and to recognize that Charlene Brundidge's crime was an aberrant act in an otherwise law abiding and productive life, an act that was a direct response to her history of domestic abuse."[112] Governor Jim Edgar of Illinois granted clemency to Guinevere Garcia, a battered woman who was to be executed.[113] Edgar reduced her sentence to life in prison without parole and insisted, "I have concluded that the punishment decreed for her was not typical . . . Horrible as was her crime, it is an offense comparable to those that judges and jurors have determined over and over again should not be punishable by death."[114] In the case of another woman who had been convicted of plotting to kill an abusive husband, who admitted that he had battered her for over a decade, Edgar commented through his press office that the woman "had served enough time." Before leaving office, Oregon Governor

107. Sharp, *supra* note 81.

108. Fran Ellers, *Jones Explains Commuted Sentences, Governor Abuse Victims on 'Donahue'*, COURIER-J. (Louisville, Ky.), Mar. 15, 1996, at 09B (referring to Governor Jones' statement that he was moved by a quilt he had seen that the women had made in prison that explained their plight).

109. *See N.H. Woman who Killed Husband Pardoned; June Briand has Served Nearly 10 Years For Shooting James Briand in 1987,* PROVIDENCE J.-BULL., Dec. 5, 1996, at 3A.

110. *See Killer Briand Wins Pardon, 'Totally Rehabilitated' Prisoner will be in Work-Release Program by April,* UNION LEADER (Manchester, N.H.), Dec. 5, 1996, at A1.

111. *See* Winifred Yu & John Caher, *Battered Woman Given Clemency,* TIMES UNION (Albany, N.Y.), Dec. 24, 1996, at A1 (marking the first time ever that a New York governor has viewed domestic violence as a mitigating factor in murder).

112. Raymond Hernandez, *7 Prisoners Get Clemency From Pataki*, N.Y. TIMES, Dec. 24, 1996, at B1 (noting that Governor Pataki referred to Charline Bundridge as an "exemplary prisoner").

113. *See Governor Stops Woman's Death on Day of Execution* (NPR radio broadcast, Jan. 16, 1996).

114. *See id.*

Barbara Roberts commuted the sentence of one woman and told the legislature that the prisoner was a battered woman, who had a dual diagnosis of post-traumatic stress disorder and battered woman syndrome.[115]

The chart below summarizes the reported reasons for governors' granting clemency to women who claimed that they were abused by the person against whom they defended themselves.

Table 1

Ashcroft, John (R) – MO								X	X
Brandstad, Terry (R) – IA							X		
Celeste, Richard (D)- OH							X	X	X
Chiles, Lawton (D) – FL							X		
Davis, Gray (D) – CA							X	X	
Edgar, Jim (R)— IL			X	X		X			
Jones, Brereton (D) – KY		X				X			X
Locke, Gary (D) – WA							X		
Merrill, Steve (R) – NH							X		
Pataki, George (R) - NY					X		X		

115. *See* Phil Mansion & Cheryl Martinis, *Roberts Commutes Woman's Sentence*, OREGONIAN (Portland, Or.), Jan. 10, 1995, at A01.

Roberts, Barbara (D) – OR							X		
Roemer, Charles (R) – LA				X					
Romer, Roy (D) – CO					X				
Schaefer, William (D) – MD				X				X	
Weld, William (R) – MA							X		
Wilson, Pete (R) – CA	X	X			X	X	X		

Most of the governors (nine) characterized their actions as a response to women who were trapped in relationships because of a mental deficiency, a "syndrome." The second largest category (four) was an admission that the women were unable to get the full story of abuse before a jury. Those governors indicated that "justice" required them to act. Two governors cited mercy and/or compassion and three felt that the punishment was either too severe (a proportionality concept) or that the women had served enough time. The majority of the reported reasons for clemency were linked to excusing the actions of the women because of their circumstances (a psycho-social explanation) and a failure of the legal system to properly hear or weigh the factors involved that led to the commission of the act for which the women were incarcerated. The closest public admission by a governor that battered women were not just excused, but perhaps justified in protecting themselves from imminent danger of death or bodily harm, the legal standard for self-defense,[116] came from Governor Jones of Kentucky.

No reasonable person would suggest that criminal behavior should not be sanctioned and deterred. However, it is not a crime to protect

116. *See* CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE 37 (1989) ("The law of self-defense was very early set in its course of ignoring the one situation where a woman's life was most apt to be put at risk: a lethal assault by her husband."); Phyllis L. Crocker, *The Meaning of Equality for Battered Women who Kill in Self Defense*, 8 HARV. WOMEN'S L.J. 121, 153 (1985) (concluding that battered women "kill their husbands in self-defense based upon a reasonable perception of danger and imminent bodily harm"). Battered women are entitled to an equal opportunity to present their claims and to have their claims equally judged. *See id.*; 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, 45-56 (1986) (asserting that battered women who kill their husbands should be permitted to present the abuse suffered as an affirmative defense in all cases rather than merely as a justification).

oneself within the boundaries of the law. The question is not simply whether victims who strike back should be held to a legal standard of reasonableness.[117] The first issue for a battered woman, who has fought to protect herself, is how the law will be applied to her case in such a way that the mere fact that she is a battered woman is not a proxy for unreasonableness. The second dilemma is, if the criminal justice system fails to fully appreciate the circumstances of a battered woman and she is incarcerated must the last legal and political forum of appeal (i.e. the governor) be blind and turn a deaf ear because of political inconvenience?

Despite the fact that governors may be morally, legally and politically justified in providing the requested relief, no governor wants to make the mistake of setting free a person who is likely to kill again. There is no guarantee that a released offender will never fall from grace. When a parole board or governor considers whether to recommend or reduce the sentence of an offender, release a convicted person, or consider a pardon, especially for someone who has taken a life, risk of future harm to the public by the convict is one of the most important criteria. The next section examines the track record of the Ohio women since their release[118] to determine whether, to date, the risk[119] was worth taking.

117. *See generally* SCHNEIDER, *supra* note 7, at 79-86 (discussing the gender bias inherent in the reasonableness standard).

118. One woman remains in prison. Her sentence was reduced from death to life.

119. In other contexts, policymakers making decisions are aware that taking any given action will involve some risk. The issue then becomes how much risk is tolerable.

V. JUST THE FACTS MA'AM: RECIDIVISM AND CLEMENCY: REVOLVING DOORS, OR RESTORED LIVES?

A roll of the dice[120]

The United States has more people in prison than any other industrial country.[121] We lock up and execute persons convicted of crimes to punish wrongdoers, to ensure our safety by incapacitating them or removing them from among the living, to deter them and others from committing crimes, and lastly to rehabilitate. While most offenders of the law do return to society, many of them also return to prison.[122]

Statistics about recidivism have been somewhat elusive and confusing. The last study on the subject by the U.S. Justice Department was conducted in 1989.[123] This research collected data on prisoners released in 1983.[124] The conventional wisdom is that among adults, the recidivism rate hovers at around sixty percent.[125] These statistics include re-arrests,[126] reconvictions, and returns to

120. Jodi Nirode & Alan Johnson, *Celeste Clemencies Revisited Recidivism Rate Law, But Ex-Governor's Actions still Troubling to Some*, COLUMBUS DISPATCH, July 28, 1996, at 01A (quoting Governor Celeste as he described gubernatorial clemency). Five years after Celeste granted sixty-seven clemencies, only five of persons had returned to prison, though none for violent crimes. *See id.* He cites this low recidivism rate as proof that the clemency process works. *See id.*

121. *See* ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2000 1 (2001) (indicating that, as of December 31, 2000, there were 1,381,892 prisoners under Federal or State jurisdiction), http://www.ojp.gov/bjs/pub/pdf/p00.pdf.

122. *See* ALLEN J. BECK & BERNARD E. SHIPLEY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 1 (1989) (indicating that 41.4% of prisoners released eventually returned to prison), *available at* http://www.ojp.gov/bjs/pub/pdf/rpr83.pdf.

123. *See id.*

124. The Bureau of Justice Statistics ("BJS") has collected new data on recidivism by tracking specific individuals in twenty states. That report is expected to be released in 2002.

125. *See, e.g.*, BECK & SHIPLEY, *supra* note 122, at 1 (stating that of the 108,580 persons released from prison in eleven states in 1983, representing more than one-half of all released state prisoners that year, an estimated 62.5% were rearrested for a felony or serious misdemeanor within three years).

126. When discussing these criteria with BJS officials, I questioned the use of the rearrest category. Being arrested only means that one is suspected of wrongdoing. In certain communities, racially motivated arrests and rearrests are the subject of controversy. *See* David A. Harris, *The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters,* 84 MINN. L. REV. 265, 318 (1999); *see also* DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999), *available at* http://www.archive.aclu.org/profiling/report/index.html; William Raspberry, *Racial Profiling Definitely is a Problem*, TIMES UNION (Albany, N.Y.), Dec. 7, 1999, at A11; David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Perpetual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 561-69 (1997) (detailing studies in Florida, Maryland, Illinois, and Colorado); Angela J.

prison.[127] In years past, this figure included a return to prison for any offense, including technical probation and/or parole violations. Research also reveals that persons who initially commit property-related crimes will more likely than not violate property laws a second time, if they re-offend again. However, when a person imprisoned for committing a violent offense is rearrested for a property crime, officials reporting the recidivism data typically fail to make a significant distinction—that although a released offender had returned to prison, and therefore lapsed in his or her obligation to be law-abiding, the re-offense was not for a repeated violent crime. This accounting procedure has made it difficult to precisely determine which crimes are actually being repeated by the same persons. Despite flaws in the collection of the data, officials maintain that recidivism is related to a prisoner's age at the time of release,[128] the amount of education the person obtained before being arrested,[129] and whether the offender committed a property crime or violent offense.[130] If a person convicted of murder is rearrested, he/she would more likely return to prison for committing the same type of crime.[131] However, the 1989 study indicated that re-arrests for homicide represented only about 6.5% of the recidivists, as compared to larcenists who were more than a third of those returning to prison.[132] In 1999, another Bureau of Justice statistical study indicated that 52% of the women discharged from prisons in eleven states in 1983 were rearrested.[133] Thirty-nine percent of the women were reconvicted within three years, and 33% were returned to prison.[134] In these cases, "prior arrest history was an important predictor of

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Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997) (describing "Driving While Black" syndrome and citing Michael A. Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1). Because being arrested does not mean that one has actually done anything wrong, presuming recidivism on that criterion is not precise and further stigmatizes a group of persons who have yet to be proven guilty of another crime.

127. *See* BECK & SHIPLEY, *supra* note 122, at 1 (noting how in 1993, 62.5% of state-released prisoners were rearrested for felonies or serious misdemeanors, 48.6% were reconvicted, and 41.4% returned to prison).

128. *See id.* at 5 (noting that the older the prisoner, the less likely s/he would be re-arrested). *Id.*

129. *See id.* (revealing that high school graduates and those who had spent some time in college had lower rates of recidivism).

130. *See id.*

131. *See id.*

132. *Id.* at 6.

133. *See* LAWRENCE A. GREENFELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 11 (1999), *available at* http://www.ojp.gov/bjs/pub/pdf/no.pdf.

134. *See id.*

post-prison recidivism."[135]

When the Ohio project on battered incarcerated women was underway, more than 400 women in three Ohio female prisons were serving time for violent felony crimes.[136] Of that number 123 women filed petitions asking for clemency because of battering.[137] Prison officials collected demographic data on ninety-two of the petitioners.[138] The demographics of those women included the following: the ages of the women ranged from twenty to seventy-two; 37% had completed high school or attained high school equivalency; one woman had a college degree; 54% of the women were African-American, 37% were white and 1% Latina; 58% had two or more children; 45% had no prior arrests, 63% had no prior convictions; 83% had sentences ranging from twenty-five years to life in prison; in 43% of the cases, there were witnesses to the incident that led to their incarcerations; 88% had no prior reports of domestic violence to police; and 90% had no record of being treated at hospitals for their injuries.

Twenty-eight requests for clemency were granted.[139] Demographic information concerning the battered women in Ohio prisons that were granted clemency is listed in the following tables.[140]

Table 2

135. *Id.* (observing that women with only one prior arrest made up 21% of those rearrested within three years).

136. In Ohio, the OHIO REV. CODE ANN. lists violent crimes as follows:

2903.01 Aggravated murder; 2903.02 Murder; 2903.04 Voluntary manslaughter; 2903.04 Involuntary manslaughter; 2903.11 Felonious Assault; 2903.12 Aggravated Assault; 2903.13 Assault; 2903.15 Permitting Child Abuse; 2903.21 Aggravated Menacing; 2903.21.1 Menacing by Stalking; 2903.22 Menacing; 2905.01 Kidnapping; 2905.02 Abduction; 2905.11 Extortion; 2907.02 Rape; 2907.03 Sexual Battery; 2907.05 Gross Sexual Imposition; 2909.02 Aggravated Arson; 2909.03 Arson; 2911.01 Aggravated Robbery; 2911.02 Robbery; 2911.11 Aggravated Burglary; 2911.12 Burglary; 2917.01 Inciting to violence; 2917.02 Aggravated Riot; 2917.03 Riot; 2917.31 Inducing Panic; 2919.22 Endangering Children; 2919.25 Domestic Violence; 2921.03 Intimidation; 2921.04 Intimidation of Attorney, Victim or Witness; 2921.34 Escape; 2923.161 Improperly Discharging a Firearm at or into Habitation or a School Safety Zone.

Felonious Sexual Penetration in violation of former section 2907.12 of the OHIO REV. CODE.

137. These women were serving time for homicide.

138. The Ohio Adult Parole Authority concluded that eighteen of these women should be granted clemency based on battered woman syndrome.

139. There would have been twenty-nine, but one woman died in prison before the process was completed.

140. Special thanks to Dr. Maureen Black, Deputy Director, Office of Policy, The Ohio Department of Rehabilitation and Correction in assisting with the collection of this data.

Abbott	0	0	GED	5	White	47	No	Life
Adkins	1	1	GED	5	Black	41	Yes	Life
Alford	0	0	11th	0	White	45	No	6 to 25
Allison	0	0	12th	2	Black	33	No	5 to 25
Asberry	N	N	11th	6	Black	32	No	8 to 25
Cole	0	0	H.S.	2	Black	37	No	Unknown
Cooper	8	3	9th	4	White	47	No	15
Crawford	2	2	11th	6	Black	36	No	5 to 25
Davis	0	0	10th	1	Black	29	No	5 to 29
Fredrick	0	0	GED	4	White	62	No	2 to 10
Hafford	2	2	9th	3	Black	36	Yes	15 to life
Hawkins	1	1	9th	0	White	24	Yes	15 to life
Johnson	0	1	16 yrs	0	Black	53	No	5 to 25
Lampkin	0	0	12 yrs	3	Black	49	No	20 to life
Martin	0	0	12 yrs	3	Black	61	No	life
Miller	N	N	GED	0	White	32	Yes	5 to 25
Moran	2	2	9 yrs	2	Black	56	?	15 to life
Redding	0	0	12 yrs	2	Black	39	?	15 to life
Reynolds	Y	Y	6 yrs	0	White	38	Yes	10 to 25
Robertson	4	4	10 yrs	1	Black	31	Yes	8 to 25
Rubalcaba	2	2	6th	2	Latina	30	No	8 to 25
Taylor	1	N	6th	0	White	34	No	7 to 25
Taylor	1	0	GED	0	Black	48	No	5 to 25
Taylor[141]	-	-	-	-	-	-	-	-
Thomas	0	0	12th	1	Black	36	No	15 to life
Tourlakis	2	0	11th	2	White	49	No	Unknown
Watson	0	0	10th	2	White	38	Yes	7 to 25
Zirkle	2	0	GED	3	White	35	No	15 to life

141. No data is available.

Table 3

Arrest Records:	No Prior Arrests	(14) 52%
	1 Prior Arrest	(5) 18%
	More than 1 Prior Arrest	(8) 30%
Previous Convictions:	No Prior Convictions	(17) 63%
	1 Prior Conviction	(4) 15%
	More than 1 Prior Conviction	(6) 22%
Level of Education:	College Graduate	(1) 3%
	High School or Equivalent Degree	(12) 44%
	6th Grade to Some High School	(14) 52%
Number of Children:	Two or More Children	(17) 63%
	1 Child	(3) 11%
	Childless	(7) 26%
Race:	African American	(15) 56%
	White	(11) 41%
	Latina	(1) 3%
Age:	25 Years of Age	(0) 0%
	26-49 Years of Age	(23) 85%
	50+ Years of Age	(4) 15%
Prior Reports of Domestic Violence:	No Prior Reports	(18) 67%
	Prior Reports	(7) 26%
	Unknown (?)	(2) 7%

Nearly two-thirds of the women had never been convicted of any offense prior to their incarceration for homicide. Most were mothers with several children, and a disproportionate number were minorities. Police reports of intervention were found in a small percentage (26%) of these cases. No one can predict, based on demographics alone, what will be the likelihood of any battered woman responding to a death threat with lethal force. More often than not, it is the battered woman who is killed. Social class (based on education and economics) may have been a factor in obtaining resources and relief. Today there are more interventions available.[142] However, while spousal homicide rates are currently in decline, reported physical aggression against white women by their intimate associates has risen over the past few years.[143] No one is sure how to

142. *See* Ammons, *Dealing With The Nastiness*, *supra* note 4, at 897-905, 914 (discussing the development of the law to deter violence against women at the hands of their spouses and others).

143. *See* LAWRENCE A. GREENFIELD ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR

prevent and/or stop batterers from abusing.[144]

There have been numerous inquiries about the Ohio women who were granted clemency. Some of the media calls were an effort to sensationalize the issue and provide entertainment in the form of movies of the week. Most of the calls were in connection with cases that were pending before a governor in another state.[145] The most frequently recurring questions from the media are, "Have these women killed anyone else since their release from prison?" and "What is the homicide recidivism rate for battered incarcerated women who are granted clemency?"

The Ohio Department of Rehabilitation and Corrections recently completed a ten-year study on recidivism. It found that most women who were released in 1991 (57.4%) have not returned to prison for any new offense, including technical violations.[146] Forty-six percent of the male releases have not been re-incarcerated. In sum, the overall recidivism rate for female offenders is about 42%, and for male offenders about 54%. If the types of commitment offenses are isolated, female offenders released in 1991, after having served time for violent crimes were returned to prison for another violent crime in nearly 23% of the cases. Thirty-eight percent of the male violent offenders released repeated violent crimes. If technical violations are factored, the overall recidivism rate for violent female and male offenders is 34% and 52%, respectively.

Twenty-seven of the twenty-eight women who were granted clemency were released during this same time period.[147] They have a zero percent recidivism rate for committing a similar felony murder. One woman was involved in property-related offenses (petty theft, receiving stolen property) and one woman was charged with a drug-related crime. One of the women is deceased, and another woman

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FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS (1998), *available at* http://www.ojp.gov/bjs/pub/pdf/vi.pdf.

144. *See* Ammons, *Dealing With the Nastiness*, *supra* note 4, at 914-15 (noting that there are questions as to what actually works in getting batterers to change their bahavior).

145. Within days after the Ohio project was completed, I received calls from advocates from Maryland and New York. Weeks later I briefly consulted with persons working with or for the late Governor Lawton Chiles of Florida. In the fall of 1991, I appeared before a California Assembly committee at Frontera Prison in California to talk about this issue in connection with an attempt to have Governor Pete Wilson review cases. Representatives working on behalf of battered women wanted to know how best to tell their clients' stories and what evidence would work best to persuade those who would make decisions about the women's fates.

146. A "technical violation" is a violation of a condition of parole (a behavior which is not itself a crime) resulting in revocation of parole and re-imprisonment.

147. Beatrice Lampkin was removed from death row, but remains incarcerated.

was employed by the Ohio Department of Rehabilitations and Corrections. The other women are living productive lives in their communities.

CONCLUSION

> *Punishment is the most dramatic manifestation of civil government power. Whom and how a society punishes are key political questions that are indicative of national character.*[148]

During the last decade of the twentieth century, society became more informed about domestic violence.[149] In this new century, challenges continue as to how to prevent loss of life and great bodily harm inflicted by intimates on one another. The challenge is daunting. No one can predict what another human will do when faced with an issue of survival. What should be predictable is that the criminal justice system will deal fairly with those individuals whose cases are being adjudicated. Many of the formal legal barriers to getting the truth of a battered woman's story told have been removed. However, other obstacles exist and women are still being violated because of their gender.

Clemency cannot and should not be counted on as the cure for responses to domestic terrorism that result in women being imprisoned for trying to save their own lives. It is a remedy that is used arbitrarily, sparingly and sometimes begrudgingly. Questioning the judgment of any public official is a legitimate exercise and central to a democratic system of government. However, when governors mitigate injustice or extend mercy in these cases, what should be challenged is hyperbole, hysteria, hypocrisy and the notion (however subtle) that the female half of humanity should be held to a higher standard when trying to save their own lives because of past or present intimate relationships.

148. *See* Dennis M. Cariello, *Forgiveness and The Criminal Law: Forgiveness Through Medicinal Punishment*, 27 FORDHAM URB. L.J. 1607, 1607 (2000).

149. *See* Ammons, *Dealing With The Nastiness, supra* note 4, at 914 (commenting that in the year 2000 people have a better understanding of how to help victims of domestic violence).