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Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women who Kill

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Florida Law Review

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OF MERCIFUL JUSTICE AND JUSTIFIED MERCY: COMMUTING THE SENTENCES OF BATTERED WOMEN WHO KILL

*Joan H. Krause**

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> A woman who defends herself against a man's violence is either a criminal or crazy; our society is very reluctant to say that she is ever justified.[1]

> It is interesting to note that governors' consciences are often good guides to injustice; like bird dogs, their pardons point to questionable legal practices.[2]

I. INTRODUCTION

In the past two years, an unprecedented amount of attention has been focused on the problem of domestic violence. The topic first made headlines in June of 1994, with the murder of Nicole Brown Simpson and the subsequent trial of her ex-husband, former football superstar Orenthal James (O.J.) Simpson.[3] As the mainstream media suddenly "discovered" the problem of domestic violence, it rushed to showcase "the system's utter failure to protect women."[4] In response, an increasing number of women sought help, at times straining the limited resources of existing shelters.[5] By the end of 1994, the federal Violence Against Women Act[6] promised funding for domestic violence prevention,[7] training for law enforcement personnel and others who deal

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1. CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 12-13 (1989).

2. KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 223 (1989).

3. Maria L. La Ganga & Elizabeth Mehren, *Simpson Case Compels Nation to Look at Domestic Violence*, L.A. TIMES, June 20, 1994, at A1.

4. *Spousal Abuse Goes Public*, ATLANTA CONST., June 23, 1994, at A16.

5. *See, e.g.*, Ros Davidson, *Bruised Egos and Battered Wives*, THE HERALD (Glasgow), Oct. 3, 1994, *available in* LEXIS, News Library, PAPERS File (noting that phone calls to a Los Angeles-area battered woman's shelter increased 25% due to the Simpson case, and many women were turned away for lack of space); Maureen O'Donnell, *From Corner Bars to Law Schools, Theories Abound*, CHICAGO SUN-TIMES, Sept. 25, 1994, at 32 (noting that calls to the Chicago Abused Women Coalition jumped 20% after Nicole Simpson's murder and were expected to increase again during the Simpson trial); Jacqueline Shaheen, *Helping Victims of Domestic Violence*, N.Y. TIMES, Aug. 14, 1994, § 13, at 3 (reporting that the increased number of women calling New Jersey shelters in response to the Simpson publicity strained the state's limited domestic violence services).

6. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 42 U.S.C.A.). This legislation was enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

7. 42 U.S.C.A. § 3796gg(b)(3) (West 1994). Congress allocated $800 million for fiscal years 1995 to 2000 in order to combat violent crimes against women. *See id.* § 3793(a)(18)

with battered women,[8] and a new civil rights cause of action for victims.[9] Yet for all the recent attention to the terrible costs of domestic violence and to the need for increased preventive resources, relatively little attention has focused on another aspect of the problem: what happens when a battered woman fights back against her batterer—and kills?

A. Battered Women Who Kill

Domestic violence is much more common than was once believed.[10] Although the possibility of under-reporting makes most statistics suspect, even conservative estimates suggest that women are abused in twelve percent of marriages, and some commentators estimate that up to fifty percent of women will be victims of abuse during their lives.[11] Women kill far less often than men do, but they usually kill their mates in the course of defending against violent assaults.[12] Yet such women

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(providing authorization of appropriations); *id.* § 3796gg.

8. *Id.* § 3796gg(b)(2).

9. *See* Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, 108 Stat. 1941 (1994) (codified at 42 U.S.C.A. § 13981(c) (West Supp. 1994)). Other recent developments include the creation of the Clothesline Project, a visual memorial to abused women, *see* Kate Folmar, *Clothesline Project Brings Message of Violence to Capitol*, ROCKY MOUNTAIN NEWS, Apr. 8, 1995, at 40A; the release of American Medical Association guidelines on recognizing and treating sexual assault and family violence, *see* Richard Saltus, *AMA Issues Guidelines on Detecting, Preventing Sex Abuse*, BOSTON GLOBE, Nov. 8, 1995, at 20; and a growing recognition of the prevalence of domestic violence among collegiate and professional athletes, *see, e.g.*, Rick Warner, *Football's Violence Can Spill into Private Lives*, DETROIT NEWS, Sept. 24, 1995, at A12.

10. 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, 7-8 (1994).

11. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 10-11 (1991). This Article addresses the issue of battering in heterosexual relationships. For a discussion of the complex issue of lesbian battering, see *id.* at 49-53.

12. GILLESPIE, *supra* note 1, at xii. In the United States, an estimated 500 women kill their spouses each year. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 397 (1991). When the category of victims is expanded to include women with abusive companions, the National Clearinghouse for the Defense of Battered Women estimates that between 800 and 1000 women each year are charged with murder. *See* Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 366 n.16 (1992). Moreover, although these women usually plead self-defense, they often are convicted of murder or manslaughter. *See, e.g.*, Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 580 (1990). For recent estimates of the number of women imprisoned in the United States for killing male "intimates," see Ammons, *supra* note 10, at 5-8.

often have had an extremely difficult time convincing judges and juries that they legitimately were acting in self-defense.[13]

Until the feminist activism of the late 1960s and early 1970s, domestic violence was not acknowledged to be a widespread—or even a public—problem.[14] Twenty years later, a battered woman still faces a skeptical legal system: judges who refuse to grant restraining orders against abusive husbands, police who will not respond to marital "spats" or enforce restraining orders, prosecutors who refuse to charge abusive men, and a severe shortage of adequate shelters and counseling facilities.[15] Yet when fighting back appears to be the only way to escape continued violence, the battered woman often finds that these same legal resources are all too readily invoked against her.

For years, advocates for battered women have sought changes in both the law and the use of public resources to address the problem of domestic violence. First, they have sought to increase public awareness of the issue, to increase the resources spent to stop the violence before it escalates, and to increase legal receptiveness to the woman's requests for help.[16] Second, they have supported the use of expert testimony in trials of battered women who kill in self-defense.[17] Finally, and more recently, advocates have sought to convince state governors to use executive clemency for those women who repeatedly have been failed by the legal system.[18]

A few days before Christmas of 1990, outgoing Ohio Governor Richard Celeste commuted the sentences of twenty-five women who had been convicted of killing or assaulting their abusive mates.[19] Two

13. *See, e.g.*, Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 647 (1980) (arguing that gender bias in the law of self-defense precludes a woman from asserting a self-defense claim). For recent analyses of domestic violence issues in the law, see *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues*, 58 ALB. L. REV. 959, 959-1306 (1995).

14. *See* Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 11-12 (1986). The first wave of public outcry against domestic violence occurred in the mid-nineteenth century. *Id.* at 11. However, these gains "were largely illusory," as violence and judicial indifference to the legal issues of spousal abuse remained largely unchallenged until the latter half of the twentieth century. *Id.* at 12.

15. *See, e.g.*, Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 76-87.

16. *See, e.g.*, Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 102-08 (1983).

17. *See, e.g.*, Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 588 (1988).

18. *See* Ammons, *supra* note 10, at 53.

19. *Governor Commutes Women Inmates' Sentences*, UPI, Feb. 20, 1991, *available in*

months later, Maryland Governor William Donald Schaefer commuted the sentences of eight battered women.[20] Both governors became the focus of an intense media debate invoking opposing views of justice, mercy, and gender roles. "Only Guilty of Being Scared," ran one headline;[21] "Mr. Schaefer Batters Justice," countered another.[22] Were these pardons "a total betrayal of how the jury system is supposed to work," as opponents alleged?[23] Or, as Governor Schaefer explained, was it simply "the right thing to do"?[24]

This Article examines the debate over the legitimacy of executive clemency for battered women who kill.[25] I believe that the motivations behind the governors' actions were laudable, and, for the most part, that their actions were justified by commonly accepted theories of punishment. However, there are several obstacles to the public acceptance of such commutations, reflected in much of the bitter media criticism. For example, executive clemency, by its very nature, raises serious separation-of-powers issues. By freeing women who had been convicted of murder, Governors Celeste and Schaefer set aside the verdicts and appeared to second-guess the jury system.[26] To the extent that any exercise of executive clemency sets aside judicial determinations, however, this criticism is not unique to the release of battered women who kill. Yet despite the inherent usurpation of judicial power, clemency has long been accepted as a valid exercise of executive power.[27] Unless we are willing to abolish executive clemency in its entirety, the separation-of-powers argument should not, on its own, invalidate the governors' actions.

A related problem concerns the timing of the clemency actions. In Ohio, Governor Celeste took action only after both the Ohio courts and the legislature had revised the relevant laws to allow the admission of

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LEXIS, News Library, UPI File; Lee Leonard, *Celeste Commutes Sentences of 25 "Battered" Women Felons*, UPI, Dec. 22, 1990, *available in* LEXIS, News Library, UPI File.

20. Ammons, *supra* note 10, at 3-4.

21. *Only Guilty of Being Scared: Ohio Governor Commutes 25 Sentences, Revives Battered Women Issue*, L.A. TIMES, Dec. 31, 1990, at B4 [hereinafter *Only Guilty*].

22. *Mr. Schaefer Batters Justice*, WASH. TIMES, Feb. 25, 1991, at E2.

23. Leonard, *supra* note 19 (quoting prosecutor Henry Hillow).

24. *Governor Commutes Women Inmates' Sentences*, *supra* note 19.

25. Thus far, clemency has been proposed most often for battered women who were unable to introduce evidence of the so-called "battered woman syndrome" at their trials, or were prevented from arguing that their actions were taken in self-defense. *See, e.g.*, *Only Guilty*, *supra* note 21, at B4. This Article generally will not address the propriety of clemency for women who were convicted after caselaw or statutory changes allowed the introduction of such evidence at trial.

26. *See infra* part IV.C.1.

27. *See infra* text accompanying notes 43-46.

expert testimony at the trials of battered women who killed their alleged abusers.[28] Had the imprisoned women been tried subsequent to these changes, they would have been able to present evidence of battered woman syndrome that was excluded at their original trials—although none would have been guaranteed an acquittal at trial.[29] Unfortunately, the relevant caselaw and legislation did not apply retroactively.[30] By choosing to review the cases of these women *because* they had been unable to take advantage of the new law,[31] Governor Celeste may single-handedly have given the changes retroactive effect, in contravention of the determinations of the other branches of government.

A different issue is raised by the Maryland commutations, which occurred *before* any such legal changes.[32] In this context, Governor Schaefer used executive clemency to encourage legal change and to invoke the weight of public opinion to pressure the legislature for action.[33] Apparently, the strategy worked; despite the considerable outcry regarding the commutations, the legislature did change the law.[34] Yet the bitter criticism leveled against Governor Schaefer suggests that it may be preferable to explore alternative means of influencing the legislative process, short of invoking clemency as a test of public opinion or to provoke a recalcitrant legislature to take action.

It is my belief that executive clemency is an appropriate means of granting relief to battered women who kill their abusers, and that such exercises of the clemency power comport with commonly accepted principles of retributive and utilitarian theories of justice. These principles provide a framework for analyzing when punishment or clemency may be appropriate. Careful attention to the requirements of such a framework and a careful examination of the Ohio and Maryland commutations may identify methods of improving the clemency process for battered women who kill their abusers. Ultimately, my message is two-fold: (1) state executives both *can* and *should* use accepted principles of justice to justify clemency for battered women who kill, but (2) there may be ways of structuring the clemency process so as to lessen the backlash against decisionmakers, advocates, and the women who receive clemency.

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28. *See Eleventh-Hour Clemency*, TIME, Dec. 31, 1990, at 17.

29. *See* Ammons, *supra* note 10, at 54-55 (discussing the arguments made against executive clemency).

30. *See* OHIO REV. CODE ANN. § 2901.06 (Anderson 1993).

31. *See* Nancy Gibbs, *'Til Death Do Us Part*, TIME, Jan. 18, 1993, at 44.

32. *Mr. Schaefer Batters Justice*, *supra* note 22, at E2.

33. *Id.*

34. Act of May 14, 1991, ch. 337, 1991 Md. Laws 2275 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (Supp. 1994)).

B. An Introduction to Clemency

The clemency power has been described as "an instrument of equity in the criminal law designed to promote the general welfare by preventing injustice."[35] Historically, American law has recognized several types of executive clemency.[36] A "pardon" is an executive action that mitigates or sets aside punishment for a crime; it is used most often to restore the reputation and civil rights of someone who has led an exemplary life subsequent to punishment.[37] "Amnesty," which usually is granted to a group of people, in essence "overlooks" an offense because the conduct served to benefit the public good.[38] "Commutation" substitutes a milder punishment for the one imposed; it does not remove the legal or moral guilt of the offender.[39] At the federal level, the United States Constitution vests the clemency power in the President,[40] and the majority of state constitutions vest similar powers in the state executive.[41] Clemency actions are generally nonreviewable, and "[r]egardless of the reasons an executive may have for granting clemency, the scrutiny of this discretionary act will be left to the political process rather than to the courts."[42]

Executive clemency, particularly the power to pardon, is by no means a modern concept.[43] Scholars have traced the pardon, and its sometimes tenuous relationship to criminal justice, back to the Babylonian Code of Hammurabi (the oldest known legal code), and have documented its use in the Old Testament and in the ancient Greek and Roman empires.[44] Historically, executive clemency has been used to

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35. Ammons, *supra* note 10, at 25.

36. For a more detailed discussion, see Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575-78 (1991).

37. *Id.* at 576.

38. *Id.*

39. *Id.* at 577. Although in some sense parole may be the immediate consequence of a commutation, it usually is considered to be a distinct system. *Id.* at 578. The last two types of clemency, of little relevance here, are "remissions" of fines and forfeitures, and "reprieves" (or "stays"). *Id.* at 577-78.

40. U.S. CONST. art. II, § 2.

41. Kobil, *supra* note 36, at 605. According to Professor Kobil, the clemency power in 29 states rests solely with the executive, with the remaining states vesting the power either jointly in the governor and an administrative body or in an administrative body alone. *Id.*

42. *See* Ammons, *supra* note 10, at 28-29.

43. *See* MOORE, *supra* note 2, at 15; Ammons, *supra* note 10, at 28.

44. MOORE, *supra* note 2, at 15. For a historical analysis of executive clemency, including how justifications for and formulations of clemency have changed over time, see Ammons, *supra* note 10, at 25-30; Carla A. Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHIL. 109, 111-14 (1991); Kobil, *supra* note 36, at 583-611; MOORE, *supra* note 2, at 15-86.

mitigate unduly harsh systems of punishment.[45] For example, in nineteenth century England, the liberal use of royal clemency served to soften the harsh system of criminal justice, and very few of the defendants convicted of the 200-odd capital offenses actually were executed.[46]

Yet, by its very nature, the clemency power exists in tension with the concept of separation of powers.[47] In an individual case, clemency overrides the conclusions of a judge or jury, and often of several appellate courts. Moreover, when clemency is granted on a "mass" scale, it may undermine the very structure of the criminal justice system. These concerns were reflected in much of the public criticism that followed the Ohio and Maryland commutations, most notably the claim that Governors Celeste and Schaefer disregarded the jury system and effectively gave battered women "the right to impose the death penalty" on their abusers.[48]

Part II of this Article describes the obstacles faced by battered women when invoking the traditional law of self-defense to explain why they killed their alleged abusers, and explains how expert testimony regarding the "Battered Woman Syndrome" has been used to counter some of these problems. Part III reviews the Ohio and Maryland experiences, including the harsh criticism to which both governors were subjected, and describes the more cautious approaches taken in other states. Part IV analyzes the role of clemency under a system of retributive justice and assesses the Ohio and Maryland actions against these philosophical criteria. Part V examines some of the reasons why these actions were so controversial, and suggests some considerations for improving future exercises of executive clemency for battered women who kill.

II. LEGAL BACKGROUND: BATTERED WOMEN WHO KILL

The images of battered women that emerge from empirical studies, clinical reports, and newspaper stories are of repeated physical, sexual, and psychological abuse:

> [T]hese women have been punched, kicked, strangled, burned, scalded, shot, and stabbed; attacked with guns, knives, razors, broken bottles, iron bars, and automobiles;

45. *See, e.g.*, Johnson, *supra* note 44, at 112-13.

46. *See* MOORE, *supra* note 2, at 17.

47. *See* Kobil, *supra* note 36, at 595-97.

48. *See, e.g.*, Janet Naylor, *Schaefer Releases Fears, Too*, WASH. TIMES, Feb. 21, 1991, at A1.

> and beaten with belts, chains, clubs, lamps, chairs, wrenches, and hammers. They have suffered cuts, bruises, lacerations, broken noses, broken bones . . . dislocations, miscarriages, serious internal bleeding, concussions, and subdural hematomas.[49]

Despite the fact that a relatively small percentage of abused women actually kill their abusers, public perceptions have been shaped primarily by sensationalized stories such as *The Burning Bed*.[50] Contrary to prevailing misconceptions, battered women who kill their abusers do not often "get away with murder."[51] The reasons why they often are convicted include the psychological effects of living in a state of "constant anticipatory terror,"[52] the legal requirements of self-defense, and general societal biases against battered women.[53]

A. The "Battered Woman Syndrome"

When faced with a battered woman who has killed her mate, the prosecutor, judge, and jury may wonder "Why didn't she leave?" After years of analyzing and treating battered women, Dr. Lenore Walker identified key elements of a syndrome that helps to explain how women become entrapped in abusive relationships.[54] Expert testimony about this syndrome has become an important but controversial means to explain a defendant's actions to a jury.

First, Walker adapted Dr. Martin Seligman's "theory of learned helplessness"[55] to the situation of battered women. Seligman demonstrated that laboratory animals subjected to random electrical shocks continue to behave passively and helplessly when subsequently given opportunities to avoid additional shocks.[56] Seligman posited that

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49. Ewing, *supra* note 12, at 581. For detailed descriptions of individual cases, see, e.g., ANGELA BROWNE, WHEN BATTERED WOMEN KILL 55-74 (1987) (providing firsthand accounts of "typical" domestic violence); CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 99-142 (1987); GILLESPIE, *supra* note 1, at 1-30.

50. FAITH MCNULTY, THE BURNING BED (1980).

51. *See* Naylor, *supra* note 48, at A1.

52. GILLESPIE, *supra* note 1, at 131 (quoting Dr. Elaine Hilberman).

53. *See* Schneider, *supra* note 13, at 647.

54. *See* Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525, 525 (1978).

55. Walker, *supra* note 54, at 526 (relying on several studies by Seligman and others). *See generally* MARTIN E. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1975) (presenting evidence to support the theory that anxiety and depression grow out of a feeling of helplessness and that this behavior must be learned).

56. Walker, *supra* note 54, at 526-27.

these animals had "learned" that they were helpless, a response that persisted even when they were given an opportunity to escape.[57] Walker theorized that women who repeatedly are abused similarly learn that they are helpless to change their situations, an attitude reinforced by stereotypical expectations of how families are expected to behave.[58] As Walker explained, "it becomes extraordinarily difficult for such women to change their cognitive set to believe their competent actions can change their life situation."[59]

Second, Walker described a three-stage "cycle of violence" that, combined with the effects of learned helplessness, works to trap the woman in the relationship.[60] The first, or "tension-building," stage involves verbal and minor physical abuse, with the woman attempting to placate her mate to prevent escalation.[61] The second phase, the "acute battering incident," is marked by a severe beating.[62] In the third stage of "calm, loving respite," the batterer is remorseful and apologetic.[63] According to Walker, this third phase becomes the woman's reinforcement for remaining in the relationship and forms the basis for her hope that the battering will end for good.[64] Over time, the periods of respite become shorter, and the stages of tension and violence escalate.[65] It is within this cycle of escalating violence that the battered woman kills in order to protect herself.

B. Self-Defense and Expert Testimony

If a woman kills her abusive mate while protecting herself from serious harm, a self-defense claim would appear to be appropriate.[66]

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57. *Id.* at 527.
58. *Id.* at 529.
59. *Id.*
60. *Id.* at 531-32; Ewing, *supra* note 12, at 582.
61. Walker, *supra* note 54, at 532; Scott G. Baker, *Deaf Justice?: Battered Women Unjustly Imprisoned Prior to the Enactment of Evidence Code Section 1107*, 24 GOLDEN GATE U. L. REV. 99, 102 (1994); Mira Mihajlovich, Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1259 (1987).
62. Walker, *supra* note 54, at 532; Mihajlovich, *supra* note 61, at 1259.
63. Walker, *supra* note 54, at 532; Baker, *supra* note 61, at 102.
64. Walker, *supra* note 54, at 532.
65. *See* GILLESPIE, *supra* note 1, at 133 (claiming that the contrition stage is better characterized as the "absence of tension or violence," and that the respite can never be complete because the woman must constantly look for the warning signs of returning tension); Rosen, *supra* note 14, at 40 n.165 (citing Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 9 (1982)).
66. Not all battered women proceed on a theory of self-defense. For example, Francine Hughes, whose story was dramatized in *The Burning Bed*, was acquitted on grounds of

Yet for various reasons, battered women often have been denied the use of this defense. Many legal scholars have blamed the inflexibility of traditional evidentiary rules and rigid definitions of self-defense for, in their minds, the unjust convictions of battered women who kill.[67]

1. Traditional Self-Defense

The doctrine of self-defense developed as a legal justification that, in limited circumstances, renders an otherwise criminal act of violence acceptable.[68] In order to limit this potentially widespread sanction of violence, the application of the doctrine was limited to a narrow set of circumstances.[69] Feminist scholars have charged that these limitations reflect the development of self-defense doctrine as "a law for men," designed to apply to the paradigm situations of sudden deadly attack or mutual combat.[70] Thus, they have argued, the law is unresponsive when *women* need to protect themselves.[71] Under traditional self-defense doctrine, a woman may defend herself only when she *reasonably*

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temporary insanity. Mahoney, *supra* note 11, at 35.

67. *See* GILLESPIE, *supra* note 1, at 50-92 (analyzing how the self-defense doctrine excludes battered women from its application); Rosen, *supra* note 14 (same). *But see* Schopp et al., *supra* note 15, at 47, 71-73 (arguing that the battered woman syndrome is not supported by clinical evidence and is not relevant to the issue of self-defense doctrine, although evidence regarding battering in general and the defendant's history of abuse remain relevant); David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 622 (1986) (questioning the validity of Walker's research and rejecting any application of the research to the law of self-defense). For recent analyses of the legal issues affecting battered women, see A. Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117 (1994); Deborrah Ann Klis, *Reforms to Criminal Defense Instructions: New Patterned Jury Instructions Which Account for the Experience of the Battered Woman Who Kills Her Battering Mate*, 24 GOLDEN GATE U. L. REV. 131 (1994).

The assumption that traditional concepts of self-defense exclude battered women was questioned in a detailed study by Professor Holly Maguigan, who concludes that the problem lies not in the doctrine of self-defense, but in how the doctrine is (mis)applied by trial judges. Maguigan, *supra* note 12, at 437. In addition, Professor Maguigan charges that the majority of battered women who kill do so during traditional "confrontations," and not in "nonconfrontational" ways (such as when the man is asleep). *Id.* at 397; *see also* Schopp et al., *supra* note 15, at 47 (arguing that standard self-defense doctrine can accommodate the relevant evidence of abuse).

68. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7, at 454-55 (2d ed. 1986); Rosen, *supra* note 14, at 25-27.

69. Rosen, *supra* note 14, at 27.

70. GILLESPIE, *supra* note 1, at 31-49 (referring to chapter entitled "A Law for Men"); *see also* Rosen, *supra* note 14, at 13 & n.11 (discussing the difficulties in applying self-defense to domestic violence). *But see* Maguigan, *supra* note 12, at 407-08.

71. *See* GILLESPIE, *supra* note 1, at 99; Rosen, *supra* note 14, at 34.

believes that it is *necessary* to use force against an *imminent* and *unlawful* threat of harm, and the amount of force used must be *proportionate* to the threatened harm.[72] In addition, many states require the defendant to retreat, historically "to the wall," before responding with force.[73]

Battered women have had trouble proving several of these elements. First, traditional self-defense law requires the amount of the defendant's force to be proportionate to the threatened harm;[74] thus, "[d]eadly force may not be used unless the actor reasonably believes that she is protecting herself against infliction of death or serious bodily harm."[75] Often, however, abusers attack with their hands, fists, or feet, or with objects not traditionally considered to be "deadly" weapons, such as chairs, cigarettes, and hairbrushes.[76] A woman who uses a gun or knife in response to such an assault may appear to use disproportionate force, and may be prevented from arguing self-defense. The traditional concept of self-defense does not recognize that hands, fists, and feet, not to mention various household objects, may indeed be deadly weapons when wielded by an enraged man who is much stronger than his victim.[77] Moreover, although many states are moving away from *per se* rules prohibiting the use of a weapon against an unarmed aggressor,[78] judges, juries, and prosecutors may retain traditional attitudes.

Second, self-defense may be invoked only when the actor reasonably believes that the threatened harm is imminent.[79] This requirement poses the greatest problem if the defendant acts when the abuser is not an immediate threat, such as when he is sleeping (*i.e.*, so-called "nonconfrontational" situations).[80] To require a battered woman to wait until the attack begins, however, may ignore her experience in the relationship.[81] For example, the woman may be aware of pre-assault symbols, such as heavy drinking, that would not signify imminent danger to outsiders.[82] In fact, the battered woman faces almost the

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72. LAFAVE & SCOTT, *supra* note 68, § 5.7, at 454; Rosen, *supra* note 14, at 34.

73. LAFAVE & SCOTT, *supra* note 68, § 5.7(f).

74. *Id.* § 5.7(b).

75. Rosen, *supra* note 14, at 28.

76. *See* GILLESPIE, *supra* note 1, at 57-58.

77. *See* State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977) (en banc); Rosen, *supra* note 14, at 34.

78. *See* Maguigan, *supra* note 12, at 417.

79. LAFAVE & SCOTT, *supra* note 68, § 5.7(d).

80. *See* Schopp et al., *supra* note 15, at 64.

81. *See* GILLESPIE, *supra* note 1, at 68; Schopp et al., *supra* note 15, at 67.

82. *See* Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 230 (1986); John Milne, *Abuse as Defense Being Mulled*, BOSTON GLOBE, Mar. 6, 1994, at 43.

exact opposite of the traditional sudden attack: "[t]he question is not *whether* he will beat her up again but *when*, and not whether he will injure her but how badly or whether he will kill her this time."[83] A court that allows the jury to consider past events as part of the circumstances of the killing, rather than focusing solely on the moment of the killing, will be more open to battered women's self-defense claims.[84]

Traditional self-defense doctrine required the defendant to retreat from the encounter prior to using deadly force, unless the attack occurred in the defendant's home (the "castle doctrine").[85] However, many jurisdictions invoked exceptions when the aggressor was a cohabitant or had permission to be in the defendant's home, which clearly work against a woman who is beaten by her husband or live-in companion.[86] In addition, particularly at the trial level, the legal requirements of the duty to retreat are often conflated with the question of whether the woman could have "retreated" from the relationship itself.[87] A court must be able to separate any applicable duty to retreat from the broader (and usually irrelevant) question of "Why didn't she leave?"

In assessing a claim of self-defense, the ultimate question is whether the defendant's actions were "reasonable."[88] The standard of reasonableness used in a particular jurisdiction is an important factor in determining whether the woman can obtain a self-defense instruction, and in determining what evidence is admissible on her behalf. States usually invoke either an objective or subjective standard of reasonableness.[89] An objective standard generally asks the jury to

83. GILLESPIE, *supra* note 1, at 68. Ironically, even a history of battering may be turned against a woman; the prosecutor may argue that because the woman survived previous beatings, she had no reason to believe that death was likely this time. *Id.* at 59-61.

84. Maguigan, *supra* note 12, at 414-16. Jurisdictions which require proof of "immediate" harm may be distinguished from those with a more expansive definition of "imminent" harm. *Id.* at 415-16; *see also* Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380-81 (1993) (arguing that the concept of necessity can encompass a broader range of circumstances than "imminent" harm); Schopp et al., *supra* note 15, at 64-69 (arguing in favor of the concept of immediate necessity rather than imminent or immediate harm).

85. LAFAVE & SCOTT, *supra* note 68, § 5.7(f).

86. GILLESPIE, *supra* note 1, at 39, 83-84; Maguigan, *supra* note 12, at 419-20.

87. Maguigan, *supra* note 12, at 419. As Cynthia Gillespie points out, the woman is under no *legal* obligation to leave the relationship. GILLESPIE, *supra* note 1, at 144-45. Furthermore, some of the most severe episodes of battering, including many deaths, are triggered by attempts to leave. *See, e.g., id.* at 150-52; Mahoney, *supra* note 11, at 65-71.

88. LAFAVE & SCOTT, *supra* note 68, § 5.7(c).

89. Schopp et al., *supra* note 15, at 91.

assess whether the action was one that would have been taken by a "reasonable man" in the same circumstances.[90] Such a standard, however, fails to account for the real-life experiences of most women, let alone those who have suffered repeated abuse:

> It is absurd for the law to demand that a woman who is assaulted conform her actions to a code of manly behavior on pain of imprisonment if she fails. And it is equally absurd for the law to say that a woman's behavior is only reasonable when she behaves like a *man*.[91]

Yet even if the standard is phrased as that of a "reasonable woman," the jury may have a hard time accepting that it is *ever* reasonable or rational for a woman to believe she needs to kill her mate.

By contrast, a "subjective" standard charges the jury with assessing the reasonableness of the defendant's actions in light of the defendant's *own* experiences, including her prior relationship with the batterer.[92] Hybrid standards, such as that of the "reasonably prudent battered woman," also have been suggested.[93] In order to deal with the apparent unfairness of the traditional objective standard, and with the more traditional biases that the judge or jury may import into any standard, defendants often turn to the testimony of expert witnesses.

2. Expert Testimony and the "Battered Woman Syndrome"

In the trial of a battered woman who kills, it is crucial for the jury to receive information about the context of ongoing violence and fear in which the battered woman acted.[94] Although the defendant herself might appear to be the most persuasive witness, " 'most battered women are terrible witnesses on their own behalf [because they] become numb.' "[95] If a woman is too "numb" to be an effective advocate for

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90. *See* GILLESPIE, *supra* note 1, at 99.

91. *Id.*

92. *See, e.g., Wanrow*, 559 P.2d at 558-59 (overturning and remanding for a new trial the conviction of an injured woman for killing a man who broke into the house where she was staying and threatened both her and her children). Although not a "battered woman" case, *Wanrow* has been cited by battered women who wish to invoke a subjective standard.

93. *See* Maguigan, *supra* note 12, at 410-12. Professor Maguigan notes that a court's characterization of the standard may be misleading. *Id.* at 410. For example, the "objective" test adopted in New York is not significantly different from the "subjective" *Wanrow* test. *Id.* She also claims that the "reasonably prudent battered woman" standard is similar to the combined standard used by many jurisdictions. *Id.* at 410-11. In contrast to many other scholars, Professor Maguigan actually finds the standard to be less significant than other factors. *Id.* at 413.

94. *See* GILLESPIE, *supra* note 1, at 158-60.

95. Laura A. Kiernan, *Battered Women Use Their Fear as a Defense*, BOSTON GLOBE,

herself, expert testimony may be the only way to explain her actions to the jury.[96] Although this strategy has been called a "battered woman's defense,"[97] many scholars are quick to point out that it is not insanity or even a true "defense" to homicide; it simply provides for the admission of relevant evidence to explain that the defendant's actions were reasonable in the context in which she lived.[98]

Expert testimony about the cycle of violence and learned helplessness, which constitute the so-called "battered woman syndrome" (BWS),[99] is often offered to demonstrate that the defendant's conduct was reasonable and hence justified.[100] Such evidence may help to explain the woman's response to the killing, and may also be relevant at the sentencing stage.[101] Generally, in order to be admissible in state courts, expert testimony must meet three requirements: (1) the information must be "beyond the ken of the average layperson"; (2) the state of the art in the field must be sufficiently advanced so that expertise is possible; and (3) the expert must possess that expertise.[102] Historically, expert testimony about BWS has met with resistance on all three points.[103]

In response to the legal community's reluctance to accept expert testimony on BWS, advocates have mounted a two-fold strategy. First, in the courts, they have continued to offer expert testimony about the growing body of research on the subject, and have argued for general acceptance of the testimony.[104] Second, in the legislatures, they have pushed for explicit statutory recognition of the relevance and admissibility of BWS, as well as for reformulation of traditional self-

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the woman's testimony, without the gloss of expert "hired guns." *Id.*

96. *Id.* However, there is disagreement over the effectiveness of expert testimony. *Compare* Ewing, *supra* note 12, at 585 (concluding that "the testimony does not appear to be all that helpful") *with* GILLESPIE, *supra* note 1, at 160 (attributing the controversy to the fact that "such testimony has proved to be so effective in gaining acquittals from juries").

97. *See* Rosen, *supra* note 14, at 14.

98. *See* GILLESPIE, *supra* note 1, at 159-60; Rosen, *supra* note 14, at 43-45 (arguing that this defense should be an excuse and not a justification like self-defense). For this reason, some writers have emphasized that advocates must look beyond Walker's syndrome when representing battered women, and try to make all other possible arguments in support of self-defense. *See* Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 41 (1993).

99. *See* GILLESPIE, *supra* note 1, at 157-59.

100. *See, e.g.*, Blackman, *supra* note 82, at 230-31.

101. *See id.* at 231-32, 236-38.

102. *Id.* at 235 (citing Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977)).

103. GILLESPIE, *supra* note 1, at 166-71.

104. *Id.* at 184-85.

defense law.[105]

Although no state has approved the creation of a separate "battered woman's defense," most jurisdictions now allow limited use of expert testimony.[106] Some states require the defendant to provide extrinsic evidence that she acted in self-defense before expert testimony is admissible, while others require only that a claim of self-defense be asserted.[107] The progressive trend is illustrated by the Ohio Supreme Court, which in 1990 overruled its earlier holding that such expert testimony was inadmissible.[108]

The legislative route also has met with success in some states. One example is the state of Maryland, which enacted a statute explicitly admitting "[e]vidence of repeated physical and psychological abuse of the defendant perpetrated by . . . the victim" and "[e]xpert testimony on the Battered Spouse Syndrome" in cases of completed or attempted first degree murder, second degree murder, manslaughter, maiming, or assault

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105. *Id.* at 185-90. This discussion focuses on the admissibility of expert testimony at the state level, largely because murder is, with few exceptions, a state crime. *Id.* at 183-84. However, the issue occasionally arises in federal court, such as when the murder occurs on federal property or when the defendant attempts to use evidence of BWS to assert a defense of duress to a federal crime. *See, e.g.*, United States v. Johnson, 956 F.2d 894, 899-900 (9th Cir. 1992). In federal court, the admissibility of expert testimony is governed by the relatively lenient requirements of Rule 702 of the Federal Rules of Evidence, which state that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *See* Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2794 (1993) (holding that Rule 702 superseded the earlier admissibility test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

The few federal circuits that have addressed this issue have held that evidence of BWS is not relevant to assessing the "objective" criteria for establishing a defense of duress. *See, e.g.*, United States v. Willis, 38 F.3d 170, 176 (5th Cir. 1994); *Johnson*, 956 F.2d at 898; United States v. Sixty Acres in Etowah County, 930 F.2d 857, 860 (11th Cir. 1991) (refusing to "substitute . . . a vaguely-defined theory of 'battered wife syndrome' for the showing of duress courts have always required to excuse otherwise criminal conduct"). However, expert testimony regarding BWS may form the basis for a downward departure during sentencing under the United States Sentencing Guidelines. *See Johnson*, 956 F.2d at 898-900 (holding that downward departure would have been allowed under the *Guidelines* as a basis for incomplete duress); United States v. Whitetail, 956 F.2d 857, 863-64 (8th Cir. 1992) (permitting downward departure based on an incomplete claim of self-defense).

106. *Johnson*, 956 F.2d at 900. However, creation of a separate battered women's defense has been considered in New Hampshire. *See* Milne, *supra* note 82, at 43.

107. *See* Maguigan, *supra* note 12, at 429. For a comprehensive survey of each state's requirements, see *id.* at 461-78. For an earlier survey of admissibility, see Cynthia L. Coffee, Note, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome*, 25 J. FAM. L. 373 (1986-87).

108. *See* State v. Koss, 551 N.E.2d 970, 974-75 (1990), *overruling* State v. Thomas, 423 N.E.2d 137 (Ohio 1981).

with intent to murder or maim.[109] While these developments provide grounds for cautious optimism, this Article discusses a class of women largely untouched by recent legal activity: those battered women who were convicted before the new court rulings or laws took effect.

C. Reform and Response

Before turning to an analysis of clemency efforts on behalf of battered women imprisoned for killing their abusers, it is important to note that there is substantial disagreement over the judicial and legislative approaches described above. The debate involves feminist theorists and advocates who worry that a "battered woman defense" ultimately would work to harm women.[110] In particular, many commentators are troubled by the learned helplessness component of BWS, which depicts the battered woman as weak and emotionally damaged.[111] Expert testimony focused on helplessness may reinforce the same sex-based stereotypes that BWS was designed to counteract.[112] Testimony that depicts a woman as too emotionally disabled to leave the relationship, if not carefully framed, may suggest that she was far too impaired to act reasonably.[113] Ultimately, judges and juries may interpret BWS merely as "a new and excusable form of female irrationality."[114]

In addition, the "battered woman" depicted by BWS may not represent many defendants. Put bluntly, explanations of passivity based on learned helplessness do not mesh well with the act of killing.[115] As

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109. Act of May 14, 1991, ch. 337, 1991 Md. Laws 2275 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (Supp. 1994)).

110. GILLESPIE, *supra* note 1, at 179-81.

111. *See id.* at 179. The negative connotations of the label also may discourage women from getting help. *See* BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 88 (1989) (noting that women "do not want to be placed in the category of 'battered woman' because it is a label that appears to strip [them] of dignity, to deny that there has been any integrity in the relationships [they] are in").

112. *See* GILLESPIE, *supra* note 1, at 180 (quoting Professor Elizabeth Schneider); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 4-5 (1994); Mahoney, *supra* note 11, at 42; Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 981-82 (1995).

113. Schopp et al., *supra* note 15, at 72-73.

114. GILLESPIE, *supra* note 1, at 180; *see also* Mahoney, *supra* note 11, at 42 (arguing that expert testimony has contributed to the focus on victimization that may be understood as pathology on the part of the woman); Schopp et al., *supra* note 15, at 93-97 (arguing that BWS falls within the definition of a psychological disorder).

115. *See* Schopp et al., *supra* note 15, at 64 (arguing that "it would be more consistent with the theoretical and empirical foundations of learned helplessness to contend that battered women who kill their batterers differ from those who remain in the battering relationships without

Professor Susan Estrich has noted, "women who arm themselves and succeed in killing their husbands are, by definition, hardly the 'helpless' creatures" BWS depicts.[116] Battered women are caught between conflicting stereotypes: a woman must appear helpless in order to invoke BWS, yet the prosecutor may argue that her passivity indicated unreasonableness—or, even worse, acquiescence in the abuse.[117] Nor does the syndrome fit the battered woman who has a successful career and does not appear to be "dependent" on her mate or unable to cope with adversity in her professional life.[118] As Professor Maguigan has noted, "[t]he creation of a generalized model of the battered woman, to say nothing of the battered woman who kills, invites courts to prevent the fair trials of women who are not 'good' battered women."[119]

More insidiously, the model generally depicts only the experiences of the middle-class, white population from which it was derived.[120] Women of color, particularly Black women, may not fit the stereotype of the passive and helpless battered woman.[121] Sharon Angella Allard has argued that Black women often are portrayed in the sociological and criminological literature as "bad" women: immoral, hostile, aggressive, and exploitable.[122] As a consequence, a Black woman may be seen as too strong and assertive for "learned helplessness" to be a plausible explanation for her behavior.[123] As Allard concludes, "not only does the theory perpetuate dominant gender role stereotypes, but it does so to the exclusion of Black women."[124]

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killing their batterers precisely because those who kill do *not* manifest learned helplessness").

116. Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1433 (1990) (reviewing GILLESPIE, *supra* note 1); *see also* Madden, *supra* note 98, at 44-48 (arguing that testimony regarding BWS may not help to prove the reasonableness of the woman's behavior) (citing Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986)).

117. *See* Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 144-45 (1985).

118. *See id.* at 148.

119. Maguigan, *supra* note 12, at 444-45. Professor Schneider has noted that BWS may be a double-edged sword: " 'Many battered women lose custody of their children because judges see them as helpless, paralyzed victims who can't manage daily life. And if a woman seems too capable, too much in charge of her life to fit the victim image, she may not be believed.' " Tamar Lewin, *Feminists Wonder If It Was Progress to Become "Victims,"* N.Y. TIMES, May 10, 1992, § 4, at 6 (quoting Elizabeth Schneider, Brooklyn Law School professor).

120. *See* Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 192, 200 (1991).

121. *Id.* at 200.

122. *See id.* at 195 (stressing the need for an approach which incorporates both race and gender analysis).

123. *Id.* at 204.

124. *Id.* at 200.

While some commentators believe that the solution lies in changing self-defense law to reflect the reality of women's experiences,[125] others believe that the problem lies elsewhere. Professor Maguigan argues that the self-defense law of most jurisdictions already encompasses the situations of battered women who kill, and that the problem lies instead with how existing law is applied at trial.[126] In her view, recent reform efforts are not only misguided but actually harmful, because proposed legislation is often much more restrictive than the common law.[127] She therefore suggests that the objective standards should be refined to aid battered women, without changing the basic content of self-defense law.[128]

While agreeing with Professors Maguigan and Estrich that self-defense laws should not be changed, other commentators disagree that the self-defense doctrine is flexible enough to include battered women, and instead turn to other models.[129] These commentators have suggested that a single paradigm is inadequate to explain why different battered women kill, and urge advocates to look beyond BWS to a range of other legal theories that could benefit these women.[130] One such suggestion is the doctrine of "psychological self-defense," which would extend self-defense to a threat of "extremely serious psychological injury . . . that significantly limits the meaning and value of one's physical existence."[131] Another suggestion is the definition of "separation assault" as an "attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return."[132] While most of these suggestions have yet to be adopted, they illustrate the complexity of the problem, as

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125. *See, e.g.*, GILLESPIE, *supra* note 1, at 189-90; Rosen, *supra* note 14, at 56 (advocating a return to self-defense as an excuse, rather than a justification).

126. Maguigan, *supra* note 12, at 458; *see also* Estrich, *supra* note 116, at 1438-39 (supporting the use of BWS evidence within the framework of current self-defense law).

127. Maguigan, *supra* note 12, at 453-55. For example, some proposals would limit expert testimony to cases where deadly force was used and would exclude assault cases. *Id.*; *see also* Schopp et al., *supra* note 15, at 104-12 (advocating "a rigorous distinction between justification and excuse by separating self-defense justified by actual necessity from excused mistakes").

128. Maguigan, *supra* note 12, at 458-60.

129. *See, e.g.*, Ewing, *supra* note 12, at 587; Madden, *supra* note 98, at 50; Mahoney, *supra* note 11, at 71.

130. *See* Madden, *supra* note 98, at 50.

131. Ewing, *supra* note 12, at 587. *But see generally* Stephen J. Morse, *The Misbegotten Marriage of Soft Psychology and Bad Law: Psychological Self-Defense as a Justification for Homicide*, 14 LAW & HUM. BEHAV. 595 (1990) (criticizing the psychological self-defense doctrine as vague and scientifically unsupported).

132. Mahoney, *supra* note 11, at 65. Mahoney argues that such a characterization would be recognizable to the jury while still encompassing the relevant elements of BWS. *Id.* at 71.

well as the dangers of creating new stereotypes in an attempt to combat the old.

III. THE GOVERNORS' ACTIONS

Against this legal background, Governors Celeste and Schaefer took their historic and controversial actions. Both men acted after personal contact with battered women, and both acted while their states either were considering or already had enacted legislation affecting battered women who kill. The actions in Ohio and Maryland continue to affect more than the individual women freed; they endure as models (both positive and negative) for the ongoing clemency movements in other states.

A. Ohio, 1990

Ohio Governor Celeste and his wife, Dagmar, had a history as advocates for battered women; when Celeste moved to Columbus to become Lieutenant Governor in the mid-1970s, the Celestes converted their Cleveland home into a battered women's shelter.[133] In December of 1990, his last month in office, Governor Celeste granted sixty-eight pardons and commutations.[134] Reportedly at the urging of his wife, this included a group of battered women convicted of killing or assaulting their abusers before Ohio revised its laws regarding expert testimony.[135]

1. Expert Testimony in Ohio

In 1981, the Ohio Supreme Court ruled that expert testimony regarding the battered woman's syndrome was inadmissible.[136] According to the court, this evidence failed to meet the requirements for admissibility of expert testimony because: it was irrelevant and immaterial to the issue of self-defense; it was within the understanding of the jury; the field was not advanced enough to allow the development

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133. Gibbs, *supra* note 31, at 44. For the development of the battered women's movement in Ohio, see Patricia Gagné, *Identity, Strategy, and Feminist Politics: Clemency for Battered Women Who Kill*, Address at the Annual Meetings of the American Sociological Association (Aug. 1994) (on file with author). For a detailed description of the Ohio commutations, written by Governor Celeste's Executive Assistant, see generally Ammons, *supra* note 10.

134. *See* Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 656 (1991).

135. *Id.* at 678.

136. State v. Thomas, 423 N.E.2d 137, 140 (Ohio 1981); *see also* Gagné, *supra* note 133, at 6-7 (describing the advocacy strategy behind the earlier attempt to introduce the testimony).

of expertise; and its prejudicial impact outweighed its probative value.[137] Ten years later, after the field had advanced and most other states had admitted the testimony, the court overruled *Thomas*. In *State v. Koss*,[138] decided in March of 1990, the court found that the battered woman syndrome had achieved enough scientific acceptance to warrant its admissibility, and held that: "Where the evidence establishes that a woman is a battered woman, and when an expert is qualified to testify about the battered woman syndrome, expert testimony concerning the syndrome may be admitted to assist the trier of fact in determining whether the defendant acted in self-defense."[139] *Koss* did not create a new defense or justification, but rather admitted the testimony as relevant to the honesty and reasonableness of the defendant's beliefs.[140]

Interestingly, one of the last states to allow such testimony by judicial decision became one of the first states to permit it by statute, with changes going into effect in November of 1990.[141] The new law expressly recognized that the "battered woman syndrome" was a matter of commonly accepted scientific knowledge and that the subject matter was not within the understanding of the jury, and permitted a person "charged with an offense involving the use of force against another" who raised a claim of self-defense to present expert testimony "to establish the requisite belief of an imminent danger of death or great bodily harm."[142] Neither the decision nor the amendments were retroactive.[143]

2. Executive Clemency in Ohio

Since 1851, the Ohio Constitution has permitted a broad range of executive clemency.[144] Written application for clemency must be made

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137. *Thomas*, 423 N.E.2d at 140.

138. 551 N.E.2d 970 (Ohio 1990).

139. *Id.* at 975.

140. *Id.* at 974.

141. Act of Nov. 5, 1990, 1990 Ohio Laws 265 (codified at OHIO REV. CODE ANN. § 2901.06 (Anderson 1993)).

142. OHIO REV. CODE ANN. § 2901.06 (Anderson 1993). Additional amendments allowed the admission of expert testimony regarding BWS when a defendant pleads not guilty by reason of insanity. *See id.* § 2945.392(B).

143. *See id.* § 2901.06; *Koss*, 551 N.E.2d at 975.

144. OHIO CONST. art. III, § 11, provides in relevant part:

> [The governor] shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law.

to the Adult Parole Authority (APA), which must investigate the matter and transmit a written report to the governor.[145] The APA may recommend clemency if "such action would further the interests of justice and be consistent with the welfare and security of society."[146] At least three weeks before recommending a pardon or commutation, the APA must notify the prosecuting attorney and judge of the county in which the original indictment was filed.[147] The APA report is purely advisory, and the governor has "recourse to little more than . . . personal moral standards, political beliefs, or considerations of expediency" in deciding whether to accept the recommendation.[148] A disclosure provision requires the governor to "provide the General Assembly with the names of the clemency recipients, their sentence and crime, as well as the reasons for granting clemency."[149]

3. The Commutations

Less than nine months after *Koss* was decided, about one month after the new law took effect, and approximately one month before he left office, Governor Celeste ordered the review of a group of women imprisoned for killing their husbands or boyfriends.[150] Ultimately, 120 applications for clemency were received; the APA recommended clemency in eighteen cases, but Governor Celeste chose to commute additional sentences.[151]

Governor Celeste announced twenty-five commutations on December 21, 1990, explaining that:

The specific procedures to be followed for pardons, commutations, and reprieves are contained in chapter 2967 of the Revised Code. *See* OHIO REV. CODE ANN. § 2967 (Anderson 1993).

145. OHIO REV. CODE ANN. § 2967.07 (Anderson 1993).

146. OHIO REV. CODE ANN. § 2967.03 (Anderson Supp. 1994). Professor Kobil concludes that, as in most states, "no meaningful statutory or administrative standards exist in Ohio to determine when a clemency application should be granted." Kobil, *supra* note 134, at 670 (citing NATIONAL GOVERNORS' ASS'N CENTER FOR POL'Y RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988)).

147. OHIO REV. CODE ANN. § 2967.12 (Anderson Supp. 1994). In certain circumstances, where the victim was present at the court proceedings, the APA must send a similar notice to the victim or a representative of the victim's family. *Id.* § 2967.12(B).

148. Kobil, *supra* note 134, at 671.

149. *Id.* at 664.

150. *Compare* State v. Koss, 551 N.E.2d 970, 970 (Ohio 1990) (decided Mar. 7, 1990) *and* OHIO REV. CODE ANN. § 2967.03 (Anderson Supp. 1994) (effective Nov. 20, 1990) *with* Dick Kimmins, *Outgoing Governor Commutes Sentences of Battered Women*, GANNETT NEWS SERV., Dec. 21, 1990, *available in* LEXIS, News Library, ARCNWS File); *Sentences of About 24 Women May Be Commuted*, UPI, Dec. 6, 1990, *available in* LEXIS, News Library, UPI File.

151. Kimmins, *supra* note 150.

> I believe these 25 individuals were victims in a profound way and were prevented from giving evidence . . . essential to a jury's being able to reach a sound verdict. . . . I do not believe these women represent a threat to the community. They will not return to the criminal justice system.
>
> . . . .
>
> These are all genuine tragedies. . . . My thoughts and prayers go out to the victims and their families. But we can't bring the victims back.[152]

Governor Celeste further explained:

> These women were entrapped emotionally and physically. . . . They were the victims of violence, repeated violence. They loved these men even though they beat them and feared them. They were so emotionally entangled they were incapable of walking away. If I thought they would be a threat I wouldn't have commuted their sentences.[153]

The women ranged in age from their early 20's to their late 60's, and some were permanently handicapped as a result of the beatings they had received.[154] A few had hired other people to kill their mates.[155] For example, one grandmother of three had hired a man to kill her husband after twenty-three years of abuse left her deaf in one ear.[156] Another woman was a former pre-school teacher whose husband sexually abused their thirteen-year-old daughter.[157]

The investigations were undertaken by Governor Celeste's aides and by the APA, which allowed the women to present evidence on their own behalf.[158] In order to prove that they had been abused, the women produced emergency room records, police reports, physician statements, and witnesses.[159] Governor Celeste examined a variety of information, including the medical records, prior convictions, the APA recommendations, and the inmates' prison records.[160] When Governor

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152. *Id.* (statement of Ohio Governor Celeste).

153. Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, at A1 (statement of Ohio Governor Celeste).

154. *See, e.g.*, Bob Lewis, *Ohio Law Aids Battered Women*, L.A. TIMES, Feb. 3, 1991, at A20; Carolyn Pesce, *Ohio's Battered Women: Inmates Hope for Freedom to Start Over*, USA TODAY, Oct. 4, 1990, at 1A; Wilkerson, *supra* note 153, at A11.

155. *See* Pesce, *supra* note 154, at 1A.

156. *Id.*

157. *Id.*

158. Wilkerson, *supra* note 153, at 11.

159. *Id.*

160. *Id.*

Celeste disagreed with the APA's negative recommendation, he reviewed the women's files at least twice.[161] Governor Celeste ultimately denied clemency to forty-eight women and sent another group of cases back to the APA for additional review.[162] The final group that received clemency represented less than one tenth of the women imprisoned in Ohio, and clemency was granted in less than one quarter of the cases reviewed.[163] Because Governor Celeste required the inmates to serve at least two years before release, four of the twenty-five women remained in prison, and all of the women receiving clemency were required to perform 200 hours of community service in domestic violence programs as a condition of release.[164] As one editorial noted, "it is important to understand how modest and narrow the Ohio governor's action was."[165]

4. The Backlash

Not all observers agreed that Governor Celeste's actions were "modest and narrow." In fact, the media had a field day with the story, attacking both Governor Celeste and the individual women.[166] The reaction of one local paper, expressed in an editorial cartoon, is notable:

> 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.[167]

Slightly more tasteful criticism, but no less angry, came from many local prosecutors and the relatives of some of the victims, who

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161. *See* Leonard, *supra* note 19.

162. *Justice and Battered Women*, CHI. TRIB., Dec. 27, 1990, § 1, at 18.

163. *Id.*

164. *Id.*

165. *Id.* Three additional women were granted clemency on January 11, 1991. Ammons, *supra* note 10, at 2, 21.

166. Kobil, *supra* note 134, at 678. *But see id.* at 678 (discussing reactions in favor of the decision to grant clemency); Wilkerson, *supra* note 153, at 1 (" 'This is a signal to the rest of the country that women will no longer permit themselves to be battered and abused by men.' ") (quoting Dr. Lenore Walker, Executive Director of the Domestic Violence Institute).

167. Kobil, *supra* note 134, at 678 n.120 (quoting CLEVELAND PLAIN DEALER, Jan. 13, 1991, at 2E (cartoon)) (internal quotes omitted); *see also* Gagné, *supra* note 133, at 17 (noting that "prosecuting attorneys throughout the state condemned the clemencies as licenses to kill and accused the women of being unfit mothers, alcoholics, and abusive women who picked fights with their husbands and abused their own pets").

complained that they had not been notified that the governor had been considering clemency for particular inmates.[168] In response, Governor Celeste claimed that the law did not require him to provide such notice.[169] Prosecutors also argued that because the *Koss* decision was not retroactive, it was not intended to apply to women already in prison.[170] Furthermore, they argued that even if the women had been allowed to present evidence of abuse at trial, there was no guarantee that any of them would have been acquitted.[171]

Some prosecutors were skeptical of the entire procedure, claiming that it was "improper for Celeste to legislate away what a jury has found."[172] The case of Asya Cole, who killed her boyfriend, Kenneth Moore, during a struggle over a gun he held to her head, came under particular scrutiny.[173] For example, the assistant prosecutor recalled no evidence of Cole being battered, and the APA disclosed that it had opposed clemency.[174] Above all, prosecutors argued that the commutations would induce more women to turn to violence.[175] In the words of Dennis Watkins, the President of the Ohio Prosecuting Attorneys' Association, " '[t]he fact that you're battered does not give you a license to kill.' "[176]

Much of the public outcry, however, centered on a later and separate group of commutations. On January 10, 1991, Governor Celeste commuted the death sentences of several convicted killers to life in

168. *See* Leonard, *supra* note 19.

169. *Id.* Governor Celeste was nominally correct: under Ohio law, the APA is responsible for such notification. OHIO REV. CODE ANN. § 2967.12(A) (Anderson Supp. 1994). Additionally, only the prosecuting attorney is required to be notified. *Id.* § 2967.12(A). Notice to victims' relatives need only be given after they make a formal request. *See id.* § 2967.12(B).

170. Wilkerson, *supra* note 153, at A11.

171. *Id.*

172. Leonard, *supra* note 19 (quoting Ashtabula County (Ohio) Prosecutor Gregory Brown); *see also Sentences of About 24 Women May Be Commuted*, *supra* note 150 ("We hear it in case after case. . . . If there's no proof, it should be looked at with a jaundiced eye. . . .") (quoting Frankin County (Ohio) Prosecutor Michael Miller).

173. *See* State v. Cole, No. 51531, at *2 (Ohio Ct. App. Feb. 19, 1987) (LEXIS, States Library, Ohio File). Cole was convicted of voluntary manslaughter and sentenced to a 10- to 25-year prison term. *Id.* at *1; *Some of Celeste's Decisions Drawing Criticism*, UPI, Dec. 24, 1990, *available in* LEXIS, News Library, UPI File.

174. *Some of Celeste's Decisions Drawing Criticism*, *supra* note 173. A news report also claimed that many of the women had denied being abused, several had discussed the possibility of killing their husbands, and two had tracked down men from whom they were separated. *See* Tamar Lewin, *Criticism of Clemency May Affect Efforts to Free Battered Women*, N.Y. TIMES, Apr. 2, 1991, at A17.

175. Wilkerson, *supra* note 153, at A1.

176. *Quoted in id.* at A1, A11.

prison.[177] Although the group included all four women on Death Row, none of the women had sought clemency as a battered woman.[178] Governor Celeste was criticized for failing to file clemency applications with the APA before issuing the commutations, and failing to give the APA enough time to investigate this second group.[179] Claiming that this failure violated Ohio law, the new Attorney General filed a declaratory judgment action seeking to have most of these later commutations declared invalid.[180] However, the original twenty-five commutations were not included in the challenge.[181]

B. Maryland, 1991

The backlash against Governor Celeste's actions was not lost on Maryland Governor Schaefer. Apparently having learned from Governor Celeste's mistakes, Governor Schaefer opted for what appeared to be a more limited action. However, the procedures that he followed, combined with a different statutory context, ultimately exposed Governor Schaefer to an even greater barrage of criticism and almost stopped the "mass" clemency movement in its tracks.

1. Expert Testimony in Maryland

Although Maryland's high court had never addressed the admissibility of BWS, the evidence often was excluded at the trial level.[182] Furthermore, the legislation admitting expert testimony in

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177. *Celeste Commutes Death Sentences of Eight Murderers*, UPI, Jan. 11, 1991, *available in* LEXIS, News Library, UPI File. For a detailed description of the controversy surrounding this set of commutations, see Kobil, *supra* note 134, at 679-95.

178. *See Celeste Commutes Death Sentences of Eight Murderers, supra* note 177. The commutations included four men, one of whom was on death row for killing a policeman, and another of whom raped and killed a seven-year-old girl. *Id.* Only one of the women had been convicted of killing her husband or boyfriend. *Id.*

179. Kobil, *supra* note 134, at 680.

180. *Id.* at 681 & n.133. Although a trial judge overturned the later clemency decisions and left the fate of those inmates to the Department of Corrections, the commutations were upheld at the appellate level. *See* Wilkinson v. Maurer, Nos. 92AP-674, 92AP-675, 92AP-677, 92AP-678, 92AP-680, 92AP-1297, 1993 WL 114448 (Ohio Ct. App. Apr. 8, 1993); Kobil, *supra* note 134, at 681-82, 686-94.

Several legislators expressed their disapproval by proposing bills to limit the governor's clemency powers. *Bill Would Limit Governor's Clemency Powers*, UPI, Mar. 5, 1991, *available in* LEXIS, News Library, UPI File; Kobil, *supra* note 134, at 683-86, 694-95. Several years later, Ohio voters amended the state constitution to provide that the governor's power to grant commutations, as well as pardons, is subject to regulation. *See* OHIO CONST. art. III, § 11 (as amended by 1995 Ohio Laws Hs. Jt. Res. 2, approved by voters Nov. 7, 1995).

181. *See* Kobil, *supra* note 134, at 686-87.

182. *See* Richard Tapscott, *Md. Panel Votes Spousal Abuse Bill: Legislation Would Aid*

Maryland was not passed until almost three months *after* the controversial commutations.[183] Similar legislation had languished in committee for several years, but Governor Schaefer's actions gave the measure new momentum.[184] The new law, which passed on May 14, 1991,[185] allowed a defendant charged with completed or attempted first or second degree murder, manslaughter, or maiming, or assault with intent to murder or maim, to present evidence as follows:

> (b) *Admissibility of evidence.*—Notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense, when the defendant raises the issue that the defendant was, at the time of the alleged offense, suffering from the Battered Spouse Syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant's motive or state of mind, or both, at the time of the commission of the alleged offense:
>
> (1) Evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged; and
>
> (2) Expert testimony on the Battered Spouse Syndrome.[186]

The bill did not change the law regarding self-defense, but merely allowed the explanatory evidence to be admitted.[187]

2. Executive Clemency in Maryland

The Maryland Constitution gives the governor the "power to grant reprieves and pardons" and requires that he or she report to the Legislature when that power is exercised.[188] The Maryland Code defines several types of executive clemency,[189] and charges the

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Courtroom Defense of Victims Who Kill, WASH. POST, Mar. 15, 1991, at B6.

183. Act of May 14, 1991, ch. 337, 1991 Md. Laws 337 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (Supp. 1994)).

184. Tapscott, *supra* note 182, at B6.

185. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (Supp. 1994).

186. *Id.* § 10-916(b).

187. *See* Banks v. State, 608 A.2d 1249, 1253 (Md. Ct. Spec. App. 1992).

188. MD. CONST. art. II, § 20.

189. MD. ANN. CODE art. 41, §§ 4-501(1)-(7) (1993).

Maryland Parole Commission (MPC) with reviewing and making recommendations to the governor on applications for pardon, parole of offenders serving life sentences, commutations of sentences, and clemency.[190] However, upon notifying the Legislature, the governor "may commute or change any sentence of death into penal confinement . . . [or] pardon any person convicted of crime, on such conditions as he may prescribe, or . . . remit any part of the time for which any person may be sentenced to imprisonment."[191]

3. The Controversial Commutations

Unlike Governor Celeste,[192] Governor Schaefer had no long-standing commitment to the cause of battered women. Instead, the impetus for the commutations came when Congresswoman Constance Morella (R-Md.), who had worked on federal domestic violence legislation, met with several convicted women in December of 1990.[193] Impressed by the inmates' articulateness and convinced that they had not received fair treatment, Morella persuaded Governor Schaefer to meet some of the women.[194]

On January 14, 1991, Governor Schaefer met with five women at the Maryland Correctional Institute for Women in Jessup.[195] Governor Schaefer said he was moved by the visit, and admitted that "You read a newspaper: 'Mary Jones shot her husband.' When you see Mary Jones and understand how she got there, it is a little different."[196] Although Governor Schaefer agreed to support the effort for new evidentiary laws and indicated that he and corrections officials would review the women's cases and the existing practices in Maryland, he did not commit to exercising his clemency powers.[197]

By February, Governor Schaefer had decided to follow in the

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190. *Id.* § 4-504(b)(3). Before granting a parole release hearing for an offender convicted of a violent crime, the MPC, upon the victim's request, must notify the victim or victim's family and may be required to complete an updated victim impact statement. *Id.* § 4-504(d). In certain cases, the MPC may be required to notify the sentencing judge as well. *See id.* § 4-504(e).

191. *Id.* § 4-513.

192. *See supra* text accompanying note 133.

193. Thomas W. Waldron & Laura Lippman, *Pardons for Battered Women Considered*, BALTIMORE EVENING SUN, Jan. 11, 1991, at D1.

194. *Id.*

195. Janet Naylor, *A Reason to Kill? Schaefer Mulls Abuse as a Defense*, WASH. TIMES, Jan. 15, 1991, at B9.

196. Howard Schneider, *Meeting Battered Women Face to Face*, WASH. POST, Jan. 15, 1991, at B7 (statement of Maryland Governor Schaefer).

197. *Id.*

footsteps of Governor Celeste.[198] On February 19, Governor Schaefer commuted the sentences of eight women, stating that the women had acted in self-defense and posed no societal threat:

> "We think after a thorough review of these [cases] that it's the right thing to do. They served enough time. . . .
>
> "Do you think I'm sending a message that it's OK to kill your spouse? No.
>
> "Maryland is just one of the few states that doesn't allow testimony of past abuse, and it's time for us to get in step."[199]

On the same day, Governor Schaefer announced support for two bills on the admissibility of past abuse and announced the establishment of a statewide domestic violence prevention task force.[200]

Before making his decisions, Governor Schaefer reviewed the cases of twelve women, including two of the women he met during his January 14 visit.[201] Information about the women was provided by lawyers from the House of Ruth shelter and the Public Justice Center, a legal services organization.[202] The recommendations of the MPC were based on "a review of the women's prison and parole files, which include[d] police incident reports, pre-sentence investigations and brief prosecutorial summaries of the criminal cases, coupled with the histories of abuse prepared by the House of Ruth attorneys."[203] However, no court records were reviewed.[204] The sentences of the eight women were commuted to time already served, but the women had to be monitored by corrections officers as if on parole for the remainder of their sentences.[205] Governor Schaefer agreed to expedite the parole hearing for a ninth woman, and requested that the MPC again review the sentences of the remaining three women.[206]

Because only eight women were released, their stories became relatively well-known. Five of the eight women had been convicted of

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198. David Simon & William F. Zorzi Jr., *Schaefer Commuted Sentences Without All the Facts*, BALTIMORE MORNING SUN, Mar. 17, 1991, at 1A.

199. Janet Naylor, *Schaefer to Free 8 Battered Women Who Fought Back*, WASH. TIMES, Feb. 20, 1991, at A1 (quoting Governor Schaefer) (alteration in original).

200. *Id.*

201. *Id.*

202. Peter Jensen, *Schaefer, Moved by Tales of Abuse, Commutes Sentences of 8 Women*, BALTIMORE MORNING SUN, Feb. 20, 1991, at 1A.

203. Simon & Zorzi, *supra* note 198, at 1A.

204. *Id.*

205. *See* Naylor, *supra* note 199, at A1.

206. Jensen, *supra* note 202, at 1A.

second-degree murder, and the remaining three had been convicted of first-degree murder, voluntary manslaughter, or battery.[207] On his visit to the Jessup facility, Governor Schaefer met Mytokia Friend, a former Baltimore police officer who killed her husband after a five-hour episode of abuse, and Virginia Johnson, a woman who had left her husband several times but returned after he tracked her down and threatened to kill her.[208] Bernadette Barnes, who hired a man to kill her husband for $5000, still carried a bullet that her husband fired into her head while she slept.[209] Eleanor Crabtree endured three years of abuse, including a poison injection and being held hostage in her own basement.[210]

4. The Aftermath

As in Ohio, prosecutors quickly expressed their dismay at not being contacted prior to the commutations.[211] Questioning the women's claims, they argued that Governor Schaefer's actions were imprudent and at odds with the criminal justice system. In the words of John Scully of the Washington Legal Foundation, "[i]n essence, what the governor is doing is giving to this certain class of individuals the right to impose the death penalty on abusive husbands."[212] Some noted that the legislature had rejected the admissibility of BWS.[213] Others argued that the women released by Governor Schaefer were not typical battered women, since "one was a private detective, another was a Baltimore policewoman, and a third was well-organized enough to find and hire a contract killer to murder her husband."[214] Criticism also came from relatives of the victims, including some who themselves had been battered.[215] Florence Steiner, whose abusive ex-husband was killed by

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207. Naylor, *supra* note 199, at A1.

208. *Id.*

209. *Id.*

210. *Id.* The other women were: Arlene Ellis, "who struck back as her abuser approached her with an axe"; Joyce Steiner, a prominent Anne Arundel businesswoman; Juanita Stinson, who suffered several miscarriages during a 30-year period of abuse; and Patricia Washington, who repeatedly was threatened by her gun-wielding husband. *Id.*; *see also* Laura K. McFadden, *A Matter of Murder and Survival*, NEWSDAY, Mar. 7, 1991, at 64 (detailing Joyce Steiner's ordeal); Sandy Rovner, *Battered Wives: Centuries of Silence*, WASH. POST, Aug. 20, 1991, at Z7 (featuring the story of Mytokia Friend).

211. Fern Shen & Howard Schneider, *Freedom in a Divided World*, WASH. POST, Feb. 21, 1991, at B1, B3.

212. Naylor, *supra* note 48, at A1 (quoting John Scully, Washington Legal Foundation attorney).

213. *See id.*

214. *Clemency in Annapolis*, WASH. POST, Mar. 11, 1991, at A10.

215. *See* Shen & Schneider, *supra* note 211, at B1.

one of the women Governor Schaefer released, stated: " 'I'm absolutely appalled. . . . There was a door there for her to leave. . . . She could have walked out the door—I did. I was in that situation with Robert Steiner, but I didn't choose to shoot him.' "[216]

The biggest wave of criticism was yet to come. On March 17, 1991, the *Baltimore Sun* published an "exposé" claiming that, in at least three cases, the House of Ruth and state investigators had ignored or overlooked evidence that contradicted the women's stories.[217] For example:

- Although reporters acknowledged that Bernadette Barnes had been severely abused by her husband, they claimed that Governor Schaefer was not aware that Barnes would have collected over $20,000 from her husband's life insurance policies.[218] Reporters claimed that officials were so appalled by the fact that Barnes' husband had shot her that they failed to examine her case in detail.[219]
- Reporters claimed that Virginia Johnson's accounts of the killing had changed several times.[220] The state's attorney also claimed that, while out on bail, Johnson allegedly accosted a high school student who was a potential prosecution witness, but that the charges were dropped as part of the murder plea bargain.[221]
- Reporters claimed that there was no evidence that Patricia Washington stabbed her husband during an attack.[222] In addition, they reported that Washington consistently had denied any history of abuse when talking to police, testifying in court, and undergoing pre-sentencing interviews.[223]

The resulting outcry exceeded even that of Governor Celeste's alleged violation of Ohio clemency law. The Maryland Senate President was quick to condemn the actions, claiming that "[s]omebody, somewhere, somehow . . . should have checked with prosecuting

216. *Id.* (quoting Florince Steiner).

217. *See* David Simon & William F. Zorzi Jr., *Case Histories Reveal Troubling Questions About Circumstances of the Crimes*, BALTIMORE MORNING SUN, Mar. 17, 1991, at 6A.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* In what I think is a rather telling typographical error, the reporters dismissed Washington's allegations of abuse during her *"premartial* relationship" with her husband. *Id.* (emphasis added).

attorneys, should have checked with investigating officers" and judges.[224] Critics charged that the lawyers who prepared the clemency petitions had taken the women's stories at face value and had failed to review facts that had emerged at trial.[225] A particularly scathing editorial claimed that Governor Schaefer had been "hornswoggled," that he had erred both in taking the advocacy groups' assessments at face value and in "single-handedly overturn[ing] the criminal justice system by ignoring the evidence from the trials," and that he had endangered "public safety by turning loose criminals who belong behind bars."[226]

Governor Schaefer staunchly defended his actions, claiming that he had reviewed all the relevant information.[227] The Public Justice Center reported that Barnes' prison file, which was made available to the governor, contained her admission that she received the insurance money, as well as her denial that the seventeen-year-old policy motivated the killing.[228] The Center also reported that Governor Schaefer had seen a presentencing report in which Washington denied being a victim of abuse.[229] However, the Center also stated that such denials of abuse were common among victims of BWS, and argued that a great deal of evidence corroborating the abuse had been compiled.[230] Public Defender Elvira White reported that Washington had described the abuse to her but had refused to testify about it,[231] and a legal clinic attorney argued that Washington had been confused by the prosecutor's use of double negatives when she denied the abuse on cross-examination at trial.[232]

Paul Davis, the Maryland Parole Commissioner, defended the decision not to review the trial transcripts themselves: "I don't think police and prosecutors are in practice of seeing things other than guilt

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224. William F. Zorzi Jr., *Schaefer's Commutations Criticized by Lawmaker*, BALTIMORE MORNING SUN, Mar. 19, 1991, at 1A (quoting Thomas V. Miller, Jr., Maryland Senate President).

225. *See id.*

226. *The Gov Blunders Again*, WASH. TIMES, Mar. 20, 1991, at G2 (editorial). The *National Review* was even less tactful, claiming that "in general the battered-women campaign is powerfully fueled by the radical feminist presumption that all sex is violence, and all men are brutes. Call in the exorcists." *Killing the Enemy*, NAT'L REV., Apr. 29, 1991, at 13, 14.

227. *Cf.* Zorzi, *supra* note 224, at 1A (providing statements from the governor's press secretary and the Director of Operations and Public Safety).

228. Paul Duggan, *Task Force Backs Schaefer on Battered Women*, WASH. POST, Mar. 23, 1991, at C4.

229. *Id.*

230. *Id.*

231. *See* Paul Duggan, *Freed Inmate Denied Abuse in Testimony: Schaefer's Review of Case Questioned*, WASH. POST, Mar. 18, 1991, at B1, B2.

232. Simon & Zorzi, *supra* note 217.

or innocence. . . . In these cases, though, we had to look at the gray area and decide whether to grant mercy."[233] Many noted that the trial transcripts would not contain evidence of abuse—because that was precisely the evidence that had been excluded at trial.[234] However, Governor Schaefer admitted that a review of the procedures was in order, saying "We'll look it over. We'll get a better process."[235]

In the midst of this controversy, Governor Schaefer still had to deal with the remaining four women, whose cases he had remanded to the MPC. On March 20, the *Baltimore Sun* reported that state investigators were questioning judges and prosecutors, thus doing a more comprehensive investigation than in the previous cases.[236] State officials denied that the investigations differed significantly from those done earlier.[237] Instead, they explained, the earlier MPC protocol had not required such checks.[238]

Because the four remaining women had been rejected under that earlier protocol, a more comprehensive "executive clemency investigation protocol," used by the Division of Parole and Probation, had been used.[239] Prosecutors expressed satisfaction over being contacted under the newer protocol but were skeptical of the state's official explanation.[240] As one courthouse official noted, "Hey, let's face it. They don't want any more surprises."[241] On June 27, Governor Schaefer stated that he planned to order the release of two of the four women and continue the review of a third case.[242] The fourth woman was not released because she had been permitted to testify about abuse at her recent resentencing.[243]

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233. Geraldine Baum, *Should These Women Have Gone Free?*, L.A. TIMES, Apr. 15, 1991, at E1, E2.

234. *See id.*

235. Tom Bowman & John W. Frece, *Schaefer Launches Review of Commutation Process*, BALTIMORE MORNING SUN, Mar. 21, 1991, at 1A. As in Ohio, a bill was introduced to restrict future commutations for people sentenced to life imprisonment by requiring the governor to solicit the recommendations of prosecutors and judges and to publish notice of his intent to commute a sentence. *Id.*

236. David Simon & William F. Zorzi Jr., *Md. Probing More Deeply in 4 Commutation Cases*, BALTIMORE MORNING SUN, Mar. 20, 1991, at 1A.

237. *Id.*

238. *Id.*

239. *Id.* However, there was no clear explanation about why this protocol was not used originally. *See id.*

240. *See id.*

241. *Id.*

242. Howard Schneider & Fern Shen, *Schaefer to Free 2 Inmates; "No Doubt" in Cases of Battered Spouses*, WASH. POST, June 28, 1991, at B1.

243. *See id.*

C. Action in Other States

Although Ohio and Maryland have been the only two states to engage in so-called "mass" clemency, other states have examined the issue. Governors and legislators in Massachusetts, Illinois, Texas, and California have taken steps to review the cases of battered women, and clemency occasionally has been granted for battered women in other states. At the same time, advocacy groups increasingly have urged that large-scale clemency efforts be undertaken.

1. Massachusetts

The clemency movement in Massachusetts started soon after the Ohio and Maryland actions. In early September of 1991, the *Boston Globe* urged Governor William Weld to review the cases of women incarcerated for killing abusive husbands or boyfriends.[244] Advocates had long noted that the sentences imposed on battered women convicted of killing their abusers in Massachusetts seemed particularly harsh.[245] In fact, Lenore Walker claimed that "[t]he average length of time a woman today spends in prison for killing her husband in this country is 2 1/2 years. In this state, you can't even think about getting her out until she spends 10 years."[246]

On September 26, Governor Weld responded by issuing new advisory commutation guidelines for battered women seeking release.[247] Acknowledging that commutation was both "an extraordinary remedy and . . . an integral part of the correctional process," Weld established a "uniform policy" for petitions.[248] In relevant part, it required the petitioner to prove by clear and convincing evidence that "further incarceration would constitute gross unfairness because of the basic equities involved including . . . (iii) a history of abuse suffered by the petitioner at the hands of the victim which

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244. *Women Doubly Victimized*, BOSTON GLOBE, Sept. 5, 1991, at 16 (calling for the Massachusetts governor to pardon ten women who were imprisoned for killing abusive husbands or boyfriends).

245. Stan Grossfeld, *"Safer" and in Jail: Women Who Kill Their Batterers*, BOSTON GLOBE, Sept. 2, 1991, at Metro/Region 1.

246. *Id.*

247. Frank Phillips, *Weld Relaxes Prison Appeal by Battered Women*, BOSTON GLOBE, Sept. 27, 1991, at Metro/Region 17.

248. COMMUTATION GUIDELINES AND PETITION (1)(c)(iii) (issued by Governor Weld, Sept. 1991) [hereinafter COMMUTATION GUIDELINES]. For detailed information regarding the clemency process in Massachusetts, see generally LISA SHEEHY ET AL., COMMUTATION FOR WOMEN WHO DEFENDED THEMSELVES AGAINST ABUSIVE PARTNERS: AN ADVOCACY MANUAL AND GUIDE TO LEGAL ISSUES (1991).

significantly contributed to or brought about the offense."[249] But the guidelines also provided that in cases of first degree murder, the governor generally would not consider a petition until fifteen years had been served.[250]

Under the revised guidelines, the Advisory Board of Pardons (Board) is required to notify the victim or victim's family prior to any public hearing on the clemency petition.[251] In homicide cases, the Board must publish notice of the hearing in a local newspaper.[252] The Board's report and recommendation must include, *inter alia*, a copy of the published notice, a summary of the evidence presented at the public hearing, an institutional progress report, a description of appropriate community correctional and parole programs, and a plan for "reintegrating [the] petitioner into normal community life."[253] Governor Weld's move marked the first time that a state actually had altered official commutation guidelines in response to the plight of battered women.[254]

By the time the Board held its first clemency hearings in July of 1992, eight women, known as the "Framingham Eight" because they all had been housed in the female state prison in Framingham, Massachusetts, had sought clemency.[255] At least five of the women have since been released from prison, either via sentence commutation or parole.[256] The women also have gained widespread media coverage

249. COMMUTATION GUIDELINES, *supra* note 248, § 1(c)(iii).

250. *Id.* § 3.

251. *Id.* § 5(h).

252. *Id.* § 5(c).

253. *Id.* § 6(a)-(e).

254. *See* Phillips, *supra* note 247, at 17.

255. Toni Locy, *Prosecutor Urges Board to Reject Commutation Plea*, BOSTON GLOBE, July 29, 1992, at Metro/Region 16; Toni Locy, *Pardon Board Hears First Tale of Abuse*, BOSTON GLOBE, July 28, 1992, at Metro/Region 1 (stating that Elaine Hyde, who plead guilty to manslaughter in the stabbing death of her husband, was the first to have a hearing); Toni Locy, *Weld Urged to Free 8 Women; Commutations Sought for Inmates Who Killed Alleged Abusers*, BOSTON GLOBE, Feb. 15, 1992, at Metro/Region 15. The *Boston Globe*, the preeminent local newspaper, also supported clemency. *See Free the Framingham Eight*, BOSTON GLOBE, Dec. 11, 1992, at 22.

256. *See* Toni Locy, *Woman's Life Sentence Is Commuted*, BOSTON GLOBE, Apr. 29, 1993, at Metro/Region 1 (reporting that Eugenia Moore was first woman to have sentence commuted by the Governor's Council); Shawn M. Terry, *Women Hold March Against Domestic Violence*, BOSTON GLOBE, July 10, 1994, at Metro/Region 22 (stating that Shannon Booker was released in June, although it is unclear whether by commutation or parole); *Three Down, Five to Go*, BOSTON GLOBE, Sept. 24, 1993, at 18 (reporting that Patricia Allen's manslaughter sentence was commuted and Meekah Scott, who was out of prison pending an appeal, had her sentence reduced to time served); *Woman Gets Parole in Murder of Husband*, BOSTON GLOBE, July 26, 1994, at 19 (Elaine Hyde). The Board voted against clemency for both Debra Reid, the lone

for their continuing clemency efforts even after release, including a profile on the television newsmagazine *Turning Point*.[257]

In addition to this encouraging exercise of executive clemency, Massachusetts has made recent progress in both the legislative and judicial arenas. In 1993, the Legislature passed a new law admitting evidence that the defendant had suffered abuse or harm and expert testimony concerning the patterns and effects of abusive relationships in cases where self-defense, defense of others, duress, coercion, or accident are raised as defenses.[258] Moreover, the Massachusetts Supreme Judicial Court recently held that women on trial for killing their alleged abusers may present evidence of past abuse, as well as expert testimony regarding BWS.[259] Under this ruling, women may have an avenue to challenge their convictions if such evidence was excluded at trial.[260]

2. Illinois

The clemency movement in Illinois has resulted in several successful petitions for release. Even before the start of an organized clemency movement, several battered women in the state had received individual grants of clemency.[261] The Illinois Clemency Project for Battered Women, composed of lawyers, law professors, law students, and

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lesbian among the Framingham Eight, and Patricia Hennessy. *See* Doris S. Wong, *Board Urges Clemency for 2 in Cases Tied to Battered Women's Syndrome*, BOSTON GLOBE, Mar. 4, 1994, at Metro/Region 35. However, Reid eventually won her freedom when she was paroled in 1994. *See "Framingham Eight" Inmate Wins Parole*, BOSTON GLOBE, Oct. 20, 1994, at Metro/Region 30. It is not clear what happened to the eighth woman. It appears that the Board's task was made easier by the fact that several of the women were eligible for parole by the time the Board examined their petitions. For a description of the Massachusetts clemency procedure, and an account of Patricia Allen's case, see Mary E. Greenwald & Mary-Ellen Manning, *When Mercy Seasons Justice: Commutation for Battered Women Who Kill*, 38 BOSTON B.J. 3 (1994).

257. *See* Bruce McCabe, *"Turning Point" Looks at "Framingham Eight,"* BOSTON GLOBE, July 20, 1994, at Living 30.

258. *See* MASS. GEN. L. ch. 233, § 23E (Supp. 1994).

259. Commonwealth v. Rodriquez, 633 N.E.2d 1039, 1042 (Mass. 1994); John Ellement, *SJC Says Courts Must Consider Abuse Defense*, BOSTON GLOBE, May 27, 1994, at Metro/Region 1.

260. *Rodriquez*, 633 N.E.2d at 1042. However, the court explicitly declined to speculate whether the statute applies retroactively to crimes occurring before its effective date of April 14, 1994. *Id.* at 1042 n.7.

261. For example, Governor Jim Edgar released Denise Babula in February of 1993, only six months after she was convicted of shooting her abusive boyfriend. *See* Rob Karwath & Hanke Gratteau, *Edgar Frees Woman Who Killed Lover*, CHI. TRIB., Feb. 4, 1993, § 2, at 1. In addition, former Governor James Thompson released five women who killed or injured their abusive husbands or boyfriends; none of these women have returned to prison. *See* Julie Irwin, *Pardons Sought for 12 Women Who Killed Alleged Abusers*, CHI. TRIB., Feb. 19, 1994, § 1, at 5.

community organizers, began to interview incarcerated women in the fall of 1993.[262] In February of 1994, petitions for twelve women were submitted[263] and a public hearing was held the following April.[264] Governor Edgar released four of the women on May 12, 1994.[265] By the Fall of 1995, Governor Edgar had granted clemency to seven women and denied petitions for at least seventeen more.[266]

3. Texas

In Texas, the impetus for releasing battered women came from the legislature, rather than the governor.[267] In 1991, the Texas Senate passed an act and resolution regarding battered women. The act allowed direct and expert testimony on the relationship between the accused and the victim in cases involving murder or manslaughter.[268] The resolution directed the State Board of Pardons and Paroles to review the cases of approximately forty Texans convicted of domestic violence-related murder.[269] The Senate resolution was amended by the House and enacted as a concurrent resolution, which read in part:

> [The Texas criminal justice system has] jurisdiction over a number of women and children who have been doubly victimized first by their abusers and later by a criminal justice system that failed to recognize the legitimacy of their defense. . . .
>
> . . . These victims are not common criminals who killed for profit or vengeance; rather, they . . . were driven by an

262. Irwin, *supra* note 261, at 5.

263. *Id.*

264. *See* Laura Duncan, *Project Seeks Freedom for Abused Women*, CHI. DAILY L. BULL., Apr. 6, 1994, at 1; Joseph C. Nunes, *Show Mercy: Clemency Project Takes Up Cause of Battered Women*, CHI. TRIB., Sept. 12, 1993, § 6, at 1. The efforts met with disapproval from some of the local media. *See, e.g.*, Michelle Stevens, *Justice Is Battered in Clemency Cases*, CHI. SUN-TIMES, Apr. 11, 1994, at 19 (arguing that many of the petitions were of "questionable merit" and did not represent "genuinely battered women").

265. Laura Duncan, *Clemency Group Aims at Appeals Process*, CHI. DAILY L. BULL., May 13, 1994, at 3.

266. *See* M.A. Stapleton, *Battered Women's Advocate Downplays Setback*, CHI. DAILY L. BULL., Oct. 9, 1995, at 1.

267. For a review of the Texas clemency procedures, see generally Meredith J. Duncan, Comment, *Battered Women Who Kill Their Abusers and a New Texas Law*, 29 HOUS. L. REV. 963 (1992).

268. Act of Apr. 29, 1991, ch. 48, § 1, 1991 Tex. Gen. Laws 474 (codified at TEX. PENAL CODE ANN. § 19.06 (West 1993)), *repealed by* Act of June 19, 1993, ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3614.

269. S. Con. Res. 26, 72d Leg., 1991 Tex. Gen. Laws 3296 [hereinafter Domestic Violence Resolution].

> unthinkable set of circumstances to perform this last desperate act of self-preservation. . . .
>
> In view of the extraordinary circumstances surrounding their crimes, these victims deserve an impartial review of their sentences so that their histories as victims of domestic violence are taken into account.[270]

The resolution asked the governor to direct the Board of Pardons to investigate convictions and guilty pleas for murder or manslaughter where the defendants were victims of domestic violence, with reviews to be conducted with the help of the Texas Council on Family Violence.[271] A similar measure had passed two years earlier, only to be vetoed by then-Governor William Clements.[272] Advocates hoped that a female governor, newly-elected Ann Richards, would be more sympathetic.[273]

Their hopes proved correct when Governor Richards signed the legislation on May 16, 1991.[274] In an attempt to avoid some of the mistakes made by Governors Celeste and Schaefer, the resolution directed that prosecutors, judges, and law enforcement officials be consulted before any clemency decision was made.[275] As Governor Richards' spokesman made clear, "We don't want to do just a blanket thing, which is where some people got into trouble in the past."[276]

As each inmate requested a review, officials contacted both prosecutors and the victims' families, who had thirty days to comment.[277] The inmate was then interviewed by a five-member panel, which referred deserving cases to the full eighteen-member Board.[278] Ten Board member votes in favor of clemency were required before the case was sent to the governor, who made the final decision.[279] Although inmates without documentation of alleged abuse could be

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270. *Id.*

271. *Id.*

272. *See* Duncan, *supra* note 267, at 966.

273. *See* Maria Puente, *Texas Considers Clemency: Will Review Cases Related to Abuse*, USA TODAY, May 17, 1991, at 3A (describing comments made by Debby Tucker, Executive Director of the Texas Council on Family Violence).

274. *Id.*

275. Domestic Violence Resolution, *supra* note 269, at 3297. The resolution also directed that a relative of the victim should be notified. *Id.*

276. Puente, *supra* note 273, at 3A (quoting Chuck McDonald). For a description of some of the 40 women whom the Council wanted to consider for clemency, see Marcia S. Harrison & Maria Puente, *Convicted Women Describe Abuse*, USA TODAY, May 17, 1991, at 3A.

277. UPI, Oct. 8, 1991, *available in* LEXIS, News Library, UPI File.

278. *Id.*

279. *Id.*

heard by the panel, most women offered evidence of battering, including police and hospital reports, letters from shelters, documentation of counseling received prior to the killing, and eyewitness testimony.[280] By October of 1991, twenty-five women had requested reviews.[281]

Although the Texas approach looked promising, the results have been disappointing. By the summer of 1993, parole officials had screened over 400 applications from people convicted of murder or manslaughter and had identified 123 women and 30 men who met the law's criteria.[282] Almost a year and a half later, however, not a single individual had been released.[283] In part, it appears that the time-consuming requirement of obtaining input from court officials might be responsible for the delay.[284] However, with the defeat of Governor Richards' bid for reelection[285] and the repeal of the 1991 act that allowed expanded testimony,[286] the prospects for future releases in Texas are not promising.

4. California

One of the best-organized but most disappointing clemency efforts has taken place in California, where an organized campaign has been underway since 1991.[287] The impetus for the effort was the introduction of a successful 1991 bill allowing expert witnesses to testify

280. *Id.*

281. *Id.*

282. Cindy Rugeley, *Freedom for Battered Women Proves to Be Elusive; No Prisoners Have Been Released Under State Amnesty Plan*, HOUSTON CHRON., July 11, 1993.

283. *See* Gayle Reaves, *Abused Spouses Rebuffed, Clemency Yet to Be Granted in Slayings*, DALLAS MORNING NEWS, Dec. 22, 1994, at 31A; Rugeley, *supra* note 282. The Board of Pardons and Paroles rejected 25 applications, and Governor Richards denied clemency for at least three women who made it past the Board's screening. *See* Reaves, *supra*, at 31A (noting allegations that Governor Richards may have turned down the three requests and let three others languish "because of the political problem of looking soft on crime"). No reports of releases were found by the author through November 1995.

284. *See* Rugeley, *supra* note 282. In addition, the Texas Council on Family Violence has not been consulted on some recommendations, in contravention of the resolution. *See* Domestic Violence Resolution, *supra* note 269, at 3297; Reaves, *supra* note 283, at 31A.

285. *See* Reaves, *supra* note 283, at 31A.

286. Act of June 19, 1993, ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3614.

287. *See* Madden, *supra* note 98, at 6; Richard Barbieri, *Battered Women Push for Clemency Program; Bay Area Counsel Establish Coalition to Aid Prisoners*, RECORDER, Dec. 3, 1991, at 1. For an in-depth review of the clemency process in California, as well as a profile of some of the prisoners seeking release, see Madden, *supra* note 98, at 4-15. For a recent review of California self-defense law as applied to battered women, see Rachel A. Van Cleave, *A Matter of Evidence or of Law? Battered Women Claiming Self-Defense in California*, 5 UCLA WOMEN'S L.J. 217 (1994).

about BWS and admitting detailed evidence of prior abuse.[288] Unlike most of the other states, the clemency effort in California began with the incarcerated women themselves.[289] In March of 1991, thirty-four women from the Frontera prison sent a clemency petition to Governor Wilson,[290] who agreed to review their cases and gave the women time to supplement their petitions.[291] In response, a group of San Francisco lawyers formed the California Coalition for Battered Women in Prison, hoping to provide lawyers for all the inmates requesting clemency.[292] Early in 1992, prison authorities agreed to the compassionate release of one terminally ill inmate, who died two days later.[293]

The legislative effort was led by Assemblyman Jackie Speier (D-South San Francisco), head of the Women's Caucus.[294] In September of 1991, ten state legislators traveled to the California Institution for Women to hear from eight battered women imprisoned there.[295] In response, numerous domestic violence bills were introduced in the Assembly, resulting in the passage of a law that explicitly included BWS as one of the factors that the Board of Prison Terms may consider during pardon and commutation proceedings.[296] By the end of 1992, thirty-four formal petitions had been filed with the governor.[297] Several months later, the Assembly passed a resolution urging the governor to launch an immediate investigation of the petitioners' cases.[298]

When Governor Wilson finally began acting on these actions in the spring of 1993, however, he left many advocates bitterly disappointed. Of the fourteen petitions he considered, Governor Wilson denied all but two: he commuted the sentence of Frances Mary Caccavale due to her

288. Act of Oct. 10, 1991, ch. 812, §§ 1-2, 1991 Cal. Legis. Serv. 3182 (West) (codified as amended at CAL. EVID. CODE § 1107 (West Supp. 1995). California appellate courts previously had upheld the admissibility of such testimony. People v. Aris, 264 Cal. Rptr. 167, 180 (Ct. App. 1989). Despite the exclusion of the testimony, however, Aris' conviction was nonetheless affirmed. *Id.* at 183.

289. Barbieri, *supra* note 287, at 1.

290. *Id.*

291. Madden, *supra* note 98, at 6.

292. Barbieri, *supra* note 287, at 1.

293. Dan Morain, *Ill Inmate Who Killed Abuser Is Released*, L.A. TIMES, Jan. 31, 1992, at A8.

294. Patt Morrison, *Legislators Listen to Women Who Killed*, L.A. TIMES, Sept. 18, 1991, at A3.

295. *Id.*

296. *See* Act to Amend Section 4801 of the Penal Code Relating to Crimes, ch. 1138, § 1, 1992 Cal. Legis. Serv. 4566 (West) (amending CAL. PENAL CODE § 4801 (West Supp. 1994)); Madden, *supra* note 98, at 19.

297. *See* Madden, *supra* note 98, at 7.

298. A. Con. Res. 10, 1993 Reg. Sess., 1993 Cal. Legis. Serv. A-3 (West).

" 'advanced years and deteriorated medical condition,' " and reduced the sentence of Brenda Aris (whose unsuccessful appeal had resulted in the judicial opinion admitting evidence of BWS in California).[299] In justifying these decisions, Governor Wilson stated: "The test of whether clemency should be considered in cases where the request is based on B.W.S. must be: Did the petitioner have the option to leave her abuser, or was the homicide realistically her only chance to escape?"[300] While advocates for clemency were dismayed by the decisions, others praised Governor Wilson for his "restraint" and cautious deliberations.[301] By the end of 1994, Governor Wilson had yet to take action on the remaining petitions.

5. Other States

When Governor Celeste decided to commute the sentences of battered women who killed their abusers, he was not acting without precedent. Although his was the first mass clemency action, other governors had granted varying forms of clemency to individual women. For example, in March of 1989, the Nebraska Board of Pardons granted a full pardon to Judy Sturm, fifteen years after she was released from prison.[302] In September of 1989, the Nevada Parole Board freed Carey Aratari after allowing her to seek parole.[303] Illinois Governor James R. Thompson commuted the sentences of Gladys E. Gonzalez and Leslie Brown in January of 1989,[304] and Washington Governor Booth Gardner released Delia Alaniz in October 1989.[305] Several of the freed

299. Greg Lucas & Teresa Moore, *Wilson Grants Clemency to 2 Battered Women: Petitions Denied for 14 Other Female Prisoners*, S.F. CHRON., May 29, 1993, at A1 (quoting California Governor Pete Wilson). Among the prisoners denied clemency was Brenda Clubine, founder of Convicted Women Against Abuse, whom Governor Wilson said had "repeatedly lied" about her husband's murder. *See* Deborah Hastings, *National Spokeswoman For Battered Women: Is She Telling the Truth?*, L.A. TIMES, Oct. 10, 1993, at B3.

300. Seth Mydans, *Clemency Pleas Denied in 14 Abuse-Defense Cases*, N.Y. TIMES, May 30, 1993, at 21.

301. *See, e.g., Mercy and Murder: Enduring Abuse Is Not a License to Kill*, SAN DIEGO UNION-TRIB., June 9, 1993, at B6. The author is not aware of any additional commutations through November 1995.

302. *See* UPI, Mar. 16, 1989, *available in* LEXIS, News Library, UPI File.

303. *See* UPI, Sept. 25, 1989, *available in* LEXIS, News Library, UPI File.

304. Susan Diesenhouse, *Women Driven to Kill Are Shown More Mercy*, N.Y. TIMES, Jan. 30, 1989, at A10.

305. Nancy Gibbs, *'Til Death Do Us Part*, TIME, Jan. 18, 1993, at 45. According to the National Clearinghouse for the Defense of Battered Women, at least 17 women in 12 states had been released prior to Governor Celeste's actions; between 1978 and 1993, the Clearinghouse estimates that 80 women from 21 states were released. NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, BATTERED WOMEN WHO HAVE RECEIVED CLEMENCY: 1978-

women had been convicted of hiring people to kill their abusive mates.[306]

After Governors Celeste and Schaefer took action, advocacy groups organized campaigns for large-scale clemency review in states such as New York, where expert testimony about BWS has been admissible since 1985.[307] In March of 1991, an Assembly resolution was introduced to urge then-Governor Mario Cuomo to direct the Parole Board to " 'investigate the cases of all women convicted of murder or other felonies which are directly related to domestic violence' " and to recommend commutations or pardons when appropriate.[308] On March 25, 1991, the unanimous Assembly asked Cuomo to direct the Board to consider the release of about 75 women.[309] However, Cuomo exercised his clemency power sparingly. He personally reviewed all applications by battered women, and released only one woman by the end of 1992.[310]

Similarly, in late November of 1992 the Florida Coalition Against Domestic Violence staged rallies in four cities and called for the state Clemency Board to begin a review of an estimated three hundred cases.[311] In mid-December of that year, the efforts appeared to pay off: BWS became admissible, and Governor Lawton Chiles and his Cabinet, sitting as the Clemency Board, agreed to create a panel to review the cases.[312] Kimberly Soubielle, the first woman to be released under this program, had her sentence commuted to time served in March of 1993.[313] By the end of 1994, five women had been released, and the

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1993 (Rev. May 1994).

306. For example, in December of 1988, New Hampshire Governor John H. Sununu granted a conditional pardon to Kathleen Brewster Kaplan. Laura A. Kiernan, *Pardon Granted in N.H. Murder-for-Hire Case*, BOSTON GLOBE, Dec. 8, 1988, at Metro/Region 29.

307. *See* People v. Torres, 488 N.Y.S.2d 358, 363 (N.Y. Sup. Ct. 1985).

308. Gary Spencer, *Legislators Seek Release of Women Prisoners*, N.Y. L.J., Mar. 5, 1991, at 1.

309. *See* Vivienne Walt, *Battered Women in Jail; Assembly Urges Clemency for 75*, NEWSDAY, Mar. 26, 1991, at News 3.

310. *See* Edward A. Adams, *Cuomo Faces Annual Ritual of Deciding on Clemency*, N.Y. L.J., Dec. 28, 1992, at 1 (noting that Cuomo had commuted the sentences of only 29 prisoners in nine years as governor, including battered woman advocate Luz Santana, compared to more than 150 commutations during his predecessor's eight years in office). However, Cuomo did grant clemency to Jean Harris, who was convicted of shooting her lover, Dr. Herman Tarnower, of "Scarsdale Diet" fame. Deborah Sontag, *Clemency Given Jean Harris Leaves 3 Others Wondering*, N.Y. TIMES, Jan. 1, 1993, at A1. The author is not aware of any additional commutations through the end of Cuomo's tenure as governor.

311. UPI, *Coalition Wants Clemency for Abused Women*, Nov. 27, 1991, *available in* LEXIS, News Library, UPI File.

312. *Florida OKs "Battered Woman" Defense*, CHI. TRIB., Dec. 19, 1991, at 21.

313. *Clemency Granted for Battered Woman*, LEGAL INTELLIGENCER, Mar. 11, 1993, at 5.

Battered Women's Clemency Project had agreed to represent additional candidates.[314]

The most innovative yet straightforward approach has been taken in Washington state. In 1993, the legislature simply gave retroactive effect to an existing law permitting convicted murderers to seek leniency during sentencing by demonstrating that their victims abused them.[315] In September 1994, this retroactive review resulted in the release of the first such woman, Sharon Hanson.[316]

In total, organized clemency efforts have been reported in approximately twenty-seven states.[317] Recently, at least one additional governor has begun to review the case histories of battered women who are in prison for killing their alleged abusers.[318] Women continue to file individual petitions in other states as well.[319]

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314. Ron Bartlett, *Women's Group Seeks Clemency in Slayings*, TAMPA TRIB., at Florida/Metro 1, Dec. 24, 1994, at 1; Bill Moss, *Battered Wife Who Shot Mate Gets Clemency*, ST. PETERSBURG TIMES, July 15, 1993. Governor Chiles and his Cabinet have denied clemency to at least one woman. *See* Bob Levenson, *Battered-Wife Appeal Fails Again*, ORLANDO SENTINEL, July 15, 1993, at B1. The Clemency Project received a $300,000 grant from the Florida Bar Foundation for a three-year review of women serving time for murder in Florida prisons. Bartlett, *supra*, at 1. For a general description of the Florida clemency process, see Mark R. Schlakman, *Clemency and the Battered Woman*, FLA. B.J., Oct. 1994, at 72. The author is not aware of any additional commutations through November 1995.

315. WASH. REV. CODE §§ 9.94A.395, 9.95.045, 9.95.047 (1993).

316. *Battered Woman to Be Freed*, SEATTLE TIMES, Sept. 2, 1994, at B2. Although the law appeared to apply to a large number of inmates, the Washington Department of Corrections was aware that only approximately 25 women were incarcerated for murders committed prior to July of 1989. Barbara A. Serrano, *Leniency for Those Who Killed Abusers*, SEATTLE TIMES, June 18, 1993, at A1. Prior to passage of the law, Washington Governor Booth Gardner had agreed to review individual cases but had declined to adopt a blanket plan of clemency. *See Many Battered Women—Ohio Governor Spares Convicted Murderers*, SEATTLE TIMES, Jan. 12, 1991, at A15.

317. *See* NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, CLEMENCY ORGANIZING PROJECTS (Draft May 1994). For more information regarding clemency organizing projects and current legislative proposals, contact the Clearinghouse at 125 S. 9th Street, Suite 302, Philadelphia, PA, 19107, (215) 351-0010.

318. *See* Patrick Crowley, *Battered Wives May Be Pardoned for Killings*, CINCINNATI ENQUIRER, Nov. 14, 1995, at A1 (outgoing Kentucky governor Brereton Jones instructed staff to review case histories because "it's the right thing to do"). Not surprisingly, the announcement engendered immediate criticism. *See, e.g.*, *No Pardon: Domestic Violence Is No Excuse for Governor Jones to Release Killers*, CINCINNATI ENQUIRER, Nov. 16, 1995, at A16 (editorial).

319. *See, e.g.*, Madden, *supra* note 98, at 5-6; Robert S. Capers, *Convictions of Abused Women to Be Reviewed*, HARTFORD COURANT, Dec. 17, 1992, at A22 (discussing Connecticut efforts); Andi Rierden, *Citing Abuse, Women Ask for Clemency in Killings*, N.Y. TIMES, May 12, 1991, § 12, at 1. Moreover, the recognition of domestic violence, and the debate over punishment for battered women who kill, is not limited to the United States. *See, e.g.*, Mary Cummins, *Domestic Violence—Will Men Get the Message?*, IRISH TIMES, Feb. 28, 1995, at 2 (discussing domestic violence public awareness campaign in Ireland); Bruce McKain, *Ruling*

IV. THE JUSTIFIABILITY OF THE PARDONS

Governors Celeste and Schaefer advanced several broad reasons for granting clemency,[320] many of which have been echoed by subsequent clemency efforts in other states. The most common reason was the unfairness of the evidentiary laws under which the women had been convicted. In Ohio, clemency followed changes to the evidentiary laws,[321] while in Maryland, Governor Schaefer simultaneously pushed for such amendments while undertaking clemency efforts.[322] Other reasons included: that the women posed no threat to the community; that the women had been trapped in their battering relationships; that the women had served enough time for their crimes; and that commutation was the "right" thing to do and served the public interest.[323] Whether any of these reasons for clemency is justifiable under a system of retributive justice is the question to which we now turn.

Should the imprisoned women have been left to the judicial system, for retrial or re-sentencing by judges? Should large-scale sentencing relief come only from the legislature? When governors take action subsequent to judicial or legislative silence, or to nonretroactive changes in the law, do they usurp judicial and legislative functions? Or is clemency indeed an executive "check" on the power of the other branches? Although a detailed discussion of separation-of-powers doctrine is beyond the scope of this Article, it is important to note that neither the existence of the executive clemency power nor the debate over the scope of the separation-of-powers doctrine are new concepts. To the extent that critics raised traditional separation-of-powers arguments against the validity of the commutations, the object of their wrath is more properly characterized as the concept of clemency in general, rather than the individual actions in Ohio and Maryland. However, to the extent that critics identified problems particular to the governors' actions, their arguments merit further examination.

A. *Theories of Punishment and Pardon*

To say that clemency historically has been an executive prerogative

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Will Renew Abuse Debate, THE HERALD (Glasgow), July 8, 1995, *available in* LEXIS, News Library, PAPERS File (reporting decision of English appeal court to release battered woman who killed her violent husband). For a discussion of international issues, see generally Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119 (1995).

320. *See* Leonard, *supra* note 19 (Celeste); Naylor, *supra* note 199, at A1 (Schaefer).

321. *See* Kimmins, *supra* note 150.

322. Naylor, *supra* note 199, at A1.

323. Kimmins, *supra* note 150; Naylor, *supra* note 199, at A1.

is not, however, to say that its exercise in these particular instances does not offend or frustrate the goals of the criminal justice system. This analysis in turn requires that such acts be measured against a generalized scheme of criminal justice. In the current "law and order" environment in the United States, modern versions of retributive theory (and at times deterrence) most often are offered as the appropriate standards on which criminal justice is based.[324]

1. Development of Modern Retributive Theory

In general, a system of criminal justice exists "to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable."[325] Yet despite that rather obvious goal, historically there has been little agreement among scholars, judges, politicians, and clergy as to how to achieve it.[326] As a result, the history of punishment has been marked not by a coherent approach to criminal justice, but by the successive dominance of different, and sometimes antithetical, approaches.

The oldest theory of punishment, and ironically the one to which society most recently has returned, is retributive justice.[327] This theory, often described as a theory of "just deserts," requires that every crime be "repaid" in the form of punishment, with the proper amount of punishment determined by the severity of the crime.[328] Retributive theories of justice can be traced back to the Code of Hammurabi, and are exemplified by the Biblical instruction to take "an eye for an eye."[329]

In the United States, retributive theories were discredited in the early twentieth century, and penal reformers instead turned their efforts toward rehabilitation.[330] Rather than focusing on the crime, rehabilitation focuses on "treating" the criminal, to enable the criminal to return to society free from the desire to commit additional crimes.[331] Unlike retributive justice, under which an appropriate sentence may be

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324. *See* LAFAVE & SCOTT, *supra* note 68, § 1.5(a)(6).

325. *Id.* § 1.5.

326. *Id.* § 1.5(b).

327. *Id.* § 1.5(a)(6).

328. *Id.*

329. *See Exodus* 21:24; MOORE, *supra* note 2, at 15-16. For consideration of theories of retributive justice, see, e.g., IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS (John Ladd trans., 1965); MOORE, *supra* note 2, at 28-34.

330. MOORE, *supra* note 2, at 56. For the progression from retributive justice through utilitarianism, the "right to punishment," rehabilitation, and back to retributive justice, see *id.* at 23-78.

331. *See* LAFAVE & SCOTT, *supra* note 68, § 1.5(a)(3).

calculated for a given crime, the rehabilitative ideal provides no set length of "treatment."[332] Rather, incarceration lasts until each criminal is ready to return to society, resulting in the so-called "indeterminate sentence."[333]

By the 1960s, the attraction of the rehabilitative ideal began to fade.[334] Despite the focus on treatment, consistent rates of recidivism convinced many people that the system had failed.[335] More importantly, reformers began to recognize that rehabilitation had dehumanizing effects, most notably the uncertainty over how much time a criminal would spend in prison and the wide disparity in sentences imposed upon individuals who committed comparable crimes.[336] The proffered solution was to move toward a system of determinate sentencing that would reduce the discretion of the sentencing judge—in other words, a return to the basic tenet of retributive justice that each crime has an appropriate punishment.[337] The return to retributive justice is perhaps best exemplified by the creation of the Federal Sentencing Guidelines, a codified method of calculating punishments that explicitly rejected the goal of rehabilitation.[338]

The new retributive ideal can be summarized as follows:

> A just system of law imposes a fair burden of self-restraining obedience on its citizens, offering them in return the benefits that flow from the law-abiding self-restraint of others. One who wilfully breaks the law of such a system disturbs that fair balance of benefits and burdens. . . . Punishment restores that fair balance by imposing on the criminal a burden which wipes out her unfair advantage. . . .[339]

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332. *Id.* § 1.5(b).

333. MOORE, *supra* note 2, at 59, 69-72.

334. LAFAVE & SCOTT, *supra* note 68, § 1.5(b).

335. MOORE, *supra* note 2, at 67.

336. *Id.* at 68-69. For a discussion of the legacy of rehabilitation theory in the United States, see Mistretta v. United States, 488 U.S. 361, 363-67 (1989) (upholding the constitutionality of the Federal Sentencing Guidelines) (citing S. REP. NO. 225, 98th Cong., 1st Sess. (1983)).

337. MOORE, *supra* note 2, at 74 (citing ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS—REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION (1976)).

338. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-238, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3599 (1988 & Supp. V 1993) & 28 U.S.C. §§ 991-998 (1988 & Supp. V 1993)); 28 U.S.C. § 994(k) (1988); *Mistretta*, 488 U.S. at 367-68 (concluding that the Act rejects rehabilitation and serves the goals of retribution, education, deterrence, and incapacitation).

339. R.A. Duff, *Review Essay: Justice, Mercy, and Forgiveness*, CRIM. JUST. ETHICS,

Such punishment should be meted out fairly and in proportion to the harm caused.[340] Yet, while a retributive framework presupposes a coherent analysis of fair and proportionate punishment, the concepts are extremely difficult to quantify.[341] Thus, even among retributive theorists, we might expect individual analyses of punishment (and of clemency) to differ measurably.

2. Utilitarian Approaches

Retribution is by no means the only viable theory of punishment in the late twentieth century. As our emphasis on the rehabilitative model demonstrates, *prevention* of criminal behavior has been as much a part of our criminal justice system as the imposition of appropriate punishment for those who transgress.[342] Although the rehabilitation model may have failed, the goal of prevention persists in the form of deterrence: either "general deterrence," which aims to prevent members of society from committing crimes, or "specific deterrence," which focuses on deterring the individual criminal.[343] Under a theory of deterrence, the punishment inflicted on the criminal should "deter others from committing future crimes, lest they suffer the same unfortunate fate."[344]

Deterrence is a utilitarian theory of punishment justified by its beneficial effects on society as a whole, rather than its effect of balancing out the individual's crime.[345] Utilitarian theories focus on the promotion of overall societal happiness; punishment is justified to the extent that the gain to society outweighs the cost to the individual.[346] As Professor Kathleen Dean Moore has noted, "[f]or Utilitarians, the punishment does not have to fit the crime, nor does it have to fit the criminal. The punishment must fit only the needs of

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Summer/Fall 1990, at 51, 51 (book review).

340. *See* LAFAVE & SCOTT, *supra* note 68, § 1.5(b), at 28; MOORE, *supra* note 2, at 104.

341. *See* MOORE, *supra* note 2, at 99-121. For example, in assessing how much punishment is deserved, "legalistic retributivism" seeks proportionality in restoring a balance and reinforcing obedience to the law, *id.* at 99-101, whereas "moralistic retributivism" measures punishment in proportion to "moral turpitude." *Id.* at 108-09.

342. LAFAVE & SCOTT, *supra* note 68, § 1.5(a)(1); *supra* notes 330-33 and accompanying text.

343. LAFAVE & SCOTT, *supra* note 68, § 1.5(a)(1), (4).

344. *Id.* § 1.5(a)(4). The *Federal Sentencing Guidelines* explicitly adopted deterrence, as well as retribution, as goals of imprisonment. *See* 18 U.S.C. § 3553(a)(2) (1988).

345. *See* MOORE, *supra* note 2, at 36-37.

346. *See, e.g.*, Madden, *supra* note 98, at 61. For a detailed discussion of utilitarian theory, see, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1970); MOORE, *supra* note 2, at 35-45.

society."[347] Thus, if retribution focuses on the nature of the crime, and rehabilitation focuses on the nature of the criminal, deterrence and other utilitarian theories focus instead on the needs of society. While empirical studies have questioned the effectiveness of deterrence, particularly in the context of the death penalty, it remains a powerful incentive for punishment.[348]

In analyzing the propriety of the sentence commutations granted by Governors Celeste and Schaefer, this Article takes as its reference point the modern retributive theory of punishment. The main reason for this choice is that retributive theories, unlike utilitarian theories, supply detailed concepts of "desert" against which punishment, and hence clemency, can be assessed.[349] Moreover, most of the criticism leveled against the governors adopted the language of retributive theory, questioning whether or not these particular women *deserved* to be released. However, in recognition of the ongoing viability of utilitarian notions of punishment and pardon, this Article addresses issues of deterrence where appropriate.

3. Justice or Mercy?

Before turning to an analysis of the clemency actions, it is worth noting that there is a basic disagreement over whether clemency should be characterized as "justice" or "mercy." For a strict theorist such as Professor Moore, these concepts are mutually exclusive: "a justified pardon is one that corrects injustice rather than tempers justice with mercy."[350] Professor Moore rejects pardons granted for the public welfare, to promote the pardoner's own welfare, to reward past actions, or for the sake of pity, characterizing them as abuses of the pardon power that cannot be justified on any retributive grounds.[351] In this view, "mercy is either justice or it is unjust"—it either advances the goals of retributivism (in which case it is justice rather than mercy), or

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347. MOORE, *supra* note 2, at 41.

348. *See* LAFAVE & SCOTT, *supra* note 68, § 1.5(a)(4), at 25 & n.27. Additional theories of punishment, less relevant in the battered women context, include incarceration and education. *See id.* § 1.5(a)(2), (5).

349. *See id.* § 1.5(a)(6), at 26. In addition, I agree with those scholars who contend that retributive theory functions as a "limiting principle" on utilitarian theory; whereas deterrence could justify the severe punishment of an individual with little (or even no) culpability if it would deter others from committing a crime, retributive theory sets an upper limit on punishment based on individual culpability. *See, e.g.*, HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 65-69 (1968); NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 25-26 (1980).

350. MOORE, *supra* note 2, at 213.

351. *Id.* at 199-207.

it impedes them (in which case it is not appropriate).[352]

Yet, in reality, clemency often has been granted for reasons best described as "merciful." In the early nineteenth century, the United States Supreme Court held that pardons were acts of grace which could be refused by the recipient.[353] But if a pardon serves the goal of justice, rather than mercy, it seems illogical to allow a prisoner to refuse the pardon (and thereby to refuse to serve the goal of justice). Interestingly, the Court eventually abandoned this "act of grace" theory in favor of a model allowing pardons to be imposed for the public good,[354] a rationale that Professor Moore explicitly rejects.[355]

However, even Professor Moore is willing to concede that other retributivist scholars have come to differing conclusions regarding the role of mercy in punishment.[356] For example, Professor Kobil presents a broader vision of retributive justice that incorporates many elements of mercy. Professor Kobil believes that most clemency decisions should be "justice-enhancing," meaning that "they ensure that our penal system operates fairly, so that each person is rendered her due."[357] However, he also would allow occasional use of "justice-neutral" clemency, granted for reasons "ranging from preserving the unity of the state to advancing the political or financial aims of" the pardoners.[358] In Professor Kobil's vision of clemency, the tension between these two types of pardons would be solved by a procedural mechanism: justice-neutral clemency would be exercised by the executive alone, while justice-enhancing decisions would be made by an independent professional board.[359]

For other commentators, mercy is an autonomous value, and clemency is best seen "as an instrument of equity in criminal law, a means of preventing injustice and ensuring fairness for those wrongly convicted or harshly sentenced."[360] Under this analysis, "[i]t is precisely because the law defines justice narrowly . . . that it can require genuine mercy to achieve genuine justice."[361] Rather than creating a conflict, such "mercy" strives to reconcile the results of an imperfect

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352. *See id.* at 192.

353. *See* United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

354. *See, e.g.*, Biddle v. Perovich, 274 U.S. 480, 485-88 (1927) (holding that the President may pardon a person convicted of a life sentence without the convict's consent).

355. MOORE, *supra* note 2, at 199.

356. *See id.* at 188-92.

357. Kobil, *supra* note 36, at 622.

358. *Id.*

359. *Id.*

360. Johnson, *supra* note 44, at 114.

361. *Id.* at 117.

criminal justice system with the retributive ideal.[362]

Some theorists attempt to reconcile the two goals by reconstituting mercy as a form of justice and arguing that it is improper to consider "mercy" a separate concept.[363] As a private creditor may waive a personal debt, society as a whole, embodied by an official who represents the victims who have a right to demand punishment, may choose to waive the punishment that otherwise is deserved.[364] These considerations have led some retributive theorists to conclude that justice and mercy are, and perhaps should be, irreconcilable; sometimes we simply must choose mercy over justice.[365]

The distinctions between individual forgiveness, mercy, and justice are less important to utilitarian theories of justice.[366] For utilitarians, the appropriateness of punishment turns on a stark choice: Will the punishment do more harm than good?[367] If so, punishment must be imposed; if not, it must not be imposed. In that context, justice and mercy have no inherent meaning and "their only moral content is that they are names for withholding or softening punishment."[368] Thus, although utilitarianism can determine if punishment is generally appropriate for a given class of crimes (*e.g.*, whether battered women who kill should be punished at all), it is less useful for analyzing whether clemency is appropriate in an individual case.

B. When Should Clemency Be Granted?

Although such debates are engaging on a theoretical level, in practice they often lead to disagreement over whether a particular act of clemency is "justified" or merely an example of mercy. But by drawing on the work of several such commentators, it is possible to discern and articulate a number of categories of appropriate clemency. Ultimately, it is my position that despite several theoretical obstacles, the acts of Governors Celeste and Schaefer fit within several categories of

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362. *See id.* at 115-16.

363. *See, e.g.*, Jeffrie G. Murphy, *Mercy and Legal Justice*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162, 170-72 (1988). It is precisely this characterization with which other commentators disagree, claiming that "[t]o eliminate the concept of legal mercy . . . because it is in most cases a means of doing justice is to ignore the message of history," and to assume we have achieved a perfect system of justice. Johnson, *supra* note 44, at 116.

364. Murphy, *supra* note 363, at 179-80.

365. Jean Hampton, *The Retributive Idea*, *in* MURPHY & HAMPTON, *supra* note 363, at 111, 157-61.

366. MOORE, *supra* note 2, at 182-83.

367. *Id.* at 183.

368. *Id.*

appropriate clemency.

1. Innocence

For a strict retributive theorist, executive clemency is most clearly justified when the convicted person turns out to be innocent.[369] Such "innocence" is divided into two categories: those prisoners who have been falsely convicted, and those who are not blameworthy due to some type of reduced ability.[370] The false conviction argument raises the almost intractable practical issues of how, and by whom, such "innocence" can be established once appellate courts have upheld the conviction (save for a later confession by the true perpetrator).[371] However, this argument may occasionally be useful to those women who can demonstrate that their legal guilt was determined in an improper or unfair manner.[372]

In a strict analysis, reduced ability includes only the impairments of insanity, mental retardation, and youth.[373] With the exception of the *Burning Bed*-type temporary insanity plea,[374] this analysis is unlikely to aid many battered women. But some commentators expand this category to include other impairments that similarly diminish blameworthiness, such as diminished mental capacity or intoxication.[375] Under an expanded formulation, the learned helplessness component of BWS may help to establish such diminished capacity, and Professor Kobil explicitly defends the Ohio commutations on this ground.[376] Governor Celeste alluded to this reasoning when he characterized the women as "so emotionally entangled [that] they were incapable of

369. *Id.* at 132-33.

370. *Id.* at 138.

371. *See, e.g.*, Ammons, *supra* note 10, at 31 (arguing that "[t]he possibility of mistake is not as infrequent as one would suppose"). Professor Kobil defines "substantial doubt of guilt" as any "reason that seriously undermines . . . confidence in the integrity of the judicial determination" and suggests that such offenders could be given a new trial. Kobil, *supra* note 36, at 624-25.

372. *See, e.g.*, Madden, *supra* note 98, at 55-56 (discussing other factors that affect the integrity of the judicial system including "[p]rosecutorial zeal, unwarrantedly stiff charges . . . unfair self-defense laws [and] the refusal or inability of jurors to recognize the reasonable nature of a battered woman's response to a fear of imminent harm"). On a practical level, however, the argument that battered women *never* receive a fair trial is unlikely to sway public opinion or to convince a wary state executive to act.

373. MOORE, *supra* note 2, at 138.

374. *See supra* note 66.

375. *See* Kobil, *supra* note 36, at 625-26.

376. Kobil, *supra* note 134, at 679 (claiming that the commutations were retributively justifiable "because of the [women's] diminished psychological culpability").

walking away."[377] But while this approach may satisfy retributive standards for clemency, it relies heavily on culture-bound stereotypes of helplessness, incapacity, and unreasonableness that battered women and their advocates may prefer to avoid.[378]

2. Excusable Conduct

If, under retributive theory, the purpose of punishment is to restore society's balance by taking away the benefits unfairly gained by the criminal, it follows that a criminal who does not receive any benefit from her crime does not deserve punishment.[379] Professor Moore labels these situations "excuses," and they include both crimes without tangible gain and crimes without any gain.[380] The former category includes unsuccessful attempts, crimes for which reparation has been made, and crimes of compensation; the latter includes strict liability offenses and coerced crimes.[381] It is possible to characterize a battered woman's killing of her abuser as reparation or compensation for the injustice of being battered.[382] Yet this is exactly the type of vigilante action that a law-abiding retributive system abhors;[383] after all, it is the criminal (the batterer), who is supposed to make amends. Not surprisingly, the governors did not cite this rationale as a justification for their clemency actions.[384]

A more appropriate excuse might be coercion, which can be expanded to include physical and psychological necessity and duress.[385] Particularly in light of new determinative sentencing

377. Colman McCarthy, *Countering Violence at Home*, WASH. POST, July 23, 1991, at D13 (quoting Ohio Governor Celeste). Yet this argument also requires an assertion that, despite their earlier diminished capacity, the women do not pose a threat to the community at large.

378. *See* Schneider, *supra* note 116, at 220-22; *supra* part II.C.

379. *See* MOORE, *supra* note 2, at 142-44.

380. *Id.* at 143-44.

381. *Id.*

382. *See* Madden, *supra* note 98, at 56 (arguing that "we should not shrink from applying the repaired crimes principle in battered women's cases merely because they involve death"). Even Madden, however, concedes that "[c]ommentators may shy away from this justification." *Id.* at 56 n.281. This author does, although more out of doubt that this rationale serves to advance the cause of clemency with decisionmakers than out of a lack of sympathy for the sentiment it embodies.

383. *Cf.* Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (stating that the criminal justice system promotes societal stability by deemphasizing "self-help, vigilante justice, and lynch law").

384. Opponents, however, clearly attributed this reasoning to the governors. *See, e.g.*, Naylor, *supra* note 48, at A1.

385. *See* Kobil, *supra* note 36, at 630-31. Traditionally, the defenses of duress and necessity were distinguished: necessity applied where the defendant's conduct was compelled by physical

guidelines, judges may no longer have the flexibility to recognize subtle distinctions in moral blameworthiness.[386] When Governor Celeste described the women as "entrapped emotionally and physically,"[387] he evoked the image of such coercion. While this is an adequate reason for clemency, Professor Kobil notes that "[p]articularly difficult issues arise when the moral principles acted upon by the accused have no widespread acceptance."[388] Thus, for decisionmakers without sympathy for battered women, these cases may not appear to be compelling. The same may be true of prosecutors, the media, and the general public.

3. Justified Conduct

Strict Kantian philosophers distinguish between "morally justified crimes" (such as self-defense, mercy killings, or draft evasion during the Vietnam War) and "morally appropriate crimes" based on sincerely held, but possibly incorrect, moral beliefs.[389] A battered woman might argue that she was morally justified in killing her abuser because he deserved to die, even if her underlying belief as to just deserts is not shared by the society at large.[390] In Kantian terms, however, her action might

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circumstances, while duress applied where the pressure came from another human being. *See* LAFAVE & SCOTT, *supra* note 68, § 5.4(b). However, the distinction has been eroded in many jurisdictions, and is not particularly relevant to the present discussion. What is relevant is that allegations of coercion that fail to establish a valid defense may nonetheless constitute an "excuse" for the purposes of clemency, as they may in some jurisdictions constitute a reason for imposing a more lenient sentence. *See, e.g.*, UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5K2.12 (1994). For discussions of the law of duress as applied to battered women, see, e.g., Beth I.Z. Bolard, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603 (1994); Susan D. Appel, Note, *Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses*, 1994 U. ILL. L. REV. 955.

386. Kobil, *supra* note 36, at 631.

387. McCarthy, *supra* note 377, at D13 (quoting Ohio Governor Celeste); *see also* Tamar Lewin, *More States Study Clemency for Women Who Killed Abusers*, N.Y. TIMES, Feb. 21, 1991, at A19 (noting Governor Schaefer's comment that some of the women would probably have been killed had they not acted).

388. Kobil, *supra* note 36, at 631.

389. *See* MOORE, *supra* note 2, at 157-62; Kobil, *supra* note 36, at 632.

390. Madden, *supra* note 98, at 57. Alison Madden argues "that there have long been situations in which society at least accepted, if not approved of, moral actions that were not in conformance with inadequate or unpopular laws." *Id.* at 58. In deciding whether a battered woman's actions were morally justified, Madden would ask "whether a morally courageous person in those circumstances, knowing what she knows, would have performed the same action, evaluating all conflicting demands." *Id.* As a practical matter, however, arguing that a battered woman is morally justified in killing her abuser (particularly when death is not an enumerated punishment for battering) is unlikely to sway either public opinion or state executives. Moreover, the argument that society has long approved of illegal but "moral" actions cannot explain why the exercise of clemency in the cases of battered women has engendered such bitter criticism;

have been taken without the requisite level of moral deliberation.[391] Furthermore, this argument seems to be an even more pro-vigilante version of the coercion argument detailed above, and easily could be rejected by unsympathetic decisionmakers, the media, or the public.

A slightly different formulation of the justification doctrine expresses the idea that people should not be punished for past conduct that is now permissible.[392] Empirical evidence suggests, not surprisingly, that the systematic use of sentence commutations increases after relevant laws are changed.[393] Because Governor Celeste took action after both the Ohio judiciary and legislature had changed the laws regarding expert testimony, this is perhaps the strongest argument in support of the Ohio commutations. While this approach suggests that we should give the women a chance to present the excluded evidence before some impartial decisionmaker, it also is problematic: it may, in effect, amount to giving retroactive effect to explicitly prospective laws and judicial decisions.[394]

4. Sentence Adjustments

If full pardons seem inappropriate in the battered women context, retributive justice also identifies a variety of situations in which an adjustment to the offender's sentence may be in order.[395] This is particularly important for battered women, because most clemency efforts have involved sentence commutations rather than pardons.[396] While such commutations may look like impermissible exercises of mercy, rather than justice, they may in fact meet retributive criteria.

A sentence reduction may be justified when the offender suffers disproportionately.[397] This category encompasses several distinct subcategories, including situations where: (1) due to special circumstances such as illness, extreme youth, or extreme age, the

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if anything, it suggests that this is one type of action that society has not (yet?) accepted.

391. MOORE, *supra* note 2, at 162-63 ("[P]eople of good character do not merely do what they believe is right; they also have an additional responsibility as moral agents to come to moral decisions in certain ways.").

392. Duff, *supra* note 339, at 62 (citing the example of post-Prohibition pardons).

393. *See* Susan E. Martin, *Commutation of Prison Sentences: Practice, Promise, and Limitation*, 29 CRIME & DELINQ. 593, 606-08 (1983) (citing New York and Pennsylvania examples).

394. *See infra* notes 434-39 and accompanying text.

395. *See* MOORE, *supra* note 2, at 143-44 (discussing instances where reduced sentences can be justified under retributionist theory); Kobil, *supra* note 36, at 628-32.

396. *See, e.g.*, Ammons, *supra* note 10, at 2-3.

397. Kobil, *supra* note 36, at 628-29.

sentence is unfair;[398] (2) compared with other participants in the same or similar crimes (*e.g.*, *men* who have killed their wives or lovers), the offender's sentence was disproportionate;[399] or (3) the sentence simply is too severe.[400] While individual battered women have been released due to special circumstances,[401] it seems difficult to apply this justification across the board. Of course, it is possible, although rather extreme, to argue that *any* imprisonment is "too severe" given the prior abuse. Perhaps a better application of this proportionality analysis can be seen in Massachusetts, where the sentences imposed on battered women traditionally have been longer than in other jurisdictions.[402] Governor Weld's guidelines explicitly state that "a history of abuse suffered by the petitioner at the hands of the victim" is a legitimate reason to argue that "further incarceration would constitute gross unfairness because of the basic equities involved."[403]

Clemency may also be appropriate when the sentence is unrelated to desert, such as when "there is a substantial likelihood that the sentence was based on factors such as the race or gender of the criminal or victim, rather than on the punishment the individual deserved."[404] The governors themselves did not argue that the judge or jury's attitudes toward battered women were so skewed as to reach this level of bias. This argument, however, may be particularly useful for attorneys who are concerned that their clients were convicted simply because they were "bad" battered women.

5. Clemency for the Public Interest

Governors are charged with promoting the rather amorphous "public welfare," which suggests that retributive justice need not be their only motivation for clemency.[405] Governor Celeste invoked this rationale

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398. *See id.*

399. *Id.* at 627. For anecdotal evidence suggesting that women who kill their husbands receive harsher sentences than men who kill their wives, see Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063 (1995); Anna Quindlen, *Court Rulings Back Notion That Men More Valuable Than Women*, CHI. TRIB., Oct. 24, 1994, § 1, at 19.

400. *See* MOORE, *supra* note 2, at 173-77; Kobil, *supra* note 36, at 627-30. Of course, this leaves open the question of who should decide whether a sentence is too severe.

401. One example is California Governor Pete Wilson's release of terminally ill Birdie Foley, a 53-year-old woman convicted of killing her abusive boyfriend; Foley died two days after her release. *See* Gina Boubion, *Battered Women Appeal for Clemency*, SAN JOSE MERCURY NEWS, Mar. 1, 1992, at 1A.

402. *See supra* text accompanying notes 245-46.

403. COMMUTATION GUIDELINES, *supra* note 248, at 1(c)(iii).

404. Kobil, *supra* note 36, at 629 (footnote omitted).

405. *See* Murphy, *supra* note 363, at 174 n.9 ("[T]he chief executive . . . might legitimately

when explaining his second (more controversial) set of pardons, saying " 'It is my hope and belief that in each of these cases the public interest is served, not just the interest of the individuals involved.' "[406] A similar rationale was used by Governor Schaefer to defend his decisions: " 'We think after a thorough review of these [cases] that it's the right thing to do.' "[407]

There is stark disagreement among retributive commentators over the appropriateness of clemency granted in the "public interest." As noted above, Professor Moore rejects all exercises of clemency for the "public good," while Professor Kobil would allow for some amount of "justice-neutral" clemency.[408] To some extent, the disagreement might be traced to the lack of retributive standards for determining what serves the "public good," short of imposing the full punishment that is deserved for a particular crime. Yet in essence, and probably more importantly, this is not a retributive rationale at all, but a basic utilitarian approach: it is not in the public interest to impose punishment that would do society more harm than good.[409]

Retributive theory may have room for the related rationale of mitigating the results of unfair laws. The Maryland commutations, which occurred almost simultaneously with the drive to amend relevant laws, illustrate that "[f]requent pardons sometimes indicate areas in which laws should be reconsidered by legislators."[410] If for no other reason, the governors' actions may be justified as a means of suggesting to the

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ignore the just deserts of an individual and pardon that individual if the good of the community required it.").

406. *See Celeste Commutes Death Sentences of Eight Murderers*, *supra* note 177.

407. Naylor, *supra* note 199, at A1 (alteration in original).

408. *See* MOORE, *supra* note 2, at 44-45; Kobil, *supra* note 36, at 636-38.

409. *See* MOORE, *supra* note 2, at 35-42. In addition to this basic theory, Bentham developed several additional rationales regarding when punishment is not appropriate. *See id.* at 40-41. According to Bentham, punishment ought not to be imposed: (1) when it would not be effective in deterring crime; (2) when the crime has not caused any "mischief" or was committed to prevent a greater harm; (3) when punishment is not needed because other approaches, such as education or social programs, will stop crime; and (4) when it would cause greater harm than not punishing the crime (for example, when a large percentage of the population commits a crime such as draft dodging). *Id.* It can be argued that each of these rationales fits battered women who kill. *See* Madden, *supra* note 98, at 61-63. But with the exception of the deterrence and education/social program arguments, which appear to be susceptible to empirical study, these rationales require a determination of the relative worth of the batterer and his victim/killer—and we are far from being able to arrive at such a consensus.

410. MOORE, *supra* note 2, at 223. Of course, this does not address the problems that arise when the legislature has rejected changes to the law, as in Maryland, or has effected a change that is not retroactive, as in Ohio. At some point, we must consider the possibility that principles of majority rule may dictate that the governor's ideas of "right" have been proved "wrong."

legislature that existing law was unfair.[411] As Alison Madden has noted, "Clemency can be used to rectify unjust results in individual cases that have not been cured through the judicial channels upon which we normally rely to accommodate changes in the law. It can correct general failings of our criminal justice system that arise from inequities in our society."[412]

C. Obstacles to Exercises of Clemency

Given these myriad retributive and utilitarian justifications for clemency, how do the Ohio and Maryland commutations fare? It seems clear that, at least in form, the governors' rationales could fit within several of these categories. From a justice-enhancing approach, the commutations might be justified by the reduced mental capacity of the offenders, the necessity or coercion leading to their crimes, the fact that the evidentiary and/or self-defense laws were changed after the women were tried or that the governor believed existing laws to be unjust, the amount the women had suffered, and the disproportionate or severe punishment imposed.[413] From a mercy perspective, these reasons are all the more compelling.[414] From a utilitarian approach, the commutations might be acceptable based on the "public good" even if retributive justice was not advanced in any particular case.[415]

However, upon closer examination, there appear to be several obstacles to justifying the commutations on either retributive or utilitarian grounds: (1) questions of the separation of powers and institutional competence; (2) retroactivity; (3) whether the women's suffering "counts" for purposes of punishment; and (4) whether the commutations serve the purpose of deterrence. Although it is my position that these issues ultimately may be resolved in favor of the commutation actions, each deserves to be addressed.

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411. *See* MOORE, *supra* note 2, at 223.

412. Madden, *supra* note 98, at 2 (footnotes omitted).

413. *See supra* part IV.B.

414. *See supra* part IV.A.3.

415. In addition, the commutations served the overall retributive purposes of ensuring proportionality and fairness in individual cases. Rather than standing for the extremist view that battered women who kill do not deserve to be tried, let alone punished (or, as opponents would phrase it, that battered women have a "license to kill" their abusers), the commutations were an attempt to correct a particular group of cases in which the criminal justice system led to unfair results. *See Justice and Battered Women, supra* note 162, at 18 ("[F]ar from trying to teach an ideological lesson in his last days in power, Celeste was trying to make up for a flaw in a fundamentally fair justice system."). Although critics may disagree over whether the system truly was unfair, the governors' goals are in harmony with the retributive ideal.

1. Separation of Powers and Institutional Competence

As mentioned earlier, it may be argued that acts of executive clemency violate the separation-of-powers doctrine by permitting the executive to overturn decisions made by the judicial branch.[416] Thus, in Ohio and Maryland, opponents of clemency chastised the governors for interfering with the proper workings of the judicial system.[417] One critic alleged that Governor Schaefer had "single-handedly overturned the criminal justice system by ignoring the evidence from the trials[,] the verdicts of the juries that convicted them and the sentences" meted out by informed judges.[418] In addition, the commutations could be seen as usurping the power of the legislative branch to alter (or refuse to alter) existing law, particularly where the Maryland legislature had yet to pass the law admitting evidence of BWS at trial.[419]

In reality, these criticisms point to inherent weaknesses of executive clemency in general, rather than particular errors made by Governors Celeste and Schaefer.[420] By definition, *any* grant of clemency interferes with the judicial process, at least to a certain extent, by remitting a portion of the punishment imposed by the judicial system. As long as it is permissible for the executive to grant clemency when he or she believes that the punishment in an individual case is unfair—be it because the conduct was excusable or justifiable, the sentence was too harsh, or the executive doubts the integrity of the conviction—there will be an inherent conflict with the other branches of government.[421] This dilemma is at the heart of our system of government, in which the traditional separation of powers coexists with a system of checks and balances. After all, the ultimate exercise of the power of checks and balances occurs not when the various branches are in harmony, but when they *disagree.*

To say that this tension is inherent in the very existence of the clemency power is not, however, to deny that there may be methods of making the exercise of clemency more palatable and politically accountable. Despite the existence of a substantial body of literature on the topic, clemency has often operated as an arbitrary system, left to the unguided discretion of the state executive.[422] In fact, the Ohio and

416. *See supra* text accompanying note 26.

417. *See supra* text accompanying notes 168-72, 211-13.

418. *The Gov Blunders Again, supra* note 226, at G2.

419. *See supra* text accompanying notes 183-84.

420. *See* Ammons, *supra* note 10, at 46 ("The debate of whether clemency is an aspect of justice or whether mercy is truly unmerited and therefore a gift is ageless and unresolved.").

421. Kobil, *supra* note 36, at 620.

422. *See id.* at 601 (claiming that "the exercise of the clemency power has been subject

Maryland commutations are typical of clemency in general, not mere exceptions to an otherwise tightly controlled process.[423]

A more interesting question is whether the executive is *competent* to decide if clemency is appropriate in a given situation. While it may be permissible under retributive theories to grant clemency to a person who is innocent, or one who suffers disproportionately, is the executive really competent to make such a determination, particularly when the judicial system has reached the opposite conclusion after a fact-intensive trial and several levels of appeal? In short, is there a way to insure that the executive branch has the requisite expertise to make the practical decisions needed to support a clemency decision?

Modern scholars have identified a lack of guiding principles for clemency, and some have proposed to divide the power among several branches of government.[424] In response, several commentators have argued that clemency is solely an executive function and cannot be limited by the legislature.[425] As Alison Madden argues:

> [I]t seems clear from a constitutional and traditional perspective that the final decision of a governor in granting or denying clemency petitions is not subject to collateral attack on due process grounds and is therefore final and non-reviewable. In addition, the express delegation of the power to the executive seems to resolve any separation-of-powers problem in favor of the governor should the legislature attempt to provide for solutions that significantly restrict the governor's discretion or mandate clemency in particular cases or situations.[426]

But this position ignores the fact that many states—including Ohio and

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only to the constraints that each chief executive has chosen to impose upon himself"); Kobil, *supra* note 134, at 670-71 (noting lack of statutory or administrative standards in Ohio).

423. *See* Madden, *supra* note 98, at 69-73 (discussing the Ohio and Maryland commutations as examples of the clemency process).

424. *See, e.g.*, Kobil, *supra* note 36, at 605-06, 622 (noting that "only a handful of states have promulgated statutory or administrative standards" governing the exercise of clemency, and suggesting a bifurcation of the clemency process between the executive and a professional board); Martin, *supra* note 393, at 596-600 & tbl. 1 (providing data that describe the procedural requirements for each state's clemency decisions).

425. *See* Hugo A. Bedau, *A Retributive Theory of the Pardoning Power?*, 27 U. RICH. L. REV. 185, 200 (1993); Philip P. Houle, *Forgive and Forget: Honoring Full and Unconditional Pardons*, 41 ME. L. REV. 273, 295 (1989).

426. Madden, *supra* note 98, at 67. Madden's claim may be true of the federal pardon power. *See Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (stating that with the exception of impeachment, "[t]he power thus conferred is unlimited . . . [and] cannot be fettered by any legislative restrictions").

Maryland—*do* restrict the governor's exercise of clemency to certain types of cases (*e.g.*, noncapital cases), or require the governor to follow certain procedures when exercising that power.[427] Whether further restrictions on the clemency power are permissible will depend on the constitution and laws of each individual state.

Notwithstanding this debate, by employing particular commutation strategies governors may make clemency decisions more palatable to opponents. Both the Ohio and Maryland commutations involved unilateral action by the executive branch, which may have been one reason they engendered such hostility. In Massachusetts, Governor Weld took action in a more limited way. By changing the published commutation guidelines, rather than simply granting clemency, Governor Weld provided advance notice to prosecutors and other interested parties.[428] Although Governor Weld's approach would not satisfy opponents who reject the exercise of executive clemency as a whole in these cases, it does create a more open process.

Even more interesting is the approach in Texas, despite its lack of success. Due to a former governor's lack of sympathy for the issue, the impetus for allowing clemency in battered women cases came in the form of a legislative resolution.[429] This approach was also influenced by the Texas clemency procedures, under which the governor shares the power with an administrative board and is less free to take unilateral action than the governors of many other states.[430] The Texas legislative resolution announced to prosecutors and to the public that a broad coalition stood behind the action.[431] It may thus have provided a measure of legitimacy, or an appearance of solidarity, that the unilateral Ohio and Maryland decisions lacked.

The origin of the clemency effort also may affect the remedy that is sought. Typically, criminal convictions rendered by a trial court are overturned via appeals to a higher court. It is true that a legislature may authorize new appeals for women who were prevented from using evidence which is now admissible, as Washington state has done. Such appeals probably would result in retrials, unless an appellate court was convinced that the excluded evidence was so overwhelming as to dictate

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427. *See* Martin, *supra* note 393, at 597-600 tbl. 1 (tabulating state restrictions); *supra* notes 177-80 and accompanying text (alleging that Governor Celeste failed to follow procedural requirements in granting clemency).

428. *See supra* notes 252-53 and accompanying text.

429. *See* Domestic Violence Resolution, *supra* note 269, at 3296.

430. *See* Martin, *supra* note 393, at 599. For example, Ohio and Maryland vest the final clemency power in the governor alone, while Massachusetts, like Texas, forces the governor to share clemency power with an administrative body. *See* Kobil, *supra* note 36, at 605 nn.232-33.

431. *See* Domestic Violence Resolution, *supra* note 269, at 3296-97.

an acquittal. Yet while a retrial may be the only way to determine conclusively that the woman would not have been convicted but for the exclusion of the evidence, retrials are very costly.[432] Furthermore, even with expedited appeals, the women would spend a fair amount of time in prison while awaiting trial.

In contrast, the executive does not have the power to order retrials.[433] But parole boards, which are executive bodies, have relevant expertise in evaluating prisoners and deciding whether they should be released.[434] Moreover, the clemency conditions imposed by Governors Celeste and Schaefer resembled traditional parole conditions: a minimum amount of time spent in prison, domestic violence-related community service, counseling, and monitoring by corrections officers for the remainder of their original sentences.[435] Thus, the governors used remedies with which the executive branch has substantial experience. These remedies are as appropriate for the executive branch as appeals are for changes emanating from the judiciary. If executive clemency is a valid approach, the remedies used by Governors Celeste and Schaefer were equally appropriate.

2. Retroactivity

A distinct but related problem concerns the exercise of clemency in a state such as Ohio, where the relevant legal and legislative changes predated the commutations. At first glance, this might appear to be an ideal situation for the use of clemency because *both* the judicial and legislative branches determined that the evidentiary laws under which the women were convicted were unfair and needed to be changed. Unfortunately, neither the *Koss* opinion nor the new evidentiary law had retroactive effect.[436] Thus, Governor Celeste's actions were necessary precisely because the women could not otherwise receive the benefits of the legal changes. But by granting clemency on the grounds that the applicable law had changed, Governor Celeste in effect *made* those legal changes retroactive, which was in direct conflict with both the

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432. In Texas, where an estimated 250 women may qualify for review, the costs of retrying all these cases would be astronomical. Puente, *supra* note 273, at 3A.

433. Ohio Governor Celeste admitted that commutation was the only way he could help the women. *See* Leonard, *supra* note 19.

434. *See* Martin, *supra* note 393, at 595-96.

435. *See, e.g.*, Naylor, *supra* note 48, at A1 (noting that Governor Schaefer commuted sentences to time served); Zorzi, *supra* note 224, at 1A (stating that Governor Schaefer released eight women on "supervised parole"); *supra* text accompanying note 164 (discussing Governor Celeste's usage of parole, commutation, and community service requirements).

436. *See* OHIO REV. CODE ANN. § 2901.06 (Anderson 1993); State v. Koss, 551 N.E.2d 970, 975 (Ohio 1990).

legislative and judicial actions.

A full discussion of the interplay between retroactivity doctrine and the executive clemency power is beyond the scope of this Article.[437] At least one commentator has answered this criticism merely by noting that "a governor's power to commute sentences is plenary and is not contingent upon other factors."[438] However, it is doubtful that Governor Celeste could single-handedly have made the legal changes retroactive in direct contravention of the judicial and legislative decisions. If this were the sole rationale supporting the commutations, I agree that it would be problematic.

Yet it also is possible to view the commutations in tandem with the legal changes, rather than simply as an application of the new laws. One formulation of the "justified conduct" rationale for clemency states that "we should not punish people for conduct that is no longer criminal—for conduct which the legislature . . . declared to be permissible."[439] From this perspective, Governor Celeste can be seen not so much as *applying* the new laws themselves to the incarcerated women, but as using the executive power to extend the *rationale* behind those changes to similarly situated women who did not fall within the scope of the changes.

This view is bolstered by the manner in which Governor Celeste identified the women who deserved clemency. Rather than committing the women back to the judicial system for another round of trials and appeals (the traditional consequence of retroactive judicial decisions), he conducted a separate analysis of the women's cases.[440] It seems clear that Governor Celeste was not trying to duplicate the judicial process, but instead was attempting to use the resources of the executive to identify women whose convictions may have been unfair.[441] While it may be valid to criticize his procedures and to disagree with his motivation, his actions did not necessarily constitute improper attempts to make the relevant laws "retroactive" in the traditional legal sense.

437. For a discussion of retroactivity issues, see, e.g., Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421 (1993); J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking* United States v. Klein, 79 CORNELL L. REV. 910 (1994). Much of this literature deals with the effect of "new" legal rules on collateral review, often in the habeas corpus context.

438. Ammons, *supra* note 10, at 55.

439. Duff, *supra* note 339, at 62.

440. *See* Leonard, *supra* note 19.

441. *Id.* (" 'I believe these [women] were victims in a profound way and were denied the right to present evidence.' ") (quoting Ohio Governor Celeste).

3. Did the Women's Suffering "Count"?

One oft-quoted rationale for justifying the commutations is that the women had "suffered enough" for their crimes.[442] But it often is difficult to determine just what type of suffering "counts" for these purposes. In a strict retributive analysis, the only relevant suffering is that which results from, and is the consequence of, the crime itself.[443] This may pose a major obstacle for battered women who kill their abusers, because suffering due to the prior beatings is not a consequence of the act of killing. In contrast, however, any suffering the women endured *because* they killed the men they loved would be relevant,[444] as would the length of time they served as punishment for their actions.[445] The governors, however, mixed all of these reasons together.[446]

Some retributive commentators present a much broader formulation of "suffering" that could include prior beatings.[447] Generally, these commentators argue that mercy, as distinct from justice, may be a valid reason for clemency:

> [S]uffering tends to bring people low, to reduce them, to humble them. If so, then enough equality may be restored in order to forgive them consistent with self-respect. They may not have severed themselves from their own evil acts, but there is perhaps a sense in which they have been severed.[448]

Other commentators stress that mercy is proper when suffering explicitly includes acts which are not the result of the crime itself: "[I]f a criminal is suffering seriously (. . . the suffering need not itself be a result of his

442. *E.g.*, Kobil, *supra* note 36, at 633.

443. *See* MOORE, *supra* note 2, at 170-71; Kobil, *supra* note 36, at 633 (limiting clemency to cases where "the punishment that the offender deserves has already been inflicted as an unintended result of the crime").

444. Grossfeld, *supra* note 245, at Metro/Region 1 (" 'I felt his soul go right through mine, and I'll never forget the feeling that I had. It was the most horrible feeling in this world.' ") (quoting Patricia Hennessy, who is serving an 18- to 20-year sentence for manslaughter in Massachusetts).

445. *See* Leonard, *supra* note 19 (noting that some pardoned women were required to serve a minimum sentence before their release).

446. *Compare* Naylor, *supra* note 199, at A1 (claiming the women have " 'served enough time' ") (statement of Maryland Governor Schaefer) *with* Lewin, *supra* note 174, at A17 (stressing that the women "were the victims of violence, repeated violence").

447. *See, e.g.*, Jeffrie Murphy, *Forgiveness and Resentment*, *in* MURPHY & HAMPTON, *supra* note 363, at 26-27.

448. *Id.* at 27.

crime), we might, and perhaps should, come to see him from the perspective of compassion and mercy rather than from that of retributive justice."[449] Such a broad formulation could include the prior suffering of these women at the hands of the men whom they killed. Thus, on balance, it seems likely that prior suffering may be considered in deciding whether the women have "suffered enough" to merit reductions in their sentences.

4. Deterrence

Finally, a utilitarian approach to clemency requires that the commutations comport with the goal of deterrence.[450] In terms of both specific and general deterrence, the question is complicated by a lack of empirical evidence. Does the fact that battered women are punished harshly for killing their alleged abusers deter some women from fighting back? Or, as many advocates claim, is the "decision" to fight back with deadly force an emotional, split-second, reflex reaction that involves no rational reflection and thus could not be deterred?[451] Viewing the situation from another perspective, does the fact that battered women who kill are granted clemency help to deter *abusive men* from further beatings?

Opponents of clemency argued that these women posed a threat to the community. Claiming that the commutations declared "open season on men,"[452] critics in Ohio and Maryland accused the governors of endangering "public safety by turning loose criminals who belong behind bars."[453] Whether the commutations will induce more battered women to kill their abusers may be a subject for empirical study; however, if allowing BWS to be raised as a defense at trial has not promoted such violence, it seems unlikely that the commutations will do so.[454] In reality, only a fraction of total female inmates have been released.[455] Moreover, those who have been released have "done time"

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449. Duff, *supra* note 339, at 59.

450. *See* Madden, *supra* note 198, at 60; *supra* text accompanying notes 341-46.

451. *See, e.g.*, Kiernan, *supra* note 95, at 1 (discussing specific instances of women who killed their husbands in an immediate response to physical abuse). Alison Madden suggests that women who kill are "not marauding, cold-blooded killers . . . likely to 'attack' again" but merely victims who acted instantaneously in self-defense. *See* Madden, *supra* note 98, at 61.

452. Kay Bartlett, *Spousal Homicide Law: "Open Season" on Men—or Domestic Violence?*, L.A. TIMES, Mar. 17, 1991, at A33 (inner quotation marks omitted).

453. *The Gov Blunders Again*, *supra* note 226, at G2.

454. Abigail Trafford, *Why Battered Women Kill*, WASH. POST (Health), Feb. 26, 1991, at 6. Ammons, *supra* note 10, at 57 (noting that "there has been no wholesale killing of husbands or lovers" since evidence of BWS began to be admitted).

455. Barbieri, *supra* note 287, at 1. Between 1983 and 1989, an average of 834 women per

both in prison and on the front pages of national newspapers, watching every unsavory detail of their lives dredged up in the name of "news."[456] On balance, these are hardly the fairy-tale stories that most women want to emulate.

Beyond the general "license to kill" argument, there is a debate over the women's futures. Are these women likely to fall into future battering relationships? If they do, are these particular women predisposed to kill again? Are they more likely to be killed or does the experience of killing instead work to break the cycle of violence? A few of the profiled women, such as Maryland's Mytokia Friend, had become involved with their victims after previous abusive relationships,[457] but the general applicability of this pattern is far from clear.[458]

As with any group of people, it seems likely that some of the individuals released may be dangerously violent. Prosecutors argued that Virginia Johnson, who allegedly threatened a potential witness, was such a woman; Governor Schaefer disagreed.[459] Rather than arguing against clemency, this argument highlights the importance of comprehensive, individualized reviews. Allegations of violence must be addressed on an individualized basis, where reviewers can determine what relevance, if any, the allegations have to the issue of clemency. However, once the information is before the executive, the final decision must be respected.

V. BETTER APPROACHES TO CLEMENCY

In reality, when state executives consider whether or not to grant clemency to battered women who kill, or when advocates plan their clemency efforts, jurisprudential concerns are likely to take a back seat to proverbial political concerns:[460] how should the clemency process be structured so as to be politically (rather than philosophically) feasible,

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year killed their husbands or boyfriends. *Id.* However, only about 80 women received clemency between 1978 and 1994. Cynthia Hubert, *Killers Win Clemency with "Battered" Defense*, SACRAMENTO BEE, Sept. 18, 1994, at A1.

456. In interviewing many of the Ohio women, Patricia Gagné found that "[a]ll expressed the opinion that the media had exploited them and their cases and a desire to stay away from any publicity about themselves." Gagné, *supra* note 133, at n.15.

457. Naylor, *supra* note 195, at B9 (noting that this was Friend's second abusive marriage); *see also* Grossfeld, *supra* note 245, at Metro/Region 1 (describing how Lisa Becker Grimshaw of Massachusetts left another abuser for victim Thomas Grimshaw); Michael Slackman, *Guilty of Killing, She Got Leniency*, NEWSDAY, Dec. 12, 1991, at News 3 (describing Christine Watson's first abusive marriage).

458. *See* Walker, *supra* note 54, at 531 (stating that it is a popular myth that battered women, after leaving one abusive relationship, enter into another).

459. *See The Gov Blunders Again*, *supra* note 226, at G2.

460. Ammons, *supra* note 10, at 29.

and how can the media backlash be anticipated and minimized (if not avoided)?[461] Once again, the experiences in Ohio and Maryland are helpful. As these experiences demonstrate, there may be ways of structuring the clemency process so as to minimize the controversy and blunt much of the criticism. To understand the criticism raised by these clemency efforts, we must examine how, by whom, and on whose behalf the clemency reviews took place.

Much of the criticism surrounding the decisions addressed the selection and evaluation of candidates.[462] To a certain extent, these problems are inherent in any clemency decision:

> What kinds of evidence should [the decisionmaker] be required to consider or to seek out? What procedures should govern her decision? Should the prosecution be allowed to argue that the conviction was justified? If we allow the pardoner too much discretion, . . . how can we have confidence in the justice of her decisions? If, on the other hand, we impose on her the kinds of procedural constraints by which the courts are bound, it begins to look as if we are simply creating a new appellate court.[463]

In Ohio and Maryland, the procedures used to identify and evaluate the women were the subject of intense and hostile debate. Although alternative procedures might not have contributed to the amount of justice that was done, they might have made the entire process more palatable.

A. *Selecting the Candidates for Review*

Once an executive has determined that battered women who killed their abusers may deserve clemency, he or she faces the difficult task of deciding which cases to review. Does the governor review the case of every woman who *could* have presented evidence of abuse at trial? Does the governor review only those cases involving women who *attempted* to present the evidence but were not allowed to do so (or were only allowed to present it in a limited form)? Does the governor review only the cases of those women whose files contain allegations of abuse? If so, should cases in which women admitted the abuse to their attorneys

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461. Madden, *supra* note 98, at 52 ("The clemency power serves as a powerful and necessary tool in an imperfect and all-too-human system of justice. . . . [R]ather than questioning whether the power is consistent with our system, we should ask how the power can best be used to augment our system of justice.").

462. *See, e.g.*, Baum, *supra* note 233; *The Gov Blunders Again*, *supra* note 226, at G2.

463. Duff, *supra* note 339, at 61.

but refused to testify about it at trial be reviewed? Moreover, in order to be fair to women who kept the abuse secret, even from their attorneys, should automatic reviews be made for *any* woman convicted of killing a male intimate?

The actual review procedures have varied. In Ohio, Governor Celeste asked his aides to review the files of women convicted of violent crimes against spouses or companions who allegedly abused them.[464] The resulting cases were then presented to the Parole Board for review, with Governor Celeste retaining final discretion.[465] But such an open approach, while it does reach a large group of women, may promote inaccurate and culturally biased stereotypes, particularly when the decisionmakers have no prior experience with battered women.[466] For example, the head of the APA stated that he wanted "the person who has lived the life of abuse with no way out."[467] Few battered women, particularly working women who hold down independent jobs, are likely to meet such a condition.

In Maryland, the cases were brought to the governor's attention by two advocacy groups.[468] In other states, the clemency process begins by action of the inmate herself.[469] In California, both of these processes have proceeded simultaneously: while the group of Frontera inmates *sua sponte* petitioned Governor Wilson for clemency, advocates have expanded the search to other inmates.[470] In states where formal clemency procedures exist, requiring the women to request review may reduce what opponents view as "frivolous" claims. Unless the clemency procedures are widely publicized and targeted to all relevant inmates, however, such "self-selection" may actually deter deserving women, particularly those who most exhibit the effects of learned helplessness.[471] The best approach may be that used in Washington state, where the Department of Corrections notified all murderers convicted prior to the effective date of the law permitting sentencing leniency; the inmates then chose whether or not to submit their own petitions.[472]

What should happen to women like Patricia Ann Washington, who

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464. Wilkerson, *supra* note 153, at 11.

465. *See id.*

466. *See* Madden, *supra* note 98, at 74-75.

467. Pesce, *supra* note 154, at 1A (quoting Raymond Kapotz) (internal quotes omitted).

468. *See supra* notes 193-202 and accompanying text.

469. *See, e.g.*, WASH. REV. CODE ANN. § 9.94A.260 (West Supp. 1995).

470. *See* Hubert, *supra* note 455, at A1.

471. *See* Madden, *supra* note 98, at 74.

472. *See* WASH. REV. CODE ANN. § 72.02.270 (West Supp. 1994); Serrano, *supra* note 316, at A1.

told her attorney about the abuse but refused to testify about it at trial, and stated under oath that her victim never hit her?[473] Governor Celeste noted that denial is consistent with BWS "because these are women who have spent their whole adult lives . . . unwilling to face what is happening to them."[474] This poses a dilemma: do we take such statements at face value and risk excluding some genuinely battered women, or do we paternalistically (and at great expense) insist upon reviewing all cases where objective evidence of battering is found, even if the women deny it? The most realistic solution may be to limit review to those women who, like Washington, admitted the abuse to their attorneys but were unwilling to describe the abuse in public.

B. Who Does the Review?

Clearly, the governor and the relevant administrative authority must be involved in the review process. In Ohio, the review is done by the Department of Rehabilitation and Corrections; in Massachusetts, the review is done by the Advisory Board of Pardons.[475] But, given time constraints and a lack of familiarity with battered women, it is tempting to turn to outside advocacy groups. Sometimes hybrid groups like the Texas Council on Family Violence, a private nonprofit organization which receives state funding, have an explicit consultation role.[476] At the other extreme is Maryland, where much of the information was reviewed and presented to Governor Schaefer and the Parole Commission by two outside advocacy groups.[477] These groups bore the brunt of the resulting criticism; if Governor Schaefer lacked important facts, critics claimed, it was because the advocates either ignored or mischaracterized the information.[478] Even the *Washington Post* claimed that "[a]dvocacy groups have badly damaged their credibility by not presenting the complete and unbiased record."[479]

Why Governor Schaefer and his aides lacked or overlooked relevant facts, if indeed they did, is an unanswerable factual question. What is clear is that the process, at least in retrospect, did not *look* unbiased, and that the appearance of impropriety added to the furor over the

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473. Duggan, *supra* note 228, at C4.

474. Lewin, *supra* note 174, at A17.

475. Kimmins, *supra* note 150; Wang Rong, *Network Urges Release of Battered Woman*, BOSTON GLOBE, May 29, 1994, at City Weekly 4.

476. David Ellison, *Women's Clemency Resolution Advances*, HOUSTON POST, Apr. 13, 1991, at A21.

477. Shen & Schneider, *supra* note 211, at B2.

478. *See* David Simon & William F. Zorzi, Jr., *Doubts Raised on Freeing Women Who Have Killed*, SACRAMENTO BEE, Mar. 17, 1991, at A20.

479. *The Commuted Sentences*, WASH. POST, Mar. 20, 1991, at A18.

unprecedented "mass" clemency actions. We thus confront a real dilemma: the expertise that advocacy groups possess is essential to the fair review of cases, but too close an involvement in the process may suggest bias.[480] The best solution may be to allow these groups to participate in some capacity, while reserving the ultimate review for a governmental body or perhaps for an existing state-funded expert organization.[481]

C. What Information Must Be Reviewed?

By far, the greatest amount of criticism was directed at the information which the governors chose to review before coming to a decision.[482] The governors were chastised for not reviewing trial transcripts, not notifying prosecutors, judges, and the victims' relatives, and ultimately being too quick to accept allegations of abuse.[483] What follows is a brief analysis of some of the information that opponents of the commutations wanted to examine. Note, however, that claims of "incomplete" information easily can be conflated with outright rejection of the relevance of prior battering; opponents who refuse to acknowledge that BWS has any bearing on culpability presumably would reject clemency under *any* review process, no matter how detailed.[484]

1. Review of Trial Transcripts

Governor Schaefer was criticized for his refusal to review the trial transcripts.[485] His supporters had a compelling argument: the clemency review was designed to consider evidence which was *excluded* at trial, and therefore would not appear in the transcripts.[486] But a review of the trial transcript would have informed Governor Schaefer that Patricia Washington, for example, had denied prior abuse at trial.[487] The value of preventing such surprises may well outweigh the general redundancy

480. *Cf. generally* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (describing tension over the role of bureaucratic agencies).

481. Professor Kobil goes a step further, suggesting that there be a review by an independent professional board established either by the executive or the legislature. Kobil, *supra* note 36, at 622-23. Even so, expert organizations could have an advisory role.

482. *See* Duggan, *supra* note 231, at B1, B2; Lewin, *supra* note 174, at A17; Simon & Zorzi, *supra* note 478, at A20.

483. *See, e.g.*, Lewin, *supra* note 174, at A17.

484. *See, e.g.*, Ammons, *supra* note 10, at 55-61 (discussing prosecutorial arguments against the use of clemency for battered women).

485. *See* Duggan, *supra* note 231, at B2; Lewin, *supra* note 174, at A17.

486. *See, e.g.*, Lewin, *supra* note 174, at A17.

487. Duggan, *supra* note 231, at B2.

of the transcripts. Moreover, to the extent that executive review is designed to approximate the trial as it *should* have occurred, it must examine evidence that was admitted as well as that which was excluded from the original trial.

2. Notification of Prosecutors, Judges, and Families

Perhaps the most vocal criticism came from prosecutors, who objected that neither they nor the trial judges had been notified of potential commutation actions.[488] Governor Celeste responded that he was not required by law to do so;[489] Maryland corrections officials responded that their review took account of the prosecutorial viewpoint through a presentence report and a brief prosecutorial summary.[490] Officials also stressed that because the women had been convicted, the trial record necessarily reflected the view of the prosecution.[491]

The general trend, however, is to require notification of both sentencing judge and prosecuting attorney, and sometimes the victim's family, during the review.[492] For example, the Texas Senate resolution required that prosecutors, police, and judges be consulted before the decision was made.[493] In Massachusetts, the Advisory Board must notify the Secretary of Public Safety and the appropriate District Attorney before the public hearing takes place; in homicide cases, notices of the hearing must be published in a local newspaper.[494] Even in Ohio, the APA is supposed to notify the prosecutor and judge of the pending application.[495] These recommendations may be highly influential in the ultimate clemency decision.[496]

Of course, whether the input of judges and prosecutors provides *useful* information is a different issue from whether it is politically advisable. If the law clearly prohibited the admissibility of BWS evidence, and the defendant made no effort to introduce that evidence in other ways, the judge should have no knowledge of the prior battering and any evidence considered by the judge at the sentencing stage should be in the record. As Professor Moore notes, the clemency process has the virtue of taking into account information that the judge

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488. *See* Lewin, *supra* note 174, at A17.
489. *See id.*
490. *Id.*
491. *Id.*
492. *See* Martin, *supra* note 393, at 596.
493. Domestic Violence Resolution, *supra* note 269, at 3296.
494. *See* COMMUTATION GUIDELINES, *supra* note 248, §§ 5(a), (c).
495. *Id.*
496. *Id.* at 596.

does *not* know, especially "factors that have a moral significance, though they may lack a legal one: factors related to the whole life of the offender, his motives, and his circumstances."[497] While it may be persuasive for a judge to state that an offender deserves clemency in an unusual case, as a practical matter we should expect judges, based on the information to which they have access, to arrive at the opposite conclusion.[498]

Professor Moore notes that "[i]t is even more of a mystery why the prosecuting attorney's recommendation would justify pardon."[499] Prosecutors may in fact have investigated the issue of battering during trial preparation, even if it was not litigated. Moreover, institutional pressure to obtain a conviction may have led the prosecutor to disregard or undervalue such evidence.[500] The pressure to continue to disregard such evidence may be intensified during clemency proceedings, when the very integrity of the conviction is questioned.[501]

The best argument for including prosecutors and judges in the review process is a practical one: inclusion may lessen the resulting hostility when clemency is granted. Sue Osthoff, Director of the National Clearinghouse for the Defense of Battered Women, admitted as much after the Maryland experience:

> "[W]e've learned a lot. I do not see it as the role of the governor to retry these cases. But if it's helpful to get extra information or if it's politically valuable to get prosecutors involved in the process, and if all of this protects women from having to be left out on the limb in the press, then we have to try it all."[502]

Similar arguments can be made regarding notification of the victims' families. Although such notification is required by both the Massachusetts and Texas procedures,[503] it is not clear that the families possess relevant information that did not already come out at the trial stage. However, allowing the survivors to express their opposition to the clemency application may well be preferable to the alternative: encouraging them to vent their frustration and disgust in the media when

497. MOORE, *supra* note 2, at 208.

498. *See id.*

499. *Id.*

500. *See* Madden, *supra* note 98, at 34-36.

501. *See* Ammons, *supra* note 10, at 60.

502. Baum, *supra* note 233, at E1 (quoting Sue Osthoff, Director of the National Clearinghouse for the Defense of Battered Women).

503. *See* MASS. GEN. LAWS ANN. ch. 279, § 4B (West 1995); Domestic Violence Resolution, *supra* note 269, at 3297; COMMUTATION GUIDELINES, *supra* note 248, § 5(h).

the governor's action catches them unprepared.

3. Corroboration

Both Governors Celeste and Schaefer were criticized for failing to "corroborate the histories of abuse cited by the women."[504] While the actual content of the evidence presented in Maryland is protected by executive privilege and privacy statutes, commission members stressed that the review was "not dissimilar to what goes on in a courtroom."[505] The types of corroborating information used by Ohio and Texas were quite extensive and included hospital records, letters from counselors and shelters for battered women, police reports, and eyewitness testimony.[506] Assuming the Maryland evidence was similar, it is difficult to imagine just what additional "corroboration" could satisfy the critics.

A related question is what type of evidence suffices to *disqualify* a particular woman from clemency consideration. Critics stressed that many of the women had financial motives for the killings, and that some allegedly planned the deed in advance.[507] But advocates note that "even the most horribly abused women might have some sordid, and deeply unsympathetic facts in their case histories."[508] For example, Bernadette Barnes paid the hit man out of the proceeds from an insurance policy on her husband's life, leading prosecutors to call it a simple contract killing.[509] Yet the House of Ruth stressed that the policy was seventeen years old, and Governor Schaefer was convinced that the money had not been a driving force behind the murder.[510] This demonstrates that, even if the reviewing authority is provided with all relevant evidence, he or she must also be given the discretion to weigh that evidence. And opponents may not like the decision.

D. Providing a Reasoned Explanation

In order to make a comprehensive assessment, the executive must review all the relevant information for each individual case. As the

504. Simon & Zorzi, *supra* note 198, at 7A.
505. *Id.* (quoting Paul J. Davis, Chairman of the Parole Commission).
506. *Only Guilty, supra* note 21, at B4.
507. *See* Lewin, *supra* note 174, at A17.
508. *Id.* Tracy Huling, policy director of the Correctional Association stated, "One of the problems with these cases is that everyone expects the perfect clean victim . . . and no one is perfectly clean." *Id.*
509. Simon & Zorzi, *supra* note 198, at 7A.
510. Lewin, *supra* note 174, at A17.

above discussion makes clear, it may also be wise to seek out less relevant information (*e.g.*, from prosecutors) in order to make the process more acceptable to the public. Finally, once the decision is made, the executive should set forth the reasons for granting clemency in each case.[511] Many states, such as Ohio, already have such a requirement, but it often is overlooked.[512] A disclosure requirement makes the executive accountable for his or her decisions; it should facilitate true retributive justice, both in practice and in the minds of the public. Whether accurate or not, a secretive process appears to be an improper one.

VI. CONCLUSION

Many lessons can be learned from the commutations in Ohio and Maryland of battered women convicted of killing their abusers, and from the efforts in other states to refine and expand the clemency process. Although subjected to intense criticism, the actions of former Ohio Governor Celeste and former Maryland Governor Schaefer met accepted retributive and utilitarian criteria for exercising the clemency power.[513] Yet the tremendous controversy that followed these efforts cannot be ignored. Responding to the criticism is important, because it directly affects whether, and in what form, clemency efforts are able to succeed in other states. I have argued that certain procedures, particularly obtaining the input of prosecutors and judges involved in the case, may make the ultimate clemency decisions more palatable, even if these procedures do not increase the amount of "justice" that is done in any individual situation. More publicly acceptable procedures may lessen the risk to other governors in taking such action, enable advocates to mount more acceptable campaigns on behalf of individual women, and allow the women who are released to return to their private lives as soon as possible.

Clemency, by its very nature, is a limited and often temporary remedy for injustices suffered at the hands of the criminal justice system.[514] While, sadly, we are unlikely to exhaust the supply of battered women who need assistance, the same cannot be said of

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511. *See* Kobil, *supra* note 134, at 696.

512. *See, e.g.*, *id.* at 696-97.

513. *See supra* part IV.C.

514. *But see* Madden, *supra* note 98, at 41 ("[Clemency efforts] should not be seen as a 'one-shot' effort to cure unjust results perceived to have occurred only because a woman did not introduce expert opinion testimony on the battered woman syndrome at trial. Clemency in battered women's cases should be used as long as necessary to correct unjust results when battered women who kill abusers are convicted despite the fact that they acted in self-defense.").

battered women who killed their abusers before evidence of BWS was admitted. At some point in the future, it is likely that all such women will receive clemency, be denied clemency, or be released from prison after serving their sentences or while on parole. These women are likely to be replaced by others who have been convicted even when testimony regarding BWS was admitted at trial. For this reason, it is important that both decisionmakers and advocates for battered women look beyond clemency efforts and evidentiary changes, to the ultimate goal of preventing domestic violence.

We are now in a unique position to take action on the problem of domestic violence. The Violence Against Women Act has provided needed funding, training, and enforcement mechanisms.[515] The trial of O.J. Simpson—despite its outcome—is likely to keep the topic of domestic violence in the media and on our minds. Moreover, the clemency actions in Ohio and Maryland have provided valuable guidance about when, and how, clemency efforts can work. There may never be a better time to address all the facets of domestic violence: prevention, enforcement, education—and justice.

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515. *See supra* notes 6-9 and accompanying text.