

THE GOVERNOR’S CLEMENCY POWER: AN UNDERUSED TOOL
TO MITIGATE THE IMPACT OF MEASURE 11 IN OREGON

by

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In this Article, we analyze the historical use of the clemency power at both the federal and state levels, including the factors that occurred during the 20th century that resulted in both presidents and governors gradually using the power less frequently up until the 1980s. We examine how the “war on crime” and other political and legal changes, including the imposition of new mandatory minimum sentencing laws during the 1980s and 1990s, has led to mass-incarceration at both a national and Oregonian level. We discuss how this new punitive sentencing and incarceration philosophy has resulted in a general souring of the use of the pardon power and is now seen as a challenge to powerful prosecutors who generally oppose clemency as an extra-judicial attack on their own policies. In looking at the current prison population in Oregon, we argue that the current Governor should use her pardon power as a tool to mitigate some of the prevalent injustice in Oregon.

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I. INTRODUCTION

In March 1996, Hope¹ agreed to drive her roommate's friend's car to a drug deal in exchange for some drugs. Hope waited in the car unaware that the deal had escalated into a robbery in which the drug dealer was murdered until afterward when police officers found her in the car and arrested her. For her participation as the driver, Hope was convicted of felony murder² and sentenced to life in prison with the possibility of parole after a minimum of 25 years.

¹ Hope's real name has been withheld by the authors to protect her identity. Interviews with her are on record with the authors.

² Section 163.115(1)(b) of the Oregon Revised Statutes provides:

When it is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit any of the following crimes and in the course of and in

Hope was charged a year after Oregon's Ballot Measure 11 was enacted into law. Measure 11 imposed punitive mandatory minimum sentences onto a number of "person" crimes.³ Along with other State reforms that abolished both parole and indeterminate sentencing, Measure 11 was Oregon's contribution to the nationwide "tough on crime era" beginning in the 1980s. This era rejected traditional ideas of rehabilitation in favor of philosophies of retribution and incapacitation that have resulted in mass incarceration nationwide. Measure 11 has dramatically transformed Oregon's prisons; the number of people incarcerated in Oregon has exploded from just over 6,000 people in 1994 to 14,756 people as of February 2019.⁴

At Hope's sentencing hearing, both the district attorney and the judge were troubled by the mandatory imposition of such a long sentence on a woman whose participation was so minor, but the judge had no choice other than to sentence her to life under the new guidelines. At the hearing, the district attorney stated that he did not feel her participation warranted more than 15 years of incarceration and promised Hope in open court that if she maintained a good prison record, he would support a petition for commutation⁵ after 15 years. The district attorney promised this on the record because he knew that a grant of clemency from the governor was the only way that Hope might receive a more appropriate sentence and a just outcome.

After 15 years, Hope, who not only maintained a perfect disciplinary record in prison, but undertook all the programming she could locate to better herself, applied to Governor Kulongoski for a commutation.⁶ He failed to review her petition and wrote a letter advising her to resubmit to the next governor just as he left office. She duly submitted a second petition to Governor Kitzhaber, who also failed to review her petition and also wrote her a letter telling her to resubmit to the next governor.

furtherance of the crime the person is committing or attempting to commit, or during the immediate flight therefrom, the person, or another participant if there be any, causes the death of a person other than one of the participants.

The statute lists the following crimes as applicable:

(A) Arson in the first degree . . . ; (B) Criminal mischief in the first degree by means of an explosive . . . ; (C) Burglary in the first degree . . . ; (D) Escape in the first degree . . . ; (E) Kidnapping in the second degree . . . ; (F) Kidnapping in the first degree . . . ; (G) Robbery in the first degree . . . ; (H) Any felony sexual offense in the first degree . . . ; (I) Compelling prostitution . . . ; (J) Assault in the first degree

OR. REV. STAT. § 163.115(1)(b) (2017).

³ PHIL KEISLING, SEC'Y ST., STATE OF OREGON GENERAL ELECTION NOVEMBER 8, 1994, VOTER'S PAMPHLET 55 (1994).

⁴ OR. DEP'T CORR., HISTORICAL PRISON AND COMMUNITY CORRECTIONS POPULATIONS (2018), <https://www.oregon.gov/doc/Documents/offender-population-trends.pdf>.

⁵ See *infra* Part II.B.

⁶ In both the U.S. and Oregon Constitutions, the broad pardon powers granted to the executive are known as clemency or executive clemency. In this Article we refer to these powers as both clemency and the pardon powers interchangeably.

After seven years of submitting petitions and waiting for governors who failed to even review her bid for mercy, Hope, who has now served 23 years in prison, submitted a third petition to Oregon's current governor, Kate Brown, over a year ago and is still waiting for an answer.

Hope's case is an all too common one in Oregon's post-Measure 11 incarceration landscape. Oregon prisons are overflowing at vast cost to the Oregon taxpayer⁷—with people who were sentenced excessively for their crimes;⁸ with people who were terrified into making unfavorable plea agreements requiring they sign away their rights to appeal or to collaterally attack their convictions;⁹ with people who, if the Department of Corrections (DOC) had not had their discretion removed with the passage of Measure 11, would have been released already due to successful rehabilitation; and with people whose life without parole (LWOP) sentences mean they have no opportunity to even earn a chance to make their case for release to the parole board. Hope, like many others, cannot receive any relief unless the Governor is willing to use her clemency power.

Yet since Governor Kate Brown took office on February 18, 2015,¹⁰ she has carried on the recent tradition of governors using their pardon power sparingly and not as a tool to correct injustice or to reward exceptional rehabilitation while incarcerated. The handful of pardons and commutations that Governor Brown has granted, out of a total of over 391 requests her office has received in the last three years,¹¹ reflects the present day, almost universal reluctance of executives, either recent presidents¹² or state governors,¹³ to use their pardon power as it was historically intended: to mitigate the often-harsh consequences of the "rigor of the law."¹⁴

⁷ See *Oregon Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/OR.html>.

⁸ See BILL TAYLOR, ST. OR. LEGIS. COMM. SERVS., BACKGROUND BRIEF ON FELONY SENTENCING (2004), https://www.oregonlegislature.gov/lpro/Publications/2004ID_Felony_Sentencing.pdf.

⁹ U.S. District Judge John L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26, 2014), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent>.

¹⁰ *Meet the Governor*, OREGON.GOV, <https://www.oregon.gov/gov/Pages/meet-the-governor.aspx>.

¹¹ There have been 391 petitions submitted to Governor Kate Brown between 2015 and mid-November 2018. Email from Emily Matazar, Gov't Accountability Attorney, Office of Governor Kate Brown, to Aliza Kaplan (Apr. 18, 2019, 10:21 PST) (on file with authors).

¹² *Clemency Statistics*, U.S. DEP'T JUST., <https://www.justice.gov/pardon/clemency-statistics> (last updated Aug. 13, 2019).

¹³ See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009).

¹⁴ THE FEDERALIST NO. 74, at 474 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

The nine pardons and four commutations that Governor Brown has granted so far reflect the excessive caution with which executives currently tend to approach the use of the pardon power. There is no doubt that being granted clemency in each of these cases lifted a weighty burden from the shoulders of these individuals, but the pardon power has a far more substantial role to play in Oregon's criminal justice system. We call on the Governor to use her pardon power more liberally to correct some of the imbalance and injustice that plagues our criminal justice system.

This Article is divided into six sections. In Section II, we analyze the historical use of the clemency power at both the federal and state levels. Section III discusses factors that occurred during the 20th century which resulted in both presidents and governors gradually using the power less up until the 1980s. In Section IV, we examine how the "tough on crime" era and other political and legal changes, including in the imposition of new mandatory minimum sentencing laws during the 1980s and 1990s, has led to mass incarceration at the federal and state level, including Oregon. In Section V, we discuss how this punitive sentencing and incarceration philosophy has resulted in a general souring on the use of the pardon power and is seen as a challenge to powerful prosecutors who generally oppose clemency as an extra-judicial attack on their own policies. In Section VI, we look at the prison population in Oregon today and the many reasons why the current Governor should use her pardon power to mitigate the impact of the "tough on crime" policies of punitive sentencing which have led to mass incarceration in Oregon.

II. WHAT IS EXECUTIVE CLEMENCY?

Clemency is the act by the president or a governor of extending a grant of mercy to an individual. The power to grant clemency derives from either the federal or state constitutional pardon power.¹⁵ The pardon power takes several different forms: a full pardon erases the legal effect of an individual's conviction such that it is as if the individual never committed the crime;¹⁶ a commutation of a sentence is a lesser form of pardon where the executive can shorten or end an individual's prison sentence;¹⁷ and a reprieve is a temporary relief from punishment and is often used

¹⁵ See U.S. CONST. art. II, § 2, cl. 1; OR. CONST. art. V, § 14.

¹⁶ In *Ex parte Garland*, the U.S. Supreme Court described its scope as "reach[ing] both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

¹⁷ *Knote v. United States*, 95 U.S. 149, 153 (1877).

to delay execution of a sentence.¹⁸ A pardon can also include the authority to grant remissions of fines and forfeitures, respites, and amnesties.¹⁹

A. Federal Pardon Power

1. *It Is the President's Power Alone*

Executive clemency is found under Article II, Section 2 of the Constitution: “The President . . . shall have the Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of impeachment.”²⁰ The Constitution provides no other text limiting or conditioning the power, other than in cases of impeachment, and since its founding it has been understood that the power can be exercised for any reason that the president alone so decides.²¹ The Supreme Court has affirmed that the power is not subject to judicial review.²²

The Founders’ views of the pardon power were discussed in Federalist Paper No. 74.²³ There, Alexander Hamilton stated: “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”²⁴ Hamilton then explained why the power was necessarily invested in the singular hands of the executive:

As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of

¹⁸ Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y 833, 848–51 (2016).

¹⁹ *Solesbee v. Balkcom*, 339 U.S. 9, 11–12 (1950); see Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1175 (2010).

²⁰ U.S. CONST. art. II, § 2, cl.1.

²¹ See Larkin, *supra* note 18, at 847; Love, *supra* note 19, at 1173; Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 595 (2012).

²² See *Schick v. Reed*, 419 U.S. 256, 266 (1974) (“The plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority in the President to ‘forgive’ the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable.”); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (“The [clemency] power thus conferred is unlimited, with the exception [in cases of impeachment]. . . . It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”); *Ex parte Wells*, 59 U.S. (18 How.) 307, 309 (1855); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 161 (1833); Larkin, *supra* note 18, at 848 n.47.

²³ THE FEDERALIST No. 74, *supra* note 14, at 473.

²⁴ *Id.*

the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind.²⁵

Hamilton's words indicate that the Founders assumed that the president would not abuse this power.²⁶ Chief Justice (and former President) Taft wrote for the Supreme Court in 1925, "[o]ur Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."²⁷ The power itself exists in several forms: (1) to pardon someone for a crime, which would consequently erase the legal effect of the conviction going into the future; (2) to commute a sentence, which reduces the punishment for a crime, most often shortening a prison sentence; (3) the remission of a fine or forfeiture; and (4) to reprieve a sentence, which is often used to delay execution of someone sentenced to death so that further analysis of a situation can be undertaken.²⁸ A reprieve can be used to postpone a sentence for a variety of reasons, such as a death in the family or other urgent responsibilities.²⁹

The Founders' conception of executive clemency was derived in many ways from English common law³⁰ in that it served two main purposes: to grant mercy toward individuals and to serve as an important public policy tool, such as to grant pardons during times of rebellion and public unrest to restore calm.³¹

Hamilton believed that pardons were necessary because without compassion, justice is denied. He explained, "without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."³² The understanding that presidential acts of mercy were intentionally built into the constitutional system to ensure just outcomes was further reflected by Chief Justice John Marshall in 1833, who wrote: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."³³ Nearly 100 years later, Justice Holmes affirmed the same belief when he explained that a pardon "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme."³⁴

²⁵ *Id.* at 473–74.

²⁶ *Id.* (stating that the responsibility would inspire "scrupulousness and caution").

²⁷ *Ex parte Grossman*, 267 U.S. 87, 121 (1925).

²⁸ Larkin, *supra* note 18, at 846–47.

²⁹ See Austin W. Scott, *The Pardoning Power*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 95, 99–100 (1952).

³⁰ Larkin, *supra* note 18, at 851–52; Rosenzweig, *supra* note 21, at 594.

³¹ Rosenzweig, *supra* note 21, at 597–98.

³² THE FEDERALIST No. 74, *supra* note 14, at 473.

³³ *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).

³⁴ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

2. *Historical Use of the Presidential Pardon Power*

From the time of the founding, presidents have used their pardon power freely. During the 45-year period from 1885 to 1930 for instance, attorney general annual reports reveal that presidents issued over 10,000 grants of clemency, sometimes upwards of 300 per year.³⁵ During that same time period, the federal prison population expanded from approximately 2,200 prisoners in 1880 to 13,000 inmates by 1930.³⁶ Some presidents used the power more than others. For instance, Presidents George Washington and John Adams did not use the power very frequently, whereas President Abraham Lincoln was legendary in his usage, especially for military pardons.³⁷ Lincoln is also reported to have spent hours personally reviewing petitions, and even entertained pardon petitioners at the White House.³⁸ However, Lincoln was president at a time when the entire federal prison population numbered under 2,000,³⁹ which was a manageable number for him to become personally involved.

The Founders were immersed in John Locke's philosophy of individual natural rights.⁴⁰ One of those fundamental rights is the concept of *mens rea*—that criminal sanctions cannot be imposed unless a person “voluntarily and with understanding chooses to violate or act with conscious indifference to a command of the criminal law.”⁴¹ Paul Rosenzweig of the Heritage Foundation argues that the Founders were particularly concerned with ensuring a direct link between criminal culpability and moral blameworthiness.⁴² Often, if the president felt that the convicted person lacked the requisite intent to commit the crime, a pardon would follow.⁴³ Thomas Jefferson wrote about this issue; he was especially concerned that punishments were proportional to the crime.⁴⁴ That is noted in the 119 pardon statements he signed.⁴⁵ James Madison signed between 196 and 202, James Monroe signed 419, and John

³⁵ See Love, *supra* note 19, at 1170 n.4 (citing early clemency statistics from attorneys general); *Clemency Statistics*, *supra* note 12.

³⁶ MARGARET WERNER CAHALAN, U.S. DEP'T JUST., BUREAU JUST. STATS., HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 29 (1986), <https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf>.

³⁷ Larkin, *supra* note 18, at 853.

³⁸ *Id.*

³⁹ CAHALAN, *supra* note 36, at 29.

⁴⁰ James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1041 (1973).

⁴¹ *Id.* at 1043.

⁴² Rosenzweig, *supra* note 21, at 601.

⁴³ *Id.* at 596. (Rosenzweig describes the contrast with the current punitive climate as one where “we are in the midst of a near orgy of creating crimes with either no criminal intent requirement or diminished intent requirements”).

⁴⁴ *Id.* at 601.

⁴⁵ *Id.* at 602.

Quincy Adams signed 183.⁴⁶ These numbers indicate the consistency with which early presidents utilized their broad pardon powers. These numbers should be considered in the context of the very small size of the federal population imprisoned at the time.⁴⁷

Up until the 1980s, presidents generally used their pardon power throughout their presidencies and were often prolific in doing so. For instance, President Truman granted a whopping 1,913 pardons,⁴⁸ and to date is the most generous presidential pardoner of all, especially considering that the federal prisoner population peaked at less than 20,000 prisoners at any one time during his tenure as president.⁴⁹ President Eisenhower pardoned 1,110 people, President Kennedy pardoned 472 people in less than three years, President Johnson pardoned 960 people, and President Nixon pardoned nearly 1,000 people.⁵⁰

Presidents traditionally also used pardons for public policy reasons. In the early days, presidents often used the pardon power to ease troubled situations. For instance, President Washington granted amnesty to all those who participated in the Whiskey Rebellion.⁵¹ During the Civil War, President Lincoln's enthusiastic pardoning frustrated his generals, who complained that his continual intervention made it almost impossible to execute spies.⁵² Lincoln was especially effective with his pardoning, and reports show that it often inspired his troops.⁵³ For instance, on one occasion he spared the lives of 62 deserters.⁵⁴

This use of the clemency power to pardon for public policy reasons continued well into the 20th century. President Carter granted amnesty to Vietnam-era draft evaders, which he announced on his very first day in office.⁵⁵ President Ford granted conditional clemency to approximately 20,000 "draft dodgers,"⁵⁶ and President

⁴⁶ *Id.*

⁴⁷ CAHALAN, *supra* note 36, at 29. The earliest statistics available show a total of 2,162 federal prisoners in 1880, which had grown to 19,260 by 1940 and then to 189,192 by 2016. *Id.*; E. Ann Carson, *Prisoners in 2016*, 3 (Aug. 7, 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>. Prior to 1890, there were no federal prisons and inmates were held in state prisons. CAHALAN, *supra* note 36, at 29.

⁴⁸ *Clemency Statistics*, *supra* note 12.

⁴⁹ CAHALAN, *supra* note 36, at 29.

⁵⁰ *Clemency Statistics*, *supra* note 12.

⁵¹ Rosenzweig, *supra* note 21, at 598.

⁵² J. T. Dorris, *President Lincoln's Clemency*, 20 J. ILL. ST. HIST. SOC'Y 547, 549–50 (1928); Love, *supra* note 19, at 1177.

⁵³ Love, *supra* note 19 at 1177.

⁵⁴ Rosenzweig, *supra* note 21, at 603.

⁵⁵ *Id.* at 598; *see also* Love, *supra* note 19, at 1174 n.17; Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 453 (2009).

⁵⁶ Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 140, 146 (2000).

Kennedy pardoned all first-time offenders convicted under the Narcotic's Control Act of 1956, which had the effect of overturning much of the law passed by Congress.⁵⁷

Thus, historically, presidents have used the pardon power regularly, depending on their individual choices and policies, as the Founders intended when they granted such broad unreviewable powers to the president.

B. Oregon's Pardon Power

1. The Scope of the Governor's Power

Executive clemency in Oregon stems from Article 5, Section 14 of the Oregon Constitution:

He shall have power to grant reprieves, commutations, and pardons, after conviction, for all offences [sic] except treason, subject to such regulations as may be provided by law. . . .

He shall have the power to remit fines, and forfeitures, under such regulations as may be prescribed by law; and shall report to the Legislative Assembly at its next meeting each case of reprieve, commutation, or pardon granted, and the reasons for granting the same; and also the names of all persons in whose favor remission of fines, and forfeitures shall have been made, and the several amounts remitted.⁵⁸

The scope of the Oregon governor's pardon power has not changed since the Oregon Constitution was enacted in 1857;⁵⁹ it follows the U.S. Constitution in granting broad substantively unreviewable powers to the executive. In *Eacret v. Holmes*,⁶⁰ the Oregon Supreme Court articulated the governor's powers, stating that the constitutional convention was clear that the "governor is the sole repository of the pardoning power" and further clarified that the governor has "unlimited power" to grant reprieves, commutations and pardons, and that neither the judiciary nor the legislature has the authority to prevent the governor's use of discretion.⁶¹ Oregon courts continue to construe the pardon power broadly. In *Haugen v. Kitzhaber*, the Oregon Supreme Court undertook both an analysis of the text and an examination of the historical circumstances surrounding its adoption to identify the principles it embodies.⁶² The court concluded that the pardon power serves as one of the only

⁵⁷ *Id.* at 142.

⁵⁸ OR. CONST. art. V, § 14.

⁵⁹ See *Haugen v. Kitzhaber*, 306 P.3d 592, 597 (Or. 2013) (en banc); *Eacret v. Holmes*, 333 P.2d 741, 744 (Or. 1958) (en banc).

⁶⁰ *Eacret*, 333 P.2d at 741.

⁶¹ *Id.* at 743–44.

⁶² *Haugen*, 306 P.3d at 597.

checks the Constitution provides to the executive, both on the legislative and judicial departments.⁶³

The Oregon Constitution, however, limits the governor's pardon power where the U.S. Constitution does not limit the president in two ways. First, the legislature can regulate the governor's clemency power, and second, the governor may not grant a pardon for the crime of treason. In all other respects, the Oregon Supreme Court concluded that the governor's power is plenary.⁶⁴

Historically and to the present day, legislative regulation has been limited to process only.⁶⁵ The Oregon Constitution was written in 1857, when the powers of the presidential pardon were already well established,⁶⁶ and the framers did not devote much time to debating the provisions.⁶⁷ What is on record however, reflects Alexander Hamilton's thinking in Federalist Paper No. 74 that the pardon power would be most responsibly used in the hands of just one person.⁶⁸ At the Oregon Constitutional Convention, the idea was presented that the legislature might create a body of officers whose advice and consent would be required before the governor could grant a pardon.⁶⁹ The delegates struck this down because they preferred that "the responsibility should be imposed upon the governor alone, and that thus the power would be exercised more carefully, and with better judgment."⁷⁰

Therefore, even with the procedural requirements that the governor must follow and the limitation of treason cases, the Oregon governor's pardon powers are broad and provide him or her with an unreviewable freedom to determine who should receive its benefits.

2. *Historical Use of Oregon's Pardon Power*

Just as many of the early U.S. presidents made robust use of the pardon power, so too did the early Oregon governors. Use of the pardon power has been documented by Oregon's constitutional requirement that the governor regularly report a list of people pardoned, the crimes they committed, and the reasons for granting the pardon to the legislature.⁷¹

⁶³ *Id.* at 608.

⁶⁴ *Id.* at 600.

⁶⁵ Section 144.660 of the Oregon Revised Statutes provides the statutory requirements for the governor to report all pardons, commutations and reprieves granted during a specified time-period, names, as well as the crime committed and the reasoning for granting the relief. OR. REV. STAT. § 144.660 (2017). Section 144.649 allows the governor to apply reprieves, commutations, and pardons under the conditions, restrictions, and limitations she so decides. *Id.* § 144.649.

⁶⁶ *Haugen*, 306 P.3d at 602.

⁶⁷ *Id.* at 601.

⁶⁸ THE FEDERALIST No. 74, *supra* note 14.

⁶⁹ *Haugen*, 306 P.3d at 601.

⁷⁰ *Id.*

⁷¹ OR. CONST. art. V, § 14.

Governor Pennoyer's 1895 report to the legislature provides an example of the regularity with which he used the pardon power. During a two-year period between 1893 and 1894, a report from the governor of the Oregon State Penitentiary established that the state prison population did not exceed 400 people.⁷² Yet during those two years, Pennoyer granted 97 full pardons.⁷³ Listed below is a chart documenting the types of crimes he gave pardons to and the reasons he provided for his decisions.

Crime of Conviction	Number of People Pardoned
Larceny of various types/Forgery	43 people for Larceny, 3 people for Forgery
Murder/Attempted Murder/Manslaughter	8 people for Murder, 1 person for Attempted Murder, 9 people for Manslaughter
Assault of various types	13 people
Riot	2 people
Rape	3 people
Miscellaneous	15 people

Reason Given for Pardon	Number of People Pardoned
Recommendation of Judge	14 people
Recommendation of District Attorney/Favorable statement of District Attorney or Deputy Assistant District*	58 people
Sufficient punishment	4 people
Doubt of Guilt/Grave doubt of Guilt/Recommendation of Jury	6 people of which 3 people based on jury recommendation alone
Needs of dependent family	4 people
Miscellaneous, such as mitigation, sickness, trivial crime	8 people
Recommendation of Judge	14 people

*on one occasion conditioned on leaving state and never returning

During the two-year period, Pennoyer additionally commuted 46 sentences and restored full citizenship to 48 other people who had already fully served their sentences and had already returned to their communities.⁷⁴ In both groups, Pennoyer relied on similar reasoning to make these decisions as he did for the pardons he granted.⁷⁵

⁷² BIENNIAL REPORT OF THE SUPERINTENDENT OF THE OREGON STATE PENITENTIARY 16–22 (1895).

⁷³ SYLVESTER PENNOYER, COMMUTATIONS AND REMISSIONS 3–6 (1895).

⁷⁴ *Id.* at 7–9.

⁷⁵ *Id.* at 3–9.

Governor Chamberlain's 1909 pardon report for 1907 and 1908 followed a similar pattern to Governor Pennoyer's report 15 years earlier.⁷⁶ In those two years, he granted 67 full pardons⁷⁷ with a prison population in the Oregon State Penitentiary under 400 people.⁷⁸

Governor Chamberlain provided more thorough explanations than Governor Pennoyer did as to his motivations for granting pardons, often providing multiple reasons for each inmate's release.⁷⁹ In the chart below, each reason he gave is matched with the number of prisoners he pardoned for that reason. Most people received more than one reason for their full pardon.

Reason Given for Pardon	Number of People Pardoned
Recommendation of Judge	21 people
Recommendation of District Attorney	22 people
Recommendation of chaplain, reverend or another religious figure	4 people
Recommendation/Petition of citizens from community	28 people
Recommendation of jury	4 people
Good conduct while in prison/Excellent prison record	21 people
Youth of prisoner	9 people
For services to the State	3 people
Dependency of family	7 people
Mitigating factors in crime	4 people
Doubt of guilt	6 people
Ill-health	4 people
Sufficient Punishment	4 people
Good reputation prior to crime	4 people

⁷⁶ GEO. E. CHAMBERLAIN, COMMUTATIONS AND REMISSIONS (1909).

⁷⁷ *Id.* at 5–9.

⁷⁸ CAHALAN, *supra* note 36, at 29.

⁷⁹ CHAMBERLAIN, *supra* note 76, at 5–9. Governor Chamberlain's pardons were somewhat descriptive in their reasoning. Some examples of reasons provided: "Petition of citizens of Umatilla County; good conduct while in prison; failing in health, cannot remain in prison and live much longer" (pardoning a man convicted of larceny two years into a five-year sentence); "A petition numerously signed by citizens asking for a pardon so that he can save a little home from foreclosure and to care for a dependent wife and children" (pardoning a man who obtained money under false pretenses two years before the end of his sentence); "Petition of citizens; served fifteen years and his conduct has been exemplary" (pardoning a man serving a life sentence for murder); "Feeble health"; age; "His Excellency, Kang Yu Wei, representative of Chinese government, agreeing to transport him to China to be cared for by friends" (pardoning Chinese national for murder seven years into his life sentence); "Doubt as to guilt; recommendation of nine trial jurors, most of the county officers of Josephine County, where the crime was alleged to have been committed" (pardoning man for crime of assault with intent to rape four years into his nine-year sentence); "Suffering from locomotor ataxia and threatened with total blindness; strong petition urging that he be pardoned" (pardoning man convicted of manslaughter one year into five-year sentence). *Id.*

Governor Chamberlain also granted 25 restorations to full citizenship for people who had already fully served their sentences along with 47 sentence commutations during the two years of 1907 and 1908.⁸⁰ He applied the same rationales to these as he did for the full pardons.⁸¹

Both governors' reports indicate that the input of judges, district attorneys, and the community were important factors when deciding on clemency. The early governors annually pardoned substantial percentages of the Oregon prison population. Governors were influenced by the length of the sentence; the needs of the defendant's family; illness; doubts as to the defendant's guilt; the defendant's youth; and occasions of exemplary behavior in prison. Any one of these factors alone could be sufficient to secure a full pardon.

Executive clemency was consistently used to a similar degree in Oregon until just after the end of World War II⁸² when grants began to slow down considerably.⁸³ The election of Governor Tom McCall in 1967 bucked the trend. Even though Governor Tom McCall granted far more than his recent predecessors, he never reached the numbers of the earlier governors.⁸⁴ Pardons were still steadily granted until 1995 when Governor John Kitzhaber came to power. His election coincided with the enactment of Measure 11.⁸⁵ Use of the pardon power essentially ground to a halt due in part to the nationwide "tough on crime" policies of punishment and sentencing that took effect in Oregon.⁸⁶

⁸⁰ *Id.* at 10–14.

⁸¹ *Id.*

⁸² Email from Layne G. Sawyer, Manager of Reference Servs., Or. Sec'y of State, to Venetia Mayhew (Mar. 7, 2017) (on file with authors). Clemency counts for the following governors: Governor Julius Meier (1931–1935) granted 71 petitions in 1931, 106 petitions in 1932, 167 petitions in 1933, 213 petitions in 1934, and 94 petitions in 1935; Governor Charles Martin (1935–1939) granted 119 petitions in 1936, 112 petitions in 1937, 159 petitions in 1938, and 150 petitions in 1939; Governor Charles A. Sprague (1939–1943) granted 120 petitions in 1940, 115 petitions in 1941, and 196 petitions in 1942; Governor Earl Snell (1943–1947) granted 172 petitions in 1943, 108 petitions in 1944, 112 petitions in 1945, and four petitions in 1946. The total number of pardons granted each year has never recovered from this 1946 low.

⁸³ *Id.* Governor John H. Hall (1947–1949) granted ten petitions in 1947, five petitions in 1948, and five petitions in 1949; Governor Douglas McKay (1949–1952) granted four petitions in 1950, three petitions in 1951, and eight petitions in 1952; Governor Paul L. Patterson (1952–1955) granted two petitions in 1953, three petitions in 1954, and 18 petitions in 1955; Governor Elmo Smith (1956) granted four petitions; Governor Robert D. Holmes (1957–1959) granted four petitions in 1957 and two petitions in 1958; Governor Mark Hatfield (1959–1967) granted four petitions in 1959, two petitions in 1960, three petitions in 1961, two petitions in 1962, one petition in 1963, three petitions in 1964, and two petitions in 1966.

⁸⁴ *See id.*

⁸⁵ *See infra* Part IV.D.

⁸⁶ *Id.*

III. REASONS WHY USE OF THE CLEMENCY SLOWED DOWN DURING THE 20TH CENTURY

Between the 1900s and the 1980s, Oregon governors still regularly used clemency depending on each of their personal beliefs. Just as with presidents, some governors were more interested in using their pardon power than others. However, important changes that took place in the criminal justice system explain the consistent drop in the number of commutation and pardons granted over the course of the 20th century until the mid-1980s in Oregon and across the country.

A. *Criminal Justice Changes and Reforms Up Until the 1980s*

In the late part of the 19th century and the early part of the 20th century, executive clemency was necessary (and used) to fix a steady stream of miscarriages of justice. Often, defendants had no counsel, prosecutors manipulated and improperly selected juries, evidence was improperly excluded, verdicts did not match up with evidence, perjury abounded, and sentences severely punished defendants without uniformity.⁸⁷ Courts had almost no general principles to guide them, and judges, guided by different penological philosophies, produced vastly disparate sentences.⁸⁸ Furthermore, defenses were not yet created for many crimes and mitigating factors were not considered.⁸⁹ In a message to the legislature in 1909, Oregon's Governor Chamberlain explained that he saw use of the pardon power as "a part of the duty of the executive branch of the government to equalize, where conditions warrant, this apparent inequality in the administration of justice."⁹⁰

This view was similar around the country. A 1903 Michigan report of the Board in the Matter of Pardons noted that: "Judge and jury sometimes seem to think that no matter what the verdict is, the governor will rectify it if unjust."⁹¹ In 1911, a member of the Colorado Board of pardons described his experiences in Colorado, where 45% of felony convictions that made it to the Colorado Supreme Court had been reversed since the court's creation, such that his respect for the importance of pardon power had increased.⁹² He stated:

The mistakes of judges are legion, and the ways of juries are past understanding. For one abuse of the pardon power there are a thousand abuses of the convicting power. I have known a judge who, just after sentencing a man, sat down and wrote our board all the mitigating circumstances in the case while they were fresh in his mind and he alive and well, so the convict might have

⁸⁷ James D. Barnett, *The Grounds of Pardon*, 6 OR. L. REV. 205, 217–18 (1927).

⁸⁸ *Id.* at 218–19.

⁸⁹ *Id.*

⁹⁰ *Id.* at 219.

⁹¹ *Id.* at 223.

⁹² *Id.*

the benefit of it in after years on application for clemency. I have read dozens of communications from judges saying their sentences in specific cases were too severe. . . . District attorneys time and again tell us that particular sentences are excessive and thus confess that a well-intended prosecution was transformed into an unintended persecution. It is a very common thing for us to have petitions for clemency from a majority of the jurors who rendered the verdict of guilty in the given case, and such petitions from all twelve jurors is not a novelty.⁹³

Thus, clemency served as a vital correction on the justice system that produced unfair and unnecessarily harsh outcomes.⁹⁴ The necessity for so many commutations and pardons shined a light onto the gross injustices noted above. Slowly over the course of the 20th century, some of the processes in the criminal justice system improved in Oregon and elsewhere.⁹⁵ Specifically, over time, defendants were granted more rights to appeal their cases, seek assistance of counsel, and secure their privacy.⁹⁶ Law enforcement was professionalized, aspects of the criminal code was codified, parole was created, and legal doctrines increased rights for defendants and set rules for law enforcement.⁹⁷

1. *Rights and Appeals*

Between the late 1950s and the present day, the U.S. Supreme Court shaped the boundaries of the modern criminal trial process under the Fifth, Sixth, Eighth, and Fourteenth Amendments.⁹⁸ It articulated minimum constitutional rights for defendants, leading courts and legislatures across the country to respond with reform. The Court created a long line of case law defining defendants' minimum Fourth Amendment privacy rights when faced with a law enforcement search or seizure.⁹⁹ *Gideon v. Wainwright* requires states to provide an attorney to defendants in criminal cases who are unable to afford their own attorneys under the Sixth

⁹³ *Id.* at 223–24.

⁹⁴ Love, *supra* note 19, at 1183 (“Some reasons given for granting pardon during this period would in time become recognized as legal defenses: lack of capacity, duress, insanity and a variety of other mitigating circumstances.”).

⁹⁵ See Larkin, *supra* note 18, at 866.

⁹⁶ Rodger Citron, (*Un*)Lucky v. Miller, *The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 483 (1991). See generally Alex S. Ellerson, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373 (1991).

⁹⁷ Larkin, *supra* note 18, at 866. See generally Christopher Stone & Jeremy Travis, *Towards a New Professionalism in Policing*, NAT’L INST. JUST., Mar. 2011, at 13.

⁹⁸ E.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also Larkin, *supra* note 18, at 859–60.

⁹⁹ See *Illinois v. Gates*, 462 U.S. 213 (1983) (overruling *Spinelli* and establishing a totality of circumstances approach); *Spinelli v. United States*, 393 U.S. 410 (1969) (creating a two-prong test to determine whether there was probable cause for a search warrant); *Katz v. United States*, 389 U.S. 347 (1967) (defining reasonable expectations of privacy).

Amendment.¹⁰⁰ *Miranda v. Arizona* requires law enforcement to advise suspects of their right to remain silent and to an attorney during interrogations while in police custody.¹⁰¹ *Terry v. Ohio* requires that the police have “reasonable suspicion” based on specific articulable facts that a person or persons has committed, is committing, or is about to commit a crime and “may be armed and presently dangerous,” to stop them and perform a surface search—a frisk or pat down.¹⁰² *Mapp v. Ohio* applied the exclusionary rule to the states so that any evidence illegally obtained by the government cannot be used in court against the accused.¹⁰³ *Chimel v. California* established that police officers arresting a person at home could not search the entire home without a search warrant, but police may search the area within immediate reach of the person.¹⁰⁴

Additionally, the appeals process grew more elaborate and permitted all convicted people access to the system. For example, in Oregon before 1959 there was no clear process to challenge the legality of a conviction.¹⁰⁵ A variety of common law methods had been historically used and had created confusion such that the Oregon Supreme Court called for the legislature to create a “single and exclusive proceeding” so that every person convicted of a crime is eligible to petition.¹⁰⁶ The passage of the Post-Conviction Hearing Act in 1959 gave all people convicted of a crime a process for appeal.¹⁰⁷

2. Law Enforcement

The movement to professionalize the police is less than a century old. Mostly, it occurred between the 1920s and the 1970s.¹⁰⁸ The period from the mid 1800s to the 1920s is referred to as the “political era” and applied the “entrepreneurial” approach.¹⁰⁹ During that time, there was no civil service system, police officers were paid in fees, not salaries, and police represented the local politicians in the neighborhoods that they patrolled.¹¹⁰ From the end of the political era to the early 1970s,

¹⁰⁰ *Gideon*, 372 U.S. at 339–40.

¹⁰¹ *Miranda*, 384 U.S. at 444.

¹⁰² *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

¹⁰³ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

¹⁰⁴ *Chimel v. California*, 395 U.S. 752, 763 (1969).

¹⁰⁵ William A. Greene, *The Oregon Approach to Post-Conviction Relief*, 27 OHIO ST. L.J. 274, 278 (1966).

¹⁰⁶ *Id.* (quoting *Strong v. Gladden*, 225 Or. 345, 348 (1961)).

¹⁰⁷ *Id.*

¹⁰⁸ George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, NAT'L INST. JUST., Nov. 1988, at 3–4.

¹⁰⁹ *Id.* at 2; Daniel Voorhies, *The Development of Policing in Portland, Oregon, 1870-1903: Professionalization and the Persistence of Entrepreneurial Modes of Policing*, 17–18 (May 2003) (unpublished B.A. thesis, Reed College).

¹¹⁰ Kelling & Moore, *supra* note 108, at 3–4.

policing in the U.S. went through the “reform era.”¹¹¹ During this era, the civil service system was implemented, which ended political influences in the hiring and firing of officers.¹¹² Police were no longer seen as working for the political leaders but instead considered law enforcement.¹¹³

In Oregon, as elsewhere, law enforcement evolved from its original political or “entrepreneurial” approach to the creation of professional agencies as urban centers grew throughout the 20th century.¹¹⁴ With professionalization, organized investigation and heavy regulation followed, which allowed for more efficient investigation of crimes.¹¹⁵ Police protected the status quo and by the time the Vietnam War and civil rights protests came around, police stood at the front lines of heated conflict between protestors and the government.¹¹⁶ During this era, police were only seen in times of conflict. They set off riots and used force against citizens to defuse contentious situations.¹¹⁷ Consequently, by the 1960s and 1970s, public opinion called for police reform due to systematic bias and brutality toward protestors and African-Americans.¹¹⁸

With police professionalism and a movement towards reform and improvement came legal rulings governing police conduct.¹¹⁹ As discussed above, many of the U.S. Supreme Court decisions during this time provided protections for the accused, restrained police from certain practices, and provided more privacy.

3. *Criminal Law*

In addition to the Supreme Court rulings that govern criminal procedure and police conduct, during this time, the Oregon legislature codified the state’s criminal

¹¹¹ *Id.* at 4.

¹¹² *Id.* at 5.

¹¹³ *Id.*

¹¹⁴ Voorhies, *supra* note 109, at 1 (“That term [‘entrepreneurial system of policing’] was developed by sociologist Allan Levett to describe the pre-modern police and their informal, non-rule bound behavior and reliance on fees rather than on salaries.”).

¹¹⁵ Larkin, *supra* note 18, at 857. The professional era introduced a variety of policing practices, professional police training, and policing academic institutions. Many police management concepts developed and police science and police training programs formed, including professional police training organizations such as the International Association of Chiefs of Police. Kelling & Moore, *supra* note 108, at 4–8.

¹¹⁶ Kelling & Moore, *supra* note 108, at 8.

¹¹⁷ *Id.*

¹¹⁸ Katherine J. Rosich, *Race, Ethnicity, and the Criminal Justice System*, AM. SOC. ASS’N, Sept. 2007, at 1, 12, <http://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf>.

¹¹⁹ Kelling & Moore, *supra* note 108, at 9.

common law,¹²⁰ including thorough rules of criminal procedure¹²¹ and rules of evidence,¹²² which all served to improve the quality of the process on the front-end. The original Oregon criminal code was established in 1864 and over the course of the century underwent corrections and improvements. But it was not until 1971 that the legislature revised the code to conform to changing standards and rectify overlapping and inconsistent crimes and penalties.¹²³ More specifically, the Legislative Assembly established the Criminal Law Revision Commission in 1967 with the goals of modernizing Oregon's criminal and correctional laws.¹²⁴ The Assembly enacted the revised criminal code in 1971 and the commission prepared a new criminal procedure code during the 1971–1972 interim that was enacted by the 1973 Legislative Assembly.¹²⁵ The Commission outlined its concern:

The existing code, because of its age and the numerous piecemeal changes made in it over the years, suffers from two basic infirmities that plague the laws of many of the states—it has not kept pace with society's changing standards, resulting in retention of substantive provisions now neither necessary nor desirable—and it is replete with overlapping and seemingly inconsistent crimes and penalties. The Commission has endeavored to rectify these faults by drafting a comprehensive, interrelated Code—internally consistent and designed not for the 1860's but for the 1970's.¹²⁶

4. Parole

Before 1905 there was no form of parole in Oregon.¹²⁷ Executive clemency offered the only way to free prisoners prior to the end of his or her sentence.¹²⁸ In 1905, the legislature gave the governor power to grant parole.¹²⁹ Parole arises from

¹²⁰ CRIM. L. REVISION COMM'N, PROPOSED OREGON CRIMINAL CODE FINAL DRAFT AND REPORT (1970) (recommending codifications later enacted by the 1971 Legislature Assembly).

¹²¹ CRIM. L. REVISION COMM'N, PROPOSED OREGON CRIMINAL PROCEDURE CODE FINAL DRAFT AND REPORT (1972) (recommending codifications later enacted by the 1973 Legislature Assembly).

¹²² CRIM. L. REVISION COMM'N, *supra* note 120.

¹²³ *Id.*

¹²⁴ *Oregon Criminal Law Revision Commission Records*, OR. SEC'Y ST., <https://sos.oregon.gov/archives/Pages/records/criminal-law.aspx>.

¹²⁵ *Id.*

¹²⁶ CRIM. L. REVISION COMM'N, *supra* note 121, at xxii.

¹²⁷ *About Us*, OR. BOARD PAROLE & POST-PRISON SUPERVISION, https://www.oregon.gov/BOPPPS/Pages/about_us.aspx.

¹²⁸ Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 34 (2013).

¹²⁹ *About Us*, *supra* note 127.

the philosophy that the correctional process serves society by rehabilitating defendants.¹³⁰ In 1911, a parole board was established.¹³¹ In 1931, the legislature passed the State Probation Act and established a commission to regulate its use, which by 1969 grew into a full-time paid agency.¹³² In 1955, “legislation gave the parole board responsibility to supervise all persons placed on probation by a circuit or district court; released from the state penitentiary on parole or conditional pardon; or released on parole, probation or conditional pardon from other states.”¹³³ As with the agency, the board was made full-time in 1969 as part of a major government reorganization and a new three-member State Board of Parole and Probation was to be appointed by the Governor for four-year terms and confirmed by the Senate.¹³⁴

The rise in parole use paralleled a decline in the use of the pardon.¹³⁵ This trend occurred in Oregon and nationally.¹³⁶ Nationally, by the 1930s parole “had largely supplanted clemency” as a method of releasing people.¹³⁷ Governors instead increasingly used commutation as a method to make recipients eligible for parole sooner than their sentence dictated.¹³⁸ Across the country there was doctrinal confusion as to the difference between parole and pardons, and early reports indicate that parole was granted as though it were a pardon.¹³⁹

The nationwide idea behind parole was that legislatures would pass laws authorizing broad indeterminate sentences to give sufficient time to rehabilitate prisoners so that ultimately the parole board would determine when a prisoner was reformed such that he could be released under the supervision of a parole officer.¹⁴⁰ Although parole is not a pardon at all, but rather an alternative and milder form of a sentence, it provided relief that did not exist before and seemed to lessen the necessity for the executive to use pardons.

¹³⁰ Larkin, *supra* note 128, at 7.

¹³¹ *About Us*, *supra* note 127.

¹³² *Id.*

¹³³ OR. SEC’Y ST., BOARD OF PAROLE AND POST-PRISON SUPERVISION ADMINISTRATIVE OVERVIEW (Dec. 2006), <https://sos.oregon.gov/archives/Documents/recordsmgmt/sched/overview-parole-post-prison-supervision.pdf>.

¹³⁴ *Id.*

¹³⁵ Love, *supra* note 19, at 1189.

¹³⁶ *Id.* at 1189; *About Us*, *supra* note 127.

¹³⁷ Love, *supra* note 19, at 1189.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Larkin, *supra* note 128, at 8.

5. *Use of Plea Deals*

One consequence of improvements in the criminal justice system over the course of the 20th century was a change in perception about the legitimacy of pleading guilty and plea deals in general.¹⁴¹ Up until the 1970s, plea agreements were deeply frowned upon as “corrupt” and an “essentially immoral” practice.¹⁴² Critics believed that pleading guilty threatened defendants’ rights and took criminal proceedings out of the courts and into the shadows.¹⁴³ From the 1970s onward, after two Supreme Court rulings made it clear it was not *per se* unconstitutional to negotiate with a defendant to obtain a plea deal,¹⁴⁴ plea deals became the norm and the criminal justice system grew dependent on them to function.¹⁴⁵ Indeed, the Court’s endorsement reflected a recognition of the necessity of plea deals to accommodate the increased volume of cases over the course of the 20th century.¹⁴⁶

Now, an estimated 97% of federal criminal cases and 94% of state criminal cases are resolved through plea agreements.¹⁴⁷ In *Missouri v. Fry*,¹⁴⁸ the case that affirmed the right of defendants to receive competent counsel during plea negotiations, Justice Kennedy cited a law review article to emphasize the reality of plea-bargaining’s role in the criminal justice system: “[h]orse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.”¹⁴⁹ Today, the vast majority of people who are incarcerated

¹⁴¹ H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 81–83 (2011).

¹⁴² *Id.* at 81.

¹⁴³ *Id.* at 82–83.

¹⁴⁴ *Brady v. United States*, 397 U.S. 742, 151 (1970); *Parker v. North Carolina*, 397 U.S. 790, 794–95 (1970).

¹⁴⁵ See Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, OUTLINE (Aug. 7, 2017), <https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials?zd=1&zi=4sjgukiu>; Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>.

¹⁴⁶ Caldwell, *supra* note 141, at 75–76; see Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1728–29 (2005) (reviewing GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003)); Shiv Narayan Persaud, *Conceptualizations of Legalese in the Course of Due Process, from Arrest to Plea Bargain: The Perspectives of Disadvantaged Offenders*, 31 N.C. CENT. L. REV. 107, 146 (2009).

¹⁴⁷ Del Valle, *supra* note 145; Yoffe, *supra* note 145.

¹⁴⁸ *Missouri v. Fry*, 566 U.S. 134, 144 (2012).

¹⁴⁹ Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

in Oregon got there through plea agreements.¹⁵⁰ Plea deals can often result in excessive sentences far out of proportion to the defendant's actual culpability,¹⁵¹ denial of remedies for the injustices that occur as a consequence of negotiations,¹⁵² and innocent people pleading guilty.¹⁵³

6. *The Effect of Criminal Justice Changes on Use of the Pardon Power*

Executive clemency was still used into the early 1980s but not with the same frequency as earlier in the century.¹⁵⁴ As the above factors significantly changed how the criminal justice system operated, Oregon governors found fewer reasons to use their pardon power. Governor Theodore Geer, who granted 17 pardons and 18 commutations between 1900 and 1903, looked to many factors in making clemency decisions, including: the jurors from the offender's trial,¹⁵⁵ "numerous" and "reputable" citizens, representatives from the county, the sentencing judge, the prosecuting attorney, the victim of the crime, witnesses from the trial who now expressed doubt of guilt, and prison officials.¹⁵⁶ He also considered the family of the offender, the youth of the prisoner, the exemplary conduct of the prisoner, service in the civil war, old age, whether the offender had served a major part of the sentence, appearing "not to be of the criminal class," and being only "technically guilty."¹⁵⁷ One prisoner received a pardon after risking his life to protect guards in a prison riot, and another because "his offense was one of a weak-minded, foolish boy, rather than that of a vicious criminal."¹⁵⁸ In contrast, Governor Tom McCall predominantly granted pardons to offenders who he considered had demonstrated "exceptional rehabilitation" or just "rehabilitation."¹⁵⁹ He preferred to give pardons only to those who had already completed their prison sentences and whom he determined were rehabilitated in both "deed as well as word."¹⁶⁰ He commuted many more sentences than

¹⁵⁰ *Protect Due Process and Rehabilitation in Plea Negotiations - SB 1002 (2019)*, ACLU OR., <https://aclu-or.org/en/legislation/protect-due-process-and-rehabilitation-plea-negotiations-hb-3419-2019>.

¹⁵¹ Caldwell, *supra* note 141, at 73.

¹⁵² *Id.* at 95.

¹⁵³ Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1239 (2008) (noting the rising number of innocent defendants entering guilty pleas to avoid risky trials).

¹⁵⁴ Love, *supra* note 19, at 1169.

¹⁵⁵ S. 22, Reg. Sess., at 56–61 (Or. 1903). The numbers of supportive jurors given in 1903 were 9, 8, 11, 12, and 5. *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 57.

¹⁵⁸ *Id.*

¹⁵⁹ S. & H. 57, Reg. Sess., at J-5 (Or. 1973). Governor Victor Atiyeh granted 10 pardons in 1983 and 1984 all for "exceptional rehabilitation." S. & H. 63, Reg. Sess., at HJ-20 (Or. 1985).

¹⁶⁰ S. & H. 57, Reg. Sess., at J-5 (Or. 1973).

he gave pardons, which fit the trend that followed after the inception of parole. In his final session as governor, from 1973 to 1974, he commuted 65 sentences (as well as granted 16 full pardons).¹⁶¹ He granted commutations due to “outstanding institutional conduct,” “rehabilitation,” and “participation in community programs,” and he commuted to time served many people who had been convicted for possession of less than one ounce of marijuana.¹⁶² Governor Victor Atiyeh listed “exceptional rehabilitation” as the only reason granting 21 pardons and 3 commutations between 1979 and 1984.¹⁶³

There are two important takeaways from Oregon’s history of executive clemency: (1) governors did not believe that clemency should only be used in the rarest circumstances, and (2) governors saw their role in using the pardon power as a mechanism to improve the quality of the criminal justice system by drawing attention to its deficiencies when appropriate.

IV. 1980S TO THE PRESENT

The “tough on crime era” of the 1980s brought a rejection of the long-time tradition of rehabilitation in prison followed by parole in favor of a new philosophy of retribution and incapacitation of offenders.¹⁶⁴ That new philosophy grossly impacted the use of executive clemency¹⁶⁵ as it gave prosecutors the power to make mercy-based decisions at the time of charging and in plea dealing.¹⁶⁶ Back-end clemency is now often perceived as an attack on law enforcement policies that underlie convictions.¹⁶⁷ Additionally, irresponsible use of the clemency power by President Clinton and President Bush’s Willie Horton advertisement also had a chilling effect on governors’ use of clemency across the nation.¹⁶⁸

¹⁶¹ S. & H. 58, Reg. & Special Sess., at 28–31 (Or. 1975); S. & H. 63, Reg. Sess., at HJ-20.

¹⁶² *Id.*

¹⁶³ S. 61, Reg. & Special Sess., at EX-1 (Or. 1981).

¹⁶⁴ See *supra* Part II.A. Note that President Lyndon Johnson actually started the “war on crime” in the mid 1960s by creating the President’s Commission on Law Enforcement and Administration of Justice. Exec. Order No. 11236, 30 Fed. Reg. 9349 (1965). In a period of 18 months, the Crime Commission collected data and studied everything from juvenile delinquency to organized crime. The final report called for sweeping changes in policing, the courts and corrections. PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>. In June 1971, President Nixon announced his decision to fight a “war on drugs.” *War on Drugs*, HISTORY (June 7, 2019), <https://www.history.com/topics/the-war-on-drugs> (stating that drug abuse was “public enemy number one”). He dramatically increased the size and presence of federal drug control agencies and pushed through measures such as mandatory sentencing and no-knock warrants. *Id.*

¹⁶⁵ See *supra* Part II.A.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *infra* Part IV.C.

A. Nationwide Tough on Crime—A New Philosophy

In response to Ronald Reagan's 1983 state of the union speech calling for an "all out war" and "major reform" of the criminal justice system to accelerate the drive against crime and specifically drug trafficking,¹⁶⁹ Congress passed the Sentencing Reform Act in 1984.¹⁷⁰ The Act officially put an end to the philosophy of rehabilitation as a legitimate sentencing justification. The statute reads, "imprisonment is not an appropriate means of promoting correction and rehabilitation."¹⁷¹ Instead, the Act promoted the goals of "retribution, deterrence, incapacitation and uniformity."¹⁷² With this new approach, sentences grew longer and more punitive.¹⁷³

The Act starkly contrasted the philosophies that had guided the criminal justice system throughout prior decades,¹⁷⁴ yet it perfectly represented the changed societal perception of those convicted of crimes. Crime rates had risen steadily during the 1970s and social unrest unnerved citizens such that politicians took extreme action to appear "tough on crime."¹⁷⁵

With the Act, the federal government imposed a new sentencing structure that attempted to take judicial discretion out of the equation at the time of sentencing and replace it with mathematical analyses of the offense, the offender, and its effects, based on an array of pre-determined categories.¹⁷⁶ Prior to the Act, trial courts had wide discretion to determine defendants' sentences on an individualized basis.¹⁷⁷ However, Congress insisted on neutral guidelines as to race, socio-economic status, sex, national origin, and creed.¹⁷⁸ In fact, the Act stated that it was inappropriate to consider, "education, vocational skills, employment record, family ties and respon-

¹⁶⁹ Ronald Reagan, *Address Before a Joint Session of the Congress on the State of the Union*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Jan. 25, 1983), <https://www.reaganlibrary.gov/research/speeches/12583c>.

¹⁷⁰ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

¹⁷¹ 18 U.S.C. § 3582(a) (2012).

¹⁷² Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1292 (1986).

¹⁷³ U.S. SENT'G COMM'N, *History of Mandatory Minimum Penalties and Statutory Relief Mechanisms*, in 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7, 23 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf.

¹⁷⁴ *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.")

¹⁷⁵ Larkin, *supra* note 18, at 869.

¹⁷⁶ Graafeiland, *supra* note 172, at 1292–93.

¹⁷⁷ *Id.* at 1293.

¹⁷⁸ *Id.*

sibilities, and community ties of the defendant” during sentencing determinations.¹⁷⁹ The result was to dehumanize defendants and to apply uniform sentences that allowed for no individual discretion based on the circumstances of a defendant or the crime.¹⁸⁰ The Act also effectively abolished federal parole by requiring all maximum sentences to be no more than 25% of the minimum sentence or six months, whichever was greater, and by making life sentences a minimum of 30 years.¹⁸¹ Parole eligibility, therefore, could only begin six months before the end of the maximum sentence, which rendered its purpose to release rehabilitated individuals early impossible to accomplish.¹⁸² President Bill Clinton continued what his predecessors had started.¹⁸³ Specifically, with the 1994 Violent Crime Control and Law Enforcement Act, (“the Crime bill”),¹⁸⁴ the largest crime control bill in U.S. history,¹⁸⁵ he signed onto the national frenzy for punishment by endorsing things like “three strikes,” “mandatory minimums,” and “truth in sentencing,” (otherwise known as “no more parole”).¹⁸⁶ The Crime bill also added 100,000 new police officers, spent billions on building and funding prisons, and expanded death-penalty-eligible offenses.¹⁸⁷ Though it did not alone create mass incarceration, the bill reinforced the popular thinking that the solution to crime was harsher punishments and helped solidify the “tough on crime” movement.¹⁸⁸

From the 1980s onward, Congress also got busy enacting many more mandatory minimum sentence statutes. It passed statutes creating mandatory minimum sentences for many drug offenses,¹⁸⁹ firearm offenses,¹⁹⁰ child exploitation offenses,¹⁹¹ and identity theft offenses,¹⁹² which expanded the scope of crimes for

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1293; Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 740–41 n.35 (1980).

¹⁸¹ Graafeiland, *supra* note 172, at 1292.

¹⁸² *Id.*

¹⁸³ Marc Mauer, *Bill Clinton, “Black Lives” and the Myths of the 1994 Crime Bill*, MARSHALL PROJECT (Apr. 11, 2016), <https://www.themarshallproject.org/2016/04/11/bill-clinton-black-lives-and-the-myths-of-the-1994-crime-bill> (noting that President Clinton adopted legislation that limited parole).

¹⁸⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

¹⁸⁵ U.S. DEP’T JUST., VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 FACT SHEET (Oct. 24, 1994), <https://www.ncjrs.gov/textfiles/billsf.txt>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Jessica Lussenhop, *Clinton Crime Bill: Why Is It So Controversial?*, BBC NEWS (Apr. 18, 2016), <https://www.bbc.com/news/world-us-canada-36020717>.

¹⁸⁹ U.S. SENT’G COMM’N, *supra* note 173, at 23.

¹⁹⁰ *Id.* at 25–26.

¹⁹¹ *Id.* at 27–28.

¹⁹² *Id.* at 29.

which mandatory minimum sentences were handed down. While Congress had used mandatory minimum punishments to curtail specific problems that needed harsh action, historically it was not used as a general form of punishment.¹⁹³

B. The Ensuing Drop in Federal Clemency

The culture that created this new approach to punishment and sentencing was far more fearful of crime and unmotivated by compassion or the likelihood of a convicted person's rehabilitation and future success in society. It does not take a leap of imagination to recognize that it was hardly a fitting environment for executive acts of mercy to be generously granted at the back end.

Thus, grants of clemency dropped. Just prior to the Sentencing Reform Act passing in 1984, President Carter granted full pardons to 33% of the petitions he received, which was a lower percentage than many of his recent predecessors¹⁹⁴ such as President Nixon at about 51% and President Ford at 39%.¹⁹⁵ As the president who signed the Act, Ronald Reagan granted full pardons to about 19% of petitions received during his eight years in office.¹⁹⁶ President George H.W. Bush granted pardons to about 10% of petitions received.¹⁹⁷ President Clinton granted full pardons to about 20% of petitions received and President George W. Bush granted full pardons to only 7.5% of petitions.¹⁹⁸ In President Obama's first term, he granted an even lower rate than his predecessor.¹⁹⁹

However, in 2014, the Obama administration set up a clemency initiative²⁰⁰ that was targeted for drug dealers who received mandatory-minimum sentences during the War on Drugs from the 1980s to the 2000s.²⁰¹ It led to 1,716 sentence

¹⁹³ *Id.* at 21. For instance, mandatory minimum sentences were imposed on people who imported slaves in the 19th century and during Prohibition, Congress enacted many mandatory minimum sentences for people who violated the law. Historically, mandatory minimum punishments were only used for the most serious crimes such as treason, murder, and rape. *Id.* at 7–17.

¹⁹⁴ *Clemency Statistics*, *supra* note 12.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and The Department of Justice*, 99 VA. L. REV. 271, 291 (2013).

²⁰⁰ *Clemency Initiative*, U.S. DEP'T JUST., <https://www.justice.gov/pardon/clemency-initiative> (last updated Dec. 11, 2018).

²⁰¹ *Id.*

commutations, by far the most of any president.²⁰² But he also granted only 212 pardons during his tenure (fewer than any modern president except Presidents George H.W. Bush, who granted 74, and George W. Bush, who granted 189).²⁰³

Though President Obama had critics of his initiative and its results, he was not accused of cronyism in the clemency process as were his many of his predecessors.²⁰⁴ He did however have a few controversial clemency cases; he commuted the sentence of Chelsea Manning after she served 7 years of a 35-year prison term for leaking government secrets,²⁰⁵ and pardoned retired General James Cartwright before he was sentenced by a federal judge.²⁰⁶ Cartwright pleaded guilty to lying to the FBI about leaking information.²⁰⁷

Based on the seven pardons and four commutations President Donald Trump has issued to date,²⁰⁸ he seems to be using his pardon power to please those that have received “unfair treatment”²⁰⁹ and who were persecuted by the “deep state.”²¹⁰ The majority of individuals that have received pardons from President Trump have been

²⁰² U.S. SENT’G COMM’N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 12 (Sept. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf/.

²⁰³ *Clemency Statistics*, *supra* note 12.

²⁰⁴ See Love, *supra* note 19, at 1171–72; Rosenzweig, *supra* note 21, at 605.

²⁰⁵ Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html>.

²⁰⁶ *Id.*

²⁰⁷ Charlie Savage, *Obama Pardons James Cartwright, General Who Lied to F.B.I. in Leak Case*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/obama-pardons-james-cartwright-general-who-lied-to-fbi-in-leak-case.html>.

²⁰⁸ As of July 10, 2018, President Donald Trump has pardoned Joe Arpaio, former Sheriff of Maricopa County, Arizona; Sholom Rubashkin, an Iowa meatpacking magnate; Kristian Saucier, a former U.S. Navy sailor; Lewis “Scooter” Libby, former Chief of Staff to Dick Cheney; Jack Johnson, a boxer; Dinesh D’Souza, a conservative political commentator; Dwight Lincoln Hammond Jr. and Steven Dwight Hammond, both ranchers. President Trump has commuted the sentences of Alice Marie Johnson, a non-violent drug offender sentenced to life; Sholom Rubashkin; and both Dwight and Steven Hammond. See John Wagner, *Trump Pardons Oregon Cattle Ranchers in Case That Sparked 41-day Occupation of National Wildlife Refuge*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/politics/trump-pardons-oregon-cattle-ranchers-in-case-that-sparked-41-day-occupation-of-national-wildlife-refuge/2018/07/10/8f7aefa0-844c-11e8-8553-a3ce89036c78_story.html.

²⁰⁹ JM Rieger, *Trump Disparaged Pardons in the Past. He’s Been Generous with Them as President*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/05/31/trump-disparaged-pardons-in-the-past-hes-been-generous-with-them-as-president/?utm_term=.0c0341a24bde.

²¹⁰ Ken Thomas, *Trump Pardons Navy Man Who Took Illegal Submarine Photos*, U.S. NEWS & WORLD REP. (Mar. 9, 2018), <https://www.usnews.com/news/politics/articles/2018-03-09/trump-pardons-navy-man-who-took-illegal-submarine-photo>.

found by the FBI and DOJ to have obstructed justice, given false statements to investigators, or broken campaign finance rules.²¹¹ He also seems interested in pleasing the celebrity crowd by using his pardon power to help those whose cases landed on his desk through his relationship with specific celebrities. So far, President Trump has not sought counsel or information from the Office of Pardon Authority within the Justice Department prior to using his pardon power.²¹² As the New York Times has explained: “A celebrity game show approach to mercy, doling the favor out to those with political allegiance or access to fame, is fully within the law.”²¹³ Regardless of President Trump’s approach thus far, neither he nor recent presidents have used the pardon power with the same vigor as their predecessors did prior to the War on Crime.

C. *Bill Clinton and Willie Horton*

It is common to note in academic literature that President Clinton’s “unseemly” use of his pardon power contributed to its decline.²¹⁴ Professor Rosenzweig believes it is at best a partial explanation for Democratic presidents who do not want to be labeled as “soft on crime,” because the decline in use of the pardon power was in place well before Bill Clinton’s “ill-considered” use of it in the final days of his presidency.²¹⁵ Paul Larkin Jr. has argued that Clinton’s action probably “poisoned the well” for governors and presidents alike for a while because granting a pardon was already a politically risky decision for a politician.²¹⁶ Nevertheless, President Clinton’s rare use of the power until the end of his presidency when he rushed through pardons for his friends and associates left a collectively bad taste in many people’s mouths.²¹⁷

The Willie Horton affair can, on the other hand, serve as a chilling cautionary tale to governors considering a grant of mercy. Horton, convicted of murder, was

²¹¹ Sam Wolfson, *What Can We Learn from the People Trump Has Pardoned So Far?*, GUARDIAN (July 10, 2018), <https://www.theguardian.com/us-news/2018/jun/07/trump-presidential-pardons-mueller-investigation>.

²¹² Adam Liptak, *How Far Can Trump Go in Issuing Pardons?*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/us/politics/pardons-trump.html>.

²¹³ Campbell Robertson, *Pardon Seekers Have a New Strategy in the Trump Era: “It’s Who You Know,”* N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/us/trump-pardons.html>; see also Philip Bump, *How to Get a Pardon from President Trump*, WASH. POST (June 5, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/05/how-to-get-a-pardon-from-president-trump/?utm_term=.fd2de27d77dc.

²¹⁴ Rosenzweig, *supra* note 21, at 605.

²¹⁵ *Id.*

²¹⁶ Larkin, *supra* note 18, at 880–81.

²¹⁷ Albert W. Alschuler, *Bill Clinton’s Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1135–37, 1160–63 (2010).

temporarily released from a Massachusetts prison as a part of the state's weekend furlough program.²¹⁸ During that time, he raped a woman and assaulted her fiancé.²¹⁹ The governor at the time, Michael Dukakis, became the Democratic presidential nominee in 1988.²²⁰ His opponent, George H.W. Bush, used Dukakis's support of the furlough program to devastating effect as the centerpiece of his attacks on Dukakis as being soft on crime.²²¹ The fact that the program had a 99.5% success rate was of no consequence to the public because the punitive culture surrounding incarceration was only satisfied by 100% guarantees which were provided by long mandatory sentences.²²² Thus, the lesson for governors was that one misguided pardon could signal political suicide.²²³

Bill Clinton's pardons and Michael Dukakis's failed campaign may or may not have had a chilling effect on grants of clemency. Nevertheless, in a system that is officially opposed to mercy for criminals and that favors long mandatory sentences guided by philosophies of retribution and incapacitation,²²⁴ they certainly could not have helped.

D. Oregon—*The End of Parole and the Introduction of Measure 11*

The national "tough on crime" era inspired a similar pattern of criminal justice reform in Oregon. Following the 1984 Federal Sentencing Reform Act,²²⁵ Oregon enacted its own reformation of the sentencing system in 1989.²²⁶ Prior to 1989, every inmate in the DOC was sentenced indeterminately—meaning that at the time of sentencing judges used broad penalty ranges established by the legislature to determine a minimum and maximum amount of time an inmate could serve.²²⁷ Judges crafted individualized sentences based on the person, the crime, and his rehabilitative needs.²²⁸ The actual amount of time served between the minimum and the

²¹⁸ John Sides, *It's Time to Stop the Endless Hype of the "Willie Horton Ad,"* WASH. POST (Jan. 6, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/06/its-time-to-stop-the-endless-hype-of-the-willie-horton-ad/?utm_term=.2e6782fb1d1c.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 201 (Charles J. Ogletree, Jr. & Austin Sarat eds., N.Y. Univ. Press 2012).

²²³ Larkin, *supra* note 18, at 872.

²²⁴ *Id.*

²²⁵ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

²²⁶ TAYLOR, *supra* note 8, at 1.

²²⁷ Nancy Merritt et al., *Oregon's Measure 11 Sentencing Reform: Implementation and System Impact* 5 (Nat'l Inst. of Justice, Working Paper No. 205507, 2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/205507.pdf>.

²²⁸ *Id.* at 5.

maximum was determined by the parole board based upon the inmate's institutional behavior.²²⁹ Thus, inmates who displayed significant rehabilitation could serve far less time than the initial maximum sentence they received and those that did not would have to serve their entire sentence. Up until 1989, every individual incarcerated in the DOC went through the parole board before being conditionally released back into the community.²³⁰

Oregon's 1989 Sentencing Reform Act abolished parole²³¹ and indeterminate sentencing,²³² replacing it with sentences that would instead represent actual time served; instead of parole board supervision, inmates were given a limited opportunity to earn up to a 20% reduction in sentence to promote good institutional behavior.²³³ Once the Act passed, no matter what institutional behavior an inmate displayed or the circumstances of the crime or conviction, his or her opportunity for early release ceased to exist except for the possibility of earning up to a 20% reduction.²³⁴

In Oregon, though, this Act did not satisfy the public desire for a punitive criminal justice system.²³⁵ During the early 1990s the public became consumed by rising rates of youth crime and the racially charged myth of the teenage super-predator was created, which led to reforms of state systems with more punitive punishments for young offenders.²³⁶ Ballot Measure 11 in 1994 reflects the tone of the era.²³⁷ It created long mandatory minimum sentences for a variety of crimes and also mandated that all people aged 15 or older were charged and sentenced as adults for specific crimes.²³⁸ For defendants under 15 years old, the prosecutor could choose whether to charge and sentence the child as an adult.²³⁹

²²⁹ *Id.*

²³⁰ TAYLOR, *supra* note 8, at 1.

²³¹ With the exception of murder and aggravated murder. *See About Us*, *supra* note 127.

²³² Sentencing Reform Act of 1989, ch. 790, 2 Or. Laws 1301, 1302.

²³³ Except for certain murder convictions that are still managed by the parole board. *Id.* at 1309.

²³⁴ Merritt et al., *supra* note 227, at 57.

²³⁵ *See id.* at 22.

²³⁶ Kevin Drum, *A Very Brief History of Super-Predators*, MOTHER JONES (Mar. 3, 2016), <http://www.motherjones.com/kevin-drum/2016/03/very-brief-history-super-predators>; Krista Larson & Hernan Carvente, *Juvenile Justice Systems Still Grappling with Legacy of the "Superpredator" Myth*, VERA INST. (Jan. 24, 2017), <https://www.vera.org/blog/juvenile-justice-systems-still-grappling-with-legacy-of-the-superpredator-myth>. The phrase "super-predator" was not coined until 1995, but it captured the essence of public opinion at the time. *See also* Bonnie Bertram & Scott Michels, *The Superpredator Scare*, RETRO REP. (Apr. 7, 2014), <https://www.retroreport.org/video/the-superpredator-scare/>.

²³⁷ Merritt et al., *supra* note 227, at 18.

²³⁸ *Id.* at 24.

²³⁹ *Id.*

The election pamphlet for Measure 11 provides insight into the approach toward crime and punishment in 1994. The Measure set mandatory minimum sentences for the following crimes: “murder and listed forms of manslaughter, assault, kidnapping, rape, sodomy, unlawful sexual penetration, sexual abuse and robbery. . . . When a person is sentenced under this measure, the person must serve the full sentence. The sentence may not be reduced for any reason.”²⁴⁰

The measure listed four main philosophies behind the sentences: incapacitation, deterrence, predictability of sentences, and comparable sentences.²⁴¹ The pamphlet included a strident argument in favor of the measure where the sponsors of the bill persuasively argued that rehabilitation and probation “flat out doesn’t work,” explaining that, “we MUST imprison all violent and repeat offenders and keep them locked up” for lengthy periods of time.²⁴² It also claimed that imprisoning offenders would save Oregon taxpayers \$382,000 per year for each prisoner as per unexplained numbers provided by the Rand Corporation.²⁴³

An analysis of media surrounding Ballot Measure 11 captured three main themes of discourse: general criminal justice in Oregon, the economic impact, and an “us vs. them” approach against people convicted of crime.²⁴⁴ Both sides of the debate focused heavily on the burdens imposed on the Oregon taxpayer, “the most valued [group] and the most in need of protection,” rather than humanizing those who would be most harmed by the policies.²⁴⁵ The stigmatization of the “other” was blatant. For example, State Representative, Kevin Mannix, a sponsor of the initiative, when advocating for mandatory adult sentences for youth, stated, “quit babying kids . . . give youth swift, sure consequences . . . if that means warehousing them, then that’s what we will do.”²⁴⁶ The measure was hugely successful and passed by 65.64%.²⁴⁷

Ballot Measure 11 was enacted into law in early 1995 and its impact on the Oregon justice system has been dramatic and profound. Anyone convicted under Measure 11 must serve the entire lengthy sentence, regardless of how exemplary

²⁴⁰ KEISLING, *supra* note 3, at 55.

²⁴¹ *Id.* at 56.

²⁴² *Id.* at 57.

²⁴³ *Id.*

²⁴⁴ Sarah Diana Cate, *Untangling Prison Expansion in Oregon: Political Narratives and Policy Outcomes* 54 (June 2010) (unpublished M.A. thesis, University of Oregon) (on file with author).

²⁴⁵ *Id.* at 52.

²⁴⁶ *Id.* at 58.

²⁴⁷ *Oregon Mandatory Sentences for Listed Felonies, Measure 11 (1994)*, BALLOTOPEDIA, [https://ballotpedia.org/Oregon_Mandatory_Sentences_for_Listed_Felonies,_Measure_11_\(1994\)](https://ballotpedia.org/Oregon_Mandatory_Sentences_for_Listed_Felonies,_Measure_11_(1994)) (last visited Dec. 19, 2019). For a fascinating thesis paper discussion of the use of economic arguments in the Measure 11 debate to cleanse the reality that people were motivated by racial animus, see Cate, *supra* note 244, at 41–50.

their institutional behavior might be. Measure 11 has twice since 1994 expanded the list of crimes that fall under the Measure.²⁴⁸ No one convicted under Measure 11 is eligible to earn the 20% reduction in sentence which is now reserved for lesser crimes.²⁴⁹

E. The Parallel Ensuing Drop of Clemency in Oregon

Measure 11 was enacted at the same time as Governor Kitzhaber began his tenure.²⁵⁰ Although Governor Kitzhaber opposed Measure 11, he ran a “tough on crime campaign” and promoted the expansion of Oregon’s prison capacity.²⁵¹ From 1995 to 2003 he granted just 6 commutations and 2 pardons in total, and from 2011 to 2015 he granted a total of 2 commutations.²⁵² Governor Kulongoski granted more in his tenure from 2005 to 2011: a total of 20 pardons and 53 commutations, but he reserved clemency only for the “the most extraordinary circumstances.”²⁵³ Kitzhaber’s actions in only granting 8 commutations and 2 pardons during a period of 12 years indicate at the very least, a similar perspective. Although it is notable that, reportedly, his last act as governor before he resigned in scandal in 2015 was to drive to Salem to meet a young inmate convicted of attempted murder; he commuted the remaining time on his sentence.²⁵⁴

²⁴⁸ Act of June 30, 1995, ch. 421, 1 Or. Laws 1072, 1072 (adding Attempted Murder and Attempted Aggravated Murder); Act of Aug. 13, 1997, ch. 852, 2 Or. Laws 2478, 2479 (codified as amended at OR. REV. STAT. § 137.700 (2017)) (adding Arson I when a serious physical threat is involved, Compelling Prostitution, and Use of Child in Display of Sex Act).

²⁴⁹ OR. REV. STAT. § 137.700 (1) (2017) (“The person is not eligible for any reduction in, or based on, the minimum sentence for any reason whatsoever under ORS 421.121 or any other statute.”).

²⁵⁰ Lee Van Der Voo & Kirk Johnson, *Gov. John Kitzhaber of Oregon Resigns Amid Crisis*, N.Y. TIMES (Feb. 15, 2015), <https://www.nytimes.com/2015/02/14/us/kitzhaber-resigns-as-governor-of-oregon.html>.

²⁵¹ Cate, *supra* note 244, at 45.

²⁵² Email from Layne G. Sawyer, *supra* note 82. Governor Kitzhaber served two terms from 1995 to 2003, another full-term from 2011 to 2015, and was sworn in for a fourth term on January 12, 2015. He resigned from office on February 18, 2015 amid state and federal investigations of criminal allegations against him and his fiancée. See Van Der Voo & Johnson, *supra* note 250.

²⁵³ Erin Golden, *Summers Denied Clemency*, BULLETIN (Apr. 30, 2010), <http://www.bendbulletin.com/news/1923253-151/summers-denied-clemency>; *Oregon Restoration of Rights, Pardon, Expungement & Sealing*, RESTORATION RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/oregon-restoration-of-rights-pardon-expungement-sealing-2/>.

²⁵⁴ Saerom Yoo, *Last-Minute Visit by Ore. Governor Led to Clemency*, USA TODAY (Feb. 21 2015), <http://www.usatoday.com/story/news/nation/2015/02/21/last-minute-visit-governor-led-clemency/23818605/>.

Thus far, Governor Brown has treaded just as cautiously as the previous two governors. She pardoned three men in November 2016, none of whom ever served time in prison but were instead placed on probation.²⁵⁵ They committed their crimes between 1989 and 1994.²⁵⁶ One man spent 36 months on probation for growing marijuana, which is no longer criminal under Oregon law.²⁵⁷ The second man, on his first day as a taxi driver, drove a prostitute and her client to a motel, a misdemeanor offense for which he paid fines and served unspecified probation time.²⁵⁸ The third man was convicted of driving with a suspended license for which he served 24 months of probation.²⁵⁹ All three of them have led crime-free lives since their one interaction with the law.²⁶⁰ Governor Brown granted a commutation in 2017 to a young man convicted of robbery and who would have been transferred from the Oregon Youth Authority (OYA) to the DOC had she not intervened.²⁶¹ In 2018 she pardoned a former gang member convicted of robbery in the early 1990s largely because he had radically transformed himself since his release from prison and has dedicated his life to working with troubled youth.²⁶² The Governor intervened because under new federal grant restrictions his felony conviction put his job at risk.²⁶³ Finally, days after the 2018 election, she granted two commutations to youth in OYA who were convicted of Measure 11 sentences.²⁶⁴ In early 2019, she granted another commutation to a young woman who also spent many years in OYA,²⁶⁵ reflecting her personal interest in youth and those who suffered in the foster care system before their incarceration.

²⁵⁵ *Governor Brown Grants Clemency, Pardoning Three Oregonians*, OR. GOV. OFF. (Dec. 22, 2016), <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1491>.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Hillary Borrud, *Kate Brown Grants Clemency to Young Man Who Served Time for 2009 Robbery Spree*, OREGONIAN (Jan. 9, 2019), https://www.oregonlive.com/politics/2017/08/kate_brown_grants_clemency_to.html.

²⁶² Shane Dixon Kavanaugh, *Gov. Kate Brown Pardons Former Portland Gang Member Turned Mentor*, OREGONIAN (Jan. 30, 2019), https://www.oregonlive.com/pacific-northwest-news/2018/02/kate_brown_pardons_former_port.html.

²⁶³ Letter from Aliza Kaplan, Professor and Director, Criminal Justice Reform Clinic, to Chair Prozanski, Vice-Chair Thatcher, Senators (Feb. 11, 2019), <https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/158653>.

²⁶⁴ Letter from Governor Kate Brown, to Ashley Aguirre (Nov. 20, 2018) (on file with authors); Letter from Governor Kate Brown, to Kyle Irvin Jones (Nov. 20, 2018) (on file with authors).

²⁶⁵ *CJRC Wins Clemency for Incarcerated Juvenile*, LEWIS & CLARK L. SCH. (Nov. 26, 2018), <https://law.lclark.edu/live/news/40061-cjrc-wins-clemency-for-incarcerated-juvenile>.

V. THE POWER OF THE PROSECUTORS

Though executives have historically used their pardon power to prevent and mitigate injustice, Rosenzweig explains that “those instincts have died, buried under a legacy of prosecutorial zeal and a fear of adverse political criticism.”²⁶⁶ Both in the federal government and in Oregon, prosecutors have created an environment where over-reliance on prosecutorial opinions (and sometimes hostility) in clemency cases has helped to ensure that very few of them are granted.²⁶⁷ Some of this attitude comes from the leftover “tough on crime” mentality of the 1980s and 1990s, but more so, it is the prosecutorial sense that clemency is an attack on the underlying convictions or prosecution in the case rather than an act of mercy or a pragmatic check on the workings of the system.

A. Federal Prosecutors

On the federal level, an explanation of that prosecutorial hostility comes from Margaret Colgate Love, who served as the U.S. Pardon Attorney from 1990 to 1997.²⁶⁸ According to Love, the “diminished role of clemency reflects and reinforces a system that has become inhumane and politicized”²⁶⁹ and that the “most important negative influence on presidential pardoning [has been] the hostility of federal prosecutors.”²⁷⁰

After the Sentencing Reform Act of 1984 was passed, scholars anticipated a resurgence in presidential clemency use, but it did not occur.²⁷¹ Love argues that the reason for this is the late 1970s decision to delegate clemency recommendations to the same officials in the Department of Justice who make prosecution policy and who view every pardon petition as a challenge to their law enforcement policies.²⁷²

²⁶⁶ Rosenzweig, *supra* note 21, at 594.

²⁶⁷ *See id.* at 608 (“[T]he trend toward criminalization is aided by legislative reliance on the existence of prosecutorial discretion.”).

²⁶⁸ Love, *supra* note 19, at 1171.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 1194.

²⁷¹ *Id.* at 1193.

²⁷² *Id.* at 1194. One of the biggest shifts in the power structure of the pardon power came in 1978, when Attorney General Griffin Bell delegated supervisory authority over the Office to the Deputy Attorney General. This marked the beginning of a transformation within the DOJ that saw a dramatic increase in prosecutorial oversight of the Office of the Pardon Attorney. This shift, though it began under the Carter administration, was made official during the first Reagan administration and parallels the broad war on crime philosophy of the time. In 1983, Attorney General William French Smith transferred the power of overseeing the transmission of clemency recommendations to the president to the same officials in charge of prosecution policy. *See* Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOLEDO L. REV. 89, 98–99 (2015).

Thus, clemency became perceived as something outside of the system of justice, used to undermine the policies put into place and the people who work tirelessly to impose them.²⁷³

Ascertaining exactly how the Office of the Pardon Attorney analyzes clemency petitions is difficult, but the whereabouts of its listed criteria is telling. The “Standards for Consideration” page of the DOJ site for the Office of the Pardon Attorney draws all its information from a prosecutor’s manual and advocates for the involvement of federal prosecutors in consideration of all clemency petitions.²⁷⁴ Section 9-140.112 of the U.S. Attorney’s Manual gives several factors for consideration of a pardon petition: post-conviction conduct, character, and reputation; seriousness and relative recentness of the offense; acceptance of responsibility, remorse, and atonement; need for relief; and official recommendations and reports.²⁷⁵ The same manual lists commutation as an “extraordinary remedy” and lists as factors for its consideration the “disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner,” alongside “other equitable factors.”²⁷⁶ Generally, the DOJ page advocates for an advisory role for U.S. Attorneys in the clemency process.²⁷⁷ The Office of the Pardon Attorney is to seek the advice of the attorneys in the districts where individuals petitioning for clemency were prosecuted and can also seek the input of attorneys in districts where petitioners reside as well as that of assistant attorneys general in relevant subjects.²⁷⁸ The Office of the Pardon Attorney must seek the input of the exact prosecutor for every clemency petition.²⁷⁹ Today, the duty of the pardon attorney is bookended by conflicting prosecutorial interests—U.S. Attorneys advise at the beginning and the Deputy Attorney General oversees final review.²⁸⁰ Indeed, since the Reagan-era shift, 24 of the 29 DOJ officials in charge of the pardon program have been former prosecutors.²⁸¹ Instead of functioning as an independent source of counsel to the president, the Office operates more as an extension of the law enforcement function of the DOJ.

The conflict innate in the present DOJ system is well-reflected in the failings of President Obama’s initiative, which fell far short of the 10,000 clemency grants

²⁷³ *Id.* at 1208–09.

²⁷⁴ *Standards for Consideration of Clemency Petitioners*, U.S. DEP’T JUST., OFF. PARDON ATT’Y (Sept. 21, 2018), <https://www.justice.gov/pardon/about-office-0>.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ 28 C.F.R. § 0.35 (2019).

²⁸¹ Love, *supra* note 272, at 98 n.50.

former Attorney General Eric Holder predicted²⁸² when the initiative began. While Obama set a record for granting commutations, he also set a record for denials. At the end of 2016, he had denied over 14,000 petitions and closed over 4,000 cases without action.²⁸³ Critics have argued that the process was arbitrary and that the Office of Pardon Authority in the Justice Department was understaffed and inefficient.²⁸⁴ Moreover, his initiative was criticized as poorly planned and involving “philosophical differences” between the Office of the Deputy Attorney General and the Office of the Pardon Attorney.²⁸⁵

Ultimately the policy changes within the DOJ are sharply reflected in the clemency statistics by the presidential administration provided by the DOJ which, excepting President Obama’s singular initiative, has steadily decreased since Jimmy Carter’s presidency.²⁸⁶

B. Oregon Prosecutors

The same over-reliance on prosecutorial opinions and culture of hostility at the federal level to executive grants of clemency has made its way to the states over the last three decades.

This is certainly the case in Oregon where many prosecutors see clemency mostly as a repudiation of individual prosecutorial decisions or a re-litigation of their cases. Moreover, some see requests for clemency from individuals serving lengthy sentences as pushback against the significant power and discretion prosecutors received during the 1980s and 1990s and have been using ever since.

Oregon district attorneys already determine “the extent and manner in which the measure will be applied.”²⁸⁷ Prosecutorial discretion is the driving force behind the implementation of mandatory sentencing laws, and therefore their primary con-

²⁸² Sari Horwitz, *Struggling to Fix a ‘Broken’ System*, WASH. POST (Dec. 5, 2015), https://www.washingtonpost.com/sf/national/2015/12/05/holderobama/?utm_term=.48e480a1b85f.

²⁸³ See U.S. SENT’G COMM’N, *supra* note 201, at 10; Sari Horwitz, *Obama Grants Final 330 Commutations to Nonviolent Drug Offenders*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-nonviolent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cfa_story.html?utm_term=.d56d2cdf8ba9; *Clemency Statistics*, *supra* note 12.

²⁸⁴ Resignation Letter from Deborah Leff, Pardon Attorney, U.S. Dep’t of Just., to Sally Yates, Deputy Attorney Gen., U.S. Dep’t of Just. (Jan. 15, 2016), <https://www.documentcloud.org/documents/2777898-Deborah-Leff-resignation-letter.html>.

²⁸⁵ U.S. DEP’T JUST., OFF. INSPECTOR GEN., REVIEW OF THE DEPARTMENT’S CLEMENCY INITIATIVE I (2018), <https://oig.justice.gov/reports/2018/e1804.pdf#page=1>.

²⁸⁶ *Clemency Statistics*, *supra* note 12.

²⁸⁷ Merritt et al., *supra* note 227, at 97.

sequence. District attorneys are the power center of the criminal system under determinate sentencing schemes, and this result has been found in almost every jurisdiction where tough on crime mandatory sentencing schemes have been analyzed.²⁸⁸

Furthermore, prosecutorial power has expanded in less obvious ways that has further changed the system. During the 1980s and 1990s, criminal law vastly expanded across the nation and resulted in overbroad statutes that were designed to give prosecutors wide discretion.²⁸⁹ It is less politically risky for legislatures to push these types of decisions to the willing prosecutors.²⁹⁰ From a clemency perspective, this creates problems. Rosenzweig explains that if prosecutors are given broad authority to make decisions, it is hardly surprising that they object to a back-end lessening of the agreed upon punishment years later.²⁹¹

Thus, what the prosecutor decides on the front end determines the outcome on the back end. As in the federal system,²⁹² it is easy to understand why Oregon's district attorneys are generally not invested in supporting pardon or commutation requests in any significant way when the requests disrupt sentences mandated by their own decisions pre-trial, especially when they are immersed in a culture that focuses on retribution and incapacitation of offenders rather than individualized sentencing and rehabilitation.

Historically, district attorneys were often the best advocates for a prisoner hoping for clemency.²⁹³ Today, it is rare to receive a district attorney's support for a clemency applicant convicted of a serious crime based on his or her transformation and/or a miscarriage of justice in Oregon. In fact, recent governors seem to have made DA support an unofficial requirement since the last three governors have generally not granted clemency to people when their petition is opposed by the prosecuting district attorney.

VI. CLEMENCY IS NEEDED TODAY MORE THAN EVER

Oregon's criminal justice system is simply not the bastion of progressive justice that those outside the state would expect.²⁹⁴ All of the reasons that motivated Oregon's governors to freely use their pardon powers in the early 20th century exist

²⁸⁸ *Id.* at 13.

²⁸⁹ Rosenzweig, *supra* note 21, at 608.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Plea bargains resolve about 95% of all federal criminal charges. See LINDSAY DEVERS, U.S. DEP'T JUST. BUREAU JUST. ASSISTANCE, RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING 1 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

²⁹³ See Barnett, *supra* note 87, at 223–24.

²⁹⁴ Kristian Foden-Vencil, *Oregon Incarcerates Youth at Higher Rate than Most States*, OR. PUB. BROAD. (May 16, 2018), <https://www.opb.org/news/article/oregon-incarceration-youth-rank-united-states/>; *Oregon Profile*, PRISON POLY INITIATIVE, <https://www.prisonpolicy.org/>

today more than ever. Governor Brown should use her pardon power *now* to manage excessive costs, both financially and societally, to soften the impact of the “tough on crime” era ballot measures designed to incapacitate convicted people. She should use the power to rectify injustice and excessive sentencing and to release rehabilitated people back into the community and to their families rather than keeping them in prison far beyond what is necessary.

A. *Over-Incarceration, Prison Costs, and the Price Everyone Pays*

The costs of incarcerating thousands of people for decades at a time continues to exact a toll on Oregonian society in many ways. Addressing the numerous ways in which mass incarceration has imposed long-term suffering upon families and communities is beyond the scope of this Article, however, we provide a snapshot of some of the most obvious problems in order to demonstrate how the Governor’s intervention is needed.

1. *Mass Incarceration in Oregon*

In the 1970s, before the “tough on crime” era, there were around 340,000 incarcerated Americans; now there are approximately 2.3 million.²⁹⁵ Oregon’s incarceration rates have skyrocketed since the advent of Measure 11 in 1995 when Oregon had a total of approximately 6,000 people incarcerated to the present day where the number stands just under 15,000.²⁹⁶ Oregon incarcerates its citizens at just under five times the rate of the United Kingdom and Canada and far more than five times the rate of most European Union countries.²⁹⁷

The incarceration rate in Oregon has grown excessively over the last 23 years, most obviously because of the impact of Measure 11.²⁹⁸ However, within that growth, certain populations have grown more dramatically than others. There has

profiles/OR.html; Casey Parks, *Oregon Imprisons African Americans at a Higher Rate than Most Other States*, OREGONIAN (Jan. 9, 2019), https://www.oregonlive.com/politics/2016/06/oregon_imprisons_african_ameri.html; Robert J. Smith, *Red Justice in a Blue State*, SLATE (Jan. 13, 2017), <https://slate.com/news-and-politics/2017/01/oregon-has-one-of-the-worst-criminal-justice-systems-in-the-u-s.html>.

²⁹⁵ Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT’L INST. JUST. (Mar. 1, 2017), <http://www.corrections.com/news/article/45873-hidden-consequences-the-impact-of-incarceration-on-dependent-children>.

²⁹⁶ Barbara Roberts & Frank A. Hall, *Tough Issues Hard Facts* 10 (Sept. 1994), <https://www.ncjrs.gov/pdffiles1/Digitization/155576NCJRS.pdf>; Aubrey Wieber, *Oregon’s Incarceration Rate to Fall 15% in 10 Years*, PORTLAND TRIB. (Oct. 12, 2018), <https://pamplinmedia.com/pt/9-news/409000-308278-oregons-incarceration-rate-to-fall-15-in-10-years>.

²⁹⁷ Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

²⁹⁸ David Cansler, *How Oregon’s Inmate Population Has Changed in 10 Years*, OREGONIAN, https://www.oregonlive.com/data/2017/03/oregons_inmate_population_2006.html.

been a stunning increase in the number of incarcerated women and youth in Oregon.²⁹⁹ The population of incarcerated women has tripled over the last 20 years.³⁰⁰ The reason for this population growth is not that women have become more violent or less law-abiding, but that the sentencing laws have changed.³⁰¹ For instance, in addition to Measure 11, there was Ballot Measure 57, voted on during the 2008 election. Measure 57 imposed mandatory minimum sentences for the types of crimes that women are most likely to commit—non-violent property crimes.³⁰² Nearly 50% of women are incarcerated in Oregon for the property crimes of theft, identity theft, and unauthorized use of a vehicle, which are the kinds of crimes most usually undertaken by people living in poverty and/or struggling with trauma and drug addiction.³⁰³ Indisputably, lengthening the sentences for these types of crimes and taking discretion away from judges has impacted vulnerable groups of women, those most likely to have experienced “childhood victimization, family violence, unhealthy relationships, unsafe housing and low levels of economic capital.”³⁰⁴

The second group whose incarceration rates have dramatically increased are youth—people who were under 18 at the time of committing a crime. Since the enactment of Measure 11, Oregon has the dubious honor of incarcerating youth at the almost highest rate in the nation—higher than Texas and Louisiana.³⁰⁵ Furthermore, Oregon incarcerates its black youth at dramatically higher rates than their white counterparts, 26 times higher.³⁰⁶ The reason for the vast increase of incarcerated youth is because of Measure 11. All youth aged 15 and older who are charged with a Measure 11 crime are automatically waived into adult court and must face the same punitive sentences as adults regardless of their personal background or the circumstances of the crime.³⁰⁷

²⁹⁹ ROBERTA PHILLIP-ROBBINS & BEN SCISSORS, OR. COUNCIL CIV. RTS., YOUTH AND MEASURE 11 IN OREGON: IMPACTS OF MANDATORY MINIMUMS 24 (2018), <https://media.oregonlive.com/pacific-northwest-news/other/Youth%20and%20Measure%2011%20in%20Oregon%20Final%202.pdf>; Whitney Woodworth, *Oregon Faces Skyrocketing Female Prison Population*, STATESMAN J. (Feb. 16, 2017), <https://www.statesmanjournal.com/story/news/crime/2017/02/16/oregon-faces-skyrocketing-female-prison-population/98012786/>.

³⁰⁰ Woodworth, *supra* note 299.

³⁰¹ *Id.*; Paris Achen, *Women's Prison Focus of State Summit, Legislative Session*, PAMPLIN MEDIA GRP. (Feb. 16, 2017), <https://pamplinmedia.com/bnw/21-news/345866-225564-womens-prison-focus-of-state-summit-legislative-session>.

³⁰² S.B. 1087, 74th Leg., Spec. Sess. (Or. 2008); *Measure 57 and Property Crime Sentencing*, HERSTORY OR. (2018), <http://www.herstoryoregon.org/measure-57-and-property-crime-sentencing/>.

³⁰³ *Measure 57 and Property Crime Sentencing*, *supra* note 302.

³⁰⁴ Woodworth, *supra* note 299.

³⁰⁵ PHILLIP-ROBBINS & SCISSORS, *supra* note 299, at 1.

³⁰⁶ *Id.* at 30.

³⁰⁷ OR. REV. STAT. § 137.700 (1) (2017) ; *id.* § 137.707(1)(a). *But see* S.B. 1008, 80th Leg., Reg. Sess. (Or. 2019) (allowing judges to decide whether juveniles 15 years of age and older should be tried as adults under Measure 11).

Therefore, the crisis of mass incarceration is no longer predominantly just a male problem—women and children are starting to be incarcerated at similar levels too.

2. *Financial Costs of Housing*

While pragmatic issues such as cost are less resonant than issues of justice or mercy in making clemency decisions, the costs of keeping people in prison has tangible consequences on all Oregonians and should be considered. Costs are currently so high that prison housing takes funding away from other pressing areas of need for Oregonian citizens—such as education or crime prevention programs.³⁰⁸ The financial costs of housing inmates in Oregon will continue to increase for the simple reason that Oregon takes in more inmates than it releases. In 2017, the average monthly prison intake count was 448, while the number of inmates released was 402.³⁰⁹ The DOC spends nearly \$600 million per year housing the current estimated prison population of just under 15,000 people.³¹⁰ This figure will only rise due to the increasing prison population and the costs that go with an aging prison population.³¹¹

3. *Medical Costs of a Rapidly Aging Prison Population*

Oregon houses the highest percentage of prisoners aged 55 and above in the nation.³¹² There are two main reasons for this. First is the imposition of Measure 11 and its long mandatory sentences, and second is LWOP (or “True Life”) which was added as a sentencing alternative in 1989 in capital murder cases. There are now currently 216 people serving LWOP sentences in Oregon—all of whom are currently destined to die in prison—and 720 people serving life sentences who will only ever be released if the parole board determines that each of them are sufficiently

³⁰⁸ *Prison Spending in 2015*, VERA INST. JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending>; Les Zaitz, *Oregon Taxpayers Will Spend \$1.3 Billion on Prisons – and It Won’t Be Enough*, OREGONIAN (July 7, 2011), https://www.oregonlive.com/politics/index.ssf/2011/07/oregon_taxpayers_will_spend_13.html.

³⁰⁹ OR. DEP’T CORR., ISSUE BRIEF: QUICK FACTS (2018), https://www.oregon.gov/doc/RESRCH/docs/inmate_profile_201801.pdf.

³¹⁰ *Id.* Estimated calculation of \$108.26 (average cost per inmate per day) multiplied by 14,713 (estimated annual prison population) = \$1,592,829.38 per day.

³¹¹ *Id.* Estimated calculation of \$108.26 (average cost per inmate per day) multiplied by 14,713 (estimated annual prison population) multiplied by 365 (average days in a year) = \$581,382,724.

³¹² Kristian Foden-Vencil, *Oregon Has Highest Percentage of Older Inmates*, OR. PUB. BROAD. (July 8, 2014), <https://www.opb.org/news/article/oregon-has-highest-percentage-of-older-inmates/>; see HUM. RTS. WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 21 (2012), https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf.

rehabilitated.³¹³ As of September 2018, Oregon housed over 1,000 inmates aged 61 years or older,³¹⁴ amounting to nearly 7% of the total prison population.³¹⁵ Indeed, the number of prisoners aged 55 years or older has grown four times faster than the overall prison population between the years 1995 and 2010.³¹⁶

An older prison population results in higher healthcare costs³¹⁷ since elderly inmates require more medical attention and are susceptible to chronic conditions that necessitate increased staffing levels, more officer training, and special housing.³¹⁸ Consequently, it costs taxpayers two or three times more to house prisoners aged 55 or older with chronic and terminal illnesses than other inmates.³¹⁹ Between the years 2001 and 2008, Oregon prison healthcare costs increased by 24%.³²⁰ Between 2015 and 2017, the Oregon Department of Corrections spent more than 15% of its overall budget on healthcare alone.³²¹ The bottom line is that healthcare for older inmates is profoundly expensive and will only become more so as inmates are held longer in prisons for certain crimes.

These costs might be justified, except for the fact that older people are the least likely group to be rearrested or returned to prison. Recidivism is far less of a concern because as individuals grow older, their risk of committing crimes decreases.³²² The U.S. Sentencing Commission found that only 13.4% of prisoners 65 years old or older when released were rearrested, compared with 67.6% of prisoners released below age 21.³²³ Overall, older prisoners pose far less of a safety risk than releasing

³¹³ Email from Jeff Duncan, Research Analyst, Dept. of Corr., to Venetia Mayhew (Nov. 13, 2018, 9:39 PST) (on file with authors).

³¹⁴ OR. DEP'T CORR., *supra* note 309.

³¹⁵ *Id.* As of September 2018, Oregon had a total prison population of 14,923. *Id.*

³¹⁶ Gabriella Dunn, *Prison Blues—and Grays: An Aging Population of Inmates Is Costing Oregon a Bundle*, WILLAMETTE WK. (Jan. 27, 2015), <https://www.wweek.com/portland/article-23887-prison-blues-and-grays.html>.

³¹⁷ See Cyrus Ahalt et al., *Paying the Price: The Pressing Need for Quality, Cost, and Outcomes Data to Improve Correctional Health Care for Older Prisoners*, 61 J. AM. GERIATRICS SOC'Y 2013, 2013 (2013) ("These rising healthcare costs are in large part due to the increasing number of older prisoners who have the highest burden of chronic health conditions and disabilities . . .").

³¹⁸ PEW CHARITABLE TR. & MACARTHUR FOUND., *MANAGING PRISON HEALTH CARE SPENDING* 8–11 (2013), <https://www.pewtrusts.org/en/research-and-analysis/reports/2014/05/15/managing-prison-health-care-spending>.

³¹⁹ *Id.* at 11.

³²⁰ *Id.* at 5.

³²¹ OR. DEP'T CORR., *BUDGET NARRATIVE* (2019), <https://www.oregon.gov/doc/divisions-and-units/Documents/agency-summary-ARB-19-2021.pdf>.

³²² KIM STEVEN HUNT & BILLY EASLEY II, U.S. SENT'G COMM'N, *THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS* 3 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf/.

³²³ *Id.*

younger offenders.³²⁴ With healthcare costs so high and the risk of recidivism very low, any justification for long sentences on an older population is weak.

Oregon has an early release statute that allows for early release of elderly or terminally ill inmates called “Early Medical Release,” also known as “Compassionate Release,” but it does not apply to offenders sentenced under Measure 11 or LWOP, even though those inmates make up most of the elderly prison population.³²⁵ Under ORS 144.126, the State Board of Parole and Post-Prison Supervision may advance the release of inmates if the Board concludes that keeping them incarcerated is cruel and inhumane and if the prisoner is suffering from a severe medical condition or the prisoner is elderly and incapacitated.³²⁶ Unfortunately, though, while Oregon has the power to grant early release, the Board rarely grants them. Of the 53 inmates who applied for early release between 2011 and 2015, 33 were denied due to sentencing restrictions, 8 died before medical release was initiated, and only one application was granted.³²⁷ This statute clearly does not achieve its intended goals.

Ultimately, there is no philosophy of punishment that can justify denying release for prisoners who are too cognitively impaired to be aware of their punishment, too sick to participate in reformation, or are too functionally debilitated to pose a risk to public safety. While there is no other route available to provide compassionate release to the vast majority of prisoners who fit under this category, it is necessary that the Governor intervene and commute sentences of individuals who are too old or sick to remain incarcerated.

4. *The Waste When Rehabilitated People Remain Incarcerated*

Measure 11 is based on a philosophy of incapacitation and retribution.³²⁸ It does not recognize rehabilitation as a justification for early release because its purpose is to ensure that no one sentenced under Measure 11 can ever be released early.³²⁹ In fact, the only pathway for early release that Ballot Measure 11 could not revoke is executive clemency. This means that currently sitting in Oregon’s prisons are many people who will never commit a crime again, who feel deep remorse for their criminality that led them to prison, who have much to offer society having learned from their mistakes and the high price they have paid, and whose families have often been decimated by their incarceration and who are desperate for their

³²⁴ PEW CHARITABLE TR. & MACARTHUR FOUND., *supra* note 318, at 22–27.

³²⁵ OR. REV. STAT. § 144.126 (2017); OR. ADMIN. R. 255-040-0028 (2019); Dunn, *supra* note 316; BILL TAYLOR, STATE OF OREGON LEGISLATIVE COMMITTEE SERVICES, BACKGROUND BRIEF ON MEASURE 11 (2012) (noting that 60% of Oregon’s prison population is currently comprised of offenders convicted under Measure 11).

³²⁶ OR. REV. STAT. § 144.126(1).

³²⁷ Dunn, *supra* note 316.

³²⁸ See, e.g., PHILLIP-ROBBINS & SCISSORS, *supra* note 299, at 25 n.158.

³²⁹ TAYLOR, *supra* note 325.

return. Anecdotally, based upon our own clemency practice, we have seen that for people who seek commutations, a shortening of their prison term is virtually always motivated by desperation to lessen the suffering of their families and loved ones. Children, aging parents, partners, siblings—these are the hidden victims whose suffering invokes almost no societal sympathy.

At least 68,000 Oregonian children have an incarcerated parent, and from 1991 to 2007, the number of children with a mother in prison more than doubled.³³⁰ About 65% of families with a member incarcerated cannot provide basic needs such as housing and food, and are more likely to live in poverty than those who have never had a family member incarcerated.³³¹ That does not even begin to take into account the stress and trauma that children go through when they lose a parent to prison and the long-term impact it will have on their development. Children with incarcerated parents are far more likely to drop out of school,³³² become homeless in adulthood,³³³ and enter the prison system themselves.³³⁴ It would surely serve Oregon far better if rehabilitated prisoners are returned as quickly as possible to society so as to avoid further suffering in their families and communities rather to keep them languishing in prison, often for years and years.

B. *Mitigate Injustice*

Clemency exists not just to be used as an act of mercy, but also to mitigate injustice. Clemency should be used in cases where an individual received an unjust prison sentence or has suffered a miscarriage of justice. Clemency provides the only avenue for individuals in these types of unjust circumstances to be heard, to have their convictions and/or sentences reexamined and where appropriate, changed—as occurred historically when governors regularly intervened through clemency.

Moreover, clemency should not only be used to rectify injustices committed against specific individuals; the governor can also use it as a check on the other branches of government when laws exist that result in bad outcomes, injustice, or that fundamentally undermine the principles of liberty. President Obama's Clemency Initiative serves as an example of an executive attempting to broadly remedy

³³⁰ ANNIE E. CASEY FOUND., A SHARED SENTENCE 2–5 (Apr. 2017), <https://www.aecf.org/resources/a-shared-sentence/>.

³³¹ *Id.* at 3.

³³² Holly Foster, *Incarceration and Intergenerational Social Exclusion*, 54 SOC. PROBS. 399, 404 (2007).

³³³ *Id.* at 404.

³³⁴ *Id.* at 420; Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 77 (2014).

unjust sentences for non-violent drug offenders who could have received substantially lesser sentences if their conviction occurred in April 2014.³³⁵ Likewise, there has been an active movement since the 1990s to seek clemency for incarcerated women who suffered domestic violence and eventually killed their abusers.³³⁶ In many of these cases, the law had not caught up with society's understanding of how these types of tragedies occur by not permitting defendants to raise battered women syndrome as a defense or when expert testimony on the subject was unavailable to them at the time their cases were adjudicated.

Clemency should also be used to remedy wrongful convictions, which stem from a fundamental breakdown in the legal process. It is a fact that prosecutors have been known to bury crucial evidence, faulty science can be relied on, witnesses lie, police coerce false confessions, eye witnesses can be wrong, defense attorneys can be ineffective—the list goes on and on. Yet in Oregon (and most states) it is extremely difficult—if not outright impossible—for a wrongfully convicted person to get any relief.³³⁷ Without DNA evidence that directly proves innocence, even in cases that involve the known causes of wrongful conviction,³³⁸ the likelihood of a court actually reviewing a claim for innocence is exceedingly rare.³³⁹ When there is no procedural mechanism to get into court, cases involving injustices such as wrongful convictions or overly harsh sentences must have a back-end avenue for review and reconsideration. Clemency provides an opportunity for that review and reconsideration.

³³⁵ U.S. DEP'T JUST., *supra* note 285, at i.

³³⁶ Jackie Schornstein, *Lessons from the Past: Revitalizing the Clemency Movement for Battered Women Incarcerated for Killing Their Abuser*, 1 WOMEN LEADING CHANGE: CASE STUD. WOMEN GENDER & FEMINISM, 78, 78 (2016); Kristen Jordan Shamus, *Gov. Rick Snyder Grants Clemency to Lifer Melissa Chapman, 60 Others*, DETROIT FREE PRESS (Dec. 21, 2018), <https://www.freep.com/story/news/local/michigan/2018/12/21/michigan-governor-rick-snyder-grants-clemency-melissa-chapman/2393565002/>.

³³⁷ See, e.g., Joanna M. Huang, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L. J. 131, 147 (2010).

³³⁸ The known causes of wrongful convictions are eyewitness misidentification, junk science, false confessions, government misconduct, snitches, and bad lawyering. *Causes of Wrongful Convictions*, MICH. INNOCENCE CLINIC (2019), <https://www.law.umich.edu/clinical/innocenceclinic/Pages/wrongfulconvictions.aspx>.

³³⁹ In 2011, Professor Brandon Garrett examined whether judicial remedies helped 250 of the first DNA exonerees. He found that of those who challenged their convictions in court prior to DNA testing, more than 90% failed. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 183 (2011).

VII. CONCLUSION

For decades now, governors have used their clemency powers sparingly, fearful of being perceived as lenient on crime, while worrying about the political risks to their own careers that can come with commuting and pardoning people. But gubernatorial clemency needs to make a comeback as part of a broader rethinking of criminal justice strategies.

In Oregon, as in most other states, much of the criminal justice system is still guided by 1980s and 1990s “tough on crime” philosophies of retribution rather than rehabilitation, leaving inmates with lengthy prison sentences and no avenues to earn an early release. The governor’s use of clemency is necessary to correct injustices, to show mercy, and to create meaningful public dialogue about mandatory minimum sentences, overcrowded prisons, an aging prison population, and the extreme cost all of this is having on taxpayers and communities. We call on Governor Brown to use the pardon power as it was intended, as a check on the criminal justice system, by intervening in more cases where inmates have no other back-end avenues to be heard and/or be released early from prison.