

GOVERNOR KATE BROWN OF OREGON'S HISTORIC USE OF CLEMENCY: USING CLEMENCY EXACTLY AS IT WAS INTENDED

by
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In Oregon, executive clemency is among the most expansive, yet historically underused, power a governor possesses. Yet, across her two terms as Oregon's 38th governor, Governor Kate Brown exercised her power of executive clemency a record 61,777 times, dwarfing the clemency use of her predecessors and her contemporaries in other states. Governor Brown's proactive approach to clemency presents a model for executive involvement in criminal justice reform and aligns with her beliefs of a redemptive and rehabilitative criminal legal system.

In this Article, we examine Governor Brown's use of clemency, analyzing what her stated and implied rationales reveal about her concerns for the nuanced impacts of criminal sanctions, as well as for the Oregonians most impacted by the criminal legal system. We contextualize Governor Brown's use of clemency with her predecessors and compare the constitutional structure and use of clemency in Oregon with other states. We detail and examine Governor Brown's grants of clemency by type: pardons, commutations, reprieves, and remissions. We discuss the media's response to Governor Brown's historic exercise of her clemency power, and finally, in Governor Brown's own words, discuss the future of clemency in Oregon and beyond.

Introduction	522
I. The Power of Executive Clemency.....	524
A. History of the Clemency Power	524
B. Theories of Clemency	525
II. Clemency in Oregon.....	528
A. The Power of Clemency in Oregon	528
B. Historical Use of Clemency in Oregon	530
III. Comparing Clemency in Oregon with Clemency in Other States	534
A. Contemporaneous Governors' Use of Clemency	537

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IV.	Governor Brown's Application-based Use of Clemency: Individual Grants of Clemency.....	542
A.	<i>Analyzing Governor Brown's Application-based Clemency Grants</i>	543
1.	<i>Trends of Application-based Clemency Grants</i>	545
i.	<i>Pardons</i>	546
ii.	<i>Commutations</i>	547
iii.	<i>Remissions and Reprieves</i>	547
B.	<i>Factors Influencing Governor Brown's Application-based Clemency Grants</i>	549
1.	<i>2022 Clemency Report</i>	549
i.	<i>Factors Influencing Commutation Grants</i>	550
ii.	<i>Factors Influencing Pardon Grants for 2022 Pardon Recipients</i>	557
C.	<i>Governor Brown's Use of Power as a Tool for Community Empowerment</i>	558
1.	<i>Factors Influencing Remissions</i>	560
D.	<i>What the 2022 Report and Governor Brown's Application-based Grants Reveal About Her Views on Clemency and Oregon's Criminal Justice System</i>	561
E.	<i>What Responses to Governor Brown's Clemency Reveals About the Politics of Clemency</i>	565
V.	Analyzing Governor Brown's Governor-Initiated Use of Clemency: Group Clemency	569
A.	<i>COVID-19 Commutations</i>	570
B.	<i>Labor Day Fire Commutations</i>	574
C.	<i>Juvenile Parole Hearing Commutations</i>	576
D.	<i>Other Governor-Initiated Clemency Grants</i>	579
i.	<i>Traffic Fine Remissions</i>	579
ii.	<i>Marijuana Pardons</i>	581
iii.	<i>Death Row Commutations</i>	583
iv.	<i>The Role of Institutional Racism in Motivating Governor-Initiated Grants</i>	584
	Conclusion.....	587

INTRODUCTION

Clemency, the constitutional power of the executive to extend a grant of mercy or leniency, has a long history in American law.¹ Since the United States and Oregon constitutions were written, presidents and governors have often used their broad clemency powers to make bold, creative, and sometimes controversial choices. While the power is commonly viewed as a way to grant forgiveness to individuals, from its inception the clemency power has also been used as a public policy tool

¹ “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; a commutation of a sentence is a lesser form of pardon where the executive can shorten or end an individual’s prison sentence; and a reprieve is a temporary relief from punishment and is often used to delay execution of a sentence. A pardon can also include the authority to grant remissions of fines and forfeitures, respites, and amnesties.” Aliza B. Kaplan & Venetia Mayhew, *The Governor’s Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in Oregon*, 23 LEWIS & CLARK L. REV. 1285, 1289–90 (2020).

during emergencies and crises, as a check on other branches of government to invalidate or mitigate the impact of laws that they disapprove of or consider unconstitutional, to reward individuals and groups for doing good deeds, providing service, and at times more notoriously, to pander to their allies and supporters.²

When Kate Brown arrived in the Oregon governor's office in 2015,³ there was little modern precedent for her to use her clemency power. In fact, as in almost all states and at the federal level, there was very little to no use of clemency over the previous 50 years, since the country ushered in the "tough on crime era," rejecting the long-time focus of rehabilitation in favor of a new philosophy of retribution and incapacitation of offenders.⁴ The culture that created this new attitude toward punishment was not a "fitting environment for executive acts of mercy to be generously granted at the back end."⁵ Yet, by the time she left office on January 9, 2023, Governor Brown would be the governor with the most prolific clemency record in history which included 104 application-based commutations, 963 COVID-19 commutations, 41 wildfire firefighter commutations, 73 juvenile parole hearing commutations, 17 death sentence commutations, 130 application-based pardons, 47,144 marijuana pardons, 4 application-based remissions of fines, 13,300 remissions of traffic fines and fees, and 1 application-based reprieve.⁶

In exercising her clemency power so expansively, she faced an extraordinary amount of hope among prisoners and their families and pressure from prison reform advocates along with condemnation from prosecutors and some crime victims.⁷ Governor Brown also received a significant amount of public criticism in the media⁸ and was even sued by district attorneys and victims for her use of clemency in *Marteeny v. Brown*.⁹

² See *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833); Andrew Novak & Daniel Pascoe, *Executive Clemency During the Coronavirus Pandemic: A Global Analysis of Law and Practice*, 2 INT. CRIMINOLOGY 84 (2022); Tess Riski, *Department of Corrections Deploys Nearly 150 Prisoners to Fight Oregon Wildfires*, WILLAMETTE WEEK (Sept. 9, 2020, 4:52 PM), <https://www.wweek.com/news/courts/2020/09/09/departement-of-corrections-deploys-nearly-150-prisoners-to-fight-oregon-wildfires/>; *infra* note 152 and accompanying text; Eric R. Johnson, *Doe v. Nelson: The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process*, 50 S.D. L. REV. 156, 169–70 (2005).

³ Kirk Johnson, *Kate Brown, New Governor in Oregon, Seeks Public's Trust*, N.Y. TIMES (Feb. 18, 2015), <https://www.nytimes.com/2015/02/19/us/kate-brown-replacing-john-kitzhaber-as-oregon-governor.html>.

⁴ Kaplan & Mayhew, *supra* note 1, at 1307, 1310.

⁵ *Id.*

⁶ E-mail from Kevin Gleim, Public Records and Special Projects Attorney, Office of Governor Kate Brown, to author (Jan. 8, 2023, 08:34 PST) (on file with author).

⁷ See Noelle Crombie, *Gov. Kate Brown Ends Term with Flurry of Commutations, Pardons; Calls Clemency a Chance 'to Save Lives'*, THE OREGONIAN (Jan. 14, 2023, 4:16 PM), <https://www.oregonlive.com/politics/2023/01/gov-kate-brown-ends-term-with-flurry-of-commutations-pardons-calls-clemency-a-chance-to-save-lives.html> [hereinafter Crombie, *Brown Ends Term*].

⁸ *Id.*

⁹ *Marteeny v. Brown*, 517 P.3d 343, 346–47 (Or. Ct. App. 2022); Megan Banta, *Appeals Court Upholds Gov. Brown's Clemency Powers, Denies Lawsuit from Lane D.A. Others*, REGISTER-GUARD (Aug. 11, 2022, 2:27 PM), <https://www.registerguard.com/story/news/2022/08/11/oregon-appeals-court-sides-with-gov-kate-brown-in-clemency-lawsuit-lane-da-patty-perlow-mannix/65400292007>.

Yet, it is important to note, as the Oregon Court of Appeals indicated in *Marteeny*, Governor Brown's historic use of her clemency power to commute and pardon individuals along with her class-wide policy grants of clemency were steeped in the traditions of the clemency power and was applied exactly in the way it was intended by the Framers.¹⁰

This Article reports on Governor Brown's use of clemency during her tenure. It is divided into six more parts. In Part I, we explain the power of clemency in general including its historical framework and general theories of when it is used. In Part II, we look at clemency in Oregon, including how it has been used over the last 50 years. In Part III, we compare clemency in Oregon with clemency in other states, both with regard to how the power is structured and how it has been used. In Parts IV and V, we look at Governor Brown's active use of her clemency power both to grant individual grants of clemency by application and her governor-initiated use of clemency by group. Finally, we conclude that while Governor Brown set the precedent for future Oregon governors to use their clemency power, the political factors surrounding clemency remain. Politics aside, Governor Brown's use of clemency should be considered a hopeful model for executives from all political parties who believe people can be rehabilitated and care about reforming the criminal legal system.

I. THE POWER OF EXECUTIVE CLEMENCY

A. *History of the Clemency Power*

Modern American clemency¹¹ finds its roots in early English common law, where British monarchs solely wielded an almost unmitigated power of mercy.¹² As the British Empire began to establish colonial governments in its territories, the Crown vested colonial governors with the power of clemency, delegated from the monarch.¹³ The colonies who eventually formed the original thirteen American

¹⁰ “[T]he pardon power provided to Oregon governors accords with the power as set forth in the federal constitution, which is itself modeled on the pardon power of monarchs in English common law. That power ‘is plenary.’” *Marteeny*, 517 P.3d at 354 (citing *Haugen v. Kitzhaber*, 306 P.3d 592, 600 (Or. 2013) (en banc)).

¹¹ In the federal and Oregon constitutions, the broad power to grant pardons, commutations, reprieves and remissions, is referred to as “clemency” or “executive clemency.” This report interchangeably refers to this power as the clemency or pardon power.

¹² Clemency can be traced to ancient power possessed by monarchs. As early as 2250 B.C., the Code of Hammurabi, known for its “eye for an eye” approach to punishment, contained provisions parallel to modern pardons. Many ancient societies, including the Greeks and Romans, developed their own mechanisms of state sanctioned forgiveness. For more, see Eric R. Johnson, *Doe v. Nelson: The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process*, 50 S.D. L. REV. 156, 167 (2005); Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641, 2691–92 (2011); *Code of Hammurabi*, HISTORY, <https://www.history.com/topics/ancient-middle-east/hammurabi> (Aug. 7 2024).

¹³ Thompson, *supra* note 12, at 2693; Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CALIFORNIA WESTERN L. REV. 55, 63 (2014).

states retained this expansive executive power, forming the basis of modern American clemency procedures.¹⁴

This broad clemency power was enshrined in the Constitution of the United States, giving the President the power to grant “reprieves and pardons.”¹⁵ In the infancy of the nation, there was resistance to centralizing clemency power in one person; eight of the 13 original states gave the legislature alone—through legislative councils—or the legislature in conjunction with the governor the power of clemency.¹⁶ However, the centralization of clemency to the President in the federal system prompted states crafting their constitutions to follow suit and vest the clemency power in the governor alone.¹⁷ Although some states later diverted from the centralization of the clemency power,¹⁸ when Oregon voters first approved the state’s constitution in 1857, the Governor alone was granted the power of clemency in all cases, except for treason.¹⁹

B. *Theories of Clemency*

The later history of clemency further reveals its ideological bases and multifaceted modern use. A prevailing theory of the clemency power is the “gift” theory, which views clemency as a state-presented gift of mercy, derived from the divine right of monarchical rulership; monarchs providing state mercy derived this power directly from the divine, making clemency, by extension, a gift of divine mercy.²⁰ Early American courts, including the Supreme Court, reflected this view of clemency as an unconditional grant of mercy that did not necessitate executive justification and that could only be abrogated in limited ways.²¹ For example, in *United States v. Wilson*, Chief Justice Marshall traces the pardon power’s English lineage, describing a pardon as “an act of grace, proceeding from the power entrusted with the execution of the laws . . .”²² To Chief Justice Marshall and other early American jurists, clemency operated as an absolute act of state mercy, a gift that did not need political justification or public policy explanation.²³ Many early presidents reflect this perspective of clemency through their pardon grants. In 1795, President George Washington granted clemency to participants of the Whiskey Rebellion.²⁴ Similarly,

¹⁴ Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL’Y 833, 844–45 (2016).

¹⁵ Thompson, *supra* note 12, at 2693; U.S. CONST. art. II, § 2, cl. 1.

¹⁶ Kathleen “Cookie” Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST. 26, 29 (2009).

¹⁷ *Id.*

¹⁸ See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 605 (1991).

¹⁹ OR. CONST. art. V, § 14.

²⁰ Clifford Dorne & Kenneth Gewerth, *Mercy in A Climate of Retributive Justice: Interpretations from A National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 419 (1999).

²¹ *Id.* at 419–20.

²² *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160, 161–63 (1833).

²³ See Dorne & Gewerth, *supra* note 20, at 419–20.

²⁴ Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL’Y REV. 447, 452 (2009).

in 1815, President James Madison granted clemency to Jean Lafitte and his Baratavia pirates, who offered to defend New Orleans from British attack if granted pardons.²⁵

As American legal and political institutions matured, another prevailing approach to the origin of the clemency power developed. Courts began to view clemency not as a gift granted by an executive power but rather as a decision justified to promote the public good. Researchers Clifford Dorne, Ph.D., and Kenneth Gewerth, Ph.D., trace the Court's adoption of this perspective of clemency to its analysis in *Biddle v. Perovich* in 1927, where Justice Oliver Wendell Holmes contemporaneously described pardons as a "determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed," rather than "a private act of grace from an individual happening to possess power."²⁶ Under this framework, executives can use clemency appropriately or inappropriately, depending on the circumstances of the individual case and the implications of the grant to society in general; under this approach, clemency thus necessitates justification for its use.²⁷

Even in states with expansive clemency power, this public welfare approach seems to be the dominant theory of the source of clemency power, as executives and boards wielding the power grapple with the necessity of political support from their constituents and recognize that their executive actions require a public policy justification.²⁸ Legal scholar Kathleen Dean Moore argues that the gift theory of clemency is incompatible with modern democratic processes, indicating that executives in modern democratic republics should only use clemency with sufficient justification.²⁹ Thus, although the executive often has few constitutional limitations on the clemency power, there is usually a political and social expectation that the executive will exercise the power only after she has carefully weighed alternatives, analyzed the potential public policy impacts of the decision, and gathered input from stakeholders. While the power of clemency traces its lineage to the benevolent gifts of divine-right monarchs, it is a tool that is modernly thought to require public utility and some level of justification.

The motivations for using clemency also have varying ideologies, generally shaped by theories of justice and punishment. For the better part of the 20th century, a rehabilitative model of punishment prevailed, focused on individualized treatment of each incarcerated person; this model provided judges and parole boards discretion in proscribing punishment and eventually, release.³⁰ However, in the 1970s, in an attempt to quell perceived crises in crime rates and social morality, the

²⁵ Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 140 (2000); Mary Ann Wegmann, *Lafitte's Blacksmith Shop and the Battle of New Orleans*, NEW ORLEANS HISTORICAL (Sept. 18, 2023), <https://neworleanshistorical.org/items/show/616>.

²⁶ Dorne & Gewerth, *supra* note 20, at 420 (quoting Justice Holmes in *Biddle v. Perovich*, 274 U.S. 480, 486 (1927)).

²⁷ *See id.* at 420.

²⁸ *See* Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHICAGO-KENT L. REV. 1501, 1505–07 (2000).

²⁹ *Id.* at 1516.

³⁰ *Id.* at 1509–10.

rehabilitative approach was widely replaced by a retributive response to criminal justice.³¹ The retributive view of criminal justice emphasizes that crime deserves punishment, and that the punishment must be measured by the culpability of the offender and the gravity of the offense.³² In the 1970s, all states had some mechanism affording judges broad sentencing discretion and providing a clear path to parole for incarcerated individuals; by the 1990s, all states had mandatory minimum sentences, including mandatory life sentences without the possibility of parole, that removed judicial discretion.³³ American criminal justice has become largely focused on retribution both rhetorically and in practice, and punishing people who commit crimes has become a more justifiable goal of criminal justice systems than rehabilitation.

This retributive theory of criminal justice has impacted views on the appropriate use of clemency. According to Professor Elizabeth Rapaport, a retributivist view of clemency only sees the power as appropriately used where the sentence imposed is inconsistent with the deserved punishment.³⁴ Under this philosophy, clemency can only be appropriately used to remedy a punishment not justly given, meaning it is only correctly used to reduce unjustly long sentences or release incarcerated individuals who are factually innocent; importantly, actions taken after conviction bear no consideration under this model of punishment.³⁵

This theory is contrasted to what Professor Rapaport calls the “redemptive” perspective of criminal justice, which attempts to reconcile the offender with their victim and ultimately their community.³⁶ This approach to clemency was prevalent before the resurgence of retributivist thought.³⁷ The redemptive model allows clemency to be exercised outside of the procedural or factual “justice” involved in a case. Under a redemptive approach to clemency, an individual can work toward a grant of clemency, engaging in activities focused on repairing the harm of the crime to the victim, community, and the individual herself; although such efforts do not necessitate the use of clemency power, they can become factors that contribute to a clemency decision.³⁸ Finally, the redemptive perspective of clemency views people who commit crimes as no different than any other member of society, rather than viewing them as particularly dangerous or prone to criminal behavior; the approach seeks to reconcile the person—who transgressed in a way any member of society could have—back to their community, serving as hopeful examples of personal transformation and completing the goal of re-integration.³⁹ In this way, redemptive clemency serves purposes beyond mere punishment, but seeks to address greater societal issues, particularly the issues that lead people to criminal justice involvement.

³¹ *Id.* at 1510–11.

³² *Id.* at 1513–14.

³³ *Id.* at 1510.

³⁴ *Id.* at 1517–19.

³⁵ *Id.* at 1518–19.

³⁶ *Id.* at 1502–03.

³⁷ *Id.* at 1507–08.

³⁸ *Id.* at 1523.

³⁹ *Id.* at 1529–30.

These theories of clemency show the historical and ideological underpinning of the clemency power, and partially explain the trends of clemency use throughout the nation. The concept of clemency as a gift granted at the state's whim has been almost entirely replaced by public good justifications, but understanding the almost limitless and arbitrary nature of clemency as originally conceived is crucial to analyzing modern uses of the power and debates surrounding the appropriate use of the power.⁴⁰ Though the “gift” theory is rarely invoked modernly,⁴¹ it helps explain broad grants of executive clemency power and raises questions about its infrequent use despite broad constitutional authorization.

An understanding of retributive criminal justice and Professor Rapaport's concept of redemptive clemency also helps frame the patterns of clemency use and the provided justifications given by executives wielding the clemency power, particularly those mandated by their constitution or legislature to provide rationales for their clemency decisions.⁴² While many executives certainly utilize both approaches in their clemency decisions,⁴³ the degree to which they rely on either approach displays the governmental goals of clemency and the goals of a criminal justice system as a whole.

The framers of the Oregon Constitution designed the clemency power to ensure that the governor alone has the power to determine when, to whom, and for what reason grants of clemency are made.

II. CLEMENCY IN OREGON

A. *The Power of Clemency in Oregon*

Oregon's governors have immense power in their use of executive clemency. Article V, Section 14 of Oregon's Constitution outlines the governor's power of clemency, providing her the “power to grant reprieves, commutations, and pardons, after conviction, for all offences except treason, subject to such regulations as may be provided by law.”⁴⁴ The provision places no immediate additional limitations on the clemency power, but provides the legislature the opportunity to regulate use of the otherwise plenary power in the future. The governor must report each use of clemency to the legislature, providing the names and reasons for each grant.⁴⁵ ORS 144.649 describes the governor's clemency power to grant reprieves, commutations, and pardons for all crimes, “[u]pon such conditions and with such restrictions and limitations” she believes is necessary and to remit penalties and forfeitures for such crimes.⁴⁶ ORS 144.660 memorializes the governor's obligation to report uses of clemency to the legislature.⁴⁷

⁴⁰ See Ridolfi and Gordon, *supra* note 16, at 33 (explaining the cost-benefit analysis that modern executives undergo when considering an exercise of clemency).

⁴¹ See Rapaport, *supra* note 28, at 1516.

⁴² See *id.* at 1534–35.

⁴³ *Id.* at 1506.

⁴⁴ OR. CONST. art. V, § 14.

⁴⁵ *Id.*

⁴⁶ OR. REV. STAT. § 144.649 (2023).

⁴⁷ OR. REV. STAT. § 144.660 (2023).

In 2013, the Oregon Supreme Court outlined the expansive power of executive clemency in *Haugen v. Kitzhaber*. The Court traced the legislative debate around Article V, Section 14, recounting how the framers of the Oregon Constitution initially introduced provisions creating a council whose “advice and consent” the governor would need to seek before granting any pardon.⁴⁸ However, delegates who weighed in on the provision found it unnecessary, potentially expensive, and contrary to the belief that the clemency power should be centralized to the governor, who was better positioned to carefully consider cases and render clemency judgment.⁴⁹ The framers of Oregon’s Constitution specifically chose not to significantly limit the governor’s clemency power, leaving her clemency power “checked” only by a legislative reporting requirement and regulations provided by the law.

The expansive nature of the clemency power of Oregon’s governors has been repeatedly affirmed by the Oregon Supreme Court. *Eacret v. Holmes* provides an example of the Court’s broad interpretation of the clemency power. After Governor Robert Holmes expressed an intention to commute the death sentence of an Oregonian convicted of murder,⁵⁰ a victim survivor sued Governor Holmes, challenging his constitutional ability to use clemency based on his moral objections to capital punishment and arguing that considerations of justice must be the basis of the clemency decision.⁵¹ While the Court found that the plaintiffs had no standing, it was careful to note that while the Oregon Constitution permitted the legislature to regulate the governor’s clemency power, no such limitation existed and the clemency power could thus not be limited by judicial review; the Court reiterated that the Constitution grants unlimited power of clemency to the governor and the only remedy for potential abuse of clemency is at the polls.⁵² In 2022, the breadth of the governor’s clemency power was similarly affirmed in *Marteeny v. Brown* where the Court confirmed that the “constitutional [clemency] power is plenary—historically indistinguishable from the powers of clemency of the President under the United States Constitution, and the powers of the monarch at English common law.”⁵³ Quoting *Fredericks v. Gladden*, the Court reiterated that there are no Oregon statutes that purport to regulate the Oregon Constitution’s plenary grant of clemency power and that any such restriction would have to be enacted through clear and direct statutory language.⁵⁴

Eacret and *Marteeny* demonstrate the breadth of the governor’s clemency power and the unavailability of judicial or additional legislative checks on its use. In Oregon, the clemency power is the governor’s alone to wield. While this power cannot be checked by the judicial or legislative branches, clemency also provides the rare opportunity for an executive check on judicial and legislative power; while the legislature maintains the ability to create sentences, and the judiciary the ability to

⁴⁸ *Haugen v. Kitzhaber*, 306 P.3d 592, 601 (Or. 2013) (en banc).

⁴⁹ *Id.*

⁵⁰ *Eacret v. Holmes*, 333 P.2d 741, 742 (Or. 1958).

⁵¹ *Id.*

⁵² *Id.* at 742–44.

⁵³ *Marteeny v. Brown*, 517 P.3d 343, 367–68 (Or. Ct. App. 2022).

⁵⁴ *Id.* at 362 (citing *Fredericks v. Gladden*, 308 P.2d 613, 616 (Or. 1957)).

enforce sentences, through clemency, the executive can check their power by modifying sentences or convictions where she deems it necessary.

It should be noted that in Oregon, as in other states,⁵⁵ the power of clemency is diverse and can be exercised both individually—in response to an individual's application—and categorically—granted to large groups of recipients based on some commonality or criteria. Throughout this report, individual grants are referred to as “application-based,” while categorical grants are referred to as “governor-initiated.”

B. *Historical Use of Clemency in Oregon*

Early Oregon governors utilized their clemency power liberally. Even in a time where the state's incarcerated population was relatively low, Oregon's first governors used clemency at a significant rate, surpassing many of their modern counterparts in grants issued.⁵⁶ From the early days of statehood until the end of World War II, many of Oregon's governors frequently used clemency, often granting it to a significant percentage of the state's incarcerated population.⁵⁷ For example, Sylvester Pennoyer, Oregon's eighth governor, made 97 grants of clemency in his first two years of office, at a time when Oregon's incarcerated population was no more than 400 people.⁵⁸ Later Oregon governors also used their clemency power expansively: From January 14, 1935 to January 28, 1937, Governor Charles Martin granted 62 conditional pardons.⁵⁹ In 1936, 1,060 people were imprisoned in Oregon facilities.⁶⁰ For each of the pardoned individuals incarcerated in county jails, Governor Martin used his clemency power upon the recommendation of sentencing judges.⁶¹ In about 20 cases, clemency was granted to allow the recipient to care for children likely to become “charges upon public relief.”⁶² Seven Oregonians pardoned were “sex offenders” who were granted clemency after seeking treatment recommended by the state board of eugenics,⁶³ while two individuals had their sentences commuted so they could be medically treated with the condition that they be returned upon completion of the treatment.⁶⁴ This snapshot of Governor Martin's use of clemency displays the breadth of potential clemency uses: granting conditional pardons based on official recommendation, for humanitarian reasons, and to

⁵⁵ For example, the governor of Colorado may exercise clemency on an individual basis or on a class-wide basis. COLO. CONST. art. IV, § 7; COLO. REV. STAT. § 16-17-102(2).

⁵⁶ Kaplan & Mayhew, *supra* note 1, at 1295–98.

⁵⁷ *Id.* at 1298.

⁵⁸ *Id.* at 1296.

⁵⁹ 1 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, DIGEST OF FEDERAL AND STATES LAWS ON RELEASE PROCEDURES 947 (1939) [hereinafter ATTORNEY GENERAL'S SURVEY].

⁶⁰ PATRICK A. LANGAN, JOHN V. FUNDIS, LAWRENCE A. GREENFELD & VICTORIA W. SCHNEIDER, U.S. DEP'T JUST., BUREAU JUST. STAT., NCJ No. 111098, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86, at 6 (1988).

⁶¹ ATTORNEY GENERAL'S SURVEY, *supra* note 59, at 947.

⁶² *Id.* at 947–48.

⁶³ *Id.* at 948.

⁶⁴ *Id.*

benefit Oregon society. It also displays the liberalness with which Oregon's early governors granted clemency. However, during the modern era, clemency in Oregon became a seldom used executive power.

A shift in Oregon governors' approach to clemency coincided with the advent of "tough on crime" and "law and order" policies across the nation. In response to the social gains of Black Americans and other social and political minorities in the 1960s, and playing to fearful reactions to Black and progressive activism of the early 1970s, legislators, politicians, and criminal justice officials began to promulgate tough on crime policies.⁶⁵ Many of these policies played to racial stereotypes and overwhelmingly shifted the administration of criminal justice in a more punitive and retributive direction. Across partisan lines, being perceived as "tough on crime" was an attractive political perception, and officials across the nation began shifting their policy stances toward punitive incarceration as a solution to problems associated with crime.⁶⁶ This interplay between politics and the administration of the criminal justice system played out across most American states and their political institutions, and Oregon was no exception.⁶⁷ Coinciding with the shift in approaches to prosecution and incarceration, there was a significant shift in the frequency of clemency use by Oregon's governors. Governor McCall, like many of his earlier predecessors, used clemency to effectuate his policy goals, ensure fairness, and to release individuals who displayed rehabilitation.⁶⁸ For example, after the legislature enacted a new criminal code in 1971, Governor McCall granted clemency to 47 individuals convicted of crimes no longer unlawful under the new code, using his executive power to undo the inherent unfairness that would otherwise exist.⁶⁹ However, as tough on crime policies began to take effect in Oregon and significantly influence the face of Oregon politics, governors began to sparingly use their clemency power.⁷⁰ The following charts map this dramatic shift, from Governor McCall in 1967 to Governor Kitzhaber in 2015.

⁶⁵ Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 13–14 (2013).

⁶⁶ See generally Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246>.

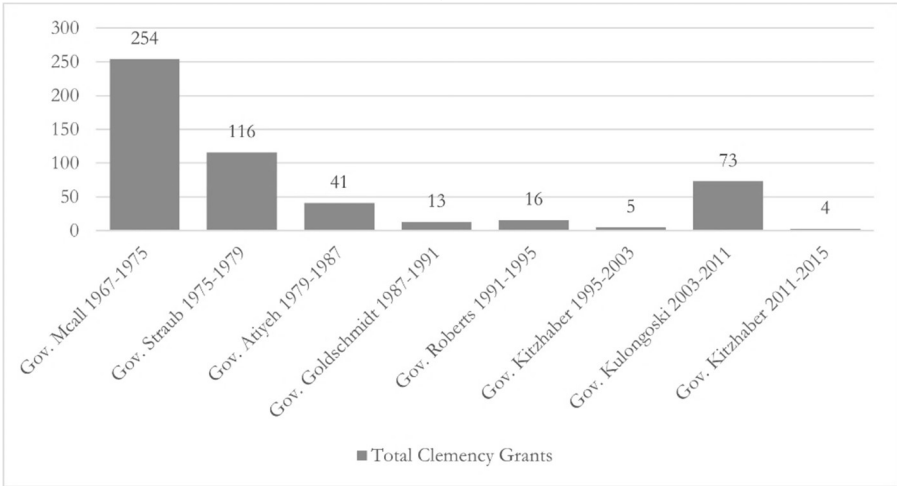
⁶⁷ See Kaplan & Mayhew, *supra* note 1, at 1313–15.

⁶⁸ See Brief for Criminal Justice Reform Clinic at Lewis & Clark Law School as Amici Curiae Supporting Respondents, at 9–10, *Marteeny v. Brown*, 517 P.3d 343 (Or. Ct. App. 2022) (No. A178127).

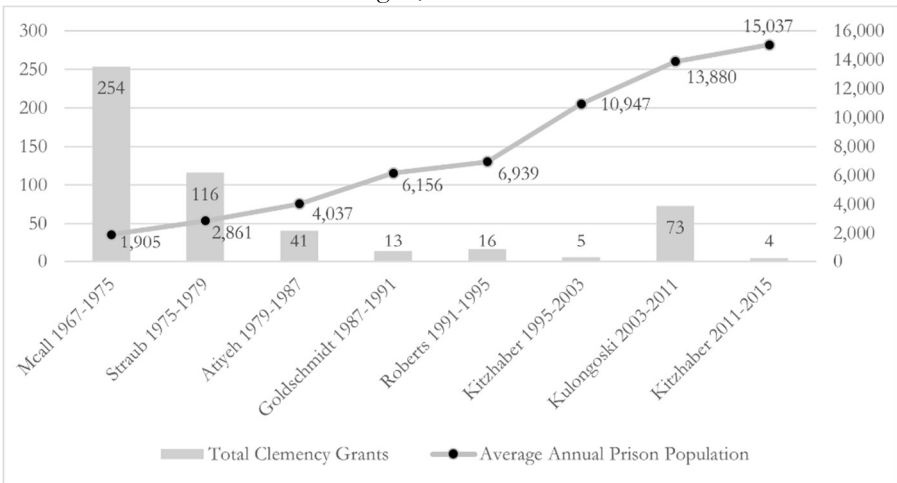
⁶⁹ *Id.* at 10; Kaplan & Mayhew, *supra* note 1, at 1298.

⁷⁰ The reduction in clemency use in Oregon reflects a larger trend across most American states in the late 20th century. See BEN NOTTERMAN, NYU L. CTR. ON ADMIN. CRIM. L., WILLIE HORTON'S SHADOW: CLEMENCY IN MASSACHUSETTS 2, 6, 9 (Courtney M. Oliva ed., 2019).

Grants of Clemency by Oregon’s Governors, 1967–2015⁷¹



Grants of Clemency by Oregon’s Governors Against Annual Prison Population in Oregon, 1967–2015⁷²



As the charts above display, Oregon’s governors issued the fewest clemencies during the “tough on crime” era. Their most sparing use of the clemency power came during the 1990s and 2000s, concurrent with the expansion of mandatory minimum sentences, three strike laws, and other tough on crime measures

⁷¹ Data on file with the Criminal Justice Reform Clinic, Lewis & Clark Law School.

⁷² See PATRICK A. LANGAN, JOHN V. FUNDIS, LAWRENCE A. GREENFIELD & VICTORIA W. SCHNEIDER, U.S. DEP’T OF JUST., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86, 11–13 (1988); *CSAT Prisoners: Corrections Statistical Analysis Tool*, U.S. DEP’T OF JUST., <https://csat.bjs.ojp.gov/advanced-query> (last visited Aug. 14, 2024).

across the country, and in Oregon, Measure 11, the state's own "one strike and you're out" mandatory minimum law.⁷³

This decrease in clemency grants occurred despite the explosion of Oregon's incarcerated population since the 1980s. According to the Vera Institute, Oregon's total incarcerated population, including jails, rose 260% since 1983, ballooning from 5,655 to 20,334 people in custody by 2015.⁷⁴ While other factors may explain the increasing hesitance of Oregon governors to grant clemency, the exploding incarcerated population provided ample opportunities to grant clemency to criminal-justice involved Oregonians. Still, Governor Brown's frequent use of clemency stands as an outlier compared to many of her predecessors, who did not consistently exercise their executive clemency power.

In their 2020 examination of Oregon clemency, Professor Aliza Kaplan and Venetia Mayhew directly point to the "tough on crime" rhetoric of the 1980s as contributing to the significant decline in clemency grants issued by Oregon governors.⁷⁵ According to Kaplan and Mayhew, the increase of prosecutorial power and decision making at the beginning of criminal cases skewed the need for clemency after conviction and made grants of clemency susceptible to criticisms that the governor was undermining the law enforcement policies supporting the convictions.⁷⁶ Oregon governors like Governor Kitzhaber made a "tough on crime" approach part of their electoral platforms, and they used the power of clemency sparingly when compared to their earlier predecessors.⁷⁷

The administrations of Governor Kulongoski and to a larger extent, Governor Brown, represent a shift away from the punitive, "tough on crime" approach of the decades before. As discussed later in this report, Governor Kulongoski expressed concern for the detrimental role incarceration plays for juveniles involved in Oregon's criminal justice system.⁷⁸ Similarly, Governor Brown questioned the appropriateness of punitive juvenile justice laws and, informed by developments in adolescent brain development science, she advocated against the detrimental effects of Measure 11 on young Oregonians.⁷⁹ She also expressed concern with the disproportionate rate of incarceration for Oregonians of color, and the effect of this overincarceration on Oregon's communities of color.⁸⁰ Finally, in the midst of a historic public health crisis, she expressed concern with the health of Oregon's adults in custody and the staff who work with them.⁸¹ Governor Brown's approach to clemency more closely aligns with the use of the power displayed by Oregon's earlier governors. Governor Brown was disappointed by the previous infrequent use of clemency in Oregon, and motivated by an innate sense of justice and equity and a

⁷³ NOTTERMAN, *supra* note 70, at 2; Kaplan & Mayhew, *supra* note 1, at 1287, 1309, 1313–14.

⁷⁴ VERA INST. OF J., INCARCERATION TRENDS IN OREGON 21 (2019).

⁷⁵ Kaplan & Mayhew, *supra* note 1, at 1298, 1307.

⁷⁶ *Id.* at 1320–21.

⁷⁷ *Id.* at 1298, 1316.

⁷⁸ THEODORE KULONGOSKI, GOVERNOR'S CLEMENCY REPORT 7–8 (2011).

⁷⁹ *See* KATE BROWN, GOVERNOR'S CLEMENCY REPORT 3 (2022) [hereinafter BROWN, 2022 REPORT].

⁸⁰ *Id.* at 3–4.

⁸¹ *Id.* at 2.

concern that the criminal justice system was not working for marginalized communities, she made a concerted effort to increase the use of clemency during her administration.⁸²

III. COMPARING CLEMENCY IN OREGON WITH CLEMENCY IN OTHER STATES

Compared to states across the country, Oregon provides one of the broadest powers of executive clemency. Many states provide a clemency scheme involving mandatory or permissive consultation or recommendation by a clemency board. For example, in Connecticut, Georgia, Utah, and Idaho, an independent board appointed by the governor, rather than the governor, possesses the sole power of clemency.⁸³ Similarly in Alabama and South Carolina, the board possesses sole clemency power, except in cases involving reprieves and capital clemency, where the governor retains the power.⁸⁴ In Florida, Minnesota, Nebraska, and Nevada, the governor and other high-ranking government officials serve as a clemency board exercising the sole power of executive clemency.⁸⁵

While these states vest a board with the power to make the ultimate clemency decision, the majority of states have a board that either mandatorily or permissively provides clemency advice to the governor.⁸⁶ The functions and composition of these boards vary, but in general, these states use a process where, practically speaking, a board provides recommendations to the governor, who exercises their authority and discretion to determine whether or not to grant clemency.⁸⁷ The extent to which this board recommendation is needed or adhered to varies by state, but in most states, clemency boards and state governors collaborate to make clemency decisions.⁸⁸

Washington, Michigan, and Massachusetts are examples of states where the governor *must* consult with a clemency board, who makes recommendations to the governor regarding each grant of clemency.⁸⁹ For example, in Washington and

⁸² Interview with Kate Brown, former Governor of Or., in Portland, Or. (Apr. 10, 2023) (notes on file with Crim. Just. Reform Clinic, Lewis & Clark L. Sch.) [hereinafter Interview with Kate Brown (Apr. 10, 2023)]; Telephone Interview with Kate Brown, former Governor of Or. (Feb. 26, 2024) (notes on file with Crim. Just. Reform Clinic, Lewis & Clark L. Sch.) [hereinafter Telephone Interview with Kate Brown (Feb. 26, 2024)]; Telephone Interview with Kate Brown, former Governor of Or. (Mar. 7, 2024) (notes on file with Crim. Just. Reform Clinic, Lewis & Clark L. Sch.) [hereinafter Telephone Interview with Kate Brown (Mar. 7, 2024)].

⁸³ GA. CONST. art. IV, § 2, ¶ II; CONN. GEN. STAT. § 54-124a (2023); UTAH CONST. art. VII, § 12; IDAHO CONST. art. IV, § 7.

⁸⁴ ALA. CONST. art. IV, § 124; ALA. CODE § 15-22-20 (2023); S.C. CONST. art. IV, § 14.

⁸⁵ FLA. CONST. art. IV, § 8(a); MINN. CONST. art. V, § 7; NEB. CONST. art. IV, § 13; NEV. CONST. art. 5, § 14.

⁸⁶ See *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT (Oct. 2023), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> [hereinafter *50-State Comparison*].

⁸⁷ See *Id.*

⁸⁸ See *Id.*

⁸⁹ Washington, Michigan, and Massachusetts are three of 18 states where the governor *must* seek advice from a board. In eight of these states, the board's recommendation is binding. WASH.

Michigan, the governor must consult a board before making a clemency decision but is not bound by their advisory recommendation. By contrast, in Massachusetts, the governor cannot exercise clemency without the advice of board and the affirmative approval of the governor's council.⁹⁰ In 13 states, including Hawaii, Illinois, New York, and Indiana, the governor *may* consult a clemency board before making a clemency decision.⁹¹ One of these states, California, practices a hybrid of the approaches discussed above: California's governor is not required to seek advice of the board, but in cases involving recidivists, they must consult the board, who provides non-binding recommendations, and receive a recommendation from a majority of the Supreme Court.⁹²

Colorado, Maine, and Wisconsin's governors have the sole constitutional power of clemency, but have non-statutory clemency boards appointed by the governor to assist in clemency decisions.⁹³ For example, similar to Oregon's governor, Colorado's governor has the power to grant reprieves, commutations, and pardons "for all offenses except treason, and except in case of impeachment," and is required to report every grant to the legislature during the next legislative session.⁹⁴ Colorado's board, an advisory body that was resurrected and reorganized by Governor Jared Polis in 2019,⁹⁵ provides recommendations about clemency to the governor.⁹⁶

REV. CODE § 9.94A.885(1) (2024); MICH. COMP. LAWS § 791.243 (2024); MASS. CONST. pt. 2, ch. II, sec. I, art. VIII; 50-*State Comparison*, *supra* note 86.

⁹⁰ In Massachusetts, clemency petitions are sent to the Advisory Board of Pardons. The Board holds a hearing and makes a recommendation to the governor; if the Board provides a positive recommendation, the governor may exercise clemency, but any grant of clemency is not given effect unless approved by the Governor's Council. 50-*State Comparison*, *supra* note 86.

⁹¹ In some of these states, the governor is not required to seek the advice of a clemency board, but in practice typically utilizes the board's help. For example, although West Virginia gives its governor the exclusive power of clemency and does not mandate board consultation, the state's governor forwards clemency applications to the parole board, as a matter of practice. *Id.* See also *Executive Clemency*, W. VA. PAROLE BD., <https://paroleboard.wv.gov/executiveclemency/Pages/default.aspx> (last visited Jul. 17, 2024).

⁹² California's governor *may* consult with the board to investigate and provide an advisory recommendation. They *must* refer clemency applications from applicants with two or more felonies to the board. While the board's recommendation to the governor is not binding, the governor cannot issue clemency to a recidivist without the recommendation of four Supreme Court Justices. See CAL. CONST. art. V, § 8; CAL. PENAL CODE §§ 4800, 4812–4813.

⁹³ In these states, executive orders, rather than statutory or constitutional mandates, authorize the board's role. JOHN W. HICKENLOOPER, EXEC. ORDER NO. B 2012 003: THE EXECUTIVE CLEMENCY ADVISORY BOARD (2012); PAUL R. LEPAGE, EXEC. ORDER NO. 25 FY 11/12: AN ORDER ESTABLISHING THE GOVERNOR'S BOARD ON EXECUTIVE CLEMENCY (2011); TONY EVERS, EXEC. ORDER NO. 30: RELATING TO THE CREATION OF THE GOVERNOR'S PARDON ADVISORY BOARD (2019).

⁹⁴ COLO. CONST. art. IV, § 7.

⁹⁵ The Colorado Executive Clemency Advisory Board was created by statute in 1969 but had its authority statutory repealed and was subsequently reformed and reorganized by executive order in 1975. Governor Polis' order superseded these previous orders, establishing the Board's composition and procedures and ensuring the operation of the Board until superseded by a subsequent executive order. JARED POLIS, EXEC. ORDER NO. B 2019 012: RECREATING AND REORGANIZING THE GOVERNOR'S EXECUTIVE CLEMENCY ADVISORY BOARD (2019).

⁹⁶ John Herrick, *Polis Sets Up New Board to Help Determine Who Deserves Clemency for Past Convictions*, COLO. INDEP. (Oct. 18, 2019), <https://www.coloradoindependent.com/2019/10/18/>

In Maine, the governor has the power to remit fees and grant reprieves, commutations, and pardons, except in cases of impeachment.⁹⁷ While the governor has the sole responsibility for making the clemency decision, they are assisted by a board that decides whether or not to hear a petitioner's case; after a successful hearing, the board reaches a decision and provides its clemency recommendation to the governor.⁹⁸ Wisconsin's governor also has the power to "grant reprieves, commutations and pardons . . . for all offenses, except treason and impeachment," and must report these clemency grants to the legislature.⁹⁹ Although Wisconsin law does not require the use of a clemency board, since 1980, most Wisconsin governors have used these boards to help evaluate clemency applications and provide recommendations to the governor.¹⁰⁰ When an eligible petitioner applies for clemency, the board considers the application and usually schedules a hearing, after which the board votes on whether to recommend the applicant for clemency to the governor; if the applicant receives a majority of the board's votes, their case is forwarded to the governor, who makes the ultimate decision.¹⁰¹ These states or their executives, for various reasons and to varying degrees, have decided to delegate some or all of the power of clemency away from the governor.

New Jersey and New Mexico's governors hold the sole power of clemency but can seek help through investigation and advice from a Board.¹⁰² Wyoming's governor has the sole power to grant clemency in all cases except commutations, where a board can provide advisory recommendations to the governor.¹⁰³ Oregon and North Carolina are the only states providing the governor with the sole responsibility of clemency in all eligible cases, without the aid of a clemency board.¹⁰⁴ In 2021, North Carolina Governor Roy Cooper created the Juvenile Sentence Review Board, designed to analyze sentences imposed on juveniles and advise the Governor on juvenile related clemency matters.¹⁰⁵ Similarly in Governor Brown's administration, an advisory committee was established to help the governor make decisions on juvenile clemency cases.¹⁰⁶

polis-clemency-board-convictions.

⁹⁷ ME. CONST. art. V, pt. 1, § 11.

⁹⁸ *Pardon Board*, STATE OF ME. DEP'T OF CORR., <https://www.maine.gov/corrections/pardonboard> (last visited July 18, 2024).

⁹⁹ WIS. CONST. art. V, § 6.

¹⁰⁰ KATIE BENDER-OLSON, *PARDONS 1* (2022).

¹⁰¹ *Pardon Information*, WIS. GOVERNOR TONY EVERS, <https://evers.wi.gov/pages/pardon-information.aspx> (last visited July 18, 2024).

¹⁰² N.J. CONST. art. V, § 2; N.J. STAT. ANN. § 2A:167-7; N.M. CONST. art. V, § 6; MICHELLE LUJAN GRISHAM, *EXECUTIVE CLEMENCY GUIDELINES* § IV(4) (Feb. 27, 2019).

¹⁰³ WYO. CONST. Art 4, § 5; *Board of Parole*, WYOMING, <https://boardofparole.wyo.gov> (last visited July 18, 2024).

¹⁰⁴ OR. CONST. art. V, § 14; N.C. CONST. art. III, § 5(6).

¹⁰⁵ Ben Finholt & Jamie Lau, *Everything You Need to Know About Clemency in North Carolina*, WILSON CTR. FOR SCI. & JUST. AT DUKE L. (Sept. 17, 2021), <https://wcsj.law.duke.edu/news/everything-you-need-to-know-about-clemency-in-north-carolina/>.

¹⁰⁶ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

A. *Contemporaneous Governors' Use of Clemency*

Although all executives have the power to grant clemency, as discussed above, as crime rates rose in the 1980s and 1990s, politicians began emphasizing law and order as a priority. At the same time, with a few exceptions,¹⁰⁷ the use of clemency declined.¹⁰⁸ While nearly no governor has used their clemency power more than Governor Brown,¹⁰⁹ over the last decade, many governors have increased the use of clemency by granting individual and categorical group clemency cases, especially during the COVID-19 pandemic.¹¹⁰

Governor Newsom provides an example of a governor who embraced the clemency power in recent years. Governor Newsom has granted a total of 123 commutations, 140 pardons, and 35 medical reprieves, including for individuals convicted of serious offenses, such as murder.¹¹¹ He also granted clemency to several non-citizens facing deportation.¹¹² Governor Newsom's most notable use of the clemency power, however, was in response to COVID-19. In the spring of 2020, California released about 3,500 people from prison.¹¹³ And in the summer of 2020,

¹⁰⁷ For example, Governor Jerry Brown of California used his clemency more often than any other governor in modern California history—1,182 pardons and 152 commutations. See Abbie VanSickle, *Through Pardons and Commutations, California Governor Jerry Brown Changed his Legacy on Criminal Justice*, PAC. STANDARD (Nov. 20, 2018), <https://psmag.com/social-justice/how-jerry-brown-changed-course-to-become-a-leader-in-pardons-and-commutations>. Over his ten years in office, Arkansas Governor Mike Huckabee granted 1,033 pardons and commutations. See *Huckabee's Record on Pardons While Governor Questioned by Critics*, 19 NEWS (Dec. 10, 2007, 10:52 AM), <https://www.cleveland19.com/story/7474242/huckabees-record-on-pardons-while-governor-questioned-by-critics>.

¹⁰⁸ Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 4–5 (2014).

¹⁰⁹ 50-State Comparison, *supra* note 86. See, e.g., GAVIN NEWSOM, EXECUTIVE REPORT ON PARDONS, COMMUTATIONS OF SENTENCE, AND REPRIEVES 2 (2019) [hereinafter NEWSOM, 2019 REPORT]; GAVIN NEWSOM, EXECUTIVE REPORT ON PARDONS, COMMUTATIONS OF SENTENCE, AND REPRIEVES 2 (2020) [hereinafter NEWSOM, 2020 REPORT]; GAVIN NEWSOM, EXECUTIVE REPORT ON PARDONS, COMMUTATIONS OF SENTENCE, AND REPRIEVES 2 (2021) [hereinafter NEWSOM, 2021 REPORT]; GAVIN NEWSOM, EXECUTIVE REPORT ON PARDONS, COMMUTATIONS OF SENTENCE, AND REPRIEVES 2 (2022) [hereinafter NEWSOM, 2022 REPORT]; Jorie K. Johnson, *Review of Governor Pritzker's Clemency Grants from 1/1/21 through 6/14/22*, ILL. EXPUNGEMENT LAW BLOG (July 4, 2022), <https://www.illinoisexpungementlawyerblog.com/review-of-governor-pritzkers-clemency-grants-from-1-1-21-through-6-14-22>.

¹¹⁰ See Melvin J. Medina, *Our Leaders Can Save Lives with the Stroke of a Pen*, ACLU (July 30, 2021), <https://www.aclu.org/news/smart-justice/our-leaders-can-save-lives-with-the-stroke-of-a-pen>.

¹¹¹ In 2019, he granted 23 commutations, 22 pardons, and placed a moratorium on the death penalty. NEWSOM, 2019 REPORT, *supra* note 109. In 2020, he granted 55 commutations, 41 pardons, and 4 reprieves. NEWSOM, 2020 REPORT, *supra* note 109. In 2021, he granted 13 commutations, 25 pardons, and 25 reprieves. NEWSOM, 2021 REPORT, *supra* note 109. And in 2022, he granted 32 commutations, 52 pardons, and 6 reprieves. NEWSOM, 2022 REPORT, *supra* note 109.

¹¹² See *California Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (Mar. 6, 2023), <https://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing>.

¹¹³ *Actions to Reduce Population and Maximize Space*, CAL. DEP'T OF CORR. & REHAB., <https://www.cdcr.ca.gov/covid19/frequently-asked-questions-expedited-releases> (last visited July 18, 2024).

Governor Newsom instituted a three-month credit for incarcerated individuals that resulted in the early release of about 2,100 people, however, the credit did not apply to those on death row, serving life without parole, or those who had other serious rule violations.¹¹⁴ Governor Newsom's 123 commutations and 140 pardons, along with his COVID-19 response, rivals Governor Brown's 104 individual application-based commutations, 131 individual application-based pardons, and 963 COVID-19 related commutations; however, this does not include the over 50,000 additional grants of clemency by Governor Brown to groups of individuals, discussed in further detail below¹¹⁵

Illinois Governor Pritzker has frequently exercised his clemency power as well. He granted 22 commutations and 128 pardons between January 1, 2021, and January 14, 2022.¹¹⁶ In his first year in office, he also issued 24 pardons and used his clemency power to authorize the expungement of more than 11,000 marijuana convictions.¹¹⁷ This group clemency for marijuana convictions resembles yet falls short of Governor Brown's pardon of 47,144 marijuana convictions.¹¹⁸ Overall, Governor Pritzker approved roughly one-third of the commutation requests his office reviewed from the beginning of his term through October 2020.¹¹⁹ Additionally, in the first month of the pandemic, Governor Pritzker commuted 17 sentences, seven of which were for murder,¹²⁰ and issued executive orders easing restrictions for early releases and granting temporary release to medically vulnerable individuals.¹²¹

Between 2021 and 2022, Connecticut Governor Lamont's Board of Pardon and Parole commuted the prison sentences of 71 people convicted of felonies, 44 of which were for murder convictions.¹²² And from 2019 through 2020, the

¹¹⁴ See *Justice System Responses to COVID-19*, CRIME & JUST. INST., <https://www.cjinststitute.org/resources/covid> (last visited July 18, 2024) [hereinafter *Justice System Responses*].

¹¹⁵ However, it is important to take into account the fact that California's prison population greatly exceeds Oregon's. Compare *California Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/CA.html> (last visited July 18, 2024) ("199,000 people from California are behind bars."), with *Oregon Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/OR.html> (last visited July 18, 2024) ("22,000 people from Oregon are behind bars.").

¹¹⁶ See Johnson, *supra* note 109.

¹¹⁷ See *Illinois Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (July 31, 2021), <https://ccresourcecenter.org/state-restoration-profiles/illinois-restoration-of-rights-pardon-expungement-sealing>.

¹¹⁸ KATE BROWN, GOVERNOR'S CLEMENCY REPORT 2 (2023) [hereinafter BROWN, 2023 REPORT].

¹¹⁹ *In 2020, Gov. Pritzker Used Clemency Authority Granting Unprecedented No. of Commutations But Reinstating Few Pardons with Gun Rights*, A BRIDGE FORWARD LLC (Jan. 13, 2021), <https://www.abridgeforward.com/blog/in-2020-gov-pritzker-used-clemency-authority-granting-unprecedented-no-of-commutations-but-reinstating-few-pardons-with-gun-rights>.

¹²⁰ See Christy Gutowski, Gov. J.B. Pritzker Quietly Grants Clemency Requests to Illinois Prisoners Amid Coronavirus Pandemic, Including One Released Thursday who had been Serving Life, *Chi. Trib.* (Feb. 3, 2021), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-pritzker-inmate-commutations-20200409-ql323nt4azfitagdeon5gswn2q-story.html>.

¹²¹ See *Justice System Responses*, *supra* note 114.

¹²² See Marc E. Fitch, *The Board of Pardon and Paroles 44 Commuted Murder Convictions*, INSIDE INVESTIGATOR (Apr. 5, 2023), <https://insideinvestigator.org/the-board-of-pardon-and-paroles-44-commuted-murder-convictions/>. See also *Commutation Statistics*, STATE OF CONN. BD. OF

Board granted 1,447 full pardons, many through an expedited process that forgoes a hearing.¹²³ However, Connecticut's recent clemency record has been more uneven than Oregon, California, and Illinois's—the Board commuted only six sentences between 2016 and 2021.¹²⁴

Louisiana Governor Bel Edwards pardoned 248 people and commuted 160 sentences between 2016 and 2022.¹²⁵ Forty of these commutations reduced sentences without parole to parole-eligible terms.¹²⁶ In response to COVID-19, Governor Bel Edwards created a panel to review individuals for a furlough program, which ultimately released 92 individuals.¹²⁷ In granting these pardons and commutations, Governor Bel Edwards diverged from his predecessor Bobby Jindal, who commuted only three sentences in eight years. He also exceeded the number of individual application-based pardons and commutations that Governor Brown granted.¹²⁸

Virginia Governor Northam pardoned more than 1,200 people during his four years in office, which is more than the nine governors before him, combined.¹²⁹ In the wake of COVID-19, in May 2020, Governor Northam initiated the release of an estimated 2,000 people by granting the Department of Corrections the power to release individuals with a record of good behavior and less than a year left to serve.¹³⁰ He also issued 126,000 restorations of civil rights.¹³¹ Under Virginia law,

PARDONS & PAROLES, <https://portal.ct.gov/BOPP/Research-and-Development-Division/Statistics/Commutation-Statistics> (last visited July 18, 2024); Jamiles Lartey, *Connecticut Normalized Clemency. Not Anymore.*, MARSHALL PROJECT (May 6, 2023), <https://www.themarshallproject.org/2023/05/06/connecticut-incarceration-clemency-commutation-pardon-justice-reform>.

¹²³ See Connecticut Restoration of Rights & Record Relief, Restoration of Rts. Project (July 17, 2024), <https://ccresourcecenter.org/state-restoration-profiles/connecticut-restoration-of-rights-pardon-expungement-sealing>.

¹²⁴ See *Board of Pardons and Parole Statistical Information*, STATE OF CONN. BD. OF PARDONS & PAROLES, <https://portal.ct.gov/BOPP/Research-and-Development-Division/Statistics/Historical/> (last visited July 18, 2024).

¹²⁵ See LA. BD. PARDONS & COMM. ON PAROLE, 2022 ANNUAL REPORT (2022).

¹²⁶ See *id.*

¹²⁷ See *Justice System Responses*, *supra* note 114.

¹²⁸ See Lea Skene & Sam Karlin, *Will Gov. John Bel Edwards Ramp up Use of Clemency Power as Part of Criminal Justice Reform Efforts?*, THE ADVOCATE (Feb. 1, 2020), https://www.theadvocate.com/baton_rouge/news/article_9769c546-4440-11ea-a045-87b5ee818f05.html. Compare *supra* text accompanying note 125 (Bel Edwards granted 248 pardons and 160 commutations from 2016-2022), with *infra* chart accompanying note 154 (Brown granted 131 pardons and 104 commutations during the same period).

¹²⁹ See Gregory S. Schneider & Laura Vozzella, *Northam Issues Pardons in Flurry of Actions Before Leaving Office*, WASH. POST (Jan. 14, 2022, 3:51 PM), <https://www.washingtonpost.com/dc-md-va/2022/01/14/northam-pardons-virginia-governor/>; Pat Thomas, *Governor Northam Issues 1200-plus Pardons During Term*, WDBJ 7 (Jan. 14, 2022, 12:02 PM), https://www.wdbj7.com/2022/01/14/governor-northam-issues-1200-plus-pardons-during-term. See also *Virginia Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (Feb. 17, 2024), <https://ccresourcecenter.org/state-restoration-profiles/virginia-restoration-of-rights-pardon-expungement-sealing> [hereinafter *Virginia Restoration*].

¹³⁰ See *Justice System Responses*, *supra* note 114.

¹³¹ See *Virginia Restoration*, *supra* note 129. In Virginia, people convicted of a felony are permanently disenfranchised unless the governor approves a restoration of rights. See *Voting Rights Restoration Efforts*

the restoration of rights is considered a form of clemency.¹³² In other states, like Oregon, the restoration of rights is an automatic component of a pardon.¹³³ Given the fact that the restoration of rights is not a distinct form of clemency in Oregon and that Oregonians convicted of felonies are not permanently disenfranchised, it's difficult to compare Governor Northam's and Governor Brown's clemency records. But taking into account his 126,000 restorations of rights, Governor Northam surpassed Governor Brown, who exercised her clemency power a total of 61,777 times.¹³⁴

While the previous paragraphs have highlighted Democratic governors, clemency doesn't necessarily fall along party lines, and Republican governors have been granting clemency in the last few years as well.¹³⁵ Between January 2015 and March 2020, Arkansas Governor Hutchinson granted more than 500 pardons.¹³⁶ On May 12, 2020, approximately 300 people were released, with corrections officials noting that more people would be released as the parole board screened and cleared them.¹³⁷ Then on May 13, 2020, in connection with a directive from Governor Hutchinson in April, prison officials announced that approximately 800 people were approved for early release from prison as a precaution against the spread

in *Virginia*, BRENNAN CTR. FOR J. (April 20, 2018), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia>. The Virginia Constitution gives the governor the power to restore the right to vote, serve on a jury, run for office, become a notary public, but not to carry a firearm. *See, e.g., Restoration of Rights*, COMMONWEALTH OF VA., <https://www.restore.virginia.gov> (last visited July 18, 2024).

¹³² *See, e.g., Howell v. McAuliffe*, 788 S.E.2d 706, 716 (Va. 2016).

¹³³ In Oregon, the rights to vote, to serve on a jury, and to run for state office are automatically restored upon release from incarceration. OR. REV. STAT. § 137.281(1) (2023). The right to bear firearms is restored upon a successful grant of pardon from the governor. *See* OR. REV. STAT. § 166.270(4)(a) (2023). *See, e.g., DEL. CONST.* art. 5, § 2(b). *See also* Griffin v. Pate, 884 N.W.2d 182, 194 (Iowa 2016) (confirming the power of Iowa governors to restore voting rights to persons convicted of “infamous” crimes through the pardoning power); KY. CONST. § 145(1).

¹³⁴ E-mail from Kevin Gleim, *supra* note 6.

¹³⁵ Historically, the decision to grant clemency has in at least some cases depended on religious ideology, as opposed to political ideology. *See generally* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 154 (2009). *See, e.g.,* Adam Nossiter & David Barstow, *Charming and Aloof, Huckabee Changed State*, N.Y. TIMES (Dec. 22, 2008), <https://www.nytimes.com/2007/12/22/us/politics/22huckabee.html> (“[b]y every account, Mr. Huckabee's approach to clemency was heavily influenced by his religious beliefs.”). *See also* Caryle Murphy, *Catholicism, Politics a Careful Mix for Kaine*, WASH. POST (Oct. 31, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/10/30/AR2005103001314.html>; Abby VanSickle, *The Jerry Brown Way of Pardoning*, THE MARSHALL PROJECT (Nov. 20, 2018), <https://www.themarshallproject.org/2018/11/20/the-jerry-brown-way-of-pardoning> (stating that Jerry Brown's clemency decisions “are often timed to coincide with Catholic holidays, a reflection of his faith”).

¹³⁶ *See Arkansas Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/arkansas-restoration-of-rights-pardon-expungement-sealing> (July 22 2024).

¹³⁷ *See Mid-South Coronavirus Live Updates: Arkansas Releases 300 Inmates Early as Virus Precaution*, ASSOCIATED PRESS, <https://www.localmemphis.com/article/news/health/coronavirus/mid-south-coronavirus-live-updates/522-c408203c-61f9-49c6-b308-2ec085a83e26> (May 13, 2020, 1:59 PM).

of COVID-19.¹³⁸ Alabama Governor Kay Ivey's Board of Pardons and Parole pardoned 830 people in 2018 and 889 people in 2019 (79% and 80% of applicants, respectively).¹³⁹ And in response to COVID-19, Oklahoma Governor Stitt commuted 450 sentences to reduce overcrowding.¹⁴⁰

To be sure, while the frequency of clemency in many states has skyrocketed in recent years, in other states, the clemency power remains nearly unused. In Alaska, only three people have received pardons since 1995.¹⁴¹ Rhode Island has granted clemency only once since 1950.¹⁴² Massachusetts granted two commutations between 2005 and February 2022.¹⁴³ Vermont granted no commutations between 2005 and mid-2021.¹⁴⁴ In these states, the law and order rhetoric of the 1980s and 1990s has not given way to more progressive clemency practices.

However, in a relatively large number of states, including California, Illinois, Connecticut, Louisiana, Virginia, Arkansas, Alabama, and Oklahoma, governors have been granting an unprecedented number of commutations and pardons in recent years.¹⁴⁵ Most of these governors seem to be granting clemency both in

¹³⁸ See Ninette Sosa, *Approx. 800 Inmates Approved for Early Release; COVID-19 Precaution*, KNWA (May 14, 2020, 11:34 AM), <https://www.nwahomepage.com/lifestyle/health/coronavirus/approx-800-inmates-approved-for-early-release-covid-19-precaution>; *Arkansas: State-by-state COVID-19 Guidance*, HUSCH BLACKWELL (Apr. 15, 2021), <https://www.huschblackwell.com/arkansas-state-by-state-covid-19-guidance>.

¹³⁹ Beth Shelburne, *Report: Alabama Pardons—Civil Rights Denied*, SMART JUST. ALA. (June 2021), <https://www.alabamasmartjustice.org/reports/alabama-pardons>.

¹⁴⁰ See David Lee, *Oklahoma Governor Commutes 450 Sentences to Reduce Prison Overcrowding*, COURTHOUSE NEWS SERVICE (Apr. 11, 2020), <https://www.courthousenews.com/oklahoma-governor-commutes-450-sentences-to-reduce-prison-overcrowding>.

¹⁴¹ *Alaska Restoration of Rights & Record Relief*, RESTORATION OF RIGHTS PROJECT (Jan. 17, 2022), <https://ccresourcecenter.org/state-restoration-profiles/alaska-expungement-pardon-sealing>.

¹⁴² Naila Awan & Katie Rose Quandt, *Executive Inaction: States and the Federal Government Fail to Use Commutations as a Release Mechanism*, PRISON POLY INITIATIVE (Apr. 2022), <https://www.prisonpolicy.org/reports/commutations.html>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ As for other states, North Carolina Governor Roy Cooper commuted the sentences of six people and granted pardons of forgiveness to four other people in 2022. Kelan Lyons, *Cooper Uses Clemency Power as Vigil Continues Outside His House*, NC NEWSLINE (Dec. 20, 2022), <https://pulse.ncpolicywatch.org/2022/12/20/cooper-uses-clemency-power-as-vigil-continues-outside-his-house>. Washington Governor Jay Inslee has granted roughly 470 commutations. Medina, *supra* note 110. Inslee also pardoned a group of people convicted of marijuana possession offenses. *Washington Restoration of Rights & Record Relief*, RESTORATION OF RIGHTS PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/washington-restoration-of-rights-pardon-expungement-sealing> (Apr. 18, 2024). Michigan Governor Gretchen Whitmer granted 18 commutations and 4 pardons in 2022, the first pardons of her term, with the majority being drug convictions. Andrea May Sahouri, *Whitmer Grants 22 Clemency Requests, Including 4 Pardons*, DETROIT FREE PRESS (Dec. 28, 2022, 2:13 PM), <https://www.freep.com/story/news/politics/2022/12/23/whitmer-pardons-sentence-commutations/69753431007>. Colorado Governor Jared Polis issued 4 commutations and 19 pardons in 2022. Press Release, Governor Jared Polis, Governor Polis Announces Clemency for 24 Individuals (Dec. 22, 2022), <https://www.colorado.gov/governor/news/9311-governor-polis-announces-clemency-24-individuals>. And in December 2021, he signed an Executive Order granting 1,351 pardons for convictions of possession of two ounces or less of marijuana. Olafimihan Oshin, *Colorado Governor Pardons 1,351 People for Minor*

response to individual petitions and to categorical groups of people. There was a surge of clemency during COVID-19 in the form of early and temporary releases for certain groups of incarcerated individuals to address overcrowding in prisons, and these releases make up a substantial percentage of all gubernatorial clemency from the past three years.¹⁴⁶ Governor Brown is part of a larger trend of governors resuscitating the clemency power, but her clemency record still stands out for the sheer quantity of petitions she accepted and for her willingness to grant clemency proactively to a variety of groups.

IV. GOVERNOR BROWN'S APPLICATION-BASED USE OF CLEMENCY: INDIVIDUAL GRANTS OF CLEMENCY

From 2015 to 2023,¹⁴⁷ Governor Brown exercised her clemency power a total of 61,777 times. This number includes 47,144 marijuana pardons,

Marijuana Crimes, THE HILL (Dec. 30, 2021, 7:28 PM), <https://thehill.com/homenews/state-watch/587789-colorado-governor-pardons-1351-people-for-minor-marijuana-crimes>. Missouri Governor Mike Parson pardoned 24 people and commuted 4 sentences in 2020. Jaclyn Driscoll, *Missouri Governor Releases Names of 24 Inmates Pardoned*, ST. LOUIS PUB. RADIO (Dec. 23, 2020, 4:58 PM), <https://news.stlpublicradio.org/government-politics-issues/2020-12-23/missouri-governor-releases-names-of-24-inmates-pardoned>. In December 2021, Tennessee Governor Bill Lee granted clemency for the first time since taking office, including three commutations—at least one was for a murder offense. Kimberlee Kruesi, *Tennessee Governor Grants Clemency to 17*, ASSOCIATED PRESS (Dec. 2, 2021, 3:28 PM), <https://apnews.com/article/tennessee-nashville-8f953c6cef75bba7577224b2bb80e38b>. Kansas Governor Laura Kelly has granted some commutations for nonviolent offenses only, with the exception of a man who had been convicted of robbery offenses but was already out of prison—the commutation meant he didn't have to go back due to a technical error with his sentencing. Sherman Smith, *Kansas Governor Grants Clemency to 8, Embracing 'Political Risk' in Rare Use of Power*, KAN. REFLECTOR (June 24, 2021, 3:00 PM), <https://kansasreflector.com/2021/06/24/kansas-governor-grants-clemency-to-8-embracing-political-risk-in-rare-use-of-power>. In April 2020, New Mexico Governor Michelle Lujan Grisham issued an executive order “that, over two-plus years, authorized more than 700 people to be released early from prison due to the pandemic, provided they met specific criteria that included being scheduled for release within the next 30 days.” ABQJournal News Staff, *Early Release for Inmates Under Scrutiny in Race for Governor*, ALBUQUERQUE J. (Sept. 29, 2022), <https://www.abqjournal.com/2536473/early-release-for-inmates-under-scrutiny-in-race-for-governor-ex-ron.html>. She recently rescinded the order, days after her Republican challenger began running attack ads against her citing it. *Id.* Delaware Governor John Carney granted more than 800 pardons in his first two years in office. See *Delaware Restoration of Rights & Record Relief, RESTORATION OF RTS. PROJECT* (Nov. 2, 2023), <https://ccresourcecenter.org/state-restoration-profiles/delaware-restoration-of-rights-pardon-expungement-sealing>; *Delaware Pardon Statistics 1988-2019 (First Quarter)*, COLLATERAL CONSEQUENCES RES. CTR. (Nov. 9, 2019), <https://ccresourcecenter.org/delaware-pardon-statistics-1988-present>.

¹⁴⁶ See KELLY LYN MITCHELL, JULIA LASKORUNSKY, NATALIE BIELENBERG, LUCY CHIN, MADISON WADSWORTH, ROBINA INST. EXAMINING PRISON RELEASES IN RESPONSE TO COVID: LESSONS LEARNED FOR REDUCING THE EFFECTS OF MASS INCARCERATION (2022); CTR. ON THE ADMIN. OF CRIM. LAW, NYU LAW, A SURVEY OF EXECUTIVE ACTION CONCERNING THE SPREAD OF COVID-19 IN STATE CORRECTIONAL FACILITIES; Amanda Waldroupe, *The Story of One U.S. Governor's Historic Use of Clemency: 'We are a Nation of Second Chances'*, THE GUARDIAN (Sep. 28, 2022), <https://www.theguardian.com/us-news/2022/sep/28/oregon-governor-kate-brown-clemency>.

¹⁴⁷ Governor Brown was Oregon's 38th governor, serving from February 18, 2015, to January 9, 2023. She previously served as Oregon's 24th Secretary of State. In 2015, when

963 COVID-19 related commutations, and 13,300 remissions of traffic related fines and fees.¹⁴⁸ Additionally, Governor Brown granted commutations to 41 individuals who worked to keep Oregon safe during the historic 2020 Labor Day wildfires, commuted the sentences of 73 youth to provide them the opportunity to go before the Oregon Board of Parole, and “cleared” death row by commuting the death sentences of 17 individuals.¹⁴⁹ Alongside these grants, Governor Brown granted 241 application-based pardons, reprieves, remissions, and commutations, after considering 3,398 individual applications for executive clemency.¹⁵⁰

The bulk of Governor Brown’s use of her clemency powers can be classified as “governor-initiated”.¹⁵¹ These grants, made without the application of recipients, were effectuated as the Governor identified a group that could benefit from clemency and established conditions for qualification to receive clemency.¹⁵² The rest of her clemency grants were application-based, as recipients submitted applications for executive clemency and were granted clemency after a careful review by the Governor and her office.¹⁵³

A. Analyzing Governor Brown’s Application-based Clemency Grants

The following chart breaks down Governor Brown’s application-based clemency grants by year and clemency type. This information accounts for each type

Governor John Kitzhaber’s resignation left a vacancy in the office of the Governor, she was elevated to Governor, pursuant to Article V, Section 8a of the Oregon Constitution. *Dedication: Governor Kate Brown*, OR. SEC’Y OF STATE: OR. BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/about-dedication.aspx> (last visited Aug. 14, 2023).

¹⁴⁸ E-mail from Kevin Gleim, *supra* note 6.

¹⁴⁹ Crombie, *Brown Ends Term*, *supra* note 7; *Gov. Brown Commutes Sentence for 41 Inmates who Helped Battle Last Year’s Wildfires*, KGW 8 (June 23, 2021, 6:06 PM), <https://www.kgw.com/article/news/local/wildfire/governor-brown-commutes-sentence-inmates-battled-historic-wildfires/283-9c12ee0f-0d53-445d-97ff-6febfc3e60f9>; Lauren Dake & Conrad Wilson, *Outgoing Oregon Governor Commutes Death Row Sentences, Orders Execution Chamber Dismantled*, OPB (Dec. 13, 2022, 4:00 PM), <https://www.opb.org/article/2022/12/13/oregon-governor-kate-brown-death-penalty-sentence-commutations>.

¹⁵⁰ See KATE BROWN, GOVERNOR’S CLEMENCY REPORT 1 (2016) [hereinafter BROWN, 2016 REPORT]; KATE BROWN, GOVERNOR’S CLEMENCY REPORT 1 (2017) [hereinafter BROWN, 2017 REPORT]; KATE BROWN, GOVERNOR’S CLEMENCY REPORT 1 (2018) [hereinafter BROWN, 2018 REPORT]; KATE BROWN, GOVERNOR’S CLEMENCY REPORT 1 (2019) [hereinafter BROWN, 2019 REPORT]; KATE BROWN, GOVERNOR’S CLEMENCY REPORT 1 (2020) [hereinafter BROWN, 2020 REPORT]; KATE BROWN, GOVERNOR’S CLEMENCY REPORT 1 (2021) [hereinafter BROWN, 2021 REPORT]; BROWN, 2022 REPORT, *supra* note 79, at 1–2; BROWN, 2023 REPORT, *supra* note 118, at 1–2.

¹⁵¹ See Brief of Amicus Curiae Criminal Justice Reform Clinic at Lewis & Clark Law School at 2–3, *Marteeny v. Brown*, 321 Or. App. 250 (2022) (No. CA A178127).

¹⁵² With the exception of her COVID-19 and 2020 Labor Day wildfire grants, Governor Brown’s group clemency grants were related to ensuring the equal application of the law for recipients who did not retroactively benefit from laws passed during or shortly before her time as governor. BROWN, 2022 REPORT, *supra* note 79, at 2, 5.

¹⁵³ See Sandy Chung, *Governor Brown’s Historic Clemency Actions Provide Hopeful Lesson*, ACLU OF OR. (Jan. 11, 2023, 4:45 PM), <https://www.aclu-or.org/en/news/governor-browns-historic-clemency-actions-provide-hopeful-lesson>.

of clemency requested as a separate application, as some applicants may have applied for and received more than one form of clemency relief:

TIME PERIOD ¹⁵⁴	PARDON	REPRIVEE	COMMUTATION	REMISSION OF FINES	TOTAL
JULY 2015—MARCH 2016	0	0	0	0	0
MARCH 2016—JUNE 2017	4	0	0	0	4
JUNE 2017—MARCH 2018	1	0	1	0	2
MARCH 2018—JUNE 2019	6	0	3	0	9
JUNE 2019—MARCH 2020	14	0	2	0	16
MARCH 2020—JUNE 2021	33	1	32	0	66
JUNE 2021—MARCH 2022	5	0	31	1	37
MARCH 2022—JAN. 2023	68	0	35	4	107
ENTIRE ADMINISTRATION	131	1	104	5	241

Governor Brown continuously increased her use of executive clemency, beginning her administration with no grants of clemency and ending with significant numbers of clemency grants. Between July 2015 and June 2019, Governor Brown only used her clemency power on a handful of occasions. Her use of the power significantly increased in 2019, as she more than doubled the number of pardons granted. However, 2020 marked an explosion in Governor Brown’s utilization of clemency, as her pardon and commutation grants increased exponentially. For Governor Brown, this increase was a matter of practice and opportunity. Governor Brown explained that after considering a few clemency petitions that lacked political controversy, clemency was able to be gradually increased: “[Clemency] is incremental and teaches you how to flex this muscle.”¹⁵⁵ She also intimated that the opportunity to use clemency inevitably increases in the later stages of a Governor’s term, as other options for criminal justice reforms become less feasible or practicable: “The other reason why [clemency] can be done at the end of your term is because it is hard to do anything else at the same time. It is difficult to start new initiatives that may not bear fruit in the next administration. So, we have created a framework for other executives to use, which is a very valuable use of the final months of one’s term.”¹⁵⁶

¹⁵⁴ See BROWN, 2016 REPORT, *supra* note 150, at 1; BROWN, 2017 REPORT, *supra* note 150, at 1; BROWN, 2018 REPORT, *supra* note 150, at 1; BROWN, 2019 REPORT, *supra* note 150, at 1; BROWN, 2020 REPORT, *supra* note 150, at 1; BROWN, 2021 REPORT, *supra* note 150, at 1; BROWN, 2022 REPORT, *supra* note 79, at 1–2; BROWN, 2023 REPORT, *supra* note 118, at 1–2.

¹⁵⁵ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82; Telephone Interview with Kate Brown (Feb. 26, 2024), *supra* note 82; Telephone Interview with Kate Brown (Mar. 7, 2024), *supra* note 82.

¹⁵⁶ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

Additional factors explaining this increase in clemency frequency are discussed below. Despite this expansion in clemency use, Governor Brown infrequently used clemency to grant reprieves and remissions of fines and fees, but as outlined below, she rarely received applications for these forms of clemency. Throughout her entire administration, Governor Brown granted one application-based reprieve and five application-based remissions of fines and fees.

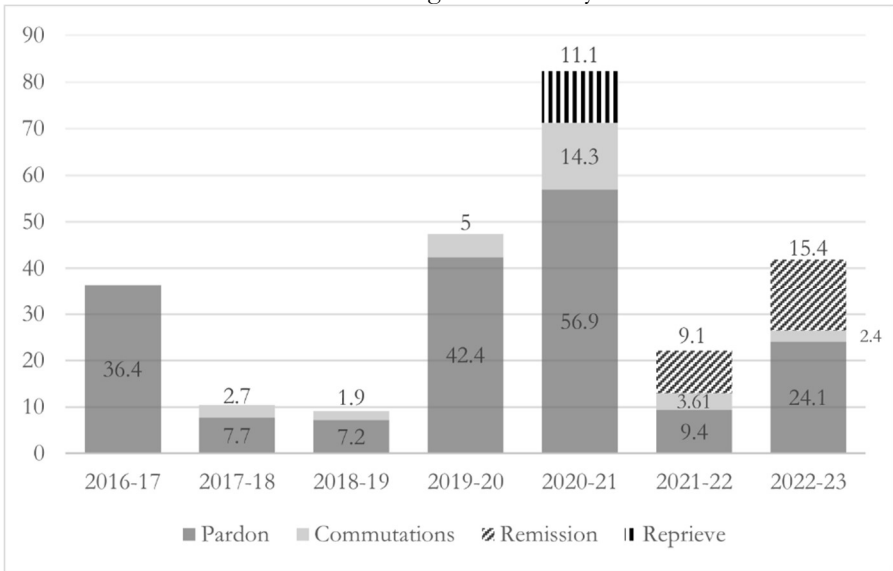
1. Trends of Application-based Clemency Grants

An analysis of the rate of her application-based clemency grants reveals trends in Governor Brown's use of the clemency power. The following charts display the number of application grants and denials for each type of clemency, as well as the percentage of grants for each reporting period. Some applicants applied for more than one type of executive clemency, and each type of clemency requested is treated as a separate application. The year when Governor Brown did not issue any clemency grants, 2015–2016, is not included below:

March 2016–June 2017 ¹⁵⁷	Pardon	Conditional Commutation	Remission	Reprieve
Granted	4	0	0	0
Denied	7	17	2	1
Granted %	36.4%	0%	0%	0%
June 2017–March 2018	Pardon	Conditional Commutation	Remission	Reprieve
Granted	1	1	0	0
Denied	12	36	0	0
Granted %	7.7%	2.7%	0%	0%
March 2018–June 2019	Pardon	Conditional Commutation	Remission	Reprieve
Granted	6	3	0	0
Denied	77	151	7	2
Granted %	7.2%	1.9%	0%	0%
June 2019–March 2020	Pardon	Conditional Commutation	Remission	Reprieve
Granted	14	2	0	0
Denied	19	38	0	1
Granted %	42.4%	5.0%	0%	0%
March 2020–June 2021	Pardon	Conditional Commutation	Remission	Reprieve
Granted	33	32	0	1
Denied	25	191	2	8
Granted %	56.9%	14.3%	0%	11.1%
June 2021–March 2022	Pardon	Conditional Commutation	Remission	Reprieve
Granted	5	31	1	0
Denied	48	827	10	7
Granted %	9.4%	3.6%	9.1%	0%
March 2022–Jan. 2023	Pardon	Conditional Commutation	Remission	Reprieve
Granted	68	35	4	0
Denied	213	1,407	22	6
Granted %	24.2%	2.4%	15.4%	0%

¹⁵⁷ BROWN, 2017 REPORT, *supra* note 150, at 1; BROWN, 2018 REPORT, *supra* note 150, at 1; BROWN, 2019 REPORT, *supra* note 150, at 1; BROWN, 2020 REPORT, *supra* note 150, at 1; BROWN, 2021 REPORT, *supra* note 150, at 1; BROWN, 2022 REPORT, *supra* note 79, at 1–2; BROWN, 2023 REPORT, *supra* note 118, at 1–2.

Trends in Percentage of Clemency Grants



i. Pardons

This data reveals no obvious trends in Governor Brown’s clemency grants, but some numbers warrant further consideration. During most years of her administration, Governor Brown granted low rates of pardons, including granting only 7.69% of pardon applications considered from June 2017 to March 2018, and 7.22% of the pardon applications received from March 2018 to June 2019. However, the consistency of this rate is notable considering the sizeable increase in pardon applications from the 2017–2018 report to the 2018–2019 report. From 2017 to 2018, Governor Brown granted one pardon and denied 12; from 2018 to 2019, she granted six pardon applications and denied 77.

Between 2019 and 2023, there was a dramatic shift in the percentage of pardon applications granted. From 2019 to 2020, Governor Brown granted 14 pardons and denied 19, at a 42.42% grant rate. From 2020 to 2021, the Governor remarkably granted more pardons than she denied, pardoning 33 Oregonians and denying 25 pardon applications. From 2021 to 2022, Governor Brown’s clemency grant rate again fell, as she granted five pardons and denied 48 applications, a grant rate of 9.42%. Governor Brown’s pardon grants from 2022 to 2023 warrant particular consideration. During this time, Governor Brown granted the most pardons of any period of her administration, granting 68 applications and denying 213, a grant rate of 24.2%. As discussed in greater detail below, many of these pardons were granted to Black Oregonians with older, non-expungable convictions, as the Governor sought to use her clemency power as an equitable tool.

Executive clemency reports show that Governor Brown generally increased the number of Oregonians she pardoned, beginning by granting only four pardons in her first year of active clemency and ending by granting 68 pardons during the 2022–2023 reporting period. She granted this increasing number of pardons

despite considering an inconsistent number of pardon applications from year to year.

ii. Commutations

Commutations largely followed similar trends during Governor Brown's administration. From March 2016 to March 2020, Governor Brown granted a handful of commutations despite receiving high numbers of commutation applications. For example, from 2018 to 2019, the Governor granted three commutations and denied 151 commutation applications, a grant rate of 1.94%. However, in 2020, Governor Brown began granting commutations at a more frequent rate. From 2020 to 2021, she commuted the sentences of 32 Oregonians, exponentially more than any previous reporting period, and rejected 191 applications. From 2021 to 2022, Governor Brown granted 31 commutations, rejecting 827 commutation requests. Similarly, from 2022 to 2023, the Governor granted 35 and rejected 1,407 commutation applications, a grant rate of 2.43%. The numbers indicate that, after increasing her commutation grants in 2020, she granted commutations at a steady rate, despite receiving an increasing number of commutation applications. Although she granted commutations at a low percentage each year, Governor Brown generally used this form of clemency more frequently beginning in 2020. While the identity and demographics of commutation recipients varied, Governor Brown consistently granted commutations to folks in custody who demonstrated remorse, rehabilitation, and preparedness for release,¹⁵⁸ as described in greater detail below. For example, in 2023, Governor Brown granted clemency to a recipient convicted at 15 years old.¹⁵⁹ Governor Brown particularly noted the recipient's remorse for his actions, his engagement in rehabilitative programming, and his efforts to prepare for reintegration into society, citing his peer mentorship and vocational training while in the custody of the Oregon Youth Authority.¹⁶⁰ This commutation exemplified the type of commutation the Governor typically granted, but also showed her particular concern for youth and the impact of incarceration on youth development; she particularly mentioned that this young person's impending transfer to more restrictive Department of Corrections custody did not advance the interests of justice.¹⁶¹

iii. Remissions and Reprieves

Remissions and reprieves were the most infrequently exercised of Governor Brown's clemency powers, as people rarely applied for these forms of clemency and she rarely granted them. Through her years in office, she only granted one reprieve and five remissions. When Governor Brown granted her first remission from 2021 to 2022, she denied 10 remission applications, and from 2022 to 2023, she denied 22 remission applications and granted four. Additionally, she previously denied two applications for remissions between 2016 and 2017. Reprieves have also been infrequently applied for and granted only once. From 2020 to 2021, Governor Brown granted her only reprieve, denying eight other applications. From 2016

¹⁵⁸ See generally BROWN, 2022 REPORT, *supra* note 79.

¹⁵⁹ BROWN, 2023 REPORT, *supra* note 118, at 6.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

to 2017, Governor Brown denied the only request for a reprieve and from 2021 to 2022, Governor Brown granted no reprieves, denying seven applications.

Governor Brown granted her only reprieve to a woman who at the time of her conviction was several months pregnant.¹⁶² Due to the COVID-19 pandemic, the prison programs that would have allowed her to see her newborn were suspended.¹⁶³ Governor Brown responded with a reprieve, allowing the woman to spend a month with her newborn child while living in a treatment facility.¹⁶⁴ This reprieve displayed Governor Brown's concerns about the COVID-19 pandemic, paired with a humanitarian interest in ensuring that a mother and child could spend crucial time together. The Governor determined that it was not in the best interests of the State of Oregon for a mother to spend the weeks before and after birth in prison, and recognized the pandemic's role in increasing this risk.

Governor Brown's four remission grants came in the last two years of her administration. Her first remission grant was given to a woman in 2022, who at the time was under post-prison supervision.¹⁶⁵ Governor Brown noted the recipient's progress since release, but found that her court-ordered financial obligations were a significant barrier to her progress.¹⁶⁶ Particularly, Governor Brown was concerned that the financial burden of these obligations could adversely affect the recipient's ability to pay restitution and compensatory fines to the victims of her crimes.¹⁶⁷ Resolving that these court-ordered obligations did not serve the best interests of the State, Governor Brown remitted all of her court-ordered financial obligations excluding compensatory fines and restitution, relieving the woman of about \$12,800 in court-ordered financial obligations.¹⁶⁸

Between 2022 and 2023 Governor Brown also remitted the court-related restitution of another woman who completed her sentence and post-prison supervision.¹⁶⁹ Despite displaying transformation and showing herself to be a valuable member of her community, her restitution, owed to the Department of Human Services, prevented her from expunging her record and making financial progress.¹⁷⁰ Recognizing the significant financial burden that the court-ordered restitution posed and noting the District Attorney's support of the remission application, Governor Brown remitted all of the recipient's court ordered financial obligations, totaling about \$50,000.¹⁷¹ Similarly, between 2021 and 2022, Governor Brown

¹⁶² BROWN, 2021 REPORT, *supra* note 150, at 1, 20.

¹⁶³ *Id.* at 20.

¹⁶⁴ *Id.*

¹⁶⁵ BROWN, 2022 REPORT, *supra* note 79, at 20–21.

¹⁶⁶ *Id.* at 21.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ BROWN, 2023 REPORT, *supra* note 118, at 40. This woman was a clemency client of the Criminal Justice Reform Clinic.

¹⁷⁰ BROWN, 2023 REPORT, *supra* note 118, at 40. *See* OR. JUD. DEP'T, CRIMINAL SET-ASIDE (ADULT CASES) 1 (2023).

¹⁷¹ *Id.* Defying conventions about perpetrators and victims of crime, this recipient was also the victim-survivor of one of Governor Brown's previous commutation recipients. *See* BROWN, 2021 REPORT, *supra* note 150, at 20; Aimee Green, *Portland Mother of Young Gang Victim Sentenced to 15 Months for Embezzling from State Job*, THE OREGONIAN, <https://www.oregonlive.com/>

granted remissions to individuals whose court-ordered financial obligations resulted in the suspension of their drivers' license and represented a barrier to their further progress.¹⁷² Noting the legislature's affirmation that suspending licenses for inability to pay is "bad public policy," Governor Brown remitted these applicants' court-ordered financial obligations, excluding compensatory fines and restitutionary awards to victims.¹⁷³

These recipients' circumstances and Governor Brown's rare use of her remission power suggests that remissions are granted in only the most burdensome circumstances, or when countervailing public policy suggests its propriety. The availability of relief from court-ordered fines and fees coming from other sources may explain this hesitant use. In the past few years, bills¹⁷⁴ and judiciary orders¹⁷⁵ have attempted to alleviate the burden of fines and fees, particularly in light of the financial strains associated with the COVID-19 pandemic.¹⁷⁶ With the advent of legislative reforms aimed at removing unnecessary and burdensome fines and fees, remissions may have been considered less necessary.¹⁷⁷ The infrequency of remission grants may also be a result of the infrequency of petitioners seeking to have their financial obligations remitted. In her eight years in office, Governor Brown only received 46 remission applications, 26 of which came during her final year in office.¹⁷⁸ Regardless of the motivations behind the reluctance to remit court-ordered financial obligations, remissions were generally used as an extraordinary clemency remedy through Governor Brown's administration.

B. Factors Influencing Governor Brown's Application-based Clemency Grants

1. 2022 Clemency Report

Governor Brown's 2022 clemency report provides evidence of the factors that motivated the Governor's grants of clemency applications.¹⁷⁹ From June 25, 2021, to March 4, 2022, the date of the report, Governor Brown granted five pardon applications, 31 commutation applications, and one application for a

portland/2012/01/portland_mother_of_young_gang.html (Jan. 5, 2012, 3:10 AM); Aimee Green, *New Details: Brothers Shot 13-year-old Victim in Back, Bludgeoned Him, Over Portland Girl*, THE OREGONIAN, https://www.oregonlive.com/portland/2013/06/new_details_brothers_shot_13-y.html (June 10, 2013, 8:31 PM).

¹⁷² BROWN, 2023 REPORT, *supra* note 118, at 40–41.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., *Juvenile Fees and Fines*, YOUTH, RTS. & JUST., <https://youthrightsjustice.org/juvenile-fees> (last visited July 28, 2024).

¹⁷⁵ See, e.g., OR. JUD. DEP'T, STATE COURTS REDUCE THE BURDEN OF FINES AND FEES (2021).

¹⁷⁶ See *COVID-19 Reform Tracker*, FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/covid-19-policy-tracker/reform-tracker/> (last visited July 20, 2024).

¹⁷⁷ See VITTORIO NASTASI & CAROLINE GREER, REASON FOUND., FINES AND FEES: CONSEQUENCES AND OPPORTUNITIES FOR REFORM (2023).

¹⁷⁸ See table *supra* Section V.a.1.

¹⁷⁹ While her 2023 report details more grants of clemency and includes categorical and individual grants, her 2022 report is analyzed here for the Governor's detailed explanations of her clemency ideology. Additionally, the number of clemency grants in 2022 make this cohort particularly conducive to detailed analysis of each individual grant.

remission.¹⁸⁰ Throughout this report, the Governor was careful to note the reasons for each grant of clemency, and an analysis of these stated reasons reveals a pattern of rationales the Governor relied upon across many of the individual cases she considered.¹⁸¹ Specifically, Governor Brown expressed interest in the following factors: the age of the person in custody, evidence of extraordinary rehabilitation, District Attorney support of the clemency application (which often indicated victim support or neutrality), the existence of a re-entry plan, and evidence of medical challenges.¹⁸² Although the Governor did not specifically condition receipt on the existence of these factors, many of them are mentioned by the Governor as dispositive to her decisions, and their existence displays their importance to the Governor and reflects her motivations for granting clemency applications.¹⁸³ They also provide useful guidance for potential clemency applicants, displaying the factors that maximize the likelihood of an affirmative clemency grant.

i. Factors Influencing Commutation Grants

The chart below shows the occurrence of these factors in each of Governor Brown's commutations listed in her 2022 report,¹⁸⁴ analyzing the language the Governor used in the report to display the frequency of each factor in her grants. Her references to District Attorney ("DA") support varies, and at times she referred to the DA's position in the case as neutral, indicating that the DA did not support or oppose the application. If the Governor did not mention the position of the DA, this chart lists DA support as "No":

Conviction	Youth	Extraordinary Rehabilitation	DA support	Re-entry plan	Medically compromised (age, illness, etc.)
Robbery I	No	Yes	No	Yes	No
Robbery I	Yes	Yes	Yes	Yes	No
Delivery/Felon in Possession of Firearm	No	Yes	No	Yes	No
Aggravated Identity Theft and Aggravated Theft I	No	Yes	Did not oppose	Yes	No

¹⁸⁰ BROWN, 2022 REPORT, *supra* note 79, at 1.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Conviction	Youth	Extraordinary Rehabilitation	DA support	Re-entry plan	Medically compromised (age, illness, etc.)
Unlawful Use of a Weapon and Felon in Possession of a Firearm	No	Yes	No	Yes	No
Aggravated Murder & Kidnapping	No	Yes	No	No	Yes
Attempt To Commit Robbery I, Kidnapping I, and Two Counts of Robbery I	Yes	Yes	Did not oppose (with conditions)	Yes	No
Aggravated Murder/Assault II	Yes	“colossal rehabilitation”	No	Yes	No
Robbery II	No	Yes	No (victim support)	Yes	No
Attempt to Commit Assault I	No	Yes	Did not oppose	Yes	No
Burglary I and II	No	Yes	No	Yes	No
Robbery II	No	Yes	Yes	Yes	No
Attempt to Commit Aggravated Murder	Yes	Yes	No	Yes	No
Robbery I	Yes	Yes	No	Yes	No
Robbery I	No	Yes	No position	Yes	No
Identity Theft/Burglary I	No	Yes	No	Yes	No
Felon In Possession of a Firearm	No	Yes	No	Yes	No
Attempt To Commit Murder, Assault I, and Unlawful Use of a Weapon	Yes	Yes	No	Yes	No

Conviction	Youth	Extraordinary Rehabilitation	DA support	Re-entry plan	Medically compromised (age, illness, etc.)
Aggravated Murder and Attempted Aggravated Murder	Yes	Yes	No	No	No
Possession of Methamphetamine	No	Yes	No	Yes	No
Robbery I and Manslaughter I	Yes	Yes	No	Yes	No
Murder	Yes	Yes	Yes	Yes	No
Conspiracy to Commit Robbery I	No	Yes	No	Yes	No
Aggravated Theft I And Burglary II	No	Yes	Not opposed	Yes	No
Aggravated Murder and Robbery I	Yes (20)	Yes	Yes	Yes	Yes
Attempt to Commit Murder	Yes	Yes	Yes	Yes	No
Felon in Possession of a Firearm and Identity Theft	No	Yes	Not opposed	Yes	No
Manslaughter II	No	Yes	No	Yes	No
Murder	Yes (21)	Yes	No	Yes	No
Felon in Possession of a Firearm	No	Yes	No	Yes	No
Felon in Possession of a Firearm	No	Yes	No	Yes	No

The breakdown of the common rationales for these 31 commutations displays notable patterns. Through every grant of commutation, Governor Brown noted the rehabilitation of the recipient, often citing evidence of extraordinary rehabilitation as a rationale for the clemency grant.¹⁸⁵ Although she did not explicitly condition rehabilitation as a prerequisite for clemency grants, she specifically mentions that rehabilitation is an important, if not dispositive factor in her grants. She noted that she exercised her clemency power “after determining that each person below demonstrated extraordinary rehabilitation and evinced a level of transformation that gave me confidence that they would not commit another crime.”¹⁸⁶ For many of these recipients, Governor Brown took time to explain this evidence of rehabilitation. For example, while describing the rehabilitation of one recipient, Governor Brown noted that he “overcame many obstacles, became a leader within his OYA institution, facilitated group programs, and demonstrated his transformation through his actions when confronted with conflict.”¹⁸⁷ The Governor was particularly interested in each applicant’s demonstration that their time in custody resulted in a positive change.

This interest has been reflected through many of the clemency grants of previous Oregon governors, including those who did not provide detailed rationales for granting clemency. For example, in 1973, 26 of the 55 recipients of pardons and commutations were noted by Governor Tom McCall as demonstrating “exceptional rehabilitation.”¹⁸⁸ In his 1985 clemency report, Governor Victor Atiyeh cited exceptional rehabilitation as the rationale for granting clemency to each of the ten recipients.¹⁸⁹ These examples demonstrate the efficacy of rehabilitation as a motivator for clemency grants. Although Governor Brown had the power to use clemency at will, she demonstrated a tendency to only utilize it for applicants who demonstrated some form of rehabilitation while in custody. However, it should be noted that for Governor Brown’s 2021–2022 grants, rehabilitation was necessary, but not sufficient for a clemency grant. Although all 37 grants were given to recipients displaying rehabilitation, rehabilitation alone did not form the basis of a single grant of clemency.¹⁹⁰

Similarly, evidence of a re-entry plan was an important theme of Governor Brown’s commutation grants. Almost all of her 2022 commutation grants were given to recipients who had some form of a re-entry plan.¹⁹¹ She specifically noted that her staff was directed to work with “the Department of Corrections and community partners to ensure that each person’s re-entry and release plan included transitional drug and alcohol treatment (if needed), appropriate housing, mental and

¹⁸⁵ See, e.g., BROWN, 2022 REPORT, *supra* note 79, at 4–5 (explaining that the recipient demonstrated “extraordinary evidence of rehabilitation and maturity,” and that their continued incarceration did not serve the best interests of the State of Oregon).

¹⁸⁶ *Id.* at 4.

¹⁸⁷ *Id.* at 8.

¹⁸⁸ TOM MCCALL, REPORT ON EXECUTIVE CLEMENCY, J-5, 57th Leg. Sess. (Or. Jan. 9, 1973).

¹⁸⁹ VICTOR ATIYEH, REPORT OF THE GOVERNOR TO THE SIXTY-THIRD LEGISLATIVE ASSEMBLY UPON THE EXERCISE OF EXECUTIVE CLEMENCY, HJ-20, 63rd Leg. Sess. (Or. Jan. 15, 1985).

¹⁹⁰ See BROWN, 2022 REPORT, *supra* note 79.

¹⁹¹ *Id.*

behavioral health care, ongoing prosocial support and mentorship, and concrete plans for employment.”¹⁹² Only two recipients did not have re-entry plans that Governor Brown specifically noted in her report: one was commuted due to his rehabilitation and declining health, and the other was commuted to the Parole Board.¹⁹³ Thus, together with evidence of rehabilitation, a release plan effectively was necessary for a successful clemency application between 2021 and 2022.

For many recipients, Governor Brown briefly noted particulars of the recipient’s release plan. These particulars included provisions for mental health, physical health, and substance use treatment.¹⁹⁴ For some recipients, Governor Brown further noted community involvement in re-entry plans, emphasizing personal and community networks available to help the recipients upon release. For example, the Governor noted that an enrolled member of the Klamath Tribes was assisted in re-entry by the Tribes.¹⁹⁵ While Governor Brown never used language indicating that a suitable re-entry plan was a condition for receiving commutations, it certainly seemed to be an indispensable factor in her decision to commute the sentences of adults in custody.

The prevalence of rehabilitation and re-entry plans as factors in clemency grants display the Governor’s concern with ensuring the successful re-integration of all the individuals she granted commutations to. Governor Brown was explicit when discussing this concern; she specifically mentioned that the determination that each recipient exhibited significant rehabilitation and transformation “gave [her] confidence that they would not commit another crime.”¹⁹⁶ By uniformly granting clemency to adults in custody who showed some sort of rehabilitation, Governor Brown ensured that the recipients worked to address the underlying issues that led to their incarceration and could safely and confidently re-enter society. By overwhelmingly granting clemency for adults in custody who had a proper release plan, Governor Brown displayed her concern that each recipient received the support needed to become a successful and contributing member of the community, and ultimately, the support needed to ensure that they did not recidivate.

While Governor Brown was particularly concerned with the success of commutation recipients, her meticulous approach can also be explained by the unpopularity of commutations as a form of clemency. Unlike pardons and remissions, commutations involve the release of an incarcerated individual back to their community before their judicially prescribed release date.¹⁹⁷ The possibility of early release often makes commutations politically unpopular, increasing the likelihood of political backlash with any grant.¹⁹⁸ Governor Brown’s methodical approach and

¹⁹² *Id.* at 4.

¹⁹³ *Id.* at 7–8, 13.

¹⁹⁴ *See, e.g., id.* at 6, 14.

¹⁹⁵ *Id.* at 9.

¹⁹⁶ *Id.* at 4.

¹⁹⁷ Kaplan & Mayhew, *supra* note 1, at 1289–90; STATE OF OR. INFORMATION ON APPLICATIONS FOR EXECUTIVE CLEMENCY 1 (PARDONS, COMMUTATIONS, ETC.), <https://www.oregon.gov/gov/Documents/information%20on%20applications%20for%20executive%20clemency.pdf> (last visited July 20, 2024).

¹⁹⁸ *See* Christopher Seeds, *Governors and Prisoners*, SOC. JUST., 2019, at 81, 96–97; Andrew Selsky, *Governor Brown’s Clemency of Murderer Unleashes Criticism*, ASSOCIATED PRESS, <https://www>.

use of informal criteria for commutation applicants indicates that, politically speaking, commutations may be the hardest form of clemency to grant.

Due to the current proximity to her clemency grants, the success of Governor Brown's approach to limiting recidivism has yet to be completely borne out. While there have been studies about the recidivism rate among the COVID-19 commutation recipients,¹⁹⁹ discussed in further detail below, there has yet to be comprehensive study of the recidivism of Governor Brown's commutation recipients as a whole.²⁰⁰

While rehabilitation and re-entry support were important considerations for Governor Brown, she further considered the degree to which an applicant was involved in their community and committed to making positive changes around them. Governor Brown described the qualities of an "ideal" clemency candidate, explaining that these candidates recognize

"the impact of their actions and display a willingness to apologize, express remorse, sorrow, regret The transformation piece is more about, 'Are they a good person not getting into trouble? What are they doing for others and their community?' That is the big piece for me . . . holding people's hands during hospice, helping folks learn English or Spanish. Any service to the community is important, even if it's a small community."²⁰¹

Although she invoked the imagery of transformation, Governor Brown's statement indicates that rehabilitation alone was not sufficient for the ideal clemency candidate. Instead, she incorporated an approach that considered the applicant's engagement with their community and the extent to which they engaged in "other-focused" activities aimed at helping and empowering a community.²⁰² In other words, Governor Brown was concerned that clemency recipients would be safe to re-enter their communities but was also keen to ensure that these recipients would meaningfully engage with and contribute to these communities, both before and after incarceration. These concerns come from the Governor's own background. Thanks in part to her mother's long-time involvement with the American Cancer Society, Governor Brown particularly valued when applicants displayed an earnest commitment to community service.²⁰³

Several other factors played a part in Governor Brown's 2022 commutation grants. While many of her clemency considerations were focused on ensuring safe re-entry into the community, Governor Brown also carefully considered the potential of commutation as a rehabilitative tool. "Another factor we hit on was the ability to use early release as a tool for rehabilitation. In a handful of cases, we

kgw.com/article/news/crime/oregon-governor-clemency-murderer-criticism/283-bd953c24-57d0-4f2f-a630-569bfd73c627 (April 27, 2022, 4:37 PM).

¹⁹⁹ See, e.g., SIOBHAN MCALISTER, KELLY OFFICER & KEN SANCHAGRIN, OR. CRIM. JUST. COMM'N, RECIDIVATING PATTERNS OF INDIVIDUALS COMMUTED IN 2020 (2022).

²⁰⁰ To the authors' knowledge, there have been about five commutation recipients who have re-offended after receiving clemency. Most of these individuals were originally commuted for offenses committed as youth. Two individuals were subsequently arrested and had their conditional commutations revoked.

²⁰¹ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

²⁰² *Id.*

²⁰³ Waldroupe, *supra* note 146.

decided to release people early for treatment because otherwise, they would not receive it. It's something people don't talk about, even though it's essential."²⁰⁴ Displaying the versatile use of clemency, Governor Brown reflected the overarching goal of utilizing her available executive power to address perceived gaps in the criminal justice system, connecting adults in custody with services not made available by other government agencies.

Throughout her report, the Governor also noted the ages of individuals convicted as juveniles and for many of these individuals, she specifically documented their work to address childhood challenges.²⁰⁵ In the context of her juvenile group clemency grants, discussed further below, the Governor took particular consideration of the age of the recipients and the role brain development played in their conviction and eventual rehabilitation.²⁰⁶

Throughout her 2022 commutation grants, District Attorney support played a less significant role in Governor Brown's actions, but was relevant to the extent that the District Attorney supported the clemency application. Governor Brown did not specifically mention the opposition of District Attorneys, and instead described the District Attorneys' contribution to the victim notification process.²⁰⁷ For a few applications, Governor Brown noted that the District Attorney did not oppose the application.²⁰⁸ Governor Brown's silence as to the position of individual District Attorneys could indicate some level of District Attorney opposition to the clemency application, or that the District Attorney did not make their position known. Either way, Governor Brown did not go into extensive detail about the lack of District Attorney support, indicating that it played a less significant role than other factors she considered. However, she was careful to note occasions where the District Attorney supported the applicant's clemency petition.²⁰⁹

Governor Brown noted health or advanced age as a factor for clemency in two cases. In her commutation of one recipient's sentence, the Governor stated that his continued incarceration would not serve the best interests of the State, "especially given that he is 78 years old and has significant debilitating medical issues."²¹⁰ Similarly, in her grant of clemency to another recipient, Governor Brown concluded that his continued incarceration would not serve the best interests of the State, "especially given [his] recent major medical issues."²¹¹ The factors of age and health were limited in their impact on 2022 clemency grants, but they display how serious health issues and advanced age may be contributing factors to the Governor's decision to grant a commutation.

While many of the rationales discussed in her 2022 clemency report represent aspects of successful commutation applicants, Governor Brown also closely considered the extent to which overarching societal factors impacted an individual,

²⁰⁴ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

²⁰⁵ BROWN, 2022 REPORT, *supra* note 79.

²⁰⁶ See discussion *supra* Section VI.c.

²⁰⁷ BROWN, 2022 REPORT, *supra* note 79.

²⁰⁸ *Id.* at 7, 9–10.

²⁰⁹ *Id.* at 6, 10, 15–17.

²¹⁰ *Id.* at 8.

²¹¹ *Id.* at 16.

even before their crime was committed. Governor Brown's commutation of Kiesha Johnson's sentence presents an example of this holistic approach. In 2003, Ms. Johnson was sentenced to life in prison after the fatal shooting of a woman during a drug deal.²¹² At the time, Ms. Johnson struggled with a drug addiction and when she went with a man to trade for drugs, she was unaware that he was going to use violence. Although she was not the perpetrator of the crime and was merely present, prosecutors argued that she assisted the perpetrator and thus was guilty of felony murder.²¹³ In a December 2022 conversation at Princeton University, Governor Brown recounted Ms. Johnson's story, specifically noting that Ms. Johnson was a Black, lesbian woman whose incarceration came from an all-white jury verdict.²¹⁴ Governor Brown later apologized to Ms. Johnson's family for the role that racism, sexism and homophobia played in her conviction.²¹⁵ The Governor's recognition of the societal factors that came into play is significant, as her rehabilitation alone would likely be grounds for a clemency grant. Ms. Johnson's commitment to rehabilitation was noted by Governor Brown on several occasions and the victim's children supported her commutation petition.²¹⁶ Yet, Governor Brown was careful to note the societal discrimination Ms. Johnson faced, and particularly, the role Oregon's criminal justice systems played in perpetuating them.²¹⁷ Governor Brown later recounted the impact cases like Ms. Johnson's had on her view of clemency and the criminal justice system. "One of these cases was Kiesha Johnson's. I had the chance to meet Kiesha and her family . . . I am so appalled by the case even today. I apologized to her, and I remember her crying. I know there are many cases like that. But for me, that case was so egregious."²¹⁸ For the Governor, these cases encouraged her to actively use her commutation power: "As I met more people and saw what was happening, and as I saw that we had few re-offenders from the commutations, I decided that I wanted to do more of them."²¹⁹

ii. Factors Influencing Pardon Grants for 2022 Pardon Recipients

The 2022 pardon recipients were situated differently than those who received commutations, and slightly different factors influenced the Governor's decision to grant pardon applications. Although in the clemency context, rehabilitation typically refers to individual progress and change made during incarceration, pardon recipients displayed rehabilitation by successfully avoiding recidivism, positively contributing to their community, or otherwise demonstrating lawful and pro-social

²¹² Sami Edge, *Portland State Helps Former Inmates Transition from Prison to College*, THE OREGONIAN (Apr. 2, 2023, 6:00 AM), <https://www.oregonlive.com/education/2023/04/portland-state-helps-former-inmates-transition-from-prison-to-college.html>.

²¹³ *Id.*

²¹⁴ Princeton School of Public and International Affairs, *Correcting Injustice: How Clemency Serves Justice and Strengthens Communities*, YOUTUBE (Dec. 2, 2022), <https://www.youtube.com/watch?v=LtV7nGSQOyA>.

²¹⁵ Edge, *supra* note 212.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

²¹⁹ *Id.* Today, Ms. Johnson is studying at Portland State University, pursuing a liberal studies degree. She also works at the university.

behavior.²²⁰ All five pardon recipients were noted by the Governor as “law-abiding citizens” and valuable members of their communities since their release.²²¹ For three of the pardon recipients, Governor Brown noted the position of the District Attorney associated with their case, noting that they did not oppose the petition in two cases, and documenting their support of one pardon petition.²²² In the case of a recipient pardoned for a drug crime, Governor Brown emphasized their current sobriety.²²³ She also noted the recipients who dedicated their time to public service and volunteering and was careful to call attention to the individual achievements of recipients who were involved with particular public service projects.²²⁴ For example, she noted that a recipient worked with Alaska’s Sustainable Lands Department to help create a training program to help native Alaskan communities learn about toxic waste cleanup.²²⁵ Where relevant, Governor Brown noted recipients’ personal motivations for receiving a pardon; in conjunction with their work to surpass past trauma and their community involvement, Governor Brown cited a recipients’ genuine desire to meaningfully connect with their family as part of her clemency decision.²²⁶

Governor Brown also noted recipients who were convicted of offenses as juveniles. In explaining her rationale for pardoning one recipient, the Governor notably mentioned that he was a young and neurodivergent juvenile at the time of conviction.²²⁷ Remarkably, she observed that professionals opined that he did not pose a risk of recidivism and should not have been incarcerated at all.²²⁸ These statements reflect the Governor’s understanding of juvenile development, and align with her skepticism of punitive incarceration’s suitability for helping juveniles who commit crimes develop into productive members of society.

C. *Governor Brown’s Use of Power as a Tool for Community Empowerment*

While the stated rationales in the 2022 report reveal patterns about the features of successful pardon applications, an analysis of one of the Governor’s first pardons reveals more about her conception of the pardon power and her conception of clemency as a tool for empowering marginalized communities. On February 12, 2018, Dondrae “Choo” Fair was pardoned by Governor Brown for crimes associated with a carjacking he committed at 19, in 1992.²²⁹ After serving a five-year

²²⁰ BROWN, 2022 REPORT, *supra* note 79, at 19–20.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 20.

²²⁴ *Id.* at 19–20.

²²⁵ *Id.* at 19.

²²⁶ *Id.* at 20.

²²⁷ *Id.* at 19.

²²⁸ *Id.*

²²⁹ *Governor Kate Brown Pardons Former Gang Member Dondrae ‘Choo’ Fair Who Became Mentor*, ASSOCIATED PRESS (Feb 12, 2018, 1:23 PM), <https://www.statesmanjournal.com/story/news/crime/2018/02/12/governor-kate-brown-pardons-former-gang-member-dondrae-choo-fair-who-became-mentor/330901002> [hereinafter *Brown Pardons Fair*]; Shane Dixon Kavanaugh, *Gov. Kate Brown Pardons Former Portland Gang Member Turned Mentor*, THE OREGONIAN (Feb. 12, 2018, 2:50 PM),

sentence and later becoming a victim of a violent crime, Mr. Fair turned his life around and severed his gang ties in 2000.²³⁰ Since then, Mr. Fair has been an important mentor and leader in his community, and an advocate for gang-affiliated men who have experienced prison.²³¹ He also currently works as a corrections counselor for Multnomah County.

Mr. Fair grew up in Northeast Portland, at a time when the crack cocaine epidemic wreaked havoc on the city's Black community, and was an eyewitness to the increase in drugs, violence, and gangs in his community.²³² From a young age, Mr. Fair learned to fend for himself and as a pre-teen, he joined a gang with other impoverished and vulnerable children.²³³ According to Governor Brown, "Mr. Fair's own history of overcoming personal challenges and turning away from gang life lends him the credibility to be such an impactful role model to the young men he mentors."²³⁴ For the Governor, Mr. Fair's willingness to empower and improve his community and to mentor gang-involved youth was an important basis for receiving his pardon. Explaining her pardon grant in a clemency report, Governor Brown explained that "Mr. Fair has demonstrated extraordinary commitment to betterment of the community by mentoring youth and working to reduce gang violence."²³⁵ Mr. Fair reflected this sentiment, arguing that by receiving this pardon, young people who look up to him can be inspired to make changes in their lives: "I come from that lifestyle... I want my story to give them hope."²³⁶ Through her pardon, Governor Brown recognized the transformative potential of community members with criminal justice involvement, while implicitly acknowledging the cycles of poverty and addiction that lead to criminal justice involvement in the first place.

Notably, Mr. Fair received support in his clemency application from various sources, including his arresting officer, prosecuting district attorney, and the victims of his crime.²³⁷ This overarching support certainly spoke to Mr. Fair's incredible accomplishments and engagement with his community, but it also represented the potential for clemency to be a vehicle for reconciliation. This reflects Professor Rapaport's redemptive approach to criminal justice. Through his efforts at rehabilitation and his community service, Mr. Fair was effectively reconciled with his community and his victims, and through a pardon, this reconciliation found legal force and effect.

Mr. Fair's pardon also represented Governor Brown's desire to provide tangible, rather than nominal relief to clemency recipients. Before 2019, executive pardons did not seal an individual's criminal conviction.²³⁸ Thus, when Mr. Fair's

https://www.oregonlive.com/pacific-northwest-news/2018/02/kate_brown_pardons_former_port.html.

²³⁰ *Brown Pardons Fair*, *supra* note 229.

²³¹ Kavanaugh, *supra* note 229.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ BROWN, 2018 REPORT, *supra* note 150, at 2.

²³⁶ Kavanaugh, *supra* note 229.

²³⁷ *Brown Pardons Fair*, *supra* note 229.

²³⁸ S.B. 388, 80th Leg., 2019 Reg. Sess. (Or. 2019) (codified in relevant part at OR. REV. STAT. § 144.652, 144.655).

pardon was granted, there was no mechanism to have his record sealed, a fact that threatened his employment at the time. In later testimony, Professor Aliza Kaplan, who represented Mr. Fair in his clemency petition, described,

After the celebration was over, the most important next step was to seal the records of the 1992 conviction so Choo could stay at his job. It was at this point we realized there is no legal mechanism to seal a pardoned conviction under Oregon law. And to be quite honest, I was dumbfounded. I called the circuit court, the Governor's Office, my contact at the Multnomah County District Attorney's office—no one knew the answer. And that's when I realized that there was no answer because our current pardon statute doesn't allow a legal mechanism to seal a pardoned conviction from someone's criminal record.²³⁹

Although Mr. Fair was able to have his record sealed in a separate hearing, his case highlighted the need for a legal mechanism to seal pardoned convictions.²⁴⁰ Thus, Senate Bill 388 ensued, requiring judges to seal felony criminal records upon notification of a grant of pardon.²⁴¹ This bill was signed into law by Governor Brown, but also received her office's support, as her general counsel at the time, Misha Isaak, testified in support of the bill.²⁴² The Governor was focused on providing real, tangible solutions through her pardon grants.

1. *Factors Influencing Remissions*

Due to the infrequent rate with which application-based remissions were granted during Governor Brown's administration, uncovering the factors that animate these grants requires analyzing all of her clemency reports. Governor Brown's remissions were granted to five individuals who generally comprised the following two categories: two formerly incarcerated applicants had court-ordered financial obligations that prevented their continued progress and three applicants had court-ordered financial obligations associated with driving offenses that resulted in the suspension of their driver's license.²⁴³ While some of the factors animating these grants vary, in all five cases, Governor Brown described the financial obligations as representing a barrier to their continued progress.²⁴⁴

In explaining her remission grants to the two formerly incarcerated applicants, Governor Brown cited their "considerable evidence of rehabilitation" and

²³⁹ *An Act Relating to Pardons; Creating New Provisions; Amending ORS 144.650 and 144.670; and Declaring an Emergency: Hearing on S.B. 388 Before the S. Comm. on the Judiciary*, 80th Leg., 2019 Reg. Sess. (Or. 2019) (statement of Aliza Kaplan, Professor, Lewis & Clark Law School).

²⁴⁰ Today, Choo Fair is still an important part of Portland's Black community. *Choo Fair: People are hurt across the country, and there's a push to make things different. And hopefully, things will be different.*; MULTNOMAH CNTY. (July 23, 2020), <https://www.multco.us/multnomah-county/news/choo-fair-people-are-hurt-across-country-and-there%E2%80%99s-push-make-things>.

²⁴¹ S.B. 388, Leg., 2019 Reg. Sess. (Or. 2019).

²⁴² *An Act Relating to Pardons; Creating New Provisions; Amending ORS 144.650 and 144.670; and Declaring an Emergency: Hearing on S.B. 388 Before the S. Comm. on the Judiciary*, 80th Leg., 2019 Sess. (Or. 2019) (statement of Misha Isaak, General Counsel, Office of Governor Kate Brown).

²⁴³ BROWN, 2022 REPORT, *supra* note 79, at 20–21; BROWN, 2023 REPORT, *supra* note 118, at 40–41.

²⁴⁴ BROWN, 2022 REPORT, *supra* note 79, at 20–21; BROWN, 2023 REPORT, *supra* note 118, at 40–41.

noted that both recipients were law-abiding citizens who were valuable members of their communities.²⁴⁵ For one of these recipients, ability to pay restitution to victims played a factor in granting the remission.²⁴⁶ For the other formerly incarcerated recipient, Governor Brown included District Attorney support and victim input as factors of her decision.²⁴⁷

Consistent factors were also present for the applicants who received remission to facilitate the restoration of their driver's licenses. For all three individuals, Governor Brown noted that their court-ordered financial obligations resulted in the suspension of their driver's licenses and posed a barrier to their continued progress.²⁴⁸

D. What the 2022 Report and Governor Brown's Application-based Grants Reveal About Her Views on Clemency and Oregon's Criminal Justice System

Governor Brown's 2022 report reveals insightful information about the Governor's beliefs about clemency and its role in ensuring the safety of Oregon's communities. In her report, before discussing the details of each individual clemency grant, Governor Brown made a clear statement about incarceration and the importance of decarceration in fostering healthy communities:

Incarceration is not the only solution to hold people accountable, and studies have shown that overly-long prison sentences do not actually make communities safer. These thoughtful and measured clemency actions—which required months of information gathering and deliberation—have a net positive impact on public safety. Communities are safer and better off with these individuals, who have demonstrated accountability and reformation, reentering society from prison and having the opportunity to become positive, contributing members of their communities (or having their conviction removed altogether, in the case of the pardons described below). Many are actively working to reduce crime and recidivism by mentoring at-risk and gang-impacted youth, providing drug and alcohol treatment services, volunteering their time in the community, assisting in the provision of mental and behavioral health services, engaging in restorative justice, and lifting the voices of marginalized, traumatized, and over-incarcerated people of color across the state. Even before their releases, these amazing men and women inspired others in custody to transform their lives and now, after their releases, are helping many more avoid a path that leads to incarceration.²⁴⁹

Through her statement, the Governor displayed her approach to considering clemency applications and made a public case justifying her use of clemency. She was careful to note that “thoughtful and measured clemency actions” positively impact public safety. Further, she emphasized the care and deliberation with which she made each individual decision and highlighted that the grants of clemency are aimed at ensuring all Oregonians lead safer lives. Based on her own remarks, the Governor

²⁴⁵ BROWN, 2022 REPORT, *supra* note 79, at 21; BROWN, 2023 REPORT, *supra* note 118, at 40.

²⁴⁶ BROWN, 2022 REPORT, *supra* note 79, at 20–21.

²⁴⁷ BROWN, 2023 REPORT, *supra* note 118, at 40.

²⁴⁸ *Id.* at 40–41.

²⁴⁹ BROWN, 2022 REPORT, *supra* note 79, at 5.

believed that clemency was not an arbitrary power exercised without significant deliberation.

Through this statement, Governor Brown also presented a justification for her use of clemency while providing her insight into the role of incarceration in Oregon's criminal justice system. Remarkably, she recognized that incarceration is not always a solution to the societal problems surrounding crime, and that extensive incarceration may actually harm communities in the long run. The Governor, who by virtue of her office influenced much of Oregon's criminal justice policy, expressed her concerns with the harm of the existing, over-punitive, carceral system. She also emphasized that formerly incarcerated people can positively contribute to the communities they re-enter, by working with those at risk of entering the criminal justice system and providing resources and treatment to Oregonians struggling with issues they once struggled with themselves.

Governor Brown's beliefs about clemency and its role in improving communities is exemplified through the commutation of Anthony Pickens. In 2000, Mr. Pickens was convicted of murder and sentenced to life imprisonment for a crime committed in 1997, when he was 15.²⁵⁰ Through his actions and his subsequent life sentence, Mr. Pickens harmed and was disconnected from his community. Mr. Pickens's first few years of incarceration bore no change, as he maintained his gang affiliation and engaged in behavior that kept him in trouble.²⁵¹ It was not until he completed a 19-month stay in solitary confinement that Mr. Pickens began to make changes in his life, renouncing his gang membership and engaging with available programming.²⁵² However, the process of reconciliation had already started. At sentencing, a close relative of the victim offered Mr. Pickens forgiveness; as Mr. Pickens matured, he began to consider the perspectives of this victim survivor and the rest of his victim's family.²⁵³ As he later told *The Oregonian*, "I cannot replace what I took from him and his family. What is the best way to make amends for that? The best way to make amends is to change myself."²⁵⁴

Mr. Pickens took advantage of the opportunities provided to him in prison to turn his life around. He engaged with a significant number of rehabilitative programs, worked to address underlying issues from his childhood, and immersed himself in educational opportunities.²⁵⁵ Multnomah County District Attorney Mike Schmidt noted that Mr. Pickens demonstrated "growth which can only be described as transcendent."²⁵⁶ However, Mr. Pickens was also focused on empowering and advocating for his peers and community during his incarceration. Among other

²⁵⁰ *Id.* at 14; Dan Tilkin, *Gov Brown Grants Clemency to 3 Convicted for Murder as Juveniles*, KOIN (Dec. 2, 2021, 5:11 PM), <https://www.koin.com/news/oregon/gov-brown-grants-clemency-to-3-convicted-for-murder-as-juveniles>.

²⁵¹ Noelle Crombie, *Gov. Kate Brown Makes Historic Push to Release Prisoners. Crime Victims, Families feel Blindsided*, THE OREGONIAN (Feb. 6, 2022, 9:34 AM), <https://www.oregonlive.com/news/2022/02/gov-kate-browns-historic-push-to-release-prisoners-surpasses-1200-but-not-without-backlash.html> [hereinafter Crombie, *Historic Push*].

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ BROWN, 2022 REPORT, *supra* note 79, at 14.

²⁵⁶ Crombie, *Historic Push*, *supra* note 251.

things, he served as president for Uhuru Sasa,²⁵⁷ organized and facilitated programming within the prison, volunteered to care for patients in hospice care, and organized and led workshops and seminars geared at helping adults in custody understand and navigate the legal system.²⁵⁸ He also took extensive steps to ensure that he would succeed upon release, developing a detailed release plan and garnering support from those who knew him.²⁵⁹ Mr. Pickens took the opportunity to rehabilitate himself, providing an opportunity for eventual reconciliation with his community. In 2021, Governor Brown commuted Mr. Pickens' life sentence and after 24 years of incarceration, he was released from Oregon State Penitentiary.²⁶⁰ Reporting her grant to the legislature, Governor Brown asserted that "Mr. Pickens demonstrated excellent progress, profound maturity, and extraordinary evidence of rehabilitation" and concluded "that his continued incarceration does not serve the best interests of the State of Oregon."²⁶¹ Through her commutation, the Governor recognized Mr. Pickens' tremendous individual change and his efforts at advocating for others, and determined that incarceration had no further role in his rehabilitation.

However, granting Mr. Pickens clemency also provided the opportunity for reconciliation and community empowerment. The victim survivor who forgave Mr. Pickens at sentencing did not oppose his commutation, later telling the Oregonian, "I am very proud of him. A lot of people go on that path he was on and never make anything of themselves."²⁶² Thanks to his efforts at self-improvement, Mr. Pickens placed himself in the position to reconcile with his victims and community. Mr. Pickens has remained active in his community and taken the opportunities available to him to make lasting change. In 2020, Mr. Pickens, served as a facilitator for Willamette University Professor Melissa Buis Michaux's class and after a Willamette student expressed an interest in challenging the slavery exception in Oregon's Constitution, members of Uhuru Sasa and students at Willamette created Oregonians Against Slavery and Involuntary Servitude (OASIS).²⁶³ OASIS's efforts resulted in Measure 112, passed in 2022, formally repealing the language in Oregon's Constitution allowing slavery and involuntary servitude.²⁶⁴ Mr. Pickens, who received clemency during the project's pendency, reflected on the significance of the change

²⁵⁷ Uhuru Sasa is the Black cultural group in Oregon State Penitentiary. Since its inception in 1968, Uhuru Sasa has provided cultural, vocational, and educational development to its members. *Adult in Custody Programs: Uhuru Sasa*, OR. DEP'T OF CORR., <https://www.oregon.gov/doc/aic-programs/pages/social-activities.aspx> (last visited July 20, 2024).

²⁵⁸ BROWN, 2022 REPORT, *supra* note 79, at 15; Portland State U., *Organizing and Education in Prison: A Panel with Uhuru Sasa*, THE BLACK BAG SPEAKER SERIES, at 53:33 (May 24, 2022), https://pdxscholar.library.pdx.edu/black_bag_series/19.

²⁵⁹ BROWN, 2022 REPORT, *supra* note 79, at 15.

²⁶⁰ Crombie, *Historic Push*, *supra* note 251; Alex Baumhardt, *How 'a Bunch of Kids and People the State Gave Up on' Rid Slavery from Oregon's Constitution*, OR. CAP. CHRON. (Dec. 28, 2022, 5:45 AM), <https://oregoncapitalchronicle.com/2022/12/28/how-a-bunch-of-kids-and-people-the-state-gave-up-on-rid-slavery-from-oregons-constitution>.

²⁶¹ BROWN, 2022 REPORT, *supra* note 79, at 15.

²⁶² Crombie, *Historic Push*, *supra* note 251.

²⁶³ Baumhardt, *supra* note 260. Previously, Oregon's Constitution allowed slavery or involuntary servitude as a punishment for crime. *Id.*

²⁶⁴ *Id.*

in law, “This meant something, as an African American man and as someone who has lived experience inside the institution, it meant a lot. I spent 24 years incarcerated and working for pennies an hour. Then, coming out of prison and not being able to have anything to show for it. No Social Security even though I worked for 24 straight years for (the Department of Corrections).”²⁶⁵ Thanks to efforts both during and after incarceration, Mr. Pickens was able to contribute to making lasting change for members of his incarcerated community and his community at large.²⁶⁶

Mr. Pickens’ story reflects a holistic approach to clemency aimed at addressing systemic problems leading to criminal justice involvement and recognizing individuals working to empower their own communities. The Governor recognized his change and efforts at empowering others, and through her grant of clemency provided an opportunity for reconciliation with his community. In turn, Mr. Pickens made the best of his second chance, using the tools available to him to seek lasting change and provide advocacy for others. While the Governor did not initiate the process of reconciliation or rehabilitation, her use of clemency recognized and affirmed these processes, creating an environment where reconciliation and rehabilitation could be fully realized. In this way, the Governor’s commutation was a tool for community empowerment, as Mr. Pickens re-joined his community better equipped to handle the most pressing challenges facing it.

This approach by Governor Brown again reflects Professor Rapaport’s redemptive theory of clemency. Through her statements, and by providing clemency to individuals like Mr. Pickens, Governor Brown reflected an ultimate goal of reconciling Oregonians who commit crimes to their communities and victims, if possible. Just as the redemptive approach emphasizes the transformative work done by clemency recipients and the importance of that work in empowering the community they re-enter, Governor Brown emphasized the role that clemency recipients have in the community, serving as examples of redemption and uniquely qualified resources to empower others and to help members of their community avoid incarceration.

It is worth noting that Governor Brown’s utilization and conception of clemency derives from her background advocating for criminal justice reform in the legislature and beyond. For Governor Brown, reforming Oregon’s criminal justice system has been a long-term initiative, and she has sought to use any tools at her disposal to pursue these goals. As she explained,

Around the time Measure 11 passed, I understood the system and understood that the outcomes were really biased. The data was really clear back then, but the legislature made different decisions. It has been really hard in Oregon from a public policy standpoint. We are such a progressive state but when it comes to this field [criminal justice], we have more seniors, young Black men, young women, etc. locked up per capita. I worked to change these dynamics in the legislature; the one tool a governor has to make this type of change is the clemency program. An example is capital punishment. In Oregon, the

²⁶⁵ *Id.*

²⁶⁶ Mr. Pickens continued his work as a Social Justice and Prison Reform Policy Associate for the Oregon Justice Resource Center until 2023. Anthony Pickens, LINKEDIN, <https://www.linkedin.com/in/anthony-pickens-25b84b238/> (last visited July 20, 2024).

application of the death penalty was arbitrary and unjust. I knew early on that we hoped to commute death row, but we didn't have a roadmap to follow.²⁶⁷

Here, Governor Brown implied that many participants in the administration of the criminal justice system possess viable tools for equity and reform. Her statement also emphasizes the importance of people administering the criminal justice system using the tools available to them to pursue equity and justice. By frequently exercising her clemency power to achieve these goals, Governor Brown not only modeled the approach of using executive power to impact the criminal justice system, but also signaled that the system's other participants should use the power available to them to create a more equitable system. As Governor Brown opined, "Clemency is one of the most powerful tools for embedding fairness."²⁶⁸

E. *What Responses to Governor Brown's Clemency Reveals About the Politics of Clemency*

While clemency can be an effective tool for equity and justice, the fact that it is wielded by an elected official can present its own weaknesses. This is especially so in the modern era, where conversations about crime and criminal justice often draw staunch political lines. Much of the media coverage around Governor Brown's clemency grants exemplified this tension and the potential political hazards associated with clemency. After increasing her clemency grants, the Governor faced increasing scrutiny from the media, many of whom profiled clemency recipients and applicants, often in a negative light.²⁶⁹ This was particularly so for the clemency recipients who had their sentences for life without parole commuted.²⁷⁰ The clemency of Kyle Hedquist presents an example of this dynamic.

In April 2022, Governor Brown commuted Mr. Hedquist's life without parole sentence for an aggravated murder committed at age 18, while still in high school.²⁷¹ In her report describing her decision to commute Mr. Hedquist's sentence, Governor Brown recognized that he demonstrated "excellent progress and extraordinary evidence of rehabilitation" and emphasized his work while incarcerated, noting that "Mr. Hedquist is the person responsible for bringing Toastmasters to prisons across the country and he volunteered in the hospice program for 20 years where he cared for people as they died without family around them, volunteered for years in the disciplinary segregation unit, pursued higher education,

²⁶⁷ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

²⁶⁸ Harvard Kennedy School Institute of Politics, *A Conversation with Former Governor of Oregon Kate Brown on Mass Incarceration*, YOUTUBE (March 23, 2023), <https://www.youtube.com/watch?v=6IRCC8x7JYU&t=329s>.

²⁶⁹ For example, Fox News published a story titled "Oregon Christmas killer could go free after just 14 years of 25 to life sentence if Gov. Brown grants clemency" before the Governor considered the commutation petition the story concerned. The subject of the piece was not granted clemency. Michael Ruiz, *Oregon Christmas Killer Could Go Free After Just 14 Years of 25 to Life Sentence if Gov. Brown Grants Clemency*, FOX NEWS (Jan. 22, 2022 1:36 PM), <https://www.foxnews.com/us/oregon-kate-brown-lynley-rayburn-murder-dale-rost-clemency>; see generally BROWN, 2022 REPORT, *supra* note 79; BROWN, 2023 REPORT, *supra* note 118.

²⁷⁰ In 2022, this included John Bray, Troy Ramsey, and Terrence Tardy. BROWN, 2022 REPORT, *supra* note 79, at 7–18. In 2023, this included Randall Clegg, Kyle Hedquist, Robert Kelley, Reschard Steward, and Kevin Young. BROWN, 2023 REPORT, *supra* note 118, at 7–20.

²⁷¹ BROWN, 2023 REPORT, *supra* note 118, at 11.

mentored men, was deeply involved in religious programming, and secured a job prior to his release.”²⁷² However, as the news media reported on the clemency grant, many publications adopted a different tone. A local NBC affiliate reported the story under the headline “Oregon governor’s clemency of murderer unleashes criticism”; the first line of the story described Mr. Hedquist’s crime.²⁷³ The story emphasized the political dynamic that ensued following many of Governor Brown’s commutation grants: “The clemency of Hedquist has fueled Republican complaints that Brown, a Democrat who is not running for reelection this year because of term limits, is soft on crime.”²⁷⁴ Notably, much of the discussion surrounding Mr. Hedquist’s release focused on the crime, with some stories providing graphic details of the case. A local CBS affiliate ran a story headlined “‘Cold blooded’ killer released, Oregon family not told.”²⁷⁵ Like others, this publication included graphic details of the crime, and no discussion of Mr. Hedquist’s rehabilitation.²⁷⁶

The difference in the media portrayal of clemency and the Governor’s reporting of the clemency grants highlights differing perspectives on the appropriateness and purpose of clemency. Through her discussion of the recipient’s progress, impact on their community, and transformation inside, the Governor indicated a belief that people involved in the criminal justice system, especially people convicted at young ages, have the capacity to change. By discussing the crime and the impact on victims years later, many publications (and through them, some local officials) expressed a view that offenders should continue to be defined by their crime and the impact it had on the victims, regardless of individual growth or change. This view provides a binarized perspective on criminal justice, where perpetrators and victims of crime are necessarily opposed, and gains for one mean losses for the other. As Marion County District Attorney Paige Clarkson claimed, “victims have reached out to [me] wondering why the perpetrator in their case was given leniency, why their sense of justice was diminished.”²⁷⁷ It should be noted that under Oregon law, responsibility for victim notification in clemency cases solely belongs to the district attorney of the county where the conviction occurred.²⁷⁸

While much of the media criticism directed toward Governor Brown centered on the role and perspectives of victims of clemency recipients, it should be noted that many victims are neutral or support clemency applications. In a statement to *The Guardian*, Mary Zinkin, founder and executive director of the Center for Trauma Support Services, emphasized that victims opposing clemency have

²⁷² *Id.*

²⁷³ Selsky, *supra* note 198; *About Us*, KGW, <https://www.kgw.com/about-us> (last visited July 20, 2024).

²⁷⁴ *Id.*

²⁷⁵ Brandon Thompson, ‘Cold Blooded’ Killer Released, Oregon Family Not Told, KOIN, <https://www.koin.com/news/oregon/cold-blooded-killer-released-oregon-family-not-told> (Apr. 27, 2022, 6:48 PM). In Oregon’s clemency system, District Attorneys are responsible for locating and contacting victims and victim survivors. OR. REV. STAT. § 144.650 (2023).

²⁷⁶ Thompson, *supra* note 275.

²⁷⁷ *Id.*

²⁷⁸ OR. REV. STAT. § 144.650 (2023).

been disproportionately represented in the press, and “[t]hey do not represent all crime survivors.”²⁷⁹

The dynamics described here represent an iteration of retributivist thought that has arisen in opposition to modern clemency efforts in Oregon. While some view clemency as an opportunity to redeem an offender and reconcile them with their community, this perspective sees clemency as a part of the paradigm of crime and punishment; in this view, by issuing a commutation, a Governor effectively prevents the complete carriage of “justice”—in their view, the completion of the person’s sentence. Governor Brown later gave her thoughts on this perspective, and the sentiments expressed by some victims and clemency opponents, “Where there was an opportunity for mediation, I encouraged folks to take advantage of those opportunities. Looking back, it is easier to say this. I had 30 years to build this muscle; I did the research, and paid attention to what was happening in the world. However, I understand that not everyone has the same experiences or perspectives.”²⁸⁰

The retributivist view was reflected by statements from a local Republican politician, who claimed that “[a]s with many others, the facts of this case are outrageous and brutal . . . [t]he Governor continues to let violent criminals out of prison, and Democrats in the majority remain silent.”²⁸¹ The allusion to state Democratic politicians is indicative of the politicization of clemency. The clemency power in Oregon is plenary, and there are no statutory mechanisms currently limiting the Governor’s power to use clemency as she pleases.²⁸² Yet, some Oregon lawmakers used their counterparts’ silence about clemency as a political invective.²⁸³ This politicization of Mr. Hedquist’s clemency was even more pronounced given the timing of his grant, in the middle of an election year. Governor Brown herself noted the political nature of the response to her commutations, arguing that some district attorneys were “scoring political points by stoking public fears in these cases.”²⁸⁴

Governor Brown later described the backlash she received from her most controversial clemency grants: “Don’t ever forget, Willie Horton. That is what we are most afraid of. We are most afraid of a case like that. You just don’t know when any of these cases will come back and haunt you. Even without Willie Horton that would still be there, you would feel horrible . . . anyone would.”²⁸⁵ This statement touched on the political precariousness often involved in clemency determinations, particularly in cases concerning recipients convicted of “serious” crimes, and the inert fears of facing political or societal backlash as a result. However,

²⁷⁹ Waldroupe, *supra* note 146.

²⁸⁰ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

²⁸¹ Selsky, *supra* note 198.

²⁸² See OR. CONST. art. V, § 14.

²⁸³ Selsky, *supra* note 198.

²⁸⁴ *Id.*

²⁸⁵ Telephone Interview with Kate Brown (Feb. 26, 2024), *supra* note 82. Here, the Governor is referencing the case of Willie Horton, who was convicted of a rape committed while on furlough. The backlash Massachusetts Governor Michael Dukakis faced as a result is often cited as a significant factor for his defeat in the 1988 presidential election. See NOTTERMAN, *supra* note 70, at 2–3, 6.

Governor Brown also displayed concern for her staff and other officials involved in the clemency process. “The other piece was the staff and the impact on the staff. Relatively speaking I am not likely to run for office again, but a lot of them are young and for them, it’s a whole different ball game. We had a conversation on the impact on them. [Clemency] was a team effort and we had to think about the impact on our team.”²⁸⁶ The Governor carefully considered not only the impact of clemency on her image or political prospects, but also the future impact on staff members of the Governor’s office. Implicitly, the Governor suggested that these concerns influenced her approach to clemency. These concerns reveal that although the clemency power in Oregon is almost unfettered, political and social worries may factor into its use, or lack thereof.

While the political landscape of Oregon and controversy surrounding criminal justice likely impacted much of the media coverage, it should be noted that Governor Brown’s gender played a role in the responses to her use of clemency. Comparing her media coverage to that of nearby male governors,²⁸⁷ Governor Brown observed that “the media response was really different, no question, because I’m female.”²⁸⁸ She continued, “Now I understand the backlash. I’m a female exercising my power and change is really hard.”²⁸⁹ Beyond the media, this sexism expressed itself as Governor Brown attempted to pursue clemency and other criminal justice reform objectives. The Governor observed: “Part of being female means that you need a third-party validator, and we struggled to find people to validate this work. It’s important to make sure you have allies to support you.”²⁹⁰ This left the Governor feeling isolated and made it more difficult to effectively pursue clemency in the state.

The media and political backlash Governor Brown received from her commutation of Kyle Hedquist²⁹¹ and others shaped her approach to reporting further clemency grants. Differences in the 2022 and 2023 clemency reports evince this change. In her 2022 report, Governor Brown “made a case” for her use of clemency, spending many parts of the report explaining how her actions promoted public safety, aligned with modern scientific advancements, and recognized systemic disparities in the state; in just one paragraph in this 2022 report, the Governor addressed the process of victim notification and input.²⁹² By contrast, her 2023 report includes an entire section on victim notification and input, and her office’s use of a Governor’s Office Victim Impact Liaison, whose work ensured the Governor’s office “made every attempt possible to reach victims and to provide

²⁸⁶ Telephone Interview with Kate Brown (Feb. 26, 2024), *supra* note 82.

²⁸⁷ Nearby Governors Newsom and Inslee both exercised clemency in significant numbers, both in response to COVID-19 and otherwise. *See, e.g.*, NEWSOM, 2020 REPORT, *supra* note 109; Medina, *supra* note 110; Selsky, *supra* note 198.

²⁸⁸ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Today, Mr. Hedquist works as a policy analyst where he advocates for reforms in Oregon’s prison system. For more about Mr. Hedquist’s life, see Grant Stringer, *For 2 Lifers, a Swift Switch from Oregon Prisons to Insider Politics*, THE OREGONIAN (May 6, 2023, 5:00 AM), <https://www.oregonlive.com/politics/2023/05/for-2-lifers-a-swift-switch-from-oregon-prisons-to-insider-politics.html>.

²⁹² BROWN, 2022 REPORT, *supra* note 79, at 3–5.

those victims with adequate information and time for them to provide feedback, while always using trauma-informed practices.”²⁹³ Governor Brown commented on this shift in approach:

One of the most painful cases was Kyle Hedquist. I got an email from supporters in Roseburg asking why I did it. I sent them a detailed email and I received a thank you note in response. [Writing clemency reports is] just like making a case in front of a judge or jury. You want to make a case in front of the public and explain why the decision was made and why it was done. Also, at some level, you want to explain to the public how incredibly unfair and unjust the system is.²⁹⁴

Facing mounting media attacks for her use of clemency, Governor Brown responded by providing more information about the role of and consideration for victims in clemency, which was always a weighty consideration in each clemency decision.

In her clemency grants throughout her administration, Governor Brown displayed a propensity for gathering the input of all stakeholders, drawing on her research-informed understanding of the impacts of incarceration on the stakeholders and the community, and rendering a decision that best protects communities. Governor Brown demonstrated a methodical and holistic approach to clemency, considering the work of the recipient, the concerns of the victim, and the impact on the community.

V. ANALYZING GOVERNOR BROWN'S GOVERNOR-INITIATED USE OF CLEMENCY: GROUP CLEMENCY

As the preceding data shows, clemency was seldom used during the first few years of Governor Brown's tenure. However, between March 2020 and June 2021, something changed, and the Governor utilized her power at a significantly higher rate than before. This shift is best exemplified by Governor Brown's governor-initiated use of clemency, where she granted clemency without first receiving a clemency petition from an applicant. Starting in 2020, Governor Brown used her clemency power to issue commutations to 963 medically vulnerable incarcerated Oregonians as a response to the COVID-19 pandemic.²⁹⁵ Throughout the rest of her administration, Governor Brown proactively used clemency a number of times, including commuting the sentences of 41 incarcerated firefighters, commuting the death sentences of the 17 former members of Oregon's death row, commuting the sentences of 73 individuals convicted as youth, allowing them to receive parole hearings, pardoning 47,144 marijuana convictions for about 45,000 Oregonians, and remitting the fines and fees in 13,300 traffic violation cases for about 7,000 Oregonians.²⁹⁶

²⁹³ BROWN, 2023 REPORT, *supra* note 118, at 5.

²⁹⁴ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

²⁹⁵ E-mail from Kevin Gleim, *supra* note 6.

²⁹⁶ *Id.*; BROWN, 2021 REPORT, *supra* note 150, at 2; BROWN, 2022 REPORT, *supra* note 79, at 4; BROWN, 2023 REPORT, *supra* note 118, at 2–4.

Political considerations may partially explain this shift; clemency, like many mechanisms relating to criminal justice, is an easy target for political attack, and it is possible that Governor Brown became increasingly comfortable using clemency as she gained political capital as her administration progressed. Still, Governor Brown's stated rationales and the context of other pressing statewide and national occurrences point to other explanations for her increased use of clemency. The COVID-19 pandemic, 2020 Labor Day fires, civil unrest related to racial injustice, and advances in understanding about juvenile justice and brain science have been significant motivations in Governor Brown's increased use of clemency. In her attempt to address these concerns, Governor Brown demonstrated the multifaceted nature of the executive clemency power and its potential to address concurrent crises, achieve policy goals, and create congruence and uniformity in the law. This section analyzes and contextualizes the Governor's governor-initiated and categorical, or group-based, use of clemency.

A. COVID-19 Commutations

Clemency was an essential tool in Governor Brown's attempt to address the COVID-19 pandemic and the ancillary crises that resulted from the virus' spread. In February 2020, the first case of COVID-19 was reported in Oregon.²⁹⁷ The state of Oregon soon faced an unprecedented pandemic that killed thousands of Oregonians and challenged the strength of the state's institutions.²⁹⁸ Like so many governors, the Governor's executive powers soon became a vital tool in ensuring the safety of Oregonians and mitigating the financial impact of the pandemic. On March 8, 2020, Governor Brown issued Executive Order 20-03, declaring a state of emergency due to the COVID-19 pandemic.²⁹⁹ Governor Brown began to utilize emergency powers to deal with the crisis, including issuing executive orders limiting the size of public gatherings, ordering many Oregonians to stay at home, and ordering Oregon schools to close.³⁰⁰

In the face of an unprecedented crisis, Governor Brown used all of the executive powers at her disposal, including executive clemency. However, the government push to utilize state institutions to help stem the spread of the virus extended beyond the Governor's office. Governor Brown's use of clemency to address COVID-19 was part of a government statewide effort to reduce the risks to incarcerated people of COVID-19 spread and exposure. For example, in Washington County, jail administrators released incarcerated people who were in custody for low-level offenses, drastically reducing the incarcerated population in the county.³⁰¹ Similarly in Multnomah County, shifts in policing priorities and pre and

²⁹⁷ *Oregon Announces First, Presumptive Case of Novel Coronavirus*, OR. HEALTH AUTH. (Feb. 28, 2020), <https://www.oregon.gov/oha/ERD/Pages/Oregon-First-Presumptive-Case-Novel-Coronavirus.aspx>.

²⁹⁸ See *Coronavirus in Oregon*, THE OREGONIAN, <https://projects.oregonlive.com/coronavirus> (last visited July 22, 2024).

²⁹⁹ KATE BROWN, EXEC. ORDER NO. 20-03 (Mar. 8, 2020).

³⁰⁰ KATE BROWN, EXEC. ORDER NO. 20-05 (Mar. 12, 2020); KATE BROWN, EXEC. ORDER NO. 20-08 (Mar. 17, 2020); KATE BROWN, EXEC. ORDER NO. 20-12 (Mar. 23, 2020).

³⁰¹ *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON

early trial releases led to a thirty percent decrease in the county's incarcerated population in April 2020; similarly in Lincoln County, only defendants charged with serious crimes were kept in pretrial custody, reducing the jail population.³⁰² Responding to the pressures of the deepening COVID-19 crisis, government officials across the state mobilized to protect the health of incarcerated Oregonians, prison and jail staff, and the community as a whole.

In June 2020, recognizing the limitations of the Oregon Department of Corrections (DOC) in maintaining social distancing in their facilities, Governor Brown's administration began analyzing the possibility of using commutations to reduce the risk of coronavirus outbreaks in DOC facilities. In a June 12, 2020, letter to the Oregon DOC, Governor Brown requested the Department to perform a case by case analysis of adults in custody to assess those who were vulnerable to COVID-19 for commutation.³⁰³ Governor Brown outlined the criteria for those eligible to be commuted, requiring that they be particularly vulnerable to COVID-19, not be serving a sentence for a person crime, served at least half of their sentence, have a record of good conduct for the last year, have a suitable housing plan, and have their out of custody needs assessed and addressed.³⁰⁴ The Governor directed DOC to provide her with a list of eligible adults by June 22, and to ensure that all eligible adults in custody tested negative for COVID-19 and displayed no symptoms of the virus.³⁰⁵ After being deemed eligible for the Governor's criteria, 567 adults in custody were granted conditional commutations.³⁰⁶

In August 2020, Governor Brown, concerned with the COVID-19 related pause in prison early release programs and in light of the worsening pandemic, directed DOC to provide an additional case-by-case analysis identifying adults in custody who were within two months of their release dates for potential commutation on a rolling basis.³⁰⁷ These candidates were required to be within two months of release, not have a sentence for a person crime, serve half of their sentence, have a record of good conduct for the last year, have a suitable housing plan, have their out of custody needs assessed and addressed, and not pose a safety risk to the community.³⁰⁸ In December of 2020, the Governor modified this criteria to include adults in custody within six months of release and in March of 2021, in light of the return of early release programs, Governor Brown again modified the criteria to disqualify adults in custody who were eligible for the Alternative Incarceration Program or received a judgment that did not allow for full Short Term Transitional

POLY INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last visited July 22, 2024).

³⁰² *Id.*

³⁰³ Letter from Kate Brown, Governor, Or., to Colette Peters, Director, Or. Dep't Corr. (June 12, 2020).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ BROWN, 2021 REPORT, *supra* note 150, at 1–2.

³⁰⁷ *Id.* at 2.

³⁰⁸ *Id.*

Leave.³⁰⁹ Governor Brown granted 345 conditional commutations to adults in custody who met these requirements.³¹⁰

By 2022, Governor Brown had granted conditional commutations to 44 adults in custody under the June 2020 guidelines.³¹¹ She similarly granted commutations to nine adults in custody under the August 2020 criteria.³¹² These releases occurred shortly after her 2021 clemency report, and Governor Brown clarified that these criteria would not be used to commute the sentences of any other adults in custody in 2022.³¹³

Governor Brown used her clemency power to specifically address issues related to the potential spread of COVID-19 through Oregon prisons. Studies have shown that jails and prisons have been sources of COVID-19 outbreaks and have contributed to the virus' community spread.³¹⁴ According to UCLA Law's COVID Behind Bars Data Project, over 663,000 incarcerated people and more than 247,000 staff have been infected by COVID-19 since the start of the pandemic and over 3,100 incarcerated people and over 300 prison staff have died from the virus nationwide.³¹⁵ Since the beginning of the COVID-19 outbreak in Oregon, approximately 6,153 incarcerated people and 2,083 DOC staff tested positive for COVID-19, and 52 adults in custody and three DOC staff members have died from the virus.³¹⁶

A summary of a September 2, 2021, study conducted by Northwestern University emphasized that jails and prisons are “infectious disease incubators”—the high turnover rate in American jails meant that, frequently, incarcerated individuals were detained in cramped facilities that posed a significant risk of COVID-19 transmission, and released to the community shortly thereafter.³¹⁷ Without policies that reduced this turnover rate, especially for short-term detentions, COVID-19 outbreaks in jails and prisons threatened to become community spread outbreaks. Reducing the number of adults in custody, especially for minor offenses, was an important goal for many state governments in reducing the spread of COVID-19. Governor Brown specifically referred to this concern in her 2022 clemency report,

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ BROWN, 2022 REPORT, *supra* note 79, at 2.

³¹² *Id.* at 3.

³¹³ *Id.*

³¹⁴ Alexandria Macmadu, Justin Berk, Eliana Kaplowitz, Marquisele Mercedes, Josiah D Rich & Lauren Brinkley-Rubinstein, Comment, *COVID-19 and Mass Incarceration: a Call for Urgent Action*, 5 LANCET e571 (2020) (discussing the implications of COVID-19 outbreaks in correctional facilities and highlighting the need for urgent action to mitigate spread); Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities—United States, February–April 2020*, 69 CDC MORBIDITY & MORTALITY WKLY. REP. 587 (2020).

³¹⁵ *COVID Behind Bars Data Project*, UCLA L., <https://uclacovidbehindbars.org> (last visited July 22, 2024).

³¹⁶ Oregon DOC no longer tracks staff cases of COVID-19. *COVID-19 Status at Oregon Department of Corrections Facilities*, OR. DEP'T OF CORR., <https://www.oregon.gov/doc/covid19/Pages/covid19-tracking.aspx> (Jan. 9, 2023).

³¹⁷ Kristin Samuelson, *High Incarceration Rates Fuel COVID-19 Spread and Undermine U.S. Public Safety*, NORTHWESTERN (Sept. 2, 2021), <https://news.northwestern.edu/stories/2021/september/incarceration-covid-19-spread-public-safety>.

noting that her grants of clemency were part of an effort undertaken by governors across the country to “reduce the risk of illness and loss of life to those in our corrections system, including adults in custody and prison staff.”³¹⁸

These measures were important to Oregon’s comprehensive COVID-19 response, and Governor Brown crafted criteria intended to ensure that Oregonians were protected from the further spread of COVID-19, while minimizing the risk that released individuals would reoffend or potentially harm the community. These efforts have borne encouraging results for the recidivism of these commutation recipients. A March 2022 study from the Oregon Criminal Justice Commission analyzed the recidivism rates of the 266 adults in custody released under Governor Brown’s COVID-19 criteria in 2020; within a year of receiving their commutations, 18% of commutation recipients were arrested, 8% were convicted of a crime, and 2% were incarcerated for an offense.³¹⁹ These figures are notable, given the fact that many recipients of these commutations were incarcerated for property crimes, and property crime offenders typically recidivate at a relatively higher rate than others.³²⁰ Further, 2020 COVID-19 commutation recipients who were arrested, charged, or incarcerated within a year of their clemency grant rarely recidivated for person crimes; of the 266 clemency recipients, only 10 recidivated for a person crime.³²¹

While the sample size of commutation recipients in this study was small, it demonstrates the results of the care with which Governor Brown formulated her COVID-19 commutation criteria. A number of her provided criteria, including having a record of good conduct, a suitable housing plan, an assessment of out of custody needs, and a determination that the individual does not pose a safety risk to the community, were crafted to ensure that those released had a low likelihood of recidivism.³²² These requirements directly addressed two important policy concerns of the Governor: protecting communities from crime and protecting adults in custody, DOC staff, and the community from COVID-19. Her criteria were crafted to ensure that Oregonians vulnerable to COVID-19 would not have constant contact with prisons and jails, places where COVID-19 prevention measures have limited effectiveness. By reducing recidivism through these requirements, fewer Oregonians would be exposed to the risk of COVID-19 in Oregon DOC facilities or risk transmitting the virus back into the community through constant contact with the justice system. As Governor Brown stated prior to ordering the DOC analysis and in response to calls to release incarcerated people in light of the pandemic, her priority in considering COVID-19 commutations was “keeping Oregonians safe and healthy—regardless of where they are living”³²³

³¹⁸ BROWN, 2022 REPORT, *supra* note 79, at 2.

³¹⁹ SIOBHAN MCALISTER, KELLY OFFICER & KEN SANCHAGRIN, OR. CRIM. JUST. COMM’N, RECIDIVATING PATTERNS OF INDIVIDUALS COMMUTED IN 2020, at 1–2 (2022).

³²⁰ See, e.g., MATTHEW R. DUROSE & LEONARDO ANTENANGELI, U.S. DEP’T OF JUST., BUREAU JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 34 STATES IN 2012: A 5-YEAR FOLLOW-UP PERIOD (2012–2017) 6, 11 (2021).

³²¹ MCALISTER, OFFICER & SANCHAGRIN, *supra* note 319, at 3.

³²² BROWN, 2022 REPORT, *supra* note 79, at 4–5.

³²³ *Governor Kate Brown Statement on Early Release*, STATE OF OR. NEWSROOM (Apr. 10, 2020), <https://apps.oregon.gov/oregon-newsroom/OR/GOV/Posts/Post/governor-kate-brown->

Governor Brown's motivations for her COVID-19 clemency grants were obvious, and her approach was calculated in coordination with local and nationwide officials:

I had allies across the country so [the COVID-19 commutations] were easier to do. California has a bigger prison population, so they did a lot more than we did in Oregon. My goal was to get as many people out of the system as quickly as possible because I was really worried about the conditions there It was a really targeted approach: most people were at the end of their sentence, were convicted of non-person felonies, had less than a year left, and had generally good behavior.³²⁴

The Governor's actions mirrored those of counterparts across the country (and the world),³²⁵ but still reflect a careful and measured approach focused on ensuring that clemency recipients would not only be healthy, but successful in re-entry as well.

B. *Labor Day Fire Commutations*

Over the Labor Day weekend in 2020, a historic windstorm swept through the state of Oregon, resulting in five simultaneously burning megafires and twelve other large fires that engulfed significant portions of Western Oregon.³²⁶ These fires burned over a million acres, displaced thousands of Oregonians, and killed nine.³²⁷ Starting on September 7, 2020, about 150 adults in Oregon DOC custody were deployed as fire crews throughout the state.³²⁸ For over 70 years, the Oregon Department of Forestry has utilized adults in custody to help fight wildfires, and working in crews of ten, these adults in custody placed their lives on the line to help contain the Labor Day fires.³²⁹

On March 5, 2021, in consideration of the efforts of adults in custody who helped fight the Labor Day fires, Governor Brown requested the Oregon DOC to assess the eligibility of these adults in custody for a one-time 12-month commutation.³³⁰ Adults in custody eligible for this commutation were required to meet the DOC fire crew participation criteria while they were deployed, have a good record of conduct for the last year, have a suitable housing plan and their out of custody healthcare needs assessed and addressed, and not pose an unacceptable safety risk to the community.³³¹ DOC identified 53 potential commutation recipients, and on June 23, 2021, Governor Brown granted 12-month commutations to 41 of these

statement-on-early-release-15460.

³²⁴ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

³²⁵ *See* Novak & Pascoe, *supra* note 2, at 84.

³²⁶ OR. FOREST RES. INST., 2020 LABOR DAY FIRES 8–9 (2021).

³²⁷ *Id.* at 8.

³²⁸ Tess Riski, *Department of Corrections Deploys Nearly 150 Prisoners to Fight Oregon Wildfires*, WILLAMETTE WEEK (Sept. 9, 2020, 4:52 PM), <https://www.wweek.com/news/courts/2020/09/09/department-of-corrections-deploys-nearly-150-prisoners-to-fight-oregon-wildfires>.

³²⁹ *See id.*

³³⁰ BROWN, 2021 REPORT, *supra* note 150, at 2.

³³¹ *Id.*

adults in custody.³³² Of these 41 adults in custody, 23 were set to be released in July 2021; the remaining 18 were not set for imminent release but had 12 months reduced from their sentences.³³³

Governor Brown's Labor Day Fire commutations display a rarely used and often overlooked facet of executive clemency. In these grants of clemency, Governor Brown came closest to displaying the traditional "gift" theory of clemency.³³⁴ Although her criteria display a keen concern for the public interest, she primarily used these grants to reward Oregonians who went to extraordinary lengths to keep their communities safe. Governor Brown's press secretary detailed the rationale behind these commutations, noting that "[t]he Governor recognizes that these adults in custody served our state in a time of crisis, and she believes they should be rewarded and acknowledged for their contribution to this historic firefighting response."³³⁵ These commutations were not provided to ensure the practical safety of other adults in custody or to remedy an injustice that Oregon's criminal justice system could not account for. Rather, they were granted in recognition of the recipients' service to the community, as determined by the Governor herself. While it should be noted that these adults in custody displayed reformative qualities—such as good behavior while in custody—that qualified them for participation in DOC firefighting programs, their commutations derived from their service rather than their rehabilitation or behavior.

The Labor Day Fire commutations demonstrate the breadth of Oregon's clemency power, and the assertive, yet meticulous use of the power by Governor Brown. Her grant of clemency to these 41 adults in custody is distinct in rationale from her other grants and shows the moral disposition of Governor Brown and members of her administration. Unlike other commutation cohorts, some of these firefighters were convicted of person crimes, including Robbery I and Assault II.³³⁶ Still, they were granted commutations. Put another way, their commutations were not based on a determination that their convictions did not warrant continued incarceration given the circumstances but were instead based on an assessment that it would be morally objectionable for them not to receive some tangible benefit. Describing her motivations for granting clemency to these firefighters, Governor Brown explained that "The timing was right, and people get it: firefighting is really hard, dirty, difficult work, these folks are putting their lives on the line. AICs [Adults in Custody] stepping up to do that says a lot. There was dissonance between these folks risking their lives for their communities and going back to prison, and that played a role . . . granting clemency to these individuals provides motivation for our AICs to step up."³³⁷ She was also careful to note the skill and professionalism of the recipients, particularly the women who risked their lives during the fires:

³³² *Id.* at 2, 51–52.

³³³ *Gov. Brown Commutes Sentence for 41 Inmates Who Helped Battle Last Year's Wildfires*, KGW 8 (June 23, 2021, 6:06 PM), <https://www.kgw.com/article/news/local/wildfire/governor-brown-commutes-sentence-inmates-battled-historic-wildfires/283-9c12ee0f-0d53-445d-97ff-6febfc3e60f9> [hereinafter *Brown Commutes*].

³³⁴ *See supra* text accompanying notes 20–41.

³³⁵ *Brown Commutes, supra* note 333.

³³⁶ BROWN, 2021 REPORT, *supra* note 150, at 2, 51–52.

³³⁷ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

“During the Labor Day Fire, folks from the Department of Forestry said they would hire these women in a second.”³³⁸ Through her grants, Governor Brown displayed an insistence in rewarding the recipients for their heroic efforts in ways most meaningful to them.

While recipients’ conduct and behavior did not form the primary basis for these grants, Governor Brown was particularly careful to ensure that the recipients would not pose a risk to the community upon release. Criteria ensuring the adult in custody is safe to release is a theme throughout her governor-initiated commutations and despite the altruistic grant of mercy, the Governor was still interested in ensuring that the commuted adults in custody could be safely released and would be able to succeed upon release. Even though the recipients’ rehabilitation, behavior, or crime of conviction was not the motivation for the clemency grant, Governor Brown attached conditions to the grants, aimed at ensuring community safety and post-release success. Although the Labor Day Fire commutations are the closest to the subjective and unconditional origins of the clemency power, Governor Brown limited her own power by attaching public safety concerned conditions to these commutations.³³⁹

The commutations granted to these 41 Oregonians display the interactions between Governor Brown’s clemency related interests. She was simultaneously interested in seeing morally just results and ensuring that adults in custody do not place other Oregonians in harm’s way. Throughout her clemency grants, these interests are equally relied upon and form the basis for many of the decisions surrounding Governor Brown’s use of clemency.

C. *Juvenile Parole Hearing Commutations*

On July 22, 2019, Governor Brown signed Senate Bill 1008 into law.³⁴⁰ The bill, among other things, made changes to Oregon’s Measure 11, removing the Measure’s requirement that youth charged with certain offenses be waived to adult court, eliminating life without parole sentences for individuals sentenced as juveniles, requiring the opportunity for judges to release youth with less than two years on their sentence before they are transferred to adult prison, providing the opportunity for individuals who received a life sentence for offenses committed before the age of 18 to see the parole board after 15 years of incarceration, and providing the opportunity for a “second look” for juveniles convicted in adult court halfway through their sentences.³⁴¹ S.B. 1008 was passed in the wake of increasing awareness of the unique ways young people’s brains develop, and their capacity for change and development as their brains develop and mature.³⁴² Through the law, judges and the Parole Board were given flexibility to make individualized determinations

³³⁸ *Id.*

³³⁹ BROWN, 2021 REPORT, *supra* note 150, at 2.

³⁴⁰ S.B. 1008, 80th Leg., 2019 Reg. Sess. (Or. 2019).

³⁴¹ *Youth Justice Reform—SB 1008*, ACLU OR. (2022), <https://www.aclu-or.org/en/legislation/youth-justice-reform-sb-1008>.

³⁴² See ROBERTA PHILLIP-ROBBINS & BEN SCISSORS, OR. COUNCIL ON C.R., YOUTH AND MEASURE 11 IN OREGON (2018).

about each person's case, and juveniles were protected from the harshest and often negative impacts of interacting with the adult legal system.

S.B. 1008 went into effect on January 1, 2020, but it did not apply retroactively to people in custody who were incarcerated as juveniles before the law's application.³⁴³ Thus, on September 28, 2021, Governor Brown requested the Oregon DOC to analyze youth and adults in custody for eligibility to receive a one-time commutation that would allow them to request a parole hearing after 15 years of incarceration.³⁴⁴ Individuals in custody were eligible for this commutation if they were a juvenile at the time of the offense they were imprisoned for, were serving a sentence imposed before January 1, 2020, serving a sentence of 15 years or more, were not serving any additional sentence for a crime committed as an adult, and were not serving a sentence with a projected release date of 2050 or beyond, unless the sentence was life without the possibility of parole.³⁴⁵ Seventy-seven adults in custody were deemed eligible by the DOC, and Governor Brown granted commutations to 73 of these individuals,³⁴⁶ effective after serving 15 years of their sentence.³⁴⁷ While these commutations did not release anyone from incarceration, they provided people in custody the opportunity to benefit from the reforms of S.B. 1008.

In January 2022, several Oregon district attorneys and victims of the juveniles who received these commutations filed suit against Governor Brown, alleging that these commutations were unlawfully granted; the plaintiffs contended that in commuting this cohort, Governor Brown failed to follow clemency procedures and improperly delegated her clemency authority to the Department of Corrections.³⁴⁸ However, in *Marteeny v. Brown*, affirming the plenary nature of the Governor's power of clemency, the Oregon Court of Appeals concluded that her grants of clemency to these juveniles and groups in general were lawful exercises of her Article V, Section 14 powers.³⁴⁹ The Court emphasized that the Governor's power to grant clemency is "plenary—historically indistinguishable from the powers of clemency of the President under the United States Constitution, and the powers of the monarch at English common law" and that the clemency power is designed for and used to "replace a judicially imposed, or legislatively mandated, sentence with an executively created sentence under the Governor's determination that, in doing so, 'the public welfare will be better served by inflicting less than what the judgment fixed.'"³⁵⁰

Throughout her 2022 clemency report, Governor Brown provided her rationales for the commutations of these 73 recipients. In her report, the Governor

³⁴³ BROWN, 2022 REPORT, *supra* note 79, at 3.

³⁴⁴ *Id.* at 4.

³⁴⁵ *Id.*

³⁴⁶ *Id.* Four eligible adults in custody did not receive this commutation, as they were released separately through individual application-based commutations.

³⁴⁷ *Id.*

³⁴⁸ Noelle Crombie, *Gov. Kate Brown's Clemency Authority is Absolute, State Attorneys Say in Asking Judge to Dismiss Challenge*, THE OREGONIAN (Feb. 17, 2022, 2:50 PM), <https://www.oregonlive.com/crime/2022/02/gov-kate-browns-clemency-authority-is-absolute-state-attorneys-say-in-asking-judge-to-dismiss-challenge.html>.

³⁴⁹ *Marteeny v. Brown*, 517 P.3d 343, 368 (Or. Ct. App. 2022).

³⁵⁰ *Id.* at 367–68 (quoting *Biddle v. Perovich*, 274 U.S. 480, 486 (1927)).

described the advances in understanding of juvenile brain science as a motivating factor for her juvenile clemency grants.³⁵¹ Particularly, she noted that through passing S.B. 1008, the legislature recognized younger people's greater capacity for rehabilitation when compared to their adult counterparts.³⁵² Governor Brown emphasized that this rehabilitative potential was increased for people convicted as juveniles who were in Oregon Youth Authority (OYA) custody, due to the expanded rehabilitative programming available in OYA facilities.³⁵³ She also noted that S.B. 1008 recognizes the new developments in adolescent development, particularly in skills like reasoning, planning, and self-regulation, and the incompatibility of the adult carceral system with the healthy development of these skills.³⁵⁴ These scientific advancements formed a basis for Governor Brown's use of clemency; for the Governor, it was a notable injustice that without the benefits of S.B. 1008, people convicted as juveniles with long sentences would not be provided the opportunity to go through this development process in an environment conducive to rehabilitation, mature development, and growth.³⁵⁵ These perspectives reflect the Governor's deep knowledge of adolescent development and her staunch opposition to Measure 11.³⁵⁶

Governor Brown's concerns about adolescent development were also shared by previous governors as scientific studies increased general awareness about the development of young people's minds. In his 2011 clemency report, Governor Theodore Kulongoski reflected a similar concern about the impact of Measure 11 on young people in custody. Governor Kulongoski concluded that his decision to grant conditional commutations to two Oregonians convicted as juveniles underscored the need for reform in sentencing juvenile offenders with mandatory minimum sentences, emphasizing that he had exercised his commutation authority in a manner consistent with the intention behind the "Second Look" concept, a concept that was included when he designed the rewrite of Oregon's juvenile justice system in 1995.³⁵⁷ This rationale from Governor Kulongoski is an example of a remedial utilization of clemency, as the Governor used his power to provide relief in the absence of the protections of eventual juvenile justice reforms and to remedy the injustice caused by the lack of reforms. Similarly, Governor Brown used her executive powers to extend the benefits of juvenile justice reforms to those who would have otherwise benefited from it, expanding the protections of recent juvenile justice reforms. Both governors used clemency in light of the developing understandings of adolescent development, and they accounted for the benefits youth in custody would have received from OYA programming. As Attorney General, Governor Kulongoski helped create Oregon's modern youth justice system; his later use of clemency affirms the belief of the systems' architects that youth in Oregon may not be best served by rigid applications of mandatory sentences and a

³⁵¹ BROWN, 2022 REPORT, *supra* note 79, at 4.

³⁵² *Id.* at 3.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 3–4.

³⁵⁶ Waldroupe, *supra* note 146.

³⁵⁷ KULONGOSKI, *supra* note 78, at 7–8.

disconnection from rehabilitative programming. Through her 2022 juvenile parole hearing commutations, Governor Brown emphasized this belief, and used the power of her office to ensure that Oregonians who would have benefitted from juvenile justice reforms under S.B. 1008 were not left behind.

These grants also display Governor Brown's concerns about racial disparities throughout Oregon's criminal justice institutions. Aside from the new understandings of adolescent development and their implications for juvenile justice, Governor Brown was careful to note the impact of Measure 11 on young Oregonians of color. Unequivocally, the Governor stated that youth of color have been disproportionately convicted of Measure 11 offenses.³⁵⁸ She also asserted the importance of addressing "the widespread racial disparities that persist throughout our criminal justice system" and particularly, the "longstanding disparity in the prosecution and incarceration of our youth of color."³⁵⁹ These system-wide disparities were a driving concern throughout Governor Brown's administration, and their impact on her clemency decisions will be analyzed below.

Governor Brown's juvenile sentence commutations display the gamut of her use of executive clemency. While her Labor Day Fire commutations provided a reward unconnected with the individuals' convictions, her juvenile justice commutations were provided to remedy inequities in the system that could not (or would not) be addressed in other ways. While many of her grants have derived from a rehabilitative approach—recognizing the progress and transformation made by individuals while in custody—her S.B. 1008 commutations draw elements from a retributive approach to clemency. Recognizing the limitations of S.B. 1008 for Oregonians already sentenced using Measure 11, Governor Brown used her executive power to ensure that each individual received their "just" sentence—the sentence they would have received had the new law been passed at the time of their sentencing. When describing these clemency grants, Governor Brown was careful to underscore the role that fairness played in her decision. The Governor explained,

Why wouldn't I use my clemency power to do something I think the courts will do eventually? Someone asked me, 'Why wouldn't you let the courts do that?' To me that seemed like a 'chicken' way out. I know it is patently unfair . . . and if I could use my clemency power to provide fairness for some of this group, why wouldn't I?³⁶⁰

While these grants consider other equitable factors, they were primarily granted to ensure that each recipient received a fair opportunity to prove rehabilitation, and to correct the law's previous ignorance of juvenile development.

D. Other Governor-Initiated Clemency Grants

i. Traffic Fine Remissions

In 2020, Governor Brown signed H.B. 4210 into law, a bill that eliminated the imposition of driver's license suspensions for nonpayment of traffic fines and

³⁵⁸ BROWN, 2022 REPORT, *supra* note 79, at 3.

³⁵⁹ *Id.*

³⁶⁰ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

fees.³⁶¹ However, the law was not applied retroactively, leaving many Oregonians with their licenses suspended despite the change in law.³⁶² Governor Brown responded by requesting the Driver and Motor Vehicles Division of ODOT (DMV) to provide her office with a list of cases where: the affected person received a traffic violation, under Oregon law; the affected person had their driver's license suspended or downgraded to an ID card due to suspension; the only sanction preventing reinstatement of their driver's license was a Failure to Comply or Failure to Appear sanction associated with the traffic violation case; the sanction occurred prior to October 1, 2020, the effective date of H.B. 4210; and DMV had an Oregon address for the affected person and its records reflect that they have not passed away.³⁶³

On December 21, 2022, Governor Brown remitted the fines and fees associated with 13,300 traffic violation cases meeting the DMV criteria, allowing about 7,000 Oregonians to seek the reinstatement of their driver's licenses.³⁶⁴ These remissions forgave fines and fees related to traffic *violations* but did not forgive fines and fees associated with traffic *crimes*, or any restitution and compensatory fines. In her explaining her remission grant, Governor Brown noted that a vast majority of the remitted fines were otherwise uncollectible.³⁶⁵

In her 2023 clemency report, Governor Brown expressed concern with the role of traffic fines and fees in perpetuating systemic inequalities and catching Oregonians in cycles of poverty. Explaining her traffic fee remission, Governor Brown recognized that “[t]hese Oregonians—who are disproportionately low-income and people of color—remain burdened by these legacy license suspensions that are no longer allowed under current Oregon law.”³⁶⁶ She further recognized the harm of license suspensions to financially vulnerable Oregonians, noting that losing licenses places low-income Oregonians:

into a court debt spiral because they often continue to rack up additional fines for driving with a suspended license to obtain goods and services to meet their basic needs, and they are less likely to get or keep a job to pay these fines without a license. Many of these individuals face abject and crippling poverty that a driver's license can help them climb out of.³⁶⁷

Remarkably, Governor Brown not only recognized the fundamental unfairness of these “legacy” suspensions but acknowledged the potentially crippling impact of

³⁶¹ Press Release, State of Oregon Newsroom, Governor Kate Brown Forgives Uncollected Traffic Fines & Fees, Enabling Oregonians to Reinstate Suspended Driver's Licenses (Dec. 21, 2022), <https://apps.oregon.gov/oregon-newsroom/OR/GOV/Posts/Post/governor-kate-brown-forgives-uncollected-traffic-fines---fees--enabling-oregonians-to-reinstate-suspended-driver-s-licenses-5263>; *House Bill 4210*, THE OREGONIAN, <https://gov.oregonlive.com/bill/2020/HB4210> (last visited July 22, 2024).

³⁶² Ben Botkin, *Kotek Allows More than 10,000 Oregonians to Reinstate Driver's Licenses*, OR. CAP. CHRON. (Dec. 5, 2023), <https://oregoncapitalchronicle.com/2023/12/05/kotek-allows-more-than-10000-oregonians-to-reinstate-drivers-licenses>.

³⁶³ BROWN, 2023 REPORT, *supra* note 118, at 3–4.

³⁶⁴ *Id.* at 4.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 3.

³⁶⁷ *Id.*

court-ordered financial obligations on low-income Oregonians. Governor Brown was equally concerned with ensuring fairness and uniformity in the law and ensuring that court-imposed legal obligations did not do more harm than good.

Through her traffic fee remissions, Governor Brown continued to display her concern for fairness and uniformity in Oregon law. Without her use of clemency, Oregonians facing traffic sanctions continued to suffer the consequences of the previous state of the law, despite H.B. 4210. By using clemency, Governor Brown was able to ensure that a significant part of the population would be able to enjoy the results of recent reforms. Also notable about these remissions is the scope of the use. Rather than identifying a discreet cohort of individuals who would have benefitted from H.B. 4210, Governor Brown used her executive power to provide remedies for as many Oregonians as possible.

ii. Marijuana Pardons

In 2014, Ballot Measure 91 was passed, legalizing the recreational use of marijuana and the possession of personal amounts of marijuana.³⁶⁸ This ballot measure was a precursor to the state's organized regulation of marijuana and helped launch the now booming cannabis industry statewide.³⁶⁹ However, Measure 91 did not apply retroactively, leaving many Oregonians convicted of crimes related to marijuana possession vulnerable to the impacts of having a drug related criminal record.³⁷⁰ Particularly, Governor Brown was concerned that "Oregonians continued to face housing insecurity, employment barriers, and educational obstacles as a result of doing something years ago that is now completely legal."³⁷¹

Accordingly, Governor Brown ordered the Oregon Judicial Department to provide a list of electronically available cases from Oregon circuit courts where the only charge in the case was for possession of one ounce or less of marijuana, the case did not include a victim, and the sole individual in the case was 21 years of age or older at the time of possession of marijuana.³⁷² In effect, these cases were those where the convicted person's possession would currently be legal. The Oregon Judicial Department identified 47,144 cases meeting these criteria, and on November 21, 2022, Governor Brown pardoned all of the marijuana offenses associated with these cases, providing relief for about 45,000 Oregonians and eliminating over \$14 million in related fines and fees.³⁷³

Governor Brown's use of clemency to address equity in marijuana convictions is similar to that of Colorado Governor Jared Polis. Colorado, like Oregon, legalized the recreational use of marijuana and allowed the possession of a personal

³⁶⁸ Noelle Crombie, *Recreational Marijuana Passes in Oregon: Oregon Election Results 2014*, THE OREGONIAN (Nov. 5, 2014, 2:34 AM), https://www.oregonlive.com/politics/2014/11/recreational_marijuana_passes.html.

³⁶⁹ See Oregon: A Trailblazer in Cannabis Policy Reform, MARIJUANA POLICY PROJECT, <https://www.mpp.org/states/oregon/> (Aug 22, 2023); Pete Danko, *Oregon Reports Big Jump in Marijuana Business Applications, Licenses*, PORTLAND BUS. J. (Jan. 9, 2017, 12:36 PM), <https://www.bizjournals.com/portland/news/2017/01/09/oregon-reports-big-jump-in-marijuana-business.html>.

³⁷⁰ BROWN, 2023 REPORT, *supra* note 118, at 2.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

amount of marijuana.³⁷⁴ In December 2021, Governor Jared Polis issued pardons to 1,351 Coloradans with convictions for possession of two ounces or less of marijuana.³⁷⁵ Governor Polis has previously issued pardons for those convicted of possession of one ounce or less of marijuana, but after the Colorado legislature raised the legal marijuana possession limit to two ounces, he responded by pardoning Coloradans with convictions for possessing this larger amount. In a press release describing the pardons, Governor Polis asserted that “It’s unfair that 1,351 additional Coloradans had permanent blemishes on their record that interfered with employment, credit, and gun ownership, but today we have fixed that by pardoning their possession of small amounts of marijuana that occurred during the failed prohibition era.”³⁷⁶ Like Governor Brown, Governor Polis expressed dissatisfaction with a system that holds its citizens accountable for actions that are no longer criminal. Governor Polis also used his executive power to announce his views on drug policy, explicitly characterizing his pardons as combating the results of “failed” marijuana prohibition.

The use of clemency by Governors Brown and Polis indicates the suitability and potential usefulness of executive clemency for states attempting to change the legal classification of controlled substances like marijuana. Using clemency, Governors Brown and Polis were able to shape the impacts of past marijuana offenses, as well as signal their view on drug policy.

While Governor Brown’s marijuana pardons are notable for a number of reasons, their connection to racial equity is significant, particularly given her concerns for racial equity expressed throughout her administration’s use of clemency. In her 2023 report, Governor Brown was careful to connect the challenges facing Oregonians with marijuana possession convictions with the disproportionate rate at which Black and Brown Oregonians were previously convicted of these offenses. She noted that despite using marijuana at similar rates, “Black and Latino/a/x people have long been arrested, prosecuted, and convicted of marijuana possession offenses at disproportionately higher rates.”³⁷⁷ Notably, this discrepancy was as important to Governor Brown as the legal discrepancy existing for all recipients of her marijuana pardons. The fact that Oregonians were facing obstacles for conduct now considered legal could have provided ample motivation for this use of clemency. However, Governor Brown went further, noting the racial disparities existing in the drug enforcement and prosecution regime and characterizing her actions as redressing the “wrongs of this flawed, inequitable, and outdated portion of our criminal justice system.”³⁷⁸ Governor Brown reflected on her marijuana pardons, calling her decision “a no-brainer, absolutely a no-brainer,” emphasizing that “fairness and equity” motivated her decision, especially given the disproportionate impact these

³⁷⁴ *Laws About Marijuana Use*, COLO. CANNABIS, <https://cannabis.colorado.gov/legal-marijuana-use/laws-about-marijuana-use> (last visited July 23, 2024).

³⁷⁵ Elise Schmelzer, *Colorado Governor Pardons 1,351 Coloradans Convicted of Marijuana Possession*, DENVER POST, <https://www.denverpost.com/2021/12/30/colorado-marijuana-possession-pardons-polis> (Dec. 30, 2021, 8:36 PM).

³⁷⁶ *Id.*

³⁷⁷ BROWN, 2023 REPORT, *supra* note 118, at 2.

³⁷⁸ *Id.*

convictions had on Black and Brown people.³⁷⁹ Just as Governor Polis noted the negative impacts of marijuana prohibition, Governor Brown alluded to and recognized the particularized negative impacts of the criminal justice system's drug enforcement on people of color.

iii. Death Row Commutations

Currently, capital punishment is a constitutionally prescribed punishment in Oregon. However, throughout Oregon's history, the legal status of capital punishment has vacillated. The death penalty is enshrined in the Oregon Constitution, as an available punishment for aggravated murder,³⁸⁰ but Oregonians have voted to repeal and reinstate the death penalty several times throughout the state's history.³⁸¹ Through this complex legal framework, Governor Brown used her power to address capital punishment's status and application.

Governor Brown's actions regarding capital punishment represent a continuation of the policy of recent Oregon governors. In 2011, Governor Kitzhaber initiated a moratorium on death penalty executions and in 2015, Governor Brown continued this moratorium.³⁸² In 2020, she went a step further and instructed DOC to dismantle death row housing and moved its residents into general population housing.³⁸³ Finally on December 13, 2022, Governor Brown commuted Oregon's death row, commuting the death sentences of 17 individuals into life sentences without the possibility of parole.³⁸⁴ Governor Brown later reflected on commuting the death row and revealed that removing death row was an objective from the beginning of her administration. She recalled, "When I came to office, my predecessor had not commuted death row. What that gave me was a really strong belief that I didn't want to leave this for the next person."³⁸⁵

In her 2023 report, Governor Brown was unequivocal about her ideology on capital punishment. She began her discussion of these clemency grants by reiterating her belief that "it is immoral for the state to put people to death, as a punishment for committing a crime."³⁸⁶ According to Governor Brown, she did not want to "leave office without taking one final step to ensure that none of the individuals in Oregon with a death sentence would be executed by the State."³⁸⁷ Unlike other grants, focused on rehabilitation and growth, these commutations were based not on the efforts of the recipients but on the "recognition that the death penalty is both dysfunctional and immoral."³⁸⁸ Governor Brown further detailed the difficulties and expenses of administering capital punishment in an equitable way and noted

³⁷⁹ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

³⁸⁰ OR. CONST. art. I, § 40.

³⁸¹ *Oregon Death Penalty*, OREGON.GOV, <https://www.oregon.gov/doc/about/pages/oregon-death-penalty.aspx> (last visited July 22, 2024).

³⁸² BROWN, 2023 REPORT, *supra* note 118, at 3.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

³⁸⁶ BROWN, 2023 REPORT, *supra* note 118, at 2.

³⁸⁷ *Id.* at 3.

³⁸⁸ *Id.*

that the final nature of the punishment impermissibly left no room for error.³⁸⁹ Reflecting an overarching concern animating many of her clemency grants, Governor Brown was also careful to indicate that in its application, the death penalty “cannot be and has never been applied fairly or equitably,” disproportionately impacting people of color, people with mental illness, and people with limited financial ability.³⁹⁰ Governor Brown made no secret of her staunch opposition to capital punishment, and she used her executive authority to legally reflect this belief.

Governor Brown’s use of clemency to address capital punishment was not novel, and Oregon Governors have used their clemency power to affirm their ideology on the death penalty and to align the legal status of individuals with death warrants with the wishes of the voting public. Governor Robert Holmes used his executive clemency power to commute every death sentence issued during his administration.³⁹¹ Similarly, days after 1964’s Measure 1 (a ballot measure constitutionally repealing the death penalty) passed, Governor Mark Hatfield, who supported the measure and opposed capital punishment, commuted the sentences of three members of death row.³⁹² These Governors’ use of clemency reflect the approach taken by Governor Brown in handling the death penalty. All three Governors expressed a moral opposition to capital punishment that was reflected in their clemency grants.³⁹³ Like Governor Holmes, Governor Brown used her most expansive power to ensure that no Oregonian would be executed by the state during her administration. Governor Brown’s use of clemency is also an indicator of the public view of capital punishment. In 2019, S.B. 1013 was signed into law by Governor Brown, reducing the scenarios where capital punishment could be imposed.³⁹⁴ Similar to Governor Hatfield’s use of clemency after Measure 1, Governor Brown commuted death row in the wake of popular disapproval of capital punishment, expressed in a legislative bill. As a staunch opponent of capital punishment, Governor Brown used all the tools at her disposal to ensure that the death penalty would not be imposed.

iv. The Role of Institutional Racism in Motivating Governor-Initiated Grants

Explicitly and implicitly, institutional racism and the disproportional impacts of Oregon’s criminal justice system have been important considerations in most of Governor Brown’s clemency grants. However, her ideologies on systemic racism particularly impacted her governor-initiated use of clemency as well.

Governor Brown’s policies have always been underlined by a concern for racial justice, so her willingness to explicitly state racial equity as a clemency factor is not surprising. Throughout her career as an attorney and later a politician,

³⁸⁹ *Id.* at 2–3.

³⁹⁰ *Id.* at 2.

³⁹¹ *Id.* at 3. Governor Holmes served as governor from 1957 to 1959. OR. SEC’Y OF STATE, 1957 TO 1959 GOVERNOR ROBERT D. HOLMES RECORD SUMMARY, APD/19/524 (2019).

³⁹² BENJAMIN SOUEDE, MISHA ISAAK & EMILY MATASAR, REPORT TO GOVERNOR KATE BROWN ON CAPITAL PUNISHMENT IN OREGON, 4 (2016); *Oregon Death Penalty*, OR. DEP’T OF CORR., <https://www.oregon.gov/doc/about/pages/oregon-death-penalty.aspx> (last visited July 23, 2024).

³⁹³ SOUEDE, ISAAK & MATASAR, *supra* note 392, at 4.

³⁹⁴ BROWN, 2023 REPORT, *supra* note 118, at 3.

Governor Brown carefully considered the impacts of government policy on Oregon's most marginalized populations, particularly the state's Black and Brown communities. This motivation has been unequivocal. Describing the factors that animated many of her clemency concerns, Governor Brown asserts:

I believe our criminal justice system was built on racism, and I think it's important for people in the dominant population to think about it, especially as someone who has experience being othered for my gender and sexual orientation. Racism is not the same as sexism . . . nothing compared to it, but I know what it's like to be treated differently because of my gender and sexual orientation. [Fighting for equity] cannot just be the responsibility of Black and Brown people; it has to be everyone.³⁹⁵

Ideologically, it was important to Governor Brown that people in positions of power utilize the tools at their disposal to advocate for and fight alongside marginalized communities. However, her willingness to publicly identify this racism and proactively grant clemency with racial equity as a motivating factor is notable and can be traced to the events of the summer of 2020.

On May 25, 2020, George Floyd, a Black man, was murdered by a Minneapolis Police Department officer, precipitating worldwide protests and demonstrations highlighting police brutality, systemic racism, and inequities across America's criminal justice institutions.³⁹⁶ In Oregon, protests in Portland drew thousands and continued for a year, as protestors highlighted Oregon's own historical and present systemic racism.³⁹⁷ In displays of solidarity and in recognition of existing inequities, many Oregonian businesses and government organizations pledged support and began to take actions aimed at raising awareness and combating institutional racism.³⁹⁸ In the wake of these events, Governor Brown's use of executive power to pursue racial justice greatly increased. For example, on July 31, 2020, Governor Brown created the Racial Justice Council, a body tasked with dismantling systemic racism across Oregon's institutions, promoting equity in policy making, and providing racial justice informed input to inform the Governor's recommendation for the 2021–2023 budget.³⁹⁹

³⁹⁵ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

³⁹⁶ Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, 7:39 PM), <https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact>.

³⁹⁷ See Jonathan Levinson & Sergio Olmo, *In America's Whitest City, Black Activists Struggle to Separate Themselves from Anarchists*, OPB (Nov. 25, 2020, 4:37 PM), <https://www.opb.org/article/2020/11/23/portland-protest-racial-justice-oregon-black-lives-matter>; Jorge L. Ortiz, *A Very Dark History: Oregon's Racist Past Fuels Protests Against Injustice in Portland*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/07/21/portland-protests-fueled-oregons-very-dark-history-racism/5483884002> (July 23, 2020, 5:03 PM).

³⁹⁸ See, e.g., *Metro's Commitment to Black Lives*, METRO, <https://www.oregonmetro.gov/public-projects/metros-commitment-black-lives> (last visited July 23, 2024); Sally Ho, *Companies Touting Black Lives Matter Face Workforce Scrutiny*, AP NEWS, <https://apnews.com/article/media-business-lifestyle-race-and-ethnicity-death-of-george-floyd-cc48d239cd93b8d07a9fc13d62ba7364> (last visited July 23, 2024).

³⁹⁹ KGW Staff, *Gov. Brown Forms Racial Justice Council to Dismantle Systemic Racism in Oregon*, KGW (June 10, 2020, 3:35 PM), <https://www.kgw.com/article/news/local/protests/gov-brown-announces-oregon-racial-justice-council/283-79f5ca12-bb1e-4241-a46e-6b0e5f135488>.

Governor Brown was determined to use the power at her disposal to increase the awareness and pursuit of racial equity in Oregon, and she used the events of summer 2020 as an opportunity to promote these initiatives. Governor Brown described the political climate within the Oregon government before the protests of 2020, and the effect the murder of George Floyd had on the mentality of members of government: “I struggled to move our racial justice agenda, unfortunately, until the murder of George Floyd. There wasn’t the political will, and Mr. Floyd’s murder was a huge catalyst in terms of the racial justice and clemency work.”⁴⁰⁰

It is notable that Governor Brown allowed equity and the impacts of criminal justice involvement on communities of color to be an important factor when deciding individual clemency applications. However, her willingness to use racial equity as a stated factor when proactively identifying groups who could benefit from clemency deserves individual mention. For example, while discussing each clemency group in her 2023 clemency report, Governor Brown noted the disproportionate effects people of color faced in these cohorts, and how eliminating these disproportionate impacts was a motivating factor in the grants.⁴⁰¹ As the figurehead of the Oregon government and the politician with sole control over clemency determinations, Governor Brown was careful to recognize how the challenges faced by a cohort of recipients related to systemic racism, and she was not reticent to identify her clemency actions as directly remedying these inequitable effects.

The impacts of systemic racism were motivating factors for most of Governor Brown’s governor-initiated clemency grants, but race factored more intimately for a clemency cohort Governor Brown identified. In December 2022, the Governor issued pardons for 48 Oregonians, a majority of whom were Black.⁴⁰² These recipients were participants of the Black Oregonian Pardon Project, an initiative where community partners worked with Lewis & Clark Law School’s Criminal Justice Reform Clinic to identify and help draft clemency petitions for Oregonians with older convictions that could not be expunged.⁴⁰³ Although the project was comprised of individual clemency applications that were independently considered, this cohort was presented as a group, and framed through the lens of systemic racism and the impacts of Oregon’s drug policy on communities of color.⁴⁰⁴ Further, the Black Oregonian Pardon Project was conceived after Governor Brown’s office expressed a willingness to use her executive powers to provide relief for members of Oregon’s Black community.⁴⁰⁵

Ultimately, clemency was a fertile ground for Governor Brown to articulate her ideology on racial equity and to use her power to make Oregon’s criminal

⁴⁰⁰ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

⁴⁰¹ BROWN, 2023 REPORT, *supra* note 118.

⁴⁰² These recipients were clients of Lewis & Clark Law School’s Criminal Justice Reform Clinic.

⁴⁰³ *Students & Alum Reflect on the Black Oregonian Pardon Project*, L&C LAW NEWSROOM, <https://law.lclark.edu/live/news/48845-students-alum-reflect-on-the-black-oregonian> (last visited July 23, 2024); Simon Davis-Cohen, *Black Oregonian Pardon Project Seeks 80+ Pardons Before Oregon Governor Leaves Office*, WE OUT HERE MAG. (Feb. 3, 2022), <https://weouthere.net/2022/02/black-oregonian-pardon-project-seeks-80-pardons-before-oregon-governor-leaves-office/>.

⁴⁰⁴ *Students & Alum Reflect on the Black Oregonian Pardon Project*, *supra* note 403.

⁴⁰⁵ *Id.*; Crombie, *Historic Push*, *supra* note 251.

justice systems more equitable. Despite not being constitutionally mandated to do so, Governor Brown was careful to note the harmful and disproportionate impacts of Oregon's criminal justice system on Black and Brown people and to use racial justice as a catalyst informing her subsequent use of clemency. For Governor Brown, clemency was an adept vehicle for remedying systemic inequities, particularly those resulting in the overrepresentation of Black Oregonians in prisons. As the Governor put it, "While it is not a replacement for comprehensive criminal justice reform . . . the power of clemency can be used to address systemic failures while we work to make lasting change."⁴⁰⁶

CONCLUSION

Governor Brown's use of clemency was historical, as her numbers greatly exceeded her predecessors in Oregon and all her contemporaries around the country, and her efforts paved the way for subsequent Oregon governors and governors across the country to embrace clemency as a tool for criminal justice reform. While the Governor's proactive and prolific use of clemency may likely encourage subsequent governors to utilize their executive power, Governor Brown expressed concern with the existing clemency mechanisms and their compatibility with making clemency an effective tool for reform. The Governor observed that "assuming that Governor Kotek runs for a second term, the horrible part of [clemency] work is that there will not be a pipeline for the next years and then it will boom for 2 to 3 years."⁴⁰⁷ Here, the Governor referenced the political weakness of the clemency power, particularly its susceptibility to political attack. Like in her own administration, Governor Brown expressed concern that clemency efforts could evaporate during a Governor's first term. The "boom" the Governor referred to is the second term of current Governor Tina Kotek; Governor Brown predicted that like herself, Governor Kotek could feel politically limited in her use of clemency until her second term, when re-election is no longer a concern. While the Governor did not explicitly advocate for governors to use their clemency powers as early as practicable, her statement implicitly urges all stakeholders interested in seeing clemency expanded to prepare for increased clemency efforts beforehand.

Governor Brown outlined the steps she believes subsequent Oregon governors should take to make clemency a more effective tool for change. First, the Governor highlighted the importance of coalition building: "Ask the community and the people doing the work to build a support group of people willing to speak up. Let's pull in a committee or an advisory board to help with the input of community organizations."⁴⁰⁸ For Governor Brown, clemency efforts should be driven in some way by communities, especially those particularly impacted by involvement in the criminal justice system. "Second, have a small team who can do the trauma informed culturally responsive victim outreach."⁴⁰⁹ Governor Brown was particularly interested in victim input in her clemency process, and wanted to ensure that

⁴⁰⁶ Crombie, *Historic Push*, *supra* note 251.

⁴⁰⁷ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

victims could be notified of clemency decisions in an appropriate and trauma-informed way. She continued, “Third, develop a 2-to-3-year plan, and spend the time to really think this through.”⁴¹⁰ Due in part to statewide emergencies, and possibly the previous rarity of clemency in Oregon, many of Governor Brown’s clemency actions did not have this requisite planning. Her advice to develop a comprehensive clemency plan reflects a shift in the perception of clemency. Previously, clemency was a rarely used formal executive power, typically utilized in the last days of an administration. By exhorting her successor to carefully develop a clemency plan, the Governor indicated that clemency should be prepared for and actively viewed as a common part of a Governor’s powers and responsibilities. Finally, she encouraged her successor to have their agency heads be “more upfront about the disparate impact of our criminal justice system when they are testifying or speaking to the public.”⁴¹¹ Governor Brown further displayed her concerns with disparate outcomes throughout Oregon’s criminal justice systems, but her statement also reveals her belief that clemency should be a tool for addressing systemic disparities. Through transparency about the disproportionate impact of Oregon’s criminal justice system, the necessity for clemency efforts could become more pronounced.

The Governor also shared her thoughts about coalition building to make clemency a more effective option across the country: “I think we should be training in other states with other progressive governors and courts. We don’t want to lose a *Marteeny* case in another state.”⁴¹² Through this type of coordination, executives and decision-makers across the country would gain familiarity with the extent of the clemency power and process in their state and be better suited to expanding its use. She continued:

We should be training and working with organizations like the Michael Thompson Clemency Project. You have a ton of governors aging out of office . . . What states could we focus on that would have a tremendous impact? In Michigan, Wisconsin, Minnesota, Illinois, New Jersey, New York, etc., there should be a team of people focused on supporting people doing this work.⁴¹³

This method represents a systematic and nationwide approach to clemency, focused on identifying and supporting individuals conducting clemency efforts in the states where clemency could see a growth in use.

Ultimately, for Governor Kate Brown, clemency is about hope. For many, clemency represents a second chance to accomplish things recipients may have given up hope of ever accomplishing, to become involved with community and family, or to

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* Here, the Governor is referring to *Marteeny v. Brown* where local district attorneys unsuccessfully challenged the extent of the Governor’s clemency power. *See Marteeny v. Brown*, 517 P.3d 343 (Or. Ct. App. 2022).

⁴¹³ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82. The Michael Thompson Clemency Project advocates for prison reform and facilitates clemency petitions to Michigan Governor Gretchen Whitmer. Mr. Thompson himself was Michigan’s longest serving non-violent offender, serving over 25 years of a 42- to 60-year sentence for the sale of marijuana before receiving a commutation from Governor Whitmer in 2021. *About*, MICHAEL THOMPSON CLEMENCY PROJECT, <https://www.mtclemency.com/about> (last visited July 23, 2024).

pursue self-improvement outside of the confines of incarceration. It can also be a formal recognition of a new chapter in a recipient's life, free from the social stigma and legal hurdles often associated with a felony record. While clemency can be used to correct legal errors or curry political favor, its redemptive use is the source of hope for many. Governor Brown provided her perspectives on clemency, iterating that "I just think that this is all about hope. People have no incentive to transform their lives, get their education, engage in employment training, etc. if they have nothing to live for, if this (prison) is it."⁴¹⁴ For Governor Brown, the hope of clemency is a motivator that encourages incarcerated people to take the steps necessary to complete their rehabilitation. Thus, through hope, clemency benefits not only the recipients and their communities, but many among Oregon's incarcerated population also interested in making the changes in their lives that could make them good candidates for clemency and valuable members of society. This was an important consideration for Governor Brown, and one she hoped other executives would consider as well. Despite the controversy frequently surrounding clemency, the Governor believes that rehabilitation is the ultimate goal for incarcerated Oregonians. As she put it, "99% of these people are going to get out. Let's figure out how we can welcome them as contributors to our community, neighbors, and friends. It's all about hope."⁴¹⁵

⁴¹⁴ Interview with Kate Brown (Apr. 10, 2023), *supra* note 82.

⁴¹⁵ *Id.*