

NOT *JUST* MERCY: GOVERNORS SHOULD USE THE EXECUTIVE CLEMENCY POWER AS A CORRECTIVE TOOL FOR MASS INCARCERATION

*Laura Tierney**

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* Senior Notes Editor, *Cardozo Journal of Equal Rights and Social Justice*, Volume 31; J.D. Candidate (May 2025), Benjamin N. Cardozo School of Law. I am grateful to Professor Alma Magaña for her guidance throughout the development of this Note. Thank you to the editors of CJERSJ Volumes 30 and 31 for their suggestions and comments. My sincere thanks to my family and friends for supporting me throughout law school.

I. INTRODUCTION

The United States incarcerates more people and has a larger prison population than any other country in the world.¹ As of 2023, federal, state, local, and Tribal detention systems in the United States held almost two million people.² Beginning with President Nixon’s “War on Drugs” and “tough on crime” agenda,³ United States prison populations began exploding in the 1970s, disproportionately impacting people and communities of color.⁴ This disparate impact continues to this day.⁵ For example, empirical evidence suggests that racial and ethnic groups sell and use drugs in proportion to their overall representation in the United States population (about thirteen percent are Black, about seventeen percent are Latino, and approximately sixty-five percent are white).⁶ However, more than fifty percent of those incarcerated for drug sales or possession are individuals of color.⁷ Incarceration has been linked to negative physical and mental health outcomes,⁸ as well as to poor socioeconomic outcomes, poverty, and devastating impacts on the family and community structures of those incarcerated.⁹

This Note argues that state governors should revitalize the use of the executive clemency power as a tool to fight mass incarceration and its unjust impacts. Executive clemency refers to the power of a chief government officer to “relieve in whole, or in part, the consequences resulting from a criminal conviction.”¹⁰ In the United States, this power resides with the

¹ James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/KL5A-Z7V7>].

² Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [<https://perma.cc/TW7N-ZU7N>]. Individuals are held in state prisons, federal prisons, local jails, juvenile correctional facilities, immigration detention facilities, and Indian Country jails, as well as in military prisons, civil commitment centers, and state psychiatric hospitals. *Id.*

³ andré douglas pond cummings, “*All Eyez on Me*”: *America’s War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417 (2012).

⁴ *Id.* at 418 (“In 1971, President Richard Nixon named drug abuse ‘public enemy number one’ in the United States. Since that time, an explicit ‘War on Drugs’ has dominated the political imagination of the United States”).

⁵ Cullen, *supra* note 1.

⁶ Robert D. Crutchfield & Gregory A. Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUES IN SCI. & TECH. 1, 47 (2015).

⁷ *Id.*

⁸ Becky Pettit & Carmen Gutierrez, *Mass Incarceration and Racial Inequality*, 77(3-4) AM. J. ECON. SOCIO. 1153-1183 (2018).

⁹ cummings, *supra* note 3, at 418.

¹⁰ Jonathan Harris & Lothórien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 AM. U. CRIM. LAW BRIEF 2 (2007).

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president and the governor of each of the fifty states.¹¹ The clemency power includes the power of the executive to grant commutations of sentences,¹² pardons,¹³ remissions of fines and penalties,¹⁴ and amnesty.¹⁵ While governors may deliberate on clemency decisions on a case-by-case basis,¹⁶ categorical clemency refers to the granting of clemency or the permitting of clemency eligibility to groups of people based on certain shared characteristics.¹⁷

Part II of this Note describes the problem of mass incarceration, explores how policies that perpetuate mass incarceration developed throughout American history, and details the devastating impact of mass incarceration on individuals and society.¹⁸ Part III explains the historical roots of the clemency power in the United States, analyzes the decline in the use of that power, and outlines how the executive clemency power operates among the states today.¹⁹ While recognizing that the executive clemency power is no substitute for comprehensive criminal justice reform, Part IV of this Note proposes that governors should use the executive clemency power to ameliorate the legacy of mass incarceration plaguing the United States and, together with state legislatures, enact reforms to make state clemency processes more efficient and transparent.²⁰ Finally, Part V provides an example of categorical clemency in action. It focuses on Oregon's governor, Kate Brown, and illustrates how governors can use executive categorical clemency to reduce prison populations and promote social justice goals.²¹

II. THE PROBLEM: MASS INCARCERATION

From the mid-1970s through the first decade of the 2000s, the United States experienced an unprecedented increase in its prison population.²² The number of individuals imprisoned in the United States peaked in 2008 when

¹¹ *Id.* at 2; U.S. CONST. art. II, § 2.

¹² *Schick v. Reed*, 419 U.S. 256, 266 (1974).

¹³ U.S. CONST. art. II, § 2.

¹⁴ *Osborn v. United States*, 91 U.S. 474, 478 (1875).

¹⁵ *Knote v. United States*, 95 U.S. 149, 154 (1877).

¹⁶ LEAH SAKALA, RODERICK TAYLOR, COLETTE MARCELLIN & ANDREEA MATEI, URBAN INST., HOW GOVERNORS CAN USE CATEGORICAL CLEMENCY AS A CORRECTIVE TOOL (2020), https://www.urban.org/sites/default/files/publication/102696/how-governors-can-use-categorical-clemency-as-a-corrective-tool_0_1.pdf [<https://perma.cc/D4QL-WYWK>].

¹⁷ *Id.*

¹⁸ *See infra* Part II.

¹⁹ *See infra* Part III.

²⁰ *See infra* Part IV.

²¹ *See infra* Part V.

²² Pettit & Gutierrez, *supra* note 8, at 1153.

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just over 2.3 million people were incarcerated.²³ Data from the Prison Policy Initiative shows that in 2023, about 1.9 million people were behind bars in the United States, approximately 565 people per 100,000 United States residents.²⁴ America’s emphasis on harsh prison sentences for crime can be traced back to President Nixon’s “War on Drugs” and the corresponding “tough on crime” policies and rhetoric that accompanied presidential administrations of the late twentieth century.²⁵ At that time, politicians, such as President Nixon and Senator Barry Goldwater, advocated for severe drug laws, insisting that there is a strong correlation between drugs and crime.²⁶ History would later reveal the true motivation behind President Nixon’s “War on Drugs”—vilifying Black communities.²⁷ The United States’s prison population further increased during the Reagan administration, aided by the passage of the Anti-Drug Abuse Act of 1986,²⁸ which effectively criminalized drug addiction.²⁹ At the start of Reagan’s tenure as president, the prison population consisted of approximately 329,000 people.³⁰ Eight years later, the United States prison population had nearly doubled to 627,000 individuals.³¹

Throughout the second half of the twentieth century, legislation such as the Violent Crime Control and Law Enforcement Act of 1994,³² now commonly known as the 1994 Crime Bill, encouraged the growth of the United States prison population by creating tough criminal sentences and incentivizing states to imprison more people by promising states funding for

²³ *Id.* at 1153.

²⁴ *United States Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> [<https://perma.cc/T9NX-ZDNP>] (last visited Sep. 24, 2024).

²⁵ Cullen, *supra* note 1.

²⁶ cummings, *supra* note 3, at 418.

²⁷ Dan Baum, *Legalize It All*, HARPER’S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> [<https://perma.cc/2B5B-EEPP>]. In this interview President Nixon’s domestic policy advisor John Erlichman stated:

You want to know what this was really all about? The Nixon campaign in 1968 and the Nixon White House after that had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

See id.

²⁸ Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

²⁹ cummings, *supra* note 3, at 418.

³⁰ Cullen, *supra* note 1.

³¹ *Id.*

³² Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

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policies that inflated prison populations.³³ The 1994 Crime Bill and its ensuing policies, including authorizing the death penalty for dozens of new and existing federal crimes and mandating life imprisonment for a third violent felony—known as the “three strikes and you’re out” rule—reflected a national focus on the use of punishment to control crime.³⁴ Despite these harsher punishments and policies of deterrence that fueled the rise in prison populations, mass incarceration has had little to no impact on the country’s rate of violent crime.³⁵ In fact, mass incarceration does little to make the American public safer.³⁶ Between 1980 and 2000, mass incarceration policies, such as the “War on Drugs,” “zero tolerance” policing, and mandatory minimum sentencing,³⁷ were responsible for only a two to four percent lower crime rate.³⁸

Since 2000, the relationship between incarceration and rates of crime has become even weaker.³⁹ Research conducted by scholars at the Vera Institute for Justice and the Brennan Center for Justice confirms that, compared to people convicted of crimes who received a sentence that did not involve jail time, imprisonment either had no impact on or slightly increased someone’s risk of perpetrating future crimes.⁴⁰ When analyzed together, the Vera Institute for Justice and the Brennan Center for Justice research suggests that incarceration, as practiced in the United States currently, is not a solution to America’s drug problem or a successful way to lower national violent crime rates.⁴¹

In stark contrast to its marginal impact on violent crime rates, incarceration undoubtedly has long-lasting impacts on those behind bars.⁴² Even further, the impact of policies of mass incarceration extends well

³³ Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), <https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis> [https://perma.cc/AH6R-7UFM].

³⁴ Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice> [https://perma.cc/TS6H-AQE2].

³⁵ DON STEMEN, VERA INST. OF JUST., *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 1* (2017).

³⁶ See generally *id.* at 2 (“Incarceration is an expensive way to achieve little public safety.”)

³⁷ Carl Vogel, *An End to Mass Incarceration*, 19 U. CHI. SCH. SOC. SERV. MAG. (2015).

³⁸ Stemen, *supra* note 35, at 1.

³⁹ *Id.*

⁴⁰ Jamie Santa Cruz, *Rethinking Prison as a Deterrent to Future Crime*, JSTOR DAILY (July 18, 2022), <https://daily.jstor.org/rethinking-prison-as-a-deterrent-to-future-crime> [https://perma.cc/C4MY-X4XK].

⁴¹ Cummings, *supra* note 3 at 418.

⁴² See generally AMY SMITH, *HEALTH AND INCARCERATION: A WORKSHOP SUMMARY* (The Nat’l Acad. Press, 2013) (examining the impact of incarceration on the mental and physical health of those incarcerated).

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beyond the imprisoned individual.⁴³ On an individual level, incarceration has been shown to negatively impact economic self-sufficiency, civic engagement, and political participation and lead to poor physical and mental health outcomes.⁴⁴ On a collective and societal level, incarceration serves as a tool to perpetuate inequality.⁴⁵ Crucially, not all groups bear the brunt of large-scale imprisonment equally.⁴⁶ A hallmark of mass incarceration is its systematic targeting of communities of color, particularly Black men.⁴⁷ While people of color make up about thirty percent of the United States population, they account for sixty percent of the population of those imprisoned.⁴⁸ Between 1980 and 2007, one in three of the 25.4 million individuals arrested was Black.⁴⁹ Because people of color make up the largest percentage of the prison population, the collective societal effects of incarceration are concentrated in communities of color.⁵⁰ Arguably, when incarceration devastates the economic, social, and political lives of those imprisoned and their communities, it creates a second-class of citizens along racial and ethnic lines in the United States.⁵¹

In the past decade, it has become increasingly clear that policies that promote mass incarceration have both had a disproportionate and devastating impact on communities of color and failed to improve public safety. Indeed, some American leaders and lawmakers have reached a general and bipartisan consensus that years of policies promoting mass incarceration have only created more challenges and have begun to change course.⁵² In 2023, legislatures in states such as California, Delaware, and Oklahoma, have undergone criminal justice reform measures aimed at reducing their states' prison populations.⁵³ Even politicians in historically conservative states such as Texas have been trailblazers in rolling back many of the punitive policies

⁴³ Pettit & Gutierrez, *supra* note 8, at 1153.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Oprah Keyes, *Mass Incarceration & People of Color*, S. COAL. FOR SOC. JUST., <https://southerncoalition.org/mass-incarceration-people-color> (last visited Mar. 4, 2024) [<https://perma.cc/9U2F-QJ5T>].

⁴⁹ *Id.*

⁵⁰ Pettit & Gutierrez, *supra* note 8, at 1153.

⁵¹ DRUG POL'Y ALL., *THE DRUG WAR, MASS INCARCERATION AND RACE* 2 (2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf [<https://perma.cc/3F5W-4LYQ>].

⁵² Michael Waldman, *Solutions: American Leaders Speak Out on Criminal Justice*, BRENNAN CTR. FOR JUST. 1 (Apr. 27, 2015), <https://www.brennancenter.org/our-work/policy-solutions/solutions-american-leaders-speak-out-criminal-justice> [<https://perma.cc/CTC5-6MVZ>].

⁵³ NICOLE D. PORTER, *THE SENT'G PROJECT, TOP TRENDS IN STATE CRIMINAL JUSTICE REFORM, 2019* (2019) <https://www.sentencingproject.org/policy-brief/top-trends-in-state-criminal-justice-reform-2019> [<https://perma.cc/W6C3-7X4Y>].

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adopted in the 1980s and 1990s.⁵⁴ In the past decade alone, Texas has reduced sentencing verdicts for non-violent offenders and mandated probation and drug rehabilitation as alternatives to incarceration for first-time, low-risk, and non-violent offenders.⁵⁵ As a result of these reform measures, many states, including Texas, have begun to see their prison populations and their crime rates decrease simultaneously.⁵⁶ Prison populations are currently declining at a rate of about ten percent per year. At that rate, it will take decades, along with comprehensive and far-reaching policies, to achieve widespread and consistent lower prison rates that reflect a rate of growth consistent with pre-mass incarceration policies.⁵⁷ In addition, while racial disparities in prisons are on the decline, at the current decarceration⁵⁸ rate of about two percent per year,⁵⁹ it will take 100 years for incarceration levels of Black people to match those of white people.⁶⁰ Just as the crisis of mass incarceration was created by decades of punitive policies under various federal and state administrations, the solution will need to be comprehensive and multifaceted.⁶¹

This leaves the question: how do we remedy the disastrous impacts of years of punitive mass incarceration policies under various federal and state administrations? An effective answer to this enormous question requires an interdisciplinary approach. At its core, this approach should advocate for a national shift away from a retributive punishment philosophy and towards a prevention and rehabilitation framework.⁶² America must reckon with the consequences of its policies on mass incarceration and develop a strategy for a more effective, more just criminal justice system. While this process will likely take years to develop, proponents argue that urgent relief is needed for those impacted by the effects of mass incarceration now.⁶³ This Note

⁵⁴ Cullen, *supra* note 1.

⁵⁵ *Criminal Justice Reform in Texas*, NOLAN CTR. FOR JUST. (2024), <https://conservativejusticereform.org/state/texas> [<https://perma.cc/UW7P-DABB>] (last visited Sept. 24, 2024).

⁵⁶ Cullen, *supra* note 1.

⁵⁷ *Id.*

⁵⁸ *Decarceration*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/decarceration> (last visited Oct. 17, 2024) [<https://perma.cc/D65X-55DU>] (defining decarceration as “the practice or policy of reducing the number of people subject to imprisonment”).

⁵⁹ NAZGOL GHANDNOOSH, THE SENT’G PROJECT, ENDING 50 YEARS OF MASS INCARCERATION: URGENT REFORM NEEDED TO PROTECT FUTURE GENERATIONS (Feb. 2023), <https://www.sentencingproject.org/app/uploads/2023/02/Ending-50-Years-of-Mass-Incarceration-Urgent-Reform-Needed-to-Protect-Future-Generations.pdf> [<https://perma.cc/26XW-R5YL>].

⁶⁰ Cullen, *supra* note 1.

⁶¹ *Id.*

⁶² Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1503 (2000); *Schick*, 419 U.S. at 266.

⁶³ SAKALA, TAYLOR, MARCELLIN & MATEL, *supra* note 16.

proposes that America's governors can and should act now by using a readily available legal vehicle for powerful and corrective justice reform in their states: executive categorical clemency.⁶⁴

III. BACKGROUND: HISTORY OF EXECUTIVE CLEMENCY IN THE UNITED STATES

Executive clemency is the discretion of the executive to forgive a punishment or replace one form of punishment with a lesser form of punishment.⁶⁵ The term clemency is “an umbrella term that encompasses the four traditional forms of executive mercy found in common law: pardons, reprieves, commutations of sentence, and remissions of fines and forfeitures.”⁶⁶ A pardon is the full repeal of a punishment and can be given freely or attached to a condition.⁶⁷ A reprieve is the temporary stay of a punishment, and a commutation of a sentence is a replacement of a punishment with a less severe punishment.⁶⁸ A remission is the forgiveness of a debt or penalty for an offense.⁶⁹

The power to grant clemency is ancient and found today in almost every nation in the world.⁷⁰ The clemency power predates written law, and has essentially existed “wherever and whenever the power to decide the fate of another rested in one individual's hands.”⁷¹ The clemency power can be found explicitly in the Code of Hammurabi, one of the earliest known codes of written law.⁷² The clemency power has also been mentioned in both the Old and New Testaments of the Bible.⁷³ Under English criminal law, the King's pardon was viewed as an act of mercy that the King could use as he pleased, not subject to any rules.⁷⁴

In the United States, executive clemency power refers to the ability of executives, the president or state governors, to modify the terms of someone's involvement in the criminal justice system.⁷⁵ The power of executive clemency includes the power to grant both commutations and

⁶⁴ *Id.*

⁶⁵ Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 U. MICH. J.L. REFORM 817, 819 (2016).

⁶⁶ Novak, *supra* note 65, at 817, 819.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Remission*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁷⁰ Rapaport, *supra* note 62, at 1501.

⁷¹ Harris & Redmond, *supra* note 10, at 2.

⁷² *Id.*

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 2.

⁷⁵ SAKALA, TAYLOR, MARCELLIN & MATEL, *supra* note 16.

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pardons and is vested in executives by the federal and state constitutions.⁷⁶ In the United States, this power is discretionary, almost entirely unreviewable by courts, subject to few restrictions, and untouchable by Congress.⁷⁷ The power of executive clemency is also deeply rooted in American history.⁷⁸ After gaining independence from the British monarchy, the Framers of the Constitution (“Framers”) were reluctant to vest the clemency power in a single executive.⁷⁹ There is significant evidence to support the notion that the Framers intended the executive clemency power to be used as a tool to correct injustice within criminal justice systems.⁸⁰ Historical archives show that the Framers intended the executive clemency power to be used as a necessary check on the Judiciary and Congress for times in which the straight application of criminal law would fail to achieve a just result.⁸¹ In this way, the clemency power was a vital part of the scheme of checks and balances created by the Framers.⁸² In the *Federalist No. 74*, Alexander Hamilton argued that it is a feature of good and compassionate policy to include a remedy for unforeseen legal circumstances in the structure of government, such as clemency.⁸³ He wrote: “[t]he criminal code of every country partakes so much of necessary severity that without easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”⁸⁴

Categorical clemency is one way to utilize the clemency power. It is generally supported by the American public, and, because it applies to more than one person at a time, it is the most effective use of clemency against mass incarceration.⁸⁵ Categorical clemency refers to granting clemency or allowing clemency eligibility to a class of people based on certain shared characteristics.⁸⁶ Categorical clemency also has deep historical roots.⁸⁷ George Washington granted clemency to participants in the Whiskey Rebellion, an early American protest of federal taxes on whiskey.⁸⁸ President

⁷⁶ Rapaport, *supra* note 62, at 1502.

⁷⁷ *Id.*; *Schick*, 419 U.S. at 266.

⁷⁸ Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1121 (2013).

⁷⁹ Harris & Redmond, *supra* note 10, at 2.

⁸⁰ Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, N. CAL. INNOCENCE PROJECT SCHOLARSHIP (1998).

⁸¹ *Id.*

⁸² Harris & Redmond, *supra* note 10, at 2.

⁸³ The *Federalist No. 74* (Alexander Hamilton); Ridolfi, *supra* note 80.

⁸⁴ The *Federalist No. 74* (Alexander Hamilton); Ridolfi, *supra* note 80.

⁸⁵ SAKALA, TAYLOR, MARCELLIN & MATEI, *supra* note 16.

⁸⁶ *Id.*

⁸⁷ Paul J. Larkin, *Whole-Sale Level Clemency: Reconciling the Pardon and Take-Care Clauses*, 19 U. ST. THOMAS L.J. 534, 540 (2023).

⁸⁸ *Id.*

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Madison granted clemency to an infamous group of smugglers and pirates because they assisted the United States during the War of 1812.⁸⁹ President Lincoln and President Johnson used categorical clemency to pardon members of the Confederacy before and after the Civil War, as both a way to encourage individuals to join the Union and as a way to promote the unification and healing of the country.⁹⁰

In a line of cases beginning in 1830, now known as the Pre-Furman⁹¹ cases, the Supreme Court consistently interpreted the clemency power as a discretionary act of “grace”⁹² that serves as an integral part of our country’s criminal justice system.⁹³ This sentiment was confirmed again in 1927 in *Biddle v. Perovich*, when Justice Oliver Wendall Holmes wrote of the pardon power: “[I]t is part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment had fixed.”⁹⁴

Perhaps unexpectedly, it was the Supreme Court’s decisions in a pair of death penalty cases in the 1970s, *Furman v. Georgia*⁹⁵ and *Gregg v. Georgia*,⁹⁶ that marked the beginning of a shift in the conception of the clemency power. This shift can be marked as from a broad one of discretionary mercy, to a more limited idea of the clemency power as one focused on legal error and actual innocence.⁹⁷ In *Furman*, the Court upheld a challenge to the death penalty practices of several states, ruling the practices unconstitutional because of their “arbitrary” and “capricious” manner.⁹⁸ As a result, states redesigned their death penalty practices to comply with the Court’s ruling.⁹⁹ These revamped death penalty practices led to another challenge to state death penalty practices two years later in *Gregg v. Georgia*.¹⁰⁰ In *Gregg*, however, the Court upheld death penalty schemes in Florida, Texas, and Georgia.¹⁰¹ The *Gregg* decision was widely seen as the Court’s acceptance of the constitutionality of the death penalty.¹⁰² Although the Court did not openly change its stance on executive clemency in the

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *infra* note 95.

⁹² *United States v. Wilson*, 32 U.S. 150, 160 (1833).

⁹³ *Harris & Redmond*, *supra* note 10, at 4.

⁹⁴ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

⁹⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁹⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁹⁷ *Harris & Redmond*, *supra* note 10, at 6.

⁹⁸ *Furman*, 408 U.S. at 295.

⁹⁹ *Harris & Redmond*, *supra* note 10, at 5.

¹⁰⁰ *Gregg*, 428 U.S. 153.

¹⁰¹ *Id.*

¹⁰² *Harris & Redmond*, *supra* note 10, at 7.

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Gregg decision, and in fact has continued to reiterate the importance of the clemency power since that decision, grants of clemency have steeply declined since then.¹⁰³

Pre-*Gregg*, grants of clemency were a common occurrence in the state criminal justice landscape.¹⁰⁴ Even in states with harsh criminal laws and high rates of death penalty executions, such as Texas, clemency grants were numerous.¹⁰⁵ For example, between 1923 and 1972, Texas executed 461 people.¹⁰⁶ During that same period, Texas governors commuted 100 capital punishment cases.¹⁰⁷ Since the 1970s, when the *Furman* and *Gregg* decisions were handed down and when policies of mass incarceration were gaining popularity, state grants of clemency have seen a precipitous decline.¹⁰⁸ Prior to the 1970s, it is estimated that clemencies were granted at a national rate of about twenty-five percent.¹⁰⁹ In the era after the *Furman* and *Gregg* decisions, the national clemency grant rate has dropped to less than six percent.¹¹⁰ Scholars attribute this decline in large part to shifting theories of criminal justice, a change in the perception of the fairness of the American legal system, and the political realities facing the president and governors.¹¹¹ The next part of this Note examines each of these factors and how they contributed to the stark decline in the rates of clemency in the United States throughout the second half of the twentieth century.

A. Shifting Theories of Criminal Justice

In the 1950s and 1960s, criminal justice, especially the clemency power, was characterized by a redemptive theory of justice.¹¹² Redemptive theories of justice, in contrast with retributivist theories of justice, emphasize the rehabilitation and reconciliation of the offender, the victim, and the community.¹¹³ Retributivist theories of punishment are based on the idea that criminal punishment should fit and match the severity of the crime committed.¹¹⁴ Evidence of a more redemptive view of executive clemency in the 1950s and 1960s can be found in public comments from governors at

¹⁰³ *Id.*

¹⁰⁴ Drinan, *supra* note 78, at 1121.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Harris & Redmond, *supra* note 10, at 7.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See generally Rapaport, *supra* note 62.

¹¹⁴ *Id.* at 1514.

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the time.¹¹⁵ For example, in 1962, when commuting the death penalty sentence of Paul Crump, convicted of murder, Illinois Governor Otto Kerner stated:

The most significant goal of a system of penology in a civilized society is the rehabilitation of one of its members who, for a variety of complex reasons, has violated the laws of society. If that premise were to be denied, solely because it is a capital case, a great disservice would be done to what we hopefully embrace as the ultimate goal of this system.¹¹⁶

Terry Sanford, Governor of Georgia from 1961 to 1965 echoed a similar ideology on his view of executive clemency.¹¹⁷ He stated:

The courts of our state and nation exercise in the name of the people the powers of the administration of justice. The executive is charged with the exercise in the name of the people of an . . . equally important attitude of a healthy society—that of mercy beyond the strict framework of the law. The use of executive clemency is not a criticism of the courts, either express or implied. I have no criticism of any court or any judge. Executive clemency does not involve the changing of any judicial determination. It does not eliminate punishment; it does consider rehabilitation It falls to the Governor to blend mercy with justice, as best he can, involving human as well as legal considerations, in light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.¹¹⁸

In the years since *Furman* and *Gregg*, retributivist theories of clemency have overshadowed redemptive theories, and the goals of mercy and rehabilitation have been largely discarded.¹¹⁹ The rise of retributivist theories of punishment has led directly to a decrease in the use of executive clemency.¹²⁰ Advocates of a retributivist view of the clemency power argue that because the severity of a punishment should match the severity of a crime, executive clemency should only be used in instances in which a mistake has been made and the person convicted is actually innocent or instances in which someone has not been afforded proper due process.¹²¹ Further, retributivists believe that only the person who was injured, or the victim of a crime, is able to forgive, or provide mercy to, the offender.¹²² The state, therefore, does not have the ability to act as an arbiter of grace or

¹¹⁵ Harris & Redmond, *supra* note 10, at 7.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Rapaport, *supra* note 62, at 1504.

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forgiveness.¹²³ According to a retributivist theory of executive clemency, clemency as grace, mercy, or due to evidence of rehabilitation or potential for rehabilitation is never justified.¹²⁴ Since the 1970s, retributivists have called for clemency reforms such as replacing executive discretion with normative standards in order to decide who could be eligible to receive grants of clemency.¹²⁵ As previously discussed because mercy and executive discretion have been essential components of clemency with deep historical roots,¹²⁶ this Note advocates for a return to a more redemptive theory of clemency, with an emphasis on humanity and the possibility for rehabilitation.

B. The Perception of Legal Fairness

Another reason for the diminishment of executive clemency is the public perception that the judicial system is, on the whole, fair and just, and therefore, there is less of a need for an executive check on the judiciary.¹²⁷ In the past few decades, this perception may have been fueled by many factors, including: a reduction in the number of offenses for which an individual may receive the death penalty; the end of mandatory death sentences and the jury's discretion to determine a sentence of life imprisonment or the death penalty; the introduction of bifurcated capital punishment trials—which divide decisions about guilt and decisions about sentencing—leeway given to defense teams in introducing mitigating evidence during sentencing; and recent limitations on which groups of individuals may be eligible for capital punishment, for example, minors.¹²⁸ The public may also perceive the appellate process to be an adequate safety net to catch any failures or mistakes of the trial court.¹²⁹ No matter the cause of the change in public views towards the judiciary, the value of the “failsafe” of the judicial process that is executive clemency has been discounted in favor of the perception that our criminal justice system can and should correctly dispense justice.¹³⁰ This perception has furthered the idea that use of the executive clemency power would be an overreach of power on the part of governors in any criminal case.¹³¹

¹²³ *Id.* at 1503.

¹²⁴ Harris & Redmond, *supra* note 10, at 7.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 8.

¹²⁹ *Id.*

¹³⁰ *Id.* 10 at 7.

¹³¹ *Id.*

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The truth of this perception, or the fairness and accuracy of trial court convictions, is beyond the scope of this Note. However, it should be noted that organizations such as the Innocence Project¹³² have exonerated over two hundred convicted individuals since 1992.¹³³ As human-made institutions, the courts are inherently fallible.¹³⁴ Indeed, there is significant evidence to show that the Framers themselves considered the pardon power to be a necessary check on the inevitably imperfect judiciary.¹³⁵ Even if criminal defendants today receive more fair trials or more thorough appellate review, there is no reason to limit the power of executive clemency to simply reviewing innocence or the denial of due process.¹³⁶

C. Politics

Because clemency is a power vested in an elected executive, a grant of clemency is necessarily a political exercise.¹³⁷ From ancient Greek and Roman times to modern American presidencies, commutations and pardons have been used to reward political allies, fulfill campaign promises, and garner widespread public support.¹³⁸ As previously noted, many of the past several decades have been defined by retributive and punitive “tough on crime” policies.¹³⁹ This shift in criminal justice philosophies was partly influenced by the public perception that the courts are more than capable of delivering justice.¹⁴⁰ As a result, since 1998 the United States has seen a rise in the popularity of retributivist politicians who are unequivocally in favor of the death penalty.¹⁴¹ Executive clemency, which was once seen as a hallmark of administrative power and strength, is now more likely to seem too politically risky and acts invoking the clemency power are sometimes avoided, as they may be subject to significant negative public attention.¹⁴² The justification behind this belief, when simplified, is essentially that

¹³² *Innocence Project*, INNOCENCE PROJECT, <https://innocenceproject.org> (last visited Jan. 3, 2024) [<https://perma.cc/YYM2-XZWY>]. The mission of the Innocence Project is to “free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone.” *Id.* Harris & Redmond, *supra* note 9, at 7.

¹³³ *Explore the Numbers: Innocence Project’s Impact*, THE INNOCENCE PROJECT, <https://innocenceproject.org/exonerations-data> [<https://perma.cc/K4YA-3BE5>] (last visited Sept. 24, 2024).

¹³⁴ Harris & Redmond, *supra* note 10, at 8.

¹³⁵ *Id.* at 4.

¹³⁶ *Id.* at 8.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Ridolfi, *supra* note 80, at 48.

decisions about punishments for crimes should be left to the judiciary.¹⁴³ These elected officials assert that it is not the job of the governor to ask questions about those punishments.¹⁴⁴

There is some evidence that a public preference for “tough on crime” policies is waning, giving way to an openness to consider more rehabilitative policies.¹⁴⁵ Specifically, recent economic downturns have forced even the “toughest on crime” states to reconsider their sentencing policies.¹⁴⁶ Polls of American voters suggest that the majority of taxpayers are not in favor of continuing to fund ever-expanding prison populations.¹⁴⁷ Ultimately, as more information about how mass incarceration has harmed communities enters the national consciousness, American voters, politicians, and advocates are searching for more just and effective ways to both tackle crime and heal the corrosive impact of mass incarceration.¹⁴⁸

D. Current Models of Executive Clemency in American States:

Importantly, each state has the power to create its own executive clemency structure and procedures.¹⁴⁹ This means that the power of governors to grant clemency can vary widely from state to state.¹⁵⁰ The states also have different reporting requirements, which can require the governor to report clemency actions to the legislature or leave their power unreviewed.¹⁵¹ The structure that each state follows can generally be broken into four models.¹⁵²

Under the first model, states delegate the clemency power to an independent review board, generally appointed by the governor, which reviews cases and makes decisions on pardons and commutations.¹⁵³ Six states¹⁵⁴ fall into this category. Because of their ability to appoint review board members, the governor retains control over who sits on the board and

¹⁴³ Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 286-270 (1990).

¹⁴⁴ Harris & Redmond, *supra* note 10, at 8.

¹⁴⁵ Drinan, *supra* note 78, at 1121.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ SAKALA, TAYLOR, MARCELLIN & MATEI, *supra* note 16.

¹⁴⁹ Margaret Colgate Love, *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2> [<https://perma.cc/RH9G-P9KK>].

¹⁵⁰ SAKALA, TAYLOR, MARCELLIN & MATEI, *supra* note 16.

¹⁵¹ *Id.*

¹⁵² Love, *supra* note 149.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (Alabama, Connecticut, Georgia, Idaho, South Carolina and Utah).

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therefore has broad discretion to influence clemency policies.¹⁵⁵ Further, in Alabama and South Carolina, the governor maintains the final clemency decision in capital punishment cases.¹⁵⁶ In Idaho, the governor must approve the board's decision to pardon specific serious crimes.¹⁵⁷

In the second model, the governor shares the clemency power with an independent review board.¹⁵⁸ In four of these states,¹⁵⁹ the governor shares clemency power by sitting as a member of the review board. Ten of these states¹⁶⁰ employ what is called a "gatekeeper board."¹⁶¹ This means that the governor's authority to grant clemency is dependent on approval or recommendation from the review board.¹⁶² Finally, eight states¹⁶³ mandate that governors consult with the review board before a clemency decision is granted, but do not require the approval of the board to act.¹⁶⁴

The third model is comprised of nineteen states¹⁶⁵ that employ review boards that governors may consult with, but this consultation is not mandated to grant clemency.¹⁶⁶ In these states, the review boards act in more of an advisory capacity, helping the governors make more educated clemency decisions.¹⁶⁷

In a small fourth model, three states¹⁶⁸ have no statutory advisory process for reviewing and granting requests for clemency.¹⁶⁹ The governors in these states retain the sole authority to grant clemency.¹⁷⁰

These models illustrate that there is variety in how states approach executive clemency.¹⁷¹ However, under each model, the governor retains broad discretionary authority to make clemency decisions, or at least heavily

¹⁵⁵ *Id.* Further, in Alabama and South Carolina, the governor maintains the final clemency decision in capital punishment cases. *Id.* In Idaho, the governor must approve the board's decision to pardon specific serious crimes). *Id.*

¹⁵⁶ ALA CONST., art. V § 124; S.C. CONST., art. IV § 14.

¹⁵⁷ Idaho Code § 20-1016.

¹⁵⁸ Love, *supra* note 149.

¹⁵⁹ *Id.* (Florida, Minnesota, Nebraska, and Nevada).

¹⁶⁰ *Id.* (Arizona, Delaware, Louisiana, Massachusetts, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Dakota, and Texas).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* (Alaska, Arkansas, Kansas, Michigan, Missouri, Montana, Ohio, and Washington).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (California, Colorado, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Mississippi, New Jersey, New Mexico, New York, North Carolina, North Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (Maine, Oregon, and Wisconsin).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (comparing pardon policy and practices across jurisdictions in Section Two).

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influence policy regarding executive clemency.¹⁷² This means that, despite reforms that include the creation of independent review boards, there is still a path forward for the reinvigoration of the use of executive clemency.¹⁷³

IV. PROPOSAL

In response to the devastating effects of mass incarceration and bolstered by the deep historical roots of the executive clemency power, this Note argues that a reinvigoration of state grants of clemency, especially categorical clemency, is an immediate and key part of the reforms that must happen to reduce our prison population levels and ameliorate the effects of mass incarceration. In particular, executive categorical clemency allows governors to provide targeted relief in the face of the costly crisis of overcrowded prisons and in response to the discriminatory impacts of mass incarceration.¹⁷⁴ In order to grant relief to those unjustly impacted by harsh policies and to aid in the process of decarceration, governors should utilize categorical commutations to reduce sentences or release people who share similar characteristics or experiences.¹⁷⁵ Governors should first prioritize individuals who were sentenced under laws that have since been repealed or for crimes that have since been reclassified.¹⁷⁶ In terms of shared characteristics, governors should prioritize commuting the sentences of those who were under the age of twenty-one at the time of conviction, the elderly, and those who are in groups who have been disproportionately impacted by the policies surrounding mass incarceration, especially Black men.¹⁷⁷ Those with the shared experiences of being survivors of sex or labor trafficking should also be considered for commutation or release.¹⁷⁸ Governors should also make informed decisions based on the needs of their own states to identify other groups of people who could benefit from categorical clemency and lower the state's prison population.

This renewed use of clemency should be paired with a movement to increase education about and transparency around the processes of executive clemency in each state. There are many ways in which the opaque clemency processes in each state make it harder for inmates to seek relief.¹⁷⁹ Governors

¹⁷² SAKALA, TAYLOR, MARCELLIN & MATEI, *supra* note 16.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ NAILA AWAN & KATIE ROSE QUANDT, PRISON POL'Y INITIATIVE, EXECUTIVE INACTION: STATES AND THE FEDERAL GOVERNMENT FAIL TO USE COMMUTATIONS AS A RELEASE MECHANISM (April 2022), <https://www.prisonpolicy.org/reports/commutations.html> [<https://perma.cc/HX5W-TUVE>].

¹⁷⁶ *Id.* See generally Crutchfield & Weeks, *supra* note 6.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

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and those who are appointed to the review boards that oversee states' clemency procedures should receive education about the legacy of policies of mass incarceration. Governors should seek to appoint individuals to review boards whose views align with redemptive views of criminal justice so they are more likely to fairly consider clemency applications. And governors and state legislatures should prioritize allowing applicants to easily obtain information about the eligibility and application requirements for requesting clemency, if applicable, in their states.¹⁸⁰

The country is reaching a turning point with regard to public opinion on clemency.¹⁸¹ An American-Civil-Liberties-Union-commissioned poll found that categorical clemency has broad public support.¹⁸² Sixty-two percent of voters polled believed that reducing prison populations would strengthen communities because individuals could be reunited with their families and taxpayer money could go towards helping communities rather than keeping people imprisoned.¹⁸³ According to the poll, eighty percent of voters support using executive categorical clemency grants to achieve reductions in prison populations.¹⁸⁴ As cases of wrongful convictions continue to come to light with the help of technological developments, and as the effects of mass incarceration continue to appear in society, it is difficult for anyone who is paying attention to perceive our criminal justice system as being entirely fair. Further, as the use of clemency is re-implemented into the political system, America's criminal justice philosophy will veer away from a retributive one and again towards a redemptive one. Taken together, it seems that many of the causes of reduced grants of clemency are now irrelevant.

The use of categorical clemency as a tool to reduce prison populations and work against the discriminatory impacts of mass incarceration policies is not only possible, but it has also been done successfully.¹⁸⁵ The next part of this Note looks at the tenure of Oregon Governor Kate Brown and her dedication to using clemency as a tool for social justice.

¹⁸⁰ *Id.*

¹⁸¹ SAKALA, TAYLOR, MARCELLIN & MATEI, *supra* note 16.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Noelle Crombie, *Oregon Gov. Kate Brown Ends Term with Flurry of Commutations, Pardons; Calls Clemency a Chance 'To Save Lives,'* THE CHRON. (Jan. 14, 2023, 4:16 PM), <https://www.chronline.com/stories/oregon-gov-kate-brown-ends-term-with-flurry-of-commutations-pardons-calls-clemency-a-chance,307274> [<https://perma.cc/Z6RN-7FSS>].

V. CASE STUDY: OREGON GOVERNOR KATE BROWN

Governor Kate Brown made executive clemency a cornerstone of her administration.¹⁸⁶ At the end of her tenure as Governor of Oregon in January 2023, Brown had pardoned or commuted the sentences of almost fifty-thousand individuals.¹⁸⁷ While she received many personal applications for clemency and ultimately granted clemency to 234 people in individual cases, the vast majority of her pardons and commutations can be characterized as categorical clemency.¹⁸⁸ Notably, Governor Brown commuted the sentences of 973 people in response to the COVID-19 pandemic, forty-one prisoners who served as firefighters during the extraordinarily deadly 2020 Oregon wildfire season, 144 people who had shown “extraordinary evidence of rehabilitation,”¹⁸⁹ and seventeen death row sentences to life without parole, effectively ending death row in the state of Oregon.¹⁹⁰ Brown made an estimated seventy-three juvenile offenders convicted in the adult court system eligible for parole after they had served fifteen years.¹⁹¹ She pardoned almost fifty thousand people who were convicted of minor marijuana violations before the state legalized recreational marijuana use in 2016.¹⁹² Governor Brown prioritized granting clemency to individuals, especially men of color in Oregon, who are incarcerated at rates far higher than the white population.¹⁹³ Nearly two-thirds of those to whom she granted clemency were Oregonians of color.¹⁹⁴

Governor Brown has spoken publicly about her belief that executive clemency can and should be used as a tool to “save lives” and correct injustices.¹⁹⁵ She sees her clemency actions as “part and parcel” of other criminal justice reforms in Oregon, which support the end of non-unanimous juries, restrict death penalty eligibility, and allow district attorneys and defendants to petition to change prison sentences.¹⁹⁶ She believes that

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Amanda Waldroupe, *The Story of One US Governor’s Historic Use of Clemency: ‘We Are a Nation of Second Chances,’* THE GUARDIAN (Sept. 28, 2022), <https://www.theguardian.com/us-news/2022/sep/28/oregon-governor-kate-brown-clemency> [<https://perma.cc/P2RS-EX75>].

¹⁹⁰ Rachel Treisman, *Oregon Gov. Kate Brown Explains Why She Commuted All of Her State’s Death Sentences,* OR. PUB. RADIO (Dec. 15, 2022), <https://www.opb.org/article/2022/12/15/oregon-gov-kate-brown-explains-why-she-commuted-all-of-her-state-s-death-sentences> [<https://perma.cc/JEF4-JBZU>].

¹⁹¹ Crombie, *supra* note 185.

¹⁹² Julia Shumway, *Oregon Gov. Kate Brown Commutes 17 Death Sentences, Ending Death Row,* OR. CAP. CHRON. (Dec. 13, 2022), <https://oregoncapitalchronicle.com/2022/12/13/oregon-gov-kate-brown-commutes-17-death-sentences-ending-death-row> [<https://perma.cc/GNG5-FMZ8>].

¹⁹³ Crombie, *supra* note 185.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Waldroupe, *supra* note 189.

retribution should not be the driving purpose of incarceration.¹⁹⁷ If victims are given the chance to be heard and individuals have gone through rehabilitation and have shown accountability, compassionate mercy and keeping people safe do not need to be mutually exclusive.¹⁹⁸ Under the leadership of Governor Kate Brown, thousands of people have been given second chances and, remarkably, the prison population in Oregon decreased for the first time since 1994.¹⁹⁹

VI. CONCLUSION

The crisis of prison overpopulation and the negative effects of decades of punitive and discriminatory mass incarceration policies need to be solved by a multidisciplinary approach to criminal justice reform and social welfare. While those solutions are in the process of being developed, governors already have a tool at their disposal to provide critical aid now: categorical executive clemency. This tool of mercy, which is supported by the American public²⁰⁰ and has been successfully utilized by politicians such as Governor Kate Brown of Oregon,²⁰¹ is one enshrined not only in the history of the country but also in societies around the world.²⁰² Ultimately, in an ideal world, a comprehensive solution to mass incarceration should pair the reinvigoration of executive clemency with new rehabilitation measures, reentry supports, and the mitigation of the consequences of felony conviction.²⁰³

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ SAKALA, TAYLOR, MARCELLIN & MATEI, *supra* note 16.

²⁰¹ Waldroupe, *supra* note 189.

²⁰² Ridolfi, *supra* note 80.

²⁰³ SAKALA, TAYLOR, MARCELLIN & MATEI, *supra* note 16.