

The Quality of Mercy in New York: A Different Kind of State Challenge to Federal Immigration Policy

Guest Post 

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On October 21, *The New York Times* [reported](#) that Governor David Paterson had received more than 1000 pardon requests from legal immigrants facing deportation because of old or minor state crimes. In May, Paterson (pictured) had [announced the creation of a panel to consider such requests](#), ostensibly to inject fairness into what he described as an "embarrassingly and wrongly



inflexible" system that expels immigrants without considering the possibility that deportation in a particular case might be unwise or unjust. Now, his term nearly up, the deadline for decision is fast approaching. Having stirred this pot, whatever he does is bound to be controversial.

Governor Paterson's decision to tackle his pardoning responsibilities on a systematic basis followed on the [heels of his pardon in March of Qing Hong Wu](#), a 29-year-old information technology executive. Wu, who had not lived in

his native China since he was five years old, faced deportation because of his participation in a series of muggings as a 15-year-old. The sympathetic facts of Wu's situation had been detailed in a series of articles in *The Times*, and his request for mercy had garnered the support of his sentencing judge and the Manhattan District Attorney's Office. Announcing his pardon initiative at an annual gathering of state judges, Paterson declared: "In New York, we believe in rehabilitation."

With the prospect of dozens or even hundreds of Paterson pardon grants becoming more real, *The Times* found advocates for immigrants euphoric: "People are being deported for indiscretions of their youth, and it's ripping families apart," one said. Another called for a replication of the pardon panel "far and wide."

The Federation for American Immigration Reform was reportedly less thrilled: "As a general rule, we would be opposed to governors or other local officials stacking the deck so that people who could legitimately be deported get to remain in the country." FAIR spokesman Ira Mehlman complained that the governor was superseding the authority of Congress. "This is not his determination to make," he said.

The role of state officials in making and enforcing federal immigration policy has been the subject of heated national debate since last spring when Arizona Governor Jan Brewer approved SB1070, making a criminal of every undocumented person in the state, and encouraging local police to arrest people they suspect are here illegally. In that case, a federal court found that Governor Brewer had gone too far. Is Mr. Mehlman right that Governor Paterson, too, has no business interfering with the federal machinery of immigration enforcement?

Mehlman is not right, because the Immigration and Nationality Act itself grants Governor Patterson that power and responsibility. For as long as criminal conviction has been a basis for deporting a lawful resident alien, pardon - including pardon by state governors - has been a formally recognized way of avoiding this penalty. (In one reported case, the Board of Immigration Appeals gave effect to a pardon issued by the mayor of Scotts Bluff, Nebraska.) The broad effect given a governor's pardon under the Immigration Act of 1917 has been gradually cut back (drug offenses have been excluded since 1952), but the exempting power itself remains, signaling Congress' well-founded recognition that the decision to permit a person to remain in this country is often best made at a retail level. From time to time, other state-administered relief mechanisms have been written into federal immigration law, such as the "Judicial Recommendation Against Deportation" that until twenty years ago gave state and federal judges the power to bar deportation at the time they imposed sentence. As the Supreme Court recently recognized in *Padilla v. Kentucky*, state prosecutors can effectively determine deportability by the charges they choose to bring or forego. The role of pardons in immigration cases is consistent with their general purpose to relieve the collateral consequences of conviction, known since Roman times as "civil death."

For better or worse, pardoning has become an activity that most chief executives avoid out of fear that forgiving the wrong person may prove politically costly. Mixed with immigration policy, pardoning becomes downright combustible. As a result, few governors in recent years have used their power to dispense with the penalty of deportation, and there has been only one presidential pardon to avoid deportation in the past thirty years. For the most part, immigration pardons nowadays are isolated occurrences, frequently prompted by press interest in a factually compelling case. Only in Georgia, where pardons are issued not by the governor but by an administrative agency, have immigration pardons issued with any degree of regularity. This is what makes Governor Paterson's action so extraordinary and, for some, so welcome. Indeed, the editors of *The New York Times*, no fans of Governor Paterson in general, greeted the announcement of his pardon

panel last May with a hearty "well done" ("[Mr. Paterson has shown courage and common sense](#) at a time when the national debate about immigration shows little of either").

But welcome or not, Paterson's proposed pardons are well within the dispensing authority federal immigration law itself gives to governors. Exempting particular individuals from the penalty of deportation is certainly not gaming the system, as Mr. Mehlman's use of the phrase "stacking the deck" would suggest. And, anyway, who or what does Mr. Mehlman think was cheated when Governor Paterson pardoned Qing Hong Wu? Would he seriously contend that the pardon power loses its legitimacy when it is exercised regularly and systematically, rather than in isolated response to publicity? Is it numbers alone that concern him?

In the end, Governor Paterson will be called upon to defend the merits of any particular pardons he issues or declines to issue in the next three months. The evident care he is taking in staffing the hundreds of petitions filed with his panel evidences an awareness that his tenure as governor may be judged as much by his final acts of compassion as on anything else he has done in that office. And he is to be commended, not criticized, for deciding to use his constitutional power in such a transparent and democratic way. We should all wish him success in this endeavor, and hope that other governors and pardoning authorities -- including President Obama, who has yet to pardon anyone, much less a deportable immigrant -- will be encouraged by his example.