GOVERNORS! SEIZE THE LAW: A CALL TO EXPAND THE USE OF PARDONS TO PROVIDE RELIEF FROM DEPORTATION

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ABSTRACT

An obscure provision of the Immigration and Nationality Act ("INA") allows an immigrant convicted of a wide range of crimes that are grounds for deportation to avoid this fate if pardoned by a chief executive. In the current era of expansion of the categories of crimes that constitute grounds for deportation and the shrinkage of equitable forms of relief, a pardon presents a vehicle for ameliorating these harsh effects. But few presidents or governors take advantage of this opportunity, even when the individual facing deportation is a long-term lawful resident whose transgression occurred long ago. During a few months in 2010, New York Governor David A. Paterson broke this trend to establish a pardon panel specifically to consider applications from immigrants.

This article argues that Governor Paterson's resolute and courageous example, though ephemeral, presents a model for governors in all states to exercise discretion on behalf of individuals who deserve the exercise of mercy and justice that a full and unconditional pardon confers, particularly when the permanent exile they face far exceeds their wrongdoing and is disproportionate to their well-established character.

Qing Hong Wu left China when he was five to immigrate with his family to the United States as a lawful permanent resident. As a teenager, he was convicted of several muggings. When he was sentenced to three to nine years in a juvenile facility, he asked for forgiveness from his victims. Fifteen years later, having turned his life around, he was engaged to be married, and was a hardworking employee at a real estate financial management company. When he applied to naturalize, he found himself snared in the intractable net of immigration laws mandating his deportation. His predicament, including detention, severely affected not only him but also other New York residents: his family, his fiancée, and his employer. Even the Family Court judge who, years before at his sentencing, had promised to stand behind him if he turned his life around, became his champion.[1]

Faced with this poignant story, former New York State Governor David A. Paterson took an unexpected tack: He pardoned Qing Hong Wu for the express purpose of preventing his deportation. This chief executive went even further to respond decisively to the harsh effects of deportation laws on New York

[1] Nina Bernstein, *Judge Keeps His Word to Immigrant Who Kept His*, N.Y. TIMES, Feb. 18, 2010, at A1.

residents to form an innovative and, to this date, unreplicated pardon panel established during the waning days of his administration.[2]

Governor Paterson took advantage of an obscure provision of the Immigration and Nationality Act ("INA") that allows individuals whose convictions are pardoned by chief executives to avoid deportation.[3] The decision of who to pardon, of course, remains ensconced in the unfettered pardon powers of a chief executive that the United States adopted from English tradition.[4] But a pardon in a criminal matter can have a direct positive impact on an individual's status by either removing all exposure to deportation or by opening up avenues of relief that a conviction otherwise would bar.[5] The possibility—or, in many cases, the certainty—of removal is a collateral consequence fully within the executive's discretion to consider when making the pardon decision.

Governor Paterson intervened in the deportation process by resorting to pardons, an option familiar to the criminal justice system that was imported into immigration laws almost a century ago in recognition of deportation's severe and often cruel effect. He nimbly and effectively made use of the existing federal law to accomplish a humane goal on behalf of at least a small number of his constituents.

For this, he stands apart from the current aggressive, anti-immigrant initiatives of his gubernatorial peers who increasingly have chosen to take an openly

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[2] Danny Hakim & Nina Bernstein, *New Paterson Policy May Reduce Deportations*, N.Y. TIMES, May 4, 2010, at A1. The panel members were: Chairman Mark Bonacquist, assistant deputy secretary of the state's Office of Public Safety; Das Velez, senior advisor to the Office of the Governor; Caroline J. Downey, general counsel of the New York State Division of Human Rights; Linda Glassman, deputy commissioner of the Office of Temporary and Disability Assistance; and Steven Philbrick, associate counsel to the Division of Parole. Chris Gilbin, *High Hopes for Paterson's Immigrant Pardon Panel*, CITY LIMITS (June 23, 2010), *available at* www.citylimits.org/news/articles/4076/high-hopes-for-paterson-s-immigrant-pardon-panel#.UcnnE_nVCso. The panel's membership included only fairly high-ranking government officials and had no representatives from a range of other types of constituencies such as clergy, victims' groups, immigration organizations, or academics.

[3] Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. § 1227(a)(2)(A)(vi), INA § 237 (a)(2)(A)(vi), (2000).

[4] U.S. CONST. art. II, § 2. Alexander Hamilton wrote about the pardoning power of the President:

> As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance.

THE FEDERALIST PAPERS 74 (Mar. 25, 1788); *see also* P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis*, 27 PRESIDENTIAL STUD. Q. 251-53 (1997); *see also* sources cited *infra* note 28.

[5] *See infra* note 115; *see, e.g.*, Baca v. Holder, 461 Fed. App'x 555, 556, 201 U.S. LEXIS 22480 (9th Cir. 2011) (remand permitting consideration of effect of pardon on eligibility for relief).

defiant position against federal immigration enforcement.[6] Relations between the federal government and the states over immigration regulation are strained as states and localities frustrated by perceived federal ineffectiveness increasingly assert themselves. Governor Jan Brewer described Arizona's restrictive law, S.B. 1070, as "another tool for our state to use as we work to solve a crisis we did not create and the federal government has actively refused to fix."[7] This law provided a model and impetus for other similarly aggravated states' multi-issue legislation. Some states, cities, and towns have passed individual laws that implicate the lives, livelihoods, and liberties of immigrants.[8] Numerous bills have been proposed (and some enacted) relating to housing, employment, drivers' licenses, voter registration, and education.[9]

Much but not all of this activity is aimed either at strengthening immigration enforcement with direct local participation or at indirectly undermining the immigrant's quality of life.[10] Although some state and local legislatures and executives have taken a more immigrant-friendly approach by opting out of federal programs such as Secure Communities[11] or passing ameliorative ordinances,[12] a

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[6] Republican Governor of Nebraska Dave Heineman asserted in 2010, "I'd be willing to bet a lot of money that almost every state in America next January is going to see a bill similar to Arizona's." Abby Goodnough, *Governors Voice Grave Concerns on Immigration,* N.Y. TIMES, July 11, 2010, at A1. Paterson's efforts were antithetical to his gubernatorial counterparts. Seth Freed Wessler, *Paterson Tries to Make New York the Anti-Arizona State*, COLORLINES (May 4, 2010), http://colorlines.com/archives/2010/05/paterson_tries_to_make_new_york_the_anti-arizona_state.html.

[7] Statement by Jan Brewer on S.B. 1070, July 28, 2010, *available at* http://www.janbrewer.com/article/statement-by-governor-jan-brewer-on-sb-1070 (last visited June 4, 2012); *see also* Keith Cunningham-Parmeter, *Forced Federalism*, 62 HAST. L. Q. 1674, 1675 (2011) ("The states, displeased with decades of lax enforcement at the federal level, have taken immigration matters into their own hands.").

[8] Stokely Baksh, *How States Broke the Record on Immigration Bills in 2011*, COLORLINES (Aug. 22, 2011), http://colorlines.com/archives/2011/08/more_state_legislatures_tackling_immigration_laws.html.

[9] Nat'l Conf. of State Legislatures, *2011 Immigration-Related Laws and Resolutions in the States* (Jan. 1-Dec. 7, 2011) [NCSL Report], *available at* http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx; Kevin O'Neill, *Hazelton and Beyond: Why Communities Try to Restrict Immigration*, MIGRATION INFORMATION SOURCE, Nov. 2010, *available at* http://www.migrationinformation.org/feature/display.cfm?ID=805; Immigration Policy Ctr., A Q&A Guide to State Immigration Laws, 4 (Feb. 2012), *available at* http://immigrationpolicy.org/special-reports/qa-guide-state-immigration-laws. Some of these ordinances have been declared unconstitutional in federal courts. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch Texas, 675 F. 3d 802 (5th Cir. 2012), *reh'g granted en banc*, July 31, 2012.

[10] Angela S. Garcia & David G. Keyes, Center for American Progress, *Life as an Undocumented Immigrant*, Mar. 2012, *available at* http://www.americanprogress.org/issues/2012/03/life_as_undocumented.html.

[11] Press Release, *Governor Cuomo Suspends Participation in Federal Secure Communi-*

more generous use of the gubernatorial pardon, if properly administered, could more directly benefit a considerable portion of local individuals (and their families) who are trapped by inflexible and unforgiving laws.

In this paper I urge expansion of the use of the pardon power at the state level because it is one of the few remaining vehicles for avoiding deportation available to any non-citizen with a wide range of criminal convictions, however minor and however old. Increasing the use of pardons would indirectly restore the formerly available exercises of judicial compassion and equity that Congress has wrested from both sentencing judges in criminal proceedings and immigration judges in removal proceedings. The pardon process is imperfect and at times politicized.[13] But its deep roots in a favorable tradition of discretionary mercy to avoid cruelty and injustice explain why it was written into and has survived in the INA and why it should be more vigorously employed in the immigration context. If clear, objective eligibility standards are applied transparently, fairly, and apolitically, any chief executive (or appropriate delegate) could institute a robust program that takes full advantage of the little-noticed, underutilized INA deportation escape-hatch.

Federal law already confers on state chief executives the authority to have an impact on an individual's immigration status through pardons. Unlike in *Arizo-*

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ties Program, *available at* http://www.governor.ny.gov/press/06012011FederalSecureCommunitiesProgram; Kirk Semple, *Cuomo Ends State's Role in U.S. Immigrant Checks*, N.Y. TIMES, June 2, 2011, at A21; Julia Preston, *Immigration Program Is Rejected by 3rd State*, N.Y. TIMES, June 7, 2011, at A13 (the governors of New York, Illinois, and Massachusetts will not cooperate with Secure Communities).

[12] For example, NYC Local Law No. 62, enacted on Nov. 22, 2011, places restrictions on when the New York City Department of Corrections can turn over undocumented immigrants to ICE after their release from jail. *Available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=967785&GUID=9F7C289B-A8D8-4A95-8882-BF044CBB5EE2&Options=ID%7cText%7c&Search=. Chicago Mayor Rahm Emmanuel signed the "Welcoming Cities Ordinance," a local law limiting the city's cooperation with the federal Secure Communities Program by detaining only those undocumented immigrants who are wanted for or have been convicted of serious crimes. Julia Preston, *Obama Policy on Immigrants Is Challenged by Chicago*, N.Y. TIMES, July 12, 2012, *available at* http://www.nytimes.com/2012/07/11/us/obama-policy-on-illegal-immigrants-is-challenged-by-chicago.html?_r=1&ref=illegalimmigrants. San Francisco's Sanctuary Ordinance, Administrative Code Chapter 12H: Immigration Status, prohibits public employees from assisting federal immigration enforcement. *Available at* http://sfgsa.org/index.aspx?page=1069; *but see* Fonseca v. Fong (No. CPF-07-507227) (2012) (invalidating this ordinance by holding that the San Francisco Police Department had to report certain drug arrests to federal authorities). In the education arena, in 2011 Connecticut and Maryland allowed unauthorized foreign nationals to be eligible for in-state tuition assistance. NCSL Report, *supra* note 9.

[13] *See, e.g.*, William Glaberson, *States' Pardons Now Looked at in Starker Light*, N.Y. TIMES, Feb. 16, 2001, *available at* http://www.nytimes.com/2001/02/16/us/states=pardons=now=looked=at=in=starker=light.html?pagewanted=all&src=pm.

na v. United States,[14] there is no conflict between federal and state law; federal law positively allows a state pardon to waive deportation. Thus, instead of having to pass controversial laws seizing some kind of role in immigration administration, governors can rely on existing federal law to establish programs that avoid the draconian results of permanent deportation on families and other community members. The same plea might be made for expanding the presidential pardon that is rarely used to counteract the harsh effects of deportation.[15] But a more localized exercise of a governor's discretion would entail a more informed, accurate, and legitimate decision about "native" sons and daughters that take into account the effect of removal on the community close at hand.

As long as the immigration laws insist on the removal of non-citizens convicted of a lengthening list of deportable crimes—and as long as previously available exceptions and waivers are foreclosed—deportations will increase.[16] Yet, when individuals are deported, leaving behind family and jobs, it is the states and cities where they formerly lived that are more likely to bear the financial and social costs of deportation. Governors, therefore, can and should turn this tide in deserving cases by restoring and expanding the use of their statutorily authorized equitable power. This article will make the case for an increased use of this authority to provide a tool to avert removal as an expression and extension of the "quality of mercy" that resides in the criminal law universe into immigration law.[17]

To put this proposal into context, Section I of this article reviews generally and briefly the history of the executive authority to grant clemency to individuals convicted of crimes. Section II provides an overview of the pardon power

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[14] 567 U.S. — (2012). In this case, the Supreme Court examined Arizona's attempt to engage in immigration enforcement under the Supremacy Clause of the U.S. Constitution, Art. V, cl. 2, to determine how to resolve a conflict between federal and state law. *Id.*, slip op. at 7-8.

[15] President Barack Obama granted a pardon on March 1, 2013, to a lawful permanent resident from China who had been convicted in 1996 of a conspiracy to defraud. Josh Gerstein, *Obama Issues Rare Immigration-Related Pardon*, POLITICO BLOG (Mar. 2, 2013), *available at* http://www.politico.com/blogs/under-the-radar/2013/03/obama-issues-rare-immigrationrelated-pardon-158297.html. This article reports that the last immigration-related pardon was issued by President Bill Clinton in 2001.

[16] Between 2007-2011, deportations based on criminal convictions increased from 102,024 to 216,412. ICE Total Removals, *available at* https://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf.

[17] In 2008, the ABA issued a resolution urging "reinvigorated use of the pardon power to avert removal." ABA Crim. Just. Sect. Comm. of Immig. Report to the House of Delegates-Recommendation 6 (urging, *inter alia*, the reinstatement of some form of JRAD), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_my06300.authcheckdam.pdf.

under the INA. Sections III and IV discuss the Paterson panel and a proposed model for expanding the use of the pardon power.

I. AN OVERVIEW OF THE FEDERAL PARDON POWER

An exercise of executive clemency embraces a variety of measures. A pardon is the most expansive type of executive clemency since it is usually unrestricted, unconditional, nullifies the conviction, and can be issued before or after conviction and/or sentence.[18] As this section will discuss briefly, a pardon eradicates the formal conviction and most of its legal consequences, although the expressive message of a pardon about the character of the offender and the effect on the stigma of conviction is less than clear. Other forms of clemency provide some form of relief for the convicted individual, but they do not disturb or mitigate the conviction itself or its after-effects. These options include sentence commutation (reduction), remission of fines and forfeitures, reprieve (postponement of punishment), and amnesty (usually granted to a group).[19] Of these options, however, only a full and unconditional pardon has any impact on deportation.

Clemency not only takes different forms, but also it accomplishes different objectives. The National Center for State Courts catalogued the most frequent grounds for an exercise of clemency and listed immigration consequences in particular:

- to correct hard cases (even under optimum conditions, exceptional cases arise that cannot be left to legally prescribed rules; laws cannot be drafted that will fit every conceivable situation);
- to correct unduly severe sentences;
- for mitigating circumstances;
- for innocence or dubious guilt;
- in death penalty cases;
- for physical condition;
- to restore civil rights;
- to prevent deportations;
- for political purposes and for reasons of state;
- for turning states' evidence; and
- for services to the state.[20]

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[18] "A pardon is an act by the executive (or others legally empowered) that lessens or eliminates a punishment determined by a court of law, or that changes the punishment in a way usually regarded as mitigating." It is, in effect a "[r]eassessment of moral guilt of the offender." KATHLEEN DEAN MOORE, JUSTICE, MERCY, AND THE PUBLIC INTEREST 193 (1989).

[19] JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 34 (2009).

[20] SAMUEL P. STAFFORD II, THE NATIONAL CENTER FOR STATE COURTS, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE xvi (1977); *see also* Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1653 (2008).

This list captures the historical bases for clemency, illustrating that averting deportation is an unquestioned basis for clemency, on equal footing with mitigation, correcting injustice, and innocence. This ground may well appear on the list precisely because of the long history of the INA pardon clause which derives its force from Congress' understanding that some deportations might be a disproportionate and unjust ramification of a criminal conviction.[21]

A. *The Development of the Pardon Power in Federal Law*

The presidential pardon power is found in the text of the Constitution. Article II, Section 2, Clause 1 permits "reprieves and pardons for offenses against the United States." This almost unlimited power (only cases of impeachment are exempted) was understood as a critical check on both the judiciary and the legislature, but was controversial at the time of its adoption since it vested total authority in the executive branch, a tradition that hewed a bit too closely to the traditional absolute powers of the monarch.[22] But, as Alexander Hamilton urged, and this view prevailed, an unfettered presidential pardon power was an important check on unjust deviations that might arise in the regular course of criminal law and process.

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partake so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilty, justice would wear a countenance too sanguinary and cruel.[23]

The pardon power's rationales and applications have changed over time as systems of criminal law and procedure have become more layered and more flexible allowing for more sentencing options and mitigation, and for more avenues of relief for the collateral consequences of a criminal conviction.[24] But fundamentally it relies on a notion of error-correction so that, when both the legislature and/or the judiciary cause or reinforce injustice, there is an opportunity of last resort to address this systemic failure. The most prominent current examples of this use of the pardon power have been to redress death penalty

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[21] *See* discussion *infra* Section II.B.

[22] For a detailed history of the uses and abuses of the pardon power in England, *see* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. R. 475, 476-97 (1977).

[23] ALEXANDER HAMILTON, THE FEDERALIST NO. 74 (Mar. 25, 1788). "The clemency power, simply put, is intended to provide for a solution in cases where—for whatever reason—normal legal procedures have produced an outcome that seems unjust." CROUCH, *supra* note 19, at 29.

[24] Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 Fed. Sent'g Rep. 119, 122 (2001), *citing* W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 115 (1941).

cases[25] and more recently, mandatory minimum drug sentences.[26] In the famous example of the 2003 mass commutation of all inmates on death row, Illinois Governor George Ryan justified his actions by citing to the "demon of error" in capital sentencing.[27]

The message of the pardon power has evolved since this country's founding, often causing considerable confusion.[28] On the one hand, this power followed ancient traditions based both in justice and practical politics that pervaded societies up to and including the British legal system imported to the United States prior to independence.[29] The presidential pardon reflects a power that has been

> exercised from time immemorial by the executive of that nation [England] whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.[30]

Yet, when deciding pardon cases, federal courts, including the Supreme Court, provide varying motivations or justifications for the pardon power. The most prominent justification of pardons has been that this authority is based on mercy, an "act of grace" accorded to the head of state.[31] The most oft-cited articulation about the meaning of a pardon appears in *Ex Parte Garland*,[32] de-

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[25] Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, *available at* http://www.nytimes.com/2003/01/12/us/citing=issue=of=fairness=governor=clears=out=death=row=in=illinois.html/.

[26] COLORLINES, *Obama Commutes 22-Year Sentence for Crack Cocaine Conviction*, Nov. 12, 2011, http://colorlines.com/archives/2011/11/obamas-first-bold-act-of-exec-clemency-pardons-woman-with-22-year-crack-sentence.html/.

[27] Kathleen (Cookie) Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers*, 24 CRIM. JUST. (Fall 2009), *available at* http://www.scribd.com/doc/78073850/Gubernatorial-clemency-and-pardon-powers-by-state-comparison-begins-on-page-9.

[28] There are several excellent and comprehensive resources that contain histories of the pardon power with particular emphasis on the federal system. *See* CROUCH, *supra* note 19; MOORE, *supra* note 18; Daniel T. Kobil, *The Quality of Mercy Strained; Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1990-1991); Samuel T. Morrison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. L. REV. 1 (2005); Philip P. House, *Forgive and Forget: Honoring Full and Unconditional Pardons*, 41 MAINE L. REV. 272 (1989); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. OF CRIM. L. & CRIMINOLOGY 1169 (2010); Duker, *supra* note 22.

[29] CROUCH, *supra* note 19, at 10-14 (summarizing the history of clemency).

[30] United States v. Wilson, 32 U.S. 150, 160 (1833) (quoted in Burdick v. United States, 236 U.S. 79, 269 (1914)).

[31] "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." Wilson, 32 U.S. at 160-61.

[32] 71 U.S. 333 (1866).

cided in an era where pardons were an important part of post–Civil War conflict normalization.[33] In holding that Garland, a lawyer who had received a presidential pardon for his role in the Confederacy, would be restored to all of his political and civil rights, the Court discussed the nature and effect of the pardon in a discourse on the history of Greece, Rome, Spain, and France.[34] The Court famously articulated its broad understanding of the effect of a pardon:

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. . . . [I]t makes him, as it were, a new man, and gives him a new credit and capacity.[35]

Garland's notion that a pardon has a cleansing effect, returning the offender to a state of pre-conviction innocence, has eroded over time. Although the paragraph above is often quoted, the Supreme Court has recognized that a pardon does not erase the past.[36]

The "act of grace" rationale furthers retributive goals by granting clemency in cases when an individual deserves not to be punished at all, does not deserve the criminal punishment as imposed, or should not have to suffer additional impairments that might result from the conviction. Although a pardon might be granted after a sentence is served or a punishment completed, the pardon represents a conclusion that the individual deserves to be treated differently than the law or other circumstances may have determined in the past.

Over time, pardons have also served other purposes. After the Civil War, they helped to reunify the country[37] and after the Vietnam War to restore rights to draft resisters.[38] The "act of grace" rationale competes with a "public welfare" theory of pardons that sees presidential clemency as a decision justified by its benefit to the public interest. In 1927, in *Biddle v. Perovich*, a case in

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[33] CROUCH, *supra* note 19, at 41-46.

[34] Ex parte Garland, 71 U.S. 333, 348-50 (1866).

[35] *Id.* at 381.

[36] In *United States v. Knote*, the Supreme Court stated:

> It does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, otherwise; it does not given compensation for what has been done of suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered and no satisfaction for it can be required.

95 U.S. 149, 153-54 (1877).

[37] CROUCH, *supra* note 19, at 11, 40-43; MOORE, *supra* note 18, at 51-52.

[38] President Jimmy Carter granted a general amnesty to Vietnam War draft evaders. Proclamation 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977); *see also* MOORE, *supra* note 18, at 81.

which President Taft commuted a death sentence over the objection of the defendant, Justice Holmes stated:

> A pardon is not a private act of grace from an individual happening to possess power. It is a 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 fixed.[39]

Thus, the "public interest" theory posits that a pardon should only be exercised if it benefits the public, and not simply because the individual deserves some leniency or remediation. But not all public interests are rooted in essential fairness and may be largely policy-driven, expedient, or actually impose unfair outcomes such as the acceptance of an unconscionable condition.[40] More often, the pardon has hybrid justifications as both an act of grace and an act of error-correction in the name of justice, thus benefitting both the individual and the public interest.[41]

On occasion, pardons appear motivated by political considerations and favoritism. Fueled by these rationales, these pardons may lack transparency. A controversial presidential act draws the attention of the "court of public opinion" such as happened when President Gerald Ford pardoned President Richard Nixon,[42] when the first President George Bush (I) pardoned individuals involved in the Iran-Contra Scandal,[43] or when President Bill Clinton ratcheted up his pardon record for the benefit of people with some personal connections during his last days in office.[44] With impeachment or non-reelection the only options to

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[39] 274 U.S. 480, 486 (1927).

[40] Pardons have been used as a tool to compel testimony during criminal investigations. In this context, *Garland*'s "blotting out" metaphor was indirectly repudiated in *Burdick v. United States*, 236 U.S. 79 (1915), in which a newspaper editor subpoenaed to testify before a grand jury refused a pardon, in effect immunity, designed to coerce his testimony. Noting that a retrospective pardon might eradicate guilt, the Court recognized that a pardon accepted without any adjudication may effectively constitute a confession of guilt and thus no one could be forced to accept one. *Id.* at 91.

[41] In his comprehensive book, Jeffrey Crouch argues that the recent self-interested clemency decisions of Presidents Ford and Clinton may have abused the delicate system but not to the extent of jettisoning it altogether. CROUCH, *supra* note 19, at 149.

[42] MOORE, *supra* note 18, at 80-81 (arguing that this was an example of using a pardon as a "tool for the public good"); CROUCH, *supra* note 19, at 73-79.

[43] CROUCH, *supra* note 19, *at* 105-07; David Johnston, *Bush Pardons 6 in Iran Affair, Averting a Weinberger Trial: Prosecutor Assails "Cover-Up,"* N.Y. TIMES, Dec. 25, 1992, at A1.

[44] Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. LAW & CRIMINOLOGY 1169, 1195-1200 (2010); *see also, e.g.*, Jonathan Peterson & Lisa Getter, *Clinton Pardons Raise Questions of Timing, Motive*, L.A. TIMES, Jan. 28, 2001, *available at* http://articles.latimes.com/2001/jan/28/news/mn=18078/; George Lardner, Jr. Op-Ed, *A Pardon to Remember*, N.Y. TIMES, Nov. 24, 2008, at A21; Jessica Reaves, *The Marc Rich Case: A Primer*, TIME, Feb. 13, 2001, *available at* http://www.time.com/time/nation/article/0,8599,

challenge the executive decision, there really is no way to force a retraction of a pardon. Many chief executives more actively pardon at the end of their terms so they minimize the risk of political fallout. But for routine pardons (to the extent that any pardon could be called "routine"), hybrid explanations that combine retributive and utilitarian rationales typify the majority of pardons that avoid wide public notice.

If the reasons for granting pardons are often conflated, the significance of a pardon is even less clear. A pardon does not revise history to erase the basic fact of conviction, nor does it eliminate the social stigma associated with the commission of the crime. Thus, the *Garland* return-to-innocence paradigm has little lasting influence on the understanding of a pardon in many circumstances. More recent cases have made a distinction between the effects of the pardon on the consequences of the conviction as opposed to the undisputed facts of the commission of the crime.[45] The pardon relieves the offender from the disabilities of the conviction, but does not necessarily constitute a finding of innocence or even a restoration of good character.[46]

It is clear, however, that, because pardons are unreviewable by their very nature, the buck stops with the executive.[47] This vests both opportunities for mercy or to correct an unjust course, as well as responsibility to exercise this power in a principled fashion. It is not surprising that many executives resort to this power sparingly and with trepidation.

B. *Federal Pardons in Immigration Cases*

Samuel Morrison, a former staff attorney in the U.S. Pardon Office, reports a long history of pardon applications to avoid deportation even before the recent era.[48] Despite the declining use of federal pardons, immigration cases now

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99302,00.html#ixzz1xgw2Fzer. *But see* William Jefferson Clinton, Op Ed, *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001, *available at* http://www.nytimes.com/2001/02/18/opinion/my=reasons=for=the=pardons.html?pagewanted=all&svc=pm.

[45] A conviction that is pardoned voids punishment so it also eliminates other restrictions on basic civil rights such as the right to vote, serve on a jury, or obtain a business license. Bjerkan v. United States, 529 F.2d 125, 128 (7th Cir. 1983).

[46] *Id.* at 128 n.2 (7th Cir. 1983), *quoting* Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 653 (1915) ("Although the effects of the commission of the offense linger after a pardon, the effects of the conviction are all but wiped out."); *see also* United States v. Noonan, 906 F.2d 952, 958-59 (3d Cir. 1990). Not all commentators agree with this view. *See, e.g.*, Philip P. Houle, *Forgive and Forget: Honoring Full and Unconditional Pardons*, 41 MAINE L.R. 273, 274 (1989) (expressly disagreeing with Williston and arguing that a full and unconditional pardon "actually blots out any guilt or infamy resulting from a criminal conviction, and . . . restores the character and standing of the pardoned individual in the eyes of the law).

[47] "[P]ardon and commutation decisions . . . are rarely, if ever, appropriate subjects for judicial review." Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 276 (1998).

[48] The author cites to only two examples after 2000 of presidential pardons that directly

make up a large proportion of the applications filed with the U.S. Pardon Office due to the non-citizens' lack of other options.[49] Notwithstanding these claims, over the 29-year period from 1928-1953, only 197 of the 5,674 pardon applicants were granted pardons to avoid deportation.[50]

Although pardons are rare in general, in 1995, the Office of Legal Counsel of the Department of Justice ("OLC") issued a memorandum generously interpreting the scope and effect of the pardon power in immigration cases.[51] This memorandum concluded that "a full and unconditional presidential pardon precludes the exercise of the authority to deport a convicted alien under 8 U.S.C. § 1251(a)(2)."[52] In particular, the OLC disputed the position of the then Immigration and Naturalization Service that the pardon clause did not apply to any crimes other than those enumerated in that sub-section. Citing the broad language of *Garland*, the opinion stated that deportation was the kind of disability that a pardon was intended to remove, an adverse consequence "regardless of whether they are viewed as 'punishment' for purposes of invoking other constitutional provisions."[53] Morrison argues that excluding particular crimes from the scope of the pardon clause violates equal protection because Congress is interfering with the absolute executive power to pardon.[54] There is, however, no current evidence that the OLC's position is being followed by any agency or court with authority over deportation decisions.[55]

II. A HISTORY OF THE IMMIGRATION AND NATIONALITY LAW PARDON CLAUSE

In 2010, Governor Paterson seemed like a bold pioneer venturing into new

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affected the recipient's immigration status. Samuel T. Morrison, *Presidential Pardons and Immigration Law*, 6 STAN. J.C.R. & C.L. 253, 261 n.32 (2010).

[49] Margaret Colgate Love, Remarks at Symposium, *Pardons: The Power Nobody Wants*, The New School, Oct. 26, 2011, *available at* http://www.youtube.com/watch?v=DqEO5v JhZ3Q,1:08:10. Highly knowledgeable and a former U.S. Pardon Attorney, Ms. Love is a big advocate of the expanded use of state pardons and a supporter of Governor Paterson's pardon initiative.

[50] *Id.* Morrison provides a slightly different number for the same time period: 192. Morrison, *supra* note 48, at 261, n.32. The yearly total clemency statistics are reported by the Department of Justice, *available at* http://www.justice.gov/pardon/statistics.htm.

[51] *Effects of a Presidential Pardon: Memorandum for the Pardon Attorney* 19 U.S. Op. O.L.C. 160 (June 19, 1995), *available at* http://www.justice.gove/olc/pardon3.19.htm.

[52] *Id.* This section corresponds to current INA § 237(a)(2).

[53] *Id.* at 10 n.3.

[54] Morrison, *Presidential Pardons*, *supra* note 48, at 258 n.2, 340-41. The author argues that an executive pardon operates to nullify any conviction so that the current limitations under INA § 237(a)(2)(A)(iv) are an invalid interference with the pardon power.

[55] The only reported federal decision to even mention the OLC memorandum dismissed it as inapplicable in a footnote. Aguilera-Montero v. Mukasey, 548 F.3d 1248, 1255 n.9 (9th Cir. 2008). No reported BIA decisions discuss the memorandum.

territory, but actually for almost one hundred years an otherwise deportable non-citizen unfortunate to be the beneficiary of an executive pardon could avoid removal. The "pardon proviso" or "pardon clause" has been a benefit in federal immigration law for non-citizens deportable due to criminal convictions since those grounds of deportation were first codified in 1917. Although a pardon can avert the loss of or restore the use of many civil disabilities resulting from a conviction, by inserting the pardon clause from the outset, the drafters of U.S. immigration laws recognized that a pardon unquestionably could prevent deportation, a consequence of conviction in a category by itself—the loss "of all that makes life worth living."[56]

While the current pardon clause differs from the original version in some respects, as will be discussed below, its rationale is deeply rooted in early-twentieth-century law. It perseveres today, although undeniably underutilized, despite other more significant changes to the statute and developments in case law.

A. *The Immigration Act of 1917*

The pardon proviso made its legislative debut in the Immigration Act of 1917, the first federal immigration statute to systematically codify grounds of deportation in addition to collecting all previously enacted provisions regarding exclusion in one law.[57] This Act was the most comprehensive federal statute since Congress began to regulate immigration. Congress defined the bases for deportation and any exceptions or defenses. Section 19 of the 1917 Act authorized the detention and deportation of, *inter alia*, any "criminal alien," a status established by the nature of the crime, the length of the sentence imposed, and the amount of time the non-citizen has been in the United States.[58]

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[56] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[57] Immigration Act of 1917, H.R. 10384, Pub. L. No. 301, Chap. 29, Feb. 5, 1917, 39 Stat. 889-890 [hereinafter "1917 Act"]. *See also* DANIEL KANSTROOM, DEPORTATION NATION 133-34 (2007). The full title of this legislation is "An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States." Earlier statutes had allowed for removal of individuals who had entered in violation of the law. Immigration Act of March 3, 1891, Ch. 551, 26 Stat. 1084; Act of Feb. 20, 1907, Ch. 11345, 34 Stat. 898. For a discussion of this history, *see* Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578, 1613-18 (1959). A conviction is defined by INA §101(a)(48) as a formal judgment of guilt where some form of punishment has been imposed.

[58] Section 19 of the 1917 Act made the following convicted criminals deportable:

> Who is hereafter sentenced to imprisonment for a term of one year or more because of a conviction in this country of a crime involving moral turpitude committed within five years after the entry of the alien to the United States, or
>
> Who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry, or

In addition to setting forth the particular crimes for which a non-citizen could be deported, the 1917 Act empowered both the executive and the judiciary to thwart deportation. Section 19 of the Act also set forth the following proviso relating to executive pardons:

> That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act.[59]

The statute exempted from deportation anyone convicted of a crime involving moral turpitude ("CIMT") who had been pardoned, without any further qualifications on that term. Although it does not specify from whom a pardon would issue, there is no doubt that the clause refers to the chief executive of either the federal or state government, the traditional holders of the pardon authority.

The pardon clause appeared in this immigration legislation without debate or fanfare. This contrasts to the more contentious provision in Section 19 allowing a judicial recommendation to prevent deportation.[60] Legislators wrangled over both the need for and the timing of that recommendation. Those who spoke against an open-ended opportunity for the sentencing judge to intervene prevailed so that the final version contained a limitation of thirty days after the time sentence was imposed. That recommendation, which later became known as a JRAD, or "judicial recommendation against deportation," was binding on the immigration adjudicator,[61] at that time the Department of Labor, until 1990

> Who was convicted of, or who admits the commission, prior to entry of a felony or other crime or misdemeanor involving moral turpitude.

The successor of the first two clauses can be found today in 8 U.S.C.A § 1227(a)(2)(A)(ii), INA § 237(a)(2)(A)(ii). Because a person with this background would be inadmissible under 8 U.S.C.A. § 1182(a)(2)(A)(i), INA § 212(a)(2)(A)(i), the third ground of deportation is currently captured in the deportation ground based on inadmissibility at time of entry. 8 U.S.C.A. § 1227(a)(1)(A), INA § 237(a)(1)(A). Inadmissibility, or as it was formerly known, excludability, based on criminal conduct had been a ground for refusing entry to an arriving non-citizen since 1891. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, *cited in* Padilla v. Kentucky, 559 U.S. —, 30 S. Ct. 1473 (2010). Section 19 also made deportable anarchists, prostitutes, and their procurers but pardons were unavailable to these offenders.

[59] 1917 Act, Sec. 19.

[60] *Id.*

[61] The JRAD, later codified INA § 241(b)(2) as 8 U.S.C.A. § 1251(b)(2) (1952), was understood to bind the agency. *See, e.g.*, Pacheco v. I.N.S., 546 F.2d 448, 452 (1st Cir. 1976), *cert. denied*, 430 U.S. 985, 97 S. Ct. 1683, 52 L. Ed. 2d 380 (1977) (binding). It was repealed by the Immigration Act of 1990, Nov. 29, 1990. Pub. L. No. 101-649, Title V, § 505(b), 104 Stat. 5050 (1990).

when Congress repealed this section.[62]

In 1917, criminal grounds for deportation were limited to CIMTs, a term that always has been disturbingly amorphous. This statute was written in an era when crimes were rooted in common law *malum in se* tradition, long before the advent of complex criminal statutes. In 1917, with the exception of anarchists, prostitutes, and procurers, only crimes involving moral turpitude, understood to be serious offenses generally, were grounds for deportation. The statute did not then, and does not to this day contain a definition of the term, however. In the early twentieth century, this crime category was notoriously vague, often dependent on individual values and perceptions, and at that time, lacking in clear limits or delineations. Nevertheless, in other contexts, its vagueness was not a problem.[63]

Given the limited grounds for crime-based deportation in this early statute, the inclusion of opportunities to exercise compassion actually was not that remarkable. The nebulous definition of the CIMT, and the ensuing abundant possibilities for inequity and unfairness gave rise to several trepidations voiced in the hearings on the bill.[64] These concerns probably explain the inclusion of both the pardon clause and the JRAD. The debates reveal some legislators' uneasiness about the inconsistent boundaries for deportation based on poorly defined criminal activity.[65] Some members of the House Committee on Immigration were troubled about the disparities of crime classifications throughout the country:

> Mr. SABATH: . . . [Y]ou know that a crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude. Under some circumstances, larceny is considered a crime involving moral turpitude—that is, stealing. We have laws in some States under which picking out a chunk of coal on a railroad track is considered larceny or stealing. In some States, it is considered a felony. Some States hold that every felony is a crime involving moral turpitude.

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[62] Report of the Committee on Immigration and Naturalization on H.R. 10384, 64th Cong., 1st Sess. Immigration Act of 1990, Nov. 29, 1990. Pub. L. No. 101-649, Title V, § 505(b), 104 Stat. 5050 (1990).

[63] Jordan v. De George, 341 U.S. 223, 229-32 (1951) (rejecting argument that term is void for vagueness). The BIA has stated that a CIMT "refers generally to conduct which is inherently base, vile, or depraved and contrary to the accepted rules of morality. . . . [It is] an act which is per se morally reprehensible or intrinsically wrong." Matter of Franklin, 20 I. & N. Dec. 867, 868 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995).

[64] For a discussion of the history of the CIMT in immigration, and its continuing vagueness today, *see* Mary Holper, *Deportation for Sin: Why Moral Turpitude Is Void for Vagueness*, *available at* http://ssrn.com/abstract=1936136.

[65] 53 CONG. REC. 5164 (1918). There is a colorful discussion of anarchists, socialist groups, and labor union activities that might involve the destruction of property included in the statute as a ground of removal. *Id.* at 5166-68. There is a discussion of the timing of the conviction vis-à-vis the amount of time an alien has resided in the U.S. *Id.* at 5168.

> In some places, the stealing of a watermelon or a chicken is larceny. In some States, the amount is not stated. Of course, if the larceny is of an article, or a thing which is less than $20 in value, it is a misdemeanor in some States, but, in other States, there is no distinction.[66]

Rep. Sabath's worries were rebuffed by Rep. Slayden who proffered anecdotal evidence that "I never knew of any man being sent to the penitentiary for stealing chickens except one, and that man stole some thoroughbred game birds."[67] This colloquy colorfully illustrates what was on the minds of the legislators and reveals the narrowness of their frame of reference at that time. For them, most crimes carried a message of moral wrongdoing, even the most minor. Given the chicken theft example, however, it appears that the boundaries between minor and serious offenses were very blurry in this era.

The discretionary provisos that allowed either chief executives or sentencing judges to ameliorate the consequences of the conviction may have allayed fears that the amorphous category of CIMT swept up too many crimes. Of the two remedial paths, the more routine JRAD would be used more frequently than the more exceptional pardon so the legislators paid considerable attention to defining its terms. Some members of Congress believed that any disparities and inequities in criminal charges under the various state laws could be leveled by judicial intervention. Others were less sanguine, dubious that this measure offered sufficient protection against anti-immigrant judicial prejudice in some parts of the country that might lead to unjust convictions of deportable offenses and reluctance to take any steps to stop deportation. Rep. Sabath again observed:

> [I]n our State [Illinois] and in our city where judges are familiar with the conditions under which these immigrants live, a judge would perhaps recommend that the man be not deported; but there are certain parts of our country where there are judges who are prejudiced against immigrants, who will listen to no reason or appeal and who will be only too pleased to order deportation whenever the opportunity presents itself.[68]

The timing of the conviction was also a matter of concern leading to the limitation that a first conviction must occur within five years of entry rather

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[66] *Quoted in* Jordan v. de George at 234-35, quoting from H. Comm. on Immigration and Naturalization on H.R. 10384, 64th Cong., 1st Sess. 8 (Jackson, J. dissenting). On the floor of the House, Mr. Sabath again expressed his concern for chicken thieves:

> In certain parts of the country, the larceny of a few pennies or a piece of coal or a loaf of bread is considered a crime involving moral turpitude. I do not think we should be too harsh on an unfortunate man of that kind. . . . We have cases of record where a man has broken into a chicken coop and stolen a chicken, has been charged with the crime of larceny or even breaking and entering, and has been sentence for a longer period than one year.

53 CONG. REC. at 5169 (1916).

[67] 53 CONG. REC. at 5169 (1916).

[68] *Id.*

than at any indefinite time. As one House member said, "[I]f a man had come over here without any criminal record behind him being shown, and had lived an upright life here for 5 or 10 or 15 years, and then was convicted of a crime, to deport him would be unjust."[69] This view led to a compromise that a second conviction, showing "a criminal heart and a criminal tendency," at any time could lead to deportation.[70] Thus, the one-time offender who resided in the country for more than five years might escape deportation, even without a pardon or a JRAD, but a recidivist, vulnerable to deportation at any time, needed one of these forms of waiver to escape that fate.

Finally, although there seemed to be widespread acceptance of the JRAD as a potentially corrective measure to assure fairness, there was considerable debate about the timing of the judicial recommendation against deportation. This led to the requirement that the judge must act no later than thirty days after imposing sentence.[71] The concerns expressed by the legislators about potential abuse of this discretion by judges would seem to apply equally to the executive authorities. Nevertheless, skepticism about the JRAD never spread to the pardon power.

Although many aspects of the 1917 Act prompted discussion and debate, the pardon provision received such relatively scant attention that its uncontroversial inclusion seems almost casual. There is no meaningful discussion about its inclusion or its unequivocal effect; nor are there any attempts to narrow its scope.[72] The legislators preoccupied with defining the bases for deportation and any exceptions to that fate seemed to assume that an executive pardon would operate as a binding bar to removal, following the well-established history of pardons.

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[69] *Id.* at 5168.

[70] *Id.*

[71] *Id.* at 5169-72.

[72] There is a glancing reference when a few Representatives exchange the following opaque colloquy as part of their discussion about judicial recommendations at sentencing:

> Mr. Mann: Suppose a man should be pardoned?
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> Mr. Howard: Well, I have known of men who were pardoned that ought not to have been pardoned.
>
> Mr. Mann: I understand and I have no doubt the gentleman has known governors to pardon men who ought to be pardoned.
>
> Mr. Howard: The mere fact that they are pardoned does not make them morally fit.
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> ***
>
> Mr. Mann: There are a great many people convicted of a great many crimes unjustly, sometimes where the circumstances were not fully known.
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> ***
>
> Mr. Hayes: [T]he judge still has the right to recommend executive pardon for the convict, . . . and a part of that pardon will, under the law, prevent the deportation.

Id. at 5170.

B. *The Acts of 1924, 1925, and 1926*

The pardon power survived unquestioned in successive bills even when Congress either sought to modify or actually did modify the grounds of deportation. All subsequent proposed bills retained the pardon as an exemption for someone convicted of a CIMT. A 1925 proposed amendment to the 1917 Act which died in Congress[73] left undisturbed the pardon power to exempt CIMT offenders from deportation.[74] Another bill in 1926 responded to the growing belief that immigrants were responsible for serious crime, were anti-government, and were avoiding deportation.[75] This bill tried to extend deportation grounds to include any crime committed at any time. A representative named Jenkins, speaking in favor of the bill, stated that public sentiment demands this house cleaning. "The fountain of patriotism and Americanism should not be fouled with a mixture of anarchy, communism and lawlessness. . . . The alien black hand and gunman has no place in American life. No time should be wasted on his extermination." [76] To summarize his absolutist position, the legislation mandating deportation for all crimes caused no injustice; indeed justice was served when deportation is both strict and certain.

Despite this high-flying law-and-order, anti-immigrant rhetoric, and an effort to eliminate the JRAD,[77] this bill made no attempt to rescind the pardon exemption for any CIMT.[78] Notwithstanding the many large and small, proposed and enacted amendments and modifications to the immigration laws throughout the first half of the twentieth century, the pardon power survived untouched.[79]

C. *The Immigration and Nationality Act of 1952*

During the first half of the twentieth century, the grounds of deportation had expanded somewhat haphazardly. The 1952 comprehensive Immigration and Nationality Act codified in a single section eighteen classes of deportable aliens.[80] The basic criminal grounds of deportation, found in Section 241 of the

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[73] 66 CONG. REC. 3271 (1925).

[74] *Id.*

[75] Deportation Act of 1926, H.R. 11489; *see* 67 CONG. REC. 10858 (June 7, 1926).

[76] 67 CONG. REC. 10873 (1926).

[77] H.R. Rep. No. 69-991, at 5-6 (1926).

[78] H.R. 11489 at 6, 69th Cong. 1st Sess., Apr. 26, 1926. This version of the statute did not limit the pardon to CIMTs specifically but the statute also permitted deportation upon conviction for any offense, however minor and not necessarily involving moral turpitude. This expansion of the grounds of deportation was objected to in the minority report. H.R. Rep. No. 69-991, Part 2, at 5-6 (1926).

[79] For more information about the early history of the pardon clause *see* Jason Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L.R. 355, 369-71 (2012).

[80] Immigration and Nationality Act of 1952 § 241(a), 8 U.S.C. § 1251(a) (1952) [hereinafter "the 1952 Act"]. In addition to criminal convictions for CIMTs, these grounds included deportation of individuals who would have been excludable at the time of entry, who failed to comply with alien registration requirements, anarchists, members of the Communist

1952 Act, largely preserved the terms of the 1917 Act, and then captured crimes that had been added sporadically during the intervening years.[81] Consistent with past laws, any non-citizen convicted of a CIMT within five years of entry, sentenced to more than a year of imprisonment, or convicted of two CIMTs arising out of more than one course of conduct, whether or not incarcerated, was deportable.[82] The statute again exempted from deportation anyone convicted of a CIMT who had been granted a pardon from either the President or a governor, but now the language required the pardon to be "full and unconditional." A judicial recommendation against deportation made at the time of sentencing or no more than thirty days thereafter remained another option for avoiding removal.[83]

The pardon clause, as well the JRAD provision, slipped easily into the new immigration act. Judging from the matter-of-fact treatment of this provision by resources written shortly after the passage of the statute, it seems clear that the ability of a pardon to prevent removal was accepted and unquestioned, even if not frequently used. For example, in one contemporary treatise, the author states, "A pardon reaches both the punishment and guilt. When the pardon is full, the offender becomes innocent of the crime charged and from a legal viewpoint he is as innocent as if he had never committed the offense."[84] In another, the pardon power is characterized as an act of discretion to avert deportation.[85]

In the 1952 Act, the pardon clause made no distinctions between the different offenses within the scope of the general criminal deportation grounds. This changed in 1956 when a single sentence was added to preclude its application to specified narcotics violations.[86] For the next forty-plus years, the pardon clause extended potential relief to any non-citizen for any crime-based deportation other than a narcotics offense.[87]

Party of the United States or other totalitarian parties, persons who have become public charges within five years of entry, narcotics addicts or traffickers, brothel managers, and persons convicted of possession of automatic weapons or sawed-off shotguns.

[81] For example, in addition to CIMTs, over the years convictions for a narcotics violation, 46 Stat. 1171, 8 U.S.C. § 156(a) (1931), and weapons possession and violations of the Alien Registration Act, ch. 439, 54 Stat. 670 (1940) had been added as grounds for deportation. See 8 U.S.C.A. § 1251 (1952).

[82] 8 U.S.C.A. § 1251(a)(4); INA § 242(a)(4).

[83] INA § 242(b).

[84] SIDNEY KANSAS, IMMIGRATION AND NATIONALITY ACT ANNOTATED 133 (1953).

[85] REUBEN OPPENHEIMER, THE ADMINISTRATION OF THE DEPORTATION LAW OF THE UNITED STATES 37 (1931). *See also* William Fliegelman, *Deportation*, *in* Proceedings of the New York University Conference on PRACTICE AND PROCEDURE UNDER THE IMMIGRATION AND NATIONALITY ACT 49, June 13, 1953 (Harry Sellin, ed., 1954).

[86] Narcotic Control Act of 1956, Pub. L. No. 84-728, Title II, § 301, Stat. 567, 575 (1956).

[87] The inability of a pardon to prevent deportation in the case of a narcotics crime continues today, although, ironically, a conviction for a controlled substance crime not charged as

D. *Modern Immigration and Nationality Laws*

The outlook today is bleak for non-citizens convicted of crimes. The types and categories of crimes that constitute grounds of removal have multiplied, while many discretionary forms of relief, including JRADs, have been eliminated or severely curtailed so that few options to avoid deportation are unavailable to so-called "criminal aliens."[88] Immigration laws now deal harshly and relentlessly with individuals convicted of an enormous array of crimes regardless of when they were committed, the status of the immigrant, the length of lawful residence, or the personal circumstances of the individual surrounding or following the conviction.

Between 1988 and 1996, four federal statutes greatly expanded the types and grounds of deportable crimes. First, the Anti-Drug Abuse Act of 1988 introduced the new concept of a conviction for an "aggravated felony" that was added to the list of deportable offenses.[89] The Immigration Act of 1990 reorganized the grounds for deportation and revised the criminal grounds of deportation by expanding the aggravated felony categories, and, while retaining the basic CIMT definition, extended the definition to state as well as federal crimes.[90] The Immigration and Technical Corrections Act of 1994 added even more crimes.[91] The Antiterrorism and Effective Death Penalty Act of 1996 further lengthened the list.[92] Finally, the Illegal Immigration and Immigrant Responsibility Act of 1996 amended, revised and expanded the term as well as applied the definition to convictions regardless of when they occurred.[93]

Throughout this time of legislative activity, the pardon clause remained safely tucked away.[94] Now denominated a waiver of deportation, a pardon applies

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an aggravated felony would not bar Cancellation of Removal. *See, e.g.*, Lopez v. Gonzales, 549 U.S. 47, 127 S. Ct. 625 (2006).

[88] Particular deportable crimes are enumerated in INA § 237(a)(2) and must be cross-referenced to the definition of "aggravated felony" found in INA § 101(a)(43), a category which expanded dramatically in the 1990s.

[89] Pub. L. No 100-690, Title VII, subtitle J, § 7344, 102 Stat. 4181, 4469-70 (1988), INA § 241(a)(4)(B). "Aggravated felony" was defined to include the most serious of crimes: "murder, any drug trafficking crime as defined in section 924(c) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States."

[90] Pub. L. 101-649, § 505, 104 Stat. 4978, 5050 (1990) added offenses to the list, extended the definition to state as well as federal crimes, and restricted both procedural rights and forms of relief. For a comprehensive legislative history, *see* Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 592-605 (1997-1998).

[91] Pub. L. No. 103-416, 108 Stat. 4311 (1994).

[92] Pub. L. No. 104-132, 110 Stat. 1270 (1996).

[93] Pub. L. No. 104-208, 110 Stat. 3009-558 (1996).

[94] The statute was slightly revised and renumbered twice, first in 1990—from INA

to: (1) a single CIMT conviction within five years of entry for which a sentence of a year or more in prison was imposed, (2) multiple CIMT convictions regardless of sentence, (3) aggravated felonies, and (4) high-speed flight from immigration authorities. Although it does not extend to all criminal grounds of removal such as weapons or domestic violence offenses, the provision is unchanged as it applies to CIMTs and aggravated felonies, the two largest categories of deportable offenses. Its continued availability to aggravated felons, however, is quite remarkable considering how many crimes this category now includes and that an aggravated felony conviction bars almost every other form of relief under the statute.[95]

Immigration laws have been remarkably consistent over the past century in creating and expanding categories of undesirable foreign nationals and have been especially unwelcoming to individuals who commit crimes. Yet these laws also contained considerable mechanisms for exercising compassion and mercy. As Justice Stevens discussed at length in *Padilla v. Kentucky*, for many years, the JRAD permitted sentencing judges to take advantage of their unique perspective presiding over the prosecution of the criminal matter, including an individualized sentence that could take into account the consequences of deportation in relation both to the facts of the crime and the non-citizen defendant.[96] To the regret of many, the JRAD has disappeared and, despite calls for its reinstatement, it does not seem a likely candidate for resurrection.[97] With the JRAD's elimination, only the pardon remains as an avenue of relief that can be effectuated outside of, but with a direct impact on, immigration proceedings.

E. *The Pardon Clause Today*

Before 1990, no doubt the JRAD offered a much simpler and more direct route to relief that avoided the practical and political hurdles involved in securing relief at the highest executive levels. But, unlike its JRAD companion, the pardon clause survived and even enlarged since now the full range of aggravat-

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§ 241(b) to INA § 241 (a)(2)(A)(iv), then again in 1996 to its current iteration in INA § 237(a)(2)(A)(vi),

[95] Cancellation of Removal, 8 U.S.C.A. § 1229b, INA §240A; Voluntary Departure, 8 U.S.C.A. § 1229c, INA § 240B; and Asylum and Withholding of Removal, 8 U.S.C.A. § 1158, INA § 208 and 8 U.S.C.A. § 1231(b)(3), INA 241(b)(3) are all forms of relief barred by an aggravated felony conviction.

[96] *Padilla*, 559 U.S. at —, 130 S. Ct. at 1479-80.

[97] Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1174 (2002) (arguing for a restoration of the JRAD); *see also* ABA Crim. Just. Sect. Comm. of Immig., Report to the House of Delegates—Recommendation (urging, *inter alia*, the reinstatement of some form of JRAD), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_my06300.authcheckdam.pdf. The JRAD survives only in cases where the recommendation was made at a sentencing prior to its repeal. *See, e.g.*, Nguyen v. Chertoff, 501 F.3d 107, 116 (2d Cir. 2007).

ed felonies is covered.[98] It is difficult to assess how frequently a pardon actually secures relief because instances where a pardon has successfully averted deportation are unlikely to result in reported decisions. But the section sits quietly in the statute inviting the brave chief executive to take advantage of its potential in deserving and appropriate circumstances.

The requirements of the pardon clause in INA § 237(a)(2)(A)(vi) are generally clear, but also are qualified so that a pardon's protection is neither absolute nor guaranteed. There are only a handful of cases in which the applicability of a pardon to deportability is raised in either Board of Immigration Appeals ("BIA") or federal court cases. The next section will review the uses and limitations of the pardon clause in the context of immigration law. In the small body of case law concerning the effect of pardons, both agency and court interpretation of the statute have been literal and strict as the following summary reveals.[99]

1. The Pardon Only Affects the Grounds of Removability Set Forth in the Statute.

Although terms like CIMT and aggravated felony include many crimes, convictions for other deportable offenses such as crimes of domestic violence,[100] controlled substance offenses,[101] and firearms offenses are not covered by the pardon clause. Thus, while a pardon might help a person convicted of sexual abuse deportable as an aggravated felon, it would not bar deportation if the conviction were for a domestic violence offense.[102]

2. The Pardon Must Be Granted by the Executive Authority.

A pardon must be issued by a constitutionally authorized executive. For example, since 1777, the governor of New York has had continuous authority to issue pardons.[103] In the past, some states provided for "legislative" pardons when certain conditions had been fulfilled such as the completion of a sentence.[104] But following 1952, those pardons were not given effect to thwart deportation.[105] Nor are pardons automatically awarded as a matter of law with-

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[98] INA § 237(a)(2)(A)(vi).

[99] A more comprehensive description of the jurisprudence of immigration pardons can be found at Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 262-68 (2010).

[100] *In re* Suh, 23 I. & N. Dec. 626 (BIA 2003) (unconditional pardon does not waive removability).

[101] Matter of Moeller, Int. Dec. 2543 (BIA 1976); Kwai Chiu Yuen v. I.N.S., 406 F.2d 499 (9th Cir. 1969).

[102] Matter of Suh, 23 I. & N. Dec. 626 (BIA 2003).

[103] N.Y. CONST. art. IV, § 4. *See infra* pp. 318-20.

[104] U.S. *ex rel.* Malesevic v. Perkins, 17 F. Supp. 851 (W.D. Pa. 1936) (giving effect to legislative pardon).

[105] *See, e.g.*, Matter of R-, 5 I. & N. Dec. 612 (1954).

out action by the executive sufficient to bar deportation.[106] If a state's constitution permits delegation of the pardon authority to a board or commission, that is considered the equivalent of an executive pardon.[107]

3. The Pardon Must Be "Full"[108] and Unconditional.[109]

To be effective, a pardon must be absolute and unqualified. Clemency, the reduction of a sentence, a form of lesser executive relief often sought in conjunction with a pardon, is insufficient to invoke the pardon clause waiver.

4. A Foreign Pardon Is Ineffective to Forestall Deportation.

Both the courts and the agency have denied relief to individuals pardoned by authorities outside of the United States. The structure of the pardon clause refers to convictions subsequent to admission so that pardons obtained prior to coming to the United States would be inadequate.[110] Difficulties in understanding the operations of foreign legal systems and the meaning of foreign pardons, as well as in obtaining reliable information from other countries are the usual justifications for this limitation.[111]

5. A Pardon May Not Provide Relief for Inadmissibility—Most of the Time.

The INA's pardon clause is drafted as a form of relief for deportation. The current trend is, therefore, to refuse to give a pardon any effect on the question of inadmissibility. Several recent decisions have restricted the effect of a pardon to deny relief in cases where the individual was seeking admission, relying on a strict reading of the statute.[112] The Ninth Circuit provided the most recent,

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[106] Matter of Nolan, Int. Dec. 3043 (BIA 1988) (automatic first offender pardon is not sufficient).

[107] Matter of Tajer, 15 I. & N. Dec. 125 (BIA 1974); Matter of D–, 7 I. & N. Dec. 476 (BIA 1957); *see also* Taran v. U.S., 266 F.2d 561, 567 (8th Cir. 1959) (pardon authority constitutionally delegated to Board of Pardons); *In re* Grant, A038 203 942 (Immig. Ct. Atlanta 2010) (unpublished BIA decision remanding to determine whether Georgia constitution provided pardon power to be exercised by Board of Pardons and Parole so that pardon is equivalent to gubernatorial pardon).

[108] Matter of Nolan, 19 I. & N. Dec. 539 (BIA 1988).

[109] Matter of C–, 5 I. & N. Dec. 630 (BIA 1954) (a pardon that depends on the completion of a sentence does not qualify).

[110] U.S. *ex rel.* Palermo v. Smith, 17 F.2d 534, 535 (2d Cir. 1927); Weedin v. Hempel, 28 F.2d 603, 604 (9th Cir. 1928); Mercer v. Lence, 96 F.2d 122, 125 (10th Cir.), *cert. denied*, 305 U.S. 611, 83 L. Ed. 388, 59 S. Ct. 69 (1938); Matter of G–, 5 I. & N. Dec. 1295 (BIA 1953); Matter of B–, 7 I. & N. Dec. 166, 169 (BIA 1956); Matter of F-Y-G-, 4 I. & N. Dec. 717 (BIA 1952); Kent v. I.N.S., 1994 U.S. App. LEXIS 13115 (10th Cir. 1994).

[111] U.S. *ex rel.* Palermo v. Smith, 17 F.2d 534, 535 (2d Cir. 1927); Matter of G–, 5 I. & N. Dec. 129 (BIA 1953).

[112] *See, e.g.*, Balogun v. United States AG, 425 F.3d 1356, 1363 (11th Cir. 2005);

and most thorough, discussion of this issue. In *Aquilera-Montero v. Mukasey*, the respondent was placed into removal proceedings on grounds of *inadmissibility* after his application to adjust status was denied due to a disqualifying criminal conviction for a controlled substance offense despite his gubernatorial pardon.[113] The court rejected an equal protection claim brought by the respondent that alleged an impermissible distinction between inadmissibility and deportability based on the same conviction.[114]

Confusingly, the State Department's Foreign Affairs Manual takes a different view in the context of a visa application.[115] The Manual cites a seemingly inapposite 1954 Board of Immigration Appeals ("BIA") case, *Matter of H-*, which held that the pardon provision includes not only a person who is deportable under the designated crimes in INA § 237(a)(2) but also someone who is deportable under INA § 237(a)(1) as having been improperly admitted due to a preexisting (pardoned) crime committed in the U.S. prior to a departure and the application for a visa for a new admission.[116]

6. A Pardon Does Not Eradicate the Impact of a Conviction on a Good Moral Character Determination.

A criminal conviction also affects other applications for relief. A pardon has no automatic or guaranteed impact on the assessment of good moral character, a requirement for naturalization, even if it meets all of the criteria for a waiver of deportation.[117] As long ago as 1878, a man convicted of perjury and sen-

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Brailsford v. Holder, 374 Fed. Appx. 738 (9th Cir. 2010); Irabar v. U.S. Att'y Gen., 219 Fed. Appx. 964 (11th Cir. 2007); Jimenez-Ariza v. Holder, 457 Fed. Appx. 607, 608, 2011 U.S. App. LEXIS 22281 (9th Cir. 2011); Brailsford v. Holder, 374 Fed. Appx. 738 (9th Cir. 2010).

[113] Aquilera-Montero v. Mukasey, 548 F.3d 1248 (9th Cir. 2008). He was charged with inadmissibility under INA § 212(a)(2)(A)(i)(II).

[114] *Id.*, at 1252-53. The court justified its holding on another basis rooted in the statute: the pardon clause does not benefit individuals convicted of controlled substance offenses and such convictions render someone both deportable and inadmissible. *See also* Yuen v. INS, 406 F.2d 499 (9th Cir. 1969).

[115] Effect of pardon by appropriate U.S. authorities/foreign states: An alien shall not be considered ineligible under INA 212(a)(2)(A)(i)(I) [for a visa] by reason of a conviction of a crime involving moral turpitude for which a full and unconditional pardon has been granted by the President of the United States, by the Governor of a State of the United States, by the former High Commissioner for Germany acting pursuant to Executive Order 10062, or by the United States Ambassador to the Federal Republic of Germany acting pursuant to Executive Order 10608. 22 C.F.R. § 40.21(a)(5) (2012).

[116] Matter of H–, 6 I. & N. Dec. 90 (BIA 1954) (full and unconditional pardon removes inadmissibility); Matter of K–, 9 I. & N. Dec. 121 (BIA 1960); 9 I. & N. Dec. 121 (relying on *Matter of H–*, JRAD removes inadmissibility).

[117] While any criminal conviction might be taken into account in the assessment, only a conviction for an aggravated felony or multiple gambling offenses operates as an automatic bar to good moral character. INA § 101(f). *See, e.g.*, Taylor v. United States, 231 F.2d 856,

tenced to prison who was pardoned by the governor of Oregon was denied naturalization because, while the pardon relieved him of ensuing disabilities, it did not eliminate the fact of his conviction.[118] In the same vein, in modern times, while affirming the denial of a naturalization application, a federal court explained why a pardon has no automatic preclusive effect on the question of good moral character:

> [A]s the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof; it does not wash out the moral stain; as has been tersely said; it involves forgiveness and not forgetfulness.[119]

III. GOVERNOR PATERSON'S PARDON PANEL AS A MODEL FOR STATE ACTION

Governor Paterson felicitously, if too fleetingly, married the INA to the power to pardon that has existed under New York State law since before independence. State pardoning authority typically rests in state constitutional law. All states have some form of clemency process but often the executive acts in conjunction with other officials such as pardon boards with whom the power is either delegated or shared.[120]

A. *The Pardon Power Under New York State Law*

The pardon power in New York State, granted originally to the Governor of New York in 1771 by King George III, reflected the royal policy in effect at that time to be followed by the government of the colony.[121] This practice continued after the Revolution and was incorporated into the first Constitution of New York State in 1777, vesting power in the governor to grant pardons.[122]

859-60 (5th Cir. 1956) (unnecessary to determine how pardon of murder conviction would operate in good character determination since pardon was granted within five-year period prior to naturalization application).

[118] *In re* Spenser, 22 F. Cas. 921, 923; 1878 U.S. App. LEXIS 1987 (Cir. Ct. D. Or. 1878).

[119] *In re* Petition for Naturalization of Quintana, 203 F. Supp. 376, 377 (S.D. Fla. 1962).

[120] *See generally* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2006); Kobil, *supra* note 28, at 605; Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1333, 1350 (2008); John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389, 393 (April 2003). The U.S. Constitution does not require states to have a clemency system, Herrera v. Collins, 506 U.S. 390, 414 (1993), but all states do.

[121] CHARLES Z. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 695-96 (1906).

[122] The governor was given the power to grant reprieves and pardons to persons convicted of crimes other than treason or murder, in which he may suspend the execution of the sentence until it shall be reported to the Legislature, at their subsequent meeting, and they

The earliest provision excluded treason, and a pardon for a murder conviction had to be confirmed by the legislature.

In subsequent versions of the New York constitution, the pardon power remained in force, essentially unchanged notwithstanding recurrent efforts to move it from the governor to some kind of pardon board or even court.[123] The pardon power was reconsidered at every subsequent constitutional convention, but no changes resulted. For example, in 1846, the following were among the proposals that were rejected: restrictions on the pardon power in cases of murder by giving the State Senate the ultimate say; a requirement that notice of intent to pardon be sent to the judge who tried the case or the district attorney; a condition that notices of applications for pardons be published in advance of a hearing in order to give interested parties a chance to voice their views.[124] At the 1867 Constitutional Convention, the Committee on Governor and Other State Officers once again spurned the idea of a pardon board, in large part because "appeals to mercy" might be prevented if the board imposed judicial-like formalities. Mercy as a basis for pardoning also influenced the rejection of a proposition that the governor provide an explanation for the decision to pardon. One committee member noted that "the pardoning power was based on mercy, not on justice; justice can always assign reasons, but mercy cannot."[125]

At the Constitutional Convention of 1894, more substantial efforts to change the structure of the pardon power were proposed. Several proposals would have shifted the pardon power to a Court of Pardons or a pardoning board, both of which would include judicial members in addition to the governor.[126] The defeat of these amendments again left the exclusive executive power unchanged. After the last Constitutional Convention in 1967, along with information explaining how the pardon system works, the pros and cons of this power were set forth in a guide to voters in 1967:

> Those in favor of the retention of the Governor's present authority argue that this power is necessary to serve as a check on "mechanical jurisprudence" that might work harsh results in an individual case. They further argue that the Governor has exercised the power fairly, that the system works well and, as a result this traditional power of the Governor should be retained.

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shall either pardon or direct the execution of the criminal, or grant a further reprieve. N.Y. CONST. art. XVIII, § 18 (1777).

[123] N.Y. CONST. art. III, § 5 (1821); N.Y. CONST. art. IV, § 5 (1846); N.Y. CONST. art. IV, § 5 (1894); N.Y. CONST. art. IV, § 4 (1938); N.Y. CONST. art. IV, § 4 (1967). At various times, several proposals to amend the pardon power largely concerned with procedures surrounding pardons for murder were under consideration but none were enacted.

[124] LINCOLN, *supra* note 121, at 135-36.

[125] N.Y. State Constitutional Convention Committee: Problems Relating to Executive Administration and Powers 51 (1938), excerpting *Debates 1867*, Vol. II. 1207-08.

[126] LINCOLN, *supra* note 121, at 310-11.

> Those opposed to the retention of his power argue that it is unnecessary since parole and certification of good conduct from parole boards accomplish the same ends. They further argue that the power could be abused, and that it would be better to put the pardoning power in the parole board which are more familiar with individual cases than is the Governor.[127]

The separate reference to treason, a grave concern at the founding of the country, was eliminated at the last Constitutional Convention.[128] Aside from that, today's version of the pardon power closely resembles the original enacted in 1777.[129]

B. *The Paterson Panel's Pardons*

In 2010, Governor Paterson made headlines when he created the New York State Immigration Pardon Board.[130] This initiative was prompted directly by Qing Hong Wu's compelling story, a narrative that epitomizes the predicament many immigrants face when, despite long ago convictions and long productive lives in the United States, they find themselves on the brink of removal without any possibility of relief.[131] Even before the Pardon Board became operational, Governor Paterson pardoned Wu,[132] who shortly thereafter naturalized.[133]

This bold step seized upon a remedy against deportation provided by Congress in the INA that confers upon state executives, as well as the President, the power to assist individuals facing deportation based on criminal convictions.[134]

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[127] N.Y.S. Temporary Commission on the Constitutional Convention 117-19 (1967).

[128] JACK B. WEINSTEIN, A NEW YORK CONSTITUTION MEETING TODAY'S NEEDS AND TOMORROW'S CHALLENGES 93 (1967). Apparently, the proviso against pardons for treason was superfluous since there had never been any convictions for treason in almost 200 years.

[129] N.Y. CONST. art. IV, § 4; *see also* N.Y. EXEC. LAW § 15.

[130] Danny Hakim & Nina Bernstein, *New Paterson Policy May Reduce Deportations*, N.Y. TIMES, May 4, 2010, at A1; Press Release, *Gov. Paterson Creates a Panel to Review Cases of Legal Immigrants Facing Deportation*, May 4, 2010, *available at* http://www.governor.ny.gov/archive/paterson/press/050310Deportation.html.

[131] Most forms of relief are barred to aliens with aggravated felony convictions, see *supra* note 95. A criminal conviction also factors into a determination of admissibility, INA § 212(a)(2) and "good moral character," INA § 101(f), which is a prerequisite for many forms of discretionary relief such as Cancellation of Removal, INA § 240A(b), and naturalization, INA § 316(d).

[132] Nina Bernstein, *Paterson Rewards Redemption With a Pardon*, N.Y. TIMES, Mar. 6, 2010, at A20.

[133] Nina Bernstein, *After Governor's Pardon, an Immigrant Is Sworn in as a Citizen*, N.Y. TIMES, May 29, 2010, at A20.

[134] INA § 237(a)(2)(B)(vi) exempts from removal non-citizens "granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States" following a conviction for crimes of moral turpitude, aggravated felonies (*see* INA § 101(a)(43)), and high speed flight from immigration checkpoints (*see* 18 U.S.C.A. § 758). Other crimes are not eligible for this waiver including controlled substance, firearms, and

Governor Paterson's motivation for this program was no secret. On Christmas Eve, 2010, when Paterson announced the pardons of additional New Yorkers, he proclaimed:

> That our Federal government does not credit rehabilitation, nor account for human suffering, is antithetical to the ideals this country represents. With these pardons, I have selected cases that exemplify the values of New York State and any civilized society: atonement, forgiveness, compassion, and the need to achieve justice, and not simply strict adherence to unjust statutes. I will not turn my back on New Yorkers who enrich our lives and care for those who suffer.[135]

Before he left office, Governor Paterson favorably acted on a record number of applications, allowing individuals to either avoid deportation altogether or to be in a more advantageous position to apply for relief in immigration court removal proceedings. By late 2010, in the waning days of his administration, he had pardoned 33 people, a notable number, but only a small fraction of the more than 1,000 applicants.[136]

Reactions to Paterson's humanitarian venture generally were favorable, but as might be expected, it was not universally praised.[137] This program was short-lived, however. After Paterson's term as Governor ended in 2010, his successor Governor Andrew Cuomo discontinued the pardon panel.[138] The

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domestic violence offenses. *See, e.g.*, In re Jung Tae Suh, I. & N. Dec. 626 (BIA 2003) (pardon does not eliminate removability after domestic violence conviction).

[135] *Governor Paterson Announces Pardons*, STATES NEWS SERVICES, Dec. 24, 2010, *available at* http://www.governor.ny.gov/archive/paterson/press/122410-GovPaterson AnnouncesPardons.html.

[136] Kirk Semple, *Governor Pardons Six Immigrants Facing Deportation Over Old Crimes*, N.Y. TIMES, Dec. 7, 2010, at A25. At the end of this article, there is a table of these pardons that singles out the date and nature of the convictions pardoned. This information was extrapolated from press releases at the time. Unfortunately, not all cases were reported consistently. Some state the age at the time of arrival in the U.S., some set forth family circumstances, and some describe the accomplishments of the individual. What is readily apparent from a perusal of the common facts that are available is that most of the convictions were quite old, for minor crimes, and were the only crimes committed by the person pardoned. Despite the staleness of the misconduct and the relative insignificance of the offenses, the DHS was seeking to deport, and in some instances was detaining, these individuals.

[137] *Compare A Reminder About American Values*, N.Y. TIMES, May 5, 2010, at A30 (commending the Governor for showing "courage and common sense at a time when the national debate about immigration shows little of either") *with OKAY, He Means Well*, N.Y. DAILY NEWS, May 6, 2010, *available at* http://www.nydailynews.com/opinion/means=paterson=pardon=state=scheme=immigrants=full=holes=article=1.444859/ (calling the panel plan "well-intentioned [but] half-baked").

[138] The New York City Council passed a resolution "calling on New York State Governor Andrew Cuomo to continue and expand the Immigrant Pardon Panel to ensure that legal

New York State executive pardon apparatus has reverted to its former structure and its usual practice of granting negligible numbers of pardons.[139]

Governor Paterson was not the first state executive to utilize the pardon authority to subvert the harsh effects of immigration laws,[140] but his project was the most ambitious and had the greatest potential for becoming permanent. But any hope that his audacious undertaking might serve as a model for an expanded use of the state pardon to alleviate the harshness of immigration law has evaporated. Not only did the New York special pardon board disappear in 2011 with the election of a new governor, but no other state's governor has followed Paterson's lead in creating a specific pardon route for non-citizens facing removal.

Neither the President nor governors dispense unconditional pardons extravagantly. Since 1900, from the administrations of Presidents McKinley to Obama, the President has granted pardons to 14,288 people.[141] Of that number,

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permanent residents who paid their debts to, and are now productive members of, society can continue to contribute to our great State." New York, N.Y., Res. No. 548-A (Mar. 23, 2011).

[139] Pardons in New York State are issued through the Governor's Counsel's Office and the Executive Clemency Committee, which recommend cases to the Governor for the exercise of his pardon power. *See* https://www.parole.state.ny.us/clemency.html. Past governors had exercised this power quite sparingly. Anahad O'Connor, *Spitzer Pardons Ex-Convict to Spare Him Deportation*, N.Y. TIMES, Dec. 22, 2007, *available at* http://www.nytimes.com/2007/12/22/nyregion/22pardon.html; Jim Dwyer, *Contemplating Official Mercy: No Small Task*, N.Y. TIMES, Dec. 28, 2011, at A18; *see also* N.Y. State Defenders Ass'n, New York Clemency, Decisions (1995-2010), *available at* http://www.nysda.org/Clemency.html. On the eve of the end of his first year in office, New York Governor Andrew Cuomo had not pardoned anyone. GOVERNOR'S JOURNAL, *Daugaard, Cuomo Pardons*, Dec. 31, 2011; *The Power to Pardon Remains Unused,* TIMES UNION, Dec. 29, 2011, *available at* http://www.timesunion.com/local/article/power=to=pardon=remains=unused=2431920.php.

[140] In response to the broadening of the range and retroactivity of deportable crimes following the 1996 Illegal Immigration Reform and Immigrant Responsibility Act [IIRAIRA], Pub. L. 104-208, 110 Stat. 3009-546 (1996), the Georgia Board of Pardons and Parole granted 138 pardons to Georgia residents specifically to thwart their removal. This effort was limited to misdemeanants but was implemented on a "class-wide" basis. Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED'L SENT. REP. 184 (2000-2001). There are some scattered accounts of "immigration" pardons in Oregon, Maryland, and Virginia prior to a 2008 ABA report. ABA Crim. Just. Sect. Comm. of Immig., Report to the House of Delegates-Recommendation (urging, *inter alia*, the reinstatement of some form of JRAD), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_my06300.authcheckdam.pdf (urging, *inter alia*, the reinstatement of some form of JRAD).

[141] U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, http://www.justice.gov/pardon/statistics.htm, (last visited Sept. 29, 2011). A fairly recent survey of the use of pardons reported that "pardons have become relatively rare in most U.S. jurisdictions, including many in which pardon provides the only way to avoid or mitigate the collateral consequences of conviction." LOVE, *supra* note 120, at 37. Sources for state pardon statistics are less organized, but those available paint a similar picture of relatively small numbers. *See,*

most pardons were granted to individuals who were not facing removal. So, despite almost a century of the INA pardon clause, its actual impact on otherwise removable non-citizens is not substantial. Notwithstanding the potential of the pardon power to affect positively the lives of individuals facing removal, there are very few court cases addressing the scope, limits, and applicability of the pardon power in the immigration context. Those that do exist usually limit rather than expand the application of this authority.[142] There is also meager scholarship on the subject.[143] Nor has there been any noticeable public debate specifically concerning the provocative issues inherent in the pardon clause: the ability of both federal and state chief executives to use their statutory authority to inhibit federal immigration authority,[144] and how the philosophical underpinnings of the executive pardon interact with the increasingly unforgiving, inflexible, and harsh deportation scheme.[145]

By expanding the option already afforded to governors to exercise their unquestioned discretion, some of the harsh effects of immigration statutes on state residents and their families might be ameliorated. Not using the pardon power to redress the extreme hardship or inequities in some cases of deportation is a squandered opportunity. There are no numerical limitations imposed by the statute, nor is there federal oversight or permissible second-guessing by immigration authorities. Nothing prevents state executives from taking advantage of the authority granted by the INA for more than a century. There are easy-to-imagine prerequisites and constraints that governors could develop to properly regulate pardon grants to avoid overuse or abuse.[146]

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e.g., OLR Research Report, *Pardon Statistics from Other* States, Jan. 14, 2005, *available at* http://www.cga.ct.gov/2005/rpt/2005-R-0065.htm.

[142] *See* discussion and notes *supra* Section III.E.

[143] In an excellent, comprehensive article, *Presidential Pardons and Immigration Law*, *supra* note 48, Samuel T. Morrison, a former attorney in the Office of the Pardon Attorney, U.S. Dep't. of Justice, reviews the history of the pardon power and criticizes the limitations imposed by the INA. He does not focus on gubernatorial pardons but concludes that their use should be expanded and surmises that, "The paucity of gubernatorial pardons in recent years suggests that they will be reserved for petitioners on whose behalf local community sentiment strongly favors a waiver of deportation, precisely those most likely to be attractive candidates for relief, as Congress presumably intended." *Id.* at 342. *See also* Nora Demleiter, *Using the Pardon Power to Prevent Deportation: Legitimate, Desirable or Neither in a Federal System*, 12 LOY. J. PUBL. INT. L. 365, 372 (2010-2011) ("It is a responsible way of dispensing executive mercy clearly permitted statutorily and under the state's constitution.").

[144] *See, e.g.*, Cade, *supra* note 79 arguing "[T]here is insufficient clarity that Congress intended to limit the effect of pardons to remove the immigration consequences of state convictions."

[145] *See, e.g.*, Demleiter, *supra* note 143.

[146] The ABA Criminal Justice Section, Commission on Immigration recently adopted a report that urges the expansion of the pardon power to provide relief to otherwise removable non-citizen "where the circumstances of the particular case warrant it" and to develop acces-

Moreover, none of the problems of unconstitutional preemption that plague efforts by state legislatures to control immigration should obstruct this effort since Congress already has permitted the pardon to function as a defense to deportation. A governor can rely on existing legislation without fear of intruding on federal immigration authority since Congress itself provided this option specifically to ameliorate the immigration consequences of a conviction. Now that the INA itself no longer recognizes waivers that reward rehabilitation, or express mercy or forgiveness, a pardon designed with standards and safeguards can provide a substitute remedy to be exercised in appropriate situations. In addition to the practical solution for deserving situations provided by the pardon, it allows immigration law to realign more rationally with the theories of criminal law based on mercy, forgiveness, and rehabilitation from which it has been drifting in recent years.

IV. CREATING A RATIONAL, TRANSPARENT SYSTEM OF GUBERNATORIAL PARDONS OF IMMIGRANTS FACING REMOVAL

Most accounts of presidential pardons tell a story of the declining use of this singular power.[147] Few state chief executives grant pardons either,[148] although a few governors have occasionally been more forceful and even courageous in granting other forms of clemency, particularly in death penalty cases.[149] Since one of the principal purposes of a pardon is to ameliorate the indirect penalties of a conviction particularly after an individual has completed a sentence, pardons are possibly becoming redundant with the growth of other state law measures that alleviate the civil disabilities or collateral consequences of convictions.[150] Governors who have exercised clemency, usually with sentence commutations rather than full pardons, are motivated by diverse "mercy" factors such as the age of the recipient (at either extreme), a reaction to a particular

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sible procedures for applying for a pardon. *Available at* http://search.americanbar.org/search?q=pardon+power+immigration&client=default_frontend&proxystylesheet=default_frontend&site=default_collection&output=xml_no_dtd&oe=UTF-8&ie=UTF 8&ud=1&sort=date%3AD%3AL%3Ad1&entqr=3&entsp=a__default_policy,crimjust_policy_my06300.authcheckdam.pdf.

[147] "There is little doubt that in recent decades, there has been an atrophy of the clemency power at the state and federal levels." Daniel T. Kobil, *Forgiveness and the Law: Executive Clemency and the American System of Justice: How to Grant Clemency in Unforgiving Times*, 31 CAP. U.L. REV. 219, 223 (2003).

[148] LOVE, *supra* note 120, at 19-20.

[149] Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency,* 21 FED. SENT. REP. 153, 153-54 (2009) (describing examples of gubernatorial pardons in Arkansas, Maryland, Virginia, Colorado, and Iowa).

[150] *See generally* LOVE, *supra* note 120. New York law restores the right to vote to felons who have been pardoned or who have completed their sentences. Following a successful application, a Certificate of Relief from Disabilities, N.Y. Correct. Law §§ 700-705, can restore a range of rights lost upon conviction but obviously cannot prevent deportation.

sentence, or a sense of moral responsibility.[151] Occasionally, a governor might consider a "public interest" clemency such as a sentence commutation that could help ease prison overcrowding or send a message to the legislature about reconsidering excessively harsh sentences.[152]

In this era of clemency scarcity, Governor Paterson's decisive and courageous program was all the more remarkable. While it is true that he was at the end of his term of office so that any political fallout would be inconsequential to his career, he acted quickly and decisively to create and implement his plan.[153] Pardon stories usually promote themes of justice and mercy, public benefit, and exceptionalism. Governor Paterson's short-lived pardon panel offers just such familiar narratives. But it was also unprecedented due to its singular mission of helping New Yorkers avoid immigration consequences and its potential influence as a model for the exercise of state executive authority to achieve this goal.

In many cases a full and unconditional pardon represents an extraordinary remedy which is used as a last resort to prevent additional or unjust harm or restore rights to individuals who are facing consequences for their past behavior that are disproportionate to their current circumstances. It is this proportionality principle that offers the most fitting justification for using the pardon power expressly to preclude deportation. Using pardons in this way can remediate in cases where the conduct that is the basis of the deportation does not warrant such a drastic, often permanent repercussion.

The expulsion of undesirable non-citizens has been woven into immigration laws since 1917, but early-twentieth-century legislators could not have imagined today's broad categories of non-citizens vulnerable to deportation. Unlike the loss of other civil rights or privileges that other laws might restore, even one hundred years ago deportation received unique treatment when the pardon clause was written into the statute itself. The contemporaneous congressional debates recognized and preserved a place for mercy and forgiveness for non-citizens faced with extreme outcome of expulsion. Both these debates

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[151] Barkow, *supra* note 149, at 154 (describing how some governors have cited religious faith as a reason for granting some form of clemency).

[152] A broader, more vigorous use of state executive discretion with the explicit goal of providing tools to avoid deportation or to remove bars to other potential relief might send a message to Congress that a reconsideration of current categorical, inflexible federal legislation is timely. MOORE, *supra* note 18, at 223-24 (giving as one example the amnesties in the 1990s to out-of-status immigrants that drew attention to the need to reform unjust immigration laws).

[153] Like Governor Ryan's system-wide death row clemency action, Governor Paterson created his pardon panel at the very end of his term in office. This timing mitigates the risk of political fall-out for an individual governor. But if a pardon was not the creature of personal initiative but an institutionalized system of regular government, this concern would be irrelevant since the decision-making would be more objective, formalized, and transparent.

and the Supreme Court (for more than a century) resisted characterizing deportation as "punishment."[154] Yet, these early lawmakers acknowledged that deportation is often disproportionate to the moral culpability of the underlying offense, and inescapably more punitive than other collateral consequences of a conviction. They therefore enacted special options to be exercised in individual cases in order to avoid an injustice.[155]

The value of an immigration pardon in this context is highly personalized since it is principally the individual and his or her family who immediately benefit. But there are unquestionable public benefits that ripple outward: to employers; to the local or state government that might have to pay public benefits following the loss of a wage earner; to public safety that results from stable families; and to the public purse in the form of taxes and Social Security payments. At bottom, perhaps the most noteworthy message of these pardons is the recognition of the United States as a "nation of immigrants."[156] Because individuality should matter in deportation decisions, a pardon provides a method to rationalize the relationship between the objective deportable act and its subjective consequences.

The benefits of a properly administered gubernatorial pardon system would outweigh the costs of deportation by protecting a state's residents from the deracination of family unity and structure while protecting the state from the economic and societal costs of family separation, displacement, and insecurity. Governors probably have much more access to the pulse of their communities and constituents than presidents. They are in a position to more knowledgeably and accurately assess the impact of deportation on the state's families, economy, and social structure. A governor likely would be in a better position to reliably assess the individual's contributions to the family, economy, and society within the more familiar boundaries of the state's interests and environment.

A program specifically dedicated to continuous, systematic consideration of pardons for immigrants would have to differ from the non-transparent current practice that lacks any clear, consistent, and accessible standards. The very essence of the power is its consolidation in the executive branch as a form of

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[154] For more than one hundred years, since *Fong Yue Ting, v. United States*, 14 U.S. 698, 730 (1893), Supreme Court jurisprudence has clung to the distinction that deportation is a civil, not a criminal, proceeding. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Bridges v. Wixon, 326 U.S. 135, 154 (1945); *see also* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1311-12 (2011).

[155] The relationship between the criminal conviction and a resulting deportation was pointed out by Justice Stevens in *Padilla*: "[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 559 U.S. at —, 130 S. Ct. at 1480.

[156] This coining of this ubiquitous phrase is attributed to the title of President John F. Kennedy's book, A NATION OF IMMIGRANTS, published posthumously in 1964.

relief of last resort so that in principle any executive could pardon any person without explanation or justification. Opacity and authoritarianism usually result in criticism of the process, however, and thus undermines its credibility regardless of the merits of a specific case. Therefore, to be legitimate, any expansion or regularization of the use of the pardon power for non-citizens must be supported by a carefully designed program to administer this incredible benefit. Many people have recommended changes and improvements to the processes of obtaining a pardon or other form of clemency to enhance its legitimacy. For example, to avoid accusations of self-interest, a clemency program should include rigorous application and decision-making procedures that safeguard due process.[157] Others have urged that all pardon decisions be accompanied by a written justification for the decision.[158]

The obvious values of consistency and transparency would assure greater public acceptance of such a project. Governors who fear pushback from their constituencies can protect themselves by carefully developing and articulating factors that would be weighed in the exercise of this discretion. To both insulate from the inevitable political pressure by special interests to grant particular pardons and to exercise their discretion objectively and equitably, governors should utilize strong and legitimate clemency institutions such as pardon commissions or boards staffed by credible and politically and ideologically neutral professionals.[159]

In a single month in 2010, the New York State Immigration Pardon Panel considered more than 1,100 applications.[160] Governor Paterson granted a total of thirty-three pardons (in addition to pardoning Qing Hong Wu), hardly an overwhelming percentage of the total number of applications filed.[161] Characterizing federal immigration laws as "often inflexible, arbitrarily applied and

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[157] Love, *supra* note 28, at 1208. There are detailed regulations and considerable publicly available information governing the application process at 28 C.F.R. Part I; *see also* U.S. Dep't of Justice, Pardon Information and Instructions, *available at* http://www.justice.gov/pardon/pardon_instructions.htm.

[158] MOORE, *supra* note 18, at 220.

[159] Many states have such entities. *See* LOVE, *supra* note 120, at 22-36 (reviewing models for administration of pardon power); *see also* Ridolfi & Gordon, *supra* note 27, at 9-15 (state-by-state chart of clemency structure, limitations and procedures).

[160] Press Release, New York State Governor David A. Paterson, Governor Paterson Announces Pardons (Dec. 6, 2010), http://www.governor.ny.gov/archive/paterson/press/120610Pardons.html.

[161] This total was derived from three press releases issued during December, 2010 identifying the recipients and summarizing the background of each pardon. *See supra* note 160 as well as Press Release, New York State Governor David A. Paterson, Governor Paterson Announces Pardons (Dec. 24, 2010), *available at* http://www.governor.ny.gov/archive/paterson/press/122410-GovPatersonAnnouncesPardons.html and (Dec. 30, 2010), *available at* http://www.governor.ny.gov/archive/paterson/press/123010-GovPatersonAnnouncesPardons.html.

excessively harsh,"[162] he granted this extraordinary benefit with a clear set of criteria in mind:

> I have selected cases that exemplify the values of New York State and that of a just society: atonement, forgiveness, compassion, realism, open arms, and not retribution, punitiveness and a refusal to acknowledge the worth of immigration. I will not turn my back on New Yorkers who enrich our lives and care for those who suffer.[163]

For the most part, the pardons granted by Governor Paterson reflected these values in action. Those pardoned included grandparents, professionals, caregivers of handicapped relatives, and veterans.[164] A pardon in the immigration context is not just a manifestation of individual forgiveness, nor solely a public benefit, but also a reaffirmation of membership that has been earned and does not deserve to be stripped without an opportunity for an individualized consideration of equities. While their circumstances were not identical, those pardoned shared many characteristics suggesting that it was not difficult then, nor would it be difficult in the future, to design criteria and standards for granting pardons for individuals facing deportation solely as a result of the criminal convictions for which they have already been punished.

There already are several examples of methodologies that assign a value to defined characteristics and situations in order to achieve a fair and consistent outcome that enhances the legitimacy of the system. The most obvious example is the U.S. Sentencing Guidelines Manual.[165] In calculating a sentence range, the Guidelines assign points based upon the nature of the crime and the nature of the offender, thereby eliminating perceived disparities in individualized sentencing by reducing judicial discretion. Although imperfect in the criminal system, the Guidelines could be instructive in the immigration context. They are detailed, structured, and objective, but also more flexible since the Supreme Court in *United States v. Booker* held that they were advisory and sentences were subject to a "reasonableness" review.[166] The Guideline system now gives judges more discretion to consider without limitation any facts relat-

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[162] Press Release, New York State Governor David A. Paterson, Governor Paterson Announces Pardons (Dec. 6, 2010), http://www.governor.ny.gov/archive/paterson/press/122410-GovPatersonAnnouncesPardons.html.

[163] *Id.*

[164] *See infra* Appendix for a complete list of all pardons.

[165] *See generally* U.S. SENTENCING GUIDELINES MANUAL (2011). In a complex matrix that examines many factors, the crime, its manner of commission, information about the victim, and the personal circumstances of the offender, a federal judge arrives at a sentencing range, but even then, the judge can depart from the Guideline sentence in a range of circumstances. *See id.* at 584 (discussing grounds for departure from the standard sentencing range).

[166] 543 U.S. 2230, 222-25 (2005).

ing to "the background, character and conduct" of the defendant.[167]

Another system for weighing equities recently was introduced in the immigration context by the Department of Homeland Security ("DHS"). A series of so-called Prosecutorial Discretion memos issued in 2011 rely on factors that balance the individual's circumstances against the goals of removal.[168] While the memos do not allocate points to particular factors, they do afford a framework for decision-making about initiating or continuing removal proceedings. These factors embody some of the same judgments about background, character and conduct that are typically embedded in the guidelines systems and in current forms of relief in the INA including length of residence, age, education, family ties and responsibilities, military service, and contributions to the community.[169]

There are also examples of point systems developed in some immigrant-receiving countries that could serve as models for a pardon scheme. Canada[170] and New Zealand[171] have established point calculators that quantify certain qualifications and characteristics. Because these points are used to predict whether an individual would be a successful permanent immigrant, they tend to base the admission decision of new immigrants on their likely future contributions to the country's economy. A pardon point system would have to look in both directions—past and future. First, it would weigh past conduct—the facts and circumstances of the crime and the sentence that are the basis for deportation and how the individual's behavior during the time between the conviction and the deportation proceeding demonstrates rehabilitation as well as the odds against repeat criminal conduct. Then, the system would be charged with predicting the future, in effect deciding whether the immigrant deserves to remain,

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[167] 18 U.S.C.A. § 3661 (2006).

[168] Memorandum, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2011), *available* at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf; Memorandum, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[169] Memorandum, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), at 4-5.

[170] *See* Citizenship and Immigration-Canada, *Backgrounder—Overview of the New Federal Skilled Worker Program*, http://www.cic.gc.ca/english/immigrate/skilled/apply-factors.asp. (last visited Mar. 24, 2013); *Points Calculator for Canadian Immigration*, CANADIAN VISA (Oct. 21, 2009), http://canadianvisa.com/news/canada-immigration/2011/points-calculator-for-canada-immigration (last visited June 18, 2012).

[171] *See Points Indicator*, IMMIGRATION NEW ZEALAND, http://www.immigration.govt.nz/pointsindicator (last visited June 18, 2012).

based on this accumulation of historical evidence. While no system is perfect and the particular assignment of points could always be disputed, the fundamental values that relief from removal have always expressed—ties to the United States, good character, effects on close relatives with lawful status—could be embodied, refined, and fine-tuned to establish a workable formula. Such a formula allows the immigration system to pay attention to individual lives and provides individuals and their supporters the opportunity to offset the fact of a criminal conviction with a life otherwise well-led.

As the volume of applications to the Paterson Pardon Panel demonstrated so clearly, many people would apply for this relief. Although there would not be a quota, probably only few ultimately would merit this benefit.[172] But a point or factorial system would operationalize the values that clearly influence this process, making it simpler, more consistent, more predictable, and more efficient. Certain point levels would assure a pardon while a score under a certain figure would assure denial. Assuming the point system is publicly available, as is the case for the Canadian and New Zealand immigration authorities, anyone who could not achieve the minimum number of points simply would not bother applying, thus diminishing the volume of work for the panel.[173] Only those applicants whose total points fell in between the presumptive grant and denial scores would require closer individual scrutiny. A system that is built on greater transparency and predictable consistency would result in greater administrative efficiency, and most importantly, increased public confidence when the reasoning behind individual decisions can be understood and even documented.

The balancing process starts, of course, with the threat of deportation and its lifetime consequences of long separation, potential permanent exile, and inevitable dislocation.[174] Against this fate, factors that fall into three broad yet interrelated categories would be assessed. These categories—affiliation-assimilation, character, and humanitarian factors—reflect the same equities that would be considered in granting pardons in general, without concern about immigration consequences. Most are already built into existing forms of immigration relief so should not be controversial. If a sufficient number and quality of the factors are present when weighted and aggregated, it would be easy to defend a pardon that precludes deportation, or at least opens the door to forms of relief under the INA barred by a conviction. Some factors, such as the vintage of the

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[172] *See supra* note 162.

[173] *See supra* notes 169-170. Having taken the self-assessment test, I would not be eligible to immigrate to either country.

[174] Anyone ordered removed is barred for either: ten years (for a first removal); twenty years (for subsequent removals); or permanently (for a conviction for an aggravated felony). 8 U.S.C.A. § 1182(a)(9)(A)(ii) (2010) (commonly known as Immigration and Nationality Act of 1959 § 212(a)(9)(A)(ii)).

conviction and its relative insignificance, might even be convincing enough to make the person categorically eligible for a pardon.

(1) Affiliation Factors[175]

Factors in this category largely focus upon the connections forged to the U.S. in terms of time, stake in the community, family, and lack of ties to another country.

- Length of residence or presence in the United States.[176]
- Age at time of initial entry to United States.
- Amount of time spent in country of origin.
- Family ties in country of origin.
- Span of time between initial entry and commission of the disqualifying crime.
- Span of time between commission of disqualifying crime and commencement of removal proceedings.
- Stakes in the community (any of these factors singly or in combination are relevant but not mandatory).
- Having United States citizen ("USC") or Lawful Permanent Resident ("LPR") immediate and extended family members without regard to hardship.
- Hardship to any other individuals or groups.
- Professional, work, or other employment history.
- Community ties.
- Home ownership.
- Business ownership.

While not all of this information was available for every person pardoned by

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[175] This term is used by Hiroshi Motomura to describe how immigration laws provide waivers or exemptions of deportation based on length of time spent in the U.S. as lawful permanent residents. HIROSHI MOTOMURA, AMERICANS IN WAITING 96-100 (2006). "[T]he treatment of lawful immigrants . . . should depend on the ties that they have formed in this country." *Id.* at 11. Motomura believes that this thinking explains, among other things, the JRAD. *Id.* at 99.

[176] Eligibility *could*, but should not necessarily, be limited to lawful permanent residents (LPRs). Governor Paterson limited his pardons to immigrants in legal status, and, judging by the descriptions, they were all lawful permanent residents as opposed to non-immigrants in legal status, *e.g.*, students or temporary employees. *See* Press Release, Governor Paterson (Dec. 24), *supra* note 161. This is an appealing limitation since it is more likely that individuals in this status would satisfy many of the other criteria, and, like Mr. Wu, their circumstances would be more sympathetic to the public. But, the INA itself permits waivers of removal for eligible long-term non-LPRs, including people with no immigration status, based on time, good character, and hardship to immediate relatives. 8 U.S.C. §1229b, INA § 240A(b). There may be an understandable political or practical reason to restrict pardons to LPRs, but there is no legal basis for this limitation.

Governor Paterson, a few cases illustrate these affiliation factors particularly well:

Frances Novoa, who is now 63 years old, [was] being threatened with removal for attempted petit larceny convictions from 1984 and 1974, for which she was sentenced to a conditional discharge. Novoa is gainfully employed, and provides stability to one of her daughters and three of her grandchildren, who would suffer a serious disruption of their lives and extreme emotional harm if she were to be deported.[177]

Walter Mills, now 60-years-old, was convicted of attempted possession of a firearm in 1973 and was sentenced to a conditional discharge. In the 37 years since this conviction, he has had no other contact with the criminal justice system. He now works full time and cares for his 82-year-old mother.[178]

Jose Palma has been a lawful permanent resident of the United States since 1971, but faces deportation as a result of a first-degree reckless endangerment conviction from 1978, for which he served 60 days in jail and five years on probation. He has lived an exemplary life during the 30 years since he was released from parole supervision, having become a business owner and raising his three children with his wife of over 30 years.[179]

(2) Character Factors

Everyone pardoned has been convicted of a crime, so there is at least one blot on his or her character. Accepting that, however, there are some clear factors that would tip the scale toward pardon, and the absence of which would militate against favorable treatment.

- The nature of the crime itself and any explanation for its commission.
- The length of time since the commission of the crime.
- The number of convictions the individual has incurred.
- The relative lack of seriousness of the crime, i.e., degree of offense, lack of violence or injury.
- The sentence itself and whether and how long ago it was completed.
- The individual's positive activities while serving or since the completion of the punishment.
- Do those activities represent rehabilitation and/or expressions of remorse?
- Do these activities benefit others and/or society?
- United States military service.

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[177] *See* Press Release, New York State Governor David A. Paterson, Governor Paterson Announces Pardons, at 3 (Dec. 24, 2010), http://www.governor.ny.gov/archive/paterson/press/122410-GovPatersonAnnouncesPardons.html (last visited June 17, 2012).

[178] *Id.*

[179] *Id.* at 5.

- Conduct demonstrating rehabilitation.
- Employment.
- Education.
- Exceptional achievement.
- Contributions to society.

The following stories exemplify character factors, although many also represent factors relating to affiliation and assimilation:

Clint Ramos was convicted of four counts of Grand Larceny in the Third Degree in June 2001, and he was sentenced to five years on probation. At the time of his conviction, Ramos was severely drug addicted, but he has since overcome that addiction and has been a sponsor for more than 10 persons in recovery. Ramos has become an award-winning costume and set designer and is well known and respected in the New York Theater community. His pardon application has received overwhelming support from numerous members of that community, who describe him as a brilliant and innovative artist as well as an asset of real value to the American theater.[180]

[Mario Benitez immigrated to the United States from the Dominican Republic in 1978, when he was 26 years old, and a few years later he served honorably in the United States Navy.] In 1988, Mr. Benitez pled guilty to second-degree criminal sale of a controlled substance and was sentenced to 8 years to life in prison. While in prison, Mr. Benitez was a "role model" inmate, who earned a Bachelors Degree in Accounting and, upon release, began working at the City University of New York's (CUNY) Lehman College. After passing the CPA exam in 1997, he has risen to jobs with higher levels of responsibility, and today he is the Assistant Director of Finance for CUNY's Graduate School and University Center in charge of a budget in excess of $60 million. Mr. Benitez, who was discharged from parole supervision after only 3 years, has been involved in numerous community activities in the Bronx, including one-on-one youth mentoring. He is married and has 4 daughters, all of whom are United States citizens.[181]

Carol Hamilton, now a Reverend, was convicted of two class A misdemeanors of Criminal Possession of Marijuana in the Fourth Degree in 1995 and 1986, for which he was sentenced to a conditional discharge and a fine, respectively. He has now earned a Bachelors and a Masters Degree and works as an ordained minister, counseling youth, ex-offenders and people living with HIV/AIDS. A pardon should assist him in fighting his deportation, allowing him to remain in the United States with his wife and three young children.[182]

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[180] *See* Press Release, Governor Paterson (Dec. 30), *supra* note 161.

[181] *See* Press Release, Governor Paterson (Dec. 6), *supra* note 160.

[182] *See* Press Release, Governor Paterson (Dec. 24), *supra* note 161.

Neil Drew has been a lawful permanent resident of the United States since he was 10 years old. He was convicted of third-degree grand larceny in 1998, for which he served a one-to-three year sentence and made restitution. He has earned a Bachelors Degree from the School of Visual Arts in New York City and has been gainfully employed as a graphic designer. His two brothers serve in the U.S. military.[183]

(3) Humanitarian Factors

These factors concentrate on the consequences of removal, usually resulting in hardship or harm to the individual or to others who have a stake in the United States. Current hardship calculations are too restrictive and tend to weigh too heavily in the balancing process. Hardship to others who have a right to remain in the United States (USCs and LPRs) is already a requirement in some existing forms of relief. But the threshold is enormously high—either "extreme hardship"[184] or "exceptional and extremely unusual hardship"[185]—and can only affect qualified immediate relatives. In general, the hardship assessment should be less demanding and more inclusive. Hardship should not be mandatory for a pardon, but rather an important factor. Hardship considerations for pardons should include not just circumstances where the deportation would hurt a limited class of close relatives, but the impact of removal on the USC or LPR himself or herself. Finally, in cases where the individual originally was granted humanitarian relief, such as asylum, deportation to a country of persecution should weigh heavily in favor of a pardon. Humanitarian factors include:

- Hardship to USC or LPR family members.
- Hardship to the individual facing deportation.
- Having USC or LPR family members, regardless of hardship:
- Effect on their education.
- Effect on their physical and/or mental health.
- Effect on social welfare.
- Effect on financial welfare.
- Having family members on active duty in the U.S. military.
- Whether the individual was admitted as a refugee having been persecuted in his or her country of origin.
- The current conditions in that country.
- Correcting an injustice incurred by the original conviction or sentence.

Some of these humanitarian factors played a large role in the following examples of pardons, although other compelling factors were also present.

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[183] *Id.*

[184] 8 U.S.C.A. § 1182(h) (2010) INA § 212(h).

[185] 8 U.S.C.A. § 1229b(b) (2010), INA § 240A(b).

Marlon Oscar Powell lawfully immigrated to this country from Jamaica in 1986, when he was 13 years old. When he was 15 years old, he was convicted of using a fake ID to gain admission to a club where he was arrested for misdemeanor drug possession and sentenced to 9 months in jail under the mistaken belief that he was then 21 years old. Had Mr. Powell properly been considered a Youthful Offender, his misdemeanor crime would not be deportable. In the 20 years since his release, he has become a productive member of society, maintaining steady employment and supporting and raising his 4 young children.[186]

Deborah Salako-Nation has been a lawful permanent resident of the United States since 1974, when she was 5 years old. She has been ordered deported to Nigeria as a result of three convictions from 1999 and 2000, for second-degree forgery (a class D felony), petit larceny (a class A misdemeanor) and third-degree forgery (a class A misdemeanor). In the decade since those convictions, Ms. Salako-Nation has worked steadily in order to support her college-age son and her 6-year-old autistic son. Like many legal immigrants, Ms. Salako-Nation was placed in removal proceedings after she applied for citizenship. She faces imminent deportation to Nigeria, a country with which she has no ties, since her parents and siblings are all citizens of the United States. Her deportation would be devastating for her autistic son, who relies on her for his medical and educational needs; many of these services would not be available in Nigeria were she to take him with her.[187]

Khamsay Chanthavilaychit received a pardon for an August 2003 conviction for the Class A misdemeanor of Criminal Possession of a Weapon in the Fourth Degree, for which he was sentenced to a three-year term of probation. Chanthavilaychit was brought to this county at age two, as a war refugee from Laos, and he has been gainfully employed for the last 16 years. He is currently facing removal after being placed in proceedings when he applied for and was denied naturalization.[188]

These histories, and all of the other cases where pardons were granted exemplify how using the pardon power can inject principles of mercy and forgiveness into immigration law. Most cases would hardly strike anyone as controversial or undeserving. Given the perfect storm of laws that expanded grounds of deportation and made some retroactive, and either eliminated forms of equitable relief or made them more demanding,[189] the gubernatorial pardon authori-

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[186] *See* Press Release, Governor Paterson (Dec. 6), *supra* note 160.

[187] *See id.*

[188] *See* Press Release, Governor Paterson (Dec. 30), *supra* note 161.

[189] One comprehensive critique of the 1996 statutes and their effect on criminal deportation is Nancy Morawetz, Symposium: *Understanding The Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L.R. 1936, 1938-43 (2000).

ty offers an appealing alternative, as Governor Paterson so eloquently understood and advocated.

A pardon awarded expressly for immigration purposes can elegantly sidestep any hardnosed concerns about leniency for criminals by joining the public interest with the individual interest. Our society wants to encourage acceptance of responsibility and rehabilitation, reward good behavior, spare harm to innocent victims, and send an expressive message about the possibilities for a better life available to immigrants. The possibility of exile may not have been contemplated at the time of most of these low-level convictions. Yet, the stakes are so high that if the plight of any one of the people on Paterson's list was widely known, the draconian fate of deportation would offend not only that person's neighbors, co-workers, or co-congregants, but also the public at large. That certainly was the reaction that Qing Hong Wu's story provoked.

Gubernatorial pardons speak eloquently about the impact of a collateral consequence on a specific community. Governors can take more risks when making decisions on a smaller, localized scale. If such a program were operationalized over a period of time, it would become routine, with costs and benefits clearly understood by the public. Other state citizens would support individuals—their neighbors, their friends, their colleagues at work or on committees—seeking pardons and would understand the immediate negative impact of deportation on job sites, schools, places of worship, or neighborhoods.[190] In addition, families who lose their support system probably require government financial support following the deportation of a breadwinner.[191] States (and counties or cities as well) often bear the social burdens and actual costs of

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[190] Ben Forer, *Alabama Immigration Law Causes Hispanics To Leave Schools*, ABC NEWS, Oct. 4, 2011, *available at* http://abcnews.go.com/US/alabama-immigration-law-hispanics-leave-schools/story?id=14663550#.T_hXTO1xUfM.

[191] SETH FREED WESSLER, APPLIED RESEARCH CENTER, SHATTERED FAMILIES, THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM, (Nov. 2, 2011, 8:00am), *available at* http://colorlines.com/archives/2011/11/thousands_of_kids_lost_in_foster_homes_after_parents_deportation.html; A REPORT BY DORSEY & WHITNEY LLP TO THE URBAN INSTITUTE, SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA'S IMMIGRATION ENFORCEMENT POLICY (2009), *available at* http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf; DHS reported that 46,486 individuals who claimed at least 1 USC child were deported in the first six months of 2011. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPORTATION OF PARENTS OF U.S.-BORN CITIZENS: FISCAL YEAR 2011 SECOND SEMI-ANNUAL REPORT TO CONGRESS 6 (Mar. 26, 2012), *available at* http://www.lirs.org/wp-content/uploads/2012/07/ICE-DEPORT-OF-PARENTS-OF-US-CIT-FY-2011.pdf (on file with author); Jacqueline Hagan, Brianna Castro & Nestor Rodriguez *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88. 1799, 1813-22 (2010) (drawing on several studies conducted over a ten-year period, the authors show N.C. L.R how U.S. enforcement policies have disrupted family ties and created stress in communities in which immigrants live and work.

deportation, so their constituencies would appreciate the resulting savings.[192] Deportation may produce even worse consequences to families who face a choice of either taking USC or LPR dependents to countries to which they have no connections and where they will probably lead less advantaged lives,[193] or abandoning children to foster care or non-family caregivers.[194]

State-level action in the immigration realm can also communicate a political message to federal legislators. Arizona's anti-immigrant efforts (which inspired Alabama, Georgia, North Carolina and other states to pass similar laws) demonstrate frustration with under-enforcement of immigration laws by the federal government. Concerted pro-immigrant measures could equally and forcefully communicate state views about immigration over-enforcement. Institutionalized, functioning state panels or commissions, operating with integrity and transparency, and shining light on the injustices of overzealous immigration laws and enforcement, might cause federal legislators to question whether the current restrictions of the INA are unjust and require reform.

V. CONCLUSION

The elegance of this proposal to invigorate the pardon power for the purpose of avoiding deportations derives from the existing, but underappreciated and underutilized law. A governor can rely on current federal law without requiring new or amended federal legislation.[195] Like the exercise of prosecutorial discretion that results in the non-initiation or termination of deportation proceedings, the pardon power is situated in executive discretion that can be subject to standards, regulation, and oversight, assuming that the pardon decision is depoliticized.

"Governors' consciences are often good guides to injustice."[196] To grant pardons to individuals who fit the criteria discussed above is both a demonstration of humanity and a wise political gesture. Hopefully, a successful experi-

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[192] This is an extension of the argument advanced by Arizona at the Supreme Court. Brief for Petitioner at 6-7, Arizona v. United States, 132 S. Ct. 2492 (2012), (No. 11-182), Brief for Petitioner, at 6-7.

[193] Damien Cave, *American Children, Now Struggling to Adjust to Life in Mexico*, N.Y. TIMES, June 18, 2012, at A1.

[194] SHATTERED FAMILIES, *supra* note 191, at 163 (reporting that 5,100 children of deported parents live in foster care).

[195] In a recent article, the author proposes a new statute entitled "The Longtime Lawful Permanent Residents and Family Unit Relief Act" which builds on Cancellation of Removal but allows consideration of the proportionality of deportation as it relates to the underlying criminal conviction that forms the basis of removal and blocks relief, and lists a series of factors to consider as a matter of discretion. Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 693-94 (2012).

[196] MOORE, *supra* note 18, at 223. The author points to examples of clemency in cases involving the death penalty, child teenage felons, and mental incompetents.

ence with the use of pardons to aid deserving immigrants to remain in the United States would inspire other governors to develop similar programs. To date, however, these efforts have not gained momentum, either in New York or elsewhere. Governor Cuomo has neither adopted the practice of his predecessor, nor followed the resolution of the New York City Council.[197] Nor has he openly taken the pulse of his constituents to see what public reaction might be to a permanent pardon panel. In the world of executive pardons, a governor really has little to lose since his or her authority, by the very nature of pardons, is exclusive and unreviewable.

As thousands of additional clemency applications are filed, with compelling claims to remain in the United States, Governor Cuomo or any one of his forty-nine counterparts may decide to reestablish a pardon panel and reinvigorate the effort to lead the nation in setting an example of generosity, forgiveness, flexibility, and resolve. Seize the law.

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[197] *See supra* note 139.

APPENDIX
PARDONS ISSUED IN NEW YORK DURING DECEMBER 2010

Name	Crime/Offense	Date of Offense
Allen, Tressan	Att. Possession of Marijuana (misdemeanor)	2002
Auyeung, Kevin	Robbery	? (Convicted at age 17)
Benitez, Mario	Sale of Controlled Substance	1988
Broomfield, Sanjay	Possession of Weapons (misdemeanor)	2005
Camacho, Luz Marina	Possession and Sale of Controlled Substance	1983
Carter, Ian	Att. Sale of Stolen Property	1994
Chanthavilaychit, Khamsay	Possession of Weapon	2003
Colas, Edouard	Att. Burglary	1997
Cruz, Lucila	Att. Grand Larceny	1996
Dandapani, Vijay	Grand Larceny	1993
Drew, Neil	Grand Larceny	1998
Gonzalez, Salvador	Assault	1975
Guzman, Engels R.	Robbery	1990
Hamilton, Carol	Possession of Marijuana	1986 & 1995
Johnson, Olusegun Ola	Forgery and Grand Larceny	1990
Mills, Walter	Att. Possession of Firearm	1973
Montesquieu, Pedro	Att. Sale of Controlled Substance	1994
Moya de Leon, Francisco	Possession of Controlled Substance	1994
Novoa, Frances	Att. Petit Larceny	1974 & 1984
Palma, Jose	Reckless Endangerment	1978
Parker, Angela	Sale of Controlled Substance / Assault	1989
Powell, Marlon Oscar	Possession of Fake ID (misdemeanor)	1988
Prado, Aqustin	Possession of Controlled Substance (misdemeanor)	1993
Ramirez, Juan P.	Unknown misdemeanors	2003
Ramos, Clint	Grand Larceny	2001
Ramsaran, Darshini	Robbery	?
Rhodon, Laurenton	Att. Possession of Controlled Substance	1995
Rojas, Fredy C.	Possession of Controlled Substance	1995

Name	Crime/Offense	Date of Offense
Sanchez, Jose	Possession of Controlled Substance	1989
Salako-Nation, Deborah	Forgery	1999 & 2000
Sinclair, Melbourne	Sale of Marijuana (misdemeanor)	1990
Valerio, Eligio	Sale of Controlled Substance and Possession of Weapons	1986
Valentin de la Cruz, Randy	Assault	1984