Further Reflections on the Pardoning Power: Reply to Hoskins and Drinan

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FURTHER REFLECTIONS ON THE PARDONING POWER: REPLY TO HOSKINS AND DRINAN

Chad Flanders*

Galifianakis: "First question. In 2013, you pardoned a turkey. What do you have planned for 2014?"

Obama: "We'll probably pardon another turkey". 1

First, let me express my gratitude to the incisive comments of Zach Hoskins and Cara Drinan. I have long been a fan of Hoskins's work, and his forthcoming book on the collateral consequences of punishment promises to be pathbreaking.2 The influence of Drinan's scholarship on the pardoning power3 is evident in my original essay4 and her newer work on the Graham case has again inspired me in new directions in my research.5 Their comments on my essay are important in their own right, and importantly for me, they have helped to clarify my own thinking. In my brief reply, I begin by restating the main points of the article.6 I then try to expand on them, building on points made in both responses.

I.

I saw my article has having three major points:

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2. ZACHARY HOSKINS, BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF COLLATERAL RESTRICTIONS ON OFFENDERS (forthcoming); see also Zachary Hoskins, Ex-Offender Restrictions, 31 J. APP. PHILOSOPHY 33 (2014) (discussing the numerous restrictions suffered by criminal offenders after they have paid their debts to society).


4. Chad Flanders, Pardons and the Theory of Second-Best, 65 FL. L. Rev. 1559 (2013) (defending the use of the pardon power but finding "strong moral limits on how it can be used.").


6. Flanders, supra note 4, at 1562-66.
(1) Pardons can be considered individually, but they can also be considered holistically.\(^7\) That is, not only can we look at a pardon of a particular person by itself, we can also consider a group of pardons, taken together: of each pardon, we can ask, is it justified? Was there a sound, rational basis for the granting of the pardon? Of a group of pardons, we can look and see if there are any patterns of bias or favoritism: was this selected for a pardon simply because of some arbitrary feature he or she possessed?

(2) Even if each pardon may be justified individually, problems may emerge at the level of a group of pardons.\(^8\) A President may pardon people not only because they deserve it, but also because they are friends of the president. Or suppose a governor only commutes the death sentences of white inmates, leaving black inmates to be executed. Even if the commutations of the white inmates were justified, there are questions of justice we can raise about the racially selective nature of the executive’s actions.

(3) In some cases, the selectivity of the executive’s acts of mercy can mean that it would be better if the executive (president, governor) did not pardon anyone rather than she pardon only some people and not others.\(^9\) I leave this question unanswered in the essay, but I at least suggest it is a possibility: it might be better that a governor pardon nobody than that he only pardon his friends, or members of a certain race, or pardon people randomly. There are values that can be violated at the level of pardons considered as a whole which at least weigh against and may even outweigh the justice of pardons considered individually.

In my original article, I wanted to register the discomfort I had with the possibility of selective pardons, and the normative issues they raise. In the ideal world, everyone who deserves a pardon should get one. But, we do not live in an ideal world. At the very least, governors and other executives do pardon selectively, and in my essay I was trying to provide a way to frame our discomfort with that: cases in which individual pardons may be perfectly justified, but there’s a pattern that seems normatively questionable. In those cases, we are actually dealing with two normative questions, not one. Therefore, the executive is vulnerable to objections on two fronts: first, were the pardons justified taken one by one and second, were the pardons distributed fairly? Haley Barbour’s pardons were like that. He pardoned a lot of people, but he

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7. Id. at 1562.
8. Id. at 1574.
9. Id. at 1575.
pardoned people selectively. He wasn't consistent, and that was a normative failing in his pardons. Moreover, it is a normative failing even if all of the people he did pardon fully deserved it.

I did not spend much time elaborating a theory of pardons per se. My larger point was that whatever your theory of justifying pardons individually was, there was still the issue of whether the pardons could be justified holistically. This point allows me to make a small clarification. Drinan quotes me as saying that I hoped my theory of pardoning would be "unobjectionable." But here I was referring to the generic theory of pardons I was presenting, which was borrowed from the important work of Kathleen Moore. That theory said that pardons could be justified when they were given for "good and sufficient reasons," leaving open what those good and sufficient reasons would be. I wanted to lay out a theory of individual pardons that was relatively uncontroversial (and relatively underspecified) so that I could point out the further problem of pardons considered holistically. I did not expect my claim about holistic pardons to be uncontroversial and unobjectionable: far from it! I expected it to be controversial.

II.

Hoskins's response is generally sympathetic, but he raises a compelling point. Hoskins wonders why we shouldn't always pardon the person who deserves it, even when others similarly situated might not be pardoned. Hoskins writes, "if an executive obtains compelling evidence of a prisoner's innocence, for instance, we may believe justice demands a pardon. In cases of mandatory pardons, it is difficult to see how the cause of justice overall is furthered by refusing to do what justice demands in particular cases (i.e., refusing to pardon some innocent people) merely to avoid an unfair distribution of pardons overall." I think I agree with this particular example, and said so in my article. But at the same time, it is important that there is still something lost, if the governor does

10. Id. at 1572.
12. Id. at 30.
14. /d. at 3.
16. Id. at 18.
17. Flanders, supra note 4, at 1594, n. 130.
not also pardon some other person who is innocent, and for reasons that are
discriminatory or arbitrary. This, in a way, was the modest aim of my
article: to show that we are not done evaluating an executive’s pardon
when we have determined whether the pardon had "good and sufficient
reasons" behind it. We also have to look at the other people pardoned, or
not pardoned. Only then can we look at the justice of the governor’s
actions as a whole.

Will it ever be the case that an unjust distribution of pardons will
mean that no one should be pardoned? I press this possibility in my
article, and Hoskins makes a helpful suggestion. In my article I made in
passing a distinction between mandatory and permissible pardons, and
Hoskins comments that "the distinction may be more central to [my]
central thesis" than I acknowledge. \(^{18}\) Hoskins wants to say that it will be
always right to grant mandatory pardons, regardless of distribution
patterns, whereas with permissible pardons we may be right to be more
sensitive to patterns of distribution. This may be right, but I would need
to hear more about what counts as mandatory and what counts as
permissible in pardoning. I also believe that in the case of some minor
mandatory pardons, \(^{19}\) we really ought to be sensitive to distribution.
People may be owed a pardon, but if for some reason we can’t or won’t
pardon everyone who is similarly situated, we may have good
normative reasons to hold off on the selective pardoning when the
stakes are relatively low.

Drinan raises many excellent points in her response, but the key one
seems to be that I focus too much on "batch" pardons, like the
Barbour’s mass pardons, and not on "regular clemency grants." \(^{20}\) As she
writes,

> Routine exercise of the pardon power theoretically should
normalizing the process for the public, which may be
otherwise wary of it, and rationalizing its operation should
enhance fairness. Yet, if Professor Flanders is correct that
"sometimes a pardon is wrong only when compared to
other instances of pardons granted or not granted," regular
exercise of the pardon power is very problematic. \(^{21}\)

I think this is correct in one respect: when a governor pardons people
*en masse*, it is easier to assess those pardons as a whole. We can see
who gets pardoned, who doesn’t get pardoned, and whether there are

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18. Id. at 19.
19. Suppose that a governor believes that it is morally wrong that ex-felons who have
served their term are denied the right to have a fishing license, but he only pardons white ex-
felons (so that they can now fish) and not black ex-felons. I would think it might be better
normatively that he pardon nobody, than that he pardon unjustly.
21. Id.
any normatively objective patterns in the pardoning. It is harder to see
the distribution of pardons when we have a governor (her example is
Robert J. Ehrlich Jr., former Governor of Maryland) who pardons one at
time, over a longer period of time, and not all at once in a "batch."

What do we say about such cases, which happen over many years?
Two things. We can still assess one pardon by itself, not only by
reference to whether that pardon is deserved (Was the person innocent?
Did he reform himself? Is he suffering too much?), but also relatively to
other people who are similarly situated, even when the pardons are
separated in time. Every pardon works against the background of other
people who are not pardoned. If one person is pardoned, and another is
not and that person is similarly situated, we can criticize the executive's
only pardoning one person. This suggests another point: when a
governor pardons one person, he or she should be setting down a
precedent, or a rule: anyone in the present or in the future who is like
the person I pardoned also deserves a pardon. Pardons, in other words,
should be principled, not just in the one case, but across all cases,
including cases yet to come.

Consider President Obama's recent pardon of eight people who had
been sentenced to longer terms because they were found guilty of
offenses involving crack as opposed to cocaine. "I am commuting the
prison terms of eight men and women who were sentenced under an
unfair system," Obama wrote in a statement. "Commuting the
sentences of these eight Americans is an important step toward restoring
fundamental ideals of justice and fairness." Were Obama's pardons
just considered individually? Probably, or let's at least stipulate that
they were. Were they just considered holistically? One of the people
pardoned, the news story notes, was a cousin of Massachusetts
Governor Deval Patrick, an Obama supporter and friend. Was
favoritism a factor in the pardon of Patrick's cousin? Probably. Should
that affect our normative assessment of that pardon? Maybe, especially
if others similarly situated were not pardoned.

Note that Obama can cure the hint of favoritism in his pardons by
pardoning more people who are similarly situated, of which there are
many. The story quotes a spokesperson from Families Against
Mandatory Minimums as saying they were pleased with the pardons, but that "the bottom line, however, is that there are several thousand more where they came from." If Obama continues to pardon, regularly and consistently with the principle he announced with his first "batch" of pardons, he avoids the claim that he is pardoning favorites. If he only pardons sporadically, he opens himself to criticisms of selective pardons. Again, we can assess Obama's pardons holistically, both with reference to those he didn't pardon (and those he did) in the present, and with reference to those he should pardon, going forward.

I too, with Drinan, wish that pardoning would become more regular, more of an accepted part of the criminal justice system rather than an occasional thing. In a criminal justice system as ours, which falls very far short of the ideal, pardons are (somewhat regrettably) necessary parts of the system. They are necessary to remove injustices that for whatever reason can't or won't be addressed by the other branches of government. We need to be consistent in remedying those injustices, to avoid the risk of creating at least the perception of even greater injustices. Therefore, we need a more aggressive use of the pardoning power. We also, at the same time, need a principled one.

25. Lewis, supra note 22.