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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 off points made in both responses.

I.

I saw my article has having three major points:

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1. *Between Two Ferns with Zach Galifianakis: President Barack Obama*, FUNNY OR DIE (Mar. 11, 2014), <http://www.funnyordie.com/videos/18e820ec3f/between-two-fems-with-zach-galifianakis-president-barack-obama>.

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).

3. Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123 (2012) (arguing for increased use of the pardon power).

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").

5. Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51 (2012) (discussing *Graham v Florida* and how lower courts and legislatures should implement the Supreme Court's decision); cf Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, GA. L. REV. (forthcoming 2015) (discussing the Supreme Court's reliance on rehabilitative theory in *Graham*).

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

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.¹⁰ This point allows me to make a small clarification.¹¹ Drinan quotes me as saying that I hoped my theory of pardoning would be "unobjectionable."¹² But here I was referring to the generic theory of pardons I was presenting, which was borrowed from the important work of Kathleen Moore.¹³ That theory said that pardons could be justified when they were given for "good and sufficient reasons,"¹⁴ 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.¹⁵ 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."¹⁶ I think I agree with this particular example, and said so in my article.¹⁷ But at the same time, it is important that there *is* still something lost, if the governor does

10. *Id.* at 1572.

11. Cara H. Drinan, *Where Pardons Are Concerned, Second Best May Not Be So Bad After All: A Response to Chad Flanders*, 65 FLA. L. REV. F. 29, 31 (2013).

12. *Id.* at 30.

13. Flanders, *supra* note 4, at 1565-70; *see generally*, KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1997).

14. *Id.* at 3.

15. Zachary Hoskins, *Problematic Pardoning Patterns: Response to Chad Flanders, Pardons and the Theory of the 'Second-Best,'* 65 FLA. L. REV. F. 17, 17-18 (2013).

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 normalize 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

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.

20. Drinan, *supra* note 11 at 30.

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 a 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.²² "Commuting the sentences of these eight Americans is an important step toward restoring fundamental ideals of justice and fairness."²³ 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.²⁴ 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

22. Erin Fuchs, *Obama Slams 'Unfair' Drug Laws as He Commutes The Sentences of 8 Crack Offenders*, BUSINESS INSIDER, (Dec. 19, 2013, 3:07 PM), <http://www.businessinsider.com/barack-obama-commutes-8-sentences-2013-12>.

23. Paul Lewis, *Obama Commutes Sentences of Eight Crack Cocaine Offenders*, THE GUARDIAN (Dec. 19, 2013) at <http://www.theguardian.com/world/2013/dec/19/obama-reduces-sentences-eight-crack-cocaine>.

24. Matt Viser & Tracy Jan, *Patrick's Cousin Gets Presidential Clemency*, THE BOSTON GLOBE, (Dec. 20, 2013), <http://www.bostonglobe.com/news/nation/2013/12/19/president-obama-commutes-drug-sentence-deval-patrick-first-cousin/9ROGlmHrTeRziiokQsRZOM/story.html>.

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."²⁵ 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.