PROBLEMATIC PARDONING PATTERNS

RESPONSE TO CHAD FLANDERS, *PARDONS AND THE THEORY OF THE "SECOND-BEST"*

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In his engaging article, Chad Flanders examines the justification of executive pardons.[1] The article's key contribution is its contention that we cannot determine whether pardons are justified solely by considering them *individually*.[2] It is not enough, that is, to ask in each case whether there exist what Kathleen Moore calls "good and sufficient reasons"[3] for the pardon (basically, whether the pardon will remedy a miscarriage of justice of one form or another). To assess whether pardons are justified, Flanders argues that we must also examine them *holistically*.[4] Pardons that are justifiable individually (because there are, we may agree, good and sufficient reasons for them) may nevertheless be unjustified if they are part of a pattern of pardoning that is racist, favoritist, or otherwise problematic.[5]

For instance, suppose a governor pardons thirty people on grounds we would accept as legitimate (in each case, the pardon remedies what Flanders calls a legal or moral mistake[6]). But suppose further that all thirty people are white, or have political connections of some sort, and also that there are plenty of nonwhite or politically unconnected people who are similarly situated and would thus be candidates for pardon on the same grounds (viz., the same legal or moral mistake was made in their cases). Flanders' central claim is that the thirty pardons may be unjust, even if justifiable on a case-by-case basis (i.e., made for good and sufficient reasons), because in this case, pardons on the whole are distributed in an unfair way.[7] In fact, at least in some cases it would be better, Flanders contends, to pardon no one than to pardon some (even for good and sufficient reasons) at the cost of perpetuating racially disparate or otherwise objectionable pardoning distributions.[8]

Flanders makes a compelling case, in my view, that pardoning patterns are morally significant. It is not enough, in assessing pardons'

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    1. Chad Flanders, *Pardons and the Theory of the "Second-Best,"* 65 FLA L. REV. 1559, 1568 (2013).
    2. *Id.* at 1595.
    3. Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 281 (1993).
    4. *See* Flanders, *supra* note 1, at 1565.
    5. *Id.* at 1581–82.
    6. *Id.* at 1568.
    7. *Id.* at 1574.
    8. *See* Flanders, *supra* note 1, at 1592.

justifications, to focus only on assessing each pardon individually; to do so would be to miss the pardoning forest for the trees. This is an important insight, and one that, as Flanders notes, is too often overlooked. [9] That said, I am not yet convinced by his provocative argument that unfair pardoning patterns are so troubling that it would sometimes be better to pardon no one (even for good and sufficient reasons) than to perpetuate such patterns.

One reason to be skeptical of this argument is that it seems to rest on a false dichotomy: pardon only some, and thus perpetuate unfair distribution of pardons, or pardon no one. There is, as Flanders points out, an obvious third option: reduce or eliminate the unfair distribution by pardoning everyone who is deserving, white and nonwhite, politically connected and unconnected. [10] Flanders endorses this option but then challenges us to consider cases where it is not available, where our choices are either to pardon some (and thus perpetuate the unfair patterns) or pardon no one. [11] When the best option of pardoning everyone who is deserving is unavailable, he suggests that the second-best option may sometimes be to pardon no one. [12]

I am not convinced that we need to accept this dichotomy — that is, I am not sure why we would ever need to rule out the option of reducing unfair pardon distributions by pardoning everyone who is deserving. But even if we accept Flanders' scenario of choosing between second-best options, it is not clear that pardoning no one will be the better choice. In many cases, the reasons to pardon will be such that we think pardoning is mandatory[13]; 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.

In other cases, however, we may think pardons are permissible but not mandatory from the perspective of justice; pardons based on considerations of mercy might be an example. In these cases, it may be more plausible to contend that it is better to pardon no one than to pardon at the cost of perpetuating unfair distributions. After all, if pardoning is merely permissible but not mandatory, then not pardoning is also permissible. And if choosing to pardon no one is permissible, then it may be justified, all things considered, to choose this option in the interests of combating racial or other objectionable disparities in

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9. *Id.* at 1563.

10. *Id.*

11. *Id.* at 1593.

12. *Id.* at 1593–94.

13. *See* Flanders, *supra* note 1, at 1570.

pardon distribution.

Flanders addresses this distinction between mandatory and merely permissible pardons, [14] but my suggestion here is that the distinction may be more significant to his central thesis than he acknowledges. As I have briefly discussed, his claim that it might sometimes be better to pardon no one than to perpetuate objectionable pardoning patterns seems to me much more plausible in the context of merely permissible pardons than in the context of mandatory pardons.

In conclusion, it is worth noting another way in which racial or other objectionable disparities in pardon distribution may be significant. Put simply, we might worry about unfair pardoning patterns because such patterns give us reason to doubt whether the individual pardons themselves really are justified on their own merits. If a governor's pattern of pardoning is obviously skewed toward cronies and political supporters, this should lead us to be skeptical in individual cases that the governor is pardoning for the morally justified reasons she claims. This is not to deny that, as Flanders contends, there may be cases in which individual pardons are justified on their own merits but the overall pattern of pardons is skewed in objectionable ways. [15] But I doubt this is the typical case; more often, I suspect, objectionable macro-level disparities are evidence of unjust micro-level pardoning decisions.

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14. *Id.* at 1571.
15. *Id.* at 1574.