Defending a Role for Mercy in a Criminal Justice System

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I. Introduction

Susan Atkins participated in several murders during 1969 as part of the notorious Manson family. Although originally sentenced to death, her punishment was soon commuted to life when California temporarily abolished the death penalty in 1972. By most accounts, she was a model prisoner who worked frequently to help fellow inmates. During her last parole hearing in 2009, she requested a compassionate release from further incarceration. She was suffering greatly from terminal brain cancer, recently had one leg amputated, was bedridden, had difficulty even speaking, and was paralyzed on one side of her body. The parole board denied her request, emphasizing the seriousness of her crimes and the lack of any excuses for them. She died less than a month later in a prison nursing facility.

Pan Am Flight 103 blew up over Lockerbie, Scotland, in December 1988. There were 270 fatalities. The catastrophe resulted from a bomb exploding in the luggage compartment of the plane. In 2001, Abdelbaset Ali Mohmed Al Megrahi, a Libyan, was convicted of being involved in planting the bomb. A Scottish court sentenced him to life. By August 2009, Megrahi was suffering from prostate cancer and given a short time to live. In that month, Scotland granted him a compassionate release to return home to Libya.²

Robert Alton Harris murdered two teenage boys in a plot to steal their car on July 5, 1978. He and his brother then used the car as a getaway vehicle in a bank robbery they committed later that day. Harris received the death penalty in California. Shortly before his execution date in 1992, Governor Pete Wilson considered Harris's plea for a commutation. The plea noted, among other things, the "monstrous abuse" that Harris suffered as a child from his parents. Because Wilson accepted that Harris's childhood was a "living nightmare," he expressed compassion for him as a child. However, Wilson ultimately chose not to commute his sentence, emphasizing that his childhood suffering did not excuse the crimes he committed as an adult. Harris became the first prisoner executed in California since 1967.³

In each of these cases, there was strong public support for mitigating the defendant's sentence. Some contended that showing mercy to the defendants would be justified out of compassion for their past or present suffering. At the same time, however, there was also strong public opposition to mercy. Some argued that mitigating their sentences would be an injustice. The defendants committed heinous crimes and deserved their initial sentences. Moreover, granting them clemency would violate a norm of equal treatment. Other criminals who experienced comparable suffering were not shown leniency. Such intense public debate motivates the question of whether mercy could ever be warranted in a criminal justice system.

In our chapter, we analyze the concept of mercy and explore the conditions under which it could be justified in a criminal context. Under our conceptual analysis, we distinguish mercy from related ideas such as condoning, excusing, and forgiving.


Under our normative analysis, we argue that reducing a criminal’s deserved punishment on merciful grounds can be legitimate in exceptional cases. Both our understanding and our defense of mercy proceed from a general theory of the justification of punishment and a novel unfair advantage theory of punitive desert. We close by critically engaging some objections to mercy. Contrary to critics, we argue that mercy is not necessarily unjust or objectionable on grounds of equality.

II. Two Theories

A. A General Theory of the Justification of Punishment

In the criminal context, mercy involves mitigating an offender’s punishment in some sense. To determine whether mercy could ever be warranted, we need a theory of the general conditions under which the state would be justified in punishing a criminal. Under our general theory, someone’s punishment would be all things considered justified if and only if it satisfies five requirements. First, according to the desert requirement, the person must deserve the punishment. If he does not, the punishment would violate his rights. The state has an overriding reason not to violate someone’s rights. Second, according to the third-party rights requirement, the punishment must not violate the rights of anyone else.

Third, according to the value requirement, the expected value of the consequences of the punishment must be at least as high as the expected value of the consequences of any other available act that would not violate anyone’s rights. The value requirement is warranted because if the expected value of such an alternative act were higher than that of the punishment, the state would have most reason not to impose the punishment. To satisfy the value

To keep matters simple, we set aside the fact that rights can have thresholds. In emergency situations, the state might have most reason to impose an undeserved punishment on someone because that would be necessary to “avoid catastrophic moral horror.” Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), p. 30.

requirement, a deserved punishment must have the prospect of promoting some sufficiently valuable aims. Chief among these will be the prevention of future crimes through incapacitation, deterrence, and moral education. As we argue herein, a deserved punishment can also serve the valuable function of restoring a criminal’s trustworthiness if undertaken in the right way under the right conditions. Fourth, according to the epistemic requirement, the state must know that the first three requirements are satisfied in punishing the offender. Fifth, according to the motivation requirement, the state must be appropriately motivated by that knowledge.

When the state has mercy on a criminal, it knows he deserves to be punished. However, it chooses to punish him less severely than the most severe punishment he deserves. And it does so for some reason that does not bear on how much the criminal deserves to be punished but nevertheless counts in favor of mitigation. Mercy is never owed to the criminal or given out of a sense of obligation to him. It is a gift. Thus, to understand the concept of mercy, we need a theory of punitive desert. We need to distinguish deserved from undeserved punishments, and we need to distinguish the reasons that bear on a criminal’s punitive desert from those that do not. After expounding our theory of punitive desert, we will be


6 See, e.g., Jeffrie Murphy, “Mercy and Legal Justice,” in Forgiveness and Mercy, ed. Jeffrie G. Murphy and Jean Hampton (New York: Cambridge University Press, 1988), pp. 165–66; Alwynne Smart, “Mercy,” Philosophy 43 (1968), p. 350. At the limit, the state might choose not to punish an offender at all. To clarify, our analysis of mercy is meant to apply to the whole range of state officials with the authority to determine how much a criminal is punished. These include, among others, judges, parole boards, and executives.
in a position to explain how mercy could be justified on the basis of the value requirement or the third-party rights requirement of our general theory.

B. A Novel Unfair Advantage Theory of Punitive Desert

1. Presuppositions

Call our novel unfair advantage theory of punitive desert RS, short for “restorative signaling.”7 RS rests on several presuppositions that it assumes obtain at the time a criminal is assessed for punitive desert. First, a criminal is a member of a large community of persons over which the state should govern as their agent. Second, any justifiable means of reducing the interaction between a criminal and others would leave a significant degree of interaction between them and so would leave others significantly vulnerable to her. Third, there are no extraordinary means of obtaining epistemic access to a criminal’s dispositions, such as dispositions to commit particular crimes.

RS makes presuppositions 1–3 because it is a practical theory of punitive desert. It seeks to explain why and how much criminals deserve to be punished in the actual world given the natural facts that generally characterize the unavoidable conditions under which people actually live.8 Presuppositions 1–3 are such facts. We should set aside any intuitions we might have about punitive desert in other worlds in which these presuppositions do not obtain. Those intuitions might stand in need of radical revision.

Fourth, everyone knows what the criminal has done and not done; they know the beliefs, intentions, and motives with which she performed her acts. Fifth, everyone knows the criminal’s physical and psychological capacities both at the time of her act and at the time of assessment. Sixth, everyone forms justified beliefs about the criminal’s dispositions on the basis of his knowledge specified in presuppositions 1–5. So if everyone’s knowledge of the relevant facts justifies his believing that the offender has a particularly bad disposition to commit crimes, then he justifiably believes she has such a disposition.9 Seventh, everyone responds rationally to his justified beliefs about the criminal’s dispositions. So if others are justified in believing that the offender has a particularly bad disposition to commit crimes, and they are rationally required to incur certain costs in response, then they incur such costs.

RS rests on presuppositions 4–6 because it seeks to explain why and how much criminals deserve to be punished on the assumption that others fulfill their epistemic duties to each other and to the criminal before they punish her. Before they do so, they have a duty to discover that no facts about her acts or capacities entail that she does not deserve the punishment. They have a duty to form justified beliefs about her dispositions to commit crimes. And when others discover facts that make someone deserving of punishment, they have a duty to promulgate such facts to those with an interest in them. Presuppositions 4–6 entail that others fulfill these duties.

RS also makes presuppositions 4–7 because the concept of punitive desert is plausibly defined conditionally on the assumption that they obtain at the time of assessment. On this definition, someone deserves a punishment for an act if and only if she committed the act, and the state would not violate her rights by imposing the punishment on her against her will for the act if

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7 For a fuller defense of RS, see Jim Staihar, “A New Unified Theory of Punitive Desert” (unpublished manuscript, on file with the authors).
9 Unlike justified beliefs as such, knowledge is factive. A person can have a justified false belief. However, to know a proposition p, p must be true. Knowledge, though, does not entail certainty. There is a distinction between knowing something with certainty and merely knowing it. See, e.g., Richard Feldman, Epistemology (Upper Saddle River, N.J: Prentice Hall, 2003), pp. 122–29.
presuppositions 4–7 were to obtain. The definition is plausible because to punish someone for committing an act, the state must know she performed it. That is a conceptual truth. Moreover, how much someone deserves to be punished does not seem to depend essentially on the moral status of punishing her under less idealized conditions. For example, whether someone deserves punishment does not seem to depend essentially on whether the state would violate her rights by punishing her under conditions in which (a) others do not know what she has done or is capable of doing; (b) they have unjustified beliefs about her dispositions; or (c) they are inclined to respond irrationally to their beliefs about her. In short, punitive desert is a response dependent concept defined in terms of certain idealized conditions.

2. The Argument
According to RS, a criminal incurs an obligation to undertake a punishment from committing his crime. More specifically, he incurs an obligation to undertake a punishment whose severity is proportional to the seriousness of his crime. He deserves a proportional punishment for his crime because unless he suffers one, he will obtain an unfair advantage consisting in the illicit benefit of freedom from the burdens required to fulfill his obligation.


To punish someone for committing a crime is to punish her because she committed it. Suppose the state punishes an innocent person because it falsely believes she committed a crime. Then it punishes her merely for apparently committing the crime, merely because it thinks she committed it.


Cf. R. B. Brandt, “Blameworthiness and Obligation,” in Essays in Moral Philosophy, ed. A. I. Melden (Seattle: University of Washington Press, 1958), pp. 3–39 (arguing that if someone is blameworthy for performing an act, then her performing the act warrants our inferring that there is a motivational defect in her character).

Some crimes under some descriptions are literally unrepeatable, like matricide or patricide. But even these undermine the offender’s trustworthiness. When someone commits a crime without an exculpatory defense, her specific crime is strong evidence that she is disposed to commit a broader range of crimes comparable in seriousness.
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Unless a criminal restores his trustworthiness to the minimally acceptable degree, he will standardly cause others to incur at least three costs of insecurity.\(^9\) First, others rationally must invest in costly precautionary measures to protect themselves from the criminal. For example, they might need to engage in costly monitoring schemes to reduce their interactions with him and to employ costly protective services when interacting with him is unavoidable. Second, others rationally must forgo pursuing some personally and socially valuable activities that would leave them too vulnerable to the criminal. Third, others will rationally experience fear in response to their higher subjective probability of the offender’s committing crimes against them.

To avoid imposing the costs of insecurity on others, a criminal incurs an obligation to restore his trustworthiness expeditiously by demonstrating to others that he has reformed. To signal his reform, the offender must demonstrate to others that he has developed a good will, which is a stable disposition to be appropriately motivated by the moral reasons against violating the rights of others.\(^{10}\) A criminal who develops a good will is disposed not to commit crimes even in situations in which he knows he could commit them without fear of detection or punishment. Criminals incur an obligation to signal their reform in part because people are unavoidably vulnerable to one another under any acceptable system of criminal justice available. For well-known reasons, no acceptable means of incapacitation or deterrence available can adequately eliminate the costs of insecurity that people rationally must incur in response to an untrustworthy criminal.\(^{21}\) Moreover,


\(^{20}\) As Annette Baier states, when we trust others, we are confident they have a good will toward us; therefore, “reasonable trust will require grounds for such confidence in another’s good will.” Annette Baier, “Trust and Antitrust,” *Ethics* 96 (1986), p. 235.

there is no reliable way for others to induce reform in a criminal, and none is forthcoming. Hence the need for a signal of reform from the criminal himself.\textsuperscript{23}

Under a criminal's obligation of restoration, he is obligated to undertake any burdens necessary to restore his trustworthiness to the minimally acceptable degree.\textsuperscript{24} Assuming the criminal must undertake certain burdens to do so, the state may impose them on him as a punishment against his will without violating his rights. For unless the criminal suffers such burdens, he will be unjustly enriched. He will obtain an illicit benefit consisting in his freedom from the burdens necessary to fulfill his obligation of restoration. This is the unfair advantage that punishment prevents the criminal from obtaining. According to the main principle of RS, a criminal deserves a punishment for his crime that is no more severe than the burdens he must undertake to fulfill the obligation of restoration he incurs from committing his crime. In other words, a criminal deserves to be punished for his crime no


\textsuperscript{23} See, e.g., Gottfredson and Hirschi, \textit{A General Theory of Crime}, p. 268.

\textsuperscript{25} For more discussion on the need for a sign of reform, see Jim Stahar, "Punishment as a Costly Signal of Reform" (unpublished manuscript, on file with the authors).

\textsuperscript{26} If a criminal were to restore his trustworthiness to the baseline degree, then he would fulfill the obligation of restoration he incurs from committing his offense. In other words, he would fulfill the obligation by restoring his trustworthiness to the level it was prior to his committing the crime. However, the minimally acceptable degree of trustworthiness is not necessarily the baseline degree. To illustrate, suppose someone has lived a supererogatory life as a saint, but then one day commits a crime without any excusable defenses. In this case, the criminal's baseline degree of trustworthiness was extraordinarily high. To fulfill the obligation of restoration he incurs from committing his crime, he must restore his trustworthiness only to the minimally acceptable degree, which would be lower than the baseline in this case. We are not warranted in demanding each other to be saints. Rather we are warranted in demanding each other to maintain a robust disposition against violating the basic rights of others codified in core criminal laws.

more severely than the burdens he is obligated to undertake to restore his trustworthiness to the minimally acceptable degree.\textsuperscript{25}

A criminal must in fact undertake some burdens to fulfill his obligation of restoration. He cannot restore his trustworthiness expeditiously through mere costless means, such as merely apologizing for his crime or pleading a change of heart. Such cheap talk is not credible precisely because criminals who do not care at all about others would be willing to convey it. To be credible, a sign of reform must be costly.\textsuperscript{26} More precisely, the sign must be too costly for criminals who have not developed a stable disposition to care highly about the interests of others.\textsuperscript{27} Thus, to restore his trustworthiness, RS assumes a criminal must demonstrate that he has developed a good will, and to do so, he must send others a costly signal that he has developed a highly benevolent character. In general, benevolence is a trust-warranting property that is inconsistent with the kind of insufficient concern for others that is typical of criminals.\textsuperscript{28}

To demonstrate the development of a highly benevolent character, the criminal must signal that he has acted with a sufficiently high degree of benevolence for a sufficiently long time after committing his crime. To demonstrate that he has acted with such

\textsuperscript{25} As a corollary, a criminal does not deserve a punishment for her crime that is more severe than the burdens she must undertake to fulfill the obligation of restoration she incurs from committing it. In other words, a criminal does not deserve to be punished for her crime more severely than the burdens she is obligated to undertake to restore her trustworthiness to the minimally acceptable degree.

\textsuperscript{26} A signal is a directly observable property that is strong evidence of its bearer's possessing another property that is not directly observable. The concept of a costly signal has wide interdisciplinary application. For an elementary game-theoretic analysis of signaling, see Avinash Dixit and Susan Skeath, \textit{Games of Strategy}, 2nd ed. (New York: W. W. Norton, 2004), pp. 263–310. For an application of signaling theory specifically to trust, see Michael Bacharach and Diego Gambetta, “Trust in Signs,” in \textit{Trust in Society}, ed. Karen S. Cook (New York: Russell Sage Foundation, 2004), 148–185.

\textsuperscript{27} This is the nonpooling condition on the credibility of a sign of reform.

\textsuperscript{28} See, e.g., Bacharach and Gambetta, “Trust in Signs,” p. 154 (noting benevolence as a trust warranting property).
benevolence, he must sacrifice some of his sufficiently important personal interests for a sufficiently long time for the sake of benefiting others. To make such a sacrifice for others, the criminal must standardly engage in labor-intensive community service, and he usually must do so under reasonable conditions of incapacitation to mitigate the costs of insecurity that others rationally must incur during the interim. The more service he performs for the sake of benefiting others, the stronger it will serve as evidence that he has rectified the prior deficiency in his concern for others.\(^6^9\) Hence, to fulfill his obligation of restoration, a criminal must undertake some burdens.\(^3^0\)

At this point, RS has explained why criminals deserve some punishment. It also explains how much they deserve to be punished. RS entails that the absolute severity of the most severe punishment a criminal deserves corresponds to the absolute severity of the burdens he must undertake to fulfill his obligation of restoration. In general, we claim that the absolute severity of such burdens corresponds to the most severe punishment a criminal seems to deserve on critical reflection. Consider someone who commits a moderately serious crime and, thus, disrespects the rights of others to a moderately bad degree in committing it. The crime undermines his trustworthiness to a moderately bad degree: it is strong evidence of a moderately bad disposition to disrespect the rights of others and so of a moderately bad deficiency in his concern for others. On reflection, to restore his trustworthiness to the minimally acceptable degree, he must demonstrate that he has acted with a moderately high degree of benevolence for a moderately long time after committing his crime. To signal this, he must sacrifice some of his moderately important personal interests for a moderately long time for the sake of benefiting others. So he must undertake no more than a moderately severe burden to fulfill his obligation of restoration. Hence, he deserves no more than a moderately severe punishment. For if he is punished moderately severely, he will not be unjustly enriched. He will not receive the illicit benefit of freedom from the moderately severe burdens necessary to fulfill his obligation of restoration. There is no unfair advantage that a more severe punishment is required to prevent the criminal from obtaining. By parity of reasoning, a mildly serious criminal deserves no more than a mildly severe punishment for his crime, and an extremely serious criminal deserves an extremely severe punishment for his.

3. Three Illustrative Examples
a. A Cooperative Moderately Serious Criminal. Consider someone who commits a hate crime against African Americans. He assaults his victims out of animosity toward their race. His hate crime undermined the minimally acceptable degree of trustworthiness that we are warranted in demanding him not to undermine: it justifies our believing with an unduly high credence that he is disposed to commit crimes, particularly against African Americans. The crime shows him to have a serious deficiency in his concern for others, especially African Americans. To restore his trustworthiness to the minimally acceptable degree, he must sacrifice important personal interests for a long time for the sake of benefiting others. More specifically, for some small number, \(n\), he must engage in \(n\) years of labor-intensive community service, and he must do so under reasonable conditions of incapacitation, in a prison, to mitigate the costs of insecurity that others rationally must incur while he performs the service. That is punishment.\(^3^1\)


\(^{3^0}\) Like other trust building or maintaining processes, the process of a criminal’s restoring her trustworthiness has a “multi-layered inferential structure.” Bacharach and Gambetta, “Trust in Signs,” p. 162. In addition to undertaking the required burdens, other steps might also be necessary to restore it, like apologizing for the crime and compensating any victims. The criminal might need to undergo some form of therapy and take steps to eliminate aspects of her situation that pressure her to commit crimes, such as unemployment and corrupting social influences. Much will depend on the specifics of the case. Because these other steps are not necessarily burdensome for the criminal, they need not be part of her punishment.

\(^{3^1}\) Although not necessary, a restorative punishment could also express an apology and provide compensation to any victims. Cf. R. A. Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001), p. 106 (noting that a criminal’s undertaking a punishment for her crime can constitute a forceful expression of her apology). A mere
Now suppose the state sentences the criminal accordingly, and he is cooperative, willing to restore his trustworthiness. He apologizes to his victims, provides compensation to them, and voluntarily undertakes the required punishment. He voluntarily undertakes n years of labor-intensive community service solely for the sake of benefiting others, particularly African Americans. In prison, he works to produce goods, such as clothes or medical supplies, that are distributed to African Americans in need. He is paid a small wage for the labor, and he consents to the state’s garnishing the wage and distributing it to his victims and other African Americans. After increasing his trustworthiness, he even works as a tutor for African American prisoners, teaching them any special knowledge he might have to share about useful trades or subjects.

By the end of his n-year sentence, the criminal has restored his trustworthiness to the minimally acceptable degree. He has justified our believing with the minimally acceptable credence that he is no longer disposed to commit crimes, even against African Americans. He has demonstrated that he has rectified the prior deficiency in his concern for others, particularly African Americans. He has fully fulfilled the obligation of restoration he incurred from committing his hate crime. There is no unfair advantage that he stands to obtain if he is not punished more. So he does not deserve further punishment. His n-year restorative sentence was all the punishment he deserved for his hate crime. We are now warranted in fully forgiving the offender. We are justified in judging that he has fully restored his trustworthiness in the right way to the minimally acceptable degree, and we should suspend all resentment or indignation toward him for this reason. As a consequence, the state would not be justified in punishing the cooperative offender any more for his hate crime

They will fear her more, reduce their activity levels, and invest more in protective services. Whether the defiant criminal would owe others compensation for these costs is a question we leave open.

c. An Extremely Serious Criminal. Consider someone who commits an extremely serious crime—a prolonged torturous murder. His murder undermines his trustworthiness to an extremely bad degree. It justifies our believing with an unduly high credence that he is disposed to commit extremely serious crimes. The crime shows him to have an extremely bad deficiency in his concern for others. Given the inevitable constraints on the duration of a human life, the criminal cannot fully restore his trustworthiness to the minimally acceptable degree. He cannot justify our believing with the minimally acceptable credence that he is no longer disposed to commit crimes, that he has fully rectified the deficiency in his concern for others. However, the criminal can partially restore his trustworthiness. He can justify our believing with a range of higher credences that he is no longer disposed to commit such serious crimes, that he has come to care increasingly more about others.

By partially restoring his trustworthiness, the criminal would mitigate the costs of insecurity that others, such as prison officials and fellow inmates, rationally must incur in response to him. Thus, the criminal is obligated to restore his trustworthiness as much as he can. To do so, he must undertake a life sentence of labor-intensive community service under reasonable conditions of incapacitation, in a prison. Hence, whether cooperative or defiant, he deserves a punishment whose severity is proportional to such a burdensome life sentence. Unless he receives such a life sentence, he will be unjustly enriched. He would obtain the illicit benefit of freedom from the burdens required to fulfill his obligation to restore his trustworthiness as much as he can. This is the unfair advantage that a sufficiently burdensome life sentence is needed to prevent the extremely serious criminal from obtaining.

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34 Although the defiant criminal and the cooperative criminal deserve equally severe punishments for their identical hate crimes, the former does undermine her trustworthiness to a worse degree by being defiant in response to her offense. So on the whole, the defiant offender deserves some more punishment than the cooperative one. This is a welcome implication of RS.

35 As a form of mere preventative detention, this additional term of incapacitation should not be considered additional punishment for two reasons. First, the additional term should not express any additional moral blame toward the offender. Second, the additional term should not be intentionally harmful to her.

36 For example, upon release, the state might require the offender to wear an ankle bracelet or report to a parole officer on a reasonably frequent basis. Although these measures would not eliminate the risk that the offender poses to others, they would still mitigate the risk to some degree.
4. An Objection
Critics might object to RS by challenging the potential for a state punishment to function as a costly signal of reform. They might concede that labor-intensive community service could be a credible sign of reform if voluntarily undertaken independently of the state. In that case, the punishment would be entirely self-imposed. But no service could demonstrate reform if the state were to force the criminal to perform it by threatening to punish him even more severely if he refused. In that case, we would have no reason to believe that the criminal undertook the service with an altruistic motive as opposed to a selfish one. For all we know, he might have made the sacrifices only to avoid the immediate threat of a more severe punishment. Alternatively, the criminal might have merely mimicked the behavior of a benevolent person in order to convince others to extend him the personal benefits of trust, such as better friendships and employment. The possibility of mimicry could undermine the potential for community service to restore a criminal’s trustworthiness even when performed independently of the state.

In response, several reasons can justify our believing that a criminal undertook his service with an altruistic motive even if it was part of a state punishment. First, we might have a mechanism for detecting the motive with which the service was performed. People seem to have a mechanism for detecting intentions. As Oliver Wendell Holmes said, even a dog can distinguish between being kicked and merely tripped over. Assuming people can detect intentions, they might be able to detect whether a criminal performs the service for the sake of benefiting others or for the sake of something else, like promoting her own personal interests. For example, assume a selfish criminal and a genuinely altruistic one engage in the same general type of community service while incarcerated. We can expect their motivational differences to manifest themselves in their behavior and morphologically at the level of facial expressions and body language. Other things being equal, the selfish criminal would likely express more frustration and reluctance in making the required sacrifices over time. We can also expect to observe differences in their output. Other things being equal, the altruistic criminal would likely be more productive and do better quality work for others over time.

Second, labor-intensive community service can be part of a criminal’s state punishment without the state’s literally forcing her to perform it. In prison, the state might provide the criminal with some humane alternatives. The criminal would then have a choice between performing the service and taking a nonhelpful way out. As we noted earlier, the state might also pay the prisoner a small wage for her service, and she could then choose whether to keep it for herself or transfer it to others, such as her victims. In addition, even if the state requires all criminals to engage in some hard labor, they can invariably choose to perform even more service for others and to put even more effort into producing better quality work for them. This is true of criminals who serve their sentences both inside and outside of a formal penitentiary.

Third, the possibility that a selfish criminal will mimic the behavior of a truly benevolent person presumes that he believes others would be willing to extend him the personal benefits of trust. However, these benefits, such as better friendships and employment, are not guaranteed to anyone, especially criminals. Thus, criminals are likely to be highly uncertain about whether they would receive any personal payoffs from signaling their reform. In light of this uncertainty, a criminal’s performing his community service for the sake of benefiting others could be the inference to the best explanation of what really motivated him in choosing it.

Suppose, though, a criminal engages in labor-intensive community service for a long time but without the right motive. He makes the sacrifices for the sake of promoting his own long-term personal interests in anticipation of receiving the personal

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benefits of trust sometime in the future. Even so, his service still restores his trustworthiness to some degree. Criminals tend to be impulsive, lacking in self-control. They tend to do what would best promote their own short-term personal interests; they tend not to be the kind of people who make significant short-term sacrifices for the sake of promoting long-term gains. When a criminal performs labor-intensive community service for the sake of promoting his own long-term interests, he signals that he has developed greater self-control. He demonstrates that he no longer gives as much priority to his own short-term interests in deciding what to do. As a result, the threat of punishment will have a greater deterrent effect on him, as will the other negative, long-term personal effects of crime. He is more willing to work at opportunities for employment, education, and treatment that would make him better off in the long term and ultimately reduce his temptation to commit crimes. More generally, he is in a better position to resist promoting his own short-term personal interests at the expense of others. In sum, all criminals who undertake the right kind of state punishments in the right way under the right conditions can restore their trustworthiness to at least a partial degree.

III. What Mercy Is Not

Given our theory of punitive desert, we can now identify several considerations that are reasons for reducing a defendant's punishment but not reasons for showing her mercy. Unlike grounds for mercy, these mitigate how much punishment the defendant deserves. When they obtain, the state is obligated to the defendant to reduce her punishment. The resulting reduction is not a gift to her: it is owed to her as a matter of justice.

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A. Innocence

Assume the state convicts a defendant of committing a crime and sentences her to a punishment. However, the state later discovers that she did not commit the crime, or any offense for that matter. In response, the state releases the defendant before she has served the full sentence. This early release is not mercy. To have mercy on a defendant, the state must know she deserves to be punished. An innocent person does not.

RS explains why. In virtue of being innocent, the defendant has not undermined the minimum degree of trustworthiness that people are warranted in demanding each other not to undermine. More precisely, she has not undermined her trustworthiness to the sufficiently bad degree necessary to incur an obligation of restoration whose fulfillment would require her to undertake a punishment. To undermine her trustworthiness to a sufficiently bad degree, an act must be sufficiently strong evidence of a disposition to commit crimes at the time of assessment. Only the commission of a crime without a range of exculpatory defenses passes the evidentiary threshold. Because innocent people are not obligated to undertake a punishment, they do not stand to obtain an unfair advantage if they are not punished. Hence, the innocent do not deserve any punishment under RS.

B. Condoning

Consider a state that condemns behavior such as homosexual sodomy between consenting adults or African Americans' riding in the front of public buses. The state criminalized the behavior and punished those who engaged in it. Later, though, the state realizes these acts are not wrongful: they do not violate anyone's rights. So the state condones the behavior, regarding it...
as morally permissible and not even a prima facie ground for blame. As a consequence, the state decriminalizes the offenses, pardons everyone convicted of them, and grants an early release to anyone currently being punished for them. This early release is not mercy. Mercy is inconsistent with condonation. Condoning an act presumes no one deserved to be punished for it. Those who violated unjust segregation laws or laws against sodomy did not undermine our justification for believing they are disposed to respect the moral rights of others. Anyone punished for violating these unjust laws was punished unjustly and owed an early release.

C. Commuting Undeserved Sentences for Unexcused Crimes

1. An Unjust Habitual Offender Law

Norman Williams was convicted of committing three separate nonviolent offenses. He burglarized an apartment being fumigated in 1982, stole some tools from an art studio in 1992, and finally stole a floor jack off a tow truck in 1997. For his last offense, he was sentenced to life in prison under California’s three-strikes law. After serving thirteen years in prison, a court reconsidered his life sentence and concluded it was too harsh. He was resentenced to time served and released.43

The release was not mercy. Williams did not deserve a life sentence. Nor did he deserve more than a thirteen-year sentence for stealing the floor jack. He could have restored his trustworthiness through a much shorter sentence. The court was obligated to Williams to release him immediately from any further punishment. His release may have been conditional, though, on his obtaining job training, therapy, and treatment for any substance abuse problems. But these conditions would not be additional

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punishment: they would not be intentionally harmful to Williams or expressive of any moral blame toward him.

Critics might object that repeat offenders are a problem for RS. In particular, RS cannot explain why repeat offenders deserve to be punished for any of their subsequent crimes. Consider someone who commits two crimes at two different times. Because the first offense undermined her trustworthiness, the second one does not. Her trustworthiness was already undermined when she committed the second offense. So her second crime does not generate an obligation of restoration. Therefore, RS unacceptably entails that she does not deserve to be punished for the second crime.

In response, a repeat offender does undermine her trustworthiness by committing subsequent crimes. The offender’s trustworthiness corresponds to the particular credence with which others are justified in believing that she is not disposed to commit particular crimes. As such, her trustworthiness has a gradational character and can be undermined to various degrees in various ways. By committing the first crime, she undermined her trustworthiness only to a degree: her first crime justifies others in believing with an unduly high credence that she has a particularly bad disposition to commit crimes. So her first crime provides others with particularly strong evidence that she has a particularly bad deficiency in her concern for others. By committing her second offense, she undermined her trustworthiness to an even worse degree: her second crime justifies others in believing with an even higher credence that she is disposed to commit crimes. Depending on the seriousness and timing of her second crime, it might also justify others in believing that she has an even worse disposition to commit crimes. For example, she might be disposed to commit more serious crimes, and she might be disposed to commit crimes with a higher frequency, in a broader range of situations, and against a broader range of people. Hence, her second offense provides others with even stronger evidence that she has the same or worse deficiency in her concern for others. Because a repeat offender does undermine her trustworthiness by committing subsequent crimes, she does incur an obligation of restoration from


Code Sections 15-22-90-02 (1975 as amended) (codifying the Rosa Parks Act, passed in 2006, which pardoned those who were convicted of protesting or violating a state segregation law).
committing each later offense. For each subsequent crime she commits, she is obligated to undertake a punishment to restore her trustworthiness to the baseline degree.\textsuperscript{44}

\section*{2. The Death Penalty}
Darrell Mease, a triple murderer, was scheduled to be executed early in 1999 in Missouri. Shortly before his execution date, Pope John Paul visited Missouri's Governor Mel Carnahan in St. Louis. Given the Catholic Church's general opposition to capital punishment, the pope asked Carnahan in a face-to-face meeting to spare Mease's life. Although Carnahan thought Mease deserved the death penalty, he commuted his sentence to life out of "deep and abiding respect for the pontiff and all he represents."\textsuperscript{45} On our view, Carnahan's commutation was not mercy. Neither Mease nor any other criminal ever deserves the death penalty. The commutation was owed to Mease as a matter of justice. Under RS, no criminal deserves the death penalty no matter how serious the crime because no criminal is obligated to undertake a capital punishment. To fulfill their obligation of restoration, criminals are obligated to undertake only punishments proportional to an appropriate term of labor-intensive community service performed under reasonable conditions of incapacitation.

Critics might object that capital punishment is also a problem for RS. Contrary to our contention, they might argue that RS unacceptably entails every criminal deserves the death penalty.

\textsuperscript{44} Assuming repeat offenders deserve to be punished more severely than first-time offenders, the repeat criminal deserves to be punished more severely for her second crime than a first-time criminal would deserve for committing the same crime. Cf. Andrew von Hirsch, "Desert and Previous Convictions in Sentencing," \textit{Minnesota Law Review} 65 (1981), p. 593. RS might explain this by, for example, assuming the increasing marginal difficulty of restoring one's trustworthiness: the worse someone undermines her trustworthiness, the more burdens she must undertake to restore her trustworthiness to a degree. We set aside for further analysis the issue of how much repeat criminals deserve to be punished relative to first-time criminals.


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To fulfill his obligation of restoration, a criminal must justify others in believing with certainty that he is no longer disposed to commit crimes. To do so, he must kill himself no matter what the offense.

In response, a criminal is not obligated to justify others in believing with certainty that he is no longer disposed to commit crimes. The criminal is obligated to restore his trustworthiness only to the minimally acceptable degree. In other words, he must justify others in believing only with the minimally acceptable credence that he is no longer disposed to commit crimes. If others were justified in believing this they would no longer be rationally required to incur any unacceptable costs of insecurity in response to the criminal. Although the minimally acceptable credence must be sufficiently high, it is not certainty. No one is justified in being certain that any living person is not disposed to commit crimes. To restore his trustworthiness to the minimally acceptable degree, community service can suffice.

Critics might still object that every criminal deserves to be executed under RS. After an offender signals his reform, he would no longer cause others to incur the costs of insecurity. However, during the time required to send the signal, he would cause uillers to incur such costs even if he were incapacitated. For example, if he were in prison, he would cause his fellow inmates and prison officials to incur the costs. To avoid imposing any costs of insecurity on others, every criminal is obligated to kill himself immediately after committing his crime.

In response, to mitigate the costs of insecurity that a criminal causes others to incur, he must incapacitate himself for the time required to signal his reform. However, no offender is obligated to undertake the death penalty to prevent himself from causing others to incur such costs while he is incapacitated. A person's obligation not to cause others harm has a limit: he is obligated to undertake the means necessary to prevent himself from causing others harm only if the means are not extremely worse for him than the harm he would otherwise cause them. The death penalty would be extremely worse for a criminal than the individual or aggregate costs of insecurity that he stands to
cause others to incur while he is incapacitated. As a consequence, even extremely serious criminals, such as Darrell Mease, do not deserve to be executed. At most, they deserve punishments proportional to life sentences of labor-intensive community service performed under reasonable conditions of incarceration. As a further consequence, criminals also do not deserve to be incapacitated under the condition that would literally minimize the degree to which others would be vulnerable to them. These conditions, which might involve straightjackets, sensory deprivation, and solitary confinement, would also run afoul of the limit at issue. So the decision not to impose such cruel punishments on criminals would also not be mercy. It would be owed to offenders as a matter of justice.

D. Standard Exculpatory Defenses

When someone performs a criminal act, satisfying all the actus reus elements of the crime, there is a rebuttable presumption that she deserves a particularly severe punishment for the act. Standard exculatory defenses, which include excuses and justifications, rebut this presumption. They mitigate how much the person really deserves to be punished for the act. So reducing someone’s punishment in response to a defense is not mercy.46

RS generates a systematic account of the defenses.47 When someone performs a criminal act, there is a rebuttable presumption that she undermined her trustworthiness to a particularly bad degree by performing the act, and she is obligated to undertake particularly severe burdens to restore her trustworthiness to the minimally acceptable degree. Defenses rebut this presumption. They mitigate the severity of burdens that the person is really obligated to undertake to restore her trustworthiness.

We can usefully delineate three general types of defenses. First, some defenses mitigate how badly the act undermined the actor’s trustworthiness by mitigating how badly she disrespected the rights of others in performing it.48 These defenses include external or internal compulsion, ignorance or mistake of fact, consent, self-defense, defense of others, duress, and necessity. Second, even if a criminal disrespected the rights of others to the presumed degree in committing her offense, other defenses can still mitigate how badly the crime undermined her trustworthiness at the time of assessment. These considerations block the otherwise justified inference from the fact that she was disposed to commit particularly serious crimes at the time of the act to her being similarly disposed at the time of assessment.49


A criminal can have this type of defense if she committed the crime under conditions that temporarily impaired her capacity to respond appropriately to the moral reasons that counted against committing it. Such conditions include intoxication, provocation, hypnosis, somnambulism, and temporary insanity.

A third type of defense consists in considerations that undermine a criminal's capacity to respond appropriately to moral reasons at the time of assessment. 59 This type includes insanity. Although an insane criminal is seriously untrustworthy at the time of assessment, he is not obligated to restore his trustworthiness. A person is obligated to do something only if others can fairly demand him to do it. 51 People cannot fairly demand someone to do something that he lacks the capacity to do. 52 Therefore, a person is obligated to do something only if he has the capacity to do it. 53 Because an insane criminal lacks the capacity to respond appropriately to moral reasons, he lacks the capacity to restore his trustworthiness: Assuming others know he lacks the relevant capacities, there is nothing he could do to justify their believing that he has developed a good will.

These three general types of defenses account for a wide range of more particular ones. However, they are not exhaustive. They leave out some considerations that mitigate the severity of burdens a criminal is obligated to undertake to restore his trustworthiness. For example, consider childhood. In some cases, children have the first type of defense. Children are sometimes incapable of understanding the harmful effects of their acts on others. 54 In other cases, childhood provides the second type of defense. Unlike adults, children generally do not have settled dispositions. As they grow, their dispositions constantly change often in radical ways. So the mere fact that a child was badly disposed at the time of her act is often not strong evidence that she is similarly disposed later at the time of assessment. 55 Children can also have the third type of defense. They sometimes lack the capacity to respond appropriately to reasons. 56

However, even if children lack any of these three general defenses, their youth can still be at least partially exculpatory under RS. Relative to adults, the dispositions of children are usually much more malleable in the sense that they are much more responsive to the demands of authority figures. So even if children do undermine their trustworthiness by committing crimes, and even if they have the capacity to respond appropriately to moral reasons, they can standardly go a long way toward restoring their trustworthiness merely by undertaking a demanding but non-punitive course in moral education. The same cannot be said for adults in general. Thus, the decision to show children leniency vis-à-vis adults in sentencing is not mercy. It is a response to their deserving less punishment.

constitute excuses because they “sever the connection between the action or attitude and the agent's judgments and character”; Strawson, “Freedom and Resentment,” p. 8 (stating that “[w]e shall not feel resentment against the man he is for the action done by the man he is not; or at least we shall feel less”); Watson, “Responsibility and the Limits of Evil,” p. 123 (describing excuses that, according to Strawson, “present the other...as acting uncharacteristically due to extraordinary circumstances”).

59 Cf. Strawson, “Freedom and Resentment,” pp. 8–10 (arguing that we should take the “objective attitude” toward those who have lost their capacity to respond appropriately to reasons); Watson, “Responsibility and the Limits of Evil,” p. 123 (same); Tadros, Criminal Responsibility, pp. 124–25 (same); R. A. Duff, Trials and Punishments (New York: Cambridge University Press, 2005), pp. 14–38 (same).


52 See Copp, “‘Ought’ Implies ‘Can’,” pp. 271–75.

53 This is similar to the more general principle that someone ought to do something only if she can do it. See id.; Immanuel Kant, The Metaphysics of Morals, ed. Mary Gregor (New York: Cambridge University Press, 1996), p. 6:380 (stating “he must judge that he can do what the law tells him unconditionally that he ought to do”).

54 See Scanlon, What We Owe to Each Other, p. 280.

55 See id., pp. 280–81.

56 See id., p. 280.
E. The Passage of Time

When a criminal is brought to trial, his offense usually occurred fairly soon before. He is obligated to restore his trustworthiness expeditiously because the longer he takes to restore it the longer others must incur the costs of insecurity. To restore his trustworthiness as quickly as is reasonably possible, he must undertake a punishment of labor-intensive community service. Consider, though, an exceptional case similar to one Alwynne Smart describes in her seminal article "Mercy." Smart stole a large amount of money from Smith's firm. No one noticed, and Smith died shortly after in an automobile accident. Roberts then had a change of heart. He mailed all the stolen money to the police and explained his crime without revealing his identity. He proceeded to live a normal law-abiding life. Thirty years later, the police discover he committed the theft against Smith. On Smart’s view, the state should punish Roberts less severely now than it should have if he had been apprehended sooner. This is true not because the state should have mercy on Roberts, but because he now deserves less punishment for the theft.

We agree, and RS best explains why. By simply avoiding criminal activity for such a long time, Roberts went a long way toward restoring his trustworthiness. Hence, his extended law-abiding behavior mitigates the severity of burdens that he is now obligated to undertake to signal his reform. That the passage of time can mitigate a criminal’s punitive desert is reflected in the widespread adoption of statutes of limitation. These bar states from prosecuting someone for a mildly or moderately serious crime she committed a sufficiently long time before the prosecution would begin. RS reflects one rationale behind such statutes: they prevent states from punishing criminals who have restored their trustworthiness to the minimally acceptable degree by avoiding criminal activity for an extraordinarily long time.

Smart defends an alternative explanation of why Roberts now does not deserve to be punished for the theft. A person deserves to be punished only for his own past crimes. He does not deserve to be punished for the offenses committed by someone else. In the example, call the person who committed the theft Robertz, and call Roberts now Robertsz. According to Smart, Robertsz does not deserve to be punished for the theft of Roberts because these are not the same person. They are different persons in virtue of the fact that Robertz was disposed to commit theft, whereas Robertsz is now reformed. Because they have radically different psychological traits, they are not parts of the same person’s life. Thus, the passage of time can be exculpatory because it can undermine the relation of personal identity between the past self who committed the crime and the present self being assessed for punitive desert.

In response, Smart’s alternative analysis rests on an implausible view of personal identity. Robertz and Robertsz do have radically different psychological traits. But this fact by itself does not make them different persons in the sense that would undermine the relation of personal identity between them. It does not entail they are not parts of the same person’s life. To illustrate, almost every adult has many past selves who were very young children with radically different psychological traits from his present self. In spite of their psychological differences, they are still the same person: they are still parts of the same person’s life.

(suggesting this rationale when they write that statutes of limitation “prevent the prosecution of those who have been law abiding for some years”). States do have other more pragmatic reasons for adopting statutes of limitation. See id., pp. 875–77. But if they have a basis in punitive desert, they are not defensible merely on grounds of “purely public policy arguments.” But see Paul H. Robinson, “Criminal Law Defenses: A Systematic Analysis," Columbia Law Review 82 (1982), pp. 229–90 (classifying statutes of limitation as providing “nonculpable public policy defenses”).


Presumably, three facts together entail that Robert1 and Robert2 are the same person in spite of their obvious differences. First, they have not only the same brain but also the same body. Second, they are psychologically connected to each other in the sense that they have some significant psychological traits in common, and the traits of Robert1 caused those of Robert2 in the normal way that preserves the relation of personal identity between selves over time. For example, Robert1 presumably remembers from the inside the experience of committing the theft as Robert1. Third, even if Robert1 and Robert2 are not psychologically connected to each other, they are psychologically continuous with each other in the sense that they are connected by a chain of selves such that each self in the chain is psychologically connected to its immediately preceding self in the chain. Because Robert1 and Robert2 have the same brain and body, and are psychologically connected to or continuous with each other, they are the same person on any plausible theory of personal identity despite their psychological differences. On any plausible view, one and the same person can undergo radical changes in his psychology and body over time without those changes undermining the relation of personal identity between his selves.

F. Repentance

Assume someone commits an unexcused crime and is apprehended shortly after. She might repent. We argue that repentance is not a reason for mercy. If anything, it is a basis for forgiveness.

1. Cheap Talk

Suppose a criminal’s repentance takes the form of cheap talk. The offender merely apologizes verbally for her crime and claims to care highly about others. Because cheap talk is costless, it is not a credible sign of reform. Hence, it is no reason to reduce the criminal’s deserved punishment.

To be credible, a sign of reform must justify others in believing that the offender has acted with the required degree of benevolence for the required time. So to be credible and not excessively burdensome, a sign of reform must satisfy two conditions. According to “the incentive compatibility condition,” the signal cannot be too costly for criminals who are benevolent to the required degree for the required time. According to “the nonpooling condition,” the signal must be too costly for criminals who are not benevolent to the required degree for the required time.

Any apparent sign of reform that is costless would not be credible because it would violate the nonpooling condition. If an act is costless, such as cheap talk, it is not too costly for people who are not at all benevolent. A costless act might be performed by criminals who do not place any weight on the interests of others relative to their own in deliberating about what to do. Offenders who do not care at all about others would still be willing to apologize verbally for their crimes and merely say they care highly about others.

2. A Credible Sign of Reform

Assume the criminal expresses her repentance through a costly signal of reform. Then she has restored her trustworthiness by undertaking all the burdens she deserves as a punishment. Because she no longer deserves to be punished, she is no longer a potential recipient of mercy. The state is obligated to release her.

At this point, the state and others are warranted in forgiving the criminal. To forgive, they must cease blaming her for the crime. In other words, they must suspend feeling any resentment.

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or indignation toward her for committing the offense. And they must do so in response to the judgment that she has in fact signaled her reform. Unlike mercy, forgiving the offender is inconsistent with judging that she has yet to restore her trustworthiness. So unlike mercy, when others are warranted in forgiving a criminal, she is no longer blameworthy or deserving of further punishment for the offense. Punishing the obviously reformed criminal more would express too much blame toward her and would impose on her burdens that she is not obligated to undertake.

To clarify, our foregoing discussion concerned a fully repentant criminal who signaled her full reform. However, a partially repentant criminal would restore her trustworthiness to a mere partial degree. She would signal that she has only partially rectified her insufficient concern for others by undertaking only some of her deserved punishment. As a consequence, she would

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RS illuminates the presuppositions and demands constitutive of an attitude of moral blame, such as resentment or indignation. See Darwall, The Second-Person Standpoint, p. 17; Strawson, “Freedom and Resentment,” pp. 14–15, 21–22; Watson, “Responsibility and the Limits of Evil,” pp. 121, 126–28. When others blame someone for a crime, they presuppose that he undermined his trustworthiness by committing it, and they demand him to restore it by undertaking certain burdens in order to demonstrate that he has developed a good will. The more severe the burdens they demand him to undertake, the more they blame him, and vice versa. Their feelings of blame are warranted just in case the constitutive presuppositions and demands are warranted.

Cf. Aurel Kolnai, “Forgiveness,” Proceeedings of the Aristotelian Society 74 (1973–1974), p. 101 (taking forgiveness to involve judging that the forgiven has undergone a change in heart); Jeffrie Murphy, “Forgiveness and Resentment,” in Forgiveness and Mercy, ed. Jeffrie G. Murphy and Jean Hampton (New York: Cambridge University Press, 1988), p. 24 (stating that one reason people forgive is that the wrongdoer repented or had a change of heart); Charles L. Griswold, Forgiveness: A Philosophical Exploration (New York: Cambridge University Press, 2007), p. 90 (claiming that forgiving a wrongdoer involves the judgment that she has shown through deeds and words a commitment "to becoming the sort of person who does not inflict injury").

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be only partially forgivable, and mercy would not only remain an option but also be easier to justify. Because the partially repentant offender has become less dangerous, others stand to incur fewer costs of insecurity in response to her if released. But although a sign of partial reform can lower the expected costs of mercy, it is not itself a reason to withhold the remaining punishment that the partially repentant criminal deserves.

IV. What Mercy Can Be

In light of the many mitigating factors that cannot be reasons for mercy, we now focus on those that can. These are considerations that do not mitigate how much a criminal deserves to be punished. Nonetheless, they still provide the state with a reason to punish the criminal less severely than she deserves. The state can have reason to be merciful on the basis of three general grounds: third-party rights, third-party interests, and the interests of the criminal. The first two grounds are in the penumbra of the concept. The third is central to any plausible conception of mercy.

A. Third-Party Rights

According to the third-party rights requirement of our general theory, the state is permitted to impose a deserved punishment on a criminal only if the punishment would not violate the rights of third parties. Assuming the punishment would, it is not permissible even if it would bring about the best consequences. The rights of third parties could be violated if the state would literally cause or risk causing them harm by imposing the deserved punishment on the criminal. This requirement is most relevant when determining the form that a deserved punishment should take. To illustrate, suppose a teacher physically assaults his preschool students. We can imagine a deserved punishment that would require the teacher to work in close proximity to his students in their classroom. However, the punishment would be impermissible because it would violate the students’ right not to be
exposed to such a risk of the teacher's assaulting them again. To respect this right, the teacher's punishment should require him to engage in community service under reasonable conditions of incapacitation far removed from his students.

These questions of form do not yet involve an issue of mercy because they do not commit the state to reducing the absolute severity of a criminal's punishment. However, we can imagine some extraordinary cases in which the state would not be permitted to punish a criminal at all because doing so would violate the rights of third parties. In these cases, the claims of others would compel the state to have mercy on the criminal, punishing him less than he deserves. For an extreme example, consider the case of Simplicio and Lucio Godina. They were Siamese twins born in 1908 in the Philippines. While driving their car in Manila, Lucio—who had been drinking—sideswiped a cart, injuring the driver. He was sentenced to five days in jail. Simplicio successfully appealed on the grounds that as an innocent man he could not be legally incarcerated. Hence, Lucio dodged his deserved punishment. In this case, the state had mercy on Lucio out of respect for the rights of his innocent twin. Even if punishing Lucio had been optimal for deterrence reasons, the state was still obligated to Simplicio to grant his brother leniency. The obligation was not owed, though, to Lucio himself.

B. Third-Party Interests

The value requirement of our general theory entails that a deserved punishment is all things considered justified only if the expected value of its consequences is at least as high as the expected value of a less severe punishment or no punishment at all. Punishments are costly. They cause criminals to suffer and restrict their liberty to engage in valuable activities. In addition, punishments use up resources. Incarceration is expensive. Even if a punishment takes the form of community service performed outside a formal penitentiary, the state must still incur costs to monitor the criminal. So to be all things considered justified, a deserved punishment must promote some sufficiently valuable aims to outweigh its costs.

Two preventative aims are noteworthy. First, punishing a criminal can prevent him or others from committing future crimes by promoting the standard goals of incapacitation, deterrence, and moral education. Second, punishments can reduce the costs of insecurity that others stand to incur in response to crimes. This is so given the prospect of a punishment's promoting the standard goals. And as we have emphasized, if a criminal is cooperative and undertakes his punishment in the right way under the right conditions, then it can actually restore his trustworthiness by signaling his reform.

These preventative aims provide the state with a strong reason to impose the full deserved punishment on any criminal. However, the reason is not always overriding. In exceptional cases, the expected costs of the full deserved punishment could outweigh its expected benefits. To see why, note first that considerable uncertainty surrounds the potential preventative benefits of a punishment. The state cannot be certain that punishing an offender will actually prevent future crimes: a criminal can commit additional offenses while incarcerated. Deterrence is always imperfect given low probabilities of detection. And there is no reliable way to induce reform. Thus, the expected preventative benefits of a punishment are not as strong as they might have seemed at first blush. Furthermore, a deserved punishment can impose extraordinarily high costs on third parties in exceptional cases. When this is so, the state could be all things considered justified in having mercy on a criminal out of concern for the interests of others.

Although exceptional, there are examples of cases in which the expected benefits of a full deserved punishment would be

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69 See Smart, "Mercy," p. 355 (writing that "[t]here are times...where one feels obliged to show mercy not because the offender himself warrants it, but because it is necessary if we are to meet the claims that other duties have on us").

outweighed by its expected costs to innocent third parties. During a fiscal crisis, the state might release some prisoners early to save the costs of punishing them more. In a plea bargain, the state might grant a less serious criminal immunity in exchange for his cooperation in convicting more dangerous criminals.

Tawana Brawley, an African American, arguably claimed falsely that several white men raped her in 1987. Racial tensions rose in the community on the false assumption that she really was the victim of a hate crime. To avoid antagonizing the African American community, the state was probably justified in not prosecuting Brawley for fabricating the crime.

People have a right not to be victims of slander or libel. Defamation causes victims serious harm. For this reason, those who commit slander or libel deserve to be punished. However, the state is probably justified in treating defamation as a mere tort, as criminalizing it could have an intolerable chilling effect on others’ freedom of expression more generally.

Last, assume a single mother of emotionally unstable young children commits a mildly serious crime, like a small theft. No other family members are available to care for her dependents. Assuming the full deserved punishment would involve incarcerating the mother for some time, it could traumatize her children. To avoid this harm, the state could be justified in having mercy on the mother out of concern for the interests of her dependents.

As a caveat to our last example, we point out that punishing a criminal will usually affect his dependents in some way. For several reasons, though, these effects will justify leniency only in extraordinary cases. First, the state does not violate the rights of dependents merely by punishing the criminal. At most, it allows them to be harmed; it does not cause them harm by punishing the offender. Second, criminals are often a danger to their dependents, such as spouses and children. Hence, dependents are often better off separating from the criminal at least until he restores his trustworthiness by undertaking the full deserved punishment.

Third, if a criminal is good overall for his spouse and children, they will initially suffer while he is punished. However, over time we can expect them to adjust to life without him. A single parent could remarry or rely more on extended family and friends for assistance. Alternatively, children could adapt to life in an altogether new family. Fourth, the state has a duty to provide all its citizens with a safety net of substantial welfare benefits. These should limit how much dependents suffer when an offender is punished. Finally, there are innumerable ways to vary the form of a full deserved punishment to lessen its harmful effects on others. For example, rather than requiring a criminal to serve his full sentence in one continuous block of time, he could be punished in discrete intervals permitting him relatively frequent contact with dependents. Delaying or spreading out an offender’s punishment is not necessarily mercy because it is consistent with making him suffer all the punishment he deserves.

C. Interests of the Criminal

Just as a deserved punishment can have extraordinarily bad effects on third parties, it can also be exceptionally bad for the criminal. When this is the case, the punishment’s expected costs to the offender can outweigh its expected benefits for all. Mercy could

79 Cf. Garrison v. Louisiana, 379 U.S. 64 (1964) (holding that a Louisiana criminal defamation statute is unconstitutional under the First Amendment and noting its general chilling effect on people’s freedom of expression).
80 Cf. United States Sentencing Guidelines Manual § 1B1.13 (2009) (commentary) (stating that a court may reduce a defendant’s term of imprisonment in the event of “[t]he death or incapacitation of the defendant’s only family member capable of caring for the defendant’s minor child or minor children”).
82 For this reason, granting criminals a temporary release to visit dying loved ones need not be mercy. The full remainder of their punishments can await their return.
then be justified out of concern for the criminal herself. A deserved punishment can be extraordinarily bad for a criminal because of her past or present suffering or because of the punishment’s opportunity costs to her.

1. Past Suffering
Reconsider the case of Robert Alton Harris, who was executed in California in 1992 for committing multiple murders. Harris had a “rotten social background” by any standard.77 He suffered terrible abuse and neglect by both parents throughout his childhood. His extraordinary past suffering seems to count in favor of mercy. Before understanding why, though, we make three preliminary points about his case.

First, Harris did not deserve the death penalty. As we argued earlier, no criminal does no matter how serious his offense. Harris undermined his trustworthiness to an extremely bad degree by committing the murders. They manifested an extremely bad deficiency in his concern for others. To restore his trustworthiness as much as could be reasonably expected of him, he was at most obligated to undertake a life sentence of labor-intensive community service in a prison. At most, he deserved a punishment proportional to such a life sentence. Governor Wilson’s decision not to commute Harris’s death sentence was an injustice, not the exercise of a morally permissible option to deny him clemency.

Second, we have reason to worry that Harris had an exculpatory defense and so deserved no punishment at all. His childhood abuse might have undermined permanently his capacity to respond appropriately to the moral reasons that count against violating the rights of others. Insofar as Harris lacked this capacity, he lacked the capacity to restore his trustworthiness and so was not obligated to undertake any punishment. Assuming Harris was insane, he should have been committed to a high-security mental hospital, not a penitentiary.

Third, assume Harris did deserve to be punished for life. It is not obvious what a potentially justifiable form of mercy could have been in his case. He was far too dangerous for an unconditional release of any duration. There were possibilities, however, because even a life sentence can vary in severity depending on the conditions under which the inmate must live in prison. Perhaps Harris could have been granted a greater number of extended visits with the rare few who loved him, such as his sister. If his sentence required him to engage in prison labor, perhaps he could have been assigned less burdensome work. Or once apprised of his past hardships, perhaps prison officials and fellow inmates might have been simply more kind to him in their everyday interactions.

Now suppose Harris both deserved to be punished and was a potential candidate for some mercy. His horrific suffering as a child does seem to count in favor of being lenient with him as an adult. But it is not obvious why. Harris as an adult was no longer suffering the trauma of his youth. Thus, it is puzzling why his past suffering would make the present gift of mercy extraordinarily good for him. In other words, it is not immediately clear why his childhood suffering would make his suffering a deserved punishment as an adult extraordinarily bad.

We contend that the best explanation lies in a diachronic prioritarian conception of value. According to this view, for any particular amount of suffering a person experiences, his suffering that amount is worse the worse his life considered as a whole.78 The terrible suffering Harris experienced as a child made his life extraordinarily worse considered as a whole. Because the quality of Harris’s life was exceptionally bad as a whole, his suffering a deserved punishment as an adult was itself extraordinarily bad. As a consequence, having mercy on Harris as an adult would have been extraordinarily good because it would have relieved him of an extraordinarily bad degree of suffering.

77 United States v. Alexander, 471 F.2d 925, 961 (D.C. Cir. 1973) (Bazelon, J., dissenting) (using the phrase “rotten social background”).

To illustrate, consider a murderer, whose crimes were comparable to those of Harris. Unlike Harris, though, her childhood and adult life were happy. Her life as a whole was better than Harris’s. In spite of this difference, they deserve the same punishments for their crimes. Because their offenses were equally serious, they undermined their trustworthiness to the same degree. So they are obligated to undertake the same burdens to signal their reform. Their full deserved punishments would make them suffer the same amount. However, because Harris’s life was worse overall, his suffering the punishment would be worse than the other murderer’s suffering the same amount. Better to have mercy on Harris.

So far we have focused on the relevance to mercy of suffering that a criminal experienced before his offense. Our prioritarian argument also applies to the suffering one might experience after his crime but before the time he is assessed for punitive desert. Proponents of poetic justice, though, might argue that such postoffense suffering not only is a reason for mercy but also could mitigate the criminal’s punitive desert at the time of assessment. For the suffering might constitute a kind of punishment for the crime. To illustrate, assume someone drives recklessly through a school zone. Because he was driving too fast, he was unable to avoid colliding with an oncoming school bus and causing one child on board to die. Now suppose the child ended up being the driver’s only daughter, and he personally suffered numerous fractures during the collision. Proponents of poetic justice might contend that the driver’s suffering from these physical injuries and the loss of his child was a kind of punishment for his crime of reckless endangerment. As a result, the suffering mitigates how much he deserves to be punished when a court later decides his sentence.

We disagree. The driver’s postoffense suffering does not reduce his punitive desert at any time. First, the suffering was no kind of punishment. A punishment is an intentionally harmful form of hard treatment imposed on someone in response to an apparent offense. A punishment also has a certain expressive significance, expressing an attitude of moral blame toward its recipient. The driver’s postoffense suffering lacks both essential features of any punishment properly understood.

Second, the driver’s suffering did nothing to fulfill the obligation of restoration he incurred from committing the crime. The offense undermined his trustworthiness by showing him to be disposed to make reckless choices that endanger others. His postoffense suffering did nothing to signal that he has rectified the deficiency in his concern for others. If a criminal’s past suffering neither was a punishment nor restored his trustworthiness, it does not mitigate his punitive desert at any time.

To clarify, a criminal’s past suffering can mitigate his punitive desert even if it was not a punishment per se. Assume the suffering was from personal sacrifices made for the sake of benefiting others. If the criminal engaged in such highly benevolent behavior before his offense, then those prior good works could mitigate how badly the offense undermined his trustworthiness. Alternatively, if the offender made such benevolent sacrifices after committing the crime, that could restore his trustworthiness at least partially. In either case, the past suffering would mitigate the severity of burdens he is obligated to undertake to signal reform at the time of assessment. The point of our current discussion is that even if an offender’s past suffering does not reduce his punitive desert in these ways, there is still a prioritarian argument for why it counts in favor of mercy.

2. Present Suffering
Reconsider the case of Susan Atkins. As a twenty-one-year-old in 1969, she participated in several murders as part of the Manson family. After serving more than thirty-nine years in prison, she made her final appeal for a compassionate release in 2009 while suffering greatly from terminal brain cancer. Although Atkins’s childhood was not ideal, it was not nearly as horrific as Harris’s. In her case, the question of mercy concerned the relevance of her present suffering— the suffering she was experiencing at the time of her last appeal for mercy.

Before discussing Atkins’ appeal, we have three reasons to worry that she did not deserve further punishment at the time of her last clemency hearing. At that time, it is possible she was no longer obligated to undertake more burdens to restore her trustworthiness. First, Atkins was reportedly a model prisoner. She formed a prison ministry and did charitable work of all kinds behind bars. Her long record of doing good for others might have demonstrated that she had fully rectified the deficiency in her concern for others that she manifested in committing the murders.

Second, even if Atkins had not signaled that she was fully reformed, she certainly restored her trustworthiness to a significant degree. Moreover, her ability to harm others was permanently impaired. She was bedridden and weak both physically and mentally. As a consequence, the costs of insecurity she stood to cause others were relatively low. Any further punishment might have been extremely worse for her than those costs to others. If so, then she would not have been obligated to restore her trustworthiness any further.

Third, it is not obvious Atkins even had the capacity to continue restoring her trustworthiness. Because she was so disabled and on the brink of death, it is not clear she had the capacity to make further sacrifices for the sake of benefitting others. Certainly, standard forms of community service were not an option.

Assume, though, that Atkins did deserve more punishment. The question is why her present suffering from terminal cancer counted in favor of granting her a compassionate release. We need to explain why her present pain made her experiencing any additional suffering from a deserved punishment extraordinarily bad. A diachronic conception of prioritarianism provides one explanation. Atkins’ extraordinarily bad present suffering made her life as a whole much worse. By doing so, it made any additional suffering from further punishment especially bad.

A second conception of prioritarianism independently explains why Atkins’ present pain was a reason for mercy. We have focused so far on a diachronic conception that takes the quality of a person’s life as a whole to affect how bad it would be for her to experience a particular amount of suffering. According to a synchronic conception, for any particular amount of suffering that someone experiences, her suffering that amount at time t is worse the worse her life at t. So Atkins’ extraordinarily bad suffering from cancer at the time of her last clemency hearing made the quality of her life at that time exceptionally bad. As a consequence, it made her suffering any more punishment at that time especially bad as well.

The diachronic and synchronic conceptions of prioritarianism are consistent: one could endorse both. We could take the badness of someone’s suffering a particular amount at time t to depend on both the quality of her life as a whole and its quality at t. However, the conceptions are also distinct such that we could endorse one but not the other. To illustrate, consider a murderer whose crimes were just as serious as Atkins’ and deserved an equally severe punishment for them. Like Atkins, he died in prison at age sixty-one after serving thirty-nine years behind bars. The quality of their lives as a whole was the same. However, unlike Atkins, he suffered a comparably painful form of cancer early in his sentence and was relatively healthy when he died.

Now suppose the state could have granted either criminal an early release exactly thirty days before he or she died. The release would have provided either one with the same benefit. The question is whether it would have been better for Atkins or the other murderer to receive mercy. On this issue, diachronic prioritarians would be indifferent. An early release would have relieved the same degree of suffering in either offender, and their lives as a whole stood to be equally bad without the release. Synchronic prioritarians, though, would not be indifferent. Better that Atkins receive the early release toward the end of her life because the quality of her life at that time was worse.

3. Opportunity Costs
The past or present suffering of a criminal typically provides the strongest reason to show her mercy. However, it is possible that a deserved punishment could also have extraordinarily high opportunity costs on an offender. The aim of avoiding those costs could justify leniency by outweighing the expected benefits of the punishment. For example, assume a very serious criminal deserves a very lengthy prison sentence of very burdensome community service. However, the criminal also happens to be an exceptionally talented writer and artist. If she were given the opportunity to exercise those talents behind bars, she would produce great works of literature and art. Although granting her this opportunity would mitigate the severity of her punishment, the extraordinary value to her of producing those creative works could justify the necessary degree of clemency.

V. Critical Discussion
A. The Concept
Critics might argue that our analysis of the concept of mercy is too broad. Mercy in the criminal context does involve the decision to punish a criminal less severely than he deserves. However, the critics might contend that this decision constitutes mercy only if made for the sake of the criminal himself out of compassion for his own interests.6 The state could be lenient with an offender out of concern for the rights or interests of third parties. But contrary to our view, that would not be mercy per se.

In response, mercy, like many concepts, has both a core meaning and a penumbra. We concede that the core paradigmatic acts of mercy are motivated by concern for the criminal himself. We only claim that acts of leniency motivated by third-party concerns fall within the penumbra of mercy.82 What is most important in any plausible analysis of mercy is that it involves a decision to mitigate a criminal’s punishment for reasons that do not bear on his punitive desert but nevertheless count in favor of mitigation.

Other critics might object that our conceptual analysis is too narrow. Contrary to our view, mercy can consist in the reduction of an undeserved punishment.83 Consider by way of analogy a culpable aggressor who has power over a victim and threatens to harm her. The aggressor could be a rapist who threatens to kill his victim. The victim might naturally plead with the rapist to have “mercy” on her by sparing her life. The rapist could then have “mercy” on his victim by not killing her even though she never deserved to be killed.

Turning to the criminal context, suppose we are correct that the death penalty is never deserved. Still states have the power to kill serious criminals and in fact sentence many to death. Such offenders might naturally plead with the state to have “mercy” on them by commuting their sentences to life. If the state does so, it has “mercy” on them even though they never deserved the death penalty.

For two reasons, we resist the critics’ attempt to extend the concept of mercy. First, the proposed extension would be misleading. Mercy connotes a gift. Treatment that is owed to someone is not a gift: it is her right. Thus, treatment to which someone is entitled should never be considered mercy. We must guard against referring to one’s entitlements in terms that suggest they lie outside what we owe to one another.

Second, the actual rhetoric of mercy does not vindicate the proposed extension. When criminals on death row expressly plead for mercy, they might be presuming falsely that they really do deserve to be executed. Furthermore, there can be pragmatic

6. See, e.g., Murphy, “Mercy and Legal Justice,” p. 173 (writing “[i]t strikes me as analytic that mercy is based on a compassionate concern for the defendant’s plight”).

82. Cf. Smart, “Mercy,” p. 353 (arguing for the stronger claim that mercy is justifiable only if required by the claims of third parties).

83. Cf. Andrew Brien, “Mercy within Legal Justice,” Social Theory and Practice 24 (1998), p. 87 (writing that “an act of mercy” might “mean no more than that the act brought relief to some person whose well-being was threatened or being diminished”).
reasons to ask for what one is owed in terms of mercy rather than demand it as a right. Requests for mercy make one appear more obsequious and are less likely to offend another’s sense of dominance or authority. Hence, it is no surprise that rape victims threatened with death would merely ask their aggressors for mercy rather than demand it as a matter of justice. No one, though, should regard the decision not to kill in these cases as an act of genuine mercy.

B. Injustice

On our view, mercy can be justified because the full deserved punishment would not satisfy the value requirement of our general theory: its expected costs would outweigh its expected benefits. Some retributivists might object that mercy cannot be justified on such grounds. According to one conception of retributivism, it is intrinsically good that criminals suffer all the punishment they deserve, and the state is obligated to impose on a criminal the full deserved punishment. Punishing him any less severely would be unjust. Just as the state may not punish the innocent, it also may not show mercy toward a criminal merely because doing so would maximize social utility or any other value.

Indeed, retributivists might contend that our theory of punitive desert, RS, actually provides the best defense of their view. If criminals are not punished, they will obtain an unfair advantage. The illicit benefit would consist in their freedom from the burdens required to fulfill the obligation of restoration they incur from committing their crimes. It would be intrinsically bad if criminals were to obtain this unjust enrichment. Imposing on criminals all the punishment they deserve would be intrinsically good precisely because it would remove the unfair advantage they would otherwise obtain. The state is obligated to impose on an


85 See Scanlon, What We Owe to Each Other, p. 274.
86 Cf. Murphy, “Mercy and Legal Justice,” pp. 179–80 (conceding this possibility). If the state has mercy on a criminal per the delegated authority, then he will still obtain an unfair advantage, which would be an unjust enrichment. But this is merely to say that the offender will obtain a benefit from acting unjustly, namely violating his obligation of restoration. The decision to permit him to enjoy this illicit benefit would not itself be unjust.
87 We refer only to telic egalitarians, who claim inequalities are objectionable because they are intrinsically bad. We do not refer to deontic egalitarians, who object to them on other grounds. Parfit, “Equality or Priority?” p. 84.
it punishes him less severely than the most severe punishment he deserves. However, the state also imposes the full deserved punishment on other like criminals. The resulting inequality is intrinsically bad and makes mercy unjustifiable.

In assessment, this egalitarian argument against mercy is unpersuasive because an inequality in the distribution of punishment among equally deserving criminals is not intrinsically bad. To illustrate, suppose several criminals each commit the same moderately serious offense and deserve the same moderately severe punishment. The state sentences them to the same moderately long period of incarceration. But at the end of their sentences, the state mistakes one for a more serious criminal and tortures her. At this point, the state must choose between torturing the others and releasing them.

For two reasons the state should release the others. First, they do not deserve torture. Second, the extreme suffering caused by torturing them would make the consequences of torture all things considered worse than the consequences of releasing them. However, although the state should release the others for these reasons, if inequality were intrinsically bad, there would be something good about torturing them. Because the state has already tortured the one, it would punish the others with a different severity by simply releasing them, whereas it would punish all of them the same by torturing the others. Nothing, though, seems good about torturing the others rather than releasing them. Torturing the others would simply harm them without benefiting anyone else, including the one who has already been tortured. So torturing the others would not be in any way better than releasing them even though torturing them would remove an inequality in the distribution of punishment among equally deserving criminals. Hence, inequality is not intrinsically bad.

Critics might concede that inequality is not intrinsically bad. But they might insist that the state should still treat like cases alike. Unfortunately, whenever the state shows mercy, it does so selectively for invidious reasons. For example, when President George Bush commuted the sentence of Scooter Libby, people worried he did so merely because of Libby's friendship with the vice president. When President Bill Clinton pardoned Marc Rich, people suspected he did so merely from feeling a debt of gratitude toward Rich for making contributions to Democratic causes and Clinton's presidential library foundation. Neither reason could justify either reduction.

In response, we concede the state should not grant mercy for invidious reasons. But it need not. As we have emphasized, the state can have sound reasons to be merciful on the basis of three general grounds. In some cases, the full deserved punishment would violate the rights of third parties. In others, the expected benefits of the full deserved punishment would be outweighed by its expected costs to third parties or the criminal himself.

Acknowledging the sound reasons for mercy, egalitarians might still argue that the practice of clemency should be governed by a robust norm of equal treatment: once the state has mercy on a criminal for a particular reason, it is obliged to have mercy on every other like criminal for the same reason. There is no justification for not treating like cases alike. To illustrate, suppose the state has reason to be merciful toward an offender with a rotten social background. Now assume the state has mercy on him, reducing the severity of his sentence by some amount. Then the state is obliged to impose a similarly reduced sentence on every other like criminal with a similarly rotten social background. In effect, the state must reduce the expected punishment of the crime for everyone in the relevant class. There could be no justification for showing mercy to some but not all like criminals with the given background.

88 Our argument against the intrinsic badness of inequality parallels "the Levelling Down Objection" that Parfit raises against telic egalitarians more generally. See Parfit, "Equality or Priority?" pp. 97–99.


We concede that there are robust norms of equality governing the distribution of certain benefits in certain contexts. For example, suppose the state must distribute a divisible benefit to a fixed class of persons with no differences between the quality of their lives considered as a whole or at the time of allocation. Suppose also the direct effects of the benefits on the lives of the class members are the only relevant consequences. Then the state should distribute equal shares of the benefit to each member of the class. This principle follows directly from a diachronic or synchronic conception of prioritarianism.

The practice of mercy, though, may not be governed by such a strong norm of equal treatment. A policy of having mercy on every criminal in a relevant class could have intolerably bad effects that would be avoidable only under a more selective policy. To illustrate, assume the state commits itself to having mercy on every criminal with a rotten social background. Under this policy, the state significantly lowers the expected punishment of committing crimes for everyone with the relevant background. As a result, the policy might weaken to an intolerable degree the extent to which members of the class are deterred from committing crimes in general. Far more people with the relevant background might become subject to punishment because many more would commit crimes. And far more people outside the class would become victims of the additional crimes. In effect, a policy of having mercy on every criminal with a rotten social background would be bad not only for the additional victims but also for the additional criminals who would have been deterred under a more selective policy.

To avoid weakening deterrence too much, the state might grant mercy only to some criminals with the relevant background on a relatively infrequent basis. Under such a selective policy, the prospect of being the beneficiary of mercy would not be as salient ex ante to those deliberating about whether to commit a crime. A selective policy of allocating the gift of mercy to only some criminals in a relevant class would be justifiable so long as it is distributed through a fair procedure consistent with the state’s having equal concern and respect for the interests of all. Thus, mercy may be treated as a benefit that is both indivisible and scarce.

D. The Costs of Mercy

Although mercy is not necessarily unjust or objectionable on grounds of equality, it is not always justified either. In spite of its potential for extraordinarily good benefits, the costs of mercy can be prohibitive. The main concern is the risk that additional crimes will be committed as a result of losses in incapacitation and deterrence. Consider two cases in which an early release was not a justified form of mercy.

As a twenty-one-year-old in 1965, Jack Abbott was serving time for forgery when he fatally stabbed an inmate. He was ultimately sentenced to more than forty years for this crime and other misbehavior behind bars. While incarcerated, he contacted the author Norman Mailer expressing an interest in writing about prison life. Mailer was impressed with Abbott’s talent as a writer and helped him publish his book In the Belly of the Beast. Despite Abbott’s lack of remorse and obviously violent nature, Mailer successfully lobbied for his early release in 1981 over protests by prison

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9 We set aside for further analysis the details of what such a fair procedure could be. However, elements of a procedure might occur naturally given various types of randomization already present in our judicial system. Cf. Adam M. Samaha, “Randomization in Adjudication,” William and Mary Law Review 51 (2009), pp. 1–86. For example, some judges are in fact more merciful than others when determining the sentences of criminals. In a legal system, we can expect a few judges to be generally merciful, whereas most will not be. Whether a worthy candidate actually receives the benefit of mercy can then be determined impartially by the random assignment of her case to one judge or another. Cf. David Dolinsky, “Some Naive Thoughts about Justice and Mercy,” Ohio State Journal of Criminal Law 4 (2007), pp. 358–59 (claiming that judges will reasonably have different views about what should mitigate a defendant’s sentence, and the resulting inequalities between the sentences they assign are not necessarily objectionable for this reason).
officials. Mailer was primarily motivated to advance Abbott's literary career. Six weeks after his release, Abbott entered a café in New York City and asked to use the restroom. After a worker told him the restroom was for employees only, Abbott stabbed him to death in an altercation. He was caught several weeks later in Louisiana.\footnote{See Joyce Wadler, "Violence's Intellectual," Washington Post, 11 August 1981; Paul L. Montgomery, "Abbott Convicted of Manslaughter in Stabbing of East Village Waiter," New York Times, 22 January 1982.}

Abbott's case illustrates that an early release should not be an option for criminals who are obviously so dangerous. When someone commits an extremely serious offense, he must demonstrate that he has gone a long way toward rectifying his insufficient concern for others before he should be considered even a potential candidate for an early release. Otherwise, the risk of recidivism and the costs of insecurity others must incur in response to him would be intolerably high. In the case of extremely dangerous criminals such as Abbott, mercy should not extend beyond mitigating the severity of the conditions that characterize the terms of their incapacitation. The state should not shorten the duration of their sentences behind bars. At most, the state should have granted Abbott the opportunity to exercise his exceptional talent as a writer inside prison.

Finally, reconsider the ostensibly compassionate release of the alleged Lockerbie bomber, Abdelbaset Ali Mohmed Al Megrahi. The release sparked international outrage. Some are skeptical of Scotland's real motives for releasing him. They suspect the real reason was to improve economic relations between the United Kingdom and Libya, specifically making Libyan oil more accessible to British companies.\footnote{See John F. Burns, "Rationale Is Questioned over Release of Bomber," New York Times, 22 August 2009.} Whatever the ultimate motive, we do not regard Megrahi's release as a justifiable act of mercy.

On the one hand, Megrahi's guilt is questionable. The evidence against him is dubious.\footnote{See Eben Harrell, "Lockerbie Bomber Returns to Cheers in Libya," Time, 21 August 2009.} Scotland might have released Megrahi out of a sense of obligation to him, no longer confident he was involved in the bombing. Assuming Megrahi is innocent, his release could not be mercy.

On the other hand, suppose Megrahi is guilty, and Scotland knows it. Then his early release could have been mercy, given out of compassion for his present suffering from prostate cancer. However, if Megrahi is guilty of the bombing, Scotland should have imposed the full deserved punishment on him, which would have been a life sentence. The primary concern is not so much the harm he stands to cause others while released. Rather the concern is with the overriding importance of deterring these atrocities generally. At some point, a crime becomes so horrific that it falls outside the range of offenses for which a compassionate release could even be potentially justifiable. Wherever the threshold lies, blowing up a commercial airliner carrying more than 250 people far exceeds it. With respect to these atrocities, the state should do all it reasonably can to ensure everyone is deterred from committing them. The expected loss in general deterrence from granting a compassionate release to the agents of such large-scale murders would seem unacceptable. Tolerating the loss would itself manifest a lack of appropriate regard for the lives at stake in these exceptionally catastrophic crimes.\footnote{In a letter dated 12 August 2009 to Scottish First Minister Alex Salmond, U.S. embassy chargé Richard LeBaron writes: "The United States is not prepared to support Megrahi's release on compassionate release or bail.... The United States maintains its view that in light of the scope of Megrahi's crime, its heinous nature, and its continued and devastating impact on the victims and their families, it would be most appropriate for Megrahi to remain imprisoned for the entirety of his sentence." Press Release, U.S. Department of State, "LeBaron Letter" (26 July 2010), at http://www.state.gov/r/pa/prs/ps/2010/07/145142.htm.}
expected costs. We close by emphasizing one additional value of the expressive variety. When the state mitigates a criminal’s deserved punishment out of compassion for his own interests, it can express a sensitivity to suffering in general. The state says suffering is never intrinsically good no matter who experiences it, even criminals. So a norm is expressed for being similarly sensitive to the interests of others in general. As a result, we can hope some will be influenced to take steps to relieve the suffering of others, thus ensuring their basic needs are met. In this way, mercy can bring about greater mutual concern and respect among people generally and might help ameliorate the impoverished social conditions most conducive to fostering criminal dispositions. Assuming a judicious display of mercy would ultimately strengthen relations of trust between persons, it would promote the conditions necessary for the value of human solidarity to flourish within a community.

Commentary on Chapter 3
Commentary on “Defending a Role for Mercy in a Criminal Justice System”

Pamela Bucy Pierson

This commentary proceeds in two sections. Section I provides a brief overview of the authors’ excellent chapter. Section II offers two observations. The first observation looks at mercy in the context of white-collar crime. Because of its nuanced nature, the white-collar arena provides a rich context for many of the points made by the authors. The second observation addresses mercy at the level of the executive branch, rather than at the level of the judicial branch, which is the focus of the authors’ views on mercy. This commentary suggests that because of the amount of discretion executive branch officials have in criminal cases and the stage at which these officials exercise their discretion, there are more, and more diverse, opportunities for granting mercy in the executive branch rather than in the judicial branch.

I. Overview

“Defending a Role for Mercy in a Criminal Justice System” is a provocative and thoughtful piece. The authors define mercy as “mitigating the criminal’s punishment” and offer guidance as to when the state should grant mercy. Key to the authors’ mercy paradigm is the concept of restorative signaling (RS), which the authors define as communicating to society that a criminal is now trustworthy to participate fully in society.

After the trustworthiness threshold (RS) has been met, the authors suggest four situations as appropriate for the state to grant mercy to defendants: (i) when imposing punishment (or further