Injustice for the sake of public health: Freeing prisoners in Portugal during the COVID-19 pandemic

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Abstract
This case study analysis looks at Portuguese policy during the COVID-19 pandemic whereby convicts were freed for the sake of public health. I defend this policy negatively by refuting the argument that suggested it involved various forms of injustice.

Keywords
comparative desert, COVID-19, injustice, leveling down objection, pandemic, public health, public safety, Portugal

The Portuguese Government hit the news when it decided to grant amnesty to convicts as a public health measure in order to prevent the spread of COVID-19.1 Following this, various countries, such as the Netherlands, the UK and Spain implemented similar strategies.2 The measures were slightly different between countries as were the successes. I will now describe and analyze the Portuguese case. I defend the policy against criticisms that freeing convicts involved various forms of injustice. The Portuguese edict to grant amnesty to convicts contains four main prescriptions. Firstly, only those convicts with sentences of less than 2 years or in the last 2 years of their sentence are eligible for an early release. Secondly, convicts identified as having committed serious crimes cannot be released. Crimes not allowing earlier release include homicide, domestic violence, crimes against personal liberty and sexual autonomy (e.g., pedophilia, rape), corruption, qualified theft, criminal association, corruption, money laundering, arson and drug trafficking. Thirdly, those crimes committed by individuals with special public responsibility during their time in office cannot be pardoned. More specifically, this includes crimes involving abuses of power that violate other citizens’ rights and liberties and are committed by the police force, army, prison guards, politicians, high public officers or judges during their stay of duty. Fourthly, the freed convicts will be put on probation during the period of their sentence and, if a crime is committed by the released convict during this period of probation, the pardon will be retracted.3

Although there is a correlation between this policy and the low number of cases that occurred in Portugal, suggesting that the policy was successful, the goal of this case study analysis is not to undertake a positive defense of the policy; rather, I defend the policy in a negative way, by refuting those arguments against it involving some form of injustice. One objection is that by releasing convicts, the policy unfairly puts innocent citizens at risk of being victims of crime.4 Innocent individuals ought to be protected from unnecessary harm as they are not responsible for any wrongdoing;5 however, the policy does the opposite of this to the extent that rather than safeguarding innocent people, it puts them

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1Diário de Notícias (2020, April 3). 1200 presos podem sair das cadeias. Perdão de penas, indultos e liberdade condicional. Diário de Notícias. https://www.dn.pt/pais/1200-presos-podem-sair-das-cadeias-perdao-de-penas-indultos-e-liberdade-condicional-12024451.html

2One Pump Court. (2020). COVID-19 and prisons: The coronavirus restricted temporary release scheme, pregnant prisoners and children in custody. One Pump Court. https://onepumpcourt.co.uk/news/covid-19-and-prisons-the-coronavirus-restricted-temporary-release-scheme-pregnant-prisoners-and-children-in-custody/; Pakes, F. (2020, April 20). Coronavirus: Why swathes of prisoners are being released in the world’s most punitive states. The Conversation, http://theconversation.com/coronavirus-why-swathes-of-prisoners-are-being-released-in-the-worlds-most-punitive-states-136563

3Diário da República. (2020). Lei 9/2020, 2020-04-10. Diário da República Eletrónico. https://dre.pt/pesquisa/~/search/131338919/details/maximized

4Carvalho, A. (2020, April 6). O perdão de penas em contexto de pandemia por Covid-19. Visão. https://visao.sapo.pt/opiniao/bolsa-de-especialistas/2020-04-06-o-perdao-de-penas-em-contexto-de-pandemia-por-covid-19/

5Lazar, S. (2020). Sparing civilians. Oxford University Press.
at unnecessary risk of being victims of crime. This concern is, however, misplaced. The policy has not freed dangerous criminals, but only individuals who have committed petty non-violent crimes. Hence, it does not likely put individuals at risk because the released convicts’ profile is not a violent one. Moreover, police surveillance increased substantially during the state of emergency to avoid violations of confinement duties during this period. This in turn made it more likely that criminals could be caught in the act, therefore, decreasing the likelihood of crime. On top of this, all these released prisoners were on probation during this period, which not only means that this had a dissuading effect on crimes being committed, but also that they would be imprisoned if they did so.

It can also be objected that the policy is a violation of justice to the extent that the government has a pro tanto duty to exert a proportional punishment to censure injustice. To the extent that the government has this duty to punish, it is discharging its obligations when it releases convicts early and, thereby, does not give them a proportional punishment. The fact that the government has such a duty, can of course be challenged, but I will concede it does for the sake of the argument. However, even assuming it has this duty, the government has also other duties, which include safeguarding public health; it is unclear that the obligation to punish petty criminals is of higher value than avoiding a sanitary catastrophe. Indeed, a sanitary catastrophe is likely to involve significant harm to well-being and even death of a high number of people, which the earlier release of petty criminals does not involve; hence, it is justified to sacrifice the supposed duty of government to exert punishment because the evils involved in a public health emergency are much higher. Put differently, it is a lesser evil to not appropriately punish individuals, when exceptional measures are needed to address a public health emergency that involves higher harms (substantial harms to health and even death) than not appropriately punish.

A final objection is that this policy violates concerns about comparative justice. Imagine that hardworking Jonathan deserves a promotion and it is non-comparatively unfair that rather than a promotion he only gets a small pay rise. Michelle is similarly hardworking and also deserves a promotion. But she receives an even smaller pay rise than Jonathan. According to some desert theorists, Michelle suffers a double injustice: not only is she treated non-comparatively unfairly because she deserves a pay rise, but she is also treated comparatively unfairly because of being treated differently from Jonathan when she should have been treated equally. Likewise, the policy treated comparatively unfairly other sectors of society in a similar situation who could have been helped, including, for example, the elderly in nursing homes.

In response, legal inequality is not bad in itself because the law usually works by changing some practices first and then incrementally changing the rest. It is not realistic to ask for all laws to change at the same time, indeed, what happens is step by step change. Moreover, this criticism is vulnerable to the leveling down objection. In particular, the criticism entails that for the sake of equality, one ought not to improve the situation of some and, indeed, make others worse off, in order to make individuals equal. This strict egalitarianism, however, is incoherent; imagine for example that it is impossible to cure everyone’s blindness, it would be unreasonable to defend that in order to enhance equality one needs either to not cure those we can cure of blindness or blind everyone in order to make everyone equal. Likewise, just because the policy has not reached everyone, this does not signify the unfairness of the policy. Furthermore, note that the policy does not only benefit prisoners; prisoners do not lose their health rights because they are convicts and if their risk of getting infected with COVID-19 is higher due to the confined conditions, they may take the place of someone else on a ventilator. That is, given the limited availability of health resources during a pandemic, a policy that avoids the infection of one individual is likely to also benefit other individuals as well, as it avoids overloading the healthcare system.

To conclude, I have defended the freeing convicts policy in a negative way, by refuting the objections that contend that the policy involves some form of injustice. I have not offered a positive defense of the policy, but suggested that its correlation with the good results Portugal has achieved so far during the pandemic is indicative of the benefits it brought. This argument is valid for the Portuguese case study given the specificities of the edict, which may have been different in other countries. Further research should explore the success of similar policies applied in other countries and the possible implementation of it in nations that did not apply it.

**CONFLICT OF INTEREST**

The author declares no conflict of interest.

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