

An Alternative to Punishment: the Crime Future Market

Section 1: Introduction

It is a moral fixed point that the criminally guilty deserve punishment. Utilitarians are troubled however: provided that deterrents to crime other than punishment obtain, it is morally wrong to diminish welfare by punishing.¹ Accordingly utilitarians favor rehabilitation over punishment. The poor historical record of rehabilitation however has weakened the respect for this view.² In this paper I will argue a) that rehabilitation's poor record³ is simply a case of poorly designed incentives; and b) that rehab's failure to satisfy punitive desert is not morally fatal. Free markets provide effective incentives for productive contribution, and this can include the private production of criminal rehabilitation. A crime futures market could function to transfer risk away from the undeserving victims of future crime to the financial portfolios of willing investors. The argument is moral however, not merely financial, and thus the Kantian objection to rehabilitation will be centrally addressed. A Kantian or autonomy-based view of justice requires giving actors what they are due given their own choices.⁴ This entails a moral obligation to retributively punish, regardless of the consequences. I argue however that willed rehabilitation redeems wrongful acts better than does unwilled punishment.

The paper unfolds in four sections: a description of the crime futures market; the system's practical and moral benefits; two practical difficulties; and the Kantian moral objection.

Section 2: The Crime Futures Market

There may be many ways to incentivize private criminal rehabilitation, but the argument will refer to the following system:

1. Instead of continued incarceration, juries and parole boards can authorize willing criminals to participate in the following contracting program.

2. The contract specifies to the criminal “If you agree to stop committing crime when we release you now, the state will pay you monetary reward R on future date D .” The rewards are paid for through tax revenues.
4. Experts with practical experience would set the R and D variables. R is linked to rehabilitation costs, but must be less than the total costs of bureaucratic punishment.
5. Allow the contracts to trade on the futures market. If the criminal makes it to D crime-free, the contract buyer receives the going market price. If the criminal commits another crime (fails to reach D), the contract is worthless. As well, the criminal is then punished.
6. Potential contract buyers would naturally be less than fully confident that the criminal will make it to the payoff date. To discount this risk the contracts will begin trading at very low prices. But if the criminal takes actions that promote buyer confidence, prices will increase.
7. The rational criminal will hire experts, i.e., private rehabilitation services, to guide him to the payoff date successfully. He pays for their service with shares of his contract.
8. There is an equilibrium point where the product of the criminal’s remaining contract shares and their increasing market price is maximized.
9. Counter-intuitively, the market price can *exceed* the contract payoff value. The reason is that contract buyers are willing to pay (and thereby provide) a premium to diversify their own risk.
10. Rehabbers will have many criminal clients, resulting in a portfolio of contracts. The rehabbers raise revenue by selling shares of their portfolio to public investors.
11. If rehab goes well the rehab shares increase in price; if not, their shares decrease in price.
12. Because the criminal is free to switch rehabbers, effective firms will thrive and ineffective firms would go out of business. Successful and innovative rehabilitation techniques would be created and spread throughout the industry and beyond.

13. A psychological speculation: criminals will be so obsessed with their daily (indeed hourly) contract market price that they would lose interest in their previous criminal lifestyle. A quick glance at the behavior and attitudes of professional futures traders suggests that “obsession” is the psychologically apt term.

The concern of utopianism might be thought to infect this entire proposal. Three defending comments. First, how futures markets operate and their counter-intuitive results can be mysterious. But this does not by itself validate the utopianism concern. For example the Irish firm *InTrade* operates a webpage where (non-expert) users can buy and sell bets on selected uncertain future events, and the resulting “prediction” of those events is superior to simply polling either the same persons or experts.⁵ In 2005 *Time* magazine printed an article explaining how corporate decisions made by futures markets can be superior to the decisions made by the corporation’s own internal board.⁶ A crime futures market is simply one variety of this kind of information and decision-optimizing scheme.

While there is a difference between ideal theory and actual practice, all institutions and practices cope with this burden. The alternative to the crime futures market is not an imagined utopia but bureaucratic punishment and all its failures. We must resist the intuition that only flawless proposals are worthy of practical consideration.

Section 3: The System’s Practical Benefits

The system properly incentivizes the three main decision-makers:

1. *Criminals* will maximize their contract price by selecting the most effective rehabbers.
2. *Rehab services* will strive for optimal outcomes to best attract clients and investors.
3. *Investors* will invest in the rehabbers with the best risk/return performance.

There are several ways that the system's practical improvements upon bureaucratic punishment are morally-relevant. Section 5 will elaborate upon and scrutinize the following several moral claims. Most centrally, we will address the primary moral objection that wrong-doers deserve punishment, not reward.

The consequential moral benefits of the system include:

1. To the extent the system is effective, there would be less crime⁷. The reduction comes in the form of improved recidivism rates and an attenuated criminal community.
2. The costs of contract payoffs is less than the costs of the replaced bureaucratic punishment.⁸
3. There is less disutility from punishment.
4. The competition between rehab firms would stimulate new and visionary techniques, which can additionally be applied within other fields.
5. There is a new asset class for diversifying investor portfolio risk.

Considerations of personal autonomy and moral dignity include:

6. The system facilitates a transfer of risk away from undeserving victims of future crime to willing investors' portfolios.
7. The criminal's autonomy is respected insofar as participation decisions are hers.
8. The system replaces bureaucratic "command and obey" practices with free market mutually voluntary practices.⁹

And there are two considerations of moral virtue:

10. The criminal's wrongful act should be redeemed, but this can be done by his authentically remaking his moral character. Retributive punishment is permissible, but it is not the only means of moral redemption.
11. The system inculcates the moral virtue of punishers who become rehabilitators.

Section 4: Two Practical Objections

There are two practical concerns so significant that the system should be rejected if they are sound.¹⁰ First, offering monetary rewards for committing crime would cause an explosion in crime. Any rational self-interested person, knowing she could easily make it to a crime-free to her payoff date, would simply commit a crime to get a free monetary reward. Five factors suggest this concern is overblown.

First, juries and parole boards are free to not allow obvious “pretend criminals” to participate; instead they would simply be punished. Second, the rehab reward is tied to the expected costs of rehabilitation, and such easy cases the reward will be so small as to not motivate. Third, pretend criminals still have a criminal record; their pretense and their participation in rehab do not erase it. Fourth, rehab is demanding; it is not a vacation. All these considerations make seeking a potential reward less attractive.

The final reason that potential monetary rewards will not promote crime is that such motivation applies only to persons who are dishonest, i.e., to authentic rather than pretend criminals. Assume (unrealistically) that it is rational to commit a crime to score a potential reward. I argue that such action will be rare because only the dishonest will act on such a reason. More to point, the way to identify dishonest persons as such is to identify the persons attracted to crime simply because of its potential rewards. Getting such persons involved in rehab is a strength of the system, not a flaw. It is a benefit that such dishonest persons are rehabbed before they commit more serious crime.

It bears noting that the most likely kind of system client will be young males from social groups and communities that mentor dishonesty rather than good civic judgment. As such, successful personal rehab equally rehabs communities.

The second practical objection to attempting to optimize rehab is that by its nature it is doomed to dysfunctional outcomes. Rehab necessarily involves a clientele that is congenitally both dishonest and irrational. Authentic criminals will fake rehab, take the monetary reward, return to crime, and consider all of it a personal victory. This objection clarifies that paradoxically it is irrational to respond to criminals rationally.¹¹ Civilization has made great technological and medical advances over history, but the congenital dishonesty and irrationality of criminals explains why crime has been immune to similar progress. Punishment may seem irrational, but it is rationally irrational. Rehab's rationality is its fatal flaw.

In response, it is not the rationality of the criminal that matters but the rationality of the expert rehabbers who must solve the problem of criminal irrationality. This does ask a lot of the rehabbers. But I want to emphasize the power of free-market competition and innovation. Of all the science fiction movies since the creation of the computer sixty years ago not one predicted the internet. Critics of the potential of competitive rehab must argue that social innovations of similar scale could not be forthcoming. But imagine a "Rehab Technique X" so effective that future crime will be reduced to the same extent that the internet has cut the costs of global communication. The rate and nature of social innovation is a function both of the level of native genius and the institutional support of rational risk-taking. By its nature, bureaucratic punishment and rehabilitation resist innovation, while by its nature a free market promotes it.

Section 5: The Moral Concern

The moral aim of punishing the guilty is two-fold: to right the wrong of particular criminal acts and to deter future crime.¹² Rewarding a wrong-doer does not right the wrong; indeed by a retributive standard of deserved punishment a reward is directly and grossly reprehensible.¹³ I challenge this intuition in two ways. First, in practice the criminals who fail futures market rehab receive punishment, not a reward. And when the criminal does make it to the contract

payoff date, the bulk of the reward actually has gone to the rehabber and investors, who do deserve their reward, not to the criminal.

Second, I suggest that the moral obligation is to repair the wrong, not necessarily to punish. Punishment is permitted, but so are the other ways that morally redeem. This section argues that a) authentically succeeding in rehab is adequate moral redemption due society by the wrong-doer; and b) not punishing does not leave a moral deficit to the particular wronged person.

Moral intuitions about systems of punishment can be confounded by a subtle fallacy of composition. Families have a mission to empower their children for adult life, both morally and practically. While this requires guidance, it also involves sanctions for violating fitting family standards. It is morally problematic to not apply the sanctions when merited. But it does not follow that the best family standards are those that maximize instances of punishment. The aim of the family is to nurture, and a family has functioned well when violation of its standards and merited punishment are rare. Likewise, any society is morally well-ordered when it seeks to optimally facilitate human potential, even if that means total punishment is not maximized.

The crime futures market is consequentially superior to bureaucratic punishment to the extent it lowers overall crime rates at lower institutional costs. But it is still possible to object that the system is immoral on a Kantian standard because rehab objectifies both the wrong-doer and the victim. It objectifies the wrong-doer because it treats her as a mere means to attaining a social goal.¹⁴ Indeed reengineering moral character is perniciously paternalistic, far more so than merely limiting options for action as paternalistic laws do. Second, rehab objectifies the victim because they do not personally receive the moral repayment properly delivered only by punishment. I offer four responses to these two objectification concerns.

First, victims are indeed objectified when punitive desert goes unsatisfied, but intuitions of what is deserved must not be too quick. My general claim is that the moral merit of *willed* rehab is superior to the moral merit of *unwilled* punishment. The claim is not that those who have done wrong deserve a reward; it is that those who have rehabbed no longer deserve punishment. The client is not objectified by rehab because it is fully optional for them to participate; their own entry and exit decisions exercise their moral autonomy. Second, rehab is modest, limited only to refining selected judgments of good citizenship rather than seeking to reengineer the client's global character. Uncontroversial lessons of good citizenship might include rightful treatment of the innocent; obedience to just laws; and the obligation to participate in the moral improvement of unjust law.

But to fully motivate the objectification concern, posit that rehab does reengineer global character. Yet, all persons become virtuous only by being intentionally mentored by other virtuous persons. This development typically occurs early in life, when transgressions are merely annoying rather than immoral. Desert indeed must track mature moral responsibility. However, it is difficult to draw a clear boundary between the individual and institutional responsibilities involved in the moral mentoring of individuals. Social institutions, primarily families, can fail to nurture their minions' virtue by no fault of those minions'. To that extent the failed mentors carry some of the blame for their minions' wrongful acts. Speculative sociology aside, it is obviously impractical to distribute punishment by such a standard, but it does not follow that simply applying the remainder punishment to the criminal instead is justified. Rather I suggest that there are moral obligations to both a) attempt to improve failed institutions; and b) employ punishment only as a last resort. The crime futures market can be understood as an innovation that seeks to finish the mentoring work left undone by failed institutions.

It can be objected that this view of “institutional mentoring” is fitting in the case of children, but once a person reaches biological adulthood they are owed treatment as a moral adult, and only punishment delivers that affirming treatment. The response is that rather than this being a reason to reject the system, it is a reason for a) the client to choose (or return to) punishment; and b) for the system gatekeepers to judge the fittingness of candidates well.

The second objectification concern of rehab applies to the victim of crime. The moral payment is due that particular victim, but rehab makes the payment to society. The response is that a victims’ strong desire for vengeance does not by itself justify paining the wrong-doer. Rather, the wrong-doers’ and punisher’s redeeming intent is the moral property of punishment; the victims’ feelings are irrelevant. To explain, reeducating a student’s civic judgment can succeed only if the student wills it. Equally, rehab and punishment redeem only if willed. Consider two categories of punishment. In the first the recipient is vigorously mindful only of escaping punishment; there is no mindfulness of the moral purpose of the pain. In the second case some external input brings understanding of the moral purpose of punishment. It is “willing one’s punishment” that explains the repayment, not the pain. The crime futures market uniquely facilitates this process by giving criminals a meaningful choice between punishment and rehab. Rehab is not a mere obstacle course; when authentic it is a morally serious accomplishment. Failing one’s contract by committing another crime indicates one’s lack of authenticity, while losing interest in the contract’s financial reward indicates a transformative accomplishment.

I add that victims can chose to forgive, and authentic rehabilitation is a reason to do so.

The third defense of rehab leaving some desert unsatisfied is that the above discussion has ignored the potential victims of future crime. No one deserves to be the victim of wrongdoing. A main purpose of the crime futures system it to enable and reward investors to

financialize and purchase the risk of future crime. Any system that reduces aggregate crime thereby honors the humanity of those who could be objectified as victims. Leaving some backwards-looking criminal desert unpunished is justified if it is consistent with the optimal satisfaction of all desert, which includes forward-looking desert.

Finally, it might be objected that a moral calculus that trades and balances desert mistakenly treats what is a moral “side constraint” as a merely weighty “outcome”. Desert is a side-constraint in order to properly capture how particular actors treat particular recipients. This view is too quick however because it does not reflect the justification of actual practices. It is considered morally better for example for a legal system to allow some guilty persons go unpunished in order to avoid punishing the innocent.

Conclusion

It is right to reward those who contribute to valued production. Clearly the alternative of punishing the unproductive would be wrong. I have argued that this same moral geometry can reveal that retributive punishment of criminals is not always morally optimal. Consequentially, if it is possible to more effectively reduce crime in a way less costly than bureaucratic punishment, there is a moral duty to do so. A well-designed futures market meets this obligation by incentivizing innovative and effective rehabilitation. While this can leave some wrong-doers unpunished, it does not follow that the institution objectifies persons. Society is indeed owed a payment from wrong-doers, but willed rehabilitation is morally superior to unwilled punishment.

End Notes

1. See Doug Husak's *Why Punish the Deserving?* (Nous, 26:4 1992): 447-464.
2. See p. 183 Erin Kelly, *Doing Without Desert*, (University of Southern California and Blackwell Publishers, 2002): 180-205.
3. For rehabilitation data, see www.ojp.usdoj.gov/bjs/prisons.htm, and www.criminon.org
4. The connection between autonomy and desert is discussed in Chapter 3 of George Sher, *Desert* (Princeton University Press, 1987).
5. See: users.nber.org/~jwolfers/Press/Mentions/PlaceYourBets.pdf
6. Jeremy Caplan, "Beyond the BlueChips", *Time* (February 13, 2006): 96.
7. For a defense of the normative priority of crime prevention, see Section IV of Husak.
8. Technically, payouts must greater than the costs of rehabilitation in proportion to their risk of failure. For risk adjusted parity, a payout with a 25% chance of success must be (presumptively) twice the size of a similar payout with a 50% chance of success.
9. The exemplar statement of this kind of view is Milton Friedman's *Capitalism and Freedom*, (University of Chicago Press, 1982).
10. I am indebted to the Bowling Green State University philosophy graduate colloquia participants for their constructive comments on this and other concerns.
11. I am indebted to Arthur Ward for elevating this concern.
12. See chapter 5 of Sher.
13. See chapter 6 of Sher for discussion on the link between contribution and desert.
14. See p. 75 of Sher.