

Alternative to Punishment: The Crime Futures Market by Adam White

Comment by Sharon Kaye

In this paper, Adam White argues for a new approach to the criminal justice system where rehabilitation is conducted through a futures market. Criminals who are judged by experts to be a good fit for the program are offered a reward funded by taxpayers for rehabilitating themselves. To achieve rehabilitation, rational criminals freely contract with a rehab company of their choice. Investors buy shares in the companies they judge to have the most potential for success.

The putative advantages of this approach are (1) it gives both the criminals and the rehab companies significant financial incentive to accomplish the beneficial societal result of reduced crime; and (2) it promotes the autonomy of the individual criminals by enabling them to choose to improve themselves.

I think this is an intriguing proposal concerning a deeply difficult problem. Clearly the current system isn't working and some creative alternatives are needed. I further applaud White's attention to both the utilitarian concern for beneficial societal results and the Kantian concern for individual autonomy. Nevertheless, I believe that the practice of short selling reveals a problem for both of the putative advantages of this approach.

The statement that struck me most in this paper is the following:

"Failing one's contract by committing another crime indicates one's lack of authenticity" (p. 9).

This statement demonstrates that the contract is supposed to function as an outward symbol of some kind of inner commitment—perhaps even Kantian good will. As White himself notes, we have to prevent "pretend" criminals from abusing the program, minimizing the possibility that someone will commit a crime just to get into the program to earn the reward. I feel he sufficiently addresses this possibility; but I am concerned with another related possibility.

A "short sale" is the sale of a borrowed security in anticipation of making a profit by repurchasing it after its price has fallen. In the stock market short selling enables one to gain financially by a company's loss. I have a colleague who plays the stock market. When the market recently took a major downturn I offered him my condolences. He smiled at me like the cat who

swallowed the canary and said: “You don’t understand. When the market goes down, I bet against it. I win either way.”

So, my question is, what is to prevent investors from betting against rehab companies and their clients? We find investors in the program as White envisions it morally praiseworthy because they have a stake in criminal improvement. Conversely, we must find the short-sellers I have envisioned morally reprehensible.

One could defend criminal short selling in the same way one defends any kind of short selling. After all, the practice of short selling arose in agriculture. Farmers seem to have a right to bet against a given crop in a given year. After all, they are not causing or even wishing the weather to destroy their crops; they are simply making a prediction.

But crops are not subject to corruption the way people are. Suppose that a rehab company owner deliberately undermines the success of his clients so that his investors can short sell. Such a company would not last, but even one batch of failures could make a fortune for the investors in the know (with a kickback for the corrupt company owner), while making victims of criminals trying to improve themselves.

Worse yet, an investor who wanted to short sell a rehab company could intimidate or bribe the clients of that company to fail on purpose, thereby incentivizing more crime. This is all beginning to sound like gambling at the racetracks...perhaps the program could be carefully regulated by the government to keep such corruption at a minimum.

But the racetrack specter brings me back to the statement that struck me most:

“Failing one’s contract by committing another crime indicates one’s lack of authenticity” (p. 9).

White deems the criminals I envision, who sabotage their own rehabilitation in order to receive a more attractive reward from a short seller, as breaking an inner commitment. But, in the end, how can we establish that contracting with a short seller is any less noble than contracting with a rehab company? For white, the contract itself is what creates the condition for authenticity; so a contract with the devil must serve equally well.

What this indicates to me is that contracts do not create the conditions of authenticity; they are not outward symbols of Kantian good will. Rather they are a move in a game that is played without recognition of the dignity Kant so ardently defended.

If White's system runs in the uncorrupt way he envisions, then it will look a lot like a humanitarian program because a contract to improve *looks like* the outward manifestation of Kantian good will. But someone can, just as easily, and for the same reward motive, make a contract to fail. The fact that there is nothing within the system to tell us that the latter is wrong while the former is right leaves the worry that the system is soulless and not conducive to the humanitarian society we seek.