



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

11-2022

Letting offenders choose their punishment?

Gilles Grolleau

Murat C. Mungan

Naoufel Mzoughi

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Law and Politics Commons](#), and the [Law Enforcement and Corrections Commons](#)

Letting offenders choose their punishment?

Gilles Grolleau^{1,2} | Murat C. Mungan³ | Naoufel Mzoughi⁴

¹ESSCA School of Management, France

²CEE-M, Univ. Montpellier, CNRS, INRAE, Institut Agro, Montpellier, France

³George Mason University, Fairfax, VA, United States of America

⁴INRAE, ECODEVLOPPEMENT, Avignon, France

Correspondence

Murat C. Mungan, George Mason University, 4400 University Dr, Fairfax, VA 22030-4444 United States of America.

Email: mmungan@gmu.edu

Abstract

Punishment menus allow offenders to choose the punishment to which they will be subjected from a set of options. We present several behaviorally informed rationales for why punishment menus may serve as effective deterrents, notably by causing people to refrain from entering a calculative mindset; reducing their psychological reactance; causing them to reconsider the reputational impacts of punishment; and reducing suspicions about whether the act is enforced for rent-seeking purposes. We argue that punishment menus can outperform the traditional single punishment if these effects can be harnessed properly. Our observations thus constitute a challenge, based on behavioral arguments, to the conventional view that adding (possibly unexercised) punishment options to an existing punishment scheme is unlikely to increase deterrence or welfare. We explain how heterogeneities among individuals can pose problems to designing effective punishment menus and discuss potential solutions. After explaining how punishment menus, if designed and implemented benevolently, can serve socially desirable goals, we caution against their possible misuse by self-interested governments.

‘Go, tell David, This is what the Lord says: “I am offering you three forms of judgment from which to choose. Pick one of them.”’ (1 Chronicles 21:10–13)

This is an open access article under the terms of the [Creative Commons Attribution](https://creativecommons.org/licenses/by/4.0/) License, which permits use, distribution and reproduction in any medium, provided the original work is properly cited.

© 2022 The Authors. *Kyklos* published by John Wiley & Sons Ltd.

1 | INTRODUCTION

Punishment is used in many real-world settings and most notably in criminal justice systems around the globe. There is an abundant literature studying various dimensions of punishment, such as the motivations of punishers, the rationales behind punishment, the effects of punishment on (would-be) rule-breakers, the counterproductive consequences of punishment, the conditions conducive or detrimental to an effective punishment, among others. The literature generally assumes that the punisher decides the punishment to be applied without offering a choice to the rule breaker.¹

While the academic literature is relatively silent on, or even disregards the use of a punishment menu where the rule breaker can choose his/her preferred punishment among the proposed options, there are numerous historical as well as contemporary examples of this practice from different parts of the world. In 2015, a judge in Ohio offered an eighteen-year-old woman a choice between walking 30 miles and spending 30 days in jail, after she did not pay a cab driver for a 30-mile trip (Pinedo et al., 2015). In Brazil, a defendant was given a choice between volunteering at a manatee rehabilitation center and serving time in prison (Pring & Pring, 2009). Similarly, in the end of the 18th century, some criminals in Britain were offered a choice between serving in the navy or being imprisoned (Royal Naval Museum Library, 2001). Many other examples, some more controversial than others, can be listed.² Moreover, anecdotal evidence suggests that such menus may have desirable consequences (e.g., greater community involvement and better matching between the crime and punishment, see Hannan, 2017; Donaldson, 2019). Despite these insightful examples, to the best of our knowledge, we are the first to analyze punishment menus from a behaviorally informed perspective.

Specifically, we bridge the gap between the existing anecdotal evidence suggesting that punishment menus could be useful and the theory which typically suggests that punishment menus are likely to be detrimental. We do so by identifying several subtle and behavioral effects that may be associated with offering punishment menus which have been ignored in the literature that could justify the use of a punishment menu. Thus, our main objective is to explain, *given realistic behavioral considerations, how a punishment menu may constitute a better alternative to the traditional single punishment*. This issue is particularly important because its exploration can lead to the identification of enforcement strategies that can increase compliance without generating additional enforcement costs. Thus, our primary focus is on the deterrence function of punishment, although we comment on other functions of punishment that may be furthered through punishment menus, most notably rehabilitation and restitution.³

Specifically, we highlight how presenting people with different punishment options may lead to several important behavioral effects and thereby enhance compliance. First, offering a non-monetary sanction (e.g., community service) as an alternative to monetary sanctions can cause people to refrain from entering a calculative mindset wherein they merely compare direct costs and benefits associated with their actions, and can thus enhance compliance by causing them to consider the social and ethical dimensions of their actions. Second, offering people a choice can increase compliance by reducing their psychological reactance, i.e., their tendency to counter-produce the goal that is being encouraged by the regulator. Third, including a sanction that is typically reserved for morally egregious acts among the options in the punishment menu can cause people to reconsider the reputational impacts of punishment as well as how they may fare among their peers in terms of the virtues they possess if they engage in the act. Finally, adding non-monetary sanctions as alternatives to monetary sanctions can reduce suspicions about whether the act is enforced for rent-seeking purposes or to reduce social harms, and can thereby further incentivize socially motivated individuals to refrain from committing the regulated act.

¹There are a handful of exceptions, e.g., Polinsky, 2006, Raskolnikov, 2009, Mungan, 2011, Guim et al., 2021, and Mungan, 2021b. We review how punishment menus enter the analysis in these articles, and explain how our observations differ from those made in these articles, in section 2.

²A Mississippi judge explained that some alternatives he offered to young defendants in lieu of more traditional sanctions include voting; writing an essay; and improving their grades (Reneau, 2020). In Alabama, a judge offered a choice between paying fines, serving jail time, and giving blood (Robertson, 2015).

³Other functions of punishment that are typically discussed by criminologists include incapacitation and retribution.

The remainder of the paper is organized as follows. First, we briefly review the existing literature pertinent to the use of punishment menus. We start by reviewing the traditional view of punishment inspired by the seminal article of Becker (1968), and explain why offering a menu of punishments is inferior to offering a single punishment in this setting. Then, we discuss more recent work incorporating punishment menus into economic models of law enforcement. In section 3, we describe how presenting people with different punishment options can generate the subtle compliance effects we briefly described above. Section 4 addresses two natural objections against the use of a punishment menu and concludes.

2 | LITERATURE REVIEW

Since the seminal contribution of Becker (1968), scholars have focused on punishment as an instrument for regulating criminal behavior.⁴ In Becker's framework, rational people, including criminals, respond to changes in relative prices. Increasing the expected punishment, everything else equal, lowers the crime rate, i.e., leads to deterrence. This simple insight has inspired a very broad literature on crime and deterrence, with many refinements and extensions of Becker's fundamental insight (see, e.g., Polinsky & Shavell, 2007 for a survey).

In simple crime and deterrence models, adding an alternative punishment option to a previously existing one can only have detrimental deterrence effects. This is because offenders will choose the punishment option that they will suffer less from. Thus, for offenders who choose the previously existing punishment, the expected cost of committing crime will remain unchanged. However, the expected cost of punishment will be reduced for offenders who strictly prefer the new punishment method that is now being offered. Therefore, the addition of a new scheme can only reduce the deterrence effect of existing punishment methods.

Despite this very simple problem associated with punishment menus, a few articles in the existing literature have explained how offering offenders a choice in how they are to be punished can serve socially desirable goals. Quite remarkably, these articles formalize the potential gains from using punishment menus even absent behavioral considerations of the kinds we consider here.

Specifically, Polinsky (2006) considers a setting where offender wealth is unobservable. Thus, the government cannot set wealth-dependent fines because wealthy individuals could claim to be judgment-proof. However, by offering offenders a choice between a sanction scheme that involves a long-imprisonment term and small monetary fines, and another involving a short-imprisonment term and large monetary fines, the government can incentivize the wealthy-individuals to reveal their types. This can be achieved by choosing sanctions that cause the former punishment scheme to carry greater expected costs, and thus be less desirable for those who can afford to pay larger fines. Offering offenders a choice enhances welfare by allowing the punishment scheme imposed on wealthy individuals to utilize greater fines which carry lower social costs compared to imprisonment.

This kind of separation through type revelation is at the core of other articles which highlight potential gains from various punishment menus. Raskolnikov (2009), for instance, considers the possibility of separating taxpayers based on their motivations to pay taxes. Raskolnikov argues that this type of choice can support a system where those who wish to game the tax system can be incentivized to opt into a regime involving high and deterrent penalties, while remaining individuals can be incentivized to opt into a regime where they comply with cooperative measures.

Similarly, Guim et al. (2021) show that allowing potential offenders to choose the enforcement regime they will be subject to, ex-ante, can lead to welfare gains by reducing enforcement costs as well as enhancing deterrence. In Guim et al. (2021), people with low [high] offense propensities choose a scheme consisting of a low [high] audit

⁴This is true, despite the functional similarity between carrots and sticks in deterring crime. See Mungan (2021a) for a discussion of how the economics literature has focused on sticks, and how carrots can be incorporated into the standard analysis.

probability and a large [small] sanction. This is because compared to potential offenders with high propensities, those with low offense propensities prioritize avoiding audits altogether compared to the size of the sanction for committing the offense. Thus, relative to a uniform sanction scheme, an appropriately designed punishment menu can reduce both enforcement costs and offenses by reducing the audit rate of people with low propensities, and increasing the opportunity cost of committing offenses for other potential offenders.⁵

In a different context, Mungan (2011) considers potential efficiency gains associated with 'regulation passes' or exemptions. Specifically, potential offenders are allowed to choose between paying a monetary fee to be exempt from a regulation which is costly to comply with, and not paying the fee and being subject to the regulation. However, an entity which does not comply with the regulation and subsequently causes harm is subject to additional sanctions regardless of whether they were exempted from the regulation in the first place. When faced with this choice, low-risk entities purchase the exemption while high-risk entities do not. This is because high-risk entities choose to comply with the regulation out of fear of causing harm and being subsequently sanctioned, and thus regulation passes are not as valuable to them as they are for low-risk entities. Thus, regulation exemptions can be used to reduce the over-deterrence of low-risk entities whose compliance with regulations would involve excessive costs.

A commonality among the prior work focusing on punishment menus is that they identify potential welfare gains, e.g., in the form of reduced under- or over-deterrence or enforcement costs, that can be obtained through better separation of (potential) offenders. In deriving these results, existing work focuses on rational offenders who are concerned with the direct private costs associated with punishment. Thus, these articles leave out important considerations, including people's reputational motivations and social preferences, as well as the possibility of potential offenders' mindset affecting the way they make decisions. Like these existing studies, we take an instrumentalist approach and ask what the behavioral consequences of offering punishment menus might be.⁶ However, we take a broader view and consider how previously neglected considerations (e.g., reputational motivations, social preferences, offenders' mindset) influence consequences. Thus, we complement the existing literature by discussing the potential impacts of these considerations on the social desirability of using punishment menus.

3 | PUNISHMENT MENUS AND BEHAVIORAL CONSIDERATIONS

We discuss five specific channels through which giving offenders a choice regarding their own punishment can have behavioral effects which may in turn impact welfare. In section 3.6., below, we discuss how heterogeneities among offenders may pose problems to designing welfare-enhancing punishment menus, and consider a few methods that can be used to mitigate these concerns.

3.1 | Situation framing and the calculative mindset

Several academic studies show that when people face a well-defined punishment (e.g., a \$1,000 fine) they enter a 'calculative mindset' wherein they focus on the direct expected benefits and costs of breaking the rule and often ignore the broader social and moral implications of the considered behaviour.⁷ To be more specific, a calculative

⁵Mungan (2011b) exploits a similar separating mechanism wherein offenders are offered different schemes consisting of an imprisonment sentence and a reward for not committing crime. In that framework, it is shown that the availability of a punishment menu enhances the conditions under which rewards can be used to deter crime in an effective manner.

⁶Other perspectives that have been used to study punishment and criminal law include deontological theories (most notably theories of retribution) (see, e.g., Tunick, 1992) and virtue ethics theories (see, e.g., Sifferd, 2016).

⁷The activation of a calculative mindset can inadvertently lead to self-fulfilling prophecies. The economics of crime à la Becker (1968) suggests that increasing either the severity of sanctions or the probability of being caught will generate deterrence. By doing so and communicating a well-defined sanction, regulators may promote a calculative mindset, which in turn can lead to the predicted effect.

mindset refers to a mode of thinking wherein a person focuses on monetary and material costs and benefits, which, in turn, diminishes the influence of moral concerns and emotional responses (Tenbrunsel & Messick, 1999). Alternative decision making processes include those in which the actor typically behaves reflexively and complies with the law without specifically calculating benefits and costs (e.g., Miceli & Mungan, 2021; see also Farrow et al., 2018) as well as one where the decision maker focuses on ethical considerations to determine what the right action is.

In some cases, the activation of this calculative mindset by the introduction of (weak) monetary sanctions and monitoring systems even lead to an increase in unethical behavior compared to a situation without sanctions (Békir et al., 2016; Tenbrunsel & Messick, 1999). Thus, the emphasis on the consequences of wrongdoing can cause monetary computations to prevail over other considerations. Wang et al. (2014), for instance, argue and find convincing evidence that these narrow calculations might increase self-interested and unethical behavior, because they activate a utilitarian mindset and suppress moral considerations. Similar effects have been found in other contexts, and scholars have interpreted the imposition of sanctions as crowding out the intrinsic motivations of subjects (e.g., Bénabou & Tirole, 2006; Fehr & Schmidt, 2007; Frey, 1992; Gneezy & Rustichini, 2000), although as we explain below the dynamics that lead to this type of crowding out is distinct from people engaging in a lesser calculative mindset.

We hypothesize that a punishment menu which contains options which are difficult to monetize (e.g., a \$1,000 fine or 80 hours of community service to repair the damage) may cause some people not to enter a calculative mindset prior to acting, and thereby increase their likelihood of complying with the law. By broadening possible outcomes, as well as including non-monetary punishments whose expected costs are not immediately clear, tunnel vision can be discouraged (see, e.g., Findley & Scott, 2006). Moreover, a menu of punishments can indirectly encourage the would-be offender to consider other dimensions where moral intuitions can play a stronger role. Thus, giving people a choice over the sanction they may face can change the perception of benefits and costs from transgressing the rule in ways that are better aligned with socially desirable objectives. For instance, a stand-alone fine may encourage economic computations or a business frame (Kouchaki et al., 2013), but a menu of punishments that includes non-monetary punishments may have a mirror effect and lead potential offenders to also consider social and ethical dimensions,⁸ making the pure economic benefit less salient and maybe less attractive, and thereby increasing compliance with the law.

3.2 | A menu of punishments to reduce psychological reactance

The psychological reactance theory predicts that people can react strongly to external influences they perceive as attempts to restrict their behavioral autonomy. This reaction can even operate subconsciously. People who perceive such attempts are therefore more likely to counter-perform by engaging in the behavior that was discouraged (see, e.g., Moore & Pierce, 2016 for an application in the criminality domain). A stand-alone punishment clearly indicates to concerned individuals that there is an attempt to control their behavior and restrict their behavioral autonomy. The prediction of reactance theory is that individuals will be less inclined to conform and more motivated to counter the restriction, even by doing the opposite of what they are asked to do. Therefore, they may be more likely to engage in actions aimed at reestablishing their threatened autonomy (Brehm, 1966; see also Moore & Pierce, 2016). Individuals with a high level of reactance are known to resist rules and regulations and are more likely to engage in impulsive and aggressive behavior (Dowd et al., 1994).

In situations where a freedom-threatening frame is likely to provoke reactance, a choice-enhancing frame or choice provision can diminish reactance arousal (Reynolds-Tylus, 2019; Reynolds-Tylus et al., 2019; Rosenberg & Siegel, 2018; Shen, 2015). Thus, we hypothesize that offering people a choice regarding their punishment can diminish the perception of a freedom-threat and mitigate subsequent reactance, and can thereby lead to an increase in compliance among people who are highly reactant.

⁸Chen et al. (2014), for instance, also argue that the use of non-monetary sanctions is more likely to cause people to adopt an ethical frame rather than a calculative or business-oriented one.

3.3 | The interplay between punishment and intrinsic motivation

The literature on the hidden cost of rewards and punishment posits that an external intervention generates two countervailing effects: a *disciplining effect* or increase in extrinsic motivation that makes the incentivized activity more likely to be performed, in our case by reducing rule breaking, and a *crowding-out effect* where the external or controlling intervention undermines intrinsic motivations and provokes an increase in rule breaking behavior. This crowding-out effect is distinct from the impact that various punishment schemes may have on the calculative mindset of individuals: crowding-out occurs by diminishing the intrinsic motivations of individuals who are often assumed to engage in a cost–benefit analysis (e.g., Bénabou & Tirole, 2006; Fluet & Mungan, 2022; Frey, 1992).

If the crowding out effect dominates the disciplining effect, the introduction of a punishment is counterproductive and increases the undesirable behavior. Tyler (2014, p. 286; see also Frey, 1992) states that ‘a focus on instrumental factors “crowds out” the role of other motivations in shaping rule-related behavior (...). People primarily decide whether to comply or to fail to comply based upon their levels of fear of punishment. And, as previously noted, often this calculation leads to rule-breaking behavior.’ Frey (1993) argues that the “crowding out effect” is likely to dominate when the relationship between principals and agents is personal, while the “disciplining effect” is likely to dominate when the relationship is abstract, as in a competitive market setting. In a similar vein, when the sanction level is low (high), the crowding-out (disciplining) effect is likely to prevail (Gneezy & Rustichini, 2000).

There is some evidence that the risk of crowding-out can be reduced by a menu where incentives can be freely directed to other beneficiaries (see Beretti et al., 2013, 2019; Mellström & Johannesson, 2008). The same rationale may extend to the disincentive side: crowding-out can be mitigated by allowing offenders to choose whom (if anyone) their punishment is likely to benefit. Relatedly, and in line with scholarship on the expressive function of the law (e.g., Cooter, 1998; McAdams, 2000; Posner, 2000; Sunstein, 1996) including severe punishment options within the menu can cause potential offenders to construe the features of the action they are contemplating differently. For instance, if the punishment menu includes imprisonment as an option, people may think that the act is a particularly egregious one, i.e., harsh sanctions may signal the blameworthiness of the act. This can cause people to shift their attention away from instrumental factors (e.g., the size of a monetary sanction) and focus instead on other factors such as their intrinsic motivations; how their (moral) rank among peers might change if they engage in the act; or the reputational impacts from being branded as a person who engages in egregious acts. This can cause people to perceive greater expected costs associated with the action and thus be more reluctant to engage in it. We therefore hypothesize that punishment menus may increase compliance by reducing crowding-out effects among offenders who have intrinsic motivations, care about their peer's opinions, and who place a high value on their reputation.

In the example studied by Gneezy and Rustichini (2000) (see also Frey & Goette, 1999), for instance, the introduction of a monetary sanction increased the number of late-coming parents to take their kids. An interesting question is whether the parents' responses would have been similar if parents faced a punishment menu, wherein the parents would have to choose between a monetary fine and taking care of other late parents' children for several hours in the future. Even if individuals systematically choose the more convenient punishment option (e.g., the monetary fine), the menu can cause them to evaluate the undesirable behavior differently and perceive greater reputational costs or a greater harm for their self-image from committing it.

3.4 | Inferences regarding law enforcement motives

An important feature of monetary sanctions is that they are collected by the authority imposing it, which may distort that authority's behavior away from the socially optimal course of actions. A very large body of public choice literature analyzes these types of distortions (Niskanen, 1971; see also Lemos & Minzner, 2014; Garoupa & Klerman, 2002; Langlais & Obidzinski, 2017; Mungan & Miceli, 2021), and notes that this possibility may cause distrust among the people who are the subject of such regulations (Graham & Makowsky, 2021). For instance,

according to a recent survey of drivers in France (Radars-Auto, 2021), 72% of respondents think of automatic radar devices and the associated fines as “cash machines” for the state rather than as instruments to increase road safety. When monetary penalties cause people to believe that authorities pursue illegitimate or self-interested motives, they may focus more on the economic dimension of the considered violation and marginalize its other dimensions, such as its morality, acceptability, and non-monetary consequences.

In a historical account of the profit motive in American government, Parrillo (2013) explains how the reliance on monetary sanctions (for the offender) and rewards (for the officer) led to counterproductive results. Specifically, Parrillo notes that the perception of profit-seeking enforcers ‘dissipates the layperson’s intrinsic motivation to abide by the law for its own sake’, and also causes people to adopt an adversarial position against enforcers (Parrillo, 2013, p. 36). Parrillo’s account outlines a mechanism through which the perception of profit-seeking enforcers leads to increased non-compliance, and thus suggests that the effectiveness of law enforcement can be restored by eliminating this type of perception.

This can be achieved through the use of punishment menus. Specifically, we hypothesize that a punishment menu that offers offenders the choice to be subjected to a punishment from which the enforcement authority does not benefit, e.g., community service, can cause some people to be less skeptical of law enforcers’ objectives, making them more likely to comply with the law. The offered choice can be considered as a means to disassociate the punishment from the perceived vested interests of the enforcement authorities. This choice also informs people about the relationship that the enforcement authority would like to build with its constituents. Punishment menus are likely to increase the procedural utility and well-being of citizens by recognizing the non-instrumental effects of processes, beyond the traditional outcome utility (Frey et al., 2004). As a result, this type of punishment menu can increase the legitimacy of the enforcement authority and direct people’s focus on dimensions that would otherwise not be activated.

3.5 | Beyond deterrence: possible rehabilitative and restorative gains

In our discussion thus far, we have primarily focused on the potential deterrence effects of offering offenders a choice in their punishment. We note here the potential rehabilitative and restorative gains that may flow from punishment menus. First, when the punishment menu includes an option that requires remedying the type of harm suffered by the victim, the punishment can restore some of the (psychological) harm that was inflicted to the victim. For instance, when a person who has stolen money from an elderly person performs community service at a retirement house, his/her victim may suffer less emotionally. Second, some alternative punishments allow offenders to gain a better appreciation of the wrongfulness of their acts. For instance, the woman who was offered the option to walk 30 miles as her punishment for not paying the taxi driver presumably has a better understanding and appreciation of the services she received by the taxi driver. Similarly, “a convicted game poacher of Amazonian manatees” was offered the choice between a prison sentence and volunteering for a year at a manatee rehabilitation center. Choosing the volunteering option, the defendant changed radically and became one of the country’s leading wildlife advocates, ‘The Man for Manatees’ (Pring & Pring, 2009). These types of experiences can have rehabilitative effects by changing offenders’ attitudes towards the wrongful acts they committed.

Of course, one could argue that stand-alone punishments can also be designed to serve these goals. The problem, however, is that the type of punishment that will carry these benefits are closely related to the characteristics of the specific offense and the offender, which may become apparent only after the offense has been committed. Thus, one cannot identify a single stand-alone punishment, ahead of time, that is likely to deliver these types of benefits. Given constitutional and other limits, it is also infeasible to give judges endless discretion in designing stand-alone punishments to fit the specific offense. One solution to this problem is to have a default punishment (e.g., a monetary fine or imprisonment) and provide judges with discretion to offer additional sanctions as alternatives for the default sanction to deliver rehabilitative and restorative benefits.

3.6 | Offender heterogeneity

A potential problem associated with offering a menu of punishments has to do with heterogeneity across offenders. While some offenders may respond to the availability of an alternative sanction positively (e.g., by abandoning their calculative mindset, reducing their degree of reactance, reducing crowding-out effects, and being less suspicious of enforcer motivations) other offenders may not be influenced by the mechanisms we discussed, above. Thus, if the alternative sanction, e.g., 80 hours of community service, is perceived as a lesser sanction by the latter group of offenders, its inclusion in the menu may reduce their incentives to comply with the law, while enhancing the deterrence of the remaining offenders. Thus, the net impact on non-compliance depends on how these two countervailing effects compare. There are at least three ways through which this problem can be mitigated.

First, the alternative sanction can be chosen such that it is no more preferable to the sanction that would be imposed through a stand-alone punishment (e.g., the monetary fine), and thereby cause some offenders to abandon their calculative mindset and have no effect on the behavior of other offenders. Second, the punishment menu may offer the alternative sanction (e.g., 80 hours of community service) in combination with a greater monetary sanction (e.g., \$1,000) than the stand-alone monetary sanction (e.g., \$800) to ensure that calculative offenders are not offered a lower expected sanction through the punishment menu. Third, the use of punishment menus can be left to the discretion of judges, who may withhold the punishment menu from offenders they believe are calculative and unlikely to react to the availability of the alternative sanction in a positive way. The usefulness of this last option is, of course, a function of how well judges can discriminate between different types of offenders.

The presence of heterogeneity among offenders naturally reduces the potential effectiveness of punishment menus. Thus, caution needs to be exercised in thinking about how to design punishment menus in a way that results in an improvement in some individuals' behavior while reducing the perverse incentives that might be generated for offenders seeking to minimize their cost of non-compliance.

4 | CONCLUSION

Two natural objections can be raised against the use of punishment menus. First, as we have previously mentioned, assuming people are rational (see Frey, 2011), they will always select the punishment they view as being the least severe among the available options. Nevertheless, even when people opt for the least severe punishment, the mere availability of the unexercised option can have an impact on their behavior, due to the reasons we have explained. Second, the availability of options could lead to unequal treatment of offenders by favoring some rule breakers over others. For instance, wealthy individuals may select monetary penalties rather than imprisonment while poor offenders may not have the same choice. Depending on how they are designed, punishment menus can in fact further existing inequalities among offenders, and this should be taken into account in designing punishment menus. Nevertheless, this objection is valid even absent punishment menus. It is therefore important to compare punishment menus to their alternatives carefully to avoid a nirvana fallacy (Demsetz, 1969) where a policy is compared to an idealized and unrealistic alternative.

We note that our observations do not imply that the broad and systematic use of punishment menus is necessarily beneficial. Punishment menus should presumably not be implemented through a one-size-fits-all approach and if carefully designed through a degree of customization their use could constitute a pathbreaking advance. For instance, their availability can be conditioned on various circumstances (e.g., made available only for first time offenders, minor crimes, or 'good people' in the sense of Feldman, 2018). Thus, future research studying the circumstances under which punishment menus are most likely to enhance social goals can be particularly useful.

We note also that punishment menus are likely to have their own limitations and pitfalls (e.g., caution must be exercised to avoid choice overload due to the availability of too many choices, and reference or starting points triggered by the menu may generate unintended consequences), and that they can potentially be used by

politicians in a self-serving manner. Politicians may select the alternatives to the default punishment not to increase compliance with the law (as we have discussed), but, rather to enable a form of ‘price-discrimination’ to maximize their rents. For instance, when an offense is punishable by monetary fines alone, offering a community service option (which benefits the government) to people who attach a low price to their leisure can increase the returns to the government. This, in turn, can increase the value to the government from finding people guilty, and further distort the government's incentives away from the social optimum in enforcing laws (as noted in the references cited in section 3.4.). One potential safeguard against this type of public choice problem would be to require alternative sanctions contained in punishment menus to have no direct impact on government revenues.

Our purpose here is not to suggest that punishment menus, if implemented, will certainly improve welfare. Rather, our goal in discussing the potential behavioral impacts of punishment menus is to guide future research such that the effectiveness of these schemes can be better understood. As we have noted, the few existing law and economics studies on punishment menus typically focus on how such menus can be used to better separate potential offenders based on their types. We have focused instead on people's potential behavioral responses to punishment menus. Under what conditions these responses are likely to emerge is an empirical question whose answer can be investigated through experimental and empirical analyses.

REFERENCES

- Becker, G. S. (1968). Crime and punishment: An economic approach. *Journal of Political Economy*, 76, 169–217. <https://doi.org/10.1086/259394>
- Békir, I., El Harbi, S., Grolleau, G., Mzoughi, N., & Sutan, A. (2016). The impact of monitoring and sanctions on cheating: Experimental evidence from Tunisia. *Managerial and Decision Economics*, 37, 461–473. <https://doi.org/10.1002/mde.2731>
- Bénabou, R., & Tirole, J. (2006). Incentives and prosocial behavior. *American Economic Review*, 96, 1652–1678. <https://doi.org/10.1257/aer.96.5.1652>
- Beretti, A., Figuières, C., & Grolleau, G. (2013). Using money to motivate both ‘saints’ and ‘sinners’: A field experiment on motivational crowding-out. *Kyklos*, 66, 63–77. <https://doi.org/10.1111/kykl.12011>
- Beretti, A., Figuières, C., & Grolleau, G. (2019). How to turn crowding-out into crowding-in? An innovative instrument and some law-related examples. *European Journal of Law and Economics*, 48, 417–438. <https://doi.org/10.1007/s10657-019-09630-9>
- Brehm, J. W. (1966). *A theory of psychological reactance*. Academic Press.
- Chen, X. P., Dang, C. T., & Highberger, F. K. (2014). Broadening the motivation to cooperate: Revisiting the role of sanctions in social dilemmas. In P. A. M. Van Lange, B. Rockenbach, & T. Yamagishi (Eds.), *Reward and punishment in social dilemmas*. Oxford University Press.
- Cooter, R. (1998). Expressive law and economics. *The Journal of Legal Studies*, 27, 585–607. <https://doi.org/10.1086/468036>
- Demsetz, H. (1969). Information and efficiency: Another viewpoint. *Journal of Law and Economics*, 12, 1–22. <https://doi.org/10.1086/466657>
- Donaldson, S. (2019). Cleveland woman holding ‘idiot’ sign only the latest oddball sentences from Northeast Ohio judges. *Cleveland.com*, January 19. https://www.cleveland.com/metro/2012/11/cleveland_woman_holding_idiot.html
- Dowd, E. T., Wallbrown, F., Sanders, D., & Yesenosky, J. M. (1994). Psychological reactance and its relationship to normal personality variables. *Cognitive Therapy and Research*, 18, 601–612. <https://doi.org/10.1007/BF02355671>
- Farrow, K., Grolleau, G., & Mzoughi, N. (2018). What in the word! The scope for the effect of word choice on economic behavior. *Kyklos*, 71(4), 557–580. <https://doi.org/10.1111/kykl.12186>
- Fehr, E., & Schmidt, K. M. (2007). Adding a stick to the carrot? The interaction of bonuses and fines. *American Economic Review*, 97, 177–181. <https://doi.org/10.1257/aer.97.2.177>
- Feldman, Y. (2018). *The law of good people: Challenging states' ability to regulate human behavior*. Cambridge University Press.
- Findley, K. A., & Scott, M. S. (2006). The multiple dimensions of tunnel vision in criminal cases. *Wisconsin Law Review*, 2006, 291–397.
- Fluet, C., & Mungan, M. C. (2022). Laws and norms with (un)observable actions. *European Economic Review*, Forthcoming, 145, 104129. <https://doi.org/10.1016/j.eurocorev.2022.104129>
- Frey, B. S. (1992). Tertiary datum: Pricing, regulating, and intrinsic motivation. *Kyklos*, 45, 161–184. <https://doi.org/10.1111/j.1467-6435.1992.tb02112.x>

- Frey, B. S. (1993). Does monitoring increase work effort? The rivalry with trust and loyalty. *Economic Inquiry*, 31, 663–670. <https://doi.org/10.1111/j.1465-7295.1993.tb00897.x>
- Frey, B. S. (2011). Punishment – and beyond. *Contemporary Economics*, 5, 90–99. <https://doi.org/10.5709/ce.1897-9254.15>
- Frey, B. S., Benz, M., & Stutzer, A. (2004). Introducing procedural utility: Not only what, but also how matters. *Journal of Institutional and Theoretical Economics*, 160, 377–401. <https://doi.org/10.1628/0932456041960560>
- Frey, B. S., & Goette, L. (1999). Does pay motivate volunteers? Working Paper Series (No. 7). Retrieved from <http://e-collection.library.ethz.ch/eserv/eth:25512/eth-25512-01.pdf>
- Garoupa, N., & Klerman, D. (2002). Optimal law enforcement with a rent-seeking government. *American Law and Economics Review*, 4, 116–140. <https://doi.org/10.1093/aler/4.1.116>
- Gneezy, U., & Rustichini, A. (2000). A fine is a price. *The Journal of Legal Studies*, 29, 1–17. <https://doi.org/10.1086/468061>
- Graham, S. R., & Makowsky, M. D. (2021). Local government dependence on criminal justice revenue and emerging constraints. *Annual Review of Criminology*, 4, 311–330. <https://doi.org/10.1146/annurev-criminol-061020-021824>
- Guim, M., Klick, J., & Mungan, M. (2021). Punishment menus. George Mason Law & Economics Research Paper No. 21–05.
- Hannan, S. (2017). Creative justice. *Cleveland Magazine*, June 24. <https://clevelandmagazine.com/in-the-cle/the-read/articles/creative-justice>
- Kouchaki, M., Smith-Crowe, K., Brief, A. P., & Sousa, C. (2013). Seeing green: Mere exposure to money triggers a business decision frame and unethical outcomes. *Organizational Behavior and Human Decision Processes*, 121, 53–61. <https://doi.org/10.1016/j.obhdp.2012.12.002>
- Langlais, É., & Obidzinski, M. (2017). Law enforcement with a democratic government. *American Law and Economics Review*, 19, 162–201.
- Lemos, M., & Minzner, M. (2014). For-profit public enforcement. *Harvard Law Review*, 127, 853–913.
- McAdams, R. H. (2000). An attitudinal theory of expressive law. *Oregon Law Review*, 79, 339.
- Mellström, C., & Johannesson, M. (2008). Crowding out in blood donation: Was Titmuss right? *Journal of the European Economic Association*, 6, 845–863. <https://doi.org/10.1162/JEEA.2008.6.4.845>
- Miceli, M., & Mungan, M. (2021). An economic theory of optimal enactment and enforcement of laws. *International Review of Law and Economics*, 68, 106029. <https://doi.org/10.1016/j.irle.2021.106029>
- Moore, C., & Pierce, L. (2016). Reactance to transgressors: Why authorities deliver harsher penalties when the social context elicits expectations of leniency. *Frontiers in Psychology*, 7, 550. <https://doi.org/10.3389/fpsyg.2016.00550>
- Mungan, M. (2011). Welfare enhancing regulation exemptions. *International Review of Law and Economics*, 31, 249–255. <https://doi.org/10.1016/j.irle.2011.06.002>
- Mungan, M. (2021a). Rewards versus imprisonment. *American Law and Economics Review*, 23, 432–480. <https://doi.org/10.1093/aler/ahab011>
- Mungan, M. (2021b). Rewards versus imprisonment: The impact of choice. George Mason Law & Economics Research Paper No. 21–17.
- Mungan, M. C., & Miceli, T. J. (2021). Legislating for profit and optimal Eighth-Amendment review. *Economic Inquiry*, 59, 1403–1416. <https://doi.org/10.1111/ecin.12968>
- Niskanen, W. A. (1971). *Bureaucracy and representative government*. Transaction Publishers.
- Parrillo, N. R. (2013). *Against the profit motive: The salary revolution in American government, 1780–1940*. Yale University Press.
- Pinedo, A., Brown, J., & Valiente, A. (2015). Why an Ohio judge is using unusual punishments to keep people out of jail. ABC News, September 1. <https://abcnews.go.com/US/ohio-judge-unusual-punishments-people-jail/story?id=33440871>
- Polinsky, A. M. (2006). The optimal use of fines and imprisonment when wealth is unobservable. *Journal of Public Economics*, 90, 823–835. <https://doi.org/10.1016/j.jpubeco.2005.05.006>
- Polinsky, A. M., & Shavell, S. (2007). The theory of public enforcement of law. In M. Polinsky & S. Shavell (Eds.), *Handbook of law and economics*. North Holland.
- Posner, R. A. (2000). Cost-benefit analysis: Definition, justification, and comment on conference papers. *The Journal of Legal Studies*, 29, 1153–1177. <https://doi.org/10.1086/468108>
- Pring, G., & Pring, C. (2009). *Greening justice. Creating and improving environmental courts and tribunals*. The Access initiative.
- Radars-Auto. (2021). Plus des deux tiers des français jugent les radars comme des pompes à fric. [Radars-auto.com](https://www.radars-auto.com/actualite/actu-radars-general/plus-des-deux-tiers-des-francais-jugent-les-radars-comme-des-pompes-a-fric-1696), January 4. <https://www.radars-auto.com/actualite/actu-radars-general/plus-des-deux-tiers-des-francais-jugent-les-radars-comme-des-pompes-a-fric-1696>
- Raskolnikov, A. (2009). Revealing choices: Using taxpayer choice to target tax enforcement. *Columbia Law Review*, 109, 689–754.
- Reneau, A. (2020). Judge offers alternative sentences to young offenders like ‘get your grades up’ and ‘vote’. Upworthy, March 11. <https://www.upworthy.com/judge-carlos-moore-offers-young-people-creative-alternative-sentences>
- Reynolds-Tylus, T. (2019). Psychological reactance and persuasive health communication: A review of the literature. *Frontiers in Communication*, 4, 56. <https://doi.org/10.3389/fcomm.2019.00056>

- Reynolds-Tylus, T., Martinez Gonzalez, A., & Quick, B. L. (2019). The role of choice clustering and descriptive norms in attenuating psychological reactance to water and energy conservation messages. *Environmental Communication*, 13, 847–863. <https://doi.org/10.1080/17524032.2018.1461672>
- Robertson, C. (2015). For offenders who can't pay, it's a pint of blood or jail time. *New York Times*, October 19. <https://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html>
- Rosenberg, B. D., & Siegel, J. T. (2018). A 50-year review of psychological reactance theory: Do not read this article. *Motivation Science*, 4, 281–300. <https://doi.org/10.1037/mot0000091>
- Royal Naval Museum Library. (2001). The press gangs and naval recruitment. http://www.royalnavalmuseum.org/info_sheet_impressment.html
- Shen, L. (2015). Antecedents to psychological reactance: The impact of threat, message frame, and choice. *Health Communication*, 30, 975–985. <https://doi.org/10.1080/10410236.2014.910882>
- Sifferd, K. (2016). Virtue ethics and criminal punishment. In A. Masala & J. Webber (Eds.), *From personality to virtue: Essays on the philosophy of character*. Oxford Scholarship Online.
- Sunstein, C. (1996). On the expressive function of law. *University of Pennsylvania Law Review*, 144, 2021–2053. <https://doi.org/10.2307/3312647>
- Tenbrunsel, A. E., & Messick, D. M. (1999). Sanctioning systems, decision frames, and cooperation. *Administrative Science Quarterly*, 44, 684–707. <https://doi.org/10.2307/2667052>
- Tunick, M. (1992). *Punishment: Theory and practice*. University of California Press.
- Tyler, T. R. (2014). Reducing corporate criminality: The role of values. *American Criminal Law Review*, 51, 267–291.
- Wang, L., Zhong, C. B., & Murnighan, J. K. (2014). The social and ethical consequences of a calculative mindset. *Organizational Behavior and Human Decision Processes*, 125, 39–49. <https://doi.org/10.1016/j.obhdp.2014.05.004>

How to cite this article: Grolleau, G., Mungan, M. C., & Mzoughi, N. (2022). Letting offenders choose their punishment? *Kyklos*, 75(4), 607–617. <https://doi.org/10.1111/kykl.12313>