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History, Race, and Prediction: Comments on Harcourt's *Against Prediction*

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HARCOURT, BERNARD E. 2007. *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. Chicago: University of Chicago Press. Pp. viii + 336. $25.00 paper.

This article reviews Bernard Harcourt's Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age *(2007). It places the rise of actuarialism in criminal law in the United States in the context of trends in other areas of law, as well as in penology. It further suggests that this move toward actuarial thinking cannot in fact be separated from race; that prediction has always involved racial profiling, and that it is no accident that it does so.*

Bernard Harcourt's *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007) elaborates a claim that runs counter to most of the received wisdom about racial profiling today. Whereas most people believe, with Frederick Schauer, that "the problems with racial profiling ... are not problems of profiling ... the problem is about race" (2003, 197–98), Harcourt tells us the opposite: "the problem with racial profiling is about the profiling, not about race" (2007, 215). He marshals evidence from history, economic modeling, and quantitative studies to demonstrate why profiling—not only in the context of drug interdiction or counter-terrorism but in parole and bail setting and other criminal law contexts—actually may run counter to the ultimate utilitarian goal of criminal justice: to maximize general welfare by minimizing crime.

There are two characteristics of this book that especially struck me. First, it is resolutely historicist. Harcourt puts the rise of actuarialism in criminal law in the context of intellectual and institutional history, and he does so as part of a normative argument about what has gone wrong in criminal law since the early twentieth century. Second, Harcourt wants us to keep our eye on the ball of the ultimate end of crime fighting: a moral theory of just punishment. There is no point in increasing "hit rates" (112) of drug interdiction if we do not further the end of reducing the illegal drug trade and if in the process we violate other important aims of our system.

I will begin with the history: *Against Prediction* traces the beginnings of actuarial methods in American criminal justice to the development of prediction instruments, first in the field of parole by University of Chicago sociologist Ernest Burgess and his students in the 1920s and 1930s. The practices of parole and indeterminate sentencing date to the beginning of the twentieth century, and early parole decisions were haphazard, based primarily on brief interviews with each prisoner. Burgess and his colleagues pioneered the development of models that took into account a certain number of more or less objective factors that might predict parole violation and tested them empirically. Interestingly, Harcourt argues that the actuarial impulse was an outgrowth of a turn to individualization in criminal law. According to Harcourt, the rise of actuarial prediction was not an aspect of abstraction or generalization but its opposite—an effort to target *better* the individual recidivist by identifying the risk factors that would predict his parole violation.

Burgess and his colleagues developed a variety of models; some included quite a long list of dozens of predictors, unweighted; others a shorter list of weighted factors. Critics of Burgess's models urged the use of multivariate regression analysis rather than simply adding the factors to give a numerical score. While a number of these models heavily weighted prior criminal history, most also included race as a factor, as well as education and employment. Some of the factors look rather quaint to contemporary eyes, such as "social type," in Clark Tibbitts's model, with the categories of "hobo," "ne'er do well," and "gangster" (1931, 16).

Yet for the most part, these academic models were not put into real use outside of Illinois until considerably later, starting in the 1970s and really gaining steam in the 1980s and 1990s. California and the federal government adopted actuarial instruments in the 1970s, and twenty-six other states followed by 2004. This trend coincided with the relative demise of parole. Today, twelve states do not use parole in new cases, but of those that do use parole in new cases, a vast majority use prediction instruments—risk-assessment tools that heavily weight past criminal history among other predictive factors. Over time, as states began to apply actuarial models, the number of factors in the models dwindled. However, the Level of Services Inventory-Revised (LSI-R), the most popular tool, is a return to a multifactor analysis, which Harcourt explains in part by the fact that it has been recycled for other

uses as well. The LSI-R is used in eight states (including Pennsylvania, Kansas, and Ohio) and several countries outside the United States, including jurisdictions in Canada and the United Kingdom.

The rise of actuarialism in criminal justice, beginning with parole prediction and later extending to selective incapacitation of high-risk offenders (primarily using prior criminal history as a proxy for future dangerousness), sentencing guidelines, capital sentencing, and criminal profiling, from hijacker profiles in the 1960s to drug-courier profiles in the 1980s, coincides with a rise of actuarialism in law more generally. Harcourt has put racial profiling in the broader context of actuarial approaches to criminal justice generally, but we could in turn put actuarial approaches to criminal justice in the context of changing thinking about risk in a variety of fields of law.

The turn to actuarialism in criminal law in the 1920s and 1930s followed on similar developments in other areas of law. To take just two examples, the law of bankruptcy and of torts underwent major changes at the turn of the century, with a similar move from individual moral fault to risk assessment. In bankruptcy, the long nineteenth century saw the shift from debtors' prisons to modern debt discharge. As Edward Balleisen has suggested, the rapid development of the life insurance business in the second half of the nineteenth century coincided with a growing concern in public life about individual bankruptcy (2001, 221–27). Of course, the insurance industry pioneered actuarial principles, and this link between insuring against personal failure and a diminishing sense of moral culpability for failure in business suggests that the "actuarial turn" (Harcourt 2007, 5) helped to facilitate changes in bankruptcy law that have made the United States one of the most debtor-friendly countries in the world. In accident law, the rise of worker compensation schemes provided predictability for businesses as well as a modicum of relief for injured employees, moving from a fault principle to a risk-assessment principle. As John Witt has shown, workers' compensation was not merely a compromise between workers and business interests; it "represented a striking new introduction of actuarial categories and probabilistic principles to American law" at the turn of the twentieth century (2004, 173). Moving from classical tort law to legislative schemes for workers' compensation "subtly shifted the work-accident debate from the ideology of free labor . . . toward actuarial categories and aggregated risks"; it was a "paradigm shift" (128).

This paradigm shift, from moral agency to actuarialism, has often been associated with a move from the individual to the general. Indeed, that is the thrust of Frederick Schauer's body of work on profiling: in Schauer's view, actuarial prediction moves us from the individual to the general, and that is a good thing (2003). But Harcourt is not "against prediction" because he wants us to stick with the individual. Rather, he is skeptical that prediction has *ever* been a move from the individual to the general. He argues that notions of individual moral fault are still present in the actuarial approach, hidden in the risk-assessment "factors." Widening our perspective to other

realms of law, such as tort and bankruptcy law, may strengthen his case; contemporary comparative negligence doctrine, for example, maintains fault principles within the newer framework.

On the other hand, there is a dimension of the move to actuarialism that is not captured in Harcourt's history. Some years ago, Jonathan Simon and Malcolm Feeley (1992) identified a "new penology" emergent in the 1970s, in which "the language of probability and risk increasingly replaces earlier discourses of clinical diagnosis and retributive judgment" (450). They highlight actuarialism as one aspect of a turn from the "traditional objectives of rehabilitation and crime control" to a new emphasis on "the efficient control of internal system processes" (450). Simon has further argued that this social-control strategy is of a piece with other late nineteenth-century developments of "techniques . . . that operated on populations rather than on bodies" (1988, 774). Simon puts these developments in a Foucauldian perspective: "Social insurance, worker's compensation, income tax, and similar devices created forms of management that did not need to rely on the cumbersome techniques of individual discipline" (774). Rather than control the troublesome lower classes through individual punishment, viewed in terms of moral blame—with the aim of actually ending or diminishing crime—the new technologies of discipline seek to manage the "offender" population. The "new penology" views high rates of recidivism not as a failure of the penal system or of the parole system's ability to reintegrate offenders, but instead an inevitable, expected part of the system, taken account of by the risk-assessment tools that are used to manage rather than reduce crime.

This new approach is exemplified by the new penology's emphasis on incapacitation. As Feeley and Simon explain, "incapacitation promises to reduce the effects of crime in society not by altering either offender or social context, but by rearranging the distribution of offenders in society" (Feeley and Simon 1992, 458). Thus, it may be that the advocates of actuarialism in the criminal law do not share the utilitarian goal of reducing crime, but rather seek only to manage populations; or, to the extent they do share that goal, they propose to reach it primarily through incapacitating targeted "offender" populations. In that sense, the move toward actuarialism does represent an important shift in the philosophy of discipline.

Harcourt, however, has chosen to build his case on a different terrain. He assumes that the advocates of profiling share the same utilitarian goals and seeks to explain why they are wrong in believing that actuarialism will help achieve those goals. He is particularly concerned to take on the models put forth by legal economists of why profiling is efficient. Yoram Margalioth's comments (see article in this issue) go into greater detail regarding Harcourt's model, so I will only briefly summarize his arguments.

First, what is he arguing against? This is the argument of the "pro-profilers": we can distinguish between bigoted police stops or searches and those motivated only by the desire to maximize the successful searches of suspects

(the "hit rate") according to whether the data reveal equal or different hit rates for different racial groups. When the hit rates are equal, police are practicing only efficient statistical discrimination; when minority hit rates are lower, then racism explains the disparity. According to this view, if minorities are the higher offending group (absent profiling), then police officers will continue to search members of the higher-offending group disproportionately until the point of equilibrium, where minority and white offending is at the same level.

The problem, according to Harcourt, is twofold: first, and crucially, the argument depends on the two groups having the same elasticity of offending to policing. That is, the minority group must be responsive to the profiling, and they must actually be deterred by the more frequent stops and searches into offending less often—or at least, they must be as deterred as whites are. If African American and Latino drivers who carry drugs, for example, have less elasticity of offending to policing—if, because of their lower socio-economic status, they have fewer choices for noncriminal economic activity and continue to carry drugs despite the disproportionate risk of being stopped and searched—then although the police may maximize their hit rate, they could actually increase overall crime in society. If whites who carry drugs while driving have higher elasticity of offending, and recognize that they are unlikely to be stopped, they will commit more drug crimes. The narrowly efficient result of more successful searches could actually lead to the broadly inefficient result of more crime. Never mind what we think about the utility of the war against drugs, or the cost-benefit analysis of dignitary harms, or teaching a population to distrust representatives of the state, as weighed against the benefits of drug interdiction. On its own terms, Harcourt suggests, the rational-choice model fails because it does not take into account elasticity of offending to policing—why should the group assumed to have a higher natural rate of offending not also have a lower rate of elasticity of offending?

The second part of Harcourt's argument drops the rational-choice assumptions and looks at the "ratchet effect" (2007, 145–79) on the targeted population. If the police dedicate more resources to investigating, searching, and arresting members of a higher-offending group, the resulting distribution of arrests will disproportionately represent members of that higher-offending group. This ratchet effect is self-perpetuating. As Harcourt writes, "criminal profiling, when it works, is a self-confirming prophecy. It aggravates over time the perception of a correlation between the group trait and crime" (154). This has all kinds of negative effects in terms of the lived experience of African Americans in the United States, some of which Harcourt discusses, citing Dorothy Roberts's moving discussion of the personal harms of white associations of blackness and criminality (2004).

This leads me to my main critique of the book, or at least of the polemical framing of the book. Although Harcourt insists at the outset that he is telling us a story that is distinct from race—"the problem . . . is about the profiling,

not race" (Harcourt 215, 4–6)—I came away from his book convinced that we should tell this as a racial history as well. The history of actuarialism, I suspect, is also a history of racial thinking—that is, the same social scientists who focused on delinquency, parole, and criminology in this era, were also developing new theories of race—environmentalist, to be sure, but heavily influenced by the racial science of the day. Ernest Burgess, in addition to working on parole prediction, collaborated with Robert Park (1921, 1925), the leading Chicago-school sociologist who helped promote "race-relations" theory and the study of "the Negro" (Park 1939). Park and Burgess were liberal social engineers who developed theories of "human ecology" (1925) and race, which were an important element of their understanding of society. I do not think it is a coincidence that race has always been one of the predictive factors for parole violation.

Yet, at the same time, in the American South, if you look at who was winning parole in the early days of parole boards, it was disproportionately African Americans. According to one Alabama study, nearly twice as many blacks as whites won parole in 1940. Why? Blacks were paroled because white employers were demanding them as "farm hands and domestic help, and as unskilled laborers in other occupations" (Johnson 1940, 388). Employers sent hundreds of letters to parole boards urgently demanding, for example, "I am in need of a negro farm hand and I am depending on one from you" or "I am anxious to get some good paroled convict to make and gather the crop. I would like to get some dependable middle age negro" (388). Likewise in Georgia, not only during years of labor shortage but even during the Depression, blacks won parole in high numbers because of the demand for their labor and the lack of seriousness with which black-on-black crime was treated (Garton 2003, 2,10). A study of criminology and criminal justice practices in the United States simply cannot be divorced or disentangled from the history of racial subordination. Most innovations in policing and punishment from the Civil War onward were developed at least in part out of a concern with the control of African American (and at times, new immigrant) young men (Kennedy 1997; Ogletree 2006; Oshinsky 1996).

The urge to categorize, which Harcourt discusses as an explanation for actuarial thinking, is not value free. If we ask what the meaningful categories were to those who developed new categories, we find that racial categories have always been part of this calculus. In every corner of criminal law where we find actuarial thinking, we will find race too. While I do not have the space here to fully explore the way racial ideology fits into this intellectual history, I believe that the connections are more than happenstance. And while the ratchet effect, of course, could happen with respect to any factor on which profiling occurs, I think it is no mistake that race is the primary place where we see this phenomenon. The association of blackness and criminality that Harcourt describes does not stem only from this self-reinforcing ratchet effect; the effect is so pronounced because that association has a long history.

The power of this association of blackness and criminality, while rein-forced by contemporary practices of profiling and the huge prison population, has its roots in a much longer history of slavery and its aftermath. One can trace a line from slavery to chain gangs and convict leasing to prison plan-tations in the mid-twentieth century and the continuing large-scale incar-ceration of black men today. Black men in the South were alternately rounded up for vagrancy and trumped-up crimes when their labor was needed for the convict lease and released on parole when their labor was needed outside the prison walls. The threat of imprisonment and the misuse of the criminal justice system have been central to the discipline of the African American "offender" population since the end of slavery; this phenomenon both pre-ceded the rise of actuarial thinking and helped shape the direction actuari-alism has taken in the development of the criminal law (Oshinsky 1996; Mancini 1996; Ayers 1984; Waldrep 1998).

After analyzing the distortion and the ratchet effects of profiling, Harcourt goes on to talk about the more fundamental problem that actuarial thinking has distorted our conceptions of just punishment. Technical progress in social science tools has come to dominate the system. We predict because we can. If we were not so busy trying to perfect our predictive tools, we would pay attention to what really matters: the failures of our prisons and parole systems to rehabilitate people and reintegrate them into society and the alignment between our criminal justice practices and moral theories of punishment. There is a delightful kind of optimism here in the implicit assumption that it is in fact technology, rather than something more cynical, driving policy—that if we were not driven by the tools of prediction, then legislatures or state officials would seek to promote a moral theory of justice. I am consider-ably more skeptical that ideology—and racial ideology at that—does not drive this process.

At times, Harcourt writes as though the problem is that this approach came from "outside" the law—that it is technologically driven by social scientists and other "experts"—if we can do it, we should do it, whether it furthers our goals or not. I am very sympathetic to the idea that we should hold all of our practices to the test of whether they conform to our moral theories of justice, but I have a few reservations. First, I am not sure that very many people in the criminal justice system today share my or Harcourt's views of a just theory of punishment. For example, rehabilitation has completely fallen out of contemporary theories of punishment, although we might think recidi-vism rates have a lot to do with the failure to rehabilitate. Second, I am not sure we should assume that the fact that actuarial approaches come from outside the law, without grounding in our jurisprudence, is necessarily auto-matically a bad thing. Surely, many positive developments in policing, and in law more generally, have come from the outside: for example, better psycho-logical understandings have influenced, a little bit, the law of insanity and incapacity, and feminism has influenced the law of rape. These developments

came completely from outside the formal confines of jurisprudential tradition. But this is really a small point.

Against Prediction is inspiring in its breadth of erudition, from mathematics to philosophy, sociology, and history, and persuasive in its impassioned and provocative argument. At the end, Harcourt argues for random sampling—a refusal to predict—to replace profiling. Whatever my caveats about the links between actuarialism and racialism, I do not doubt for a moment the power of his prescription. If we want to break the hold that racialist thinking has on criminal law, there is no better place to begin than the apparently neutral actuarialism of the new penology.

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