

Against Prevention? A Response to Harcourt's *Against Prediction* on Actuarial and Clinical Predictions and the Faults of Incapacitation

Yoav Sapir

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), in which he criticizes the use of actuarial prediction methods in the contexts of policing and sentencing. I focus on the latter context. I argue that Harcourt has identified an important, and not exclusively American, trend and develops a valid critique of it that should be pushed further. From a theory of punishment perspective, I argue that Harcourt's critique is no less applicable to clinical prediction methods than to the use of actuarial ones. Harcourt's arguments, however, beg a more general explanation of the flaws of incapacitation as a justification for punishment. If we base our objection to the use of prediction methods on such larger grounds, questions arise as to the legitimacy of other practices that are not considered punitive but rather "regulatory" or "preventive."

INTRODUCTION

Once again Bernard Harcourt is directing his sharp arrows at a major trend in the criminal justice system. As he did with "broken windows policing"

Yoav Sapir is the Deputy Chief Public Defender and the Director of Supreme Court Appellate Division at the National Public Defender Office of Israel; Adjunct Lecturer in Law at Tel Aviv University and Bar-Ilan University; SJD, LL.M. (Harvard Law School); LL.B. (Tel Aviv University).

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(Harcourt 2001), he is now critiquing the growing use of actuarial prediction methods for policing and sentencing purposes. Broken windows policing, he showed us, does not really reduce serious crime; rather, it leads to an uncritical dichotomy between “diorderly people” and law abiders, which masks tremendous costs, including police brutality and racial bias. Now we are told that actuarial methods of prediction are not only inefficient, they also have an overlooked social cost of distorting the carceral population and our conceptions of just punishment.

In the first chapter of the book, Harcourt (2007) visually displays the dramatic increase in use of prediction instruments in the context of parole. Found in only two states until the mid-1970s, prediction tools began to then be adopted by a growing number of states until, in 2004, twenty-eight states (72 percent of those with an active parole system) were found to use risk-assessment tools to guide their parole decisions.

But this, like most other American trends—legal or otherwise—is not restricted to the United States. Specifically in the criminal justice context we have seen notable American influence on many legal systems. Among these we find nonadversarial ones, including the Italian, French, Spanish, and German, who for many years have been great producers and exporters of ideas in criminal law and procedure. Thus, under a clear American influence, notions such as plea bargaining and jury trials are no longer foreign to these systems.¹

One sense in which the Americanization tendency is disturbing is that often ideas and policies travel, but their important critiques stay home. It is, therefore, extremely important that Harcourt’s critiques, as well as the many other critical voices within the United States, be made known in those countries adopting or contemplating adoption of American trends.

Israel is one of the countries whose criminal justice system has been continually influenced by the American one. The influence has been exerted in criminal law, criminal procedure, and general policies of criminal justice administration. To name just a few examples, there has been a recent move toward limiting the discretion of judges in sentencing, and the Israeli Ministry of Justice is promoting a proposal to adopt sentencing guidelines;²

1. Maximo Langer (2004) argues that despite the introduction of plea bargaining in Argentina, France, Germany, and Italy, a paradoxical consequence of the American influence on civil law jurisdictions may be the production of fragmentation and divergence, rather than the Americanization of criminal procedures of the civil law tradition.

2. Penal Law Bill 2006. Ironically, because in the criminal justice context there is a lag of about two decades between the United States and Israel, and because ideas travel without their accompanying critiques, some of the ideas are adopted in Israel when they are already discredited in the United States. Thus, when Israel adopted mandatory minimums for some offenses, the devastating effects of mandatory minimums in the United States were already known. The sentencing guidelines bill is being promoted in Israel despite the harsh critique that sentencing guidelines schemes received in the United States (e.g., Stith and Cabranes 1998). It is still on the agenda in Israel despite the fact that the U.S. Supreme Court declared the Federal Sentencing Guidelines to be nonmandatory (*United States v. Booker* (2005)).

an exclusionary rule for illegally obtained evidence has recently been adopted by the Supreme Court;³ and following the enactment of a law permitting it,⁴ the first private prison in Israel is being built.

The tendency to use prediction methods in the criminal justice system has not skipped Israel and has in fact become more pronounced in recent years. The 2001 Parole Law determined that no sex offender would be released on parole before dangerousness is assessed. A similar provision requires dangerousness assessment for domestic violence offenders. The 2006 Protection of the Public from Sex Offenders Law requires dangerousness assessments in other stages of the criminal process, including before sentencing. Finally, the sentencing guidelines proposal (Penal Law Bill (Amendment No. 92)) includes some prediction elements, such as an evaluation of the likeliness that an offender will reoffend, on the basis of criminal histories.⁵

Harcourt's book deals with prediction in two main contexts—that of policing and that of punishment. I chose the three examples above from the latter because this is the context that unjustifiably receives far less attention. In the United States, the use of prediction methods in the policing context received enormous attention in public debate and academia, especially with regard to racial profiling of African Americans in car stops and searches. Currently high on the agenda in both the United States and Israel is the issue of profiling people of Arab and Muslim descent in airports, and elsewhere, as a measure against terrorist attacks. On the other hand, there is little thorough discussion of actuarial prediction in the context of sentencing.

What could explain the fact that the use of prediction in the area of sentencing has been largely ignored? Part of the reason is that not all are aware that prediction actually plays a role in this area. For example, one could justify the increasing significance of criminal record in sentencing on grounds of retribution or general deterrence rather than prediction. From the point of view of retribution or “just desert,” the argument is that a multiple offender is more culpable than a “first timer” is, and deserving of harsher punishment.⁶ From a deterrence point of view, one could say that harsher

3. *Issacharov v. State of Israel* (2006). In reaching its decision the court extensively relied on American (as well as Canadian, English, South African, and Australian) sources.

4. Law Amending the Prisons Ordinance (2004). A petition to declare this law unconstitutional is pending before the Supreme Court of Israel: *The Human Rights Section of the Academic College in Ramat-Gan v. The Minister of Finance*.

5. According to Section 40(e) of the bill, protection of the public, based on the likeliness of reoffending, allows the judge to deviate from the “appropriateness” principle, which is determined by the bill to be the major principle of punishment.

6. Julian Roberts argues that greater punishment for recidivists is supported publicly due to the perception that repeat offenders are showing disrespect for the criminal justice system (1996, 493). Andrew Von Hirsch provided a theoretical formulation of this conception of punishment according to which a repeat offender is more blameworthy because he is “thumbing his nose” at the justice system (1976, 85). Later he argued for a reduction of punishment for first-time offenders (1985, 78–85).

punishments are needed to deter recidivists. In fact, the Federal Sentencing Guidelines (Federal Sentencing Commission) justify the central role of criminal history as aiding all purposes of punishment designated by Congress.⁷ The Israeli bill attributes a double significance to criminal record. The judge can use it as a way to predict dangerousness and to enhance public safety, but it is also an aggravating circumstance regardless of dangerousness.⁸ So prediction is not the sole focus here. With regard to parole, one could argue that the use of prediction in this context has nothing to do with sentencing and punishment at all. The sentence, so the argument goes, is already determined, and the parole is a different phase in a different point in time, with different considerations on the scales.

And so, Harcourt's book makes its first important point by shedding light on the very fact that there is a growing tendency to use actuarial data and prediction in punishment. At first sight some of the practices can seemingly be explained away by classical goals of punishment (deterrence and retribution), and others seem not to be related to punishment at all. However, a closer look through Harcourt's lenses helps us recognize that at least in part these practices are about prediction as an element in punishment.

Harcourt's book develops three critiques of actuarial prediction. First, it is not clear that the use of actuarial prediction methods actually reduces crime. Second, it has social costs that are being ignored. And third, use of actuarial prediction methods distorts our conception of just punishment. Not only are these critiques valid, I believe they can be pushed further. From a theory of punishment point of view, I maintain that Harcourt's critique must apply not only to the use of actuarial prediction methods in punishment practices. It must apply also to clinical prediction methods and to what is often referred to as incapacitative and "preventive" nonpunitive practices.

ACTUARIAL VERSUS CLINICAL

At a very early stage of the book, Harcourt limits his critique to actuarial methods of prediction and distinguishes them from clinical ones:

7. See Federal Sentencing Guidelines: "The Comprehensive Crime Control Act sets forth four purposes of sentencing. . . . A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first time offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation" (Federal Sentencing Commission).

8. Section 40(f)(e)(1) of the bill. The explanatory notes are quite ambiguous, but they reveal that the need to deter a person who was not deterred by past punishment is the decisive consideration.

I label these methods “actuarial” in a very narrow and specific sense. They are actuarial in that they use statistical methods—rather than clinical methods—on large databases of criminal offending rates in order to determine the different levels of offending associated with a group or with one or more group traits and, on the basis of those correlations, to predict the past, the present, or future criminal behavior of a particular person and to administer a criminal justice outcome for that individual. (2007, 16)

In contrast, “clinical” is defined by Harcourt as “a model of prediction or diagnosis that relies primarily on the subjective judgment of experienced decision makers” (269, note 48).

The distinction between clinical and actuarial methods is complicated. Even in what is considered as the prototype of a clinical method—the psychiatric evaluation—there are elements that fit Harcourt’s definition of the actuarial. The psychiatrist may conclude that a person suffers from a certain “disorder,” say “antisocial disorder,” and is therefore dangerous because the statistical offending potential of people with such disorders is higher than average. If a psychiatrist attributes dangerousness to a prisoner because he or she does not “take responsibility” or empathizes with the victim (say, because this prisoner maintains his or her innocence), this is because it is believed or proved statistically that such prisoners are more likely to reoffend. Often the clinical evaluation is a way to collect data that have statistical meaning on the person evaluated. These data, for example, marital status, education, criminal history in the family, drug use, and employment history frequently correlate with categories like race, ethnicity, gender, or class, which Harcourt believes to be irrelevant for the likelihood of apprehension or the severity of punishment. It is clear, then, that since clinical methods of prediction are often based on probabilities, they possess the same disadvantages of what Harcourt calls “actuarial” methods, including prejudicing disadvantaged groups and the deviation from the principle of punishing for past rather than future behavior.

What is the reason for insisting on this very problematic distinction, when his critique is perfectly valid without it? It is clear that Harcourt is concerned not to stretch his critique to the point of attacking almost every possible decision making in the criminal justice system. In his own words:

I use the term *actuarial* in this narrow and limited sense so as not to include many other criminal justice outcomes that are also based on probabilities. The truth is, most criminal justice determinations rest on probabilistic reasoning. The jury’s verdict at trial, for instance, is nothing more than a probabilistic determination of prior fact. So is a police officer’s determination whether there is sufficient cause to search or arrest a suspect; a judge’s decision whether a suspect was coerced to confess

or even a forensic laboratory's conclusion regarding a DNA match—or DNA exoneration. In all these cases, the decision maker renders a factual finding using some legal standard—"beyond a reasonable doubt," "probable cause," "a preponderance of the evidence," or "clear and convincing evidence"—that essentially translates a probability into a legal conclusion. . . . I reserve the term *actuarial*, then, for the narrower set of criminal justice determinations that do not rest simply on probabilities, but on statistical correlations between group traits and group criminal offending rates. There is absolutely no way to avoid using probabilities in the larger category of criminal justice determinations. (17–18)

Harcourt is right to be concerned about such broadening of his critique. Given our state of epistemological uncertainty, probability-based decision making is necessary. However, the best way to avoid the problem of overbroadening the critique is not by excluding the clinical from its realm, but rather, as Harcourt clarifies in his response, by limiting the critique to judgments that depend on group offending differentials—be they based on actuarial or clinical methods.

Despite "the rise of the actuarial paradigm" (39–107), which is accurately and vividly described in the book, clinical evaluations still play a major role in the criminal justice system. Although clinical methods have lost their hegemony and the academic view that actuarial assessments are superior has gained ground, the clinicians are not out of the picture. In fact, the more common view today is that the best way to assess dangerousness is to combine clinical evaluation with actuarial methods.⁹ My own sentiment is that the use of clinical methods is at least as offensive as the use of actuarial ones, and in some senses perhaps more so. Having one's characteristics arrayed onto tables and charts is not necessarily preferable to undergoing clinical examination, with clinical criminologists and psychiatrists analyzing one's soul. Given this state of affairs, and the fact that his critiques could easily

9. In his response to this essay, Harcourt (2008, in this issue) agrees that the same critiques could apply to clinical prediction methods, but explains his focus on actuarial methods by his intention to "engage the very strongest arguments for prediction" (278) and the assertion that "there is a general perception today in the United States that actuarial instruments are far more accurate and useful than clinical predictions" (p. 278). It is important to note, however, that some of the commonly used prediction instruments have major clinical components: The Psychopathy Checklist-Revised (PCLR) (Hare 2003; Hare et al. 2000); The HCR-20 (Douglas and Weir 2006); and The Sexual Violence Risk (SVR-20) (Boer et al. 1997). The HCR-20 even takes its name from the combination of actuarial and clinical methods it uses (Historical, Clinical, Risk Management). Outside the United States, as Harcourt (2008) notes regarding Canada, the clinical is still heavily relied upon. In Israel, both the Parole Law (2001) and the Protection of the Public from Sex Offenders Law (2006) prescribe dangerousness assessments that include major clinical elements.

apply to “the clinical,” Harcourt would have done better to state that his pointed criticisms go to prediction in general—clinical and actuarial.¹⁰

It is worth noting that Harcourt’s explanation of the turn to actuarial methods of prediction in terms of “the desire to know the criminal” (174–80) and “the urge to categorize” (180–83) is at least as applicable to clinical methods as to actuarial ones. Although his name is hardly mentioned throughout the book, at least the sixth chapter is clearly influenced by the work of Michel Foucault. In *Discipline and Punish: The Birth of Prison* (1976), Foucault argues that the genealogy of prison and punishment is also a genealogy of disciplinary power and of the subject. The move was from public, corporal, brutal punishment to an individualized “humane” disciplinary one. The modern carceral system operates by training the body with an arsenal of coercive techniques. These techniques include comparisons, measurements, and classifications, and they correspond to the development of the sciences of man—psychology, psychiatry, sociology, criminology, economy—that has turned the individual into an object of knowledge, and thus to a subject. “The modern soul,” says Foucault, “is the effect and instrument of a political anatomy” (29–30). In punishment, it is the turn from judging the *offender’s act* to disciplining the *delinquent’s character*.

Harcourt uses phrases such as “the will to know the criminal” (2007, 174), “the desire to place human behavior on a more scientific level” (174), “the impulse to dissect, categorize and predict” (180), and “the urge to categorize—to put people in the right box” (180), which are blatantly Foucaultian. Harcourt is well versed in the work of Foucault. In *Illusions of Order: The False Promise of Broken Windows Policing* (2001), he used Foucault to launch a brilliant critique of broken windows policing, which constitutes the category of the “disorderly” (127–59). Foucault, who was so present in Harcourt’s first book, lies only beneath the surface in *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007). It seems to me that a more explicit engagement with Foucault would have made it difficult to leave aside the faults of “the clinical.”¹¹

10. In the last part of the book, when Harcourt describes the virtues of randomization, he recognizes that clinical prediction is no better than the actuarial: “Clinical judgment is merely the human, intuitive counterpart to the actuarial. It is simply the less rigorous version of categorization—the hunch rather than the regression. We should not return to the clinical” (2007, 237). I am in complete agreement with these words. But if it is so, why was it so important to make the distinction in the first place?

11. Indeed “the clinical” was one of Foucault’s greatest preoccupations, not only in *Discipline and Punish: The Birth of Prison*, (1976) but also in his earlier works (1965, 1975). In his later works Foucault develops the concept of *biopower*, which includes both the *disciplines* and *biopolitics*. This distinction between the two is somewhat parallel to the clinical-actuarial distinction. Foucault insists, however, that the two poles are linked together by a whole intermediary cluster of relations (1998). In writings and lectures published later it becomes clearer that biopower centers on controlling populations in particular through the use of statistics and probabilities and by the apparatuses of security (Foucault 2003, 1991).

WHAT'S WRONG WITH INCAPACITATION?

Harcourt maintains that actuarial prediction methods have displaced earlier conceptions of just punishment:

Today, the criminal sentence is related, primarily, to prior criminal history as a proxy to future offending. . . . These actuarial instruments allow for a level determinacy that cannot be matched by retribution, deterrence theory, or the harm principle. The prediction of future dangerousness has begun to colonize our theories of punishment. (Harcourt 2007, 188)

I agree with Harcourt that the more we take prediction of dangerousness into consideration, the more we deviate from classical justifications of punishment like retribution and deterrence. However, this is a negative development only if we do not believe that incapacitation is a legitimate purpose of punishment.

An important objection Harcourt raises to actuarial prediction is actually a good critique of incapacitation, namely that it may cause a ratchet effect on the profiled populations. Notice, though, that Harcourt assumes that prediction actually works. But if it does in fact work, and if we can predict who is likely to reoffend, is it not legitimate to put them away for a longer period of time? Don't we need more robust reasons to be opposed to selective incapacitation?

In my opinion, there are at least two larger objections to incapacitation as a purpose of punishment. The first is that under the prediction/incapacitation model we do not punish people for wrongs they did, but we make them suffer for possessing certain traits or belonging to certain groups. This is wrong from a moral point of view. If we would like to incapacitate dangerous people regardless of what they did, why wait until they do anything? Why not gauge the entire population for dangerousness? If incapacitation becomes a major justification for punishment, we should consider in the sentencing phase not only criminal records but also predictors such as employment history, age, and family situation. But increasing the punishment of the unemployed, the young, or those who grew up in a single-parent family contradicts our moral intuitions and beliefs (Robinson 2001, 1439–440).

The second problem with incapacitation as a theory of punishment is that it is a reflection of the state's shirking its responsibility to deal with the causes of crime. The massive increase in prison population in recent years is largely due to the turn to incapacitation expressed in the use of criminal record as a major factor in sentencing guidelines, mandatory minimums, "three strikes and you're out" laws, etc. These policies, and dangerousness assessments among them, are a reflection of the fact that we have given up on trying to reduce crime by investing in job opportunities, education, assistance to immigrants, drug rehabilitation programs, reentry programs, and the like. We have also given up on punitive measures that keep the offender in the community. Instead we approach the problem of crime largely by

putting those we call “dangerous” behind bars. In order to become evermore efficient, we develop actuarial methods to determine who should be exiled to prison and for how long.¹²

Again, as is the case with limiting the critique to “the actuarial,” it seems that the reason Harcourt does not adopt a harder stance against incapacitation is that it would take him further than he desires. On the one hand, he suggests excluding any predictive element from punishment. On the other hand, he does not push these further arguments against incapacitation.

In one powerful passage Harcourt states his opposition to the use of actuarial prediction as follows:

The criminal law is by no means a neutral set of rules. It is a moral and political set of rules that codifies social norms, ethical values, political preferences, and class hierarchies. The use of actuarial methods serves only to accentuate the ideological dimensions of the criminal law. It hardens the purported race, class, and power relations between certain offenses and certain groups. It exacerbates any correlation, reinforcing the public perception that certain groups are more prone to crime than others. In this sense it polarizes social and political divisions, rather than defusing them. (2007, 190–91)

The passage ends, however, with: “Again, this is perhaps acceptable if we are dealing with child molesters, terrorists, and serial killers. But the criminal law is by no means limited to these heinous and egregious crimes” (191).

This possible exception for “heinous and egregious crimes” is theoretically questionable. If we insist on our theory of punishment (and Harcourt seems to be troubled by it, as he devotes a full chapter to the distortion of our conceptions of just punishment), the severity of the crime should not matter.¹³ Furthermore, just as the criminal law is not a neutral set of rules, what counts as heinous and egregious is also ideologically loaded. Drug

12. It is therefore not surprising that in Israel, just like in the United States, an increase in the use of actuarial methods and prediction is observed at around the same time as lengthening imprisonments and expanding prison populations. In the United States, the exceptional rise in incarceration, described in *Illusions of Order: The False Promise of Broken Windows Policing* (Harcourt 2001, 4), occurred at the same period as the exceptional rise in the use of actuarial prediction methods, described in *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007). In Israel, as noted above, prediction methods have become prevalent in recent years. In the same years, there has been a radical growth in incarceration. In a matter of one decade, the total number of prisoners in Israel has risen from 9,094 in 1996 to 16,157 in 2006. Even if we disregard prisoners incarcerated for state security offenses, we are still looking at a growth of 44 percent in the number of “regular” criminal prisoners (from 7,295 to 10,491). The data are taken from the Israeli Prison Service www.ips.gov.il (accessed September 28, 2007).

13. In his reply to this comment, Harcourt (2008, in this issue) explains that he is willing to make the exception for heinous crimes because “the ratchet effect” critique is a cost-benefit analysis and the costs here are greater. This is, to a limited extent, a valid response as we are all willing to make sacrifices for the sake of preventing such crimes. However, the social costs of the ratchet effect are only one of Harcourt’s three main critiques. The other two seem not to be based on a cost-benefit analysis.

trafficking, drunk driving, sexual assaults, public corruption, and domestic violence are just a few examples of offenses that are also currently commonly regarded as heinous and egregious enough to justify waging a “war” against them. So the exception can easily become a broad one. Harcourt’s important critiques apply to the use of prediction in such severe offenses. It is important that Harcourt’s conclusions and policy proposals also be applied to such offenses because it is exactly there that the urge to predict and prevent is most compelling, and prejudice against profiled groups is most harmful.

PUNISHMENT VERSUS PREVENTION

Finally, if we base our opposition to the use of prediction methods on a more general objection to incapacitation, a question arises as to the legitimacy of other practices that are not considered punitive but rather “regulatory” or “preventive.” These practices have also become increasingly more pervasive, and they include a wide variety of measures such as pretrial preventive detention, civil commitment, offender registration and community notification, laws limiting the liberty of discharged sex offenders, and various kinds of preventive policing.

Harcourt proposes a distinction between matters in which “the criminal justice goal originally called for the use of prediction,” and matters in which “the criminal justice standard gravitated toward prediction” (224–25). In the first type of matters, “when the criminal justice standard itself . . . is originally and entirely focused on the prediction of criminal offending, there can be no distortion of our conception of punishment” (222).

This distinction is problematic on two levels. First, the line between “prediction at the outset” and “gravitation toward prediction” is sometimes hard to detect. For example, throughout the book, Harcourt treats the parole decision as part of punishment and the use of actuarial methods to predict dangerousness in this context as distortion. But one may argue that the whole point of the parole decision is the prediction of future dangerousness. And what about, for example, granting furloughs from prison to sex offenders? Does this decision belong to the first or the second category? Second, it is unclear why the original intent is the determinative factor. It may well be that the conception of punishment has changed through the years, and some practices gravitated toward prediction only recently. This does not necessarily mean that the change has been for the worse. The reverse side is also problematic: the fact that a practice is purely predictive in nature, and has always been so, does not mean that it is morally acceptable.

This brings me to my final remark. Harcourt’s critique of the use of prediction methods in the criminal justice system is extremely strong. The objections he makes regarding sentencing and policing can apply with equal force to other practices. Carol Steiker (1998) has justly critiqued the legal

discourse in the United States for being focused on the question whether a certain measure is punitive or preventive, an important question in the United States because punitive sanctions are arguably subject to the protections of the Bill of Rights. As Steiker notes, merely classifying something as “preventive” should not be determinative; we must still consider what are the limits of the preventive state. In trying to answer this thorny question, Harcourt’s book is invaluable, as it points out some of the important, often overlooked detriments of prediction-based prevention.

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