

BOOK REVIEWS

INCIVILITIES: REGULATING OFFENSIVE BEHAVIOUR. By A.P. Simester and Andrew von Hirsch (eds.). Oxford and Portland: Hart Publishing, 2006. Pp. 293. \$78.00 (cloth).

The ten papers which make up this collection began life as contributions to two colloquia held in Cambridge in 2002 and 2003 to explore the new and fast developing field of legal regulation applied to “offensive” or, as it has come to be more familiarly known in the UK, “anti-social” behavior. The published volume aspires to bring a deeper conceptual analysis to a phenomenon close to the core of New Labour political philosophy and much of its public policymaking but which, in pioneering new forms of regulation, intervention, and enforcement, has threatened to fundamentally alter the nature of the “power to criminalize” in British criminal justice. Indeed, at times, in utterances of the former Prime Minister, precisely such an ambition appears to have been envisaged. What the various papers share is a rigorous critical analysis which they bring to bear, from their respective disciplines—legal philosophy, criminology and sociology—upon the new modes, rationales and practices of behavior regulation.

That said, however, claims about the collection’s originality may be a little presumptuous. The fast moving world of anti-social behavior management and, not least, the significant degree of “mission creep” which this field of governance has experienced, has been paralleled by a burgeoning academic critique, especially in and around criminology, though perhaps less so in the more refined atmospheres of legal philosophy. As has already been argued,

A substantial section of the British legal establishment voiced their collective concerns about the Government’s new security Bill, [but] rather fewer commentators have felt equally moved to criticise the growing ASB

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enforcement machine now taking shape. No doubt the symbolic significance of the threat of terrorism and the measures deemed necessary to resist it far exceed the risks posed by the more mundane question of ASB, even though countless more people are likely to be affected by the latter compared to the former. Then again, perhaps great legal minds are not fully exercised by minor nuisances. (Peter Squires & Dawn E. Stephen, *Rougher Justice: Anti-Social Behaviour and Young People* 206 (2005))

In the light of such criticism this timely collection, in particular the interdisciplinary approach it fosters, has much to commend it. Even the recognition, addressed in a number of the chapters but most fully developed in Burney's useful overview of the development of offensive behavior regulation in England and Wales, that the public behavior of the poorest has long been subject to varying forms of quasi-legal regulation since well before the middle ages, tends to be overlooked in our modern preoccupation with the novelty of behavior deemed specifically "anti-social" as opposed to simply "against the law." *Plus ça change*, perhaps?

Perhaps it is precisely the editors' ambition to direct some serious academic scrutiny to the apparently mundane details of civic behavior regulation that has dictated the running order of the chapters in the book. Otherwise one might have expected that the final three chapters would have opened the book. These chapters comprise Burney's history, referred to already; Turner's scholarly sociological discussion of the relations between the rise of incivility and the erosion of collective efficacy (social capital) in fragmented communities; and Bottoms's detailed analysis of the British Crime Survey data on perceptions of anti-social behavior which is employed to emphasize a "cumulative effects" conception of ASB. Bottoms then turns to examine the ways in which these problems are understood, giving relatively short shrift to the ubiquitous "broken windows" argument and combining something of the collective efficacy hypothesis with a "signal crimes" perspective in order to draw pertinent conclusions about the need for policies to engage communities in more supportive and sustainable regeneration as opposed to yet more enforcement-driven responses. Bottoms's chapter makes common cause with Turner's emphasis on the symbolic nature of much anti-social offensiveness and the role of popular perceptions in its recent problematization. It is a strong theme on which to end the book, suggesting the need for a wider and more culturally contextualized analysis of these phenomena, beyond the *RESPECT Agenda*, as it were.

Yet rather than begin the book with these contextual, historical, and notably empirical chapters, it opens instead with a number of more abstract philosophical inquiries into the nature of law and the purposes of criminal prohibition. Roberts, developing the “interdisciplinary conversation” which forms the book, confirms, in his opening remarks to the first chapter, that “offensiveness, as the specific target of criminal prohibition, is largely unexplored territory” (1). In the course of a very useful chapter he then charts the separate, but ultimately related, questions that “offensiveness” poses for the distinct disciplines of philosophy, criminology, and jurisprudence, setting up an important debate on Feinberg’s “harm” and “offence” principles which is taken up in a number of the ensuing contributions (Joel Feinberg, *Harm to Others* (1984); *Offense to Others* (1985)). Roberts then concludes his introduction, establishing another important theme echoed, in different ways, throughout the subsequent chapters, that we must assert “the priority of moral principle over political opportunism” (49). The difficult questions must precede the answers and enforcement must be a last resort, he argues.

Duff and Marshall take up this very theme of restraining criminalization in their own chapter. Having thoroughly unpicked contemporary conceptions of “harmfulness” and “offensiveness,” they conclude by advocating, via a very specifically policy-related turn in their commentary, a rejection of the enforcement driven and “morally objectionable” ASBO in favor of a suitably enhanced form of ABC (Acceptable Behavior Contract) by virtue of the latter’s avowedly more contractual foundation. Husak’s chapter adds both international and psychosocial dimensions as it turns to reflect upon the regulation of so-called quality of life offenses, our conceptions of “disgust,” and what we are entitled to expect be done about what offends us. His rejection of what he terms a “disgust realism” provides the basis for his argument about necessary restraint in lawmaking and for alternative means of resolving differences and social conflicts. Concluding this first sequence of papers, von Hirsch and Simester reflect upon a broader culture shift from “two decades ago” (although arguably it is now closer to four) “when there was extensive interest in decriminalisation” (116), to today’s “less tolerant political atmosphere” where governments show a much greater inclination to legislate for incivilities. Their contribution offers a succinct discussion of harmfulness and wrongfulness, including the requirement that advocates of regulation must offer compelling arguments for why the conduct complained of amounts to a

wrong. They consider a number of limiting and mediating conditions upon regulative controls while closing with a brief comment on the discriminatory potential of preemptive or precautionary restrictions imposed upon categories of persons and predicated upon what they *might* do.

The next three contributions to the book explore further dimensions of this “problematic of criminalization.” Hörnle, reflecting a more continental and European perspective on regulation, rooted in notions of “social defense,” explores the basis for establishing, yet equally restraining, the power to criminalize. Her arguments center upon a conception of indispensable human rights which are constitutive of and a precondition for everyone’s reasonable life plans. This is, she acknowledges, still no panacea and will entail conflict and debate, although, for Hörnle, the salient issue is the role of law to protect the public good rather than “interests of personal importance . . . based on personal choices [or] beliefs,” which are not “reasons to extend the scope of the criminal law” (147). Tasioulis, in the following chapter, develops something of this discussion in his commentary on the need to demonstrate that the regulation of alleged harms or offenses be predicated upon some discernible “setback” to legitimate social interests. This is conceived of as a way of restraining the “lamentable propensity” of modern legislatures “to invoke offensiveness as a justification for enacting criminal laws that oppress and further marginalise unpopular minority groups” (170).

These discussions are admirably synthesized, and the course to the final three papers firmly set, by Simester and von Hirsch’s original critique of “two step prohibitions” in legal regulation. The essence of such provisions is that, not unlike police bail conditions, they are relatively quick and easy to apply while establishing an enforcement conditionality, supplemented by more coercive sanctions and streamlined due process against certain specified groups or individuals. The authors clearly have their sights set upon the ASBO and the range of supplementary orders: dispersal orders, curfews, and injunctions which relevant authorities have been encouraged to surround them of late. They succinctly outline nine substantial challenges to such orders which they regard, ultimately, as “undermining the moral authority of the criminal law” (189) before turning directly to critique contemporary ASB management law and practice.

So we come full circle, back to the specifics of ASB policy and practice discussed in the three final chapters referred to at the outset of this review. Perhaps the editors were right, after all, to order the chapters in the way

they have. They have given us an immensely rich and varied text, bringing disparate perspectives to bear upon the hyperactive ASB management industry of our time. Always insightfully critical while opening up many new avenues of inquiry, not everything in the book is quite as original as the contributors sometimes imply, but their commentaries are invariably authoritative and compelling and deserve our full attention.

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AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE. By Bernard E. Harcourt. Chicago: University of Chicago Press, 2007. Pp. viii, 336. \$55.00 (cloth), \$25.00 (paper).

Books about statistics rarely make compelling reading. *Against Prediction* is an exception. Harcourt's impassioned critique of actuarial justice is a page-turner. Beautifully written, engaging, and a model of clarity even when expounding the most technical aspects of statistical modelling, this book tackles with great verve one of the most important developments in contemporary criminal justice—the use of actuarial methods in crime control and criminal law.

The first part of the book is historical: tracing the rise of actuarial techniques within the criminal law in the 1920s and the increase in resort to profiling from the 1960s onwards. In the second part, Harcourt sets out three sweeping criticisms of actuarialism: the false assumption of equal elasticity (or responsiveness) upon which profiling rests, the distorting and potential ratchet effects of targeting profiled populations, and the deleterious impact of actuarialism upon existing conceptions of just punishment. The final section examines the implications of actuarial techniques in particular spheres, not least the targeting by police of racial minority populations and the profiling of terrorist suspects in the war on terror. Harcourt's purpose is to call into question the underlying premises of actuarialism: the validity of the calculus upon which it is based, its claim to efficiency, and its justifiability. Just as his earlier and much applauded book *Illusion of Order* (2001) confronted the claims of the broken-windows theory head on, here Harcourt challenges one of the dominant truths of our time on its own terms. By demonstrating that predictive

techniques do not secure the ends claimed, Harcourt plays—and claims to win—the game of immanent critique. This approach is smart because if successful it has the potential to provide a knockdown argument, unassailable by those who promote actuarialism. But it also has potential costs, to which I turn now.

Although Harcourt amply demonstrates the flaws inherent in the statistical models upon which actuarialism is based and develops sophisticated counter models that suggest the inefficiency of profiling, an empirical study demonstrating these unanticipated effects in practice might have furnished even more persuasive grounds for contestation. Furthermore, in accepting that actuarialism has colonized crime control, *Against Prediction* makes little distinction between policing, penalty, and parole, yet one might argue that different considerations and objections apply pre- and post-trial. Most importantly, by playing the efficiency card, Harcourt concedes too much: for to do so privileges consequentialism without posing the prior question of whether it is here justified. Efficiency is licensed as the master category ahead of moral and political questions of principle. Harcourt argues, “[p]rofiting has become second nature because of our natural tendency to favor economic efficiency” (188). Yet one only has to apply this claim to capital punishment, torture, preventive detention, and other supposed security measures to see that efficiency cannot insulate a policy from normative critique. To call into question the efficiency of an approach is to invite improvements or technical refinements but does not tackle the prior question of whether it is justifiable. If a measure is in principle wrong, efficiency should not count in our arguments because it cannot render legitimate that which is not.

A second major theme in *Against Prediction* is the role of technology in contemporary crime control. Harcourt argues that actuarialism is “deeply troubling because it demonstrates the influence of technical knowledge on our sense of justice. We have become slaves of our technical advances” (32). He presents technology as exogenous and determinative of norms, claiming that prediction instruments “flip on its head the traditional relationship between social science and the legal norm. . . . [T]hey fundamentally redirected our basic notion of how best and most fairly to administer the criminal law” (188). This claim is questionable on at least two counts. First, it appears to assume that legal norms exist independently of, or prior to, sociological knowledge and social scientific understanding. Secondly, it suggests that technology is developed and adopted independently of legal

norms or any larger normative or political framework. Granted technological possibility is important. Without fingerprinting and DNA, forensic science would not have its present place in police investigations and the criminal trial. Yet despite Harcourt's claim that actuarial technology "chose us," we need to consider more critically why we chose this particular technology, what drives this choice, what purposes and whose interests it serves. It remains a moot point whether statistical profiling is better understood as a scientific tool, or the expression and rationalization of penal policies that might otherwise offend our moral sensibilities.

Harcourt's claims of technological takeover rely upon a curious denial of human agency, attention to which requires us to consider other causal factors. The growing dominance of actuarial techniques over proportionate punishment may be seen as symptomatic of a larger shift in political allegiance from classical conceptions of retributive justice to the consequentialist orientations of deterrence and incapacitation. In addition the demand to avert risk is fed by the growth of penal populism with its attendant calls for public protection, bolstered by media-fed perceptions of the risks of sexual predation, violent crime, and terrorist attack. These contribute to a growing sense that "presumption of innocence," "proof beyond reasonable doubt," and the requirement of proportionality in punishment are legal luxuries ill-suited to present perils. Finally, averting disaster has become a political imperative for governments anxious to safeguard their reputation against the adverse fallout that inevitably occurs if harms eventuate. These profoundly political factors fit ill with the story of technological takeover and suggest a more complex relationship between technological, political and legal developments than Harcourt allows.

Rightly disturbed by the damage done to our conceptions of just punishment by actuarialism, Harcourt makes a radical argument instead for randomization. Randomization here does not mean policing by sweepstake or parole by lottery, but "eliminating the effects of prediction of future dangerousness" (38). Yet it is unclear why Harcourt's promotion of randomization is to be preferred over equal treatment, insistence on which is a more powerfully limiting condition. Equal treatment is the well-established principle that all should be treated alike before the law and that categorical belonging by class, ethnic group, sex, age, or other demographic should not result in different treatment for that reason alone. By contrast advocating randomization may just pose more problems than it

aspires to solve. This said, one is tempted to conclude that Harcourt deploys randomization as a deliberate provocation. If, as is likely, it attracts academic attention or even incites rebuttals, it will have served the vital purpose of stimulating a much needed debate about the injustices of actuarial justice.

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