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THE PREDICTION OF CRIMINAL VIOLENCE. Edited by *Fernand N. Dutile* and *Cleon H. Foust.* Springfield, Ill.: Charles C. Thomas. 1987. Pp. xviii, 238. $34.75.

The Prediction of Criminal Violence reports the papers and discussions that took place at the Multi-Disciplinary Conference on the Prediction of Criminal Violence, held in Indianapolis, Indiana on April 26 and 27, 1985. The Conference, organized by the Indiana Lawyers Commission, Inc. and the Research and Information Consortium of the Indiana Criminal Justice Institute, and chaired by Professor Norval Morris, brought together legal scholars, behavioral scientists, and criminal justice system practitioners to consider various issues concerning the prediction of criminal violence. The proceedings make fascinating and disturbing reading.

When I sat down to read this book for the first time, I was in the middle of revising an essay considering the effects of unconscious racism on the criminal justice system and on criminal procedure decisions. The essay's immediate impetus was the Supreme Court's recent decision in *McCleskey v. Kemp,*[1] in which the Court upheld the Georgia death penalty against an equal protection challenge based on a sophisticated statistical study. That study revealed large and significant differences in the imposition of the death penalty between white victim and black victim cases, and smaller but still significant differences between black defendant and white defendant cases. As I read this book, my mind still focused on unconscious racism, two thoughts kept recurring: first, that the standards governing the reliability required of scientific evidence that will be used to justify a person's further incarceration or execution are astonishingly different from the standards for evidence that will be used to prove racial discrimination in the sentencing process; and second, that decisions to predict criminal violence and to use those predictions to deprive individuals of liberty should be considered in light of their racially disparate impact, a consideration treated as insignificant by this Conference.

Initially, I rejected these reactions as peripheral to the focus of this

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1. 107 S. Ct. 1756 (1987).

Conference, as the product of my own intellectual and political obsessions. But as I contemplated the two issues that the participants described as dominant — the accuracy of predictions of criminal violence and the legitimacy of various uses of those predictions — I realized (with some relief, given my commitment to write this review) that my first reaction related to the accuracy question and my second to the legitimacy debate. After rereading the various contributions, I was struck by the extent to which the *definition* of the accuracy question and the determination of *which* legitimacy challenges to include are highly political questions. Idiosyncratic responses are to be expected; the book contains some very interesting ones. They are also fruitful, though the book would have been better if the legitimating function of the conference agenda had been explicitly discussed,[2] and the range of political interests represented by the speakers broadened.

In one sense, the complaints of insufficient attention to premises and inadequate representation of relevant viewpoints can be leveled at almost any symposium. Any agenda, however broad, can always be self-consciously questioned. Whatever the number of speakers, more might be invited to address other perspectives. In some ways, this book reflects a commendable consideration of both agenda and speakers. Both the novice and the expert are accommodated: The first speaker, Henry Steadman, gave an overview of what prediction is and how it might be criticized, thus rendering the subsequent papers accessible to those previously unfamiliar with the general topic yet quite comprehensive footnotes are provided to aid the reader with a research interest in one of the subtopics. The speakers included representatives from each profession with a stake in the prediction of criminal violence. As a result, the selections range from purely theoretical discussions about the retributive and utilitarian purposes of punishment, to technical explanations of the proper interpretation of actuarial and clinical data, to political arguments about expenditures for alternatives to incarceration.

So far, so good. We could quibble about whether the hardline crime control advocates have been adequately represented, particularly in the separate section concerning the prediction of criminal violence for juveniles, but certainly the book cannot be criticized as being narrow or one-sided. The problem is that there are more than two sides, and more to consider than half-a-dozen professions. What about the nonprofessional *far* side: the pretrial detainee at the bail hearing, the defendant at sentencing, the prisoner before the parole board? Although no consensus is reached in this book, a majority

2. Dean Singer did begin his talk by noting that the definition of "dangerousness" is highly political, and that nonviolent white-collar offenders, such as toxic waste dumpers and corrupt politicians, may be more dangerous than "violent" criminals. However, he then chose to "avoid that volatile issue." P. 56.

view is described in the conference summary and recapitulation. But any determination of a majority view depends upon to whom the franchise is granted and who is allowed to address the enfranchised. It may be obvious that the subjects of criminal violence predictions cannot be speakers at a conference or enfranchised participants in the political process, but it is not obvious why the issues could not be considered from their perspective. Their perspective would seem to be important to decisionmakers for both fairness and efficiency reasons.

At this point a rational decisionmaker would have to take some notice of the characteristics of these subjects, one of which is their racial identity. Although black Americans make up about 12% of our population, they constitute 41% of the 275,000 people in local jails awaiting trial or serving short terms there; 45% of the 547,000 inmates of state and federal prisons; and 30% of the 2.4 million people currently on parole or probation. One would imagine that the racially disparate impact of any criminal justice system practice would matter to many of these subjects of criminal violence prediction — and should, I submit, matter to policymakers. It seems to me that even a feeble attempt to consider possible responses of the black detainee, prisoner, parolee, or probationer to the positions taken in this book would shed a different — and darker — light on both the accuracy and legitimacy issues; hence the following feeble attempt.[3]

As a logical matter, the uninitiated reader might expect the legitimacy of predictions of criminal violence to be addressed before consideration of their accuracy. After reading Henry Steadman's review of the accuracy literature, however, the same reader might well wonder why the participants bothered to come to the Conference at all. In studies of clinical prediction of violence in the criminal justice system (usually by psychiatrists), the *best* any clinician has done is to make two incorrect predictions for every correct prediction. Although actuarial predictions (those based on statistical models) are almost always better than clinical predictions, the *best* actuarial predictions improve upon chance probabilities only to a trivial extent. In most cases, predictions from the base rate were not improved upon.

The advocates of prediction responded to this embarrassing picture in two ways. One was to turn to the prospects and techniques for improving predictive accuracy. For example, Stephen Gottfredson, Executive Director of the Maryland Criminal Justice Coordinating Council, expressed enthusiasm over the possibility of using situational factors to predict violence; and Seymour Halleck, of the University of North Carolina Medical School, stressed the importance of providing

3. I do not pretend to have any relevant experience, expertise, or knowledge, but I suppose that even armchair speculation is better than treating the subjects of violence prediction as unthinking objects. Even if my speculations are quite mistaken, I hope they illustrate the desirability of consulting someone with more insight into the subjects' perspectives.

observations rather than conclusions, perhaps incorporating actuarial data into clinical predictions. This kind of response is interesting and perhaps potentially useful, but certainly does nothing to justify using predictions now.

The second response, stressed by Gottfredson and relied upon by Marc Miller, Attorney-Advisor for the Office of Legal Counsel of the Justice Department, was to contrast actuarial predictions with intuitive judgments. Because judges and parole boards *do* predict and because their unaided predictions are even less accurate than chance, actuarial predictions are better than the current system of implicit and ignorant guesses. Gottfredson acknowledged one problem with this argument: there is no evidence that implementing an empirically based predictive system serves to reduce the prevalence of violent crimes. He attributed this failure to human error and to the alteration of predictors based on policy considerations. (As a later commentator, Gerome Miller from the National Center of Institutional Alternatives, pointed out, this could also be explained by the criminogenic effect of incarceration.) Then why predict? Gottfredson answers that prediction increases the *reliability* of criminal justice decisions, thus advancing equity. But, as a member of the audience asked, should not "crime controllers" bear the burden of proving that implementing an actuarially based prediction system will be more effective in reducing crime than would be a determinative sentencing system — which is also highly reliable? Norval Morris, as discussion leader, answered that less harm would be done by frankly recognizing the "realities" of prediction and attempting "to identify when prediction should be used to allocate deserved punishment" (p. 68).

Why is it "reality" that prediction will persist but not that intuitive prediction will persist? One can certainly *imagine* formally removing violence prediction as a factor from pretrial detention, sentencing, and parole decisions just as one can *imagine* replacing intuitive predictions with actuarial tables. Is it politics that limits the imagination here? Does the public demand prediction in all of these decisions? What supposedly justifies inaccurate prediction then is that it is an improvement over politically foreseeable alternatives. But if such "realities" are claimed to resolve the accuracy issue, further "realities" also must be considered.

Barefoot v. Estelle[4] comes to mind. In *Barefoot,* the Supreme Court was confronted with conclusive empirical evidence demonstrating that psychiatrists cannot predict violent behavior accurately, with disclaimers by both the American Psychiatric Association and the American Psychological Association of professional competence to predict violent behavior, *and* with egregious behavior on the part of the two Texas psychiatrists proffered by the state as experts, Grigson

4. 463 U.S. 880 (1983).

("Dr. Death") and Holbrook. Yet the Court held evidence based upon clinical predictions of future dangerousness admissible as relevant to the ultimate issue of the imposition of the death penalty. I would suppose that the literate death row inmate would note the contrast between this evidence and the sophisticated empirical study proffered and rejected in *McCleskey v. Kemp;* he might be struck by the thought that the Court affords substantially more deference to professionally decried testimony increasing the likelihood of a death sentence, than it does to professionally acclaimed studies offered for the purpose of showing death sentences are influenced by improper factors. At least, that thought certainly strikes *me.* True, there is a difference between deeming evidence admissible and deeming it sufficient proof of the disputed proposition. But the professional evaluation of these two kinds of evidence takes into account these differences. There is also an argument for deference to state choices when causal relationships are uncertain. But is there not an equally compelling argument for requiring the state to meet strict standards when lives are at stake? If political "realities" count in resolving accuracy questions, then two further "realities" must be considered: inculpatory evidence is more welcome than exculpatory evidence, and legitimating conclusions are awarded more weight than delegitimating ones.[5] Surely experts ought to consider the risk that their data and conclusions may not be used in a neutral fashion. When viewed in the abstract, accuracy objections to immediate implementation of violence predictions seem unanswerable; taking note of political "realities" only makes the objections stronger.

The proffered justifications for implementing a system of "scientific" predictions that are no more successful than chance were not debated or explored by other speakers. Nor did anyone challenge Gottfredson's assertion that lack of accuracy is not devastating to scientific prediction because scientific prediction increases reliability and, hence, equity. Perhaps this is because everyone else was in a hurry to get to the legitimacy arguments. Dean Singer argued that whether or not prediction is accurate, it does not belong in the criminal justice system. He waved the retribution flag, arguing that the criminal law is about blame for past wrongdoing and should not be tainted by utilitarian concerns about future behavior. (Singer's retributive theory is not limited to punishment proportionate to the forbidden act. He would consider a variety of facts about the offense and the offender, but only in so far as those facts affect culpability.) Miller disagreed, arguing that, if properly constrained (for example, to "customary" uses of prediction rather than "extraordinary" ones), predictions of dangerousness are a permissible factor in sentencing decisions. Because it is not

5. *See* McCleskey v. Kemp, 753 F.2d 877, 899 (1985), *aff'd.*, 107 S. Ct. 1756 (1987) (citing part of the disputed study as demonstrating that much irrationality has been removed from death sentences while discounting the study's conclusions about racial disparities).

possible to say exactly what punishment is deserved for a particular offense, fairness requires only that the criminal act and criminal record be used to set limits on possible sentencing decisions; "[w]ithin the resulting ranges of discretionary justice, predictions of dangerousness can properly be applied to distinguish among members of a group, all of whom are receiving their retributive due — their just deserts" (p. 48). Several of the contributors seemed to accept this approach or similarly "eclectic" justifications for using predictions of dangerousness as part of the pretrial detention, sentencing, and parole decisions: Individual justice was perceived as a concern and a constraint, but it could be balanced against community welfare.

Other speakers avoided this retribution/crime control debate by focusing on alternatives to incarceration that would be more desirable for both society and the individual. As these contributors pointed out, one can use the statistical and clinical data for purposes other than determining sentence length; the information can be used to determine bail conditions, the intensity of probation supervision, the design of a rehabilitation plan, or the identification of target groups for social programs. These participants transformed the legitimacy question from an equity issue into another opportunity for debating what is humane and effective treatment of offenders.

This is an appropriate transformation, at least at some point. To assume that the only rational use of clinical and statistical predictions of violence is to determine whom to incapacitate for how long is a big assumption, and it needs to be challenged. But because devising incapacitation strategies has been the purpose behind violence prediction efforts to date, it seems to me that it would have been useful to explore further the legitimacy of using such predictions as a factor in decisions about incarceration. Certainly Singer's position is the most basic objection. I suppose the typical reader has already decided how she feels about the purposes of the criminal law and therefore will either agree or disagree that blame and deserts are the only proper considerations in meting out punishment. But for the reader who does not agree with Singer, yet is not fully persuaded by Miller and Morris — and maybe for the inmate who would not respond to fairness questions in such theoretical terms — there are some intermediate positions to consider. Even if there is a range of punishment for each offense that might, in the abstract, seem just, just punishment may be relative and therefore not susceptible to abstract evaluation. My own experience with criminal defendants and inmates is that most of their complaints focus on disparities between their own treatment and that of others considered similarly blameworthy, rather than on the absolute harshness of the term imposed upon them. To the subject of a detention, sentencing, or parole decision, the reason why the upper or lower bound of the discretionary range was chosen may be crucial in evaluating its fairness; defendants often object to the lighter sentences received by informers.

Moreover, the aggregate effects of using particular criteria may also affect the subjects' perceptions of fairness; inmates frequently complain that rich defendants get lighter sentences and nicer prisons. In my view these additional fairness considerations are valid and should not be denigrated. In other contexts, we certainly would attend to them, whether or not we would view them as dispositive, for example, in the discipline of siblings, or the grading of students.[6]

This brings us to race. If there is any criterion that should not be used, if there is any disparate impact that is disturbing, this is it. The subjects would care. Any criminal justice system decisionmaker should at least think about racial equity, given the composition of offender populations. Yet this volume contains no affirmative arguments that race is worth worrying about. Instead, the reader is informed in a backhanded way that there are racially disparate impacts in criminal prediction. There is, perhaps, even some quiet consideration of race as a predictor. Miller noted that there may be racially disparate impacts of predicting violence, but quickly assured the reader that such impacts are not the result of bias, or if they are, that those impacts stem from biases in other parts of the criminal justice system. The pretrial detention paper noted that race predicts whether crimes will be committed while the defendant is on bail and said that this raises "serious questions." The participants who discussed violent crime prediction for juveniles also noted correlations with race, but did not discuss implications. Gottfredson mentioned policy considerations as limiting the accuracy of predictions by precluding the use of some variables; following the footnote trail reveals that the allusion is to the elimination of race from the federal parole guidelines. Finally, the psychiatrist's contribution notes an advantage of clinical prediction over actuarial prediction: the clinician can "launder" out race and other disturbing variables so that they need not be discussed. Here the footnote refers to Monahan's *Predicting Violent Behavior: An Assessment of Clinical Techniques.*[7] If the reader consults Monahan to learn what "laundering" means, it turns out that Monahan advises clinicians to incorporate actuarial data into their predictions, that he educates clinicians to the strong correlation between race and recidivist violence, and that he describes the clinicians' opportunity to conceal the role of some actuarial variables as desirable given judicial feelings about explicit consideration of these statistical relationships. He does, however, caution the clinician to consider whether using such predictors as race violates the clinician's personal ethics.[8]

6. We do not find it silly to discuss whether effort should be a factor in grading. We may question whether, if we do count effort, we will largely reward apple polishers.

7. P. 74. J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981).

8. J. MONAHAN, *supra* note 7, at 32-36.

There is enough uncertainty here to raise the specter of equal protection violations. Certainly, if a court relied upon a clinical prediction from a clinician who factored race into his prediction but did not disclose that factor, an equal protection violation would have occurred. The application of the purposeful discrimination requirement to actuarial predictions is less clear. If a statistician first checks for a correlation between race and recidivism, finds it, and then eliminates race as a predictor on *both* ethical and mathematical grounds due to the high degree of overlap with other variables (as did the designers of the federal parole guidelines), is this purposeful discrimination? It certainly is more than disparate impact, but I suppose how much more depends on *exactly* what was in the statistician's mind.

Whether or not equal protection constraints have been violated (or will be violated) by various predictions of violence from the criminal justice system, it seems unlikely that such violations will often — if ever — be proved. But certainly this does not end the matter. The likelihood of at least occasional covert violations should be one source of caution about violence prediction.

Even more damning, to my mind, is the matter of pervasive disparate effect. Of course, the criminal justice system as a whole has disparate impact on minorities. But in some measure this is justified (or perhaps only legitimated, given the prevalence of undetected and underprosecuted white white-collar criminals[9]) by differential blameworthiness; at least in part, more minorities go to prison because more minorities are detected committing crimes. Other aspects of the criminal justice system's disparate impact are not defensible at all, but are well entrenched and very difficult to eliminate, the most notable being covertly biased exercises of discretion. Prison sentences are not about to be eliminated; neither is discretion. But here we have a proposed new feature, known or strongly suspected to have disproportionately severe effects on minorities, a feature that is not justified by blameworthiness principles *and* not demonstrated actually to reduce criterion offenses. What would make us embrace it, if not a very heavy dose of selective indifference[10] to the concerns of the racially different? I cannot see that *reliable* decisionmaking, as touted by Gottfredson, is worth this cost.

What I can or cannot see may be irrelevant, but it does seem to me that the subjects of these decisions might well have the same reaction, and that such reactions ought to be explored. This is not a novel idea; Professor John Coffee sought to arouse interest in this issue ten years

9. *See generally* C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 41-47 (1978).

10. *See* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 7-8 (1976).

ago.[11]

One might castigate the conference planners at this point. I suppose what I have said thus far is already implicit castigation. Yet I think the broader question this book illuminates is more important: If *experts,* informed about disparate impact, could virtually ignore racial equity issues, can we really expect legislators and administrators to be more sensitive? I come back to *McCleskey.* After concluding that the disparate racial impact did not prove purposeful discrimination (sophisticated statistical analyses notwithstanding), and after raising slippery slope concerns, Justice Powell noted an additional reason not to respond to racial disparities in capital sentencing: "McCleskey's arguments are best presented to the legislative bodies."[12] Really? Only if we want such arguments ignored.

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11. Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission,* 66 GEO. L.J. 975 (1978).

12. McCleskey v. Kemp, 107 S. Ct. 1756, 1781 (1987).