THE RISK–JUSTICE PARADOX IN CONTEMPORARY CRIMINAL LAW: DESISTANCE, STIGMATISATION, AND THE ANTI-STIGMATISATION DOCTRINE OF CRIMINAL PROFILING

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Abstract: This article examines the structural tension between risk-oriented social control and the normative foundations of the rule of law a tension theorised here as the Risk–Justice Paradox. Drawing on Radbruch's formula, Beck's risk society thesis, and Feeley and Simon's new penology, the article argues that the progressive shift from ex post criminal liability to ex ante risk governance threatens the principles of legality, equality, and proportionality. The article then analyses criminal profiling as a multi-stage mechanism of stigmatisation that structurally undermines desistance the process of identity-based transformation through which individuals disengage from crime, as theorised by Shadd Maruna. Attention is paid to the particular acuity of these dynamics in wartime societies, where emergency security measures carry heightened risks of normalised surveillance and permanent labelling. The article proposes an anti-stigmatisation doctrine of profiling, articulated through five minimum conditions of admissibility, grounded in ECHR standards and Ukraine's European integration obligations.

Keywords: Risk–Justice Paradox; desistance; stigmatisation; criminal profiling; Radbruch's formula; criminal liability; resocialisation; narrative criminology; affective criminalisation.

1. Methodological Preamble: Framing the Risk–Justice Paradox

The question of whether a person who has committed a crime can genuinely "become different" is not merely psychological or criminological in character: it is, above all, a legal question. The answer to it determines the purpose of punishment, the architecture of criminal liability, and the substantive meaning of resocialisation. At the same time, the rise of risk-oriented social control within contemporary legal systems has generated a theoretical paradox that is increasingly described as the Risk–Justice Paradox: the more intensively a state seeks to manage social risks through legal mechanisms, the more acutely it risks eroding the foundational principles of the rule of law legality, equality, and proportionality (Beck, 1992, pp. 19–34; Radbruch, 1946, pp. 105–107). Criminal profiling sits at the epicentre of this contradiction, functioning simultaneously as a risk-management instrument and as a potential mechanism of stigmatisation (Kaliuha, 2020, pp. 110–115; Tuliakov, 2025b, pp. 234–240).

The Risk–Justice Paradox is the logical continuation of the debate inaugurated by Gustav Radbruch in the aftermath of the Second World War. Radbruch demonstrated that law cannot exist as a pure instrument of social expediency: even a normative system that successfully controls a society loses its legal legitimacy when it conflicts with the fundamental principles of justice (Radbruch, 1946, pp. 105–108; Seredyuk & Dudar, 2024, pp. 389–396). In the context of risk-oriented strategies, this thesis acquires new urgency, because contemporary criminal policy is increasingly oriented not toward reaction to crimes already committed but toward the preventive governance of potential threats (Beck, 1992, pp. 19–34; Feeley & Simon, 1992, pp. 452–459).

Malcolm Feeley and Jonathan Simon conceptualised this transformation in their theory of the "new penology": contemporary criminal justice systems operate as mechanisms of administrative risk management, where the primary unit of analysis is no longer the individual person but risk categories population groups statistically associated with an elevated probability of offending (Feeley & Simon, 1992, pp. 452–459). The theoretical foundation of this transformation is linked to Ulrich Beck's concept of the "risk society," in which legal institutions orient themselves toward preventing the potentially catastrophic consequences of the future, discharging a function of governing uncertainty (Beck, 1992, pp. 19–34). It is precisely here that structural tension arises between risk rationality and the normative nature of law.

Risk-oriented policy tends to expand the domain of preventive state intervention: terrorism, hybrid warfare, mass migration, cybercrime each new threat generates political demand for enhanced control (Beck, 1992, pp. 34–40; Feeley & Simon, 1992, pp. 460–470). As a result, criminal law shifts from a model of ex post liability to a model of ex ante prevention, in which the key role is played by behavioural prediction. In extreme cases this leads to the preventive criminalisation of intentions, social associations, or the statistical characteristics of certain population groups: what Radbruch described as "statutory non-law" (Radbruch, 1946, pp. 105–108). Radbruch's formula accordingly functions as a normative safeguard: absent a minimum level of justice and equality, any control system however effective forfeits its legal character.

This allows the Risk–Justice Paradox to be formulated in its operational form: the state's aspiration toward maximally efficient risk management inevitably creates the temptation to expand preventive control, and it is precisely this expansion that is capable of undermining the normative foundations of law. Contemporary law is undergoing a structural transition from rule-based justice to risk-based governance: it ceases to fulfil a function of retribution or guarantee and becomes an instrument of governing uncertainty. The intensity of this governance is not a quantitative but a composite variable, encompassing three dimensions normative density (deviation from lex certa through excessive criminalisation and evaluative concepts), discretionary breadth (the autonomy of the state actor from judicial review), and the level of interference (deviation from proportionality through mass and preventive measures).

A permissibility threshold exists, but it is not fixed: it is a normatively critical limit, defined through fundamental rights. It is crossed not when the state intervenes intensively, but when the individual is transformed from a subject of law into an object of risk management. Authority is legitimate only as delegated authority accordingly, any risk management that detaches itself from the protection of rights constitutes a usurpation of function. No preventive policy can legitimise the degradation of dignity: where risk becomes the justification for dehumanisation, absolute limits have already been breached. Crucially, the abuse of power does not require a criminal offence to be constituted a deficit of legal legitimacy is sufficient: victims are persons harmed by acts that violate internationally recognised human rights standards, even where those acts are not formally criminalised.

For the operationalisation of this threshold, a three-step test is proposed: a teleological step (a measure is legitimate only if directed toward the protection of rights rather than the minimisation of risk as an end in itself); a status step (the threshold is crossed when the individual becomes an object of profiling rather than a subject of law); and a victimological step (intensity is excessive regardless of formal legality if a policy generates victims of power abuse within the meaning of the UN Declaration).

Hence the central conclusion of the paradox: the more the state optimises risk management, the greater the risk it incurs of losing normative legitimacy unless human rights operate as hard limits on that process. Intensity is accordingly not “how much” the state intervenes, but how far it departs from the human-centred teleology of law.

2. Desistance as a Challenge to Risk-Oriented Logic

The question of desistance the cessation of criminal activity directly calls into question the logic of risk governance. Shadd Maruna defines desistance not as a momentary act of renouncing crime but as a prolonged process of identity transformation: a person "exits" a criminal way of life when he or she constructs a new self-narrative not "former offender" but a person who has acquired experience and is capable of becoming a resource for society (Maruna, 2025, p. 43). This redemptive narrative is the key condition of desistance and, simultaneously, the primary object of stigmatisation. An important dimension of Maruna's analysis is his ethical reflection on the boundaries of "trauma tourism," the question of authorship in qualitative research, and the difficulty of accumulating knowledge about desistance through an outsider's lens without losing sensitivity to context.

Punitive policy and "performative" toughness, rather than supporting the exit from crime, only deepen the stigma and consolidate criminal identity (Tuliakov, 2025a, pp. 330–334; Tuliakov, 2025b, pp. 234–240). Criminological thinking as creative destruction of established dogmas demands a rethinking of the normative practice of stigmatisation: if resocialisation is the declared purpose of punishment (Article 50 of the Criminal Code of Ukraine), then a risk-management system that reproduces the profile as its principal organising principle contradicts its own normative foundations (Tuliakov, 2025a, pp. 330–334; Tuliakov, 2025b, pp. 234–236). The European Court of Human Rights in Petrov v. the Republic of Moldova (Application no. 38066/18, 5 March 2026) confirmed that any additional suffering or restrictions that are not an organic element of the sentence enforcement regime are subject to assessment under Article 3 ECHR irrespective of their formal source.

Maruna directly points to the risk that even well-intentioned interventions restorative justice programmes, probation, reintegration schemes can become "stigmatising interventions" if their logic remains one of risk management rather than one of support for identity transformation (Maruna, 2025, p. 43). This critique applies in full to the Ukrainian context: while declaring the aims of rehabilitation and resocialisation (Article 50 CC Ukraine), the system in practice reproduces the profile as its principal organising principle from the prison regime to conditional early release. Here the Risk–Justice Paradox assumes an applied dimension: a system that declares rehabilitation simultaneously produces instruments that render it structurally impossible (Tuliakov, 2025b, pp. 236–240).

3. Profiling as a Mechanism of Stigmatisation: A Stage-by-Stage Analysis

Criminal profiling in criminal law has a fundamentally different function from its role in criminalistics or criminology. Whereas in investigation a profile is a search instrument that narrows the circle of suspects, in the criminal-law dimension it risks becoming a normative label a stable characteristic of the person that determines legal status independently of the specific act (Kaliuha, 2020, pp. 110–115; Tuliakov, 2025b, pp. 234–236). This is where the problem of criminal-law stigmatisation arises: when the psychological or behavioural profile of a person substitutes for the assessment of the concrete criminal act and influences legal consequences beyond the limits permitted by the principles of culpability and individual responsibility. Stigma in the criminal-law context is not merely a social label but a normative mechanism embedded in law enforcement (Tuliakov, 2025b, pp. 234–240).

At the stage of legal qualification, stigmatisation manifests in the substitution of intent by profile: the law-enforcement actor operates with a generalised image of a “type of subject” rather than establishing the subjective element of the offence. This is the effective revival of the concept of the “dangerous state” (état dangereux) under new designations: “actuarial risk assessment,” “criminal profile,” “behavioural pattern.” Such an approach conflicts with Article 2 of the Criminal Code of Ukraine, which confines the ground of liability to the presence of a corpus delicti. If a person matches the profile of a “serial aggressor” or a person “prone to extremism,” the investigator or court may unconsciously select qualifying features to fit an already-formed image rather than establishing those features from evidence. Mens rea must be established with respect to the specific act of the specific person; psychological profiling, however, can “suggestion” intent where none exists, or predispose the law-enforcement actor toward a particular qualification.

At the stage of sentencing, profiling manifests in a shift from individualisation to typologisation. The concrete person is replaced by a “statistical category,” and formulations such as “persistent anti-social orientation” or “elevated social dangerousness” are converted into informal aggravating circumstances that are not susceptible to challenge (Tuliakov, 2025a, pp. 330–334; Tuliakov, 2026a). The discriminatory potential is especially pronounced: socio-demographic markers are imperceptibly converted into “risk,” and punishment is effectively imposed for social affiliation contrary to the principle of equality before the law (Article 24 of the Constitution of Ukraine) (Tuliakov, 2025b, pp. 238–240). The threat of affective criminalisation, whereby the legal response is determined not by rational analysis but by emotional and media impulses, is also identified in the study of intuitive criminal law (Tuliakov, 2026b).

At the stage of conditional early release, actuarial risk-of-recidivism assessment tools (Static-99, LSI-R and their analogues) evaluate the statistical risk of a category rather than the real probability of a specific future offence (Feeley & Simon, 1992, pp. 460–470). This substitutes a pseudo-scientific construct for the normative criterion of conditional early release the establishment of the fact of rehabilitation (Article 81 CC Ukraine) in violation of the principle of legal certainty (Tuliakov, 2025b, pp. 236–238).

At the post-penitentiary level, the profile “follows the person”: digital registries, restrictions in the sphere of employment, spatial prohibitions all of this constitutes an “invisible punishment” that continues beyond the sentence served and nullifies any desistance potential (Tuliakov, 2025b, pp. 238–240; Tuliakov, 2026c). The self-fulfilling prophecy effect is evident: intensified restrictions increase the probability of recidivism, and recidivism retrospectively “confirms” the correctness of the initial profile.

4. The Jenec Dimension: ECJ C-81/24 and the Limits of List-Based Automatism

The structural argument of the Risk–Justice Paradox receives decisive empirical support from a recent judgment of the Court of Justice of the European Union. On 11 June 2026, the Grand Chamber delivered its ruling in Case C-81/24, Jenec (ECLI:EU:C:2026:470). The facts were deceptively simple. A consumer, identified as LH, applied to open a basic payment account at a Slovenian bank. The bank refused solely because the applicant's name appeared on the sanctions list maintained by the United States Office of Foreign Assets Control (OFAC). The applicant was subject to no restrictive measures imposed by the United Nations, the European Union, or Slovenia. The Court's answer was unambiguous: EU law does not permit an automatic refusal of a basic payment account on the sole ground of inclusion in a third-country sanctions list.

The doctrinal significance of Jenec extends far beyond its immediate facts. The Court held that Directive 2015/849 (the Fourth AML Directive) does not provide that inclusion on the OFAC list or on any similar list drawn up by a third country automatically prohibits a bank from entering into a business relationship with the person concerned. A refusal is lawful only following an individual, case-by-case assessment of the risk of money laundering and terrorist financing. Even where that assessment yields a high-risk result, refusal is justified only if the bank cannot effectively manage the risk through measures proportionate to its nature and size. The Court further noted that the inherently limited functionality of basic accounts no overdraft, no credit facilities reduces the ML/TF risk profile of such products, making categorical exclusion even less defensible.

Read alongside the Payment Accounts Directive (2014/92/EU), which confers on every legally resident consumer a right to access basic payment services, Jenec establishes that financial exclusion is a rights violation, not a neutral compliance outcome. The bank's fear of being associated with an OFAC-listed person essentially a compliance-driven reputational calculus cannot substitute for the substantive assessment that EU law requires. This is precisely the logic of the anti-stigmatisation doctrine transposed into the field of financial regulation: a listing is a signal of risk, not proof of risk; a signal cannot replace assessment. Jenec thus furnishes three normative propositions of direct relevance to Ukrainian law and practice. The first issue due to UA consequences and analysis concerns financial monitoring. A risk-oriented approach cannot remain a merely declarative formula; it presupposes a concrete and individualized assessment of the client, the nature and structure of transactions, the scale of the alleged risk, and the availability of less intrusive means of its mitigation. Institutional compliance anxiety, however understandable, does not constitute a lawful ground for restricting access to fundamental financial services. The second issue relates to the reception of third-country sanctions. Foreign sanctions regimes, including OFAC, as well as comparable instruments, may serve as informational signals or elements within a broader risk assessment. They cannot, however, acquire the quality of self-sufficient legal grounds for the restriction of rights. In the Ukrainian context, this directly calls into question administrative practices whereby inclusion in a foreign sanctions list is treated as automatically producing domestic legal consequences, such as account blocking, denial of services, or the initiation of enforcement measures, absent an independent national procedure. Third-country sanctions may inform, but they cannot substitute for domestic legal processes, judicial control, or constitutional safeguards. The third proposition concerns criminal procedure. In matters such as asset seizure, account freezing, temporary access to documents, special confiscation, and the establishment of a nexus between assets and criminal conduct, Ukrainian judicial practice must abandon residual forms of automatism. The structural limits articulated by Jenec in the field of financial regulation find direct parallels within criminal justice. Inclusion in a list cannot be equated with proof of risk; suspicion cannot legitimize indiscriminate deprivation of property; and compliance considerations cannot override the individual's right to basic financial access. EU law reinforces, at the normative level, what the Risk–Justice Paradox demonstrates conceptually: even within the domains of AML/CFT, sanctions, and security regulation, the individual remains a bearer of rights, not a mere data point within administrative or financial systems.

Jenec is thus a judicial instantiation of Radbruch's formula in the domain of financial governance: a system that automates exclusion on the basis of list membership, without individualised assessment and without proportionality review, substitutes administrative efficiency for legal legitimacy. It produces precisely the "victims of power abuse" that the victimological limb of the three-step threshold test identifies as the marker of the paradox's breach. In the language of desistance theory, it is the financial-sector equivalent of the "invisible punishment" that follows the person beyond the formal enforcement act and forecloses the redemptive narrative before it can begin.

5. The Special Context: Wartime Societies

The Risk–Justice Paradox assumes particular salience for societies undergoing war or profound political transformation. In such conditions, the state resorts to enhanced security mechanisms: filtration procedures, expanded forms of population control, special regimes of criminal liability (Tuliakov, 2025b, pp. 234–236; Lazarenko & Maksymenko, 2025; Druchek, 2018). On the one hand, such measures may be necessary to ensure national security; on the other, they create a risk of the gradual erosion of legal guarantees. In conditions of martial law, criminological profiling acquires new applications in particular for the prevention of unauthorised abandonment of military unit and place of service. The expansion of profiling practices against the backdrop of armed conflict is objectively conditioned, and it is precisely for this reason that it requires especially rigorous legal limitation (Lazarenko & Maksymenko, 2025; Druchek, 2018).

Radbruch's formula operates here as a criterion of the ultimate permissibility of risk-oriented social control: it delineates the boundary beyond which security policy ceases to be an element of the rule of law and is transformed into a mechanism of purely administrative governance of society (Radbruch, 1946, pp. 105–108). At the same time, the analysis of victims' rights in the context of Ukraine's European integration demonstrates that the new EU Directive 2024/1385 and Ukraine's corresponding obligations require criminal-law instruments including profiling not only to protect society but also to refrain from producing new forms of social exclusion (Tuliakov, 2026c). This directly corresponds to the logic of the anti-stigmatisation approach to desistance (Maruna, 2025, p. 43; Tuliakov, 2025b).

6. The Anti-Stigmatisation Doctrine of Profiling

Resolving the Risk–Justice Paradox in the sphere of profiling requires not the abandonment of this instrument but its normative domestication through an anti-stigmatisation doctrine. Its content can be articulated through five minimum conditions of the admissibility of profiling in the criminal-law context (Tuliakov, 2025b, pp. 238–240).

First, profiling must be auxiliary rather than self-sufficient in character: the profile does not substitute for the proof of a specific act and cannot be the sole basis for any criminal-law decision. Second, adversarial contestability is essential: the defence must have the right to challenge the methodology and conclusions of profiling, including through expert evidence. Third, stage-based demarcation is required: instruments admissible in the assessment of risk at the stage of sentence enforcement are impermissible at the stage of qualification, and a profile employed in investigation cannot automatically influence sentencing. Fourth, socio-demographic attributes must be excluded as independent criteria of risk. Fifth, mechanisms for the review and appeal of profile-based conclusions must exist.

These requirements correspond to the standards flowing from Articles 6 (right to a fair trial), 8 (right to respect for private and family life), and 14 (prohibition of discrimination) of the European Convention on Human Rights, as well as to the jurisprudence of the European Court of Human Rights on ethnic and discriminatory profiling in policing and criminal proceedings. Without their observance, even the most technologically sophisticated risk-assessment system reproduces structural inequality, makes desistance impossible, and converts declared rehabilitation into a fiction.

7. A Multi-Level Perspective: From Micro to Macro

The combination of desistance theory, the analysis of profiling-based stigmatisation, and the concept of the Risk–Justice Paradox opens up a research horizon in which the cessation of criminal activity is understood not merely as an individual story but as the outcome of interaction across three levels.

At the micro-level, the concern is with changes of identity, narrative, and close relationships what Maruna describes as the formation of the redemptive narrative, and what law must support through the principle of rehabilitation and resocialisation (Maruna, 2025, p. 43). At the meso-level, what matters are the institutional practices of custodial establishments, probation services, social services, and community initiatives, which either reproduce the profile as stigma or promote identity transformation (Tuliakov, 2025a, pp. 330–334; Tuliakov, 2025b, pp. 236–240). At the macro-level, the relevant factors are criminal-law policy, victimological standards, and the culture of punitiveness it is here that the Risk–Justice Paradox manifests in its most structural form as a systemic contradiction between the declared goals of criminal justice and the real mechanisms of their realisation (Beck, 1992; Feeley & Simon, 1992; Tuliakov, 2026c).

Profiling as a normative practice is a test of the maturity of criminal law: can the legal system renounce the label in order to support the redemptive narrative? The answer determines not merely the fate of an individual with a criminal past: it determines the social contract of justice. In this sense, Radbruch’s formula remains an indispensable normative safeguard: even the most effective system of dangerousness management cannot claim the status of a legal system if its functioning systematically contradicts the principles of human dignity and equality.

References

1. Beck, U. (1992). *Risk society: Towards a new modernity*. SAGE Publications.
2. Court of Justice of the European Union. (2026, June 11). *Jenec* (Case C-81/24, ECLI:EU:C:2026:470). https://curia.europa.eu
3. Druchek, O. V. (2018). Profiling as a method of ensuring state security and public order: Problems of application. *Naukovyi Visnyk Publichnoho ta Pryvatnoho Prava, 1*(2), 132–136.
4. European Court of Human Rights. (2026, March 5). *Petrov v. the Republic of Moldova* (Application No. 38066/18). https://hudoc.echr.coe.int
5. Feeley, M. M., & Simon, J. (1992). The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology, 30*(4), 449–474. https://doi.org/10.1111/j.1745-9125.1992.tb01112.x
6. Kaliuha, K. V. (2020). Profiling as a contemporary means of identifying an offender. *Zbirnyk Naukovykh Prats Viiskovoho Instytutu Kyivskoho Natsionalnoho Universytetu Imeni Tarasa Shevchenka, 69*, 110–115.
7. Lazarenko, A. M., & Maksymenko, M. I. (2025). Criminological profiling as a methodology for preventing unauthorised abandonment of military unit and place of service. *Analitychno-Porivnialne Pravoznavstvo, 2*. https://journal-app.uzhnu.edu.ua/article/view/327848
8. Maruna, S. (2025). Interview by Prof. L. Cheliotis and Assoc. Prof. G. Giannoulis. *The Art of Crime, 15*, 43–73. https://theartofcrime.gr/wp-content/uploads/2025/11/ART_OF_CRIME_15_INTERVIEW_EN.pdf
9. Radbruch, G. (1946). Gesetzliches Unrecht und übergesetzliches Recht. *Süddeutsche Juristen-Zeitung, 1*, 105–108.

10. Seredyuk, V. V., & Dudar, S. K. (2024). Formula Gustava Radbrukha: kontseptualny analiz ta praktychne znachennia [Radbruch's formula: Conceptual analysis and practical importance]. *Naukovyi Visnyk Uzhhorodskoho Natsionalnoho Universytetu. Seriia: Pravo, 4*(84), 389–396. https://doi.org/10.24144/2307-3322.2024.84.4.54
11. Tuliakov, V. O. (2025a). Kryminolohichne myslennia yak tvorche ruinuvannia [Criminological thinking as creative destruction]. In *Innovation and Internationalisation in Higher Education: Proceedings of the British–Ukrainian Conference (London, 16 October 2025)* (pp. 330–334). National University "Odesa Law Academy." https://hdl.handle.net/11300/31874. https://doi.org/10.32837/11300.31874
12. Tuliakov, V. O. (2025b). Teoriia styhmatyzatsii ta chasy viiny [Stigmatisation theory and wartime]. In *Protydiia zlochynnosti v umovakh dovhotryvaloyi viiny: Materialy Vseukrainskoyi naukovo-praktychnoyi konferentsiyi (Kharkiv, 20 May 2025)* (pp. 234–240). https://hdl.handle.net/11300/29837
13. Tuliakov, V. O. (2026a). Desistance, styhmatyzatsiia ta profailinH: kryminalno-pravovyi vymir [Desistance, stigmatisation and profiling: A criminal-law dimension]. In S. Kivalov (Ed.), *Sotsialno-politychna ta pravova systema Ukrainy v tsyfrovuiu epokhu: Suchasni vyklyky: Materialy Mizhnar. nauk.-prakt. konf. (Odesa, 22 kvitnia 2026 r.)*, Vol. 1 (pp. 414–417). Feniks. https://doi.org/10.32837/11300.33182
14. Tuliakov, V. O. (2026b). Intuitive criminal law and the role of civil society in preventing affective criminalisation. In *Viina v Ukraini: Zrobleni vysnovky ta nezasvoieni uroky: Materialy Mizhnar. nauk.-prakt. konf. (Lviv, 20 February 2026)* (pp. 532–535). Lviv State University of Internal Affairs. https://hdl.handle.net/11300/32306

15. Tuliakov, V. (2026c). Victims’ rights in the context of Ukraine’s European integration: From the new EU Directive to paradoxes of implementation. *SSRN*. https://doi.org/10.2139/ssrn.6285658