

DELIBERATE DISORDER: HOW POLICING ALGORITHMS MAKE THINKING ABOUT POLICING HARDER

EMILY TUCKER[∞]

[∞] Executive Director, Center on Privacy & Technology at Georgetown Law. For thoughtful feedback on early drafts of this essay I am thankful to Alvaro Bedoya, Julie Cohen, Andrew Ferguson, Hamid Khan and the members of the Stop LAPD Spying Coalition, Kung Li, David Vladeck, and Nina Wang. I am grateful to Josie Duffy Rice and Marbre Stahly-Butts, whose work and friendship inspired many of the ideas I try to express here, and especially to David McNeill, whose writing and conversation has been definitive for my thinking in this essay.

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INTRODUCTION

In the many debates about whether and how algorithmic technologies should be used in law enforcement, all sides seem to share one assumption: that, in the struggle for justice and equity in our systems of governance, the subjectivity of human judgment is something to be overcome. While there is significant disagreement about the extent to which, for example, a machine-generated risk assessment might ever be unpolluted by the problematic biases of its human creators and users, no one in the scholarly literature has so far suggested that if such a thing were achievable, it would be undesirable.

This essay argues that it only becomes possible for policing to be something other than mere brutality when the activities of policing are themselves a way of deliberating¹ about what policing is and should be, and that algorithms are definitionally opposed to such deliberation. An algorithmic process, whether carried out by a human brain or by a computer, can only operate at all if the terms that govern its operations have fixed definitions. Fixed definitions may be useful or necessary for human endeavors—like getting bread to rise or designing a sturdy foundation for a building—which can be reduced to techniques of measurement and calculation. But the fixed definitions that underlie policing algorithms (what counts as transgression, which transgressions warrant state intervention, etc.) relate to an ancient, fundamental, and enduring political question, one that cannot be expressed by equation or recipe: the question of justice. The question of justice is not one to which we can ever give a final answer, but one that must be the subject of ongoing ethical deliberation within human communities.²

1. In this Article I am relying, for the concept of ethical deliberation, primarily on Aristotle and, to a lesser extent, on the deliberative democracy literature that develops the Aristotelian conception of the political as the space of a uniquely human form of self-realization. Some of the sources in this tradition—notably Jürgen Habermas, Hannah Arendt, and John Rawls—treat ethical deliberation as first and foremost a speech act, and a type of speech act that takes place in specialized discursive arenas reserved for that purpose (such as parliaments). For the purpose of my argument here, ethical deliberation must be—in the broader Aristotelian sense—a kind of human thinking that occurs through participation in political community, with speech being only one aspect of that participation. At any rate, my purpose here is not to articulate or side with a full theory of deliberative democracy, but rather to borrow the philosophical framework that regards the political community as a home of human self-realization and to use the insights of that framework to think about the cultural impulses that policing algorithms represent.

2. See, e.g., CHARLENE A. CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS 102 (2018) (“Liberation is a perpetual project of creating and maintaining right relationships between people and the land we inhabit.”).

The temptation of policing algorithms is the temptation to be relieved of the responsibility for and, especially in unjust legal regimes, the pain³ of that kind of ethical deliberation. Corporations that sell technologies like face recognition, predictive policing software, and risk assessment programs⁴ are profiting not only from their overt promise to remove bias from policing, but from their implicit promise to remove the liability⁵ for bias from the police. Others have written exhaustively about the ways that racial bias and the carceral mindset are actually constitutive of the policing technologies that have been marketed as tools of “neutral” decision-making.⁶ My more basic argument is that no improvement in technology, and indeed no improvement in the social and political structures in which technologies arise, can render it morally unproblematic to defer the deliberative aspect of any exercise of state power to a machine.

Much has been said about “feedback loops” in the algorithms that underlie policing technologies.⁷ But these algorithmic feedback loops are the offspring of a conceptual feedback loop, or “macro” feedback loop, that is created when we resort to an algorithm in the first place, and which instead of reifying our ideas about who and what should be policed, reifies our ideas about what policing is.⁸

3. PLATO, GORGIAS 469a–79e (Joe Sachs trans., Focus Publishing 2012) (c. 380 B.C.E.) (“[I]f it were necessary either to commit injustice or suffer it, I’d choose to suffer it rather than commit it.”).

4. See Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 19 (2017) (describing the ways that private companies, motivated by profit, are actually shaping public policy by providing police with new surveillance technologies which end up changing the way that law enforcement agencies and officers operate).

5. I am thinking of ethical liability more than financial liability, but certainly police departments and local governments are always alert to the costs of litigation.

6. See, e.g., RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 3 (2019); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2221 (2019); Rashida Richardson, Jason M. Schultz, & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 22 (2019).

7. See, e.g., Will Douglass Heaven, *Predictive Policing Technologies Are Racist. They Need to Be Dismantled.*, MIT TECH. REV. (July 17, 2020), <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/> [<https://perma.cc/WH2P-YNFA>] (Rashida Richardson, director of policy research at AI Now Institute, explains how feedback loops may form, stating, “Just because there’s a call [to the police] that a crime occurred doesn’t mean a crime actually occurred. If the call becomes a data point to justify dispatching police to a specific neighborhood, or even to target a specific individual, you get a feedback loop where data-driven technologies legitimize discriminatory policing.”).

8. For a helpful articulation of five distinct categories of race equity harm in the context of policing technologies, see Laura M. Moy, *A Taxonomy of Police Technology’s Racial Inequity Problems*, 2021 U. ILL. L. REV. 139, 139 (2021).

Using technology in a way that reduces political contestation⁹ about the meaning and purpose of policing is obviously especially problematic in a context like the current American criminal legal system, which has lost legitimacy¹⁰ with the majority because of its violence,¹¹ racism, authoritarianism, and corruption.¹²

The greater the fundamental inequities of a given system, the more likely it becomes that attempts to improve the “accuracy” of outcomes in that system will have the practical effect of exacerbating injustice.¹³ This is true as a definitional matter: what it means to be accurate within a given system is to correctly apply the principles according to which the system runs.¹⁴ If the principles are diseased, then repairs to accuracy will spread disease; and if the system is automated, that spread will accelerate.¹⁵ It would be a mistake, though, even if we could build the political will, to think that it is possible to heal a diseased system of policing by

9. It is important to my thesis that political contestation does not mean only, or even primarily, acts of intentional resistance to structures of authority. Rather, the idea of political contestation must be large enough to include actions that disrupt the public order even when, from the perspective of the person or people doing the disruption, it has no political purpose. *But see* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017) (insisting that political contestation must be adversarial).

10. Aimee Ortiz, *Confidence in Police is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html> [<https://perma.cc/J43L-5YN9>].

11. MICOL SEIGEL, *VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE* 10 (2018) (providing several theoretical accounts of violence in the state and identifying violence as the essential function of police work in the criminal legal system.).

12. *See* Paul Butler, Opinion, *Policing in the US is Not About Enforcing Law. It's About Enforcing White Supremacy*, GUARDIAN (May 30, 2020, 10:59 AM), <https://www.theguardian.com/commentisfree/2020/may/30/policing-in-the-us-is-not-about-enforcing-law-its-about-enforcing-white-supremacy> [<https://perma.cc/4YGK-5FX3>]; Vesla M. Weaver & Gwen Prowse, *Racial Authoritarianism in U.S. Democracy*, 369 SCI. 1176, 1176 (2020); Daniel W. Gingerich & Virginia Oliveros, *Police Violence and the Underreporting of Crime*, 30 ECON. & POL. 78, 80 (2018) (describing the causal relationship between witnessing police violence and being reluctant to report crime to the police); ANTHONY STANFORD, *COPPING OUT: THE CONSEQUENCES OF POLICE CORRUPTION AND MISCONDUCT* 21 (2015).

13. There is a significant body of scholarship describing specific examples of this phenomenon in the criminal legal context. *See, e.g.*, BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 2 (2007); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013) (explaining how a right to criminal defense for the indigent has worsened the criminal justice system for those it was meant to help); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 70 (2014) (arguing that attempts to minimize disparities through algorithmic laws, like the Sentencing Reform Act, have made mass incarceration worse); Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 483 (2019) (arguing that reliance on actuarial tools in sentencing deepens injustice in the criminal justice system).

14. *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 81 (2020) (arguing that the criminal justice system is working how it is supposed to, racism and all).

15. For an example of how this works in the context of risk assessment specifically (where the algorithms are designed to treat the likelihood of recidivism as the sole relevant factor, ignoring, for example, the harms to the individual and the community as a result of incarceration), see Ben Green, *The False Promise of Risk Assessments: Epistemic Reform and the Limits of Fairness*, FAT* '20: PROC. 2020 CONF. ON FAIRNESS, ACCOUNTABILITY, & TRANSPARENCY 599 (2020).

changing the rules by which it operates. Rather, the revolutionary move is to understand that system building (in the American vernacular sense of that term) is the wrong way to organize, or even think about organizing, the work we must do together to protect each other and redress the harms we do to one another. For policing to be something that can be just, it must become a practice through which communities attempt, within particular experiences of conflict and transgression, to take up questions about what justice is.¹⁶ The animating paradox is that for justice to remain possible, it must remain a question. We should therefore, especially in this historical moment, repudiate any technology that offers to *solve* a policing problem for us.¹⁷

Part One of this essay situates the problem of policing algorithms within the history of carceral systems in the United States and situates the current calls to end police violence within the history of movements to reform those systems. I describe the accelerating shift from physical to digital infrastructures of coercion, explain how policing algorithms are now defining the interactions that police have within communities of color, and highlight some of the strongest critiques of policing algorithms from scholars and activists. In Part Two, I attempt to take existing critiques even further, using the concept of the policing algorithm to expose a particular ethical and philosophical imprecision in the current discourse about policing. Part Three offers three principles for reclaiming our discourse about policing and the relationship of policing and justice making from the misguided hopes for accuracy, efficiency, and fixity to which algorithms pander.

A word about why I have chosen to think about the problem of algorithms as it relates to police. Police are far from the only institutional actors in the criminal legal system that use algorithms in exercising their power over the lives of individuals and communities. Prosecutors rely on algorithmic predictions about which suspects or defendants are more likely to engage in future criminal activity in decisions about who and what to charge, and to inform sentencing and bail requests and case resolution.¹⁸ Judges use algorithmic risk assessment scores in pretrial

16. “The virtue of justice is political/of the citizen (*πολιτικόν*). For justice is the ordering of the political community, and the virtue of justice is judging/discriminating (*κρίσις*) the just.” ARISTOTELIS, *POLITICA* 1253a36–9 (W.D. Ross ed., Oxford Classical Press 1957) (c. 350 B.C.E.) (author’s translation).

17. See generally David N. McNeill, *The Virtue of Error: Solved Games and Ethical Deliberation*, 28 EUR. J. PHIL. 639, 656 (2020) (elucidating, through a thought experiment using the game tic-tac-toe, the conditions necessary for a given problem to serve as a potential locus for ethical deliberation, and the danger of treating such problems as instead wanting final solutions). Of course, police use technology in many ways that are not problematic within the framework put forth here. Anything from the pens and paper that police take notes with, to the cars they drive, to the heating in the offices where they conduct investigations could be viewed as a “technology” that enhances the efficiency of policing. But none of those tools are substituting machine outputs for human judgment.

18. See Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705, 721–26 (2016) (describing how prosecutors use data to inform decisions).

and sentencing determinations.¹⁹ Corrections agencies use similar risk assessment algorithms in case management inside of prisons²⁰ and in the management of probation and parole.²¹ These technologies have emerged out of a conceptual mistake which is expressed and extended as much when prosecutors, judges,²² corrections officers, and parole boards rely on them as when police departments do.

But it is in looking at policing that we can see most clearly that the resort to machines is a symptom of our alienation from the idea that the purpose of a political community is justice-making. Policing is the arena in which people most unquestioningly experience themselves and others as objects of, rather than participants in, supposedly democratic policy implementation. In adjudicative and legislative contexts, there is still a justice pretense. Judges must explicitly take up questions of guilt and innocence, of degrees of harm, and of appropriate responses to harm. Legislators must explicitly take up questions of what communities need and want. The way that judges and legislators take those questions up may be fatally trivial, and our expectations of them as deliberators about those questions may also be fatally trivial, but we talk about the failures of those institutions in terms of our hope to realize human goods within them.²³

While there are communities and organizations, most of them led by Black women organizing through an explicitly intersectional and abolitionist lens, who are working to imagine and practice new processes for accountability, redress, and healing in response to instances of harm,²⁴ unfortunately that work is not for the most part influencing policing policy.²⁵ Instead, dominant arguments about policing—in scholarship, in the media, in policymaking and in social movements—tend to swing between two notions. On the one hand, there is the idea that,

19. See, e.g., Laurel Eckhouse, Kristian Lum, Cynthia Conti-Cook, & Julie Ciccolini, *Layers of Bias: A Unified Approach for Understanding Problems with Risk Assessment*, 46 CRIM. JUST. & BEHAV. 185, 186 (2019); Kelly Hannah-Moffat, *Algorithmic Risk Governance: Big Data Analytics, Race and Information Activism in Criminal Justice Debates*, 23 THEORETICAL CRIMINOLOGY 453, 459 (2018).

20. Michael Kwet, *Microsoft's Iron Cage: Prison Surveillance and E-Carceration*, AL JAZEERA (Dec. 21, 2020), <https://www.aljazeera.com/features/2020/12/21/microsofts-iron-cage-prison-surveillance-and-e-carceration-state> [<https://perma.cc/VPR6-H7JW>].

21. Cade Metz & Adam Satariano, *An Algorithm That Grants Freedom, or Takes It Away*, N.Y. TIMES, Feb. 9, 2020, at B1; Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1118 (2017).

22. See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (elucidating the violence inherent in acts of legal interpretation by judges and cautioning against “exaggerating the extent to which any interpretation rendered as part of the act of state violence can ever constitute a common and coherent meaning.”).

23. In jury trials, for example, the presumption that evidence of prior actions, when used to establish facts, are prejudicial, makes an ethical claim on the jury about what kinds of considerations should and should not matter in their deliberative process.

24. See generally MARIAME KABA, *WE DO THIS ‘TIL WE FREE US* (2021) (discussing the work of Black women organizers in Chicago); CARRUTHERS, *supra* note 2 (describing the work of Black women organizers in Chicago).

25. KABA, *supra* note 24, at 66–67 (listing, in a call to action, policies that continue even after years of organizing to end them).

however you want to draw the boundaries, the world is essentially full of good guys and bad guys. The job of the politicians is to draw boundaries around each category, and the job of the police is to find and remove from society the people in the bad category. This is the idea that has prevailed in American society so far. The “tough on crime” laws of the nineties²⁶ and the current proposals for criminal law reform are all based on this conception of policing; they only differ in what principles they use to draw the lines between good and bad people and between the kinds of police violence that are acceptable and unacceptable. On the other hand, there is the idea that there really isn’t such a thing as better and worse behavior; there is only me and my people versus you and your people, and once one of our groups annihilates the other, policing will no longer be necessary. The purpose of this idea is war, and the danger is that we may mistake it as having the purpose of revolution. Neither of these ideas offers a critique of the American system of policing as resulting from flawed thinking about what community norm creation and enforcement should look like in our lives. The best we seem able to do is demand of others a better system. We have lost any sense of justice as something that cannot be systematized, as something we must always be working out together, in the spaces where we live, through both the things we do and the things that happen to us.²⁷ It is hard for us to see that algorithms should never drive decisions about how policing is done or who is subject to it because, when it comes to policing, we already see ourselves as data.²⁸

I.

POLICING ALGORITHMS IN THE CONTEXT OF AMERICAN CARCERAL HISTORY

After the uprisings that began in June 2020 in response to the murder of George Floyd, which endured through the summer in spite of the deadly pandemic and environment of end-stage democratic decay, pundits and politicians have begun calling for, and offering up, solutions to the problem of racist policing in America. City council members have vowed to defund local law enforcement.²⁹

26. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 102–06 (2007) (delineating crime control methods in the 1990s).

27. This, of course, does not mean that we should not build institutions or set up systems of government. It means that in doing so, we should understand the question of the justice of systems and institutions as a question about whether they may make it more possible for people to engage in deliberative activity with one another about questions of justice.

28. The word data comes from the past participle of the Latin verb dare, which means to give. *Datum*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). The Oxford English Dictionary gives the definition of a “datum” as: “A thing given or granted; something known or assumed as fact, and made the basis of reasoning or calculation; an assumption or premise from which inferences are drawn.” *Id.*

29. Daniel Beekman, *Majority of Seattle Council Pledges to Support Police Department Defunding Plan Laid Out by Advocates*, SEATTLE TIMES (Aug. 12, 2020, 11:35 AM), <https://www.seattletimes.com/seattle-news/politics/majority-of-seattle-council-pledges-to-support-police-department-defunding-plan-laid-out-by-advocates/> [https://perma.cc/MF6A-324M].

Members of Congress have put forth proposals for greater accountability and oversight which range from defensive³⁰ to reformist.³¹ And organizers, activists, and academics formerly dismissed as belonging to the radical fringe are now seeing the vocabulary of abolition,³² which they honored and sustained over half a century of carceral capitalism,³³ mainstreamed and hashtagged. We have found ourselves inside such moments of compelled penitence before, whenever the energies of resistance in the communities of the oppressed have grown hot enough to make the authorities sweat, extracting concessions which—while real—have put off any reckoning with our nation’s founding sins. Indeed, it may produce the most generous account of American political history to view the last 150 years as the story of a people intermittently on the verge of, but demurring from, the redemptive act. The white power structure reacted to the end of slavery not by making restitution and renegotiating the social contract on terms of equal power with Black people, but by adjusting and adapting systems and strategies for the coercion and control of Black bodies.³⁴ From the perspective of ruling institutions, the reforms of Reconstruction,³⁵ the Progressive Era,³⁶ the Labor Movement³⁷ and the Civil Rights

30. Karoun Demirjian, *Republican Senators Outline GOP’s Police Reform Bill*, WASH. POST (June 14, 2020), https://www.washingtonpost.com/powerpost/republican-senators-outline-gops-police-reform-bill/2020/06/14/8d10a3a0-ae6f-11ea-856d-5054296735e5_story.html [https://perma.cc/6R7M-ZRGZ].

31. Catie Edmondson, *Democrats Seek to Block G.O.P. Police-Reform Bill*, N.Y. TIMES, June 24, 2020, at A16.

32. American political thought of course has an extremely robust abolitionist strain extending back to the founding. For some of the most crucial contemporary expositions of the tradition, see, e.g., ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* (2005) [hereinafter DAVIS, *ABOLITION DEMOCRACY*]; RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); ALEX S. VITALE, *THE END OF POLICING* (2017); CARRUTHERS, *supra* note 2; Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police*, N.Y. TIMES, June 12, 2020, at SR2.

33. See generally JACKIE WANG, *CARCERAL CAPITALISM* (2018).

34. DAVIS, *ABOLITION DEMOCRACY*, *supra* note 32, at 95–96.

35. See generally W.E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880*, at 670–729 (1935) (describing how the white Southern establishment undid the victories of Reconstruction, then whitewashed the history of Reconstruction to make themselves the heroes); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 564–601 (1988).

36. See THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA*, at ix (2016) (describing the changes, and the limitations of the changes, brought about by the Progressive Era).

37. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 118 (2011) (providing a brief discussion of the benefits provided to white people by the NLRA, and the precision with which Black people were excluded).

Movement³⁸ were sufficient to relieve immediate social and economic pressures, *and* sufficient to preserve original structures of exploitation.³⁹ Preemptive concession is a common reflex of power when threatened (especially if violent suppression of the opposition appears for whatever reason unworkable), but in the context of white supremacy the operation of that tendency has been especially literal—drawing a starkly straight genealogy from slavery, to convict leasing to chain gangs to Jim Crow to mass incarceration.⁴⁰

If we understand the relationship of our current systems of law enforcement, adjudication, and punishment to the white supremacist project,⁴¹ and the centrality of white supremacy to the American project,⁴² then we must acknowledge that we currently have no working notion of policing, whether abstract or practical, that is ethically cogent enough to repair.⁴³ And if we take seriously the corruption of our

38. See MURAKAWA, *supra* note 13, at 8–11.

39. See, e.g., DU BOIS *supra* note 35; Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 30 (1993) (describing the way that a focus on judicial rights creation and enforcement can actually undercut the power of social movements by legitimizing the existing systems in terms of the availability of individual relief); MURAKAWA, *supra* note 13 (tracing the history of mass incarceration in the United States to rights-centric liberalisms of the 1940s and 1960s); Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 746 (1992) (positing that there is “a good deal of evidence that *Miranda*, like *Brown*, traded the promise of substantial reform implicit in prior doctrine for a political symbol.”); Perea, *supra* note 37.

40. Angela Davis develops this idea through her reading of W.E.B. DuBois:

Although DuBois referred very specifically to slavery and its legal disestablishment as an economic institution, his observation that this negative process by itself was insufficient has deep resonances for prison abolition today. DuBois pointed out that in order to fully abolish the oppressive conditions produced by slavery, new democratic institutions would have to be created. Because this did not occur; [B]lack people encountered new forms of slavery—from debt peonage and the convict lease system to segregated and second-class education. The prison system continues to carry out this terrible legacy. It has become a receptacle for all of those human beings who bear the inheritance of the failure to create abolition democracy in the aftermath of slavery. And this inheritance is not only born by black prisoners, but by poor Latino, Native American, Asians, and white prisoners.

DAVIS, *ABOLITION DEMOCRACY*, *supra* note 32, at 73–74; see also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 233–78 (2009); MICHELLE ALEXANDER, *THE NEW JIM CROW* 30–58 (2012).

41. Butler, *supra* note 12.

42. Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), <https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html> [https://perma.cc/Q7UD-9REA] (“Out of slavery—and the anti-black racism it required—grew nearly everything that has truly made America exceptional . . .”).

43. Even putting aside the ways that our contemporary use of the term “policing” has lost any resonance with its historical and etymological roots in notions of the polity, it should still be relatively obvious that the term policing is conceptually weak when we acknowledge that: (1) to the extent that the term can be given clear contours, it has them only with reference to the most modern manifestations of law enforcement in the West; and (2) if we try to understand the term “policing” as referring to a more universal human practice of community harm prevention and restitution, the range of different activities it would point towards are extremely diverse across geographies, eras, and types of political community.

own perspective, or, failing that, if we take seriously the demands of communities across the country to radically rethink the purpose and practice of policing in the United States,⁴⁴ we must be ready to resist the next attempt to bargain. Yet another mutation of slavery, if enough people survive this one, will be offered by those who would like to avoid real peace, and accepted by those who would like to avoid the real struggle that real peace will require. Our skepticism should entail not only a close and critical appraisal of supposed policy solutions proffered by our governing institutions, but a long hesitation before the language of solution itself. A proposal to solve racism in policing will never be a proposal to save people from policing or racism; it will always be a proposal to save policing and racism.

There are excellent reasons to think that the next renovation of the carceral state will be digital. One reason is that policymakers, think tankers, and political financiers have already been having the explicit conversation about shifting from incarceration to surveillance, from human to machine resources, and from physical to electronic infrastructure for at least the last decade.⁴⁵ Another reason is that much of the groundwork for this shift has already been laid. From tracking and recording devices like ankle monitors, cell site simulators, body-worn cameras, drones, face recognition, and automated license plate readers,⁴⁶ to the aggregation, sharing, and analysis of massive amounts of data gathered through state and local government databases as well as private companies and data brokers,⁴⁷

44. To date, the most detailed translation of the abolitionist view of policing in the form of policy proposals comes from the Movement for Black Lives Policy Platform. *See Invest-Divest, MOVEMENT FOR BLACK LIVES* (2020) [hereinafter Policy Platform], <https://m4bl.org/policy-platform/invest-divest/> [<https://perma.cc/VR7M-EMJL>] (last visited Sept. 10, 2021).

45. *See, e.g.,* Malkia Amala Cyril, *Black America's State of Surveillance*, PROGRESSIVE (Mar. 30, 2015, 12:17 PM), <https://progressive.org/magazine/black-america-s-state-surveillance-cyril/> [<https://perma.cc/2PNF-LVYP>]; James Kilgore, *Progress or More of the Same? Electronic Monitoring and Parole in the Age of Mass Incarceration*, 21 CRITICAL CRIMINOLOGY 123, 127–28 (2013); HARCOURT, *supra* note 13, at 8; Graeme Wood, *Prison Without Walls*, ATL. (Sept. 2010), <https://www.theatlantic.com/magazine/archive/2010/09/prison-without-walls/308195/> [<https://perma.cc/4N8R-YLPE>]; Eaglin, *supra* note 13.

46. Electronic Frontier Foundation (EFF) maintains the Atlas of Surveillance, an interactive digital map of most types of surveillance technology and which jurisdictions use them. Archive of Atlas of Surveillance Compiled Data for the United States, ELEC. FRONTIER FOUND. [hereinafter EFF Archive], <https://atlasofsurveillance.org/search?utf8=%26location=%26technologies%5B86%5D=on> [<https://perma.cc/96DB-LFBF>] (last visited Sept. 10, 2021). EFF is careful to note that police were using predictive algorithms in some jurisdictions for years before the communities they serve became aware of it, and that their list of known users of predictive policing is likely a small percentage of the actual universe of law enforcement users.

47. This is itself part of the much more encompassing capture of our collective political imagination by the capitalism of the digital realm. *See generally* SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019) (describing the rise of a new economic system based on the large scale collection and commodification on personal information); BERNARD E. HARCOURT, *EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE* 1–22 (2015) (offering a critique of the way that life lived online has obscured any distinction between the public and private, incentivized unprecedented exhibitionism and voyeurism, and provoked a reckless sacrifice of liberty in exchange for convenience and whim satisfaction).

exponential increases in the power, reach and inter-connectivity of surveillance technology have already reshaped law enforcement.⁴⁸ Investigative and adjudicative tools built around machine learning algorithms are just one phenotype in the surveillance tech ecosystem, but they suffuse policing and most other criminal legal system processes, starting well before a person's first interaction with police and reverberating long after.

One of the most sensational stories in the digitization of policing over the last several years has been the discovery that police are buying, and incorporating into regular department practices and infrastructure, technology that purports to predict where and when crime will occur, who will commit crime, and who will be victimized by crime.⁴⁹ Overall we lack good information about exactly how and to what extent police departments use, or have used, predictive policing software. What information we do have has been learned through sources of information that are inherently relatively sparse: Freedom of Information Act and public records requests,⁵⁰ leaks to journalists,⁵¹ and scattered moments of transparency by a handful of police departments⁵² (some of whom seem to have expected their adoption of predictive policing to be taken as a sign of sophistication or

48. See SARAH BRAYNE, PREDICT AND SURVEIL 2 (2020); CAPTIVATING TECHNOLOGY: RACE, CARCERAL TECHNOSCIENCE, AND LIBERATORY IMAGINATION IN EVERYDAY LIFE 1–2 (Ruha Benjamin ed., 2019); Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 15–16 (2016).

49. See BRAYNE, *supra* note 48, at 8; Ferguson, *supra* note 21, at 1121–22, notes:

Particular types of crimes . . . have generated particularized predictive tools to assess future risk. In sex offender cases, risk assessment mechanisms have been used to preventively detain suspects before trial, and civilly commit them after they have served their sentences. In domestic violence cases, courts have used . . . screening tools to identify factors that might signal future violence. In non-domestic violence cases predictors of future dangerousness are relied upon to determine sentences. In juvenile cases, over 85% of jurisdictions use risk assessment mechanisms to evaluate young people. In capital cases, experts regularly must make a determination of future dangerousness using risk assessment tools.

(citations omitted).

50. See, e.g., *NYPD Predictive Policing Documents*, BRENNAN CTR. FOR JUST. (Aug. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/nypd-predictive-policing-documents> [<https://perma.cc/V8Z5-8SQU>]; *Stop LAPD Spying Coalition Wins Groundbreaking Public Records Lawsuit*, STOP LAPD SPYING COAL. (Dec. 9, 2019), <https://stoplapdspying.medium.com/stop-lapd-spying-coalition-wins-groundbreaking-public-records-lawsuit-32c3101d4575> [<https://perma.cc/267Y-9QFX>].

51. Ali Winston, 'Red Flags' as New Documents Point to Blind Spots of NYPD 'Predictive Policing,' DAILY BEAST (July 15, 2019, 2:21 PM), <https://www.thedailybeast.com/red-flags-as-new-documents-point-to-blind-spots-of-nypd-predictive-policing> [<https://perma.cc/LH9M-CF2P>].

52. See, e.g., Steven Melendez, *NYPD Unveils Controversial Algorithm to Track Crime Patterns*, FAST CO. (Mar. 20, 2019), <https://www.fastcompany.com/90321778/nypd-unveils-controversial-algorithm-to-track-crime-patterns> [<https://perma.cc/NUU5-BHT8>].

progress).⁵³ The Electronic Frontier Foundation maintains a Surveillance Atlas⁵⁴ which maps law enforcement use of a wide range of different types of surveillance technology. The map currently lists 149 agencies that are known to use some form of predictive policing.⁵⁵ In 2015, Forbes reported that software from PredPol, one of the major companies hawking predictive policing, was “being used in almost 60 [police] departments.”⁵⁶ The company no longer shares information about the number of departments using their product, but their website currently makes the fuzzy and impossible to substantiate claim that “PredPol is currently being used to help protect one out of every 33 people in the United States.”⁵⁷

The most detailed accounts of how algorithms have shaped police intervention in communities have come from efforts to resist those interventions. For example, the Los Angeles Police Department (LAPD), which was one of the earliest pilot sites for predictive policing, for years used both PredPol (to predict where crime was likely to occur) and another program known as LASER (to identify people likely to commit crime in the future).⁵⁸ Relentless organizing by the Stop LAPD Spying Coalition,⁵⁹ along with the accumulation of nationwide negative press about policing algorithms, led them to cancel both programs.⁶⁰ While the LAPD used the software, PredPol generated lists of which 500x500 foot “hotspots” in the city were likely to have the highest crime rates during a given time period, and then distributed those reports to officers as they set out on patrol.⁶¹ Using LASER, the department issued “Chronic Offender Bulletins,” listing names of people supposedly likely to commit crimes and providing photos and physical descriptions of each person on the list, which police would use to make decisions about who to target for surveillance and enforcement.⁶² The Stop LAPD

53. See, e.g., Ali Winston, *Predictive Policing is ‘Wave of the Future,’ NY Commissioner Says*, REVEAL (July 31, 2015), <https://revealnews.org/article/predictive-policing-is-wave-of-the-future-ny-commissioner-says/> [<https://perma.cc/54GT-EQ4N>].

54. EFF Archive, *supra* note 46.

55. *Id.*

56. Ellen Huet, *Server and Protect: Predictive Policing Firm PredPol Promises to Map Crime Before It Happens*, FORBES (Feb. 11, 2015, 6:00 AM), <https://www.forbes.com/sites/ellenhuet/2015/02/11/predpol-predictive-policing/?sh=58d3a04b4f9b> [<https://perma.cc/45SM-SCSB>].

57. *Overview*, PREDPOL, <https://www.predpol.com/about/> [<https://perma.cc/4YXC-TUB7>] (last visited Oct. 10, 2021).

58. Eva Ruth Moravec, *Do Algorithms Have a Place in Policing?*, ATL. (Sept. 5, 2019), <https://www.theatlantic.com/politics/archive/2019/09/do-algorithms-have-place-policing/596851/> [<https://perma.cc/XCD9-C7BS>].

59. *Id.*

60. Mark Puente, *LAPD Ends Another Data-Driven Crime Program Touted to Target Violent Offenders*, L.A. TIMES (Apr. 12, 2019, 4:48 PM), <https://www.latimes.com/local/lanow/la-me-laser-lapd-crime-data-program-20190412-story.html> [<https://perma.cc/D9CG-5PVE>]; Emmanuel Morgan, *Group that Sued LAPD Over Controversial Data Policing Programs Claims Victory*, L.A. TIMES (Dec. 10, 2019, 1:27 PM), <https://www.latimes.com/california/story/2019-12-10/stop-lapd-spying-coalition-announces-lawsuit-victory-against-lapd> [<https://perma.cc/2DZV-8NZB>].

61. STOP LAPD SPYING COALITION, *BEFORE THE BULLET HITS THE BODY: DISMANTLING PREDICTIVE POLICING IN LOS ANGELES 7* (2018).

62. See *id.* at 8–13.

Spying Coalition spent many years laying the groundwork to dismantle predictive policing in Los Angeles by researching the technology and LAPD's use of it, expanding on existing knowledge about the programs through public records requests, and building a powerful grassroots coalition.⁶³ Pressure from the coalition was crucial to the police commission's decision to audit LAPD's use of predictive policing. The findings from that audit, which found that the program was haphazardly implemented and that there was no evidence it had reduced crime,⁶⁴ along with the public response coordinated by Stop LAPD Spying, led directly to the department's decision to end the program.⁶⁵

In New York City,⁶⁶ where the surveillance infrastructure is even more vast and complex, most of what we know about the New York Police Department's (NYPD's) use of algorithms comes from public records requests that researchers at academic institutions and non-profit organizations have made and often had to litigate. In 2016, the Brennan Center for Justice sued NYPD to obtain records related to the department's massive real-time surveillance network, called the Domain Awareness System (DAS).⁶⁷ The DAS integrates live feeds from cameras, automated license plate readers, and radiological sensors with massive data sets containing hundreds of millions of historical policing records; it then applies what the department calls a "crime pattern recognition" algorithm.⁶⁸ While the New York State Supreme Court, because of that litigation, ordered NYPD to release many of them, the department continued to guard key records related to the operation of the algorithms and datasets that DAS uses until 2019.⁶⁹

There have been efforts to compel transparency from police departments through legislation, but most proposed or enacted legislation still gives control over the reporting, evaluation and policy-making process to the police. For

63. *Timeline of Stop LAPD Spying Coalition's Fight to Dismantle LAPD Predictive Policing Program*, STOP LAPD SPYING COAL., <https://stoplapdspying.org/wp-content/uploads/2020/04/Timeline-of-Stop-LAPD-Spying-Coalition-Fight-to-Dismantle-LAPD-Predictive-Policing-Program.pdf> [<https://perma.cc/GS86-NDEE>] (last visited Nov. 19, 2021).

64. Moravec, *supra* note 58.

65. *Id.*

66. The histories of predictive policing in Los Angeles and New York are deeply intertwined through Bill Bratton, who was commissioner of both departments and was responsible for the creation of COMPSTAT, the pre-big data ancestor of predictive algorithms, during the era of broken windows policing under Mayor Giuliani in the mid-nineties and early 2000s. See William J. Bratton & Sean W. Malinowski, *Police Performance Management in Practice: Taking COMPSTAT to the Next Level*, 2 POLICING 259 (2008); Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35, 43 (2014).

67. *Brennan Center for Justice v. New York Police Department*, BRENNAN CTR. FOR JUST. (Aug. 6, 2021) [hereinafter *Brennan Center*], <https://www.brennancenter.org/our-work/court-cases/brennan-center-justice-v-new-york-police-department> [<https://perma.cc/JT2E-BDRX>].

68. See Joh, *supra* note 66, at 48–49.

69. *Brennan Center*, *supra* note 67.

example, the American Civil Liberties Union (ACLU) has developed a model bill⁷⁰ to compel police departments to make regular public disclosures about the surveillance technologies they use and to receive recommendations from a community advisory board about the impact of surveillance technologies on policed communities. So far, 21 jurisdictions have passed legislation based on the ACLU bill.⁷¹ The main effect has been to build the police bureaucracy and to entrench surveillance technology within it. New York City passed its version of the police transparency bill, known as the POST Act,⁷² in June 2020 after three years of organizing and advocacy by local groups.⁷³ When the NYPD released the first round of mandated reports—36 in total⁷⁴—in early 2021, some of the advocates who had fought for the bill were dismayed to find the pages of the reports filled with a combination of empty boilerplate language, vague unsupported claims, and simple falsehoods.⁷⁵

The companies that develop and sell algorithmic policing tools are also secretive about the structure of their algorithms and the datasets they use to train them—even more so than the police departments who actually use them. The developers often invoke trade secrets to thwart attempts to subject them to greater oversight.⁷⁶ We do know, however, that historical police department and criminal legal system data is a keystone of all predictive policing and risk assessment algorithms.⁷⁷ In the case of predictive policing software, the algorithms that purport to identify specific people who are likely to commit crime combine arrest records with other datasets to create lists of names and assign accompanying risk scores.⁷⁸ The datasets they use are often both about particular individuals—such as records related to police interactions in the field, gang database information, and social media history—and about group behavioral trends according to traits like age or

70. *Community Control Over Police Surveillance (CCOPS) Model Bill*, ACLU (April 2021), <https://www.aclu.org/legal-document/community-control-over-police-surveillance-ccops-model-bill> [<https://perma.cc/Z7RT-4RC3>].

71. Chad Marlow, *The People, Not the Police, Should Decide If and How Surveillance Technologies are Used in Their Communities*, ACLU (May 25, 2021), <https://www.aclu.org/news/criminal-law-reform/the-people-not-the-police-should-decide-if-and-how-surveillance-technologies-are-used-in-their-communities/> [<https://perma.cc/U5QA-3ERH>].

72. N.Y.C., N.Y., Local Law No. 65 (July 15, 2020).

73. *The Public Oversight of Surveillance Technology (POST) Act: A Resource Page*, BRENNAN CTR. FOR JUST. (Mar. 5, 2021), <https://www.brennancenter.org/our-work/research-reports/public-oversight-surveillance-technology-post-act-resource-page> [<https://perma.cc/M8SG-C9XM>].

74. *Policies*, N.Y.C., <https://www1.nyc.gov/site/nypd/about/about-nypd/public-comment.page> [<https://perma.cc/8QPY-29B6>] (last visited Oct. 10, 2021).

75. See, e.g., Letter from Michael Sisitzky, Daniel Schwarz, Senior Pol’y Couns., Priv. & Tech. Strategist, & Justin Harrison, Senior Pol’y Couns., N.Y. Civ. Liberties Union, to Dermot Shea, Comm’r, N.Y.C. Police Dept., Comments on Draft Surveillance Impact and Use Policies (Feb. 24, 2021), https://www.nyclu.org/sites/default/files/field_documents/nyclu_letter_on_post_act_draft_policies_0.pdf [<https://perma.cc/872A-6FQE>].

76. See Joh, *supra* note 4, at 43.

77. See Mayson, *supra* note 6, at 2251–61.

78. *Id.* at 2240.

gender.⁷⁹ The policing algorithms that claim to predict where and when crime will occur combine crime reporting data with environmental data (such as weather patterns, population density, or the presence of liquor stores) to generate “heatmaps.”⁸⁰

Over the last few years, community activists, journalists, legal theorists, and social scientists have joined in chorus to point out that, among the many problems with these algorithms, data about policing and the criminal legal system can only “predict” the behaviors of police and other criminal legal system actors. It is unsurprising, then, that algorithms direct police to police the exact people and places that they have always policed. The people who bear the burden of suffering when police rely on algorithms are the very same people who bear that burden when police rely on their own judgment: poor people and people of color.⁸¹ From this simple observation has arisen a whole corpus of methodologically and analytically sophisticated critiques exposing the ways that policing algorithms reproduce racial bias,⁸² exacerbate corruption and malfeasance within police departments,⁸³ and fail to reduce crime⁸⁴ or generate “accurate” predictions even according to their own terms.⁸⁵

The shared heart of all of these (important and correct) arguments for rejecting policing algorithms is that we cannot rely on computers to repair the very deep, and very longstanding, systemic inequities of which policing is one manifestation. But what if we did succeed in repairing those inequities? What if one day we live, maybe not even in a utopia, but in an imaginably good society of the kind we can and must hope to create, one where materialism and racial animus are not the center of political gravity? In that world, would policing algorithms, beautifully designed with the collective good in mind, work? Could the interest in efficiency align with the aspiration for justice? I believe the answer is no, and the purpose of the remainder of this paper is to explore why.

79. Ferguson, *supra* note 21, at 1137–43; Will Douglas Heaven, *Predictive Policing Algorithms are Racist. They Need to Be Dismantled.*, MIT TECH. REV. (July 17, 2020), <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/> [<https://perma.cc/R2MX-B4ZK>].

80. Ferguson, *supra* note 21, at 1123–37; STOP LAPD SPYING COALITION, *supra* note 61, at 26.

81. There is now a myriad of scholars and journalists who have described different aspects of the racial and economic inequities that pervade the criminal legal system in the United States. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 8–9 (1999).

82. *See* Mayson, *supra* note 6, at 2251–54.

83. *See* Richardson, Schultz, & Crawford, *supra* note 6, at 43–45.

84. *See* Jessica Saunders, Priscillia Hunt, & John S. Hollywood, *Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago’s Predictive Policing Pilot*, 12 J. EXPERIMENTAL CRIMINOLOGY 347, 366 (2016).

85. *See, e.g.*, Mayson, *supra* note 6, at 2233–38, 2249; Ferguson *supra* note 21, at 1145–58.

II.

WHY ALGORITHMS CAN NEVER PRODUCE JUSTICE

Fundamentally, the issue I am pointing to in this Article is not about software, or data, or technology, or even algorithms. An algorithm is any calculative procedure that can be followed without insight. Human beings deploy if-then rules, learned and confirmed through life experience, more or less constantly and automatically to navigate daily activities. Following a recipe, figuring out the quickest route to a destination, creating a schedule for the day—all of these tasks involve algorithmic thinking. There is nothing inherently problematic about algorithmic processing, and there is nothing problematic about creating machines that can do the work of algorithmic processing for human beings. What is problematic is creating machines to do the *non-algorithmic* work of human judgment—thinking work that *does* require insight and that therefore cannot be automated.

In *The Human Condition*, Hannah Arendt describes the risks of technology and automation as arising from the way they divorce the problem of whether something is possible from the problem of understanding what that something is:

[I]t could be that we, who are earth-bound creatures and have begun to act as though we were dwellers of the universe, will forever be unable to understand, that is, to think and speak about the things which nevertheless we are able to do. . . . If it should turn out to be true that knowledge (in the modern sense of know-how) and thought have parted company for good, then we would indeed become the helpless slaves, not so much of our machines as of our know-how, thoughtless creatures at the mercy of every gadget which is technically possible, no matter how murderous it is.⁸⁶

To build an algorithm for policing is to tell the lie that policing need not involve insight, and to use an algorithm for policing is to spread that lie, violently, throughout the community. The sense of violation may be much more accessible when we think about technologies that take this to the even further extreme. For example, the debates about autonomous drones (originally developed as military weapons, but now increasingly deployed in domestic policing⁸⁷) recognize that drones stand in for human beings in life-or-death contexts, and that this raises

86. HANNAH ARENDT, *THE HUMAN CONDITION* 3 (2d ed. 1998). *Cf.*, LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 85 (G.E.M. Anscombe, P.M.S. Hacker, & Joachim Schulte trans., Blackwell 4th ed. 2009) (1953) (“‘How am I able to follow a rule?’—if this is not a question about causes, then it is about the justification for my acting in *this* way in complying with the rule. Once I have exhausted the justifications, I have reached bedrock, and my spade is turned. Then I am inclined to say: ‘This is simply what I do.’”).

87. Rudolph Herzog, *Rise of the Drones: Drone Technology Spans a Century’s Worth of Science Fiction and Military Research*, LAPHAM’S Q., Winter 2016, at 194.

serious legal and ethical questions about their use.⁸⁸ Policing algorithms displace human judgment, rather than human beings, and so can seem less obviously and primitively troublesome.

Invariably, when the police departments using policing algorithms are questioned about the issue of machines usurping human functions, they resort to this exact distinction. They remind us that they are not RoboCop: police are not using algorithms to replace human beings, and tools like PredPol are just that—tools that give officers more information upon which to exercise their own human judgment.⁸⁹ It is of course true that a predictive policing algorithm does not totally eliminate the space for human mediation, and different police departments can implement policing algorithms in ways that leave more and less space for such mediation. But while there is a difference in degree, there is no difference in kind. And the difference in degree matters only to the extent that it preserves some possibility for a human being to reject the kind of thing that a policing algorithm is.

To understand what kind of thing a policing algorithm is, one must notice that the only way that an algorithm can work is by holding constant a set of definitions and value assignments. In policing, those definitions relate to “crime,” and include definitions of particular kinds of conduct as criminal as well as a definition of the category itself, expressing what kind of thing crime is generally. Some of these definitions are written down in criminal statutes, and others lurk behind and give rise to what is written down. To encode those definitions in an algorithm is to make them static, removing them from the space of political contestation and setting them up as facts that limit the activities of consciousness within that space.⁹⁰ “Criminality” is treated not as a concept that societies create and invoke in countless ways, but as a thing that exists in the world and need only be identified and removed. A statement in an inspector general audit of LASER gave perfect voice to this perversion of the crime idea in describing the purpose of the software: “The basic premise is to target with laser-like precision the violent repeat offenders and gang members who commit crimes in the specific target areas. The program is analogous to laser surgery, where a trained medical doctor uses modern

88. See, e.g., Zachary Fryer-Biggs, *Can Computer Algorithms Learn to Fight Wars Ethically?*, WASH. POST MAG. (Feb. 17, 2021), <https://www.washingtonpost.com/magazine/2021/02/17/pentagon-funds-killer-robots-but-ethics-are-under-debate/> [<https://perma.cc/P3NP-53WW>].

89. “The officer still has a lot of discretion. It’s not just the algorithm,” LAPD Captain John Romero says. “The officer still has to know the area well enough to know when to adjust and go back into manual.” Nate Berg, *Predicting Crime, LAPD Style*, GUARDIAN (June 25, 2014, 5:19 AM), <https://www.theguardian.com/cities/2014/jun/25/predicting-crime-lapd-los-angeles-police-data-analysis-algorithm-minority-report> [<https://perma.cc/GNR9-VHNE>].

90. One consequence of this as it has played out in the United States is that large parts of the political community (especially those with race and economic privilege) have no access to the realities of what policing behavior actually looks like for policed people. Even without that knowledge, people may believe themselves to have signed on to the policies that authorize brutal policing practices through the nominally “deliberative” processes that their elected representatives engage in for them, deliberative processes so removed that large portions of the supposedly included community have no real understanding of what they have agreed to.

technology to remove tumors or improve eyesight.”⁹¹ Hearing this account, one understands viscerally what Hamid Kahn, the founder of LAPD Spying Coalition, means when he says of the human rights implications of policing algorithms: “The first human right would be to stop being experimented on. I’m a human, and I am not here that you just unpack me and just start experimenting on me and then package me.”⁹² Crime is not cancer or poor eyesight. Crime is a label that some societies assign, through more and less democratic processes, to some kinds of conduct. Its definitions and the consequences of those definitions always say at least as much about the power arrangements in the particular society as they do about the nature of the labeled conduct.⁹³ And yet policing in America most certainly does involve the targeted molestation of human bodies.⁹⁴ Kahn’s notion of “experimentation” thus captures an important nuance of the experience of being part of a policed community in the United States. It is not only the sense of suffering state violence disproportionately; it is also the sense that the exercise of violence is what the state perceives you as *being for*.

A police officer relying on PredPol to any degree is embracing not only the outputs of the algorithm and the definitions of crime on which it is based, but the idea of themselves (and—it goes without saying—the person they are policing) as a non-participant in political deliberation about what crime is. Of course, policing algorithms do not necessarily discourage an individual police officer from participating in whatever forums for democratic deliberation may or may not exist elsewhere, but those algorithms do express the idea that decisions about who and what should be policed are answered outside the spaces where policing happens, by people who have neither the burden of policing nor the burden of being policed. The purpose of policing, of the crime category and the punishment it authorizes, in such societies is to preserve for the people making the decisions a space of freedom from the consequences of those decisions. In a framework like that, efficient policing means policing that reduces the space for dissent by the people whose lives policing puts at stake.

91. Puente, *supra* note 60.

92. Tate Ryan-Mosley & Jennifer Strong, *The Activist Dismantling Racist Police Algorithms*, MIT TECH. REV. (June 5, 2020), <https://www.technologyreview.com/2020/06/05/1002709/the-activist-dismantling-racist-police-algorithms/> [<https://perma.cc/85US-6GFF>].

93. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Random House 2d ed. 1995) (1975) (exploring the rise of the prison in terms of broader shifts in the technology of social control in modern societies); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001) (tracing the evolution of ideas about crime and punishment in the United States and Britain from 1970); VIVIEN BURR, *SOCIAL CONSTRUCTIONISM* (3d ed. 2015) (laying out the theory of social constructionism and considering its application across the social sciences).

94. See, e.g., SEIGEL, *supra* note 11, at 8–12; VITALE, *supra* note 32, at 76–128 (identifying several groups of marginalized and vulnerable people for whom regular and often violent police intervention is frequently their primary experience of government services); Kaba, *supra* note 32. Cf. Cover, *supra* note 22, at 1601 (“Legal interpretation takes place in a field of pain and death.”).

The efficiency model has dominated American conceptions of policing for almost a century.⁹⁵ But digital technology has brought such ease and such scale to surveillance that the totalization of the efficiency model is now in sight. Every algorithm that turns a moment for human judgment into a moment for machine calculation further crowds the narrow space that remains for resistance. To make this terrifyingly concrete, consider that one corporation has begun working with police departments to beta-test body cameras equipped with face recognition technology.⁹⁶ The cameras compare the faces of any person the police officer encounters against online databases, and a search algorithm labels each face according to database matches.⁹⁷ In a promotional video by one of the companies building these cameras:

Three people stand side by side. As they enter the body camera's field of vision, a nearby computer monitor shows a graphic over the live video, guessing their age, gender, and facial expression and announcing if they are a missing person, have an outstanding warrant, or are wanted for felony assault.⁹⁸

In other words, this technology literally turns the police officer's field of vision into a mechanism for sorting members of the public into crime categories. So far, critiques of the technology have focused solely on questions of privacy (for the "good guys") and accuracy (about the "bad guys").⁹⁹

But the harms of automation and efficiency are sometimes easiest to perceive in the proposals to turn automation and efficiency towards harm reduction. For example, Bernard Harcourt, whose book *Against Prediction*¹⁰⁰ remains the most persuasive and comprehensive takedown of "actuarial justice," has proposed that criminal law enforcement be randomized—the idea being that to eliminate discretion is to eliminate bias—and that (in an example that he explores in an article subsequent to his book, co-authored with Tracey Meares) the Fourth Amendment individualized suspicion standard be replaced with randomized checkpoints in order to "distribute more evenly the costs of policing throughout society."¹⁰¹ This is the perfect *reductio ad absurdum* of the efficiency paradigm that has made it so

95. See HARCOURT, *supra* note 13, at 39–107.

96. Dave Gershgorn, *Exclusive: Live Facial Recognition is Coming to U.S. Police Body Cameras*, ONEZERO (Mar. 5, 2020), <https://onezero.medium.com/exclusive-live-facial-recognition-is-coming-to-u-s-police-body-cameras-bc9036918ae0> [<https://perma.cc/HDK6-7XQR>].

97. *Id.*

98. *Id.*

99. For an example of this very common crutch in framing the problems with policing algorithms, see Drew Harwell, *Facial Recognition May Be Coming to a Police Body Camera Near You*, WASH. POST (Apr. 26, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/04/26/facial-recognition-may-be-coming-to-a-police-body-camera-near-you/> [<https://perma.cc/EY6G-3TS5>].

100. HARCOURT, *supra* note 13.

101. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 877 (2011).

difficult for us to conceive of policing as something other than the diagnosing and catching of “bad guys.” The idea that all that is required for justice is for injustice to be distributed equally is technocratic nihilism.¹⁰² Putting aside for a moment the enormous political resources that would be required to do so, and the remorse we might feel at having made lavish expenditure on such a glib experiment, if we could implement his proposal it might in fact have insurgent consequences,¹⁰³ because those for whom, as Josie Duffy Rice has observed,¹⁰⁴ the police are effectively already abolished might, after having themselves experienced the brutality of state sponsored violence, be inspired to join the resistance.¹⁰⁵

But in that case, what is the logic of limiting randomization to enforcement? It is no longer controversial that racism is deeply encoded in the criminal statutory and regulatory frameworks themselves.¹⁰⁶ Why should we not address that bias through randomization as well? Each variety of individual conduct could be randomly assigned a yes or no crime value, and then we would employ randomized policing to enforce that legal scheme, thereby ensuring that no population would be disproportionately burdened by our society’s design for crime.¹⁰⁷ There is likely no rational being on Earth who would support such a scheme. But to defend the distinction, you have to be ready to say either that criminality is a fixed, natural, known, and discoverable category of human activity and that whether the criminal law is just depends only on how accurately the law defines the phenomenon of criminality, *or* that the project of defining crime(s) must be part of the work of collective deliberation about the good in a democratic polity and that it would therefore be staggeringly unethical to assign random crime values to all conduct. There is no way to take account of the vast literature on the social construction of crime¹⁰⁸ and defend the first proposition, and as to the second, there is no reason to think that questions about how criminal laws should be enforced

102. See SHIRLEY JACKSON, *The Lottery*, in *THE LOTTERY AND OTHER STORIES* 291 (paperback ed. 2005).

103. This would depend on implementation being perfect, with no constituency succeeding in creating an exception for themselves from the randomness imperative. It is hard to imagine a path there that starts in the current American political situation.

104. Josie Duffy Rice (@jduffyrice), TWITTER (May 28, 2020, 6:46 AM), <https://twitter.com/jduffyrice/status/1265957718260690944> [<https://perma.cc/GXJ5-5QB8>].

105. If this is the outcome that Harcourt actually has in mind, he does not express it overtly, nor does his prose read as ironic or indicate that he is offering an esoteric teaching.

106. See ALEXANDER, *supra* note 40 (exposing the ways in which racism is encoded in our systems).

107. Consider Arizona’s infamous S.B. 1070 which, among other things, made it a crime for any non-citizen to be present in the state without physically carrying their immigration papers with them. Random enforcement of this crime would have done nothing to make the prosecution or conviction of any person under the statute less racially biased. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, § 2, 2010 Ariz. Sess. Laws 450, 451–53 (codified as amended at ARIZ. REV. STAT. ANN. § 11-1051).

108. See, e.g., RICHARD ROSENFELD, *THE SOCIAL CONSTRUCTION OF CRIME* (2010); SIMON, *supra* note 26; DAVID POLIZZI, *A PHILOSOPHY OF THE SOCIAL CONSTRUCTION OF CRIME* (2015).

should be any less a subject of construction for the political community than questions about what kinds of things should be considered crimes.

Andrew Ferguson, who has written prolifically about predictive policing, has proposed the creation of a *Miranda* App which would take the place of the human warnings and waiver process.¹⁰⁹ The *Miranda* App would essentially teach a person in police custody a short lesson on their Constitutional rights with respect to the situation in which they find themselves, and then evaluate their comprehension.¹¹⁰ Ferguson admits that to do this well would involve answering some big questions about how broad a lesson the App would need to give to meet the Constitutional threshold: “Do you need to explain the Constitution’s role in regulating criminal procedure? Do you need to explain the Supreme Court’s constitutionalizing of the *Miranda* script? Do you need to explain the larger adversarial process of criminal justice? Do you simply need to explain the fact that *Miranda* rights exist?”¹¹¹ Ferguson is clear that part of the purpose of the App would be to create an opportunity to rethink those questions which, though

rarely examined[,] are embedded in any *Miranda* recitation. After all, when a detective says something to the effect of “the Supreme Court has required I read you your *Miranda* rights before we speak,” this statement presumes knowledge of basic concepts like “what is the Supreme Court?” or “what is *Miranda*?” or “what are rights?”¹¹²

What is so diagnostic about this example is that all of the “big question” asking is to be done by the legal system professionals, and the purpose of the questions is to ensure that the information that those professionals deem important is processed “correctly” by the people for whom they deem it important. The goal is to delineate as perfectly as possible the kind of communication that could happen through a *Miranda* warning and waiver process. The impetus for the *Miranda* App—to find a way to restore the power of *Miranda* warnings, which have lost any real communicative force, to support a person in police custody to exercise their rights even in the coercive context of arrest—is important and laudable. But it also shows us something about the limitations of our existing framework for thinking about which political spaces are appropriate for deliberation about justice, and which are not—which people are trusted to deliberate about justice, and which are not.

As a thought experiment purely to illustrate the ethical mistake I am trying to point to in this paper, and not as a proposal for legal reform, what if we wanted to try to turn the justice failures of *Miranda* warnings into a space for justice-

109. Andrew Guthrie Ferguson & Richard A. Leo, *The Miranda App: Metaphor and Machine*, 97 B.U. L. REV. 935, 938 (2017).

110. *Id.*

111. *Id.* at 953.

112. *Id.*

making?¹¹³ To do that authentically, we would have to reach in the opposite direction from an app. We would not simply require that a police officer read a script to the person they are arresting, but that they engage in a two-way conversation (within a space of exception where the words of the arrested person could not be used against them) about the rights at stake and the implications for both parties. If the rights that are at stake are to have any content at all, “Do you understand these rights?” should always be a *real* question awaiting a *real* response, and the expectation of a real response should include the possibility of a challenge to the question or the questioner. Imagine a dialogue over the course of which it would be possible for both the officer and the detained person to realize they *do not* “understand these rights”—they have further questions about what is at stake both personally and constitutionally at the moment in which they find themselves. This kind of *Miranda* process would be neither efficient nor accurate. It would be slow, difficult, and disruptive. It would not guarantee the protection of rights. It would only make possible a small space for shared inquiry. There is some possibility it could push law enforcement officers and courts to engage more thoroughly with the question of whether a person waiving their *Miranda* rights *understands* that waiver, but more likely it would go the same direction as *Miranda* warnings themselves: easily abused. Ultimately, such a policy would be both out of place in the context of our existing algorithmic system and very much at odds with the aspiration of democratic deliberation, as it would still be asking whether one party has the correct set of ideas about one particular question.

Other scholars, legal practitioners, commentators and activists have proposed a range of other methods for turning efficiency and automation towards harm reduction, such as the use of pre-trial risk assessment algorithms *solely* for the purpose of evaluating potential for a person’s release¹¹⁴ and tools for diagnosing and

113. Ferguson in fact proposed “a dialogue approach” to *Miranda* in an article that predates his *Miranda* App paper. In it, Ferguson envisions a process in which police would ask a person under interrogation to explain their understanding of their Constitutional rights. Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437 (2012). While requiring a dialogue like this could push law enforcement officers and courts to engage in a more meaningful and substantive inquiry into the question of whether a person waiving his or her *Miranda* rights understands the implications of that waiver, the goal of the “dialogue approach” would still be to discern whether one party has the correct set of ideas about a particular question, which is a goal very much at odds with the aspiration of democratic deliberation.

114. See THE LEADERSHIP CONF. ON CIV. & HUM. RTS., THE USE OF PRETRIAL “RISK ASSESSMENT” INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS 4–5, 8, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> [<https://perma.cc/H28H-R9B8>] (last visited Aug. 24, 2021).

reducing bias of police officers and prosecutors.¹¹⁵ There may be short term reasons to use technology in these ways to alleviate urgent suffering. But these proposals also tempt us to take comfort in them as solutions that reassure us that we need not dissent too roughly or dangerously from the culture that made us. If we want to remain awake to the material and spiritual suffering of our age, that should make us pause. The question cannot be “How do we use these technologies for good?” but “Do these technologies help us or hinder us in understanding who we are or what *the good* is?”

III.

PRINCIPLES FOR RESISTING ALGORITHMIC CONCEPTIONS OF POLICING

If automation is the natural end state of the American model of policing, abolition is the natural call of the people whose lives feed the machine. If it is still possible, given where we find ourselves in the trajectory of the American experiment, for abolition to give rise to revolution rather than war, what must that entail? This paper is not, and cannot by its own lights be, a policy proposal. But for those who share my hope that we can work to rediscover the justice urge in our own hearts, I will suggest some principles that might guide that effort.

The first is that we should insist that policing is, and must be, political.¹¹⁶ One most often hears the assertion that “policing is political” as a response to complaints about the “politicization” of the police, and in that context the assertion that “policing IS political” is meant to be descriptive: the police are there to enforce the legal norms and power structures around which the life of the polity takes place, and therefore policing is inherently political. A more forceful response to the “politicization” critique would be to make the normative claim that policing *should* be more deeply and authentically political than it is now. That is, the question about what policing is should not be legislatively or administratively

115. See, e.g., Alex Chohlas-Wood, Joe Nudell, Keniel Yao, Zhiyuan (Jerry) Lin, Julian Nyarko, & Sharad Goel, *Blind Justice: Algorithmically Masking Race in Charging Decisions*, AIES '21: PROC. 2021 AAAI/ACM CONF. ON A.I., ETHICS, AND SOC'Y, July 12, 2021, at 35; Rob Voigt, Nicholas P. Camp, Vinodkumar Prabhakaran, William L. Hamilton, Rebecca C. Hetey, Camilla M. Griffiths, David Jurgens, Dan Jurafsky, & Jennifer L. Eberhardt, *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PROC. NATL. ACAD. SCI. 6521, 6524 (2017); Sidney Fussell, *The Push to 'Predict' Police Shootings*, ATL. (MAY 8, 2019), <https://www.theatlantic.com/technology/archive/2019/05/how-machine-learning-can-help-prevent-police-shootings/588937/> [<https://perma.cc/3BPU-YWF8>]; Sean Hollister, *San Francisco Says It Will Use AI to Reduce Bias When Charging People with Crimes*, VERGE (June 12, 2019, 2:57 PM), <https://www.theverge.com/2019/6/12/18663093/ai-sf-district-attorney-police-bias-race-charge-crime> [<https://perma.cc/9WXN-RKB3>]. There are also a growing number of nonprofit organizations and research institutions dedicated to “equitable” or “ethical” AI, including the Algorithmic Justice League and the Stanford Institute for Human Centered Artificial Intelligence. ALGORITHMIC JUST. LEAGUE, <https://www.ajl.org/> [<https://perma.cc/M2T9-H8RB>] (last visited Aug. 24, 2021); STAN. INST. FOR HUM. CENTERED A.I., <https://hai.stanford.edu/> [<https://perma.cc/J3X7-XUYG>] (last visited Aug. 27, 2021).

116. See generally BENJAMIN BOWLING, ROBERT REINER, & JAMES SHEPTYCKI, *THE POLITICS OF THE POLICE* (5th ed. 2019) (collecting essays arguing that policing must be political).

answered, but should remain a *question* that is alive within a political community, and the community struggle over what policing is should be constitutive of policing practices. Jürgen Habermas’s essay on deliberative democracy as the reverberating idea of the French Revolution puts this beautifully:

Revolutionary consciousness was further expressed in the conviction that emancipated individuals are jointly called to be authors of their destiny. In their hands lies the power to decide about the rules and manner of their living together. As citizens, they give *themselves* the laws they want to obey, thereby producing their own life context. This context is conceived as the product of a cooperative practice centered in conscious political will-formation. A radically this-worldly politics understands itself as the expression and confirmation of the freedom that springs simultaneously from the subjectivity of the individual and the sovereignty of the people.¹¹⁷

These ideas may be familiar to us to the extent that we have read or thought about the origins of American democracy, or characteristics of democracy generally. But if we ask ourselves what “cooperative practices” of “conscious political will-formation” we are part of in our own lives, we may be hard pressed to think of an example. The closest approximation for many of us may be experiences of hyper-local political participation, such as a community-based organization, or town council, or student government.¹¹⁸ In such spaces, because of the real power that each participant may wield within a narrowed scope, a given instance of decision making takes place against the lurking possibility that the decision-making process itself, and the distribution of power within that process, may be up for reconsideration at any time. The question “How shall we do things?” is never finally answered, but revisited—sometimes explicitly, often atmospherically—with every new instance of the question “What shall we do about this particular thing?”

Because algorithms are built out of pre-answered “*how*” questions, reliance upon them in political spaces will necessarily make deliberation about the “*what*” questions more superficial. The more fundamentally political the questions the

117. Jürgen Habermas, *Popular Sovereignty as Procedure*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASONS AND POLITICS* 35, 40–41 (James Bohman & William Rehg eds., 1997).

118. Through a notably different set of commitments, Alasdair MacIntyre draws similar conclusions about the kinds of associative spaces most conducive to rediscovery of Aristotelian political virtues:

When recurrently the tradition of the virtues is regenerated, it is always in everyday life, it is always through the engagement by plain persons in a variety of practices, including those of making and sustaining families and households, schools, clinics, and local forms of political community. And that regeneration enables such plain persons to put to the question the dominant modes of moral and social discourse and the institutions that find their expression in those modes.

ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY*, at xv (3d ed. 2007).

algorithm treats as belonging not to the people, but to nature, the greater the harm. Policing algorithms are among the most extreme examples of this problem, because the supposedly-answered questions from which they are constructed ask things like: “What counts as transgression?”; “Which transgressions should provoke a community response?”; and “What should that response be?” For policing to be anything other than the distribution of state violence, those questions must remain part of the community’s “practice of conscious political will-formation.”¹¹⁹ At a minimum, this means that policing cannot be removed from the community and professionalized.¹²⁰ It also means that we cannot separate democratic deliberation about the content of the laws from democratic deliberation about enforcement of the laws.¹²¹ However difficult it may be from our current sociocultural vantage point to imagine what the alternatives would look like, it is clear that policing algorithms cannot produce them.

It may be worth saying explicitly that proposed cures to policing that involve transferring control of the police¹²² to a more benevolent sets of actors are not sufficient to remove the harms of algorithms in the policing context. If communities most affected by the racism and violence of our criminal legal system participate in the design and use instructions for algorithms used in policing, it may well reduce the severity of the harms made automatic by algorithm, but it will do nothing to mitigate the harms that come from the automation itself. If those most affected by the racism and violence of our criminal legal system have decision-making authority in the policing context, including “the power to hire and fire officers, determine disciplinary action, control budgets and policies, and subpoena relevant agency information,”¹²³ this will almost certainly make justice and equity in policing more possible, but it will do nothing to make justice and equity in policing more automatable.

The second guiding principle is that—to be true to the claim that policing is political—we must be willing to take transgression as a politically serious act. By serious I do not mean “very bad,” but serious in the sense of containing an important meaning. This is not the same thing as attributing a consciously political

119. *Supra* note 117.

120. *See* BOWLING, REINER, & SHEPTYCKI, *supra* note 116, at 41–62 (discussing the rise of professionalized policing as an institution in western societies in the 1800s).

121. For a discussion of how community policing might embrace principles of the philosophical literature on deliberative democracy, *see* JOHN M. RAY, RETHINKING COMMUNITY POLICING 155–162 (2014).

122. *See, e.g.*, Policy Platform, *supra* note 44 (calling for community control of police departments as part of a larger set of recommendations for transforming the criminal legal system and our political institutions more generally); *see also* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021); MIKE BROGDEN & PREETI NIJHAR, COMMUNITY POLICING: NATIONAL AND INTERNATIONAL MODELS AND APPROACHES (2005) (comprehensive account of the various reform efforts undertaken under the “community policing” rubric).

123. *Community Control of Law Enforcement One Pager*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/wp-content/uploads/2020/05/CommControlofLawEnforcement-OnePager.pdf> [<https://perma.cc/Q52P-EPPU>] (last visited Nov. 19, 2021).

motive to any particular individual in any particular instance. Rather it is the idea that, whenever there is an instance of disorder in a community, we need to be able to ask, “What is disordered?” To ask well it must be possible to ask about not only the actions of individual people in a single moment, but to ask about their lives, the lives of those near to them, and the structures of power and resource distribution in which those lives unfold. To ask *those* questions well, it must be possible for the people closest to the disorder to do the asking in the place where the disorder erupts and for their asking to be the engine for decisions about what happens next. This is not to assert that the mere identity of those most impacted ought to confer political authority, but that to engage in ethical deliberation about questions of justice requires that one be personally at stake in those questions.¹²⁴ Mariame Kaba articulates her vision for transformative justice as a widening circle of concern, with the harmed person at the center, and the wider social and political realities as encompassing:

A truly transformative justice would mean that . . . we would immediately focus on addressing the harms perpetrated, centering on the concerns and experiences of the person who was harmed. Next, we would also focus on the person responsible for the harm—but without disregarding their humanity. This means we have to acknowledge the reality that often it is hurt people who hurt other people. Understanding that harm originates from situations dominated by stress, scarcity, and oppression, one way to prevent violence is to make sure that people have support to get the things they need.¹²⁵

The current architecture of policing in the United States fills the space for asking, “What is disordered?” with the radically shallower questions “*Who* is disordered?” and “How badly?” Policing becomes a deadly game: for the police, winning means finding and locking up all the “bad” people; and for the rest of us winning means avoiding the police, *both* by avoiding the “bad” people, and by avoiding becoming one of them ourselves. It is this reduction of the justice problem that makes it possible to create policing algorithms in the first place, and the more police rely on algorithms, the less space there is for questioning the simplification those algorithms encode. Of course, this is not just a negative side effect of policing algorithms—it is their central opportunism. What the corporations that create these algorithms are profiting from is the incentive that those in power have to tighten the space for resistance. What it really means to improve the accuracy and efficiency of American policing is to erase the reminders of, and the opportunities for, dissent and disobedience.

124. McNeill, *supra* note 17, at 651 (discussing how Aristotle’s teachings on a good friendship requires a kind of “active contemplation” of our practical activity, which necessarily requires that one be personally at stake in those questions).

125. KABA, *supra* note 24, at 132.

To recreate policing as a space of “conscious political will-formation”¹²⁶ such that, when necessary, it may be possible to ask each other, “What is disordered?” we should hold dear the inefficiencies of and the disruptions to any system for the keeping of public order: they are the only spaces in which it may be possible for us, as individuals or communities, to realize something about what justice is, and so realize justice.¹²⁷ This is not to say that the harms we suffer and cause (while policing or being policed) are not real, or even that they are relative. It is not to say that those harms should not entail consequences. Rather it is a way of saying that, even once we have agreed that a given action warrants a community response, we are not relieved of the duty of shared inquiry. Whatever system we agree upon, however good it might seem at the moment of agreement, we continue to owe each other reasons not only to justify conduct (whether the conduct involves an offense against the existing order or a reaction to such an offense), but because in the practice of offering and receiving reasons we agree that we are each real and each capable of making claims on the other. Bernard Harcourt elucidates this idea in his discussion of Foucault’s concept of *illegalisms*:

The core concept of *illégalismes* is a term that has somewhat erroneously been translated as “illegalities” in the English edition of *Discipline and Punish*. It would be more appropriate to use a neologism, such as “illegalisms,” because “illegalities” is actually the end state, that which, in some sense, resolves the struggle. *Illegalities* is what represents the culmination of a power struggle that operates through *illegalisms*. The idea of *illegalisms* is that the law itself is a struggle, a negotiation, agonistic combat, a competition over the very question of defining the line of illegality—the line that divides deviations, disorderliness, rule-breaking, rule-interpretation, from illegality and the sanction.¹²⁸

If the idea that inefficiencies or “illegalisms” are a crucial part of shared meaning creation in a legal regime feels uncomfortable, we might look for an analogy to the much more familiar political and philosophical discourse about

126. See *supra* note 117.

127. Woodrow Hartzog, Gregory Conti, John Nelson, & Lisa A. Shay, *Inefficiently Automated Law Enforcement*, 2015 MICH. ST. L. REV. 1763, 1778 (2015) (arguing that “inefficiency and indeterminacy (in the form of human actors with free will) are vital components within the law enforcement process and should be conserved in some form. When one aspect of a law enforcement process (surveillance, analysis, or action) is automated to increase efficiency and determinism, inefficiency and indeterminacy should generally be proportionally and explicitly preserved elsewhere in the process to prevent harms from automation.”).

128. Bernard E Harcourt, *The ‘73 Graft: Punishment, Political Economy, and the Genealogy of Morals* 6 (Columbia L. Sch. Pub. L. & Legal Theory Working Paper Grp., Paper No. 14-485, 2015). I do not know how to reconcile Harcourt’s insights in this paper, and in much of his other writing, with the policing randomization proposal discussed in the previous Section. For a related take on the law/transgression dialectic, see SLAVOJ ŽIŽEK, *THE PLAGUE OF FANTASIES* 99 (2d ed. 2008).

efficiency and automation in the labor context.¹²⁹ In his Marxist critique of the legacy of Frederick Winslow Taylor, Harry Braverman describes how Taylor's principles of "scientific management" gave rise to a whole discipline of workplace engineering whose adherents offered to reduce to mathematical measurement every movement of the worker in the labor process and then recalculate that process to produce maximum surplus:

The unity of thought and action, conception and execution, hand and mind, which capitalism threatened from its beginnings, is now attacked by a systematic dissolution employing all the resources of science and the various engineering disciplines based upon it. . . . To the materials and instruments of production are added a "labor force," another "factor of production," and the process is henceforth carried on by management as the sole subjective element.¹³⁰

One need not have Marxist commitments to resist intuitively the invitation to become a "cog in the machine," nor to understand intellectually the ways that overvaluing efficiency can lead to economic tyranny. That workers should have the power to participate in decisions about the content and conditions of their labor, that automation might have a negative effect not only on the availability of work but the dignity of work, and that the dignity of work is something that matters both for living a good life and building a good society—these ideas are common and, even if not rigorously espoused in our late capitalist gig economy, part of the regular political discourse. We take for granted that the workplace itself can be a space for contestation¹³¹ between the various people who have a direct interest in the work, both about what the work should be and how it should be done. We are used to viewing even unorganized forms of resistance to management structures, such as being late, or slow, or otherwise bringing less than our full capacities to our work (what Taylor referred to as "soldiering"¹³²) as forms of dissent. In the context of policing, however, we have removed the possibility of contestation from the very definition of the activity, so that individuals or communities who bring disruption into a policed regime can show up only as contesting the authority

129. There is of course not only an analogy, but a relationship, between the disciplinary structures that define labor in the United States and the disciplinary structures that define policing. The question of what the implications of that relationship are, when viewed through the theoretical lens I am experimenting with here, is unfortunately outside the scope of this essay. *But see generally* FOUCAULT, *supra* note 93.

130. HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 118 (25th anniversary ed. 1998).

131. Contestation which becomes much more difficult when workers do not share a physical workplace.

132. BRAVERMAN, *supra* note 130, at 64.

of the police, not as contesting prevailing conceptions of policing or of justice in the policed regime.¹³³

In thinking about what it might look like to reclaim policing as justice-making within a community, the final guiding principle is that our ability to create new ways to respond to harm may depend on our ability to create new ways to do everything else. This is a core commitment of the contemporary abolitionist movement,¹³⁴ and it is also one that has motivated some of the most transformative social change work in American history. The Black Panther Party, long caricatured in the popular imagination as the militant foil to non-violent organizing during the Civil Rights Movement, ran dozens of “survival programs” to meet the basic needs of Black communities.¹³⁵ The most famous of these programs was the Breakfast for Children Program, but the Panthers also ran free health clinics and a free ambulance service, provided rides to help elderly people take care of daily needs and busing to prisons so that people could visit incarcerated loved ones, gave away clothing and other basic necessities, and started several educational initiatives, including the Oakland Community School.¹³⁶ These programs not only provided essential services, but also mobilized the communities they served, creating spaces in which people could develop a political analysis and vision.¹³⁷

133. While the idea of policing as a space for political contestation must certainly include explicit forms of contestation like protest and direct action, it is important to make clear that I am thinking first and foremost of the kinds of disruption that—within our current system—would be labeled as “crime,” or at least as apolitical deviance. In other words, I am pointing not to the meanings that an individual gives to their own actions, but to the meaning that we are all responsible for giving to one another’s actions.

134. As Ruth Wilson Gilmore put it in a recent profile in the *New York Times Magazine*, “Abolition is deliberately everything-ist; it’s about the entirety of human-environmental relations.” Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/LN5M-6RFJ>]; see also McLeod, *Envisioning Abolition Democracy*, *supra* note 32 (describing the movement to replace policing and imprisonment with democratic institutions and fair redistribution of resources as “abolition democracy”); DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* (2020) (detailing how ordinary people facing moments of crisis join together to create innovative means of survival and demand transformative social change).

135. See, e.g., Andrea King Collier, *The Black Panthers: Revolutionaries, Free Breakfast Pioneers*, NAT’L GEOGRAPHIC (Nov. 4, 2015), <https://www.nationalgeographic.com/culture/article/the-black-panthers-revolutionaries-free-breakfast-pioneers> [<https://perma.cc/HD8G-JMDE>]; Shani Ealey, *Black Panthers’ Oakland Community School: A Model for Liberation*, BLACK ORG. PROJECT (Nov. 3, 2016), <http://blackorganizingproject.org/black-panthers-oakland-community-school-a-model-for-liberation/> [<https://perma.cc/TJ53-5DAJ>].

136. Ealey, *supra* note 135; see generally THE DR. HUEY P. NEWTON FOUND., *THE BLACK PANTHER PARTY: SERVICE TO THE PEOPLE PROGRAMS* (David Hilliard ed., 2008) (describing the People’s Free Medical Research Health Clinics, People’s Free Ambulance Service, Free Busing to Prisons Program, People’s Free Clothing Program and other “survival programs” operated by the Black Panther Party).

137. Dean Spade, *Solidarity Not Charity: Mutual Aid for Mobilization and Survival*, SOC. TEXT, March 2020, at 136.

It is so difficult for us in the United States today to think of harm response and repair as something a community can and must do for itself because most of us do not live in communities where we provide each other with the basic things we need for survival. That policing algorithms do not strike us as conceptually absurd is a sign of how shallow our experience of political community has become. In 1967, Martin Luther King spoke of the War in Vietnam as a “symptom of a far deeper malady within the American spirit,” the cure of which would require that we “rapidly begin the shift from a thing-oriented society to a person-oriented society.”¹³⁸

The giant triplets of which King warned may now be so dominant in American society that most of us have never experienced political relationship as mutual care and mutual responsibility.¹³⁹ In Dean Spade’s essay, *Solidarity Not Charity*, he observes that the purpose of “mutual aid” is not only to meet basic needs without reliance on oppressive institutions, but also to provide community members with a kind of deliberative experience that is unavailable to us when we depend on those institutions:

This means participants get to practice wanting to hear people’s concerns and their creative approaches to resolving them, and not needing the group’s decision to be *exactly* what any one individual wants. We need ways of practicing wanting one another present and participating, not just going along with what one charismatic or authoritative person says. Most people have not gotten to practice this, since the institutions that run our lives, like schools, jobs, and governments, are hierarchical.¹⁴⁰

Before we can become a people capable of deliberating together about justice, we will have to become a people willing to demand back from our institutions the power we exchanged for the protection of our fears, hatred, and greed. In order to do that, we will first need to recognize that the bureaucratic inertias which currently define and constrain our experiences of coexistence, of which policing algorithms are an exemplar, do not express any force of nature, but an arrangement of power which was never the subject of any social or political covenant.

In complex societies, even the most earnest endeavors at political self-organization are defeated by resistant elements originating in the stubborn systemic logics of the market and administrative power. At one time, democracy was something to be asserted against the despotism palpably embodied in the king, members of the aristocracy, and higher-ranking clerics. Since then, political authority has

138. MARTIN LUTHER KING, JR., *Beyond Vietnam*, in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF MARTIN LUTHER KING, JR.* 156–58 (Clayborne Carson & Kris Shepard eds., 2001) (“When machines and computers, profit motives and property rights, are considered more important than people, the giant triplets of racism, extreme materialism, and militarism are incapable of being conquered.”).

139. *See id.*

140. Spade, *supra* note 137, at 145.

been depersonalized. Democratization now works to overcome not genuinely political forms of resistance but rather the systemic imperatives of differentiated economic and administrative systems.¹⁴¹

Policing algorithms are the ultimate depersonalization of political authority, but they are part of a much larger set of economic and administrative systems that have encouraged us, often silently and invisibly, to be subject rather than sovereign. Given this, it makes powerful sense that the policy platform of the Movement for Black Lives, which initially came together through organizing and protest in response to the police killing of Michael Brown in 2014, puts forth a set of demands that are much less about what policing should look like than they are about what all of our other social, political, and economic institutions should look like.¹⁴² Deliberation about the just must happen not only, or even primarily, through political debates in specialized discursive spaces. Deliberation in a democracy must be possible within all the activities of the political community: work, caregiving, learning, play, celebration, protest, mourning, law making and law breaking.

The work of building deep political community will be hard—hard to figure out, and hard to carry out. It will involve suffering both because we will have to fight for the right to undertake it, and because we will have to sacrifice to succeed at it. But we are at a moment in our trajectory as a nation where we have no choice. This is evident if you look closely upon any feature of the body politic, but nowhere more evident than in policing. If we do not do the hard work of creating political communities within which policing can become a justice practice, policing will always be a loaded gun that happens to be sitting in a room full of citizens.¹⁴³

141. Habermas, *supra* note 117, at 41.

142. Policy Platform, *supra* note 44.

143. Citizens as in members of the polity, not as in individuals who hold citizenship papers. Cf. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 12 n.26 (Donald A. Cress trans., Hackett Publishing 2d ed. 2019) (1762) (“The true meaning of this word is almost entirely lost on modern men. Most of them mistake a town for a city, and a townsman for a citizen. They do not know that houses make a town but citizens make a city.”).