

Ethics Beyond Transparency: Resisting the Racial Injustice of Predictive Policing

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Abstract: This paper responds to recent work highlighting the problematic racial politics of predictive policing technologies. Drawing on Michel Foucault’s account of ethics as counter-conduct, I develop a set of ethical techniques for resisting the racial injustice at work in predictive policing. This framework has the advantage, I argue, of not reducing the ethical issues of predictive policing solely to epistemic concerns of transparency. What I suggest is that we think about the ethics of technology less as an *epistemic problem* than as a problem for *action* or *practice*. By thinking of ethics in terms of resistant practices, we can begin to consider a notion of responsibility that holds us and the technologies we bind ourselves to accountable for the harms created by this bond.

Key words: predictive policing, algorithms, racial injustice, Foucault, ethics

Introduction

In recent years, the application of data analytics to the practice of policing has increased dramatically. Activists, theorists, and journalists have raised a number of ethical and political concerns about this relatively novel practice, referred to as “predictive policing.” Prevalent among these concerns is the way predictive policing technologies contribute to problems of racial injustice and discrimination. As David Robinson and Logan Koepke argue, predictive policing can “reinforce disproportionate and discriminatory policing practices” (2016, 1). These algorithmic systems routinely target populations that face the highest rates of police surveillance, brutality, and incarceration. By relying on historical crime data to generate predictions about future crime, predictive policing algorithms reinforce racial bias and discrimination in a field already plagued by issues of racial injustice.

One common response to these issues is to call for more transparency in the deployment of predictive policing technologies. This response is reflective of a more general approach to the ethics of algorithms, which takes transparency as *the* unquestioned normative ideal. Transparency aims to address the problem of opacity pervasive in predictive algorithms. Opacity refers to the way algorithms resist comprehension (on either the part of the public or on the part of data analysts) such that we do not know how or why an algorithm generates particular outputs on the basis of its inputs. As Jenna Burrell suggests, this lack of transparency is often due to the fact that the inputs are either entirely unknown or only partially known (2016, 1). For many theorists of technology, opacity presents one of the most (if not *the* most) pressing ethical challenges of machine learning and predictive algorithms.¹ Consequently, ideals of transparency and trust are valued as imperatives for redressing algorithmic opacity.

Drawing on recent critiques of the transparency ideal, I argue that a framework of transparency is insufficient for addressing the problems of racial injustice involved in predictive policing. I develop an alternative ethical framework for responding to the racial power at work in predictive policing systems by building on Michel Foucault's account of ethics as counter-conduct.² In concert with other critics of technology, this approach helps us move beyond technocratic solutions to ethical problems of technology as exemplified by appeals to transparency. Rather than seeking to reform predictive policing by making its technology more transparent, an ethics of counter-conduct offers strategies for resisting predictive policing's operation of power. By thinking of ethics in terms of resistant practices, we can begin to consider a notion of responsibility that holds us and the technologies we bind ourselves to accountable for the harms created by this bond.

Recent scholars like Simone Browne (2015) and Ruha Benjamin (2019) have pointed out how contemporary technologies of surveillance and prediction reinforce and even exacerbate conditions of racial injustice in the U.S. Browne's book, *Dark Matters: On the Surveillance of Blackness*, shows how current surveillance technologies have their historical conditions in practices of racialization deployed during slavery. As Browne argues, techniques like the branding of slaves and the design of the eighteenth-century slave ship *Brooks* reveals how blackness was produced through surveillance practices (Browne 2015, chapters 1 and 3). In a slightly different register, Benjamin has argued that technologies like those used in predictive policing contribute to the encoding of racial discrimination and entrenchment of racial hierarchies. This "New Jim Code" can be witnessed, for instance, in predictive policing systems which are designed to fix bias in humans

but ultimately reproduce racial bias in their results and applications (Benjamin 2019, 80–84).

Contributing to this field of scholarship, I have recently described the power exercised by predictive policing algorithms as consisting in a paranoid-racialized temporality that governs by closing off a contingent past and future for non-whites, particularly for Black, Native, and Latinx populations (Sheehy 2018). Expanding on a Foucauldian conception of power as productive, this work accounts for the racialized harms produced and conditioned by predictive policing, which are irreducible to violations of privacy and transparency. Without accounting for how this power might be resisted, this work suffers from the limitation of neglecting the concrete strategies undertaken by agents to contest the power of predictive policing technologies. That is, an account of power without resistance risks rendering the agents affected by power's exercise as powerless.

To flesh out an ethics of counter-conduct that resists the racialized power of predictive policing, I begin (in section one) by offering a critique of the transparency ideal as advocated by Frank Pasquale (2015) and distinguishing this critique from those offered by Shannon Vallor (2016), and Mike Ananny and Kate Crawford (2016). I then clarify (in section two) the ethics of counter-conduct, as practiced by Foucault through his involvement with the Prisons Information Group (GIP) and which he later theorizes in his 1977–1978 lectures at the *Collège de France*. While Foucault's ethics is typically examined through his later work on self-transformation and the care of the self (including, for example, by Vallor 2016), I attend to his account of counter-conduct as a useful frame for thinking through the resistance of predictive policing technologies. As I argue, a notion of counter-conduct moves us beyond the position that ethical action consists in altering *either* our technologies *or* our selves. Rather, it shows us that resistance depends on the counter-actions of socio-technical arrangements.

After discussing counter-conduct as a frame for theorizing the ethics of algorithms, I then describe (in section three) three examples of counter-conducts that resist the power exercised by predictive policing algorithms. The strategies developed in this section seek to address algorithms at the level of their problematic racial politics. I argue that any attempt to resist the power of predictive policing technologies must reckon with their participation in an enduring legacy of racial injustice in criminal justice practices in the U.S.

1. The Limits of Transparency

In *The Black Box Society* (2015), Frank Pasquale critically examines the logic of secrecy that governs a variety of large corporations, political institutions, and legal systems. The resulting “black box society” creates an imbalance of power such that while the lives of ordinary citizens are increasingly being surveilled and tracked, the world of commerce is kept opaque, protected by trade secrets, non-disclosure agreements, gag rules, and proprietary technologies. Pasquale presents this logic of secrecy as an epistemic problem having political effects. “Knowledge is power,” he writes, “To scrutinize others while avoiding scrutiny oneself is one of the most important forms of power” (2015, 3). Pasquale appeals to norms of transparency and intelligibility as remedies to this problem. He argues, “Secrecy is approaching critical mass, and we are in the dark about crucial decisions. Greater openness is imperative” (Pasquale 2015, 4). Greater transparency is ultimately a means to make complex systems more intelligible. To achieve intelligibility, Pasquale argues for transparency being enforced through the use of auditors who ensure the fairness of algorithmic systems used by corporations.

A central problem with the ideal of transparency is that it reduces ethics to the purview of epistemology. By construing the ethical harm of algorithmic systems as epistemic, i.e., as one of secrecy or opacity, the remedy for ameliorating this harm is necessarily framed as epistemic.³ Here ethical action consists primarily in *knowing* how an algorithm generates its results in order to remedy the epistemic harm of opacity. According to the transparency model, predictive policing systems would be ethically improved if we could observe and know exactly what went into their algorithms to produce their particular predictions. While I agree that making predictive algorithms more transparent is important for ameliorating some of their harmful effects, I do not think this is sufficient for addressing the power exercised by these algorithms. Even if we knew exactly how the algorithm produced its results, this does not address the surrounding conditions that inform and affect these results—e.g., the enduring legacy of structural racism that conditions the entire criminal justice system in the U.S. The danger here is that the transparency model potentially hides problems that are irreducible to opacity. The ethical challenge presented by predictive algorithms is not just that the public has no knowledge of how they work, but also that the algorithms often encourage law enforcement to target people who have historically been subjected to higher rates of incarceration, surveillance, and brutality.

Other scholars have also critiqued transparency as a normative value for the use of technology. Shannon Vallor (2016), and Mike Ananny and Kate Crawford (2016), for instance, have critiqued the way an ethics of transparency privileges truth above other ethical norms. In *Technology and the Virtues*, Vallor argues that the “cult of transparency” which guides a “sousveillance society” promotes an impoverished understanding that does not contribute to human flourishing (2016, 188). In a sousveillance society, citizens participate in multiple forms of watching and being watched through wearable tracking devices. Devices like Fitbits and Apple watches function as sousveillance technologies designed to make our actions, habits, and bodies more transparent to us. For Vallor, this ideal of transparency is troubling because it unquestioningly prioritizes truth over other moral values like trust, compassion, humility, and respect, all of which add to the richness of moral life and encourage human flourishing (Vallor 2016, 192). What results is a reduction of the plurality of ideals that populate ethical life and reflection.

Akin to Vallor, Ananny and Crawford show the limits of the transparency ideal and its prioritization of truth in the context of governing algorithms. On their view, transparency functions as an epistemic norm that assumes a direct correspondence between observation and truth—the more we can see and observe about a thing, the more truth we will have about it (Ananny and Crawford 2016, 2). As Ananny and Crawford note, the tacit assumption involved in appeals to transparency is that “*seeing* a phenomenon creates opportunities and obligations to make it accountable and thus to *change* it” (2016, 2). This ideal is problematic not only because the inner workings of technical systems can be impervious to observation, but also because it assumes that seeing is equivalent to understanding. That is, even if we could observe the inner workings of complex systems like algorithms, that does not mean we thereby understand them (Ananny and Crawford 2016, 9). What is needed, they suggest, is an alternative conception of algorithmic accountability that aims at understanding how these systems work across networks of humans and nonhumans (Ananny and Crawford 2016, 11).⁴

My own critique about the reductive feature of appeals to transparency differs from, but also enriches, those offered by Vallor (2016) and Ananny and Crawford (2016). I locate the reductive problem of the transparency ideal in terms of the way it frames both ethical challenges and solutions solely in terms of epistemology. This intervention is a metaethical perspective that implicitly informs Vallor’s and Ananny and Crawford’s critiques. Vallor’s point about the reductive way in which transparency prioritizes truth as *the* ethical value can be understood as privileging an epistemic norm—truth—over other norms that are not only or entirely epis-

temic (e.g., compassion and respect). This metaethical perspective also informs Ananny and Crawford's critique of the conflation of observation with truth that is at work in appeals to transparency. Observation is taken as the epistemic process that will address the need to make algorithms more accountable (Ananny and Crawford 2016, 2). The epistemic reduction here assumes that accountability is only an epistemic issue requiring observation as its epistemic solution.

The perspective I offer suggests that we think about ethics less as an epistemic problem than as a problem for conduct or practice.⁵ I develop this ethical framework in the following section by drawing on the practical and theoretical work of Foucault.⁶ My account of ethics as counter-conduct is helpful, I suggest, because of the way it understands ethics not from a perspective outside of power, but as something immanent and responsive to power.

2. Ethics as Counter-Conduct

In the early 1970s, Foucault famously cofounded and participated in an activist organization dedicated to circulating information about conditions of prisons through first-hand accounts of prisoners themselves. This organization, *Le Groupe d'information sur les prisons* (the Prisons Information Group or GIP), took on the task of not only making the realities of prison life more transparent to a larger public, but of resisting these realities as intolerable.⁷ That is, in resisting conditions of prison life, members of the GIP assumed a practice of "active intolerance" (Zurn and Dilts 2016, 2). The GIP did not engage the reformist work of fixing the prison system but of contesting its violence and subjugation of prisoners. Through the collaborations of intellectuals, activists, and incarcerated people, the GIP published prison questionnaires and demands in the form of pamphlets and booklets, and disseminated this information through press conferences, public performances, and the production of a documentary. It also incited several revolts and hunger strikes in various French prisons (Zurn and Dilts 2016, 5).

As several scholars have argued, Foucault's involvement with the GIP would inform his theoretical work, interests, and methods, perhaps most notably with the publication of *Discipline and Punish* in 1975 (see Hoffman 2012, 2014; Demers 2015).⁸ Perry Zurn and Andrew Dilts suggest, moreover, that the collaborative and critical nature of the GIP serves as a model for rethinking the divide between theory and practice and allows us to "recenter Foucault as both a collaborator and an abolitionist" (Zurn and Dilts 2016, 7). Against the separation of theory and practice, Foucault insists that theory is itself practice and practice is already theory (Foucault and Deleuze 1989). As he suggests in a well-known exchange with

Gilles Deleuze from 1972, understood as *practice*, theory is a “struggle against power . . . it is an activity conducted alongside those who struggle for power, and not their illumination from a safe distance. A ‘theory’ is the regional system of this struggle” (Foucault and Deleuze 1989, 75–76).

Foucault’s engagement with the GIP and his reflections on the theory-practice relation in the same period is, I suggest, instrumental for understanding his later conception of ethics as counter-conduct. That is, Foucault’s participation in practices of resistance with the GIP is already theory—a regional system of a struggle against disciplinary power. As practice, Foucault’s theory of ethics as struggle, resistance, or counter-conduct insists on the collaborative nature of resistance. This is significant, I argue, because it wrests us away from the idea that ethics as counter-conduct is Foucault’s unique invention, or the result of his intellectual inquiries into historical conditions of power formations. Rather, counter-conduct is the theoretical distillation of struggle with and for power practiced by a variety of agents, and extends beyond the context of French prisons in the early 1970s. It is a concept that functions less as the singular contribution of a French scholar than it is a tool for constructing theory as practice.⁹

In a lecture from 1 March 1978 at the *Collège de France*, later published as *Security, Territory, Population*, Foucault deploys the concepts of conduct and counter-conduct to analyze sixteenth-century techniques of governmentality linked to what he calls “pastoral power.” As Arnold Davidson suggests, these concepts offer a hinge which connects Foucault’s earlier work on power with his later turn toward ethics (Davidson 2011, 26). This connection comes to the fore when we consider how Foucault increasingly utilizes the language of conduct to describe what he means by power. Power, as he puts it in a 1982 essay, can be understood as a “conduct of conducts”—that is, a way of acting on the actions of others (Foucault 2000, 341). Here Foucault clarifies a direct relation between power, conduct, and governmentality:

Basically, power is less a confrontation between two adversaries or their mutual engagement than a question of “government.” This word must be allowed the very broad meaning it had in the sixteenth century. “Government” did not refer only to political structures or to the management of states; rather, it designated the way in which the conduct of individuals or of groups might be directed—the government of children, of souls, of communities, of families, of the sick. . . . To govern, in this sense, is to structure the possible field of action of others. (Foucault 2000, 341)

Conduct can be understood as the activity and object of power. It refers simultaneously to the activity of conducting (i.e., directing) and to action as the object of this activity. If conduct names what Foucault means by power (or governmentality), then counter-conduct designates what he means by ethics—acts that counter or resist the conduct of power. Counter-conduct refers to “the sense of struggle against the processes implemented for conducting others” (Foucault 2007, 201). Hence, Foucault’s lecture makes explicit a concept of ethics as conducts of resistance or struggle, which was implicit in his collaborative practice with the GIP several years prior.¹⁰

The historical practices of resistance outlined by Foucault in these lectures take governmentality, specifically the pastoral mode of governmentality, as their primary target of contestation. In the sixteenth century, a specific form of power emerges through the Christian pastorate that assumes the objective of governing the conduct of men and women. Pastoral power bears affinities with the form of power Foucault described in *Discipline and Punish*, published in 1975. Like disciplinary power, the Christian pastorate is an individualizing power that functions by acting on individuals with the aim of directing their behavior.¹¹ To fulfill this aim, pastoral power both relies on and produces knowledge about individuals, especially concerning the state of their soul, through techniques like the examination of conscience (Foucault 2007, 183–84). Such techniques function to create a relationship of subordination between an individual and their spiritual director. In the midst of this formation of pastoral power, Foucault locates several revolts of conduct undertaken by individuals and groups within convents and political institutions whose object was “to be conducted differently” and “to escape the direction by others” (2007, 194–95).¹² In other words, these movements of resistance were concerned with the conducting activity of power and were developed in direct relation to it.

For Foucault, counter-conduct does not exist in complete exteriority to power, but rather bears an immanent relation to it. As he notes in *Security, Territory, Population*, “the struggle was not conducted in the form of absolute exteriority, but rather in the form of the permanent use of tactical elements that are pertinent in the anti-pastoral struggle, insofar as they fall within, in a marginal way, the general horizon of Christianity” (Foucault 2007, 215). A year prior in the publication of the first volume of *The History of Sexuality, The Will to Know*, Foucault makes a similar point about the relationship between power and resistance. There he writes, “[w]here there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power” (Foucault

1978, 95). Resistance is thus not outside of power, but is contemporaneous and coterminous with it.

A few consequences follow from this view. First, against the idea that power is totalizing or all-encompassing, Foucault suggests that power is accompanied by a plurality of fractures, contestations, and counter-movements. Contrary to critics who claim that Foucault's analyses of power evacuate subjects of any sense of agency, his attention to acts of resistance and counter-conduct point toward how agents can transform power relations (Smart 1982; Deveaux 1994; Newton 1998; Caldwell 2007; Bevir 2011). Second, just as there are multiple forms of power, there are multiple strategies of resistance whose efficacy partly depends on addressing the object, tactics, and techniques of specific modes of power. "Hence," Foucault explains, "there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case" (Foucault 1978, 95–96). Third, power and resistance share certain tactical elements that can be used to bolster a particular mode of governing our conduct or to create a counter-conduct. The form resistance takes is parasitic to the form that power assumes. As Foucault makes clear in the lectures from *Security, Territory, Population*, counter-conduct arose as a specific way to resist the type of power that took the conduct of people as its object. Thus, counter-conduct acts on the same material as pastoral power—conduct—but acts on it differently and for different ends.

Foucault lands on the concept of counter-conduct in his lecture after considering other alternatives for designating what he means by resistance. He rejects notions of 'revolt,' 'disobedience,' 'insubordination,' 'dissidence,' and 'misconduct' for being either too strong, too weak, too localized, too sacrilizing, and too passive respectively. Unlike these other terms, counter-conduct allows him to analyze the dimensions or components involved in "the way in which someone actually acts in the very general field of politics or in the very general field of power relations" (Foucault 2007, 202). The focus here is less on the people behind the actions than on the actions themselves and the ways in which they are performed. This also enables a way of identifying and grouping certain counter-conducts together to specify their features.¹³ Counter-conduct offers a useful heuristic for thinking through the ethics of predictive policing. It is helpful, I argue, because it directs us toward practices of contestation that struggle against the power deployed in predictive policing, and resist the reformist tendencies of technocratic solutions as exemplified in appeals to transparency. In the next section, I develop three strate-

gies of counter-conduct that contest predictive policing's exercise of power as it perpetuates racial injustice.

3. Counter-Conduct and Predictive Policing

Against the tendency to think that technology can be detached from the context in which it is created and mobilized, I begin by attending to the ethical challenges that arise with the entanglements of specific conducts. If the power of predictive policing is distributed across a network of agents (law enforcement officers, programmers, academic researchers, social service workers) and technologies (algorithms, computer databases, historical crime data, police dashboards), then we ought to understand resistance or counter-conduct as dispersed similarly along socio-technical relations. This is to say that resistance will depend on the joint techniques of humans and machines.

In what follows, I outline three distinct strategies of counter-conduct for resisting the power of predictive policing. These strategies are distinct insofar as they aim at resisting different aspects of predictive policing, from the algorithms deployed to generate predictions about crime and possible criminal actors, to the law enforcement personnel who make use of these algorithms, to the specific bodies affected by this practice. In outlining these three methods of resistance, I am suggesting that I do not see a single solution to the problem of racial injustice at work in predictive policing.

3.1. Counter-Conduct 1: Auditing the Algorithm

The audit is historically tied to the domain of finance and accounting and refers to a systematic assessment of accounts, records, books, and documents of an organization by an independent body in order to ascertain the fairness and accuracy of its financial statements (Puttick and van Esch 2007, 1–4). In the context of information systems, the audit has been used to examine the efficiency and effectiveness of a system's infrastructure. Similar to the financial audit, algorithmic audits have been conceptualized as a means for identifying an algorithm's internal logic in order to make it more fair and trustworthy (Burrell 2016, 9). In *The Black Box Society*, Pasquale, for instance, argues that algorithms could be regulated by relying on "trusted auditors" who have access to the algorithm's code and ensure that it is non-discriminatory (2015, 141). Distinct from financial audits and information system audits, social audits were developed in the 1970s as field experiments designed to detect and diagnose various forms of discrimination. These were originally used by government researchers in the U.S. to identify racial discrimination

in housing.¹⁴ Christian Sandvig, Kevin Hamilton, Karrie Karahalios, and Cedric Langbort have recently outlined a set of idealized algorithmic audit studies designed to investigate discrimination on online platforms (2014, 8).

In 2016, researchers at RAND Corporation undertook an external audit of the Chicago Police Department's pilot Strategic Subject List (SSL) program. In their study, Jessica Saunders, Priscilla Hunt, and John S. Hollywood identify the impact of the SSL on individual- and city-level gun violence. Drawing on mixed methods, including statistical analysis, interviews with police officials, and observation of COMPSTAT (a police management tool) meetings, the authors demonstrate that subjects on the SSL were neither more nor less likely of becoming a victim of a homicide or shooting, thus indicating the limits of the SSL for predicting and preventing violent crime in Chicago (Saunders, Hunt, and Hollywood 2016, 361–63).¹⁵ Furthermore, their study reveals that individuals on the SSL were more likely to be arrested for a shooting, suggesting that the SSL led to “increased contact with a group of people already in relatively frequent contact with police” (Saunders, Hunt, and Hollywood 2016, 363). Hence, the results of this research shows SSL to be ineffective in its aim of decreasing violent crime, while also raising the incidence of arrest for individuals and groups (ostensibly victims) that are routinely subjected to higher rates of police suspicion and surveillance.

Despite being limited to the first iteration of the SSL, this audit can be understood as highlighting a strategy of counter-conduct for resisting predictive policing.¹⁶ The aim of this strategy, which I call “auditing the algorithm,” is to assess the particular effects of a predictive policing algorithm. Without accounting for the *effects* of these technologies, we will not know, for instance, whether they are effective in achieving their aims, whether their predictions reflect racial bias, or whether they result in over-policing. That is, auditing an algorithm is a way of tracking what an algorithm *does* and the results of its activity. While the concept of auditing has typically been used by scholars in new media studies as a response to problems of algorithmic opacity, I find it useful as a method for tracking the effects of algorithmic power rather than illuminating the inner workings of a black box (Burrell 2016; Sandvig et al. 2014; Pasquale 2015). This is a strategy of counter-conduct insofar as it offers a way of assessing the power of predictive policing algorithms—what they do, to whom, and for what purpose. Hence, auditing the algorithm functions as a form of resistance by enabling subjects targeted by predictive policing to track how it has governed them such that they might contest this exercise of power.

My approach to the strategy of auditing algorithms combines features of the financial and social audits. Like the financial audit, the auditing of predictive policing algorithms would rely on systematic assessments made by independent researchers or auditors. These assessments would be conducted in the service of comprehending the effects of algorithmic power, and thus, like social audits, could be used to detect forms or patterns of discrimination. As with the RAND study of the SSL described above, it is important that the audits of predictive policing algorithms be undertaken by an independent body of researchers who do not share the interests of police agencies, city officials, or programmers for the assessment to be fair and accurate. Currently these assessments are conducted by nonprofit agencies like the RAND corporation and the American Civil Liberties Union (ACLU). An independent body of algorithmic auditors does not yet exist and there are no standard set of regulations or procedures for auditing algorithms. While a set of standards for auditing algorithms need not exist for this to function as a strategy of counter-conduct, it would lend a sense of unity and coherence to otherwise disparate auditing methods. Likewise, creating an organization of algorithmic auditors would resolve any uncertainty about the agents responsible for auditing these technologies. In attending to the discriminatory effects of predictive algorithms, auditing would not only represent a descriptive practice of reporting what an algorithm does, but would be self-consciously involved in the resistant practice of contesting the disproportionate impact of the algorithm's actions. As a mode of counter-conduct, the auditing of algorithms expresses a concern for those affected by predictive policing's exercise of power.

3.2. Counter-Conduct 2: Altering the Algorithm's Implementation

The development of the Chicago Police Department's Strategic Subject List was inspired by the work of Yale sociologist, Andrew Papachristos, who applies a public health approach to the study of violence. In a study from 2015, Papachristos and his co-authors show that 70 percent of nonfatal gunshot victims in Chicago can be located in a network of less than six percent of the city's overall population (Papachristos, Wildeman, and Roberto 2015, 143). What this suggests is that gun violence, like infectious disease, is concentrated in rather small social networks. Violence thus "spreads like an infection among individuals as they engage in risky behaviors" (Papachristos, Wildeman, and Roberto 2015, 1). On the basis of this analogy between violence and disease, Papachristos advocates for treating violent crime as a public health problem. Hence, interventions of violent crime "must be conducted with a victim-centered public health approach in mind—one based on

risk assessment and observation, rather than prediction—that involves not just law enforcement, but social services and community members” (Papachristos, Wilde-
man, and Roberto 2015, 1).

In spite of the serious limitations presented by a public health approach to crime (as I discuss below), the idea that we understand and respond to crime differently than we currently do highlights another type of counter-conduct to predictive policing, albeit one that is more radical in orientation than the reformist model offered by Papachristos: altering the implementation of the algorithm. This strategy of counter-conduct is less concerned with the results of algorithms like the SSL, but rather seeks to alter such problematic implementations of predictive algorithms by suggesting alternative applications that do not rely on police or policing. It thus contests current uses of predictive algorithms that contribute to toxic policing practices like overpolicing, hyper surveillance, aggressive patrolling, augmented sentencing, and police brutality. This strategy is distinct from the others insofar as it aims at intervening in the algorithm’s execution—how it is used—rather than in its design or construction. In some cases, altering the algorithm’s implementation may require more severe measures up to and including not using the algorithm altogether. For example, given the unreliability of the SSL as a predictive tool as well as its disproportional impact on Black men and women, it would be best to cease using it entirely.¹⁷

Altering an algorithm’s implementation in the context of predictive policing draws on the idea that there are other methods for crime prevention. Policing is a method of crime response and prevention that depends on a particular conception of crime as a matter of unlawful acts undertaken by groups and individuals, with arrest, trial, and eventual incarceration of those bad actors as *the* solution thereof. The problem with such a conception is that it does not consider how social, historical, and environmental conditions impact both criminal activity, and what is *considered to be* criminal activity. Such conditions call for different types of responses to crime than that of policing precisely because policing does not address these underlying conditions and may even exacerbate them. In the words of Aderson B. Francois, they require “less coercive social tools to deal with the trauma of economic distress, family dislocation, mental illness, environmental stress and racial discrimination that often masquerade as criminal behavior” (2015, 1).

Other social tools for preventing crime might take the form of social support from community organizations and social workers, counseling services from clinical psychologists, medical attention from clinicians and doctors, and housing and financial assistance from social service programs.¹⁸ This is the model of crime

prevention championed by Papachristos, but it presents some serious dangers when we consider the biopolitical effects of treating crime as a public health problem. As Foucault reminds us, the medicalization of crime is part and parcel of a disciplinary apparatus that addresses the body of the individual and a biopolitical practice addressing the life and health of the population (Foucault 1978, 1984). Andrea J. Pitts (2015) has also shown how mass incarceration is buttressed by medical institutions that reinforce the structural racism of the prison industrial complex (Pitts 2015, 269–70). Historically, reformist efforts to “humanize” crime prevention—i.e., to provide gentler means of punishment and prevention—have tended to further justify and re-entrench the need for prisons and policing.¹⁹ Hence, we should be cautious of drawing on medical and social services as panaceas to the problems presented by policing.

If crime prevention is to address the historical and environmental conditions of crime, it will require measures that are more radical than reformist in nature. Measures including, but not limited to, the desegregation of cities and schools, the redistribution of land and property, reparations for the damages incurred under slavery, Jim Crow, and redlining practices, and the abolition of policing and prisons (Shihadeh and Maume 1997; Davis 2003; Bjerk 2006; Coates 2014). Ta-Nehisi Coates (2014) defends the case for reparations as way of making amends both materially and morally for the brutality and injustices of the past. Injustices including redlining practices which entrenched segregation in cities like Chicago and Los Angeles, creating zones of undervalued and devalued property that were and continue to be subjected to policing. According to Coates, reparations entails more than monetary handouts or payoffs, but involves the (arguably) more difficult work of reckoning ourselves with “our collective biography and its consequences” (2014, 54). Advocates of prison abolition like Ruth Wilson Gilmore argue that in seeking to dismantle the prison system, abolition advances a vision of change through the persistent struggle for freedom.²⁰ Abolitionists reject the idea of relying on police to protect or ensure social welfare insofar as it undermines the welfare of people of color. In practice, abolition seeks to dismantle not only institutions like prisons, but the whole system that supports incarceration. This includes police—an institution isomorphic with prisons—as well as conceptions of crime and criminality and techniques of surveillance such as those deployed through predictive policing technologies.

As a strategy of counter-conduct for resisting predictive policing, advocating for alternative implementations of predictive algorithms identifies and contests a central assumption at work in predictive policing: namely, that policing is the best

way to prevent crime. This is troubling, as Aderson B. Francois contends, because “predictive policing does not and cannot account for the reality that often law enforcement is the default but destructive policy with which American society deals with real and perceived ills in communities of color in general and black communities in particular” (2015, 1). To push beyond this default assumption, predictive algorithms should be utilized by affected communities for methods of crime prevention that address the historical and social conditions contributing to crime. Only then will these algorithms not contribute to the repetition of discriminatory policing tactics that rob the lives of men and women of color through surveillance, incarceration, and brutality.

3.3. Counter-Conduct 3: Protesting Predictive Policing

The killing of seventeen-year-old Laquan McDonald by now-former Chicago police officer Jason Van Dyke in October 2014 sparked city-wide protests across Chicago. Van Dyke shot McDonald sixteen times in response to a call about a teenager breaking into vehicles. After the release of the dashcam footage of the shooting in November 2015, demonstrators took part in a Black Friday shopping boycott, shut down roadways, and called for the removal of Mayor Rahm Emanuel, police superintendent Garry McCarthy, and state attorney Anita Alvarez for their mishandling of the case.²¹ During Van Dyke’s trial, chants of “16 shots” and “Justice for Laquan” could be heard outside of the courtroom as activists staged “die ins” to protest police violence and the lack of accountability by the Chicago Police Department.²²

The protests organized around McDonald’s death are one of many large scale demonstrations against police brutality that have ignited in cities across the U.S. in response to the killings of Black men and women, including Trayvon Martin, Michael Brown, Freddie Gray, Philando Castile, Terence Cruther, Samuel DuBose, Alton Sterling, Jamar Clark, Jeremy McDole, William Chapman II, Walter L. Scott, Akai Gurley, Laquan McDonald, Eric Harris, Tamir Rice, Kathryn Johnston, Eric Garner, Sandra Bland, Charleena Lyles, Shukri Ali, Deborah Danner, Rekia Boyd, Mya Hall, Miriam Carey, Stephon Clark, Aiyana Stanley-Jones, Botham Jean, Michelle Cusseaux, De’von Bailey, Aura Rosser, Janisha Fonville, Tanisha Anderson, Breonna Taylor, George Floyd, Atatiana Jefferson, Elijah McClain, Rayshard Brooks, and Tony McDade. These demonstrations offer another possible model of counter-conduct for contesting predictive policing. Public protest can both draw attention to and call into question the use of predictive algorithms by police agencies. This strategy of resistance thus serves two functions—it *high-*

lights the (mis)use of predictive policing technologies and *contests* the ostensibly benign or “objective” character of such technologies. By taking the form of public protest, a mechanism most immediately associated with racial justice movements, this counter-conduct also serves to underscore the continuity between the racial bias at work in predictive policing and systemic problems of racial injustice operant in the criminal justice system. Through this framework, the racial politics of predictive policing is not an isolated problem, but is continuous with the shootings of unarmed Black men and women by police officers and with the disproportionate arrests and incarceration of Black, Latinx, and Native populations. Hence, this type of counter-conduct directs its contestation to a network of discriminatory policing practices and institutions of criminal justice, which include prisons, courts, and pre-trial sentencing, cash bail, and detention.

A number of local and national movements founded by activists and scholars have organized directly around the cause of resisting the system of mass incarceration via public protest. Co-founded in 1997 by activist-scholars Angela Davis, Ruth Wilson Gilmore, and others in Berkeley, California, Critical Resistance is an abolitionist movement that seeks to eliminate the prison industrial complex through public policy, community organizing, academic research, and coalition building. With chapters in New York, Los Angeles, Oakland, and Portland, Critical Resistance addresses local problems and issues ranging from copwatching, opposing the construction of jails and prisons, participating in community education projects, and campaigning for mental health care.²³ Founded in 2000 at a conference held at University of California Santa Cruz, INCITE! adopts an intersectional approach to address state violence directed against communities of color, such as police brutality and genocide, as well violence within these communities, including rape and domestic violence. Today INCITE! has local chapters across the U.S. that aim to end state and personal violence against women, transpeople, and gender non-conforming people of color.²⁴

In Chicago, Black-led organizations like the Black Youth Project 100 (BYP100) have been active in contesting police brutality as well as the use of a gang database by the CPD.²⁵ This database was generated as a subset of the SSL to track subjects on the list with gang affiliations (Yousef and Moore 2018), and has been used to criminalize Chicago’s Latinx, Black, and immigrant communities.²⁶ Like the SSL, it has been criticized for being prone to error and for having harmful effects on populations that are already subjected to higher rates of police attention. Together with other activist groups like Organized Communities Against Departa-

tions (OCAD), BYP100 Chicago has used direct action and grassroots organizing to call for an end of the CPD's gang database.

Other organizations like Black Lives Matter Chicago (BLM Chicago) have been active in protesting police brutality and the criminalization of Black communities by holding town hall meetings on police accountability, vigils for Black men, women, and children killed by the CPD, offering support for families, and initiatives dedicated to communal healing.²⁷ Like BYP100, the BLM movement was formed by three Black queer women, Alicia Garza, Patrisse Cullors, and Opal Tometi in response to the acquittal of George Zimmerman (Garza 2014). The movement mobilized through the use of hashtags (#BlackLivesMatter) on social media platforms like Twitter and Facebook. An early Facebook post from Patrisse Cullors specifies the purpose behind the #BLM movement: “#blacklivesmatter is a movement attempting to visibilize what it means to be black in this country. Provide hope and inspiration for collective action to build collective power to achieve collective transformation. rooted in grief and rage but pointed towards vision and dreams” (cited in Chase 2018, 1096). While the organizing tactics of BLM Chicago are less directed at protesting the SSL specifically, they attend to a network of problems connected to policing, including surveillance, violence, overpolicing, incarceration, and the disinvestment of community resources. For instance, one of BLM Chicago's coalitional campaigns, #NoCopAcademy, contests mayor Rahm Emanuel's plans to fund a \$95 million training center for Chicago police on the West Side of the city. #NoCopAcademy activists call for the money to be redirected to invest in community needs like education, youth programs, job training, and mental health facilities.²⁸

The counter-conduct strategy of protesting predictive policing involves already-existing organizations like Critical Resistance, INCITE!, BYP100, and BLM to draw attention to and call into question the racially discriminatory effects of predictive algorithms like the SSL. By attending to the populations that are disproportionately targeted, incarcerated, and killed by police, these movements highlight the continuity between the bodies that are assigned the highest risk scores, those that are routinely incarcerated, and those that are vulnerable to police brutality.²⁹ By mobilizing these social movements for the work of contesting predictive policing, this mode of counter-conduct addresses the problems of predictive policing as part and parcel of a whole network of practices and institutions that contribute to historical and ongoing forms of racial injustice.³⁰

Conclusion

In early 2018, For the People Artists Collective held a month-long exhibition titled “Do not Resist?” that chronicled a history of police violence in Chicago. The organizer of the event, Monica Trinidad, describes the exhibition’s title as a play on the police’s command when making arrests, “do not resist.” She asks, “How can you not resist all of this violence in our communities? Do not resist? Really? After 100 years of police violence and impunity?” (Misra 2018). For Trinidad, the purpose of the exhibition was to encourage the imagining of “a different way of living,” one without the ever-present threat of police surveillance, violence, and death (Misra 2018). What would it be like to not fear the obliteration of one’s body at the hands of police? What would it mean to live without the paranoia of having to constantly monitor one’s body, one’s actions, one’s location, one’s relations as a matter of survival? What would it be like to live otherwise?

The practices of counter-conduct described above address these questions by supplying different strategies of resistance to the power exercised by predictive policing algorithms. That is, they embody distinct ways of imagining a different mode of living without the racialized threat of police surveillance, brutality, and incarceration.

The strategies of resistance outlined here contribute to an ethical framework. A framework for responding to racial injustice in predictive policing that does not rely on the ideal of transparency. I argue that this ideal is limited in two ways: first, it does not allow us to address the problem of power at work in predictive policing, a problem that is irreducible to one of opacity; and second, in reducing ethics to an epistemic issue, transparency neglects the racial politics that condition and inform predictive policing. The ideal of transparency leads us to believe that by knowing how the algorithm makes its predictions, we can ameliorate its issues of racial bias and injustice. I argue that this is insufficient, and that in order to contend with the problems of power in predictive policing, and the limitations of the ideal of transparency, we ought to instead conceptualize ethics as a practice of counter-conduct. This counter-conduct works to resist the racialized effects of predictive policing algorithms, and can thus open and cultivate possible futures for subjects whose futures are preemptively foreclosed by such algorithms.

Notes

1. For scholarship on the problem of opacity as central to algorithms and machine learning, see Dwork et al. 2012; Sandvig et al. 2014; Pasquale 2015; O’Neil 2016; Burrell 2016; Veale, van Keel, and Binns 2018.

2. My reasons for drawing on Foucault for this ethical framework are threefold. First, having previously utilized the work of Foucault to diagnose the form of power exercised by person-based predictive policing programs like the “Strategic Subject List,” this essay likewise draws on resources in Foucault to develop an ethics of resistance to the racializing power of predictive policing. Hence, for the purposes of analytical consistency between my previous work (Sheehey 2018) and this follow-up piece, I draw on Foucault’s ethics of counter-conduct. Second, and relatedly, what is particularly useful about conceptualizing ethics as resistance or counter-conduct is the way it develops an ethics from a perspective immanent to power. This metatheoretical orientation offers a productive contrast to an ethics of transparency, which adopts a perspective outside of power, or at least, outside of racializing power, and is thus incapable of addressing the problems of racial injustice posed by predictive policing technologies. Third, the ethics of counter-conduct (highlighted in the activism and theorizing of Foucault) functions as a tool or heuristic for what I see is the more important work of developing and clarifying strategies for resisting the racial injustice of predictive policing. In that way, what I take from Foucault is less the insights of an intellectual than a useful tool for responding to present social problems (problems that Foucault himself did not nor could have addressed). I want to emphasize, then, at the outset that I am not relying on Foucault to tell us what is “good”—an intellectual role he consistently criticized and refused—rather, such a judgment “will be up to people themselves, basing their judgment on the various analyses of reality that are offered to them, to work or to behave spontaneously, so that they can define for themselves what is good for them. . . . The good is defined by us, it is practiced, it is invented. And this is a collaborative work” (Foucault 1988, 13).

3. This can be seen, for instance, in the way Pasquale frames the entire problem of the “black box society” through the logic of secrecy. Indeed, the introduction of *The Black Box Society* opens with an appeal for “the need to know” as way of addressing what he calls “gaps in knowledge” or the “knowledge problem” (Pasquale 2015, 1-2).

4. They frame this as a “pragmatic approach to epistemology” in contrast to the representational account of knowledge at work in the transparency ideal (Ananny and Crawford 2016, 11).

5. In distinguishing between epistemology and practice, my intent is not to set up an unnecessary dualism between them, but rather to say that epistemology is one kind of practice among many others. That is, the idea that ethics is a question of doing

(or practice) includes knowing as one type of ethical action but does not reduce ethics solely to that type of action.

6. In describing this account of ethics, it is not my claim that Foucault is the unique author and contributor of such a perspective. Rather, I look to Foucault as one among many critics of technology who have elaborated a conception of ethics in terms of resistance in both their activism and scholarship and, in doing so, have pointed out the limits of technocratic solutions to problems of power. What I take from Foucault is a concept of ethics that functions as a tool or heuristic for contesting the power of predictive policing.

7. The statement of the GIP published in March 1971 clarifies, “We do not make our inquiry in order to accumulate knowledge, but to heighten our intolerance and make it an active intolerance. Let us become people intolerant of prisons, the legal system, the hospital system, psychiatric practice, military service, etc.” (Foucault 2001, 1044). For more on the history of the GIP and Foucault’s involvement in this group, see Zurn and Dilts 2016, 1-19.

8. For a critique of overemphasizing the connection between the GIP and Foucault’s theoretical work as a specific intellectual, see Zurn and Dilts 2016, 7.

9. The idea of understanding theoretical concepts as tools is expressed by Deleuze in the same exchange with Foucault. He notes, “A theory is exactly like a box of tools. It has nothing to do with the signifier. It must be useful. It must function.” See Foucault and Deleuze 1989, 76.

10. I borrow this language of explicit concepts being implicit in practice from Robert Brandom (1994). See also Tuomo Tiisala’s Foucauldian rejoinder to Brandom in Tiisala 2015.

11. In *Discipline and Punish*, Foucault describes the emergence of disciplinary power in the nineteenth century through an analysis of the prison and contrasting regimes of punishment. Disciplinary power refers to a *dispositif* or arrangement of power that punishes via the machinery of imprisonment in order to address the souls or consciences of criminals and to produce docile bodies (Foucault 1997).

12. These pastoral counter-conducts took five main forms in the Middle Ages: asceticism, communities, mysticism, Scripture, and eschatological belief (Foucault 2007, 214).

13. Foucault shows how the counter-conducts of asceticism and those of communities comprised different, even opposing, ways of resisting pastoral power. Where ascetic practices tend to have an individualizing function that contests pastoral power by setting up an ethical relation of self to self, what Foucault would later describe as “care of the self,” communities contest pastoral power by developing alternative religious groups with divergent organizations to that of the Church (Foucault 2007, 204-08).

14. See Mincy 1993 for the history of social audits.

15. The predictions generated by the SSL do not differentiate between victims or offenders of violent crime. As I have argued elsewhere, however, the individuals with high risk scores tend to get targeted by police as future *offenders* of crime, rather than as potential victims. See Sheehy 2018.

16. Along with pressure from local activists and community organizers, this audit has been partly instrumental in getting the Chicago Police Department to decommission the Strategic Subject List.

17. As noted above, the Chicago PD has recently ceased using the SSL, and has replaced it with similar predictive tools, including the Subject Assessment and Information Dashboard (SAID) and the Crime and Victimization Risk Model (CVRM). These tools are used in concert with the Custom Notification program, which was previously used with the SSL, to notify individuals of their risk of being involved as either victim or offender in a shooting or homicide. Data on the reliability and individuals impacted by these technologies is not yet available.

18. This is referred to in criminology literature as “community crime prevention.” According to Tim Hope, community crime prevention “refers to actions intended to change the social conditions that are believed to sustain crime in residential communities. It concentrates usually on the ability of local social institutions to reduce crime in residential neighborhoods. Social institutions encompass a diverse range of groupings and organizations—including families, friendship networks, clubs, associations, and organizations—which bring people together within communities and, by doing so, transmit guidance concerning conduct in the locality” (Hope 1995, 21).

19. This argument can be found, for instance, in Foucault 1997, Davis 2003, and Gilmore 2019.

20. For more on Gilmore’s advocacy of prison abolition, see Kushner 2019.

21. See Rubenstein 2018 and Husain 2019 for a report and timeline of the shooting.

22. A report conducted by the U.S. Department of Justice in 2017 highlights the extent of misconduct and excessive use of force by Chicago police officers (USDJ Civil Rights Division 2017, 15).

23. For a summary of these projects and the history of Critical Resistance, see <http://criticalresistance.org>.

24. For the history and organizing principles of INCITE!, see <https://incite-national.org> and *INCITE!* 2016.

25. BYP100 was formed in 2013 in response to the verdict of Trayvon Martin’s killer, George Zimmerman, who was found not guilty. They are a national, member-based organization of Black activists and organizers between the ages of 18-35 who are dedicated to “creating justice and freedom for all Black people” through “transformative leadership development, direct action organizing, advocacy, and political education using a Black queer feminist lens.” See <https://byp100.org/about-byp100/#mission>.

26. In March 2017, Wilmer Catalan-Ramirez, a Guatemalan national, was arrested by Immigration and Customs Enforcement officers after being wrongfully placed on the gang database, which ultimately led to his immigration arrest. After examining city data, Odette Yousef and Natalie Moore (2018) found that roughly 65,000 Chicagoans on the SSL are considered “gang affiliated” and more than 95 percent of these subjects are Black, Latino, or both.

27. See <https://www.blacklivesmatterchicago.com/10-demands-of-blmchi/>.

28. See <https://www.blacklivesmatterchicago.com/nocopacademy/>. The groups collaborating with BLM Chicago include Assata’s Daughters, People’s Response Team, For the People Artists Collective, and other grassroots organizations.

29. Some groups, like the Stop LAPD Spying Coalition, are already highlighting the continuity between predictive policing technologies and mass incarceration and contesting the use of predictive technologies such as the LAPD’s PredPol and Laser programs used to identify crime hot spots. This grassroots organization won a legal dispute with the LAPD in December 2019, which forced the LAPD to release information and public records on its predictive policing programs and to scrap two of its programs—Laser and the Chronic Offender program—after they were found to be inconsistent and lacking in oversight. See Stop LAPD Spying Coalition 2018 and Morgan 2019.

30. There have been adjacent successes of this counter conduct strategy as witnessed in the most recent BLM protests, including the arrest of George Floyd’s killers, the in-progress dismantling of the Minneapolis Police Department, and other efforts to defund police departments in cities like San Francisco. These successes, however, in no way undercut the work still to be done, such as the arrest of Breonna Taylor’s killers, the removal of federal agents from cities to deter protests, as well as the dismantling of police departments and the prison industrial complex.

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