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March 2025

How AI is Setting the stage for a Digital Jim Crow Era

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Executive Summary

In recent years, predictive policing has risen in popularity, allowing police departments to cut back on costs by relying on algorithms to direct their efforts in a more targeted manner. Predictive policing employs computer systems to analyze past behavior, including historical crime data, to help allocate police resources and identify individuals who are likely to be victims or perpetrators of a crime [1]. However, communities of color often pay the price of this increasingly used new technology given biased data sets and a lack of safeguards.

Background

With the modernization and rise of technology, police departments have begun using Artificial Intelligence (AI) to aid their efforts, including predictive policing methods. Predictive policing is "the collection and analysis of data about previous crimes for identification and statistical prediction of individuals or geospatial areas with an increased probability of criminal activity to help to develop policing intervention and prevention strategies and tactics."[2] Moreover, predictive policing tools analyze historical data including crime and arrest data to predict future crimes. Essentially, predictive policing utilizes "advanced data collection and analysis to predict where or when crimes occur, who commits crimes, or who is victimized by crimes." [3] Theoretically, this method of policing should improve law enforcement accountability by using an "objective" tool to allocate policing resources in areas where crime is likely to occur. [4]

The digitalization of police records in the 1990s paved the way for data-driven policing. [5] With all the data stored in a computer database, police departments soon began to police in a data-driven manner by scoping out algorithmically predicted hot spots. Algorithms predict crime by analyzing factors including past arrests, violent incidents, and trends in criminal activity to identify individuals deemed high risk. These risk scores are used to create a "heat list" ranking people based on their likelihood to commit or be a victim of gun violence. [6] While different software is available, some police departments such as the New York Police Department have created in-house predictive policing algorithms. [7]

Predictive policing programs have been shown to have a disproportionate impact on people of color.A 2018 study from Geolitica showed that Indianapolis's Latine population would have endured anywhere from "200% to 400% the amount of patrol as white populations" had it been deployed in that city. [8] The researchers stated that there was a possibility to alter the algorithm to minimize bias. However, such a change would yield less accurate predictions, though it could still potentially be more accurate than human predictions. Nevertheless, the CEO of Geolitica did not change the algorithm because he claimed that it would "reduce the protection provided to vulnerable neighborhoods with the highest victimization rates." [9]

Historically, the Latine community has been persecuted by different forms of authority, whether from Customs and Border Protection agents, Immigration and Customs Enforcement officers, or local police officers. In the late 1920s, xenophobia against people who appeared to be of "Latin" descent, grew across the country. As fears about job stability and the economy grew, the United States forcibly removed about 2 million people of Mexican descent from the country, with up to 60% being American citizens. [10] A pattern of "Juan Crow,"[11] similar to Jim Crow, emerged in the United States. Under this phenomenon, Latines were segregated, excluded from public places, and targeted for deportation. The remnants of decades of racism are also evident in the war on drugs which earned it its name as the "New Jim Crow" signaling its goal of putting people of color behind bars by employing color blindness. [12]

Today, the harsh rhetoric targeting Latines as being "criminals" or "stealing jobs" is still very much alive, as biased AI sets the stage for a new way to oppress the Latine community. [13] This legacy extends to the criminal justice system as any data fed into algorithms regarding past crimes will inevitably reflect preexisting biases against Latines.

Problem Analysis

Several reasons can be attributed to Congress's slow legislative efforts in the AI arena. These include AI's continuous growth – faster than the government's ability to legislate – and the multi-faceted aspects of AI such as its omnipresence in everyday life, including social media, video games, and Google searches. Thus, the United States has failed to create a legislative framework for AI innovators to follow, allowing the technology's bounds to be defined by the people who developed the technology. Additionally, given that mostly private corporations compile the data fed to algorithms, Congress has failed to exercise oversight over law enforcement's use of AI in predictive policing.

The lack of federal oversight in the AI space is particularly evident in how police departments across the country use predictive policing tools. The population negatively impacted includes predominantly people of color: mainly Black and Brown people. Another aspect of this issue is jurisdiction. Police often utilize private contractors to obtain technology used for predictive policing. Because the states oversee their law enforcement agencies according to their police powers, the federal government might run into Constitutional problems regulating areas where states have jurisdiction. However, to address the issues of regulating private contractors employed by state police, the federal government can use financial incentives, such as federal funding, that require transparency and oversight of the algorithms used by those private entities.

AI has the potential to operate as a Digital Jim Crow disguised as modern efficiency, meaning that Black and Brown offenders are overpoliced and targeted for minor offenses at a disproportionate rate, even when their white counterparts are engaged in crime at the same rates. Even though AI does not explicitly use race as a category in its algorithm, it uses other proxies for race such as zip code information. Jim Crow, and later the New Jim Crow, segregated Latines and other people of color, structuring cities, towns, and communities in ways that deeply embedded racial identity within the current justice system and—by extension, affected past crime data. [14] Using past data to predict future crime is merely replicating and digitizing the Jim Crow era.

Consequences in the Use of Predictive Policing in Articulable Suspicion Calculus

Predictive policing algorithms can lead to inequitable outcomes by eroding the 4th Amendment, which protects individuals from unreasonable searches and seizures. [15] One exception to this protection is a Terry Stop, where police can briefly detain someone based on reasonable suspicion. [16] The low threshold for reasonable suspicion in Terry Stops creates a risk that predictive policing tools, which may label someone as a threat, could lead to unwarranted stops and interrogations, without solid evidence of criminal activity.

While using race directly in predictive policing is illegal, race proxies like socioeconomic status, education, and zip codes can lead to discriminatory outcomes. [17]

Algorithms used in predictive policing analyze factors like past arrests, violent crime involvement, and trends in criminal activity to generate a threat score for individuals.[18] This score ranks people based on their likelihood to commit a crime, influencing police decisions to stop, question, or intervene with individuals. These systems can affect police behavior, influencing how officers conduct themselves and whom they target. Additionally, predictive policing algorithms are often not audited, leaving the public little oversight or accountability.

Some studies indicate predictive policing does not yield a high level of accuracy. A study of 23,631 predictions generated by Geolitica for the Plainfield Police Department between February 25th to December 18th, 2018, showed the "success rate was less than half a percent."[19] Additionally, "fewer than 100 of the predictions lined up with a crime in the predicted category."[20] Further, the same study looked at predictions for robberies or aggravated assaults likely to occur in Plainfield and found a success rate of 0.6% and burglary predictions had a success rate of .1%.

Blackbox Dilemma

Given the history of the criminal justice system, police brutality, and the use of violence against people of color, the partnership between the private sector and police poses concerns without proper safeguards. AI uses past information about crime to predict future crimes, thus the data used to teach the software is embedded with biases that are very clearly rooted in racial injustice.[21]

The lack of transparency creates issues for defendants accused of crimes, and in most jurisdictions, prosecutors do not have to disclose the use of AI to a judge or defense

counsel.[22] Even if disclosed, however, trade secret law prevents the public from inspecting the same tools used to incarcerate them.[23] In summation, AI is creating the potential to perpetuate continued racism within the criminal justice system, feeding new AI algorithms with racially biased information, and hiding behind intellectual property rights and algorithms.

Conclusion

The civil liberties of Brown and Black individuals are at stake, and it is important to seek out additional proactive safeguards to bolster the already scarce 4th amendment protections. Although the White House, under former President Biden, attempted to remedy the situation by issuing a policy that imposed requirements on federal agencies and their use of AI,[24] current President Donald Trump revoked the same executive order thus leaving Americans with fewer protections.[25]

A lot of policing occurs at a state level. Thus, intervention by Congress needs to consider the police powers granted to individual states by the Constitution. Two federal bills that may mitigate some of the harmful impacts of AI bias are H.R.10092 and S.1671.

Regulation of AI Bias on the Federal Level

In November 2024, H.R.10092, known as the "Eliminating Bias in Algorithmic Systems Act of 2024," was introduced in both the House and the Senate. This bill addresses the risks posed by AI bias within federal agencies, mandating federal agencies utilizing, funding, or overseeing AI to establish a civil rights office dedicated to combating algorithmic bias, discrimination, and associated harms.[26] The bill requires these offices to submit regular reports to Congress detailing their efforts to monitor and mitigate AI-driven discrimination, providing vital insights and recommendations for further action. Thus, this legislation would be instrumental in combating AI bias on the federal level. Further, the Senate introduced S.1671, known as the "Digital Platform Commission Act of 2023," to create a Digital Platform Commission. This new agency would exercise oversight over digital technology such as AI while focusing on a risk-based approach to developing regulation. An administrative agency's oversight of AI would be helpful in the sense that agencies are more specialized and can often act faster than Congress to regulate an area.

Regulation of AI Bias on the State Level

On the state level, state legislators should introduce legislation that requires government contracts to include provisions mandating that contractors are subject to audits by the Department of Justice. Through this process, contractors should make available their methodologies, sources, and impact assessments. Based on established Constitutional law precedent, Congress can incentivize the states to incorporate such a clause by making disbursement of federal funds based on the incorporation of these oversight mechanisms.[27]

Additionally, it would be imperative to create a private civil cause of action for individual defendants. This private cause of action would help individuals take ownership of their information and privacy by allowing them to challenge the data being used against them in a court of law. Current law does not bestow that right on individuals. Thus, defendants should be able to sue the contractor in a civil suit for monetary damages. Such a claim should be available to any defendant exposed to criminal liability.

Endnotes

[1]Tim Lau, Predictive Policing Explained, BRENNAN CENTER, (Apr. 1, 2020), https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained.

[2] Albert Meijer et al., Predictive Policing: Review of Benefits and Drawbacks, INTERNATIONAL JOURNAL OF PUBLIC ADMINSTRATION, 1031, 1033 (2019).

[3] Andrea DaViera et al., Risk, Race, And Predictive Policing: A Critical Race Theory Analysis Of The Strategic Subject List, AMERICAN JOURNAL OF COMMUNITY PSYCHOLOGY, 91, 93 (2024).

[4]Id.

[5] Dhruv Mehrotra, How We Determined Crime Prediction Software Disproportionately Targeted Low-Income, Black, and Latino Neighborhoods, THE MARKUP, (Dec. 2, 2021), https://themarkup.org/show-your-work/2021/12/02/how-we-determined-crime-prediction-software-disproportionately-targeted-low-income-black-and-latino-neighborhoods#:~:text=However%2C%20a%20study%20published%20in,%E2%80%9C150%25%20to%2050%25%20the.

6] Madison Blevins, When Dirty Data Leads to Dirty Policing, 29 Rich. J.L. & Tech. 166, 184-185 (2023); Dhruv Mehrotra, How We Determined Crime Prediction Software Disproportionately Targeted Low-Income, Black, and Latino Neighborhoods, THE MARKUP, (Dec. 2, 2021), https://themarkup.org/show-your-work/2021/12/02/how-we-determined-crime-prediction-software-disproportionately-targeted-low-income-black-and-latino-neighborhoods#:~:text=However%2

C%20a%20study%20published%20in,%E2%80%9C150%25%20to%2025 0%25%20the.
[7] Lau, supra note 1.
[8] Mehrotra, supra note 5.
[9] Id.
[10] Erin Blakemore, The Long History of Anti-Latino Discrimination in America, HISTORY, (Aug. 4, 2023), https://www.history.com/news/the -brutal-history-of-anti-latino-discrimination-in-america.
[11] Roberto Lovato, Juan Crow in Georgia, The Nation, (May 8, 2008), https://www.thenation.com/article /archive/juan-crow-georgia/.
[12] See Michelle Alexander, The Color of Justice, in THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).
[13] Stephanie L. Canicales et al., Latinos & Racism in the Trump Era, JOURNAL OF THE AMERICAN ACADEMY OF ARTS & SCIENCES, 150, 150-151 (2021).
[14] See Michelle Alexander, The New Jim Crow, in THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).
[15] Fourth Amendment, LEGAL INFO.INST., https://www.law.cornell.edu/consti tution/fourth_Amendment [https://perma.cc/R6XV-GLYC].
[16] Madison Blevins, When Dirty Data Leads to Dirty Policing, 29 Rich. J.L. & Tech. 166, 184-185 (2023).
[17] Id.
[18] Id.
[19] Aaron Sankina, et al., Predictive Policing Software Terrible At Predicting Crimes, THE MARKUP, (Oct. 2, 2023), https://themarkup.org/prediction-bias/2023/10/02/predictive-policing-software-terrible-at-predicting-crimes.
[20] Id.
21] Hope Reese, What Happens When Police Use AI to Predict and Prevent Crime?, JSTOR, (Feb. 23, 2022), https://daily.jstor.org/what-happens-when-police-use-ai-to-predict-and-prevent-crime/.
[22] Clayton Vickers, How AI Risks Creating a 'Black Box' at the Heart of US Legal System, (Apr. 7, 20224) THE HILL, https://thehill.com/business/personal-finance/4571982-ai-black-box-legal-system/.
[23] Id.
[24] POLICING PROJECT, What Does the New White House policy on AI mean for law enforcement? Here are our takeaways, (Apr. 16, 2024), https://www.policingproject.org/news-main/2024/4/15/what-does-the-new-white-house-policy-on-ai-mean-for-law-enforcement-here-are-our-takeaways.
[25]Micheal Santiago, President Trump Repeals Biden's AI Executive Order, TECH CRUNCH, (Jan. 20, 2025), https://techcrunch.com/2025/01/20/president-trump-repeals-bidens-ai-executive-order/.
[26] H.R. 10092 – 118th Congress (2023-2024): Eliminating Bias In Algorithmic Systems Act of 2024, H.R. 10092, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/house-bill/10092/text
[27] New York v. United States, 505 U.S. 144 (1992).