HOW NOT TO DEMOCRATIZE ALGORITHMS

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A growing set of jurisdictions has embraced "consultative algorithmic governance," the idea that community members, particularly racially and otherwise politically marginalized ones, should be involved in the processes by which state institutions procure, construct, implement, and oversee artificially intelligent algorithms employed in public sector decision-making. Consultative processes range from public hearings that provide communities with an opportunity to comment about anticipated algorithmic use to community advisory boards that help public officials evaluate the impact of current or future algorithmic use.

This Article argues that consultative algorithmic governance is critically flawed and then builds upon this critique to point toward a more pluralistic, and potentially contentious, vision of community participation. Consultative algorithmic governance rests on the assumption that community participation should be limited to consultation. This narrow conception depoliticizes the stakes of algorithm use for different communities to the detriment of communities who are most likely to be harmed by algorithm use. For racially and otherwise politically marginalized communities, algorithmic use is not neutral but rather can serve as a mechanism to facilitate and justify their punitive treatment by the state. By treating consultation as the primary goal of community participation, consultative algorithmic governance undermines

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efforts by politically marginalized communities to force the state to account for the multifaceted interests at stake.

To illustrate the problem, the Article focuses on the use of consultative algorithmic governance in criminal administration. It then sets out a different approach to community participation, one that recognizes that communities may seek to do more than consult with criminal legal institutions. They may seek to influence algorithmic construction, change algorithmic policy, participate in ongoing algorithmic oversight, or even build political power to stop algorithmic use all together. If we are serious about accounting for the needs of different communities, then we should aim to better facilitate the diverse purposes for which communities participate in algorithmic governance. This recognition directs us beyond just providing opportunities for community consultation and toward also aiding communities in their efforts to render the state more responsive to their perspectives and their needs. This Article explores the incorporation of resources into algorithmic governance that can better facilitate the diverse aims that different communities pursue in algorithmic governance, whether the aim is to consult, collaborate, or check institutional power. While these resources are not a complete solution, they are part of the larger restructuring needed to create a more democratic iteration of algorithmic governance for all.

Introduction 897
I. Contextualization 910
A. The Rise of Algorithms in Criminal Law Reform Debates 910
B. The Shortcomings of Algorithms 915
1. Algorithmic Discrimination 915
2. Algorithmic Variance 917
3. Algorithmic Opacity 918
C. Participation and Democratic Accountability 921
II. The Threats of Algorithmic Governance to Institutional Democratic Accountability 922
A. Institutional Democratic Accountability 923
B. Institutional Democratic Accountability and Algorithmic Governance 928
1. Democratic Accountability and Algorithmic Procurement 928
2. Democratic Accountability and Algorithmic Construction 930
3. Democratic Accountability and Algorithmic Implementation 932
4. Democratic Accountability and Algorithmic Oversight 933
C. Consultative Algorithmic Governance 935
1. Consultative Algorithmic Governance and Criminal Legal Agencies 935
2. Consultative Algorithmic Governance and Criminal Courts 940

D. Consultative Algorithmic Governance and Democratic Accountability 942
III. Toward More Democratic Algorithmic Governance 948
A. Revisiting the Pennsylvania Commission on Sentencing .. 950
B. Principles for Collaborative and Countervailing Power ... 957
1. Transparency 957
2. Responsivity and Contestation 959
3. Enforceability 964
IV. Objections 966
A. Insufficient Community Capacity 966
B. Procedure Fetish Objection 967
C. Patchwork Objection 968
Conclusion 968

INTRODUCTION

In 2018, the Pennsylvania legislature passed Senate Bill No. 449.[1] The law mandated the Pennsylvania Commission on Sentencing to develop a state-wide pretrial risk assessment algorithm for use in domestic violence bail decisions.[2] The algorithm was to be designed to provide predictions about the threat that a charged person's release would pose to a domestic violence complainant free from racial or economic bias.[3] The hope was that bail judges would condition a charged person's bail eligibility on the algorithm's prediction, thereby decreasing how race, class, and other heuristics often drive outcomes.[4] Following its development and approval by the Commission, each trial court district could choose whether to adopt the algorithm in its bail decision-making.[5]

To accomplish this mandate, the Commission decided to heavily involve "experts and key criminal justice stakeholders," which it solely defined as the (1) algorithm developers, (2) domestic violence researchers, and (3) criminal law administrators (such as bail judges, prosecutors, police officers, pretrial services coordinators, and probation officers).[6] Shortly after the passage of S.B. 449, the Commission

1. S.B. 449, 2018 Gen. Assemb., Reg. Sess. (Pa. 2018) (codified at 18 PA. CONS. STAT. § 2711 (2025)).

2. § 2711(c)(2), (c.2)(1).

3. § 2711(c)(2), (c.2)(2).

4. *See* Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE 21, 34 (Erik Luna ed., 2017) ("There is reason to be optimistic about the actuarial turn in pretrial practice. Risk assessment tools should reduce the subjective, irrational bias that distorts judicial decision making.").

5. § 2711(c)(2), (c.1).

6. This language is included in the Pennsylvania Commission on Sentencing Proposed Model Pretrial Risk Assessment Tool. 50 Pa. Bull. 295–96 (Jan. 18, 2020).

undertook a multifaceted collaborative strategy to involve these stakeholders in its decision-making process. In September 2018, the Commission hosted a roundtable discussion with "local practitioners and state experts" to develop mutually defined criteria about how "best [the Commission could] utilize [its] authority under [SB-449] to improve decision-making and outcomes."[7] Additionally, in order to identify which algorithms were feasible for use, Commission staff held multiple meetings with algorithm developers and domestic violence researchers.[8] According to the Commission, these meetings helped it get a sense of "best practices on domestic violence pretrial decision-making" and "issues associated with the creation and validation of existing pretrial and domestic violence pretrial risk assessment tools."[9] Commission staff also conducted numerous site visits to trial courts around Pennsylvania.[10] In addition to those visits, they had extensive discussions with different sets of criminal law administrators in order to understand and account for the different perspectives within each professional community about the state of domestic violence pretrial practices and the potential role that a risk assessment algorithm could play.[11] Once the Commission had narrowed its choice to the Ontario Domestic Assault Risk Assessment algorithm (ODARA), it continued this collaborative posture.[12] Following this extensive collaboration, the Commission moved to approve ODARA as its proposed pretrial risk assessment algorithm in January 2020.[13]

The Commission took an entirely different approach to involving communities in its decision-making process, as compared to those it identified as experts and key criminal justice stakeholders. After deciding to move forward with ODARA, the Commission held three public

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7. *Id.* at 295.

8. *Id.*

9. *Id.*

10. RSCH. & ANALYSIS UNIT, PA. COMM'N ON SENT'G, PRETRIAL DOMESTIC VIOLENCE RISK ASSESSMENT PROJECT (2019) [hereinafter RSCH. & ANALYSIS UNIT, PRETRIAL DOMESTIC VIOLENCE RISK ASSESSMENT PROJECT].

11. *Id.*; 50 Pa. Bull. 295 (Jan. 18, 2020).

12. *See* PA. COMM'N ON SENT'G, DOMESTIC PRETRIAL ASSESSMENT TOOL: STAKEHOLDER SUMMIT (2019), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/pretrial-domestic-violence-risk-assessment-commission-research/ [https://perma.cc/W5GG-2SJ8]. It is important to note that the Allegheny County Public Defenders' Office is mentioned as a participant in the one-day stakeholder participatory summit. *Id.* However, since there is not extensive discussion about the Commission's efforts to involve the Allegheny County Public Defenders' Office or any other Public Defenders' Office in the Commission's publicly available records, it does not appear that Public Defenders' Offices were a major participant in the Commission's decision-making process. However, I acknowledge that the publicly available records may be incomplete and fail to account for informal discussions that may have occurred between the Commission and Public Defenders' Offices across Pennsylvania.

13. 50 Pa. Bull. 294 (Jan. 18, 2020).

hearings on its proposal and a two-month written comment period.[14] These were the only input opportunities provided to community members and community groups, including those hailing from and/or representing the racially and otherwise politically marginalized communities most vulnerable to algorithmically facilitated harms.[15] Yet, it was individuals from organizations representing these communities that made the most use of these public hearings. While each participant held different views about algorithm use, each shared an important goal. They desired to be heard, to be responded to, and to share in the same power to influence the Commission's course of action that had been afforded to those designated as "experts and key criminal justice stakeholders."[16] Put differently, they sought to share *power with* the Commission.[17]

While they shared the same power goal, participants pursued different types of power. Some sought to collaborate with the Commission (which this Article will refer to as "collaborative power"). In this vein, several made demands for more information.[18] They asked

14. *Id.*

15. *See id.* (noting that three public hearings would be held and that "[w]ritten comments from persons or organizations not wishing to testify should be received by the Commission at least five business days before the last-scheduled public hearing"). This Article uses the term "community members" to refer to individuals who have an "identification and emotional connection to other members, common symbol systems, shared values and norms, mutual—although not necessarily equal—influence, common interests, and commitment to meeting shared needs." Barbara A. Israel, Amy J. Schulz, Edith A. Parker & Adam B. Becker, *Review of Community-Based Research: Assessing Partnership Approaches to Improve Public Health*, 19 ANN. REV. PUB. HEALTH 173, 178 (1998). This definition focuses on socially constituted communities and includes members of these communities who may themselves possess technocratic or technical expertise, but who also have and utilize their expertise from their lived experience as a member of a social community. This Article uses the term "community groups and organizations" to refer to organizations that seek to represent a community or advocate for a community. Community members, groups, and organizations are typically not referred to as "experts and key criminal justice stakeholders" by criminal legal institutions.

16. *See, e.g.*, Sean Damon, Amistad L. Project, Comment Letter on Proposed Model Pretrial Risk Assessment Tool Under 18 PA. CONS. STAT. § 2711 (Mar. 4, 2020) [hereinafter Damon, Comment Letter], https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/.

17. Susan Sturm coined the term "power with" to refer to situations where communities without power are given the capacity and resources to influence institutional structures in ways that enables them to "change [an institution's] course of action." SUSAN STURM, WHAT MIGHT BE: CONFRONTING RACISM TO TRANSFORM OUR INSTITUTIONS 159 (2025).

18. *See, e.g.*, John Rowland, Abolitionist L. Ctr., Comment Letter on Proposed Model Pretrial Risk Assessment Tool Under 18 PA. CONS. STAT. § 2711 (Mar. 4, 2020) [hereinafter Rowland, Comment Letter], https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/; Def. Ass'n of Phila., Comment Letter on Proposed Model Pretrial Risk Assessment Tool Under 18 PA. CONS. STAT. § 2711 (Feb. 19, 2020) [hereinafter Def. Ass'n of Phila., Comment Letter], https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/.

the Commission to conduct research into the algorithm's anticipated racial impact.[19] In Pennsylvania, even though those racialized as Black only make up about 10 percent of the population, they make up 46 percent of the incarcerated population and are incarcerated at a higher rate than those racialized as White.[20] These participants worried that the algorithm would maintain or exacerbate this inequity.[21] Several others criticized the Commission's decision to minimally involve communities most ravaged by mass incarceration in the process.[22] To this point, aside from the public hearings and comment period, the Commission had provided no mechanism for community members or groups: (1) to influence the choice to use ODARA, (2) to participate in creating policies governing ODARA's usage, or (3) to oversee ODARA's implementation in order to identify and address any potential adverse impacts that it may have on their community.[23] Still others sought the power to check the Commission's exercise of power (which this Article will refer to as "countervailing power").[24] In this vein, this set of community members voiced their opposition to the adoption of ODARA altogether.[25] Their concern was that the adoption of ODARA would serve as a barrier to the public debate and reflection needed to address poverty, resource deprivation, and the other individualized and collective material realities that are sources of domestic violence, none of which could be addressed through an algorithm.[26]

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19. *See, e.g.*, Rowland, Comment Letter, *supra* note 18; Def. Ass'n of Phila., Comment Letter, *supra* note 18.

20. *Pennsylvania Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/PA.html [https://perma.cc/HY6Z-WYYN] (last visited Aug. 25, 2025).

21. *See, e.g.*, Rowland, Comment Letter, *supra* note 18.

22. *See, e.g.*, Damon, Comment Letter, *supra* note 16.

23. 50 Pa. Bull. 295–96 (Jan. 18, 2020). Neither community members from nor community groups representing racially or otherwise politically marginalized communities most affected by incarceration are explicitly listed as among the stakeholders that the Commission engaged with before recommending the ODARA tool and subjecting the algorithm to public comment. However, I acknowledge that the publicly available records may be incomplete and fail to account for informal discussions.

24. *See, e.g.*, Def. Ass'n of Phila., Comment Letter, *supra* note 18; Pa. Ass'n of Crim. Def. Laws., Comment Letter on Proposed Model Pretrial Risk Assessment Tool Under 18 PA. CONS. STAT. § 2711 (Mar. 3, 2020), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/.

25. *See, e.g.*, Hannah Sassaman, Media Mobilizing Project, Comment Letter on Proposed Model Pretrial Risk Assessment Tool Under 18 PA. CONS. STAT. § 2711 (Mar. 4, 2020), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/.

26. *See id.* ("[The causes and context of domestic violence] are deeply individual ones, that require care, attention, and nuanced support. Risk assessment doesn't provide these things. Please engage in a longterm process with [domestic violence] organizations statewide to help them get what they need to support families, without risk assessment.").

The Commission moved to approve its ODARA proposal on March 5, 2020.[27] In its reasoning, the Commission explained that its approval had been shaped by its "numerous discussions with experts and key criminal justice stakeholders."[28] If the feedback received through the public hearings had any substantive impact, the Commission did not indicate so.[29] Ultimately, due to the COVID-19 pandemic, the algorithm's implementation was indefinitely suspended.[30] Though the algorithm remains unused, in September 2023, the Commission produced a report reiterating its continued support for the algorithm's implementation.[31]

The Commission's approach to involving communities is not unique.[32] Rather it is illustrative of how the state is responding to calls to expand community participation in "algorithmic governance," a term which the Article uses to refer to the processes governing the procurement, construction, implementation, and oversight of algorithms employed in decision-making or modes of policy implementation in the public sphere.[33] Algorithms that impact individual and communal liberties, rights, safety, and security are proliferating in the public

27. PA. COMM'N ON SENT'G, MODEL PRETRIAL DOMESTIC VIOLENCE RISK ASSESSMENT TOOL: FINDINGS & RECOMMENDATIONS (REVISED – SEPTEMBER 14, 2023) 1 (2023).

28. *Id.* at 4.

29. *See id.* at 5. It is important to note that while the Commission stated that its vote to approve ODARA was "[f]ollowing consideration of testimony received during public hearings," *id.* at 6, it is only a bare assertion. The Commission did not explain how community feedback shaped its decision to approve ODARA, even though it did explain how feedback it received from algorithm developers, domestic violence researchers, and criminal law administrators shaped its course of action. *Id.* at 2–4.

30. *Id.* at 1.

31. *See id.* at 10 (reiterating this Commission's recommendation of "the use of the Ontario Domestic Assault Risk Assessment (ODARA) as the model pretrial risk assessment tool for use with domestic violence cases").

32. Other state institutions have used a similar approach to ensure community involvement in algorithmic governance in a variety of spheres. *See, e.g.*, Amina A. Abdu, Lauren M. Chambers, Deirdre K. Mulligan & Abigail Z. Jacobs, *Algorithmic Transparency and Participation Through the Handoff Lens: Lessons Learned from the U.S. Census Bureau's Adoption of Differential Privacy*, *in* FACCT '24: PROCEEDINGS OF THE 2024 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 1150, 1150–51 (2024) (discussing the Census Bureau's efforts to involve communities in its decision to use the algorithmic technique known as differential privacy to protect census data); PITTSBURGH TASK FORCE ON PUB. ALGORITHMS, UNIV. PITTSBURGH, REPORT OF THE PITTSBURGH TASK FORCE ON PUBLIC ALGORITHMS 10–11 (2022) (discussing how from 2014–2016, the Allegheny County Department of Human Services held three open community meetings about its plan to adopt an algorithm for use in the child welfare context); *infra* Section II.B (discussing the use of this approach by other criminal legal institutions).

33. *See infra* Section II.C.

sphere.[34] Advances in data collection, data processing, and computational techniques have made algorithms cheaper, faster, and more capable of making, aiding, and structuring decisions and modes of policy implementation.[35] Criminal administration is no exception. Either by their own motion or by legislative mandate, criminal legal institutions have become increasingly reliant on algorithms.[36] For clarity, this Article uses "criminal legal institutions" to refer to police departments, prosecutor offices, probation and pretrial services divisions, and criminal courts acting in their rulemaking capacity.

As the use of algorithms increases, so too has calls that algorithmic governance be democratized.[37] Growing concerns about algorithmic bias, opacity, errors, and ineffectiveness has spurred interest in the power of criminal legal institutions in algorithmic governance and how that power can be accountable in a democracy.[38] Consider the following examples.

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34. Ari Ezra Waldman, *Power, Process, and Automated Decision-Making*, 88 FORDHAM L. REV. 613, 613 (2019) [hereinafter Waldman, *Power, Process, and Automated Decision-Making*]. For clarity, this Article uses the term "algorithm" with reference to the definition of "public algorithmic system[s]" provided by the Pittsburgh Task Force on Public Algorithms which is "any system, software, or process that uses computation, including those derived from machine learning or other data-processing or artificial intelligence (AI) techniques, to aid or replace government decisions, judgments, and/or policy implementations that impact opportunities, access, liberties, rights, and/or safety." PITTSBURGH TASK FORCE ON PUBLIC ALGORITHMS, UNIV. PITTSBURGH, *supra* note 32, at 8. This definition includes everything from simple actuarial risk assessment tools to complex large language models that are used in public sector decision-making. The definition excludes the use of algorithms that are a set of rules that are not derived from an actuarial or data-informed process, such as sentencing guidelines. While this latter set of algorithms may also pose issues of accountability, they differ in that they do not pose the same democratic governance concerns. It is also important to note that this Article does not focus on the use of algorithms in private sector decision-making (such as hiring algorithms) given the difference between governance in the public and private sector.

35. Margot E. Kaminski & Jennifer M. Urban, *The Right to Contest AI*, 121 COLUM. L. REV. 1957, 1960 (2021) ("As data collection and storage have become cheaper, processing has become faster, and algorithms have become more complex and more effective at certain tasks, the use of AI in decision-making has increased.").

36. Ric Simmons, *Big Data and Procedural Justice: Legitimizing Algorithms in the Criminal Justice System,* 15 OHIO ST. J. CRIM. L. 573, 573 (2018).

37. *See* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1271–72 (2008); Daniel Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REG. 800, 804 (2020) (contending that the proliferation of algorithmic decision-making in the public sector warrants a rethinking about the state of the current structures of democratic accountability).

38. ACLU, COMMUNITY CONTROL OVER POLICE SURVEILLANCE: TECHNOLOGY 101, at 2 (2016) [hereinafter ACLU], https://www.aclu.org/publications/community-control-over-police-surveillance-technology-101 [https://perma.cc/VK7Q-U5RA] (discussing this rationale in the context of democratic accountability efforts over police surveillance technologies); Memorandum from Jumana Musa, Dir., Nat'l Ass'n Crim.

An eight-month pregnant Black woman arrested after facial recognition software falsely flagged her as a suspected carjacker.[39] A sixty-five-year-old Black man wrongfully charged with first-degree murder after the faulty analysis of a popularly used gunshot detection software (ShotSpotter) suggested that he was the shooter.[40] Bail judges selectively give effect only to algorithmic outcomes that conform with their own intuitions and understanding of institutional expectations, rather than based upon their accuracy and fairness.[41] These problems undergird the push to democratize algorithmic governance. The publicity these incidences garnered has ushered in a growing recognition that the current unchecked power of criminal legal institutions in algorithmic governance produces harms, particularly on members of racially or otherwise politically marginalized communities.

An important dimension of this democratization call advocates for increasing community participation in algorithmic governance.[42] A growing number of state and local legislative bodies as well as criminal legal institutions themselves are responding with an approach that I refer to as "consultative algorithmic governance." Under this approach, communities are typically given an opportunity to learn and be consulted about a specific criminal legal institution's decision to use a

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Def. Laws., to the Off. Legal Pol'y, Dep't Just. (May 28, 2024), https://www.nacdl.org/getattachment/097760a8-5a96-40c2-8932-be9a3708e754/nacdlcomments-to-doj-on-issues-with-the-use-of-data-driven-policing-technologies-ineo14110-05282024.pdf [https://perma.cc/2KHK-CAKM]; *Artificial Intelligence in Predictive Policing*, NAACP, https://naacp.org/resources/artificial-intelligence-predictive-policing-issue-brief [https://perma.cc/TY98-MC52] (last visited Sep. 14, 2025).

39. Kashmir Hill, *Eight Months Pregnant and Arrested After False Facial Recognition Match*, N.Y. TIMES (Aug. 6, 2023), https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html [https://perma.cc/X3S7-NXYG].

40. Garance Burke, Martha Mendoza, Juliet Linderman & Michael Tarm, *How AI-Powered Tech Landed Man in Jail with Scant Evidence*, AP NEWS (Mar. 5, 2022, at 12:23 CT), https://apnews.com/article/artificial-intelligence-algorithm-technology-police-crime-7e3345485aa668c97606d4b54f9b6220 [https://perma.cc/V7GQ-FYK3].

41. Sino Esthappan, *Assessing the Risks of Risk Assessments: Institutional Tensions and Data Driven Judicial Decision-Making in U.S. Pretrial Hearings,* 2024 SOC. PROBS. 1, 6.

42. It is important to note that there are other reforms on the table. Scholars have proposed several reforms aimed at creating safeguards against government overreach and abuse via algorithms. *See, e.g.*, Aziz Z. Huq, *Artificial Intelligence and the Rule of Law*, *in* ROUTLEDGE HANDBOOK OF THE RULE OF LAW 260, 265–68 (Micheal Sevel ed., 2025) [hereinafter Huq, *Artificial Intelligence and the Rule of Law*] (rule of law framework for algorithmic decision-making by the state); Aziz Z. Huq, *Constitutional Rights in the Machine-Learning State*, 105 CORNELL L. REV. 1875, 1903 (2020) [hereinafter Huq, *Constitutional Rights*] (advocating for a substantive rights framework for algorithmic decision-making by the state). *See generally* Kaminski & Urban, *supra* note 35 (advocating for a meaningful framework within which affected individuals could contest AI decisions).

specific algorithm in a specific decision-making process.[43] In rare cases, a select group of community members are given the chance to be consulted on ex ante algorithm policies as representatives on task forces and advisory boards.[44] Though differing in substance, scope, degree, and site of implementation, I refer to the impetus for all these reforms as consultative algorithmic governance, since their purpose is to provide more avenues for community input without any "assurance that citizen concerns and ideas will be taken into account."[45]

Increasing community participation in algorithmic governance has critics. Some caution that more community participation can undermine the transparency and accountability goals that the reform is meant to advance.[46] They also point out that community participation is costly, vulnerable to industry capture, and can slow down algorithm integration.[47] Even some participation sympathizers have concerns. They worry about "participation washing," which concerns the use of community participation to build trust in algorithms that support unlawful outcomes or ones contrary to community values and needs.[48] In my past work, I also have critiqued current approaches to community participation in algorithmic governance. More specifically, I caution against participatory approaches that fail to address how the state's use of algorithms often undermines the democratic participation of racially

43. Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688, 1695 & n.21 (2023) [hereinafter Okidegbe, *To Democratize Algorithms*]; *see* Vincent Southerland, *The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, 70 UCLA L. REV. 2, 30–33 (2023) (noting how over twenty municipalities have passed ordinances requiring local agencies to receive approval from the local legislative body prior to procurement and use of a surveillance technology including an algorithmic one).

44. Margot E. Kaminski & Gianclaudio Malgieri, *Impacted Stakeholder Participation in AI and Data Governance*, 27 YALE J.L. & TECH. (forthcoming 2025) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4836460#.

45. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 219 (1969).

46. Johannes Himmelreich, *Against "Democratizing AI"*, 38 AI & SOC'Y 1333, 1344 (2023). It is important to note that this argument is connected to a line of argument that has been made by administrative law scholars regarding process-based reforms. Nicolas Bagley has cautioned against the embrace of more process-based reforms, such as participation, in the administrative context for the reason that it can undermine the very transparency and accountability values that it seeks to advance. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 389–91 (2019).

47. Himmelreich, *supra* note 46, at 1338–40.

48. *See generally* Mona Sloane, Emanuel Moss, Olaitan Awomolo & Laura Forlano, *Participation Is not a Design Fix for Machine Learning*, *in* EEAMO '22: PROCEEDINGS OF THE 2ND CONFERENCE ON EQUITY & ACCESS ALGORITHMS, MECHANISMS, & OPTIMIZATION 1 (2022) (discussing the relationship between stakeholderism and participation washing).

and otherwise politically marginalized communities in our political system.[49]

The aim of this Article is to foreground a different conversation focused on community participation, power, and institutional democratic accountability. Algorithmic governance needs to be democratized. Algorithmic governance involves political and value-laden decisions that are now decided solely by criminal legal institutions and their preferred algorithm developers, technocrats, and technologists. Too often, criminal legal institutions wield this power not only to deploy opaque, biased, and ineffective algorithms—though that is a problem.[50] They also wield this power to make their own decision-making and modes of policy implementation less (1) transparent, (2) responsive, (3) contestable by the communities under their jurisdiction, and (4) protective of minorities.[51] To put it differently, criminal legal institutions use this unchecked power to make themselves less democratically accountable.

Redressing this problem through traditional channels of political and legal accountability is difficult.[52] Algorithms are a form of policy-setting.[53] They may opaquely undermine or contradict democratically produced law and policies in ways that "evade democratic checks."[54] Yet, since criminal legal institutions tend to use privately developed algorithms, the policies that such algorithms may generate neither originate from, are known to, nor are even necessarily understood by the specific criminal legal institution reliant upon them.[55] This result undermines efforts by the public to hold criminal legal institutions legally and politically accountable. Algorithmic governance, in its current form, aggravates the already full-blown democratic crisis in criminal administration that threatens the lives and political, economic, and social citizenship of Black and other politically marginalized communities the most.[56]

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49. Okidegbe, *To Democratize Algorithms*, *supra* note 43, at 1696.

50. *Id.* at 1693–95.

51. *See infra* Section II.B.

52. Kate Crawford & Jason Schultz, *AI System as State Actors*, 119 COLUM. L. REV. 1941, 1942–43 (2019) (discussing this problem as the accountability gap since current accountability frameworks fail to provide a mechanism for holding algorithm developers liable).

53. Alicia Solow-Niederman, *Administering Artificial Intelligence*, 93 S. CAL. L. REV. 633, 643–44 (2020).

54. *Id.*

55. Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J.L. & TECH. 103, 108–09 (2018) (discussing this problem in the administrative context, yet the same problem exists in the criminal sphere).

56. Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1699, 1708, 1713–14 (2019) (reviewing VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018))

Staying the course in algorithmic governance is not an option, since it means maintaining this pernicious feedback loop whereby criminal legal institutions deploy harmful algorithms that in turn undermine their democratic accountability, which in turn makes it easier for them to rely upon harmful algorithms in the future. Stepping out of this cycle requires recognizing that the problem is not with algorithms *per se*, rather it is with their governance. Instead of being entrenched and concentrated in criminal legal institutions, power in algorithmic governance should be dispersed and distributed to other "rival centers of [state] power" and to the different communities that constitute the polity.[57]

This Article focuses on shifting power to communities with attention to racially and otherwise politically marginalized communities.[58] If we aspire for democratic criminal legal institutions, then we must democratize algorithmic governance, and community participation must be understood as a part of that larger effort. While community participation is not a panacea, even participation skeptics recognize that participation has some role to play in institutional democratic accountability, if only to promote the democratic friction needed to slow institutional action enough to render it cognizable, transparent, and accountable to the public.[59]

(discussing how algorithms facilitate carceral practices that deny Black communities the resources that they need to exercise collective democratic citizenship). This problem has only worsened since the commencement of the second Trump administration. *See generally America's Democracy in the Age of Trump: A Conversation with Francis Fukuyama*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 12, 2025), https://carnegieendowment.org/events /2025/02/americas-liberal-democracy-in-the-age-of-trump-a-conversation-with-francis-fukuyama?lang=en [https://perma.cc/ACX3-EV8K] (discussing the current and possible implications of Trump's presidency on America's democracy).

57. *See* Philip Pettit, Dispersing Power Within the State 14 (Nov. 30, 2024) (unpublished manuscript), https://philarchive.org/archive/PETDPW [https://perma.cc/L88J-P9SM] (discussing the importance of distributing power among rival centers of state power and to non-state actors in a democracy).

58. This Article focuses on these communities for two reasons. First, these communities, particularly their undocumented members, serve as canaries in the coalmine for new forms of state oppression. Lani Guinier & Gerald Torres, *Excerpt from The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy*, 27 N.Y.U. REV. L. & SOC. CHANGE 1, 1 (2001) ("It is easy enough to think that when we sacrifice this canary, the only harm is to communities of color. Yet others ignore problems that converge around racial minorities at their own peril, for these problems are symptoms warning us that we are all at risk."). Second, these communities are the least able to rely on current political and legal challenges to protect their rights or interests outside of the algorithmic governance context. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014).

59. L. ENF'T SUBCOMM., NAT'L A.I. ADVISORY COMM., NAIAC LAW ENFORCEMENT SUBCOMMITTEE: YEAR 1 REPORT & ROADMAP 7–8 (2024),

Community participation is particularly important for politically marginalized communities. Decisions in algorithmic governance can reinforce these communities' punitive treatment by the state.[60] These stakes motivate these communities to utilize available processes, such as participatory ones, to make algorithmic governance more transparent, responsive to community needs, contestable, and protective of minorities' interests.[61] In their pursuit of these aims, these communities, alongside others, can use participatory mechanisms to usher in an iteration of algorithmic governance that reflects and is constrained by the multifaceted and competing community interests, rather than one solely oriented toward criminal legal institutions' priorities.

Although community participation is important, consultative algorithmic governance is not a complete answer because it does not attend to power. Since it exclusively focuses on community consultation, it does not nurture the non-consultative aims for which racially and otherwise politically marginalized communities seek to participate in algorithmic governance. More precisely, it does not nurture these communities' desire to share power with criminal legal institutions in algorithmic governance, neither in terms of collaborative power nor countervailing power. Though this shortcoming harms all communities, it is most harmful to racially and otherwise politically marginalized communities who are most vulnerable to entrenched and concentrated power.[62]

This recognition should direct us toward rethinking the embrace of consultative algorithmic governance. No participatory process can give effect to every substantive aim sought by every individual or community. However, we could offer processes that better foster efforts by individuals and groups to participate in the democratic discourse that determines what algorithmic governance should look like. To accomplish this feat institutionally, communities, particularly racially and otherwise politically marginalized ones, need resources that can empower them in their effort to share power with criminal institutions. These resources

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https://data.aclum.org/storage/2025/01/NAIAC_ai_gov_wp-content_uploads_2024_06_NAIAC-Law-Enforcement-Subcommittee_Year-1-Report-Roadmap.pdf [https://perma.cc/GEZ8-LCYB] (noting that when it comes to the adoption and oversight of algorithms in policing, some degree of participation and transparency is needed in a democratic society); Bagley, *supra* note 46, at 352, 391 (noting how in the administrative context, transparency and deliberative processes have a role in democratic accountability even though overreliance upon them can undermine this role).

60. Roberts, *supra* note 56, at 695, 1697–99, 1727.

61. Motahhare Eslami et al., *From Margins to the Table: Charting the Potential for Public Participatory Governance of Algorithmic Decision Making*, *in* FAccT '25: Proceedings of the 2025 ACM Conference on Fairness, Accountability, and Transparency 2657, 2657 (2025).

62. Martha Minow, *Cooperation and Resistance to Entrenched Power: Some Preconditions for a Constitutional Democracy*, 63 Duq. L. Rev. 315, 331 (2025).

must be oriented toward putting communities on a closer footing with the select group of technocrats and technologists that criminal legal institution often defer to.[63]

This Article aims to advance a different approach to community participation in algorithmic governance. Critical to this approach is the idea that sustained institutionalized community participation that can nurture collaborative and countervailing power has a role in the larger project of ushering in a more democratic iteration of algorithmic governance. It presumes that algorithmic governance should be a site where political disagreements inclusive of various communities' perspectives are aired out, resolved, and a part of how algorithmic governance evolves. As Jocelyn Simonson's work has surfaced, not all communal participation is constructive or productive.[64] In the end, some communal participation may push toward outcomes in tension with other important democratic values, such as the stability of rules, rule of law, clarity, and fairness.[65] However, if a central purpose of democratic institutions is to identify, channel and give effect to "the common, perceived interests" of the governed while also protecting minorities,[66] then we should put a thumb on the scale of nurturing participation. Nurturing participation means nurturing the diverse aims sought by that participation—whether it is to be consulted, to delay, to obtain a seat at the table, to influence algorithm policy, to gain complete control, or to dissent. Our starting position should be that community participation in algorithmic governance is valuable.

The Article explores the critical flaws of consultative algorithmic governance with the view of building out a new approach to community participation designed to foster collaborative and countervailing power. The Article takes criminal administration as its subject and proceeds in three parts.[67] Part I provides a brief overview of the rise of algorithms in

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63. STURM, *supra* note 17, at 158.

64. Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 256–57 (2019) (noting how not "all [of the contestatory dimension of communal participation] is healthy or desirable").

65. *Id.* at 257 (noting how in the context of criminal procedure "[i]n the end, some popular interventions on behalf of defendants may skew the results of adjudication in ways that subvert our notions of fairness or the rule of law").

66. Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163, 173 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) [hereinafter Pettit, *Republican Freedom*].

67. Although the democratic impacts of algorithmic governance are experienced outside of criminal administration, the role of participation in solving these impacts and securing democratic accountable institutions will depend on the area of governance. Sharon Jacobs, *The Challenges of Participatory Administration*, 58 U.C. DAVIS L. REV. 323, 328 (2024) (noting how "corners of the rich and heterogenous world of administration, like much of energy regulation, are poor loci of democratic

criminal administration and situates the rise within current criminal law reform debates. It also discusses how algorithms tend to entrench and exacerbate some of criminal administration's most pernicious anti-democratic features. Part II squarely confronts the reasons why algorithmic governance should be democratized. It also lays out the contours of consultative algorithmic governance and its limits for democratizing algorithmic governance. Part III theorizes a different approach to community participation that might better facilitate collaborative and countervailing power at the loci of the criminal legal institutions reliant on algorithms. It takes insights from the shortcomings of consultative algorithmic governance to articulate a community-led approach to transparency, responsivity, and contestation. As a way for thinking through how this approach might work in practice, this Article also explores potential reforms that communities could trigger to incentivize criminal legal institutions to share *power with* them. These reforms track transparency, responsivity, and contestation. For transparency, it explores providing individuals and groups with the right to petition a criminal legal institution for information about algorithmic use.[68] For responsivity and contestation, it explores the creation of an algorithmic adoption process modeled off of negotiated rulemaking that would give individuals and groups a check on criminal legal institutions' power to subject a criminal law process to an algorithm.[69] To support these reforms, it also explores the creation of a new statutory private action that enables individuals and groups to enforce criminal legal institutions' compliance with the abovementioned reforms.[70] Part IV addresses potential objections to its different conception of community participation.

This Article makes two contributions to the field. First, it fills a gap in the current scholarly discourse about how to involve affected communities in algorithmic governance. This Article surfaces the role of current law reform efforts in constructing the terms of this debate. It aims to show how law reform efforts can operate to create or foreclose opportunities for empowered and transformative community participation in algorithmic governance that can advance the needs and interests of different communities in a polity.[71] Second, it also aims to contribute to immediate policy discussions on the role of communities, particularly

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engagement" (footnote omitted)). Given the long-standing importance placed on participation in criminal administration, it provides the perfect loci for this discussion.

68. *See* discussion *infra* Section III.B.1.

69. *See* discussion *infra* Section III.B.2.

70. *See* discussion *infra* Section III.B.3.

71. *See* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 2–5 (2019); Meg Leta Jones, *Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw*, 2018 U. ILL. J.L. TECH. & POL'Y 249, 281.

racially and otherwise politically marginalized communities, within algorithmic governance. It asks policymakers to confront the foundational "why" question of participation anew and reckon with its implications upon power, representation, safety, and justice in this country.

Three caveats are in order. First, this Article focuses on participatory reforms, severed from the political economy changes needed for operationalization. Because of the current political and institutional climate of the Trump era, operationalization is unlikely in near term. Given this, this Article writes to the future. Second, this Article sometimes uses the language of minorities to refer to politically disempowered communities and majority to refer to politically empowered communities. Even though the United States is on trend to become a majority-minority country by 2050, the Article uses this language to capture the power differentials between different groups.[72] Third, this Article is exclusively focused on community participation. How its proposal will complement and reinforce the important role of technocrats and technologists on the one hand, and substantive and procedural rights, rule of law, and a checks-and-balances framework on the other hand, will be considered in future work.

I. CONTEXTUALIZATION

A. The Rise of Algorithms in Criminal Law Reform Debates

In 2022, the Yolo County District Attorney's Office introduced a pilot program on race-blind charging.[73] Central to the program is the use of a race-obscuring algorithm developed by the Stanford Computational Policy Lab.[74] Built with big data and a natural language processing method, the algorithm is designed to identify and redact names, addresses and references to race from the free text of case files.[75] Prosecutors are to use these algorithmically redacted case files to make charging decisions.[76] When interviewed about the program, Yolo District Attorney Jeff Reisig proclaimed, "the idea is we want to eliminate any effects of

72. SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, CURRENT POPULATION REPORT NO. P25-1143, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 2 (2015).

73. *Race Blind Charging: Mitigating Potential Bias in Charging Decisions with Automated Race Redaction*, YOLO CNTY. DIST. ATT'Y (Jan. 19, 2022) [hereinafter *Race Blind Charging*], https://yoloda.org/race-blind-charging/ [https://perma.cc/ST54-Y557].

74. *Id.*

75. Alex Chohlas-Wood et al., *Blind Justice: Algorithmically Masking Race in Charging Decisions*, *in* PROCEEDINGS OF THE 2021 AAAI/ACM CONFERENCE ON AI, ETHICS, AND SOCIETY 35, 37–38 (2021).

76. *Race Blind Charging*, *supra* note 73.

implicit bias or explicit bias and just make a clean decision."[77] He further stated that "my hope is that will help instill public confidence in the process and they will know we don't consider race at all when we make these charging decisions."[78]

The Yolo County District Attorney's Office is not alone. It is one of a dozen prosecutors' offices experimenting with the use of race-obscuring algorithms in the charging process.[79] This usage is part of a trend in criminal administration. Consider the following examples. At least 38 local police departments use predictive policing algorithms designed to predict areas most at risk of criminal activity in order to allocate police resources.[80] A handful of police departments have implemented automated early warning systems designed to identify police officers most at risk for police misconduct.[81] At least a dozen police departments are piloting generative AI systems that use data captured from body camera footage to produce the first draft of a police report.[82] Seventy-five percent of jurisdictions rely on a pretrial algorithm designed to predict non-appearance risk and risk of arrest upon release to determine a charged person's pretrial release eligibility and conditions.[83] In many states, trial courts utilize sentencing algorithms, designed to

77. Sam Stanton, *Northern California DA Using Software to Make 'Race Blind' Decisions on Filing Charges*, SACRAMENTO BEE (Sep. 9, 2021), https://www.sacbee.com/news/local/article253708533.html#storylink=cpyhttps://www.sacbee.com/news/local/article253708533.html [https://perma.cc/WNU9-BUBW].

78. *Id.*

79. *See, e.g.*, Criminal Justice Team, *Blind Justice RCT: Algorithmically Masking Race in Prosecutorial Charging Decisions*, ARNOLD VENTURES (July 1, 2024), https://www.arnoldventures.org/stories/blind-justice-rct-algorithmically-masking-race-in-prosecutorial-charging-decisions [https://perma.cc/9KRC-STSH].

80. Aaron Sankin & Surya Mattu, *Predictive Policing Software Terrible at Predicting Crimes*, MARKUP (OCT. 2, 2023), https://themarkup.org/prediction-bias/2023/10/02/predictive-policing-software-terrible-at-predicting-crimes [https://perma.cc/X5KA-CL9Z].

81. Mary D. Fan, *Smarter Early Intervention Systems for Police in an Era of Pervasive Recording*, 2018 U. ILL. L. REV. 1705, 1708–09 (noting that these systems are often implemented as a condition of consent decrees and, unlike early intervention systems, utilize machine learning techniques as well as more sources of data).

82. *See, e.g.*, Sean Murphy & Matt O'Brien, *Police Officers Are Starting to Use AI Chatbots to Write Crime Reports. Will They Hold Up in Court?*, AP (Aug. 26, 2024), https://www.ap.org/news-highlights/spotlights/2024/police-officers-are-starting-to-use-ai-chatbots-to-write-crime-reports-will-they-hold-up-in-court/ [https://perma.cc/Q2BD-ADJE]. *See generally* Andrew Guthrie Ferguson, *Generative Suspicion and the Risks of AI-Assisted Police Reports*, 120 NW. L. REV (forthcoming 2025), https://ssrn.com/abstract=4897632 (addressing the pretrial, discovery, trial, plea, and sentencing considerations arising from the soon-to-be widespread use of AI-generated police reports by police departments).

83. *See State Laws on RATs*, MAPPING PRETRIAL INJUSTICE, https://pretrialrisk.com/national-landscape/state-laws-on-rats/ [https://perma.cc/673C-YU2W] (last visited Sep. 12, 2025).

predict risk of arrest, to inform the type of sentence and sentencing length that a convicted individual will receive.[84] Parole boards use algorithmic prediction to determine which incarcerated persons are eligible for supervised or conditional release.[85] Algorithmic use has a long history in criminal administration.[86] The difference is that the algorithms of today are developed solely or primarily by private companies utilizing large pools of state-produced data and data techniques including, in some cases, machine learning or deep learning techniques.[87] This is not to say that all algorithms are created equal. They vary in terms of computational methods employed, diversity and size of training data used, modeling, and problem formulation.[88] The common theme, however, is that these algorithms are a growing component of decision-making and policy implementation at all levels of criminal administration.[89]

The rise of algorithms is a part of a growing movement to use big data, data analytics, and computational methods to reform criminal administration.[90] Criminal administration is in crisis. The near-unanimous consensus is that criminal administration in its current state neither safeguards public safety nor ensures accountability for wrongdoing.[91] Social inequities, structural discrimination, endemic police violence, staggering rates of criminalization, prosecution, and incarceration—alongside how criminal law administrators' mistaken, biased, and arbitrary viewpoints often drive outcomes—are among the reasons why criminal administration's legitimacy, morality, and credibility is in question.[92]

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84. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61–62 (2017) [hereinafter Eaglin, *Constructing Recidivism Risk*]; Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 61 (2018) (discussing how risk assessment algorithms are being used in sentencing to determine "how much punishment is due" rather than "to guide decisions about how to administer punishment").

85. Christopher Slobogin, *Preventive Justice: How Algorithms, Parole Boards, and Limiting Retributivism Could End Mass Incarceration*, 56 WAKE FOREST L. REV. 97, 104 (2021).

86. *See* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 1–2 (2007).

87. *See* Huq, *Constitutional Rights*, *supra* note 42, at 1896.

88. *See* Rob Kitchin, *Thinking Critically About and Researching Algorithms*, 20 INFO., COMMC'N & SOC'Y 14, 15–16, 18, 25 (2017).

89. Simmons, *supra* note 36, at 573.

90. Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403, 407 (2022).

91. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 265–66 (2018) [hereinafter Levin, *The Consensus Myth in Criminal Justice Reform*].

92. Benjamin Levin, *Disentangling Safety and Accountability in Criminal Justice Policy*, IOWA L. REV. (forthcoming 2026) (manuscript at 3–4) [hereinafter Levin, *Disentangling Safety and Accountability in Criminal Justice Policy*], https://ssrn.com/abstract=5189433 [https://dx.doi.org/10.2139/ssrn.5189433].

Criminal law scholars have surfaced different and often mutually exclusive sets of reform proposals designed to address the state of criminal administration.[93] The differences in the criminal law reform literature, as Ben Levin contends, reflect deep disagreements as to "what criminal legal institutions are designed to do and what they actually do."[94] These scholarly disagreements have produced a vibrant body of literature that need not be repeated here. What is important to note is that the turn to algorithms is most often associated with the bureaucratic vision of criminal law reform.[95] Under the bureaucratic vision, the problem with criminal administration is one of calibration.[96] There is an optimal rate of surveillance, criminalization, and incarceration, yet the current system of criminal administration surveils, criminalizes, and incarcerates too many people—the harms of which are experienced most acutely by racially and otherwise politically marginalized communities.[97] On this account, a major problem concerns the discretion afforded to criminal law administrators, which enable individually-held biases, arbitrariness, and inefficiencies to drive outcomes.[98] For this reason, this vision of reform prioritizes constraining criminal law administrators' discretion and leveraging "evidence-based reforms" to reduce surveillance, criminalization, and incarceration to "optimal rate[s]."[99] Algorithms have tended to be advanced as one such "evidence-based reform."[100]

Algorithms have sparked an intense debate in criminal reform circles. Proponents contend that algorithms can usher in a more objective, neutral, and efficient criminal administration.[101] Christopher Slobogin, for example, argues that risk assessment algorithms can decrease racial and class disparities and "drastically reduce prison and

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93. *Id.* at 35–36.

94. *Id.* at 3 (emphasis omitted).

95. Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2804 (2022) [hereinafter Levin, *Criminal Justice Expertise*].

96. *Id.* at 2812–13.

97. Levin, *The Consensus Myth in Criminal Justice Reform*, *supra* note 91, at 262–63.

98. Danielle Kehl, Priscilla Guo & Samuel Kessler, *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing*, RESPONSIVE COMTYS., BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y, July 2017, at 29–30.

99. Levin, *The Consensus Myth in Criminal Justice Reform*, *supra* note 91, at 262, 270–71, 293, 298.

100. Collins, *supra* note 90, at 421. But see my work surfacing how algorithms are not intrinsically tied to the evidence-based paradigm: Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2057 (2022) [hereinafter Okidegbe, *Discredited Data*].

101. I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1271–77 (2017) (discussing the use of algorithmic technologies in policing as bias control); Michael Selmi, *Algorithms, Discrimination and the Law*, 82 OHIO ST. L.J. 611, 616–17 (2021).

jail populations without significantly increasing crime rates."[102] Cary Coglianese and Alicia Lai make the point that algorithmic decision-making is less prone to bias than human decision-making. More precisely, they argue that algorithms have a distinct advantage over humans, which is that their biases are more noticeable and thus amendable to correction than human decision-makers.[103] They support their position with empirical evidence on the mental shortcuts and cognitive biases that undermine the efficiency and accuracy of human reasoning.[104]

Algorithms have their detractors. Many take issue with the idea of algorithms as reform. One reason is that the concept is based in a human-versus-algorithm comparison that fails to account for the fact that algorithms are human products: their impact depends on their data, designers, implementers, overseers, and the assemblage of law, systems, and institutional structures that they work to serve and further. To put it differently, algorithms are human all the way down.[105] Others take specific issue with the idea that algorithms could reform criminal administration. Jessica Eaglin argues that, for example, the idea of algorithms as bias control is a social construction that aims to obscure the role of law and legal institutions as producers of race and racism.[106] Ari Waldman argues that the idea of algorithms as reforms is pretextual,

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102. Christopher Slobogin, *Presumptive Use of Pretrial Risk Assessment Instruments*, 72 AM. U. L. REV. F. 133, 135 (2023) [hereinafter Slobogin, *Presumptive Use*] (citing CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK 25–36 (2021) [hereinafter SLOBOGIN, JUST ALGORITHMS]), https://aulawreview.org/blog/presumptive-use-of-pretrial-risk-assessment-instruments/ [https://perma.cc/AX97-97X7]; *see* Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 295 n.11 (2020).

103. Cary Coglianese & Alicia Lai, *Algorithm v. Algorithm*, 72 DUKE L.J. 1281, 1286–87 (2022) (noting that "[t]he human brain has its own internal wiring that might be said to operate like a complex algorithmic system in certain respects" but "is arguably more prone to inscrutability, bias, and error than are digital algorithms"); *see* Cass R. Sunstein, *Governing by Algorithm? No Noise and (Potentially) Less Bias*, 71 DUKE L.J. 1175, 1180 (2022).

104. Coglianese & Lai, *supra* note 103, at 1293–99. *But see* Daniel J. Solove & Hideyuki Matsumi, *AI, Algorithms, and Awful Humans*, 92 FORDHAM L. REV. 1923, 1935 (2024) ("Humans can perform poorly when using algorithmic output because of certain biases and flaws in human decision-making. Far from serving to augment or correct human decision-making, algorithms can exacerbate existing weaknesses in human thinking, making the decisions worse rather than better."); Citron, *supra* note 37, at 1271–72 (explaining how algorithmic use renders humans susceptible to automation bias, which can cause human decision-makers to defer to algorithmic predictions that they know are incorrect).

105. Ari Ezra Waldman, Comment at Information Privacy Law at the Crossroads: Boston University Law Review Conference (Nov. 3, 2023).

106. Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 758, 771 (2023).

given that institutions typically turn to algorithms as a cost-saving, deregulatory, and privatization measure.[107]

The objective of this Article, however, is not to debate whether the bureaucratic vision of criminal law reform is correct or if algorithms could improve criminal administration in theory. Rather than debating these premises, I focus on how the idea of algorithms as reform is in tension with how algorithms are working in practice. In the next subsection, I discuss three problems with current algorithms that cause them to keep the inefficiencies, biases, and errors produced by criminal administration in place. These problems are algorithmic discrimination, algorithmic variance, and algorithmic opacity. These problems are not inevitable but rather are caused by algorithmic governance. The discussion will set the stage for the need to constrain the power of criminal legal institutions in algorithmic governance and the important role that community participation can play in this effort.

B. The Shortcomings of Algorithms

Three recurring problems have operated to hinder the reform potential of algorithms within the human system of criminal administration. This Section will discuss each of them separately.

1. Algorithmic Discrimination

The idea of algorithms as reform depends on algorithmic outcomes being unbiased or at least less biased than outcomes produced by humans without the aid of an algorithm.[108] One barrier to achieving this in practice concerns algorithmic discrimination. Studies show that algorithms can produce racialized, class-ed, and ableist decisions.[109] These decisions can render politically marginalized communities

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107. Ari Ezra Waldman, *Algorithmic Legitimacy*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS 107, 117 (Woodrow Barfield ed., 2021) [hereinafter Waldman, *Algorithmic Legitimacy*] (pointing out how algorithmic use epitomizes "neoliberalism's underlying philosophical and political orientation toward deregulation, nonintervention, and efficiency"); *see* Hannah Bloch-Wehba, *Algorithmic Governance from the Bottom Up*, 48 BYU L. REV. 69, 77–79 (2022) [hereinafter Bloch-Wehba, *Bottom Up*].

108. Ignacio N. Cofone, *Algorithmic Discrimination Is an Information Problem*, 70 HASTINGS L.J. 1389, 1391–92 (2019).

109. SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 1–3 (2018); Hideyuki Matsumi & Daniel J. Solove, *The Prediction Society: AI and the Problems of Forecasting the Future*, 2025 U. ILL. L. REV. (forthcoming) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453869 ("Decisions involving algorithmic predictions can reinforce patterns from past data and can further entrench discrimination, inequality, and privilege.").

vulnerable to mass management by criminal legal institutions and reinforce existing inequities.[110]

There are many reasons for algorithmic discrimination.[111] To understand the causes of algorithmic discrimination, it is useful to consider algorithmic construction. Algorithmic construction requires developers to make discretionary decisions about how to identify the problem that the algorithm is to solve, how to design the algorithm, and which data sources and data should be relied upon to build, train, test, and/or revise the model.[112] This discretionary work is one source of algorithmic discrimination. My prior work has surfaced this issue in the context of pretrial algorithmic construction.[113] To develop pretrial algorithms, developers have tended to utilize data produced by the very criminal legal institutions responsible for pretrial mass incarceration, such as the police, pretrial services agencies, and courts.[114] This reliance creates algorithms that produce inequitable inputs. For example, the use of police as a data source has resulted in the inclusion of arrests as a common pretrial algorithmic input.[115] Because mass policing renders disabled people and Black people more vulnerable to arrests, the inclusion of arrests as an input serves as an ableist and racial proxy. The inclusion of such a proxy increases the likelihood that the algorithm will label charged persons, constructed as disabled as well as those racialized as Black, as at high risk of pretrial misconduct. Arrests are but one example of this issue. Because criminal legal institutions produce data infected with racial, ableist, and class biases, reliance on them within

110. *See* Cherise Fanno Burdeen & Wendy W. Shang, *The Case Against Pretrial Risk Assessment Instruments*, 36 CRIM. JUST. 21, 24–25 (2021); Okidegbe, *Discredited Data*, *supra* note 100, at 2019 n.42 (discussing how New Jersey's use of pretrial algorithms has served to reinforce the overrepresentation of Black people among the pretrial incarcerated population). *But see* Slobogin, *Presumptive Use*, *supra* note 102, at 142 (discussing a 2017 study that compared the recommendations of Public Safety Assessment (a popular risk assessment algorithm) with the pretrial release and detention decisions by human decision-makers; the result showed that Public Safety was more likely to recommend release and, if implemented, would have led to higher release rates for Latinx and Black charged persons).

111. CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 199–200 (2016) (discussing algorithmic discrimination as a biased data problem); Cofone, *supra* note 108, at 1406–10 (discussing it as an informational problem); Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1678–80 (2020) (discussing it as a symptom of biases and power imbalances baked into current law).

112. Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 BERKELEY TECH. L.J. 1051, 1074–76 (2021); Okidegbe, *Discredited Data*, *supra* note 100, at 2049.

113. Okidegbe, *Discredited Data*, *supra* note 100, at 2048–49.

114. *Id.* at 2024–29.

115. *Id.* at 2026.

pretrial algorithmic construction facilitates the creation of pretrial algorithms that can reinforce the very inequities that their implementation is designed to redress.[116] This "data source selection problem" is not unique to pretrial algorithms; rather, it affects most algorithms built for use in criminal administration.[117] Regardless of its source, the problem with algorithmic discrimination is that it undermines accuracy and the anti-bias rationale favoring algorithms. It operates to create algorithms that maintain systemic and institutional biases, while justifying them under the guise of empirical neutrality and objectivity.[118]

2. Algorithmic Variance

The reform potential of algorithms also depends on criminal law administrators adhering to predictions, outcomes, or other information produced by algorithms. This promise has gone unfulfilled in practice. Researchers continue to find that criminal law administrators inconsistently act upon algorithmic outcomes, a problem that has been termed "algorithmic variance."[119] Recent studies have emerged showing how algorithmic variance tends to introduce biases and mistakes into the decision-making or policy-implementation processes.[120] Algorithmic variance occurs at the stage of algorithmic implementation and has many causes. One concerns criminal law administrators' own biases, and another concerns bureaucratic pressures and social expectations.[121]

Recent studies have also shown that algorithmic variance disproportionately disadvantages politically marginalized people, particularly those racialized as Black. A study by researchers Yi-Jen Ho, Wael Jabr, and Yifan Zhang on the impact of algorithmic predictions on

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116. *Id.* at 2031–32; *see also* Jamelia Morgan, *Policing Under Disability* Law, 73 STAN. L. REV. 1401, 1423–24 (2021) (discussing mass policing of disabled people).

117. Okidegbe, *Discredited Data*, *supra* note 100, at 2013.

118. Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 487 (2019).

119. Sarah Brayne & Angele Christin, *Technologies of Crime Prediction: The Reception of Algorithms in Policing and Criminal Courts*, 68 SOC. PROBS. 608, 618 (2021); Megan T. Stevenson & Jennifer L. Doleac, *Algorithmic Risk Assessment in the Hands of Humans*, *in* DISCUSSION PAPER SERIES 1, 24, 26 (IZA Inst. of Lab. Econ., IZA DP No. 12853, 2019); Dasha Pruss, *Ghosting the Machine: Judicial Resistance to a Recidivism Risk Assessment Instrument*, *in* PROCEEDINGS OF THE 2023 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY (FACCT '23) 312, 316 (2023).

120. *See, e.g.*, Victoria Angelova, Will S. Dobbie & Crystal Yang, *Algorithmic Recommendations and Human Discretion* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31747, 2023), https://www.nber.org/system/files/working_papers/w31747/w31747.pdf [https://perma.cc/F72A-QZEN].

121. Esthappan, *supra* note 41, at 6–7.

sentencing outcomes in Virginia is instructive.[122] They found that judges were more likely to adhere to an algorithmic prediction consistent with imposing a non-custodial or a short custodial sentence when the convicted person was racialized as White than when the person was racialized as Black.[123] They note that "[t]his selection bias puts [Black people] in an unfavorable situation, wherein they suffer from a lower probability of alternative punishment, a higher probability of incarceration, and a longer imprisonment time."[124] Other empirical studies on algorithmic use in criminal administration have made similar findings.[125] Algorithmic variance operates to undercut algorithms as reform for at least two reasons. One involves bias. Algorithms are supposed to reduce the impact of individually held bias by providing decision-makers with algorithmically produced information that should rationalize their decisions.[126] The existence of algorithmic variance undercuts this bias control rationale. Since decision-makers are choosing whether and how to follow algorithmically produced information, algorithms are mediating rather than reducing bias.[127]

The other reason concerns efficiency. Algorithms are supposed to advance efficiency by standardizing and streamlining decision-making and policy-implementation.[128] The existence of algorithmic variance undercuts this efficiency rationale. In addition to its adverse effects on consistency and predictability, it also means that algorithms are not reducing the time and resources that decision-makers and policy-implementors spend on each decision. Considered together, these results undermine the idea of algorithms as reform in practice.

3. Algorithmic Opacity

Implicitly, the idea of algorithms as reform relies on the possibility for ex post and ex ante algorithmic evaluation and assessment. In order to determine whether any particular algorithm is operating as intended,

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122. *See* Yi-Jen Ho, Wael Jabr & Yifan Zhang, AI Enforcement: Examining the Impact of AI on Judicial Fairness and Public Safety 3–5 (Aug. 9, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4533047 (showing that judges are less likely to follow an algorithmic prediction consistent with release for a Black convicted person than a White convicted person).

123. *Id.*

124. *Id.* at 5.

125. *See, e.g.*, Alex Albright, If You Give a Judge a Risk Score: Evidence from Kentucky Bail Decisions 4 (Sept 3, 2019) (unpublished manuscript), https://thelittledataset.com/about_files/albright_judge_score.pdf [https://perma.cc/7AX8-DWP7] (noting that bail judges tended to "interpret risk score levels differently based on a defendant's race").

126. Angelova, Dobbie & Yang, *supra* note 120, at 1.

127. *Id.*

128. Kehl, Guo & Kessler, *supra* note 98, at 29.

one should have access to key information about the algorithm model's source code, inputs, training data, innerworkings, and test results.[129] One should also have an understanding of how the algorithm would work before it is implemented and its impact on the ground following implementation.[130] These types of assessments matter since they can help determine if an algorithm is effective for its intended purpose, which in turn enables criminal legal institutions to stop the use of those that are not. One barrier to this type of assessment in practice concerns algorithmic opacity. Algorithmic opacity refers to "the technical complexity, trade secrecy, and managerial invisibility of AI systems that hamper inspection of [their] inner workings and operating results."[131]

Algorithmic opacity has three dimensions. One concerns its complexity. Algorithms can be complex and produce outcomes that even experts cannot fully understand or explain.[132] The advent of deep learning, machine learning, and, more recently, large language models, have only exacerbated this problem. This level of opacity can hinder efforts to assess the effectiveness and impact that a specific algorithm has on a particular process. To make matters worse, this opacity affects criminal law institutions as procurers and consumers, since they tend to lack access to neutral technical experts that could help them identify and understand an algorithm's potential impact.[133] As a result, they can struggle to understand, let alone assess, the trade-offs associated with a specific algorithm's use in a specific decision-making or policy implementation process in their institution.[134] This technical opacity creates a barrier to the kind of algorithm evaluation needed to ensure that algorithmic use is advancing, rather than distracting from, its intended reform purpose. To put it more concretely, it is useful to consider the example of AI-generated police reports. One popular model is the Axon model, which is a large language model that can generate a draft police report by largely relying on the audio of a police officer's body camera.[135] Issues of bias, hallucination, and other inaccuracies are prevalent in large language models.[136] However, the extent to which these issues exist with the Axon model remains unknown partly due to issues of technical

129. SLOBOGIN, JUST ALGORITHMS, *supra* note 102, at 160.

130. *Id.*

131. Sylvia Lu, *Data Privacy, Human Rights, and Algorithmic Opacity*, 110 CALIF. L. REV. 2087, 2098 (2022).

132. Waldman, *Power, Process, and Automated Decision-Making*, *supra* note 34, at 618.

133. Elizabeth A. Rowe & Nyja Prior, *Procuring Algorithmic Transparency*, 74 ALA. L. REV. 303, 349 (2022).

134. *Id.*

135. Ferguson, *supra* note 82, at 15–17.

136. *Id.* at 36.

complexity.[137] Despite this, at least a dozen police departments have started to experiment with it, raising the specter that the use of this technology will cement or even exacerbate the accuracy problems associated with police reports that predate algorithmic use.[138]

The second layer of opacity involves trade secrecy. Trade secrets law is an area of law that protects commercial information that is secret and whose secrecy provides value to the commercial entity maintaining its secrecy.[139] Because source code, training data, and algorithmic methodology are not protectable by copyright law or patent law, Sylvia Lu notes that algorithm developers heavily rely on trade secrets to prevent disclosure.[140] Assertions of trade secrecy often work to hinder efforts to make key information about the algorithm available to the public or even to criminal legal institutions themselves.[141] At the same time, trade secrecy assertions even hinder efforts of charged individuals and their lawyers to access key information needed to challenge an algorithm's reliability and validity or to adjudicate an affected charged person's civil rights or due process claims.[142] Because criminal administration is concentrated on racially and otherwise politically marginalized neighborhoods, this problem is disproportionately born by charged individuals from these neighborhoods.

The problem of trade secrecy is further exacerbated by criminal legal institutions themselves. During the procurement process, criminal legal institutions willingly enter into broad non-disclosure agreements with private algorithm developers that exempt key information about algorithmic construction and implementation from disclosure under the Freedom of Information Act and under state public records laws.[143] Even where information on algorithmic use has not been exempted, criminal legal institutions routinely ignore or refuse to fully comply with public

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137. *Id.* at 34.

138. *Id.* at 43–45.

139. Christopher Morten explains that "a trade secret is legally protected, 'proprietary' information that has economic value from not being known to competitors and is subject to reasonable efforts to maintain its secrecy." Christopher J. Morten, *Publicizing Corporate Secrets*, 171 U. PA. L. REV. 1319, 1326 (2023).

140. Lu, *supra* note 131, at 2099.

141. Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1366–67 (2018).

142. *Id.* at 1346–47, 1375–76, 1411 (explaining the evolution of trade secret claims in criminal cases and how it operates to hinder charged persons' efforts to enforce their constitutional and procedural rights); Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337, 1342 (2021) (contending that "corporate and government actors have pushed to transform the law of trade secrecy into one of the most—if not *the* most—powerful tools to ensure the concealment of information . . . foreclosing investigation and inquiry in the public interest").

143. Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1286 & n.160 (2020); Bloch-Wehba, *Bottom Up*, *supra* note 107, at 88 n.89.

records requests.[144] In cementing algorithmic opacity, the combination of trade secrecy and non-disclosure agreements operates to ensure that neither criminal legal institutions themselves nor the public can determine if algorithmic use is improving criminal administration.

The third level of opacity involves institutions themselves. Too often, criminal legal institutions decide to use algorithms without any public notice.[145] Moreover, even where their use has been made transparent, the exact policies governing algorithmic implementation and oversight may not be transparent.[146] This level of opacity matters, since it can be a source for algorithmic variance and other preventable algorithmically facilitated harms. Relatedly, in cases where criminal legal institutions reliant on the algorithms have failed to make clear implementation policies, that situation also makes it difficult for criminal legal institutions themselves to gauge whether algorithms are operating as intended, since they have no standards from which to assess. The combination operates to hinder the actualization of the reform potential of algorithms.

C. Participation and Democratic Accountability

These shortcomings have prompted a vibrant reform agenda focused on algorithmic use in criminal administration.[147] A persistent barrier to

144. Martha Rayner, *Commentary: This Algorithm Is Used to Deny Inmates Parole. We're Not Allowed to Know Anything About It*, TIMES UNION (May 5, 2023), https://www.timesunion.com/opinion/article/commentary-proprietary-algorithm-deny-inmate-18001304.php [https://perma.cc/V2S7-8XWH].

145. *See, e.g.*, Skylar Rispens, *NYPD Scrutinized for Not Complying with Surveillance Tech Disclosure Law*, STATESCOOP (Dec. 22, 2023), https://statescoop.com/nypd-surveillance-technology-disclosure-law/ [https://perma.cc/Y3JT-YUCC]; Elizabeth E. Joh, *Police Technology Experiments*, 125 COLUM. L. REV. F. 1, 13–16 (2025), https://columbialawreview.org/content/police-technology-experiments/ [https://perma.cc/ 44Q2-KUCX]. It is also important to note that the lack of transparency can come from the fact that the criminal legal institution reliant on the algorithm has not itself developed, implemented, or attempted to adhere to clear policies. Discussing this issue in the context of the 2012–2019 Chicago Police Department's use of a risk assessment algorithm as part of its "Heat List" initiative, Elizabeth Joh describes how the harms of the initiatives stemmed from the fact that "[p]roper protocols were neither carefully designed nor followed. . . . That same lack of clarity about appropriate interventions to take against those identified on the 'heat list' also meant that collateral harms were easily identifiable from the beginning." *Id.* at 16.

146. *See supra* note 145.

147. Frank Pasquale, *The Second Wave of Algorithmic Accountability*, L. & POL. ECON. PROJECT: BLOG (Nov. 25, 2019), https://lpeblog.org/2019/11/25/the-second-wave-of-algorithmic-accountability [https://perma.cc/S6TY-E2YU] (discussing the first wave of algorithmic accountability reform); Waldman, *Algorithmic Legitimacy*, *supra* note 107, at 107 (noting that, under the first wave of algorithmic accountability reform, reformers advance algorithm reforms that strive to "improve existing systems from

reform concerns the concentrated and entrenched power of criminal legal institutions. Not only do criminal legal institutions fail to use this power to redress issues stemming from algorithmic variance, algorithmic discrimination, and algorithmic opacity, but they tend to use this power to render their own processes less democratic.[148] At the same time, making their power in algorithmic governance democratically accountable has been made more difficult by how they delegate policy-making power to unaccountable private algorithm developers whose actions evade democratic oversight.[149] The push for increasing community participation in algorithmic governance is connected to this democratic deficit. It emerges out of the view that the power criminal legal institutions wield within algorithmic governance should be in line with institutional democratic accountability and reflect the collective values of the different communities that constitute the demos.[150] In the next Part, this Article makes the case for why algorithmic governance needs to be democratized and how consultative algorithmic governance is not the answer.

II. THE THREATS OF ALGORITHMIC GOVERNANCE TO INSTITUTIONAL DEMOCRATIC ACCOUNTABILITY

This Part is divided into four sections. Section A discusses the concept of institutional democratic accountability. Section B describes

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within: better data, better procedures, better systems" (cleaned up)); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1045, 1111 (2019) [hereinafter Huq, *Racial Equity*] (arguing for a racial equity principle that would permit algorithmic use only where its benefits outweighed its cost to racially marginalized communities); Yang & Dobbie, *supra* note 102, at 294, 352–53 (advocating for a race-aware approach in which "race [is considered] in the estimation step but not the prediction step" of algorithmic construction). It is important to note that many have advanced the abolition of algorithmic use as a racial equity reform. Roberts, *Digitizing the Carceral State*, *supra* note 56, at 1713–14, 1724–25.

148. *See* Okidegbe, *To Democratize Algorithms*, *supra* note 43, at 1693 (noting that "algorithms make governance less democratic").

149. Andrew D. Selbst, *An Institutional View of Algorithmic Impact Assessments,* 35 HARV. J.L. & TECH. 117, 120 (2021) (discussing how algorithmic use can operate to "transfer . . . decisionmaking authority from the democratic process to programmers").

150. *See* ACLU, *supra* note 38, at 2; Julian Lam & Sonja Solomun, *Reclaiming Democracy: Civic Power in the Age of AI*, *in* DELIBERATIVE APPROACHES TO INCLUSIVE GOVERNANCE: AN ESSAY SERIES PART OF THE DEMOCRATIC LEGITIMACY FOR AI INITIATIVE 1, 2 (Taylor Owens & Sequoia Kim eds., 2025) ("The need for cutting-edge democratic innovations like these are becoming particularly urgent, as emerging technologies—particularly AI—develop at a breakneck pace. The risk of decision-making becoming concentrated in the hands of an elite few—whether corporations, governments, or technocrats—becomes increasingly apparent; revealing a marked democratic deficit. Without mechanisms for inclusive and participatory governance, AI policies risk being shaped by narrow interests rather than the collective needs and values of society.").

how algorithmic governance, in its current form, undermines institutional democratic accountability. Section C describes the reforms central to consultative algorithmic governance. Section D surfaces its limits. Redressing this problem requires an approach to community participation that genuinely restructures and diversifies who has power in algorithmic governance. If our ultimate aim is to make criminal legal institutions accountable to the diverse communities affected by the decisions made in algorithmic governance, then democratizing participatory reforms must create opportunities that allow different groups to pursue aims beyond consultation—aims in line with fostering collaborative and countervailing power.

A. Institutional Democratic Accountability

Institutional democratic accountability is a contested notion. There is active debate about its character, its essential features, and the background conditions needed to maintain it.[151] Abolitionists go so far as to dispute the idea that criminal legal institutions can even be democratically accountable.[152] The Section neither aims to muddle into this discussion nor be comprehensive. Instead, the Section describes some core features of institutional democratic accountability: transparency, responsivity, contestability, and protection of minorities.

First, institutional democratic accountability requires transparency. As Barry Friedman and Maria Ponomarenko contend, transparency requires that "[t]he people must be able to see what their agents are doing so they can evaluate those actions and exercise control as necessary."[153] Second, democratic accountability also requires responsivity. Here, responsivity means institutional rulemaking, policymaking, and modes of policy implementation that impact individual and communal rights, liberties, and wellbeing that should "track the common, perceived interests" of communities.[154] By common interests, I am referring to Philip Pettit's definition, which are interests that, "were the population holding discussions about what it ought to cooperate in collectively providing, then they could not be dismissed as irrelevant."[155] Here, the

151. John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 711–12, 808–09 (2020) (describing the different threads of debates pushing for the democratization of criminal administration).

152. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1805–07 (2020).

153. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1838 (2015).

154. Pettit, *Republican Freedom*, *supra* note 66, at 173.

155. Philip Pettit, *Democracy, Electoral and Contestatory*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 105, 108 (Ian Shapiro and Stephen Macedo eds., 2000) [hereinafter Pettit, *Democracy, Electoral and Contestatory*].

premise is that institutions are implementors and facilitators of the common interests authored by the governed.[156] Communities that comprise the governed therefore should have "an individualized, unconditioned and efficacious influence that [can] push[] [the state] in a direction that they find acceptable."[157]

Third, contestability is another central feature of democratic accountability. Here, the "function of contestation is to restrain power by creating channels for challenging power."[158] For individuals and communities, contestation takes on at least two different meanings. One meaning is that individuals and groups should have the ability to challenge and seek to revise an institution's decision or action that is adverse to them.[159] The other meaning involves what Niva Elkin-Koren and Maayan Perel term "public contestation."[160] Public contestation refers to how the governed should have spaces to dispute an institution's position.[161] As an example, the governed should have spaces to collectively deliberate, disagree, and negotiate about whether a criminal legal institution's approach to public safety is in line with their common interests. Both forms of contestation ensure that the governed can push back against institutional action, decisions, or modes of policy implementation that undermine the common interests or individual interests of those subjected to its jurisdiction.[162]

The final feature concerns protection of minorities, which is a feature stemming from the fact that criminal legal institutions operate in a constitutional democracy.[163] Protection of minorities requires preventing entrenched and concentrated power, since such power renders minorities vulnerable to both "potentially tyrannical majorities" and to powerful minorities inimical to their interests.[164] This feature is needed for minorities to participate in the project of democratic accountability. It is important to note that democratic accountability does not require that criminal legal institutions adopt every policy or mode of policy

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156. *Id.* at 116.

157. PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 239 (2012) [hereinafter PETTIT, ON THE PEOPLE'S TERMS].

158. Niva Elkin-Koren & Maayan Perel, *Speech Contestation by Design: Democratizing Speech Governance by AI*, 50 FLA. ST. U. L. REV. 611, 620 (2023).

159. *Id.* at 656–57; Pettit, *Democracy, Electoral and Contestatory*, *supra* note 155, at 119.

160. Elkin-Koren & Perel, *supra* note 158, at 656–57 (discussing this idea in the context of speech governance).

161. *Id.*

162. *Id.* at 657 (describing this form of contestation as public contestation).

163. Minow, *supra* note 62, at 331 (discussing protection of minorities in the context of constitutional democracy and noting that "[p]rotection of minorities of any sort against potentially tyrannical majorities is a precondition and a goal" of constitutional democracy).

164. *Id.*

implementation that any specific member or group advocates for. Rather, it obligates criminal legal institutions to at the very least be transparent, and to recognize and contend with the diverse interests, needs, and values of communities within their jurisdiction, including politically marginalized ones.

To advance democratic accountability, communities in their role as the governed need resources. First, they need electoral resources.[165] At a minimum, they need regular and periodic elections that ensure criminal legal institutions are headed by individuals who are directly or indirectly politically accountable through elections.[166] In addition to electoral resources, communities need contestatory resources, which are resources that invest them as individuals and as groups with a "power of challenge."[167] The premise is that exercises of institutional power should be challengeable before impartial and non-electoral bodies that can hold "a fair hearing and discussion to different arguments and . . . pass compelling judgments."[168] These resources can be either internal or external to the criminal legal institution in question. Checks afforded to charged people and to the public by the rights provisions of the Constitution provide an example of an external contestatory resource.[169] The importance of contestatory resources is that they provide individuals and groups with a mechanism to render institutional power more transparent and potentially more responsive to collective interests. For racially and otherwise politically marginalized communities, contestatory resources have a protective function. They aid these communities' efforts to oppose and possibly change majoritarian "supported [institutional] policies or modes of policy implementation that do not promise to promote [their] interests."[170]

Communities also need consultative resources. These resources give communities opportunities to have input into policymaking and rulemaking determinations.[171] These resources can also be internal or external to the criminal legal institution in question. In the policing context, community policing initiatives have become a common consultative resource. These initiatives give communities opportunities to provide police departments with input "about . . . policing priorities at the systemic level."[172] Even though consultative resources may not

165. Pettit, *Republican Freedom*, *supra* note 66, at 173.

166. Bloch-Wehba, *Bottom Up*, *supra* note 107, at 74.

167. Pettit, *Democracy, Electoral and Contestatory*, *supra* note 155, at 119.

168. *Id.* at 119–20.

169. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) (noting how these checks are a poor safeguard for criminally charged and convicted persons).

170. Pettit, *Democracy, Electoral and Contestatory*, *supra* note 155, at 119.

171. *Id.* at 130.

172. Simonson, *supra* note 64, at 263–64.

impact outcomes, they serve two important functions. One is that these resources advance procedural justice and therefore can enhance the perceived legitimacy of institutional action.[173] Another is that these resources can help criminal legal institutions identify and implement policies that reflect the evolving common interests of communities.[174]

Racially and otherwise politically marginalized communities may require additional resources oriented toward building up their power and capacity. These resources should aim to place these communities in a *power with* situation vis-à-vis institutions whereby, as Susan Sturm puts it, "[t]hose [with] 'power over' [the community] [have] to listen to, respect, and respond to the concerns of the community."[175] In this vein, these resources must facilitate these communities' efforts to pursue collaborative power and countervailing power. When it comes to collaborative power, these resources must be the kind that can aid efforts by communities to build up their knowledge and capacity to share their perspectives and needs in ways that could influence an institution's course of action.[176] When it comes to countervailing power, these resources must be the kind that can aid communities' efforts to act as a check on an institution's power. This means, in part, resources oriented toward building up the power of disparate communities to form coalitions with, as Amy Kapczynski and Joel Michaels put it, "the organized capacity . . . to exercise collective influence . . . over both the state itself, and the private sector actors who make critical ordering decisions."[177] Two caveats are needed. First, these resources do not guarantee outcomes.[178] Rather they offer mechanisms for communities to advance their aims, which may or may not win out in the end. Second, these resources are useful to the governed as a whole, since all groups need resources that can "proactively catalyze and facilitate [their ability] . . . to be better able to exercise power and influence" in our

173. Tracey L. Meares, *The Path Forward: Improving the Dynamics of Community-Police Relationships to Achieve Effective Law Enforcement Policies*, 117 COLUM. L. REV. 1355, 1362–63 (2017).

174. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 21–23 (2012).

175. STURM, *supra* note 17, at 168.

176. *Id.* at 159.

177. Amy Kapczynski & Joel Michaels, *Administering a Democratic Industrial Policy*, 18 HARV. L. & POL'Y REV. 279, 284 (2024).

178. *See generally* Trevor Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. 798 (2021), https://www.yalelawjournal.org/forum/by-any-means-a-philosophical-frame-for-rulemaking-reform-in-criminal-law [https://perma.cc/2G23-M3RM] (warning that process-based reforms do not guarantee just and equitable outcomes, and they can even produce results contrary to these aims).

current moment of "democratic backsliding."[179] Yet, the focus on racially and otherwise politically marginalized communities is because, due to their marginalized status, having these resources is a precondition for their meaningful participation in the democratic accountability project.[180]

Though democratic accountability is critical, it is tenuous and has been elusive in criminal administration. Criminal legal institutions have long-standing deficits in transparency, responsivity, contestability, and fostering the protection of minorities.[181] For decades, scholars have periodically raised alarms about how this profound democratic deficit is a source for the routine violence, abuse, corruption, and discrimination endemic in criminal administration.[182] This crisis has fueled calls by some to democratize criminal administration, a call most sharply made by the authors and signatories of the *White Paper of Democratic Criminal Justice* in 2017.[183] Against this background, one cannot suggest that the current state of algorithmic governance inaugurated the institutional democratic accountability deficit. Nor do I make that suggestion here. Rather, my point is that the entrenched and concentrated power that criminal legal institutions wield in algorithmic governance exacerbates this democratic accountability deficit as a matter of degree. It has become an additional source for the undemocratic state of criminal legal institutions. For this reason, democratizing criminal administration without democratizing algorithmic governance specifically will not resolve the ongoing criminal administration's democratic crisis. In the next Section, this Article specifically explores how the current state of algorithmic governance is inimical to any meaningful conception of democratic accountability in criminal administration, further demonstrating the need for democratization.

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179. K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 3, 31 (2019).

180. Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 762 (2024) ("The protection of minorities, who may face impediments in protecting their interests in majoritarian politics, is also a critical aspect of meaningful democracy.").

181. Jocelyn Simonson, *Democratizing Criminal Justice through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1610 (2017).

182. *See, e.g.*, *id.*; Akbar, *supra* note 152, at 1805; Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 Nw. U. L. Rev. 1597, 1598–99 (2017).

183. *See generally* Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1694 (2017) ("[T]he root of the crisis [in criminal administration] is a set of bureaucratic attitudes, structures, and incentives divorced from the American public's concerns and sense of justice, and the solution is to make criminal justice more community-focused and responsive to lay influences").

B. Institutional Democratic Accountability and Algorithmic Governance

In a superficial sense, the power of criminal legal institutions in algorithmic governance is democratically accountable. The decision to use an algorithm is either the product of legislation or a choice made by a politically accountable criminal legal institution.[184] Moreover, the use of an algorithmic prediction to inform an individual's treatment by the state is a state action challengeable by affected individuals on constitutional or procedural grounds.[185] However, the power of criminal legal institutions is not meaningfully democratically accountable in practice. To surface the extent of this tension, the Section will discuss the democratic accountability deficit in each dimension of algorithmic governance separately: algorithmic procurement, algorithmic construction, algorithmic implementation, and algorithmic oversight.

1. Democratic Accountability and Algorithmic Procurement

Algorithmic procurement is an important site from which criminal legal institutions undermine democratic accountability. Algorithmic procurement refers to the process by which criminal legal institutions contract with algorithm developers for the purposes of furnishing the use or construction of an algorithmic system.[186] Criminal legal institutions enjoy significant negotiating power at this stage of algorithmic governance.[187] As Elizabeth A. Rowe and Nyja Prior explain, permissive local and state legislative authorizations and the absence of federal requirements applicable to technological acquisition have meant that criminal legal institutions are free to negotiate and conclude any contractual term with a private algorithm developer so long as the term meets "minimal standards of justice."[188]

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184. Bloch-Wehba, *Bottom Up*, *supra* note 107, at 74; *see, e.g.*, 2014 N.J. Laws 467–69 (codified at N.J. STAT. ANN. § 2A:162-16 (West 2025)) (a 2014 New Jersey criminal justice reform statute requiring the use of bail risk assessment algorithms statewide, which became effective in 2017); *see also* Andrew Guthrie Ferguson, *Surveillance and the Tyrant Test*, 110 GEO. L.J. 205, 220 (2021) [hereinafter Ferguson, *The Tyrant Test*] (discussing how police departments across the country have largely implemented predictive policing algorithms on their own initiative).

185. *See generally* Michael Brenner et al., *Constitutional Dimensions of Predictive Algorithms in Criminal Justice*, 55 HARV. C.R.-C.L. L. REV. 267, 278–82, 292–96 (2020) (discussing the current state of equal protection and due process doctrine as it pertains to the use of risk assessment algorithms in criminal administration).

186. Rowe & Prior, *supra* note 133, at 318.

187. *Id.*

188. *Id.* Andrew Ferguson has explained this discretion in the context of policing as follows: "[I]f we trust police to enforce the law, why would we not also trust them with the technology to support those law enforcement policy goals?" Ferguson, *The Tyrant Test*, *supra* note 184, at 217.

In practice, criminal legal institutions exercise this power in ways that make their own processes less democratically accountable. The tension between trade secrecy and contestability provides a useful illustration of this problem. Consider, for example, a sentencing algorithm that produces biased predictions on the basis of race. A criminally convicted person might seek to challenge the use of such an algorithm in their sentencing proceedings under the Equal Protection Clause. As an initial matter, in order to make out an Equal Protection claim, a convicted person would need information about key aspects of the algorithm, such as its data, input variables and weights, its model, and available testing.[189] However, the sentencing algorithm's developer can prevent the disclosure of this information by asserting trade secrecy privilege.[190] Though the operation of trade secrecy is not the sole barrier to succeeding on an Equal Protection claim, it is an important one.[191] Without this information, the convicted person would have no evidence to support their claim that such an algorithm infringed upon either the anti-classification or anti-discriminatory intent prong of the Equal Protection Clause.[192] The effect of this opacity is to remove a critical avenue from which affected individuals can seek to render criminal legal institutions accountable for discriminatory conduct facilitated by an algorithm. Though the elimination of this avenue affects all communities, it is particularly harmful for racially and otherwise politically marginalized communities. It operates to further exacerbate the barriers these communities experience in their efforts to challenge algorithmic use that facilitates their collective unsafety through mass surveillance and incarceration.

The role that trade secrecy plays in making the actions of criminal legal institutions less contestable lies at the feet of algorithmic governance. Algorithm developers only benefit from trade secrecy because criminal legal institutions allow them to.[193] As one of the major

189. Renata M. O'Donnell, *Challenging Racist Predictive Policing Algorithms Under the Equal Protection Clause*, 94 N.Y.U. L. REV. 544, 571–72 (2019).

190. Wexler, *supra* note 141, at 1360–63.

191. Huq, *Racial Equity*, *supra* note 147, at 1094–99. Such a criminally convicted person would also have to surmount the onerous burden placed on a claimant under current Equal Protection case law. Since race is typically not an input considered by the algorithms in use, a convicted person would have to prove that the criminal institution's use of an algorithm violated the discriminatory intent prong of the Equal Protection Clause. *Id.* at 1097–99. However, it is not enough to show that the algorithm produced disparities that resulted in race-based discrimination. *Id.* at 1097–98. To succeed, the convicted person would also have to show that the criminal legal institution chose to use the algorithm at issue because of these effects, rather than despite of them. *See id.* at 1098. Because criminal legal institutions could always point to a bias-control or public safety justification for their algorithmic use, a court will likely find no violation.

192. *See id.* at 1088.

193. Rowe & Prior, *supra* note 133, at 318.

consumers of these technologies, criminal legal institutions enjoy significant negotiating power during algorithmic procurement. They could refuse contractual terms that protect trade secrets or at the very least ones that protect trade secret assertions when it comes to criminally charged and convicted individuals.[194] In fact, a few state statutes regarding government procurement presume that a state institution would refuse to contractually protect trade secrets. For example, in Florida, any trade secret protection is presumed waived unless the requisite state institution and private party contractually agree to maintain the trade secret status of the object in question.[195] Despite this, criminal legal institutions continue to contractually protect trade secrets and sometimes go as far as exempting key information about algorithmic construction and implementation from disclosure under public records laws.[196] This discussion shows how criminal legal institutions misuse their power in algorithmic procurement to insulate themselves from transparency and contestation. This misuse operates to render it harder to bring their power to account.

2. Democratic Accountability and Algorithmic Construction

Algorithmic construction is another site from which criminal legal institutions undermine democratic accountability. Algorithmic construction refers to the process by which algorithm developers construct algorithmic systems.[197] It is a very discretionary and value-laden process.[198] To construct an algorithm, developers must decide what problem to design the algorithm to solve, what data and computation methods to deploy to develop the algorithm, and what criteria should determine its efficiency.[199] Though criminal legal institutions do sometimes procure off-the-shelf algorithms, algorithms are often the product of public-private partnerships.[200] In this latter case, criminal legal institutions have significant power to shape algorithmic construction as end consumers and financers. This shaping power is important.

194. Rebecca Wexler argues that trade secrecy should not apply to charged and convicted individuals who need the information to make their defense or to make due process or civil rights claims. Wexler, *supra* note 141, at 1395.

195. Rowe & Prior, *supra* note 133, at 318–19.

196. Bloch-Wehba, *Bottom Up*, *supra* note 107, at 91–93, 125.

197. Ngozi Okidegbe, *Revisioning Algorithms as a Black Feminist Project*, *in* FEMINIST CYBERLAW 200, 203 (Meg Leta Jones & Amanda Levendowski eds., 2024).

198. Eaglin, *Constructing Recidivism Risk, supra* note 84, at 88.

199. Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 BERKELEY TECH. L.J. 1051, 1074 (2022).

200. *See* Bloch-Wehba, *Bottom Up*, *supra* note 107, at 123.

Algorithms are policy-setting by their nature.[201] Algorithms can undermine current law and policy or, in some cases, even create new policies.[202] Criminal legal institutions could use their power to ensure that the algorithms produced are tested, safe, and effective, fit their needs, and are in line with current law and policies. Instead, criminal legal institutions delegate this authority to unelected and unaccountable private algorithm developers.[203]

Pretrial algorithms provide a useful illustration of how this delegation erodes democratic accountability in practice. Developers have designed pretrial algorithms to assign each charged person with a risk designation of either low, medium, or high.[204] This risk designation is meant to signify the likelihood that a charged person will fail to appear at a hearing or be arrested for a new crime.[205] The democratic accountability issue arises from the fact that these "risk designations" are embedded in algorithmic systems used in jurisdictions that have yet to adopt a clear threshold about what level of risk should warrant detention, surveillance, or any other criminal legal intervention.[206] It is in this context that design choices by algorithm developers threaten the responsivity aspect of democratic accountability. Developers are making normative determinations as to risk-levels—determinations that influence the practice of criminal legal actors—outside of any democratic process.[207] More pressingly, these de-facto policy decisions are sticky. As Elizabeth Joh explains, when "city councils[] and state legislatures are slow to adopt regulations [for technologies, then a] vendor's product design choices become the de facto policies."[208] This phenomenon threatens democratic accountability through its effect on the authorship power of the governed. Because the algorithm embeds policies that were neither known to, generated by, or consented to by the governed, it

201. Solow-Niederman, *supra* note 53, at 643–44.

202. Citron, *Technological Due Process*, *supra* note 37, at 1254.

203. Selbst, *supra* note 149, at 120.

204. Cristopher Moore, Elise Ferguson & Paul Guerin, How Much Risk, and Risk of What? A Closer Look at Pretrial Rearrest and Risk Assessment 2 (Feb 10, 2023) (unpublished manuscript) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4352036.

205. *Id.*; Cristopher Moore, Elise Ferguson & Paul Guerin, How Accurate are Rebuttable Presumptions of Pretrial Dangerousness? A Natural Experiment from New Mexico 20 (July 9, 2022) (unpublished manuscript) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143886.

206. SLOBOGIN, JUST ALGORITHMS, *supra* note 102, at 47 (calling for the specification of clear thresholds rather than "abstract judicial pronouncement[s]").

207. Solow-Niederman, *supra* note 53, at 643–44.

208. Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 19, 41–42 (2017), https://nyulawreview.org/online-features/the-undue-influence-of-surveillance-technology-companies-on-policing/ [https://perma.cc/A3NK-ZA3A].

provides an additional avenue through which criminal legal institutions can opaquely give effect to policies and rules that do not track the common interests and whose opacity renders them difficult to contest.

These policy decisions have consequences for all communities, most acutely racially and otherwise politically marginalized communities. The setting of thresholds for risk designations, for example, can reduce or increase the number of individuals subjectable to detention or surveillance. The impact of this reduction or increase will be disproportionately experienced by these communities. The end result is that by transferring their decision-making and policy implementing authority toward private developers, criminal legal institutions further insulate themselves from efforts by communities to make them responsive to their needs and interests.

3. Democratic Accountability and Algorithmic Implementation

Algorithmic implementation is another site through which criminal legal institutions can undermine democratic accountability. Algorithmic implementation refers to the process by which criminal legal institutions integrate an algorithmic system into a decision-making process or mode of policy implementation. At this stage of algorithmic governance, criminal legal institutions have nearly unlimited discretion to determine if and how to integrate an algorithm into a specific process. This stage matters since an algorithm's impact largely depends upon an institution's culture and the implementation guidelines governing its usage.[209] Too often, criminal legal institutions fail to adopt clear, comprehensive, and uniform implementation policies that account for institutional culture.[210] This absence is exacerbated by the fact that criminal law administrators often do not receive training about how the algorithm works and the meaning of its outcomes.[211] This void is a source for algorithmic variance and leads to one of three scenarios.

To understand this problem, it is useful to consider these scenarios in the context of pretrial algorithms. One scenario concerns automation bias. In this scenario, bail judges blindly defer to algorithms without evaluating if the algorithmic outcome should be followed.[212] The second scenario is the exact opposite of automation bias, which is algorithmic

209. Andrew Selbst, Danah Boyd, Sorelle A. Friedler, Suresh Venkatasubramanian & Janet Vertesi, *Fairness and Abstraction in Sociotechnical Systems*, *in* FAT* '19: PROCEEDINGS OF THE 2019 CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 59, 63 (2019).

210. *Id.*; Rowe & Prior, *supra* note 133, at 319.

211. Rowe & Prior, *supra* note 133, at 319.

212. Citron, *Technological Due Process*, *supra* note 37, at 1271–72 (describing how automation bias is the tendency of human beings to defer to algorithmic predictions even where they are wrong).

aversion. In this latter scenario, bail judges blindly refuse to give effect to an algorithmic outcome, even if there is a justification for why it should be followed.[213] The third scenario, and the more common one, is that bail judges selectively give effect to algorithmic outcomes depending upon institutional pressures, potential political backlash, or their own subjective, irrational, or biased viewpoints about the charged person.[214] Each of these scenarios undermine institutional democratic accountability by making the reasons for outcomes less transparent and therefore less contestable. More precisely, it makes it harder to identify the relationship between state action and algorithmic use. The result adds an additional barrier to efforts by communities to render the power that criminal legal institutions have in algorithmic governance responsive to communal needs and interests.

4. Democratic Accountability and Algorithmic Oversight

Algorithmic oversight refers to the ongoing assessment of the algorithm's necessity and its impact. Criminal legal institutions should actively engage in algorithmic oversight to ensure that the algorithm at issue is operating as intended and is in line with the institution's priorities as well as community needs and values.[215] The problem here is that criminal legal institutions typically make the initial decision to use an algorithm sticky: once implemented, it stays implemented.[216] This choice poses a democratic accountability problem for two reasons. First, this choice permits the continued use of an algorithm, even where its use is in tension with transparency, responsivity, contestability, and/or the protection of minorities.

The second problem concerns the future. Criminal administration is at a critical juncture. Competing, and sometimes mutually exclusionary, visions of public safety and accountability for wrongdoing are currently playing out in the political and scholarly arena.[217] As a result, criminal

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213. Dasha Pruss, *Ghosting the Machine: Judicial Resistance to a Recidivism Risk Assessment Instrument*, *in* FACCT 2023: PROCEEDINGS OF THE 6TH ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 312, 313 (2023).

214. Esthappan, *supra* note 41, at 8–10.

215. Note that this aspect does not negate the need for regulatory oversight as well. Rather, my point is that criminal legal institutions have power in oversight and that they exercise this power in ways that undermine democratic accountability.

216. Rebecca Crootof, *"Cyborg Justice" and the Risk of Technological-Legal Lock-in*, 119 COLUM. L. REV. F. 233, 247–50 (2019), https://www.columbialawreview.org/content/cyborg-justice-and-the-risk-of-technological-legal-lock-in/ [https://perma.cc/5B8N-3VN8].

217. *Compare, e.g.*, Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020), https://harvardlawreview.org/wp-content/uploads/2020/12/134-Harv.-L.-Rev.-F.-90.pdf [https://perma.cc/8TJD-7HCE]

legal institutions are being confronted with changing and often conflicting views about their place in a democratic society and how best to serve the different communities under their jurisdiction.[218] An approach to algorithmic oversight that presumes the continuation of any specific implemented algorithm risks preventing the full airing out of this democratic debate. The reason involves the efficiency by which an algorithm can effectuate state law and policies. This efficiency can remove the friction needed to spur democratic debate and experimentation.[219] On many accounts, democratic discourse depends on institutionalized processes, procedures, and practices that reduce the speed of state action in ways that give members of a polity a chance to recognize, consider, debate, and disagree about that state action and collectively create the background conditions needed to support or change it.[220] For this reason, even an algorithm that correctly accords with the law on the books can pose a democracy problem. By fossilizing law and policies on the books, such an algorithm can make legal "change (particularly reform or social progress) impossible."[221] This problem lies at the feet of criminal legal institutions since they could adopt policies to ensure that algorithmic use would not preempt or prevent democratic progress or experimentation.[222] Left unaddressed, how criminal legal institutions exercise their power in algorithmic oversight will further exacerbate the democratic stagnation of criminal legal institutions.

The combination of these problems demonstrates the need to democratize algorithmic governance.[223] The focus on community

("[Abolitionists] seek to delegitimate the underlying system in service of building new forms of social organization. Rather than relegitimate, they seek to sustain ideological crisis as a way to provoke action and develop public consciousness about the possibilities of alternatives and our collective capacity to build them together."), *with* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 44 (2020), https://harvardlawreview.org/wp-content/uploads/2020/10/134-Harv.-L.-Rev.-42.pdf [https://perma.cc/29KF-TRYX] ("For criminal law minimalism, the penal system still has a role to play in society, but a radically reduced, reimagined, and redesigned role relative to the one it has played in the United States.").

218. Levin, *Disentangling Safety and Accountability in Criminal Justice Policy*, *supra* note 92, at 3.

219. Niva Elkin-Koren & Maayan Perel, *Democratic Friction in Speech Governance by AI*, *in* HANDBOOK OF CRITICAL STUDIES OF ARTIFICIAL INTELLIGENCE 643, 643 (Simon Lindgren ed., 2023).

220. *See id.* at 646.

221. Rónán Kennedy, *The Rule of Law and Algorithmic Governance*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS 209, 223 (Woodrow Barfield ed., 2021).

222. For example, criminal legal institutions could time-limit the use of a specific algorithm to ensure an ongoing revisiting of whether it is in line with how the needs and values of the different communities that make up the polity are evolving.

223. *See* ACLU, *supra* note 38, at 2.

participation in algorithmic governance should be understood as a part of this larger effort. In the following Section, this Article explores the promises and shortcomings of consultative algorithmic governance for democratizing algorithmic governance.

C. Consultative Algorithmic Governance

Consultative algorithmic governance refers to the new wave of participatory reforms in algorithmic governance that aim to provide avenues for community input without "any assurance that citizen concerns and ideas will be taken into account."[224] The hope is that consultative algorithmic governance can make algorithmic use by the state more transparent, responsive, contestable, and therefore in line with the perspectives of the demos. Legislative bodies are passing reforms designed to render the power exercised by criminal legal institutions more transparent and subjectable to community consideration and input.[225] Criminal legal institutions are adopting similar reforms internally.[226] For clarity, two notes are in order. First, the term "criminal legal agency" is utilized to refer to criminal legal institutions that are not criminal courts. Second, the discussion of criminal courts and consultative algorithmic governance concerns courts' rulemaking power, not their adjudicative function.

1. Consultative Algorithmic Governance and Criminal Legal Agencies

This Section describes how consultative algorithmic governance has operated when it comes to criminal legal agencies. It first considers the recently enacted laws and policies that require criminal legal agencies to undergo community consultation as a condition of algorithmic procurement, development, implementation, or continued use. Given that criminal administration is primarily managed on the state and local level,[227] this Section focuses on state and local reforms. The Section then

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224. Arnstein, *supra* note 45, at 219.

225. *See* discussion *infra* Section II.C.1. Though this Article focuses on proposed and current legislative and institutional measures, it is important to note that democratic accountability reformers seek reforms more far reaching than those that have gained the most traction. *See, e.g.*, Comments from Jeramie D. Scott, the Elec. Priv. Info. Ctr., to the U.S. Comm'n on Civ. Rts. (April 8, 2024), https://epic.org/documents/comments-of-epic-to-u-s-commission-on-civil-rights-on-facial-recognition-technology/ (advocating for the non-use of facial recognition technology).

226. *See* discussion *infra* Section II.C.2.

227. Michele Estrin Gilman, *Beyond Window Dressing: Public Participation for Marginalized Communities in the Datafied Society*, 91 FORDHAM L. REV. 503, 515–17 (2022).

considers participatory initiatives that criminal legal agencies themselves have adopted to involve communities in algorithmic governance.

In recent years, states and local legislative bodies have enacted measures designed to facilitate community participation in algorithmic governance. Some states have set up regimes for providing communities with notice and an opportunity to comment on the use of surveillance technologies.[228] Though these regimes are modeled off administrative notice-and-comment rulemaking, they differ in two key respects. One is that, unlike administrative agencies, criminal legal agencies are not obligated to respond to comments, even significant ones received during the comment period.[229] The other respect is that any arbitrary or capricious rules that criminal legal agencies might adopt pursuant to these regimes are not subject to judicial review as is the case with administrative agencies.[230]

Washington state provides a useful example. In 2020, it passed Senate Bill No. 6280, which requires all state and local agencies, including criminal legal agencies, to engage in community consultation meetings before developing, procuring, or using facial recognition software.[231] As part of the process, the agency must produce a report outlining how it plans to use the software and the steps that it intends to take to mitigate "potential disparate impacts on marginalized communities."[232] These regimes have also been implemented around surveillance technologies at the municipal level. In recent years, several municipalities have implemented Community Control over Police Surveillance (CCOPS) ordinances that apply to all agencies within the locality. The ordinances place conditions on an agency's procurement and use of surveillance technologies, including algorithmic ones.[233] Before an agency can procure or use surveillance technologies, they must

228. It is important to note that these processes differ from the notice and comment processes that administrative agencies must undergo as part of rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553.

229. Ronald M. Levin, *The Duty to Respond to Rulemaking Comments*, 134 YALE L.J.F. 821, 822 (2025), https://www.yalelawjournal.org/forum/the-duty-to-respond-to-rulemaking-comments [https://perma.cc/ER2Q-67NW] (describing "an administrative agency's obligation to respond to comments submitted during a notice-and-comment period" as a stable cornerstone of administrative law).

230. *Id.*

231. S.B. 6280, 66th Leg., Reg. Sess., 2020 Wash. Sess. Laws 257.

232. 2020 Wash. Sess. Laws 257, § 3(d)(i), (g).

233. Mailyn Fidler, *Local Police Surveillance and the Administrative Fourth Amendment*, 36 SANTA CLARA HIGH TECH. L.J. 481, 550–51 (2020). Though these ordinances differ in substance, most adhere to the model bill issued by the ACLU in 2021 except for the enforcement mechanisms. *Id.* at 545–46, 550–55; *Community Control Over Police Surveillance (CCOPS) Model Bill*, ACLU (Apr. 2024) [hereinafter *Model CCOPS Bill*], https://www.aclu.org/sites/default/files/field_document/aclu_ccops_model_bill_april_2021.pdf [https://perma.cc/L27R-G5T3].

obtain legislative approval.[234] To obtain approval, the agency must produce a publicly available impact report, stating how it intends to use the technology and the potential civil rights implications.[235] Before a legislative body can approve the agency's request, the legislative body must hold a public hearing whereby community members can provide oral or written comments.[236] Following approval, that legislative body retains oversight power over the agency.[237]

Some ordinances contain more robust community participation requirements. A useful example concerns Seattle's CCOPS Ordinance. Before a public hearing on a local department's request to procure or use a surveillance technology can be held, the ordinance requires that the department first hold a meeting with the most affected communities.[238] It also establishes a Community Surveillance Working Group (the "Working Group") to advise the City Council and Mayor on the equity impacts of surveillance technologies.[239] As part of its duties, the Working Group must produce a report assessing the equity impact of a department's request to use a surveillance technology and make a recommendation about whether it should be approved.[240] These impact reports are non-binding on the legislature.[241]

Another participatory reform that has been gaining traction involves AI advisory boards. While advisory boards have a long history in criminal administration, they are relatively new in the algorithm space.[242] These advisory boards aim to give the public an opportunity to provide input meant to inform systemic algorithm policy.[243] Washington, DC provides a recent example. Mayor's Order 2024-028 establishes an Advisory Group on AI Values Alignment, which aims to ensure that a local department's adoption and use of AI tools is equitable.[244] The order defines AI tools broadly.[245] One of its purposes is to advise the mayor on the public's perspective on the government's use of AI tools.[246] To do so,

234. *Model CCOPS Bill*, *supra* note 233, at § 1(A).
235. *Id.* § 2(A)–(B).
236. *Id.* § 1(A).
237. *Id.*
238. SEATTLE, WASH., MUN. CODE § 14.18.020(C) (2025).
239. *Id.* § 14.18.080.
240. *Id.* § 14.18.080(B).
241. *Id.* § 14.18.050(B).
242. Kaminski & Malgieri, *supra* note 44, at 10–11.
243. *Id.* at 11.
244. OFF. OF THE MAYOR, GOV. OF D.C., MAYOR'S ORDER 2024-028, ARTICULATING D.C.'S ARTIFICIAL INTELLIGENCE VALUES AND ESTABLISHING ARTIFICIAL INTELLIGENCE STRATEGIC BENCHMARKS § IV(B) (2024) [hereinafter MAYOR'S ORDER 2024-028].
245. *Id.* § II(B).
246. *Id.* § IV(B).

the advisory group held public listening sessions twice in 2024 and is set to hold another in 2025.[247] The feedback provided is supposed to influence future AI policies.[248] The Advisory Group is not permanent and is set to sunset in 2026.[249]

In addition to state and local legislative reforms, criminal legal institutions have also begun to adopt their own participatory reforms. These reforms typically take the form of ad-hoc and one-off community meetings. The City of New Orleans' police department (NOPD)'s approach to drones provides a useful illustration. In November 2023, NOPD decided that it would adopt drone technology to support "emergency events, crime scene and vehicular accident forensics collection" and other missions.[250] Prior to implementation, NOPD subjected its draft departmental drone policies to a one-week written public comment period, from November 21 to December 1, 2023.[251] In addition to this week-long comment period, NOPD held an in-person informational session on November 28, 2023.[252] Despite receiving significant public opposition to the proposal,[253] NOPD implemented its

247. *Id.* § IV(G); Off. of the Mayor, Gov. of D.C., *DC's AI Values and Strategic Plan: Advisory Group on AI Values Alignment*, D.C. TECH PLAN, https://techplan.dc.gov/page/dcs-ai-values-and-strategic-plan [https://perma.cc/LP79-CFFZ] (last visited Sep. 13, 2025).

248. MAYOR'S ORDER 2024-028, *supra* note 244, § IV(C)(1).

249. *Id.* § IV(J).

250. NEW ORLEANS POLICE DEP'T OPERATIONS MANUAL: UNMANNED AIRCRAFT SYS. (SUAS/DRONES) (draft 2023) [hereinafter NOPD DRAFT POLICY], https://web.archive.org/web/20231122002219/https:/nola.gov/getattachment/NOPD/Policies/Chapter-43-5-Unmanned-Aircraft-Systems-Drones.pdf/?lang=en-US [https://perma.cc/7EQX-F28Y]; NOPD Public Affairs, *NOPD Working to Adopt Drone Technology, Seeking Public Feedback*, NOPD NEWS (Nov. 21, 2023) [hereinafter NOPD Public Affairs, *Seeking Public Feedback*], https://nopdnews.com/post/november-2023/nopd-working-to-adopt-drone-technology,-seeking-pu.

251. NOPD Public Affairs, *Seeking Public Feedback*, *supra* note 250.

252. NOPD Public Affairs, *NOPD Holds Public Meeting to Discuss Implementation of Drone Technology*, NOPD NEWS (Nov. 29, 2023), https://nopdnews.com/post/november-2023/nopd-holds-public-meeting-to-discuss-implementatio/.

253. Kat Stromquist, *New Orleans Residents Are Uneasy About the NOPD's Planned Drone Program, Documents Show*, WWNO - NEW ORLEANS PUB. RADIO (Jan. 5, 2024), https://www.wwno.org/law/2024-01-05/new-orleans-residents-are-uneasy-about-the-nopds-planned-drone-program-documents-show [https://perma.cc/R84M-7W7B] (noting how 250 pages of public comments evidenced opposition to the proposal in comparison to 100 pages of public comments that supported it). It is important to note that subsequent to the public comment period, NOPD changed its draft policy. Two changes are worth pointing out. One is that the draft policy had indicated that "PSAB shall audit flight documentation monthly," while the final policy indicates that "PSAB shall review all flight documentation quarterly." *Compare* NOPD DRAFT POLICY, *supra* note 250, at 2, *with* NEW ORLEANS POLICE DEPARTMENT OPERATION MANUAL, UNMANNED AIRCRAFT SYSTEM (sUAS/DRONES) CH 43.5, at 8 (2024) [hereinafter NOPD FINAL POLICY], https://nola.gov/nola/media/NOPD/Policies/Chapter-43-5-Unmanned-

proposal in February 2024 after having received approval from the Department of Justice and the Office of Consent Decree Monitor.[254]

These participatory reforms have been subject to criticism.[255] One issue concerns the effect of community input on outcomes. Though community consultation is required, there is no obligation for agencies or legislative bodies to adhere to public feedback.[256] Evidence suggests that community input does not materially affect outcomes.[257] The Seattle City Council, for example, has routinely ignored its Working Group's recommendations.[258] The Los Angeles County Sheriff's Department (LASD)'s approach to drones provides a stark illustration. In January 2017, the LASD announced its plan to implement a drone program and asked the Sheriff Civilian Oversight Commission to review it.[259] The Sheriff Civilian Oversight Commission is an advisory board empowered to make recommendations to LASD based upon their solicitation of input from the public.[260] It consists of nine members, four of which must be community members.[261] Though initially supporting the program with caveats in July 2017,[262] the Civilian Oversight Commission in September recommended by a 5-4 vote that LASD ground the program, citing community privacy and transparency concerns.[263] The LASD refused to adhere to the Commission's recommendation, with the then Sheriff Jim McDonnell noting, "I value greatly the Commission and the input they

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Aircraft-Systems-sUAS-Drones-Effective-2-7-2024.pdf [https://perma.cc/3ZX4-SGYY]. The other change is that the final policy requires PSAB to make more information publicly available than the draft policy. NOPD FINAL POLICY, *supra*, at 8–9. It is unclear the extent to which public comments influenced these changes.

254. NOPD Public Affairs, *NOPD Receives Approval on Done Operation Policy,* NOPD NEWS (Feb. 7, 2024), https://nopdnews.com/post/february-2024/nopd-receives-approval-on-done-operation-policy/.

255. *See* Gilman, *Beyond Window Dressing*, *supra* note 227, at 509–15; Southerland, *supra* note 43, at 36–44, 60–65; Ferguson, *The Tyrant Test*, *supra* note 184, at 259–62; Okidegbe, *To Democratize Algorithms*, *supra* note 43, at 1724–29.

256. Okidegbe, *To Democratize Algorithms*, *supra* note 43, at 1716.

257. Southerland, *supra* note 43, at 60–61.

258. *Id.* at 61–62.

259. Sheriff Civilian Oversight Comm'n, *Report of the Sheriff Civilian Oversight Commission Regarding the Unmanned Aircraft System Program of the Los Angeles County Sheriff's Department, Sheriff Civilian Oversight Commission*, L.A. CNTY. 3 (July 27, 2017), https://file.lacounty.gov/SDSInter/bos/supdocs/1026734_Item6-AttachmentReportoftheUnmannedAircraftSystem.pdf [https://perma.cc/4Y36-WCJ6].

260. L.A., CAL., CODE OF ORDINANCES § 3.79.030 (2025).

261. *Id.* § 3.79.040.

262. Sheriff Civilian Oversight Comm'n, *supra* note 259, at 11–12.

263. Paul Glickman & Frank Stoltze, *Oversight Commission Asks LA Sheriff to Halt Drone Program, but He Refuses*, LAIST (Sep. 28, 2017, at 14:26 CT), https://laist.com/news/kpcc-archive/civilian-commission-votes-to-halt-la-sheriff-depar [https://perma.cc/673R-SYEG].

give, but they are not a policy-making body."[264] Since then, LASD's drone program has continued to expand.[265]

In addition to the disregard of community feedback, another problem concerns the transparency these regimes afford. Scholars and activists alike have criticized criminal legal agencies for providing communities with boilerplate information about algorithmic use and the potential impact.[266] Moreover, communities are typically given insufficient time to review provided information. Consider, again, NOPD's approach to drones. NOPD held its information session just a little over seventy-two hours before the public comment period was set to expire.[267] These two problems are further exacerbated by the fact that regimes under consultative algorithmic governance are plagued with enforcement issues. Agencies face no penalties for failing to consult with communities, leading to the criticism that these regimes are merely rubber-stamping exercises.[268] These deficits are concerning since it has resulted in these regimes failing to facilitate the transparency and meaningful consultation that they are designed to advance. As a result, these deficits undermine these regimes' ability to aid the governed in their efforts through participation to advance democratic accountability in algorithmic governance.

2. Consultative Algorithmic Governance and Criminal Courts

When it comes to criminal courts, consultative algorithmic governance has typically been accomplished through judicial rulemaking. Judicial rulemaking refers to the power of state supreme courts to promulgate rules.[269] Though the judicial rulemaking process varies by state, it can include a process for public notice and comment.[270] In recent years, a few supreme courts have exercised their rulemaking power to involve the public in their decisions about algorithmic governance

264. Frank Stoltze, *LA Sheriff's Civilian Oversight Panel Gets Mixed Reviews*, LAIST (Jan. 31, 2018, at 17:00 CT), https://laist.com/news/kpcc-archive/la-s-sheriff-civilian-oversight-panel-gets-mixed-r [https://perma.cc/2F7F-8FAP].

265. Salvador Hernandez, *Police Drones Could Soon Crisscross the Skies. Cities Need to Be Ready, ACLU Warns*, L.A. TIMES (July 27, 2023, at 3:30 PT), https://www.latimes.com/california/story/2023-07-27/proliferation-police-drones-lacks-regulation-transparency-aclu-warns [https://perma.cc/J9Q4-3DZD].

266. *See, e.g.*, Southerland, *supra* note 43, at 71–73.

267. NOPD Public Affairs, *Seeking Public Feedback*, *supra* note 241.

268. Ferguson, *The Tyrant Test*, *supra* note 184, at 259–60.

269. *See* Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, And Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 5 (2024).

270. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-110 (2025).

statewide.[271] New Mexico provides a recent example. New Mexico's Supreme Court has the inherent power to make rules of criminal procedure.[272] In February 2024, the Court used this power to subject a proposed rule change about the weight that judges could assign the predictions of pretrial algorithm to public comment.[273] The proposed change was to forbid judges from releasing charged persons based solely on an algorithmic prediction.[274] Following the public comment period, the Court enacted the change.[275]

There are important caveats. First, there is no requirement that courts engage in judicial rulemaking before adopting an algorithm. In practice, this has meant that courts sporadically subject algorithmic adoption or algorithm policy to judicial rulemaking. Second, the public comment component of judicial rulemaking is not well publicized, and therefore it is rarely used by communities. For example, in 2019 when Nevada's Supreme Court held a public comment period on a proposal to use a pretrial algorithm statewide, only a small segment of members of the public participated.[276] To compound the issue, whether algorithm policies are subjected to judicial rulemaking are often driven by the interests of system actors rather than the public. New Mexico's recent process provides a useful example. The push to prohibit courts from releasing a charged person on the basis of an algorithmic prediction was in part due to support from local police departments, who were seeking to curtail how pretrial algorithmic use was increasing pretrial release

271. The use of judicial rulemaking for algorithmic adoption or use occurred in Arizona, Nevada, and New Mexico. For more information on judicial rulemaking matters of criminal procedure: Frampton & Osowski, *supra* note 269, at 5 ("[S]tate supreme courts have long enjoyed broad authority under state constitutional law (sometimes supplemented by statutory delegations) to act as quasi-legislatures, drafting and promulgating procedural rules as they best see fit.").

272. N.M. STAT. ANN. § 38-1-1 (2024).

273. N.M. SUP. CT., PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS, THE RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS, THE RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS, AND THE RULES OF PROCEDURE FOR THE MUNICIPAL COURTS 4–5, 18–19 (2024), https://supremecourt.nmcourts.gov/wp-content/uploads/sites/2/2024/05/Proposal-2024-001-Pretrial-Release-and-Detention-comments-begin-on-p.-63.pdf [https://perma.cc/WVN9-8JV5].

274. *Id.*

275. N.M. CODE R. § 5-401 (LexisNexis 2025) (approved by N. M. Supreme Court on May 8, 2024).

276. *See generally In the Matter of Adoption of Risk Assessment Tool for Use in Pretrial Decision Making*, ADKT 539 (Public Hearing, Feb. 5, 2019) (listing only five individuals as providing formal testimony). It is important to note that the Court has discretion about if a public hearing is held. NEVADA RULES ON THE ADMINISTRATIVE DOCKET § 4 (adopted June 7, 1978, and amended June 16, 1978).

rates.[277] The strong influence of criminal law administrators in judicial rulemaking processes, alongside its sporadic use, combine to undermine judicial rulemaking's ability to advance the governed in their push for democratic accountability.

D. Consultative Algorithmic Governance and Democratic Accountability

In the previous Section, this Article examined the reforms that have come to substantiate consultative algorithmic governance. The Article has shown how consultative algorithmic governance in its current form often fails on its own terms in practice. Its reforms do not meaningfully advance democratic accountability, since they largely keep the lack of transparency, responsivity, and contestability of criminal legal institutions within algorithmic governance in place. That said, consultative algorithmic governance could be reformed. To improve the transparency and community consultation afforded by consultative algorithmic governance, administrative law provides a guide. Michele Gilman, for example, has pointed to the regime governing community participation under the National Environmental Policy Act of 1969 (NEPA) as providing lessons on how to facilitate community participation in algorithmic governance.[278] Under a NEPA-like regime, agencies would have a duty to provide detailed statements on possible algorithmic use and impact.[279] They would also have to proactively seek out feedback at different stages in algorithmic governance with a focus on the most impacted communities.[280]

A similar fix is possible for contestability. One reason that consultative algorithmic governance falls short of its full potential revolves around the absence of enforceability mechanisms. To accomplish this feat, legislative bodies and criminal legal institutions themselves would only need to adopt the enforcement penalties contained in the ACLU's model CCOPS statute.[281] Section 9 of the ACLU's model CCOPS statute contains a private enforcement mechanism that empowers any person to sue a state entity subjected to the statute for non-compliance and to seek relief, including injunctive relief as well as costs and attorney fees.[282] In theory, the adoption of such reforms could better equip

277. *See* John Cardinale, *How New Mexico Courts Will Be Impacted by Arnold Tool Restrictions*, KOAT 7 (May 9, 2024), https://www.koat.com/article/how-new-mexico-courts-will-be-impacted-by-arnold-tool-restrictions/60750286 [https://perma.cc/888P-ZV85].

278. Gilman, *Beyond Window Dressing*, *supra* note 227, at 535–44.

279. *Id.* at 535–36.

280. *Id.* at 536–37.

281. *Model CCOPS Bill*, *supra* note 233, § 9.

282. *Id.*

communities in their effort to exercise influence in algorithmic governance. However, this promise is dampened by the on-the-ground consequence of the problem of concentrated and unchecked power in algorithmic governance. If more robust transparency and community consultation were the answer, then algorithmic governance would already look different.

Seattle's experience under its CCOPS regime illustrates the reason for skepticism. Seattle's CCOPS regime has some of the strongest transparency and community consultative components of any enacted CCOPS regime.[283] Its Working Group has a leading advisory role and is representative of racially and other politically marginalized communities most vulnerable to surveillance-facilitated harms.[284] Despite this, its recommendations are routinely ignored by agencies subjected to the statute.[285] A major reason for this result is that agencies have neither incentives nor face consequences for failing to consider community viewpoints.[286] This lack of incentivization is a core feature of consultative algorithmic governance. Community consultation as a concept is not meant to change the power dynamics that determine which groups do and do not hold influence within state institutions.[287] A focus on community consultation is not designed to treat communities as collaborators. For this reason, consultative algorithmic governance provides no mechanism with which communities can build up their knowledge and capacity to incentivize criminal legal institutions to hear and respond to their viewpoints. A focus on community consultation is also not designed to enable communities to act as a check on criminal legal institutions' power. In order for community participation to become a genuine mechanism for democratic accountability, then participatory approaches must attend to power and create the conditions for the building of meaningful community power. Consultative algorithmic governance is not up to this task.

The community power issue also crystallizes another problem with consultative algorithmic governance. Because consultative algorithmic governance prioritizes community consultation, it is not designed to support efforts by racially and otherwise politically marginalized communities to form the type of coalitions that can "exercise sustained political power."[288] Coalition-building is important for all communities

283. *Compare* SEATTLE, WASH., MUN. CODE § 14.18.080 (2025), *with* Southerland, *supra* note 43, at 46–47 (describing Berkeley's citizen police oversight body which provides only an advisory function, not an oversight function).

284. § 14.18.080.

285. Southerland, *supra* note 43, at 60–62, 73–77.

286. *Id.* at 62–63.

287. Arnstein, *supra* note 45, at 219–220.

288. Rahman & Gilman, *supra* note 179, at 27, 35.

but is particularly so for politically and racially marginalized communities. Because of their political powerlessness and minority status, these communities must sensitize, appeal to, and gain buy-in from more politically powerful communities in order to advance their needs and interests. Derrick Bell describes this as the "interest convergence" problem.[289] Theorizing this problem in the context of racial justice, he advanced that the rights of those racialized as Black are only accommodated to the extent that those rights aligned with the interests of the White majority.[290] Civil rights gains are therefore never permanent and are always subject to retrenchment when they no longer serve the White majority's interests.[291] Other scholars have extended this theory beyond the race context in order to describe the impermanence of rights achieved by those ascribed with other politically marginalized statuses.[292]

A common strategy of community groups emanating from politically marginalized communities is to create and capitalize on moments of interest convergence in order to coalition build. The work of Stop LAPD Spying Coalition in Los Angeles provides a useful example. The Coalition started in 2011 as a gathering of community members from politically marginalized communities strategizing a response to the Los Angeles Police Department (LAPD)'s growing use of opaque carceral algorithmic systems in Skid Row and other under-resourced neighborhoods of color.[293] Important to the Coalition's mission was building up public knowledge around the scope and scale of the LAPD's surveillance programs.[294] In its multi-year contestation of LAPD's surveillance apparatus, the Coalition staged protests, sit-ins, and letter campaigns, disrupted budgetary allocation meetings, and sued the LAPD

289. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–25 (1980).

290. *Id.* at 523.

291. Alexis Hoag, *Derrick Bell's Interest Convergence and the Permanence of Racism: A Reflection on Resistance*, HARV. L. REV. BLOG (Aug. 24, 2020), https://harvardlawreview.org/blog/2020/08/derrick-bells-interest-convergence-and-the-permanence-of-racism-a-reflection-on-resistance [https://perma.cc/KV3V-RU8N]. *But see* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 155–57 (2015) (contending that Bell's premise of the impermanence of racial progress is not empirically or analytically grounded).

292. *See* Kevin K. Washburn, A *Different Kind of Symmetry*, 34 N.M. L. REV. 263, 286–87 (2004) (applying the interest convergence problem in the context of indigenous people and Indian law).

293. STOP LAPD SPYING COAL., AUTOMATING BANISHMENT: THE SURVEILLANCE AND POLICING OF LOOTED LAND 1 (2021).

294. Neil Ballantyne, *The Contentious Politics of Data: The Stop LAPD Spying Coalition*, MEDIUM (Aug. 13, 2023), https://medium.com/@neilballantyne/the-contentious-politics-of-data-the-stop-lapd-spying-coalition-2c04082a16c [https://perma.cc/S9UQ-6VSJ].

for its refusal to release information about its surveillance programs.[295] They also started a public records community clinic to equip ordinary people with the tools to obtain information about the location of the surveillance equipment used by LAPD.[296] The work of community organizing, such as the work of the Coalition, was partially responsible for building up opposition to police surveillance among different communities in Los Angeles.[297] Their work was designed to enable politically powerful communities to recognize and view mass police surveillance as an encroachment on their communities' privacy as well as a threat to democratic governance.[298] In 2021, partly in response to this sustained pressure, LAPD announced the end of two of its predictive policing programs, Operation LASER and PredPol.[299]

The success was short-lived. An important component of the interest convergence problem concerns the impermanence of progress.[300] Retrenchment remains a looming prospect. In 2023, for example, LAPD replaced its defunct predictive policing program with its Data-Informed Community-Focus Policing program.[301] Because of this impermanence, racially and otherwise politically marginalized communities are consistently pursuing new strategies. Participating in algorithmic governance is one strategy. It is part of a broader effort to create new interest convergence opportunities to sensitize, build up support from, and to form coalitions with the majority as to the impact of algorithms.

Consultative algorithmic governance is not designed to nurture coalition-building. This inadequacy is felt most by racially and otherwise politically marginalized communities who rely upon coalition-building to facilitate the inclusion of their viewpoints in political discourse. This

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295. *See, e.g.*, *id.*; *Weekly Update 09/02*, STOP LAPD SPYING COAL., https://stoplapdspying.org/weekly-update-09-02/ [https://perma.cc/9AY3-N6TW] (last visited Sep. 21, 2025); Stop LAPD Spying Coal. (@stoplapdspying), X (May 6, 2025, at 19:29 ET), https://x.com/stoplapdspying/status/1919897418805469308 [https://perma.cc/56XW-Y6CH].

296. *Public Records Organizing Workshop*, STOP LAPD SPYING COALITION (Feb. 19, 2023), https://stoplapdspying.org/public-records-community-clinic/ [https://perma.cc/VD2P-GY8X].

297. *See* DASHA PRUSS ET AL., PREDICTION AND PUNISHMENT, CRITICAL REPORT ON CARCERAL AI 7 (2025).

298. STOP LAPD SPYING COAL., THE DRONE REPORT 8–10, 15–18 (2025), HTTPS://STOPLAPDSPYING.ORG/THE-DRONE-REPORT/ [https://perma.cc/U2HL-H43M].

299. *See id.*; Johana Bhuiyan, *LAPD Ended Predictive Policing Programs Amid Public Outcry. A New Effort Shared Many of Their Flaws*, GUARDIAN (Nov. 8, 2021), https://www.theguardian.com/us-news/2021/nov/07/lapd-predictive-policing-surveillance-reform [https://perma.cc/S97D-NMFZ].

300. Bell, *supra* note 289, at 525.

301. *See* MICHAEL HACKMAN ET AL., L.A. POLICE DEP'T, DATA-INFORMED COMMUNITY-FOCUSED POLICING IN THE LOS ANGELES POLICE DEPARTMENT 10–13 (2021) https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2021/12/data-informed-guidebook-042020.pdf [https://perma.cc/Z8J2-ETLY].

inclusion is important in algorithmic governance, given that algorithmic governance is political and value laden. Consider, for example, the issue of racial equity. Imagine that a criminal legal institution would like to advance racial equitable algorithmic use. The critical questions would be: What does racial equity mean and how can it be advanced? There is no normative consensus on these points.[302] There are at least two different approaches. One approach would be that algorithms advance racial equity if they are colorblind and produce reliable and valid predictions across the populations subjected to them.[303] From this understanding, algorithms might be racially inequitable if they use race as a factor.[304] They may also be racially inequitable if their predictions are less reliable and valid for racially marginalized communities than for racially privileged communities.[305]

Another approach is to recognize that "race" is an unstable social construct that ascribes racial stereotypes onto individuals for political and social aims.[306] This definition of race redirects the racial inequity inquiry away from both a narrow concern about the use or non-use of race and the narrow concern about reliability and validity. The concern then becomes how an algorithm might uphold racial ideas that operate to maintain the unequal distribution of carceral control and vulnerability within an institutional structure and, by extension, in society, even if the algorithm is colorblind as well as reliable and valid across populations.[307] These two different ways of thinking about racial equity produce vastly

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302. This issue is what Christopher Havasy calls a social justice conflict. Christopher S. Havasy, *Social Justice Conflicts In Public Law*, 113 CALIF. L. REV. 1315, 1319–20 (forthcoming 2025) [hereinafter Havasy, *Social Justice Conflicts*]. Social justice conflicts refer to how a policy issue can have multiple applied justice claims simultaneously. *Id.* For example, a policy that implicates climate justice, reproductive justice, economic justice, and racial justice. *Id.* However, it can also refer to multiple claims about justice within a specific justice claim as well. *Id.*

303. *"Introduction," Critical Race Theory: The Key Writings That Formed the Movement*, *in* THE CANON OF AMERICAN LEGAL THOUGHT 903, 904–06 (Kimberlé Crenshaw, Neil Gotanda, Gay Peller & Kendall Thomas eds., 2006) (explaining the mainstream legal ideal of colorblindness).

304. This first understanding of race dominates algorithmic discrimination debates and constrains the discussion to whether the use of race as a factor is or is not constitutionally permissible. *See, e.g.*, Yang & Dobbie, *supra* note 102, at 304–06.

305. *Id.* at 294–96.

306. Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1806–07 (1993) ("'[R]ace' is a verb, that we are 'raced' through a constellation of practices that construct and control racial subjectivities."); Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 NYU ANN. SURV. AM. L. 77, 115–19 (2013).

307. Ngozi Okidegbe, *Of Afrofuturism, of Algorithms*, 9 CRITICAL ANALYSIS L. 35, 39–43 (2022); Roberts, *Digitizing the Carceral State*, *supra* note 56, at 1708 (discussing how algorithms facilitate carceral practices that deny Black communities the resources that they need to exercise collective democratic citizenship).

different results. To illustrate this point, predictive risk assessment algorithms provide an instructive example. If we define racial inequity as the explicit consideration of race and as "accuracy," then racial equity reforms should aim to decrease the number of false positives that a facially color-blind algorithm produces. However, if we define racial inequity as the continued concentration of criminal administration on racially marginalized communities, then colorblind and accurate predictive risk assessment algorithms are not racially equitable. Because a person's designation as high risk under current algorithms corresponds with that person's experience with poverty and other socially adverse conditions[308]—conditions that are disproportionately enacted upon racially marginalized communities[309]—colorblind and accurate algorithms are not a racial equity reform. The reason being that such algorithms serve only to entrench existing racial inequities.[310] This second approach to racial equity would militate against reforms focused on colorblindness and instead may push for race-conscious reforms or even bans.

Social conflicts such as these are inevitable in algorithm reform debates due to the lack of normative consensus. Racially and otherwise politically marginalized communities must participate in these debates, otherwise these conflicts will be resolved in favor of politically powerful groups.[311] However, to fully participate in these debates, these communities need to be empowered. Coalition building is one mode of empowerment. Because consultative algorithmic governance is not designed to nurture this type of empowerment, it is not the proper vehicle for ensuring these communities' full participation in the democratic accountability project.

This Part concludes by focusing on the inadequacy of consultative algorithmic governance. Its focus on community consultation obscures the non-consultative aims for which politically marginalized communities seek to participate in algorithmic governance. While law can neither

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308. Deborah Hellman, *Big Data and Compounding Injustice*, 21 J. MORAL PHIL. 62, 66, 76–78 (2024).

309. Ngozi Okidegbe, *Beyond More Accurate Algorithms: Takeaways from* McCleskey *Revisited*, 121 MICH. L. REV. 1109, 1116–18 (2023).

310. *See* Benjamin Eidelson, *Patterned Inequality, Compounding Injustice, and Algorithmic Prediction*, 1 AM. J.L. & EQUAL. 252 (2021).

311. This is not a hypothetical situation. This risk is starting to materialize. In 2019, Idaho passed a law requiring pretrial algorithms to be "free of bias." H.B. 118, 65th Leg., Reg. Sess. (Idaho 2019). The law defines "free of bias" as "an algorithm . . . shown to predict successfully at the same rate for those in protected classes as those not in protected classes, and the rate of error is balanced as between protected classes and those not in protected classes." *Id.* This definition of bias is consistent with the first way of knowing about racial inequity. As a result, the definition risks entrenching how the use of algorithms can reinforce the concentration of pretrial incarceration on racially marginalized communities.

facilitate all the aims nor the outcomes sought by these communities, it could better enable these communities to advance their collaborative and countervailing power aims. For the democratic accountability project to reach its full potential, we must rethink community participation in algorithmic governance. In the next Part, this Article will explore the potential of law to construct new resources that better facilitate these diverse aims.

III. TOWARD MORE DEMOCRATIC ALGORITHMIC GOVERNANCE

The shortcomings of consultative algorithmic governance provide fertile ground to rethink the current approach to community participation, democratic accountability, and algorithmic governance. Resources for community participation in algorithmic governance can and should facilitate more than community consultation. Yet, lawmakers and courts have exclusively equated community participation with community consultation when implementing participatory processes that give communities a role in algorithmic governance. To be sure, the answer is not to eliminate participatory resources oriented toward community consultation. As noted before, some community members do participate in algorithmic governance with consultative aims. Rather, the limitations of consultative algorithmic governance shows that participatory resources must be geared toward supporting non-consultative participatory aims as well. We need an approach to community participation in algorithmic governance that can nurture the various reasons for which different communities or segments of a specific communities seek to participate. When it comes to racially and otherwise politically marginalized communities, this means resources that could facilitate their aims to exert collaborative or countervailing power. What might those resources look like? How might the state facilitate community aims to exert collaborative or countervailing power without guaranteeing outcomes? This Part is not intended to provide all the answers. Moving toward resources that could facilitate collaborative as well as countervailing power will require experimentation and consideration of institutional design (specifically as to content of and the time period allotted for each resource's use), grassroots organizing, and jurisdictionally specific questions of law and political economy. For this reason, this Part does not attempt to provide all the answers.

This Part aims to start a conversation. Using insights that can be gleaned from the shortcomings of consultative algorithmic governance, it theorizes a different approach to community participation focused on transparency, responsivity, contestation, and enforceability. The proposal aims to explore principles and a set of reforms that may offer a path toward providing all communities, including racially and otherwise politically marginalized ones, with a method to pursue their diverse aims

within algorithmic governance that complements (or at least does not preempt) the on-the-ground political contestation by social movements operating outside of institutional processes.[312]

With this in mind, this Part starts by examining the approach to community participation that the Pennsylvania Commission on Sentencing took in regard to its 2010 sentencing algorithm. It starts here because the Commission's 2010 approach was arguably the closest any criminal legal institution has ever come to facilitating the collaborative and countervailing power aims of communities. Using the Commission's 2010 approach as a starting point, it then separately discusses the principles of transparency, responsivity, contestation, and enforceability alongside reform implications. When it comes to transparency, it explores the potential reform of creating a petition system. When it comes to responsivity and contestation, it explores the potential reform of institutionalizing an algorithmic adoption process modeled off of negotiated rulemaking. When it comes to enforceability, it explores the potential reform of creating a private citizen enforcement mechanism.

This Part treats each reform as operating in tandem to provide communities with multiple levers through which they can cooperate in or resist algorithmic governance. It recognizes that communities are not a monolith and attempts by some community members to collaborate with criminal institutions may be in tension with attempts by other members of the same community to exert countervailing power. It is also the case that different segments of a single community may have internal disagreements about which substantive aims should be sought by attempts to exert either collaborative or countervailing power, especially given the variance in views about the extent to which carceral resources can promote public safety and accountability. This tension is expected and welcomed given that such tension is inherent in any process that aims to empower the people "through and beyond government, to meet their collective aims."[313]

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312. *See* Francesca Polletta, *Public Deliberation and Political Contention*, *in* DEMOCRATIZING INEQUALITIES: DILEMMAS OF THE NEW PUBLIC PARTICIPATION 222, 223–25 (Caroline W. Lee, Michael McQuarrie & Edward T. Walker eds., 2022); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 826 (2021).

313. Kapczynski & Michaels, *supra* note 177, at 284. It is worth noting that some caution against this form of democratization given the potential punitiveness and carceral leanings of communities. Some members of communities may support the coercive aims that criminal legal institutions seek to effectuate by way of algorithm, especially in certain types of contexts, such as domestic violence cases. Their viewpoints, if they win out, could lead to a 'harsher' algorithmic model then if those viewpoints were not accounted for. Rappaport, *supra* note 151, at 764–65, 808–09 (contending that participatory reforms oriented toward democratizing criminal administration risks increasing the coerciveness of criminal administration due to the punitive mindset held

A. Revisiting the Pennsylvania Commission on Sentencing

In order to conceptualize resources that could facilitate collaborative and countervailing power, it is useful to build upon a real-life case study. The case study involves the Pennsylvania Commission on Sentencing's approach to involving communities in the development and implementation of its sentencing algorithm between 2010 and 2019. Its approach came the closest to nurturing community aims oriented toward collaborative and countervailing power. As background, in 2010, Pennsylvania's legislature passed a law mandating the Pennsylvania Commission on Sentencing to develop and implement a risk assessment algorithm for use in sentencing.[314] The algorithm was to be designed to predict the likelihood that a convicted person would recidivate.[315] The hope was that sentencing judges would account for the prediction produced when determining eligibility for alternatives to incarceration as well as sentencing length. To accomplish its mandate, the Commission took an unusual approach to involving communities. The Commission extensively involved communities in its algorithmic construction process. It produced over a dozen detailed reports about its process.[316] As part of the Commission's process, it held nineteen hearings in different parts of Pennsylvania, making it one of the most extensive public consultation processes about algorithmic development ever conducted.[317] For their part, community members and groups primarily from or representing racially and politically marginalized communities used these hearings as an opportunity to voice their concerns and to influence the Commission's process.[318] Several demanded that the Commission research the proposed algorithm's anticipated racial impact.[319] Several pushed for the removal

by some community members who may participate in those processes). One response is that this Article does not aim to guarantee outcomes. Another response is that it is an open question what outcomes the form of democratization imagined by this Article will yield. Because the participation advanced will be continuously dynamic, and potentially collaborative or contentious, these processes will change the starting viewpoints of both the institutional actors and community members involved. In such a circumstance, it is difficult to predetermine outcomes.

314. 42 PA. CONS. STAT. § 2154.7 (2025).

315. *Id.*

316. 49 Pa. Bull. 5410 (Sep. 21, 2019).

317. *Id.*; *see* Stephanie Wykstra, *Just How Transparent Can a Criminal Justice Algorithm Be?*, SLATE (July 3, 2018, at 08:00 CT) [hereinafter Wykstra, SLATE], https://slate.com/technology/2018/07/pennsylvania-commission-on-sentencing-is-trying-to-make-its-algorithm-transparent.html [https://perma.cc/V9HN-MDQ3].

318. Wykstra, SLATE, *supra* note 317.

319. *See, e.g.*, Marni Jo Snyder, Risk Assessment Task Force, Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (May 23, 2017), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/; Defender Ass'n of Phil., Pa. Ass'n of Crim. Def.

of racial proxies in the proposed algorithmic model, such as zip codes, past arrests, past convictions, and technical violations of parole.[320] Others called on the Commission to not move forward with any algorithm.[321]

For its part, the Commission was more responsive to community feedback. In response to community feedback, it took three actions. First, in response to community members' requests for more information, the Commission decided to subject its proposed model to an external review by Carnegie Mellon University.[322] Second, the Commission removed counties of residence and arrests as factors in the final model.[323] Third, it entertained proposals for "an alternative to the Commission's proposed instrument."[324] The Commission's approach to community participation delayed the algorithmic construction and implementation by nearly a decade. In 2019, the Commission adopted the proposed algorithm over community opposition.

At first blush, one could argue that the Commission's approach to community participation failed from the perspective of efficiency. The Commission's approach delayed algorithmic construction and led to nearly a decade-long postponement in algorithmic implementation.[325]

Laws., Pub. Def. Ass'n of Pa. & the Allegheny Cnty. Publ. Defs. Office, Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (May 23, 2017), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/.

320. *See, e.g.*, Nyssa Taylor, ACLU of Pa., Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (June 13, 2018), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/.

321. *See, e.g.*, Kimberly Woolfolk, Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (June 13, 2018), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/; Kyle Price, Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (June 13, 2018), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/; Reuben Jones, Frontline Dads Inc., Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (June 13, 2018), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/.

322. DAVID MITRE BECERRIL ET AL., VALIDATION AND ASSESSMENT OF PENNSYLVANIA'S RISK ASSESSMENT INSTRUMENT PENNSYLVANIA COMMISSION ON SENTENCING 52–55 (2019) (contending that the flaws in the proposed model alongside its racial and gender impact warranted non-use or use only in the sentencing of low-risk convicted persons).

323. *Id.* at 7–8; Asli Bashir, *Pennsylvania's Misguided Sentencing Risk-Assessment Reform*, REGUL. REV. (Nov. 5, 2020), https://www.theregreview.org/2020/11/05/bashir-pennsylvania-misguided-sentencing-risk-assessment-reform [https://perma.cc/34B9-X89S].

324. 48 Pa. Bull. 5445 (Sep. 1, 2018).

325. Elizabeth Hardison, *After Nearly a Decade, Pa. Sentencing Commission Adopts Risk Assessment Tool Over Objections of Critics*, PA. CAP. STAR (Sep. 5, 2019, at 12:38 CT) [hereinafter Hardison, *After Nearly a Decade*], https://penncapital-

Moreover, it transformed algorithmic construction and algorithmic implementation, which are typically streamlined processes in algorithmic governance, into fricative and more costly ones.[326] By increasing the cost and time of these processes, the Commission's approach was in tension with efficiency.

The Commission's approach also appears to have failed from the perspective of legitimacy. While the approach facilitated robust community participation, it also subjected the algorithm to significant community opposition.[327] By 2018, 2,000 people had signed a Color of Change petition seeking the algorithm's non-use.[328] The community backlash spurred legislative action. State legislators Sharif Street and Joanna McClinton both independently introduced bills that would have repealed the Commission's mandate.[329] Neither bill passed.[330] By June 2019, the Commission changed its approach toward community participation, prioritizing instead the algorithm's implementation.[331] As the Commission's then-vice-chairman Todd Stephens put it, "I do feel that we need to put this to bed and move on to other issues that we've got."[332] In September 2019, the Commission approved the adoption of the algorithm in a 7-2 vote.[333] In the years since the algorithm's adoption, it remains a controversial tool. In a 2023 study on the judicial use of the algorithm, Dasha Pruss found that "regardless of county size, judges almost unanimously did not use the instrument."[334] She partly attributes this algorithmic aversion to years of community resistance.[335]

These problems may point against the Commission's approach to its sentencing algorithm and may explain why it took a different approach when it came to the ODARA pretrial algorithm in 2018. After all, the

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star.com/criminal-justice/after-nearly-a-decade-pa-sentencing-commission-adopts-risk-assessment-tool-over-objections-of-critics/.

326. *See id.*

327. Wykstra, SLATE, *supra* note 317.

328. Stephanie Wykstra, *Just How Transparent Can a Criminal Justice Algorithm Be?*, NEW AM. (July 12, 2018) [hereinafter Wykstra, NEW. AM.], https://www.newamerica.org/weekly/just-how-transparent-can-criminal-justice-algorithm-be/.

329. H.B. 1799, 2019-2020 Gen. Assemb., Reg. Sess. (Pa. 2019); S.B. 474, 2019-2020 Gen. Assemb., Reg. Sess. (Pa. 2019).

330. Both bills were referred to committee on judiciary, where no further action was taken. *See* H.B. 1799; S.B. 474.

331. *See* Elizabeth Hardison, *Sentencing Officials Are Trying — Again — to Build an Algorithm to Predict Future Crimes. Critics Still Have Big Concerns*, PA. CAP. STAR (Aug. 22, 2019, at 7:28 CT), https://penncapital-star.com/criminal-justice/sentencing-officials-are-trying-again-to-build-an-algorithm-to-predict-future-crimes-critics-still-have-big-concerns/.

332. *Id.*

333. Hardison, *After Nearly a Decade*, *supra* note 325.

334. Pruss, *supra* note 213, at 316.

335. *Id.* at 319.

Commission's approach to involving communities in the context of the ODARA pretrial algorithm in 2018 was more efficient and garnered less community opposition.[336] Yet, these 'wins' came at a significant cost. Community involvement was more streamlined and caused less controversy, because the consultative resources given to communities did not provide them with mechanisms to collaborate or act as a countervailing power to the Commission. The result was that the 2018 approach did not advance efforts by these communities to render the Commission's exercise of power in the context of the ODARA algorithm more democratically accountable.

Efficiency and legitimacy are not the only metrics for evaluating the success of the Commission's approach to community participation. As Bijal Shal has surfaced, the pursuit of efficiency and other such institutional virtues often come at the expense of meeting the needs of marginalized communities.[337] If we seek to better facilitate the collaborative and countervailing power aims of communities seeking to have their needs met, then we must think beyond efficiency and legitimacy as the sole or as the most prized values. Once we do that, then we can reevaluate the success of the Commission's approach to involving communities in the context of its sentencing algorithm.

To be clear, the Commission's approach was not perfect, which I have surfaced and critiqued in past work.[338] However, it provides a starting place for thinking about resources that could facilitate the collaborative and countervailing power aims that some community members have in algorithmic governance. Four aspects of the Commission's approach warrant consideration. The first aspect considers its approach to transparency. Throughout the process, the Commission made most aspects of algorithmic construction transparent. Information about the data relied upon to construct the algorithm, the model's inputs, and weights as well as internal testing were largely available on the Commission's website.[339] In addition to making available the information within its purview, it also responded to and gave effect to some of the demands by several community members for the production of additional information about the model's anticipated racial impact. The most significant example concerns the Commission's decision to subject the model to external review partially due to community demands for

336. *See* discussion *supra* Introduction.

337. Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1612, 1627–28 (2024).

338. Okidegbe, *To Democratize Algorithms*, *supra* note 43, at 1718–20.

339. *Guidelines and Statutes: Risk Assessment*, PA. COMM'N ON SENT'G, https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/ [https://perma.cc/48KE-CL8D] (last visited Oct. 4, 2025).

additional information about the algorithm's impact.[340] This research action is a stark contrast from the Commission's approach to its ODARA algorithm, where it chose not to give effect to informational community demands, including ones requesting information about the algorithm's validation for use in Pennsylvania.[341]

The second aspect concerns the Commission's approach to responsivity and contestability. The Commission responded to some community demands to change the model during the stage of algorithmic construction. For example, the Commission removed counties of residence and prior arrests as inputs from the final algorithm model due in part to community feedback.[342] This responsiveness allowed for contestation. While some community members sought to collaborate with the Commission, some did not. For this latter set of community members, algorithms operated within a broader carceral ecosystem that politically subordinates and incarcerates their communities.[343] They sought to stop the adoption of the algorithm altogether.[344] To put it differently, they aimed to check the Commission's power in algorithmic implementation.[345] The fact that the algorithm was ultimately adopted meant that this set of community members did not achieve the outcome that they sought, but they did partially succeed. Due to the Commission's approach to community participation, these community members' dissent served to elongate the algorithmic construction and implementation process. The push and pull between this set of politically marginalized communities and the Commission spurred a larger pluralistic, diverse, and normative debate about the relationship between algorithms, racial justice, sentencing, and carceral power. It unsettled the idea of algorithms as a neutral reform upon a broken sentencing system, allowing

340. *See generally* BECERRIL ET AL., *supra* note 322 (assessment of the performance and fairness of the algorithm by the Heinz College System Synthesis Project).

341. Defender Association of Philadelphia, *supra* note 18.

342. Bashir, *supra* note 323.

343. *See, e.g.*, Lorraine Haw, Coal. To Abolish Death by Incarceration, Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (Dec. 2018), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/.

344. *See, e.g.*, Troy Wilson, Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (May 23, 2017), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/.

345. *See, e.g.*, Marie Norman, Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (Aug. 22, 2019), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/; Kevin Carrington, Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (Aug. 14, 2019), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony.

for a democratic debate as to whether implementing an algorithm was the best solution.[346] At the same time, the length of the adoption process enabled these communities to build support both within the community and outside the community for their cause.[347] The Commission's coalition-building approach bolstered racially and otherwise politically marginalized communities' influence and power. Dissenting community members attempted to use this power to check the Commission's power at various points through the process. On the other hand, supporting community members attempted to use this power to collaborate with the Commission. This was made possible through the Commission's approach; it provided a process that nurtured pluralistic and diverse dialogue about the sentencing algorithm and its governance. Though the Commission's approach did not guarantee outcomes, this process affected key decision points that ultimately changed the algorithm's model and made the Commission more democratically accountable.

This brings us to the final aspect which concerns enforceability. The Commission's approach to community arose from the Commission's exercise of discretion. The Commission could have held fewer hearings, shortened the period for public hearings, or chosen not to respond to community demands for more information. Put differently, it could have taken the approach to community participation that it subsequently took with its ODARA algorithm.[348]

The sentencing algorithm case study reveals the importance of restructuring power in algorithmic governance. Here, power is defined as "the ability to make things happen, or to prevent things from happening."[349] A useful entry point to considering power, institutional resources, and community participation is the work of Susan Sturm. Building on the work of Steven Lukes, she puts forth two possible institutional approaches to power and community participation: (1) the *power over* approach and (2) the *power with* approach.[350] The *power over* approach is where an institution subjects communities to their power "by constraining their choices [and] thereby securing their compliance."[351] As an example, Sturm refers to situations where an institution makes decisions without the involvement of the very communities that they have invited feedback from.[352] This approach leads to these communities'

346. *See* Tim Stevens, The Black Pol. Empowerment Proj., Comment Letter on Proposed Model Sentencing Risk Assessment Tool Under 42 PA. CONS. STAT. § 2154 (June 13, 2018), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony/.

347. *See* Wykstra, NEW. AM., *supra* note 328.

348. *See infra* Part I.

349. Sturm, *supra* note 17, at 158.

350. *Id.* at 158–59.

351. STEVEN LUKES, POWER: A RADICAL VIEW 74 (2d ed. 2005).

352. Sturm, *supra* note 17, at 159.

domination by preventing their capacity to act, pursue their own interests, and be heard.[353] In contrast, the *power with* approach is where an institution provides communities with effective influence power by supporting community capacity to pursue their aims. More precisely, the *power with* approach requires institutions to create situations where communities have opportunities to exert influence "in the service of their aims."[354] Importantly, rather than displacing technologists or technocrats, the *power with* approach requires that communities also comprise those "who [are] an 'authority' respected for their skill, knowledge, and experience with the issue at hand, and who [have] 'authority' with a mandate to determine the questions asked, the information credited, and the solutions proposed and adopted."[355] As an example of the *power with* approach in action, Sturm refers to the success of the Newark Community Street team, which is a mayoral initiative to reduce violence.[356] The key to its success was its approach to community participation. Taking a *power with* approach, the team created opportunities for communities to be genuine partners with the police and other government agencies in advancing public safety and reducing crime.[357] As Sturm puts it, the team created situations in which "those in 'power over' positions had to listen to, respect, and respond to the concerns of the community."[358] This approach helped Newark succeed in its goal of reducing crime rates.[359]

Sturm's articulation of both the *power over* approach and the *power with* approach provides a framework from which to evaluate the Commission's approach to community involvement in the context of its sentencing algorithm. At times, the Commission engaged in a *power with* approach. This came out the clearest when it decided to hold numerous public hearings through which communities could pursue their collaborative and countervailing power aims. During these moments, communities were able to exert real influence as evidenced by changes to the model. Yet, the Commission did not maintain this *power with* posture throughout the process. By 2019, the Commission reverted to a *power over* approach, which is evidenced by the decision to cease further community participation following the algorithm's implementation. Sturm's discussion also surfaces how the Commission's actions could serve as a template for the development of resources that can nurture collaborative and countervailing power in algorithmic governance.

353. *Id.* at 158; LUKES, *supra* note 351, at 74.
354. Sturm, *supra* note 17, at 159.
355. *Id.* at 164.
356. *Id.* at 166–69.
357. *Id.* at 169.
358. *Id.* at 168.
359. *Id.* at 169.

Imagine if the Commission was legally obligated to pursue its initial approach to transparency, responsivity, and contestation. It is this imagining that is taken up in the next Section. Section B will explore potential resources that could empower communities to pursue their collaborative and countervailing power aims through creating the conditions needed to force criminal legal institutions to engage in a *power with* approach. It will also explore the creation of a private enforcement mechanism to enable individuals and community groups to enforce criminal legal institutions' compliance with the abovementioned reforms.

B. Principles for Collaborative and Countervailing Power

1. Transparency

One lesson to be drawn from the sentencing algorithm case study is that the current approach to transparency needs to change. Transparency requires communities to "see what their agents are doing so they can evaluate those actions and exercise control as necessary."[360] Transparency means access to information. To advance their collaborative and countervailing power aims, communities need the ability to access two types of information. One type concerns information about an algorithm. This information includes source code, training data, methodology, and other key aspects of the algorithm's innerworkings. It also includes information about the algorithm's validity, reliability, and potential social impact.

The other type concerns information about the integration of the algorithm into a specific criminal legal institution. Information about which decision-making processes or modes of policy implementation would be subjected to the algorithm and how they would be subjected to it would fall into this category. Information about policies governing implementation, criminal administrators' usage training, and oversight (including ongoing validation and impact studies) would also fall into this category. To facilitate this informational need on the part of communities, one potential reform would be to bar criminal legal institutions from finalizing contracts with algorithm developers that contain non-disclosure agreements or provisions that protect trade secrecy. One could also imagine requiring criminal legal institutions to make any information that they possess about an algorithm publicly available during the algorithm procurement stage. However, even with these reforms, communities would still need a mechanism to incentivize criminal legal institutions to produce pertinent yet nonexistent information. In some situations, communities seek information that

360. Friedman & Ponomarenko, *supra* note 153, at 1838.

neither the criminal legal institution nor the algorithm developer has because that information has not been produced. This is especially the case when it comes to the impact that an algorithm will have on a specific racially and otherwise politically marginalized community. For this category of information, communities need a mechanism to incentivize a criminal legal institution to either produce such information or to seek its production by a third party. Put differently, they need a resource to force criminal legal institutions to engage in a *power with* approach as it pertains to information creation and sharing.

One potential reform that stands out concerns the creation of a petitioning system at the stage of algorithmic procurement. Petitioning refers to the "open ability of [any person] to approach the [government] with a complaint or request . . . [that] would generally receive a response."[361] Important to petitioning is that requests can include the production of information. This quality distinguishes a petition system from a public records regime, which is oriented to the disclosure of produced government records from non-exempt government agencies.[362] This quality, as Aziza Ahmed-Jackson notes, also distinguishes a petitioning system from an administrative notice and comment process.[363] In the latter case, individuals and groups passively receive information that the government institution has decided to produce about a proposed rule change.[364]

How might this work in practice? State governments could create a statutory right to petition criminal legal institutions. To illustrate how this could work in practice, it is useful to consider again the adoption of the sentencing algorithm by the Pennsylvania Commission on Sentencing. Several community members demanded that the Commission provide information about the racial impact of the algorithm. Under current law, the Commission had and continues to have no requirement to respond to this research request.[365] However, the Commission's enabling statute

361. Daniel Carpenter & Sean Gailmard, Bootstrapping Sovereignty: Petitions and Power in Nascent States 2 (Oct. 10, 2024) (unpublished manuscript), https://priceschool.usc.edu/wp-content/uploads/2024/10/Carpenter.pdf [https://perma.cc/Q7LL-9Q29].

362. *See* Christina Koningisor, *Policy Secrecy Exceptionalism*, 123 COLUM. L. REV. 615, 621 (2023) (noting how "law enforcement agencies can and often do continue to withhold [public] records by invoking an array of other exemptions" and how they have no obligation to produce information that they do not currently possess).

363. Aziza Ahmed-Jackson, Life and Death Bureaucracy: Law, Science, and Social Movements in the Administrative State 47 (Jan. 24, 2025) (unpublished manuscript) (on file with author) (distinguishing petitioning "from notice and comment as built into the rule making process").

364. *See id.*

365. *See* 42 PA. CONS. STAT. §§ 2151–55 (2025) (establishing the Pennsylvania Commission on Sentencing and imposing only a limited duty to solicit public feedback before adopting new guidelines).

could be amended to include a petitioning process. Under it, any resident of Pennsylvania would be allowed to request that the Commission take a research action within a specified period. Petitioners would have to disclose the factual basis for the request. Petitioners could meet their burden with quantitative or qualitative research or with personal knowledge. The Commission would have to respond to the petition either by complying with the request or by providing reasons for denying it. As an example of what a petition could look like, one could imagine a petition requesting the Commission to run a proposed algorithmic model on a set of training data representative of the population that would be subjected to the algorithm.

Introducing a petition system would have important implications for community participation more broadly. One comes from the responsiveness requirement. This requirement has the potential to incentivize criminal legal institutions to produce or cause the production of more information to the governed. In the scenario where the criminal legal institution accepts the petition, petitioning acts as a knowledge-building mechanism. Even if criminal legal institutions deny petitions, denials are still a power-building mechanism. Petition denials could help racially and otherwise politically marginalized communities coalition-build with the politically powerful ones in order to create the conditions for mass mobilizations and social movements that could produce durable change.[366] They can be a powerful organizing tool.[367] In this sense, petitioning could become a mechanism for communities as they pursue their diverse aims through their participation in algorithmic governance.

2. Responsivity and Contestation

Another lesson to be drawn from the sentencing algorithm case study is that the current approach to responsiveness and contestation needs to change. Responsivity requires that criminal legal institutions reflect the common interests of the different communities that constitute the polity. To facilitate collaborative and countervailing power aims, communities must have opportunities to "push [criminal legal institutions] in a direction that they find acceptable."[368] Because this includes racially and otherwise politically marginalized communities, any meaningful approach to responsivity should address the power imbalances that hinder

366. Daniel Carpenter, *Petitioning, Strategy and Agenda Democracy (Balkinization Response to Frances Lee and Robert Tsai)*, HARV. UNIV., 2, 4 (Apr. 19, 2022), https://dcarpenter.scholars.harvard.edu/publications/petitioning-strategy-and-agenda-democracy-balkinization-response-frances-lee [https://perma.cc/NCX9-NZXV].

367. *Id.* at 2.

368. PHILIP PETTIT, ON THE PEOPLE'S TERMS, *supra* note 157, at 239.

efforts by these communities to exert influence in algorithmic governance.

A different approach is also needed for contestation. Contestation requires providing communities with a right of challenge. This requirement goes toward countervailing power. In order for communities to pursue their aim to act as a check on criminal legal institutions, they need the ability to resist certain exercises of an institution's authority. This could place criminal legal institutions in a *power with* posture, since they would have to consider and account for the diverse and competing interests of different community groups. In order to accomplish these feats, communities need a resource to force criminal legal institutions to engage in a *power with* approach.

One potential reform would be to create an algorithmic adoption process akin to negotiated rulemaking. Negotiated rulemaking started as a creature of federal administrative law. The passage of the Negotiated Rulemaking Act of 1990 formalized and created a framework for the process.[369] It also specified certain instances where an agency must utilize negotiated rulemaking.[370] Where an agency decides or is required to use negotiated rulemaking, it must create a negotiated rulemaking committee to consider, discuss, and debate one of its proposed rules.[371] The typical composition of these committees is "representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff."[372] In order for the proposed rule to move forward, the committee must reach consensus (which must be unanimous) as to the content of the proposed rule.[373] If consensus cannot be reached, the agency can revise the rule or restart the process.[374] Alternatively, the agency can abandon the process (and determine the rule unilaterally).[375] If consensus is reached, the agency then initiates the notice and comment procedure under the Administrative Procedure Act.[376]

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369. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561–570); CTR. FOR PUB. POL'Y DISP. RESOL., TEXAS NEGOTIATED RULEMAKING DESKBOOK 21–25 (1996), https://law.utexas.edu/wp-content/uploads/sites/30/2015/10/Texas-Negotiated-Rulemaking-Deskbook-web.pdf [https://perma.cc/KG8C-UFX9].

370. MAEVE P. CAREY, CONG. RSCH. SERV., R46756, NEGOTIATED RULEMAKING: IN BRIEF 9 (2021).

371. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256–57 (1997).

372. *Id.* at 1257.

373. *Id.* at 1257 & n.10.

374. CTR. FOR PUB. POL'Y DISP. RESOL., *supra* note 369, at 11.

375. *Id.*

376. 5 U.S.C. § 553.

My proposal for how to bring a negotiated rulemaking-type process into algorithmic governance is to enact a state statute that would require state and local criminal legal institutions to undergo an algorithmic adoption process with a negotiated rulemaking-like component. To have the most impact, negotiated rulemaking should take place at the stage when an institution is considering subjecting a criminal law process to an algorithm. This requirement would not apply to all algorithms. It would apply to algorithmic use that (1) mediates a decision-making process or mode of policy implementation and (2) impacts liberty, rights, or safety.[377] The proposal would have to account for institutional differences. One could imagine providing the judiciary with leeway as to how it incorporates this negotiated rulemaking component, while mandating a process for other criminal legal agencies. Regardless of the intricacies of how it is implemented, the function of the negotiated rulemaking component will be to ensure that a negotiated rulemaking committee debates the question of whether a process will be subjected to an algorithm. If the committee reaches consensus, then the criminal legal institution would be permitted to move forward with algorithmic procurement and implementation.[378]

For this process to be resource oriented toward collaborative and countervailing power, representation is important. To accomplish this feat for politically marginalized communities, the statute could require committees to have representation from community groups serving communities in zip codes most vulnerable to incarceration and police violence.[379] Because of segregation and the importance of place when it comes to the operation of criminal administration and its harms, the use of zip codes would result in representation from politically marginalized communities.

One problem with this approach concerns stacking. Stacking is when an agency establishes a negotiated rulemaking committee consisting of representatives that will support their position on a proposed rule or on

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377. This definition borrows in part from the definition of a public algorithm provided by the Pittsburgh Task Force on Public Algorithms. PITTSBURGH TASK FORCE ON PUB. ALGORITHMS, REPORT OF THE PITTSBURGH TASK FORCE ON PUBLIC ALGORITHMS 8 (2022), https://www.cyber.pitt.edu/sites/default/files/Algorithms/Pittsburgh%20Task%20Force%20on%20Public%20Algorithms%20Report.pdf.

378. In most cases, the criminal legal institution would be able to move on to algorithmic procurement, construction, or use. The only exception would be in cases where the institution's enabling statute requires a notice and comment process. This is the case with some state sentencing commissions. *See*, *e.g.*, 42 PA. CONS. STAT. § 2155(a)(1) (2025).

379. *See* Hossein Zare et al., *Analyzing Fatal Police Shootings: The Roles of Social Vulnerability, Race, and Place in the U.S.*, 68 AM. J. PREVENTIVE MED. 126, 133 (2025).

a proposed rule change.[380] The concern here is that a criminal legal institution could stack committees with community group representatives who will support that institution's position on algorithmic use, undermining the collaborative and countervailing value of this reform. One potential solution is to make the selection process for community groups randomized. The statute could identify criteria for a community group's eligibility to serve on a negotiated rulemaking committee. Criminal legal institutions could have an obligation to both seek out eligible community groups and to publicize a request that community groups could respond to. In either case, eligible community groups would have to opt in to be considered for the committee. Following the opt-in process, the agency would create a process akin to a jury selection process to select a set number of community groups. Each selected community group would provide a specific number of representatives to be on the negotiated rulemaking committee. Like with jury duty, each representative would only serve for a specified period of time and would be compensated. The hope is that this process could thwart stacking attempts, while also having the advantage of compensating community representatives. In addition to representation of community groups, the statute should ensure representation for other affected stakeholders. To do this, the statute could specify categories of representation.[381] As an example, it could require representation from system actors, lawyers, algorithm developers, academics, and stakeholders residing in the jurisdiction of the criminal legal institution.

Beyond the representation concern, another issue to contend with is the authority agencies have under negotiated rulemaking. In the administrative context, agencies retain the authority to conclude a negotiated rulemaking process if that agency's good faith attempts fail to result in a consensus.[382] This principle should also apply to criminal legal institutions. In other words, if the committee does not reach consensus, then the relevant criminal legal institution should have the discretion to move forward with the adoption process. However, one could imagine requiring the criminal legal institution to have to wait for a specified period of time before it could exercise its authority to continue with the algorithmic adoption process. This delay could have important

380. *See* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 40 (2022) (discussing the problem of how agencies often choose "outside constituencies that will support partisan initiatives").

381. It is important to note that many statutes specify categories of representation for committees and for commissions. *See, e.g.*, CITY OF OAKLAND, OAKLAND PRIV. ADVISORY COMM'N BYLAWS Art. 2, § 2(h).

382. CTR. FOR PUB. POL'Y DISP. RESOL., *supra* note 369, at 12; Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENV'T L.J. 386, 401–02 (2001).

implications. It could incentivize the institution to work with the negotiating committee or risk a delay in algorithmic adoption. Normatively speaking, incorporating a process to delay algorithmic adoption may be a bridge too far for some. However, allowing such a delay is in line with democratic accountability aims, since the delay could operate to facilitate collaboration or serve as a check on state power oriented toward empowering the demos. Moreover, this delay has the added benefit of enabling additional opportunities for public reflection and deliberation—opportunities that could aid politically marginalized communities' efforts to coalition build.

The final issue concerns how to set up such a negotiated rulemaking-like process within criminal legal institutions. Although used in the federal context, the process is comparatively rare for local and state agencies and is entirely absent in the judiciary.[383] This means that jurisdictions would have to resolve institutional design questions without much guidance. Though questions of institutional design are beyond the scope of this paper, it is worth noting that there are state negotiated rulemaking statutes that could serve as precedents.[384]

To illustrate how this algorithmic adoption process could work in practice, it is useful to again consider the adoption of the pretrial algorithm by the Pennsylvania Commission on Sentencing in 2018. Several community members opposed the use of an algorithm.[385] Under current law, the community members could only voice their concerns through the notice and comment process set out in the Commission's enabling legislation.[386] There is no institutionalized mechanism to force the Commission to respond to this opposition or at least bear any consequences from it.[387] The Commission was able to ignore these communities' opposition without garnering much attention or political blowback. However, the Commission's enabling statute could be amended to include an algorithmic adoption process that would redress this issue. Under such a process, communities would have representation in the adoption process. Any community representative could use their power to delay algorithmic adoption. In such a case, the Commission would have to either accommodate the delaying representative or risk having algorithmic adoption delayed.

An algorithmic adoption process modeled off negotiated rulemaking would have important implications. One comes from its consensus requirement. This requirement has the potential of incentivizing criminal

383. *But see* CTR. FOR PUB. POL'Y DISP. RESOL., *supra* note 369, at 13.

384. *E.g.*, Negotiated Rulemaking Act, TEX. GOV'T CODE ANN. § 2008 (West 2025).

385. *See* discussion *supra* Introduction.

386. *See* 42 PA. CONS. STAT. § 2155(a)(1) (2025).

387. *Id.* § 2151–55.

legal institutions to be more responsive to community viewpoints, including those held by politically marginalized communities. Because the decision to subject a process to an algorithm could be delayed by a negotiated rulemaking committee, it could cause criminal legal institutions to make concessions if they would like to streamline algorithmic adoption. Community stakeholders could also use the potential for delay as an effective bargaining chip to ensure that the decision to subject a process to an algorithm has accounted for these communities' views and values on safety. This result would serve both collaborative and countervailing power aims. One could imagine that criminal legal institutions might attempt to circumvent the process. In such a case, that circumvention would trigger public scrutiny and supply fuel for activists and other political groups that are already resistant to algorithms.[388] For these reasons, negotiated rulemaking could become a power-building mechanism that could support collaborative power and countervailing power aims in algorithmic governance.

3. Enforceability

Any reform oriented toward facilitating communities' aims for collaborative or countervailing power needs to be enforced. This Article recommends private enforcement mechanisms. Private enforcement mechanisms refer to mechanisms that "harness private citizens, . . . nongovernment organizations, [and/or] private market agents to regulate social harm."[389] Where implemented, this mechanism consists of a private right of action against another individual, private entity, or government institution. Since the second half of the twentieth century, private enforcement has become the primary mechanism by which civil rights are enforced.[390] A major reason for this result is that enabling statutes often promote private enforcement by "includ[ing] a provision for awarding attorney fees for prevailing plaintiffs."[391]

For a petition system and an algorithmic adoption process as described in this Article to become effective resources for facilitating collaborative and countervailing power, a private enforcement mechanism is needed. First, a recurring problem with the current iteration of consultative algorithmic governance is compliance. Criminal legal institutions experience no repercussions for failing to adhere to

388. Polletta, *supra* note 312, at 224–26 (noting how state driven processes can operate as a site for political protest by activists). Arguably, negotiated rulemaking could serve a similar function.

389. Maria J. Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1146 (2012).

390. *Id.* at 1149–50.

391. *Id.* at 1149; *see, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(k), 78 Stat. 241, 261 (codified at 42 U.S.C. §2000e-5(k)).

established consultative processes or setting up defective ones. As a result, compliance by criminal legal institutions has been inconsistent. This issue points against allowing criminal legal institutions to police themselves when it comes to these new resources. Second, we are living through an age of extreme disinvestment and dismantlement of government institutions. While there are reasons why we might want to entrust the enforcement of these resources to a state government agency, such as the state equivalents of the U.S. Department of Justice, these institutions have scarce resources, rendering them unable to effectively investigate non-compliance.[392] In such a circumstance, reliance on ex post enforcement by private suits is an effective second-best option.[393] Moreover, given the nature of the resources proposed, community members would "possess the best information about any alleged statutory . . . violation."[394] The combination suggests that private individuals and communities are well-positioned to engage in private enforcement.

To accomplish this feat, the private enforcement mechanism under Illinois's Biometric Information Privacy Act (BIPA) warrants consideration.[395] BIPA governs the collection, maintenance, dissemination, and destruction of biometric information such as facial scans.[396] Important to BIPA is its private enforcement regime. BIPA provides individuals with a private right of action against private entities that violate it.[397] BIPA also includes a provision that awards a prevailing plaintiff with damages for each violation.[398] BIPA has been an effective regime.[399] One reason is that a plaintiff need not experience an actual injury or adverse effect to sue under the Act.[400] Another reason is that a five-year statute of limitations applies to all claims brought under BIPA.[401]

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392. Glover, *supra* note 389, at 1153.

393. *Id.*

394. *Id.* at 1155.

395. 740 ILL. COMP. STAT. 14/1 (2024). Many thanks to Alicia Solow-Niederman for pointing me to this regime.

396. *Id.* 14/10, 15.

397. *Id.* 14/20.

398. *Id.*

399. Because of its effectiveness, BIPA has been the subjected of a concerted lobby effort by private companies in recent years. Hannah Meisel, *Court Rulings Supercharge Illinois' Strongest-in-Nation Biometric Privacy Law*, CAP. NEWS ILL. (Mar. 1, 2023), https://capitolnewsillinois.com/news/court-rulings-supercharge-illinois-strongest-in-nation-biometric-privacy-law/ [https://perma.cc/4SJ7-MMED].

400. *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 40, 129 N.E.3d 1197, 1207.

401. *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801, ¶ 32, 216 N.E.3d 845, 852.

A potential way forward would be to design a private enforcement mechanism akin to BIPA. Though issues of administrability would need to be worked out, it could be a model. A private enforcement mechanism could be provided for in the statutes enabling the petition system and the algorithmic adoption process noted above. The idea would be that any criminal legal institution using an algorithmic system that did not first hold an algorithmic adoption process or is in breach of its requirement to respond to petitions could be sued by any person. To promote private enforcement, prevailing plaintiffs would receive nominal damages and attorney fees. The mechanism could also include whistleblower protections in order to encourage government employees to disclose violations of these regimes.[402]

IV. OBJECTIONS

This Article has advanced an approach to participation that could better facilitate the diverse aims sought by racially and otherwise politically marginalized communities in algorithmic governance. However, a critical question remains: Would such an approach be realizable in our current political moment? This is a particular concern since the operationalization of this proposal is dependent on state legislative bodies passing reforms that constrain the power of agencies and courts. Overcoming these barriers is a precondition for this Article's proposal to become realizable. Acknowledging this difficulty, this Part will address three other objections.

A. Insufficient Community Capacity

Some may critique this prescription for its failure to attend to the issue of community capacity. To effectively pursue collaborative and countervailing power aims, communities need not only process-based institutionalized reforms but also educational and financial resources. Otherwise, additional participatory resources can overburden racially and otherwise politically marginalized communities who have limited resources.[403] Moreover, as Margot E. Kaminski and Gianclaudio Malgieri caution, lack of attention to this issue also risks "creat[ing] an avenue for policy capture by better resourced stakeholder groups, unintentionally disempowering more vulnerable groups."[404] This objection is important but can be redressed. Legislative bodies and criminal legal institutions themselves can pay attention to capacity building. Kaminski and Malgieri explain that, "[p]articipation requires

402. *See Model CCOPS Bill*, *supra* note 233, § 9.
403. Kaminski & Malgieri, *supra* note 44, at 56.
404. *Id.*

energy, competence, time for preparation, education, and costs (including, e.g., for travels)."[405] Communities need access to "external and neutral third-party experts."[406] They suggest that the state should fund these costs.[407] Any proposal advocating for public funding will be contentious.[408] However, the fact is that any meaningful systems of community participation will require funding.[409] Therefore, the fact that this Article's prescription requires funding is not an insurmountable barrier.

B. Procedure Fetish Objection

Some may critique this prescription as procedure fetishism. Nicholas Bagley coined this term to critique the belief in proceduralism as a vehicle for greater public accountability.[410] Counterintuitively, he contends that procedural rules can undermine this goal.[411] Though his critique was directed at proceduralism in the administrative law context, his critique remains applicable. Process-based participatory reforms do not necessarily guarantee particular results.[412] Moreover, they are vulnerable to capture by state and private forces and to participation fatigue.[413] This Article's proposal has protections against some of these shortcomings. First, because community group representatives under the algorithmic adoption process reform would be selected in a randomized process, they would be less vulnerable to capture and to participation fatigue. Second, when it comes to state and industry capture, the private enforcement mechanism proposed in Part III can help identify and potentially address this issue.

One remaining issue concerns the disconnect between process and outcome. This Article's proposal cannot guarantee specific outcomes. There is a real risk about the role of profound polarization and misinformation in shaping community viewpoints and aims, issues that could lead to participatory processes that produce outcomes more in line with special interest partisan groups. One response is that, although this

405. *Id.* at 57.

406. *Id.* at 58.

407. *Id.* at 57.

408. *Id.* at 58.

409. *Id.*

410. Bagley, *supra* note 46, at 389–91.

411. *Id.* at 391–92.

412. Gardner, *supra* note 178, at 805–07; Rappaport, *supra* note 151, at 711–12, 808–09 (contending that increased public participation risks increasing the punitiveness of the criminal law system). Though his critique was focused on criminal law governance, his critique could also be applied to participation-based proposals in algorithmic governance.

413. Sloane, Moss, Awomolo & Forlano, *supra* note 48, at 1–6.

risk exists, recent empirical studies suggest that this risk is lower in the context of algorithmic governance. Early studies show that there is less polarization on algorithm regulation, democratic accountability, and social impact. While this consensus may be temporary, Yotam Margalit and Shir Raviv suggest that this result "point[s] to the potential—perhaps only a temporary one—for creating broad coalitions that span across the political spectrum and promote AI governance that is centered on safeguarding the public interest rather than those of special interest partisan groups."[414] Another response to this concern is that these resources are not meant to be a complete solution. Participation is only one dimension of democratic accountability. My prescription should be understood as one mechanism, among others, to create the conditions for pluralistic, diverse, deliberative, and ongoing democratic discourse. This prospect makes this proposal worth pursuing.

C. Patchwork Objection

There may be criticism stemming from the fact that reforms under this Article's proposal are meant at the state or local level. The concern is that local variances would lead to a patchwork of different algorithmic governance schemes. One response to this objection is that this patchwork already exists. Because Congress has yet to pass legislation to govern algorithmic governance nationally, states and cities have begun to craft their own solutions.[415] Given that there are no easy answers, this patchwork approach should be nurtured. Democratic experimentation can ensure that the reforms advanced are tailored to local knowledge, local circumstances, and are designed to produce a durable change.[416]

CONCLUSION

We are at a critical juncture for algorithm reform in this country. Current laws and institutional practices favor consultative algorithmic governance. This embrace has left communities, particularly politically marginalized individuals and communities, without a mechanism to

414. Yotam Margalit & Shir Raviv, The Politics of Using AI in Public Policy: Experimental Evidence 36–37 (Sep. 19, 2023) (unpublished manuscript) (on file with author). A 2025 empirical study by Motahhare Eslami, Sarah Fox, Hong Shen, Bobbie Fan, Yu-Ru Lin, Rosta Farzan, and Beth Schwanke surfaced that individuals from marginalized communities directly affected by the algorithms were more motivated to pursue accountability by participating in algorithmic governance than other groups. Eslami et al., *supra* note 61, at 2664–65.

415. *See, e.g.*, Fidler, *supra* note 233, at 545–55 (discussing the solutions of fourteen local governments).

416. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 288–90 (1998).

pursue non-consultative aims in algorithmic governance. If we are serious about including racially and otherwise politically marginalized communities in the democratic accountability project, we must better facilitate why they seek to participate. To do that, we must rethink our current approach to community participation. Developing new resources that can better incentivize criminal legal institutions to share *power with* communities provides a way forward. Community power is a critical dimension of democracy, yet resources to facilitate that power are absent in the algorithm reform agenda. By rethinking and empowering community participation, we create a path to formally and publicly recognize the governed, including politically marginalized ones, as equal coauthors in the ongoing project of creating a more equitable, responsive, and democratic iteration of algorithmic governance.

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