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Of Afrofuturism, Of Algorithms

Ngozi Okidegbe*

Abstract

Algorithms are proliferating in criminal legal structures. The predictions produced by these algorithms inform life-altering decisions around surveillance and incarceration. Their continued use poses a challenge to ongoing racial justice efforts. Contesting how algorithms of today maintain the racial status quo requires a fundamental rethinking of the algorithm project. This essay explores how Afrofuturism can facilitate such a rethinking. It imagines how applying an Afrofuturist paradigm to the adoption, construction, implementation, and oversight of algorithms could radically change the kind of algorithms developed and the purposes for which they are developed. Tapping into this potential offers the chance for members of marginalized communities to subversively use algorithms to challenge, contest, and potentially reform or dismantle and reconstitute the systems in which they are used.

I. Introduction

What might an Afrofuturist¹ approach to the adoption, construction, implementation, and oversight of criminal legal algorithms look like? This essay begins to answer this question. Why focus on criminal legal algorithms? This focus is meant to fill an existing gap in the legal scholarship on Afrofuturism and the law. Legal scholars have yet to apply an Afrofuturist approach to algorithms specifically. One reason for this gap is that engagement with Afrofuturism within legal scholarship is still burgeoning. Another reason is that scholarship on Afrofuturism and the law has tended to focus on radically reimagining existing governmental institutions and structures. One inspiring and often cited example of this trend is found in *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, where Professor Bennett Capers uses Afrofuturism to conceptualize how policing might look in a United States with a majority Black and Brown population.²

The current legal attention to institutions and structures is important. The Afrofuturist tradition is premised on conceptualizing a future in which Black and other marginalized people are alive, thrive, and hold power alongside those who have traditionally

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¹ The term “Afrofuturism” was coined by Mark Dery. Mark Dery, Black to the Future: Interviews with Samuel R. Delany, Greg Tate, and Tricia Rose, in *Flame Wars: The Discourse of Cyberculture* 179, 180 (Mark Dery ed., 1994) (“[s]peculative fiction that treats African-American themes and addresses African-American concerns in the context of twentieth-century technoculture—and, more generally, African-American signification that appropriates images of technology and a prosthetically enhanced future”).

² Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. Rev. 1 (2019).

been in power.³ Accomplishing such a feat will require a radical rethinking by activists and scholars from multiple disciplines. An important question for legal scholars stemming from this rethinking is, and will continue to be: what kinds of institutional structures and arrangements can support Black thriving in the near or distant future?

Starting from this vantage point, it may seem strange to apply Afrofuturism solely to criminal legal algorithms. One critique might be that a Black future would not expend resources around fixing the criminal legal algorithms of today. That future would have no use for such algorithms given that they operate to support the current criminal legal system's racial subordinative function.⁴ Since the orientation of Afrofuturism is to build a future that is more than a mere improvement over the status quo and one that is free from the legacies of slavery, carcerality, and hierarchies that have forced those with marginalized identities into state sanctioned vulnerability, such a world would abolish the criminal legal algorithms of today. Moreover, in such a future, no epistemic energy would be spent on reimaging this technology of the past for fear that such might result in the reanimating of the racial ideologies and commitments that gave rise to its popularity in the early twentieth century.⁵

But my focus on criminal legal algorithms comes from the fact that we do not live in the Afrofuturist vision of the future. We live in a world in which these algorithms are increasingly influencing life-altering criminal legal decisions around surveillance and incarceration—decisions that have severe physical, psychological, financial, and socioeconomic consequences for defendants, their families, and their communities.⁶ Given the current racial makeup of those ensnared by the criminal legal system, these consequences are largely borne by Black communities. Not only is it imperative to apply an Afrofuturist frame to reflect on and to envision ways to change this present reality; this approach is also in line

³ Philip Butler, Introduction, in *Critical Black Futures: Speculative Theories and Exploration 3* (Philip Butler ed., 2021).

⁴ As Professor Dorothy Roberts's work has shown, the criminal legal system operates to support racial subordination because the concentration of the criminal legal system on Black and other marginalized communities operates to render large segments of these communities vulnerable to state-sanctioned violence and caging. At the same time, this state of affairs has diluted these communities' political, economic, and social power to the point of hampering their ability to exercise full citizenship rights. For more information on this point, see, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stan. L. Rev.* 1271 (2004); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 *Nw. U. L. Rev.* 1597 (2017); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 *Harv. L. Rev.* 1 (2019).

⁵ Jessica M. Eaglin, *When Critical Race Theory Enters the Law & Technology Frame*, 26 *Mich. J. Race & L.* 151, 163 (2021) ("I suggest this is simply a narrative—the expansion of sentencing technologies are deeply political, and cultural, too. In short, *Technologically Distorted* offers a counter-narrative that illuminates how technology shapes social realities and legitimates the role of law in sustaining the status quo.") (footnote omitted)).

⁶ Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 *Emory L.J.* 59, 61-62 (2017) ("Predictive technologies increasingly appear at every stage of the criminal justice process."); Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 *Conn. L. Rev.* (forthcoming 2022) ("[Algorithms] inform life-altering decisions around pretrial release, detention, and electronic monitoring.").

with the Afrofuturist tradition. As Afrofuturist and writer Greg Tate has warned, it is important for conversations around Black futures to engage in the present and past so as not to ignore the “race and power relations in this historical moment.”⁷ Moreover, as Professor and Afrofuturist Lonny Avi Brooks has theorized, Afrofuturism has never exclusively relegated itself to consideration about the future, since surviving decades of oppression and attempts at annihilation have required Black people to simultaneously think in the past, the present, and the future.⁸ Afrofuturism grows out of the rich Black intellectual and artistic traditions stemming from this positionality.

This essay is a preliminary effort to apply Afrofuturism to the paradigm governing algorithms in order to envision how this paradigm could be done differently. Specifically, the aim is to envision this paradigm as one that is designed to operate toward the elimination or reduction of the racial harms of carceral governance as opposed to its maintenance. In so doing, this essay seeks to contribute to the growing legal literature considering the congruency between algorithm-based reforms and racial justice efforts. This line of scholarship questions the viability of repurposing algorithmic tools in order to contest and to combat unequal systems of power. This essay adds another layer to this issue by exploring how an Afrofuturist vision for algorithms may hold the key to transforming algorithm-based reforms into vehicles that can endow Black and other marginalized people with a voice to reform, reimagine, or dismantle a system that has traditionally subordinated their values, needs, and interests.

The essay proceeds in two parts. Part II contextualizes the use of criminal legal algorithms and explains how the paradigm governing these algorithms perpetuates rather than ameliorates the criminal legal system’s harms on racially marginalized people. Part III introduces Afrofuturism into the frame and considers what an Afrofuturist approach would mean for the paradigm governing algorithms and its implications on the systems in which such algorithms would be used.

II. Criminal Legal Algorithms of Today

In order to apply an Afrofuturist approach to algorithms, it is important to first contextualize their rise in the last decade. For clarity, this essay uses the term “criminal legal algorithms” to refer to algorithms that employ an actuarial method and information about a defendant to produce a forecast about the defendant’s future conduct. This forecast concerns the likelihood that a defendant will engage in conduct that would merit their surveillance or detention under the current conception of public safety pursued by the criminal legal system.⁹ These algorithms tend to be risk assessment algorithms. In the pretrial

⁷ Greg Tate, *Flyboy 2: The Greg Tate Reader* (2016).

⁸ Lonny J Avi Brooks, *When Is Wakanda: Imagining Afrofutures*, The Long Now Foundation (July 7, 2020) (<https://longnow.org/seminars/02020/jul/07/when-wakanda-imagining-afrofutures/>).

⁹ I am building off of the definition provided in Sandra G. Mayson, *Bias In, Bias Out*, 128 *Yale L.J.* 2218, 2228 (2019) (“‘criminal justice risk assessment’ refers to the actuarial assessment of the likelihood of some future event, usually arrest for crime”).

arena, these algorithms are designed to predict the probability that a defendant will fail to appear or be arrested for pretrial crime if released pending trial.¹⁰ In the sentencing context, these algorithms are designed to predict a convicted defendant's future recidivism risk.¹¹ Though algorithms are utilized in a variety of areas in the criminal legal system, this essay will focus on their use in the pretrial and sentencing arenas.¹²

Criminal legal algorithms are part of a growing movement to use data-driven technologies with the aim, as Professor Erin Collins notes, to be smart on crime.¹³ These algorithms are used by jurisdictions in tandem with other predictive technologies.¹⁴ As Professor Jessica Eaglin explains, algorithms are used in the criminal legal system “to limit and shape the exercise of criminal justice actors’ discretion at the systemic level” in order to promote the release of individuals that the algorithm flags as at a “low risk” of committing misconduct.¹⁵ The theory underlying the movement is that the risk scores produced by these algorithms can encourage judges to identify and divert “low risk” defendants for release or alternatives to incarceration.¹⁶

The turn to algorithms has produced a debate in criminal reform circles. Algorithm proponents contend that their greater utilization can empower jurisdictions to reduce their reliance on incarceration by enabling the release of low risk defendants.¹⁷ Algorithm critics

¹⁰ Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 713, 716 (2018) (“In addition to gauging a particular defendant’s ‘danger to the community,’ each tool endeavors ‘to identify the likelihood of failure to appear in court.’”).

¹¹ Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 Wash. U.L. Rev. 483, 484 (2019) (“[Risk assessment algorithms] are statistical assessments designed to predict a defendant’s likelihood of engaging in recidivism in the future.”).

¹² It should be noted that risk assessment algorithms were initially used in the parole context. For more information, see Alicia Solow-Niederman et al., *The Institutional Life of Algorithmic Risk Assessment*, 34 Berkeley Tech. L.J. 705, 710-11 (2019).

¹³ Erin Collins, *Punishing Risk*, 107 Geo. L.J. 57, 59 (2018).

¹⁴ Predictive technologies are also being used in policing and prosecution. See, e.g., Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. Rev. Online 192 (2019); Andrew Guthrie Ferguson, *The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement* (2017); Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 Wake Forest L. Rev. 705, 705-08 (2016) (explaining that risk predictions shape prosecutors’ positions at bail, charging, and sentencing).

¹⁵ Eaglin, *supra* note 11, at 504.

¹⁶ Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 *Reforming Criminal Justice* 21, 23, 30 (Erik Luna ed., 2017) (https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf [<https://perma.cc/4S3A-EK6Y>]); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. Rev. 1399, 1401-04 (2017). Discussing the use of these tools in sentencing and policing, Chris Slobogin has argued that risk assessment tools are preferable to unstructured judgment since they can provide more transparent, accurate, and consistent conclusions on risk. See Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 Ohio St. J. Crim. L. 583, 586 (2018).

¹⁷ Christopher Slobogin, *Just Algorithms: Using Science to Reduce Incarceration and Inform a Jurisprudence of Risk* 159 (2021) (“Risk and needs assessment instruments are crucial tools for pinpointing the hundreds of thousands of arrestees and offenders who can, with relative safety, be diverted to community programs or be

contend that the move threatens to maintain existing racial inequities while cloaking inequities under the veneer of a scientific and objective process.¹⁸ Moreover, they worry that the greater use of these tools will prevent critical engagement with the ideological commitments to carcerality, white supremacy, and divestment in the welfare state that have resulted in a conceptualization of public safety that has produced racialized mass incarceration.¹⁹ Their concerns have begun to bear fruit. The greater use of algorithms has not meaningfully reduced racial disparities in either the pretrial or posttrial incarcerated population.²⁰

In prior work, I have highlighted the problems with the algorithm project within the criminal legal system that have rendered it incompatible with racial justice. In the following section, I will briefly discuss these problems in order to set up our ultimate goal of sketching out how an Afrofuturist paradigm could be harnessed to reimagine the paradigm currently governing these algorithms.

A. Democratic Exclusion Problem

As an initial matter, the fact that the algorithm project democratically excludes members of racially marginalized communities renders it incompatible with racial justice. Despite the fact these communities are the most affected by these algorithmic predictions due to the concentration of the criminal legal system in their communities, they are unable to stop, shape, or influence these algorithms.²¹ Rather, the process of adopting, constructing, implementing, and overseeing the algorithms in use often occurs in opaque ways that restrict opportunities for contestation by or consultation with affected racially marginalized communities.²² Even where participatory mechanisms are set up by enacting jurisdictions to solicit feedback from the public, these mechanisms tend to be only responsive to those

released with no restrictions. Without the quantitative clarity and authority of these instruments, governments will have neither the wherewithal nor the will to make serious inroads on our incarcerated populations.”)

¹⁸ Dorothy E. Roberts, *Digitizing the Carceral State*, 132 *Harv. L. Rev.* 1695, 1699 (2019) (reviewing Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (2018)); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 *Fed. Sent’g Rep.* 237, 237 (2015) (warning that “risk today has collapsed into prior criminal history, and prior criminal history has become a proxy for race. The combination of these two trends means that using risk-assessment tools is going to significantly exacerbate the unacceptable racial disparities in our criminal justice system.”); Eaglin, *supra* note 11, at 487 (“The introduction of sentencing technologies facilitated interpreting those inequities as natural. As such, sentencing technologies reified structural racism under the auspice of scientific objectivity.”) Though focused on risk assessment algorithms used in sentencing, her criticism equally applies to all uses of risk assessment algorithms.

¹⁹ Eaglin, *supra* note 11.

²⁰ Okidegbe, *supra* note 6.

²¹ *Id.*

²² *Id.*

in favor of the algorithm project, muting the voices of those who oppose it.²³ The combination of these factors has resulted in an antidemocratic iteration of the paradigm governing these algorithms.

In *The Democratizing Potential of Algorithms?*, I argue that resolving the anti-democratic nature of the paradigm governing algorithms is critical for rendering them compatible with racial justice.²⁴ Yet, as I argue in that work, solving the democratic exclusion problem requires more than rendering this paradigm inclusive of participation by Black and other marginalized communities.²⁵ Rather, redressing the democratic exclusion requires reckoning with the fact that this exclusion operates to reinforce the traditional marginalization that these communities experience in the creation and implementation of criminal law, practice, and policy. As Professor Jocelyn Simonson's work has shown, unequal distribution of political, social, and economic power has meant that "resulting criminal laws and enforcement are rarely responsive to the interests of the poor populations of color most likely to come into contact with the system as arrestees, defendants, or victims."²⁶ This state of affairs has subjected poor, Black, and otherwise marginalized communities to a carceral form of governance that, as Professor Dorothy Roberts has argued, renders them unable to meaningfully exercise their full citizenship rights while leaving them vulnerable to state violence, adverse health outcomes, loss of kinship, and premature death.²⁷

Although the algorithm project did not inaugurate the democratic exclusion that Black and other marginalized communities experience, it reinforces it with grave consequences for racial justice efforts by these communities. Because these communities are excluded from the paradigm governing currently employed algorithms, they are unable to meaningfully challenge the use of these algorithms in criminal law hearings. An illustration of this problem occurs in regard to the contestatory practices that marginalized communities have developed and utilized to challenge the large-scale surveillance and incarceration of their communities. In the pretrial context, as Professor Simonson's work notes, one contestatory practice is the utilization of community bail funds to challenge bail assignments that prevent the release of community members.²⁸ As she notes, bailing out a defendant subject to an unaffordable bail amount is a definitive statement by at least one segment of

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 Nw. U. L. Rev. 1609, 1610 (2017).

²⁷ Roberts, *Democratizing Criminal Law*, supra note 4, at 1602-04; Roberts, *Abolition Constitutionalism*, supra note 4, at 16-19; see also Ekow N. Yankah, *Compulsory Voting and Black Citizenship*, 90 Fordham L. Rev. 639, 649 (2021) ("Further, the long-standing issue of felon disenfranchisement, combined with the racially disproportionate makeup of mass incarcerated individuals, equated to racial disempowerment, barring wide swathes of Black voters from the polls. Felon disenfranchisement cements the view that it is natural for Black voters to be excluded systematically from elections.") (footnote omitted).

²⁸ Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585, 591 (2017).

the community that, contrary to the bail judge's assessment, that specific defendant's release is in line with promoting public safety.²⁹ As Marla Sandys, Raj Jayadev, and Professor Janet Moore's work has shown in the sentencing context, participatory defense is another contestatory practice. This practice seeks to support defendants, humanize convicted defendants, and show how harmful their incarceration would be to their family as well as to their community that is facing various levels of instability due to large-scale incarceration.³⁰ Such contestatory acts render visible the disconnect between the criminal legal system's operations and the views and values of those living in communities devastated by the carceral state.

The efficacy of these practices is adversely affected by the growing use of algorithms. When judges utilize algorithms to condition decisions around release, detention, and surveillance, such decisions cannot be influenced or counteracted by community practices. For instance, community bail funds are powerless to facilitate the release of a detained defendant, when their detention is conditioned on a risk prediction.³¹ Participatory defense methods are unable to influence sentencing judges that are required to give effect to the prediction of a sentencing algorithm that has flagged a defendant as at high risk for recidivism. Given this, these algorithms maintain the marginalization that these communities face within criminal law governance, the marginalization that hampers their efforts to reform or to dismantle and rebuild a criminal legal system that is currently implicated in their mass policing, surveillance, and incarceration.

B. Racially Inequitable Predictions Problem

Another problem is that the algorithms created under the current paradigm serve to support the criminal system's role in racial subordination since the predictions produced by these algorithms operate to maintain the racially disproportionate makeup of incarcerated individuals. This problem stems from three interconnected issues. First, nearly all criminal legal algorithms utilize inputs that operate as proxies for race.³² These inputs include, among others, past arrest records, past sentences to incarceration, and pending charges. Because of the large-scale policing and prosecution of members from racially marginalized communities, racially marginalized individuals are more likely to accrue the factors

²⁹ Id. ("Community bail funds provide to the public real-life examples of indigent defendants returning to court without having undermined public safety, despite an expert judicial determination that personal money was needed to prevent flight and mayhem.").

³⁰ Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 *Alb. L. Rev.* 1281, 1283 (2015).

³¹ In this regard, it is important to note that community bail funds are able to bail out a defendant whose detention is due to their inability to pay a financial bond assigned by a bail judge. However, a community bail fund is unable to facilitate the release of a defendant whose pretrial detention is based on the outcome of a risk assessment algorithm.

³² Okidegbe, *supra* note 6.

that are considered inputs within the algorithm and, as a result, are more likely to be assigned risk scores that are not predictively accurate of their risk of misconduct.³³

The second connected issue relates to the carceral inputs of these algorithms. Nearly all algorithms exclusively use carceral inputs, which are inputs connected to the risk that an individual's release poses to the safety of the public.³⁴ Their exclusive use means that the predictions produced fail to contend with the risks to public safety associated with that individual's incarceration. Yet, incarceration presents public safety risks in both the pretrial and sentencing arena, particularly in communities forced to endure large-scale incarceration. For the community that the defendant is part of, their incarceration alongside the incarceration of so many other community members risks further destabilization of the social fabric of the community as the financial, caretaking roles, mentorship, and succor that such individuals provided are lost.³⁵ The omission of inputs that account for the grave social and private costs of incarceration produces predictions that maintain incarceration rates that undermine rather than facilitate the safety of these communities.

The third connected issue concerns how these algorithms are constructed. As many scholars have noted, a major reason for which these algorithms produce racially inequitable outputs comes from the fact that they are built and trained with biased data.³⁶ In other words, bias in, bias out.³⁷ But the problem goes beyond the fact that algorithms are built with racially biased data, although this issue poses a barrier to constructing algorithms that have the potential to produce racially equitable outcomes. The problem, which I have noted in prior work, is that these algorithms are built and trained exclusively with data from criminal legal institutions, such as the police, the pretrial agencies, the court system, and

³³ An example of this problem is the notable 2016 ProPublica-Northpointe debate. In their study on the use of the compass algorithm in bail hearings in Broward, Florida, ProPublica found that Black defendants were erroneously flagged as at a high risk for pre-trial crime more often than white defendants, who were correspondingly mistakenly flagged as at low risk for pretrial crime when compared with their actual commission of pretrial crime within the two years following their bail hearing. The cause of the racial disparity in risk scores and risk classification was caused by the fact that the compass algorithm considered past arrests, convictions, and sentences to incarceration in determining a defendant's risk score. Because the Black defendants had been arrested, convicted, and sentenced to incarceration more often than white defendants in the study, they were ascribed high-risk scores and classifications that were not predictively accurate of their risk of misconduct. The continued use of such inputs means that these algorithms will continue to erroneously flag racially marginalized, particularly Black defendants, as risky which will justify their disproportionate incarceration and surveillance. Julia Angwin et al., *Machine Bias*, ProPublica, May 23, 2016 (<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/HQF7-4YAF>]); William Dieterich et al., *COMPAS Risk Scales: Demonstrating Accuracy Equity and Predictive Parity*, Northpointe (2016) (https://go.volarisgroup.com/rs/430-MBX-989/images/ProPublica_Commentary_Final_070616.pdf [<http://perma.cc/L7VU-T4BT>]).

³⁴ Okidegbe, *supra* note 6.

³⁵ See *id.*; see generally Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 *UCLA L. Rev.* 1418 (2012).

³⁶ Ngozi Okidegbe, *Discredited Data*, 107 *Cornell L. Rev.* (forthcoming 2022).

³⁷ "Bias in, bias out" is a popular phrase that refers to the fact that creating and training a system (in this case, an algorithm) with biased data can lead that system to produce biased results. For more information, see Kristian Lum & William Isaac, *To Predict and Serve?*, 13 *Significance* 14 (2016); Mayson, *supra* note 9.

probation services.³⁸ These “carceral knowledge sources” are known to produce racially and socioeconomically inequitable data that support the criminal legal system’s role in racial subordination. Moreover, the dominance of these carceral knowledge sources in algorithmic construction is not rooted in the unavailability of other knowledge sources. For instance, as I note in prior work, developers routinely discount or fail to engage with the data produced by communities that are the most impacted by the criminal legal system, even though these communities hold invaluable knowledge about the relationship between risk, crime, and safety in their communities.³⁹ Harnessing their knowledge could render algorithms more accurate and potentially untether them from their current role of upholding the racial inequities within the criminal legal system. Attending to this epistemic problem within algorithmic construction shifts the nature of the incompatibility between the current algorithm project and racial justice away from Black people’s actions toward the kinds of data deemed credible and legible for use in the construction of these systems. So long as algorithmic construction remains ideologically and epistemically tethered to carceral knowledge sources, algorithms will continue to produce outcomes in line with maintaining the racial status quo.

III. Applying an Afrofuturist Ethos to the Algorithm Project

What is Afrofuturism? Although there is no single answer, Afrofuturism is premised on the radical rejection of the present world of Black suffering.⁴⁰ The project of Afrofuturism is, as Professor and Afrofuturist Philip Butler notes, “an attempt to explore the perceived possibilities of what may be in futures where Black people are alive, thrive and in power.”⁴¹ Actualizing this world requires engagement with approaches “not rooted in the present reality.”⁴² Though originating in the African-American experience, Afrofuturism is intersectional and in conversation with diverse futuristic imaginaries. As Professors and Afrofuturists tobias c. van Veen and Reynaldo Anderson contend, Afrofuturism shares space with Indigenous futurisms, Indofuturism, Gulf and Arabfuturism, Sinofuturism, Chicanafuturism, Latinxfuturism, and other futurisms that “signal[] both resistance and radical dreaming through a creative refusal of the hegemonic imposition of a utopia for some, [and a] neoliberal dystopia for the other(s).”⁴³ It is also premised on the inclusion of perspectives

³⁸ Okidegbe, *supra* note 36.

³⁹ *Id.*

⁴⁰ Justin Louis Mann, *Pessimistic Futurism: Survival and Reproduction in Octavia Butler’s Dawn*, 19 *Feminist Theory* 61, 65 (2018) (“Because anti-blackness ‘adapts to change and endlessly refashions itself,’ black people are forced ‘to place our hope in a future politics that avoids history, historicity, and the immediacy of black suffering.’ Rather than refuse future possibilities, Afrofuturists seek radical world-making to unsettle the terms of black life in the contemporary moment.”) (citation omitted).

⁴¹ Butler, *supra* note 3, at 3 (emphasis omitted).

⁴² *Id.*

⁴³ tobias c. van Veen & Reynaldo Anderson, *Future Movements: Black Lives, Black Politics, Black Futures—An Introduction*, 39 *TOPIA: Can. J. Cultural Stud.* 5, 9 (2018).

of those experiencing multiple layers of oppression. Moreover, the Afrofuturist vision imagines a world where Black thriving is not at the expense of others. As Professor Capers contends, actualization of an Afrofuturist world is one in which all people thrive since such a world aims to eliminate the systems and identities of today that have been used to enforce the marginalized status of some over others.⁴⁴

What makes Afrofuturism radical is its recognition that dismantling the political, economic, social, and epistemic violence of today's world requires disengaging with imaginaries that have perpetuated it.⁴⁵ Though Afrofuturists acknowledge that the present cannot be ignored, they also recognize that the present is built on imaginaries of racism, sexism, homophobia, transphobia, and other violent ways of knowing that entrench our current unequal social structures. The project of Afrofuturism is the project of developing new imaginaries, new epistemologies, and new ways of being that can support true liberation.⁴⁶

Applying Afrofuturism to the algorithm project requires engagement with the broad themes of Afrofuturism. In *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, Professor Capers explores these central themes. In the following section, the essay uses Professor Capers's typology of Afrofuturism to explore the potentialities stemming from applying this vision to the paradigm currently governing algorithms.

A. People of Color Are in the Future

One important theme of Afrofuturism is the idea of a future world for Black people. As Professor Capers notes, a central tenet of Afrofuturist text "is the insistence that people of color in fact have a future."⁴⁷ The focus on Black people in the future within Afrofuturism comes from the fact that mainstream depictions of science fiction and the future tend to, as Professor Butler notes, "exclude, relegate, or invisibilize Blackness into irrelevance/obscurity or extinction."⁴⁸ One prominent example of a mainstream white depiction of the future is the 2002 film *Minority Report*, which involves a dystopian future society in which law enforcement agents are equipped with technology that enables them to apprehend and incapacitate future committers of murders. Despite being set in Washington, D.C., the film is, as Professor Capers notes, "a white affair."⁴⁹ Not only are most of the

⁴⁴ Capers, supra note 2, at 38 ("Likewise, although Afrofuturists insist that black and brown individuals will survive in the future, that survival is not contingent upon the subordination of whites. Rather, Afrofuturists imagine a future free of hierarchies along the lines of race, gender, class, or sexuality.").

⁴⁵ van Veen & Anderson, supra note 43, at 7.

⁴⁶ Butler, supra note 3, at 5.

⁴⁷ Capers, supra note 2, at 11 (emphasis omitted).

⁴⁸ Butler, supra note 3, at 3. Consider also the lyrics to Afrofuturist FKA twigs' song, *home with you*, which is featured on the album *Magdalene*: "I've never seen a hero like me in a sci-fi/So I wonder if your needs are even meant for me/I wonder if you think that I could ever raise you up/I wonder if you think that I could ever help you fly."

⁴⁹ I. Bennett Capers, Notes on *Minority Report*, 42 Suffolk U. L. Rev. 795, 805 (2009).

characters white, but the three pre-cog siblings at the center of the future crime prediction technology personify the whiteness of this technological advancement.

Such white imaginaries around technology play out in real life. First, as Professor Kate Crawford has contended, developers of new technologies, such as criminal law technologies, are disproportionately white and affluent.⁵⁰ Second, the technocrats that are charged with the decision to adopt or implement an algorithm are disproportionately members of whiter and wealthier communities. Finally, where oversight mechanisms have been implemented in regard to the deployment of algorithmic systems, those racialized as white are overrepresented in the group of technocrats tasked with such oversight. One reason for this problem is the lack of educational opportunities that limit the number of developers and other technocrats that are from racially marginalized and poor communities.⁵¹ Another reason involves the political and economic powerlessness experienced by racially marginalized communities, who on account of the criminal legal system, are unable to assert communal preference around appointed representatives which in turn enables those racialized as white to exercise a disproportionate share of political power.⁵² However, these long-standing issues, when viewed within the prism of the algorithm project, cement the view that it is natural for Black people to be systemically excluded from the paradigm-governing algorithms.

An Afrofuturist approach to algorithms would insist that Black and other marginalized people be part of the algorithm project. It would imagine their role as not only objects affected by the use of algorithms but as the developers, implementers, and overseers of algorithms. It would place them in an equal role in sharing power over critical decisions around whether algorithms are used in the first place and what purpose they should be used for. Under this vision, algorithms built without Black people would be illegitimate and unable to be utilized within any system of accountability whether the criminal legal system as currently conceived of or another system of accountability that has yet to be thought of.

B. Disruption of Hierarchies

Afrofuturism is committed to the dismantlement of socially constructed hierarchies that operate to promote and justify the vulnerability and disenfranchisement of those living with marginalized identities. As Professor Capers notes, Afrofuturism seeks to usher in a world in which race, gender, sexuality, class, and other hierarchies are relics of the past.⁵³ An Afrofuturist approach to algorithms would not only mean shifting power over the paradigm governing algorithms to racially marginalized communities—it would also mean

⁵⁰ Kate Crawford, *Artificial Intelligence's White Guy Problem*, N.Y. Times, June 25, 2016 (<https://www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html>).

⁵¹ Sarah Myers West et al., *Discriminating Systems: Gender, Race, and Power in AI*, AI Now Institute 20-21 (2019) (<https://ainowinstitute.org/discriminatingystems.html>).

⁵² Roberts, *Abolition Constitutionalism*, *supra* note 4, at 79-89.

⁵³ Capers, *supra* note 2, at 38.

ensuring that the shift did not replicate existing power dynamics within those communities. It would welcome and require the perspectives of those whose experiences and ways of knowing have been subordinated due to class and other marginalized statuses. In his essay *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, Professor Olúfemi O. Táíwò laments the fact that attempts to shift power to racially marginalized people tend to afford epistemic privilege to the most educated and politically and economically powerful members of that marginalized group, who have often adopted ways of knowing that are in line with maintaining the status quo.⁵⁴ Because Afrofuturism truly embodies Audre Lorde's warning that the master's tools cannot dismantle the master's house,⁵⁵ if applied to the current algorithm project, the focus would be to shift power over algorithms toward those epistemically disadvantaged in the present reality and away from those epistemically advantaged by it.

C. Alienation and Reclamation

As Professor Capers contends, Afrofuturism is concerned with recovering Black subjectivities, epistemologies, and ways of being that would exist if not for the legacies of slavery and colonization.⁵⁶ Shifting power over the current paradigm governing algorithms to racially marginalized communities offers a chance at addressing the current alienation that these communities experience around the algorithm project and at reclaiming what the algorithm project could be. This begs the question of what the algorithm project could be if it is so reclaimed. The remainder of this essay will be devoted to imagining that future. Under this paradigm, algorithms as we know them may cease to exist since the power to use algorithms as a first order matter would be in the hands of Black and marginalized communities. While members of whiter and wealthier communities would be part of this new paradigm, the use of algorithms could be prohibited if a majority of members from marginalized groups vote not to use such algorithms at all.

Another feature of these algorithms that would change is the purpose for which they would be utilized. Currently, algorithms support the carceral purposes of the criminal legal system.⁵⁷ As Professor Chaz Arnett observes, judges are supposed to utilize these algorithms in order to determine the question of which individual should be released or subject to increased surveillance or incarceration by the state.⁵⁸ But under an Afrofuturist paradigm, carcerality as a way of protecting public safety would be subject to intense scrutiny given how it has operated to control and manage members of racially marginalized

⁵⁴ Olúfemi O. Táíwò, *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, 108 *The Philosopher* (2020) (<https://www.thephilosopher1923.org/essay-taiwo>).

⁵⁵ Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *Sister Outsider* 110, 110-12 (1984).

⁵⁶ Capers, *supra* note 2, at 16.

⁵⁷ Roberts, *supra* note 18, at 1697 ("In the United States today, government digitization targets marginalized groups for tracking and containment in order to exclude them from full democratic participation.").

⁵⁸ Chaz Arnett, *From Decarceration to E-Carceration*, 41 *Cardozo L. Rev.* 641, 651 (2019).

communities to their detriment. Under this framework, algorithms would become a contestatory space in which to give voice to alternative ways of imagining the relationship between the criminal legal system and public safety. Just like the contestatory practices that members from marginalized communities have developed to contest the incarceration of their community members due to unaffordable bail amounts or sentences to incarceration, the algorithm space would become a way to continue this posture of contestation. Attending to this novel use of algorithmic systems produces various possibilities. One could imagine algorithms directed toward identifying judges most at risk to be biased toward racially marginalized defendants, a suggestion that Professor Vincent Southerland has theorized in his work.⁵⁹ Or, for that matter, law enforcement officers most at risk of being biased or prone to unjustified uses of force, a suggestion that Professor Andrew Guthrie Ferguson has considered in his work.⁶⁰ One could also imagine algorithms directed toward identifying community members whose incarceration would adversely harm the community due to the importance of that individual to the community. Such algorithms would not be risk assessments and would produce harm scores rather than risk scores. Finally, we can imagine algorithms that are directed toward identifying those living at the intersection of various marginalized identities that are at risk for harmful outcomes, including premature death, in order to divert financial resources to them. As a final matter, these possibilities require that algorithms be built with data that differ from the data used to produce algorithms of today. In other words, such algorithms would have to engage with different knowledge sources. In a prior work, I discussed how when one engages with the epistemic dimension of algorithmic discrimination, it becomes possible to reckon with how utilizing knowledge sources that are not required for the functioning of the current criminal legal system within algorithmic construction could enable the development of algorithms that produce different and potentially equitable outcomes.⁶¹ Taken further within the prism of Afrofuturism, one could imagine the creation of institutional structures and arrangements around developing community data for use in algorithmic systems, while also protecting it from use by other institutions that might seek to use it for carceral purposes. To ensure that the data does not only come from the most epistemically privileged members in the community, one can imagine a community jury system in which community members task themselves with the obligation to present their own knowledge about public safety at various intervals during the year while being compensated for their labor. One could also imagine that the idea of data itself would be expanded to take into account ways of knowing about public safety that are inclusive of all people, even those at the periphery of marginalized communities, such as people living with psychological disabilities, transient people, and

⁵⁹ Vincent Southerland discusses how shifting the gaze of algorithmic systems to decision-makers could enable racial justice outcomes. Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 *Md. L. Rev.* 487, 547-54 (2021).

⁶⁰ Andrew Guthrie Ferguson, *The Exclusionary Rule in the Age of Blue Data*, 72 *Vand. L. Rev.* 561 (2019) (contending that predictive technologies should be used to monitor and to check police behavior).

⁶¹ Okidegbe, *supra* note 36.

other people who have traditionally been unable to actualize their full membership within a community.⁶²

The very creation of these algorithms would be radical. It may be that such algorithms would not be utilized by the current system given that the current system is steeped in racial hierarchy and pursues a notion of justice that requires the control and monitoring of large swaths of the population. However, even if these algorithms are not used, at least the algorithm project would not be a tool of furthering a way of knowing that is harmful to vulnerable communities of today. Moreover, the results of such algorithms could be themselves a statement about the extent to which the criminal legal system does not represent the views and values of vulnerable and marginalized communities, a statement that those who benefit from the system need constant reminding of. That being said, what if such algorithms were used? Imagine the shifts it would produce in the practices of system actors, who would be tasked with giving effect to the results of such algorithms. It could change the behavior of judges who currently engage in practices that promote the overincarceration of marginalized communities. It could mean that whole categories of crimes are not enforced by law enforcement, since the results of the algorithms under this Afrofuturist model suggest that the committing of such crimes does not adversely impact public safety, but the policing of those crimes does. And finally, alongside other contestatory practices, it may facilitate a path toward the dismantling of the criminal legal system as we know it and its reconstitution into one that seeks to ensure the well-being and safety of all—through the dispensing of resources rather than through the dispensing of harms.

IV. Conclusion

The paradigm governing algorithms presents a troubling challenge to racial justice. The exclusion of racially marginalized people within this paradigm has created algorithmic systems that produce racially biased predictions and operate to facilitate a status quo that jeopardizes the physical, political, economic, and social integrity of communities devastated by the carceral state. Tapping into Afrofuturism opens up new possibilities in how to engage with this challenge. Transforming Black and other marginalized people into decision-makers with the power to adopt, construct, implement, and oversee algorithms allows these algorithms to be a vehicle to challenge rather than entrench the status quo. It offers up a means—though not the only means—to reimagine this project as a racial justice project. As racial justice activists challenge present-day algorithms, this essay encourages a simultaneous consideration of Afrofuturism. Perhaps, the algorithm project could be a vehicle for racial justice, but only if its future iteration bestows upon Black and other marginalized people their rightful place to create and deploy the algorithms of tomorrow.

⁶² Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 *Ohio St. L.J.* 1045 (2020).