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To Democratize Algorithms

Ngozi Okidegbe

ABSTRACT

Jurisdictions increasingly employ algorithms in public sector decisionmaking. Facing public outcry about the use of such technologies, jurisdictions have begun to increase democratic participation in the processes by which algorithms are procured, constructed, implemented, used, and overseen. But what problem is the current approach to democratization meant to solve? Policymakers have tended to view the problem as the absence of public deliberation: agencies and courts often use algorithms without public knowledge or input. To redress this problem, jurisdictions have turned to deliberative approaches designed to foster transparency and public debate.

This Article contends that the current approach to democratization is too narrow a solution if we seek to redress how algorithms mediate the political powerlessness experienced by oppressed groups. The problem with algorithms is not the mere absence of public input; it is one of power. Current algorithms operate to entrench state practices that suppress the democratic participation of oppressed groups, reinforcing their economic and social inequality as well as their structural marginalization in governance. While deliberative approaches have attracted broad political support, these reforms cannot reach these deeper power concerns. Moreover, the current approach to ‘democratization’ comes with a hidden cost: by building trust and legitimacy around algorithms, it can distract attention from how the state’s current use of algorithms exacerbates existing inequalities, power imbalances, and social stratification.

Addressing these harms may be possible, but doing so requires equalizing how power is distributed among different groups within our current democratic institutions and our society more generally. In this sense, the democratic participation problem facing algorithms extends beyond the challenges of regulating a new technology; instead, the problem represents a microcosm of oppressed people’s broader struggle for full participation in this country’s democracy. Building a more inclusive democracy will be a long-term, and ongoing, project. As we struggle to move toward that world, the aim should be to build processes that endow oppressed groups with the power to resist algorithmic technologies that reinforce their political, economic, and social subordination in the current moment.



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U.C.L.A. Law Review

TABLE OF CONTENTS

INTRODUCTION.....	1692
I. CONTEXTUALIZATION	1700
A. The Rise of Algorithms	1700
B. Democratic Participation Problems.....	1705
1. Public at Large, Algorithms, and Democratic Participation.....	1705
2. Agencies, Courts, Algorithms, and Democratic Participation.....	1707
3. Oppressed Groups, Algorithms, and Democratic Participation.....	1710
II. LIMITS OF DELIBERATIVE DEMOCRATIZING REFORMS.....	1715
A. Background to Deliberative Democratizing Reforms.....	1716
B. Common Deliberative Democratizing Reforms.....	1718
1. Public Hearings Model.....	1718
2. Notice and Public Review.....	1720
3. Community Control Over Police Surveillance Ordinances Model.....	1722
C. Critique of Deliberative Democratizing Reforms.....	1724
III. A WAY FORWARD	1729
A. Commission Thought Experiment	1731
1. Nature of Authority	1734
2. Composition	1737
3. Moment of Authority	1740
B. Some Concerns.....	1740
CONCLUSION.....	1743



INTRODUCTION

Jurisdictions are increasingly employing algorithms at all levels of government.¹ Algorithms inform redistricting processes,² government benefits determinations,³ voter eligibility,⁴ public high school admissions,⁵ and investigations into child abuse,⁶ among other consequential decisions. This governmental turn to algorithms has been particularly pronounced in the criminal system, where algorithms affect police deployment,⁷ pretrial release,⁸ sentencing,⁹ probation and parole eligibility,¹⁰ and prison assignments.¹¹ Algorithms have

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1. See Ari Ezra Waldman, *Power, Process, and Automated Decision-Making*, 88 FORDHAM L. REV. 613, 613 (2019) (describing how many human decisions are made by algorithms); see generally 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/pittsburgh_task_force_on_public_algorithms_report.pdf [https://perma.cc/6EY5-QYCC].
 2. See Moon Duchin & Douglas Spencer, *Models, Race, and the Law*, 130 YALE L.J. F., 744, 746 (2021) (noting how “algorithms that generate large samples of ‘ensembles’ of plausible districting plans have been increasingly used [for redistricting efforts]”).
 3. See VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 40–83 (2018) (detailing Indiana’s \$1.3 billion venture “to privatize and automate the state’s welfare eligibility processes”).
 4. Sarah M.L. Bender, Note, *Algorithmic Elections*, 121 MICH. L. REV. 489, 503 (2022).
 5. Colin Lecher & Maddy Varner, *NYC’s School Algorithms Cement Segregation. This Data Shows How*, THE CITY (May 26, 2021, 5:00 AM), <https://www.thecity.nyc/2021/5/26/22453952/nyc-high-school-algorithms-segregation> [https://perma.cc/7VZD-4YNE].
 6. See Anjana Samant, Aaron Horowitz, Sophie Beiers & Kath Xu, *Family Surveillance by Algorithm: The Rapidly Spreading Tools Few Have Heard Of*, ACLU (Sept. 29, 2021), <https://www.aclu.org/news/womens-rights/family-surveillance-by-algorithm-the-rapidly-spreading-tools-few-have-heard-of> [https://perma.cc/NEU2-WCG9].
 7. ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING 28–33 (2017) (discussing the use of predictive policing technology by police departments across the country).
 8. See Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2017–20 (2008) [hereinafter Okidegbe, *Discredited Data*]; Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2227–28 (2019).
 9. 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”); 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.”).
 10. CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK 159 (2021).
 11. Vanessa A. Massaro, Swarup Dhar, Darakhshan Mir & Nathan C. Ryan, *Carceral Algorithms and the History of Control: An Analysis of the Pennsylvania Additive Classification Tool*, BIG DATA SOC’Y, Jan.–June 2022, at 1, 1.

generated significant concern as the individual, familial, communal, and societal harms arising from their use by the state have become clearer.¹² This Article focuses on one particular harm that concerns democratic participation. Algorithms harm democratic participation in three ways. First, there is little transparency about or public participation in the processes that give rise to the construction, adoption, use, and oversight of the algorithms employed in public sector decisionmaking processes.¹³ Ordinary people have little say about the algorithms affecting their rights and liberties that also mediate their relationship with the state. Second, algorithms make governance less democratic. The state tends to rely upon privately developed (and sometimes privately implemented) algorithms that “neither the public nor the government itself really understands.”¹⁴ This opacity enables algorithmic use to set or alternatively

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12. See Andrew D. Selbst, *An Institutional View of Algorithmic Impact Assessments*, 35 HARV. J. L. & TECH. 117, 119–20 (2022) (summarizing the various harms that algorithms can facilitate); Deborah Hellman, *Big Data and Compounding Injustice*, J. MORAL PHIL. (forthcoming 2023) (manuscript at 4, 14–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3840175 [<https://perma.cc/4Z2J-8V8Q>] (discussing how algorithmic decisionmaking can compound the injustice, particularly where the algorithmic technology treats an individual’s experience of injustice (such as an individual’s experience with less wealth, poorer health, child abuse, and job instability) as risk factors that determine that person’s risk score and resultingly their future treatment by the state); RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 23–25 (2019) (exploring the political, epistemic, and ideological reasons for which algorithmic technologies operate to naturalize the inequities that their implementation was intended to correct); Andrew Guthrie Ferguson, *Persistent Surveillance*, 74 ALA. L. REV. 1, 15 (noting how surveillance technologies undermine “human values of intimacy, autonomy, association, creativity, obscurity, and, of course, privacy”).
 13. By processes, this Article is referring to the fact that ordinary people are not involved in the construction, implementation, use, or oversight of algorithms. This means that they lack the ability to determine if an algorithm will be used by the state in a public sector decisionmaking process in the first place. Ordinary people are typically not involved in the development of the algorithm. See Ngozi Okidegbe, *When They Hear Us: Race, Algorithms and the Practice of Criminal Law*, 29 KAN. J.L. & PUB. POL’Y 329, 334 (2020) [hereinafter Okidegbe, *When They Hear Us*] (describing the lack of public participation around the processes that fuel the use of algorithms in the realm of criminal punishment); Jessica M. Eaglin, *When Critical Race Theory Enters the Law & Technology Frame*, 26 MICH. J. RACE & L. REV. 151, 161–63 (2021) (noting how the demos is excluded from algorithmic development and use, despite the socially constructed nature of algorithms). Though beyond the scope of this article, ordinary people are also not involved in the processes that give rise to the use of algorithms in the private sector. For more information, see generally Sylvia Lu, *Algorithmic Opacity, Private Accountability, and Corporate Social Disclosure in the Age of Artificial Intelligence*, 23 VAND. J. ENT. & TECH. L. 99 (2020) (discussing the legal and policy concerns emanating from the use of privately developed machine learning algorithmic technologies in the private sector).
 14. Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J.L. & TECH. 103, 109 (2018).

undermine state policies and priorities outside the public purview,¹⁵ hampering the public's ability to keep the government transparent and accountable.¹⁶ Third, the use of algorithms often operates to entrench state practices that suppress the democratic participation of historically oppressed groups,¹⁷ reinforcing these groups' structural marginalization.¹⁸ These democratic harms are one reason the state's use of automation, datafication, and predictive analytics to govern has provoked concern from people across the political spectrum.¹⁹

In an effort to stem public concern, jurisdictions are increasingly implementing reforms designed to increase direct democratic participation in the processes by which the government procures, implements, uses, and oversees

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15. Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 19, 41–42 (2017) (noting how the design choices of police surveillance technologies become de facto police policy, particularly in cases in which police departments, city councils, and state legislatures have failed to adopt their own policies about the technologies' usage).
 16. Hannah Bloch-Wehba, *Algorithmic Governance From the Bottom Up*, 48 BYU L. REV. 69, 79–80 (2022) [hereinafter Bloch-Wehba, *Bottom Up*] (discussing how public-private partnerships impact government transparency and accountability); Elizabeth A. Rowe & Nyja Prior, *Procuring Algorithmic Transparency*, 74 ALA. L. REV. 303, 318–24 (2022) (problematizing how algorithms make the governments less open to the public).
 17. In using the term “oppressed groups,” the Article relies on Iris Young’s theory of oppression. She notes that oppression is structural, relational and has five faces: exploitation, marginalization, powerlessness, cultural imperialism, and violence. Young explains that oppression “refers to the vast and deep injustices some groups suffer as a consequence of often unconscious assumptions and reactions of well-meaning people in ordinary interactions, media and cultural stereotypes, and structural features of bureaucratic hierarchies and market mechanisms—in short the normal processes of everyday life.” IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 40–41 (1990). Importantly, the oppression experience by a group differs by group. No group is oppressed to the same extent nor in the same way. *Id.* at 40. The Article uses “oppressed groups” to refer to those subordinated on the basis of race, class, gender identity, gender expression, disability, sexuality, and the intersection thereof. *Id.*
 18. See Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1699, 1708, 1713–14 (2019) [hereinafter Roberts, *Digitizing the Carceral State*] (reviewing EUBANKS, *supra* note 3) (discussing how algorithms facilitate carceral practices that deny Black communities the resources that they need to exercise collective democratic citizenship); see also Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739, 764 (2022) [hereinafter Okidegbe, *Democratizing Potential*] (discussing how the use of algorithms operates to hamper the ability of racially marginalized groups to use state-driven processes to contest government law, policies, and practices that promote their oppression).
 19. See e.g. Arne Hintz, *Towards Civic Participation in the Datafied Society: Can Citizen Assemblies Democratize Algorithmic Governance?*, Paper Presented at the 22nd Annual Conference of the Association of Internet Researchers (Oct. 13–16, 2021) <https://spir.aoir.org/ojs/index.php/spir/article/download/11943/10316> [https://perma.cc/T94F-8XYW]; Mhairi Aitken, *Government Algorithms Are Undermining Democracy – Let’s Open Up Their Design to the People*, THE CONVERSATION (Sept. 8, 2020, 10:11 AM), <https://theconversation.com/government-algorithms-are-undermining-democracy-lets-open-up-their-design-to-the-people-145515> [https://perma.cc/F72L-LE4N].

algorithms.²⁰ These reforms are designed to give ordinary people the opportunity to deliberate and have their views about a specific proposal (or decision to use) algorithms heard by the state officials in control of algorithmic use.²¹ But what problem are these deliberative democratizing reforms meant to solve?²² These reforms are structured to tackle the first two democratic harms: they increase transparency as well as give the public the ability to provide input about the state's use of algorithms on an algorithm by algorithm basis.²³

When one turns the focus away from the public at large and considers this problem from the perspective of historically oppressed groups, the inadequacy of

20. See *infra* Part II.

21. See *infra* Part II. As discussed in more detail in Part II, it is important to note that current deliberative reforms generally limit public discussion to a government entity's proposal or decision to procure a specific algorithm or specific type of algorithm. As such, current deliberative reforms are designed to ensure that public discussions revolve around a specific algorithm and not around the larger question of whether the public function at issue should be subjected to an algorithm in the first place. Moreover, these processes typically are not designed to give the public a chance to weigh in on problem formation (the problem that the algorithm should be designed to solve), data sources, or inputs. These deliberative reforms are input-based, meaning that they do not endow the public with the power to stop or determine algorithmic use.

22. It is important to note that this Article uses the term deliberative democratizing reforms to refer to transparency-oriented and deliberative reforms targeting algorithmic adoption, construction, use, and oversight. Its aim is to critique these reforms specifically. Because the Article's critique focuses on permanent deliberative democratizing reforms that have grown in recent years, this Article does not examine deliberative processes attached to task forces. See *infra* Part II. It is also important to note that the meaning of democratizing is not stable and varies across contexts. It has sometimes been invoked to narrowly refer to the idea that ordinary people should have broader access to and use of algorithmic technologies. See, e.g., Andreas Sudmann, *Introduction*, in *THE DEMOCRATIZATION OF ARTIFICIAL INTELLIGENCE: NET POLITICS IN THE ERA OF LEARNING ALGORITHMS* 9, 23–24 (Andreas Sudmann ed., 2019) (noting that “large tech corporations in connection with AI . . . present the concept of a ‘democratic AI’ first and foremost as a great promise of universal, all-inclusive accessibility, participation, and transparency . . . [that] advance[s] the simplification, standardization, and automation of AI, so that even non-experts inside and outside companies and universities can increasingly use the corresponding technologies[.]”). The term “democratizing” has also been invoked to refer to the idea that algorithms (both public sector and as well as private-sector algorithms) should be regulated by democratically accountable bodies. See Mariano-Florentino Cuéllar & Aziz Z. Huq, *The Democratic Regulation of Artificial Intelligence*, KNIGHT FIRST AMEND. INST. (Jan. 31, 2022), <https://knightcolumbia.org/content/the-democratic-regulation-of-artificial-intelligence> [https://perma.cc/6W6R-HZ5A]. At other times, the term “democratizing” assumes a broader definition that embodies an aspiration to bring about the political, social, and economic conditions needed for technological innovation to be in line with human flourishing and democratic values, however defined. See, e.g., Sudmann, *supra*, at 22–23 (discussing how democratizing AI can contain a utopian idealistic dimension).

23. PITTSBURGH TASK FORCE ON PUB. ALGORITHMS, *supra* note 1, (noting that jurisdictions should aim to offer the public opportunities to participate on an algorithm by algorithm basis).

these reforms is brought into sharp view.²⁴ For these groups, the problem goes beyond the fact that they—like members of the public at large—are generally not informed or consulted about algorithmic use. That is the tip of the iceberg. The deeper issue is that algorithms often serve to keep state practices that dilute these groups' political power in place, including through maintaining carceral practices, wealth inequality, and voter suppression.²⁵ Moreover, in the criminal arena, algorithmic use operates to erode the participatory nature of decisionmaking processes that racial justice activists and community groups have utilized to contest mass incarceration and surveillance.²⁶ Current deliberative reforms are incapable of addressing this democratic harm. Moreover, these reforms come at a significant cost. They legitimize algorithms without addressing how the state's use of them reinforces and legitimates historically oppressed groups' political powerlessness. This ongoing political powerlessness operates to impede efforts by these communities to challenge and redress the poverty, pollution, state-sanctioned violence, and other vulnerable conditions that they are disproportionately forced to endure on account of their oppression.²⁷

In past work, I have explored the democratic and epistemic harms to racially marginalized communities arising from the use of risk assessment algorithms in the criminal system.²⁸ I have explained how these harms are not inevitable but are instead the product of the ideological, legal, and political context controlling algorithmic development, implementation, and oversight.²⁹ In this Article, I seek to build on my past work to initiate a different conversation. If we truly seek to fully

24. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2757 (2014) (noting how “normal channels of politics are often impervious to [minorities’] needs”).

25. Roberts, *Digitizing the Carceral State*, *supra* note 18, at 1699, 1708, 1713–14.

26. See Okidegbe, *Democratizing Potential*, *supra* note 18, at 765 (“[P]retrial algorithmic governance means the foreclosure of avenues for disruptive and influential communal participation in pretrial governance.”).

27. See Allegra McLeod, *An Abolitionist Critique of Violence*, U. CHI. L. REV. 525, 541–45 (2022) (noting how the sources of violence in resource-deprived communities of color are connected to state violence and disinvestment).

28. See Okidegbe, *Democratizing Potential*, *supra* note 18, at 757–67; Ngozi Okidegbe, *Of Afrofuturism, of Algorithms*, 9 CRITICAL ANALYSIS L. 35, 39–43 (2022) [hereinafter Okidegbe, *Afrofuturism*].

29. Okidegbe, *Discredited Data*, *supra* note 8, at 141–43 (noting how the ideological commitment to exclusively build and train algorithms with the data produced by criminal legal institutions is one cause of algorithmic discrimination). Much of my past work has examined the political, social economic, and legal changes needed to build algorithms capable of dismantling oppression. Okidegbe, *Afrofuturism*, *supra* note 28; Ngozi Okidegbe, *Revisioning Algorithms as a Black Feminist Project*, in FEMINIST CYBERLAW (Meg Leta Jones & Amanda Levendowski eds., forthcoming 2024).

address the impact that algorithms have upon democratic participation, then we must move beyond the current approach to democratizing algorithms. The current approach seeks to give every member of the public the opportunity to express their views about a specific government entity's desire to use a specific algorithm. Given the deep power differentials between different groups in our society, this approach operates to reify existing inequities as well as the structural barriers that impede oppressed groups' efforts to meaningfully participate in governance. Moreover, how algorithms entrench and legitimate oppressed groups' political powerlessness is not a bug that can be fixed through better discrete deliberative processes. It is a feature arising from the unequal distribution of power among different groups in our institutions of governance and in society, resulting in an inequitable democratic order.³⁰ Rather than continuing with the current approach, democratizing should focus on equalizing power among different constituencies at the institutional, systemic, and societal levels.³¹

My use of the term 'democratizing' has a specific connotation that is connected to demosprudence and a theory of change based in direct participation and ongoing collective action by ordinary people in a democracy.³² It also reflects the idea of democracy laid out by K. Sabeel Rahman, which is that "through political institutions, we the people expand our capabilities and capacities to remake social and economic systems."³³ Both notions encompass the view that, in its ideal form, democratization makes it possible for us to address "background social and economic inequalities" and to realize "substantive democratic values of equality and inclusion."³⁴ In the context of algorithms, this form of democratization has the potential to build processes capable of preventing inequality by algorithm and to ensure that algorithmic use supports the wellbeing

30. This point draws from the insight of Paul Butler around criminal law reform, who explains that the violence and excessiveness within the criminal legal system are "integral features of policing and punishment in the United States." In other words, they are not problems, but rather how the system is supposed to work. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 81 (2019) (explaining how "many of the problems identified by critics are not actually problems, but are instead integral features of policing and punishment in the United States. [The problems] are how the system is supposed to work.").

31. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CAL. L. REV. 679, 682–92 (2020).

32. See Guinier & Torres, *supra* note 24, at 2749–50 (2014) ("[D]emosprudence focuses on the ways that ongoing collective action by ordinary people can permanently . . . chang[e] the people who make the law and the landscape in which that law is made.").

33. K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1676 (2018) (reviewing JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017)).

34. *Id.*

of all, including oppressed groups. Realizing this democratizing potential is the long-term project. In the meantime, this long-term effort must be accompanied with short-term strategies designed to reduce the negative democratic impacts that these algorithms have on oppressed groups. One of the aims of these short-term strategies must be to create processes that endow oppressed groups with the power to determine if and how a public sector decisionmaking process is automated or informed by algorithmic use in the first place. As an example for thinking through how such power equalization strategies might look in practice, this Article sketches out the creation of a new commission subjected to negotiated rulemaking that would be tasked with determining current and future algorithmic use. The idea is that the institutional design of such a commission could facilitate power equalization among different groups and resultingly build up the power of oppressed groups to prevent harmful algorithmic use by enabling them to stop algorithmic use or, alternatively (if they so choose), be among those determining the policies that govern algorithmic design, use, implementation, and oversight. In this sense, the focus is on how such a commission could be designed for powerbuilding, rather than the particular outcomes that it might achieve, or the legal and policy reforms needed to usher it into existence.³⁵ In advancing this model, the aim is not to provide a full account of how the commission will operate. Instead, my purpose is to start a deep conversation about what kinds of processes have the potential to build up the power of oppressed groups to push back against how the state currently uses algorithms.

This Article makes three contributions. First, the Article synthesizes recent work in different legal fields to offer a taxonomy of the three democratic participation problems with the government's use of algorithms. By so doing, it joins together literatures that have largely remained siloed. Second, it identifies and analyzes the commonalities between the different approaches that jurisdictions have taken to democratizing algorithms through deliberative processes. It uses insights from criminal law scholarship to highlight how these deliberative processes operate to keep the status quo in place and hinder efforts by marginalized communities to dismantle their oppression.³⁶ Deliberative processes have been integral to maintaining the continued use of algorithmic technologies that are implicated in the oppression of marginalized communities. Third, the Article joins a growing set of what Frank Pasquale has termed "second

35. As explained in more detail in Part III, increasing the power of oppressed groups through a commission does not guarantee outcomes. See *infra* Part III.

36. See generally Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 N.W. U. L. REV. 1609, 1612, 1623–24 (2017).

wave” algorithmic scholarship, which considers the substantive concerns raised by algorithmic use.³⁷ These scholars critique the political economy of algorithms and the structural impediments to genuinely democratic and equitable algorithmic uses.³⁸ This Article adds to this body of work with its normative claim that meaningful change cannot be achieved through deliberative reforms that do not redress the current maldistribution of power. By shedding light on this limit, the Article offers a window into a conversation that is broader than the difficulties associated with placing democratic guardrails on the state’s use of a new technology. Rather, it is a microcosm of recurrent debates about how to rebuild this country’s democracy into one that is inclusive of all—including its most marginalized members.

The Article proceeds in three parts. Part I examines the rise of algorithms and provides specific examples of their impact on democratic participation. Part II sets out reforms that have come to be representative of the deliberative democratizing approach, and the inability of such reforms to fully address the democratic participation problem. Part III proposes an alternative way forward.

Three caveats are in order. First, the Article does not present a full account of how its proposal will operate in practice or how the power equalization goals of such a commission will work alongside other algorithmic accountability goals—for example, legitimacy, substantive rights, fairness, transparency, reliability, validity, or procedural justice. As a thought experiment, it does not offer a blueprint that is ready-made for implementation. Second, the focus here is on algorithms employed in public sector decisionmaking processes. The democratic participation concerns raised by private sector algorithms and their possible redress are outside the scope of this Article.³⁹ Third, the deliberative reforms critiqued in the Article have primarily arisen in the criminal arena. These same

37. Frank Pasquale, *The Second Wave of Algorithmic Accountability*, L. & POL. ECON. BLOG (Nov. 25, 2019), <https://lpeblog.org/2019/11/25/the-second-wave-of-algorithmic-accountability> [<https://perma.cc/S6TY-E2YU>].

38. *Id.* For examples of second wave algorithmic scholarship, see Ari Waldman, *Algorithmic Legitimacy*, in *THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS* 121, 122 (Woodrow Barfield ed., 2020); 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 (2021); Anita L. Allen, *Dismantling the “Black Opticon”: Privacy, Race, Equity, and Online Data-Protection Reform*, 131 *YALE L.J.* 907 (2022); BENJAMIN, *supra* note 12; Jessica Eaglin, *Racializing Algorithms*, 111 *CALIF. L. REV.* (forthcoming 2023).

39. This topic will be taken up in future work. See Ngozi Okidegbe, *Private Deliberation* (unpublished manuscript) (on file author).

deliberative reform efforts, however, are gaining traction in other legal arenas, warranting the larger critique at the heart of the Article.⁴⁰

I. CONTEXTUALIZATION

This Part contextualizes the rise of algorithms. It then sets out how algorithms harm democratic participation and provides examples, setting the stage for a critique of the deliberative democratizing approach.

A. The Rise of Algorithms

An algorithm is a set of rules for solving a specific problem.⁴¹ In recent years, algorithms built with big data and computational techniques have become prominent in public sector decisionmaking.⁴² These algorithms typically produce predictions or inferences that state officials use to manage resources, places, and people.⁴³ The introduction of algorithms into government decisionmaking followed sociopolitical shifts in governance toward privatization⁴⁴ and

40. For example, deliberative processes have begun to be deployed in the realm of family regulation. *See, e.g.*, PITTSBURGH TASK FORCE ON PUB. ALGORITHMS, *supra* note 1, at 8 (lauding the fact that Allegheny County’s Department of Human Services held informal community meetings before implementing its algorithm. These meetings were designed to allow community members to deliberate and express their views around its decision to use a risk assessment algorithm in the child welfare context).

41. Allen Clark Zoracki, *When Is an Algorithm Invented? The Need for a New Paradigm for Evaluating an Algorithm for Intellectual Property Protection*, 15 ALB. L.J. SCI. & TECH. 579, 581 (2005). Though this Article focuses on algorithms built with big data implemented by computers, less sophisticated algorithms have a long history in public sector decisionmaking. For example, sentencing guidelines are algorithmic. This Article focuses on big data algorithms for the reason that these algorithms are the target for current deliberative democratizing reforms.

42. *See* Margot E. Kaminski, *Understanding Transparency in Algorithmic Accountability*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS 121, 122 (Woodrow Barfield ed., 2020) (noting that these algorithmic technologies derive predictions and inferences from large datasets).

43. *See id.* at 22; Aziz Z. Huq, *Constitutional Rights in the Machine Learning State*, 105 CORNELL L. REV. 1875, 1877 (2020). *See also* Rob Kitchin, *Thinking Critically About and Researching Algorithms*, 20 INFO. COMM’N & SOC’Y 14, 15–16, 18, 25 (2017) (“Algorithms search, collate, sort, categorize, group, match, analyze, profile, model, simulate, visualize and regulate people, processes and places.”).

44. *See* Deirdre K. Mulligan & Kenneth A. Bamberger, *Saving Governance-by-Design*, 106 CALIF. L. REV. 697, 707 (2018) (noting the “delegation of public sector decision making to private sector actors in specific areas of risk, including financial data, homeland security, and conflict of interest”); Okidegbe, *Discredited Data*, *supra* note 8, at 2021–22 (describing how two of the most used pretrial algorithms, PSA and COMPAS, are privately developed and owned).

resource rationing,⁴⁵ on the one hand, and attempts to debias and optimize public sector decisionmaking on the other hand.⁴⁶ As a result, many government decisionmaking and policy implementing processes have been automated. For example, in at least eleven states, child welfare agencies are using algorithms to inform decisions to screen and investigate families for child abuse.⁴⁷ In the benefits context, in at least twenty states, state agencies use algorithms to identify fraudulent government assistance claims.⁴⁸ Moreover, most jurisdictions use pretrial algorithms to guide bail determinations.⁴⁹ Indeed, most people live in a jurisdiction in which at least one government entity uses an algorithmic technology.⁵⁰

Though the focus of the Article is on democratic participation, it is worth noting some other harms that can be wrought by algorithms. The use of algorithms has been controversial from the start. Algorithm proponents claim that algorithms can improve decisionmaking because the technology is less prone than humans to errors, biases, arbitrariness, and variability in theory.⁵¹ Consider,

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45. Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 486, 497 (2019) [hereinafter Eaglin, *Technologically Distorted*].
 46. Okidegbe, *Discredited Data*, *supra* note 8, at 2010; 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); Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147, 1167–69 (2017) (discussing how administrative agencies are using algorithms to optimize administrative tasks and decisionmaking).
 47. Samant et al., *supra* note 6. It is important to note that the algorithm does not make the final recommendation, rather the prediction produced is one part of a multipart intake process. The final recommendation is made by an intake screener. *See id.* at 3. For more information, see EUBANKS, *supra* note 3, at 140.
 48. Michele Gilman, *How Algorithms Intended to Root Out Welfare Fraud Often Punish the Poor*, PBS (Feb. 17, 2020, 7:15 AM), <https://www.pbs.org/newshour/economy/column-how-algorithms-to-root-out-welfare-fraud-often-punish-the-poor> [<https://perma.cc/EQ3A-ESFE>].
 49. *See State Laws on RATs*, MAPPING PRETRIAL JUSTICE, <https://pretrialrisk.com/national-landscape/state-laws-on-rats> [<https://perma.cc/A2CN-9Q66>].
 50. To give an example, it useful to consider risk assessment algorithms. In the work conducted by Movement Alliance Project and MediaJustice, every state had at least one jurisdiction using a pretrial algorithm except for Arkansas, Massachusetts, Mississippi, and Wyoming. *See id.*
 51. *See e.g.*, Michael Selmi, *Algorithms, Discrimination and the Law*, 82 OHIO ST. L.J. 612, 616–17 (2021) (contending that algorithms are better than the status quo because of their potential to reduce discriminatory results created by human decisionmakers); Mayson, *supra* note 8, at 2280 (noting that in the context of pretrial algorithm: “[A]lgorithms have distinct advantages over subjective assessments of risk. They eliminate the variability, indeterminacy, and apparent randomness—indeed, the subjectivity—of human prediction that has long pervaded criminal justice. They bring uniformity, transparency, and accountability to the task.”).

for example, the increased use of risk assessment algorithms in the bail context.⁵² These algorithms produce a prediction about the likelihood that an individual will fail to appear or be arrested for a new crime.⁵³ State and local governments claim pretrial algorithms can redress existing racial and class inequities. This view is supported by studies that demonstrate that racial bias is a major cause for these inequities.⁵⁴ But the use of pretrial algorithms has been mixed in practice.⁵⁵ Research shows that pretrial algorithms produce racially and socioeconomically biased outcomes about a charged person's likelihood of nonappearance and arrest for pretrial crime, hampering racially marginalized charged persons' chances at pretrial release.⁵⁶ Broadly speaking, two factors are responsible for this result.

52. See Okidegbe, *Discredited Data*, *supra* 8, at 2017–20.

53. *Id.* at 2018.

54. David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, 1917, 1929 (2018). In comparing marginally white charged persons with marginally released Black charged persons, the authors found that bail judges erroneously overestimated Black charged persons' pretrial crime risk in comparison to white charged persons. Moreover, they found that this variance could not be explained by white-Black differences in static factors (such as criminal history) or in the type of crimes charged among the study participants. Rather they found that the differences were due to the fact that bail judges were "relying on inaccurate stereotypes that exaggerate the relative danger of releasing Black charged persons versus white charged persons at the margin." *Id.*

55. For example, while the use of pretrial algorithms has corresponded with a decrease in the overall pretrial detainee population, that decrease has not altered the disproportionate percentage of Black charged persons in pretrial incarceration. See GLENN A. GRANT, N.J. JUDICIARY, JAN 1–DEC 31 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 1, 26–27 (2019), <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=dSE> [<https://perma.cc/2W3V-WUDU>] (noting that in New Jersey, the percentage of Black individuals in jail remained the same, 54 percent, even after the state implemented a risk-based system, which had reduced the pretrial population by 20 percent in its first year, then 12 percent in the second year). Moreover, pretrial risk assessments can even expand the net of those who experience pretrial surveillance. See Roberts, *Digitizing the Carceral State*, *supra* 18, at 1723 (noting how risk assessment algorithms can "sweep[] into the carceral net low-risk individuals who previously would not have been on the government's punitive radar at all").

56. In their study on the use of COMPAS in the bail hearings of 7000 charged persons in Broward County, Florida, ProPublica concluded that COMPAS was racially biased, after finding that it erroneously flagged Black charged persons as at high risk for pretrial crime more often than white charged persons, who were correspondingly mistakenly flagged as at low risk for pretrial crime compared to Black charged persons. See Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/E34F-KP2A>]. Northpointe defended itself by emphasizing COMPAS's compliance with the metric of predictive parity. See WILLIAM DIETERICH, CHRISTINA MENDOZA & TIM BRENNAN, NORTHPOINTE INC., COMPAS RISK SCALES: DEMONSTRATING ACCURACY EQUITY AND PREDICTIVE PARITY 21 (2016), https://go.volarisgroup.com/rs/430-MBX-989/images/ProPublica_Commentary_Final_070616.pdf [<http://perma.cc/L7VU-T4BT>].

First, this result arises from how pretrial algorithms are currently constructed and implemented.⁵⁷ Second, this result comes from law: pretrial algorithms are typically built in the shadow of what is permissible under current pretrial law and policies, both of which are responsible for mass pretrial incarceration.⁵⁸ Pretrial algorithms are not unique in this regard.⁵⁹ Instead, as many scholars have pointed out, these factors are among the reasons why algorithms frequently do not improve decisionmaking and can cause injustices.⁶⁰ Algorithms can produce

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57. For more information about the relationship between algorithmic discrimination and algorithmic construction, see Okidegbe, *Discredited Data*, *supra* note 8 (discussing how one cause of algorithmic discrimination is that developers choose to rely exclusively on data produced by the institutions of criminal punishment in algorithmic construction); Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 358 (2020) (discussing how the use of race in algorithmic construction could reduce algorithmic discrimination). For more information related to racial disparities, see generally Alex Albright, *If You Give a Judge a Risk Score: Evidence From Kentucky Bail Decisions*, 85 1, 4 (2019) OLIN CTR. L. ECON. & BUS. FELLOWS' DISCUSSION PAPER SERIES (finding that bail judges in Kentucky are more likely to depart from the predictive recommendation of a risk assessment algorithms and impose a harsher bond condition on Black charged individuals than similarly situated white charged individuals). Megan T. Stevenson & Jennifer L. Doleac, *Algorithmic Risk Assessment in the Hands of Humans*, at 10 (Sept. 29, 2022) (finding that “judges give Black defendants sentences that are 15–20% longer than White defendants with the same risk score”).
 58. Discussing this problem in the context of employment algorithms, Ifeoma Ajunwa argues that the current state of employment law is one reason for which employment algorithms to produce raced and class outcomes. Employment algorithms are built in the shadow of employment law. Because employment law enables race and class to shape employment decisions, employment algorithms do as well. See Ifeoma Ajunwa, *The Paradox of Automation as an Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1677–79 (2020).
 59. For instance, in their study on how the Internal Revenue Service (IRS) algorithm could contribute to racial disparities in audits, Hadi Elzayn Evelyn Smith Thomas Hertz, Arun Ramesh, Robin Fisher, Daniel E. Ho, and Jacob Goldin contend this problem could be caused by the algorithm's design and implementation on the one hand and/or by IRS auditing policies on the other. See Emily Black, Hadi Elzayn, Alexandra Chouldechova, Jacob Goldin & Daniel E. Ho, *Algorithmic Fairness and Vertical Equity: Income Fairness with IRS Tax Audit Models*, FACCT 2022 ACM CONF. PROC. 1479 (June 2022).
 60. See, e.g., EUBANKS, *supra* note 3, at 152–54 (noting the adverse racial and socioeconomic impact that algorithms have in the public welfare context); SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 11–14 (2018) (noting how the biased algorithms used by online search engines cause societal harms on racial and socioeconomic grounds); Pauline Kim, *AI and Inequality*, in THE CAMBRIDGE HANDBOOK ON ARTIFICIAL INTELLIGENCE & THE LAW (Kristin Johnson & Carla Reyes eds., 2022) (forthcoming) (“[T]he growing use of predictive AI also threatens broader social harms. In particular, these technologies risk increasing inequality in two distinct ways—first, by reproducing or exacerbating the marginalization of historically disadvantaged groups, and second, by reinforcing the power hierarchies that contribute to economic inequality.”).

wrong, biased, and arbitrary outcomes⁶¹ that subject individuals to discriminatory, financially destabilizing, unfair, and violent treatment by the state. These individual harms can produce familial harms. For example, the denial of government benefits to one individual by virtue of an algorithmic prediction can disenfranchise and undermine the safety of a family or an entire social kinship network.⁶² To compound the issue, algorithms can be hard to review, analyze, challenge, or correct due to the complexity of and lack of transparency around their construction.⁶³

Another problematic issue concerns the scale of harm that algorithms can produce. Since algorithms are often implemented at the institutional, sectoral, or jurisdictional level, the scale of harm that can be caused by a biased or arbitrary algorithm vastly outstrips that causable by an individual decisionmaker.⁶⁴ Moreover, the algorithms that target specific geographic areas create large-scale communal hardships that “exceed any human parallel.”⁶⁵ For example, algorithmic surveillance technologies, such as gunshot detection systems, and facial recognition systems, place communities of color under a level of constant monitoring to the detriment of their dignity, privacy, equality, and psychological wellbeing.⁶⁶

Together, these problems have given rise to a deep interdisciplinary literature critiquing and offering novel approaches to addressing algorithmic harms.⁶⁷

61. CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* 25 (2016) (showing that algorithms reproduce existing biases using the example of sentencing algorithms). Mayson, *supra* note 8 at 2221 (“[A]lgorithmic prediction has the potential to perpetuate or amplify social inequality, all while maintaining the veneer of high-tech scientific objectivity.”).

62. EUBANKS, *supra* note 3.

63. Waldman, *supra* note 1, at 614 (“[I]n some ways, these automated tools are worse: their opacity—even to experts, let alone ordinary citizens—makes algorithmic decisions difficult to challenge and analyze.”); Selbst, *supra* note 12, at 119–20.

64. See Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 70 (2019).

65. Ferguson, *supra* note 12, at 18.

66. *Id.* at 15 (noting how surveillance technologies undermine “human values of intimacy, autonomy, association, creativity, obscurity, and, of course, privacy” (citations omitted)).

67. See e.g. Ajunwa, *supra* note 58; Selbst, *supra* note 12; Ion Meyn, *Race-Based Remedies in Criminal Law*, 63 WM. & MARY L. REV. 219 (2021); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017); Michele Estrin Gilman, *Beyond Window Dressing: Public Participation for Marginalized Communities in the Datafied Society*, 91 FORDHAM L. REV. 503 (2022); Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487 (2021).

B. Democratic Participation Problems

The above-mentioned harms are grave and, on their own, present reasons to contest how algorithms are currently in use. But these harms are exacerbated by the impact that algorithms have on democratic participation. First, the public is typically unable to participate in the processes around algorithmic construction, procurement, use, and oversight. Second, algorithmic use operates to change (or alternatively undermine) policies in ways that render it harder for the public to keep the government transparent and democratically accountable. Third, algorithms reinforce state practices that suppress the political power of oppressed people in governance. These three problems overlap, intersect, and reinforce each other. However, this Part discusses them as three distinct problems in order to set the stage for a discussion concerning the limits of current deliberative reforms.

1. Public at Large, Algorithms, and Democratic Participation

Members of the public have generally had little insight or input into the processes that determine the construction, procurement, use, and oversight of the algorithms that affect so many aspects of their lives. This dynamic is neither new nor unique to algorithms. Technologies that aid agencies and courts in their public mandate are rarely subjected to public consideration or debate before being acquired, developed, and/or used.⁶⁸ But the absence of public input is particularly concerning here, given how algorithms mediate individual rights and the relationship between individuals and the state.⁶⁹ In recent years, this absence has come under criticism.⁷⁰ Deliberative reforms seek to redress this problem, but it is important to understand how members of the public have been and continue to be excluded from the processes that fuel the state's use of algorithms.

First, there is little transparency or public participation over the state's choice to use an algorithm in the first place. Members of the public are typically given no opportunity to consider or debate whether and how a particular public sector

68. See Andrew G. Ferguson, *Surveillance and the Tyrant Test*, 110 GEO. L. REV. 205, 210–11 (2021) [hereinafter Ferguson, *Surveillance and the Tyrant Test*] (noting this trend in the policing context, where police acquisition and implementation of various technologies has generally occurred without significant regulation or public input or oversight).

69. See Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1290 (2020) [hereinafter Bloch-Wehba, *Access*].

70. Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 929–30 (2021) [hereinafter Bloch-Wehba, *Visible Policing*].

decisionmaking process should be subjected to an algorithm. This decision is generally made at the agency or court level. Similarly, the public often has little insight about or chance to voice their views around the contractual arrangements between government institutions and private vendors that lead to the procurement of off the shelf algorithms or even arrangements that lead to the development of jurisdiction-specific algorithms.⁷¹ As Elizabeth Rowe and Nyja Prior explain, these agreements are often subjected to confidentiality clauses and trade secret protection.⁷² The result is a public unable to influence critical first-order questions about algorithmic use.

Second, to compound the problem, the public is typically also not involved in algorithmic construction. Most algorithmic construction takes place in the private sector, where private companies are not structured to accommodate public input.⁷³ Moreover, they also lack the incentive to create such processes, given that the state's use of their algorithms is not dependent upon their solicitation or incorporation of public input. This absence of public input is concerning. Constructing algorithmic technologies requires developers to make discretionary and normative decisions "that shape how law and public policy are applied."⁷⁴ For example, as Jessica Eaglin explains, constructing sentencing algorithms, which are designed to predict an individual's risk of recidivism, is unavoidably value-laden. Their design requires developers to make judgments about what level of recidivism risk is considered acceptable in society.⁷⁵ And these value judgements can produce downstream algorithmic harms. Thus, such judgments could and should be made in consultation with the public, yet are typically made by unaccountable private sector developers.⁷⁶

71. Okidegbe, *Democratizing Potential*, *supra* note 18, at 742; Katherine J. Strandburg, *Rulemaking and Inscrutable Automated Decision Tools*, 119 COLUM. L. REV. 1851, 1874 ("Because many rulemaking entities do not have data scientists on staff, they outsource development or purchase off-the-shelf products."). Though the federal government develops many of its own algorithmic tools, most agencies purchase off the shelf algorithms or outsource their development due to a lack of expertise. *Id.*

72. See Rowe & Prior, *supra* note 16, at 318–24. See also Bloch-Wehba, *Access*, *supra* note 69, at 1270.

73. Okidegbe, *Democratizing Potential*, *supra* note 18, at 743. See also Selbst, *supra* note 12, at 160 ("Private firms do have technical expertise, but they do not have expertise in determining what communities will be affected adversely by their product nor do they have expertise in soliciting and synthesizing input from those communities.").

74. Okidegbe, *Democratizing Potential*, *supra* note 18, at 768. See also Karen Levy, Kyla E. Chasalow & Sarah Riley, *Algorithms and Decision-Making in the Public Sector*, 17 ANN. REV. L. & SOC. SCI. 309, 313 (2020).

75. Eaglin, *supra* note 9, at 73.

76. Eaglin, *supra* note 13, at 161.

Finally, the public is generally shut out of oversight processes. Consider, for example, algorithmic audits and algorithmic impact assessments. Algorithmic audits are designed to review algorithms for compliance with regard to civil rights, existing regulations, and/or other pressing objectives.⁷⁷ Algorithmic impact assessments aim to anticipate the harms that an algorithmic system may cause in a particular jurisdiction before it is implemented in order to correct them.⁷⁸ While not yet common, both approaches have begun to gain steam.⁷⁹ Though these methods can be tooled for public participation, most are not.⁸⁰ Algorithmic audits and impact assessments are, as Hannah Bloch-Wehba reminds us, “often designed by and for experts and bureaucrats, not for use by the public[.]”⁸¹ This renders such oversight processes as another site for public exclusion. Taken together, these different aspects produce an approach to governing algorithms that is inimical to democratic participation.

2. Agencies, Courts, Algorithms, and Democratic Participation

Algorithmic use has often made government less democratic. First, algorithms can de-facto change policies in ways that would ordinarily be subject to a democratic process.⁸² This can occur regardless of whether the algorithm is publicly or privately developed. To illustrate this operation, it is useful to consider the example of sentencing. Traditionally, changes to sentencing regimes are subjected to a democratic process. The legislature proposes and passes a new sentencing policy or law. Sentencing commissions (where applicable) promulgate rules and establish policies that affect sentencing outcomes, such as length of

77. Ellen P. Goodman & Julia Trehu, *An Audit-Washing and Accountability 4* (Sept. 30, 2022) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4227350 [<https://perma.cc/4286-YE4K>]).

78. See Selbst, *supra* note 12, at 127.

79. Goodman & Trehu, *supra* note 77, at 1. New York City passed a law requiring independent audits of algorithms used in employment. See N.Y.C., N.Y., ADMIN. CODE §§ 22-870-20-874 (2023).

80. Sasha Costanza-Chock, Inioluwa Deborah Raji & Joy Buolamwini, *Who Audits the Auditors? Recommendations From a Field Scan of the Algorithmic Auditing Ecosystem*, FACCT’22: PROC. ACM CONF. FAIRNESS, ACCOUNTABILITY & TRANSPARENCY 1571, 1573 (2022) (noting how community stakeholder involvement in AI audits is important, but is rare). *But see* Selbst, *supra* note 12, at 160 (noting how private firms lack the expertise needed for soliciting and incorporating community input in algorithmic assessment).

81. Bloch-Wehba, *Bottom Up*, *supra* note 16, at 116.

82. Elizabeth E. Joh, *supra* note 15, at 31-37 (noting how the design choices of police surveillance technologies become de-facto policy for police, particularly in cases in which police departments, city councils and state legislatures have failed to adopt their own policies about such technologies’ usage).

sentence.⁸³ Though often shallow and captured processes, these two scenarios have meant that changes to sentencing regimes occur within a democratic forum, providing members of the public with the ability to reflect, debate and influence what proper sentencing policies should be. But as Jessica Eaglin’s work has explored, state use of sentencing algorithms can deviate from this status quo.⁸⁴ To construct sentencing algorithms, developers tend to use arrest records because they “provide a cheap, easy and accessible data set.”⁸⁵ But as Eaglin explains, consideration of a convicted person’s arrests during sentencing is controversial and even prohibited in some states.⁸⁶ When used, the sentencing algorithm de-facto changes that state’s sentencing policy into one where arrests are considered during sentencing.⁸⁷ Given the opacity around state use of algorithms, the public may not be aware that such an algorithm is being used at all or that it has de-facto changed their jurisdiction’s sentencing policy. In addition to undermining state policy, this result also hampers efforts by the public to ensure that state policy reflects the public’s will and interest.⁸⁸

Second, because most algorithmic development occurs in the private sector, algorithms afford unelected and unaccountable private companies with significant power in governance. This renders the government less democratic as private companies can use their developer role to set or undermine state law and policy. To be clear, algorithms did not inaugurate this problem. Nearly fifteen years ago, Jody Freeman and Martha Minow lamented how “we live in an era of

83. Because these commissions are subjected to the Administrative Procedure Act, 5 U.S.C. §§ 551–559, or its state equivalent, these rules and policies undergo notice and comment before implementation. For more about the role of sentencing commissions, see generally Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2004) (arguing that the agencies responsible for sentencing are most effective when working within the political landscape).

84. Eaglin, *supra* note 9, at 103–05.

85. *Id.* at 103.

86. *Id.* at 104.

87. *Id.*

88. Eaglin, *supra* note 13 at 161. One counterargument is that the democratic processes available for creating and changing sentencing law and policy also suffer from opacity, since the internal reasoning and subjective views of legislators and state officials are opaque to the public. See generally Cary Coglianese & Alicia Lai, *Algorithm v. Algorithm*, 71 DUKE L.J. 1281 (2022) (noting that human beings internally reason algorithmically but in ways far more opaque and problematic than digital algorithms). Though this is true, one response is that democratic processes facilitate a greater level of transparency than what is available through the current approach to adopting and using algorithms.

pervasive government outsourcing.”⁸⁹ But algorithms have exacerbated these tendencies.

Algorithms are not mere decision aids. As Deirdre K. Mulligan and Kenneth A. Bamberger have explained, algorithms are “intentionally designed to constrain and direct behavior consistent with regulations decided upon elsewhere.”⁹⁰ The power of algorithmic design to direct behavior offers private developers a mechanism to govern the public.⁹¹ This issue of private governance has also played out in the administrative context. Ryan Calo and Danielle Citron have explored how agencies use privately developed algorithmic technologies that they lack the expertise to comprehend.⁹² The source code of these algorithms often contains errors about current agency rules and policies, yet is relied upon in decisionmaking.⁹³ This agency reliance means that these errors de-facto rewrite agency rules.⁹⁴ As Calo and Citron forcefully argue, agency use of such algorithms operates to transfer decisionmaking power from democratically accountable agencies to private sector developers.⁹⁵ The result continues how private power erodes our democracy and the ability of agencies to reflect the will of the demos.

Third, algorithmic use permits the government to evade established democratic mechanisms for keeping government accountable. Consider, for example, notice and comment. Notice and comment is a prominent feature of the administrative state.⁹⁶ Generally speaking, before an agency can implement a new rule, it must give the public notice and the opportunity to comment. One function that notice and comment serves is to ensure that agencies operate in line with their

89. Jody Freeman & Martha Minow, *Reforming the Outsourcing Debates*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1 (Jody Freeman & Martha Minow eds., 2009).

90. Mulligan & Bamberger, *supra* note 44, at 706.

91. Bloch-Wehba, *Bottom Up*, *supra* note 16, at 78 (synthesizing the literature on how technologies such as algorithms can be a “powerful tool for private governance and, at times a substitute for public regulation”).

92. Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797, 818 (2021) (“[A]gencies do not understand and cannot control the machines to which they have delegated their authority.”).

93. *Id.* at 800.

94. *Id.* at 616; Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1294, 1296 (2008) (conceptualizing how the use of algorithmic technologies by administrative agencies can operate to effectively create new policy and, in those cases, constitutes a “de facto delegation of rulemaking power”).

95. Ryan Calo & Danielle Keats Citron, *supra* note 92, at 799–800 (“Agencies are invested with governing authority (over the objections of many) due to their unique capabilities and knowledge, and now they are turning that authority to machines.”).

96. Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 8–10 (2022).

mandate.⁹⁷ But as Danielle Citron problematizes in *Technological Due Process*, the ‘new rules’ that agency use of algorithms create are not subjected to notice and comment.⁹⁸ This hampers the public’s ability to check agencies and keep them accountable. The combination of these three different issues shows the ways in which algorithmic use undermines the democratic pedigree of governance.

3. Oppressed Groups, Algorithms, and Democratic Participation

The previous two Subparts discussed the democratic participation problems facing the public at large. This Subpart focuses on oppressed groups. By oppressed groups, I mean groups formed by virtue of a shared subordinated identity such as race, class, gender expression, gender identity, sexual orientation, or disability and the intersection thereof, to name a few. These groups are targeted by violent state practices, such as punishment, surveillance, wealth extraction, and containment⁹⁹—though each group experiences these practices in different ways and to different degrees. For our purposes, the concern is how algorithmic use operates to entrench and legitimate state practices that suppress the democratic participation of these groups, reinforcing their oppression and their political powerlessness in governance. To illustrate this problem, it is useful to consider three scenarios. Take electoral practices. These practices often dilute the political power of oppressed groups. Voter suppression and gerrymandering occur along race, class, gender, and disability lines.¹⁰⁰ Racially marginalized people are more

97. Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 602 (2018) (explaining how the comment power “serve[s] a checking function on government”).

98. Citron, *supra* note 94, at 1290.

99. See, e.g., Dorothy Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 33 HARV. L. REV. 1, 85–86 (2019) [hereinafter Roberts, *Abolition Constitutionalism*] (noting how the criminal system “is structured to target and disadvantage black people, its oppressive impact does not require its agents deliberately to harm black people out of prejudice against them”); Emma Coleman Jordan & Angela P. Harris, *The New Black Codes: Racialized Wealth Extraction, Economic Justice, and Excessive Fines Schemes in Timbs v. Indiana*, L. & POL. ECON. BLOG (Mar. 11, 2019), <https://lpeproject.org/blog/the-new-black-codes-racialized-wealth-extraction-economic-justice-and-excessive-fines-schemes-in-timbs-v-indiana> [<https://perma.cc/KV3A-8LJR>].

100. For an example of the oppression produced by our legal systems in the context of race, see *The Impact of Voter Suppression on Communities of Color: Fact Sheet*, BRENNAN CTR. FOR JUST. (Jan. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color> [<https://perma.cc/4F37-RPPN>].

vulnerable to being struck from voter rolls¹⁰¹ and having their ballots voided.¹⁰² The introduction of algorithms into election administration has begun to entrench these practices. Consider, for example, signature verification processes. Electoral officials often rely on signature discrepancies as a proxy for voter fraud.¹⁰³ Manual signature verification processes are riddled with errors and biases. Electoral officials disproportionately flag as fraudulent the genuine signatures of members of oppressed groups, such as trans people, disabled people, and racially marginalized people.¹⁰⁴ In recent years, counties have begun employing signature matching algorithms that automate signature verification. In counties in at least eight states, signature-matching algorithms are in use.¹⁰⁵ Though touted as an improvement, such algorithms may do the opposite. Since they are built on historical and unrepresentative data sets, they risk producing the same disparities as manual signature-matching processes.¹⁰⁶ Moreover, in at least one study based on California data, the use of such algorithms, without human review (as is the practice in three California counties), increased average county rejection rates by 74 percent.¹⁰⁷ The concern, as Sarah Bender notes, is that “these signature-matching AIs are flagging the wrong ballots, with marginalized voters bearing the brunt of such errors.”¹⁰⁸ For this reason, the use of signature verification algorithms appear prime to reinforce the diluted political opportunity and political power of oppressed groups.

Criminal punishment provides another example. The system targets and dilutes the political power of Black, Brown, and other marginalized communities of color through mass surveillance, arrests, prosecutions, criminalization, and

101. Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [<https://perma.cc/64MY-PCCP>].

102. Kyle Wiggers, *Automatic Signature Verification Software Threatens to Disenfranchise U.S. Voters*, VENTUREBEAT (Oct. 25, 2020), <https://venturebeat.com/ai/automatic-signature-verification-software-threatens-to-disenfranchise-u-s-voters> [<https://perma.cc/GE75-4M87>].

103. Maya Lau & Laura J. Nelson, *‘Ripe for Error’: Ballot Signature Verification Is Flawed—and a Big Factor in the Election*, L.A. TIMES (Oct. 29, 2020), <https://www.latimes.com/california/story/2020-10-28/2020-election-voter-signature-verification> [<https://perma.cc/T3S2-BAZ7>].

104. Bender, *supra* note 4, at 509.

105. *Id.* at 508.

106. Rachel Blumenstein, *The Perfect Match: Solving the Due Process Problem of Signature Matching with Federal Agency Regulation*, 24 VAND. J. ENT. & TECH L. 121, 136 (2022).

107. STAN. L. SCH. L. & POL’Y LAB, SIGNATURE VERIFICATION AND MAIL BALLOTS: GUARANTEEING ACCESS WHILE PRESERVING INTEGRITY 35 (May 15, 2020), https://law.stanford.edu/wp-content/uploads/2020/04/SLS_Signature_Verification_Report-5-15-20-FINAL.pdf [<https://perma.cc/P53K-LVBJ>].

108. Bender, *supra* note 4, at 509.

imprisonment.¹⁰⁹ Those directly under carceral control are removed from their communities, rendering them unable to participate in political, civic, or social life.¹¹⁰ Following their release, they remain marked by the experience.¹¹¹ In many jurisdictions, felony convictions permit continued political disenfranchisement.¹¹² Moreover, the system undermines these community members' democratic participation in other ways. Cascading penal fines alongside barriers to finding work, shelter, and receiving state benefits also operate to impede their ability to participate in political life.¹¹³ These harms have communal ramifications. As Dorothy Roberts explains, the removal of so many community members “deprives [these communities] of the resources, liberties, and legitimacy needed for democratic participation.”¹¹⁴ Moreover, the scale of carceral brutality causes collective physical, financial, and psychological injuries that have politically disempowering effects. In sum, the combination of these practices, as Amna Akbar contends, effectively locks Black and other politically oppressed people out of formal channels of participation.¹¹⁵

The introduction of algorithms entrenches how criminal punishment operates as a site for political powerlessness for these communities. In the last decade, algorithms increasingly facilitate how institutions of criminal punishment criminalize, manage, prosecute, contain, and remove resource-deprived members of communities of color.¹¹⁶ As I have explored in past work, since these algorithms are exclusively built with data produced by carceral institutions, their

109. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, CALIF. L. REV. 1781, 1803–05 (2019) (describing how carceral institutions are anti-democratic to poor communities and communities of color).

110. Nicole D. Porter, *Voting in Jails*, THE SENTENCING PROJECT (May 7, 2020), <https://www.sentencingproject.org/policy-brief/voting-in-jails> [<https://perma.cc/7GTF-YC5W>].

111. Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 165–66 (2021) (explaining how criminal records mark individuals and entrench racial inequality).

112. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 593 (2013) (noting and problematizing the exclusion of individuals with a criminal record from criminal jury service’); Simonson, *supra* note 36 at 1610 (“[O]ur current criminal justice system regulates African Americans and other marginalized populations into non democratic subjects—not just through literal disenfranchisement of individuals with criminal records, but also through doctrine policy and rhetoric.”).

113. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 59–61 (2019) (examining how inability to pay economic sanctions associated with the criminal process may result in a person’s inability to vote in forty-eight states that authorize the practice).

114. Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U.L. REV. 1597, 1604 (2017) [hereinafter Roberts, *Democratizing*].

115. Akbar, *Abolitionist Horizon*, *supra* note 109, at 1805.

116. Roberts, *Digitizing the Carceral State*, *supra* note 18, at 1699, 1708, 1713–14.

predictions reproduce existing inequities, serving to epistemically justify the current racialized and class-ed based status quo.¹¹⁷ As Rashida Richardson, Kate Crawford, and Jason Schultz have discussed in the policing context, biases embedded into predictive policing algorithms create pernicious feedback loops that repeatedly “sen[d] [the police] back to the same neighborhoods regardless of the actual crime rate”¹¹⁸ To compound this issue, algorithms also serve to exacerbate the large-scale surveillance that these communities already experience. As Khaled Beydoun reminds us, algorithmic and nonalgorithmic digital surveillance technologies work in tandem to simultaneously keep criminal punishment practices and their politically subordinative effects in place.¹¹⁹ Given this, by replicating and in some cases exacerbating existing carceral practices, algorithms perpetuate how the criminal system hampers these groups’ political participation.¹²⁰

The interplay between algorithmic use, criminal judges, and resistance practices deployed by racially subordinated communities provides another example. On account of voter suppression and gerrymandering, these communities are unable to obtain accountable representative judges.¹²¹ Unlike wealthier and whiter communities, they cannot effectively rely on the electoral process to hold judges or others to account for mass surveillance, policing, and punishment of their community members. As a workaround, oppressed groups have begun to develop a toolkit of resistance practices tailored for state-driven processes. These practices complement broader resistance strategies. Participatory defense is one such practice. It aims to bring community knowledge, values, and views to criminal proceedings. The work conducted by Silicon Valley De-Bug (hereafter, De-Bug) is illustrative. In the bail context, De-Bug has created

117. Okidegbe, *Discredited Data*, *supra* note 8, at 2012.

118. Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. 15, 41 (2019).

119. Khaled Ali Beydoun, *The New State of Surveillance: Societies of Subjugation*, 79 WASH. & LEE L. REV. 769, 778–79, 792, 797–98 (2022); *see also* Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 655 (2019) (discussing “e-carceration” and how GPS monitoring reinforces the social marginalization that Black people experience).

120. Arnett, *supra* note 119, at 655.

121. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1080 (1991) (discussing how hard it is for Black communities to obtain authentic and accountable representation through the electoral process. Though the focus is on representative legislators, this issue applies to judges who are themselves either elected or appointed by a legislature).

“community support identifying” forms for community members to fill out.¹²² The forms prompt respondents to provide information about the charged person’s standing in the community and the communal implications of their potential pretrial incarceration.¹²³ Community members are also encouraged to provide context about any past convictions, arrests, or other carceral data points.¹²⁴ This information is provided to the defense lawyer as well as the bail judge at the arraignment stage. In the post-conviction context, De-Bug works with community members to bring their views into sentencing hearings. As in the arraignment context, the practice aims to show the humanity of the convicted person, their dynamic life, their relationship with their community, and the importance of their release.¹²⁵ As Marla Sandys, Raj Jayadev, and Janet Moore explain, a participatory defense approach in the sentencing context aims to force judges to hear from and confront the family and community members who will be impacted by a person’s potential incarceration.¹²⁶ Participatory defense has yielded results, reducing the use of incarceration.¹²⁷

Participatory defense is one method by which racial justice activists and community groups representing oppressed groups challenge carceral decisionmaking processes despite their marginalization in criminal governance.¹²⁸ As Jocelyn Simonson has explored, such resistance practices amount to a definitive statement by at least one segment of the community that carcerality and its communal effects are not in line with community safety.¹²⁹ But algorithms undermine these resistance practices.¹³⁰ In past work, I have explored this

122. Raj Jayadev, *The Future of Pretrial Justice Is Not Money Bail or System Supervision—It’s Freedom and Community*, SILICON VALLEY DE-BUG (Apr. 4, 2019), <https://www.siliconvalleydebug.org/stories/the-future-of-pretrial-justice-is-not-money-bail-or-system-supervision-it-s-freedom-and-community> [<https://perma.cc/89ZU-AM3R>].

123. *Id.*

124. *Id.*

125. Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and The Struggle for Criminal Justice Reform* 78 ALB. L. REV. 1281, 1286 (2015).

126. *Id.* at 1281–83, 1287.

127. *Id.* at 1287 (“The participatory defense model has led to acquittals, charges dismissed and reduced, and prison terms changed to rehabilitation programs.”).

128. See generally JOCELYN SIMONSON, *RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION* (forthcoming Aug. 2023) (exploring the rise of communal practices in the criminal context that aim to end mass incarceration through undermining the logic that naturalizes and legitimizes prosecution, incarceration and prisons).

129. *Id.*

130. It is important to note that one reason that algorithms have this pernicious effect on resistance tactics is because these communities are not involved in algorithmic adoption, construction, use and oversight. While the public at large is not involved in these processes, the non-

dynamic. One reason concerns automation bias. As Citron has explained, automation bias causes human decisionmakers to defer to the predictions of algorithmic systems, even when they know the outcome is incorrect.¹³¹ This operation hampers the ability for participatory defense (or any resistance practice to effectively influence judges, or those who are susceptible to following the algorithmic prediction.¹³² Another reason algorithms undermine resistance practices concerns the incentives created by algorithmic predictions. In the current political climate, judges face no consequences for a decision to incarcerate an individual but could for a release decision. For instance, a bail judge faces the prospect of losing their judgeship or re-election campaign over releasing a charged person who absconds or is arrested for a new crime, but rarely experiences electoral consequences for their decisions to incarcerate individuals whose incarceration undermines community safety and produces individual and familial harms.¹³³ These dynamics increase the likelihood that an algorithmic prediction consistent with incarceration will be followed, blunting efforts by these communities to influence judges toward less carceral outcomes. The fact that algorithms undermine communal resistance tactics, alongside their entrenchment of politically disempowering state practices, has ushered in an iteration of algorithmic use that is anti-democratic to oppressed people.

II. LIMITS OF DELIBERATIVE DEMOCRATIZING REFORMS

Part I set out the democratic participation problem arising from the state's use of algorithms. In this Part, the Article discusses how jurisdictions have responded by adopting deliberative democratizing reforms that appear responsive. It shows how these reforms are not designed to address how state use of algorithms is anti-democratic to marginalized people. To compound the issue, these reforms also often fail on their own terms. Issues around enforcement render them ineffective in achieving the transparency and accountability needed to redress the first two democratic participation problems in practice. By surfacing these failures, this Part demonstrates the limits of deliberative approaches and the

involvement of racially marginalized communities results in a 'double exclusion' since members of these communities are unrepresented in algorithmic governance: they are underrepresented in government (and thus are less likely to be among those deciding algorithmic adoption, procurement, and use) and in the technology industry (and thus are less likely to be among those constructing the algorithms). I have discussed this 'double exclusion' in my past work. See e.g., Okidegbe, *Afrofuturism*, *supra* note 28, at 45.

131. See Citron, *supra* note 94, at 1271–72.

132. Okidegbe, *Democratizing Potential*, *supra* note 18, at 764–65.

133. Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 431 (2016).

need to move beyond them. To do this, the Part is organized into three sections. Subpart A contextualizes the rise of deliberative reforms. Subpart B examines three common deliberative approaches: (1) public hearing model; (2) notice and public review; and (3) Community Control over Police Surveillance ordinances. Its aim is not to suggest that transparency and deliberation approaches have no value. The problem is the implementation of these practices without considering deeper questions about the role of technology in entrenching the existing power structure and further marginalizing oppressed groups. This Part explores the limits of current approaches and their ensuing consequences.

A. Background to Deliberative Democratizing Reforms

State and local governments have responded to the democratic participation concerns raised by algorithmic use by implementing reforms designed to increase transparency and public deliberation. These reforms tend to be attached to larger regulatory frameworks that are designed to foster algorithmic accountability.¹³⁴

The inspiration for these deliberative reforms stems from participatory processes used in the administrative law realm. These processes aim to provide the public with information and a voice, but not a veto. Public participation aims to ensure that administrative agency rules and policies reflect the public's values and the common good.¹³⁵ As Richard A. Bierschbach and Stephanos Bibas have explained, members of the public get an opportunity to inform the process, obtain reasonable explanations for proposed policies, and hold agencies accountable to their mandate.¹³⁶

In the algorithmic context, reforms typically contain the following features, though differing in degree and substance. First, the public is given notice about the current or impending use of an algorithmic technology. Then, they are provided with an opportunity to express their views. Although the public does not have veto power, the aspiration is that the applicable agency, court, or legislative body will

134. Bloch-Wehba, *Bottom Up*, *supra* note 16, at 86–89 (describing technocratic reforms that have largely come to substantiate algorithmic accountability efforts).

135. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 21 (2012); Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RSCH. & THEORY 103, 103 (2005) (contending that agencies are responsive to public feedback and use it to make changes that affect the final version of the rule).

136. Bierschbach & Bibas, *supra* note 135, at 20 (“Public participation, of course, is not the only way to check agency abuses. But it is a crucial way to ensure that agency decisions are legitimate, accountable, and just.”).

consider their feedback when determining whether to implement (or continue using) the specific algorithmic technology. Moreover, the transparency generated from these processes encourages the applicable agency or legislative body to give effect to the public's preference to avoid public backlash.

The growth in this form of deliberative democratizing reforms has come at a critical juncture. Over the past decade, an increasing number of scholars have called for more external transparency and public participation (either direct participation or through elected representatives) over the state's use of algorithms as part of a broader regulatory project.¹³⁷ These calls have been complemented by the advocacy of civil liberties organizations. Various prominent civil rights organizations have supported legislative responses that include transparency and deliberative-oriented reforms. The ACLU has issued model legislation, along these lines, with its Community Control over Police Surveillance Ordinance model bill being a recent example.¹³⁸ The relationship between these calls on the one hand and the uptake of deliberative democratizing reforms by jurisdictions on the other is complicated. As discussed in more detail below, jurisdictions often enact such reforms without the enforcement provisions needed to ensure agency compliance. For this reason, support for such reforms has waned in recent years,

137. Ferguson, *Surveillance and the Tyrant Test*, *supra* note 68, at 247 (noting how these mechanisms tend to be attached to a technocratic lens that “emphasizes democratic accountability, external transparency, and internal front-end evaluations, policies, and limitations to cabin the use of new policing technologies”). See Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 178–80 (2017) (advocating for algorithmic impact assessments that would allow public input through a notice and comment process); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1886–89 (2015) (advocating for more public participation around policing through public rulemaking including around police use of surveillance technologies); SLOBOGIN, *supra* note 10, at 115 (emphasizing the importance of public participation); David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REGUL. 800, 845–47 (2020) (advocating for reforms to notice and comment procedures to contend with the use of algorithmic technologies by administrative agencies). In past work, I have also called for more public participation. See Okidegbe, *When They Hear Us*, *supra* note 13, at 334. The deliberative democratizing reforms advanced underscore Ari Waldman's observation that algorithmic accountability scholarship tends to “legitimize algorithmic systems but with the same types of tools that we've applied to human decisionmaking. This makes them inadequate.” Waldman, *supra* note 38, at 107.

138. ACLU, COMMUNITY CONTROL OVER POLICE SURVEILLANCE (CCOPS) MODEL BILL (2021) [hereinafter ACLU Model CCOPS Bill], <https://www.aclu.org/legal-document/community-control-over-police-surveillance-ccops-model-bill>; see also ACLU OF N. CAL., SURVEILLANCE TOOLKIT: MODEL LEGISLATION FOR A SURVEILLANCE TECHNOLOGY & COMMUNITY SAFETY ORDINANCE (2020) https://www.aclunc.org/sites/default/files/13.%20model%20legislation%20for%20a%20surveillance%20technology%20%26%20community%20safety%20ordinance_1.pdf [<https://perma.cc/7WTD-KSSA>].

particularly as it has become clear that their implementation has neither stemmed abusive algorithmic use nor resulted in meaningful public deliberation.¹³⁹ Even so, jurisdictions continue to turn to these reforms, examples of which are discussed below.

B. Common Deliberative Democratizing Reforms

1. Public Hearings Model

Public hearings are a common reform aimed at the democratic participation problems raised by algorithms. Pennsylvania provides a useful example of this model.

In 2010, Pennsylvania passed Senate Bill No. 1145, which required the Sentencing Commission (the Pennsylvania Commission) to develop and adopt an algorithm for use in sentencing.¹⁴⁰ In 2018, Pennsylvania passed Senate Bill No. 449, which directed the Pennsylvania Commission to develop a pretrial algorithm for bail determinations involving charges of domestic violence.¹⁴¹ As required by its enabling legislation, the Pennsylvania Commission held public hearings around each algorithm.¹⁴² For the sentencing algorithm, the Pennsylvania Commission developed its own tool and held nineteen hearings to solicit public feedback about the proposed formula.¹⁴³ These hearings were held in different areas of Pennsylvania, including in those with large, marginalized communities.¹⁴⁴ In response to feedback, the Pennsylvania Commission changed two aspects of the algorithmic formula. For instance, it abandoned its initial proposal to include zip code and arrests as risk factors on the basis that these factors operated as race and class proxies.¹⁴⁵ However, the Pennsylvania Commission used many factors

139. Ferguson, *Surveillance and the Tyrant Test*, *supra* note 68, at 259; Sidney Fussell, *It's Not Easy to Control Police Use of Tech – Even with a Law*, WIRED (Sept. 24, 2021), <https://www.wired.com/story/hard-control-police-tech-law> [<https://perma.cc/TSN8-Q6SN>] (explaining how police often flout requirements to engage in deliberative processes).

140. S.B. 1145, 2009–2010 Gen. Assemb., Reg. Sess. (Pa. 2009) (enacted).

141. S.B. 449, 2017–2018 Gen. Assemb., Reg. Sess. (Pa. 2017) (enacted).

142. 42 Pa. Cons. Stat. § 2155(a)(1) (2023).

143. 49 Pa. Bull. 5410 (Sept. 21, 2019), <https://www.pacodeandbulletin.gov/secure/pabulletin/data/vol49/49-38/49-38.pdf> [<https://perma.cc/ZZ25-A2D5>].

144. *Id.*

145. 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/4P44-7HW7>]. It is important to note that the discriminatory effects of including past arrests as a factor in the algorithm was also recognized by a few of the commissioners. For instance, Rachel Lopez advocated for the

correlated with race and class in the algorithmic formula that community members and groups objected to—for example, prior public order convictions are among the type of offenses that influence a person’s risk score under the algorithm, despite the discriminatory effects that stem from the racialized, classed, and ableist enforcement of public order offenses.¹⁴⁶ The sentencing algorithm took effect on July 1, 2020.¹⁴⁷ A similar but smaller-scale approach was taken by the Commission for its pretrial algorithm. The Pennsylvania Commission proposed the adoption of an existing algorithm known as the Ontario Domestic Assault Risk Assessment.¹⁴⁸ The Pennsylvania Commission ultimately approved the use of the pretrial algorithm in March 2020¹⁴⁹ despite dissent from affected communities.¹⁵⁰ However, implementation of the pretrial algorithm was tabled indefinitely due to COVID-19.¹⁵¹

In both cases, community members were afforded opportunities to provide input concerning the implementation of the algorithms. The input given by the public informed the Pennsylvania Commission’s approach, and, in the case of the

removal of arrests as an algorithmic factor during several commission meetings. *See, e.g., Commission Meeting Minutes: Mar. 3, 2016*, PA. COMM’N ON SENT’G, 5, 7 (2016), <https://pcs.la.psu.edu/policy-administration/previous-commission-meetings> [<https://perma.cc/EN2G-GZ8A>] (navigate to March Meeting Minutes) (hereinafter PA. COMM’N ON SENT’G).

146. For instance, the algorithmic formula was built with public order conviction data (including disorderly conduct) and prior public order convictions are among the offense types accounted for by the algorithm. *See* Sentence Risk Assessment Instrument, PA. COMM’N ON SENT’G (July 1, 2020), <https://pcs.la.psu.edu/guidelines-statutes/risk-assessment> [<https://perma.cc/L6E9-BV9F>] [navigate to Sentence Risk Assessment Instrument]. Many scholars have studied how the enforcement of public order offences occurs on racial, class, and disability lines. Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CAL. L. Rev. 1637, 1641–44 (2021) (discussing the intersection of race and disability in the criminalization, surveillance, and incarceration of bodies as it pertains to the enforcement of disorderly conduct offenses). Moreover, enforcement of these offences has democratic implications. *See* Roberts, *Democratizing*, *supra* note 114, at 1600.
147. *Risk Assessment*, PA. COMM’N ON SENT’G (July 1, 2020), <https://pcs.la.psu.edu/guidelines-statutes/risk-assessment> [<https://perma.cc/L6E9-BV9F>].
148. 50 Pa. Bull. 294 (Jan. 18, 2020), <https://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol50/50-3/60.html> [<https://perma.cc/QX8A-PPL2>].
149. PA. COMM’N ON SENT’G, *supra* note 145. Unlike with the sentencing algorithm, it is unclear if and how the Commission’s decisionmaking process regarding the adoption of the pretrial algorithm was affected by the public input given. *See Recommended Model Pretrial Risk Assessment Tool: Commentary on Annex A*, PA. COMM’N ON SENT’G, <https://pcs.la.psu.edu/guidelines-statutes/risk-assessment> [<https://perma.cc/M9ZW-H4DY>] (navigate to Pretrial Domestic Violence Risk Assessment) (noting only that public hearings were held, but not detailing the effect of these hearings).
150. PA. COMM’N ON SENT’G, *supra* note 145 (testimony demonstrates the dissenting opinion from affected communities).
151. *Id.*

sentencing algorithm, changed the algorithm's formula. In this sense, the process addressed the first two democratic participation problems, but not the third. This issue relates to process and power. The public hearing model led to the approval of algorithms that members of communities targeted by mass incarceration resisted. This resistance arose in part because both algorithms stood to aid in pretrial and posttrial incarceration and facilitate how these practices undermine the democratic participation of these groups.¹⁵² Although members of the oppressed communities most affected by algorithmic use had the opportunity to voice these concerns, there existed no process by which they could stop the Pennsylvania Commission from adopting the use of these algorithms or any carceral algorithm.¹⁵³ Because the Pennsylvania Commission had exclusive decisionmaking power over the algorithmic technology, it moved ahead despite staunch community opposition.

To compound the issue, the public hearing model was deployed after the legislature had approved the use of a sentencing algorithm and of a pretrial algorithm, meaning that public input could not inform the first-order question of whether an algorithm should be used in the first place. The combination meant that under the public hearing model members of oppressed groups could not stop the very adoption and use of algorithmic technologies that would stand to maintain their political subordination.

2. Notice and Public Review

Another deliberative reform is the process of notice and public review, which requires agencies to provide public notice of impending algorithmic procurement and the opportunity for public feedback. In the process, the agencies must produce a report identifying how they intend to use the technology and the

152. One reason for this is that the algorithms were designed to be used to facilitate pretrial and post-trial incarceration. Another reason concerns problem formulation. Both the pretrial and sentencing algorithms were constructed under a carceral way of knowing about public safety and therefore were designed to solve the problem of who should be subjected to incarceration. However, one could imagine the algorithms designed under a noncarceral way of knowing about public safety. *See generally* Okidegbe, *Afrofuturism*, *supra* note 28 (contending that algorithms built under an Afrofuturistic vision of public safety could lead to the creation of noncarceral algorithms. For example, one could imagine the creation of algorithms designed to identify and recommend the nonenforcement of criminal laws that if enforced would undermine public safety.)

153. *Id.* *See*, for example, comments provided during each public hearing. *See Sentence Risk Assessment Proposals and Testimony*, PA. COMM'N ON SENT'G, <https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/sentence-risk-assessment-proposals-and-testimony> [<https://perma.cc/5YS7-N7P3>].

anticipated impact on civil rights. Prior to procurement, the agency must provide a public comment review period or hold community meetings. The main difference from the public hearing model is the requirement of a report.¹⁵⁴

Washington's Senate Bill No. 6280 provides a useful illustration.¹⁵⁵ The law concerns the use of facial recognition software by state and local government agencies.¹⁵⁶ It mandates that before an agency can develop, procure, or use facial recognition software, it must produce an accountability report describing the software's anticipated use and civil rights impacts, and provide a period of public review that includes at least three community meetings.¹⁵⁷ The expectation is that the agency will "consider issues raised by the public through . . . the public review and comment period and [c]ommunity consultation meetings during the public review period."¹⁵⁸

The Washington law has an enforcement problem. It lacks mechanisms to ensure agency compliance. But, on its face, the law addresses the first two dimensions of the democratic participation problem. The public is given the chance to express their views about the procurement and implementation of facial recognition software. Public feedback could theoretically influence if and which facial recognition software is procured.¹⁵⁹ The information provided in the required reports, if sufficiently detailed, could redress the opacity that permits private vendors to set or undermine policy through design choices.¹⁶⁰ But even if these theoretical aims were met, the law would not address the third democratic participation problem. There is no process by which oppressed groups can stop the technology's use. While the public at large also lacks this ability, this issue is particularly concerning for oppressed groups, given how facial recognition software entrenches their mass surveillance and, in so doing, maintains their weak democratic standing within this country. As with the public hearing model, oppressed groups are left powerless to collectively stop the use of algorithmic

154. It is important to note that such reports are also required under community control over police surveillance ordinances that will be discussed below. *See infra*, Part II.A.3.

155. S.B. 6280, 66th Leg., Reg. Sess. (Wash. 2020).

156. *Id.* § 1.

157. *Id.* § 3(3)(b).

158. *Id.* § 3(3)(c).

159. Hannah Bloch-Wehba, *Transparency's AI Problem*, KNIGHT FIRST AMEND. INST., (June 17, 2021), <https://knightcolumbia.org/content/transparencys-ai-problem> [<https://perma.cc/HS3F-LN57>].

160. *Id.* ("In theory, at least, the ex ante notice and comment framework set forth in Washington's law will provide ample opportunity for the public to weigh in on potential issues with bias, accuracy, and trade secrecy for facial recognition software.").

technologies that entrench the state practices that suppress their democratic participation. This issue is unresolvable under this model.

3. Community Control Over Police Surveillance Ordinances Model

Another approach that has become increasingly popular in recent years is community control over police surveillance (COOPS) ordinances. Though these ordinances initially focused on surveillance technologies used by police, current ordinances typically apply to the procurement and use of surveillance technologies by any local governing institution. These ordinances have been implemented in at least twenty-one different localities.¹⁶¹ Despite their name, these ordinances do not, in fact, shift power directly to local community members. Rather, they vest decisionmaking and oversight power in the local legislative body (city councils and their equivalents).¹⁶²

Though their provisions vary by locality, they share four basic features.¹⁶³ First, agencies need prior approval from the legislative body in order to procure, use (or continue to use), or acquire funding for surveillance technologies, including algorithmic ones.¹⁶⁴ Second, in order to obtain approval, the relevant agency must produce and make publicly available a report outlining the algorithm's intended use and anticipated civil impact.¹⁶⁵ Third, the local legislative body can only approve the request after hearing and considering public input at a public meeting.¹⁶⁶ Fourth, the local legislative body retains ongoing oversight power over the use of the technology, including through annual reports submitted by the agencies.

Stronger versions of CCOPS ordinances have additional public participatory components.¹⁶⁷ For instance, Seattle's ordinance created a Community

161. *Boston Passes Law Requiring Community Control of Police Surveillance*, ACLU MASS. (Oct. 20, 2021, 10:15AM), <https://www.aclum.org/en/news/boston-passes-law-requiring-community-control-police-surveillance> [<https://perma.cc/EZ9R-NYUA>].

162. 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, 30–31 (2023).

163. See ACLU Model CCOPS Bill, *supra* note 138.

164. *Id.* § 1(A).

165. *Id.* § 2(A).

166. *Id.* § 1(A).

167. It is important to note that the ACLU Model CCOPS Bill includes additional participatory components. It specifically envisions a community advisory committee being set up for the purposes of producing annual impact assessments. See *id.* § 8.

Surveillance Working Group,¹⁶⁸ which is required to file annual equity impact reports on the effects of the approved technologies on historically targeted communities.¹⁶⁹ Membership consists of seven members appointed by the mayor and City Council, at least five of whom must represent equity-focused organizations or groups that work with historically excluded and marginalized communities.¹⁷⁰ In addition, procuring agencies are required under the ordinance to hold at least one community meeting to solicit feedback from the communities most likely to be impacted by the proposed acquisition.¹⁷¹

CCOPS ordinances mitigate the first two democratic participation problems facing algorithms. Like the public hearing and notice and public review models, the ordinances increase public deliberation and transparency around the acquisition and use of algorithms. Moreover, unlike the other models, the laws place the power to initiate algorithmic use in the hands of electorally accountable legislative officials. This latter feature could theoretically create the pressure needed to make the state responsive to the public, since failure to account for public feedback could result in removal from office in the next election cycle. But, even in its most ideal form, CCOPS ordinances are unable to eliminate the democratic participation problem as it pertains to oppressed groups. This is because the public meeting component of these ordinances is structured to account for views expressed by the majority, which often differs from views held by those that stand to be the most politically marginalized by algorithmic use. More fundamentally, these ordinances' inability to ameliorate the third dimension of the democratic participation problem emerges from a feature that would seem to make them more democratic: the power that they place in elected officials. Because of electoral politics, campaign financing, lobbying, gerrymandering, and voter suppression, legislative bodies are deeply unrepresentative and unresponsive to the needs of oppressed groups. The Seattle model provides insight into this dynamic. As Vincent Southerland explains, the Seattle City Council can and does disregard the impact assessments produced by the Community Surveillance Working Group under the ordinance.¹⁷² It faces no electoral consequences for so

168. SEATTLE, WASH., MUN. CODE § 14.18.080 (2023), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TTT14HURI_CH14.18ACUSSUTE [https://perma.cc/6FPW-EB36].

169. *Id.* § 14.18.050.

170. *Id.* § 14.18.080.

171. *Id.* § 14.18.020.C.

172. Vincent Southerland provides an example of this issue in the context of automated license plate readers (ALPRs). The Community Surveillance Working Group raised concerns about the police's use of ALPRs. Given the impact that ALPRs have had on historically poor

doing. In sum, by not providing a mechanism for oppressed groups to stop politically disempowering algorithmic use (either directly or indirectly through a community committee, such as the Community Surveillance Working Group), the CCOPs model is structurally incapable of redressing how current algorithms have anti-democratic effects on marginalized people.

C. Critique of Deliberative Democratizing Reforms

In the previous Subpart, the Article looked at three common deliberative democratizing approaches and their potential to redress the democratic participation problem. Yet it is important to note that these approaches have fallen short of their own aspirations in practice. There are many reasons for this. First, these reforms tend to be implemented without effective enforcement mechanisms. Under the public hearing model, there is typically no requirement that a hearing actually occurs in the first place.¹⁷³ In the latter two models, there is the additional problem of governing agencies facing no repercussions for failing to comply with public deliberation requirements. The Washington law provides a particularly egregious example. It contains no provisions requiring the procuring agency to demonstrate compliance, a fact that the ACLU has criticized.¹⁷⁴ While the CCOPS ordinances contain such requirements, enforcement problems plague CCOPS as well. In the policing context, Andrew Ferguson and Vincent Southerland have separately criticized how law enforcement departments rarely face penalties for bypassing the transparency and public deliberation processes

communities of colors in other jurisdictions, the Community Surveillance Working Group made a series of recommendations to the police department's proposed use and data retention policies. However, most of the recommendations were not taken up, instead as he notes "ALPRs were ultimately approved in early 2021, with little in the way of additional substantive changes to the policies governing their use." Southerland, *supra* note 162, at 60–61, 73–74.

173. The Pennsylvania Sentencing Commission is unique in that it must hold public hearings under its enabling legislation. 42 PA. CODE§ 2155 (2022). In most instances, however, the procuring governing institutions which utilize the public hearing model do not have that requirement. For example, the public hearing model was used by the Supreme Court of Nevada in regard to its adoption of a pretrial algorithm, despite the fact such was not required by its enabling legislation. Public Hearing Recordings, *ADKT 539: In the Matter of Adoption of Risk Assessment Tool for Use in Pretrial Decision Making*, NEV. JUDICIARY (Feb. 5, 2019), https://nvcourts.gov/supreme/arguments/public_hearing_recordings2/adkt_539_in_the_matter_of_adoption_of_risk_assessment_tool_for_use_in_pretrial_decision_making [<https://perma.cc/5RJA-6E5U>]. It is important to note that the Court has discretion about if a public hearing is held. NEVADA RULES ON THE ADMIN. DOCKET § 4.3(d) (Sept. 29, 2021), <https://www.leg.state.nv.us/Division/Legal/LawLibrary/CourtRules/NRAD.html> [<https://perma.cc/VS49-D3NE>].

174. S.B. 6280, 66th Leg., Reg. Sess. (Wash. 2020).

under CCOPS ordinances.¹⁷⁵ This outcome is due to the implementing jurisdictions themselves, which have chosen not to adopt the enforcement provisions prescribed in the model ACLU legislation.¹⁷⁶ To further compound the matter, the strength of these deliberative processes depends upon the degree of detail provided by agencies to the public in advance. Agencies, however, routinely fail to provide sufficient details about the anticipated impact of these technologies. For instance, the Santa Barbara CCOPS ordinance requires that the procuring agency's impact report include potential impacts on civil liberties and privacy.¹⁷⁷ However, many of the reports submitted for consideration by Santa Barbara's Board of Supervisors (the county's legislative body) omit a thorough discussion of any anticipated civil rights impact.¹⁷⁸ More fundamentally, these deliberative democratizing reforms typically hold their processes during normal working hours, greatly reducing the number and diversity of members of the public that have the ability to make the time to attend and provide feedback.¹⁷⁹ The

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175. Ferguson, *Surveillance and the Tyrant Test*, *supra* note 68, at 259 (“There is little penalty for failing to follow the policies. Even with strong legislative authority, real remedies are lacking to make police comply with the rules.”). Southerland, *supra* note 162, at 73–74 (“Police can flout the oversight and approval process without many repercussions.”).
 176. ACLU Model CCOPS Bill, *supra* note 138 (the ACLU Model CCOPS Bill contains a variety of enforcement mechanisms. For example, section 9(a) envisions that any person would have the right to bring an action to enforce an agency's compliance with the Act and would obtain costs and reasonable attorney fees upon prevailing.) Jennifer Lee, *We Need a Face Surveillance Moratorium, Not Weak Regulations: Concerns About SB 6280*, ACLU WASH. (Mar. 31, 2020), <https://www.aclu-wa.org/story/we-need-face-surveillance-moratorium-not-weak-regulations-concerns-about-sb-6280> [<https://perma.cc/YH63-6NN7>].
 177. SANTA CLARA CNTY., CALIF., CODE OF ORDINANCES, § A40–7(d), https://library.municode.com/ca/santa_clara_county/codes/code_of_ordinances?nodeId=TI TAGEAD_DIVA40SUECCOAF_SA40-7DE [<https://perma.cc/K8UM-FSS4>].
 178. For example, a surveillance use policy regarding an automated license plate reader technology for use by the County of Santa Clara Office of the Sheriff omitted a discussion of anticipated civil rights impact. See SANTA CLARA CNTY. OFF. OF THE SHERIFF, SURVEILLANCE USE POLICY FOR AUTOMATED LICENSE PLATE READER (2018) <https://countyexec.sccgov.org/sites/g/files/exjcpb621/files/Office%20of%20the%20Sheriff%20-%20Automated%20License%20Plate%20Reader%20Technology%20%28June%202018%29.pdf> [<https://perma.cc/VJU7-4L84>]. This use policy was approved by the Board of Supervisors in their August 28, 2018 meeting which had provisions for public comment. See SANTA CLARA BD. OF SUPERVISORS, MINUTES: AUGUST 28, 2018 9:30 AM: REGULAR MEETING 10 (2018), <http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=12&ID=7319&Inline=True> [<https://perma.cc/NTD5-385U>]. Vincent Southerland has also raised the boilerplate nature of these reports in regard to body worn cameras. Southerland, *supra* note 162, at 71.
 179. For example, the Nevada Supreme Court held a public hearing in response to a petition against its proposal to mandate use of a risk assessment algorithm in bail. The public hearing was held at 3:00pm and public comment was received by only five persons. See NEV. JUDICIARY, *supra* note 173.

combination of these issues undermine the capability of these reforms to address the first two democratic participation problems.

The practical impediments facing these deliberative reforms are not the core reason these reforms cannot redress the democratic participation problem as it pertains to oppressed groups. Even if the above issues were resolved, these reforms are structurally designed to maintain the existing marginalization of oppressed people in governance. To be clear, my point is not that these reforms have no effect on the democratic participation of oppressed groups. Rather, my point is that their structural design renders them incapable of meaningfully addressing this problem.

Deliberative democratizing reforms place undue faith in transparency and deliberation. This faith sidesteps the structural dynamics that render transparency and deliberation on their own less valuable to oppressed groups than they may appear at first glance.¹⁸⁰

Transparency measures can substantially increase public knowledge about if, how, and which algorithms are being used by the state. This information can aid litigation strategies, policy proposals, information campaigns, and resistance efforts by communities targeted by the carceral state. Abolitionist-oriented groups, Mijente and the Black Youth Project 100, for instance, have used transparency processes to bring attention to police datafication and surveillance practices that support the mass policing, deportation, and incarceration of these communities.¹⁸¹ But transparency without power provides these communities without a mechanism to change how these algorithms are impacting their material and political realities.¹⁸²

Moreover, the value of transparency by the state as it pertains to algorithmic impact is limited for oppressed groups. For example, as I have explained in prior work, Black and other racially marginalized communities have their own knowledge production and validation processes.¹⁸³ They produce and share

180. This critique builds upon and is informed by criticism levied against procedural justice (a framework that emphasizes the importance of transparency and giving voice to those affected by a decision). See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2083 (2017); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 342–43; Akbar, *supra* note 109, at 1806–09.

181. Bloch-Wehba, *Visible Policing*, *supra* note 70, at 953–54.

182. Kaminski, *supra* note 42, at 121 (“It can’t be sprinkled on like seasoning; it has to be built into a regulatory system from the onset. And determining the who, what, when, and how of transparency requires first addressing the question of why.”). Okidegbe, *Democratizing Potential*, *supra* note 18, at 746.

183. Okidegbe, *Discredited Data*, *supra* note 8, at 2048–52.

knowledge about their own oppression. Discussing this knowledge production in the context of police violence, Bennett Capers has explained, “[s]uch acts of violence are part of our ‘pools of knowledge[,]’ talked about in barbershops and hair salons, on church pews and on street corners, and yes, in prisons.”¹⁸⁴ Knowledge about the racial, classed, gendered, and other subordinative effects arising from the state’s use of algorithmic technologies is being produced and validated within community pools of knowledge that are accessible by the members of and groups that serve these communities. Organizations, such as Data for Black Lives¹⁸⁵ and Community Justice Exchange,¹⁸⁶ are developing processes to collect and act upon the knowledge produced by oppressed groups to redress the harms of surveillance, and automation practices. Their work reveals that these communities are deeply aware of the fact that technology is implicated in their oppression, even if they are unaware of the exact innerworkings of the algorithmic systems being deployed by the state. On this basis, while transparency by the state on the anticipated impact of a particular algorithm has value, these measures tend to confirm what oppressed groups already know, making it more informative to constituencies that have had the privilege of traditionally being outside of the algorithmic gaze.

But more fundamentally, transparency has costs.¹⁸⁷ It can counterintuitively produce an epistemic harm to these communities. The information produced by the state affords an allure of neutrality that allows it to operate as the baseline for public deliberation in these forums.¹⁸⁸ As Patricia Hill Collins explains,

184. Capers, *supra* note 46, at 1246–47 (citation omitted).

185. *About Us*, DATA FOR BLACK LIVES, <https://d4bl.org/about.html> [<https://perma.cc/7HQ3-TLKG>].

186. See CMTY. JUST. EXCH., AN ORGANIZER’S GUIDE TO CONFRONTING PRETRIAL RISK ASSESSMENT TOOLS IN DECARCERATION CAMPAIGNS 33 (2019), <https://www.communityjusticeexchange.org/en/resources-all/an-organizers-guide-to-confronting-pretrial-risk-assessment-tools-in-decarceration-campaigns> [<https://perma.cc/YLC4-MR4H>] (discussing the ways in which community members can influence and shape the creation and deployment of algorithms used in the criminal legal system). Moreover, beyond community groups, it is important to note that the Algorithmic Justice League commenced the crash project which seeks to, among other things, “learn from those who have been directly harmed by algorithmic systems” in order to create new paths of accountability. See *The Crash Project*, ALGORITHMIC JUSTICE LEAGUE, <https://www.ajl.org/crash-project#crash> [<https://perma.cc/7GYN-QKEK>].

187. Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 845 (2019) (noting that the goals achievable by transparency are limited and come with a significant tradeoff).

188. One reason is anchoring bias, which concerns how people are psychologically influenced by the first piece of information given about a topic which anchors their viewpoints on that topic going forward. See Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 751 n. 60 (1999) (“Anchoring refers

knowledge is a political and ideological enterprise.¹⁸⁹ The state operates as a gatekeeper for what counts as knowledge and, in so doing, excludes the knowledge (particularly counter knowledge) produced outside of its apparatus. This role enables the state to use its knowledge production practices to shed doubt and render illegible the knowledge produced by oppressed groups.¹⁹⁰ The consequence of this gatekeeping function is that state-driven transparency can hinder efforts by oppressed groups to inform the majority about what these technologies do to their communities.

Deliberative processes have similar problems. They operate on the presumption that all members of a polity have equal opportunity and equal voice to influence the state's use of algorithms.¹⁹¹ But that presupposition is unattainable in practice. Politically oppressed groups are structurally unable to participate at a comparable level to more powerful constituencies. This concern has been discussed by scholars in the administrative context in regard to notice and comment. Notice and comment processes, which are designed to solicit public input, amplify existing inequities and "discourage and marginalize contributions of rulemaking [outsiders]" who lack the resources to effectively participate.¹⁹² This is not to say that oppressed groups and community groups that represent them do not participate in these processes. The point is that participation is difficult for politically oppressed communities. It is not compensated and occurs during working hours, rendering it difficult for those with extensive caretaking obligations or who are financially unstable to participate.¹⁹³ These factors are more likely to be experienced by members of oppressed groups.

to the tendency for arbitrary set points to influence judgment. Anchoring occurs largely because anchors usually convey information and therefore influence the final estimate. People quickly and automatically update their beliefs as a result of being provided with an anchor.”).

189. See Patricia Hill Collins, *Black Feminist Epistemology*, in BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 327, 329 (1st ed., 1990) (noting that knowledge production practices are not neutral and instead are shaped by the intersecting privilege or oppression that the producer experiences in society).
190. Okidegbe, *Discredited Data*, *supra* note 8, at 2048–52. It is also worth noting that the ways of knowing by the state that support algorithmic use may be epistemically incompatible with communal ways of knowing oriented toward building a more equitable world. Erin Collins, *Abolishing the Evidence-Based-Paradigm*, 48 BYU L. REV. 403, 438–42 (2022).
191. This very aim is suspect given that the state's use of algorithms affects politically oppressed constituencies differently than more powerful constituencies. Jenny Carroll uses this argument as it applies to criminal law to argue in favor of disproportionate representation in juries. Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825 (2014).
192. Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 101, 103 (2012).
193. See Okidegbe, *Democratizing Potential*, *supra* note 18, at 772.

Such structural components are only exacerbated by the power that deliberative processes afford the majority. These processes are designed to give effect to majority preference. Given existing power imbalances, this aim works to the disadvantage of the oppressed groups who seek to resist harmful algorithmic use. But more fundamentally, the idealization of deliberation sidesteps its role in the political subordination that oppressed groups experience. Reflecting on this in the context of police reform, Amna Akbar reminds us that “powerful segments of the populace have consented to a democratic system that empowers police to punish poor, Black, and Brown people.”¹⁹⁴ This same dynamic exists in the algorithmic context. Powerful segments of the populace are on board with algorithmic technologies that harm poor and subordinated communities. Though deliberative processes may lead to bans of the algorithmic technologies that infringe the rights of the majority (such as facial recognition software bans), they will rarely translate into bans on algorithmic technologies that target oppressed groups specifically. It is therefore hard to imagine how deliberative democratizing reforms can materially change the anti-democratic function of algorithms for oppressed people.

III. A WAY FORWARD

Exploring the limits of deliberative democratizing reforms provides fertile ground to rethink the entire project of democratizing algorithms. These reforms divorce state use of algorithms from broader questions of oppression and power. For this reason, they are incapable of addressing how algorithmic use is implicated in state-driven inequality, violence, wealth extraction, and the reduced life chances that oppressed groups experience. Moreover, these reforms come at a cost. They legitimize the state’s use of algorithms and in so doing allow algorithmic technologies that harm oppressed groups to benefit from the veneer of public consideration and debate.

To be fair, transparency and deliberative oriented reforms around algorithms were not designed to remedy existing power imbalances and the structural dynamics that these imbalances produce. They take our systems, institutions, laws, and society as-is. We cannot expect conventional reforms, such as deliberative democratizing reforms, to meaningfully change these problems without addressing the power imbalances and distribution of inequities produced by our broader democratic ecosystem. Put another way, if we are serious about resolving the democratic participation problems posed by algorithms then we must look beyond algorithms. Though algorithmic construction,

194. Akbar, *supra* note 109, at 1804.

implementation, and oversight are key levers for building and deploying more equitable algorithms, those levers cannot, on their own, perform the legal, political, social, and moral work needed to address how algorithms currently affect oppressed groups. Even radically equitable algorithms can only change outcomes, where institutional actors are responsive and motivated to give full effect to their predictions. Viewed in this context, democratizing algorithms must be connected to a far-reaching democratizing project aimed at our current political, social, and economic order. As K. Sabeel Rahman has explained, such democratization will involve “providing the policy tools and spaces through which we the people can collectively address problems of structural economic inequalities or social exclusions, and providing a process through which we can design and implement these policies through democratic participation and checks and balances.”¹⁹⁵

Deep questions exist about whether and how such democratization can be effectuated. Abolition scholars and Law and Political Economy scholars are charting transformative paths forward. Dorothy Roberts pushes us to engage with constitutionalism on abolitionist terms.¹⁹⁶ Paul Butler advances a third reconstruction.¹⁹⁷ Amna Akbar, Sameer Ashar, and Jocelyn Simonson advocate for movement law.¹⁹⁸ Amna Akbar also presents an abolitionist horizon.¹⁹⁹ Allegra McLeod envisions an abolition democracy.²⁰⁰ Their work, alongside abolitionist activist organizations, asks us to divest from current institutions and to invest in the creation of new institutions that are more democratic, just, accountable, and oriented toward providing aid and care for all communities.²⁰¹ Building a world on these terms will be a long-term, ongoing, unending project,

195. Rahman, *supra* note 33, at 1710.

196. Roberts, *Abolition Constitutionalism*, *supra* note 99.

197. Butler, *supra* note 30, at 75, 81.

198. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

199. Akbar, *Abolitionist Horizon*, *supra* note 109.

200. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019).

201. MARIAME KABA, WE DO THIS “TIL WE FREE US 158, 212 (2021); McLeod, *supra* note 27, at 527 (“Movement participants have worked to end the violence of imprisonment and policing and, importantly, to create more equitable, just, and peaceful forms of collective existence through mutual aid.”); Akbar, *supra* note 109, at 1815 (noting that abolitionist movements “have aspired toward the building of alternate modes of collective provision and care, and the transformation of the economic, political, and social systems that form the state and our relationships to each other and the commons”); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1576 (2019) (“Abolition seeks (as it performs) a radical reconfiguration of justice, subjectivity, and social formation that does not depend on the existence of either the carceral state (a statecraft that institutionalizes various forms of targeted human capture) or carceral power as such (a totality of state-sanctioned and extra state relations of gendered racial-colonial dominance).”).

the results of which, as McLeod explains, are not concrete and remain subject to internal debates.²⁰²

While we struggle to build a more democratic and equitable order, short-term strategies that reduce the harms inflicted by the state's use of algorithms are needed. To be effective, these strategies must be “non-reformist” reforms. Their goal should be to build the power of oppressed people to transform the current order. Powerbuilding as a strategy is connected to a broader abolitionist project focused on “undermin[ing] the prevailing order in service of building a new one.”²⁰³ As Marina Bell explains it, “non-reformist reforms have as their end goal the eventual dismantling of that system and are understood to be individual elements or steps in a larger strategy of structural transformation.”²⁰⁴ Many who critique the systemic harms that algorithms pose for oppressed groups seek only the disuse of algorithms.²⁰⁵ Others advance non-reformist regulatory reforms. For instance, Southerland has theorized retooling CCOPS ordinances to give community working groups, such as the Seattle Community Surveillance Working Group, veto power over a city council's surveillance acquisition or use decisions.²⁰⁶ His proposal is attentive to the role of power and how it can be shifted within an existing legal mechanism. The following section theorizes how institutional design could be employed as another non-reformist short-term strategy. To explore this potential, the focus here is on the creation of a new institutional structure in the form of a commission subjected to negotiated rulemaking.

A. Commission Thought Experiment

As an initial matter, institutional design typically refers to “attempts to shape institutional structures based on understanding how certain characteristics of institutions produce certain desirable effects.”²⁰⁷ A useful entry point to considering the relationship between institutional design, power, and legal structures is the work of Jocelyn Simonson and K. Sabeel Rahman. Building on the

202. McLeod, *supra* note 200, at 1617.

203. Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103 (2021).

204. Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 45 (2021).

205. Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 986 (2021).

206. Southerland, *supra* note 162, at 78.

207. R. Beunen & J.J. Patterson, *Analysing Institutional Change in Environmental Governance: Exploring the Concept of 'Institutional Work'*, 62 J. ENV'T PLAN. & MGMT. 12, 18 (2019).

institutional arrangements advocated by justice-oriented movements on the left, they start from the position that counteracting structural inequality might require new institutional structures that “aim to equalize power among the many different groups within a polity.”²⁰⁸ Important to realizing this potential are institutional design choices that shift power to these groups.

They put forth three important institutional design dimensions that are critical to evaluating if an institutional arrangement carries this potential: (1) nature of authority, (2) composition of authority, and (3) moment of authority.²⁰⁹ The *nature of authority* component concerns the decisionmaking power that members of oppressed groups (or their representatives) can exercise through the institution. They make a distinction between non-power-shifting institutional arrangements that provide oppressed groups with input power from those that would provide oppressed groups with “non-reviewable control over policies and decisions.”²¹⁰ The *composition of authority* component examines the representativeness of the institutional structure. It focuses on whether members of the oppressed group are given decisionmaking power. The *moment of authority* component refers to the stage at which representatives from oppressed communities can make decisions.²¹¹ Here, the authors make a distinction between arrangements that enable representatives to make downstream decisions versus power-shifting ones that allow representatives to make upstream decisions “early in a policy-making discussion when many possibilities are live.”²¹²

Rahman and Simonson’s three design dimensions provide a framework for thinking through how to design an institutional structure for governing algorithms that can build power. As a starting point, one could imagine the creation of a new permanent commission that would consist of technocrats, community members, and technologists in charge of determining whether an algorithm should be used in a public sector decisionmaking process and if so, its construction, implementation, and oversight within a polity.²¹³ For such a commission to work, it would need to have, among other features, a powerbuilding institutional structure. My focus is on institutional structure. On

208. Rahman & Simonson, *supra* note 31, at 692.

209. *Id.* at 727.

210. *Id.* at 720.

211. *Id.* at 725.

212. *Id.*

213. It is important to note that I have advocated for the use of a commission structure in my past work. In *Democratizing Potential of Algorithms*. I advocated for the use of a commission structure for the narrow purpose of regulating the use of pretrial algorithms. Okidegbe, *Democratizing Potential*, *supra* note 18. My aim here is to consider such a structure to redress the democratic participation problems stemming from the use of algorithms in public sector decisionmaking.

the institutional structure front, two issues arise. One concerns how to construct a commission in such a way that enables it to effectively blend communal, technocratic, and technological expertise within the institutional structure itself. The other concerns how to construct a commission in such a way as to enable it to have a dialectic with members of the public at large to ensure its representativeness of the polity on the one hand and to give oppressed groups power to resist on the other hand. There are no easy solutions to these issues, but there are a few on-the-ground advisory commissions that, if retooled with Rahman and Simonson's framework, provide some ways forward.

The Oakland Privacy Advisory Commission (Oakland Commission) provides a starting point. The Oakland Commission provides technical assistance to the city of Oakland in connection to the city's acquisition and use of surveillance and other technologies that produce, collect, and/or retain citizen data.²¹⁴ It is one of the few civilian-based oversight commissions with influence.²¹⁵ It is designed to do more than facilitate transparency and discrete instances of deliberation; it is meant to enable an ongoing dialectic with the public, city government, and agencies about the privacy concerns arising from the use of such technologies with the broader goal of reducing harm. It is based in Oakland, a city with a long history of sustained and local organizing against mass surveillance, incarceration, state divestment, policing, and other oppressive systems.²¹⁶ The Oakland Commission itself was created in the wake of the city's 2013 plan to expand its surveillance apparatus by creating a Domain Awareness Center (DAC) "comprised of over 700 cameras throughout schools and public housing, facial recognition software, automated license plate readers (ALPRs), and 300 terabytes of storage for all the data they anticipated collecting on Oakland residents."²¹⁷ When the plan was uncovered, residents organized and staged protests. Many of these protestors subsequently formed the Oakland Privacy Working Group, a citizen's privacy rights advocacy coalition.²¹⁸ In response, the city council reduced the DAC's reach to only the Port of Oakland and created an ad hoc citizens' committee to draft

214. Privacy Advisory Commission, *About*, CITY OF OAKLAND, <https://www.oaklandca.gov/boards-commissions/privacy-advisory-board#page-about> [<https://perma.cc/VU2D-CF7P>].

215. Ferguson, *supra* note 68, at 281.

216. Southerland, *supra* note 162, at 36–37.

217. Brian Hofer, *How the Fight to Stop Oakland's Domain Awareness Center Laid the Groundwork for the Oakland Privacy Commission*, ACLU NORCAL (Sept. 21, 2016), <https://www.aclunc.org/blog/how-fight-stop-oaklands-domain-awareness-center-laid-groundwork-oakland-privacy-commission> [<https://perma.cc/XB4W-RAUA>].

218. *Id.*

privacy policies around its limited use.²¹⁹ In 2016, the city council created the Oakland Commission.²²⁰ It consists of nine appointed commissioners with power to hold public hearings, make findings, draft model legislation, analyze existing or proposed legislation, and produce reports and make recommendations to the city.²²¹ Its design attempts to harness different sets of expertise. In selecting commissioners, the mayor is encouraged to draw from certain categories: (1) attorneys, legal scholars, or activists with experience in privacy or civil rights; (2) law enforcement; (3) auditors; (4) hardware/software, or encryption experts; or (5) members “of an organization which focuses on government transparency and openness.”²²²

The Oakland Commission, as currently designed, cannot build the power of oppressed groups to resist harmful algorithmic use. It is weak on the institutional design dimensions raised by Rahman and Simonson. Its authority is advisory and is limited to surveillance technologies. The composition of the commission lacks guaranteed representation of members of oppressed groups. However, it serves as a useful jumping-off point for thinking through how to design an institutional structure with power-building potential. It is an on-the-ground civilian-driven experiment with aspects that can be retooled and reimaged.

1. Nature of Authority

The nature of authority granted to the Oakland Commission would need to be changed. Three avenues for reform in particular stand out. First, we could imagine broadening the mandate of the Commission to all algorithmic technologies used in public sector decisionmaking. To determine which algorithms would fall under the Commission’s mandate, the definition provided by the Pittsburgh Task Force on Public Algorithms is helpful: algorithms that implicate the opportunities, access, liberties, rights and/or safety of ordinary people in the public realm.²²³ Second, we could imagine giving the Commission decisionmaking authority about which public sector decisionmaking processes can be subjected to algorithms and how so. This would mean that algorithmic use could be prevented through the Commission. Alternatively, it could mean that algorithmic use continues, but the Commission becomes a site for the creation of mandatory requirements that an algorithm and a particular institution must meet

219. *Id.*

220. *Id.*

221. Oakland, Cal. Ordinance 13349 C.M.S. § 2 (2015).

222. Oakland Priv. Advisory Comm’n By-Laws, Art. 2, § 2(h).

223. PITTSBURGH TASK FORCE ON PUB. ALGORITHMS, *supra* note 1, at 8.

before that algorithm can be introduced into a decisionmaking process. The latter prospect could provide a mechanism for democratizing governance, since algorithms, and by extension decisions by algorithms, would be the product of the will of the demos. Additionally, this prospect could produce several ancillary effects on private algorithmic construction and implementation. One is radical transparency. For the Commission to determine such compliance, private developers would need to disclose source code, data sources, inputs, and any testing conducted. Commissioners could incentivize meaningful disclosure by banning the use of algorithms that developers fail to disclose as well as by penalizing misleading disclosure. On the institutional front, decisionmaking authority could be accompanied with enforcement capabilities. One could imagine granting the Commission the power to sue agencies for noncompliance.

Third, we could imagine shifting some decisionmaking authority toward members of oppressed groups who are not commissioners nor part of the Commission's apparatus. The idea would be to give different groups the space and opportunity to organize and "to plug in and to advocate for their views in a structured manner."²²⁴ To accomplish this, negotiated rulemaking should be on the table. As background, negotiated rulemaking is a creature of administrative law. It gained support in the 1980s, resulting in the passage of the Negotiated Rulemaking Act of 1990.²²⁵ Under negotiated rulemaking, before a proposed rule can be promulgated, an agency is required to create a negotiating committee consisting of relevant stakeholders as well as a few commissioners. The committee must meet, negotiate, and reach unanimous agreement on the proposed rule.²²⁶ The agreed upon rule is then subjected to notice and comment after which it can be adopted by the agency. Presently, certain agencies are required by the Act to utilize negotiated rulemaking for specific regulations.²²⁷ In recent years, support for negotiated rulemaking has diminished for several reasons, two of which are

224. Rahman, *supra* note 33, at 1706.

225. 5 U.S.C. §§ 561–570; Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1261–63 (1997).

226. MAEVE P. CAREY, CONG. RSCH. SERV., R46756, NEGOTIATED RULEMAKING: IN BRIEF 5 (2021) (noting that the goal of the committee is to reach consensus on a proposed rule. "Consensus under the [Negotiated Rulemaking Act] means 'unanimous concurrence among the interests represented on a negotiated rulemaking committee,' unless the committee agrees on another definition.").

227. *Id.* at 1 ("Section 492 of the Higher Education Act requires the Secretary of Education to conduct negotiated rulemaking in certain circumstances and obtain advice and recommendations from specified individuals and groups.").

important for our purposes.²²⁸ One reason is that negotiating committees are vulnerable to the problem of stacking. Agencies have significant discretion to determine the composition of negotiating committees. As Daniel Walters explains, this discretion has been regularly abused by agencies to stack the committees by choosing “outside constituencies that will support partisan initiatives.”²²⁹ Another problem has been that of adoption. Agencies retain discretion to refuse to adopt the agreed upon rule.

With adjustment, negotiated rulemaking presents opportunities. Though most issues would be determined by the Commissioners themselves, issues that mediate how algorithms function to suppress the democratic participation of oppressed groups would need to undergo negotiated rulemaking. While this definition produces some ambiguity, certain questions would always qualify: (1) Should a public sector decisionmaking process be automated? (2) If so, which kind of algorithm should be utilized? (3) Who should build the algorithm? (4) What problem should the algorithm be designed to solve? (5) What data sources should or should not be utilized for algorithmic construction? In these cases, the Commission would be required to create a negotiating rulemaking committee consisting of relevant stakeholders and a few commissioners. Any stakeholder could dissent and prevent a specific proposal from coming to fruition. In so doing, the process would enable resistance by all individuals in the committee, including members of oppressed groups. Beyond resistance, such a process might be able to engender meaningful negotiation. Stakeholders who advocate for the use of an algorithm in a public sector decisionmaking process, for instance, will have to convince other members of the committee. This might spark debate, consideration, compromise and potentially result in transformative changes to the initial proposal that reduces the proposed algorithmic system’s harms. The agreement reached by the committee would then be publicized and subjected to a public hearing. To address the adoption problem, the Commission could be required to give effect to the decision adopted by the negotiating committee in most circumstances.²³⁰ To address the stacking problem, careful attention would have to be paid to how relevant stakeholders are selected for negotiating committees. The Commission’s enabling statute could specify criteria for selecting stakeholders. For example, the Oakland Commission could be required

228. For more information about the shortcomings of negotiated rulemaking, see generally Coglianese, *supra* note 225.

229. Walters, *supra* note 96, at 40.

230. It is possible to imagine that the enabling statute could include a process by which such implementation could be resisted on grounds of due process, illegality, and other limited conditions.

to have representation from: each Oakland neighborhood; those harmed by state systems (such as formerly incarcerated people) or by virtue of an algorithmic prediction (such as those targeted by Oakland police's past use of predictive policing); technologists; and technocrats. This is not an exhaustive list. Rather, the point is that legislative instruments can be used for the purpose of ensuring genuine representation of groups that tend to face exclusion from such processes alongside traditional experts.

2. Composition

Unlocking its power-building potential also requires changing the composition of the Oakland Commission. As it currently stands, there is no guarantee that members of oppressed groups will be represented on the Commission. The selection process under its enabling ordinance gives the mayor discretion to appoint commissioners.²³¹ One concern is that this approach increases the prospect that only those friendly to the current political apparatus will be appointed. However, the enabling ordinance attempts to combat this problem by requiring that each appointment be confirmed by at least five current commissioners.²³² The more pressing problem from a powerbuilding perspective relates to the qualifications required for an individual to serve. The ordinance stipulates that commissioners need experience in privacy rights and may include representatives from certain categories including (1) attorneys, legal scholars, or activists with experience in privacy or civil rights; (2) law enforcement; (3) auditors, (4) hardware/software, or encryption experts; or members "of an organization which focuses on government transparency and openness."²³³ Though this stipulation is not a requirement, it has generally been adhered to.²³⁴

The criteria for serving operate as a barrier for representation, particularly from the most marginalized members of an oppressed group. Most of the categories mentioned require professional credentials and work experience that those most harmed by this system lack by virtue of their experiences with incarceration, poverty, unemployment, and other vulnerable conditions.²³⁵ As Rahman and Simonson explain, the notion of qualifications is often wielded to

231. Oakland, Cal., Ordinance 13349 at § 3(a) (Jan. 19, 2016).

232. *Id.*

233. *Id.* § 3(g).

234. Julian Clark & Barry Friedman, *Community Advisory Boards: What Works and What Doesn't (Lessons from a National Study)*, 47 AM. J. CRIM. L. 159, 173 (2020).

235. Rahman & Simonson, *supra* note 31.

prevent participation by oppressed groups.²³⁶ The requirement for education credentials or particular employment experience, they note, operates to “exclude[] the very individuals who have been hampered from achieving experience by the structures at hand [such as] the distribution of policing and the interaction between criminal records, employment, and race.”²³⁷ Their point is not that technocratic expertise has no place, but rather design choices that do not critically interrogate who is understood to possess the requisite experience and expertise to serve on a body are less capable of building oppressed groups’ power.²³⁸ Moreover, lack of representation by oppressed groups affects which issues and solutions are pursued. For these two reasons, the Commission needs representation from outsiders. To accomplish this, the Commission could expand the number of commissioners and require that each neighborhood have representation on the Commission. A mechanism for selecting community commissioners would need to be chosen. An appointment process is vulnerable to selection bias and brings the risk that the community commissioners chosen will reflect the whims of the state. An election approach risks the structural dynamics that prevent, as Lani Guinier explains, Black communities from obtaining authentic electoral representation.²³⁹ A jury pool approach, which Andrew Ferguson theorizes, warrants consideration. In *Tyrant Test*, he has advocated for the creation of local neighborhood institutions that have absolute approval power before the adoption of any policing technology.²⁴⁰ He theorizes that civilian members would be chosen by jury lottery.²⁴¹ The advantage of this approach is that it would increase the pool of potential commissioners beyond what is possible with an election or appointment process. It also has the advantage of a pay structure so that commissioners would be compensated for their role. For this approach to work, the process would need to be voluntary given the substantial commitment involved. It would also need to be retooled to take into account the racial disparities that exist in our current jury selection system to ensure representation from oppressed communities.²⁴²

236. *Id.* at 723.

237. *Id.* at 723–24.

238. *Id.* at 724.

239. Guinier, *supra* note 121, at 1102.

240. Ferguson, *Surveillance and the Tyrant Test*, *supra* note 68, at 279–80.

241. *Id.* at 281.

242. See generally Ronald Randall, James A. Woods & Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71 (2008) (discussing the lack of racial representativeness on juries).

One counterargument could be that such a change to the Oakland Commission's composition is counterproductive. As Julian Clark and Barry Friedman note, the fact that the Oakland Commission's commissioners are drawn from a limited set of categories is one reason why the Oakland Commission has had successes. They note that, "these credentials give [the Oakland Commission] unusual credibility with both city officials and local policing agencies."²⁴³ Moreover, there is a concern about the place of expertise in a Commission. Algorithmic technologies vary in sophistication. Understanding their innerworkings and their impact within a particular institutional structure is not common knowledge. This point could support the sole use or at least prioritization of technocratic and technological expertise in determining law, policy, and practice in this realm. This proposal is in tension with such a perspective. Though technocrats and technologists would be represented on the Commission, their expertise would not be prioritized over that of community commissioners. There are at least three reasons for this position. First, addressing algorithmic harm cannot be ascertained only through technocratic and technological expertise. Community commissioners possess ways of knowing about oppression and the systems that facilitate it that are critical for reducing algorithmic harm. For instance, community commissioners may have knowledge about which systems should not be automated in the first place given their oppressive nature. Moreover, if algorithmic use is approved, they may also have a different perspective about which problems the algorithm should be designed to solve.²⁴⁴ That problem may differ from the one that the specific public sector agency currently seeks to solve, or the one that technocrats think should be solved. The point is that every commissioner would bring a particular skillset, each of which is insufficient on its own. Second, the hope is that this approach would facilitate a blending of communal, technocratic, and technological expertise.²⁴⁵ The tensions and benefits of such a blending would be a feature—not a bug. Third, the fact that some algorithmic technologies may be too complex for adequate review under such a structure does not undermine the project. Rather it should mean that such an algorithm should not be utilized in public sector decisionmaking. This view might be a bridge too far for some, but this argument

243. Clark & Friedman, *supra* note 234, at 173.

244. Okidegbe, *Afrofuturism*, *supra* note 28, at 44–45.

245. This blending is difficult to accomplish but there are a few examples of successful participatory algorithmic construction and implementation that could serve as a way forward. See generally Fernando Delgado, Solon Barocas & Karen Levy, *An Uncommon Task: Participatory Design in Legal AI*, 6 PROC. ACM ON HUM.-COMPUT. INTERACTION 1, 1 (2022).

has been made before in a different context. Christopher Slobogin has argued that if future risk assessment algorithms are developed in ways that make them too complex and inscrutable to “litigants, policymakers and decision-makers,” then they should be banned in criminal punishment proceedings.²⁴⁶ Expanding on that logic, algorithms that are incapable of review by a commission consisting of civilians and technocrats should be prohibited.

3. Moment of Authority

The Oakland Commission scores highly on the institutional dimension pertaining to the moment of authority. Though it only has influence power, this power touches on both ex-ante and ex-post privacy concerns about surveillance technologies.²⁴⁷ In expanding the decisionmaking power of the Commission, it is important to ensure this power touches upstream decisions. Broadening the scope of authority, as noted above, should facilitate this component.

B. Some Concerns

The proposal raises several concerns, a few of which are considered below. First, a commission approach, like any democratization approach, does not guarantee just or equitable outcomes. This problem has been invoked to eschew other efforts aimed at democratizing algorithms. Johannes Himmelreich, for example, argues that “democratizing AI may cause or sustain moral problems.”²⁴⁸ Moreover, the idea of power-shifting requires a faith in the fairness and wisdom of ordinary people, a view that is controversial among democratic theorists. Joseph A. Schumpeter, for example, viewed the “typical citizen” as irrational, biased, and unpredictable.²⁴⁹ This perspective of human nature would suggest that power-

246. SLOBOGIN, *supra* note 10, at 111.

247. Oakland, Cal. Ordinance 13349 at § 2 (Jan. 19, 2016).

248. Johannes Himmelreich, *Against “Democratizing AI”*, 38 AI & SOC’Y 1333, 1348 (2023). Trevor Gardner makes a similar argument in the context of criminal law reforms. *See generally* Trevor Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. (2021) (advocating that substantive equitable reforms should be prioritized over process-based reforms given that process-based reforms do not guarantee (and can produce results contrary to) just and equitable outcomes).

249. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, & DEMOCRACY 233–37, 241 (1943) (Because Schumpeter doubted the “typical” citizen’s capacity for rationality and wisdom, he argued that avenues for sustained citizen participation within governance were not a required criterion for democracy. Instead, his position was that a society was a democracy so long as they had “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”).

shifting could lead to outcomes that are at odds with the pursuit of justice. If so, it may be, as Daniel Walters admits, that “fighting injustice and inequity is not necessarily a democratic project.”²⁵⁰ One response is that this pessimistic view of human nature is speculative. Power-shifting has never been accomplished in practice and oppressed communities have never been given the opportunity to effect algorithms on the same basis as more powerful and politically connected constituencies. Given this, there is no evidence that decisions made under a power-shifting context would be necessarily more harmful or unjust than decisions made under the current status quo. Moreover, while power-shifting presents risks, these risks are worth taking given the inability of commonly advocated algorithm reforms, such as deliberative democratizing reforms, to, on their own, redress algorithmic harm.²⁵¹ One reason for their failure is that these responses, are incremental and therefore fail to grapple with the power dynamics that impose constraints on our understanding of the relationship between algorithms, oppression, and law and policy. But a key insight emanating from political theories on equality is that oppression is difficult to remedy through incremental reforms. As Iris Young reminds us:

We cannot eliminate . . . structural oppression by getting rid of the rulers or making some new laws, because oppressions are systematically reproduced in major economic, political, and cultural institutions.²⁵²

Approaches designed only to incrementally improve existing algorithmic systems or the processes for their implementation are insufficient if we seek to dismantle how algorithms facilitate oppression and social stratification. A radical departure, such as shifting power over who gets to decide algorithmic use and its conditions, is needed if algorithms are ever to become consistent with the democratic participation of all.

Second, another concern is that this model would prevent most public sector decisionmaking processes from being automated. It is hard to predict, however, the decisions such a commission would make in practice. Algorithmic use presents different concerns in different public sectors and oppressed groups have never been given a process to effectively express their preferences. It could be that oppressed groups use this process to resist all algorithms, or potentially resist only certain algorithmic use. Oppressed groups are not a monolith and different

250. Walters, *supra* note 96, at 76.

251. Bloch-Wehba, *Bottom Up*, *supra* note 16, at 119–23 (discussing the limits of technocratic reforms).

252. YOUNG, *supra* note 17, at 41.

oppressed peoples have divergent views about the use of algorithmic technologies. An example of where oppressed communities might diverge could be around the use of risk assessment algorithms that identify which law enforcement officers are a risk for committing physical brutality.²⁵³ One group could find that the use of these risk assessment algorithms is consistent with the democratic participation of historically oppressed groups, because it might lead to the removal of a set of violent police officers. Another community, however, might take issue with the fact that such a risk assessment algorithm would naturalize the myth that police violence is a system bug as opposed to a system feature.²⁵⁴ Such a community may resist the algorithm on this basis, viewing its use as running counter to their efforts to end policing and its politically oppressive effects. The result reached would depend on the makeup of the commission and the different groups in the polity. Ferguson's approach embraces this divergency, suggesting that the different conclusions to these questions are best left to each locality.²⁵⁵ My point is to suggest that the results are unclear and that it is difficult to speculate in the abstract.

Finally, there may be criticism stemming from the focus on a city model like the Oakland Commission. As Rahman and Simonson note, local level politics should not be romanticized. It can be as oppressive and co-opting as state and federal politics.²⁵⁶ It must also be taken into account that the commission approach can only be considered if and where it has buy-in from oppressed groups. Some members of oppressed groups might prefer an outright ban on all algorithmic technologies rather than pouring resources into a commission.

Some concerns, such as a lack of buy-in from oppressed groups, will halt a move in this direction. Other concerns are significant but raise important moral, political, social, and empirical questions—the answers of which are beyond the scope of this Article. What metrics should be used to evaluate the success of such a commission? How could such a commission be properly insulated from state and industry capture? What aspects of Rahman and Simonson's institutional framework could be sacrificed and still produce transformative change? What local or state conditions would make such a commission more or less likely to

253. See, e.g., Melissa Fassbender, *UChicago Alums, Researchers Develop Evidence-Based Police Force Management and Early Intervention System*, POLSKY (June 8, 2021), <https://polsky.uchicago.edu/2021/06/08/benchmarking-police-performance-for-early-intervention-evidence-based-solutions> [<https://perma.cc/FK6Q-UK9W>].

254. Butler, *supra* note 30, at 81.

255. Ferguson, *Surveillance and the Tyrant Test*, *supra* note 68, at 281–82.

256. See generally, Aziz Huq, Robert Vargas & Caitlin Loftus, *Governing Through Gun Crime: How Chicago Funded Police After the 2020 BLM Protests*, 135 HARV. L. REV. F. 473, 490 (noting “the powerful resources and strategies [to co-opt movement actors] that the police state can mobilize when threatened”).

power-build? What processes should be built within such a commission to resolve disagreements between different oppressed groups (or disagreements within an oppressed group)? Beyond the commission itself, what political and social arrangements are needed for the commission to realize its potential? What institutional structures are needed to ensure that the commission is a temporary short-term strategy and not a new site for compliance? What reforms are necessary to ensure that the commission supports and complements other justice-oriented efforts? How could such a commission achieve political buy-in? Though such a model is a bridge too far for many jurisdictions, it might not be for progressive localities. Given this, what strategies should be pursued? These are the kinds of questions that must be on the table before power-shifting under a commission model can become a realizable prospect. In future work, I intend to take up these issues, but my aim here is not to advocate for a commission per se, rather it is to add to the burgeoning conversation around the kind of processes that can shift power to the groups that stand to be the most harmed by algorithmic use.

CONCLUSION

Algorithmic use by the state hampers the democratic participation of oppressed people in this country. Deliberative democratizing leaves this systemic oppression in place and hidden from view. If we truly seek to redress this function, we must focus on making our institutions more democratic in the long term. This world is possible, but only if we are ready to truly democratize our institutions. There are many reasons to doubt that we are. True democratization requires the dismantlement of old institutional structures and investment in new ones that the current order has no incentive to create. Even implementing short-term solutions, such as powerbuilding will be hard given that it may not be politically palatable to the status quo. But, it is the fight for such radical change that is the precondition to bringing about a future where algorithmic technologies align with a truly inclusive democracy.