On "Color-blind" and the Algorithm

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"Earthling?"

I jump and bump my head on the underside of a bookshelf. It is a quiet Monday in late summer, right before the start of the school year. I am unpacking boxes of books. To suggest that I am distracted would be an understatement. Yet, when I hear that airy call behind me, I know who it is.

"AJ, hello," I call out as I turn to open yet another box of books. "What brings you back to visit me on this planet?"

"Earthling, I have been quite interested to learn more about race, algorithms, and law after our last conversation.[1] *I need your help."*

I sigh. It's very early in the day for such a conversation. But such is the way with this curious alien, who likes to appear before (or, in this instance, behind) me at inopportune times.

"If everyone knows race in society, why does it matter whether an algorithm 'knows' race in law?"

"Well, everyone is aware of race in society. But most people do not understand race at all. That's part of what my research considers in the context of criminal law reforms." I begin to stand up. "In law—"

You might think the presence of an alien would startle me. It did not. But when I turn around to address AJ directly, I jump. The alien no longer looks like an alien to me. It looks, instead, a bit like a human.

"AJ, I don't mean to be rude here, but what happened to your green skin and your three eyeballs? Why aren't you hovering in the air like before? Today you look like . . . a human."

"Earthling, I take many forms. My people operate mostly through what you might call sensory engagement. You sensed me as a three-eyed green thing the last time we spoke. Those features informed you that I am not of your world, and so that is how I appeared to you. I wish to communicate with you, and so you 'hear' me in your language, though my words are not audible to others.

"Today, I have decided to take another form. I am trying to understand your people and their relationship to technology and law, so I decided to

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1. For more on AJ's first visit to my office, see Jessica M. Eaglin, *When Critical Race Theory Enters the Law & Technology Frame*, 26 MICH. J. RACE & L. (SPECIAL ISSUE) 151, 151–54, 168 (2021).

try to look like one of your people, too. And since I am engaging with you, I thought I might as well look like you."

How strange. The alien does look a bit like me. It is a little shorter than me. It has the same tightly coiled hair. It has brown skin like mine, though of a slightly different shade. While my brown eyes are bespectacled with thick black glasses, it has no eyes. Rather, empty blue light shines from the spaces that would be eyeballs on a human face. Each gaping hole shines brightly, like a beacon from a lighthouse. Where the third eye once sat on its forehead, a blue amethyst jewel now rests.[2]

I take a deep sigh. It will be a little more challenging to "talk" to AJ now. When AJ looks like an alien, it is easier to remember that we do not share the same sets of assumptions about the world.[3] *With AJ in human form, I may quickly forget. But who am I to impose a specific body form on a visiting alien? I'll just have to make do.*

"Back to my question, Earthling. If everyone is aware of race because it is socially determined, why does it matter whether and how algorithms are aware of race in law?"

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2. *See* Paul Lewin, *Cover Art for the Limited Edition of* N.K. JEMISIN, HOW LONG 'TIL BLACK FUTURE MONTH? (Subterranean Press 2020) (2018), https://subterraneanpress.com/how-long-til-black-future-month-1/ [https://perma.cc/DZN7-FB7N] (last visited Apr. 14, 2024).

3. Easier, but not easy. *See* Eaglin, *supra* note 1, at 153–54 (struggling to explain race to the alien without shared social assumptions). Science fiction is a mode through which we grapple with and imagine the intersection between science, technology, and society. *Cf.* Sheila Jasanoff, *Future Imperfect: Science, Technology, and the Imaginations of Modernity*, *in* DREAMSCAPES OF MODERNITY: SOCIOTECHNICAL IMAGINARIES AND THE FABRICATION OF POWER 1, 1–2 (Sheila Jasanoff & Sang-Hyun Kim eds., 2015) ("[W]orks in this [science fiction] genre are also fabulations of social worlds, both utopic and dystopic."). Shapeshifting is a common trope through which defamiliarization occurs in the fantasy and science fiction genres that undergird some threads of Afrofuturism. *See generally, e.g.*, N.K. JEMISIN, THE BROKEN KINGDOMS (2010). Defamiliarization "refers to the many ways that an author can make a familiar thing seem strange or different so that this familiar thing moves from mundane and predictable to surprising, interesting, and thought-provoking." SAMI SCHALK, BODYMINDS REIMAGINED: (DIS)ABILITY, RACE, AND GENDER IN BLACK WOMEN'S SPECULATIVE FICTION 114 (2018). It is "a major nonrealist method through which black women's speculative fiction reimagines the possibilities and meanings of the categories of (dis)ability, race, gender, and sexuality and thereby change the rules of interpretation and analysis." *Id.*

In deploying speculative fiction within legal storytelling, I consciously build upon the work of critical race legal scholars who infuse narrative and perspective into legal scholarship as a means to challenge powerful assumptions that shape legal discourse. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) ("Stories, parables, chronicles, and narratives are powerful means for destroying mindset — the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 7–8 (1991) ("I would like to write in a way that reveals the intersubjectivity of legal constructions, that forces the reader to both participate in the construction of meaning and to be conscious of that process. . . . To this end, I exploit all sorts of literary devices, including parody, parable, and poetry."); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 158–94 (1992); I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 26–29 (2019). Fusing speculative fiction and legal storytelling offers a lens to surface and interrogate open-ended, collective belief formation in the United States.

"Interesting question. People do not agree on why it is important, though there is a growing consensus that it is.[4] *It may be about legitimacy, efficacy, social justice, or some combination of all three. Legal scholars and policymakers increasingly frame their interventions on the issue through the term 'colorblind.'*[5] *But I don't know how much that helps, either. There isn't a settled meaning to the term in relation to the algorithm."*

"What is color blind, Earthling?"

"'Color-blind.'[6] *Here, the term 'color' connotes race."*

"But doesn't race signify more than skin color?"[7]

"Yes."

"And what is blind?"

"Blind connotes a person who is not sighted. One who cannot see."

"Your people debate over algorithms through the term 'color-blind' because the algorithm cannot 'see' race like all humans can?"

"Well, no, algorithms can infer race in society."[8]

"Okay. So humans cannot see race in society?"

"Well, no, humans can see race in society too, even though sometimes they will choose not to recognize it."[9]

"Alright. But some people are blind and so they cannot see race in society?"

"Well, no, even people who are blind know race."[10]

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4. *See, e.g.*, Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2228 (2019) ("As the use of criminal justice risk assessment has spread, concern over its potential racial impact has exploded.").

5. "Colorblind" is a symbolic metaphor that "profoundly shapes popular understandings of race, law, justice, and equality, and for many Americans embodies a kind of collective racial common sense." MARK GOLUB, IS RACIAL EQUALITY UNCONSTITUTIONAL? 3 (2018). As a metaphor, legal discourse tends to use the term as a single word, often affixed with a suffix. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 210 (2023) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 416 (1978) (Stevens, J., concurring in part and dissenting in part)); KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 40–41 (2019) ("Traditional civil rights discourse identifies this constant race-thinking as the flaw of the pre-civil rights era. . . . It designates colorblindness as the moral, legal, and political compass that ought to guide the nation."). For insight into the origin of the "language of color-blindness," see GOLUB, *supra*, at 63–93.

6. By separating the term into two words, the alien just highlighted that this common metaphor has two parts, color and blind. In contrast, legal and popular discourse tends to treat the two words as a single metaphor. *See supra* note 5. Throughout this text, I use the term "color-blind" to underscore that this metaphor has two distinct parts, an insight that is easily overlooked in legal and popular discourse. *See infra* note 81 and accompanying text.

7. *See* Eaglin, *supra* note 1, at 152.

8. *See* Aaron Rieke, Dan Svirsky, Vincent Southerland & Mingwei Hsu, *Imperfect Inferences: A Practical Assessment*, 2022 ACM CONF. ON FAIRNESS, ACCOUNTABILITY, & TRANSPARENCY 767, 767.

9. *E.g.*, Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1758–59 (2001); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 6 (1991).

10. OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND 3 (2014) ("Despite their physical inability to engage with race on the very visual terms that are thought to define its salience and social significance, blind people's understanding and experience with race is not unlike that of sighted individuals.").

I pause. AJ's head tilts slightly. The alien is waiting for more explanation. I'd better say something.

TABLE OF CONTENTS

INTRODUCTION

As in society, algorithms are expanding in criminal law's administration like wildfire.[11] An algorithm is "[a] finite series of well-defined, computer-implementable instructions . . . ."[12] It uses numerical inputs to produce specific results based on refined statistical methodologies.[13] In the criminal law context, an algorithm may be used to predict future outcomes of import, such as the likelihood that a person will engage in criminal behavior in the future based on analyses of historical data sets.[14] Such algorithms are increasingly used to inform various decisions

11. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61 (2017). For descriptive summaries on how government increasingly deploys algorithms, see Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. Rev. 1688, 1692 & nn.1–11 (2023).

12. *The Definitive Glossary of Higher Mathematical Jargon*, MATH VAULT, https://mathvault.ca/math-glossary/[https://perma.cc/Z9EY-5W3M] (last visited Apr. 14, 2024).

13. *See id.* When thinking about the advance of information technology in law and policy, it is helpful to think of algorithms like the "outermost doll" of Russian nesting (matryoshka) dolls. Rebecca Kelly Slaughter, Janice Kopec & Mohamad Batal, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission*, 23 YALE J.L. & TECH. (SPECIAL ISSUE) 1, 2 n.1 (2021). Popular and more statistically robust tools like machine learning, deep learning, and neural networks fall under the rubric of artificial intelligence (AI). *See id.* All AI tools use algorithms, though not all algorithms use AI. *Id.* I intentionally refer to algorithms to capture a broad scope of technological interventions currently proliferating or on the horizon of criminal law's administration.

14. *See* Eaglin, *supra* note 11, at 67–88.

by police,[15] pretrial service administrators,[16] judges in the pretrial and postconviction sentencing context,[17] and probation and parole administrators.[18] As the technology underlying algorithms gets stronger, the ubiquity of their uses may expand.[19] Nevertheless, the contemporary expansion of algorithms as a criminal legal practice is highly controversial for a number of reasons. Race figures prominently in these controversies as both a reason for and against the tool's expansion.[20]

At the same time, much legal discourse considers "colorblindness" and the law. As Professor Kimani Paul-Emile recently observed, "colorblindness" is "[a]t once an ideology, discursive practice, and the Supreme Court's dominant analytical approach to antidiscrimination case law."[21] Accordingly, it comes as no surprise that the U.S. Supreme Court and legal scholars alike ground various reflections on race and trends in constitutional law doctrine by referencing the term.[22] Yet the discursive meaning of "color-blind" is not fixed in society.[23] The term gains social meaning through particular use in social and historical contexts.

In this reflection, I demonstrate that color-blind is a contested term within the contemporary legal discourse around race and algorithms in criminal law reform. Scholars and policymakers use the term in relation to algorithms to signify at least four different meanings about the interplay between race, technology, and law in the United States. Delineating the different meanings ascribed to color-blind at the juncture of algorithms and criminal law reveals the social and political stakes

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15. *E.g.*, SARAH BRAYNE, PREDICT AND SURVEIL: DATA, DISCRETION, AND THE FUTURE OF POLICING 14 (2021); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 705–09 (2020).

16. *E.g.*, Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2017–20 (2022); Mayson, *supra* note 4, at 2227–33.

17. *E.g.*, Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 441 (2020); Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 63–64 (2018).

18. *E.g.*, CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK, at vii–viii (2021); Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 651–52 (2019) (describing the "electronic surveillance pipeline" (emphasis omitted)).

19. For a deeper dive into the machine learning tools on the horizon and their application to criminal law, see generally Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019).

20. *See* Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 762–66 (2023).

21. Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 317–18 (2018).

22. *See*, *e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 241–42 (2023). For a recent and comprehensive summary of the Supreme Court's race jurisprudence beyond the limits of equal protection doctrine, see generally Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022).

23. *See* Issa Kohler-Hausmann, *What Just Got Banned? Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305, 307 (2024) (observing that phrases like "equal or individual treatment, race blindness, or neutrality" are "sonorous formula[s] which [are] in fact only a euphemistic disguise for an unresolved conflict" (alterations in original) (quoting Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring))); Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002, 1032–34 (2019) (emphasizing the historically-situated nature of "'colorblind' Jim Crow laws and administrative action (in other words, legal action intended to reach racial results through means that were not facially discriminatory)").

of this contest occurring in and through law in contemporary society. Not only can these social meanings underwrite different roles for law in society, the contest itself may co-opt and foreclose radical political critiques of the status quo through law in the name of race. Illuminating the stakes of this debate in law has practical import. It sets a foundation to differently engage in social and political critique at the juncture of algorithms and criminal law going forward.

The Essay proceeds in three parts. First, I identify the divergent social meanings ascribed to color-blind in relation to algorithms in criminal law. Second, I explain the political stakes underlying the emergence of these different meanings in society. Here, I ground the stakes of this meaning-making contest—emerging at the intersection of technology and law—through reference to Afrofuturity and critical race theory. Finally, I conclude with some thoughts on how to move forward in law given the social and political context of the contest.

I. "COLOR-BLIND" AND THE ALGORITHM IN CRIMINAL LAW

Let me begin with some brush-clearing. Legal scholarship and public policy discourse reference race in relation to algorithms in criminal law to different ends. Increasingly, divergent critiques deploy the term "color-blind" when articulating the role of law in relation to this development. The following paragraphs lay out four different critiques of race, algorithms, and criminal law, organized around how each critique conceptualizes color-blind. I set forth these different conceptualizations, or social meanings, along a spectrum from those taking the expansion of algorithms in criminal law as a positive, technically objective intervention to those expressing fundamental skepticism and frustration toward this development.

Note that not every scholar or policymaker uses the term "color-blind" in relation to algorithms. Further, some people will hold views that do not fit perfectly into any one category. My aim in what follows is to present paradigmatic social meanings. This approach illuminates a fuller scope of contestation between disparate understandings of what is normatively good, why, and where law fits within the "sociotechnical imaginary" of contemporary U.S. society.[24] As will become clear through the discussion, these divergent conceptualizations of color-blind, articulated at the intersection of algorithms and criminal law, substantiate four different paths for law in the future.[25]

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24. Jasanoff, *supra* note 3, at 19 ("[S]ociotechnical imaginaries . . . are 'collectively held and performed visions of desirable futures' (or of resistance against the undesirable), and they are also 'animated by shared understandings of forms of social life and social order attainable through, and supportive of, advances in science and technology.'").

25. This Essay will not discuss transparency or privatization with any detail. The proprietary nature of algorithms expanding in criminal law is a striking and concerning feature of this development. *See, e.g.*, BRAYNE, *supra* note 15, at 5; Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1349 (2018). Yet "transparency only scratches the surface of the threats risk tools pose" in criminal law's administration. Eaglin, *supra* note 11, at 106. This Essay demonstrates a contest underlying a follow-up question: transparency for what? In legal discourse, scholars and policymakers may articulate different answers in relation to race.

A. COLOR-BLIND TECH: RENDERING ALGORITHMS "COLOR-BLIND" THROUGH LAW

One could conceptualize algorithms as a mechanical and objective policy intervention that can improve criminal law's administration. Nevertheless, adherents to this understanding of the algorithm also recognize that technical aspects can undermine its legitimacy as a tool used in criminal law, including potentially improper consideration of race.[26] These adherents seek to eliminate consideration of race within algorithms to legitimize the tool. Such law- and policymakers endeavor to render the algorithm color-blind to the extent that they use law to cleanse some technical features of the algorithm that directly implicate race.

For example, the Pennsylvania State Legislature directed the Pennsylvania Commission on Sentencing to develop a predictive risk assessment instrument for sentencing courts in 2010.[27] The Commission conducted a transparent algorithm-design process that included public hearings and a series of published reports explaining its various design choices.[28] In this process, the Commission confronted commentary and critiques that several predictive risk factors included in the algorithm's design implicated race. They acknowledged that using an assessment instrument which relies on predictive factors like gender, age, and a defendant's county of origin "raise[d] constitutional, ethical, and fairness issues."[29] Public criticism led the Commission to similarly recognize the threat of racial bias generating from prior arrests and county of origin as predictive risk factors.[30] Ultimately, the Commission chose not to use race as an explicit factor

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26. *See, e.g.*, Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 675 (2015) (examining "the legality and propriety of risk-assessment instruments through the lens of widely-accepted theories of punishment"); *id.* at 693–701 (concluding that "Congress declared race, sex, national origin, religion, and socioeconomic status off-limits in risk-assessment instruments in the federal system" based upon an interpretation of the Sentencing Reform Act of 1984, and that similar limits would be placed on risk assessments in the states due to the Equal Protection Clause); John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCH. 489, 501–05 (2016) ("[I]n the view of many scholars, perceptions of blame morally constrain not just the range of possible sentences, but also the nature of the risk factors that can be used to sentence an offender within this range [such that it might implicate risk assessment instrument design]."); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 428 (2006) ("Past criminal behavior is the only scientifically valid risk factor for violence that unambiguously implicates blameworthiness, and therefore the only one that should enter the jurisprudential calculus in criminal sentencing.").

27. 42 PA. CONS. STAT. § 2154.7 (2010).

28. *See generally*, *e.g.*, PA. COMM'N ON SENT'G, RISK/NEEDS ASSESSMENT PROJECT: SPECIAL REPORT: IMPACT OF REMOVING DEMOGRAPHIC FACTORS (2015) [https://perma.cc/32V2-XSV2].

29. *Id.* at 2 (first citing Sonja B. Starr, Opinion, *Sentencing, by the Numbers*, N.Y. TIMES (Aug. 10, 2014), https://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html; and then citing Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014)).

30. Stephanie Wykstra, *Just How Transparent Can a Criminal Justice Algorithm Be?*, SLATE (July 3, 2018, 8:00 AM), https://slate.com/technology/2018/07/pennsylvania-commission-on-sentencing-is-trying-to-make-its-algorithm-transparent.html [https://perma.cc/J483-TPMQ] (removal of prior arrests because of racial bias); Elizabeth Hardison, *After Nearly a Decade, Pa. Sentencing Commission Adopts Risk Assessment Tool over Objections of Critics*, PA. CAP.-STAR (Sept. 5, 2019, 12:38 PM), https://penncapital-star.com/criminal-justice/after-nearly-a-decade-pa-sentencing-commission-adopts-risk-assessment-tool-over-objections-of-critics/ [https://perma.cc/J77G-U7BN] (explaining the removal of home county as a

to predict an individual's recidivism risk at sentencing.[31] It removed prior arrests and county of origin as predictive factors within the final algorithm as well.[32]

This example illuminates one meaning of "color-blind" in relation to algorithms and criminal law. Color-blind tech adherents are sensitive to the legitimacy of an algorithm in criminal law. When the Pennsylvania Commission on Sentencing preselected specific risk factors for use in the algorithm via a legal process, it considered then removed specific predictive factors associated with race from the final algorithm implemented in the state. This example demonstrates one way color-blind tech adherents may seek to legitimize algorithms by limiting their express and implicit consideration of race through law. Here, "color-blind" carries a positive connotation. It signifies a society where criminal legal actors and the algorithms upon which they rely are not shaped by race. Law facilitates this normative horizon by excising race in technology at its intersection with criminal law's administration.

B. COLOR-BLIND LAW: "COLOR-BLIND" RESPONSES TO ALGORITHMS IN LAW

One could also conceptualize algorithms as a technical and potentially positive policy intervention in criminal law. Adherents to this conceptualization have faith that algorithms can improve criminal law's administration, but they also recognize that algorithms are not, on their own, objective. For color-blind law adherents, the problem generates from the social nature of data. Because algorithms operate on historical data and those data are shaped by social practices that disproportionately and negatively impact racial minorities, an algorithm deployed in criminal law may exacerbate racial inequality too.[33] Given this reality, these adherents consider whether color-blind laws—meaning laws that require ignoring race—facilitate or mitigate efforts to neutralize the negative effects that algorithms may have on racially marginalized groups. They explore "race-conscious"

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predictive risk factor because "advocates warned it would penalize minority offenders living in counties with crime rates").

31. PA. COMM'N ON SENT'G, RISK ASSESSMENT PROJECT II INTERIM REPORT 2: VALIDATION OF A RISK ASSESSMENT INSTRUMENT BY OFFENSE GRAVITY SCORE FOR ALL OFFENDERS 12 n.8 (2016), https://pcs.la.psu.edu/guidelines-statutes/risk-assessment/ [https://perma.cc/5JCT-W87B] ("While race and county were found to be significant predictors of recidivism, they are not included in the risk scale.").

32. *See* sources cited *supra* note 30. The final algorithm does rely on some controversial factors—prior convictions, gender, and age. 204 PA. CODE § 305.1(b)(15); Asli Bashir, Opinion, *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/SER7-GW3L].

33. Mayson, *supra* note 4, at 2251 ("[S]ubjective and algorithmic prediction alike look to the past as a guide to the future and thereby project past inequalities forward. . . . To understand and redress disparity in prediction, it is therefore necessary to understand how and when racial disparity arises in the data that we look to as a representation of *past* crime."); *see* Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 298 (2020) (arguing that because "almost every algorithmic input is likely correlated with race due to the influence of race in nearly every aspect of American life today," algorithms used in criminal law either cannot "achieve full race neutrality" or "the set of permissible [data] inputs . . . is likely so small that the accuracy of the algorithm will be substantially degraded").

interventions to address the negative racial impact that algorithms may have in criminal law's administration.

For example, Professor Sandra Mayson demonstrates that algorithms reflect disparities in underlying target variables—if an algorithm predicts future arrest and arrest is disparately distributed in its historical data along racial lines, then the algorithm will reflect that distribution of inequality into the future.[34] Mayson contends that "[t]weaking an algorithm or its input data" is "misguided."[35] Instead, she urges a shift from "coercive" to "supportive" responses to risk in criminal law as a measure to "mitigate the disparate racial impact of prediction."[36] Professor Aziz Huq details the way that criminal law operates as a mechanism of social stratification in the United States.[37] He worries that too much state coercion will be distributed along racial lines through a single risk assessment instrument in criminal law.[38] He suggests adjusting the thresholds between different risk scores (high, medium, or low risk) along racial lines.[39] Such an intervention would reduce the negative impact of algorithms in criminal law and improve the efficacy of algorithms in reducing incarceration in society.[40]

These scholarly contributions illuminate another meaning of "color-blind" in relation to algorithms and criminal law. Color-blind law adherents critique how the law may require ignoring race in an algorithm even though producing and deploying an algorithm that positively impacts criminal law administration and society may require taking race into consideration. Here, "color-blind" carries a negative connotation. It signifies a stance that is bad for racial minorities and mainstream society. Here, an algorithm that equitably distributes benefits in society is the normative horizon. To the extent that law frustrates the capacity for algorithms to fulfill this normative aim in society, law should change.

C. COLOR-BLIND SOCIETY: CHANGING LEGAL GOVERNANCE STRUCTURES AROUND ALGORITHMS IN A "COLOR-BLIND" SOCIETY

In contrast to the previous two meanings, one could be ambivalent to the advance of algorithms as a criminal legal intervention. Color-blind society adherents contest the technological objectivity of algorithms as criminal legal reform, but they also see the technology as an opening to rethink existing laws and policies that negatively impact marginalized groups in a deeply racially-stratified society.[41] These adherents challenge existing legal governance structures around

34. Mayson, *supra* note 4, at 2251.
35. *Id.* at 2225, 2263.
36. *Id.* at 2226.
37. Huq, *supra* note 19, at 1104–11.
38. *Id.* at 1128–33.
39. *Id.* at 1131.
40. *See id.* at 1132 ("[T]he case for multiple risk thresholds can be made independently on either racial equity or pure social efficiency grounds.").
41. *See, e.g.*, Ngozi Okidegbe, *When They Hear Us: Race, Algorithms, and the Practice of Criminal Law*, 29 KAN. J.L. & PUB. POL'Y 329, 332 (2020); I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1283–91 (2017) (considering the connection between "deracializ[ing] policing" through technology and the distribution of privacy in society along racial lines).

algorithms deployed in criminal law. Changing these governance structures, in turn, may reveal how law contributes to and maintains a color-blind society, meaning one where people are resigned to various resources being distributed along racial lines.

For example, Professor Ngozi Okidegbe critiques algorithms in pretrial bail reform for "utiliz[ing] colorblind risk factors to assess a defendant's statistical riskiness."[42] These measurable factors—like criminal history, educational attainment, employment history, and geographical location—are racially distributed in society.[43] In response, Okidegbe urges creating a governance structure over pretrial bail, shifting power over that structure to oppressed groups most impacted by punitive criminal enforcement practices, and "endowing [that group] with control over if and on what basis algorithmic-based reforms are pursued."[44] To make this concrete, consider again the situation of the Pennsylvania Commission on Sentencing described above.[45] Whereas color-blind tech adherents used existing administrative governance structures to scrub specific, racially-inflected predictive factors from the algorithm, Professor Okidegbe would create a bail commission and alter who sits on such a commission and what kinds of choices that commission can make in relation to algorithms and pretrial determinations more broadly.[46] Such an intervention shifts decisionmaking power over pretrial governance, not just pretrial algorithms' design, toward marginalized communities. This move represents the broader strategy of color-blind society adherents. They reimagine or cast doubt on existing legal structures that currently govern algorithms. The thrust of their legal intervention has less to do with fixing technology and more to do with creating what Professor Bennett Capers refers to as a "think again" moment—how engaging with law and technology prompts critical reflection on the status quo in society.[47]

These scholarly contributions illuminate a third meaning of "color-blind" in relation to algorithms and criminal law. For color-blind society adherents, the term signals toward a society that demonstrates apathy or indifference to legal estrangement that is raced.[48] The normative aim is to transform this color-blind

42. Okidegbe, *supra* note 41, at 332.

43. *See* Okidgebe, *supra* note 16, at 2024–32 (discussing the orientation toward "carceral knowledge sources" in the construction of pretrial algorithms and its racial implications); Eaglin, *supra* note 11, at 87, 94–99 (discussing the use of employment status, zip code of residence, and criminal history as predictive risk factors and its racial implication).

44. Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739, 745 (2022).

45. *See supra* notes 27–32 and accompanying text.

46. Okidegbe, *supra* note 44, at 774–77.

47. *See* Capers, *supra* note 41, at 1271.

48. On legal estrangement, see Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) ("The concept of legal estrangement . . . clarifies the real problem of policing: at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic."). I use the term "raced," although common discourse would use the term "racialized," for reasons discussed in Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 760 & n.21 (2023).

society through law. As with color-blind law adherents, the term "color-blind" carries a negative connotation here. Yet color-blind society adherents differ from color-blind law adherents because structural transformation is their normative horizon. Such transformation may occur in relation to algorithms and criminal law, but these adherents do not rely on the algorithm to change society. Rather, law is a means to disrupt the status quo and facilitate meaningful—though perhaps unmeasurable—transformation.

D. COLOR-BLIND PUNITIVE SOCIETY: CRITIQUING ALGORITHMS AS A "COLOR-BLIND" CRIMINAL LEGAL POLICY INTERVENTION

Finally, one could express deep skepticism and frustration toward the expansion of algorithms as a policy intervention in criminal law. Consistent with the color-blind society adherents, color-blind punitive society adherents challenge the technological objectivity of algorithms in criminal law. They also critique a society resigned to the distribution of resources along racial lines through law. Yet this set of adherents diverges from the color-blind society adherents in terms of how to proceed in law. Color-blind punitive society adherents illuminate how algorithms in criminal law likely exacerbate, not ameliorate, the historical expansion of criminal law enforcement in contemporary society and its role in preserving the distribution of resources along racial lines in the United States.[49] They urge legal interventions that diminish punitive governance structures to achieve structural transformation in society.

For example, notable mass incarceration critic Michelle Alexander denounced algorithms as a criminal justice reform tool in her 2019 *New York Times* opinion piece, *The Newest Jim Crow*. As she explains,

> Under new policies in California, New Jersey, New York, and beyond, "risk assessment" algorithms recommend to judges whether a person who's been arrested should be released. These advanced mathematical models—or "weapons of math destruction" as data scientist Cathy O'Neil calls them—appear colorblind on the surface but they are based on factors that are not only highly correlated with race and class, but are also significantly influenced by pervasive bias in the criminal justice system.[50]

In combination with electronic monitoring devices and other types of information technology, she positions algorithms as pivotal to a new system of racial

49. *See*, *e.g.*, Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1712 (2019) (reviewing VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018)) ("Automated risk assessments are not only a way to make government decisionmaking more effective; they also reflect and implement a carceral approach to social problems."); Michelle Alexander, Opinion, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html ("Many of the current reform efforts [around mass incarceration] contain the seeds of the next generation of racial and social control, a system of 'e-carceration' that may prove more dangerous and more difficult to challenge than the one we hope to leave behind.").

50. Alexander, *supra* note 49.

subordination deployed through criminal law for private gain.[51] In a similar vein, critical race legal scholar and sociologist Dorothy Roberts rebukes algorithms (even the reformed kinds) as "insufficient to rein in the carceral state."[52] Professor Sean Hill enhances this point in the context of pretrial bail reform. Through an analysis of grassroot coalitions' proposed decarceral bills in New York and California, he underscores how prediction and algorithms reframe legal action around pretrial detention by displacing decarceration as the metric of legal and policy success.[53] Yet, Hill argues, decarceration would erode two "pillars of racial hierarchy," namely "the presumption that carceral policies are an essential or practical response to matters of public safety" and "the nexus between Black identities and criminality."[54]

These legal and policy interventions illuminate a fourth meaning of "color-blind" in relation to algorithms and criminal law. For color-blind punitive society adherents, "color-blind" signifies a society resigned to the distribution of resources through punitive measures along racial lines. As with both the color-blind law and color-blind society adherents, "color-blind" carries a negative connotation here. Yet color-blind punitive society adherents emphasize the end of the carceral state as their normative horizon. Whether or not algorithms have a role to play in that aim,[55] these adherents converge on asserting that law plays a pivotal role in reaching that normative, transformative end.

51. *Id.*

52. Roberts, *supra* note 49, at 1724.

53. Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 981–82 (2021).

54. *Id.* at 981.

55. For example, Professor Roberts reflects on the role that technology in the hands of abolitionists can play toward ending the carceral state. Roberts, *supra* note 49, at 1726 ("With an abolitionist vision, people can employ technology in novel ways to facilitate social change."). Not everyone who adheres to this meaning necessarily expresses a viewpoint on technology in society.

TABLE 1: THE "COLOR-BLIND" DISCOURSE ON ALGORITHMS IN CRIMINAL LAW

The Racial "Problem" with Algorithms in Criminal Law	The Social Meaning	The Legal Norm
Color-blind Technology	Algorithms are not legitimate when they overtly consider race or racially-inflected predictive factors.	Seek to eliminate consideration of race in algorithms through law.
Color-blind Law	Algorithms distribute harm because they operate on historical data shaped by social practices that disproportionately impact racial minorities.	Challenge existing laws that prevent "race-conscious" interventions to reduce the negative racial impact of algorithms.
Color-blind Society	Algorithms illuminate a society resigned to the distribution of resources along racial lines.	Change governance structures around algorithms through law to disrupt the normalized distribution of resources along racial lines.
Color-blind Punitive Society	Algorithms illuminate a society resigned to the distribution of resources along racial lines through punitive enforcement measures.	Eliminate punitive enforcement measures.

II. "COLOR-BLIND" AS RACIAL DISCOURSE IN LAW: THE SOCIAL AND POLITICAL STAKES

I take another deep sigh. "Basically, AJ, this is an emergent site of contestation in law."

"Hmm. I understand that people use the term 'color-blind' differently in relation to algorithms and law. 'Color-blind' may concern how the algorithm is designed, how it is governed, whether an algorithm should be implemented, and why. But Earthling, I am still confused. Why would people with very different perspectives on algorithms, race, and criminal law all invoke the same term, 'color-blind,' when making their respective arguments?"

"Oh! Because 'color-blind' is a term of art in relation to race and law in the United States. It encompasses two very different normative aims articulated through race in society. One aim is moral—many aspire toward a society where race does not matter in the distribution of resources. The other aim is political—

some aspire toward a society where resources are distributed more equitably across society regardless of race. In law, these divergent visions of racial justice lurk underneath the term 'color-blind.' So even as the meaning of the term changes, the term itself often functions to tenuously bring people with different understandings of race and racism in society together. The meaning of 'color-blind' compels society toward action in and through law."

"So color-blind discourse in law is a political tactic intentionally deployed through technology to make people act a certain way?"

"Not exactly. 'Color-blind' is a powerful political discourse deployed in the language of race. When invoking the term 'color-blind' in relation to algorithms, lawmakers and legal scholars alike play upon unspoken and divergent normative ambitions. Those divergent ambitions compel people to act.

"To understand this, let's take a step back from algorithms and start with racism. Racism is a constantly changing discourse constituted in and through law. For those who aspire toward a society where race does not matter, race hinders a 'more perfect' society through racism. In contrast, for those who aspire toward a more equitable society regardless of race, race illuminates a politically imperfect society often sustained by racism. In the latter meaning, racism is capacious. In the former, it is quite narrow. But, and this is important to my point, racism in either sense is constantly changing. This means that as society changes, what constitutes racism from either perspective changes too. In these moments of flux, political realignment occurs.

"My point, quite simply, is that the United States is in a moment of flux. Various forces converge around criminal law such that political realignment is happening now via a reconstitution of the meaning of 'color-blind' in and through law at its intersection with technology. The discursive contest around 'color-blind' and algorithms in criminal law illuminates a deeper contest about what is wrong with society and how to move forward in law that is being articulated through race and technology. Let me slow down so I can be more concrete."

Racism, at the most basic level, refers to "a mode of thought shaped by racial assumptions and a set of human practices influenced by that mode of thought."[56] Many legal scholars characterize racism as permanent in society.[57] I concur in that description. However, we must also recognize that racism exists on a continuum between permanence and change.[58] Racial hierarchy in the United States persists.[59]

56. Eaglin, *supra* note 20, at 760.

57. *See, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Pathological Racism, Chronic Racism & Targeted Universalism,* 109 CALIF. L. REV. 1107, 1109–10 (2021) (urging racial justice scholars to adopt the lens of "chronic racism" in law, a concept that "operates on the assumption that racism is permanent" rather than pathological); BELL, *supra* note 3, at 147–57.

58. *See* PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 54–55 (2004); OCTAVIA E. BUTLER, PARABLE OF THE SOWER 3 (Grand Cent. Publ'g 2019) (1993) ("The only lasting truth [i]s Change.").

59. *See, e.g.*, Bell, *supra* note 15, at 762 & n.543.

Further, racism continues to produce race.[60] Yet the social context and modes of racial assumptions' expression continue to change in a landscape defined by political, economic, and social transformation.[61] In contrast to this dynamic conceptualization of racism, "color-blind" is a term often associated with a temporally-contained project of white supremacy in the United States.[62] Many invoke the term to distinguish pre- and post-Civil Rights Era tactics of racial subordination through law.[63]

With this historical context in mind, the term "color-blind" carries particular social force in relation to contemporary criminal law reform. Criminal law's administration is changing in the United States, and for good reason. Part of the "crisis" in criminal law which demands change concerns its racial effect.[64] Not only has the United States emerged as a lead incarcerator in the world, but the racial impact of mass incarceration has been well documented.[65] Race is a key feature of the problem of mass incarceration in the United States. Today, people from across the political spectrum will invoke the negative racial effects of mass incarceration as a reason to change current criminal law practices.[66]

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60. DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 50 (2011) ("[R]ace is the product of racism; racism is not the product of race.").

61. *Id.* at 23; Eaglin, *supra* note 20, at 771. The idea of the "past-in-present" nature of racism connects deeply to the concept of *Sankofa*, critical to Afrofuturism. As philosopher Lewis Gordon explains, *Sankofa* underscores "the importance of retrieving important information from the past to facilitate moving to the future. . . . The argument is that the past is not to be erased. It is to be understood." Lewis R. Gordon, *A Black Existential Perspective on Afrofuturity and the Law*, 112 GEO. L.J. 1409, 1419–20 (2024); *see* COLLINS, *supra* note 58, at 55 ("The new racism reflects sedimented or past-in-present racial formations from prior historical periods. Some elements of prior racial formations persist virtually unchanged, and others are transformed in response to globalization, transnationalism, and the proliferation of mass media." (footnote omitted)).

62. *See* George Lipsitz, *The Sounds of Silence: How Race Neutrality Preserves White Supremacy*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 23, 25 (Kimberlé Williams Crenshaw et al. eds., 2019) ("Colorblindness purports to be a recent invention, an imputed product of the success of the civil rights movement, civil rights laws, and the political and legal gains they envisioned and enacted. Yet in fact it is merely a present-day manifestation of a long-standing political project emanating from Indigenous dispossession, colonial conquest, slavery, segregation, and immigrant exclusion.").

63. *But see* Eyer, *supra* note 23, at 1033 (observing that "'colorblind' Jim Crow laws and administrative action (in other words, legal action intended to reach racial results through means that were not facially discriminatory) were also an important piece of how [racial] inequality was sustained" in the pre-Civil Rights Era).

64. Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1956–57 (2019) (identifying "race and class disparities throughout the [criminal legal] system" as "main ingredients of the perceived crisis" in criminal law).

65. *See, e.g.*, HELEN FAIR & ROY WALMSLEY, WORLD PRISON BRIEF, WORLD PRISON POPULATION LIST 6 tbl.2 (13th ed. 2021), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf [https://perma.cc/4Y7R-A4CQ] (situating U.S. incarceration trends in context of world prison populations from 2000 to 2015). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (illuminating the racial impact of mass incarceration in the United States).

66. *See, e.g.*, I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 799–800 (2022) (noting that criminal law scholarship increasingly references that there is a "racial component to its administration"); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*,

In this social and historical context, the convergence of color-blind discourse, law, and algorithms becomes socially significant at the juncture of criminal law reform. The algorithmic project in criminal law at this social and historical moment cannot exist diametrically opposed to the racial aspect of mass incarceration as a force which motivates social transformation. Unsurprisingly, then, robust debates have emerged around the racial implications of addressing mass incarceration through algorithms in criminal law, and what to do about them.[67] This is a fertile site for social contestation in law.

In this contest, adherents to the color-blind tech and color-blind law meanings invoke "color-blind" to claim the moral high ground in relation to a particular path forward in law. For example, color-blind tech adherents deploy law in such a way that suggests being color-blind is good; society can further that aim by changing technology through law. In contrast, color-blind law adherents converge with color-blind society and color-blind punitive society adherents to the extent each uses the term "color-blind" as a negative idiom. Yet color-blind law adherents converge with color-blind tech adherents in an important way. Both seek to establish the algorithms' legitimacy by using law—in very different ways—to uphold "the principle of equal status and equal concern for every racial group."[68] These efforts register in what critical race legal theorist Kendall Thomas refers to as the "moral constriction" over racial justice.[69] Where color-blind tech adherents suggest the moral high ground is a society that never takes race into account in law, color-blind law adherents suggest the moral high ground is a society that takes race into account in the law around algorithms deployed for criminal legal purposes.

In contrast, both color-blind society and color-blind punitive society adherents invoke "color-blind" to political, not moral, ends. Each stance, in different ways, "directs its concerns to the bisection of race and power."[70] Color-blind society and color-blind punitive society adherents use racial inequality, made visible at the juncture of algorithms and criminal law reform, as a mechanism to demonstrate power dynamics and contest various forms of oppression suffered by many in the United States' deeply stratified society. Addressing such inequities by reconceptualizing the governance of algorithms or via abolition-oriented practices like decriminalization, for example, would benefit more than just racially marginalized groups. It would transform society in ways that could redistribute resources regardless of race. Yet these conceptualizations of color-blind come with a

117 MICH. L. REV. 259, 276–90 (2018) (noting that both the "over" and "mass" frames of critique around mass incarceration discuss race as a reason for reform).

67. For more details on the configuration of this debate, see Eaglin, *supra* note 20, at 772–90 (situating discourse on algorithms based on how one understands race in criminal law reform).

68. Kendall Thomas, *Racial Justice: Moral or Political?*, 17 NAT'L BLACK L.J. 222, 226 (2002).

69. *Id.* at 229.

70. *Id.* at 231 (articulating a "political account" of racial justice).

distinct and significant caveat—each encompasses legal interventions that come without any guarantees of what society might look like in the future.[71]

In this social and historical context, we can also begin to understand the political stakes of this emergent contestation in law. Color-blind law and color-blind tech adherents displace the political force of law from society—its structures and functions—to technology through race. Both meanings confine "racial power politics" made visible through technology within the "dispassionate discursive boundaries" of traditional legal spaces: the confines of "juridical settlement, bureaucratic administration and deliberative legislation," [72] but with a new, more technological spin. For example, color-blind tech assertions may confine race and power to statistical methods and administrative governance processes.[73] Color-blind law assertions may confine race and power to the intersection of statistical methods and constitutional law.[74] At best, each meaning cedes to technology acting upon society, not law. Such an approach may lead to some downstream benefits for marginalized groups along racial lines,[75] but it sacrifices the "distinctively political dimensions" of race and law in America.[76]

The implication of this political choice is twofold. First, the approaches reflected by color-blind tech and color-blind law adherents—whether using "color-blind" as a positive or a negative term—depoliticize algorithms and racial hierarchy in society through law. To be sure, both color-blind tech and color-blind law adherents politicize *algorithms* in society. Yet the invocation of "color-blind" within either meaning legitimates the *algorithmic project* in society through law. In each instance, the legal discourse solidifies algorithms as a response to race as a contemporary social problem within criminal law's administration and outside it. Simultaneously, each invocation eliminates race as a

71. It is the will to imagine different futures without guarantees that allows Afrofuturism, critical race theory, and abolition to converge seamlessly around criminal law right now. *See, e.g.*, Bennett Capers, *Afrofuturism and the Law*, 9 CRITICAL ANALYSIS L., no. 1, 2022, at 1, 7 ("Afrofuturism is about imagining better, more egalitarian futures. And since the law shapes our present, and polices our future, we need more conversations about Afrofuturism and the law."); *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii (Kimberlé Crenshaw et al. eds., 1995) (asserting that critical race theory is unified by "a desire not merely to understand the vexed bond between law and racial power but to *change* it"); Jamelia Morgan, *Abolition in the Interstices*, LAW & POL. ECON. PROJECT: BLOG (Dec. 14, 2023), https://lpeproject.org/blog/abolition-in-the-interstices/ [https://perma.cc/5WST-FMCE] (defining "abolition in the interstices" as "the work of abolitionists dedicated to dismantling while building, protecting vulnerable groups now while pushing toward futures where protection from harm is unnecessary, providing for material needs now while working towards a new world where all material needs are met").

72. Thomas, *supra* note 68, at 229.

73. *See supra* notes 27–32 and accompanying text.

74. *See supra* notes 37–40 and accompanying text.

75. *But see* Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. 1531, 1574–84 (2024) (critiquing the redistributive terms of progressive criminal law reforms).

76. Thomas, *supra* note 68, at 229.

specific lens through which to articulate, contest, and so politicize the hierarchical status quo in contemporary society through law.[77]

Second, the emergent color-blind law meaning specifically facilitates a reconfiguration of tenuous political convergences around criminal law. Contingent alliances between criminal justice and racial justice advocates emerged around the phenomenon of "mass incarceration."[78] The color-blind law meaning advanced through algorithms as criminal legal reform provides a foundation for divergence from emergent alliances.[79] It centers equality in the administration of algorithms through law while displacing the pursuit of transformative power dynamics in society through law. Yet the color-blind law meaning recognizes racial inequality in society to an extent that the color-blind tech stance never could.[80] Thus, advancing this meaning in society allows its adherents to co-opt the critical stance of broader racial justice critiques while simultaneously containing those critiques.

Consequently, at this juncture of information technology and criminal law, the color-blind law approach to algorithms and criminal law forges a shift in the social connotation of "color-blind" from a positive ambition to a negative horizon. That altered connotation enables a broader configuration of the various constituents of criminal justice coalitions by sacrificing the broader, political critiques that accompany in-depth observations about racial injustice. Perversely, this end is achieved by legitimating the isolated recognition of race in statistical models about criminal law. By decentering the aim of law away from society and toward algorithms, the negative invocation of "color-blind" can shift from a critical, political normative stance in opposition to the hierarchical status quo to a palatable, depoliticized position for mainstream society.

III. MOVING FORWARD IN LAW

AJ sits down. The alien's body is suspended in mid-air, cross-legged. I smile. AJ may look like a human, but it remains an alien. How did I think I could forget?

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77. On the significance of language when contesting social inequality in the face of mass incarceration, see Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 488 (2019).

78. *See, e.g.*, Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [https://perma.cc/F6GL-YF4A]) ("Mass incarceration makes our country worse off, and we need to do something about it. . . . This is a cause that's bringing people in both houses of Congress together. It's created some unlikely bedfellows."). *But see, e.g.*, Levin, *supra* note 66, at 263 ("The existing literature on mass incarceration and overcriminalization displays a troubling elision between [the 'over' and 'mass' incarceration] frames. . . . While it has become popular to identify the current moment as one of 'bipartisan consensus' on criminal justice reform, it is important to recognize how tenuous this consensus is and how much it relies upon different frames and different goals." (footnote omitted)).

79. For more on the "interest-divergence dilemma," see Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma,* 91 J. AM. HIST. 92, 100–01 (2004).

80. *See, e.g.*, Yang & Dobbie, *supra* note 33, at 334 (recognizing the racial significance of "nonrace correlates" like zip code of residence, education level, and employment status).

"I understand. The shifting social meaning around 'color-blind' that you see at the intersection of information technology and law is a problem if one thinks of race as a political, not just a social, construct."

"Yes, exactly."

"Earth is a strange place," muses the alien. "Understanding the social meanings embedded in your society can be exhausting."

"Not everywhere on Earth is necessarily like this. But yes, the United States is certainly strange . . ."

"One more question, Earthling. If one understands race as a social and political construct—as you do—this color-blind legal discourse around algorithms and criminal law seems like a terrible development. What is to be done? Should your people just stop using the term 'color-blind'? Would that resolve any of the issues you raised today?"

"We could stop using the term, AJ. It would not resolve the underlying issues that the term reveals at the intersection of technology and law. Our words are a window into how we think and act in and through law in society.

"That said, illuminating the discursive terrain around 'color-blind' and algorithms in criminal law does point to a way forward in law. The contest over 'color-blind' at the intersection of technology and criminal law reform signals deep instability in the term and existing social arrangements. Engaging with those instabilities differently in law can lead to different social horizons through law."

"In other words, this moment of transition around 'color-blind' can be an opportunity for transformation?"

"I think so, AJ. To see the opening for transformation, we need to understand the term 'color-blind' as a metaphor with two parts: 'color' and 'blind.'[81] *Blindness is an impairment, meaning an inability to see. Blindness is also considered a disability. Disability is the social meaning given to an impairment, and it is stigmatized too.*

"For example, AJ, you mentioned that others cannot hear you in your form of communication. In the United States, you would be considered mute. In your world, perhaps, this is unremarkable. Here, however, inability to speak presents a variety of challenges based upon how people choose to structure society. When scholars talk about the social construction of disability, this is what they mean. While physical impairments may be real, these scholars engage with the social,

81. On the flaws of this metaphor from a race and disability perspective, see Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz, *Introduction* to SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 1, 4 (Kimberlé Williams Crenshaw et al. eds., 2019) ("[C]olorblindness . . . mobilizes a metaphor of visual impairment to embrace a simplistic and misleading affirmation of racial egalitarianism.") and Subini Ancy Annamma, David J. Connor & Beth A. Ferri, *Introduction: A Truncated Genealogy of DisCrit*, *in* DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 1, 6 (David J. Connor et al. eds., 2016) ("We refrained from using the term '*color-blindness*,' which equates not seeing with not knowing. In other words, the phrase likens lack of vision to ignorance.").

historical, and political context within which those impairments are structured as meaningful in society.[82]

"The assumptions we bring to disability are shaped by ableism. Ableism refers to the 'complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society.'"[83]

"You mean that disability is another category of identity that carries significant meaning in your society, like race?"

"Yes, and like race, disability is a construct around which society is structured. But my point is not to think about race and disability as the same thing.[84] *I am interested in the way these constructs interact with one another to co-constitute social hierarchy in the United States through law*.[85]

"Thinking about ableism and racism together illuminates the different axes of change occurring at this intersection of technology and law. As the legal discourse shifts the meaning of 'color-blind' at its juncture with algorithms and criminal law, it also signifies the relationship between race and disability in society differently. Teasing out that new signification at the juncture of technology and law may be a critical avenue for future research and advocacy. Let me explain."

The legal discourse on "color-blind" and algorithms in criminal law may shift the connotation of the term "color-blind" from a positive to a negative horizon while depoliticizing racial hierarchy through law. Yet, the shift in connotation also differently signifies the terms "color" and "blind" in relation to each other and to society. In the context of algorithms as criminal law reform at least, the "blind" aspect of the "color-blind" metaphor is, increasingly, doing all the work. This alteration in the term signals a different set of political stakes and begs a different set of questions to ponder in law going forward.

Historically, ableist notions of disability have been used to demean and dehumanize nonwhite people and, in turn, constitute disability in and through law.[86] In

82. *See generally, e.g.*, Rabia Belt, *The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future*, 110 GEO. L.J. 785 (2022); Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, *in* THE OXFORD HANDBOOK OF LAW AND HUMANITIES 145 (Simon Stern et al. eds., 2020).

83. Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1670 (2021) (quoting Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 980 (2019)).

84. For exemplary legal scholarship considering the similarities between the two, see Paul-Emile, *supra* note 21, at 338–40.

85. *Cf.* Jamelia Morgan, *On the Relationship Between Race and Disability*, 58 HARV. C.R.-C.L. L. REV. 663, 682 (2023) ("[A]n intersectional approach permits an uncovering of the interdependent ways that race and disability have shaped ideas about which bodyminds are considered 'normal,' and how law reflects, constructs, and/or reifies these notions of normalcy.").

86. Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, *in* THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 33, 36 (Paul K. Longmore & Lauri Umansky eds., 2001) ("By the mid-nineteenth century, nonwhite races were routinely connected to people with disabilities, both of whom were depicted as evolutionary laggards or throwbacks."); *see, e.g.*, KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 79 (2010) (documenting the insistence that the majority of Blacks were

contemporary society, disability tropes remain subtle yet powerful concepts. Indeed, disability theorist Lennard Davis suggests that society may change its notions about other social categories, but disability remains an anchor through which "normal" is constituted.[87] There is a hint of that logic in discourse around race and algorithms in criminal law. Among the alternative meanings of "color-blind" at the juncture of algorithms and criminal law, only the color-blind tech meaning treats being color-blind as a positive normative horizon.[88]

Thus, the "good" meaning of "color-blind" is associated with the "old" meaning. For color-blind society and color-blind punitive society adherents, a color-blind society is nothing new.[89] It is a problem "now" with the advance of technology. It was a problem "then," in the historical past upon which the era of mass incarceration emerged, too. From adherents of the color-blind law meaning, the algorithm is new—it presents new issues at the juncture with society.[90] The challenge in law is to figure out how to adjust properly—and the thing that should change is law. The "old" way of refusing to consider race in law is, suddenly, outdated. The "old" way, it turns out, refers to the approach endorsed by color-blind tech adherents.[91] Accordingly, through the rubric of color-blind law, efforts to remove racial inflection from algorithms through law become associated with the "old," while consideration of race in law is associated with the "new."

In this context, the signification of "color" and "blind" in society alters through law. Whereas blind was good and color (race) was bad, color-blind law, color-blind society, and color-blind punitive society adherents converge insofar as some consideration of race becomes good. If lumped together, these meanings collectively signal that the "old," "color-blind" way of thinking about race and law is outdated, too. Particularly as color-blind law adherents make the negative connotation of "color-blind" palatable to the masses, the "color-blind" metaphor takes on new meaning. Increasingly, the color (race) component of the metaphor

"mentally retarded, 'savage[s] at heart,' and amoral—'unable practically to discern between right and wrong'") (alteration in original) (quoting WILLIAM HANNIBAL THOMAS, THE AMERICAN NEGRO: WHAT HE WAS, WHAT HE IS, AND WHAT HE MAY BECOME 129, 134 (1901)); Morgan, *supra* note 85, at 693–99 (conducting a close reading of early cases involving breach of warranty during chattel slavery to demonstrate the legal construction of race and disability).

87. LENNARD J. DAVIS, THE END OF NORMAL: IDENTITY IN A BIOCULTURAL ERA 7 (2013) ("We may want diversity in all things, but not insofar as medicalized bodies are concerned. It is in this realm that 'normal' still applies with force.").

88. *See supra* Section I.A.

89. *See, e.g.*, Capers, *supra* note 41, at 1270–71; Roberts, *supra* note 49, at 1697 ("The key features of the technological transformation of government decisionmaking . . . mark a new form of managing populations that reinforces existing social hierarchies.").

90. *See, e.g.*, Huq, *supra* note 19, at 1045 ("New predictive algorithms trawl immense quantities of data, exploit massive computational power, and leverage new machine-learning technologies to generate predictions no human could conjure. These tools are likely to have enduring effects on the criminal justice system.").

91. *See, e.g.*, Mayson, *supra* note 4, at 2263 ("It is an almost-universal orthodoxy . . . that race must be excluded as an input to prediction. . . . This focus on input variables, however, is not an effective approach to achieving racial equity [in algorithmic prediction]."); Yang & Dobbie, *supra* note 33, at 343 (critiquing the "formalistic solution" followed by "mainstream legal consensus" to "exclud[e] both race and all nonrace correlates from the predictive algorithm" as "unlikely to work in practice").

takes on a positive connotation while the blind (disability) component does not. This altered social meaning, substantiated in law, more directly adopts the trope of disability as negative.

To be clear, my point is not to say that the "old" use of "color-blind" was good, and the "new" way of using "color-blind" is bad. Neither am I saying that the "new" way is good and the "old" way is bad.[92] Regardless of whether one uses the term "color-blind" with a positive or negative connotation, law can be a repository for racial assumptions that constitute race at its juncture with technology and criminal legal reform.[93] My point, instead, is to elucidate the past-in-present nature of this discourse at the intersection of race, technology, and law: the color-blind of then is different from the color-blind of now.

This observation about the altered term is more than just semantics. It signals two very concrete political implications for critical race legal scholars and activists to consider. First, it suggests that a critical stance on disability is an important complementary lens to incorporate when examining the intersection of technology and law.[94] Currently, legal scholars are doing important critical work looking at the constitution of disability and race in criminal law,[95] disability and technology in society,[96] and race and technology in criminal law.[97] More legal scholars should critically examine the interplay of racism and ableism at its intersection with technology and criminal law going forward. Thus, the insight to color-blind legal discourse encourages a new avenue for critical thinking in law.

There is a second and related reason the analysis of this metaphor is important. Unpacking shifts in the connotation and meaning of the term "color-blind" in social and historical context reminds legal scholars and activists alike to engage power, not just the social category of race, at its intersection with technology and law. Race is a particularly salient lens through which to see and engage power in this context, but it is not the only one.[98] That the meaning of "color-blind" can change and is changing at the intersection between law and technology suggests this is a particular site of power that needs more engagement and explanation.

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92. Such an approach falls prey to the "perils of old and new." Jessica M. Eaglin, *The Perils of "Old" and "New" in Sentencing Reform*, 76 N.Y.U. ANN. SURV. AM. L. 355, 371 (2021) (warning that "[c]ritically engaging with technical reforms through a framework of 'old' and 'new' may obscure the clear choices that law and policymakers are making—choices that beg deeper questions about punishment and society").

93. Eaglin, *supra* note 20, at 772–90 (demonstrating how racial assumptions embedded in society facilitate the expansion of algorithms as criminal legal practice and normalize the production of racial difference in society through law).

94. *See* BRIDGES, *supra* note 5, at 243 (intersectionality requires "identify[ing] the axes that are most relevant to [an] investigation" (emphasis omitted)).

95. *See, e.g.*, Belt, *supra* note 82, at 821–27; Morgan, *supra* note 85, at 700–04; Morgan, *supra* note 83, at 1670–76.

96. *See, e.g.*, Fanna Gamal, *The Private Life of Education*, 75 STAN. L. REV. 1315, 1348–54 (2023).

97. *See, e.g.*, Eaglin, *supra* note 20, at 772–90.

98. *See, e.g.*, Khaled Ali Beydoun, *The New State of Surveillance: Societies of Subjugation*, 79 WASH. & LEE L. REV. 769, 796–806 (2022) (expanding upon racial subordination critiques in law to illuminate the subordinating power of surveillance among marginalized groups around the world).

Though we can think about the constitution of various categories like race or disability in law separately, we will glean a better sense of power at their intersections.[99] The perils of the discourse on "color-blind" and the algorithm in criminal law reveal the impending necessity to engage power differently. An intersectional analysis of race and disability at the juncture of technology and law offers a lens to do so going forward.

I look around my new office in the waning afternoon light. Once again, time passed quickly in conversation with this strange alien. I pause and reflect. It is difficult to explain the interplay between race, technology, and law to an alien. These conversations only underscore how deeply human the production of race and social hierarchy in law really is.

"Earthling, I will leave you now. I sense that you are tired. You have given me much to think about. I always learn something about this place through our conversations. Perhaps I will visit again at some point."

"I hope you will, AJ. Until next time . . ."

With that, AJ disappears. I am alone in my office once again.

I begin to gather my belongings to leave for the day. As I reach for the keys off my desk, I hesitate. On second thought, I grab a pencil instead. Surely, I have time for just a few notes . . .

99. *See* Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 785, 804 (2013) ("[N]ot only do intersectional prisms excavate and expose multilayered structures of power and domination by adopting a grounded praxis approach; they also engage the conditions that shape and influence the interpretive lenses through which knowledge is produced and disseminated.").