Dismantling the Master's Algorithm: Understanding Defense Attorney Use of Algorithmic Recommendation Tools Using N. K. Jemisin's *Red Dirt Witch*

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Across the United States, algorithmic tools are proliferating throughout the criminal legal system, with more than 3,000 jurisdictions in the United States using some sort of predictive technology to determine where police should be deployed, who should be arrested, how long defendants should be detained, whether someone is eligible for parole, and more. While these new technologies promise a more just and equitable society, scholars have shown that they often only reinforce bias and perpetuate systemic harms. This Essay explores how legal advocates find creative ways to use the systems that they oppose to the benefit of their clients. Using N. K. Jemisin's fictional musings, I evaluate the case of pretrial detention hearings in New Jersey criminal courts wherein defendants are assigned a risk score by a pretrial risk assessment tool. Despite the scholarship and experiential knowledge of practitioners that suggest how harmful these risk assessment tools can be for defendants, legal advocates continue to develop legal strategies that subvert these harms. Using N. K. Jemisin's work, I document new strategies that lawyers in the New Jersey context use which prioritize long-term gains even if immediate wins are less available.

Table of Contents

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INTRODUCTION

The appeal of science fiction often takes shape as possibility: the stories animated by creatives provide society with concrete visions of tech-centric futures that society may be able to achieve.[1] While such visions can seem appealing to all, these visions are often articulated by white authors who center the utopias of those in power.[2] In many cases, subordinated groups are forced to live in visions of those in power. One person's utopia can quite easily become another's dystopia.[3] As a subgenre of science fiction, Afrofuturism continues to dabble with themes of possibility, though it is also deeply invested in depicting utopias that center Blackness. Still, one of the central themes of Afrofuturism is the coproduction of utopias and dystopias.

Beyond the fictive, our political life is shaped by these dystopia–utopia pairs of technological futures. Science technology and society scholar Sheila Jasanoff describes these visions as "sociotechnical imaginaries," or the "collectively held, institutionally stabilized, and publicly performed visions of desirable futures, animated by shared understandings of forms of social life and social order [made] attainable through, and supportive of, advances in science and technology."[4] Importantly, she emphasizes that many sociotechnical imaginaries can exist at once and can come into conflict as people hold different visions of a desirable future.[5]

Numerous examples reflect this political tension. In recent memory, the overturning of *Roe v. Wade*,[6] our current immigration enforcement practices,[7] and the

1. Consider examples of flying cars, cell phones, FaceTime, spaceships, etcetera.

2. *See* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 11–14 (2019).

3. The idea that utopias rely upon—or at least coproduce—dystopias is common in Afrofuturist literature and science fiction. From more mainstream texts like Margaret Atwood's *The Handmaid's Tale* and Aldous Huxley's *Brave New World*, to Ursula K. Le Guin's *The Ones Who Walk Away from Omelas* and Octavia E. Butler's *Parable of the Sower*, each of these texts explores what happens when antagonists and protagonists have different visions of what the future should hold. Those forced to live in dystopic realities use the tools at their discretion to build alternative utopic worlds. While some opt out of these dystopic worlds entirely, others stay in dystopic realities to fight for better futures.

4. Sheila Jasanoff, *Future Imperfect: Science, Technology, and the Imaginations of Modernity*, *in* DREAMSCAPES OF MODERNITY: SOCIOTECHNICAL IMAGINARIES AND THE FABRICATION OF POWER 1, 4 (Sheila Jasanoff & Sang-Hyun Kim eds., 2015).

5. *See id.*

6. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

7. *See, e.g.*, Elliot Spagat, *Americans Divided on Immigration and Refugees, New AP Poll Says*, PBS NEWSHOUR (Mar. 7, 2023, 11:15 AM), https://www.pbs.org/newshour/nation/americans-divided-on-immigration-and-refugees-new-ap-poll-says [https://perma.cc/Y8SR-X6HP].

development of tough-on-crime policies[8] all reflect the reality that the American polity is deeply split on what constitutes justice. Regardless of where one stands on these matters, it is difficult to deny the fact that some view these institutions as deeply unjust while others believe that that these policies reflect the best of society.[9] Such debates especially manifest as advances in technology promise more equitable futures. Algorithms used by police,[10] child protective services,[11] medical professionals,[12] welfare workers,[13] and many more promise to distribute state resources[14] more equitably and objectively. Yet critics are deeply skeptical of these promises. Algorithms are trained on biased data that produce biased results, are used inequitably by decisionmakers, and often simply do not work.[15]

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8. *See, e.g.*, Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged.*, N.Y. TIMES (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html.

9. While I choose examples that seem to reflect certain levels of partisanship, it should be noted that the clear lines of distinction between support of these policies and frustration with them rarely manifest in practice. Consider the case of Black Americans living in cities that face high crime rates: while typically construed as liberal in our electoral politics and therefore opposed to mass incarceration, many feel deeply attached to the police state, which in their estimation may provide the only—albeit flawed—protection from a dangerous environment. *See* Vesla Weaver, Gwen Prowse & Spencer Piston, *Withdrawing and Drawing In: Political Discourse in Policed Communities*, 5 J. RACE ETHNICITY & POL. 604, 612 (2020) (observing that "highly policed communities have often responded to police oppression . . . by building power in order to achieve community authority over the police" (emphasis omitted)). Such debates even manifest on the same side of the political spectrum as liberals quarrel with each other about the extent of police reform and conservatives struggle to determine a collective stance on Donald Trump. *See* Reid J. Epstein & John Eligon, *Biden Said, 'Most Cops Are Good.' But Progressives Want Systemic Change.*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2020/08/19/us/politics/democrats-biden-defund-police.html; The Run-Up, *The Anti-Trump Republicans (and the Specter of 2016)*, N.Y. TIMES, at 07:40 (May 11, 2023), https://www.nytimes.com/2023/05/11/podcasts/the-anti-trump-republicans-and-the-specter-of-2016.html. For more on this concept, see generally DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM (2021).

10. *See generally, e.g.*, SARAH BRAYNE, PREDICT AND SURVEIL: DATA, DISCRETION, AND THE FUTURE OF POLICING (2021).

11. *See, e.g.*, VIRGINIA EUBANKS, *The Allegheny Algorithm*, *in* AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 127, 127–73 (2017) (analyzing Allegheny County's use of a child welfare algorithm); Hao-Fei Cheng, Logan Stapleton, Anna Kawakami, Venkatesh Sivaraman, Yanghuidi Cheng, Diana Qing, Adam Perer, Kenneth Holstein, Zhiwei Steven Wu & Haiyi Zhu, *How Child Welfare Workers Reduce Racial Disparities in Algorithmic Decisions*, PROC. 2022 CHI CONF. ON HUM. FACTORS COMPUTING SYS., Apr.–May 2022, at 1, 3; Anna Brown, Alexandra Chouldechova, Emily Putnam-Hornstein, Andrew Tobin & Rhema Vaithianathan, *Toward Algorithmic Accountability in Public Services*, PROC. 2019 CHI CONF. ON HUM. FACTORS COMPUTING SYS., May 2019, at 1, 2.

12. *See, e.g.*, Eileen Guo & Karen Hao, *This Is the Stanford Vaccine Algorithm That Left Out Frontline Doctors*, MIT TECH. REV. (Dec. 21, 2020), https://www.technologyreview.com/2020/12/21/1015303/stanford-vaccine-algorithm/ [https://perma.cc/6D4E-EGWJ].

13. *See, e.g.*, Julia Angwin, *The Seven-Year Struggle to Hold an Out-of-Control Algorithm to Account*, MARKUP: HELLO WORLD (Oct. 8, 2022, 8:00 AM), https://themarkup.org/newsletter/hello-world/the-seven-year-struggle-to-hold-an-out-of-control-algorithm-to-account [https://perma.cc/P78V-Z9RM].

14. Here, "state resources" refers to everything from more commonly conceptualized items such as food and medicine to more obscure "resources" such as bureaucratic energy and punishment.

15. *See generally, e.g.*, 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. ONLINE 15 (2019), https://www.nyulawreview.org/wp-content/uploads/2019/04/

Despite jocular promises to abandon the United States altogether amidst frustrating political outcomes,[16] most Americans—whether by choice or circumstance—rarely imagine that they might walk away from the collective reality. This is especially true of legal professionals who, while they may be deeply frustrated by the institutional environment, have dedicated time, money, and energy to working within it. While total dismissal of our current system is certainly a possibility, it avoids the hard work of the simultaneous creation and destruction inherent in abolition. Rather than abandon the project altogether, those seeking to build a new world must simultaneously dismantle the current system and construct a new one. The question remains, how?

Abolitionists have long supplied an answer. From Douglass's call that "if there is no struggle, there is no progress"[17] to Lorde's famous "the master's tools will never dismantle the master's house"[18] and Davis's call to "dismantle those structures in which racism continues to be embedded,"[19] progress has often been typified as an easy dichotomy between revolutionary change and utter stagnation. Scholars have also cautioned that even practices that look like progress can continue to reinforce deeply unjust systems. Critical Resistance, an abolitionist organization, identifies this tension as the difference between reformist reforms—or those that only further entrench existing inequality under the guise of progress—and abolitionist reforms—or those that truly build the capacity for revolutionary change.[20]

While helpful in the abstract, the distinction between reformist reforms and abolitionist reforms presents a conundrum for those operating within American democracy. While one's own personal politics might push them to vote for, advocate for, and otherwise support abolitionist reforms, others are equally committed to maintaining—or even deepening—the oppression inherent to the status quo. In a majoritarian democratic system, our best-case outcome is often a reformist reform.[21] While important, the question of what the utopic version of

NYULawReview-94-Richardson_etal-FIN.pdf [https://perma.cc/MDA3-VH8K] (critiquing the use of biased data in predictive policing).

16. *See, e.g.*, Jennifer Finney Boylan, Opinion, *Will You Leave the Country If Trump Is Re-Elected?*, N.Y. TIMES (Sept. 30, 2020), https://www.nytimes.com/2020/09/30/opinion/trump-2020-moving-abroad.html; Alexandra Villarreal, *'I Just Want Peace of Mind': Americans Mull Leaving US If Trump Wins Again*, GUARDIAN (Nov. 2, 2020, 2:15 AM), https://www.theguardian.com/us-news/2020/nov/02/us-election-trump-move-abroad-canada-new-zealand [https://perma.cc/24B5-GEBN].

17. Frederick Douglass, Address on West India Emancipation (Aug. 3, 1857) (transcript available at https://www.blackpast.org/african-american-history/1857-frederick-douglass-if-there-no-struggle-there-no-progress/ [https://perma.cc/YV8N-WDN4]).

18. Audre Lorde, The Master's Tools Will Never Dismantle the Master's House, Comments at the Second Sex Conference (Sept. 29, 1979), *in* SISTER OUTSIDER 110, 110 (1984) (alterations omitted).

19. ANGELA Y. DAVIS & EDUARDO MENDIETA, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 29 (2005).

20. *See* CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT (2021), https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitioniststeps_antiexpansion_2021_eng.pdf [https://perma.cc/TWS8-CKQV].

21. Consider, for example, those interested in abolishing student loan debt. While the radical and revolutionary action would be to cancel debt altogether, the more salient political reality is that many are opposed to this vision. Instead, those who seek the abolition of student loan debt are left with policies

the world looks like leaves little direction for those stuck on the ground in somewhat dystopic versions of the current moment.[22]

A more practical question then might be: How can legal advocates who are forced to participate in what can feel like a dystopia use the tools at their disposal to articulate a new future? As an answer, I turn to the teachings of science fiction to complicate the easy dichotomy between reformist reforms and abolitionist reforms. Using the fictional musings of N. K. Jemisin's *Red Dirt Witch*, a story in which the protagonists cannot run away from a dystopic present but instead must stay and fight using the tools at their disposal to achieve a utopic future,[23] I explore how legal practitioners might be able to use the tools at their disposal to advocate for both their clients in the short-term and a more equitable system in the long-term. I evaluate this question by focusing on a case of technological advancement in the criminal legal system—New Jersey's bail reform, which replaced a system of pretrial detentions predicated on cash bail with one dictated by the risk calculated by an algorithm. On its surface, these algorithms were thought of as solutions to the harms posed by cash bail. However, these harms, such as large racial disparities in pretrial detention, high rates of confinement, and long terms of pretrial incarceration, continue to manifest.[24]

This Essay proceeds as follows: First, I describe how Afrofuturism benefits our collective dreaming for better visions with N. K. Jemisin's *Red Dirt Witch* as an example. Next, I describe the New Jersey context and the strategies that lawyers use in court to counteract technological visions of the future developed by the judiciary. Finally, I conclude with reflections on how Jemisin's work should influence our collective imagination around legal strategy.

I. AFROFUTURISM AND TECHNOLOGICAL FUTURES

A. DEFINING AFROFUTURISM

It is worth pausing briefly to define Afrofuturism. As a subfield of science fiction, Afrofuturism is more than just art—it is a global movement which seeks to elicit change and empower African and Afro-diasporic peoples by imagining the worlds we would like to live in through aesthetic tradition. While many definitions of Afrofuturism focus on the past and the future, the process of reimagination is an active task. Under this active definition, Afrofuturism is "a program for recovering the histories of counter-futures created in a century

that help *reduce* debt but do not altogether eliminate it or create the conditions for it to be eliminated. *See* Michael Stratford, *Progressives Worry Biden's New Student Loan Relief Proposal Is Too Small*, POLITICO (Dec. 11, 2023, 8:00 AM), https://www.politico.com/news/2023/12/11/biden-student-loan-relief-proposal-00131016 [https://perma.cc/NR3U-TNFN].

22. This *does not* imply that imagining utopias is a useless practice. Instead, imagining utopias is quite integral to the project of creating them, for it is impossible to strive to build a world that one has not first articulated. Instead, this Essay suggests that a useful next step after one imagines utopias might be developing a set of practices that help achieve that utopic vision, even when that utopia does not yet exist.

23. N. K. JEMISIN, *Red Dirt Witch*, *in* HOW LONG 'TIL BLACK FUTURE MONTH? 34, 34–57 (2018).

24. *See infra* Section II.B.

hostile to Afro-diasporic projection and as a space within which the critical work of manufacturing tools capable of intervention within the current political dispensation may be undertaken."[25] In its active grammar, Afrofuturism is deeply concerned with manifesting these desirable futures.

While many stories in the Afrofuturist traditions are shaped by the dystopia–utopia pairs, the benefit of Afrofuturism is the approach that the main characters take to dealing with the problems they face. In a manifestation of real-world debates about how best to achieve change, some Afrofuturist characters abandon the system,[26] while others stay and fight,[27] others work to integrate the current system,[28] and others still develop new worlds entirely.[29]

As a result, Afrofuturist texts are an excellent reflection on the relationship between reformist reforms and abolitionist reforms. These stories reflect modern debates about reform and abolition: Does one burn the system to the ground, or work to change it incrementally?

Legal scholars especially might creatively and effectively borrow from Afrofuturism to understand practical paths forward. The orientation of these characters toward the best method of change is a direct reflection of tensions that lawyers can experience: Does one choose to participate in the system, or does one choose to walk away? As situated actors deeply invested in a system,[30] lawyers can draw from Afrofuturism to provide examples of what to do.

This work considers itself an addition to a small but growing group of "Afrofuturist legal scholarship" that continues to grapple with these questions.[31] It recognizes that Afrofuturism can seep into even our most traditional, venerable, and institutionalized spaces. Its references are nontraditionally aesthetic, concerned with race, and interested in constructing worlds that better suit the needs of all, but particularly minoritized individuals.

B. N. K. JEMISIN'S AFROFUTURISM

N. K. Jemisin's work provides particularly poignant lessons for lawyers who, while invested in a system, may be deeply frustrated by it. As a direct response to many canonical texts,[32] Jemisin's work does more than simply imagining a better world or describing those who chose alternatives to dystopias. Instead, many of Jemisin's short stories begin in dystopic places and follow characters as they navigate these worlds to some conclusion.[33] Even if that conclusion is neither

25. Kodwo Eshun, *Further Considerations on Afrofuturism*, 3 CR 287, 301 (2003).

26. *See generally, e.g.*, URSULA K. LE GUIN, THE ONES WHO WALK AWAY FROM OMELAS (1973).

27. *See generally, e.g.*, N. K. JEMISIN, *The Ones Who Stay and Fight*, *in* HOW LONG 'TIL BLACK FUTURE MONTH?, *supra* note 23, at 1, 1–13.

28. *See generally, e.g.*, OCTAVIA E. BUTLER, FLEDGLING (2005).

29. *See generally, e.g.*, OCTAVIA E. BUTLER, PARABLE OF THE SOWER (1993).

30. *See* Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1880 (2019). Consider also this dilemma through the lens of critical race theory.

31. Capers, *supra* note 2, at 4. *See generally* Eshun, *supra* note 25.

32. Consider, for example, Jemisin's *The Ones Who Stay and Fight* as a direct response to Le Guin's *The Ones Who Walk Away from Omelas*. *Compare* JEMISIN, *supra* note 27, *with* LE GUIN, *supra* note 26.

33. *See generally* HOW LONG 'TIL BLACK FUTURE MONTH?, *supra* note 23.

revolutionary nor exultant, there is beauty in the seemingly small wins that many of her characters experience. In so doing, much of the author's work adheres more closely to the reformist tradition rather than a revolutionary one. Still, though, these "reforms" are not reformist in nature; instead, her characters calculate each trade-off and use the tools at their disposal to advance justice.[34] Even if their actions are not radical enough to produce the desired futures in their own lifetimes, such acts build the capacity for liberation in the future.

For lawyers interested in the "radical pragmatism"[35] that lawyering requires when one seeks to change a system from within, Jemisin's *Red Dirt Witch* is a particularly useful example of how Afrofuturism can inform legal practice. The fictive narrative follows a mother and daughter duo, Emmaline and Pauline, as they attempt to secure the future of landmark civil rights milestones like *Brown v. Board of Education*,[36] *Loving v. Virginia*,[37] and the election of the first Black president.[38] Importantly, while the family is able to achieve such futures with their actions, it is only in the face of seemingly small wins and surface-level losses.[39]

Set in a fictive antebellum Southern town, the story opens with a description of Emmaline and Pauline as well-known prophetic dreamers.[40] As such, they have guessed for months that "the White Lady" would visit them.[41] When she does, she requests ownership of Pauline in exchange for the future security of not only the rest of their family, but also racial progress.[42] Emmaline, not wanting to give up her daughter under any circumstances, declines, but Pauline, recognizing the importance of the future even if she must sacrifice herself, agrees to the White Lady's request and sneaks out of her house to complete the deal.[43] When Emmaline notices, she runs in search of her daughter.[44] When she finds her, she must fight for Pauline's freedom in a dream battleground.[45] Here, the dreams of each of the characters clash: Emmaline's dream for the security of her daughter and Pauline's desire to secure the future safety of Black people bump up against the White Lady's vision of indefinite Black servitude.[46] This clash produces a

34. *See* CRITICAL RESISTANCE, *supra* note 20.

35. *See* Daniel Farbman, *A Commons in the Master's House*, 90 FORDHAM L. REV. 2061, 2084 (2022) ("'[R]adical pragmatism' . . . requires the institutional actors to be in active and integrated relationships with movement actors and to seize the opportunities to open a commons when they appear at the cracks and joints of their institutional practice.").

36. 347 U.S. 483 (1954).

37. 388 U.S. 1 (1967).

38. *See generally* JEMISIN, *supra* note 23, at 34–57.

39. *See generally id.*

40. *Id.* at 34.

41. *Id.*

42. *See id.* at 47, 52–53.

43. *Id.* at 50–51.

44. *Id.* at 50.

45. *Id.* at 51–52.

46. *Id.* at 52–53.

dream battleground, wherein each character is able to access folkloric weapons to fight for their desired vision of the future.[47]

When Emmaline struggles to access her own folkloric weapons—rosemary, sage, and fig—from the depths of her dreams, Pauline intervenes to provide the resources.[48] While admirable, the fight only partially defeats the White Lady: while she will still require ownership of one dreamer, she will let Emmaline choose between herself and her daughter.[49] Ultimately, Emmaline takes the place of Pauline, serving the White Lady in exchange for the safety of her children and the Black race over time.[50] While Emmaline and Pauline did not have the full capacity to thwart the White Lady, they did assert their own power within her dream in ways that secured an abolitionist future, even if the win in the present was far more incremental.

Jemisin's fictional musings reveal that in order to achieve large-scale wins, changemakers often must participate in systems that they find deeply unjust. Still, participating in such systems, when done in the right way, can produce benefits that extend far beyond the immediate present and well into the future. Practically speaking, I use this framework to examine how legal practitioners, forced to operate in a world where the use of technological risk assessment tools is mandated, subvert these technologies to continue building better futures for their clients.

II. EMPIRICAL CONTEXT

Historically speaking, the use of risk assessment tools occurs at a time when data-driven population management and risk mitigation are occurring in nearly every aspect of social life from work to education to health care. State agencies at all levels have started using privately created technologies[51] to distribute medical supplies,[52] unemployment insurance,[53] bureaucratic energy for child protective services,[54] and much more. Today, the closest estimate we have of government use of algorithms comes from a federal report that states that 64 of the largest 142

47. *Id.*

48. *Id.* at 54–55.

49. *Id.* at 55.

50. *Id.* at 56.

51. While beyond the scope of this Essay, the fact that these algorithms are privately created also generates a set of legal and ethical concerns: many private companies enjoy intellectual property protections over algorithms such that even the government agencies that use them are unable to evaluate the variables that animate the technologies. As a result, many Americans are subject to life-changing decisions that are automated by technologies that we do not fully understand. For more on this topic, see SURVEILLANCE RESISTANCE LAB, https://surveillanceresistancelab.org/ [https://perma.cc/5MTE-HVN4] (last visited June 10, 2024).

52. *See, e.g.*, Ziad Obermeyer, Brian Powers, Christine Vogeli & Sendhil Mullainathan, *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCIENCE 447, 447 (2019).

53. *See, e.g.*, Robert N. Charette, *Michigan's MiDAS Unemployment System: Algorithm Alchemy Created Lead, Not Gold*, IEEE SPECTRUM (Jan. 24, 2018), https://spectrum.ieee.org/michigans-midas-unemployment-system-algorithm-alchemy-that-created-lead-not-gold [https://perma.cc/R6RH-7QU7].

54. *See, e.g.*, Sally Ho & Garance Burke, *How an Algorithm That Screens for Child Neglect Could Harden Racial Disparities*, PBS NEWSHOUR (Apr. 29, 2022, 2:48 PM), https://www.pbs.org/newshour/nation/how-an-algorithm-that-screens-for-child-neglect-could-harden-racial-disparities [https://perma.

federal agencies have expressed explicit interest in or have begun using data-driven technologies.[55] Still, this number only accounts for federal agencies; local and state government agencies *also* use a variety of technologies to perform government functions.[56] While many scholars have argued that data about a population have been fundamental to state power throughout history,[57] more contemporary work examines how large-scale data shift how the state, its subjects, and populations are defined.[58]

Despite the debate about whether data-driven technologies can make government more[59] or less[60] equitable, scholarship and journalism alike have documented that many of these technologies reinforce existing inequality by automating already-biased state processes.[61] State use of data-driven technology has already

cc/S24M-A26R]. *See generally* EUBANKS, *supra* note 11 (discussing Allegheny County's use of a child welfare algorithm).

55. *See* DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE M. SHARKEY & MARIANO-FLORENTINO CUÉLLAR, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 6, 16 (2020), https://www.acus.gov/sites/default/files/documents/Government%20by%20Algorithm.pdf [https://perma.cc/AEB6-5Q79].

56. *See id.* at 30.

57. *See* Pierre Bourdieu, *Rethinking the State: Genesis and Structure of the Bureaucratic Field*, 12 SOCIO. THEORY 1, 4 (trans. Loïc J. D. Wacquant & Samar Farage, 1994) ("The state is the *culmination of a process of concentration of different species of capital*: capital of physical force or instruments of coercion (army, police), economic capital, cultural or (better) *informational* capital, and symbolic capital." (second emphasis added)); SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 94 (2015) ("By making blackness visible as commodity and therefore sellable, branding was a dehumanizing process of classifying people into groupings, producing new racial identities that were tied to a system of exploitation.").

58. *See* Fleur Johns, *Governance by Data*, 17 ANN. REV. L. & SOC. SCI. 53 (2021), for a description of the ways in which governmentality is premised on the subjectification of citizens and residents, which has primarily been accomplished through statistical methods. Prior to algorithms, governments a priori assigned categories upon which they used statistical tools to define populations. *See id.* at 59. While algorithmic methods are a subset of statistical methods, they differ in that algorithms—and especially machine learning and artificially intelligent systems—generate relationships and patterns in data rather than being imposed by the government. *See id.*

> Faced with the outputs of a statistical model (either directly or by their expression in law and policy), social and legal subjects may plot themselves or be plotted against available categories and values and understand more or less how those were generated. Statistics generates interpretable normalities that may inform conduct and judgment . . . . Data science constitutes categories and rankings of subjectivity too, of course, but not in ways that conform readily to received accounts of subjectification.

Id.

59. *See* Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass R. Sunstein, *Discrimination in the Age of Algorithms*, 10 J. LEGAL ANALYSIS 113, 114 (2018).

60. *See, e.g.*, Alex Albright, If You Give a Judge a Risk Score: Evidence from Kentucky Bail Decisions 3 (2019) (working paper), https://thelittledataset.com/about_files/albright_judge_score.pdf [https://perma.cc/C8L8-MEKN]. *See generally* RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE (2019); BRAYNE, *supra* note 10; Sarah Brayne & Angèle Christin, *Technologies of Crime Prediction: The Reception of Algorithms in Policing and Criminal Courts*, 68 SOC. PROBS. 608 (2021); Jenny L. Davis, Apryl Williams & Michael W. Yang, *Algorithmic Reparation*, BIG DATA & SOC'Y, July–Dec. 2021, at 1.

61. Examples of such scholarship abound and are growing. For a few canonical references, see BENJAMIN, *supra* note 60; BRAYNE, *supra* note 10; CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION:

caused significant harms: residents of the United States have been wrongfully flagged for unemployment insurance fraud,[62] have been passed over for lifesaving healthcare resources,[63] have been denied parole,[64] and—in at least one particularly pernicious instance—have been arrested and detained due to faulty data-driven technologies.[65] Most who have experienced harms caused by these technologies have yet to receive remuneration as the legal community debates who should be held responsible for technological flaws.[66]

The criminal justice system is no different. Various technologies have been adopted[67] throughout the criminal legal system to automate processes in the hopes that using seemingly objective metrics to automate decisions will make such processes fairer. The proliferation of these technologies has prompted a new wave of scholarship on the impact of these tools. In these studies, much attention has been given to *lone* street-level bureaucrats like judges or police officers who often have ultimate decisionmaking authority and who utilize these tools to help make those decisions.[68] However, focusing on a single individual inadequately captures how these tools work in practice, especially in courtrooms. Instead of one individual working with a tool, it is often the case that *many* individuals create, use, and debate these tools in ways that influence the ultimate decisionmaker.

HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html; SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018).

62. *See* Charette, *supra* note 53.

63. *See* Heidi Ledford, *Millions Affected by Racial Bias in Health-Care Algorithm*, 574 NATURE 608, 608 (2019).

64. *See* Rebecca Wexler, *Code of Silence*, WASH. MONTHLY (June 11, 2017), https://washingtonmonthly.com/2017/06/11/code-of-silence/ [https://perma.cc/PS2E-YU7R].

65. *See* Hill, *supra* note 61.

66. *See, e.g.*, Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 99–107 (2019); Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1351 (2018).

67. Algorithms have been adopted at all stages of the criminal legal system. At the level of policing, departments across the country have secured predictive policing technologies like Palantir, license plate readers, gang databases, facial recognition technologies and more. *See, e.g.*, BRAYNE, *supra* note 10, at 111; Cierra Robson, *Broken Mirrors: Surveillance in Oakland as Both Reflection and Refraction of California's Carceral State*, *in* ABSTRACTIONS AND EMBODIMENTS: NEW HISTORIES OF COMPUTING AND SOCIETY 360, 370 (Janet Abbate & Stephanie Dick eds., 2022). At the pretrial stage, numerous jurisdictions rely on algorithmic recommendations to determine who will be released from pretrial detention. *See, e.g.*, *National Landscape*, MAPPING PRETRIAL INJUSTICE, https://pretrialrisk.com/national-landscape/ [https://perma.cc/J8N5-9SDJ] (last visited June 10, 2024). At the trial stage, courtrooms across the country regularly rely on evidence garnered from predictive systems both prior to and as a result of arrest. *See, e.g.*, *Data Library*, ELEC. FRONTIER FOUND.: ATLAS OF SURVEILLANCE, https://atlasofsurveillance.org/library [https://perma.cc/VR44-6VBZ] (last visited June 10, 2024). At the sentencing and parole stage, judges and parole boards use algorithms to predict a defendant's likelihood of recidivism. *See generally, e.g.*, Mona Lynch, *The Narrative of the Number: Quantification in Criminal Court*, 44 LAW & SOC. INQUIRY 31 (2019). For an incomplete list of jurisdictions using algorithmic and surveillance technologies and at what stages, see ELEC. FRONTIER FOUND., *supra*.

68. Such explorations have even gone beyond the criminal legal system to explore teachers, child welfare workers, and more. *See, e.g.*, Kenneth Holstein & Vincent Aleven, *Designing for Human–AI Complementarity in K-12 Education*, 43 AI MAG. 239, 244 (2022); Cheng et al., *supra* note 11, at 3.

Focusing on the ultimate decisionmaker alone disregards much of the science of decisionmaking, which argues that decisions are almost always influenced by our networks.[69] Instead, this Essay takes seriously the fact that judges in an adversarial legal system *must* consider the arguments of both the state and defense, many of which surround the use of the algorithm in this context.

A. WHY PRETRIAL?

There are several different reasons why focusing on the pretrial system makes an important case for society, and an especially good analytical case for understanding meaning-making and resistance amidst unsavory technological circumstances. Practically speaking, jurisdictions in all but four states are experimenting with innovations around pretrial risk assessment tools so that they can think through solutions to inequality in pretrial detention shaped by a defendant's ability to pay cash bail.[70] Across most of the country and for most of history, a system of monetary bail has existed in which a defendant was held in jail until their trial unless they could afford a seemingly arbitrary amount of cash bail.[71] As a part of the system of monetary sanctions, bail puts defendants in debt in ways that increase their contact with the criminal legal system in the long run and negatively impact life chances across several domains.[72]

More than the financial setbacks caused by having to pay bail, the harms of pretrial incarceration are vast: individuals detained pretrial have a lower chance of trial success later, have greater sentences, and suffer financial, employment, and familial setbacks.[73] This solution has been the subject of much political debate, such as in the case of Allegheny County, Pennsylvania, in which community members and stakeholders lobbied to change the inputs of a pretrial algorithm.[74]

This stage of the criminal legal system has received such attention because the harms are particularly pronounced: at this stage in the criminal legal process, all

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69. *See, e.g.*, Gabriel Abend, *Outline of a Sociology of Decisionism*, 69 BRIT. J. SOCIO. 237, 245 (2018); Elizabeth Bruch, Ross A. Hammond & Peter M. Todd, *Coevolution of Decision-Making and Social Environments*, *in* EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES 1, 2 (Robert Scott & Stephen Kosslyn eds., 2015).

70. *See* MAPPING PRETRIAL INJUSTICE, *supra* note 67.

71. *See* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 716–17 (2019).

72. *See* SANDRA SUSAN SMITH, PRETRIAL DETENTION, PRETRIAL RELEASE, & PUBLIC SAFETY 6, 8 (2022), https://craftmediabucket.s3.amazonaws.com/uploads/AVCJIReport_PretrialDetentionPretrialReleasePublicSafety_Smith_v3-1.pdf [https://perma.cc/TFG3-ABQK]; *see also* Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 716 (2022) (observing that pretrial detention practices "reflect[] an implicit discounting of the value of detainees' well-being relative to the well-being of potential crime victims").

73. *See* SMITH, *supra* note 72, at 6–8.

74. *See* Dasha Pruss, *Ghosting the Machine: Judicial Resistance to a Recidivism Risk Assessment Instrument*, PROC. 2023 ACM CONF. ON FAIRNESS, ACCOUNTABILITY, & TRANSPARENCY, June 2023, at 312, 314, for more on this particular case.

defendants are innocent.[75] Therefore, they are constitutionally protected from punishment.[76] Still, research has shown that the pretrial stage is uniquely punitive: even just one day in jail can negatively impact an individual's life and case outcomes.[77] Focusing on how pretrial detention decisions are made may help reveal inadequacies in our criminal legal system from which defendants are constitutionally protected.

B. NEW JERSEY'S CRIMINAL JUSTICE REFORM ACT

In response to the concerns surrounding cash bail, New Jersey undertook a massive reorganization of the pretrial system called the Criminal Justice Reform Act (CJRA) in 2017.[78] This Section details the circumstances that led to the adoption of the CJRA in New Jersey, the key features of the bill, and the import of the New Jersey context.

New Jersey's CJRA was prompted by the state's abysmally high rates and lengths of pretrial incarceration. In 2012, New Jersey's state jails operated as what some have called "debtor's prisons": of those held in New Jersey prisons, nearly 75% had not yet been sentenced and nearly 40% of those held in detention had an option to post bail but could not afford to do so.[79] Moreover, about 12% of the jail population was held because of an inability to pay $2,500 or less.[80] Most of those who were detained were not accused of a violent offense; instead, over 50% of the pretrial population was arrested for charges such as theft, drug charges, and traffic violations.[81] Not only were defendants detained due to an inability to pay, they were also detained for extremely long periods of time while they awaited their trials: on average, defendants in New Jersey county jail spent *314 days in there without being found guilty*.[82] These delays made it exceedingly difficult to prepare for a case and avoid taking a plea deal.[83]

While several features of the pretrial system prompted such rates of incarceration, one of the most important was the institutional and bureaucratic environment

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75. *See* Bell v. Wolfish, 441 U.S. 520, 536 (1979) (observing that "[a] person lawfully committed to pretrial detention has not been adjudged guilty of any crime").

76. *Id.* at 535 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

77. *See* SMITH, *supra* note 72, at 5.

78. N.J. STAT. ANN. §§ 2A:162-15 to -25 (effective Jan. 1, 2017).

79. MARIE VANNOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION 11, 13 (2013), https://www.criminallegalnews.org/media/publications/new_jersey_jail_population_analysis_march_2013.pdf [https://perma.cc/5YBA-B9QY]. For more on debtor's prisons, see Thomas Hanna, *The Facts on New Jersey Bail Reform*, ARNOLD VENTURES (Mar. 1, 2023), https://www.arnoldventures.org/stories/the-facts-on-new-jersey-bail-reform [https://perma.cc/6WZN-SV9G].

80. VANNOSTRAND, *supra* note 79, at 13.

81. *Id.* at 12.

82. *Id.* at 14.

83. *See* Dillon Reisman, *How New Jersey Used an Algorithm to Drastically Reduce Its Jail Population – and Why It Might Not Be the Right Tool for the Job*, ACLU N.J. (Aug. 30, 2022, 9:30 AM), https://www.aclu-nj.org/en/news/how-new-jersey-used-algorithm-drastically-reduce-its-jail-population-and-why-it-might-not-be [https://perma.cc/F33G-U98M].

itself. Prior to the CJRA, an individual could take one of two paths after arrest. First, the police department could release a defendant on a summons and tell them to return to court at a later date.[84] Second, the police could hold a defendant in custody on a warrant.[85] Those who were held on a warrant would participate in a bail hearing where a judge would set an amount of cash bail.[86] If the individual could pay this bail (or 10% of it to a bail bondsman), they would be released until their court date.[87] Those who were unable to make bail were detained until their court date.[88] Prior to the CJRA, judges could only consider risk of flight in their determination of cash bail.[89] Further, the law mandated that prosecutors quickly charge a defendant to ensure that those detained pretrial—and presumed innocent—did not spend an inordinate amount of time incarcerated.[90] Yet judges often disingenuously used risk of flight as a reason for detention, and there was no set mandated time by which prosecutors needed to charge a defendant.[91] As a result, thousands of individuals were held pretrial for inordinately long periods of time—often on petty or nonviolent offenses—simply because they could not pay their bail.[92]

As a result of this egregious record, a bipartisan coalition of legal professionals, politicians, activists, and community members pushed forward a sweeping set of bail reforms with a lofty goal: Nearly eliminate cash bail in the state.[93] In 2017, the state implemented the CJRA, which sought to dramatically reform the system of monetary bail.[94]

New Jersey's institutional environment is specific, but rather ordinary. Even still, the state is often heralded as a leader in the pretrial space by other states, the

84. Nat'l Ass'n of Crim. Def. Laws., *New Jersey Pre-Trial Reform: Nuts and Bolts [NACDL WEBINAR]*, YOUTUBE, at 16:02 (Dec. 12, 2018), https://www.youtube.com/watch?v=QOSOC441bis.

85. *Id.* at 16:21.

86. *Id.* at 02:21.

87. *Id.* at 00:56.

88. *Id.* at 05:03.

89. *Id.* at 02:52.

90. *Id.* at 03:42.

91. *Id.* at 03:48.

92. *Id.* at 03:53.

93. *See* ARNOLD VENTURES, NEW JERSEY BAIL REFORM FACT SHEET 1 (2023), https://craftmediabucket.s3.amazonaws.com/uploads/AV-New-Jersey-Bail-Reform-Fact-Sheet.pdf [https://perma.cc/T9FP-VCYH]; Matt Friedman & Joseph Spector, *New Jersey Overhauled Its Bail System Under Christie. Now Some Democrats Want to Roll It Back.*, POLITICO (Dec. 11, 2022, 7:00 AM), https://www.politico.com/news/2022/12/11/new-jersey-bail-system-roll-back-00072781 [https://perma.cc/UG6E-T4FK].

94. N.J. STAT. ANN. §§ 2A:162-15 to -25 (effective Jan. 1, 2017). It should be noted that New Jersey did not *completely* eliminate cash bail. Instead, they eliminated the *constitutional right* to cash bail in the state, and instead opted to detain defendants on the "least restrictive condition or combination of conditions that . . . will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct . . . the criminal justice process." *Id.* § 2A:162-16(b)(2)(b). That said, cash bail is *still* an option available to a judge, though it is quite rarely used in the current context. According to a report on the new law, New Jersey reported using cash bail for defendants covered by the Criminal Justice Reform Act in only forty-four cases. GLENN A. GRANT, N.J. CTS., 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 4, https://www.njcourts.gov/sites/default/files/2017cjrannual.pdf [https://perma.cc/EFL4-5PAE].

Arnold Foundation, and the National Association of Criminal Defense Lawyers because of its ability to dramatically reduce its pretrial jail population.[95] Until recently, the CJRA has been deemed so successful that other jurisdictions in the United States have begun implementing changes to their pretrial systems based on the New Jersey example.[96] This implies that while findings in New Jersey are not strictly generalizable to all courtrooms across the country, they will be important for understanding the future landscape of pretrial risk assessment in the United States. The remaining parts of this Essay describe the key features of the CJRA, before turning to the strategies that lawyers use to advance their goals amidst a requirement that they use a tool which often harms racialized defendants.

III. KEY PROVISIONS OF THE CRIMINAL JUSTICE REFORM ACT

Among other things, the statute radically reorganized the system of pretrial detention in the state such that: (1) nonmonetary alternatives to pretrial incarceration were prioritized;[97] (2) detention would be presumed only for certain violent offenses;[98] and (3) cash bail could be used only "to reasonably assure the eligible defendant's appearance."[99] To accomplish these goals, the legislature mandated that judges statewide consider a pretrial risk assessment tool alongside other factors to determine the conditions of an individual's release.[100]

While the judiciary and legislature[101] maintain that the risk assessment tool is only one piece of the CJRA, its adoption reorganized the pretrial process around the risk assessment tool. Today, after an individual is arrested, a preliminary risk

95. *See, e.g.*, John Arnold & Laura Arnold, Opinion, *On Bail Reform, New York Should Look to New Jersey*, WALL ST. J. (Feb. 12, 2023, 3:10 PM), https://www.wsj.com/articles/on-bail-reform-new-york-should-look-to-new-jersey-crime-shooting-violence-public-saftey-jail-45d9a6c1; ALEXANDER SHALOM, COLETTE TVEDT, JOSEPH E. KRAKORA & DIANE DEPIETROPAOLO PRICE, ACLU N.J., NAT'L ASS'N CRIM. DEF. LAWS. & N.J. OFF. OF THE PUB. DEF., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 6 (2016), https://www.nacdl.org/getattachment/50e0c53b-6641-4a79-8b49-c733def39e37/the-new-jersey-pretrial-justice-manual.pdf [https://perma.cc/BBN8-Z4UD] (praising the "groundbreaking pretrial justice and speedy trial legislation" that New Jersey adopted).

96. New Jersey routinely serves as an example for other jurisdictions. States like Illinois and New York have been encouraged to reference New Jersey's context in their own criminal justice reform policies. *See* Christopher Porrino & Elie Honig, Commentary, *Illinois Bail Reformers: New Jersey's Model Works, Plain and Simple*., CHI. TRIB. (Feb. 14, 2020, 11:52 PM), https://www.chicagotribune.com/2020/02/14/commentary-illinois-bail-reformers-new-jerseys-model-works-plain-and-simple/; Stephanie DiCapua Getman, *What New Jersey Got Right*, ARNOLD VENTURES (Feb. 17, 2023), https://www.arnoldventures.org/newsletter/what-new-jersey-got-right [https://perma.cc/S7EK-6J22]. Such support for the law has dwindled on both sides of the aisle, and Republicans and moderate Democrats insist on lengthening the list of crimes that trigger preventive detention. *See* Friedman & Spector, *supra* note 93. On the other hand, more liberal democrats in the state continue to critique the proposed revisions to the law for not being liberal enough. *See id.*

97. N.J. STAT. ANN. § 2A:162-17(b)(2).

98. *Id.* § 2A:162-18(b).

99. *Id.* § 2A:162-17(c)(1).

100. *Id.* § 2A:162-17(a).

101. *See generally* Cierra Robson, Risk Roulette: How Lawyers Make Pretrial Risk Assessment Tools Matter in Criminal Court (2024) (Ph.D. dissertation, Harvard University) (on file with author).

assessment is sent to the prosecutor's office, which helps them make a recommendation of who should be released on a summons and who should be detained on a warrant.[102] Those held on a warrant are held in jail until an official pretrial risk assessment can be conducted by the county's Pretrial Services Program.[103] The law mandates that the assessment be conducted within forty-eight hours of arrest.[104] That risk assessment score is then used by both defense attorneys and prosecutors in an adversarial hearing to consider a defendant's detention.[105] Finally, a judge must consider the risk assessment score before making a detention decision.[106]

The state uses the Public Safety Assessment (PSA), an algorithm created by the Laura and John Arnold Foundation (now Arnold Ventures), to calculate a three-part score detailing a defendant's risk of failure to appear (FTA), new criminal activity (NCA), and new violent criminal activity (NVCA).[107] These scores correlate to the Decision Making Framework (DMF), a set of policy priorities which specify which conditions of release are recommended for different combinations of PSA scores.[108] Once a risk assessment score is generated, the defendant appears before a judge for their first appearance and a detention hearing, in which the prosecutor and defense attorney present evidence for or against the defendant's detention. During the hearing, the judge considers: (1) the recommendations of the PSA; (2) the weight of the evidence presented by the prosecutor; (3) the arguments of the defense attorney; and (4) the history and characteristics of the defendant, before determining the conditions of an individual's release.[109]

Practically speaking, the PSA is a point system that assigns values to various defendant characteristics. The PSA uses nine factors to calculate a three-part score including: age at current arrest; whether the charge is of a violent nature; whether there were any pending charges at the time of arrest; whether there were

102. CHRISTOPHER S. PORRINO, N.J. OFF. OF THE ATT'Y GEN., ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2016-6, DIRECTIVE ESTABLISHING INTERIM POLICIES, PRACTICES, AND PROCEDURES TO IMPLEMENT CRIMINAL JUSTICE REFORM PURSUANT TO P.L. 2014, C. 31, at 27 (2016), https://www.nj.gov/lps/dcj/agguide/directives/2016-6_Law-Enforcement.pdf [https://perma.cc/3NDQ-ZBAG].

103. N.J. STAT. ANN. § 2A:162-16(a).

104. *Id.* § 2A:162-16(b)(1).

105. *See id.* § 2A:162-19.

106. *Id.* § 2A:162-16(b)(1). While it is generally quite difficult to challenge judicial decisions under the deferential abuse-of-discretion standard of review on appeal, both prosecutors and defense attorneys seeking appeals at this stage regularly use the risk assessment score as a basis upon which to challenge an unfavorable ruling. *See* SHALOM ET AL., *supra* note 95, at 44; *see also* Robson, *supra* note 101, at 7 (interviewing public defenders who have used the risk assessment score as a basis for appeal).

107. SHALOM ET AL., *supra* note 95, at 7.

108. *Id.* at 10–11; *see infra* Figure 2.

109. *See* N.J. STAT. ANN. § 2A:162-20. In most cases, there is a presumption of release, which means that it is assumed that the defendant will be released pretrial unless the state can provide sufficient evidence to suggest that the defendant would be a danger to the community or a flight risk. *Id.* § 2A:162-17(a). In any case in which the defendant is charged with a crime for which there is a mandatory minimum life sentence such as murder or rape, there is a presumption of detention, which implies that the burden of proof shifts toward the defense. *Id.* § 2A:162-19. In these instances, the individual is detained regardless of their risk assessment scores and personal history unless the defense is able to present evidence that they will *not* be a danger to the community or a flight risk. *Id.*

any prior misdemeanor convictions; whether there were any prior felony convictions; whether there were any violent convictions; whether there were any failures to appear in the last two years; whether there were any failures to appear older than two years; and whether the individual served a prior sentence prior of incarceration.[110] These factors are used in various combinations to predict a risk score for three pretrial outcomes: a risk of FTA; a risk of NCA; and a risk of NVCA.[111]

For example, if a defendant has pending charges, their "Pending Charge Prior to Arrest" factor will be counted as one point on the FTA outcome, three points on the NCA outcome, and one point on the NVCA outcome. These point totals are then converted to a six-point FTA scale, a six-point NCA scale, and a binary NVCA flag.[112] The lower the score, the less likely an individual is to experience a given pretrial outcome.

In addition to these scores, each jurisdiction using the PSA creates a DMF to match scores to release conditions.[113] While the PSA point values are assigned by Arnold Ventures and are the same across states, these release–condition matrices are a matter of policy and therefore reflect jurisdictional variations in criminal law.[114] As a result, an individual with the same PSA score in two different states could have two radically different detention decisions.[115]

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110. SHALOM ET AL., *supra* note 95, at 8. There are a few items that are notably missing from the calculation of these risk scores, including but not limited to a defendant's criminal history outside of the state, the defendant's criminal history at the federal level, and the defendant's juvenile record. *See id.* at 8, 11. The absence of these factors is one clear example of the importance of attorneys in the context of pretrial risk assessment. While these factors are not calculated into the risk assessment score, lawyers may use this information to argue for the relative inaccuracy of score. These factors may be considered in the pretrial hearing but must be brought into evidence before doing so. *See id.* at 42. Therefore, if a prosecutor would like to argue that an individual has a more extensive criminal history than the PSA suggests, the burden lies on their office to first research the defendant.

111. SHALOM ET AL., *supra* note 95, at 7.

112. *See* SHALOM ET AL., *supra* note 95, at 7.

113. For the New Jersey Matrix, see N.J. CTS., PRETRIAL RELEASE RECOMMENDATION DECISION MAKING FRAMEWORK (DMF) 5 (2022), https://www.njcourts.gov/sites/default/files/decmakframwork.pdf [https://perma.cc/J23Q-CME7].

114. See *Where the PSA Is Used*, ADVANCING PRETRIAL POL'Y & RSCH., https://advancingpretrial.org/psa/psa-map/ [https://perma.cc/UC7T-NU6L] (last visited July 10, 2024); Diana Dabruzzo, New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In., ARNOLD VENTURES (Nov. 14, 2019), https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in [https://perma.cc/P2EV-SQNR]. Arnold Ventures provides a set of best practices to jurisdictions regarding the development of their decisionmaking framework. Among other things, much variation between jurisdictions is shaped by their application of preventive detention—or the set of charges for which there is an automatic presumption of detention regardless of a defendant's risk score. In New Jersey, for example, all aggravated charges and those that carry a gun charge result in an automatic presumption of detention—even if the risk assessment score is the lowest possible. *See* N.J. STAT. ANN. § 2A:162-19. Other jurisdictions may simply consider gun charges and other violent crimes as they would all other charges.

115. Today, the PSA is used in "[h]undreds of localities" across the country. ADVANCING PRETRIAL POL'Y & RSCH., *supra* note 114. Four states mandate the use of the tool statewide (New Jersey, Kentucky, Arizona and Utah), while other states use the PSA on a county-by-county basis. *See id.* The PSA is not the only such risk assessment tool. Across the United States, nearly every state has at least one jurisdiction that uses a pretrial risk assessment tool. MAPPING PRETRIAL INJUSTICE, *supra* note 67.

Pretrial Services uses the DMF to recommend various conditions of release for defendants with different NCA and FTA scores.[116] Note that charges of murder or charges that carry a life sentence are precluded from the use of the DMF matrix because there is an automatic presumption of detention.[117] If an individual scores a 1-1 on the PSA, but has been arrested on a murder charge, the presumption is that they will be detained pretrial even though their PSA recommends that they be released on their own recognizance.

TABLE 1. DMF RECOMMENDATION DEFINITIONS[118]

Term	Definition
Released on Own recognizance (ROR)	No conditions of release
Pretrial Monitoring Level (PML) I	Phone reporting once per month
PML II	Phone reporting once per month and in-person reporting once per month (alternating methods of check-in every 2 weeks)
PML III	Weekly reporting, alternating in-person and telephone check-ins
PML III PLUS	Same as Level III with added electronic monitoring
No Release Recommended	Pretrial detention

While the judiciary remains silent on how judges are trained to use the tool,[119] the National Association of Criminal Defense Lawyers (NACDL), the New Jersey American Civil Liberties Union (ACLU), and the New Jersey Office of the

Additionally, risk assessment is not limited to the pretrial space. Instead, risk assessment tools have been implemented at *every* stage of the criminal legal process including policing, pretrial detention, jail and prison sentencing, release, parole, and probation. *See Risk Assessment Landscape*, U.S. DOJ: BUREAU OF JUST. ASSISTANCE, https://bja.ojp.gov/program/psrac/selection/risk-assessment-landscape [https://perma.cc/4JV2-AY7X] (last visited July 10, 2024); sources cited *supra* note 67.

116. *See id*. at 1–4.

117. *See* N.J. STAT. ANN. § 2A:162-19.

118. SHALOM ET AL., *supra* note 95, at 10.

119. Several attempts have been made to access the contents of this judicial training, including an Open Records request. However, the New Jersey Judiciary has declined to provide this information, citing Rule 1:38-3, which states that the New Jersey Open Public Records Act excludes any documents "maintained in any form by or for the use of a justice, judge, or judiciary staff member in the course of performing official duties." N.J. CT. R. 1:38-3(b)(1); see, e.g., E-mail from Michelle M. Smith, Clerk, N.J. Super. Ct., to Cierra Robson, Ph.D. Candidate, Harvard Univ. (Oct. 13, 2022, 9:30 AM) (on file with author). Additionally, the judiciary declined to allow me to interview judges about their behaviors. *See* Robson, *supra* note 101, at 31. What we do know of how judges use the risk assessment tool comes from the letter of the law itself.

Public Defender created a pretrial manual which is used to train lawyers. The New Jersey Pretrial Justice Manual includes information about the history of the state's adoption of the risk assessment, the importance of litigating pretrial release, the ways that the PSA might be used to advocate for a client at a detention hearing, important case law that attorneys may be able to use to their benefit, and ways to appeal a detention decision. Importantly, the manual stresses that lawyers should be prepared to argue about the accuracy of the risk assessment score regardless of the score.[120]

While lawyers have mixed reviews of the risk assessment tool, they recognize that they must participate in it.[121] Those whose arguments altogether reject the premise of the algorithm lose credibility with the court. But those who are strictly adherent to the algorithm face the possibility of harming their client's life chances. Rather than strict adherence or rejection of the algorithm, legal advocates have developed creative legal strategies to use the tool to the benefit of their clients.

IV. RESISTING TECHNOLOGICAL NIGHTMARE-SCAPES

Much like Emmaline and Pauline in *Red Dirt Witch*, legal advocates in New Jersey have developed a series of practices to resist the legal system within which they must work, despite mixed feelings about the new algorithmic regime. These strategies include critiquing the algorithm in court, using procedural rules to shape the timeline of the hearings, and deploying the appeals process to challenge judges that might be too strictly adherent to the algorithm.[122] In so doing, these lawyers practice what legal scholar Daniel Farbman terms *resistance lawyering*, or a "direct service practice within a procedural and substantive legal regime that [one] considers unjust . . . to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself."[123]

A long line of Black studies scholarship has argued about the relative merits and failures of using the metaphorical "master's tools"[124] to dismantle metaphorical houses of injustice. Similarly, resistance lawyering has occurred throughout history to secure most landmark civil rights legislation.[125] However, this Essay uniquely uses lessons from the Afrofuturist tradition to argue that such practices are not only important, but necessary for liberation. In the New Jersey context,

120. *See* SHALOM ET AL., *supra* note 95, at 11.

121. *See* Robson, *supra* note 101, at 100. Information was gathered from pilot informational interviews with ten lawyers in New Jersey. While some are adamantly opposed to the use of the algorithm, others consider it "better than the previous system" of bail, in which a judge could make a decision based upon few objective standards. *See id.* at 100. Others still believe the algorithmic system is generally quite fair, especially in the context of legal representation. *See id.* at 100.

122. *See id.* at 9.

123. Farbman, *supra* note 30, at 1880. It should be noted that while Farbman describes resistance lawyering with the example of abolitionist practices, lawyers of any ideological leaning can use the tactics of resistance lawyering. *See id.* at 1883.

124. Lorde, *supra* note 18, at 110.

125. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967).

resistance lawyering manifests as direct attempts at shaping judicial decisions, both for individual cases and for the larger scale legal regime.[126]

By way of arguing this point, I explore several strategies that lawyers use surrounding risk assessment tools. Lawyers: (1) strategically attack the algorithm or its use in court; (2) use procedural rules to shape the timeline of pretrial detention to increase the chances their clients will be released; and (3) mobilize the appeals process to overturn specific judges. In so doing, lawyers participate in a system that they are at best ambivalent about and at worst deeply frustrated by. On an individual case-by-case basis, these practices will accomplish very little. Importantly, though, the lawyers continue to participate in this system and use these strategies because their aggregation is a legal record of attacks which might be used in the future to dismantle the algorithm's use altogether. I take each of these strategies in turn.

First, lawyers systemically reinforce or undermine the algorithm's use to persuade a judge to adhere to or deviate from the algorithmic recommendation.[127] There are at least two ways that this direct engagement with the algorithm manifests. First, an attorney can engage in ontological attacks, in which an attorney argues for the reasons why a certain algorithmic calculation is wrong. Ontological

126. The idea that the action of lawyers can shape the decisionmaking practices—more than just the decision alone—of judges has received some theoretical debate in the literature. This Essay takes the view that lawyers are deeply integral to the way that judges consider evidence and make decisions. Given that courts have long been understood as complex professional networks embedded in an organization, it stands to reason that if judicial decisions are influenced by their social environments, they are also influenced by all actors—both legal and otherwise—that exist within the courtroom organization. The view of judicial decisions as embedded in court organizations and influenced by several actors is characteristic of the "strategic view." *See* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1415 (2000). In contrast to the strict traditional view which argues that judicial decisions are shaped only by the letter of the law, the strategic view argues that judicial behaviors must be shaped by all actors in a courtroom environment, including defendants, court staff, victims, witnesses, observers in the courtroom, and more. *See id*. In contrast to the traditional view in which lawyers only impact judicial decisions to the extent that they present evidence directly relevant to laws on the books, the strategic framework posits lawyers' strategic actions beyond the bounds of what might strictly implicate the law as integral to the decisions of judges. Lawyers, for example, might strategically use their relationships to negotiate deals with opposing counsel, use procedural rules to shape the timeline of a trial in ways that favor their argument, and even encourage their clients to dress a certain way. *See* Andrew J. Trask, *Litigation Matters: The Curious Case of* Tyson Foods v. Bouaphakeo, 2016 CATO SUP. CT. REV. 279, 283–84. Simply put, lawyers—and all that they do—matter to case outcomes. The spectrum of mechanisms by which lawyers come to matter to case outcomes is broad: while some scholars have gone so far as to suggest that the mere presence of an attorney is enough to make having a lawyer better than not having one, others argue that lawyers are fundamental to the social production of law itself as they interpret, shape, and even produce law. *See* Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOCIO. REV. 909, 924–25 (2015); Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423, 427 (1993). The evidence is overwhelmingly positive: not only do lawyers act as street-level bureaucrats with the ability to interpret laws and policies in real time; having a lawyer increases one's chances of success in the courtroom in almost every kind of case from civil eviction hearings to criminal procedures. *See* Sandefur, *supra*, at 910, 924–25. *See generally* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

127. *See* SHALOM ET AL., *supra* note 95, at 11.

attacks argue that the algorithm itself is inaccurate because it does not include variables that may be important to predicting the success of a client.[128] These kinds of attacks are unique to the defendant but may center around characteristics such as housing instability, health, or a track record of substance-use treatment.[129] Ultimately, lawyers using this strategy aim to persuade a judge that the algorithm is incorrect *for this particular defendant*.

In addition to ontological attacks on the algorithm, an attorney might deploy a set of procedural attacks in which she argues that for a particular case, the use of the algorithm does not follow court rules—regardless of its accuracy. For example, if a PSA score was not given to the defense attorney in discovery as the statute requires, they might argue that the score is inadmissible.[130] Procedural arguments generally use existing case law to circumvent the recommendation of the algorithm. Consider, for example, the case *State v. Mercedes*, in which the New Jersey Supreme Court ruled that an individual cannot be detained simply because of the crime they are charged with (except for certain statutorily excluded crimes that are particularly violent, such as murder).[131] Because the algorithm takes current charges into consideration when calculating risk, some defendants will receive especially high scores with a recommendation of no release simply because of their charges.[132] Defense attorneys faced with this situation often rebuke the use of the algorithm in this particular instance, stating that its use is in direct opposition to the holding of *Mercedes*.[133]

Observations and interview data confirm that attorneys use the algorithm in whatever way makes sense for their arguments.[134] Sometimes, that means that the same attorney on the same day will argue that the PSA is accurate for one defendant and inaccurate for another. When the PSA does not support their clients, lawyers: (1) check that there is nothing wrong with the calculations in the algorithm; (2) understand why the defendant has achieved those scores, and attempt to minimize any factors that may have caused an increase; and (3) make the strongest case for their client, even when they are up against a particularly harsh judge or opposing counsel has a particularly strong case.[135] When the PSA does support their client, lawyers: (1) argue for its statistical validity; and (2) describe how the algorithm includes most factors relevant to the court.[136]

Second, lawyers can manage the decision of a judge by taking the power out of a specific judge's hands completely. In almost rumor-like fashion, lawyers are

128. *See id.*

129. *See id.* at 15–16.

130. *See* N.J. CT. R. 3:4-2(c)(2). While I present these strategies as separate, they are not mutually exclusive. In fact, most attorneys stack strategies together in a single defense, especially if one strategy is proving unsuccessful.

131. 183 A.3d 914, 925 (N.J. 2018).

132. *See* SHALOM ET AL., *supra* note 95, at 8.

133. *See* Robson, *supra* note 101, at 117.

134. *See id.* at 100.

135. *See* SHALOM ET AL., *supra* note 95, at 7.

136. *See id.*

aware of which judges in their counties are notoriously strict adherents to the algorithm, strict adherents to detention despite the algorithm, and strict adherents to release conditions despite the algorithm.[137] If a lawyer feels that the judge they are assigned to will be particularly detrimental to their client, they might strategically use the statutorily allotted three-day adjournment period (when requested by the prosecution)[138] to hopefully get onto the calendar of a different, more amenable judge.[139] While the three-day adjournment is meant to help counsel (both defense and prosecution) prepare discovery, interview clients, and otherwise prepare their case, many attorneys have adopted an alternative use of the adjournment period.

Finally, lawyers can hold specific judges accountable via the appeals process.[140] Attorneys use the appeal process to check the behavior of a judge that is religiously (non)adherent to the algorithm. Even though it is nearly impossible to win an appeal because the standard for judicial discretion is so high, attorneys continue to file appeals at this stage to signal to the judge that their legitimacy is in question.[141] Interviewees describe how much judges hate appeals and how regular appeals against the same judge—what one attorney called "appeal season"[142]—can prompt a judge to reorient their decisionmaking approach in future cases, even if it does nothing to shift the outcome of the case in question. Other interviewees recount that often, repeated appeals are necessary before a judicial behavioral shift occurs: "[S]ometimes six, seven, eight appeals" must take place against the same judge before the appellate division rules in favor of counsel.[143] Repeated appeals signal to the appellate division that a particular judge has problematic decisionmaking tendencies. While a use of resources and time, exercising the appeals process can successfully prompt a judge to reorient their decisionmaking approach in later cases, even if it does nothing to change the current case.[144]

While rarely successful in the immediate term, uses of arguments to discredit the algorithm, the three-day adjournment period, and the appeals process contribute to an ongoing *legal record* that challenges the algorithm. In the act of using

137. *See* Robson, *supra* note 101, at 9.

138. N.J. STAT. ANN. § 2A:162-19(d)(1).

139. *See* SHALOM ET AL., *supra* note 95, at 40; Robson, *supra* note 101, at 51.

140. *See* SHALOM ET AL., *supra* note 95, at 44.

141. *See id.*; *see also* State v. Mercedes, 183 A.3d N.J. 914, 930 (N.J. 2018) (granting an appeal in a trial court's detention holding under the deferential abuse-of-discretion standard, and remanding for further proceedings).

142. *See* Robson, *supra* note 101. During an interview conducted on September 20, 2023, at 3:00 PM ET with an anonymous advocate, they stated: "Once you're in front of an appeal seasoned judge, you know, for sure, that there's a good chance that you're going to have to appeal some of these cases. For those, you put every single detail you have, you put every single . . . You make every argument like a Supreme Court oral argument."

143. *See id.*

144. *See id.* It should be noted that these practices of persuasive argumentation surrounding the PSA, strategic use of procedural rules, and deployment of the appeals process are not limited to only one side; both prosecutors and public defenders use these strategies to shape judicial decisions. *See id.* at 143.

the algorithm despite their general frustration toward it, these lawyers are able not only to accomplish the short-term goal of assisting their clients, but also to contribute to a longer standing goal of generating a record of resistance that might later be used by an appellate court to dismantle the state's reliance on the algorithm altogether.

Like Emmaline and Pauline in Jemisin's *Red Dirt Witch*, these attorneys commit to a system that has systemically excluded their clients, but only to the extent that doing so achieves a more transformative future goal. While these strategies may produce a loss in the present, this strategic momentary adherence to the dreamscapes of those in power—whether Jemisin's proverbial White Lady or New Jersey's judiciary in black robes—lays the groundwork for a complete divestment from harmful dreams in the future. It is only by succumbing to dreamscapes of those in power, reorienting these dreamscapes to their benefit, and taking a seemingly minuscule win in the present that Emmaline, Pauline, and the defense attorneys in New Jersey are able to set the stage for future advancement.

CONCLUSION

In this Essay, I have explored how N. K. Jemisin's darkly optimistic work can inform legal practice. Not only does *Red Dirt Witch* teach us the importance of strategy and long-term struggle, but the story also reinforces a commitment to revolutionary reforms even in a landscape which is inhospitable to them. While these reformers engage the dreamscapes of those in power, like Emmaline, they never fully succumb to them. Instead, they move the collective struggle forward, even if that forward movement is predicated on working within a system that is unfair. In describing stories about the journey toward a utopic existence, Jemisin's texts push us to consider not just *what* we want, but *how* we achieve it. In so doing, she posits a deeply realistic yet generative strategy for forward movement.

Such realism presents several lessons for alternate visions: for those interested in dismantling a criminal legal system reliant on algorithmic recommendations, the work of abolition requires first an imaginative practice followed by a practical one. However, such practices are only made possible through deep collaboration and community building, not only between legal professionals, but also between defendants, activists, organizers, artists, and scholars. Beyond the work of critiquing algorithms in court, lawyers *must* engage with these other stakeholders to better inform their own practices. As this Essay has shown, such engagement can even manifest in seemingly small ways, such as reading Afrofuturist texts and employing their lessons.