

October 1, 2019

Representative Danielle Gregoire
House Chair, Joint Committee on State Administration & Regulatory Oversight
State House, Room 22
Representative Sean Garballey
House Vice Chair, Joint Committee on State Administration & Regulatory Oversight
State House, Room 540
Boston, MA 02133

Senator Marc. Pacheco
Senate Chair, Joint Committee on State Administration & Regulatory Oversight
State House, Room 312-B
Senator Barry Finegold
Senate Vice Chair, Joint Committee on State Administration & Regulatory Oversight
State House, Room 507
Boston, MA 02133

Re: Support for House 2701 and Senate 1876

Dear Representatives Gregoire and Garballey, Senators Pacheco and Finegold,
and Members of the Committee:

Massachusetts Law Reform Institute (MLRI) submits this letter in support of two bills pending before your Committee: House 2701, An Act Establishing a Commission on Automated Decision-making, Artificial Intelligence, Transparency, Fairness, and Individual Rights, and Senate 1876, An Act Establishing a Commission on Transparency and Use of Artificial Intelligence in Government Decision-making.

MLRI is a statewide, non-profit legal services organization whose mission is to advance economic, social and racial justice. We urge you to give a favorable report to these bills, which would establish a commission to study and make recommendations regarding the use of automated decision systems by state agencies. As we explain below, such a commission is urgently needed.

Automated decision systems use statistical analysis in conjunction with mathematical computer models with the goal of predicting human behavior, ostensibly to improve agency decision-making. These systems use techniques from

data mining, statistics, machine learning, and artificial intelligence to develop algorithms to make forecast how people will act in the future. These algorithms purport to assess how valuable we are as customers, how responsible we are as tenants, how trustworthy we are as borrowers and how desirable we are as employees. In one well-known example from the world of commerce, Target Corporation engaged in extensive data mining about the buying habits of its female customers in an effort to guess which ones were pregnant.¹

The appeal of automated decision systems to government agencies is understandable. In the context of criminal law, for example, where automated decision systems first came into use in the public sector, the ability to predict which defendants were most likely to commit new crimes could enable corrections officials to be more rational about incarceration policies. But, as shown in this example from the state of Wisconsin, that optimistic goal soon collides with human limitation.

In 2016, the Wisconsin Supreme Court affirmed a six-year prison sentence that had been imposed on Erik Loomis, who had pleaded guilty to charges of eluding a police officer and driving a car that had been used in a shooting. His sentence had been determined in part based on a score he received using an algorithm intended to assess his risk of committing another crime. The algorithm, called COMPAS, was developed by a company called Northpointe, Inc. The algorithm results the company produces for a particular criminal defendant come from his or her history and the answers he or she provides in response to a survey questionnaire. The company refuses to provide information about how COMPAS was designed. As an executive told *The New York Times*: “The key to our product is the algorithms, and they’re proprietary... We’ve created them, and we don’t release them because it’s certainly a core piece of our business.”²

In his appeal to the Wisconsin Supreme Court, Loomis argued that the court’s use of a COMPAS risk assessment at sentencing violated his right to due process because the proprietary nature of COMPAS prevented him from assessing its accuracy, thus potentially subjecting him to a sentence based on inaccurate information and thereby depriving him of the right to an individualized sentence. The court, as noted above, denied his motion for a new sentencing hearing and affirmed

¹New York Times, “How Companies Learn Your Secrets, February 6, 2012.
<http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>

² Sent to Prison by a Software Program’s Secret Algorithms,” *New York Times*, May 1, 2017.
<https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html>

the original sentence. Loomis then filed a petition to the U.S. Supreme Court seeking certiorari review of the Wisconsin Supreme Court decision. That petition was denied in June, 2017.

Eric Holder, U.S. Attorney General during the Obama administration, warned that risk scores like the ones in the Loomis case might be introducing racial bias into the judicial system: “Although these measures were crafted with the best of intentions, I am concerned that they inadvertently undermine our efforts to ensure individualized and equal justice,” he said, adding, “they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.”³

The investigative journalism newsroom ProPublica investigated Northpointe in an effort to reverse-engineer the COMPAS algorithm that was used in the Loomis case. In an article published in May, 2016,⁴ the newroom reported that the algorithm was only “somewhat more accurate than a coin flip” in determining which defendants would reoffend. ProPublica also confirmed Attorney General Holder’s fears about the algorithm’s racial bias:

In forecasting who would re-offend, the algorithm made mistakes with black and white defendants at roughly the same rate but in very different ways. The formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants. White defendants were mislabeled as low risk more often than black defendants. Could this disparity be explained by defendants’ prior crimes or the type of crimes they were arrested for? No. We ran a statistical test that isolated the effect of race from criminal history and recidivism, as well as from defendants’ age and gender. Black defendants were still 77 percent more likely to be pegged as at higher risk of committing a future violent crime and 45 percent more likely to be predicted to commit a future crime of any kind.

Governmental agencies making determinations in civil contexts are also beginning to employ automated decision making. And just as with criminal law matters, there is very good reason for skepticism about its value and good reason for concern about its possible harm. Author Cathy O’Neil argues that algorithms used to

³ <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th>

⁴ <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>

predict behavior may not be eliminating human bias, they may simply be disguising it.⁵ And it is racial and ethnic minorities as well as persons of low-income, who often have fewer options for obtaining employment, credit and housing, who face the most exposure to the risks and weaknesses of automated decision making.

The best known civil applications of automated decision making is the Allegheny Family Screening Tool⁶ developed by the Allegheny County Pennsylvania Department of Human Services to guide decision-making when the department receives information suggesting that a child in its jurisdiction may be being mistreated. The tool pulls together information in a “data warehouse” maintained by the department that comes from, among other sources, the state human services and public assistance programs, the department of probation, the bureau of drug and alcohol services, the Allegheny County police department, and local school districts. When a call comes into the Department’s child protection hotline, a Department employee enters information from the caller and then engages the Screening Tool, which produces two scores: the likelihood that another call will be made to the hotline about the child, and the likelihood of that child being placed in foster care. The higher the score, the higher the reported risk.

The same concerns that former Attorney General Eric Holder expressed about the use of automated decision making in the context of criminal justice – i.e., that it may exacerbate disparities that are already too common in our society – are worthy of consideration in this context as well. As author Virginia Eubanks has documented in her book, *Automating Inequality: How High-Tech Tools Profile, Police and Punish the Poor*, a quarter of the predictive variables used in the Screening Tool are direct measures of poverty such as receipt of TANF, SSI, and SNAP benefits. Other predictive variables measure interaction with juvenile probation and with the Office of Children, Youth and Families (the equivalent of the Massachusetts Department of Children and Families).⁷ The result, Eubanks argues, is that this “poverty profiling” targets individuals for extra scrutiny based on a personal characteristic: living in poverty.

The Allegheny screen tool model risks confusing parenting while poor with poor parenting, and consequently risks viewing parents who reach out to public

⁵ Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*, New York, Crown Publishing, 2016.

⁶ <http://www.alleghenycounty.us/Human-Services/News-Events/Accomplishments/Allegheny-Family-Screening-Tool.aspx>.

⁷ *Automating Inequality: How High-Tech Tools Profile, Police and Punish the Poor*, St. Martin’s Press, 2018, pp. 155-56.

programs as endangering their children. Evidence that these risks are very real is the fact that although only 27 percent of Pittsburgh children receive public assistance, 80 percent of children placed in foster care in 2015 were removed from families who were receiving TANF or SNAP benefits.⁸

Automated decision making is already beginning to be used in state government here in Massachusetts. Our drug courts and community corrections centers use it to evaluate which candidates are most likely to succeed in those programs. And the special commission on bail reform established in last year's criminal justice reform law, will evaluate its possible use in determining when bail should be set and when defendants should be released without bail and under what conditions.

The state now has an opportunity to undertake a careful deliberation about automated decision systems, to evaluate their relevance, strengths and weaknesses, their transparency and accountability, and the due process, equal protection and privacy rights of those affected by such decision-making. The special commission proposed in these bills can guide the state in making informed choices about the use of this new technology. It is imperative to ensure that automated decision systems are not permitted to thwart human agency or worsen racial or economic inequality. MLRI, which would be a member of this commission under the proposed legislation, would be honored to play a role in this important effort.

Thank you for your consideration of our views.

Sincerely,

Georgia Katsoulomitis
Executive Director

⁸ Id. at 157-58.