LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

UNIVERSITY OF WINDSOR

FACULTY OF LAW

NOVEMBER 20, 2019

Law Commission of Ontario

- LCO provides independent analysis and advice on complex legal policy issues.

- Mandate: advance law reform, promote access to justice, stimulate public debate.

- Located at Osgoode Hall Law School

- Recent/current projects:
  - Class Actions
  - Defamation in the Internet Age
  - Last Stages of Life
  - Indigenous Last Stages of Life

- www.lco-cdo.org

LCO Digital Rights Projects

- Current Projects
  - AI and Algorithms in Criminal Justice System
  - AI and Algorithms in Administrative and Civil Justice System
  - Consumer Protection in Digital Marketplace with Centre for Law, Technology and Society, Faculty of Law, University of Ottawa

- Past Projects
  - AI for Lawyers with Element AI and Osgoode Hall Law School
  - Roundtable on Digital Rights and Digital Society with Mozilla Foundation
  - AI, Access to Justice and Legal Aid
  - Big Data in the Justice System with Legal Aid Ontario

Criminal/Civil Justice Algorithm Projects

- How are AI/algorithms used to support decision-making in criminal and civil justice systems?
  - Criminal: Risk assessments to assist bail decision-making
  - Civil: AI/Algorithms to assist welfare determination, entitlement to public benefits

- What is impact of technology on dispute resolution, human rights, due process and access to justice?

- What can we learn from other jurisdictions and sectors?

AI, Algorithms in Law and Justice

- How are AI, algorithms and automated decision-making being used in law and justice?

  - Legal information, legal advice and A2J digital services ("Steps to Justice" "Clicklaw") "Legal Line")
  - E-discovery, legal research, smart contracts, automated pleadings; AI-driven litigation strategy ("ROSS Intelligence" "Willful" "Legal Zoom" "Wonder.Legal" "Clausehound")
  - Predictive analytics ("Blue J Legal" "Lex Machina")
  - Decision-making in public agencies, courts, tribunals

    (Source: Justice Lorne Sossin, CIAJ Annual Conference, October 16, 2019)

AI, Algorithms in Public Law Decision-Making

- AI/algorithms already used in many government/public law applications (esp. in US, UK)

- Notable civil/admin applications include:
  - Child welfare, government benefits, fraud detection, public health and education
  - Immigration and visitor determinations
  - National security

- Most extensively used in US and UK criminal justice systems:
  - Surveillance, including facial recognition
  - Investigations, including "predictive policing"
  - Bail and sentencing, including pre-trial risk assessments
  - Corrections, including inmate classification and parole

Case Study: Algorithms and Bail

- Most extensive use of algorithms in justice system is in US, especially bail.

- Pretrial risk assessments (RA):
  - RAs predict likelihood that someone will miss court date or commit crime("recidivism")
  - RAs apply list of risk factors against historic data to create "risk score" for accused
  - Scores used by judges to help assess whether accused should be released, conditions, detained

- Use of RAs has grown exponentially in US in support of evidence-based bail reform

- RAs were widely supported at outset, but many original supporters now object

(See generally, Logan Koepke and David Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*)

Pubic Safety Assessment (PSA)

Standard Pretrial Risk Assessment Report

(Arnold Ventures, *Public Safety Assessment*)

12A Standard PSA Report

Name:	John Defendant	Arrest Date:	06/15/17
PID:	123456	PSA Completion Date:	06/16/17

Current Charge(s): 14-113.9 FINANCIAL CARD THEFT F 1

PSA Score

FAILURE TO APPEAR

1	2	3	4	5	6

NEW CRIMINAL ACTIVITY

1	2	3	4	5	6

NEW VIOLENT CRIMINAL ACTIVITY FLAG: NO

Risk Factors:

1.	Age at Current Arrest:	23 or Older
2.	Current Violent Offense:	No
	2a. Current Violent Offense and 20 Years Old or Younger:	No
3.	Pending Charge at the Time of Offense:	No
4.	Prior Misdemeanor Conviction:	Yes
5.	Prior Felony Conviction:	Yes
	5a. Prior Conviction:	Yes
6.	Prior Violent Conviction:	0
7.	Prior Failure to Appear in Past 2 Years:	1
8.	Prior Failure to Appear Older than 2 Years:	Yes
9.	Prior Sentence to Incarceration:	Yes

Presumptive Release Level

Based on the Release Conditions Matrix, the defendant's presumptive release level is **Release Level 2.**

Law Reform Issue #1: Disclosure

- High priority administration of justice and access to justice issue

- "Black box" criticism

- Law Reform/Access to Justice Issues:
  - How to ensure development or use of systems is disclosed at all?
  - More complex questions:
    - What is disclosed and when?
    - Disclosure of training data, software, source code, policy guidance?
    - Public vs. private systems?

Law Reform Issue #2: Historic Data and Bias

- All systems rely on data

- Bias in, bias out?
  - Criminal Justice: Training data reflects *generations* of discrimination
  - If data is inherently discriminatory, outcomes inevitably be discriminatory?

- In US:
  - Many advocates say RAs should *never* be used in bail
  - Others support algorithmic affirmative action or say RAs can used effectively in different manner

- Law Reform Issues:
  - Not all data is discriminatory, but no data is neutral
  - Is discrimination issue insurmountable in criminal justice/other contexts?
  - Data science issues and best practices (model bias, statistical fairness, data quality, relevance, etc)

Law Reform Issue #3: Using Predictions

- How to ensure tools are understood and interpreted appropriately?

- Distinction between prediction/policy is crucial

- Law Reform Issues:
  - Automation bias
  - How to better understand scoring, group predictions vs individual decision-making, statistical results
  - Decision-making frameworks

Law Reform Issue #4: Due Process

- Use of AI/algorithms by courts and tribunals raises obvious due process/fairness issues:
  - Notice, hearings, impartial decision-maker, ability to challenge decisions, reasons, appeals and remedies

- Law Reform Issues:
  - How to ensure *AI systems* protect due process?
  - How to ensure *tribunals/courts* protect due process?
  - Impact of machine learning systems (esp. on "explainability)?
  - Impact on self-represented?

Law Reform Issue #5: Regulation

- Many models of regulation, algorithmic accountability, AI audits:
  - Advisory, generic standards-based guidelines or tools
  - Ethical AI principles (Toronto Declaration), engineering standards (ISO, Partnership for AI), Corporate Social Responsibility Codes

- National or sub-national legal/regulatory rules guiding development of systems
  - Federal Treasury Board Directive, Algorithmic Accountability Act (US), Human Rights Codes, Privacy Legislation

- Context-specific rules, statutes, regulations, practice directions

- Litigation in individual cases

- Law Reform Issues:
  - Are existing statutory or common law rules sufficiently flexible to adapt to new technologies?
  - Is new legislative or regulatory direction needed?
  - What are elements of comprehensive regime?

Some Ideas to Think About

- AI and Algorithms: New frontier of A2J

- There is a current and urgent need to learn about the technology
  - Legal community must involve new stakeholders (technologists, digital rights)
  - Lawyers need to learn new skills (data science, "litigating AI")

- Advocates should think both defensively and opportunistically

- Must work collaboratively

More Information

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