The Rise of Artificial Intelligence in Sentencing Law

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A. Introduction

The rise of Artificial Intelligence (AI) has permeated into many facets of individuals' lives, including their workplace, interpersonal communications, and use of social media. In addition to these realms, AI has also impacted the criminal justice system, namely, sentencing procedures. Courtrooms have begun to utilize AI tools to promote safety and efficiency in sentencing.[1]

Primarily, these tools work to determine risk assessment.[2] The tools use data such as, "[s]ocioeconomic status, family background, neighborhood crime, employment status, and other factors to reach a supposed prediction of an individual's criminal risk, either on a scale from 'low' to 'high' or with specific percentages."[3] From there, the tool will predict the likelihood of recidivism before trial, and likelihood the defendant will not appear, and further be used to determine bail and sentences.[4]

There are both advantages and challenges to implementing AI in sentencing policy. A study conducted by Tulane University found that AI recommendations, "[s]ignificantly increased the likelihood low-risk offenders would avoid incarceration," including for crimes such as fraud and larceny, as well as drug offenses.[5] However, there is a great concern pertaining to racial biases in Artificial Intelligence.[6]

In response to these developments, individuals and collective organizations have taken to the legal system. While some groups have come together to make a public condemnation of the use of AI practices, others have taken legal recourse and have challenged the government's use of AI practices in sentencing law.

B. The Advantages of Utilizing AI in Criminal Sentencing

Implementing AI in sentencing procedures can have some positive impacts on the legal system. AI has been found to hand down shorter jail sentences than its traditional sentencing

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[1] Karen Hao, *AI is sending people to jail- and getting it wrong*, MIT TECHNOLOGY REVIEW (Jan. 21, 2019) https://www.technologyreview.com/2019/01/21/137783/algorithms-criminal-justice-ai/ [https://perma.cc/6RF7-X7PR]

[2] *AI in the Criminal Justice System*, ELECTRONIC PRIVACY INFORMATION CENTER, (n.d.) https://epic.org/issues/ai/ai-in-the-criminal-justice-system/ [https://perma.cc/J55M-CJD2] [hereinafter *AI in the Criminal Justice System*].

[3] *Id.*

[4] *Id.*

[5] Keith Brannon, *AI sentencing cut jail time for low-risk offenders, but study finds racial bias persisted*, TULANE UNIVERSITY (Jan. 23, 2024) https://news.tulane.edu/pr/ai-sentencing-cut-jail-time-low-risk-offenders-study-finds-racial-bias-persisted [https://perma.cc/W4UB-3GEK]

[6] *Id.*

counterparts.[7] It has also been found to reduce biases in human decision making. For example, "[a] study found that judges were more likely to make a more favorable decision in parole hearings immediately after lunch."[8] Utilizing AI could prevent these unconscious biases that are impacted by humans' needs to eat, and emotional or hormonal fluctuations throughout the day that may cause tiredness or irritability.

Another major advantage of utilizing AI in the courtroom is its efficiency. AI can process and analyze legal documents at a significantly quicker speed than humans, which is especially helpful in reducing the backlog of cases in the U.S. legal system.[9] According to an article published in *Critical Debates in Humanities, Science and Global Justice*, AI court cases would, "[s]ave $1.7 billion in US taxpayer dollars," due to the increased efficiency of the court services.[10]

C. The Disadvantages of Utilizing AI in Criminal Sentencing

Many jurisdictions utilize risk assessment tools to assist in multiple areas of the criminal justice system, including sentencing and parole.[11] However, utilizing AI in criminal sentencing can have disastrous impacts that should be considered when deciding to implement these tools. These include biasing against certain social groups and inaccuracy in predicting recidivism.

For example, Florida uses a system known as COMPAS to determine the likelihood of reoffending.[12] The formula utilized by COMPAS flagged Black defendants as future criminals at twice the rate of white defendants.[13] Additionally, the system did not accurately predict rates of violent crime, and, "[o]nly 20 percent of the people predicted to commit violent crimes actually went on to do so."[14]

There are many factors that contribute to the risk of racial bias in sentencing policy. It is rare that jurisdictions using pretrial algorithmic or AI sentencing procedures disclose to the public how they are developed, and if jurisdictions do allow for public input, it is rare that their concerns will have an impact on the way that the technology is implemented.[15]

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[7] *Id.*
[8] Sienna Sedlarcik, *Ethical AI Sentencing: A Framework for Moral Judgment in Criminal Justice*, 4 CRITICAL DEBATES IN HUMANITIES, SCIENCE AND GLOBAL JUSTICE 70-79 (Nov. 5, 2024).
[9] *Id.*
[10] *Id.*
[11] *AI in the Criminal Justice System*, supra note 2.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Molly Glass, *Algorithms Were Supposed to Reduce Bias in Criminal Justice-Do They*?, BOSTON UNIVERSITY (Feb. 23, 2023)https://www.bu.edu/articles/2023/do-algorithms-reduce-bias-in-criminal-justice/ [https://perma.cc/KHB3-N8GW]

D. Legal Implications and *State v. Loomis*

The concern of bias in sentencing procedures has led groups to take legal recourse against courts and police precincts looking to implement these systems. In July 2018, a group of over 100 civil rights and community-based organizations released a statement spotlighting concerns with risk assessment tools, specifically in the context of bail procedures.[16]

In addition to public condemnation, AI sentencing concerns have also been brought to the courtroom. *State v. Loomis* is a Supreme Court of Wisconsin case concerning the use of COMPAS in a Presentence Investigation Report (PSI).[17] Following a plea deal, Defendant Loomis received a PSI that included a COMPAS risk assessment that, "[i]ndicated that he presented a high risk of recidivism on all three bar charts."[18] The PSI included a warning stating that COMPAS should be used to, "[i]dentify offenders who could benefit from interventions," and that the tool, "[s]hould not be used to determine the severity of a sentence or whether an offender is incarcerated."[19] Despite this warning, the circuit court went on to include the COMPAS risk score in its decision to rule out probation.[20]

In response to the court's consideration of COMPAS score, Loomis brought forth the argument that including these scores violated his due process rights, contending that COMPAS both, "[p]revents a defendant from challenging the scientific validity of the risk assessment," and that because "[a] defendant is denied full access to information in the PSI," he could not fully be ensured that his sentencing was based on accurate information.[21]

The court found that while COMPAS can be used, courts should include a cautionary statement regarding the capacity and accuracy of COMPAS.[22] The court cautions circuit courts regarding the tool's use of group data, rather than individualized information, and explains that COMPAS should be weighed as one of many factors.[23] The court sets forth rules and limitations regarding COMPAS, holding that COMPAS may be used to, "'enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized

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[16] *More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (Jul. 30, 2018) https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/ [https://perma.cc/74D7-EF3Q]

[17] *State v. Loomis*, 371 Wis.3d 235 (Wis. 2016).

[18] *Id.* at 244–46.

[19] *Id.* at 246

[20] *Id.* at 246–47

[21] *Id.* at 257

[22] *Id.* at 264

[23] *Id.* at 266–67.

sentencing program appropriate for each defendant.'" [24] However, the court reinforces the need for a written statement attached to any PSI containing a COMPAS report and sets forth specific limits that COMPAS cannot be used to, "[d]etermine whether an offender is incarcerated; or…. to determine the severity of the sentence."[25]

E. Conclusion and Proposed Solution

The rise of AI has naturally led to its expansion to the realm of criminal law. Specifically, courtrooms across the United States have utilized AI to assist in sentencing, promoting the efficiency of criminal law matters. While AI may increase efficiency in the courtroom, there are negative factors courts must consider when deciding to implement AI, namely, the risk of racial bias in sentencing assignments. Through public condemnations and lawsuits, citizens and organizations have expressed their concerns regarding the rise of AI in sentencing law.

Even though AI is not going away anytime soon, it is important for legal professionals and court staff to take steps to ensure that it is not misused, especially in proceedings as high stakes as criminal adjudications. To ensure that these tools are implemented in the most ethical manner possible, courts must take steps such as those in *Loomis* to guarantee that AI sentencing guidelines are used as one of many tools, rather than a sole decider, when handing down a sentence.

[24] *Id.* at 273 (quoting *Malenchik v. State*, 928 N.E.2d 564 (Ind. 2010)).
[25] *Id.* at 275–76.