



**New York City Council
Committee on Technology**

**Oversight - Follow up on Local Law 49 of 2018 in Relation to Automated Decision Systems
Used by Agencies
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*Written testimony of
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Chairman Holden and members of the Committee on Technology thank you for the opportunity to speak today. My name is Rashida Richardson and I am the Director of Policy Research at the AI Now Institute at New York University. AI Now is the first university research institute dedicated to understanding the social implications of artificial intelligence (“AI”). Part of my role includes researching the increasing use of and reliance on data-driven technologies, including government use of automated decision systems (“ADS”), and then designing and implementing policy and legal frameworks to address and mitigate problems identified in this research.

The Problem with Government Reliance on Automated Decision Systems and Big Data

Nationally, state and local governments are increasingly turning to ADS and other data-driven processes to aid or supplant human decision-making and government procedures in various sensitive social domains. These systems determine where a child will go to school, who will go to jail before their trial, who will have their food subsidies terminated, how much Medicare benefits a person is entitled to, and who is likely to be a victim of a crime. While these new technologies are often hailed for their time-saving, cost-cutting, or even bias-reducing potential, the actual implementation of these technologies demonstrate a very different reality:

one of rampant discrimination, hidden or unanticipated costs, increased government distrust, litigation, and even the death¹ of individuals misidentified by such systems.

AI Now's 2018 and 2019 *Litigating Algorithms* workshops and reports, hosted and issued in collaboration with NYU Law's Center on Race, Inequality and the Law, highlighted numerous examples of legal challenges to these harmful realities. For instance, in Michigan, roughly 20,000 residents were improperly disqualified from food assistance benefits after the State Department of Health and Human Services used a matching algorithm to implement the State's "fugitive felon" policy, which attempted to automatically disqualify individuals from food assistance based on outstanding felony warrants.² Michigan subsequently lost a class action lawsuit that required the state to restore benefits and pay back pay to the plaintiff class. To date, this ADS failure has cost Michigan over \$50 million, and the state is still engaged in the process of restoring food assistance benefits and issuing settlement payments.

In my law review essay, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, I examined the use of the ADS colloquially known as predictive policing in jurisdictions with documented histories of racially biased and unlawful policing practices and policies, including New York City.³ I found these policing practices and policies skew police data so that it does not accurately represent actual crime trends or rates but rather reflects the department's policing practices and policies. Because predictive policing systems rely on police data to make predictions, these systems are likely to further perpetuate the legacies of biased and unlawful policing practices and policies. In fact, I found that in some jurisdictions the predictive policing system's forecasts predominantly targeted that the same demographic that was disproportionately affected by the police department's unlawful and

¹ Rashida Richardson, Jason M. Schultz, & Vincent M. Southerland, *Litigating Algorithms 2019 US Report: New Challenges to Government Use of Algorithmic Decision Systems* (AI Now Institute, September 2019). <https://ainowinstitute.org/litigatingalgorithms-2019-us.html>.

² Rashida Richardson, Jason M. Schultz, & Vincent M. Southerland, *Litigating Algorithms 2019 US Report: New Challenges to Government Use of Algorithmic Decision Systems* (AI Now Institute, September 2019). <https://ainowinstitute.org/litigatingalgorithms-2019-us.html>.

³ 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 192 (2019).

biased practices. The paper also articulates the broader societal and public policy implications that result from the continued use of this “dirty data” and ADS in the criminal justice system. Shortly after the publication of this paper, the Los Angeles Police Department (LAPD) suspended the use of one of its controversial predictive policing systems after an audit by the Inspector General questioned its overall effectiveness at predicting crime and revealed that use of this ADS may have facilitated unconstitutional police conduct.⁴

These accounts and countless others around the country have diminished public trust and safety, reduced the efficacy of government services, deterred people from government services or benefits they are entitled to, and increased government expenditures (both from hidden costs of implementation⁵ and subsequent litigation expenses). Yet, in spite of these recurring and harmful outcomes, government reliance on ADS persists and is likely to drastically increase, particularly in light of policy changes made by the Trump Administration.

In 2018, President Trump issued Executive Order 13828, which imposes more bureaucratic burdens on public benefits recipients such as work requirements (that in turn require government agencies to track and measure more data and outcomes).⁶ These policy changes were coupled with requirements to “streamline services to promote the effective use of resources” and “reduce wasteful spending.” It is notable that this same austerity-focused rhetoric and policy changes are commonly followed by the adoption of ADS to achieve these goals. This push from the federal level will likely increase use of ADS because with shrinking budgets and increased reporting requirements, local and state governments will presume they lack the infrastructure and capacity to implement the necessary changes. And this concern is not speculative. For instance, in Oregon, the state implemented an ADS that issued drastic cuts

⁴ Los Angeles Police Commission Office of The Inspector General, Review of Selected Los Angeles Police Department Data-Driven Policing Strategies (2019).

https://docs.wixstatic.com/ugd/b2dd23_21f6fe20f1b84c179abf440d4c049219.pdf.

⁵ See, e.g., Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (2018).

⁶ Exec. Order No. 13828, 83 Fed. Reg. 72 (Apr. 13, 2018).

<https://www.whitehouse.gov/presidential-actions/executive-order-reducing-poverty-america-promoting-opportunity-economic-mobility/>

to residents disability benefits without notice or explanation. The litigation process revealed that the state was aware of the tool's flaws, but implemented nonetheless in response to political pressure to cut costs.⁷

In 2019, the Trump Administration's tacit endorsement of ADS as a front for reducing regulation was made explicit with the Department of Housing and Urban Development's proposed rule change regarding the disparate impact standard, an important legal mechanism for challenging housing discrimination.⁸ In addition to attempting to dilute the disparate impact standard, this proposed rulemaking provided broad defenses for the use of algorithmic tools, effectively absolving government and private actors of responsibility when use of algorithmic tools produces discriminatory outcomes.⁹

In light of this projected expansion of ADS in government, there is an even greater need for policy interventions. Though legal challenges to government use of ADS have been useful in shining light on the impact of these tools and mitigating some of their worst consequences, litigation is not a viable long-term solution. In addition to being a costly and slow mitigation mechanism, litigation does not always result in adequate redress those harmed or necessary structural change in government practices and policies. Also, depending on the types of legal claims raised, liability and responsibility may not reach third-party vendors¹⁰ nor incentivize best practices in ADS development and design. These limitations of litigation are also concerning in the backdrop of the evolving Supreme Court dicta. In a recent essay, legal scholar Amy Kapczynski detailed the disturbing trend in Supreme Court decisions that are increasingly

⁷ Rashida Richardson, Jason M. Schultz, & Vincent M. Southerland, *Litigating Algorithms 2019 US Report: New Challenges to Government Use of Algorithmic Decision Systems* (AI Now Institute, September 2019). <https://ainowinstitute.org/litigatingalgorithms-2019-us.html>.

⁸ U.S. Hous. & Dev., HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019), <https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>

⁹ AI Now Institute & NYU Law Center on Race, Inequality, and the Law, *Comments on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard* (Oct. 18, 2019). <https://ainowinstitute.org/ainow-cril-october-2019-hud-comments.pdf>.

¹⁰ Kate Crawford & Jason Shultz, *AI Systems as State Actors*, 119 Colum. L. Rev. 1941 (2019).

interpreting civil liberties to favor corporate interests.¹¹ In particular, she notes several cases where private vendors made first amendment claims to resist attempts of democratic regulation. Since there is established Supreme Court case law holding that the source code of algorithmic systems is protected speech,¹² it is likely that vendors in the ADS space will also turn to similar perverted legal arguments to evade regulation. Therefore, legislative and regulatory interventions are necessary, and the City Council must act with urgency.

Why The New York City Council Must Act with Urgency

In November 2019, Mayor de Blasio published the New York City Automated Decision Systems Task Force Report, which culminated an 18-month process that most hoped would result in recommendations on regulatory and policy interventions the City could implement to address the concerns regarding City use of ADS. On the same day Mayor issued an Executive Order creating an Algorithms Management and Policy Officer that is tasked with creating guidelines and policies regarding City agency use of ADS but lacks authority to obtain information regarding current agency use of ADS. After months of no community education and minimal public engagement, we still have no clear understanding of ADS use by City agencies and no clear plan on how New York City could expeditiously and critically address ADS issues.

This is why me and several other advocates, researchers, and community members published *Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force*.¹³ This Shadow Report not only provides a robust counter narrative of the NYC ADS Task Force process, but it also includes over 70 recommendations with rationales on next steps for a variety of stakeholders in New York City and State. The recommendations range from pre-deployment considerations for agencies wishing to acquire or use ADS; policy and practical changes that can be implemented at an agency level; legislative changes to improve the

¹¹ Amy Kapczynski, *Free Speech, Incorporated*, Boston Review (Dec. 5, 2019).

<https://bostonreview.net/law-justice/amy-kapczynski-free-speech-incorporated>

¹² *Bernstein v. United States*, 922 F. Supp. 1426 (1996).

¹³ Rashida Richardson, ed., “Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force” (AI Now Institute December 2019). <https://ainowinstitute.org/ads-shadowreport-2019.html>.

procurement process; investigatory and oversight actions that can be taken by different City officials; and tips for community members and advocates interested in ADS accountability issues. I hope that in addition to considering the legislative proposals before the Committee on Technology today, the City Council will evaluate the policy interventions proposed in our Shadow Report and work with other City officials and agencies to implement our recommendations.

Int. 1806 & Int. 1447

Int. 1806 is an important first step for the City to take to create greater transparency regarding the City's use of ADS. Int. 1806 requires the Mayor's Office of Operations to annually compile a list of all ADS used by City agencies along with pertinent information that can help City officials as well as City residents understand the scope and reach of these tools in agency decision-making and policy implementation. Government use of ADS presents a myriad of issues that require context specific solutions because their use often implicates or exacerbates existing structural problems within agencies, local issues, and broader societal concerns (e.g. wealth inequalities, discrimination). Thus transparency is needed to fully evaluate the broad and complex scope of problems and concerns.

Last month, almost twenty organizations including AI Now and led by the NAACP Legal Defense and Educational Fund hosted a public education focused community event where there was dynamic group discussion of ADS uses in New York City and community concerns.¹⁴ The turnout and engagement during this event demonstrates that New Yorkers are concerned about government use of ADS and desire more information about what is happening in this City. The transparency provided by Int. 1806 is necessary to meet this community need, evaluate community and legal concerns within the local use context, and assess the appropriateness of mitigation interventions or legislative solutions.

¹⁴ See, Addressing Algorithmic Bias in NYC's Automated Decision Systems Transcript (Dec. 7, 2019), https://isoc.live/ldf/2019-12-07_adscommunityforum.pdf; Richard Wexler, *Predictive Analytics in child welfare--and elsewhere: A brilliant lesson in understanding algorithms and bias*, NCCPR Child Welfare Blg (Dec. 9, 2019). <https://www.nccprblog.org/2019/12/predictive-analytics-in-child-welfare.html>.

Int. 1447 requires the Mayor's Office of Data Analytics to annually report on datasets created and maintained by City agencies. Datasets are used to develop and implement ADS; inform or justify government decisions, practices, and policies; and function as a digital record of City activities. City agency datasets can derive from agency practices or policies, the administration of government services (i.e. data collected to receive benefits), and data sharing within or outside of government. They can be created through automation, manual processing, or a combination of both. Thus, datasets, even from the same agency, can vary drastically and the methodology shaping their creation and maintenance are rarely apparent without extensive documentation. Even the City agencies themselves may not fully know what data they have or what it reflects.¹⁵

When datasets are made available to the public, they can be a valuable resource in understanding government services and procedures; identifying problems and necessary reforms; auditing by researchers; streamlining of interagency cooperation; and building public trust.¹⁶ Int. 1447 helps illuminate the need for greater transparency regarding the role and function of big data in City agencies, but the legislation falls short for several reasons. The definition of dataset is incomplete and provides several loopholes. The current definition ignores several important techniques and practices common in dataset construction and maintenance, which would result in many datasets of public interest being excluded from the legislation's reporting requirements. Int. 1447 also includes an overly broad carve out provision that undermines the legislation's transparency and accountability goals. If the City has concerns about the disclosure of sensitive datasets, agencies should be required to demonstrate why public disclosure would create a liability for the City rather than evade compliance with

¹⁵ Ben Green, *The Smart Enough City: Putting Technology in Its Place to Reclaim Our Urban Future*, MIT Press (2019). See "6. The Innovative City: The Relationship between Technical and Nontechnical Change in City Government," <https://smartenoughcity.mitpress.mit.edu/pub/yyth5w6y>.

¹⁶ Ben Green, et al., *Open Data Privacy* (Berkman Klein Center for Internet & Society Research Publication 2017). <https://cyber.harvard.edu/publications/2017/02/opendataprivacyplaybook>.

undefined and subjective concerns currently allowed by this carve out provision.¹⁷ Finally, the disclosure requirements of Int. 1447 are both incomplete and hard to operationalize without ensuring that agencies employ rigorous documentation. We encourage the City Council to consult the growing body of research on dataset documentation to assess how to improve Int. 1447 to meet the growing public interest in data transparency.¹⁸

¹⁷ See, e.g., Ben Green, et al., Open Data Privacy (Berkman Klein Center for Internet & Society Research Publication 2017). <https://cyber.harvard.edu/publications/2017/02/opendataprivacyplaybook> (highlight privacy preserving approaches for open data).

¹⁸ See, Timnit Gebru et al., *Datasheets for Datasets*, arXiv:1803.09010 [cs] (2020), <http://arxiv.org/abs/1803.09010> (last visited Jan 15, 2020); Margaret Mitchell et al., *Model Cards for Model Reporting*, Proceedings of the Conference on Fairness, Accountability, and Transparency - FAT* '19 220–229 (2019), <http://arxiv.org/abs/1810.03993> (last visited Jan 15, 2020); Matthew Arnold et al., *FactSheets: Increasing Trust in AI Services through Supplier's Declarations of Conformity*, arXiv:1808.07261 [cs] (2019), <http://arxiv.org/abs/1808.07261> (last visited Jan 15, 2020).