Negative: Prison Phone Calls

By “Coach Vance” Trefethen

***Resolved: The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction***

Case Summary: The AFF plan uses artificial intelligence to monitor and flag outgoing phone calls from federal prisoners to detect suicidal intentions, criminal plots, contraband smuggling, and other threats. There are at least 3 major companies that contract with prisons at the State level to do this today: GTL, Securus, and LEO Technologies (a.k.a. “Verus”). The federal government does not yet have such a system in place, and they only way to get it would be to contract with these companies for it (the federal Bureau of Prisons doesn’t have the software developers nor the manpower to do it themselves). All prisons (state and federal) tell prisoners that their outgoing phone calls (they can’t receive incoming calls) are subject to surveillance and recording. But the reality is that nobody is listening most of the time, and nobody has time to go back and play the recordings of hundreds of hours of random stuff prisoners talk about. The plan has AI listen to the recordings, transcribe them automatically, and search them for key words that indicate something bad is being discussed. Then, prison officials and law enforcement can take action to prevent or solve whatever the problem is, hopefully before it happens or gets any worse (like a prisoner discussing killing himself, or a plot to smuggle drugs into the prison, or retaliatory violence against someone who testified against the prisoner at trial).

Negative: Prison Phone Calls 3

HARMS / SIGNIFICANCE 3

1. Violence and suicides aren’t a big problem in federal prisons 3

Federal Bureau of Prisons has better track record on violence and recidivism than most state prisons 3

All prisons have higher suicide rates than regular society. But federal prisons are only slightly higher, and far lower than state prisons and jails 3

SOLVENCY 3

1. Nebulous and unreliable 3

AI analysis of prison phone calls is too nebulous and unreliable to be effective 3

Reliance on low quality recordings 4

2. More study needed 4

House of Representatives panel recommended doing more study to see if we should do the plan 4

A/T “States are doing it already” – Still needs more study to apply at the federal level 4

DISADVANTAGES 5

1. Privacy Loss #1: Violates privacy rights of families on the outside 5

AI monitoring violates the constitutional rights of families on the outside as a privacy violation 5

Innocent loved ones and even minor children are subject to government surveillance 5

“Consent” doesn’t matter: it still criminalizes the innocent families 6

Recorded calls store private information about innocent families 6

2. Privacy Loss #2: Vulnerable to hacking 7

Inadequate security makes prison call recordings vulnerable to hackers 7

3. Violating attorney/client privilege 7

Inadequate safeguards against recording attorney/client calls. Even the possibility of it creates chilling effect 7

Not merely hypothetical: Securus got caught recording thousands of attorney/client calls from prison 8

Impact: Attorney/Client privacy is essential to integrity of the legal process and the rights of the client 8

4. Wrongful accusations based on racial bias 8

Speech to text technology isn’t accurate enough to use for criminal justice, and introduces racial bias 8

Faulty voice identification, accents, and dialects lead to wrongful targeting of minorities 9

AI phone monitoring amplifies racial bias 9

5. Losing 6th Amendment rights 10

When AI generates evidence against a suspect, he could lose the 6th Amendment right to confront & cross-examine witnesses against him 10

Impact: Human rights lost. The 6th Amendment keeps American trials from turning into the Spanish Inquisition, where people were convicted by secret evidence 11

Negative: Prison Phone Calls

HARMS / SIGNIFICANCE

1. Violence and suicides aren’t a big problem in federal prisons

Federal Bureau of Prisons has better track record on violence and recidivism than most state prisons

Michael Carvajal 2020 (DIRECTOR, FEDERAL BUREAU OF PRISONS) Statement BEFORE THE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY U.S. HOUSE OF REPRESENTATIVES FOR A HEARING ON OVERSIGHT OF THE FEDERAL BUREAU OF PRISONS AND THE U.S. MARSHALS SERVICE 2Dec 2020 <https://www.congress.gov/116/meeting/house/111100/witnesses/HHRG-116-JU08-Wstate-CarvajalM-20201202.pdf> (accessed 11 July 2021)

As the Subcommittee recognizes, it is imperative that we effectively reintegrate individuals back into the community following release from prison to reduce the likelihood of future criminal behavior and associated victimization. To that end, the mission of the Bureau is to confine offenders in prisons and community-based facilities that are safe, humane, cost-efficient, and secure, and to assist inmates in becoming productive, law-abiding citizens when they return to our communities. The Bureau has had great success with respect to both parts of our mission: we have low rates of inmate on staff and inmate on inmate assaults, disturbances, and escapes, and our recidivism rate is lower than that found in most studies of state prisons using comparable definitions and methodologies.

All prisons have higher suicide rates than regular society. But federal prisons are only slightly higher, and far lower than state prisons and jails

Kristiana J. Dixon PhD, Allison M. Ertl PhD, Rachel A. Leavitt MPH, Kameron J. Sheats PhD, Katherine A. Fowler PhD, Shane P. D. Jack PhD 2020. (all are with 1Division of Violence Prevention, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, Atlanta) <https://stacks.cdc.gov/view/cdc/94033/cdc_94033_DS1.pdf> (accessed 12 July 2021)

Suicide rates are higher among incarcerated than nonincarcerated persons (Konrad et al., 2007; Snow et al., 2002). In 2014, the suicide rate was 50 per 100,000 jail inmates (Noonan, 2016a), 20 per 100,000 state prisoners, and 14 per 100,000 federal prisoners (Noonan, 2016b), while the age-adjusted suicide rate for the entire U.S. population was 12.9 per 100,000 (Centers for Disease Control and Prevention [CDC], 2017).

SOLVENCY

1. Nebulous and unreliable

AI analysis of prison phone calls is too nebulous and unreliable to be effective

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York University School of Law, Columbia University, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021) (brackets added)

One example is Securus’s THREADS software, which Securus claims can identify trends in inmate calling patterns and then generates targeted investigative leads for law enforcement from these trends that are not subject to external substantiation. These technologies identify “suspicious” key words or phrases, threatening calls and suspected criminal activity. Any “suspicious” calls can then be used to alter Securus’s data-mining strategies to meet DOCCS’s [New York State Department of Correction and Community Supervision] intelligence-gathering priorities and target specific inmates. Thus, inmates are targeted based on little understood, potentially biased, and even abusive algorithms, generated from nebulous “suspicions.”

Reliance on low quality recordings

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York Univ School of Law, Columbia Univ, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021)

Low quality recordings of conversations do not allow for “fine-grained distinctions of speech sounds” and generally are not reliable evidence in the context of criminal prosecution. Courts have addressed similar concerns over the accuracy of automated systems. In State v Loomis, an algorithmic recidivism risk assessment identified the defendant as a high-risk re-offender, based on aggregate recidivism data of groups of persons “similar” to him. Although the assessment algorithm was a trade secret, the Wisconsin Supreme Court ruled that judicial reliance on the assessment in sentencing did not violate the defendant’s right to due process, so long as the assessment came with a written warning and was not the sole basis for the sentencing decision. The court noted, however, that judges likely lack the requisite knowledge to “modulate their consideration of the tool” and may succumb to “cognitive biases supporting data reliance.”

2. More study needed

House of Representatives panel recommended doing more study to see if we should do the plan

David Sherfinski & Avi Asher-Schapiro 2021. (journalist) 9 Aug 2021 “U.S. prisons mull AI to analyze inmate phone calls” <https://www.reuters.com/article/us-usa-tech-prison-idUSKBN2FA0OO> (accessed 5 Oct 2021)

Prisons in the United States could get more high-tech help keeping tabs on what inmates are saying, after a key House of Representatives panel pressed for a report to study the use of artificial intelligence (AI) to analyze prisoners’ phone calls.

A/T “States are doing it already” – Still needs more study to apply at the federal level

David Sherfinski & Avi Asher-Schapiro 2021. (journalist) 9 Aug 2021 “U.S. prisons mull AI to analyze inmate phone calls” <https://www.reuters.com/article/us-usa-tech-prison-idUSKBN2FA0OO> (accessed 5 Oct 2021)

A House Democratic aide said in an emailed statement they were encouraging the DOJ “to engage with stakeholders in the course of examining the feasibility of utilizing such a system.” Several state and local facilities across the country have already started using the tech, including in Alabama, Georgia and New York. The House panel wants the DOJ to look into potentially leveraging the technology for federal use and to identify gaps or shortcomings in the information it produces.

DISADVANTAGES

1. Privacy Loss #1: Violates privacy rights of families on the outside

**[Writing in context about NY state prisons starting to use AI to monitor phone calls…]**

AI monitoring violates the constitutional rights of families on the outside as a privacy violation

Surveillance Technology Oversight Project 2020. (non-profit advocacy organization and legal services provider) S.T.O.P. Report Highlights Risk From Artificial Intelligence Surveillance In NY Prisons 15 Sept 2020 <https://www.stopspying.org/latest-news/2020/9/15/stop-report-highlights-risk-from-artificial-intelligence-surveillance-in-ny-prisons> (accessed 5 Oct 2021) (A.F. Cahn: attorney; has lectured at Harvard Law School, New York University School of Law, Columbia University, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) (brackets added)

“This software isn’t just a threat to prisoners, but to their friends, family, children, and communities,”**s**aid **Surveillance Technology Oversight Project Executive Director Albert Fox Cahn**. “This is just the latest example of New York investing in wasteful and invasive surveillance instead of evidence-based safety measures. Any person who speaks to an inmate is at risk of falling into this dystopian surveillance web, having every syllable of our conversation analyzed to predict if we pose a risk of committing a crime in the future. This Minority Report style policing is not just unconstitutional, but it may suffer from the same sorts of bias as facial recognition and other biometric tracking tools.” The report warns that DOCCS’s [New York State Department of Correction and Community Supervision] audio surveillance of inmates, former inmates, pretrial detainees, and bystanders constituted an unconstitutional invasion of privacy.

Innocent loved ones and even minor children are subject to government surveillance

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York University School of Law, Columbia University, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021) (brackets added)

Because the SCP [Secure Call Platform] records all parties to inmate phone calls, it records inmates’ friends and family, spiritual advisers, and even minor children. Although IPRO [Investigator Pro] does not identify these innocent bystanders by name, IPRO still samples their voices. Through IPRO’s searchable voice feature, investigators can then search for matches to these voice samples across Securus’s database, subjecting innocent members of the public to investigation simply for speaking to incarcerated loved ones.

“Consent” doesn’t matter: it still criminalizes the innocent families

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York University School of Law, Columbia University, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021) (brackets in original)

While there is a fiction of consent where called parties receive notice that the calls are subject to monitoring and recording, inmates’ loved ones often have “no realistic choice but to divulge information.” Further, Securus is not divulging the full capabilities of its monitoring when it gives that notice to the innocent called party. Regardless of the legal ambiguity, a system that “criminalize[s] relationships” is intuitively unsettling. An attorney at New York’s Legal Aid Society states the problem clearly: “if you have a family member convicted of a crime, yet you haven’t been, why are you now having your information being used for government investigations?”

Recorded calls store private information about innocent families

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York University School of Law, Columbia University, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021) (brackets in original)

The severity of these privacy intrusions is illuminated when considering the scale of IPRO’s data recording. Securus’s database of recorded calls includes millions of recordings that can be stored indefinitely and remain available throughout the life of the contract period. At the end of the contract period, calls must be turned over to a succeeding contractor. These capabilities seem especially problematic when used in conjunction with other police investigative tools. Even though IPRO does not identify the names of called parties whose voice prints are included in the database, it is plausible that police seeking to identify a suspect in a criminal investigation could compare a voice print from Securus’s database with a voice captured on a separate wiretap. Thus, it stands to reason that one who accepts a call from an inmate using the Inmate Telephone System risks unwittingly inserting oneself into a police investigation. Academics have noted that, more than merely “pierc[ing] the veil of anonymity,” the ITS enables the surreptitious capturing of private information. This private information, once captured, potentially can be stored for an indefinite amount of time. Some see a slippery slope between these capturing / storage capabilities and mass surveillance directed toward persons caught up in the criminal justice system and the people they love.

2. Privacy Loss #2: Vulnerable to hacking

Inadequate security makes prison call recordings vulnerable to hackers

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York University School of Law, Columbia University, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021) (brackets added)

According to Securus’s technical proposal to DOCCS, Securus protects telephone call data by constantly monitoring data storage equipment, conducting audits, and maintaining chains of evidence to prevent data tampering. However, Securus designed the ITS to maximize ease of access to recordings and call logs over its obligations to maintain the security of such invasive surveillance technology. Through the facility portal, DOCCS officials can access the SCP remotely on an internet browser with only a username and password and without the need to be on a DOCCS network. SCP users, such as local police departments, can retain recordings indefinitely, keeping recordings on the SCP server for the length of the contract, with the ability to copy recorded conversations onto any external media device connected to the user’s personal computer. The ability to access the SCP remotely, combined with the lack of requirements for two factor authentication, leave the SCP and its recordings vulnerable to hackers and other unauthorized users.

3. Violating attorney/client privilege

Inadequate safeguards against recording attorney/client calls. Even the possibility of it creates chilling effect

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York University School of Law, Columbia University, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021) (brackets added)

The SCP [Secure Call Platform] provides a limited carve-out for private phone calls, such as those subject to attorney-client privilege, by permitting the designation of certain phone numbers as “private.” Private phone numbers are automatically eliminated from all monitoring or recording, and are listed as “private” in call logs. The Technical Proposal is notably silent on the details of how calls are designated as private, who determines such designation, and how Securus is held accountable for following its own protocols. As noted below, Securus has been shown to be recording nominally private calls. The mere knowledge that a privileged call can be recorded is likely to create a chilling effect, deterring inmates from speaking freely with counsel. Further, private calls that are not privileged, such as those with intimate partners, children and clergy are monitored and recorded.

Not merely hypothetical: Securus got caught recording thousands of attorney/client calls from prison

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York Univ School of Law, Columbia Univ, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021)

In 2015, it was reported that hackers uploaded more than 70 million call records and downloadable recordings of calls obtained from Securus, of which at least 14,000 were “private” calls between inmates and their attorneys. [**END QUOTE]** Securus denied the reports and blamed third-party operators over whom it claimed to lack control. In 2016, Securus settled a lawsuit in Texas, where it was alleged that Securus had improperly recorded privileged inmate calls. In 2018, it was reported that hackers uploaded more than 2,800 usernames, email addresses, phone numbers, and scrambled passwords and security questions of Securus users. Further it was noted that in an online user’s manual for its products, Securus revealed personally identifiable information of real people. [**HE GOES ON LATER IN THE CONTEXT TO SAY QUOTE:]** More recently, in 2019 and 2020, Securus settled lawsuits in Kansas and California, again for recording privileged calls, settlements in which it promised to improve on its security protocols and submit biannual compliance reports.

Impact: Attorney/Client privacy is essential to integrity of the legal process and the rights of the client

Jackie Unger 2013. (attorney, writing for the American Bar Association) 31 Oct 2013 Maintaining the Privilege: A Refresher on Important Aspects of the Attorney-Client Privilege https://www.americanbar.org/groups/business\_law/publications/blt/2013/10/01\_unger/

The attorney-client privilege is the backbone of the legal profession. It encourages the client to be open and honest with his or her attorney without fear that others will be able to pry into those conversations. Further, being fully informed by the client enables the attorney to provide the best legal advice.

4. Wrongful accusations based on racial bias

Speech to text technology isn’t accurate enough to use for criminal justice, and introduces racial bias

David Sherfinski & Avi Asher-Schapiro 2021. (journalists) 9 Aug 2021 “U.S. prisons mull AI to analyze inmate phone calls” <https://www.reuters.com/article/us-usa-tech-prison-idUSKBN2FA0OO> (accessed 5 Oct 2021)

Technology that transcribes voice conversations is flawed and has a particularly high error rate when applied to the voices of Black people, according to a 2020 paper on the five leading systems by researchers at Stanford University and Georgetown University. “Speech-to-text technology is not in a place where it can be used to make these kinds of criminal justice decisions,” said Allison Koenecke, the lead author of the study. The researchers found that Amazon’s automatic speech recognition software had an error rate for Black speakers that was nearly twice as high as for white speakers.

Faulty voice identification, accents, and dialects lead to wrongful targeting of minorities

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York Univ School of Law, Columbia Univ, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021) (brackets added)

Others voice concern with what they say is a lack of transparency with respect to how Securus collects and analyzes voice print data. IPRO provides a “voice probability score” that rates the likelihood that an inmate’s voice was the voice heard on the targeted call. However, the error rates of IPRO are not publicly known. In the absence of proper oversight, decisions may be made based on faulty voice probability scores. Filtering and data mining techniques tend to struggle with certain accents, dialects, and pitches of voices, exposing minority groups to higher risks of wrongful targeting. A recent study by researchers at Stanford University found that five automated speech recognition systems, each developed by one of five giant American technology companies, had an average error rate of 0.35 for Black speakers and 0.19 for White speakers. Despite the flaws inherent to automated speech recognition systems, Securus claims its systems have “higher accuracy,” but it has shown publicly no evidence to support that claim.

AI phone monitoring amplifies racial bias

David Sherfinski & Avi Asher-Schapiro 2021. (journalists) 9 Aug 2021 “U.S. prisons mull AI to analyze inmate phone calls” <https://www.reuters.com/article/us-usa-tech-prison-idUSKBN2FA0OO> (accessed 5 Oct 2021)

Privacy groups say the technology could amplify racial bias in the justice system and unfairly subject prisoners to unaccountable artificial intelligence. “This Congress should be outlawing racist policing tech - it shouldn’t be funding it,” said Albert Fox Cahn, executive director of the Surveillance Technology Oversight Project (STOP), an advocacy group based in New York. “People who have been caught up in the criminal justice system are always turned into the subjects of experimentation for new technology systems.”

5. Losing 6th Amendment rights

When AI generates evidence against a suspect, he could lose the 6th Amendment right to confront & cross-examine witnesses against him

Albert Fox Cahn 2020 (attorney; Director of Surveillance Technology Oversight Project; has lectured at Harvard Law School, New York Univ School of Law, Columbia Univ, and Dartmouth College. Formerly an associate at Weil, Gotshal & Manges, where he advised Fortune 50 companies on technology policy, antitrust law, and consumer privacy) 15 Sept 2020 LISTENING BEYOND THE BARS New York's Artificial Intelligence Surveillance of Prisoners and their Loved Ones. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f5ff0bd5b99c619be085e91/1600123069848/2020-9-15+Listening+Beyond+The+Bars.pdf> (accessed 5 Oct 2021)

Low quality recordings of conversations do not allow for “fine-grained distinctions of speech sounds” and generally are not reliable evidence in the context of criminal prosecution. Courts have addressed similar concerns over the accuracy of automated systems. In State v Loomis, an algorithmic recidivism risk assessment identified the defendant as a high-risk re-offender, based on aggregate recidivism data of groups of persons “similar” to him. Although the assessment algorithm was a trade secret, the Wisconsin Supreme Court ruled that judicial reliance on the assessment in sentencing did not violate the defendant’s right to due process, so long as the assessment came with a written warning and was not the sole basis for the sentencing decision. The court noted, however, that judges likely lack the requisite knowledge to “modulate their consideration of the tool” and may succumb to “cognitive biases supporting data reliance.” In light of IPRO’s shortcomings and recent pro-surveillance cases like People v. Diaz (recordings of pretrial detainees with notice admissible as evidence), it is not hard to imagine how courts may fail to adequately consider the inherent bias and inaccuracy of the automated systems prosecutors employ. Some argue that it is only a matter of time before courts must decide whether to allow testimony from systems having artificial intelligence capabilities. The Sixth Amendment’s Confrontation Clause guarantees a criminal defendant the right to be confronted with the witnesses against him. This raises the concern of whether, if courts allow artificial intelligence systems to testify in criminal proceedings, can such systems be confronted and cross-examined in a way that is consistent with the Constitution?

Impact: Human rights lost. The 6th Amendment keeps American trials from turning into the Spanish Inquisition, where people were convicted by secret evidence

Justice Antonin Scalia 2004. (member of the US Supreme Court) opinion of the Court in the case of Crawford v. Washington 541 US 36, 8 Mar 2004 <https://supreme.justia.com/cases/federal/us/541/36/> (accessed 5 Oct 2021) (brackets and ellipses in original)

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation.[**END QUOTE**] See Virginia Declaration of Rights §8 (1776); Pennsylvania Declaration of Rights §IX (1776); Delaware Declaration of Rights §14 (1776); Maryland Declaration of Rights §XIX (1776); North Carolina Declaration of Rights §VII (1776); Vermont Declaration of Rights Ch. I, §X (1777); Massachusetts Declaration of Rights §XII (1780); New Hampshire Bill of Rights §XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). [**SCALIA CONTINUES LATER IN THE CONTEXT QUOTE:]** The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: “The mode of trial is altogether indetermined; … whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told… . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, … the Inquisition.” [**END QUOTE**] 2 Debates on the Federal Constitution 110–111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of “written evidence” while objecting to the omission of a vicinage right: “Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question… . [W]ritten evidence … [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.” R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, supra, at 469, 473. [**SCALIA CONCLUDES LATER IN THE SAME CONTEXT QUOTE**:] The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.