WEAPONS OF MASS DEPORTATION: BIG DATA AND AUTOMATED DECISION-MAKING SYSTEMS IN IMMIGRATION LAW

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INTRODUCTION

The world is run by data. Predictive analytics and machine learning are constantly feeding from people's data to predict behaviors. Big Tech propelled the "Big Data" revolution after discovering that data translates into revenue.[1] Netflix predicts what movies you will like, Facebook helps businesses predict what kinds of ads you are likely to click on, and insurance companies predict whether you will be in an accident or become sick.[2] But what happens when the government uses your data to predict that you are going to commit a crime, or to track you and deport you if you are undocumented?

What used to be the arms race among nations has now turned into the technology race. President Putin professed that the nation that obtains leadership in artificial intelligence (AI) will rule the world.[3] After China announced that it wants to become the global leader in AI research by 2030[4], the United States took strong stands on AI development through the "Executive Order on AI" signed by President Trump in February 2019.[5] The Research and Development Strategic Plan that followed the executive order calls for the "[d]eveloping of AI systems that complement and augment human capabilities. . ." as well as the "[d]eveloping and making accessible a wide variety of datasets to meet the needs" of different applications.[6] The United States widely uses computer-human collaboration systems within the criminal justice system under the name of Automated Decision-Making Systems (ADM

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1. *See* ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT 7 (2017).

2. ERIC SIEGEL, PREDICTIVE ANALYTICS: THE POWER TO PREDICT WHO WILL CLICK, BUY, LIE, OR DIE 27–29 (2013).

3. James Vincent, *Putin Says the Nation that Leads in AI "will be the ruler of the world,"* VERGE (Sept. 4, 2017), https://www.theverge.com/2017/9/4/16251226/russia-ai-putin-rule-the-world.

4. Paul Mozur, *Beijing Wants A.I. to Be Made in China by 2030*, N.Y. TIMES (July 20, 2017), https://www.nytimes.com/2017/07/20/business/china-artificial-intelligence.html.

5. Exec. Order No. 13,859, 84 Fed. Reg. 3976 (Feb. 14, 2019). *See generally* Rebecca Fannin, *Wake-Up Call: US-China Tech Race Could Only Be The Beginning*, FORBES (June 4, 2019), https://www.forbes.com/sites/rebeccafannin/2019/06/04/wake-up-call-us-china-tech-race-could-only-be-the-beginning/#502e9be931ff.

6. EXEC. OFF. OF THE PRESIDENT, THE NATIONAL ARTIFICIAL INTELLIGENCE RESEARCH AND DEVELOPMENT STRATEGIC PLAN: 2019 UPDATE 14, 29 (June 2019), *available at* https://www.nitrd.gov/pubs/National-AI-RD-Strategy-2019.pdf.

Systems). In the immigration context, the use of these systems is limited. Does the Executive Order on AI call for the expansion of these systems to other governmental functions in immigration enforcement?

This article argues that while ADM Systems may increase immigration enforcement efficiency, their use in this context presents serious concerns under international and domestic laws. Furthermore, ADM Systems can be easily manipulated to accomplish political outcomes as we have already seen administrations manipulate the Risk Classification Assessment System (RCA). The RCA helps Immigration and Customs Enforcement (ICE) to determine whether a detained immigrant should be released with bond or kept detained. Currently, the RCA almost always recommends indefinite detention.[7] The expansion of ADM Systems to other areas of immigration enforcement, like the Trump Administration's proposed "extreme vetting initiative" that would allow for the automated and continuous surveillance of immigrants, present additional challenges and concerns. Therefore, it is paramount that academia and the public-at-large engage in conversations about the risks that such systems pose against the most vulnerable populations and strategize ways to mitigate those risks.

Part I will provide an overview of ADM Systems and AI. Part II will describe the use of two types of ADM Systems in criminal law enforcement, as well as their advantages and critiques. Part III will explain in detail the current use of ADM Systems by ICE. Part IV will discuss the potential future expansion of ADM Systems to other areas of immigration law. Part V will describe the concerns that the use of ADM Systems in immigration enforcement present under international and domestic laws. Finally, Part VI will provide recommendations for administrations or Congress to implement before expanding the use of ADM Systems in immigration enforcement.

I.   PREDICTIVE ANALYTICS, ADM SYSTEMS, AND THEIR FAILINGS

Predictive analytics is a subset of statistics that predicts the future behavior of individuals based on predictive models that may use logistic or linear regression algorithms.[8] Machine learning technologies take predictions one step further by using computer coding to "enable [systems] to improve at tasks with experience."[9] As a result, systems can create their own models by identifying meaningful patterns in data sets without human involvement.[10]

This article focuses on a type of predictive analytics called Automated Decision-Making Systems (ADM Systems) that may or may not be powered by machine learning. ADM Systems can be any "software, system, or process that aims to aid or replace human decision making." They function by

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7.   Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16 CONN. PUB. INT. L.J. 1, 13–14, 23–24 (2017).

8.   SIEGEL, *supra* note 2, at 34, 48.

9.   *Glossary of A.I. Terms*, TIME (SPEC. ED.), Sept. 29, 2017, at 7.

10.   Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1279 (2018).

analyzing data to "generate scores, predictions, classifications, or some recommended action(s)," which in turn are used by the government to "make decisions that impact human welfare."[11] ADM Systems that do not use machine learning may generate results based on a limited set of inputs entered by humans. In contrast, ADM Systems that use machine learning work along with Big Data or massive amounts of historical data in order to reveal patterns and trends.[12] These patterns and trends become predictions thanks to a process called "labelling" by which programmers assign class labels to certain data so that the algorithm can "learn" from the labels.[13] Labelling data to train algorithms can bring a degree of subjectivity, particularly when the value assigned involves a subjective determination.[14]

There are two major problems with ADM Systems. First, ADM Systems that use biased historical data generate biased predictions. Second, ADM Systems' predictions cannot be questioned or challenged since the algorithms are proprietary and protected under the veil of trade secret.

A.   *"Algorithms of Oppression"*

ADM Systems have the potential to have positive impacts in society. For example, social services agencies can increase efficiency in providing resources to abused children;[15] public school districts can better control school choice assignments;[16] fire departments can decide where to allocate funding[17] or predict which buildings have a higher fire risk;[18] and cities can identify landlords most likely to discriminate against housing applicants based on income.[19] Furthermore, one might argue that these systems are better than humans in making impartial decisions because they use mathematical models and are not susceptible to emotions, hunger, or illness.

Despite these potentially positive uses for ADM Systems, they can be used to harm society, especially communities of color. For example, financial

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11.   Recommendation Letter from Andrew Guthrie Ferguson et al. to New York City's Automated Decision Systems Task Force Chairs Emily W. Newman & Brittny Saunders 2 (Aug. 17, 2018) [hereinafter NY Task Force Recommendation Letter], *available at* https://www.nyclu.org/sites/default/files/field_documents/nyc_ads_task_force_letter_8.17.18.pdf.

12.   *See* FERGUSON, *supra* note 1, at 8.

13.   McKenzie Raub, *Bots, Bias and Big Data: Artificial Intelligence, Algorithmic Bias and Disparate Impact Liability in Hiring Practices*, 71 ARK. L. REV. 529, 534 (2018).

14.   For example, qualities of a desirable employee. *Id*.

15.   *See* Dan Hurley, *Can an Algorithm Tell When Kids Are in Danger?* N.Y. TIMES (Jan. 2, 2018), https://www.nytimes.com/2018/01/02/magazine/can-an-algorithm-tell-when-kids-are-in-danger.html (The C.Y.S. algorithm has received praise even by the ACLU thanks to the implementers' openness to hear and consider hard criticism.).

16.   *See* Aytek Erdil & Haluk Ergin, *What's the Matter with Tie-breaking? Improving Efficiency in School Choice*, 98 AM. ECON. REV. 669, 669–89 (2008).

17.   *See* Joe Flood, *Why the Bronx Burned*, N.Y. POST (May 16, 2010), https://nypost.com/2010/05/16/why-the-bronx-burned/.

18.   *See* Brian Heaton, *New York City Fights Fire with Data*, GOV'T TECH. (May 15, 2015), https://www.govtech.com/public-safety/New-York-City-Fights-Fire-with-Data.html.

19.   *See* Chris Bousquet, *How New York is Protecting Affordable Apartments with Analytics*, DATA-SMART CITY SOLUTIONS (Feb. 28, 2018), https://datasmart.ash.harvard.edu/news/article/how-new-york-protecting-affordable-apartments-analytics.

institutions use ADM Systems to decide to whom to give loans, and some use variables such as zip code and number of household members in the same address to do so.[20] This practice can translate into unlawful discrimination against people of color.[21] Similarly, hiring practices that use ADM Systems in selecting candidates may lead to Title VII violations for employment discrimination if they take into account variables such as ZIP code or past job retention.[22] In short, these systems can perpetuate and sometimes magnify the existing inequalities that disadvantage communities of color.

The use of ADM Systems in law enforcement presents the most serious danger to communities of color. Historical crime data are full of racial bias due to the disproportionate targeting of communities of color.[23] This data subsequently freed ADM Systems to continue to sanction the over-policing and over-surveillance of these communities.[24]

Developers are partially at fault. Not only because they are the ones selecting the data and making the labelling to train the systems,[25] but also because they fail to recognize the bias embedded in their systems.[26] Part of the problem is that developers are predominantly white and often fail to seek multiple perspectives and viewpoints when developing their systems.[27] Some proponents argue that, regardless of the developers' choices, AI can minimize bias over time to the degree that it is statistically insignificant.[28] This argument falls short because if the system is continuously fed by new data, gathered within the framework of institutions and structures infected by bias, there is no way ADM Systems can correct for these biases without intervention. Recognizing the biases before creating the system would allow developers to introduce technical fixes to the algorithms. Increasing diversity in the tech profession is the best starting point towards eliminating biases in these systems.

B.   *The Secrecy of Algorithmic Predictions*

Individuals affected by ADM Systems cannot question a decision made by the system or hold the system accountable.[29] The trade secret privilege

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20.   Miriam Vogel, *Making Equitable Access to Credit a Reality in the Age of Algorithms*, HILL (Aug. 30, 2019), https://thehill.com/blogs/congress-blog/technology/459455-making-equitable-access-to-credit-a-reality-in-the-age-of.

21.   Jerry Kaplan, *Why Your AI Might Be Racist*, WASH. POST. (Dec. 17, 2018), https://www.washingtonpost.com/opinions/2018/12/17/why-your-ai-might-be-racist/.

22.   *See* Raub, *supra* note 13, at 531, 547, 549–50.

23.   Karen Hao, *AI is Sending People to Jail – and Getting it Wrong*, TECH. REV., (Jan. 21, 2019), https://www.technologyreview.com/s/612775/algorithms-criminal-justice-ai/.

24.   *See* FERGUSON, *supra* note 1, at 3–5.

25.   Zeynep Tufekci, *Algorithmic harms beyond Facebook and Google: emergent challenges of computational agency*, 13 COLO. TECH. L. J. 203 at 216–17 (2015).

26.   Raub, *supra* note 13, at 542.

27.   Stephanie Weber, *How Artificial Intelligence is Transforming the Criminal Justice System*, THOUGHT WORKS (Jan. 10, 2018), https://www.thoughtworks.com/insights/blog/how-artificial-intelligence-transforming-criminal-justice-system.

28.   *Id*.

29.   Hao, *supra* note 23.

protects against disclosure of codes when the ADM System is developed by a private company;[30] however, even cities have successfully prevented the disclosure of the code when it was developed in-house and with taxpayers' money.[31] New York City's Office of Chief Medical Examiner (OCME) prevented the disclosure of the code of the Forensic Statistical Tool (FST) against a criminal defendant.[32] When OCME was finally ordered to disclose the code at a subsequent case, the defense's expert witness found that the FST's behavior departed from the published description of the system.[33] Such discovery led the inspector general to investigate OCME.[34]

   Some scholars argue that individuals' due process rights are violated when the trade secret privilege prevents the defendant's access to relevant evidence.[35] Nevertheless, courts are extremely reluctant to allow disclosure of trade secrets.[36] This information asymmetry gives the prosecution an unfair advantage over the defendant.[37]

   Even if proprietary algorithms are revealed, some outcomes are impossible to understand.[38] Machine learning turns some ADM Systems into very sophisticated predictors thanks to its self-modeling.[39] *Deep learning*—or a system with artificial neural networks that mimic how the human brain processes signals—is able to produce outcomes based on Big Data, thousands of variables, and under countless combinations of different conditions that the human brain cannot comprehend.[40] As a result, deep learning may present serious problems of non-compliance of laws and regulations. For example, in the loan application case, the credit company may be required to give an explanation to a rejected applicant.[41] But machine learning would not allow for a meaningful explanation due to the complexity of its predictions. Therefore, these types of systems are not appropriate in certain circumstances.

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   30.   United States v. United Fruit Co., 410 F.2d 553, 556 (5th Cir. 1969) (noting that courts should exercise discretion to avoid unnecessary disclosure of trade secrets).

   31.   Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STANFORD L. REV. 1343, 1397 (2018).

   32.   *See, e.g.*, People v. Carter, No. 2573/14, 2016 WL 23908, at *7 (N.Y. Sup. Ct. Jan. 12, 2016).

   33.   Letter from Preet Bharara, United States Attorney for the S. Dist. of New York to the Honorable Judge Valerie E. Caproni, United States Dist. Judge, S. Dist. of New York (May 3, 2016), *available at* https://www.courtlistener.com/recap/gov.uscourts.nysd.446412.37.0.pdf.

   34.   Wexler, *supra* note 31, at 1398-99.

   35.   *Id.*

   36.   *Id.* at 1401.

   37.   *Id.* at 1428.

   38.   PETRA MOLNAR & LEX GILL, BOTS AT THE GATE: A HUMAN RIGHTS ANALYSIS OF AUTOMATED DECISION-MAKING IN CANADA'S IMMIGRATION AND REFUGEE SYSTEM 3–5 (2018), https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf [Hereinafter CANADA REPORT].

   39.   David Weinberger, *Our Machines Now Have Knowledge We'll Never Understand*, WIRED (Apr. 18, 2017), https://www.wired.com/story/our-machines-now-have-knowledge-well-never-understand/.

   40.   *Id.*

   41.   Vogel, *supra* note 20.

II.   THE USE OF ADM SYSTEMS IN LAW ENFORCEMENT

ADM Systems are used both by police officers to make arrests and by judges to determine sentences. Police officers use them to identify where the next car theft will occur[42] or where people are most likely to be shot.[43] Judges use them to determine whether a defendant will remain in jail without bail, receive harsher sentences, or receive rehabilitation services.[44] Proponents argue that ADM Systems help with efficiency and allocation of resources, but scholars found that ADM Systems disproportionately affect people of color.[45]

ADM Systems are fed with historical crime data, which is full of racial bias. Historically, law enforcement has disproportionately targeted communities of color.[46] For example, in Ferguson, Missouri, historical data showed that between 2012 and 2014, blacks accounted for 85% of vehicle stops and 93% of arrests when the population is just 67% black.[47] Among the charges, blacks accounted for 95% of "failure to comply" and 94% of "walking in the roadway."[48] In addition, national data shows that although marijuana consumption is evenly distributed among races, blacks are almost four times more likely to be arrested for marijuana possession than whites.[49] Blacks are also incarcerated in state prisons at a rate that is five times that of whites.[50] In eleven states, at least one in twenty adult black males is in prison.[51] Racial profiling, inequities in law enforcement, and harsher treatment of blacks in the judicial system are the main causes.[52]

Massive databases of historical crime data power ADM Systems. The National Crime Information Center (NCIC) is one of the largest federal databases that includes information about individuals' arrests, warrants, gang affiliations, terrorism ties, and fugitive status.[53] Law enforcement accesses this database around twelve million times daily.[54] Some databases have very detailed information on certain individuals who have previously interacted with law enforcement such as their addresses, places of employment, schools,

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42.   Colorado Springs uses a risk assessment system to identify the areas where a car is more likely to be stolen by using data variables such as police calls for service, foreclosures, multi-family housing units, parks, sit-down restaurants, and commercial zoning. FERGUSON, *supra* note 1, at 67–68.

43.   Newark uses a risk assessment system to identify where future shootings are likely to occur by using data variables such as narcotics arrests, foreclosures, restaurants, gas stations, convenience stores, take-out restaurants, bars, abandoned properties, schools, liquor stores, and certain housing. *Id.* at 68.

44.   Hao, *supra* note 23.

45.   FERGUSON, *supra* note 1, at 3–4.

46.   Hao, *supra* note 23.

47.   U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

48.   *Id.*

49.   FERGUSON, *supra* note 1, at 48.

50.   *Id.*

51.   *Id.*

52.   Kaplan, *supra* note 21.

53.   FERGUSON, *supra* note 1, at 14.

54.   *Id.* at 15.

and even intimate details such as whether they have tattoos and scars on their bodies.[55]

Data brokers, or private companies that sell online users' data, can also feed data into ADM Systems. For example, Acxiom claimed to have information of over 700 million people worldwide.[56] Similarly, Datalogix claimed to have information about almost every household in the United States.[57] The information that data brokers have can be as detailed as miles traveled in the last month, OBGYN visits in the last year, pet owner status, military status, reading habits, etc.[58] They surveil people to find their interests, habits, and inclinations in order to package the desired information to sell it to the best bidder—in many cases, law enforcement.

Considering the type of data these systems use, it is no surprise that their outcomes can be racially biased. Section II will provide two examples of these systems, their advantages, and impacts on communities of color.

A.   Risk Assessment Systems: The Recidivism Score

Judges are using predictive systems to determine defendants' recidivism score, a score that predicts whether a particular defendant is likely to reoffend.[59] With this information, judges decide whether the defendant will receive rehabilitative services, whether the defendant will be held in jail before trial, and the ultimate final sentence, such as probation or time served.[60] High scores translate to no bail before trial and harsher sentences.[61]

These systems use many variables that highly correlate with race, such as the individual's occupation, prior crimes, prior arrests, prior incarcerations, and current zip code.[62] Because of the different weights assigned to these variables, some scores end up making little sense. For example, a defendant who had molested a child every day for a year may receive a lower score than a defendant convicted of a drug offense simply because the first has a job while the other is homeless.[63]

Although the scores may be shared with defense attorneys, defendants rarely have an opportunity to challenge them.[64] For example, the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) has

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55.   *Id.*
56.   *Id.* at 13.
57.   *Id.*
58.   *Id.*
59.   Hao, *supra* note 23.
60.   *Id.*
61.   *Id.*
62.   A predictive system developed by Northpointe determines the recidivism score by using defendants' answers to specific questions related to members of defendant's family in prison, drug use among defendant's friends, and defendant's past school disciplinary actions. Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, *Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks*, ProPublica (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [Hereinafter ProPublica Study].
63.   *Id.*
64.   *Id.*

been challenged due to constitutional concerns, in *State v. Loomis.*[65] In that case, the Supreme Court of Wisconsin addressed whether the use of COMPAS at sentencing violates a defendant's right to due process because its proprietary nature prevented the defendant from challenging its results.[66] The court held that there was no violation because COMPAS's findings were supported by "other independent factors." Thus, it was not determinative in the sentencing decision.[67] Nevertheless, the court acknowledged the potential problems that COMPAS may cause and held that its use must be subject to certain cautions and limitations.[68]

B.   *Automated Suspect Discovery Systems: Predicting Who is a "Person of Interest"*

Predictive policing is used in at least twenty of the fifty largest police departments in the United States.[69] ADM Systems, such as the Automatic Suspect Discovery System (ASD System), allow law enforcement to score individuals to predict who is a "person of interest."[70]

Two different approaches were tested using these scores: the public health approach and the prosecutorial approach. In 2013, New Orleans tested the public health approach with Palantir technology that identified hidden social relationships in existing databases.[71] Once the program created maps with crime hot spots, the focus was to identify high-risk individuals for intervention.[72] Intervention involved calls from social workers and invitations to prevention meetings.[73] In addition, the city funded a host of social services programs aimed to prevent violence, such as the training of mediators, violence interrupters, and community first responders.[74] By 2014, homicide rates decreased by 21.9% and group or gang murders rate decreased by 55%.[75]

New York City, conversely, chose the prosecutorial approach. Once "priority targets" were identified, the goal was to remove them from society.[76] What is worse is that individuals, many without criminal records, were

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65.   State v. Loomis, 371 Wis.2d 235, 241–82 (2016).

66.   *Id*. at 753.

67.   *Id*.

68.   Specifically, the court held that sentencing courts must be informed that (1) the proprietary nature of COMPAS does not allow disclosure of how factors are weighed or how risk is determined, (2) there is no cross-validation study for a Wisconsin population, (3) some studies have raised questions of bias against minorities, and (4) the system is constantly re-normed for accuracy. *Id*. at 763–64.

69.   Logan Koepke, *Predictive Policing Isn't About the Future – it's about the past*, SLATE (Nov. 21, 2016), https://slate.com/technology/2016/11/predictive-policing-is-too-dependent-on-historical-data.html.

70.   SIEGEL, *supra* note 2, at 89–90.

71.   Palantir combined and analyzed different city databases than contained information about police calls for service, electronic police reports, probation and parole records, arrest and booking records, gang databases, etc. Analysts added community and infrastructure data such as the location of schools, hospitals, libraries, parks, police offices, liquor stores, etc. FERGUSON, *supra* note 1, at 40–41.

72.   FERGUSON, *supra* note 1, at 41.

73.   *Id*.

74.   *Id*. at 41–42.

75.   *Id*. at 42.

76.   *Id*. at 43.

included in an "arrest alert system," whereby any time one of these targets was arrested, the system automatically informed prosecutors.[77] Prosecutors were ready to push for no bail, recommend a harsh sentence, pressure a guilty plea, and extract information of other targets.[78] Before and after the implementation of this intelligence-based program, New York City has seen a sharp crime decline.[79] Unsurprisingly, society's appeal to punitive systems made cities like Baltimore, San Francisco, Philadelphia, Richmond, and Baton Rouge to adopt the prosecutorial approach while proclaiming New York City's success.[80]

New Orleans' example shows that law enforcement can positively use ASD Systems, particularly when addressing the root causes of violence, and providing sufficient social services funding. Conversely, scholars and advocates have criticized the prosecutorial approach. For example, the ACLU stated that ASD Systems are used as an excuse to circumvent constitutional protections against searches and seizures without reasonable suspicion.[81] Professor Ferguson called this issue "the Big Data suspicion" because data alters police suspicion.[82] However, he noted that not much more than a mere inclusion on a "heat list" based on algorithms is needed to overcome the threshold.[83]

III.   ADM Systems in Immigration Enforcement

Immigrants are particularly vulnerable to potential ADM Systems' decisions that determine their fate. First, some decisions could result in horrendous consequences such as death when denying entry to an asylum-seeker. Second, immigrants—especially those who just arrive—enjoy very limited rights. For example, immigrants who are apprehended within 100 air miles of the U.S. land border and within the first fourteen days of their arrival are subject to expedited removal, a practice that allows Customs and Border Protection (CBP) officers to deport immigrants without any opportunity of review by an officer or a judge.[84] The Trump Administration is earnestly fighting to expand expedited removal against immigrants who are not able to show that they have been continuously present in the United States for at least two years prior to their apprehension anywhere in the country, not just near the border.[85] Finally, immigrants are unlikely to contest or appeal decisions

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77.   FERGUSON, *supra* note 1, at 43.

78.   *Id.*

79.   *Id.* at 44.

80.   *Id.*

81.   SIEGEL, *supra* note 2, at 94–95.

82.   FERGUSON, *supra* note 1, at 54–56.

83.   *Id.* at 56.

84.   *See* 8 C.F.R. 235.3(b) (2017); 69 Fed. Reg. 48877, 48879 (Aug. 11, 2004).

85.   *See* 84 Fed. Reg. 35409 (July 23, 2019). *See also* Vanessa Romo, *Trump Administration Moves To Speed Up Deportations with Expedited Removal Expansion*, NPR (July 22, 2019), https://www.npr.org/2019/07/22/744177726/trump-administration-moves-to-speed-up-deportations-with-expedited-removal-expan. In September 2019, the United States District Court for the District of Columbia issued a preliminary injunction to block the expansion of expedited removal under APA challenges. Make Rd. N.Y. v.

due to their lack of understanding of the immigration system and limited opportunities to obtain counsel.[86]

Other countries are looking into relying on ADM Systems to support their immigration enforcement goals. New Zealand used a system that flagged potential "troublemakers" to deny them entry or deport them.[87] After allegations of racial profiling, New Zealand discontinued the system's use.[88] In 2018, the Canadian government started discussions of a pilot project called "Artificial Intelligence Solution" in immigration decision-making and assessment.[89] In a meeting to request information, the Canadian government asked the private sector to develop ADM Systems to evaluate the merit of certain immigration applications.[90] In addition, a trusted source revealed that the Canadian government briefly experimented with the use of AI in "express entry" applications.[91]

The United States has used ADM Systems in immigration enforcement since 2013. The Risk Classification Assessment System (RCA), a type of ADM System, recommends ICE officers whether an apprehended immigrant should be detained or released on bond.[92] The Trump Administration expressed its desire to use ADM Systems and automated surveillance systems to fulfill his mandate known as the "extreme vetting initiative."[93] These examples and other potential uses of ADM Systems in immigration enforcement show how administrations can implement effective weapons of mass deportation.

This section will first explain the sources of "immigrant data" that enable the surveillance of immigrant populations and have the potential to facilitate future ADM Systems' uses in immigration enforcement. Second, it will explain in detail how the RCA works and how it evolved throughout different administrations. Third, it will provide examples of potential uses of ADM Systems in immigration enforcement. Finally, it will raise human rights and constitutional concerns of current and future uses of these systems.

McAleenan, 405 F. Supp. 3d. 1, 72 (D.D.C. 2019). However, in June 2020, the injunction was reversed. Make Rd. N.Y. v. Wolf, No. 1:19-cv-02369 (D.C. Cir. June 23, 2020).

86.   A study found that between 2007 to 2012 only 14% of detained immigrants had counsel. INGRID EAGLY & STEVEN SHAFER. ACCESS TO COUNSEL IN IMMIGRATION COURT 1 (Am. Immigr. Council 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. *See also* Mazin Sidahmed, '*It's Like an Automatic Deportation if You Don't Have a Lawyer*', N.Y. TIMES (Aug. 13, 2019), https://www.nytimes.com/2019/08/13/opinion/facing-the-injustice-of-immigration-court.html.

87.   Lincoln Tan, *Immigration NZ's Data Profiling "Illegal" Critics Say*, NZ HERALD (Apr. 5, 2018), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12026585.

88.   *Computer Says No: Transparency Needed in Automated Visa Decision Making*, DEFSEC (Jan. 12, 2019), https://defsec.net.nz/2019/01/12/transparency-automated-decision-making/.

89.   CANADA REPORT, *supra* note 38, at 1.

90.   *Id*. at 15.

91.   *Id*. at 14.

92.   Shane Ferro, *ICE's Bond Algorithm Has One Response: Detain*, ABOVE THE L. (June 27, 2018), https://abovethelaw.com/2018/06/ices-bond-algorithm-has-one-response-detain/.

93.   *See infra* Section III.C. for a discussion on the Trump Administration's proposal for an automated extreme vetting initiative.

A. *"Immigrant Data" and Surveillance*

The Big Data revolution has reached immigration enforcement, and it is just the beginning. Like in the criminal justice system, ICE now has unprecedented access to federal and local databases through shared systems.[94] These shared databases allow ICE to flag potential undocumented immigrants who come into contact with local law enforcement, even if the contact occurred in a "sanctuary city" where the information would not be otherwise shared with ICE.[95] For example, Washington, D.C. is among the cities that shares its data with regional databases accessible by ICE.[96] Relatedly, cities in Utah and Vermont have allowed ICE to mine state driver's license databases using facial recognition technology to identify undocumented immigrants.[97] These cities have never told immigrants that their faces would be shared with ICE.[98]

Furthermore, ICE uses its detention centers to collect an unprecedented amount of immigrant data. Some facilities have software that records both sides of non-privileged conversations in telephone calls and analyzes links between the callers and the recipients.[99] Even worse, the Trump Administration plans to collect all detainees' DNA samples.[100] Although the government already collects biometric information such as fingerprints and pictures,[101] mass DNA collection presents serious issues. First, mass collection shifts the purpose of DNA collection from one of criminal investigation to one of population surveillance.[102] Second, collecting DNA data from immigrants who have committed only civil violations (such as visa overstays) or those

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94. George Joseph, *Where ICE Already Has Direct Lines to Law Enforcement Databases with Immigrant Data*, NPR (May 12, 2017), https://www.npr.org/sections/codeswitch/2017/05/12/479070535/where-ice-already-has-direct-lines-to-law-enforcement-databases-with-immigrant-d.

95. MIJENTE, IMMIGR. DEF. PROJECT, & NAT'L LAW. GUILD, WHO'S BEHIND ICE? THE TECH AND DATA COMPANIES FUELING DEPORTATIONS 3 (2018), https://mijente.net/wp-content/uploads/2018/10/WHO%E2%80%99S-BEHIND-ICE_-The-Tech-and-Data-Companies-Fueling-Deportations-_v1.pdf [Hereinafter WHO'S BEHIND ICE REPORT].

96. *Id.*

97. Catie Edmondson, *ICE Used Facial Recognition to Mine State Driver's License Databases*, N.Y. TIMES (July 7, 2019), https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html.

98. *Id.*

99. McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html?te=1&nl=morning-briefing&emc=edit_NN_p_20191003&section=topNews?campaign_id=9&instance_id=12803&segment_id=17539&user_id=104f6c040f4d3958cf256bd25b46d86f&regi_id=98440224tion=topNews.

100. *See* DNA-Sample Collection From Immigration Detainees, 4 Fed. Reg. 56397 (proposed Oct. 22, 2019) (to be codified at 28 C.F.R. pt. 28) (this rule would strike a provision that allowed the Secretary of Homeland Security to exempt from the sample-collection requirement certain detained immigrants)*; see also* Nicole Narea, *The US wants to collect DNA from immigrant detainees for a federal criminal database*, VOX (Oct. 3, 2019), https://www.vox.com/policy-and-politics/2019/10/3/20895459/dna-test-immigrant-detention-criminal-database; Krista Oehlke, *Trump Administration Proposes Rule to Collect DNA from Detained Noncitizens*, LAWFARE (Dec. 13, 2019), https://www.lawfareblog.com/trump-administration-proposes-rule-collect-dna-detained-noncitizens.

101. WHO'S BEHIND ICE REPORT, *supra* note 95, at 36 (DHS agencies store all biometric data in the department's Automated Biometric Identification System, which contains nearly 230 million identities).

102. Caitlin Dickerson, *U.S. Government Plans to Collect DNA From Detained Immigrants*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/us/dna-testing-immigrants.html?te=1&nl=

seeking asylum may raise serious constitutional and human rights concerns. To date, it is unclear whether the Administration attempts to collect DNA of asylum seekers.[103] Third, collected genetic material can have implications against detainees' family members who may be United States citizens or legal permanent residents.[104] Therefore, the collection of immigrant data in immigration detention centers should be closely scrutinized.

Not only are federal and local agencies sharing data with ICE, but commercial databases are helping ICE as well. Reuters and RELX Group have been ICE's data brokers since 2013.[105] Unsurprisingly, the size of their contracts increased after President Trump issued the executive order calling for the extreme vetting of immigrants.[106] Reuters' most important service is the CLEAR system, which allows ICE to access "phone records, credit data, healthcare provider content, utilities data, DMV records, . . . data from social networks and chatrooms, and 'live access' to more than seven billion license plate detections."[107] Another system, provided by Vigilant Solutions, allows ICE to see precisely when and where vehicles of interest have been spotted and triggers immediate iPhone alerts when a target is scanned by a camera in the network.[108] ICE also contracted with Palantir to provide a system called Investigative Case Management (ICM) that provides Big Data analytics to discover connections between immigrants as well as access to intimate information.[109] In the summer of 2017, just before the Administration met with the Tech Industry to explore the development of ADM Systems for its "extreme vetting initiative," ICE signed a $2.4 million contract with PenLink to provide real-time monitoring of immigrants through "telephone data analysis and geolocation data mining and tracking."[110] Finally, ICE is working with Amazon to acquire a program called Rekognition that would allow it to track immigrants by using facial recognition technology.[111] ICE's strategy in

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morning-briefing&emc=edit_NN_p_20191003&section=topNews?campaign_id=9&instance_id=12803& segment_id=17539&user_id=104f6c040f4d3958cf256bd25b46d86f&regi_id=98440224tion=topNews.

103.   Associated Press, *US Takes Step to Require DNA Samples from Asylum Seekers*, CNBC (Oct. 21, 2019), https://apnews.com/9e9f240525444c798ac2bd0e64feef93.

104.   *Id.*

105.   Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255, 277 (2019).

106.   *Id.* at 277.

107.   *Updated Thomson Reuters Selling US Immigration and Customs Enforcement (ICE) Access to Data*, PRIVACY INT'L (June 21, 2018), https://privacyinternational.org/long-read/2079/updated-thomson-reuters-selling-us-immigration-and-customs-enforcement-ice-access; *see also* Sam Biddle, *Thomson Reuters Defends its Work for ICE, Providing "Identification and Location of Aliens,"* INTERCEPT (June 27, 2018), https://theintercept.com/2018/06/27/thomson-reuters-defends-its-work-for-ice/.

108.   Funk, *supra* note 99.

109.   Lamdan, *supra* note 105, at 260. *See also* Spencer Woodman, *Palantir Provides the Engine for Donald Trump's Deportation Machine*, INTERCEPT (Mar. 2, 2017), https://theintercept.com/2017/03/02/palantir-provides-the-engine-for-donald-trumps-deportation-machine/.

110.   Chantal Da Silva, *ICE Just Launched a $2.4M Contract with a Secretive Data Surveillance Company that Tracks You in Real Time*, NEWSWEEK (June 7, 2018), https://www.newsweek.com/ice-just-signed-24m-contract-secretive-data-surveillance-company-can-track-you-962493.

111.   Neema Singh Guliani, *Amazon Met With ICE Officials to Markey Its Facial Recognition Product*, ACLU (Oct. 24, 2018, 12:00 PM), https://www.aclu.org/blog/privacy-technology/surveillance-

collaborating with commercial databases seems obvious: obtain data, identify undocumented immigrants, track them, and deport them.

Under the automated "extreme vetting initiative," immigrants who enter the country would be continuously watched throughout their stay in the United States and even after they become legal permanent residents. The government would know what they posted online, what protests they joined, what doctors they visited, and other intimate information. Such intrusion raises serious concerns that will be further developed in Section V.

B. *ICE Risk Classification Assessment System*

The Risk Classification Assessment System (RCA) is a tool that in theory determines an immigrant's flight risk and danger to society. [112] ICE Enforcement Removal Officers or local officers input immigrants' information through intakes and other databases to obtain custody recommendations by the system.[113] Officers collect general data such as the immigrant's address, work, family status, scars, tattoos, etc.[114] Additionally, officers collect information relevant to the immigrant's "special vulnerabilities" such as mental illness, sexual orientation, and victim status.[115] Finally, officers rely on other databases such as ICE's internal database to determine the immigrant's prior immigration history as well as the NCIC to check on the immigrant's criminal history.[116]

Under the Obama Administration, the tool was designed to recommend detention without bond or immediate release according to scores on three main categories: flight risk, dangerousness, and special vulnerabilities.[117] Generally, when an immigrant had special vulnerabilities whose detention was not mandated by removal charges or reinstatement, the RCA did not provide an independent recommendation and instead recommended for the "supervisor to determine."[118] In contrast, when the immigrant with special vulnerabilities had low flight risk and low dangerousness, the RCA always recommended release.[119] Similarly, even if the immigrant did not have special vulnerabilities but had low flight risk and low dangerousness, the RCA

technologies/amazon-met-ice-officials-market-its-facial?fbclid=IwAR1AmiRNFnbFmaFaVqOG6pgXO DS4nSgVprLUdZExYnLy1Bc4Tr6140F74wE.

    112.   Mica Rosenberg & Reade Levinson, *Trump's Catch-And-Detain Policy Snares Many Who Have Long Called U.S. Home*, REUTERS (June 20, 2018, 10:18 AM), reuters.com/investigates/special-report/usa-immigration-court/.

    113.   Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. (forthcoming 2020).

    114.   *Id.*

    115.   *Id.*

    116.   *Id.*

    117.   *Id.*

    118.   *Id.*

    119.   Evans & Koulish, *supra* note 113.

recommended release.[120] For all other immigrants, the RCA recommended detention without bond.[121]

RCA's initial custody determination is crucial to immigrants not subject to mandatory detention. That is because these immigrants can contest a custody determination by requesting a hearing in front of an immigration judge.[122] Unfortunately, most immigrants do not understand their legal rights and fail to request review.[123] Even if immigrants successfully request a hearing, release is far from secured and sometimes depends on the ability to afford counsel to navigate the process and convince the judge.[124] If release is granted, it is conditioned on paying a bond that is at minimum $1,500.[125] As a result of these limitations, for many immigrants, the RCA's determination is the last word.

The developers of the RCA envisioned positive changes for immigrants. They hoped to reduce harm to vulnerable individuals, increase transparency and create standardization in custody determinations.[126] Scholars and advocates hoped that the tool would push for greater use of alternatives of detention.[127] Unfortunately, these goals and hopes never came to fruition. Recent FOIA results shed some light on why the RCA's use did not live up to those good intentions.[128] First, many vulnerable immigrants were not protected due to poor screening mechanisms and broad discretion by individual officers.[129] Second, transparency was never achieved because attorneys attempting to challenge custody determinations were never given a detailed summary of the RCA flight risk and dangerousness.[130] Third, standardization was never realized because individual officers overrode the RCA at a high rate.[131] For example, at one point, the RCA recommended detention without bond for 47% of immigrants, but the actual decisions by supervisors' overriding the RCA was 76%.

Over time, the RCA moved from being a risk assessment system to a weapon of mass deportation. The first major manipulation of the RCA occurred in 2014 under the Obama Administration with the elimination of many factors that were previously used by the RCA.[132] The Obama Administration reasoned that the system had to better align to both the actual custody decisions determined by ERO's and ICE's priorities.[133] These

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120. *Id*.
121. *Id*.
122. 8 C.F.R. § 1236.1(d) (2020).
123. Evans & Koulish, *supra* note 113.
124. *Id*.
125. 8 U.S.C. § 1226(a) (2018).
126. Evans & Koulish, *supra* note 113
127. *Id*.
128. *Id*.
129. *Id*.
130. *Id*.
131. *Id*.
132. Evans & Koulish, *supra* note 113.
133. *Id*.

alignments resulted in more "detain without bond" recommendations while reducing the overrides.[134] The Trump Administration further manipulated the RCA to no longer recommend release under any circumstances.[135] These last changes led to a FOIA lawsuit against the Trump Administration in order to understand the rationale of these new changes considering the grave implications of indefinite detention against immigrants.[136] In the meantime, the RCA became a mere vehicle for imposing detention pursuant to purely political goals.

C. *The Automated Extreme Vetting Initiative*

President Trump had more ambitious plans than just changing the RCA. In January 2017, he signed his first executive order addressing border security and immigration enforcement.[137] As his first official pronouncement as president, he made clear that one of his objectives was to "promptly" remove undocumented immigrants and end the "abuse" of asylum laws.[138] Later that month, he issued another executive order to ban immigrants from entry to the United States from Muslim-majority countries.[139] This "Muslim Ban" also called for extreme vetting of immigrants requesting entry to the United States.[140]

To carry out Trump's "extreme vetting initiative," ICE hosted an "industry day" in the summer of 2017 to obtain interest by Big Tech to develop an automated vetting program to determine applicants' probabilities of becoming a "positively contributing member of society" and to assess applicants' propensities to commit criminal or terrorist acts in the United States.[141] The initiative also called for the automatic and continuous monitoring of immigrants already living in the United States.[142] This program, as desired by the Administration, would flag individuals likely to present a national security

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134. *Id.*
135. Daniel Oberhaus, *ICE Modifies Its "Risk Assessment" Software So It Automatically Recommends Detention*, VICE (June 26, 2018), https://www.vice.com/en_us/article/evk3kw/ice-modified-its-risk-assessment-software-so-it-automatically-recommends-detention.
136. *See* Complaint, N.Y. Civil Liberties Union v. Immigration & Customs Enf't, No. 1:18-cv-11557 (S.D.N.Y. Dec. 11, 2018); *see also* Chris Welch, *NYCLU Sues ICE Over Changes to Immigrant Risk Assessment Algorithm*, VERGE (Dec. 12, 2018), https://www.theverge.com/2018/12/12/18138243/nyclu-lawsuit-ice-immigration-risk-assessment-tool.
137. *See* Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).
138. *Id.* at 8793.
139. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).
140. Since then, a new version of the Muslim Ban was enacted as a result of court's enjoinments of its previous provisions. *See* Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). Later, Exec. Order No. 13815, 82 Fed. Reg. 50055 (Oct. 24, 2017) titled "Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities" noted that a working group and the Secretary of State have developed uniform baseline screening and vetting standards to resume the admission of refugees.
141. Sam Biddle & Spencer Woodman, *These Are the Technology Firms Lining Up to Build Trump's "Extreme Vetting" Program*, INTERCEPT (Aug. 7, 2017), https://theintercept.com/2017/08/07/these-are-the-technology-firms-lining-up-to-build-trumps-extreme-vetting-program/; *see also* U.S. DEP'T OF HOMELAND SEC., EXTREME VETTING INITIATIVE STATEMENT OF OBJECTIVES 2 (June 12, 2017), https://www.brennancenter.org/sites/default/files/Extreme%20Vetting%20Inititate%20-%20Statement%20of%20Objectives.pdf [hereinafter EVI Statement of Objectives].
142. Biddle & Woodman, *supra* note 141.

threat by analyzing existing databases and publicly available information in order to generate at least 10,000 investigative leads every year.[143] Under the plan, publicly available information would include "media, blogs, public hearings, conferences, academic websites, social media websites such as Twitter, Facebook, LinkedIn, . . . internet sites" and "anything that can be found" to continue vetting visitors throughout their entire stay.[144] This continuing surveillance would likely be used even against legal permanent residents since the proposed statement of objectives asserted that the failure to vet legal permanent residents "creates a significant national security risk."[145] After immigrants' rights groups and technology experts condemned the plan, the Administration abandoned the technology-driven approach and instead hired a contractor to provide the training and supervision of people who can perform the job.[146]

D. *Public Response and Advocacy*

Society has mobilized against the government and the enabling companies to denounce the risks of surveillance and assessment technologies.[147] In 2017, after Trump made public his plans of an automated "extreme vetting initiative," advocates and many technology experts responded with outrage.[148] Advocates asserted that this program would threaten freedom of speech, assembly, civil liberties, and human rights.[149] Likewise, technology experts asserted that it is impossible to build an algorithm that can accurately predict whether someone is likely to commit a terrorist act.[150] They concluded that such system would be inaccurate and biased.[151] Relatedly, in July 2018, more than 100 civil rights, digital justice, and community-based

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143.   *Id.*

144.   *Id.*

145.   EVI Statement of Objectives, *supra* note 141; *see also* U.S. DEP'T OF HOMELAND SEC., COUNTERTERRORISM AND CRIMINAL EXPLOITATION UNIT RESPONSES TO VENDOR QUESTIONS 6 (2017), https://www.brennancenter.org/sites/default/files/CTCEU%20-%20Responses%20to%20Vendor%20 Questions%20-%20Industry%20Day%20-%20July%202017.pdf (when asked whether the program would be used against legal permanent residents, the Administration declined to answer).

146.   Drew Harwell & Nick Miroff, *ICE Just Abandoned Its Dream of "Extreme Vetting" Software that Could Predict Whether a Foreign Visitor Would Become a Terrorist*, WASH. POST (May 17, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/17/ice-just-abandoned-its-dream-of-extreme-vetting-software-that-could-predict-whether-a-foreign-visitor-would-become-a-terrorist/.

147.   Leadership Conf. on Civ. & Hum. Rts, The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns (2018), http://civilrightsdocs.info/pdf/criminal-justice/ Pretrial-Risk-Assessment-Full.pdf [hereinafter Shared Statement of ADM Systems' Concerns].

148.   *See* Letter from NGOs to Acting Sec'y of Homeland Sec. (Nov. 16, 2017), https://www. brennancenter.org/sites/default/files/Coalition%20Letter%20to%20DHS%20Opposing%20the%20 Extreme%20Vetting%20Initiative%20-%2011.15.17.pdf [hereinafter NGOs' Letter to DHS]; Letter from Hal Abelson et al. to Elaine C. Duke, Acting Sec'y of Homeland Sec. (Nov. 16, 2017), https://www. brennancenter.org/sites/default/files/Technology%20Experts%20Letter%20to%20DHS%20Opposing% 20the%20Extreme%20Vetting%20Initiative%20-%2011.15.17.pdf [hereinafter Tech Experts' Letter to DHS]; *see also* Matt O'Brien, *Federal "Extreme Vetting" Plan Castigated by Tech Experts*, AP NEWS (Nov. 16, 2017), https://apnews.com/08d469b81a31492e91682b24b6b8995a.

149.   NGOs' Letter to DHS, *supra* note 148.

150.   Tech Experts' Letter to DHS, *supra* note 148.

151.   *Id.*

organizations released a shared statement of the ADM Systems' concerns in pretrial practice in the criminal justice system.[152]

Society has also condemned Big Tech companies. In June 2018, over 100 Microsoft employees protested against the company's work with ICE.[153] Amazon workers also demanded the company to stop selling its facial recognition technology to law enforcement and ICE.[154] After ICE held the "industry day" in 2017, the Credo Action organized a petition to tell IBM not to help Trump spy on immigrants.[155] RELX, owner of Lexis Nexis, and Thomson Reuters, owner of Westlaw, received their share of backlash when law students and immigration lawyers widely shared a letter and petition asking them to end their deals with ICE.[156] More recently, in November of 2019, GitHub lost five employees who resigned in protest of a software development contract with ICE.[157] These are just examples of how society can organize and fight for the most vulnerable when evolving technologies and hostile administrations team up to develop automated weapons of mass deportation.

IV.   POTENTIAL EXPANSION OF ADM SYSTEMS IN IMMIGRATION ENFORCEMENT

The technology race is likely to cause an expansion of ADM Systems' use across governmental functions. The RCA and current surveillance capabilities against immigrants are just examples of new approaches of immigration enforcement that will continue to evolve as new administrations come to power. This section presents a frightening picture of what the technology race can mean for immigrants, starting from how an automated extreme vetting program can look and moving to new potential applications that may both follow immigrants in their journey to the United States and accompany them throughout their stay in the country.

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152.   Shared Statement of ADM Systems' Concerns, *supra* note 147.

153.   Sheera Frenkel, *Microsoft Employees Protest Work With ICE, as Tech Industry Mobilizes Over Immigration*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/technology/tech-companies-immigration-border.html.

154.   Kate Conger, *Amazon Workers Demand Jeff Bezos Cancel Face Recognition Contracts With Law Enforcement*, GIZMODO (June 21, 2018, 6:22 PM), https://gizmodo.com/amazon-workers-demand-jeff-bezos-cancel-face-recognitio-1827037509. *See also* Neema Singh Guliani, *Amazon Met With ICE Officials to Market Its Facial Recognition Product*, A.C.L.U. (Free Future) (Oct. 24, 2018, 12:00 PM), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazon-met-ice-officials-market-its-facial?fbclid=IwAR1AmiRNFnbFmaFaVqOG6pgXODS4nSgVprLUdZExYnLy1Bc4Tr6140F74wE.

155.   @CredoMobile, TWITTER (Jan. 22, 2018, 8:05 PM), https://twitter.com/CREDOMobile/status/955607273505742848.

156.   Cora Currier, *Lawyers and Scholars to LexisNexis, Thomson Reuters: Stop Helping ICE Deport People*, INTERCEPT (Nov. 14, 2019), https://theintercept.com/2019/11/14/ice-lexisnexis-thomson-reuters-database/.

157.   Janus Rose & Lauren Kaori Gurley, *As GitHub's Conference Begins, Five Employees Resign Over ICE Contract*, VICE (Nov. 13, 2019), vice.com/en_us/article/evjwwp/as-githubs-conference-begins-five-employees-resign-over-protest-ice-contract.

A. *Before Entering the United States*

Trump's "extreme vetting initiative" called for the development of an ADM System that can predict immigrants' likelihood of becoming national security threats or becoming "positively contributing members of society."[158] Presumably, consulates would use this ADM System to decide whether to grant or deny visas. The higher the score, the higher the likelihood that an applicant may pose a threat to national security.

Technology experts argued that it is impossible to predict whether a person is likely to commit a terrorist attack in the United States due to the small sample size of historical data.[159] Terrorist acts are so infrequent that predictions would lead to unacceptable rates of error.[160] But what if the Administration focuses on assessing whether the applicant would positively contribute to society?

President Trump has repeatedly stated that he wants the United States to move to a merit-based visa system.[161] To that end, he successfully implemented a new "public charge" rule despite wide opposition and only after the Supreme Court lifted an injunction supported by various federal judges.[162] Under the new regulations, public charge refers to an immigrant who received or is likely to receive one or more public health benefits for more than 12 months in the aggregate within a three-year period.[163] Furthermore, the regulations impose a "totality of the circumstances" test that weighs many factors and standards to determine whether an applicant is likely to become a public charge.[164] These factors include age, health, family status, wealth, education level, and skills.[165] It would not be a surprise if the government attempts to develop an ADM System that determines an applicant's "public charge score" or "wealth score."

With the increase in the number of visa denials at consulates under current policies, many immigrants have lost faith that they would ever obtain a visa.[166] The lack of redress in the form of appeal or reconsideration in

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158. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

159. *See* Tech Experts' Letter to DHS, *supra* note 148.

160. *Id.*

161. Jordyn Hermani, *Trump Pitches His 'Merit-Based' Immigration Proposal*, POLITICO (May 16, 2019), https://www.politico.com/story/2019/05/16/trump-merit-based-immigration-policy-1329380.

162. *See* New York v. Dep't of Homeland Sec., 408 F. Supp. 3d 334 (S.D.N.Y. 2019); California v. Dep't of Homeland Sec., 408 F. Supp. 3d 1057 (N.D. Ca. 2019); Washington v. Dep't of Homeland Sec., 408 F. Supp. 3d 1991 (E.D. Wash. 2019); Cook County, Ill. v. McAleenan, No. 1:19-cv-06334 (N.D. Ill. Oct. 14, 2019); Casa de Md. v. Trump, 414 F.Supp.3d 760 (D. Md. 2019). *See also* 84 Fed. Reg. 41292 (Aug. 14, 2019) *amended by* 84 Fed. Reg. 52357 (Oct. 2, 2019); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020).

163. *See* 8 U.S.C.A. § 1182(a)(4) (West 2013); 8 C.F.R. § 212.22 (2019); 22 C.F.R. § 40.41(b) (2019).

164. 8 C.F.R. § 212.22 (2019).

165. *Id.*

166. Yeganeh Torbati & Kristina Cooke, *Denials of U.S. Immigrant Visas Skyrocket After Little-Heralded Rule Change*, REUTERS (Apr. 15, 2019, 6:04 AM)), https://www.reuters.com/article/us-usa-immigration-visas-insight/denials-of-u-s-immigrant-visas-skyrocket-after-little-heralded-rule-change-idUSKCN1RR0UX.

consular visa applications would make it even more harmful to allow ADM Systems to decide who is a bad person or who is wealthy enough to receive a visa.

B. *Near the Border and Within the United States Territory*

Many immigrants do not have the means or the time to apply for visas, in particular when they are fleeing for their lives. Under the Trump Administration, asylum seekers can no longer ask for asylum at ports of entry at the United States border if they have travelled through a third country where they did not seek protection.[167] As a result, many immigrants cross the border between ports of entries risking harm or even death.[168] When an immigrant is apprehended near the United States border but inside the United States territory and expresses a fear of persecution, CBP officers must refer the immigrant to an asylum officer to perform a "credible fear interview" (CFI).[169] Once the asylum officer determines that the immigrant is credible, the immigrant can file for asylum.[170] At this stage, some believe that ADM Systems can be used to assess whether the immigrant is telling the truth. In Germany, officers use data mining technology in immigrants' cellphones to download metadata in order to find inconsistencies with their story.[171] Such use is not far off in the United States considering the lack of Fourth Amendment protections against searches and seizures near the border.[172]

Going forward, ICE may crave the use of ADM Systems to score immigrants based on their likelihood of deportability regardless of their criminal record. This type of system could identify targets by analyzing where immigrants work, where they live, and who they live with. Once ICE officers have this information, they can track and detain their targets. Palantir is already helping ICE to determine who to target.[173] Soon, these data-driven

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167. Jonathan Blitzer, *Does Asylum Have a Future at the Southern Border?* NEW YORKER (Oct. 3, 2019), https://www.newyorker.com/news/daily-comment/does-asylum-have-a-future-at-the-southern-border; *See also* Nick Miroff, *Trump Administration to begin sending asylum seekers to Guatemala as soon as this week*, WASH. POST (Oct. 28, 2019, 5:40 PM), https://www.washingtonpost.com/immigration/trump-administration-to-begin-sending-asylum-seekers-to-guatemala-as-soon-as-this-week/2019/10/28/998868c4-f99e-11e9-8190-6be4deb56e01_story.html.

168. *See* Anne Flaherty, *More Than 260 Migrants Died Trying to Cross the US Southern Border: Report*, ABC NEWS (Dec. 14, 2018, 11:19 PM), https://abcnews.go.com/International/260-migrants-died-cross-us-southern-border-report/story?id=59832675.

169. 8 U.S.C.A. § 1225(A)(ii) (West 2009).

170. 8 U.S.C.A § 1225(B)(ii) (West 2009). Under the Trump Administration, Credible Fear Interviews (CFI) are performed by CBP officers when the role was always performed by asylum officers trained in the adjudication of asylum claims. The American Immigration Council and the Tahirih Justice Center have filed a FOIA lawsuit to demand information about this sudden shift of functions. Complaint, Am. Immigration Council v. Customs & Border Patrol, No. 1:19-cv-02965 (D.D.C. Oct. 7, 2019).

171. Morgan Meaker, *Europe is Using Smartphone Data as a Weapon to Deport Refugees*, WIRED (July 2, 2018), http://www.wired.co.uk/article/europe-immigration-refugees-smartphone-metadata-deportations.

172. United States v. Ramsey, 431 U.S. 606, 616 (1977) (holding that "searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border . . . ").

173. Lamdan, *supra* note 105, at 278.

technologies could become even more sophisticated, allowing ICE to create extremely detailed profiles of immigrants. This level of surveillance would exacerbate ICE's harassment against immigrant communities turning ADM Systems into weapons of mass deportation.

C.   *USCIS and the Courts*

USCIS reviews affirmative immigration applications which means that they are non-adversarial in nature.[174] At this stage, immigration officers in charge of granting or denying applications, can use ADM Systems to flag potential fraudulent applications. Two concerning questions arise under this scenario. What criteria would be used to determine fraud? and what would be the margin of error? Allowing an ADM System to decide which applications are fraudulent would most likely result in a high number of false positives, thus denying immigration benefits to otherwise honest applicants.

USCIS also reviews adjustment of status or green card applications for immigrants present in the United States.[175] USCIS can deny applications of immigrants deemed to be a "public charge" based on information about public benefits they received, as well as their age, health, household size, wealth, and education.[176] ADM Systems could make these determinations by calculating a "wealth score" to select which immigrants "deserve" to stay in the country.

Conversely to USCIS, immigration courts handle deportation proceedings that are defensive and adversarial in nature.[177] At this stage, immigrants have the opportunity to argue that they qualify for certain immigration relief that would allow them to remain in the United States legally. The government's attorney generally enjoys prosecutorial discretion not to contest the immigrant's assertion to immigration relief.[178] ADM Systems could be used to predict the likelihood of a case being granted by a judge to incentivize the government's attorney to exercise prosecutorial discretion. [179] Unfortunately, the current Administration would unlikely promote this use. In fact, the Trump Administration's zero-tolerance policy effectively eliminated prosecutorial discretion in immigration courts.[180]

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174.   U.S. CITIZENSHIP IMMIGRATION SERV., *What Do We Do*, https://www.uscis.gov/about-us/what-we-do (last visited Jan. 19, 2020).

175.   8 C.F.R. § 245.2 (2011).

176.   *See* supra Section IV.A. *See also* 22 C.F.R. § 40.41(b) (2019).

177.   U.S. DEP'T. OF JUSTICE, *About the Executive Office for Immigration Review*, https://www.justice.gov/eoir/about-office (last visited Jan. 19, 2020).

178.   *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("An agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion.").

179.   Canada explored this idea in a Request for Information to the industry to develop an AI predictive system with such capability. PUBLIC WORKS & GOV'T SERVS. CAN., *Artificial Intelligence Solution (B8607-180311/A)* (Apr. 13, 2018, amended June 7, 2018), https://buyandsell.gc.ca/procurement-data/tender-notice/PW-EE-017-33462.

180.   *See* Barbara McQuade, *Trump's Zero Tolerance Immigration Policy Leaves No Room for Discretion*, LAWFARE (June 22, 2018), https://www.lawfareblog.com/trumps-zero-tolerance-immigration-policy-leaves-no-room-discretion. The Trump Administration instructed government attorneys that they are

V. CONCERNS

Apart from the general concerns of bias and the secrecy of algorithms explained in detail in Section I, the use of ADM Systems in immigration enforcement presents a set of serious legal concerns. This section discusses the legal concerns under international and domestic laws.

A. *Human Rights Violations*

Under international law, the use of ADM Systems in immigration enforcement violates the right of free movement, life, liberty and security of a person.[181] The United States is a party of the 1967 Protocol relating to the Status of Refugees, the Convention Against Torture (CAT) of 1987, and the International Covenant on Civil and Political Rights (ICCPR) of 1992.[182] Article 12 of the ICCPR promotes people's ability to enter and leave a country while the Protocol relating to the Status of Refugees promotes the right for people to seek protection in another country.[183] In addition, Article 9 of the ICCPR recognizes the rights to life and security of a person[184] and CAT prohibits a country from sending an immigrant back to his or her home country where likely torture awaits.[185] ADM Systems can violate these human rights if they arbitrarily deny a person's visa, incorrectly deem an asylum application fraudulent, or deport someone to a country where torture awaits. The lack of accuracy and accountability makes their use inappropriate in situations where loss of life is a real consequence.

ADM Systems can also violate a human's right to be free from arbitrary interference of his or her privacy as required by Article 17 of the ICCPR.[186] The UN General Assembly adopted Resolution 68/176 to address privacy concerns of surveillance in the age of data and its impact on human rights.[187] In response, the United States indicated that Article 17 of the ICCPR only applies to state action, not private action.[188] This statement implies that Big

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no longer required to check their email inbox used to receive requests of prosecutorial discretion by immigration attorneys. Hamed Aleaziz, *An ICE Memo Lays Out the Differences Between Trump and Obama on Immigration Enforcement*, BUZZFEED NEWS (Oct. 8, 2018), https://www.buzzfeednews.com/article/hamedaleaziz/trump-ice-attorneys-foia-memo-discretion.

181. CANADA REPORT, *supra* note 38.

182. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267; Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 1057.

183. International Covenant on Civil and Political Rights art. 12, *supra* note 182; *See generally* Convention Relating to the Status of Refugees, *supra* note 182.

184. International Covenant on Civil and Political Rights art. 9, *supra* note 182.

185. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 3, *supra* note 182.

186. International Covenant on Civil and Political Rights art. 17, *supra* note 182.

187. G.A. Res. 68/176 (Nov. 16, 2016). *See also* Deborah Brown, *New UN Resolution on the Right to Privacy in the Digital Age: Crucial and Timely*, INTERNET POL'Y REV. (Nov. 22, 2016), https://policyreview.info/articles/news/new-un-resolution-right-privacy-digital-age-crucial-and-timely/436.

188. UNHCR, *Contributions From Stakeholders: Right to Privacy in the Digital Age*, https://www.ohchr.org/Documents/Issues/Privacy/United%20States.pdf (last visited Jan. 19, 2020). *See also* Violet

Tech companies are free to "surveil" their users perhaps for commercial pur-poses while at the same serving as "data brokers" to the United States govern-ment.[189] The Big Data revolution that encourages data brokers to sweepingly surveil people to later sell their information to the government is likely an ar-bitrary interference of privacy that should be imputed to the state.

B.   *Constitutional Violations*

Most provisions of the United States Constitution apply to all persons physically present within the United States territory regardless of their immi-gration status.[190] The use of ADM Systems can violate the constitutional rights of immigrants. Surveillance by private companies and use of this data by ADM Systems owned by the government present First Amendment con-cerns due to the resulting chilling effect on free speech and assembly in immigrant communities.[191] As a result of the Trump Administration's efforts of mass deportation, immigrants are afraid to even be outside their homes.[192] The Big Data and ADM Systems' revolution would only exacerbate immi-grants' fear, many who came to the United States to find freedom.

The use of ADM Systems in immigration enforcement presents Fourth Amendment concerns. As in the criminal context, ADM Systems would likely be used to identify "persons of interest" without the minimal require-ment of reasonable suspicion.[193] Such use would allow for the identification and deportation of immigrants across the board, many with clean criminal records.

The use of ADM Systems also presents Fifth Amendment concerns. The Supreme Court acknowledged that immigrants are entitled to due process in deportation proceedings.[194] Hence, immigrants must be given notice and a hearing where the government has the burden to find, by clear and convincing evidence, that the immigrant deserves deportation.[195] Further, legal permanent

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Blue & Zero Day, *Despite US Opposition, UN Approves Rights to Privacy in the Digital Age*, ZDNET (Nov. 27, 2013), https://www.zdnet.com/article/despite-us-opposition-un-approves-rights-to-privacy-in-the-digital-age/.

189.   *See supra*, Section II.

190.   Immigrants are entitled to constitutional protections when they are present in the United States and develop substantial connections with the United States. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

191.   ICE Extreme Vetting Initiative: A Resource Page, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/ice-extreme-vetting-initiative-resource-page   (last   visited Jan. 20, 2020).

192.   Charles Reed, *'I Live in Fear' : Under Trump, Life for America's Immigrants Can Change in a Flash*, AP (Oct. 18, 2018), https://www.theguardian.com/us-news/2018/oct/18/immigration-ice-deportation-undocumented-trump.

193.   FERGUSON, *supra* note 1, at 54–56. *See also supra* Section II.

194.   Wong Wing v. United States, 163 U.S. 228, 238 (1986) (". . . it must be concluded that all per-sons within the territory of the United States are entitled to the protection guaranteed by [the Fifth Amendment] . . . "). *See also* Reno v. Flores, 507 U.S. 292, 306 (1993).

195.   Cervantes-Ascencio v. INS, 326 F.3d 83, 86 (2d Cir. 2003) (the Due Process Clause requires that immigrants receive notice and fair hearing where the government must prove by clear and convincing evidence that the immigrant deserves deportation).

residents, and arguably immigrants with strong ties to the United States, are entitled to substantive and procedural fairness.[196] In evaluating what process is due to immigrants, courts consider the immigrant's interest at stake, the risk of erroneous deprivation and the probable value of additional or different procedural safeguards, and the interest of the government in using current procedures.[197] Finally, visa applicants are not entitled to constitutional protections because being granted a visa is not a right, but a privilege.[198]

The use of ADM Systems poses clear substantive and procedural due process concerns. First, ADM Systems' decisions are not fair or impartial when they contain biases and are predisposed to make unfavorable decisions.[199] Further, how can there be a clear explanation of the decision when it is impossible to uncover its workings due to the secrecy shield of proprietary rights.[200] Even if an officer or judge makes the final decision, how can we know the degree in which the decision was delegated to the system?[201] The illusion that systems are "objective and fair" poses the risk that immigration officers and judges would consciously or unconsciously heavily rely on them with enormous consequences for the lives of immigrants.[202]

Some courts have already acknowledged that the inability to test the accuracy of ADM Systems poses due process concerns when their decisions affect people's lives and liberties. In *Houston Fed. of Teachers v. Houston Independent*, the court dealt with the use of an ADM System to evaluate teachers' performance.[203] The court held that using a private algorithm that did not provide a way to verify the accuracy of the predictions raised due process concerns.[204] However, it acknowledged that the "rational connection test" is a "loose constitutional standard" which may allow local or federal governments "to use blunt tools which may produce only marginal results."[205] The court implicitly stated that a way to test the accuracy of these systems may cure any due process violations.

196. Landon v. Plasencia, 459 U.S. 21, 32 (1982) (" . . . once an alien . . . begins to develop the ties that go with permanent residence, his constitutional status changes.").

197. Matthews v. Eldridge, 424 U.S. 319, 334–35 (1976).

198. *See* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

199. CANADA REPORT, *supra* note 38, at 49–51.

200. *Id*.

201. *Id*. The COMPAS system in the law enforcement context is a clear example of some level of delegation to the algorithms in sentencing the defendants. However, there is no way to know how much delegation occurs since the judge makes the final decision. *See* Ed Yong, *A Popular Algorithm Is No Better at Predicting Crimes Than Random People*, ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/technology/archive/2018/01/equivant-compas-algorithm/550646/.

202. CANADA REPORT, *supra* note 38, at 53–54.

203. Houston Fed'n. of Teachers v. Houston Indep. Sch. Dist., 251 F. Supp. 3d 1168 (2017).

204. *Id*. at 1178.

205. *Id*. at 1182. The case was ultimately settled with the district paying $237,000 in legal fees and agreeing to not use the system's results as a basis of termination. *See also* Liana Loewus, *Houston District Settles Lawsuit With Teachers' Union Over Value-Added Scores*, EDUC. WEEK (Oct. 26, 2017), https://www.theverge.com/2019/4/15/18309437/new-york-city-accountability-task-force-law-algorithm-transparency-automation; *Teacher Evaluation Heads Systems to the Courts*, EDUC. WEEK (Oct. 6, 2015), https://www.edweek.org/ew/section/multimedia/teacher-evaluation-heads-to-the-courts.html (last visited Oct. 27, 2019) (the status of similar lawsuits across the country).

Courts give great deference to immigration agencies in interpreting immigration laws.[206] Likewise, immigration officers are given a great degree of discretion in enforcing immigration laws.[207] As such, courts may agree that the use of ADM Systems such as the RCA that "recommends" decisions that are already discretionary does not violate immigrants' rights. If that is the case, courts would not be the answer to the plea for the protection of immigrants against automated weapons of mass deportation. The most effective approach would be to create safeguards to protect immigrants' basic rights before implementing these systems.

VI.   RECOMMENDATIONS

This section provides recommendations to administrations and Congress willing to preserve immigrants' basic rights. This section does not address measures that can be taken by other actors such as courts, and the public at large through community organizing. While intervention of all actors is important as technologies evolve and new issues arise, experts and advocates agree that at present, our government should follow these recommendations before implementing any ADM System to make decisions that impact immigrants' lives.

A.   *Safeguards Against Disparities*

The government should put in place mechanisms to allow for the consultation of experts and representatives of immigrant communities during the development of a system.[208] Further, developers should take affirmative measures to eliminate potential disparities in the system.[209] Finally, agencies should create a process to assess the system's accuracy and potential disproportionate impact based on protected status.[210] The New York City Task Force on ADM Systems suggested that if a system is found to select or affect members of a particular race at a rate that varies fourth-fifths or more, then the system should not be used unless the agency provides a meaningful explanation, has an important interest to implement the system, and no less discriminatory alternative to achieving such interest is available.[211]

B.   *More Transparency*

Agencies should give notice to the public when evaluating whether or not to use ADM Systems for a particular function, and the public should have an

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206.   Chevron v. Nat. Resources Def. Council, 467 U.S. 837, 842–43 (1984) (holding that when Congress's intent is not clear, courts defer to a reasonable agency interpretation).
207.   Shannon Dooling, *ICE Agents and the Power of Discretion in Immigration Enforcement*, WBUR NEWS (Mar. 3, 2017), https://www.wbur.org/news/2017/03/03/ice-agents-immigration-discretion (new guidance from the Department of Homeland Security stripped deportation priorities giving ICE agents greater discretion in selecting targets for deportations).
208.   NY Task Force Recommendation Letter, *supra* note 11.
209.   *Id.*
210.   *Id.*
211.   *Id.*

opportunity to comment as set forth in the Administrative Procedure Act.[212] In addition, the government should disclose information pertaining to all ADM Systems currently in use and before implementing new ones. First, the government should disclose the ADM Systems' purpose and the extent to which the ADM System replaces, modifies, or supports human decision-making.[213] Experts recommend that ADM Systems are never used as autonomous decision-makers and that they be limited to support human decision-making.[214] Second, the government should disclose the developer's information and the ADM System's proprietary status.[215] Ideally, the government should not use proprietary ADM Systems. However, if there is a compelling reason to protect these systems' algorithms, disclosure can be limited to legal proceedings under protective orders.[216] The government should also disclose the process used to evaluate the system's accuracy so that interest groups and experts can corroborate it.[217] Relatedly, the government should not use ADM Systems that have not been validated by the industry.[218] Finally, the government should disclose other relevant information such as a description of the training set, inputs, factors, criteria, and their respective weights to allow the public and interest groups to evaluate the fairness of the system.[219]

C. *Due Process Protections*

The government should comply with due process protections when using ADM Systems to support human decision-making. First, individuals should receive clear notice that an ADM System is making or supporting a determination in their case.[220] The European Union's General Data Protection Regulation (GDPR) already imposes this requirement.[221] Second, individuals should receive an explanation of the outcome of their cases by outlining the

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212.   Experts have suggested a similar approach tailored to ADM Systems, the Algorithmic Impact Assessment (AIA) compels agencies to define their ADM Systems, inform affected communities of the intent to release ADM Systems, allow for public comment and challenge, and gives the public a right of action if the agency fails to address public concerns. Dillon Reisman, Jason Schultz, Kate Crawford, and Meredith Whittaker, *Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability*, AI NOW INSTITUTE (2018); Eddie Copeland, *10 principles for public sector use of algorithmic decision making*, NESTA (Blog) (Feb. 20, 2018), https://ainowinstitute.org/aiareport2018.pdf.

213.   *Id.*

214.   Scholars have argued that AI predictive systems "should not be left autonomous to decide on issues which are crucial for the human being." Elena Tilovska-Kechedji, Milica Kolakovic Bojovic & Dragana Cvorovic, *Artificial Intelligence Influencing Foreign Policy and Security*, 2018 J. E.-EUR. CRIM. L. 7 (2018).

215.   CANADA REPORT, *supra* note 38, at 58.

216.   Wexler, *supra* note 31, at 1429.

217.   NY Task Force Recommendation Letter, *supra* note 11 (the Task Force recommends that the City make agency funding conditioned upon meeting standards of interpretability through external independent audits).

218.   CANADA REPORT, *supra* note 38 at 63.

219.   *Id.*

220.   CANADA REPORT, *supra* note 38 at 64.

221.   *See* Commission Regulation 2016/679, Art. 14(2)(g), 15(1)(h), General Data Protection Regulation (GDPR), 2014 J.O. (L119) 1–3.

factors and the criteria considered by the ADM System in making decisions.[222] When the system is used to support the reviewing officer, the explanation should also include information about how much the officer relied on the ADM System's determination.[223] Third, the individual should be given an opportunity to challenge the ADM System's determination.[224] To make this last protection meaningful, the government should allow for the inclusion of amici or system's experts to intervene on behalf of aggrieved individuals when ADM Systems seem to be making unfair or biased decisions.[225]

D. *Creation of Advisory Task Force*

Stakeholders, academia, advocates, and civil society should form a task force in order to understand and mitigate the impact of these systems on immigrant rights and the public interest. In 2017, New York City Council created an Automated Decision Systems Task Force, the first of its kind in the country, to scrutinize ADM Systems in the criminal justice system.[226] The task force's role is to provide recommendations that include how private citizens can "meaningfully assess" the algorithms' functions and gain explanation from their decisions.[227]

CONCLUSION

The technology race and the specter of more anti-immigrant administrations present a frightening picture of increased profiling, discrimination, and unfair treatment against immigrants. From determining who deserves a visa, to surveilling, tracking, and deporting undocumented immigrants, ADM Systems have the potential to cause great harm to otherwise law-abiding immigrants. Concerns of bias, lack of transparency, and political manipulations are going to be latent as their use expands across the administration of immigration law. Society must question whether it is willing to allow mass profiling and mass deportations while eroding civil liberties for all. This article calls for action to demand that the government follow basic recommendations before it lets algorithms and AI become weapons of mass deportation.

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222.   NY Task Force Recommendation Letter, *supra* note 11.

223.   *Id.* (the Task Force recommends a 20-day turnaround period for an agency to provide an explanation upon request).

224.   *Id.*

225.   CANADA REPORT, *supra* note 38, at 64.

226.   Julia Powles, *New York City's Bold, Flawed Attempt to Make Algorithms Accountable*, NEW YORKER (Dec. 20, 2017), https://www.newyorker.com/tech/annals-of-technology/new-york-citys-bold-flawed-attempt-to-make-algorithms-accountable. Since the creation of the task force, members have openly criticized the city for its failure to provide access to information and are losing hope on the success of the task force. Colin Lecher, *New York City's algorithm task force is fracturing*, VERGE (Apr. 15, 2019), https://www.theverge.com/2019/4/15/18309437/new-york-city-accountability-task-force-law-algorithm-transparency-automation.

227.   NY Task Force Recommendation Letter, *supra* note 11.