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## **Algorithms, emotions, and the fluid justice: the law solely based on algorithmic decisions cannot be just**

Should we rely solely on algorithmic decision-making processes in the courtroom? In this paper, I will defend the thesis that algorithms cannot replace humans fully, at least in criminal law, due to a lack of possibility to include emotions in decisions.

Algorithmic tools are already used in the justice system, including in the courtrooms (cf. Završnik 2020). However, the most important decisions, such as those concerning the guilt of the person accused of a crime, are still reserved for human beings. In theory, algorithms have the potential to be better than humans (cf. Kahneman 2013), could be much quicker and cheaper than us, but could they be better? Being "better" than humans in different spheres means something different. In the field of criminal law, we could say that the better means more just. And in contemporary criminal justice, there is a problem with justice. The broad literature of sentencing disparities shows that there is a significant issue with equality before the law (cf. Brandon and O'Connell 2018; Franklin and Henry 2020; Hamilton 2017; Mamak et al. 2020), and equality is the requirement of justice (Katzner 1973). Hence, there is a space for improvements, but could algorithms fully replace humans? Could law based on the algorithmic decisions be more just? There is already skepticism in the literature in that matter (cf. Morison and Harkens 2019). What's more, algorithms could preserve problems of justice, because of the usage of biased historical data (cf. Starr 2014; Barabas 2020; Coeckelbergh 2020), algorithmic law decisions could "scale the past and freeze the future" (Hildebrandt 2020).

I want to add to the skepticism that the legal system based solely on the algorithmic decision cannot be just, due lack of emotions in the decision loop. What is so special about the emotions in decisions? Emotions are crucial in decision making, and we tend to underestimate their role (cf. Haidt 2001). Emotions are also an important component of the legal mind, and we cannot fully explain what lawyers do without taking into account emotions in their work. (Brožek 2019). Without emotional acceptance of the law, it is hard to talk about its just. According to Petrażycki, the strength of legal norms comes from the emotional experience of their rightness or lack thereof (Petrażycki 1955). The social acceptance of law requires an emotional component in the decision. An entity which is obliged to make decisions need to include emotions in the decision-making process. Algorithms cannot, at least for now, act emotionally (cf. Brožek and Janik 2019). In other words, from a long-term perspective, the law which is solely based on algorithmic decisions cannot be just. It cannot change, be creative, and therefore cannot also adapt to social emotions, which are changing over time.

### **References**

Barabas, Chelsea. 2020. "Beyond Bias." In *The Oxford Handbook of Ethics of AI*. <https://doi.org/10.1093/oxfordhb/9780190067397.013.47>.

- Brandon, Avril Margaret, and Michael O'Connell. 2018. "Same Crime: Different Punishment? Investigating Sentencing Disparities Between Irish and Non-Irish Nationals in the Irish Criminal Justice System." *The British Journal of Criminology* 58 (5): 1127–46. <https://doi.org/10.1093/bjc/azx080>.
- Brożek, Bartosz. 2019. *The Legal Mind: A New Introduction to Legal Epistemology*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/9781108695084>.
- Brożek, Bartosz, and Bartosz Janik. 2019. "Can Artificial Intelligences Be Moral Agents?" *New Ideas in Psychology*, January. <https://doi.org/10.1016/j.newideapsych.2018.12.002>.
- Coeckelbergh, Mark. 2020. *AI Ethics*. Cambridge, MA: The MIT Press.
- Franklin, Travis W., and Tri Keah S. Henry. 2020. "Racial Disparities in Federal Sentencing Outcomes: Clarifying the Role of Criminal History." *Crime & Delinquency* 66 (1): 3–32. <https://doi.org/10.1177/0011128719828353>.
- Haidt, Jonathan. 2001. "The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment." *Psychological Review* 108 (4): 814–34. <https://doi.org/10.1037/0033-295x.108.4.814>.
- Hamilton, Melissa. 2017. "Sentencing Disparities." *British Journal of American Legal Studies* 6 (2): 177–224. <https://doi.org/10.1515/bjals-2017-0010>.
- Hildebrandt, Mireille. 2020. "Code Driven Law. Scaling the Past and Freezing the Future." SSRN Scholarly Paper ID 3522079. Rochester, NY: Social Science Research Network. <https://doi.org/10.2139/ssrn.3522079>.
- Kahneman, Daniel. 2013. *Thinking, Fast and Slow*. 1st edition. New York: Farrar, Straus and Giroux.
- Katzner, Louis I. 1973. "Presumptions of Reason and Presumptions of Justice." *The Journal of Philosophy* 70 (4): 89–100. <https://doi.org/10.2307/2024957>.
- Mamak, Kamil, Joanna Dudek, Maciej Koniewski, and Daniel Kwiatkowski. 2020. "A Failed Attempt to Radically Reduce Inter-Court Sentencing Disparities by Legislation: Empirical Evidence from Poland." *European Journal of Criminology*, August. <https://doi.org/10.1177/1477370820952729>.
- Morison, John, and Adam Harkens. 2019. "Re-Engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-Making." *Legal Studies* 39 (4): 618–35. <https://doi.org/10.1017/lst.2019.5>.
- Petrażycki, Leon. 1955. *Law and Morality*. Translated by Hugh W. Babb. Harvard University Press. <http://archive.org/details/dli.ernet.425533>.
- Podgórecki, Adam. 1980. "Unrecognized Father of Sociology of Law: Leon Petrażycki: Reflections Based on Jan Gorecki's Sociology and Jurisprudence of Leon Petrażycki." *Law & Society Review* 15 (1): 183–202. <https://doi.org/10.2307/3053227>.
- Starr, Sonja B. 2014. "Evidence-Based Sentencing and the Scientific Rationalization of Discrimination." *Stanford Law Review*, no. 66. <https://papers.ssrn.com/abstract=2318940>.
- Završnik, Aleš. 2020. "Criminal Justice, Artificial Intelligence Systems, and Human Rights." *ERA Forum* 20 (4): 567–83. <https://doi.org/10.1007/s12027-020-00602-0>.