Governance Conflicts and Public Court Records

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ABSTRACT

Datafication of society has heavily influenced the way in which we use technology and how technology is designed. Social informatics research illustrates that technology use by diverse groups is not neutral. With the increased usage of technology, critical analysis of data and uses becomes a more significant topic of research. Data governance, as one priority research subarea, varies widely as it is influenced by those who have the power to control it, raising many research questions. With the differences in how data is governed differing across data, what does that mean for data that is used to train models? How do the implications of data governance shape how what is trained? This paper seeks to evaluate that relationship through multi-method content analysis of governance documents regarding data and access to public court records in Illinois and California. It seeks to address the gap in research surrounding ethical impacts of data governance and how those impacts can have larger implications, both positive and negative.

KEYWORDS

Training data; governance; court records; public data

1 Introduction

Datafication is ubiquitous and often disregards contextual norms; data collected in one context increasingly trains algorithms in others. It is important that we appropriately govern data, throughout its lifecycle, to respect contextual norms. We need to consider data governance, as the assemblage of formal and informal institutions structuring and constraining data, as shaping fairness, equity, and other human values to ensure that governance minimizes and mitigates biases. If data governance cannot address these crucial needs, the data in question should not be used as training data.

Prior research has evaluated the issues surrounding algorithms and fairness. Fairness is important due to its assumed objectivity: treating everything equal makes everything fair. Many algorithms are designed with this principle ignoring that systemic inequalities are in place that prevent people from having fair access [7]. Additionally, there has also been research on data mining and how it can further impact systemically disadvantaged groups. When data is trained on cases that have pre-existing bias, the bias can be reproduced in the model [4]. Influential to the way in which technology is designed, the capitalist society demands exploitation for profit [5]. With algorithms, marginalized communities are often exploited to maximize profit. Engineers and statisticians have been charged with taking responsibility and accountability for ethical decisions made when data is utilized [2]. This expectation should be extended to the way in which data is governed.

The usage of public court records is not only important for public sector organizations, but

private sector organizations as well. Private sector organizations will utilize public records [3]. It is imperative that public records have strong data governance and that there is more dialogue between public and private sector organizations. This paper also implements the contextual integrity framework, which defines privacy in terms of the appropriate flow of personal information in context [8]. The contextual integrity framework provides us with guidance on navigating data flows and lifecycles, and how we will assess it. Contextual integrity may be violated in some cases where algorithms are trained on data in inappropriate contexts.

2. Background

2.1 Public Scrutiny of Bias in Training Data

Within the last decade, multiple different technologies have come under scrutiny with respect to how the models were trained and what pre-existing biases may have been introduced from the training data. These cases provide existing evidence for the need to critically evaluate public sector data governance to mitigate and prevent harms introduced by subsequent public sector deployment of AI-based decision-making systems. We consider three key exemplar cases antecedent to our empirical analysis of data governance, highlighting the downstream harms that could be preempted or prevented by appropriate data governance.

First, in ProPublica's 2016 analysis of the recidivism algorithm COMPAS, it was found that many white defendants would receive false negatives and many Black defendants would receive false positives. This was due to the algorithm's use of data from the existing criminal justice system, which contains pre-existing biases [6]. This case highlights the need for appropriate contextualization of and use restrictions on public data regarding historic legal and criminal justice proceedings and decisions, to avoid reinforcing or exacerbating institutional racism via new discriminatory systems.

Second, some companies that develop or own AI technologies that were trained on public data have been involved in lawsuits due to privacy harms that their systems have caused. The ACLU filed a lawsuit against Clearview AI stating that the company violated the Illinois Biometric Information Privacy Act (BIPA). Clearview used biometric identifiers to create surveillance technology. The company violated BIPA because they did not alert Illinois residents of the collection of their biometric identifiers, nor did they did gain written consent to collect their biometric data. The company also sells this data to law enforcement agencies [1], thus feeding back into subsequent public sector harms. This case highlights the need to limit collection of sensitive data, in accordance with state and local laws, as well as reuse of personal data collected for specific purposes. While the data may be in the public interest, it is not necessarily appropriate for all uses, especially cross-context.

Third, another company, Black Horse Carriers Inc., is also involved in an ongoing lawsuit involving BIPA. Two employees are suing Black Horse Carriers Inc. on the claim that BIPA was violated due to the company's collection and possession of their fingerprints by use of a fingerprint time clock. While the Illinois First District Appellate Court ruled in favor of the

employees, Black Horse Carriers appealed the ruling to the Illinois Supreme Court [9]. This case highlights the need for governance regarding data collection and consent beyond neoliberal models of implicit notice and consent; rather, there is a case for meaningful mechanisms regarding exit and voice with respect to data collection.

These recent examples reveal implications regarding privacy, fairness, and consent from the data. Evaluation of data governance—addressing data quality, transparency, privacy, and control—allows us to look at problems that algorithms may create before they harm people.

2.2 Research on Bias and Training Data

Decades of critical research shines light on the problems of biases associated with data sets, when applied to train algorithms. From scholarship that focuses on downstream technical challenges to critical theoretical work that classifies and characterizes bias types to legal scholarship exploring harms and means of recourse, there is widespread awareness that biased data sets are problematic. This section explores some of that literature and highlights key conceptualization around sources of bias, types of bias and impacts of bias.

Sources of Bias

Bias does not randomly appear. While it has origins, these origins can differ depending on the type of bias. When describing computer systems, Friedman and Nissenbaum describe three types of bias: pre-existing social bias, technical bias, and emergent social bias. Pre-existing social bias can be developed through sociological or psychological reasoning. Technical bias can be developed through limitations due to the technical capabilities. Emergent social bias can be developed through a disconnect between developers of technology and the target audience or new information that could not be included in the design of the technology (Friedman and Nissenbaum, 1996). While these types of bias have different sources, bias can be a combination of many different sources. For example, training data is not inclusive of marginalized communities and there is a great lack of diversity in AI (Campolo et al., 2017). This is representative of the technical bias and pre-existing social bias. The lack of inclusivity in the training data is a result of technical bias. The lack of diversity in the field of technology is related to pre-existing social bias as systemic bias prevents opportunities for marginalized groups to work in technical fields.

Bias also has roots in choices. Many people choose to use datasets that are easily accessible for training data. These datasets are typically not diverse, as they mostly do not contain people with access to technological devices or the internet. Additionally, historical impacts influence bias. Women and people of color were excluded purposefully from employment opportunities in AI or credit for their work on AI was given to men. This has resulted in a lack of diversity in the current field of technology, which results in a lack of diverse perspectives when creating or designing technology (Campolo et al., 2017).

Types of bias

The origins of bias influence what type of bias is produced. While bias as a term is used to describe many different types of bias, many researchers have decided to classify or discern different types of bias. As previously mentioned, pre-existing social bias, technical bias, and emergent social bias are some classifications. Pre-existing social bias is defined as systemic bias that has existed prior to the development of computer systems. Technical bias is defined as bias that results from restrictions of technology. Emergent social bias is defined as bias that comes about after use (Friedman and Nissenbaum, 1993). These classifications paved the way for new classifications to emerge.

In relation to datasets, Bird et. al has acknowledged datasets having two types of bias: bug feature bias and commit feature bias. Bug feature bias develops when there is an overrepresentation of bugs due to their prevalence in specific software features. Commit feature bias arises when certain features are more modified than others, neglecting other features that might have biases. They state that these biases are connected to sampling selection bias, further proving the relationship between bias within datasets and sociological issues (2009). This relationship is key to understanding and developing indicators of bias. Bias can be classified due to its sources, but it can also be classified in relation to its impact. This increases the difficulty of developing indicators of bias.

Other classifications of bias include the relationship bias has with implementation. These types of biases include bias that is related to a goal of a business, training data bias, and individual data input bias. A business' goal can influence what decisions are made. For example, a university may want the best students in their program. However, the indicators they rely on, such as specific classes or high standardized test scores, may not be accessible to all types of students in terms of the resources required. Not all students have access to assistance with standardized exams. This would create a bias, even though it seems as if those indicators are the appropriate ones. In relation to individual data input bias, data can be inaccurate or out of date (Roselli et al., 2019).

Impacts of bias

The type and source of bias influence the impact bias will have. This impact can range from large to small, however the impacts felt from the bias will still be immense either way. These impacts can harm marginalized communities in many different ways. These impacts include marginalized groups purposefully being excluded from resources, errors in the process of data mining that results in negative impact, and negative impact from data mining in relation to decisions influenced by that data mining (Barocas, 2014). Big data can also harm people who are low-income by keeping them out of the analysis that big data arrives at and targeting them for predatory reasons. People who are low-income often do not have access to the technology that would include their data in big data. Additionally, they are more susceptible to interactions with

law enforcement agencies. This data is also used for analysis and perpetuates systemic barriers that prevent low-income communities from accessing employment, educational, and housing opportunities (Madden et al., 2017).

Impacts of bias can also come from the development of technology that is seemingly meant to improve people's wellbeing. PredPol is a predictive policing system. This would predict areas that could be "hot spots" or areas where crime could happen, allowing law enforcement agencies to arrive at the scene before crime occurs. This system, while presumably well-intentioned, relies on historical bias. The hot spots detected by PredPol are majority communities of color and increases presence of law enforcement agencies in those areas (Campolo et al., 2017). The assumption of crime is a bias in itself as it relates to using racial profiling and statistics to develop assumptions pertaining to what types of people are most likely to commit crimes (Susser, 2021).

From this literature, we have an excellent sense of what bias is and its relationship to complex social systems and applications in AI, in particular. However, it is also clear from this literature that there is much to be learned about how public sector data factors into aggregated and large scale data sets, how public sector data is used to train algorithms, and how differences in governance choices impact these issues in practice.

3. Methods

Our empirical analysis compares public datasets referring to court records from California and Illinois. Qualitative and quantitative content analysis methods are used to evaluate the data governance for both states, exploring institutionalization around data collection, processing, quality, use, and access by government officials, the public, and subsequent commercialization.

We build on the existing literature surrounding data governance and address research gaps connecting data governance, ethics, and technology. We critically examine existing data governance in California and Illinois in relation to public court records, considering how that shapes the use of court records as training data, thereby impacting algorithms. Key results highlight the degree to which hierarchical and polycentric models of operationalization regarding open records and data governance lead to inconsistency, with significant implications for data quality, privacy, and discrimination. While the paper specifically uses court records as an example, the implications can be used to understand how public sector data governance can heavily influence training data and AI systems.

Knowing that the way that data is governed involves those with the power to control it, this paper exemplifies the impact that those with control or decision-making power may have. Improvement of data governance models is recommended to diminish the harms that could be caused by the algorithms that are trained on this data. These improvements must include ethical frameworks, exposure of mistaken assumptions, and coherency and consistency in governance choices. Without these improvements, data governance will not be robust enough to allow responsible use

of data for AI systems.

4. Results

This section presents a qualitative characterization of four key aspects of data governance relative to public court records in California and Illinois: (4.1) access to public court records, (4.2) restrictions on use, (4.3) biases in public court record data sets, and (4.4) uses of public court record data sets. This section supports conceptualization of conflicts and tensions in data governance, providing a foundation for the discussion of conflicts of interest and issues of bias that are further explored in Section 5.

4.1 Access to public court record data sets

While in theory, under the law, access to public court records would be consistent within states, the reality is that data sets constructed off these records are highly contextual, by place, by case type, by record type, and by time. Much is left up to the discretion of the court, leading to variation not just between states but also within them.

Over time, a public commitment to open records and access to government information has become more compelling and encompassing. As we see in both California and Illinois, obligations regarding sunshine laws and open data for purposes of transparency are taken seriously. Access to court related records is notably, however, distinct from access to other types of public records or data sets. For example, the Office of the Attorney General in California clearly delineates distinct guidelines for Open Access and distinct motivations for public access to these records in comparison to, for example, environmental data. The office acknowledges "Californians have the right under the state Public Records Act and the California Constitution to access public information maintained by local and state government agencies, including the Department of Justice." They recognize only a few exemptions regarding Department of Justice public records (California Public Records Act, Government Code Sections 7920.000-7930.215):

> ***Exemptions.*** *The Department will provide access to all public records upon request unless the law provides an exemption from mandatory disclosure. Examples of records exempt from mandatory disclosure under the California Public Records Act include: certain personnel records, investigative records, drafts, confidential legal advice, records prepared in connection with litigation, and information that may be kept confidential pursuant to other state or federal statutes. In most circumstances, when the Department removes or redacts exempt information from the record, it will disclose the remainder of the record.*

Beyond those exemptions, California does not make accessible confidential records, such as those cases regarding juvenile delinquency or dependency, or specific documents for other cases, as with confidential files like fee waiver applications. Relative to these latter caveats, anyone party to the case will still have access to records, even though the public will not.

Similarly, the Illinois State Open Operating Standard established via the 2014 Illinois Public Act 098-0627 aims to provide transparency, cost efficiency, and accountability via an Open Data Portal, yet provides considerably different parameters for access to court data. Part of this stems from intersections of legal precedent and regulations, as the State Open Operating Standard pertains to data and information subject to the Illinois Freedom of Information Act, which does not apply to the judiciary. Individual counties in Illinois provide quite different levels of access, some charging for access, others providing open reporting data, and many providing tools to access individual records within bounds, at the discretion of county courts. For example, Champaign County, does not provide any access to the following case types:

- *Adoption Cases*
- *Juvenile Abuse and Neglect Cases*
- *Juvenile Delinquency Cases*
- *Expunged or Sealed Cases*
- *Cases involving juvenile victims*
- *Sexual Assault Cases (by Champaign County Administrative Order)*
- *Eavesdropping Cases*
- *Cases that have been impounded by judicial order*

Further, in available court records, financial statements, medical records (including mental health), and social security or other PII are excised.

As a comparison, while California differentiates between court records and other agencies data sets based on the need for greater specificity and a few exemptions, Illinois has different expectations and greater discretion at the local level. California also experiences differences due to local operationalization, with significant differences based on relative resources between, for example urban counties with higher populations and rural counties with sparse populations and comparatively fewer administrative resources. Yet, these differences are not directly analogous to Illinois given the unifying standards at the state level.

Counties in CA with the smallest populations—with Alpine, Sierra, and Modoc Counties at the extreme low end—may not provide digital access to as many record types as other, more populous counties. While applicable records from those counties appear in state databases, records, from for example Alpine County's Superior Court of Alpine must be requested unless you are party to a given record. This is not in violation of open records laws, however, but reflects county level discretion and a recognition of the limits of deidentification among a population of 1204, as California's least populous county. Issues of deidentification are further explored in Section 4.3. Further, they have fully digitized other types of data, such as funding and allocations.

Illinois offers a different study in contrast. Cook County, which contains approximately 40% of all Illinois residents, provides a vastly different open data portal and breadth of online access to records than any other in the state, particularly rural counties downstate. On the surface, Cook

County provides more data and appears transparent, but their use of the DataCatalog framework demonstrates how superficial this access is, without data in all non-mandatory fields, it is difficult to use this data. In contrast, Winnebago County, in which Rockford is located, provides more limited data, but all is well structured, annotated, and supported for public use.

What we can take away from this, is not that California or Illinois are particularly exceptional or exemplify the only two models for Open Access to these records, but rather a deeper understanding that the complex polycentric system of public administration in the United States produces a wide variety of outcomes that are difficult to anticipate or predict. even when we understand that local operationalization in places with more or less resources will not be perfectly consistent, we need to also understand that the same rules on the books or expectations regarding transparency will lead to locally different outcomes in different places. Rural California and rural Illinois are not necessarily similar, just as they are likely to differ from rural counties in other states.

4.2 Restrictions on Use

As distinct from the limits to access that are described in California law and various Illinois guides to data portals, open data, and digital repositories, there are also key limits on the ways available data may be used. Restrictions on the use of public court record data sets are critical to trust in governance to the safety of data subjects and citizen participation in record collection efforts. However relatively little oversight exists as to secondary and downstream uses of public court records, in the cases of California and Illinois. This is true even to their detriment, as through the duration of this research one data set at the state of Illinois level was made publicly inaccessible, subject to ongoing legal disputes, and another data set in the state of California at the Alameda County level also went offline, when challenged politically.

Many of the restrictions on the use of public court records are made via sectorial legislation that intersects with governance of open data and government transparency, rather than directly in those regulations. For example, the California Fair Employment and Housing Act (FEHA), Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act all provide restrictions on decision-making based on criminal history, including disclosures via court records, whether directly accessed or included in background checks. As the California Code of Regulations was updated in 2020 (§ 11017.1) specific to employment:

> *(a) Except in the circumstances addressed in subdivisions (a)(1) - (4) below, employers and other covered entities ("employers" for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant. Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check or internet searches directed at discovering criminal history, until after a conditional employment offer has been made to the applicant.*

> *Employers who violate the prohibition on inquiring into criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee's pre-conditional offer failure to disclose criminal history information as a factor in subsequent employment decisions, including denial of the position conditionally offered…*

This example illustrates the recognition that the degree of openness with respect to these records can have serious externalities and that consistent and clear regulation to prevent specific inappropriate uses is warranted.

Illinois offers some parallels, with respect to 2021 amendments to the Illinois Human Rights Act (IHRA) that prohibit the use of criminal conviction records in hiring, as well as added procedural requirements regarding human-resource decision-making in these cases. Yet, as described relative to other examples in this paper, the state also offers discretion, as for example, under the *Electronic Access Policy Circuit Court Records of the Illinois Courts*, in place since 2004, "public access" is defined as ""Public access" means that the public can inspect and copy the electronic court record using electronic access, except as provided for in Section 4.30 of this policy." This definition does not require bulk download ability or broad open data sets and allows for multiple interpretations and flexibility in implementation and design. A parallel system is in place for other courts levels, with many opting for access portals view few barriers to individual records but that also make it impossible to collect and repurpose records in bulk.

Building on this flexibility, many jurisdictions and courts systems leverage technical design to limit reuse, while also maintaining required access for those party to cases or with interest in a particular case within the boundaries of open case and file types. This reduces the need for monitoring relative to secondary uses, outside of the hiring context, and aims to expand public trust, building on past efforts to "ban the box" and take a broad approach to preventing discrimination based upon these records. California, in contrast, addresses anti-discrimination with respect to these records in more categories, but also must continue to monitor for broad scale collection, commercialization, and use in those categories because the data is more widely and easily available.

4.3 Biases in public court record data sets

Issues of bias are significant relative to public court records, associated data sets, and subsequent uses and require scrutiny and governance to minimize or mitigate whenever possible. Further, recognition that some biases are intrinsic to deeply rooted institutional legacies and failures and/or cannot be avoided or prevented without significant inaccuracies or externalities is critical to prevent inappropriate uses or dissemination of biased datasets. Innovation is not more critical than the rights and autonomy of individual data subjects as citizens and humans.

Key issues in both states, and the broader context of public court records include representation in records and overall data quality, given the ways they contribute both to bias directly and secondary harms. Whereas misrepresentation and representation of sensitive characteristics, as

well as demographic biases associated with who is included in these records to begin with, shape both individual and community level harms, data quality problems that arise when inconsistencies arise limit the utility of individual records and increase harm at the individual level, specifically. These issues are recognized as deeply problematic by some courts, as well as problematic in particular contexts such as employment as housing. For example, in addition to the Public User's Guide to Justice System's Winnebago County Court Records, a series of FAQs explain restrictions on access in use in functional terms (e.g., "ONLY Attorneys of Record and listed parties to the case will be given any information regarding Juvenile Cases. We adhere strictly to this policy."), as well as with justifications related to providing safety and preventing bias (e.g., "It is a violation of multiple Illinois state laws to use criminal records or data about race and ethnicity collected from these records for employment decisions.").

Biases can negatively impact the quality of the data. Changes to the ways that data is collected may not be reflected in data sets. This deems comparisons between data in specific data sets to be insufficient because the collection process for the data changed over time. This is exemplified through the Illinois Cook County Naturalization Declaration of Intention data set. This data set was inaccessible as the link to access this data set did not work. This data set claims to contain over 400,000 records pertaining to people who desired to become citizens of the U.S. that filed a Declaration of Intention between 1906-1929. This speaks to the quality of the data through its previous inaccessibility and the time period in which the data was collected. This data should not be used to make inferences surrounding immigration, as immigration has changed over time due to changes in policies. Additionally, city names have also changed over time. This would influence inferences drawn from where certain populations immigrate from and would render those inferences insufficient.

The history of incarcerated people has a meaningful relationship with race and class. This relationship created a bias influencing the design of data sets in California and Illinois. Both states have data sets and public court records available for the public to access, including private information. Within those data sets and public court records one can access the records of incarcerated people. For example, through the Illinois Department of Corrections website or the Cook County Sheriff Individual in Custody Locator, access to a person's name information about their incarceration is publicly available. In addition to the harm of having mostly marginalized people's data publicly accessible, there is also harm in its place in relation to other data sets and public court records. For example, it is just as easy to search up a traffic ticket with a person's name in the Cook County Traffic Ticket Search as it is to find an individual in custody with a person's name through the Cook County Sheriff Individual in Custody Locator. The decision to make those two databases accessible the same way dehumanizes incarcerated people. This dehumanization is directly related to the bias that influences the development of predictive policing systems that rely on pre-existing biases. The California Department of Corrections and Rehabilitation also has an inmate locator system and Los Angeles County has data on incarcerated people available through their Los Angeles County Inmate Information Center. However, it is not as easy to access personal traffic ticket data in Los Angeles County. One must need a driver's license number to access the data. This distinction in data sets highlights the bias that promotes the dehumanization of incarcerated people. It also highlights the intersectionality

of people in the data set, showcasing how marginalized communities are further impacted by bias in public court records and data sets where they are disproportionately represented.

4.4 Uses of public court record data sets

Public court record data sets are increasingly valuable as training data for various applications of AI for legal, criminal justice, human resources, and other screening purposes. While data from one state or another is not inherently more valuable, it may be more useful in one state over another, not only reflecting population differences but also the relative usability of a given data set. In this case, we find that the usability of data from California is significantly greater than that of Illinois. The latter notably has adopted a strategy wherein data is nominally available but not necessarily usable, providing access to data via proprietary file types or systems, unstructured data dumps, and without meaningful documentation.

Usability of data is a significant factor in re-use of data, yet access without structure and transparency may be more likely to lead to misuse. While California provides consistent structures, guides, and documentation in support of transparency aims, its openness has come at the expense of reuse and discrimination, which they have had to regulate and litigate in numerous ways. In contrast, Illinois has not made meaningful efforts to prioritize usability, except for very few county and local courts, or to provide consistent governance on structure or documentation. Instead of adopting data dump strategies or per record access, they have attempted to govern reuse and limit commercialization, while allowing for the baseline transparency and compelling interest needs to be met. This distinction is important because open records and access to records are not synonymous. There is a meaningful difference between full tables and searchable tools, as well as structured data and unstructured, non-guided records. The latter options limit viewing and increase likelihood of misinterpretation. Overall, California has sought to govern via regulation, court policy, and design, while Illinois has governed more so by design.

Yet, despite their differences in data governance, California and Illinois both have had public court records used in a way that may have violated the privacy rights of citizens in their respective states. In California, Immigration and Customs Enforcement (ICE) utilized CLEAR, a Thomson Reuters database that contained information collected through public records and private databases. Many California residents' data is available in the CLEAR database without their consent. A lawsuit was filed against Thomson Reuters in December 2020 (Zakrzewski, 2021). In Illinois, the data broker company LexisNexis has been accused of selling data to ICE. LexisNexis has an approximately $22.1 million contract that enables them to sell personal information with ICE such as court records, names, incarceration data, and more. The Cook County Board of Commissioners held a hearing surrounding the actions of LexisNexis in July 2022 (Lee, 2022). The LexisNexis accusations could be related to the inaccessibility of the Illinois Cook County Naturalization Declaration of Intention data set. These recent issues exemplify how proactive we must be in ensuring the data governance of public court records is robust. Bias is the foundation for these harms and recognizing and tackling those biases as they

exist in data and governance structures will decrease the potential of harms that marginalized communities consistently face due to perpetual bias.

5. Discussion

Implications of data governance vary significantly across populations, with institutional inequities and long-standing biases intersecting in both predictable and complicated ways. Efforts to protect specific populations may be as likely as efforts to target them to make them more vulnerable to information and data related harms, in the absence of robust data governance, such as with efforts in sanctuary cities and differential records retention rules regarding on undocumented individuals. This section discusses three key issues associated with the identified links between access, governance, bias, and reuse of public court records.

First, there are conflicts of interest between financial logics motivating reuse of these records and ethical decision-making frameworks developed by various scholars, advocates, civil society groups, professional organizations, and government agencies in support of sound and normative data governance within communities. Those who aim to ground practice and infrastructure around public data in community norms of appropriateness with respect to information flow and access do not, on principle, view financial logics as a legitimate driver of transmission unless there is consensus in a community that this is so. Public opinion does not obviously lie with those interests; thus, the difference is difficult to reconcile.
Second, major tensions exist between individual rights or interests and actors with incentives to extract and commercialize public data or tools trained on public data. In this sense, individuals with relevant records in these systems, whether due to criminal records or custody proceedings, are more closely aligned with data governance frameworks. This presents an opportunity for co design or participatory research to empirically ground more effective frameworks for the future, given shared interests, as the policy window is open and coalitions are likely to be more effective, though they will undoubtedly be faced with steep challenges regarding the industry actors who want to use these records to train profitable systems.

Third, the entrenched military industrial complex and privatization of criminal justice present major challenges to data autonomy at a fundamental level. Not only are the objectives in tension, but the underlying values of control and autonomy are nearer antonyms than they are compatible, reflecting diametrically opposed paradigms for decision-making.

6. Conclusions

Qualitative content analysis and comparison of governance in effect and as written in California and Illinois illustrates that prioritization of openness and transparency with respect to data, including court records, can come at the expense of privacy and contribute to instances of

discrimination. It is necessary for governance to directly target issues of bias and privacy, as well as leverage discretion by courts to protect citizens, as in the cases of small California counties requiring directed requests due to identification potential among small populations and Illinois counties that restrict additional types of records, due the potential harm to children or vulnerable populations. Specifically, Illinois could learn from California cases in which an individual must be a party to access records. Illinois is currently very inconsistent and difficult to use in many counties and most court levels, but this diminishes ease of reuse and thus limits commercialization of data, resulting in an unexpected tradeoff. California, in turn, could learn from Illinois on Freedom of Information Act (FOIA) exemptions for the judiciary. Further, they should recognize that more transparency, consistency, and openness increase risks for misuse.

This paper identifies key governance choices that are inherently value-laden and explores the implications of those choices. The resulting takeaways emphasize that bias and discrimination are deeply embedded in this context and modern data governance does not adequately engage or address this. Biases, long embedded in criminal justice and courts systems, are influencing how data is governed, particularly with respect to "oversights" in what reuses are prohibited and differential treatment of case and record types. For example, the contrast between systems to access data related to traffic or incarceration illustrate that the average person is granted greater privacy by design, wherein personally identifiable information (PII) such as a drivers' license number is required to access.

It is critical that states, local government, and courts systems adopt intentional and clear strategies to limit misuse of these records and associated data and provide clarity as to how to appropriately interpret that data. While this may seem counterintuitive, undocumented or ambiguously structured data is likely to led to misinterpretation, as well. Moving forward, rather than choosing between governance via policy and design, a tandem application, providing consistency, structure, and appropriate limits, as well as discretion with sensitive files and records, is likely to be more effective, less biased, and privacy preserving. However, given the contextual nature of this study, it is important that future work considers whether discretion, historically afforded to courts, may apply to other types of public records or data sets held by other agencies. Additionally future research should address: expanded empirical analysis of data reuse in this context, comparisons to other states, comparisons to other agencies within these states, and legal analysis of any harms associated with these records, as well as indicators to prevent bias and harms.

REFERENCES

Barocas, S. (2014, August). Data mining and the discourse on discrimination. In *Data ethics workshop, conference on knowledge discovery and data mining* (pp. 1-4).

Barocas, S., & Selbst, A. D. (2016). Big data's disparate impact. *California law review*, 671-732.

Bird, C., Bachmann, A., Aune, E., Duffy, J., Bernstein, A., Filkov, V., & Devanbu, P. (2009, August). Fair and balanced? bias in bug-fix datasets. In *Proceedings of the 7th joint meeting of the European Software Engineering Conference and the ACM SIGSOFT Symposium on the Foundations of Software Engineering* (pp. 121-130).

Campolo, A., Sanfilippo, M. R., Whittaker, M., & Crawford, K. (2017). AI now 2017 report.

Eliot, D., & Lance, B. (2021). Clamor for More Open Court Records is Augmented via AI Beneficial Uses. *Available at SSRN 3973217*.

Friedman, B., & Nissenbaum, H. (1993, April). Discerning bias in computer systems. In *INTERACT'93 and CHI'93 Conference Companion on Human Factors in Computing Systems* (pp. 141-142).

Friedman, B., & Nissenbaum, H. (1996). Bias in computer systems. *ACM Transactions on Information Systems (TOIS)*, *14*(3), 330-347.

Lee, B. (2022). Chicago Investigates ICE Use of Data Brokers to Skirt Sanctuary Laws. *Illinois Coalition For Immigrant And Refugee Rights*. https://www.icirr.org/News/Chicago-Investigates ICE-Use-of-Data-Brokers-to-Skirt-Sanctuary-Laws.

Madden, M., Gilman, M., Levy, K., & Marwick, A. (2017). Privacy, poverty, and big data: A matrix of vulnerabilities for poor Americans. *Wash. UL Rev.*, *95*, 53.

Roselli, D., Matthews, J., & Talagala, N. (2019, May). Managing bias in AI. In *Companion Proceedings of The 2019 World Wide Web Conference* (pp. 539-544).
Rubel, A., Castro, C., & Pham, A. (2021). *Algorithms and Autonomy: The Ethics of Automated Decision Systems*. Cambridge University Press.

Susser, D. (2021). Predictive policing and the ethics of preemption. *The ethics of policing: New perspectives on law enforcement*, 268-292.

Susser, D., Roessler, B., & Nissenbaum, H. (2019). Technology, autonomy, and manipulation. *Internet Policy Review*, *8*(2).

Tommasi, T., Patricia, N., Caputo, B., & Tuytelaars, T. (2017). A deeper look at dataset bias. *Domain adaptation in computer vision applications*, 37-55.

Torralba, A., & Efros, A. A. (2011, June). Unbiased look at dataset bias. In *CVPR 2011* (pp. 1521-1528). IEEE.

Zakrzrewski, C., (2021). The Technology 202: Activists are suing Thomson Reuters over its sale of personal data. *The Washington Post*.

https://www.washingtonpost.com/politics/2021/03/18/technology-202-activists-are-suing thomson-reuters-over-its-sale-personal-data/