Jenneke Evers
g.h.evers@law.leidenuniv.nl
eLaw – Center for Law and Digital Technologies, Leiden University

Calculating children: The effects of ProKid23- on children's right to privacy and non-discrimination

The use of algorithmic decision-making in law enforcement is increasing, in the fields of both administration and policing. Many of these decision-making systems target the lower socioeconomic class or other vulnerable or marginalized groups in society (Eubanks 2018; Bridges 2017). The increasing prevalence of these decision-making support systems create new power (im)balances, as they sort people into categories and treat them accordingly (Gandy 1993, 2009; Lyon 2003), such as that fundamental rights like privacy are not applied equally (Bridges 2017). One of the spheres where that is most pressing is in law enforcement (administrative and criminal). Here, citizens can experience severe consequences, such as registrations of being fraudulent, benefits that are put on hold, obligatory repayments, or even sentences.

This paper zooms in on one of those algorithmic decision-making support systems used by the Dutch Police. The system in question is ProKid23-, a risk assessment system that identifies persons under the age of 23 who have a heightened risk of engaging in criminal behavior. The system, for now, identifies a few different types of crime: violent offences, sexual offences, property offences with violence, property offences without violence, and offences in general. Whenever a person under 23 is being registered within one of the police databases/ registrations, ProKid23- estimates the risk that this particular person will exhibit criminal behaviour again (i.e. will commit a violent, sexual or property offence or will offend in general). The systems' risk score will then be examined by a police officer, who can choose to refer the person to child or youth welfare services or child or youth protection services.

ProKid23- is not the first system the Dutch Police has used for this purposes, but is a follow-on development of ProKid12- (also: ProKid) and ProKidPlus (also: ProKid+). Those two systems have now been discontinued. ProKid23- is in development, and therefore has not been given much attention yet in the debates about algorithmic justice, unlike ProKid (La Fors 2015; La Fors 2016; La Fors 2020) and ProKid+ (Jansen 2022a, Jansen 2022b).

As I argue, ProKid23- can be understood as both a predictive policing system and a recidivism risk system. It's aim, however, goes beyond those developments, and it is a prime example of an 'iGovernment' application (Prins, Broeders & Griffioen 2012) where boundaries between the domains of service, care and control are blurred. Not only is ProKid23- used within the criminal justice system, it is intertwined with youth welfare and protection services – its use has therefore potentially far-reaching ramifications. The development and use of ProKid23- then raises important questions: whose privacy is breached? Is ProKid23- applied equally? Is this in accordance with the legal framework?

From a legal point of view, in particular from the perspective of human rights, these questions should be answered according to a set of criterions. Interferences with human rights, such as the right to privacy and the right to non-discrimination, should (1) be prescribed by law; (2) have a legitimate aim; and (3) be necessary in a democratic society, and be proportional. I argue that ProKid23- does not meet those set of criterions.

My argument relies in particular on concepts used within law, ethics and surveillance studies. I argue that through sorting and triaging (Gandy 1993, 2009; Eubanks 2018), the Dutch Police decides based upon profiles and stereotypes who should be referred to youth care or youth protection services. That means that trough using ProKid23-, children's informational and decisional privacy is breached (Lanzing 2018), and they are possibly discriminated by association (Wachter 2019). As human rights are rooted in the autonomy and equality of citizens (Roessler 2017; Stoljar and Voigt 2022), the violation of privacy and non-discrimination poses a threat to the children's autonomy and equality.

Literature

Bridges, K.M. 2017. The Poverty of Privacy Rights. Stanford: Stanford University Press.

Eubanks, V. 2018. Automating Inequality: How Hight-Tech Tools Profile, Police and Punish the Poor. New York: St. Martin's Press.

Gandy, O.H. 1993. The panoptic sort: A political economy of personal information. Boulder: Westview.

Gandy, O.H. 2009. Coming to Terms with Chance: Engaging Rational Discrimination and Cumulative Disadvantage. London: Routledge.

Jansen, F. 2022a. Data-Driven Policing: Negotiating the Legitimacy of the Police. Dissertation Cardiff University.

Jansen, F. 2022b. Top400: A top-down crime prevention strategy in Amsterdam.

La Fors-Owczynik, K. 2020. Legal Remedies for a Forgiving Society: Children's protection rights and the value of forgiveness in AI-mediated risk profiling of children by Dutch authorities. Computer Law & Security Review (38), 105430.

La Fors-Owczynik, K. 2015. Minor protection or major injustice? – Children's rights and digital preventions directed at youth in the Dutch justice system. Computer Law & Security Review (31), pp. 651-667.

La Fors-Owczynik, K. 2016. Prevention strategies, vulnerable positions and risking the 'identity trap': digitalized risk assessments and their legal and socio-technical implications on children and migrants. Information & Communications Technology Law (25:2), pp. 71-95.

Lanzing, M. 2018. Strongly Recommended: Revisiting Decisional Privacy to Judge Hypernudging in Self-Tracking Technologies. Philosophy & Technology (32:3), pp. 549-568.

Lyon, D. 2003. Surveillance as Social Sorting: Privacy, risk, and digital discrimination. London: Routledge.

Prins, J.E.J., Broeders, D. & Griffioen, H.M. 2012. iGovernment: A new perspective on the future of government. Computer Law & Security Review (28), p. 273-282.

Roessler, B. 2017. X – Privacy as a Human Right. Proceedings of the Aristotelian Society (117:2), pp. 187-206.

Stoljar, N. and Voigt, K. 2022. Autonomy and Equality: Relational Approaches. New York: Routledge.

Wachter, S. 2020. Affinity profiling and discrimination by association in online behavioral advertising. Berkeley Technology Law Journal (35:367 2020), pp. 367-430.