Washington and Lee Law Review Online

Volume 81 | Issue 1 Article 1

12-29-2023

Code and Prejudice: Regulating Discriminatory Algorithms

Bernadette M. Coyle
Washington and Lee University School of Law, coyle.b24@law.wlu.edu

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr-online

Part of the Civil Rights and Discrimination Commons, Computer Law Commons, Legislation Commons, and the Science and Technology Law Commons

Recommended Citation
Bernadette M. Coyle, *Code and Prejudice: Regulating Discriminatory Algorithms*, 81 WASH. & LEE L. REV. ONLINE 31 (2023), https://scholarlycommons.law.wlu.edu/wlulr-online/vol81/iss1/1

This Note is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review Online by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Code and Prejudice: Regulating Discriminatory Algorithms

Bernadette M. Coyle*

Abstract

In an era dominated by efficiency-driven technology, algorithms have seamlessly integrated into every facet of daily life, wielding significant influence over decisions that impact individuals and society at large. Algorithms are deliberately portrayed as impartial and automated in order to maintain their legitimacy. However, this illusion crumbles under scrutiny, revealing the inherent biases and discriminatory tendencies embedded in ostensibly unbiased algorithms.

This Note delves into the pervasive issues of discriminatory algorithms, focusing on three key areas of life opportunities: housing, employment, and voting rights. This Note systematically addresses the multifaceted issues arising from discriminatory algorithms, showcasing real-world instances of algorithmic abuse, and proposing comprehensive solutions to enhance transparency and promote fairness and justice.

Table of Contents

INTRODUCTION 32

I. SECTION 230 35

* J.D. Candidate, Class of 2024, Washington & Lee University School of Law. Thank you to my advisor, Professor Allison Weiss, for her invaluable guidance throughout the writing process, and to the members of the *Washington & Lee Law Review* for making this publication possible. A special thank you to my family for their unwavering support and for always encouraging me to chase my dreams.

A. *Application to Discriminatory Algorithms in the Courts* 37
B. *The Supreme Court Hears Its First Section 230 Case* 39

II. DISCRIMINATORY ALGORITHMS IN KEY AREAS OF LIFE OPPORTUNITIES 41
A. *Housing* 43
B. *Employment* 54
C. *Voting* 60

III. LEGISLATION 64
A. *White House AI Bill of Rights* 64
B. *Congressional Legislation* 65
C. *State Legislation* 71

IV. PROPOSED SOLUTIONS 73
A. *Amending Section 230* 74
B. *Uniform State Legislation* 76

CONCLUSION 77

INTRODUCTION

In the age of efficiency, algorithms have become ubiquitous, driving decisions and shaping outcomes in virtually every aspect of our lives.[1] They influence the advertisements we see, the products we buy, and even the jobs we apply for.[2] Behind the seemingly neutral façade lies a dark truth: they can, and often

---

1. *See* Lee Rainie & Janna Anderson, *Code-Dependent: Pros and Cons of the Algorithmic Age*, PEW RSCH. CTR. (Feb. 8, 2017), https://perma.cc/PRE5-H5QP ("The use of algorithms is spreading as massive amounts of data are being created, captured and analyzed by businesses and governments."); VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 11 (2018) ("These systems are being integrated into human and social services across the country at a breathtaking pace, with little or no political discussion about their impacts.").

2. *See* Alice Marwick, *How Your Data Are Being Deeply Mined*, N.Y. REV. (Jan. 9, 2014), https://perma.cc/ZKQ5-8N7V ("Using techniques ranging from supermarket loyalty cards to targeted advertising on Facebook, private companies systematically collect very personal information, from who you are, to what you do, to what you buy.").

do, perpetuate, and even amplify, biases against certain groups.[3] This is particularly concerning given the increasing reliance on algorithms in high-stakes domains, such as lending, hiring, and criminal justice, where their decisions can have profound and lasting consequences for individuals and society as a whole.[4]

In its simplest form, an algorithm is a list of instructions designed to solve a problem or perform a computation.[5] Algorithms are given an input, then using specified sequences of logical operations, they achieve a desired result, transforming the input into the output.[6] These automated decision-making tools are the foundations that compose machine learning and artificial intelligence.[7] Algorithms are deliberately presented as automatic, impartial computerized functions to preserve their legitimacy.[8] "In fact, no information service can be completely hands-off" and without human influence, creating the reality of bias and discrimination in these ostensibly unbiased systems.[9]

As the world has become more dependent on technology, algorithms have advanced and grown to permeate many areas

---

3. *See infra* Part II.

4. *See* EUBANKS, *supra* note 1 ("The widespread use of these systems impacts the quality of democracy for us all. Automated-decision making shatters the social safety net, criminalizes the poor, intensifies discrimination, and compromises our deepest national values.").

5. *See* THOMAS H. CORMEN ET AL., INTRODUCTION TO ALGORITHMS 5 (3d ed. 2009) ("Informally, an algorithm is any well-defined computational procedure that takes some value, or set of values, as an input and produces some value, or set of values, as an output.").

6. *See* SOLON BAROCAS ET AL., DATA & CIVIL RIGHTS: TECHNOLOGY PRIMER 3 (2014), https://perma.cc/G84Z-8SKB (PDF) ("[Algorithms] are step-by-step instructions for acting on some kind of input to achieve a desired result."); DONALD E. KNUTH, SELECTED PAPERS ON COMPUTER SCIENCE 59 (1996) ("An algorithm is a set of rules for getting a specific output from a specific input. Each step must be so precisely defined that it can be translated into computer language and executed by a machine.").

7. *See What's The Difference Between AI, ML, and Algorithms?*, QUINYX, https://perma.cc/EJ4S-S3KY (last visited Oct. 29, 2023).

8. *See* Tarleton Gillespie, *The Relevance of Algorithms*, *in* MEDIA TECHNOLOGIES: ESSAYS ON COMMUNICATION, MATERIALITY, AND SOCIETY 167, 179 (Tarleton Gillespie et al. eds., 2014) ("But, though algorithms may appear to be automatic and untarnished by the interventions of their providers, this is a carefully crafted fiction.").

9. *Id.*

of daily life,[10] including determining eligibility for employment, housing, and public accommodations.[11] Humans are constantly leaving digital traces across the internet.[12] These digital traces can be collected and then transformed into data usable for algorithms.[13] The combination of the sweeping availability of data and technological advances in algorithms are causing significant societal changes.[14] The lack of widespread knowledge among the general public about the collection, aggregation, and brokering of data used to create algorithms, has created a climate where these practices have been allowed to operate with little regulatory oversight.[15] In essence, a wide swath of private and governmental actors are increasingly deploying the use of invasive, modern algorithms, with very limited protection or

---

10. *See* PEDRO DOMINGO, THE MASTER ALGORITHM 1 (2015) ("If every algorithm suddenly stopped working it would be the end of the world as we know it."); *see also* Rainie & Anderson, *supra* note 1 ("Algorithms are the new arbiters of human decision-making in almost any area we can imagine, from watching a movie (Affectiva emotion recognition) to buying a house (Zillow.com) to self-driving cars (Google).").

11. *See* Legislative Transmittal Letter from Karl A. Racine, Att'y Gen. for D.C., to Phil Mendelson, Chairman, Council D.C. (Dec. 8, 2021) https://perma.cc/6YRP-9FE7 (PDF) ("Increasingly, algorithms are used to determine eligibility for opportunities in employment, housing, education, and public accommodations like healthcare, insurance, and credit.").

12. *See* LAUREN AROSIO, WHAT PEOPLE LEAVE BEHIND ONLINE: DIGITAL TRACES AND WEB-MEDIATED DOCUMENTS FOR SOCIAL RESEARCH 311 (Francesca Comunello et al. eds., 2022) ("Today, the advent of new information technologies and the growth of the World Wide Web have encouraged the creation, dissemination and preservation of many different types of materials that people leave behind online.").

13. *See* Rainie & Anderson, *supra* note 1 ("In fact, everything people see and do on the web is the product of an algorithm.").

14. *See* S. C. Olhede & P. J. Wolfe, *The Growing Ubiquity of Algorithms in Society: Implications, Impacts and Innovations*, PHIL. TRANSACTIONS ROYAL SOC'Y A, Aug. 6, 2018, at 1, 2 ("The large-scale availability of data, coupled with technological advances in algorithms, is changing society markedly.").

15. *See* Mary Madden et al., *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities For Poor Americans*, 95 WASH. U. L. REV. 53, 64–65 ("The obfuscation of big data methods that now occurs across many industries has been variably described by scholars as creating a 'black box society,' a 'transparency paradox,' and a lack of 'algorithmic accountability.'"); Marwick, *supra* note 2 ("The scope of this collection, aggregation, and brokering of information is . . . almost entirely unregulated and many of the activities of datamining and digital marketing firms are not publicly known at all.").

recourse available to those harmed by misapplication or misuse.[16]

This Note addresses the grave issues presented by discriminatory algorithms in three key areas of life opportunities: housing, employment, and voting rights, as well as their legal implications and potential solutions to ensure that algorithms promote fairness and justice rather than perpetuate inequality. Part I of this Note provides background on Section 230 of the Communications Decency Act[17] and its application to algorithms through the judicial system. Part II explores the impact of discriminatory algorithms on key areas of life opportunity through specific instances of their abuse. Part III discusses legislative attempts to combat discriminatory algorithms at both the state and federal level. Part IV proposes two solutions: (1) Congressional amendment of Section 230, and (2) the development and adoption of uniform state regulation to protect against algorithmic discrimination and promote transparency about the development and use of algorithms in three areas of key life opportunities.

I. SECTION 230

Famously labeled "The Twenty-Six Words That Created the Internet,"[18] Section 230 of the Communications Decency Act was enacted by Congress in 1996 to protect children on the internet and provides immunity for website platforms with respect to

16. *See* Maurice E. Stucke & Ariel Ezrachi, *Looking Up in the Data-Driven Economy*, COMPETITION POL'Y INT'L ANTITRUST CHRON., May 30, 2017, at 1, 5 (quoting Tim Berners-Lee, inventor of the worldwide web, as stating, "[t]hese sites make more money when we click on the links they show us. And, they choose what to show us based on algorithms which learn from our personal data that they are constantly harvesting"); Rainie & Anderson, *supra* note 1 ("The overall impact of ubiquitous algorithms is presently incalculable because the presence of algorithms in everyday processes and transactions is now so great, and is mostly hidden from public view.").

17. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. § 230).

18. *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019). *See also* David Post, Opinion, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or so Dollars of Value*, WASH. POST (Aug. 27, 2015), https://perma.cc/7EPK-GKVH ("Yet it is impossible to imagine what the Internet ecosystem would look like today without [Section 230].").

third-party content.[19] Since its enactment, courts have interpreted Section 230 as conferring broad protection for claims involving third-party content that appears online, which has led internet companies to frequently rely on Section 230's liability shield in state and federal litigation.[20]

Section 230 has two key provisions: Subsection (c)(1) and Subsection (c)(2).[21] Subsection (c)(1) shields online service providers from liability for publishing content posted by third parties.[22] It states: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[23] An interactive computer service is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[24] "Publisher" and "speaker" are not defined in the Act, which has caused difficultly for courts in interpreting and applying Section 230.[25]

There are three elements of immunity under Section 230(c)(1). First, the defendant seeking immunity must be a "provider or user of an interactive computer service."[26] Second, the plaintiff's claim must treat the defendant as a "publisher or

19. *See* U.S. DEP'T JUST., DEPARTMENT OF JUSTICE'S REVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996 (2020), https://perma.cc/F7JT-G8ES ("Section 230 . . . provides immunity to online platforms from civil liability based on third-party content as well as immunity for removal of content in certain circumstances.").

20. *See* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021) ("Courts have interpreted Section 230 to foreclose a wide variety of lawsuits and to preempt laws that would make providers and users liable for third-party content."); Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 13 ("But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.").

21. *See* 47 U.S.C. § 230(c)(1)–(2).

22. *Id.* § 230(c)(1).

23. *Id.*

24. *Id.* § 230(f)(2).

25. *See* Facebook v. Force, 934 F.3d 53, 65 (2d Cir. 2019).

26. 47 U.S.C. § 230(c)(1).

speaker."[27] Third, the plaintiff's claim must be based on information "provided by another information content provider."[28]

Subsection (c)(2) provides protection to internet service providers and users of interactive computer services from liability for their actions taken in good faith to block certain types of objectionable third-party content.[29] Specifically, it applies only to decisions to restrict content, stating that service providers and users cannot be held liable for voluntarily acting in good faith to restrict access to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material.[30] Subsection (c)(2) was intended to encourage internet service providers and website operators to take proactive steps to moderate the content on their platforms without fear of being held liable for each piece of content that is posted by third parties.

A. *Application to Discriminatory Algorithms in the Courts*

As artificial intelligence has rapidly assimilated into nearly every aspect of daily life, online platforms have sought protection under Section 230.[31] Two of the first cases addressing Section 230 immunity in the use of discriminatory algorithms are *Force v. Facebook*[32] and *Google v. Gonzalez*.[33]

In *Force v. Facebook*, the Second Circuit addressed claims against Facebook brought by victims, estates, and family members of victims of Hamas terrorist attacks in Israel.[34] The plaintiffs alleged that Facebook's algorithms pushed Hamas terrorist-related content to the personalized newsfeeds of the individuals who harmed the plaintiffs.[35] A divided panel held that the plaintiffs' claims were barred under Section 230.[36] The

27. *Id.*
28. *Id.*
29. *Id.* § 230(c)(2).
30. *Id.*
31. *See* BRANNON & HOLMES, *supra* note 20.
32. 934 F.3d 53 (2d Cir. 2019).
33. 2 F.4th 871 (9th Cir. 2021).
34. *Force*, 934 F.3d at 57.
35. *See id.* at 62.
36. *See id.* at 57.

court explained that "arranging and distributing third-party information inherently forms 'connections' and 'matches' among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media" is an essential result of publishing.[37] The court reasoned that Facebook's algorithms are content neutral because the platform takes information provided by Facebook users and matches it to other users "based on objective factors applicable to any content."[38]

Chief Judge Katzmann dissented in part, arguing that Section 230 immunity does not protect Facebook's friend- and content-suggestion algorithms.[39] Chief Judge Katzmann argued that Facebook is not solely providing a framework that could be used for proper or improper purposes. Instead, Facebook's role in creating "the algorithm and suggesting connections to users based on their prior activity on Facebook, including their shared interest in terrorism, 'is directly related to the alleged illegality of the site.'"[40] Section 230 may immunize Facebook for liability for its allowance of terrorist accounts, because here Facebook acts merely as the publisher of the accounts' content.[41] "That does not mean, though, that it is also immune when it conducts statistical analyses of that information and delivers a message based on those analyses."[42]

In *Gonzalez v. Google*, the Ninth Circuit reached the same conclusion as the majority in *Facebook v. Force* when addressing similar terrorism-related claims brought against social media companies for their use of algorithms.[43] The family of Nohemi

37. *Id.* at 65–66.

38. *Id.* at 70.

39. *See id.* at 76–77 (Katzmann, C.J., concurring in part and dissenting in part) ("[I]t strains the English language to say that in targeting and recommending these writings to users—and thereby forging connections, developing new social networks—Facebook is acting as 'the *publisher* of . . . information provided by another information content provider.'" (quoting 47 U.S.C. § 230(c)(1))).

40. *Id.* at 83 (quoting Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1171 (9th Cir. 2008)).

41. *See id.* (distinguishing between allowing terrorist accounts and promoting content related to terrorism).

42. *Id.*

43. *See Google*, 2 F.4th at 800 ("We conclude the district court in *Gonzalez* properly ruled that § 230 bars most of the Gonzalez Plaintiffs' claims . . . .").

Gonzalez, an American student killed in an ISIS terrorist attack in Paris in 2015, filed suit against Google, arguing that YouTube's recommendation algorithm led users towards ISIS recruitment videos, making the company partially responsible for Nohemi's death.[44] The court reasoned that even accepting as true "that Google's algorithms recommend ISIS content to users, the algorithms do not treat ISIS-created content differently than any other third-party created content."[45] The Ninth Circuit held that "a website's use of content-neutral algorithms, without more, does not expose it to liability for content posted by a third-party."[46]

In her concurring opinion, Judge Berzon, agreeing with Chief Judge Katzmann's dissent in *Force*, urged the Court to reconsider the panel's decision in Gonzalez and hold "that websites' use of machine-generated algorithms to recommend content and contacts are not within the publishing role immunized under section 230."[47] Judge Gould dissented in part for the reasons stated in Chief Judge Katzmann's partial dissent in *Force.*[48]

B. *The Supreme Court Hears Its First Section 230 Case*

In October 2020, the Supreme Court denied certiorari in *Malware Bytes, Inc. v. Enigma Software Group USA, LLC*,[49] a case concerning immunity given to internet companies under Section 230.[50] In his statement respecting the denial of certiorari, Justice Clarence Thomas wrote, "I agree with the Court's decision not to take up this case. I write to explain why, in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state

44. *See id.* at 880.

45. *Id.* at 894.

46. *Id.* at 896.

47. *Id.* at 917 (Berzon, J., concurring).

48. *See id.* at 920 (Gould, J., concurring in part and dissenting in part) ("I do not believe that Section 230 was ever intended to immunize such claims for the reasons stated in Chief Judge Katzmann's cogent and well-reasoned opinion concurring in part and dissenting in part in *Force v. Facebook*.").

49. 141 S. Ct. 13 (2020).

50. *See id.*

of immunity enjoyed by Internet platforms."[51] Justice Thomas argued that courts have interpreted Section 230 in such a way as to grant immunity to internet platforms even when those platforms are primarily responsible for the creation of their content.[52]

The Supreme Court heard its first Section 230 case, *Gonzalez v. Google*,[53] in February 2023.[54] Connected to *Google v. Gonzalez*, and also argued in front of the Supreme Court in February 2023, is *Twitter v. Taamneh*.[55] At the heart of each of these cases, the Supreme Court focused on whether *recommendations* of content are equivalent to *display* of content, the latter of which is widely accepted as being covered by Section 230.[56]

Although the Supreme Court did not explicitly consider Section 230 in *Twitter v. Taamneh*, content moderation and the use of algorithms was still a central issue in the case. At issue in the case was whether internet platforms can be held liable for aiding and abetting global terrorism for content on sites.[57] The suit was filed following the murder of Nawras Alassaf, a victim of the 2017 ISIS attack at a Turkish nightclub.[58] The plaintiffs sued Twitter, alleging that ISIS used Twitter to expand its reach and Twitter knew that ISIS had done so and failed to take sufficient countermeasures–thus Twitter aided and abetted an act of international terrorism.[59] Section 230 immunity was raised by the defendant companies, but the lower court never

51. *Id.* at 14.

52. *See id.* at 16 ("Courts have . . . departed from the most natural reading of the text by giving Internet companies immunity for their own content. . . . Nowhere does this provision protect a company that itself is the information content provider.").

53. 598 U.S. 617, 622 (2023) (per curiam).

54. *Id.*

55. 143 S. Ct. 1206 (2023).

56. *See* Petition for Writ of Certiorari at i, Gonzalez v. Google, 143 S. Ct. 1191 (2023) (No. 21-1333); Petition for Writ of Certiorari at i, Twitter v. Taamneh, 143 S. Ct. 1206 (2023) (No. 21-1496).

57. *See Taamneh*, 143 S. Ct. at 484.

58. *See* Gonzalez v. Google, 2 F.4th 871, 908 (9th Cir. 2021) ("The Taamneh Plaintiffs' aiding-and-abetting claim stems from Abdulkadir Masharipov's murder of Nawras Alassaf at the Rein nightclub on January 1, 2017.").

59. *See id.* at 908–09.

reached a conclusion and thus its applicability was not considered in the Ninth Circuit's decision.[60] The Ninth Circuit held that the plaintiffs in *Taamneh* had adequately alleged that the defendants knowingly assisted ISIS and could face claims that, by failing to identify and remove the content, their actions played an assistive role.[61] Notably, in its opinion, the Ninth Circuit stated, "There is no indication the drafters of § 230 imagined the level of sophistication algorithms have achieved," acknowledging the insufficiency of Section 230 for application to algorithms.[62]

Ultimately, the Supreme Court reversed the Ninth Circuit's decision on the grounds that the plaintiffs failed to state a claim for aiding and abetting terrorism under 18 U.S.C. § 2333(d)(2).[63] *Gonzalez v. Google* was disposed of by the Supreme Court on the same grounds in a brief *per curiam* order.[64] Thus, the proper contours of Section 230 are still debated.

II. DISCRIMINATORY ALGORITHMS IN KEY AREAS OF LIFE OPPORTUNITIES

The Civil Rights Movement of the 1950s and 1960s had a profound impact on American legal history. The Civil Rights Act of 1964,[65] the Voting Rights Act of 1965,[66] and the Civil Rights Act of 1968[67] are three landmark pieces of legislation born out of this era. The 1964 Act was primarily executed to respond to

60. *See id.* at 908 ("[T]he district court in *Taamneh* did not reach § 230; it only addressed whether the Taamneh Plaintiffs plausibly alleged violations of the ATA for purposes of Rule 12(b)(6).").

61. *See id.* at 910 ("Taking the FAC's allegations as true, we conclude the Taamneh Plaintiffs adequately allege the defendants' assistance to ISIS was substantial. The FAC alleges that defendants provided services that were central to ISIS's growth and expansion, and that this assistance was provided over many years.").

62. *Id.* at 912.

63. *See Taamneh*, 143 S. Ct. at 497–98.

64. *See* Gonzalez v. Google, 598 U.S. 617, 622 (2023) (per curiam).

65. 42 U.S.C. § 1981.

66. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314).

67. Pub. L. No. 90-284, 82 Stat. 73.

racial discrimination and segregation.[68] The eleven titles of the Civil Rights Act of 1964 worked to "improve access to voting, public accommodations, and employment as well as improve the overall status of individuals discriminated against on the basis of race, color, religion, sex, and national origin."[69] Congress passed the Voting Rights Act in 1965 "as a far-reaching statute to combat voter discrimination both at a national level and at a jurisdiction-specific level."[70] The Voting Rights Act extended protections beyond voting to include voting-related conduct, such as helping others to register to vote or encouraging others to vote.[71] The Civil Rights Act of 1968 furthered these protections with the inclusion of key titles, such as the Fair Housing Act,[72] providing, "within constitutional limitations, for fair housing throughout the United States."[73] The Act prohibits discrimination in the sale and rental of housing on the basis of race, color, national origin, disability and family status, religion, or sex.[74]

Many algorithms implemented in the name of economic efficiency have come under fire for being discriminatory and racially biased.[75] "Ample research has shown that by using

---

68. *See* CHRISTINE J. BLACK, CONG. RSCH. SERV., IF11705, THE CIVIL RIGHTS ACT OF 1964: ELEVEN TITLES AT A GLANCE (2020) (discussing the purpose of the Civil Rights Act of 1964 and each of its titles).

69. Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424, 425 (2015).

70. Sudeep Paul, *The Voting Rights Act's Fight to Stay Rational:* Shelby County v. Holder, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 271, 273 (2013).

71. 52 U.S.C. § 10307(b).

72. Pub. L. No. 90-284, § 800–820, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601–3619, 3631).

73. 42 U.S.C. § 3601.

74. *Id.* § 3604.

75. *See* CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION 3 (2016) ("The math-powered applications powering the data economy were based on choices made by fallible human beings. . . . Nevertheless, many of these models encoded human prejudice, misunderstanding, and bias into the software systems that increasingly managed our lives."); EXEC. OFF. PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS 4 (2016), https://perma.cc/5CB3-QCZZ (PDF) ("Our challenge is to support growth in the beneficial use of big data while ensuring that it does not create unintended discriminatory consequences."); EXEC. OFF. PRESIDENT, BIG DATA AND DIFFERENTIAL PRICING 2 (Feb. 2015), https://perma.cc/TE3A-MQNV (PDF) ("Commercial applications of big data deserve ongoing scrutiny given the speed at which both the technology and business practices are evolving.").

biased data and potentially biased code, algorithms are creating a funneling effect that perpetuates discrimination and stereotypes."[76] These discriminatory algorithms pose problems beyond the scope of the current civil rights protections originally conceived in the 1950s and 1960s. The level and presence of sophisticated technology surpasses what was in existence at the time these laws were enacted. It is important that the immunity conferred by Section 230—whatever its scope—not be permitted to interfere with the enforcement of the federal civil rights laws or analogous provisions of state law against the rapidly evolving exploitation of technology intended to subvert or evade these laws or undermine the rights that they confer.

A. *Housing*

Algorithms have been used in the housing industry for decades, including in mortgages, lending, and tenant screening.[77] The use of discriminatory algorithms in various aspects of the housing industry perpetuates existing disparities—for example, home ownership is a crucial tool for building generational wealth, and one that Black people have been historically deprived of.[78] People of color are denied mortgages at significantly higher rates than White people—with one study stating that loan applicants of color were 40% to 80% more likely to be denied loans when compared to White

---

76. James A. Allen, *The Color of Algorithms: An Analysis and Proposed Research Agenda for Deterring Algorithmic Redlining*, 46 FORDHAM URB. L.J. 219, 229 (2019).

77. *See* Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1346 (2007) ("The trend of gathering information about tenants, which began to raise eyebrows almost thirty years ago, has continued to grow in magnitude and concern."); Paula A. Franzese, *A Place to Call Home: Tennant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 667 n.38 (2018) ("The tenant screening service industry is not new. Blacklists have existed since the 1970s, but have grown exponentially in the past several decades, due in large part to the advent of quicker and more accessible technologies.").

78. *See* Bill Block, *How Biased Algorithms Create Barriers to Housing*, ACLU WASH. (Feb. 16, 2022), https://perma.cc/RZ4X-5PC4 ("Barriers to home ownership, both past and present, are an important reason for the persistent wealth gap between Black families and white families. Thus, discriminatory decisions about home loan applications have profound ramifications that reverberate beyond the denial of the loan itself.").

applicants with the same credit score.[79] This disparity exceeded 250% in certain metro areas.[80]

Tenant screening has become a growing practice among landlords, with an estimated nine out of ten landlords using tenant reports in their businesses.[81] These reports are produced by over 2,000 companies that make up the unregulated $1 billion industry.[82] Using algorithmic technology, tenant screening companies provide landlords with reports used to accept or reject tenant applications.[83] The reports can be created almost instantly using partial names or incomplete dates of birth and are then given to landlords without human review for errors.[84] Tenants are often left with no choice but to submit to

---

79. *See* Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approved Algorithms*, MARKUP (Aug. 25, 2021), https://perma.cc/5END-EVYG

> Holding 17 different factors steady in a complex statistical analysis of more than two million conventional mortgage applications for home purchases, we found that lenders were 40 percent more likely to turn down Latino applicants for loans, 50 percent more likely to deny Asian/Pacific Islander applicants, and 70 percent more likely to deny Native American applicants than similar White applicants. Lenders were 80 percent more likely to reject Black applicants than similar White applicants. These are national rates. In every case, the prospective borrowers of color looked almost exactly the same on paper as the White applicants, except for their race.

80. *See id.*

81. *See* Lauren Kirchner & Matthew Goldstein, *How Automated Background Checks Freeze Out Renters*, N.Y. TIMES (May 28, 2020), https://perma.cc/X42E-9JQJ ("The companies produce cheap and fast—but not necessarily accurate—reports for an estimated nine out of 10 landlords across the country.").

82. *See id.* ("The growing data economy and the rise of American rentership since the 2008 financial crisis have fueled a rapid expansion of the tenant screening industry, now valued at $1 billion.").

83. *See* Shriver Ctr. on Poverty L., Comment Letter on Proposed Rule Governing HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, at 17 (Oct. 22, 2019), https://perma.cc/U28M-YQ6R ("Using parameters set by the landlord, companies now offer products that compare the retrieved records against the landlord's admission policy and use an algorithm to determine whether the applicant should be admitted to that property.").

84. *See* Kirchner & Goldstein, *supra* note 81; Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back from Tough Times*, CONSUMER REPORTS (Mar. 11, 2021), https://perma.cc/35PZ-3Q8D ("For one

and pay for these screenings.[85] The underlying records used to make decisions or reasons for denials are not always provided by the companies to the landlords, leaving tenants in the dark about why they were turned down.[86] Tenant companies refute criticism of this sort, contending that less than 1% of reports are disputed by renters.[87] The actual error rate could likely be higher, as tenants may not know to complain. However, an error rate of this size is not trivial—"an error rate of 1 percent could upend the lives of hundreds of thousands of people."[88]

For example, CoreLogic, an industry leader who previously maintained a tenant screening business, has faced allegations of violating the Fair Housing Act.[89] Carmen Arroyo was a tenant of WinnResidential, and requested that she and her son be transferred to a two-bedroom apartment following an accident that left her son unable to speak, walk, or care for himself.[90] CoreLogic conducted tenant screenings for WinnResidential, using an algorithm to interpret an applicant's criminal record and provide landlords with a decision on whether the applicant qualifies for housing.[91] No additional information, such as underlying records, the nature of the alleged crime, the date of

---

thing, the documents are often littered with errors. As the tech-focused news site The Markup and other have reported, they can include criminal or eviction records from people with similar names, a problem that can arise more often with Black or Latino applicants.").

85. *See* Waddell, *supra* note 84 ("Dozens of companies supply the reports, which can cost between $20 and $40, typically paid by the applicant."); Kirchner & Goldstein, *supra* note 81 ("Tenants generally have no choice but to submit to the screenings and typically pay an application fee for the privilege.").

86. *See* Kirchner & Goldstein, *supra* note 81 ("Some screening companies don't even provide the underlying records to landlords, instead producing a color-coded "risk" score or a thumbs-down or thumbs-up lease recommendation.").

87. *See id.* (presenting responses of tenant screening companies to lawsuits and criticism related to the accuracy of reports).

88. *See id.* (providing data on the number of rental turnovers per year in the United States).

89. *See* Waddell, *supra* note 84 ("CoreLogic, which sold off its tenant screening business in February 2021, declined to speak with Consumer Reports about the Arroyo case or its tenant screening business."). *See generally* Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362 (D. Conn. 2019).

90. *Conn. Fair Hous. Ctr.*, 369 F. Supp. 3d at 367.

91. *Id.*

the crime, or the outcome of the case, was provided with the reports.[92] CoreLogic screened Mr. Arroyo "and informed WinnResidential that Mr. Arroyo was disqualified from tenancy based on unspecified criminal records," failing to take relevant factors into consideration "such as the facts surrounding the criminal conduct, Mr. Arroyo's age at the time of the conduct, and the impact of Mr. Arroyo's significant disabilities on the ability for future misconduct."[93] As a result, Mr. Arroyo remained in a nursing home for an additional year, while Ms. Arroyo struggled to secure housing at the hands of a discriminatory algorithm, causing emotional distress and adding unnecessary expenses.[94]

The District Court rejected CoreLogic's motion to dismiss, holding that CoreLogic could be held liable for violations of the Fair Housing Act because the company "held itself out as a company with the knowledge and ingenuity to screen housing applicants by interpreting criminal records and specifically advertised its ability to improve 'Fair Housing compliance.'"[95] Following a ten-day bench trial, the court ruled in favor of CoreLogic on the plaintiffs' Fair Housing Act claim, asserting that providing a screening tool for use by a property management company does not amount to providing or denying housing—a key factor for establishing liability under the Fair Housing Act.[96]

The Ninth Circuit considered the issue of whether a website operator can claim immunity from liability for a discriminatory

---

92. *Id.*

93. *Id.*

94. *See id.* at 368–69

> WinnResidential eventually allowed Mr. Arroyo to move in with Ms. Arroyo in June 2017, approximately one year after Ms. Arroyo's request. . . . [T]he Arroyo Plaintiffs allege that a result of Defendant's actions Mr. Arroyo remained in a nursing home for an additional year and the Arroyo Plaintiffs suffered emotional distress along with additional medical, travel, and housing expenses.

95. *Id.* at 372.

96. *See* Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC, No. 18-cv-705, 2023 WL 4669482, at *20 (D. Conn. July 20, 2023).

algorithm in the context of housing under Section 230.[97] Roommates.com is a popular website designed to match people renting out spare rooms with people looking for a place to live.[98] At the time of the case, subscribers were required to create profiles before being permitted to search listings or post housing opportunities on the website.[99] In creating a profile, users were asked to provide basic information such as name, location, and email address.[100] Users were also asked to disclose sex, sexual orientation, and whether the user would bring children to the household from a pre-populated list of answer choices created by the website.[101] Users were required to describe their preferences in roommates with respect to the same three criteria: sex, sexual orientation, and whether they would bring children to the household, again selecting from a pre-populated list of answer choices created by the website.[102] The website also provided users with the ability to submit "Additional Comments" describing themselves and their desired roommate in an open-ended essay.[103] Upon completion of the application, an "algorithm developed by Roommate then decodes the input, transforms it into a profile page and notifies other subscribers of a new applicant or individual offering housing matching their preferences."[104] The profile page presents the user's pseudonym, description, and preferences, as disclosed through answers to Roommate's questions.[105]

The Fair Housing Councils of the San Fernando Valley and San Diego ("Councils") filed suit against Roommate.com, alleging violations of the federal Fair Housing Act and

---

97. *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) ("Here, we must determine whether Roommate has immunity under the CDA because Councils have at least a plausible claim that Roommate violated state and federal law by merely posing the questions.").

98. *Id.* at 1161.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1157 n.20.

105. *See id.* at 1161–62 (explaining the compilation of user inputs into a profile page on defendant's website).

California housing discrimination laws.[106] The Councils alleged that Roommate.com "is effectively a housing broker doing online what it may not lawfully do off-line."[107] The district court held that Roommate.com was immune from liability under Section 230, and dismissed the claims without considering whether Roommate.com's actions violated the Fair Housing Act.[108]

On appeal, the Ninth Circuit reversed the district court's decision on Section 230 immunity in part and remanded the case for a determination of whether Roommate.com violated the Fair Housing Act.[109] Although the court held that Roommate.com was immune from liability under Section 230 for publishing the "Additional Comments" section,[110] the site did not receive protection for posting questionnaires that required disclosure of sex, sexual orientation, and familial status;[111] limiting the scope of searches by a user's preferences on a roommate's sex, sexual orientation, and familial status;[112] and using an algorithmic matching system that paired users based on those preferences.[113] In its opinion, the court explained that, "By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a

106. *See id.* at 1162.

107. *Id.*

108. *See id.*

109. *See id.* at 1175 ("In light of our determination that the CDA does not provide immunity to Roommate for all of the content of its website and email newsletters, we remand for the district court to determine in the first instance whether the alleged actions for which Roommate is not immune violate the Fair Housing Act, 42 U.S.C. § 3604(c).").

110. *See id.* at 1174.

111. *See id.* at 1165 ("The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its own doing and thus section 230 of the CDA does not apply to them. Roommate is not entitled to immunity.").

112. *See id.* at 1167 ("If Roommate has no immunity for asking the discriminatory questions, as we concluded above, it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing.").

113. *See id.* at 1169 ("Here, Roommate's connection to the discriminatory filtering process is direct and palpable: Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children.").

passive transmitter of information provided by others; it becomes the developer, at least in part, of that information."[114] Thus, Roommate.com was not afforded immunity under Section 230 for the operation of its algorithmic search system, designed to "steer users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose" through a series of discriminatory questions.[115] Roommate.com was protected by Section 230 for publishing users "Additional Comments" section.[116] The court determined that Roommate.com was "not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate."[117] Here, Roommate.com did not give any guidance or requirements as to what kind of information users should include as "Additional Comments," thus the site cannot be considered a developer of the information in this context.[118]

More recently, Facebook has been at the center of several lawsuits for its use of discriminatory algorithms in housing advertisements.[119] Facebook generates a significant percentage of its revenue by selling advertising opportunities to third-parties.[120] The company allows advertisers to select which groups of users are targeted or excluded from seeing their advertisement using data assembled from users' on- and off-site activity.[121] Advertisers have the option to specify their own

---

114. *Id.* at 1166.

115. *Id.* at 1166–67.

116. *See id.* at 1174 ("This is precisely the kind of situation for which section 230 was designed to provide immunity. The fact that Roommate encourages subscribers to provide *something* in response to the prompt is not enough to make it a 'develop[er]' of the information . . . .").

117. *Id.*

118. *See id.* ("Roommate does not tell subscribers what kind of information they should or must include as "Additional Comments," and certainly does not encourage or enhance any discriminatory content created by users. Its simple, generic prompt does not make it a developer of the information posted.").

119. *See generally* Mobley v. Facebook, Inc., No. 16-cv-06440, 2017 WL 10560600 (N.D. Cal. Feb. 13, 2017); Nat'l Fair Hous. All. v. Facebook, Inc., No. 18-cv-02689 (S.D.N.Y. Mar. 27, 2018).

120. *See Meta Reports Fourth Quarter and Full Year 2021 Results*, META (Feb. 2, 2022), https://perma.cc/4KGZ-AKAX (PDF).

121. *See* Aaron Rieke & Miranda Bogen, *Leveling the Platform: Real Transparency for Paid Messages on Facebook*, UPTURN (May 9, 2018),

custom audiences made up of lists of specific people provided by the advertiser.[122] The most powerful option for targeted advertisements on Facebook is lookalike audiences, which allows an advertiser to target users who share similarities with a predefined custom audience.[123] After the advertiser chooses a custom audience as a source, Facebook employs machine learning techniques to locate and target individuals with characteristics similar to those present in the initial list.[124]

In October 2016, ProPublica released an article exposing Facebook for allowing advertisers to exclude users by race.[125] ProPublica purchased a housing advertisement on Facebook, and using the platform's targeted advertising tools, opted to exclude anyone with an "affinity" for African American, Asian American, or Hispanic people.[126] The advertisement was approved by Facebook within fifteen minutes.[127] Facebook responded to the investigation by avowing to improve enforcement of its prohibition against discriminatory advertising for housing, employment, or credit.[128] One year later, ProPublica again purchased dozens of rental housing advertisements on Facebook, selecting to exclude "certain categories of users, users such as African Americans, mothers of high school children, people interested in wheelchair ramps, Jews, expats from Argentina and Spanish speakers."[129] Each of

---

https://perma.cc/75C6-WGXK (explaining the options for advertising that Facebook offers to third-party advertisers).

122. *See id.*

123. *See id.*

124. *See id.*

125. *See* Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016), https://perma.cc/S5PK-T785.

126. *See id.* ("The ad we purchased was targeted to Facebook members who were house hunting and excluded anyone with an "affinity" for African-American, Asian-American or Hispanic people.").

127. *See id.* ("Facebook declined to answer questions about why our housing-categories ad excluding minority groups was approved 15 minutes after we placed the order.").

128. *See* Julia Angwin et al., *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA (Nov. 21, 2017), https://perma.cc/TX75-5KKC ("After ProPublica revealed last year that Facebook advertisers could target housing ads to whites only, the company announced it had built a system to spot and reject discriminatory ads.").

129. *Id.*

these groups are protected under the Fair Housing Act.[130] Every advertisement was again approved in minutes.[131]

The uncovering of Facebook's discriminatory advertising practices led to the filing of numerous lawsuits. *Mobley v. Facebook*,[132] a class action lawsuit against Facebook, alleged that the platform both "enable[d] and encourage[d] discrimination by excluding African Americans, Latinos, and Asian Americans—but not White Americans—from receiving advertisements for the Relevant Opportunities."[133] The lawsuit is based on the same discriminatory practices outlined in the ProPublica investigation.[134] The complaint states that Facebook did not have an option "to exclude the 'demographic' of White or Caucasian Americans from the target audience."[135] Additionally, there were no procedures in place to prevent third-party advertisers from excluding based on illegal characteristics.[136] Facebook filed a motion to dismiss, asserting that the plaintiffs' claims were barred by Section 230.[137] Facebook argued that it is an interactive computer service provider, that the plaintiffs' causes of action treated Facebook as a publisher or speaker, and that the ads and targeting decisions at issue were provided by other information content

130. 42 U.S.C.S. § 3604(c).

131. *See* Angwin et al., *supra* note 128 ("Every single ad was approved within minutes. The only ad that took longer than three minutes to be approved by Facebook sought to exclude potential renters 'interested in Islam, Sunni Islam and Shia Islam.' It was approved after 22 minutes.").

132. First Amended Complaint, Mobley v. Facebook, Inc., No. 16-cv-06440 (N.D. Cal. Feb. 13, 2017), 2017 WL 10560600.

133. *Id.* at 1 (defining "Relevant Opportunities" as "employment, housing, and credit opportunities").

134. *See* Angwin & Parris, Jr., *supra* note 125; Angwin et al., *supra* note 128.

135. Complaint Class Action, Jury Demand at 6, Mobley v. Facebook, Inc., No. 16-cv-06440, (N.D. Cal. Nov. 3, 2016), 2016 WL 6599689.

136. *See id.* at 7 ("There is no mechanism to prevent ad buyers from purchasing ads related to employment/housing and then excluding based on these illegal characteristics.").

137. *See* Defendant's Notice of Motion to Dismiss First Amended Complaint; Memorandum of Points & Authorities in Support Thereof at 4, Mobley v. Facebook, Inc., No. 16-cv-06440 (N.D. Cal. June 1, 2017), 2017 WL 10560576 [hereinafter Motion to Dismiss].

providers.[138] Facebook cited *Fair Housing Council of San Fernando Valley v. Roommates.com*[139] to support its assertion that it is immune from liability under Section 230 because it did not *require* advertisers to use the audience options.[140]

Then, in 2018, four nonprofit fair housing organizations sued Facebook under the Fair Housing Act, again alleging that Facebook created categories on its advertising platform that facilitated unlawful housing discrimination in housing advertisements.[141] The plaintiffs conducted their own investigation into Facebook's advertising tools by creating their own housing advertisements in multiple cities, excluding women, families with children, women, and users with interests based on disability and national origin.[142] Facebook again filed a motion to dismiss, claiming that it was immune from suit under Section 230 and that the plaintiffs failed to allege discriminatory conduct on the part of Facebook.[143]

Both motions to dismiss ultimately failed, and in March 2019, Facebook settled both *Mobley v. Facebook* and *National Fair Housing Alliance v. Facebook*.[144] The settlement agreement required Facebook to undertake far-reaching changes to prevent

---

138. *See id.* at 6 ("[N]umerous cases recognize that the publication of third-party ads falls squarely within the realm of traditional publisher functions protected by the CDA, even if the ads themselves are discriminatory or otherwise unlawful under federal or state law.").

139. 521 F.3d 1157 (9th Cir. 2008).

140. *See* Motion to Dismiss, *supra* note 137, at 13–14 ("The operation of Facebook's Ad Platform stands in stark contrast to the kind of website functionality for which courts have denied CDA immunity–and, in particular, to the situation at issue in *Roommates*.").

141. *See* Complaint at 1, Nat'l Fair Hous. All. v. Facebook, Inc., No. 18-cv-02689 (S.D.N.Y. Mar. 27, 2018) ("Facebook has created a pre-populated list of demographics, behaviors, and interests that makes it possible for housing advertisers to exclude certain home seekers from ever seeing their ads. Facebook's conduct is illegal under the FHA.").

142. *See id.* at 2 ("Over the past months, Plaintiffs, four nonprofit organizations with the common mission of eliminating housing discrimination and promoting residential integration, investigated Facebook's conduct. Plaintiffs created dozens of housing advertisements and completed Facebook's full ad submission and review process.").

143. *See* Memorandum of Law in Support of Motion to Transfer Venue, or Alternatively to Dismiss Plaintiffs' Complaint at 17–25, Nat'l Fair Hous. All. v. Facebook, Inc., No. 18-cv-02689-JGK (S.D.N.Y. June 4, 2018).

144. *See generally* Settlement Agreement and Release, Nat'l Fair Hous. All. v. Facebook, Inc., No. 18-cv-02689-JGK (S.D.N.Y. Mar. 28, 2019).

discrimination in housing, employment, and credit advertising.[145] Following the settlement, journalists at The Markup reported that Facebook still allowed discriminatory advertisements as of 2020.[146]

In June 2022, Facebook again became the subject of legal action in *United States v. Meta Platforms, Inc.*[147] The complaint alleged largely the same practices as the aforementioned lawsuits—that Facebook's advertising system discriminated against Facebook users based on their race, color, religion, sex, disability, familial status, and national origin, in violation of the Fair Housing Act.[148] The parties reached a settlement agreement requiring Facebook to stop using the "Special Ad Audience" tool for housing ads, develop a new system to address racial and other disparities caused by its use of discriminatory personalization algorithms in its ad delivery system for housing ads, and pay a civil penalty of $115,054, the maximum penalty available under the Fair Housing Act.[149]

With 72 percent of apartment-seekers and 90 percent of homebuyers using the internet to facilitate their searches, the threat of discriminatory algorithms furthering disparities in housing looms larger than ever.[150] Although companies are being subjected to punishment for the use of discriminatory algorithms, a more effective remedy is clearly necessary, as these companies continue to violate discrimination laws.

---

145. *See generally id.*

146. *See* Jeremy B. Merrill, *Does Facebook Still Sell Discriminatory Ads?*, MARKUP (Aug. 25, 2020), https://perma.cc/2JCC-34UF (detailing a Facebook employment advertisement purchased in May 2020 in which the agency that purchased the advertisement "asked Facebook to not show it to anyone over 54 years of age. And they asked Facebook to show it specifically to people who have 'African American multicultural affinity.' Facebook, apparently, complied.").

147. Complaint, United States v. Meta Platforms, Inc., No. 22-cv-05187 (S.D.N.Y. June 21, 2022).

148. *See id.* at 1–4 (detailing the allegations and the connection to previous related lawsuits).

149. *See* Settlement Agreement & Final Judgment at 4–9, United States v. Meta Platforms, Inc., No. 22-cv-05187 (S.D.N.Y. June 27, 2022).

150. SHANTI ABEDIN ET AL., NAT'L FAIR HOUS. ALL., MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY: 2018 FAIR HOUSING TRENDS REPORT 79 (2018), https://perma.cc/3SZM-TKDD.

B. *Employment*

Algorithms are also often used improperly in the employment sector, and unregulated algorithms will worsen the deep inequities that have plagued employment for decades.[151] Companies are rapidly and widely adopting the use of algorithms in hiring at all stages of the hiring process, from advertising to interviews, reshaping how organizations are assessing their workforce.[152] "Predictions based on past hiring decisions and evaluations can both reveal and reproduce patterns of inequity at all stages of the hiring process, even when tools explicitly ignore race, gender, age, and other protected attributes."[153] Currently, women's median weekly earnings are about 82.3% of those for men.[154] Black women's medial annual earnings are less than 70% of White men's earnings.[155] Black men are earning eighty-seven cents for every dollar earned by a White man.[156] In 2019, Black workers were

151. *See* Laura M. Moy, *A Taxonomy of Police Technology's Racial Inequity Problems*, 2021 U. ILL. L. REV 139, 185–88 (2019) (using online employment recruiting algorithms to illustrate mirroring racial inequities in police technology).

152. *See* Avi Asher-Schapiro, *AI Is Taking Over Job Hiring, But Can It Be Racist?*, REUTERS (June 7, 2021), https://perma.cc/B3NC-45Y2

> According to the most recent survey by human resource (HR) industry group Mercer, more than 55% of HR managers in the United States use predictive algorithms to help them make hiring choices. AI is being introduced at every stage of the hiring pipeline, from the job adverts that potential applicants see to the analysis and assessment of their applications and resumes.

153. Aaron Rieke & Miranda Bogen, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, UPTURN (Dec. 10, 2018), https://perma.cc/3AUJ-WQB6.

154. LOST JOBS, STALLED PROGRESS: THE IMPACT OF THE "SHE-CESSION" ON EQUAL PAY (2021), https://perma.cc/993N-79J4.

155. SHORTCHANGED AND UNDERPAID: BLACK WOMEN AND THE PAY GAP (2021), https://perma.cc/YPH8-764Q.

156. *See* Stephen Miller, *Black Workers Still Earn Less than Their White Counterparts*, SOC'Y HUM. RTS. MGMT. (June 11, 2020), https://perma.cc/YAV5-QT6Q (presenting data and findings from a 2019 study conducted by PayScale).

twice as likely to be employed as White workers.[157] The employment rate for people without disabilities is 79%, compared to 37% for people with disabilities.[158] These are just a few data points that illustrate the disparities in employment, attributable at some level to discriminatory hiring practices.[159] These disparities will undoubtedly be worsened by unregulated use of algorithms.

Employers utilize algorithms in advertisement platforms and job boards to reach the most qualified and relevant job seekers.[160] Broadly targeted job advertisements on Facebook, however, have been proven to have gender and racial biases.[161] Advertisements for supermarket cashier positions were shown to an audience of 85% women, while jobs with taxi companies were shown to an audience that was 75% Black.[162] Google's ad distribution engine was exposed for displaying ads that promised large salaries more frequently to men than to women.[163] Personalized job boards also use algorithms to find and replicate patterns in user behavior and recruiter preference. For example, if the algorithm finds that recruiters more often interact with White men, it may learn to find proxies for those

---

157. Jhacova Williams & Valerie Wilson, *Black Workers Endure Persistent Racial Disparities in Employment Outcomes*, ECON. POL'Y INST. (Aug. 27, 2019), https://perma.cc/JVM7-VH6P.

158. *See* CTR. DEMOCRACY & TECH., ALGORITHM-DRIVEN HIRING TOOLS: INNOVATIVE RECRUITMENT OR EXPEDITED DISABILITY DISCRIMINATION? (2020), https://perma.cc/Z8QQ-MV23 (PDF).

159. *See generally* Lincoln Quillian et al., *Meta-Analysis of Field Experiments Shows No Chance in Racial Discrimination in Hiring Over Time*, 114 PROC. NAT'L ACAD. SCI. U.S. 10870 (providing additional data and analysis on racial inequities in hiring).

160. *See* Miranda Bogen, *All the Ways Hiring Algorithms Can Introduce Bias*, HARV. BUS. REV. (May 6, 2019), https://perma.cc/45XW-TEHJ (discussing areas and methods of use of algorithms by employers).

161. *See id.* (reporting the results of a study that observed "significant skew in delivery along gender and racial lines" for employment advertisements).

162. *See id. See generally* Muhammad Ali et al., *Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Skewed Outcomes*, PROC. ACM HUM.-COMPT. INTERACTION, Nov. 2019, https://perma.cc/95BU-5H7J (PDF).

163. *See* Amit Datta et al., *Automated Experiments on Ad Privacy Settings: A Tale of Opacity, Choice, and Discrimination,* 2015 PROC. ON PRIV. ENHANCING TECHS. 92, 93 (2015) (explaining the results of an experiment exploring how user behaviors, Google's ads, and Ad Settings interact).

traits and replicate the pattern without instruction or oversight.[164]

In 2018, Amazon, one of the largest companies in the world, made headlines for creating a discriminatory recruiting algorithm.[165] Using data from resumes submitted in the last ten years, Amazon created an algorithm to screen resumes and recommend the top candidates for interviews.[166] In the past ten years, however, most resumes were submitted by men, so the algorithm taught itself that male candidates were preferable.[167] The system downgraded resumes that included words such as "women's" as well as resumes from all-women's colleges.[168] An audit of the algorithm showed that the system found two factors to be most indicative of job performance: if the applicant's name was Jared, and whether they played high school lacrosse.[169] After reporting of the recruiting algorithm biases was released, Amazon corrected the error, but "that was no guarantee that the machines would not devise other ways of sorting candidates that could prove discriminatory."[170] The project was ultimately

---

164. *See* Bergen, *supra* note 160 (explaining the implications of algorithms that are made to learn the preferences of recruiters for the purpose of recruiting job candidates).

165. *See* Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women*, REUTERS (Oct. 10, 2018), https://perma.cc/9PN9-AF93.

166. *See id.* ("The team had been building computer programs since 2014 to review job applicants' resumes with the aim of mechanizing the search for top talent . . . by observing patterns in resumes submitted to the company over a 10-year period."); Isobel Asher Hamilton, *Amazon Built an AI Tool to Hire People But Had to Shut It Down Because It Was Discriminating Against Women*, BUS. INSIDER (Oct. 10, 2018), https://perma.cc/655Z-WGYW ("The company created 500 computer models to trawl through past candidates' résumés and pick up on about 50,000 key terms. The system would crawl the web to recommend candidates.").

167. *See* Dastin, *supra* note 165 ("Amazon's computer models were trained to vet applicants by observing patterns in resumes submitted to the company over a 10-year period. Most came from men, a reflection of male dominance across the tech industry.").

168. *See id.* ("In effect, Amazon's system taught itself that male candidates were preferable. It penalized resumes that included the word "women's," as in "women's chess club captain." And it downgraded graduates of two all-women's colleges.").

169. *See* Dave Gershgorn, *Companies Are on the Hook if Their Algorithms Are Biased*, QUARTZ (Oct. 22, 2018), https://perma.cc/PXA5-NQ2L.

170. Dastin, *supra* note 165.

abandoned in 2017.[171] Although recruiting and sourcing advertisements algorithms may appear facially neutral, they nonetheless create significant and often discriminatory barriers by not informing specific audiences of job opportunities.[172] These recruiting and hiring algorithms rely on proxies, which are inexact and unfair, because they cannot incorporate information about how the individual would actually perform at the company because that is in the future and therefore unknown.[173]

In 2022, the Equal Employment Opportunity Commission filed suit against English-language tutoring company iTutorGroup, Inc., alleging violation of the Age Discrimination in Employment Act.[174] The complaint alleges that iTutorGroup programmed their application software to automatically reject certain applicants based on sex and age.[175] iTutorGroup is an online tutoring company that hires tutors from the United States and other countries to provide English-language tutoring to adults and children in China.[176] A bachelor's degree is the only stated qualification required to be hired as a tutor.[177] However, as alleged in the complaint, the company programmed its software to automatically reject female applicants over the age of fifty-five years old and male applicants over the age of sixty years old.[178] In one instance, a female applicant over the age of fifty-five submitted an online application using her real

171. *See id.* ("[Amazon] ultimately disbanded the team by the start of last year because executives lost hope for the project.").

172. *See* Bogen, *supra* note 160 (quoting legal scholar Pauline Kim as stating, "not informing people of a job opportunity is a highly effective barrier").

173. *See* O'Neil, *supra* note 75, at 108 (explaining that employment sector algorithms are created with past data and proxies then use that data to make predictions about the future).

174. *See* Complaint at 1, Equal Emp. Opportunity Comm'n v. iTutorGroup, Inc., No. 22-CV-2565 (E.D.N.Y. May 5, 2022).

175. *See id.* ("Defendants—providers of English-language tutoring services to students in China under the 'iTutorGroup' brand name—programmed their application software to automatically reject female applicants over the age of 55 and male applicants over the age of 60.").

176. *See id.* at 3.

177. *See id.* at 4.

178. *See id.* at 1.

date of birth and was rejected.[179] The same applicant reapplied using an identical application with a more recent date of birth and was offered an interview.[180] iTutorGroup rejected over two hundred qualified applicants from the United States because of their age.[181]

In August 2023, the parties reached a settlement requiring iTutorGroup to pay $365,000, which will be distributed to over 200 applicants whose applications had been rejected because of their sex and age.[182] iTutorGroup has ceased hiring tutors in the United States. However, the agreement also provides for substantial non-monetary relief to foreclose the possibility of further discrimination should iTutorGroup resume operating in the United States.[183] The relief includes submitting a proposed anti-discrimination policy to the EEOC and providing extensive anti-discrimination training to those involved in hiring tutors.[184] The company is prohibited from rejecting applicants on the basis of age.[185] iTutorGroup continues to deny any wrongdoing.[186]

In February 2023, a class action lawsuit was filed against Workday, Inc., alleging that its artificial intelligence systems and screening tools disproportionately disqualify African-Americans, individuals over the age of forty, and individuals with disabilities.[187] The complaint alleged that the

---

179. *See id.* at 1, 5–6 ("In early 2020, Defendants failed to hire Charging Party Wendy Pincus and more than 200 other qualified tutor applicants age 55 and older from the United States because of their age.").

180. *See id.* at 5–6 ("On or about March 29, 2020, Charging Party applied using her real birthdate and was immediately rejected because she was over the age of 55. On or about March 30, 2020, Charing Party applied using a more recent date of birth and otherwise identical application information and was offered an interview.").

181. *See id.* at 6 ("Charging Party and the more than 200 other older applicants rejected because of their age all had bachelor's degrees (or higher degrees).").

182. *See* Consent Decree at 15, Equal Emp. Opportunity Comm'n v. iTutorGroup, Inc., No. 22-cv-2565 (E.D.N.Y. Sept. 8, 2023).

183. *See id.* at 7.

184. *See id.* at 9–11.

185. *See id.* at 7.

186. *See id.* at 3; Annelise Gilbert, *EEOC Settles First-of-Its-Kind AI Bias in Hiring Lawsuit*, BLOOMBERG L. (Aug. 10, 2023), https://perma.cc/NCK9-NF4T.

187. *See* Complaint at 1–2, Mobley v. Workday, Inc., No. 23-cv-00770 (N.D. Cal. Feb. 21, 2023).

artificial intelligence systems and screening tools created and used by Workday were created by humans with conscious and unconscious built-in motivations to discriminate.[188] As a result, Workday offers a discriminatory algorithm-based applicant screening system that determines whether an employer should accept or reject an application for employment on the basis of an individual's race, age, or disability.[189] The tools marketed by Workday to its customers, namely employers, allows these customers to utilize Workday's products in a "discriminatory manner to recruit, hire, and onboard applicants and employees."[190] Workday provides this service for thousands of companies, including Fortune 500 firms.[191] The lead plaintiff, Derek Mobley, is an African American male over the age of forty years who suffers from anxiety and depression.[192] Since 2018, Mr. Mobley, who possesses a Bachelor's and an Associate's degree, has applied for at least eighty to one hundred positions that use Workday as a screening tool for hiring.[193] He has been denied employment each time.[194] The complaint alleges that Mr. Mobley and other similarly situated plaintiffs were unlawfully discriminated against as a result of Workday's algorithm and thus denied employment opportunities.[195]

The discriminatory use of algorithms can and does affect employment opportunities at every level–from searching for jobs, to screening and interviewing candidates. The lack of

188. *See id.* at 2 ("Defendant Workday, Inc.'s artificial intelligence systems and screening tools rely on algorithms and inputs created by humans who often have built-in motivations, conscious and unconscious, to discriminate.").

189. *See id.* at 10 ("Workday, Inc. provides screening tools that allow its customers to use discriminatory and subjective judgments in reviewing and evaluating employees for hire and allows the preselection of applicants outside of the protected categories.").

190. *Id.* at 4.

191. *See id.* at 10.

192. *Id.* at 2.

193. *Id.* at 10.

194. *See id.* ("Since 2018, Mr. Mobley has applied for at least 80-100 positions that upon information and belief use Workday, Inc. as a screening tool for talent acquisition and/or hiring. He has been denied employment each and every time.").

195. *See id.* at 4 ("These policies and procedures have been continuously utilized by the Defendant since at least 2018, and their implementation and use has personally harmed the Plaintiff, and the putative class members he seeks to represent.").

regulation has allowed companies to employ algorithms, both knowingly and unknowingly, to unfairly and likely unlawfully deny applicants of key life opportunities.

C. *Voting*

In 2016, the Russian Internet Research Agency purchased over $20,000 in Facebook advertisements.[196] The Kremlin-backed enterprise was founded by Yevgeny Prigozhin, a Russian mercenary leader and oligarch, as well as a close confidant of Vladimir Putin.[197] The digital ads were aimed at Black voters, targeting users interested in "Martin Luther King, Jr; African-American Civil Rights Movement (1954-68); African American history of Malcom X," with the intention of suppressing these voters.[198] The ads spread maliciously false information and encouraged boycotting of the election, with one ad stating, "We don't have any choice this time but boycott the election. This time we choose between two racists. No one represents Black people. Don't go vote."[199] All major platforms, such as Twitter and YouTube, were used by the Russian Internet Research Agency in their suppression efforts.[200] As one study stated, "The scale of their operation was unprecedented—they reached 126 million people on Facebook, at least 20 million users on Instagram, 1.4 million users on Twitter, and uploaded over 1,000 YouTube videos."[201] The Black voter turnout rate declined sharply in 2016, falling from 66.6% in 2012 to 59.6% in 2016.[202] Social media companies like Facebook have

196. *See* PHILIP N. HOWARD ET AL., THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012-2018 23 (2019), https://perma.cc/RTE7-2Y3N.

197. *See* Krishnadev Calamur, *What Is the Internet Research Agency?*, ATLANTIC (Feb. 16, 2018), https://perma.cc/5438-XVPW.

198. *See* YOUNG MIE KIM, BEWARE: DISGUISED AS YOUR COMMUNITY, SUSPICIOUS GROUPS MAY TARGET YOU RIGHT NOW FOR ELECTION INTERFERENCE LATER 9 (2018) (providing photos and descriptions of actual advertisements used by the Russian Internet Research Agency).

199. *Id.*

200. *See generally* RENEE DIRESTA ET AL., THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY (2019), https://perma.cc/T5TA-UXJA.

201. *Id.* at 6.

202. *See* Jens Manuel Krogstad & Mark Hugo Lopez, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots*, PEW RSCH. CTR. (May 12, 2017), https://perma.cc/ML8B-SZPP ("The black voter turnout

unprecedented levels of influence. With roughly one-third of adults in the United States regularly getting news from Facebook, the question becomes: can Facebook manipulate the political system by tweaking its algorithm and determining the news presented on users' newsfeeds?[203]

The use of discriminatory algorithms to suppress voters has continued past the 2016 Election. The Southern District of New York recently considered a lawsuit involving the use of robocalls to threaten and intimidate Black voters.[204] During the summer of 2020, defendants Jacob Wohl and Jack Burkman enlisted the assistance of a telecommunication broadcasting platform, Message, to send robocalls containing false information and threats to thousands of voters in New York, Ohio, Michigan, Pennsylvania, and Illinois.[205] The robocall messages were intended to prevent recipients from voting by mail by using racist stereotypes based on systemic inequities and false information to discourage Black voters, for example, by stating that mail-in voting would result in an individual's personal information being used by law enforcement to track down old warrants, by credit card companies to collect outstanding debt, and by the Center for Disease Control for mandatory vaccination.[206]

---

rate declined for the first time in 20 years in a presidential election, falling to 59.6% in 2016 after reaching a record-high 66.6% in 2012. The 7-percentage-point decline from the previous presidential election is the largest on record for blacks.").

203. *See Social Media and News Fact Sheet*, PEW RSCH. CTR. (Sept. 2022), https://perma.cc/JQE6-HRQK ("When it comes to where Americans regularly get news on social media, Facebook outpaces all other social media sites. Roughly a third of U.S. adults (31%) say they regularly get news from Facebook.").

204. *See generally* Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457 (S.D.N.Y. 2020).

205. *See id.* at 465.

206. *See id.*

> Hi, this is Tamika Taylor from Project 1599, the civil rights organization founded by Jack Burkman and Jacob Wohl. Mail-in voting sounds great, but did you know that if you vote by mail, your personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts? The CDC is even pushing to use records for mail-in voting to track people for

Message maintains a database of phone numbers that can be targeted for purposes of a robocall campaign.[207] Message is alleged to have actively conspired with Burkman and Wohl and "provided active assistance in identifying target zip codes to maximize the threatening effect of the robocalls."[208] The targeting of Black zip codes was not a mistake–defendant Jacob Wohl has been quoted in multiple interviews, stating his intent to interfere with the 2020 election.[209] The defendants were successful in their quest to intimidate Black voters, with receivers of the robocalls reporting that they felt traumatized, anxious, frightened, upset, and distressed by the message.[210] One plaintiff, Gene Steinberg, as a result of the robocall,

---

> mandatory vaccines. Don't be finessed into giving your private information to the man, stay safe and beware of vote by mail.

207. *See* Nat'l Coal. on Black Civic Participation v. Wohl, 20 Civ. 8668, 2021 WL 4254082, at *3 (S.D.N.Y. Sept. 17, 2021) ("It is further alleged that Message maintains a database of phone numbers that can be targeted for purposes of a robocall campaign and that it was aware of, and directed the robocall message to, specific communities that Wohl and Burkman had selected.").

208. *Id.; see also* Nat'l Coal. on Black Civic Participation v. Wohl, 20 Civ. 8668, 2023 WL 2403012, at *23 (S.D.N.Y. Mar. 8, 2023) ("Defendants deliberated and reflected on their choice of cities and states to which they would disseminate the Robocall, settling on 'black neighborhoods' and ultimately disseminating the call to cities with significant Black populations . . . .").

209. *See* Manuel Roig-Franzia & Beth Reinhard, *Meet the GOP Operatives Who Aim to Smear the 2020 Democrats—But Keep Bungling It*, WASH. POST (June 4, 2019), https://perma.cc/C794-M69A (laying out Wohl's plan to "disseminate false information about Democratic presidential candidates to swing political betting markets"); Christal Hayes & Gus Garcia-Roberts, *This Is How Jacob Wohl Created a Sexual Harassment Accusation Against Robert Mueller*, USA TODAY (Feb. 26, 2019), https://perma.cc/QS2D-Z6H5

> Jacob Wohl, a 21-year-old self-professed "political and corporate intel consultant" and supporter of President Donald Trump, told USA TODAY in an interview that he's already plotting ways to discredit Democrats in the 2020 election with lies and other disinformation, using his large following on social media to cause disarray similar to what Russians did during the 2016 election.

210. *See Nat'l Coal. on Black Civil Participation*, 498 F. Supp. 3d at 467–68 (describing the emotional impact of the robocalls on individual plaintiffs); *Nat'l Coal. on Black Civic Participation*, 2023 WL 2403012, at *17 n.19 (same).

requested that his name be removed from the voter roll out of fear and voted in person despite initial plans to vote by mail.[211]

Message, the telecommunication platform defendant, filed a motion to dismiss, presenting an additional argument that they are an interactive computer service protected by Section 230 immunity.[212] Noting that the issue of whether Section 230 precludes liability for violations of civil rights statutes against a telecommunications platforms was an issue of first impression, the court stated that it was unpersuaded that Section 230 precludes the defendants' potential liability.[213] Message, the telecommunication platform defendant, was much more than a "neutral intermediary"[214] because it "contribute[d] materially to the alleged illegality of the conduct"[215] by actively targeting Black neighborhoods to maximize the threatening effect of the message being disseminated.[216] "Message did not impartially provide a neutral tool that was then misused by third parties—Message itself engaged in misuse that materially contributed to the illegality of the complained of conduct."[217] The court denied the defendants motion.[218] Message was ultimately

---

211. *See* Nat'l Coal. on Black Civic Participation, 20 Civ. 8668, 2023 WL 2403012, at *21 (S.D.N.Y. Mar. 8, 2023).

212. *See Nat'l Coal. on Black Civic Participation*, 2021 WL 4254802, at *4 ("The Message Defendants further assert that any liability based on the contents of Defendants' robocall message is barred by Section 230 of the Communications Decency Act.").

213. *See id.* at *6

> Whether Section 230 immunity precludes liability for violations of civil-rights statutes against a telecommunications broadcast platform like Message that disseminates robocalls containing prerecorded messages uploaded to a website appears to be an issue of first impression. But the Court is not persuaded that in the circumstances alleged in this case, dismissal of the NY AG's claims is appropriate.

214. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 174 (2d Cir. 2016) ("A defendant, however, will not be held responsible unless it assisted in the development of what made the content unlawful.").

215. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008).

216. *Nat'l Coal. on Black Civic Participation*, 2021 WL 14254802, at *7.

217. *Id.* at *10.

218. *See id.* ("In sum, the Message Defendants' entitlement to Section 230 immunity is not apparent from the face of the Complaint in Intervention.").

dismissed from the action following mediation with the plaintiffs.[219]

The use of discriminatory algorithms not only violates the basic tenets of democracy, but also perpetuates and exacerbates existing patterns of inequality in society. These systems have already begun to threaten the integrity of elections and make material contributions to prejudiced voter suppression.

III. LEGISLATION

As the development and implementation of artificial intelligence continues to spread rapidly, calls for increased and improved oversight have also grown. Among the common concerns in the governance of artificial intelligence are transparency, accountability, and bias.[220] Actors at both the federal and state level have introduced different attempts at regulation and oversight.

A. *White House AI Bill of Rights*

In October 2022, under the Biden-Harris Administration, the Office of Science and Technology Policy released an AI Bill of Rights, intended to serve as a blueprint for protecting civil rights when designing, developing, and deploying artificial intelligence.[221] The blueprint creates a framework for protecting

219. *See Nat'l Coal. on Black Civic Participation*, 2023 WL 2403012, at *6.

220. *See* HANS-W. MICKLITZ ET AL., CONSTITUTIONAL CHALLENGES IN THE ALGORITHMIC SOCIETY 166–67 (2021)

> A key issue concerning the use of machine learning in the public sector also concerns the fact that some of the most effective technologies for learning . . . tend to be opaque—that is, it is very difficult to explain, according to human-understandable reasons . . . . So not only can such machines fail to provide adequate justifications to the individuals involved, but their opacity may also be an obstacle to the identification of their failures and the implementation of improvements.

221. *See* WHITE HOUSE OFF. SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE 2 (2022), https://perma.cc/UY9G-A8WD (PDF) ("This framework was released one year after OSTP announced the launch of a process to develop 'a bill of rights for an AI-powered world.' Its release follows a year of public engagement to inform this initiative.").

Americans through five core principles: protection from unsafe or ineffective systems; systems should be designed and used in an equitable way to prevent discrimination; protection from abusive data practices via built-in protections and agency over the use of data; notice that an automated system is being used; and the ability to opt out and access human alternatives.[222] The framework uses a two-part test to determine what systems are within its scope, applying "to (1) automated systems that (2) have the potential to meaningfully impact the American public's rights, opportunities, or access to critical resources or services."[223] The AI Bill of Rights identifies and establishes important goals for increasing accountability and equity in automated systems. Nonetheless the nonbinding white paper received criticism for failing to sufficiently meet existing gaps in the regulation of artificial intelligence.[224]

B. *Congressional Legislation*

In recent years, various attempts at regulating artificial intelligence, largely through reforming Section 230, have been introduced by Congress, indicating concrete interest in the issue at hand. Republicans argue that it discriminates against and enables censorship of conservative viewpoints, while Democrats believe it does not mandate sufficient moderation for hate and

---

222. *See id.* at 5–7.

223. *Id.* at 8.

224. *See, e.g.*, Lance Eliot, *US Releases an AI Bill of Rights That, Though Encouraging, Won't Yet Move the Needle*, JURIST (Oct. 5, 2022), https://perma.cc/AG93-PU7W (providing a non-exhaustive list of insufficiencies of the AI Bill of Rights); Emmie Hine & Luciano Floridi, *The Blueprint for an AI Bill of Rights: In Search of Enaction, at Risk of Inaction*, 33 MINDS & MACHS. 285, 286 (2023) ("This is a step in the right direction, that is towards regulating the uses of AI, not AI itself. However, it is insufficiently bold in its approach to implementation."); Donna Etemadi, *AI Bill of Rights Must Protect Against Government Overreach*, LAW360 (Oct. 27, 2022), https://perma.cc/2TNB-WEPQ (explaining the shortcomings of the Blueprint as a whole and of each principle); Khari Johnson, *Biden's AI Bill of Rights Is Toothless Against Big Tech*, WIRED (Oct. 4, 2022), https://perma.cc/H2PL-RRSN ("The document released today resembles the flood of AI ethics principles released by companies, nonprofits, democratic governments, and even the Catholic church in recent years. Their tenets are usually directionally right, using words like *transparency*, *explainability*, and *trustworthy*, but they lack teeth and are too vague to make a difference in people's everyday lives.").

misinformation.[225] Both parties have put forth efforts to amend Section 230.

In 2021, Representative Jim Banks, joined by group of fourteen republican cosponsors, introduced the Stop Shielding Culpable Platforms Act,[226] which would repeal Section 230(c)(1) immunity for providers or users of an interactive computer service that knowingly share illegal materials and instead find interactive computer services to be distributors of their users' content.[227] The bill, aimed primarily at child pornography, is a modest attempt at curbing the presence of illicit materials on the Internet, and is thus insufficient for the purpose of stopping algorithmic discrimination.[228]

The Justice Against Malicious Algorithms Act of 2021,[229] sponsored by House Democrats, sought to eliminate immunity under Section 230 when a provider of an interactive computer service provider knowingly or recklessly uses an algorithm to recommend content that materially contributes to physical or severe emotional injury.[230] The bill does not apply to search features or algorithms that do not rely on personalization or to online platforms with less than five million unique monthly visitors.[231] It was an attempt to create reform while working around political division on the issue of content moderation by

---

225. *See* Chris Ip, *The Senate's Section 230 Hearing Was Partisan and Predictable*, ENGADGET (Oct. 28, 2020), https://perma.cc/Y5XC-CTQ ("Both political parties feel that the law should be reformed. Neither can agree on how. Republicans have argued that social media platforms are moderating speech too much (such as President Donald Trump's tweets) while Democrats have said platforms aren't moderating enough (such as conspiracy theories and disinformation).").

226. H.R. 2000, 117th Cong. (2021).

227. *See id.*

228. *See id.*

> It has recently been reported by the New York Times that Pornhub executives believe that section 230 protects them from liability for their platform allegedly hosting videos of rape, child abuse, and other criminal activity. As reported in the New York Post, a recent lawsuit has alleged that Twitter left up a child pornography video despite being notified by the victim, and only took it down after Federal officials intervened.

229. H.R. 5596, 117th Cong. (2021).

230. *See id.*

231. *See id.*

focusing on how platforms recommend content to users, and how those choices can lead to real-world harm.[232] The bill received criticism over some of its vaguer concepts and definitions, such as reckless algorithm use,[233] emotional injury[234], and personalized algorithm[235], and stoked fears of overly broad interpretations.[236]

In 2021, a bipartisan effort to require transparency, accountability, and protections for consumers online emerged from the Senate in the form of the Platform Accountability and Consumer Transparency Act.[237] Under this bill, tech companies would be subject to a series of requirements in order to receive immunity under Section 230.[238] Companies must publish a policy explaining what content it allows, how it moderates that content, and how users can report policy-violating or illegal content.[239] Additionally, companies would be required to establish a process for removing content that violates their

---

232. *See* Cristiano Lima, *Top Democrats Unveil Bill to Rein in Tech Companies' 'Malicious Algorithms'*, WASH. POST (Oct. 14, 2021), https://perma.cc/DRP8-4WZB ("Democrats and Republicans have sparred for years over whether companies like Facebook over- or under-enforce many of their policies. Democrats say major platforms haven't done enough to crack down on misinformation, hate speech and other online harms, while Republicans accuse the platforms of stifling conservative viewpoints.").

233. *See* Justice Against Malicious Algorithms Act, H.R. 5596, 117th Cong. (2021) ("Subsection (c)(1) does not apply to a provider of an interactive computer service with respect to information provided through such service by another information content provider if—such provider of such service—recklessly made a personalized recommendation of information").

234. *See id.* (removing Section 230(c)(1) protections from providers of interactive computer services if "such recommendation materially contributed to a physical or severe emotional injury to any person").

235. *See id.* ("The term 'personalized algorithm' means an algorithm that relies on information specific to the individual.").

236. *See* Joe Mullin, *Lawmakers Choose the Wrong Path, Again, with New Anti-Algorithm Bill*, ELEC. FRONTIER FOUND. (Nov. 11, 2021), https://perma.cc/VX5D-DUS6 (identifying perceived issues with the Justice Against Malicious Algorithms Act, which the author refers to as "yet another misguided attack on internet *users* in the name of attacking Big Tech"); Jon Fingas, *House Bill Would Limit Section 230 Protections for 'Malicious' Algorithms*, ENGADGET (Oct. 14, 2021), https://perma.cc/KB72-LAG3 ("The bill's vaguer concepts, such as 'reckless' algorithm use and emotional damage, might raise fears over over-broad interpretations.").

237. S. 797, 117th Cong. (2021).

238. *See id.*

239. *See id.*

policies and notifying the information content provider about the removal, including an appeal mechanism.[240] Under the bill's biannual transparency report requirement, providers of interactive computer services must publish a transparency report every six months that provides details on instances in which the provider took action with respect to content, including removing content, deprioritizing content, and suspending content provider accounts.[241] The bill strips certain liability protections under Section 230 if companies have actual knowledge of illegal content on its service and do not remove the illegal content within specified time frames.[242] The bill also provides for enforcement of its requirements by the Federal Trade Commission.[243]

The Platform Accountability and Consumer Transparency Act received a wide swath of praise and criticism. Critics argued that under the system proposed in the bill, companies will devote most or all of their resources towards the content that they are required to report and fail to address abuses that are not mandated.[244] Other critics contended that oversight should not be delegated to the Federal Trade Commission, as it would add increased authority to an already overburdened agency.[245] Instead, a new dedicated agency should be tasked with the proposed regime in the Platform Accountability and Consumer Transparency Act.[246]

---

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.*

244. *See* Carly Miler, *Can Congress Mandate Meaningful Transparency for Tech Platforms?*, BROOKINGS (June 1, 2021), https://perma.cc/TYM2-66VZ ("[O]ne potential consequence is that platforms will devote most or all of their resources toward addressing the types of abuse they have to report and neglect those that aren't mandated, either because they don't want to look or because they don't have any resources left to do so.").

245. *See* Tom Wheeler, *Facebook Says It Supports Internet Regulation. Here's an Ambitious Proposal That Might Actually Make a Difference*, TIME (Apr. 5, 2021), https://perma.cc/AR79-Y4SQ ("The FTC, its commissioners and staff are dedicated public servants, but the agency is already overburdened with an immense jurisdiction.").

246. *See id.* ("Oversight of digital platforms should not be a bolt-on to an existing agency but requires full-time specialized focus.").

The bill received support for its efforts on transparency.[247] The proposed regime would result in a better understanding of how algorithms work, what happens on these platforms, and public accountability.[248] Brian Boland, former vice president of strategic operations and analytics at Facebook, described the bill as "one of the most important pieces of legislation that is before" the Senate Homeland Security & Governmental Affairs Committee.[249] Even critics applauded the constructiveness of the bill's transparency reporting requirements as a means to bring standardization and specificity to platform enforcement reports.[250]

The Algorithmic Accountability Act[251] was reintroduced by Democratic members of Congress in 2022.[252] The bill was originally introduced in 2019, and the reintroduction follows efforts to improve upon the original version after consultation with experts, advocacy groups, and other important stakeholders.[253] The bill would require companies to assess the impacts of automated systems that they use and sell through bias impact assessments, and create new transparency about when and how automated systems are used, with the goal of empowering consumers to make informed choices about the automation of critical decision.[254] The bias impact assessments would be performed in a variety of sectors, including employment, financial services, healthcare, housing, and legal

247. *See* Hirsh Chitkara, *To Fix Social Media, Senators Turn to a Research Transparency Bill*, PROTOCOL (Sept. 14, 2022), https://perma.cc/3XPB-8TVW ("PATA by itself wouldn't require them to change their algorithms—it would just give the public greater visibility into them.").

248. *See id.*

249. *Id.*

250. *See* Will Duffield, *PACT Act Does More Harm than Good*, CATO INST. (July 27, 2020), https://perma.cc/M2GR-KTVG ("Some of the bill's components are constructive. Its transparency reporting requirements would bring standardization and specificity to platform enforcement reports, particularly around the use of moderation tools like demonetization and algorithmic deprioritization.").

251. H.R. 6580, 117th Cong. (2022).

252. *See id.*

253. *See Wyden, Booker and Clarke Introduce Algorithmic Accountability Act of 2022 to Require New Transparency and Accountability for Automated Decision Systems*, RON WYDEN U.S. SENATOR FOR OR. (Feb. 3, 2022), https://perma.cc/E65J-UAFQ.

254. *See* H.R. 6580.

services, and then submitted to the Federal Trade Commission.[255] The Algorithmic Accountability Act's requirements would only apply to entities within the jurisdiction of the Federal Trade Commission.[256] A fifty person Bureau of Technology within the Federal Trade Commission would be established under the bill to assist in the mission.[257]

The Algorithmic Accountability Act proposed meaningful progress toward regulating algorithms to ensure fairness.[258] The bill, however, lacks important transparency requirements, such as requiring companies to disclose the formula of their algorithms and explanations of the operation of machine learning algorithms.[259] A clearer statement that algorithmic bias is illegal is crucial, but nonetheless lacking in the text of the bill.[260] Criticism of the bill was aimed largely its potential to reduce innovation and competition and increase compliance costs, among other gaps.[261] Additionally, scholars called for

---

255. *See id.*

256. *See id.*; 15 U.S.C. § 45(a)(2).

257. *See* H.R. 6580.

258. *See* Margot E. Kaminski & Andrew D. Selbst, Opinion, *The Legislation That Targets the Racist Impacts of Tech*, N.Y. TIMES (May 7, 2019), https://perma.cc/L48J-RVHG ("The proposed bill would be a significant step forward toward ensuring that algorithms are fair and nondiscriminatory.").

259. *See id.* ("[T]he proposal needs to mandate at least some public transparency for the results of impact assessments. If the results of assessments aren't public, we can't learn anything from them.").

260. *See id.* ("Significantly, the bill does not clearly prohibit algorithmic bias or unfairness. It relies instead on the F.T.C. to do so, or on penalties set by existing consumer protection and discrimination law, which may not cover all forms of algorithmic bias.").

261. *See* Maneesha Mithal et al., *The Algorithmic Accountability Act: Potential Coverage Gaps in the Healthcare Sector*, ABA: ANTITRUST MAG. ONLINE, Aug. 2022, at 5, https://perma.cc/R8AL-V2PV (PDF) ("[A]ssuming it meets the revenue thresholds, a private, for-profit hospital would have to incur costs to comply with the AAA, thereby placing non-profit and government-owned hospitals at a competitive advantage in implementing automated decision-making techniques."); Joshua New, *How to Fix the Algorithmic Accountability Act,* CTR. FOR DATA INNOVATION (Sept. 23, 2019), https://perma.cc/9YNC-2V9X ("[I]t would be better to require these impact assessments to be publicly available . . . . This would make consumers more aware of any potential risks of engaging with a particular algorithmic system and create competitive pressure for companies to reduce this risk."); Jakob Mökander et al., *The US Algorithmic Accountability Act of 2022 vs. The EU Artificial Intelligence Act: What Can They Learn From Each Other?*, 32 MINDS

including a mandate for external input in the impact assessments and a mandate for public transparency for the results of the assessments.[262]

C. *State Legislation*

Several states have enacted legislation aimed at regulating artificial intelligence, and many other states have such legislation pending.[263] The District of Columbia has introduced landmark legislation, the Stop Discrimination by Algorithms Act of 2023,[264] to protect the civil rights of District residents from discriminatory algorithms by holding businesses accountable for preventing biases in their algorithms.[265] Following the bill's reintroduction in February 2023, Councilmember Robert White announced his commitment to advancing the bill in the first quarter of 2023.[266] The bill is intended to strengthen civil rights protections for residents of the District of Columbia by prohibiting companies and institutions that use algorithmic-decision making from using the technology in a discriminatory manner.[267]

Broadly speaking, the bill would combat the discriminatory use of algorithms by requiring covered entities to stop the discriminatory use of traits such as race, sex, and disability in automated decisions about employment, housing, education, and public accommodations; audit algorithms for discriminatory

---

& MACHS. 751, 754 (2022) ("The cost of complying with new regulations tends to impact SMEs disproportionately.").

262. *See* Kaminski & Selbst, *supra* note 258.

263. *See, e.g.*, California Consumer Privacy Act, CAL. CIV. CODE §§ 1798.100–1798.199.100 (West 2018); Virginia Consumer Data Protection Act, VA. CODE ANN. §§ 59.1-575–59.1-585 (2021); Connecticut Data Privacy Act, S.B. 6, (2022).

264. B25-0114 (Feb. 2, 2023).

265. *See id.*

266. *See Statement: Councilmember Robert White Shares Path Forward for Stop Discrimination by Algorithms Act*, OFF. COUNCILMEMBER AT-LARGE ROBERT WHITE (Nov. 17, 2022), https://perma.cc/8DET-7R46 ("I am committed to advancing the bill in the first quarter of 2023. I plan to work closely with Attorney General Karl Racine, businesses operating in the District, and civil rights advocates to ensure that this first-in-the-nation civil rights bill is strong and intentional.").

267. *See* Stop Discrimination by Algorithms Act of 2023, B25-0114 (Feb. 2, 2023).

patterns and report the results and any corrective actions to the Office of the Attorney General for the District of Columbia; and disclose and explain when algorithms negatively affect a consumer's opportunities.[268] The proposed legislation would apply to both for-profit and non-profit entities that employ algorithms, both knowingly and unknowingly, and meet one of four criteria.[269] First, entities that possess or control personal information on more than twenty-five thousand residents of the District of Columbia would be subject to the requirements of the bill.[270] Entities that have greater than $15 million in average annualized gross receipts for the three years preceding the most recent fiscal year and entities that are data brokers that obtain 50 percent or more of their annual revenue by collecting, assembling, selling, distributing, providing access to, or maintaining personal information, some portion of which concerns a resident of the District of Columbia who is not a customer or employee of that entity would be required to comply with the proposed legislation.[271] Lastly, entities that are service providers, meaning those that perform algorithmic eligibility determinations or algorithmic availability determinations on behalf of another entity, would be covered under the bill.[272] Covered entities would be expected to comply with the legislation as soon as it is passed.[273]

The Stop Discrimination by Algorithms Act proposes a multi-pronged approach to regulating the use of algorithms to protect against bias and discrimination.[274] First, covered entities would be required to provide notice to individuals about how the entity uses personal information in algorithmic decisions, including additional information when the algorithmic decisions results in adverse action, in a clear, concise, and easily accessible manner.[275] If an algorithm makes an unfavorable decision, companies would be required to provide

268. *See id.*
269. *See id.*
270. *See id.*
271. *See id.*
272. *See id.*
273. *See id.*
274. *See id.*
275. *See id.*

an in-depth explanation to the affected individual and allow consumers to submit for corrections.[276] Second, Covered entities would be mandated to conduct annual audits to ensure the algorithms do not result in unlawful discrimination and to analyze disparate impacts.[277] The results of annual audits would be submitted to the Office of the Attorney General along with information detailing how the entity's algorithms are built, how they make decisions, and all decisions made using the algorithm.[278] Lastly, the proposed legislation provides for enforcement by the Attorney General for the District of Columbia and a civil penalty of up to $10,000 per violation. It also creates a private right of action, authorizing a court to award no less than $100 and no more than $10,000 per violation or actual damages, whichever is greater.[279]

The Stop Discrimination by Algorithms Act of 2023 provides a timely and innovative proposal to regulating the use of discriminatory algorithms, setting a precedent that regulators and policymakers have already begun to mirror.[280]

IV. PROPOSED SOLUTIONS

Meaningfully and effectively regulating discriminatory algorithms, scholars argue, means improving platform transparency, including requiring that companies be specific about the type of information that is disclosed.[281] "[P]latforms

---

276. *See id.*

277. *See id.*

278. *See id.*

279. *See id.*

280. *See AG Racine Supports White House AI Bill of Rights that Includes Core Aspects of His Office's Landmark Bill to Modernize Civil Rights & Stop Algorithmic Discrimination*, OFF. ATT'Y GEN. FOR D.C. (Oct. 4, 2022), https://perma.cc/TR4Q-G2QY (providing a statement of support from Attorney General Karl A. Racine "on the White House's new Blueprint for an AI Bill of Rights that incorporates much of his legislation that would modernize civil rights laws by prohibiting discrimination through the use of automated decision-making tools, known as algorithms, that impact residents' everyday lives").

281. *See* Nicolas P. Suzor et al., *What Do We Mean When We Talk About Transparency? Toward Meaningful Transparency in Commercial Content Moderation*, 13 INT'L J. COMMC'N 1526, 1527 (2019) ("In this article, we directly address the conceptual problem of vagueness in class for transparency in the moderation of social media content. We argue that there is a pressing need for

cannot just increase the amount of information made public but also need to communicate that information to stakeholders in a way that empowers them to hold platforms" accountable for discrimination.[282] Below are two primary solutions: (1) amend Section 230 to clarify and limit the scope of the statute's immunity; and (2) develop and enact uniform state legislation that provides a regulatory framework to combat the inequitable use of discriminatory algorithms while balancing federal preemption against the recognized need of States to be able to regulate algorithm abuse.

A. *Amending Section 230*

Amending Section 230 is a task for Congress. In the absence of action by Congress, courts have been left to puzzle over how to apply a statute enacted in 1996 to algorithms, the sophistication of which were not even imaginable at the time Section 230 was written, while bound by precedent that relies on overly broad interpretations.[283] Continuing to allow the scope of Section 230 to be determined through the courts is unproductive and inefficient, as the pace of development and usage of algorithms will continue to easily outpace the ability of the judicial system to render decisions. As the Supreme Court and other courts have acknowledged, there are better suited governing bodies with the requisite knowledge to properly

more specificity in identifying what information should be provided and to whom."); Heike Felzman et al., *Transparency You Can Trust: Transparency Requirements for Artificial Intelligence Between Legal Norms and Contextual Concerns*, BIG DATA & SOC'Y, Jan.–June 2019, at 5 ("Stakeholder groups differ in their ability to make use of information provided, and different types of information pose different barriers to understanding.").

282. Carly Miller, *Can Congress Mandate Meaningful Transparency for Tech Platforms?*, BROOKINGS (June 1, 2021), https://perma.cc/U46V-BGV3.

283. *See* Force v. Facebook, 934 F.3d 53, 84 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) ("[T]oday's decision also illustrates the extensive immunity that the current formulation of the CDA already extends to social media companies for activities that were undreamt of in 1996. It therefore may be time for Congress to reconsider the scope of § 230."); Gonzalez v. Google, 2 F.4th 871, 920 (9th Cir. 2021) (Gould, J., concurring in part and dissenting in part) ("I do not believe that Section 230 was ever intended to immunize such claims for the reasons stated in Chief Judge Katzmann's cogent and well-reasoned opinion concurring in part and dissenting in part in *Force v. Facebook*.").

amend Section 230.[284] In its current form, Section 230 immunizes too broadly by enabling an internet service provider to escape liability for not adequately policing the consequences of how the forum it created actually operates. Various efforts proposed by Congress in recent years demonstrate awareness and interest in the issue on both sides of the aisle.[285] Congress should clarify the original intent of Section 230 and clearly establish that Section 230 cannot be invoked as a defense against federal and state civil rights claims stemming from discriminatory algorithms. In clarifying the intentions of Section 230, Congress should define previously undefined terms, most importantly "publisher" and "speaker." Defining these central terms presents an opportunity to establish the proper scope of Section 230 so that it does not continue to provide such sweeping immunity to discriminatory algorithms.

Additionally, Congress should amend Section 230 to include subsection(c)(3), which should state, "Nothing in this statute is intended to limit, impede, or interfere with any state or federal law providing equal opportunity for housing, employment, and voting rights, or any other equal opportunity." This subsection would serve to protect civil rights from violation by discriminatory algorithms while preserving immunity afforded under Section 230 for law-abiding platforms, thus abating concerns that further advancement of the Internet would be obstructed by amending the scope of Section 230 as prohibiting

---

284. *See* Adi Robertson, *The Supreme Court is Deciding the Future of the Internet, and It Acted Like It*, VERGE (Feb. 21, 2023), https://perma.cc/ZGW8-689V (quoting Supreme Court Justice Elena Kagan as stating "We're a court. We really don't know about these things. These are not the nine greatest experts on the internet."); *Force*, 934 F.3d at 77 (Katzmann, C.J., concurring in part and dissenting in part) ("Whether, and to what extent, Congress should allow liability for tech companies that encourage terrorism, propaganda, and extremism is a question for legislators, not judges."); *Gonzalez*, 2 F.4th at 919 (Gould, J., concurring in part and dissenting in part)

> I further urge that regulation of social media companies would best be handled by the political branches of our government, the Congress and the Executive Branch, but that in the case of sustained inaction by them, the federal courts are able to provide a forum responding to injustices that need to be addressed by our justice system.

285. *See supra* Part III.B.

the misuse and abuse of algorithms in ways that are likely unlawful under civil rights laws has no effect on hampering lawful activity contributing to the growth of the Internet.

B. *Uniform State Legislation*

In lieu of action by Congress to amend Section 230, States can and should take action against discriminatory algorithms. In the design of a legislative framework to regulate algorithms and prevent discriminatory use of these systems, there are many options—the most effective being one modeled largely after the District of Columbia's Stop Discrimination by Algorithms Act. The uniform state legislation should prohibit the discriminatory use of traits such as race, sex, and disability in automated decisions about key areas of life opportunities, including housing, employment, voting, education, lending, and public accommodations. Some contend that enacting legislation to augment the regulation of discriminatory algorithms would impede the progression of the internet.[286] However, this assertion lacks merit, as permitting algorithms to engage in unlawful discrimination does not serve to promote the advancement of the internet.

There are multiple options for determining which entities would be covered under the uniform state legislation. For example, the Justice against Malicious Algorithms Act of 2021 did not cover algorithms that do not rely on personalization or online platforms with less than five million unique monthly

286. *See* Cameron F. Kerry, *Section 230 Deserves Careful and Focused Consideration*, BROOKINGS (May 14, 2021), https://perma.cc/GY8M-W63G ("Many proposed solutions—such as mandating content moderation, imposing common carrier obligations, or outright repeal—present potential unintended consequences, including diminishing freedom of expression."); Aaron Terr, *Why Repealing or Weakening Section 230 Is a Very Bad Idea*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Feb. 20, 2023), https://perma.cc/GQG2-ZS7Q ("Section 230 made the internet fertile ground for speech, creative, and innovation, supporting the formation and growth of diverse online communities and platforms. . . . Repealing or weakening Section 230 would jeopardize all of that."); Will Duffield, *Repealing Section 230 Would Limit Americans' Speech*, CATO INST. (Feb. 6, 2021), https://perma.cc/52NX-FZKD ("Some argue that amending or repealing Section 230 would compel platforms to suppress extremist speech and criminal activity. However, exposing platforms to broad liability for user speech would lead to the removal of much more than dangerous speech.").

visitors.[287] The Stop Discrimination by Algorithms Act applies to entities that meet one of four criteria, such as having greater than $15 million in average annualized gross receipts.[288]

To prevent discrimination by algorithms, it is crucial that a new legislative framework promotes transparency. This can be achieved by requiring covered entities to submit to annual audits to certify that the algorithms do not result in unlawful discrimination and to analyze disparate impacts. The results of the annual audits would be submitted to the appropriate State Attorney General's office, along with information detailing how the organization's algorithms are built, how the algorithm makes decisions, and all decisions made by the algorithm.

Enforcement of the uniform state legislation would lie with the Attorney General of each state. The legislation would allow for a civil penalty of up to $10,000 per violation. A private right of action should not be included, as it would open the floodgates to excessive litigation.

Covered entities should be required to provide notice to individuals regarding how the entity uses personal information in algorithmic decisions. When algorithmic decisions result in adverse action, additional information should be conveyed to users in a clear and accessible manner. When unfavorable decisions are produced by an algorithm, companies should be mandated to provide a comprehensive explanation of the decision to the individual and allow for consumers to submit an appeal.

CONCLUSION

This Note has demonstrated that the current regulatory landscape, largely created and enacted before the emergence of artificial intelligence, is insufficient to confront the exigent threats of inequity and discrimination posed by algorithms. Sophisticated algorithms have been shielded from liability for unlawful discrimination through the application of Section 230, written and enacted nearly thirty years ago. Without legislative interference, algorithms will continue to deepen inequities across nearly every key area of life opportunity. Congress should

287. *See* Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong. (2021).

288. *See* Stop Discrimination by Algorithms Act, B25-0114 (Feb. 2, 2023).

amend Section 230 to clarify the purpose and scope of the statute, and uniform state legislation should be enacted to provide individuals with adequate protection from the inequities caused by discriminatory algorithms.