ANNOTATED LEGAL BIBLIOGRAPHY

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GENDER BIAS AND DISCRIMINATION

Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, And Theories of Justice*, 2019 U. ILL. L. REV. 45 (2019).

Although the #MeToo movement has had notable successes in the spread of sexual assault awareness through high-profile cases, continued success requires focusing on restorative justice and transitional justice in order to address skepticism and keep momentum. The famous #MeToo movement started when actress Alyssa Milano used #MeToo on Twitter to exemplify the commonality of sexual assault and abuse and expanded to public naming and shaming of abusers, but receiving much backlash. The author suggests that restorative justice and transformative justice can improve #MeToo by focusing on a change in harmful societal views, practices and behavior, validating and supporting the recovery of survivors, and alleviating concerns about due process for the accused. Restorative justice may help to spur broad change by focusing on the "restoration and reintegration" of the survivors as well as the perpetrators, and its elements are: "acknowledgment" by the offender of the victim and the consequences of the abuse, "responsibility-taking" by the offender, "harm repair" (ranging from individual monetary compensation to community service), "nonrepetition" (taking tangible steps to change behavior and prevent repeat offenses), and finally, "redemption and reintegration" for the offender into society (which, if successful, may include forgiveness by the victim that is voluntary and not pressured). Transitional justice focuses on "patterns of wrongdoing," and the history of its use in model cases offer helpful guidance; specifically, it encourages individual response to victims, careful noting of whose harms are considered in order to encourage inclusion of marginalized communities, and the necessity of a "holistic approach to institutional reform" which could include monetary reparations, criminal trials, truth commissions, memorials, or direct efforts at institutional reform, each of which be too limited on its own to properly hold perpetrators accountable and remedying the loss of victims. In conclusion, #MeToo has had successes in public indictments, civil litigation, firings, and introduction of legislation, but skepticism exists; advocates should consider the ideas of restorative justice and transitional justice to improve conversation about complicated questions, and focus on offenders, victims, and the community as a whole, and the necessary cultural changes and individual alterations will require both public and private efforts.

Annotated by: Christina Giordanella

Brianna L. Eaton, *Pregnancy Discrimination: Pregnant Women Need More Protection in the Workplace*, 64 S.D. L. Rev. 244 (2019).

Even after the passing of the Pregnancy Discrimination Act (PDA) in 1978, women nationwide still face issues of pregnancy discrimination, such as being passed over for promotions and raises, being fired while pregnant, and being forced to lift heavy items while pregnant. The enactment of the PDA prohibited employers from engaging in gender discrimination on the basis of pregnancy, but did not require employers to provide accommodations to pregnant women. Although the passing of the PDA made it clear that discriminating on the basis of pregnancy was in fact gender discrimination, a staggering increase of cases with the Equal Employment Opportunity Commission (EEOC) were filed by pregnant women after the PDA. As a result, Congress tried passing the Pregnant Workers Fairness Act in 2017, which aimed to eliminate discrimination and promote women's health by enforcing reasonable workplace accommodations for pregnant women, but ultimately failed in doing so. One solution to reducing pregnancy discrimination in the workplace includes educating employees and employers of their rights and obligations as detailed on the EEOC's website. Further, the author highlights that the best solution to diminishing pregnancy discrimination nationwide is to begin with implementing pregnancy accommodation laws in every state, such as creating on-site rooms for breastfeeding and providing generous parental leave policies. The hope is that with the rise of state pregnancy accommodation laws, a federal law will be passed that will ultimately grant more protections and accommodations to pregnant women.

Annotated by: Amanda Povman

Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. Pa. J. L. & Soc. Change 1 (2018).

In 1964, Congress enacted Title VII of the Civil Rights Act to prohibit workplace discrimination on the basis of race, color, sex or national origin. The use of the word "or" has led to a split among the federal appellate circuits over whether to recognize and permit intersectional claims brought by black women, who allege discrimination on the basis of both race and sex. While Title VII's categorical framework was designed for white women and black men, black women are subject to unique stereotypes and biases as a group that neither white women nor black men face. The author argues that when courts refuse to combine a black woman's race and sex in their Title VII claim, it marginalizes black women and causes them to fare worse in court than those who allege discrimination based on a single protected category. The author proposes three solutions to combat this problem by focusing on each branch of government. Through the executive branch, the author suggests that the EEOC, which has expressly acknowledged "intersectional discrimination," issue clear, concrete guidelines for courts to follow, which would translate their educational content into instructions. Second, because the word "or" is partly responsible for the courts' reluctance to acknowledge intersectional claims, the legislative branch should amend Title VII to include the phrase "or any combination thereof." Third, because the Supreme Court is charged with resolving splits among the circuits, it should craft a framework that both recognizes black women's intersectional claims and addresses the logistical fears about which courts seem to be concerned. These solutions would increase black female plaintiffs' chances of success in pursuing employment discrimination claims, and provide them with a remedy under Title VII.

Annotated by: Jennifer Russnow

Jean Galbraith & Beatrix Lu, *Gender-Identity Protection, Trade, and the Trump Administration: A Tale of Reluctant Progressivism*, 129 YALE L.J. 44 (2019).

The recent United States-Mexico-Canada Agreement (USCMA) that committed the U.S., Mexico, and Canada to "implementing policies that protect workers against employment discrimination on the basis of sex, including . . . sexual orientation and gender identity," exemplifies how international negotiations can influence powerful governments to compromise and make commitments that are contrary to the government's objectives. The Trump Administration has been known for diminishing the original protections transgender people received from the past administration, but time-pressure and the goal of reaching a deal encouraged the Trump Administration to compromise and sign the USMCA. However, once the original text was signed, lawyers made slight manipulations and changes to the final text that cut short the protections granted by the original text. For example, the original text defined "sex" to protect discrimination against sexual orientation and gender identity, a definition that is consistent with the interpretation of the Equal Employment Opportunity Commission, the agency that enforces Title VII. However, the definition in the final text took a narrower approach to defining "sex," and listed discrimination on the basis of sexual orientation, gender identity, pregnancy, and caregiving responsibilities as separate types of discrimination, a view that is consistent with the current Justice Department's interpretation of Title VII and curtails the protection from discrimination. This change in the final version suggests that the Justice Department was not debriefed about the USMCA before the initial text was published, which allowed the sex-related provisions to make it onto the USMCA in the first place. Nevertheless, although it appears the final text removed lots of protections, it still carries both meaningful substance and expressive significance; the language suggests recommitting the US to the protections under the Obama Administration, reflecting the fact that human rights issues were negotiated and that sexual orientation and gender identity were protected in an international agreement. Congress must eventually approve the USMCA, but the authors remain positive and believe that the watered-down final text might actually help attract enough republican votes to approve the USMCA, which at this point would be acceptable to them because any new attempt to change the document's language could be detrimental to the entire agreement.

Annotated by: Lion Song

RACIAL DISCRIMINATION

Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 Colum. J. Race & L. 265 (2019).

The typical approach to identifying and treating disabilities among children of color has led to their overrepresentation in the juvenile justice system because attitudes about disability are impacted by the type of school environment as well as the racial and cultural biases of teachers and administrators, which results in the differences in the way White children with disabilities and children of color with disabilities, specifically Black and Latinx, are viewed. For White students and students in high-performing schools, a disability is typically considered a medical condition that can be treated and worthy of school resources, while for Black and Latinx students, who typically attend highly surveilled schools, a disability is treated with punishment and discipline, thus making these students a more likely target for law enforcement. Research shows that Black boys, Latinx boys, and Black girls are typically perceived as less innocent, less childlike, and more culpable of their actions. These biases are evident in two common scenarios: first, where a teacher perceives a Black or Latinx child as deviant, teachers generally mislabel normal adolescent behavior as a disability; second, where a teacher deems poor behavior to be a common attribute of Black and Latinx children, based on low expectations for them, and fails to examine whether a disability exists, which the author views as a distinction based on race and an unequal distribution of rights and privileges only. Because students of color often attend underfunded schools that have fewer special education resources, the students tend to be more highly surveilled and disciplined via suspensions and expulsions, and eventually enter the juvenile justice system. To ameliorate the overpopulation of children of color with disabilities in the juvenile justice system, the author recommends that schools support and prepare these students with the use of transition plans and services post-high school to encourage the pursuit of higher education and meaningful employment. These recommendations may provide an alternative future for students who are likely to end up in the juvenile justice system by cause of the educational opportunities offered to them.

Annotated by: Andrea Barrientos

Anthony V. Alfieri*, Black, Poor, and Gone: Civil Rights Law's Inner-City Crisis*, 54 Harv. C.R.-C.L. L. Rev. 629 (2019).

In light of sociological and legal developments that have occurred in the decades since the passage of the Fair Housing Act, a new approach to understanding the problem of racial housing disparity is necessary, such as a new process of movement building and strategic reform vividly exemplified by the West Grove Task Force Campaign in Miami. In order to elaborate upon present-day realities and bring clarity to the future of fair housing activism, the author parses through the different patterns seen in both urban and suburban poverty and housing segregation, as far as the development of West Grove compared to other areas. Situated in that historical analysis, and accompanied by a deconstruction of less comprehensive theories of issues in housing and poverty, this article provides an outline of the two dominant legal pathways available to plaintiffs in FHA actions, namely the disparate impact and segregate effects doctrines. These two approaches to understanding legal recourse and a way forward for FHA plaintiffs are not fully adequate according to the author, but offer pieces of what could be a more comprehensive approach. Providing a critical look at these two theories then gives the author an opportunity to discuss the axes along which both de facto and de jure housing discrimination fall, which the author uses to dispense with the notion that the two forms of discrimination are separate. Blending a sociological perspective with legal argument by reviewing different visions of social movements and emphasizing the importance of historical racism, before revisiting the aforementioned Fair Housing Act doctrine, the author hopefully concludes that expanding the scope of understanding the housing segregation crisis is the proper way forward in mobilizing and effecting change in order to ameliorate that crisis. Acknowledgement of power structures as they relate to the developmental formation of the West Grove environment, in order to create a holistic community-focused way forward, the author concludes, is the best solution to the problems and limitations of legal advocacy in the field of housing justice.

Annotated by: Patrick Keogh

Luna Martinez G. and Kiki Tapiero, *Prax-is In Action: A Resistance Toolkit for Family Separations at the Border*, 29 Berkeley La Raza L.J. 51 (2019).

Societal change for social justice causes relies on activists being able to organize and bring their movements to a wider audience; the newly established Practical Resistance Alliance X (Prax-is) hopes to be the vehicle by which communities respond to pressing social problems, such as the family separation crisis at the border. Organizing has taken on many forms from drawing attention to disadvantaged groups or enacting policies to shows of force against tyrannical states or leaders. The author provides examples from twitter tweeted during The Arab Spring and the street theatre in Serbian election fraud of 1998 to show how activists use different avenues to organize resistance and how the Prax-is system plans to face other crises. The Prax-is system is a website the author hopes will act as a space for activists, as well as the general public to create blogs, articles, discussion posts and artistic works to facilitate solutions to social justice issues and educate others on unique experiences. The Prax-is system's functions will include avenues such as articles used to discuss detainment experiences or examine recent executive orders, blogs used to allow local groups to blog about upcoming events, inform the public and recruit new members, webinars used to educate immigrant communities about their legal rights, and a forum space used to organize larger events or respond to targeted problems or changes to policy that may arise. Thus, Prax-is, while new, is a promising tool to assist concerned individuals in responding to injustice; as technology allows harmful policies, such as family separation to be implemented quicker, social justice causes must do as much as possible to efficiently respond to the world's suffering using advanced technology systems as well.

Annotated by: Caroline Kutschera

Chase S. Burton, Essay, *Child Savers and Unchildlike Youth: Class, Race, and Juvenile Justice in the Early Twentieth Century*, 44 L. & Soc. Inquiry 1251 (2019).

Although the reforms in juvenile services began with the belief that all children assume diminished responsibility and that they should be redeemed rather than condemned, such "child-saving" movement unfortunately developed alongside the trend of eugenics and thereby infused with a racist and classist framework. In a discussion of The Child Savers, the Author noted that when such notion clashes with a changing society of increasing levels of governmental intervention, immigration, and urbanization, the result is the tightened control of black youths and sometimes the ironically more severe treatment than adult justice system. In addition to the observation of unequal treatment against the poor and the immigrant in The Child Savers, the Author opines that the multi-stratification in the juvenile justice system—more complicated than the two factors pointed out—is better captured by the distinction between "childlike" and "unchildlike," theorized by Elizabeth Brown. Because the courts base the norm of childhood on the typical white middle-class youths, any deviation are implicitly labeled as "unchildlike," a category that is somehow more than a child, yet less than an adult. The Author's subsequent discussions on The Black Child Savers and The Criminalization of Black Children not only illustrated how black youths depart from this illusionary norm of childhood but also how they do not fit into the narrative of saving the "potential future citizens" as the modern democratic society deprives their voice. While resistance has recently surged within the black communities, coinciding with their growing involvement of social movements, the general lack of resources is likely to limit the long-term effect it has on black youths' disproportionately high involvement with the system yet low benefit yielding results—such is the ineffable taint on juvenile justice system, conceived from classism and racism at its inception, and unlikely to be self-redeemed.

Annotated by: Esther Engelhart

Elias R. Feldman, Article, *Strict Tort Liability for Police Misconduct*, 53 Colum. J.L. Soc. Probs. 89 (2019).

The current remedies for parties affected by police misconduct are slim; a fact that disproportionately burdens minority communities that are vulnerable to predisposed racial biases held by police officers, who may resort to deadly force in a confrontation with a racial minority. When police officers have an encounter that results in harm to the suspect, the physical injuries are also accompanied by long-lasting dignitary injuries that may go uncompensated. Here, the author proposes a solution to compensate victims of police misconduct by imposing strict tort liability on government municipalities whose police officers have been convicted of misconduct in a criminal proceeding. The author uses a policy-based approach to advance his argument that policing meets the elements of a strict liability offense under the Third Restatement of Torts. However, the author recognizes two objections to imposing strict tort liability: (1) political objections and (2) legal objections that may result from the current governmental immunity rule held by most states. The author argues that the societal benefits of imposing liability outweigh its costs and clarifying the limited plaintiff pool that would be entitled to damages. Under the author's approach, plaintiffs can only recover if the police officer acted in his official capacity and has been convicted in a criminal proceeding. Thus, that author articulates that police misconduct falls squarely into the strict liability definition and is the exact type of activity the Restatement seeks to prevent, and concludes that strict tort liability is a solution which can fairly compensate victims of police misconduct.

Annotated by: Melissa Koppel

TITLE VII DISCRIMINATION

Timothy Parrington, Article, *Title VII & LGBYQ Employment Discrimination: An Argument for a Modern Updated Approach to Title VII Claims*, 60 Wash. U. J.L. & Pol'y 293 (2019).

Congress enacted the Civil Rights Act in 1964 when Title VII of the Act prohibits employers from discriminating against an employee because of the individual's race, color, religion, sex, or national origin. Even though the meaning of the word "sex" has been a subject of debate among judges since the Act's enactment, virtually all courts adopted a narrow interpretation and thus have read Title VII to only afford protections against discrimination based on biological distinctions. The Supreme Court weighed in on the issue in Price Waterhouse v. Hopkins and held that Title VII also protects individuals who were discriminated for not conforming to the stereotype of his or her gender. Although the LGBTQ community has seen some positive effect of Title VII after the high court's ruling in Price Waterhouse, federal courts among the different circuits do not have a uniform interpretation for what constitutes discrimination "because of sex," which led to incoherent results for different members of the LGBTQ community. Here, the author suggests two approaches to remedy the current situation, the first is through the legislative pathway, by putting pressure on Congress to either amend the statutory language of Title VII or to enact a standalone bill to protect LGBTQ employees from discrimination; the second is through the judicial route, where courts adopt a more liberal interpretation of the statute, thereby allowing more LGBTQ employees to move forward with a Title VII discrimination claim. Although Congress is in a much better position to implement changes to the status quo, it's unwillingness to adopt such a change is apparent, shown when the House sought to amend Title VII to include sexual orientation as a protected class in many occasions but was voted down every single time. The author argues that although "judicial interpretive updating" is a bold idea, it is nevertheless in line with the Supreme Court precedent, and the best way to enforce Title VII to its intended effects. In conclusion, courts should take it upon themselves to defend the spirit of anti-discrimination law by interpreting the statute liberally, so it conforms to society's current understanding of genders and identities.

Annotated by: Jack Yeh

Joseph J. Railey, Note, *Married on Sunday, Evicted on Monday: Interpreting the Fair Housing Acts Prohibition of Discrimination "Because of Sec" to Include Sexual Orientation and Gender*, 36-37 Buff. Pub. Int. L.J. 99 (2017-19).

Today, LGBTQ individuals are no longer considered criminals, or mentally ill, because of their choices and have been given the basic rights all people deserve, including marriage, serving the military, and holding public office, yet even with such great advances for the LGBTQ community, there remains one right that has stalled: Fair Housing. Housing discrimination has become an impermeable issue thus far, with studies showing a high rate of gay couples fearing forms of housing discrimination, which is further driven by the fact that there exists no nationwide protections against housing discrimination based on an individuals' sexual orientation or identity. The current Fair Housing Act makes it unlawful to discriminate against an individual on the basis of "race, color, religion, sex, familial status, or natural origin" when selling or renting a home, however, the Act does not provide a definition for what is protected as "sex". The Obama Administration was previously welcoming to renouncing housing discrimination, but under the current Trump administration, the jury is still out. As an alternative, the LGBTQ community may turn to Congress, which is given the power to interpret the laws and can therefore define "sex" as protected under the Fair Housing Act, but this has been an issue since Congress is always preoccupied with maintaining a certain political status quo, and thus, in the present case, LGBTQ individuals may have more success before the judicial court system. Moving forward, the author argues for the federal government, via the judiciary, to provide housing protections for sexual orientation and gender identity by expanding the radius of the term "sex". Over the past sixty years, the LGBTQ community has made unbelievable progress in securing equal rights, and there is no doubt that tackling housing discrimination will be the next obstacle LGBTQ individuals will be able to defeat.

Annotated by: Eli Well

DISCRIMINATION AND TECHNOLOGY

Rachel Levinson-Waldman, Article, *Private Eyes, They're Watching You: Law Enforcement's Monitoring of Social Media*, 71 OKLR 997 (2019).

Social media is an overwhelmingly popular tool which provides a broad swath of humanity with the means by which to express themselves online and connect with individuals from diverse backgrounds across the globe. The prevalence of social media has given rise to widespread, and often covert, monitoring and surveillance of these networks by law enforcement—disproportionately directed against social activists and people of color. Lower courts at the state and federal levels have ruled differently on whether or not unlimited social media surveillance offends the constitutionally enshrined right to free speech, and implied right to privacy. While some online platforms, including Facebook and Instagram, have formally banned developers from using data collected through their proprietary service for surveillance, the ban did nothing to preclude police investigators from manually accessing individual profiles, or generating a potentially unlimited number of fraudulent accounts with which to surveil suspects. However, by analogizing to extant jurisprudence which has limited the ability of law enforcement to physically track suspects using GPA surveillance, the author suggests that there is reason to suspect the Supreme Court will ultimately hold unlimited, electronic police surveillance unconstitutional. Ultimately, while there may be some limited utility for law enforcement investigation of private individual's social media presence, there is a pressing need for local and state legislatures to propound statutory guidelines restricting the untrammeled use of online monitoring. The article argues that should the judiciary ultimately impose more stringent limitations on the ability of law enforcement organizations to surveil social media accounts, there would be a very limited (or possibly non-existent) decline in the ability of police to ensure public safety, but a large increase in the ability of minority and activist groups to organize online and demonstrate freely pursuant to their constitutionally protected rights, making this outcome desirable.

Annotated by: David Belmont

Kelsey Stein, Note, *Dangers of the Digital Stockade: Modernizing Constitutional Protection for Individuals Subjected to State-Imposed Reputational Harm on Social Media*, 87 Geo. Wash. L. Rev. 996 (2019).

With the increase of social media use, law enforcement agencies have turned to social media to provide information to the public about individuals who are accused of committing a crime or who have been arrested, which results in collateral consequences as individuals are labeled to be criminals by someone with high public regard. One's reputation has been recognized to be a liberty interest, but reputational harm alone does not trigger due process. For reputational harm, the Court in Paul v. Davis, 424 U.S. 693 (1976) set forth the stigma-plus test that requires one's reputation to be harmed and to be deprived of another constitutional right for due process to be triggered. In Paul v. Davis, the Court held that Mr. Davis was not owed due process because reputational harm alone is not enough, as he needed reputational harm and a deprivation of a constitutionally recognized interest. Not only has the stigma-plus test been difficult to apply, but the expansion of social media has allowed law enforcement agencies to freely write about individuals resulting in lifelong consequences. Unlike in Paul v. Davis, information that is published online can reach anyone in the world, thus making it nearly impossible to rehabilitate one's reputation. To combat the use of social media by law enforcement, the Author argues that the Court should either change its test to allow reputational harm alone to trigger due process or hold that online public posting satisfies the plus factor under the Davis test, and in the meantime law enforcement agencies should establish social media guidelines.

Annotated by: Tziona Breitbart

Francis X. Shen, Note, *Neuroscience, Artificial Intelligence, and the Case Against Solitary Confinement*, 21 VAND. J. ENT. & TECH. L. 937 (2019).

Solitary confinement in prisons is persistent in the United States because it is difficult to make a legal case against it, which would require systematic and precise evidence of the detrimental effects of solitary confinement on inmates. While some research shows that solitary confinement can harm the brain, such evidence is difficult to gather because: 1) most research is limited to nonhuman animal models and thus, how these studies translate to humans remains uncertain; 2) only one study has been conducted in measuring brain activity in inmates by using electroencephalography (EEG); 3) prolonged confinement is not seen as a cruel and unusual punishment because solitary confinement is not so bad that it rises to the level of constitutional violation since prisons meet the basic requirements of life, such as food, clothing, shelter, medical attention, and basic hygiene; and 4) psychological harms, like a brain injury, are not easy to prove because it is an invisible injury. The author argues that while neuroscience might be useful in forcing psychological injuries to become visible, neuroscience can only speculate that solitary confinement changes inmates' brains. The author purposes artificial intelligence (AI) as a solution to gathering evidence because an AI would allow objective systematic observance and documentation of the true experiences of isolated inmates by engaging and communicating with inmates to collect individualized data on the effect of solitary confinement on individual inmates. Nonetheless, there are challenges to using an AI, such as: 1) while an AI should be administrated by an independent organization, a state might still gain another layer of surveillance, control, and domination, which could result in a violation of privacy, 2) whether the communication between the AI and inmate should be privileged, 3) whether all inmates should have access to an AI, and 4) how will this AI be funded. While neuroscience and an AI are still limited in demonstrating the effects of solitary confinements on the brains of inmates, an AI has the potential to provide litigants and advocates, who are challenging solitary confinements, with a more complete record of solitary confinement experience if an AI is given the utmost priority, not co-opted by the government, and is sensitive to inmate privacy.

Annotated by: Lyudmilla Gilyadova

Tomer Shadmy, Note, *The New Social Contract: Facebook's Community and Our Rights,* 37 B.U. INT'L L.J. 307 (2019).

In the modern era, around the second half of the twentieth century, rights are typically construed as individuals' agency and autonomy. However, through the user-interface design, the algorithms building the feeds, and their own rhetoric, data-driven corporations, such as Facebook, are currently reinventing the idea of rights, and reframing the scope of social contract in the political, social, and individual realms. On political dimension, through Facebook's construct of a depoliticized, personalized, and structured filter, it is actually exercising a monopoly over the ability to legislate, judge, and execute the platform's internal norms. On social dimension, Facebook has enabled users to practice their rights without imposing the correlative duty to respect these same rights of other individuals; in the meantime, Facebook has also barred users from knowing which rights are accessible to others and thus taking away people's mutual guarantee of each other's rights. While on individual dimension, Facebook's adoption of the choice version of personal rights, together with its practices have diluted the notion of rights, as well as undermined people's ability to choose meaningfully. In the face of globalization, the Neoliberal movement and its premises, the rising power of multinational corporations, and other epistemic and ontological changes, we are encountering with the pressing need to reinvent human rights or to invent parallel concepts that will guide current normative organizing principles. The author suggests that we could look to the alternative conceptualization of rights and legal order promoted by Facebook's infrastructure, but also warns of the worrisome elements in Facebook's version of rights that could possibly reduce human freedom. We should, at the same time, be monitoring both Facebook's codes and the outputs thereof, attributing to the broad, deep and abstract influence of Facebook's code on people's shared understanding of legal and political notions.

Annotated by: Yifan Li

Joseph Blass, *Algorithmic Advertising Discrimination*, 114 N.W. U. L. REV. 415 (2019).

The use of machine learning algorithms has recently been incorporated into targeted advertising, which presents complex issues regarding an algorithm's interaction with the public, effectively demonstrating algorithmic bias based on social and systematic factors through machine learning. The problem is that algorithms are trained on too small of a data set, which results in algorithmic bias in machine learning that is not explicit, but rather discriminative as a result of the algorithm's purpose; the only way to discover if the algorithm is discriminating against a particular group is to expose the algorithm to immense amounts of data and have it produce complex results. One example of an unintentional machine learning bias arises when the algorithm is looking to create predictions about who would receive an interview during a job application process, where previous interviews had been determined based on non-algorithmic factors and skewed in favor of a particular protected class, and the algorithm is trained on this past data, the algorithm may begin to consider the class information more significantly than the external factors that led a human operator to reach the same conclusion. Legally, apportioning liability for discrimination resulting for machine learning algorithms is difficult; numerous factors contribute to an algorithm's outcome and while some of them may have been easily spotted and mitigated, many would pass even the most trained developer who is focused on producing fairer results. The author argues that it is better to proactively counter discrimination in machine learning by training algorithms on larger data sets, considering a reactive solution is insufficient if the effects of the discrimination are already in place, thus a proactive solution would reduce the likelihood that individuals would be exposed to discriminative tendencies of machine learning algorithms. In conclusion, machine learning algorithms are being implemented more broadly in a variety of fields, the ramifications of untested algorithms will create biases when exposed to certain setting, and the most formative measure algorithm developers can take to prevent biased results from machine learning algorithms is to train them on sophisticated data sets so they can identify biased tendencies before their effects reach the public.

Annotated by: Joshua Weisenfeld