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Do You Even Know Me?: A.I. and It's Discriminatory Effects in the Hiring Process

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NOTE
DO YOU EVEN KNOW ME?: A.I. AND ITS DISCRIMINATORY EFFECTS IN THE HIRING PROCESS

I. INTRODUCTION

Due to great advances in technology, Artificial Intelligence ("A.I."), and its use by companies, both big and small, has had a significant impact on our everyday lives.[1] A.I. can be defined as computers making human-like decisions by being fed data that allows a program to make connections and discover patterns.[2] A.I. is used to make quick, more efficient decisions based on a large data set.[3] Due to its efficiency and the increase in remote work, several employers throughout the country utilize A.I. in their hiring practices.[4] An employer may use A.I. to conduct personality tests, video interviews, and resume screening.[5] On its surface, A.I. use seems to be fair, neutral, and able to reach a large amount of applicants.[6] However, just as humans make errors, so can A.I.[7]

On one side of the screen is a person like Mr. Carballo.[8] Mr. Carballo is Latino and the first in his family to go to college.[9] Mr. Carballo wanted to gain valuable work experience before making the

1. *See* LEGAL RESEARCH AND LAW LIBRARY MANAGEMENT § 5.19 (Law J. Press 1990).
2. *See id.* § 5.15.
3. *See id.* § 5.19.
4. *See* Gary D. Friedman & Thomas McCarthy, *Employment Law Red Flags in the Use of Artificial Intelligence in Hiring*, A.B.A. (Oct. 1, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/10/ai-in-hiring [https://perma.cc/88PJ-QB5H] (explaining that the increase in remote work makes it more difficult for in-person interviews to occur and therefore the use of A.I. tools, such as facial recognition during video interviews, has begun to increase).
5. *See id.*
6. *See id.*
7. *See generally* LEGAL RESEARCH AND LAW LIBRARY MANAGEMENT § 5.19, *supra* note 1 (illustrating examples in which A.I. use exhibited error or bias).
8. Avi Asher-Schapiro, *AI Is Taking Over Job Hiring, But Can it Be Racist?*, THOMSON REUTERS FOUND. (June 7, 2021), https://news.trust.org/item/20210607035142-h238l [https://perma.cc/E2V8-N34D].
9. *Id.*

decision to go to law school.[10] While applying to law firms, he found several of his applications automatically rejected only hours after he sent them in.[11] Mr. Carballo was instantly concerned about the role automated hiring technology had in his rejections.[12] He had gone through several different A.I. assessments including video interviews and logic games.[13] He described the process as "shooting in the dark while being blindfolded."[14] In other words, he had little to no control over the process and he was totally unaware of how the algorithms analyzing his application would assess him.[15] Racial bias in the hiring process is a major concern for Mr. Carballo, as he has stated that there was "no way . . . to tell [his] full story when a machine is assessing [him]."[16]

On the other side of the screen, an employer uses A.I. to streamline the application process.[17] They train the tools to look for certain characteristics that made previous employees successful and A.I. "tests" applicants either through resume screening, video interviewing, or actual personality tests to match those characteristics.[18] A.I. can then filter through large amounts of applications and quickly reject those that do not fit with the standards set by the employer, even though the employer knows absolutely nothing about the applicant.[19] Worse still, certain groups of people can be completely turned away based on a biased dataset that the employer may not even be aware of.[20]

The contrast between the two stories told above shows the potential disconnect between employers' goals and the reality of the applicant pool that may be drawn from an A.I. hiring process, as well as the

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Asher-Schapiro, *supra* note 8.
15. *See id.*
16. *Id.* ("I worry these algorithms aren't designed by people like me, and they aren't designed to pick people like me.").
17. *How to Beat Automated Resume Screening*, WORKOPOLIS (June 28, 2017), https://careers.workopolis.com/advice/beat-automated-resume-screening [https://perma.cc/8TF5-4S92].
18. Drew Harwell, *A Face-Scanning Algorithm Increasingly Decides Whether You Deserve the Job*, WASH. POST (Nov. 6, 2019), https://www.washingtonpost.com/technology/2019/10/22/ai-hiring-face-scanning-algorithm-increasingly-decides-whether-you-deserve-job [perma.cc/PBU9-UNS5].
19. *See* AARON RIEKE ET AL., ESSENTIAL WORK: ANALYZING THE HIRING TECHNOLOGIES OF LARGE HOURLY EMPLOYERS, UPTURN 7 (2021), https://www.upturn.org/static/reports/2021/essential-work/files/upturn-essential-work.pdf [https://perma.cc/QBS2-ZLN4].
20. *See* Ifeoma Ajunwa, *An Auditing Imperative for Automated Hiring Systems*, 34 HARV. J.L. & TECH. 621, 636 (2021).

discriminatory impact A.I. can have.[21] After several more attempts, Mr. Carballo finally got a full-time job at a law firm.[22] The manager who hired him did so without using any type of A.I. hiring tool.[23] "I think that made a difference," Mr. Carballo said.[24] Mr. Carballo summarized how this process affected him by stating, "I wasn't just a guy from a rough neighborhood, with a Spanish last name . . . . I was able to make an impression."[25]

This Note will begin by describing how A.I. programs are created and A.I.'s growing popularity among employers who seek to streamline the hiring process and identify candidates who are the "best fit" for their workplace.[26] Part II also examines the history of Title VII of the Civil Rights Act of 1964 ("Title VII") and the evolving case law of disparate impact claims.[27] Part III will argue that the continued use of unregulated A.I. has a disparate impact on members of protected classes, thereby violating Title VII.[28] Part IV contends that A.I. must be audited for bias by the Equal Employment Opportunity Commission ("EEOC") in order to remedy this issue, and advocates for an update to the Uniform Guidelines on Employee Selection Procedures ("UGESP") to assist employers and vendors in addressing discrimination.[29]

II. THE EVOLUTION OF A.I. AND DISPARATE IMPACT

This Part will discuss the origin of A.I. as well as how A.I. functions.[30] Subpart A will demonstrate the increased use of A.I. in the hiring process and how it is evolving.[31] Subpart B discusses disparate impact and the role of the EEOC in relation to enforcing Title VII.[32] It also analyzes the cases that came after the passage of Title VII and the Court's changing views on disparate impact.[33] Subpart C discusses the

21. *See* Alonzo Martinez, *Considering AI in Hiring? As Its Use Grows, So Do the Legal Implications for Employers*, FORBES (Dec. 5, 2019), https://www.forbes.com/sites/alonzomartinez/2019/12/05/considering-ai-in-hiring-as-its-use-grows-so-do-the-legal-implications-for-employers/?sh=1400598d4a51 [perma.cc/LM49-E9WM].
22. Asher-Schapiro, *supra* note 8.
23. *Id.*
24. *Id.*
25. *Id.*
26. *See infra* Part II.
27. *See infra* Part II.
28. *See infra* Part III.
29. *See infra* Part IV.
30. *See infra* Part II.
31. *See infra* Part II.A.
32. *See infra* Part II.B.
33. *See infra* Part II.B.

importance of the 1991 amendment to Title VII, in the form of the Civil Rights Act of 1991.[34]

A.I., as a concept, dates back to the 1950s.[35] In order for A.I. to function, it needs to be fed information from its builder.[36] This process can be simplified into four basic steps: first, the builder assigns the computer a task; second, the builder inserts the algorithm to complete the task; third, he or she instructs the computer how to evaluate its "performance"; fourth, the computer improves on solving the task through experience.[37] This learning process can be as complex as the human brain and hidden behind a "black box" of sorts that masks this process from the public.[38] A.I. has been adopted across all different fields and is a part of our everyday life through finance, housing, health care, and employment.[39] This seemingly simple, four-step process, however, can have discriminatory effects and its unchecked use can truly test the bounds of existing law, which was not created with A.I. in mind.[40]

A. The Rise of A.I. in the Hiring Process

Many employers are veering away from a time in which an employer would post a vacancy on a job board and wait for people to apply.[41] Twenty-four percent of companies have adopted A.I. in their recruitment of talent.[42] Fifty-six percent of companies, in the same study, stated in 2020 that they would adopt A.I. for recruitment within a year.[43] In addition, nearly all Fortune 500 companies use A.I. in their hiring practices.[44] Moreover, A.I. use in hiring is not only confined to talent recruitment for the biggest companies in the United States, but also in

34. *See infra* Part II.C.

35. *See* Nicholas Schmidt & Bryce Stephens, *An Introduction to Artificial Intelligence and Solutions to the Problems of Algorithmic Discrimination*, 73 CONSUMER FIN. L.Q. REP. 130, 133 (2019).

36. *See id.* at 133.

37. *Id.*

38. Yifat Nahmias & Maayan Perel, *The Oversight of Content Moderation by AI: Impact Assessments and Their Limitations*, 58 HARV. J. ON LEGIS. 145, 154-55 (2021). A.I. decision-making systems are not only complex but also constantly changing. *Id.* at 155.

39. *See* LEGAL RESEARCH AND LAW LIBRARY MANAGEMENT § 5.19, *supra* note 1.

40. *See Meeting of October 13, 2016 - Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law - Transcript*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 13, 2016), [hereinafter *Meeting of October 13, 2016 Transcript*], https://www.eeoc.gov/meetings/24068/transcript [https://perma.cc/76N5-G655].

41. SAGE, THE CHANGING FACE OF HR 15 (2020).

42. *Id.* at 16.

43. *Id.*

44. Ajunwa, *supra* note 20, at 623.

the low-wage retail market, which currently employs nearly ten million people.[45] These employers are some of the biggest adopters of A.I.-enhanced online hiring, which provides little or no feedback to rejected applicants.[46] The growing trend of employers to make the switch to use A.I. in hiring is due to its speed, cost effectiveness, and ability to reach a wide amount of people, especially with a growing shift towards remote work.[47] Employers claim that A.I. use in hiring is both efficient and fair because it allows true consideration of an application, rather than missing relevant data a human reviewer may miss or gloss over.[48]

This kind of efficient hiring is mainly done through A.I. tools such as pre-employment tests, video interviewing, and resume screening.[49] These tools can analyze candidates at a fraction of the time it would take a human employer to review each and every application, and further improve its learning capability in the process.[50] Nearly all of these tools, through A.I., incorporate either searching for traits to match the "model candidate" or predicting certain outcomes, such as success as an employee.[51] Some vendors go so far as advertising that their A.I. tools can predict whether candidates are likely to leave their job if hired, likelihood of promotions or movement between previous roles, and how well that applicant may fit into the new position.[52] By using A.I., employers, generally, are not motivated by laziness in the hiring process; rather, the consensus among employers is that A.I. is actually better equipped to match the best candidates to the employer's needs as well as promising a fairer and more neutral process.[53] In fact, A.I. vendors promise and advertise more diversity and equality in the workplace

45. *Id.*; D. Augustus Anderson, *Retail Jobs Among the Most Common Occupations*, U.S. CENSUS BUREAU (Sept. 8, 2020), https://www.census.gov/library/stories/2020/09/profile-of-the-retail-workforce.html [perma.cc/3F9G-9SWV] (detailing the number of workers in the retail market).

46. RIEKE ET AL., *supra* note 19, at 6 (noting that many of these applicants are young people, people of color, and people with disabilities).

47. *See* Ajunwa, *supra* note 20, at 632; Friedman & McCarthy, *supra* note 4.

48. Rebecca Heilweil, *Artificial Intelligence Will Help You Determine If You Get Your Next Job*, VOX (Dec. 12, 2019), https://www.vox.com/recode/2019/12/12/20993665/artificial-intelligence-ai-job-screen [perma.cc/8NKC-TRRH] ("Proponents say they can be more fair and more thorough than overworked human recruiters skimming through hundreds of résumés and cover letters.").

49. *See* Natalie A. Pierce & Tiana R. Harding, *The Implication and Use of Artificial Intelligence in Recruiting and Hiring*, 62 ORANGE CNTY. LAW. 36, 36-37 (2020).

50. *Id.* at 37.

51. Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 531-32 (2018).

52. Heilweil, *supra* note 48.

53. Pierce & Harding, *supra* note 49, at 36.

because of the tools' broader reach, free of human bias.[54] Nevertheless, these tools are not as perfect as they seem.[55]

B. Disparate Impact Generally and its Application Over Time

Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.[56] Congress recognized the growing reality that discrimination was not always a deliberate and conscious choice.[57] Unconscious discrimination, such as stereotyping, has a negative effect on applicants by unfairly treating them simply as a member of a group, rather than assessing them based on their individual characteristics.[58] As a result, Congress added the disparate impact provision in Title VII, which intended to protect applicants that were discriminated against, but perhaps not in such an overt or apparent manner.[59] In other words, an employer need not have an intent to discriminate because disparate impact theory focuses on the consequences of discriminatory hiring rather than the motive.[60] The EEOC is tasked with enforcing Title VII through mediation, lawsuits, and commissioner-generated administrative charges.[61] This Note focuses on Title VII because the use of A.I. in hiring practices mainly has a

54. Bornstein, *supra* note 51, at 532.

55. *See* Letter from Am. Ass'n of People with Disabilities et al., to Charlotte Burrows, Chair of the Equal Emp. Opportunity Comm'n et al. (July 13, 2021).

56. 42 U.S.C. § 2000e (1964). Additionally, states and localities throughout the country have enacted statutes protecting against disparate impact and discrimination as a whole. Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 L. CONTEMP. PROB. 115, 118 (2016) [hereinafter Johnson, *The Local Turn*].

57. Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 917 (2005) [hereinafter Sullivan, *Disparate Impact*]; *see also* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1192 (2003) (stating that Congress and commentators knew at the time of Title VII's passage that discrimination was not always "overt" and the statute was passed in order to protect against such discrimination). Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Dothard v. Rawlinson, 433 U.S. 321, 328 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

58. *See* Sullivan, *Disparate Impact*, *supra* note 57, at 917-18.

59. *See* 42 U.S.C. § 2000e-2(k).

60. Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L. J. 1, 10 (2010).

61. *See* 42 U.S.C. § 2000e-4; 42 U.S.C. § 2000e-5(b) (referring to charges "filed by or on behalf of a person claiming to be aggrieved, *or by a member of the Commission*") (emphasis added). In 1972, Congress expanded the power of the EEOC and empowered it with the ability to bring a civil action against an employer to further the public interest and bolster effective enforcement of private rights. Gen. Tel. Co. v. EEOC, 446 U.S. 318, 325-26 (1980). The Court also acknowledged that the power to engage in a civil suit was intended to supplement the private right of action, not to replace it. *Id.* at 326.

discriminatory effect against people based on their race, national origin, or sex.[62] There are also other avenues of federal law available to other types of people who have been victims of A.I. discrimination in hiring, such as the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA").[63] Both laws also include disparate impact provisions, as they were modeled after Title VII.[64]

The U.S. Supreme Court unanimously held in *Griggs v. Duke Power Co.* that Title VII not only prohibits "overt" discrimination, but also fair practices that are discriminatory in operation.[65] The Court in *Griggs* emphasized that the absence of discriminatory intent does not redeem employment procedures that have a discriminatory effect.[66] This disparate impact theory allows a plaintiff to sue an employer if he or she can show that a particular procedure used by an employer had an adverse effect on members of a protected class, as compared to their representation in the applicant pool.[67] The Court also held that if an employer seeks to use tests, devices, or mechanisms in the hiring process, they must establish that the tests are both related to the job and represent a reasonable measure of job performance.[68] Even if a test or device is deemed to be job-related, a plaintiff can overcome this by offering a less discriminatory alternative that the employer refused to adopt.[69]

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62. 42 U.S.C. § 2000e-2.

63. Friedman & McCarthy, *supra* note 4.

64. *See id.*; Fox v. GMC, 247 F.3d 169, 176 (4th Cir. 2001) ("[T]he ADA echoes and expressly refers to Title VII, and because the statutes have the same purpose . . . courts have routinely used Title VII precedent in ADA cases.").

65. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

66. *Id.* at 432.

67. *See Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 898 (1993). This differs from disparate treatment, which is the showing of intentional discrimination in hiring practices. Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good for? What Not?*, 42 BRANDEIS L.J. 592, 601 (2004). The Court distinguishes the two theories by stating that disparate impact involves facially neutral practices, while disparate treatment needs proof of intent and is the "most easily understood type of discrimination." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

68. *See Griggs*, 401 U.S. at 436 ("The touchstone is business necessity."). Many of the early cases regarding the use of tests in hiring came from public employers such as fire departments and police, which are useful to illustrate the job-relatedness requirement. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 763 (2006) [hereinafter Selmi, *Disparate Impact Theory*]; *see* Vulcan Soc'y of N.Y.C. Fire Dep't, Inc. v. Civ. Serv. Comm'n., 490 F.2d 387, 393-94 (2d Cir. 1973) (holding that to apply for a firefighter job, questions on a comprehension test regarding civics and current events were not job-related and therefore plaintiffs were able to succeed on their disparate impact claim). *But see* Rivera v. Wichita Falls, 665 F.2d 531, 536-37 (1982) (holding that for a police officer, a comprehension test consisting of material from training academy was statistically discriminatory, but sufficiently related to job performance and met validation standards under EEOC guidelines).

69. *See* 42 U.S.C. § 2000e–2(k)(1)(A)(ii).

In 1989, the Court in *Wards Cove Packing Co. v. Atonio* curtailed its holding in *Griggs* in two ways.[70] First, the Court stated that a plaintiff must show evidence of "statistical disparities" in the employer's workforce in order to establish a claim of disparate impact.[71] Essentially, there are two common methods that courts have used to analyze statistical disparities: "pass/fail statistics" and "population/work force statistics."[72] "Pass/fail statistics" compare the percentage of minority applicants who qualify under the challenged employment selection standard with the percentage of the majority class of applicants who qualify.[73] If there is a disparity between the comparison that is not attributable to chance, then courts will assume the selection criteria was discriminatory.[74] Courts may also analyze "population/work force statistics," which can be described as a comparison between the employer's workforce and the population at large.[75]

In cases where standardized tests or subjective criteria are used, plaintiffs must identify the specific employment practice that is the cause of the disparity.[76] The Court remanded the plaintiff's case in *Wards Cove Packing Co.*, even though the reason the plaintiff could not meet the Court's new standard was because of the defendant's failure to maintain records.[77] Secondly, the Court held that the burden of production in proving business necessity remains with the defendant, but the ultimate burden of persuasion rests with the plaintiff, at all times.[78]

Disparate impact is not a heavily litigated legal theory, primarily because it is challenging for plaintiffs to succeed.[79] For instance, the Court has previously held that there is no single standard for proving

70. Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; *see Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 67, at 898.

71. *See Wards Cove Packing Co.*, 490 U.S. at 656.

72. EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE § 2.05 (Janice Goodman ed., 2020).

73. *See id.* The EEOC endorses the "pass/fail" method and uses it to guide their decisions. Shoben, *supra* note 67, at 604.

74. EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE § 2.05, *supra* note 72.

75. Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977). In *Dothard*, the Court applied this statistical analysis when they found discrimination in height and weight requirements for female applicants to be correctional officers. *Id.* The Court analyzed the general population of women, 52.75%, compared with the population of women that were correctional officers, 12.9%. *Id.* at 329. The Court found that when the height and weight restrictions were combined, they would exclude 41.13% of the female population, while excluding less than 1% of the male population. *Id.* at 329-30.

76. *Wards Cove Packing Co.*, 490 U.S. at 656.

77. *Id.* at 661; *see Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 67, at 899.

78. *See Wards Cove Packing Co.*, 490 U.S. at 659-60.

79. Shoben, *supra* note 67, at 607.

disparate impact; it must instead be looked at on a case-by-case basis.[80] This can cause difficulty for plaintiffs in actions regarding A.I. because each employer's system works differently and is already subject to a high degree of confidentiality.[81] Also, it has been argued that disparate impact is difficult to prove and actually undercuts intentional discrimination claims.[82] Nevertheless, disparate impact remains active and is a historically important tool for plaintiffs who have been discriminated against, especially through selection tools in the hiring process.[83]

C. 1991 Amendment to Title VII

The negative reaction to the Court's holding in *Wards Cove Packing Co.* was swift.[84] Two years later, Congress passed the Civil Rights Act of 1991 ("the Act"), which was later signed by President George Bush that same year.[85] The Act added additional language to Title VII, which allows courts to analyze an employer's decision-making process as a whole if the plaintiff can show that the elements of the process are not capable of separation.[86] The Act sought to strengthen the success of disparate impact claims by actually codifying disparate impact as a cause of action as well as restricting courts' abilities to narrowly apply disparate impact theory and increase the burden on employers.[87] The Act also addressed "business necessity" and the new standard set forth in *Wards Cove Packing Co.*[88] Specifically, the drafters of the Act made clear that its purpose was to codify the Court's interpretation of "business necessity" and "job relatedness" in *Griggs* and ultimately reject the interpretation the Court set forth in *Wards Cove Packing Co.*[89] Although the passage of the Act was a tumultuous process, Congress generally agreed upon this notion, as seen in both the

80. *Id.* at 604.

81. *See* Letter from Brett A. Brenner, Assoc. Dir., Off. of Commc'ns and Legal Aff., to Hon. Michael Bennet, U.S. Senator (Jan. 15, 2021).

82. *See* Selmi, *Disparate Impact Theory*, *supra* note 68, at 734.

83. RAYMOND F. GREGORY, THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION: A 50 YEAR HISTORY 216 (2014).

84. *See Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 67, at 896. Congress emphasized that the *Wards Cove Packing Co.* decision "weakened the scope and effectiveness of" civil rights protections. *Id.* at 912.

85. *See id.* at 896.

86. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

87. *Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 67, at 911-12.

88. Civil Rights Act § 105.

89. *See id.*

purposes section of the Act and in the Congressional Record.[90] Nevertheless, some ambiguity remains, which may have a negative effect on litigation against discriminatory A.I.[91] As to "business necessity," the question of degree also remains: must the test or technology be essential to the viability of the business, or simply important?[92]

III. RAPID REJECTIONS—HOW A.I. USE IN HIRING CAN HAVE A DISPARATE IMPACT

This Part argues that the increased, unregulated use of A.I. in hiring practices has a disparate impact on those in protected classes.[93] Section A analyzes specific types of A.I. used in hiring practices such as personality tests, video interviews, and resume screening.[94] Section B addresses the growing concerns about A.I discrimination.[95] Section C describes the reasons why these practices largely have not been challenged.[96] This Section will also examine how each tool can cause a disparate impact and subsequent violation of Title VII.[97] A.I. reflects the builder who created it and fed it information.[98] Therefore, the main issue that arises from unregulated A.I. use in hiring is biased inputs and design flaws which have a disparate impact on certain protected classes of people.[99] The discrimination that occurs remains unresolved due to both a lack of guidance for employers and a lack of information given to applicants.[100]

90. *Id.*; *see* 137 CONG. REC. S15276-77 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth) (stating that the Act would codify the standards set in *Griggs*).

91. *See* Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J. L. & LIBERTY 1, 104 (2020).

92. *Id.*

93. *See infra* Part III.

94. *See infra* Part III.A.

95. *See infra* Part III.B.

96. *See infra* Part III.C.

97. *See infra* Part III.A.

98. *See* Friedman & McCarthy, *supra* note 4.

99. *See* Ajunwa, *supra* note 20, at 636.

100. *See* Letter from Hon. Michael Bennet, U.S. Senator, to Hon. Janet Dhillon, Chair of the Equal Emp. Opportunity Comm'n (Dec. 8, 2020).

A. Specific Uses of A.I. in Hiring Practices and How They Can Violate Title VII

There are a wide variety of A.I. programs and vendors that allow companies to automate the hiring process.[101] These are often called the modern day "gatekeepers" to employment in the United States.[102] Some are fairly new, such as video interviewing.[103] Other tools, such as pre-employment personality tests, are more traditional but have adopted A.I. over the years.[104] Although these types of tools seem like a less discriminatory way to hire applicants, it is often human biases that heavily influence the inputs into the A.I. which can cause disparate impact.[105] There is also a concern that the increased reliance on these tools by employers, and their belief that they are completely neutral, will cause employers to defer completely to the A.I.[106] This can cause a lack of oversight and decisions that have a discriminatory impact.[107]

Princeton computer scientist Aylin Caliskan has stated that A.I. software can be biased because it is "trained on human data, [a]nd humans are biased."[108] The idea of the "good worker" is often skewed by the inputs entered into the tools by humans that are described below.[109] These can be subjective labels such as intelligence, productivity, and action-oriented worker.[110] Nevertheless, an employer's subjective idea of the type of applicant who may fit these labels can be distorted based on their implicit bias, and the A.I. results will reflect that.[111]

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101. *The Future of Work: Protecting Workers' Civil Rights in the Digital Age: Hearing Before the Subcomm. on Civil Rts. and Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong. 7 (2020) (statement of Ifeoma Ajunwa, Professor).

102. *Id.* at 3.

103. *Id.* at 7.

104. RIEKE ET AL., *supra* note 19, at 5.

105. *See* Brian Resnick, *How Artificial Intelligence Learns to Be Racist*, VOX (Apr. 17, 2017), https://www.vox.com/science-and-health/2017/4/17/15322378/how-artificial-intelligence-learns-how-to-be-racist [https://perma.cc/P6YU-TL4C]. Cathy O'Neil, a data science consultant, analogized A.I. use to how we use tools in our daily lives. Sara Stewart, *The Shady Ways Myers-Briggs and AI Are Used in Corporate Hiring*, N.Y. POST (Mar. 4, 2021), https://nypost.com/2021/03/04/hbos-persona-how-myers-briggs-and-ai-are-being-misused [https://perma.cc/6V2Q-RDJM] ("No technology is inherently harmful; it is just a tool . . . [b]ut just as a sharp knife can be used to cut bread or kill a man, [A.I.] could be used to harm individuals or communities.").

106. *See* Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1292 (2020).

107. *See id.* at 1293-94.

108. Resnick, *supra* note 105. Caliskan also stated that A.I. "learn[s] how to be racist, sexist, and prejudiced in a similar way a child does . . . from their creators." *Id.*

109. McKenzie Raub, *Bots, Bias and Big Data: Artificial Intelligence, Algorithmic Bias and Disparate Impact Liability in Hiring Practices*, 71 ARK. L. REV. 529, 534 (2018).

110. *Id.*

111. *See id.*

1. Personality Tests

For many years, employers have used personality tests as a way to select applicants that best fit their needs.[112] In fact, these personality tests date back to World War I, where soldiers would be assigned certain jobs based on the results.[113] Employers still utilize these types of personality tests, but now they increasingly do so online with the use of A.I.[114] These standardized tests are designed to assess an applicant's skills or particular characteristics.[115] An applicant may see statements such as "I do not obsess over the minor parts of my work," or "[p]eople are easy to understand."[116] These statements would then be rated by the applicant by checking off answers like completely disagree, neutral, strongly agree, etc.[117] The employer then will use A.I. to quickly measure these responses and compare them to the ideal successful employee.[118]

The U.S. Supreme Court has previously ruled on the use of standardized tests in hiring practices, which may provide insight on how the Court could analyze a claim of A.I. discrimination.[119] The Court held in *Albemarle Paper Co. v. Moody* that the criteria of any tests, including personality tests, must be sufficiently related to an employer's legitimate interest in "job-specific" ability.[120] The Court stated that the question of job-relatedness must be viewed in the context of the job and the history of the type of test.[121] It may be an open question of how personality tests relate to any type of job, but as far as the history of the type of test, the most popular being the "Myers-Briggs" test, there is no real evidence of its ability to predict job performance of any kind.[122]

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112. Bornstein, *supra* note 51, at 529.

113. *Id.*

114. *Id.* at 530.

115. *See* RIEKE ET AL., *supra* note 19, at 10.

116. Kelly Cahill Timmons, *Pre-Employment Personality Tests, Algorithmic Bias, and the Americans with Disabilities Act*, 125 PENN. STATE L. REV. 389, 400-01 (2021).

117. *Id.* at 400.

118. *Id.* at 404. The notion of the "successful employee" is usually created by an employer observing their best employees and their behavior through resumes, emails, calls, networks, and other data points that can be assigned to them. *Meeting of October 13, 2016 Transcript*, *supra* note 40. Additionally, the A.I. is capable of screening even written applications by searching for "red flag" words. Stewart, *supra* note 105.

119. Friedman & McCarthy, *supra* note 4.

120. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding that if an employer uses tests, they must show job-relatedness).

121. *Albemarle Paper Co.*, 422 U.S. at 427.

122. *See* Ajunwa, *supra* note 20, at 641 (questioning the reliability of personality tests amidst the growing popularity of its use among several employers in the U.S.); Stewart, *supra* note 105 (referencing the granddaughter of the creator of the Myers-Briggs personality test's statement that

In 2018 the EEOC reached an agreement to resolve a discrimination charge with the retailer Best Buy regarding their use of personality tests.[123] The EEOC found that Best Buy's use of the "Unicru" personality test, which was an automated A.I. tool, adversely impacted applicants based on race and national origin.[124] Although Best Buy did not admit liability, and the charge did not lead to litigation, Best Buy did agree to end their use of Unicru and instead increase the recruiting of minorities, in-house training, and diversity committees.[125]

Personality tests have been shown to be unreliable and, for the most part, not correlative with job performance.[126] A.I.-driven personality tests function by assigning a numerical value to a qualitative characteristic.[127] An issue arises when these values and numbers that the employer assigns come from a homogenous population, which may not be reflective of the applicant pool.[128] Therefore, these tests may have a disparate impact on individuals who may be qualified for the job, but do not "fit into" the preferred cultural characteristics an employer has fed into its program.[129] The difference between who the A.I. would classify as a "good" employee versus a "bad" employee is based on a subjective evaluation, which has been a notorious source of discrimination.[130] As best illustrated in Best Buy's conciliation agreement with the EEOC, disparate impact and discrimination can easily arise from unchecked use of A.I. in hiring.[131]

2. Video Interviewing

Video interviewing is becoming a popular and more convenient option for many employers due to the overall increase in remote work.[132] One vendor, HireVue, uses A.I. to analyze tone of voice and facial

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the purpose of the test was never to determine if someone was "hirable," but instead for people to try and find their true callings).

123. Press Release, Equal Emp. Opportunity Comm'n, Best Buy and EEOC Reach Agreement to Resolve Discrimination Charge (June 6, 2018) [hereinafter Press Release, Best Buy].

124. *Id.*; Alison Overholt, *True or False: You're Hiring the Right People*, FAST CO. (Jan. 31, 2002), https://www.fastcompany.com/44463/true-or-false-youre-hiring-right-people [perma.cc/49PT-WUZ2] (describing the Unicru test as an A.I. tool that allows an employer to "clone [their] best, most reliable people.").

125. Press Release, Best Buy, *supra* note 123.

126. *See* RIEKE ET AL., *supra* note 19, at 25.

127. *Id.*

128. *See id.*

129. *See id.*

130. MIRANDO BOGEN & AARON RIEKE, HELP WANTED: AN EXAMINATION OF HIRING ALGORITHMS, EQUITY, AND BIAS 35 (2018).

131. *See* Press Release, Best Buy, *supra* note 123.

132. *See* Friedman & McCarthy, *supra* note 4.

expressions of applicants on video interviews.[133] Employers generate questions to ask applicants during a video interview and the A.I. technology grades the applicant's responses against the model answers from current, successful employees.[134] To reiterate, there have been no studies or evidence to show that "expressions" have any indication of successful job performance.[135] HireVue claims it tests its A.I. for bias and if bias is found, they then remove the factor causing the disparate impact.[136] The issue, however, is that HireVue's video interviewing A.I. program can negatively grade those with accents, or even struggle to identify faces of women with darker skin in particular, which can lead to negative grades and therefore a lower chance of being selected by the employer.[137] As a whole, facial recognition algorithms are thirty times more likely to make an error identifying darker-skinned women than identifying lighter-skinned men, presenting a genuine issue of race- and gender-based discrimination.[138]

In a study conducted by the American Civil Liberties Union ("ACLU"), a facial recognition program incorrectly identified members of Congress as people who had been arrested.[139] This is mainly because the algorithms are usually trained on white, male faces and voices, which can lead to minorities being negatively affected and "misjudged."[140] In the employment context, this discriminatory, error-prone method can be the difference between an applicant being hired or rejected.[141] Additionally, in the above mentioned ACLU study, African American and Latino Congress members were disproportionately misidentified.[142] If Congress members can be misidentified by A.I., despite their faces being present all across

133. *See* Ajunwa, *supra* note 20, at 626. Other popular vendors include Talview, Spark Hire, and Wepow. *The Future of Work*, *supra* note 101, at 7-8.

134. BOGEN & RIEKE, *supra* note 130, at 36. HireVue's A.I. uses facial expressions, word choice, word complexity, and eye contact to grade the responses. *Id.*

135. Lisa F. Barrett et al., *Emotional Expressions Reconsidered: Challenges to Inferring Emotion from Human Facial Movements*, PSYCH. SCI. IN THE PUB. INT. 1, 16 (2019).

136. BOGEN & RIEKE, *supra* note 130, at 37.

137. *See id.* There is not only a concern of discrimination, but also a concern that A.I. use in video interviewing is not even a legitimate metric to measure successful job performance. *Id.* at 37-38.

138. *See* Letter from Kamala D. Harris, U.S. Senator et al., to Victoria A. Lipnic, Acting Chair of the Equal Emp. Opportunity Comm'n et al. (Sept. 17, 2019).

139. *Id.*

140. Stewart, *supra* note 105.

141. *See* Letter from Kamala D. Harris et al., to Victoria A. Lipnic et al., *supra* note 138.

142. *Id.*

television and the internet, how will facial recognition identify and judge an applicant without those same benefits?[143]

Part of HireVue's technology includes "affect" or emotion recognition.[144] Emotion recognition allows the A.I. program to analyze and understand nonverbal signs like facial expressions and body language in order to determine how a human is feeling, emotionally.[145] In addition to several doubts about the effectiveness of "affect" recognition, it is unclear how an employer's use of this technology could truly be predictive of job performance.[146] Despite its flaws, HireVue is widely used among retail and customer service employers as well as nationally known companies, such as HBO and Staples.[147]

Illinois recently passed the Artificial Intelligence Video Interview Act ("AIVIA"), which seeks to protect applicants from the harm of discrimination in A.I. video interviewing.[148] Under this statute, employers are required to provide notice to applicants of their A.I. use in the interviewing process, explain how the process works to the applicant, and receive consent from applicants to be evaluated by the A.I.[149] However, AIVIA has been criticized because of its ambiguity, both in design and implementation.[150] For instance, the statute places sole responsibility on the employer to explain how A.I. works to applicants.[151] Employers, in general, may not know enough about how A.I. functions in their program to adequately meet the statute's standards.[152] In addition, AIVIA is vague in its implementation by not

143. *See id.* The importance of the Congress members being well-known and having a presence on the internet and television is because A.I. supposedly learns better with the more information it has, thereby theoretically making it "easier" for A.I. to correctly identify a face of someone of national popularity. Resnick, *supra* note 105.

144. Aziz Z. Huq, *Constitutional Rights in the Machine-Learning State*, 105 CORNELL L. REV. 1875, 1914 (2020). Affect recognition differs from facial recognition in that the recognition technology detects and classifies emotions by looking at the person's face. Kate Crawford, *Artificial Intelligence Is Misreading Human Emotion*, ATL. (Apr. 27, 2021), https://www.theatlantic.com/technology/archive/2021/04/artificial-intelligence-misreading-human-emotion/618696 [perma.cc/D6M5-R6ND].

145. Gaundenz Boesch, *AI Emotion and Sentiment Analysis with Computer Vision in 2022*, VISO.AI (Sept. 26, 2021), https://viso.ai/deep-learning/visual-emotion-ai-recognition [perma.cc/BBY2-ZLA5].

146. *See* Huq, *supra* note 144, at 1914-15.

147. *The Future of Work*, *supra* note 101, at 7.

148. *See* 820 ILL. COMP. STAT. 42 (2020).

149. *See id.*

150. Blythe McGregor, *Artificial Intelligence in the Hiring Process*, CIN. L. REV. (Mar. 10, 2020), https://uclawreview.org/2020/03/10/artificial-intelligence-in-the-hiring-process [perma.cc/G52R-DZAJ].

151. *Id.*

152. *Id.*

specifying how the applicant can give consent or even refuse consent and still have an alternative option of consideration.[153]

3. Resume Screening

Resume screening is a way for employers to quickly sift through applications to determine which candidate would be the best fit for their company.[154] The role of the A.I. programs is to parse through the resumes and recommend to employers which candidates they should be contacting first.[155] One vendor, Ideal, uses A.I. to screen through resumes, then rank applicants based on how closely they match the job for which they are applying.[156] In one scenario, a company's A.I. resume screening tool was audited and the audit discovered two factors that proved to be indicative of job performance for that particular employer.[157] One factor was if the applicant was named "Jared" and the other was if the applicant played "high school lacrosse."[158] These factors may prove to be related to job performance based on a possible high, statistical correlation between the two inputs.[159] However, the lack of relation to "actual" job performance outweighs the correlation, which leaves the employer with a discriminatory tool and no valid defense.[160] As for a business necessity defense, it would be difficult for an employer to argue that being named "Jared" or playing "high school lacrosse" are necessary for a successful business.[161]

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153. *Id.*

154. *How to Beat Automated Resume Screening*, *supra* note 17. More than sixty percent of employers currently use automated screening technology. *Id.*

155. Heilweil, *supra* note 48. "Even if you are the perfect fit for a job, if your resume is not optimized for a resume parser, you will not make it through." *How to Beat Automated Resume Screening*, *supra* note 17.

156. Heilweil, *supra* note 48.

157. Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1689-90 (2020) [hereinafter *The Paradox*].

158. *Id.* at 1690.

159. Dave Gershgorn, *Companies Are on the Hook if Their Hiring Algorithms Are Biased*, QUARTZ (Oct. 22, 2018), https://qz.com/1427621/companies-are-on-the-hook-if-their-hiring-algorithms-are-biased [perma.cc/96Y8-LR7F].

160. *Id.*; *see also The Paradox*, *supra* note 157, at 1689-90 (discussing the bias that can arise from a limited data set). Furthermore, it must be noted that the people creating this technology are not necessarily a diverse group, which can lead to A.I. bias. Raub, *supra* note 109, at 540. Only nine percent of graduates from highly regarded computer science programs are minorities. *Id.* As for the workforce within the technology industry, only five percent are from underrepresented groups. *Id.* Forty-one percent of this workforce are women, but fifty-two percent of these women leave these jobs in their thirties. *Id.*

161. *See* Gershgorn, *supra* note 159 ("It's a really great representation of part of the problem with these systems, that your results are only as good as your training data.").

Furthermore, employers run the risk of violating Title VII as a result of unchecked A.I. use through resume screening.[162] If the employer's workforce is largely made up of one race or gender, and the A.I. screens resumes of previous hires, it could negatively affect applicants of another race or gender.[163] Additionally, the A.I. tool may exclude pregnant women or those with disabilities if it is actively excluding those with gaps in their resumes.[164] A less noticeable example of this issue can be if an employer uses the input "aggressive leadership abilities."[165] In this case, the A.I. is not looking for objective factors, but instead making subjective decisions based on previously hired employees, which may mostly be men.[166] Now, the A.I. would be assuming future behavior based on traditionally masculine "cues," excluding those who do not match.[167] Effectively, the A.I. is now stereotyping in the same way a human employer would, but without the obvious consequences.[168] Given the speed of A.I. and its general ability to complete tasks at a high level, the number of applicants this process can negatively affect is significant.[169]

Perhaps the most infamous case of resume screening bias was Amazon's planned A.I. hiring tool.[170] In 2019, Amazon internally developed, and later rejected, a recruiting tool that disfavored the word "woman" as a result of the A.I. being fed an overwhelming amount of resumes belonging to men.[171] Amazon trained the A.I. to analyze ten years of its hiring data, yet the program consistently ranked female applicants lower.[172] Amazon ultimately admitted that the program was not helpful in determining job performance by stating that it was

162. Kevin White & Daniel Butler, *Steps to Reduce Title VII Risks When Hiring With AI*, LAW360 (July 21, 2020), https://www.law360.com/articles/1292974/steps-to-reduce-title-vii-risks-when-hiring-with-ai [perma.cc/XSA7-JSWK].

163. *Id.*; *see also* EXEC. OFF. OF THE PRESIDENT NAT'L SCI. AND TECH. COUNCIL COMM. ON TECH., PREPARING FOR THE FUTURE OF ARTIFICIAL INTELLIGENCE 31 (2016) (illustrating that biased data inputs create a system where the best candidates available may be rejected in favor of applicants who "resemble" past hires).

164. Pavritha Mohan, *How Algorithm-Based Hiring Tools Can Increase Disability Discrimination*, FAST CO. (Jan. 14, 2021), https://www.fastcompany.com/90593541/how-algorithm-based-hiring-tools-can-increase-disability-discrimination [perma.cc/6WDP-TNTP].

165. Bornstein, *supra* note 51, at 564.

166. *Id.*

167. *Id.*

168. *See id.*

169. White & Butler, *supra* note 162.

170. Friedman & McCarthy, *supra* note 4.

171. *Id.* This included the A.I. disfavoring resumes with information about an applicant's participation in a women's hockey team or if an applicant attended "all-women" colleges. *Id.*

172. Gershgorn, *supra* note 159.

abandoned because "the models randomly returned unqualified candidates."[173]

B. Growing Concerns

Several advocacy groups and members of the U.S. Government have expressed their concerns about how these tools may violate Title VII.[174] On July 13, 2021, the ACLU and several other advocacy groups called on the Biden Administration to address growing discrimination in technology, including technologies used by employers in their hiring practices.[175] The letter describes the lack of oversight by the EEOC and overall lack of information regarding the use of these technologies.[176] Some companies in the private sector have also expressed concerns about unregulated A.I. use, such as Somen Mondal, the CEO of Ideal, an A.I. vendor itself.[177] Mondal stated that there is no way to use these tools without extensive auditing; even if the vendor explicitly teaches the A.I. not to discriminate, it can still inadvertently learn how to discriminate.[178] Athena Karp, CEO of HiredScore, another company that uses A.I. to assist employers in hiring applicants, has supported the use of audits by government.[179] In her testimony before the New York City Council regarding the passage of Int. 1894, a recently passed law addressing algorithmic employment discrimination, Karp acknowledged that A.I. use can have discriminatory effects and negatively impact diversity and job opportunities.[180] Karp states that these issues are avoidable and audits can ensure properly designed A.I. tools which can still benefit both employers and potential applicants.[181]

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173. Heilweil, *supra* note 48.

174. Letter from Am. Ass'n of People with Disabilities et al. to Charlotte Burrows, *supra* note 55; Letter from Hon. Michael Bennet to Hon. Janet Dhillon, *supra* note 100 (arguing for more transparency, information, and reform to A.I. use in general and in relation to employment law).

175. Letter from Am. Ass'n of People with Disabilities et al. to Charlotte Burrows, *supra* note 55.

176. *See id.*

177. Heilweil, *supra* note 48.

178. *Id.*

179. *Ethical Implications of Using Artificial Intelligence and Automated Decision Systems: Hearing on Int. 1894 Before N.Y. City Council Comm. on Tech.* (N.Y. 2020) (statement of Athena Karp, Chief Exec. Officer, HiredScore).

180. *Id.* Dr. Frida Polli, CEO of the vendor Pymetrics, expressed similar sentiments regarding the need for audits. *Id.* (statement of Frida Polli, Chief Exec. Officer, Pymetrics). However, Polli believes that the bill should be implemented in a different manner, with a focus on a technical approach, rather than a manual approach. *Id.*; see Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 643-45 (2017), for further discussion regarding a technical approach to auditing.

181. *Ethical Implications of Using Artificial Intelligence and Automated Decision Systems: Hearing on Int. 1894 Before N.Y. City Council Comm. on Tech.*, *supra* note 179.

In addition, ten U.S. Senators wrote a letter to the Chairperson of the EEOC in 2020 expressing their concerns.[182] The Senators stated that this issue, if left unresolved, could lead to high unemployment rates for minorities and an increase in the racial unemployment gap.[183] The EEOC has also expressed concern about this issue.[184] Keith Sonderling, a commissioner at the EEOC, has stated that as a result of A.I., hiring discrimination can occur on a scale never seen before.[185]

Congress has attempted to address this issue in the form of the Algorithmic Accountability Act of 2019.[186] This bill would require commercial vendors of A.I. technology to conduct assessments to evaluate their product and its development process for impacts on accuracy, bias, and discrimination.[187] The proposed legislation did not specifically focus on A.I. use in employment, but it provided a foundational basis for potential oversight and accountability.[188] Nevertheless, the bill was never passed into law.[189] Senator Wyden has stated that he intends to reintroduce the bill in the near future, which demonstrates the continued support and advocacy for reforming A.I. discrimination generally.[190]

Although there are no reported cases directly challenging A.I. use in hiring, there has been growing legal concern on the related matter of A.I. use in the firing of employees.[191] In these cases, several similar

182. Letter from Hon. Michael Bennet to Hon. Janet Dhillon, *supra* note 100.

183. *Id.*

184. Paige Smith, *Artificial Intelligence Bias Needs EEOC Oversight, Official Says*, BLOOMBERG L. (Sept. 1, 2021), https://news.bloomberglaw.com/daily-labor-report/artificial-intelligence-bias-needs-eeoc-oversight-official-says [perma.cc/3M8N-ZGMN].

185. *Id.*

186. Algorithmic Accountability Act of 2019, 116 H.R. 2231, 116th Cong. (2019). This bill uses the term "Automated Decision System" which the bill defines as a "computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that makes a decision or facilitates human decision making, that impacts consumers." *Id.* It is important to note that automated decision system and A.I. are synonymous. *See generally* LEGAL RESEARCH AND LAW LIBRARY MANAGEMENT § 5.19, *supra* note 1 (using terms "automated decisions," "algorithms," and "A.I." interchangeably).

187. *See* H.R. 2231.

188. *See* Nahmias & Perel, *supra* note 38, at 159.

189. Grace Dille, *Sen. Wyden to Reintroduce AI Bias Bill in Coming Months*, MERITALK (Feb. 19, 2021), https://www.meritalk.com/articles/sen-wyden-to-reintroduce-ai-bias-bill-in-coming-months [perma.cc/S4RA-7DPQ] ("Our bill recognizes that algorithms have authors, and without diligent oversight, they can reflect the biases of those behind the keyboard.").

190. *See id.*

191. *Teacher Evaluation Heads to the Courts*, EDUC. WEEK (Oct. 8, 2015), https://www.edweek.org/policy-politics/teacher-evaluation-heads-to-the-courts [perma.cc/DK6Y-ST7L] (indicating around fourteen lawsuits regarding A.I. use in the assessment of teachers); LEGAL RESEARCH AND LAW LIBRARY MANAGEMENT § 5.15, *supra* note 1 ("No courts have come up with any standards that address clear responsibility for liability in the event AI causes harm, and very few laws and regulations specifically address AI.").

challenges arise when relying on a disparate impact theory of discrimination.[192] Plaintiffs do not have proper access to the employer's A.I. and data to verify that the tools used are accurate and testing for qualities related to the job, as required by Title VII in disparate impact cases.[193] In one case, *Hous. Fed'n of Teachers, Local 2415 v. Hous. Indep. Sch. Dist.*, plaintiffs sued under the Fourteenth Amendment, claiming that the A.I. system their employer used was opaque, unfair, and inaccurate.[194] However, the Texas court, despite acknowledging concern of A.I. misuse, found that the program used in this case was related to performance.[195] The question remains whether courts will be as deferential to defendants in cases regarding hiring, as they were in this particular case.[196]

C. Under the Radar of Title VII

As a whole, disparate impact claims have been difficult to establish and prove in court, and plaintiffs have often failed to succeed in these lawsuits.[197] This is mainly because employers have relied on the standards set forth in *Griggs* and have justified any selection tool as job-related and necessary to their business, despite its potential discriminatory effect.[198] In other words, if the inputs used in the A.I. tool are traits of current, successful employees, then on its face the use of the tool is both necessary for the business and also closely related to successful job performance.[199] Additionally, because employment discrimination suits have overwhelmed court dockets, courts seem to be

192. *See Teacher Evaluation Heads to the Courts*, *supra* note 191.

193. *See* Hous. Fed'n of Teachers, Local 2415 v. Hous. Indep. Sch. Dist., 251 F. Supp. 3d 1168, 1176 (S.D. Tex. 2017).

194. Audrey Amerin-Beardsley, *The Education Value-Added Assessment System (EVAAS) on Trial: A Precedent-Setting Lawsuit with Implications for Policy and Practice*, J. EDUC. POL'Y 1, 3-4 (2019). It should be noted that in addition to Title VII and the Fourteenth Amendment, there are other avenues in which similar types of actions can be brought such as under 42 U.S.C. § 1983, which provides for a civil action for deprivation of rights. *See* 42 U.S.C. § 1983.

195. *Hous. Fed'n of Teachers, Local 2415*, 251 F. Supp. 3d at 1179, 1181.

196. *See id.* at 1183.

197. GREGORY, *supra* note 83, at 283; Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558 (2001) (calculating the low percentage of successful plaintiffs in employment discrimination lawsuits, 18.7% as opposed to successful plaintiffs, in for instance, insurance cases, which is 43.6%).

198. *See* Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J. C. & U. L. 547, 549 (2007).

199. Timmons, *supra* note 116, at 409. *But see* Ben Dattner et al., *The Legal and Ethical Implications of Using AI in Hiring*, HARV. BUS. REV. (Apr. 25, 2019), https://hbr.org/2019/04/the-legal-and-ethical-implications-of-using-ai-in-hiring [perma.cc/Y32F-NRBA] (arguing that many A.I. tools do not come from scientifically derived methods and are not actually able to predict successful job performance).

more inclined to restrict the types of claims that can be brought under disparate impact theory.[200] As a result, victims of employment discrimination have usually failed in their attempts to sue employers.[201]

A.I. and its use by employers is not a process that applicants generally know about or are an active part of.[202] This makes it even more difficult for rejected applicants to bring suit under a disparate impact theory because applicants have no way of showing that the employer's A.I. has discriminated against them.[203] The EEOC itself has stated that victims typically lack information about discriminatory hiring practices.[204] Therefore, potential plaintiffs suing employers for A.I. discrimination will likely be unsuccessful because they lack access to the employer's inputs, which may be considered a trade secret.[205] Successful plaintiffs who rely on a disparate impact legal theory often do not have to deal with such a burden, due to somewhat easier access to an employer's hiring criteria, such as grades on an employment test, or data points in a proficiency exam.[206] Plaintiffs may have more difficulty accessing an employer's A.I. inputs, mostly because of the complexity of A.I., intellectual property law, and trade secret protection.[207] This heavy burden is best described by Yifat Nahmias and Maayan Perel:

> While these systems could be as complex as the human brain, they cannot be explained by legal doctrines that focus on human conduct rather than the learning capabilities of algorithms. This means that members of the public have no way of knowing how the decision-making process works, what the goals are that the system was designed to carry out, or how a specific recommendation or decision was derived.[208]

200. Shoben, *supra* note 67, at 620-21.

201. GREGORY, *supra* note 83, at 283.

202. *See* Letter from Hon. Michael Bennet to Hon. Janet Dhillon, *supra* note 100.

203. *See* Ajunwa, *supra* note 20, at 639-40; *cf.* RIEKE ET AL., *supra* note 19, at 7 (stating that A.I. does not necessarily make affirmative hiring decisions for an employer; it mostly is a tool for automatic rejections).

204. EEOC, ADVANCING OPPORTUNITY: A REVIEW OF THE SYSTEMIC PROGRAM OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2016), https://www.eeoc.gov/advancing-opportunity-review-systemic-program-us-equal-employment-opportunity-commission [https://perma.cc/5CPS-XTWC].

205. Ajunwa, *supra* note 20, at 630; *cf.* Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81 (emphasizing the difficulties in allowing the public to see how an employer uses A.I.).

206. *See* Ajunwa, *supra* note 20, at 640.

207. *Id.* at 639-40, 650-51.

208. Nahmias & Perel, *supra* note 38, at 154-55.

Although A.I. discrimination may seem non-existent given a lack of formal complaints, it is a real and destructive issue.[209] As a result, several law firms throughout the country are preparing for lawsuits related to A.I. hiring discrimination.[210] The legal gaps, however, remain, and a narrowly tailored solution is necessary to keep employers and vendors accountable for any disparate impact.[211]

IV. "[AUDIT] THE POD BAY DOORS, HAL"[212]—RESEARCH, UPDATED GUIDANCE, AND AUDITS BY THE EEOC ARE NECESSARY TO STOP A.I. DISCRIMINATION IN HIRING

This Part will explain why the EEOC must update the UGESP to recommend that employers inform applicants of the A.I. they utilize and to issue informal guidance to both vendors and employers to test and audit their technologies.[213] It is the providence of the UGESP to provide guidance to employers regarding employee selection procedures.[214] Secondly, the EEOC should conduct further research on A.I. use, with an option to make such research public.[215] Depending on their findings, the EEOC should increasingly invoke commissioner charges in order to investigate and audit systemic employment discrimination within A.I. use.[216] These audits should adopt the basic "anti-bias" standards set by the Algorithmic Accountability Act as well as Int. 1894, the recently passed bill from the New York City Council.[217]

Subpart A will discuss the reasons why the EEOC is best equipped to handle this issue.[218] Subpart B will discuss updating the UGESP and

209. *See* Smith, *supra* note 184.

210. Paige Smith & Jaclyn Diaz, *Law Firms Fill Void Left by Lawmakers in AI Discrimination Space*, BLOOMBERG L. (July 19, 2019), https://news.bloomberglaw.com/daily-labor-report/law-firms-fill-void-left-by-lawmakers-in-ai-discrimination-space [perma.cc/S5PY-9PLK]. Employers have approached firms, such as Paul Hastings, DLA Piper, and Fisher Phillips, expressing interest in learning more about A.I. and how they can avoid liability in the face of increasing complaints from workers. *Id.*

211. *See* Letter from Am. Ass'n of People with Disabilities et al. to Charlotte Burrows, *supra* note 55.

212. 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer Pictures 1968).

213. *See infra* Part IV.

214. 29 C.F.R. § 1607.1 (2020) ("These guidelines incorporate a single set of principles which are designed to assist employers . . . to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin.").

215. *See infra* Part IV.C.

216. *See infra* Part IV.C.

217. H.R. 2231; Sale of Automated Employment Decision Tools, N.Y.C. COUNCIL Int. No. 1894 (2020), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=ID [perma.cc/S7RA-SSA6].

218. *See infra* Part IV.A.

recommended guidance.[219] Subpart C will illustrate how the research, commissioner charges, and anti-bias audits should function.[220] Subpart D will address counterarguments that have been proposed, and the reasons they would not be feasible or successful.[221]

A. Why the EEOC Is Best Equipped

The EEOC, since its inception, has played a significant role in preventing employment and hiring discrimination.[222] In fact, the EEOC can act, and has previously acted on behalf of plaintiffs by becoming a party in an action.[223] As a complaining party, the EEOC may bring suit to enjoin employers from engaging in discriminatory hiring practices as well as pursue damages.[224] The EEOC, or any enforcement agency for that matter, has had difficulty in pressuring employers and vendors to audit their A.I. tools and consider less discriminatory alternatives.[225] However, that is beginning to change.[226]

The EEOC held a meeting in 2016 with witness testimony regarding the use of A.I. in employment and its implications.[227] In this meeting, several witnesses demonstrated the need for increased education and research, updating EEOC guidelines, and even audits.[228] The EEOC has the ability to implement these recommended changes.[229] Although it is true that the EEOC is overburdened with several complaints and has been since its inception, Jenny Yang, former Chairperson of the EEOC, has stated that the EEOC was capable of setting auditing standards.[230] While Yang was Chairperson in 2016, she

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219. *See infra* Part IV.B.

220. *See infra* Part IV.C.

221. *See infra* Part IV.D.

222. *See* GREGORY, *supra* note 83, at 273.

223. EEOC v. Waffle House, Inc., 534 U.S. 279, 287 (2002).

224. *Id.*

225. RIEKE ET AL., *supra* note 19, at 39; *see also* Press Release, Equal Emp. Opportunity Comm'n, EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness (Oct. 28, 2021) (announcing increased actions on the part of the EEOC to help address and remedy this issue).

226. *Meeting of October 13, 2016 Transcript*, *supra* note 40.

227. *Id.*

228. *See id.*

229. *See* Letter from Am. Ass'n of People with Disabilities et al. to Charlotte Burrows, *supra* note 55.

230. GREGORY, *supra* note 83, at 273; *The Future of Work: Protecting Workers' Civil Rights in the Digital Age: Hearing Before the Subcomm. on Civil Rts. and Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong. 13 (2020) [hereinafter *Hearing*] (statement of Jenny R. Yang, Senior Fellow, Urban Institute). In fact, the A.I. vendor HireVue, who had a third party audit their technology, stated that they sought to follow the strict standards set by the EEOC. Lindsey Zuloaga, *Industry Leadership: New Audit Results and Decision on Visual Analysis*, HIREVUE (Jan. 11, 2021),

led the meeting with the witnesses mentioned above.[231] This demonstrates the EEOC's research capability and growing willingness to address this issue.[232] Chairperson Yang herself expressed that the EEOC would work to guide employers on how A.I. actually works, as opposed to how vendors advertise their products.[233]

Furthermore, the EEOC has already taken the first steps in directly remedying this issue.[234] In October of 2021, EEOC Chairperson Charlotte A. Burrows announced an initiative that would address A.I. bias in the hiring process.[235] The EEOC, as a federal entity, could act as a leader because of its resources and widespread reach, thereby allowing states and localities to also follow suit.[236] Perhaps the most notable part of this initiative is the willingness to not only further research this issue, but to act on it by establishing an "internal working group" to coordinate the EEOC's efforts.[237] Therefore, although the EEOC is understaffed, underfunded, and has faced a backlog of cases over the years, it can still set standards for audits and even allow for third parties to conduct audits with the proper framework.[238] Given recent developments, that framework is beginning to take shape and further prove that the EEOC is a capable entity in ensuring that A.I. is properly used in hiring practices.[239] Even if it is true that private attorneys may have more success as far as legal action against specific employers in employment discrimination cases, A.I. discrimination in hiring is widespread, and it is the duty of the EEOC to further research potentially biased selection procedures and ensure that these technological measures do not act as "built-in headwinds for minority groups."[240]

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https://www.hirevue.com/blog/hiring/industry-leadership-new-audit-results-and-decision-on-visual-analysis [perma.cc/ESG6-W39T]. This is particularly important because it shows the need for increased guidance and a larger role for the EEOC. *See* Letter from Am. Ass'n of People with Disabilities et al. to Charlotte Burrows, *supra* note 55.

231. *Meeting of October 13, 2016 Transcript*, *supra* note 40.

232. *See id.*

233. *Id.*

234. Press Release, Equal Emp. Opportunity Comm'n., *supra* note 225.

235. *Id.*

236. *See* GREGORY, *supra* note 83, at 75.

237. *See* Press Release, Equal Emp. Opportunity Comm'n., *supra* note 225.

238. GREGORY, *supra* note 83, at 274; *Hearing*, *supra* note 230, at 13. This framework can resemble what has been done at the Securities and Exchange Commission ("SEC"). *Hearing*, *supra* note 230. The SEC empowers independent auditing agencies to examine financial statements, using standards set by and governed by the SEC. *Id.*

239. *See* Press Release, Equal Emp. Opportunity Comm'n., *supra* note 225.

240. GREGORY, *supra* note 83, at 277 (suggesting that the EEOC's power as a deterrent to discriminatory behavior is not as strong as an employer's fear of a private attorney because of the difference in costs and risks between an EEOC ruling and litigation in front of a jury). *But see* Letter from Hon. Michael Bennet to Hon. Janet Dhillon, *supra* note 100 (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

B. Updating the Uniform Guidelines on Employee Selection Procedures

The EEOC should update the UGESP in order to better inform employers and the public of the dangers of A.I. discrimination.[241] The EEOC adopted the UGESP in 1978 to provide guidance to employers on how to conform to Title VII requirements, especially in their hiring practices.[242] More specifically, the UGESP provides guidance on the use of "tests" or other selection procedures.[243] These guidelines, however, only address general, traditional methods of hiring; the UGESP makes no mention of A.I.[244]

Additionally, the EEOC should update the UGESP to include language similar to the standards set forth in the recently passed New York City Council Bill, Int. 1894.[245] Int. 1894 introduces a duty on an employer to give notice to an applicant about the use of A.I. in their hiring process.[246] Int. 1894 states that anyone who uses A.I. or any automated tool must notify an applicant that such tool was used in making their decision and more importantly, which characteristics or qualifications the tool analyzed in making its decisions.[247] Employers and vendors would have to disclose sufficient, actionable information that would allow an applicant to improve their chances for acceptance.[248] In fact, disclosures have been recommended as a way to create transparency by the Algorithmic Justice League, a nonprofit advocacy

241. *See* Smith, *supra* note 184. On a related matter, the UGESP should be updated to better address employers using their own studies to pass the job-related standard. RIEKE ET AL., *supra* note 19, at 38-39.

242. 29 C.F.R. § 1607.1; *see also* RIEKE ET AL., *supra* note 19, at 29-30 (describing the origin of the UGESP). Although the UGESP are not law, they have been given deference in case law and viewed as authoritative. Ajunwa, *supra* note 20, at, 675-76; *see also* Gulino v. N.Y. State Educ. Dep't., 460 F.3d 361, 384 (2d Cir. 2006) (noting that the UGESP are a "primary yardstick" to measure the defendant's attempt to validate a standardized test).

243. 29 C.F.R. § 1607.1. It must be noted that the UGESP only applies to discrimination on the basis of race, sex, gender, or ethnicity and not on disability or age. RIEKE ET AL., *supra* note 19, at 29-30.

244. *See* 29 C.F.R. § 1607. The UGESP defines selection procedures as "the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms." *Id.* § 1607.16.

245. *See* Sale of Automated Employment Decision Tools, N.Y.C. COUNCIL Int. No. 1894, *supra* note 217.

246. *Id.*

247. *Id.*

248. *Ethical Implications of Using Artificial Intelligence and Automated Decision Systems: Hearing on Int. 1894 Before N.Y. City Council Comm. on Tech.*, *supra* note 179 (statement of Julia Stoyanovich, Assistant Professor of Comput. Sci. and Eng'g, Tandon School of Eng'g).

group.[249] The disclosure must be specific, and have enough clarity so that an average applicant will know how the employer's A.I. came to its decision.[250]

Furthermore, the guidelines should include language advising employers to notify applicants about potential liability under disparate impact theory for biased A.I.[251] This would be a crucial step in allowing applicants to understand how A.I. in hiring functions and can offer transparency for those who feel as if they have been discriminated against due to the use of this technology.[252] The guidelines should recommend that employers explain the rationale for their decision to reject an applicant when using A.I., which can in turn provide applicants with information that might be useful in determining if they were discriminated against.[253] This can be done, for instance, in the form of a summary, provided to the candidate before they submit their application, similar to a disclaimer, of how the A.I. functions in making its decisions.[254]

The EEOC could also look to the European Union's General Data Protection Regulation ("GDPR") to help craft language that should be included in such a summary.[255] Article Twelve of the GDPR states that the "[c]ontroller [of the A.I.] shall take appropriate measures to provide any information . . . and any communication . . . relating to processing to

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249. Khari Johnson, *The Movement to Hold AI Accountable Gains More Steam*, WIRED (Dec. 2, 2021), https://www.wired.com/story/movement-hold-ai-accountable-gains-steam [perma.cc/FLR6-J356].

250. *See Ethical Implications of Using Artificial Intelligence and Automated Decision Systems: Hearing on Int. 1894 Before N.Y. City Council Comm. on Tech.*, *supra* note 179 (statement of Julia Stoyanovich, Assistant Professor of Comput. Sci. and Eng'g, Tandon School of Eng'g). The disclosures could possibly be modeled after nutritional labels in the food industry, which provide clear and concise information about food production. *Id.*; *see also* Julia Stoyanovich & Bill Howe, *Nutritional Labels for Data and Models*, BULL. OF THE IEEE COMPUT. SOC'Y TECH. COMM. ON DATA ENG'G 13, 13 (2019) (introducing the idea of using a nutritional label model for A.I. use disclosures).

251. *See* Letter from AI Now Inst. at NYU et al., to Laurie A. Cumbo, Majority Leader, New York City Couns. (Nov. 11, 2020) (arguing for more consistent, less vague language as well as advocating for a private right of action).

252. *See* Letter from Am. Ass'n of People with Disabilities et al. to Charlotte Burrows, *supra* note 55.

253. *See Hearing*, *supra* note 230, at 13.

254. *See* Sale of Automated Employment Decision Tools, N.Y.C. COUNCIL Int. No. 1894, *supra* note 217.

255. Regulation 2016/679, art. 12, 2016 O.J. (L 119/1) (EU). The European Union is currently addressing the issue of discrimination arising from A.I. use in hiring. Asher-Schapiro, *supra* note 8. For further discussion on the growing movement to regulate A.I. use in hiring in the European Union, see Catherine Skrzypinski, *EU Proposal Could Limit AI Use in Recruiting and Hiring*, SHRM (June 4, 2021), https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/eu-proposal-could-limit-ai-use-in-hiring.aspx [perma.cc/3CAK-U22H].

the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language . . . ."[256] The GDPR further states that this information could even be provided electronically, which could allow for applicants to easily learn about the use of A.I. in the hiring process in the midst of completing their online applications.[257] Commissioner Sonderling has stated that providing guidelines for both employers and workers should be a priority for the EEOC.[258] Given the difficulty in motivating both the EEOC and employers to address this issue, sufficient information must at least be given to applicants in order to bring civil actions against their employers or vendors.[259] As Justice Louis Brandeis said, in regards to the importance of transparency: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[260]

C. Research, Commissioner Charges, and Audits

The EEOC has acknowledged that it needs more information regarding A.I. use in hiring in order to assist in its objective of enforcing Title VII.[261] Title VII, however, gives the EEOC authority to conduct research, engage in technical studies, and release this information to the public.[262] The problem arises if employers or vendors refuse to voluntarily offer up their technology to the EEOC, leaving only the option of a subpoena.[263] It would be difficult, however, for the EEOC to issue a subpoena to compel employers or vendors to voluntarily disclose their technology for research and audits due to trade secret concerns and the potential for litigation with the EEOC via a commissioner charge.[264] Also, a subpoena issued by the EEOC is judicially enforceable only if it

256. Regulation 2016/679, art. 12, 2016 O.J. (L 119/1) (EU).

257. *See id*. *But see generally* Lilian Edwards & Michael Veale, *Slave to the Algorithm? Why a "Right to Explanation" is Probably Not the Remedy You Are Looking For*, 16 DUKE L. & TECH. REV. 18, 33-35 (2017) (discussing the insufficiency of the European Union's model under the GDPR to address the "right to explanation").

258. Smith, *supra* note 184.

259. *See id.* This may ease the burden of the statistical proof that is put upon plaintiffs as well as helping the plaintiff identify if the employer's A.I. is the specific employment practice that is causing the disparity. Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977).

260. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. 1914); *see also* Edwards & Veale, *supra* note 257, at 39 (quoting Brandeis in the context of algorithmic transparency).

261. EEOC, *supra* note 204.

262. 42 U.S.C. § 2000e-4(g)(5).

263. *See* Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81.

264. *Id.* A commissioner charge is the initiation of an investigation of discrimination under Title VII launched not by a complainant, but by any commissioner within the EEOC. Heriot, *supra* note 91, at 162.

is pursuant to an arguable basis of a charge of discrimination.[265] Effectively, if there are no reports of discrimination alleged by an applicant, there is no basis for the EEOC to issue a subpoena.[266] Therefore, the EEOC should first attempt to entice employers and vendors to voluntarily allow the EEOC to audit their technologies with the tradeoff of keeping any trade secrets and confidential information private and not released to the public.[267] Some companies, including HireVue, have already undergone third-party audits to assess their use of A.I. in the hiring process.[268] In fact, under § 705(g) of Title VII, the EEOC already has the authority to "make such technical studies as are appropriate to effectuate the purposes and policies of [Title VII] . . . ."[269] The cooperation and research that would result would be a large step in fixing the systemic issue of A.I. bias without leading to litigation.[270]

In lieu of volunteers, the EEOC should then increase the use of commissioner charges to combat A.I. hiring discrimination.[271] In the

265. Equal Emp. Opportunity Comm. v. Maritime Autowash, Inc., 820 F.3d 662, 665 (4th Cir. 2016).

266. Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81.

267. *See id.* Employers or vendors may prefer voluntary audits with the EEOC because of the high costs of resolutions resulting from EEOC commissioner charges. Kelly Trindel et al., *Fairness in Algorithmic Employment Selection: How to Comply with Title VII*, 35 ABA J. LAB. & EMP. L. 241, 242 (2021). In 2019, employers paid nearly $350 million to resolve discrimination charges. *Id.*; *see* EQUAL EMP. OPPORTUNITY COMM'N, FREEDOM OF INFORMATION ACT, https://www.eeoc.gov/commissioner-charges-and-directed-investigations [perma.cc/9ZVZ-EK82] (last visited Aug. 12, 2023) (discussing the EEOC's ability to limit certain information to the public, even with a FOIA request).

268. Susanna Vogel, *The Federal Government is Warning Employers that Hiring AI Must Comply with Civil Rights Laws*, HR BREW (Nov. 8, 2021), https://www.morningbrew.com/hr/stories/2021/11/08/eeoc-is-scrutinizing-potential-bias-arising-from-ai-in-hiring [perma.cc/XHN7-THMN].

269. 42 U.S.C. § 2000e-4(g)(5). The EEOC also has the authority to make such studies public, however, employers and vendors may be cautious to cooperate because they would not want the risk of their trade secrets known to the public. Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81. *But see* GLADYS GLICKMAN, FRANCHISING § 19.02 (Matthew Bender ed., 2021) ("Companies using an A.I. hiring program should prepare to turn over hiring information to the EEOC.").

270. *See* Letter from Hon. Michael Bennet to Hon. Janet Dhillon, *supra* note 100; Andrew Birt, *How to Fight Discrimination in AI*, HARV. BUS. REV. (Aug. 28, 2020), https://hbr.org/2020/08/how-to-fight-discrimination-in-ai [perma.cc/7E8E-6YY6] (considering the need for employers to coordinate with the EEOC and conduct audits on their technologies).

271. *See* Letter from Am. Ass'n of People with Disabilities et al. to Charlotte Burrows, *supra* note 55. Despite some resistance from the EEOC in issuing commissioner charges, as seen in their January 15 letter to U.S. Senators, the EEOC is currently investigating two cases of algorithmic discrimination in the hiring process. *See* Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81. *But see* Chris Opfer, *AI Hiring Could Mean Robot Discrimination Will Head to Courts*, BLOOMBERG L. (Nov. 12, 2019), https://news.bloomberglaw.com/daily-labor-report/ai-hiring-could-mean-robot-discrimination-will-head-to-courts [perma.cc/5WL9-RQ5C] (stating that the EEOC is currently investigating cases of A.I. discrimination).

absence of an applicant alleging disparate impact, the EEOC is empowered to issue a commissioner charge and investigate potential discrimination.[272] A commissioner charge could be more effective in rooting out discrimination because applicants may be apprehensive in launching complaints against an employer they would like to work for.[273] Additionally, this preemptive step can alleviate applicants' concerns about "algorithmic blackballing," a term coined by Professor Ajunwa.[274] Algorithmic blackballing describes the fear that a vendor may sell applicants' data profiles to other vendors.[275] This would potentially allow for the same applicant to be rejected over and over again from different employers, perhaps for the same discriminatory reason.[276]

Commissioner Sonderling has supported the idea of using commissioner charges to investigate A.I. discrimination in hiring.[277] A charge can generally arise if the EEOC learns of discrimination from community leaders, observations from field offices, or from an investigation of an individual charge.[278] A charge can also arise if a commissioner simply learns of a case of discrimination and subsequently launches an investigation.[279] Although commissioner charges are not meant to be adjudicatory, they can lead to conciliation, which is another option for employers or vendors to remedy potential issues regarding their use of A.I. without necessarily going to court.[280]

Moreover, the EEOC should audit employers' use of A.I. in order to ensure fairness in the face of rapid, unfettered use of such technology.[281] Audits are a way to evaluate A.I. and to check the

272. 29 C.F.R. § 1601.11. A commissioner charge allows the EEOC to investigate claims, use state and local resources, and issue subpoenas to assist in its investigation. *Id.* § 1601.15. The Subpoenas are still subject to the standard set forth in *Maritime Autowash, Inc.* Equal Emp. Opportunity Comm. v. Maritime Autowash, Inc., 820 F.3d 662, 665 (4th Cir. 2016).

273. *See* RIEKE ET AL., *supra* note 19, at 35.

274. Ajunwa, *supra* note 20, at 682.

275. *Id.*

276. *Id.*

277. Smith, *supra* note 184.

278. *Commissioner Charges and Directed Investigations*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/commissioner-charges-and-directed-investigations [perma.cc/3TTA-ADEZ] (last visited Aug. 12, 2023).

279. *Id.*

280. *See* EEOC v. Chesapeake & O.R. Co., 577 F.2d 229, 232 (4th Cir. 1978); Press Release, Best Buy, *supra* note 123 (demonstrating that conciliation is a viable option for both companies and the EEOC to consider). "Once the investigating office has obtained sufficient information to determine the nature and scope of any violation, the investigating EEOC office can work with the respondent to develop a voluntary resolution." *Commissioner Charges and Directed Investigations*, *supra* note 278.

281. *See Hearing*, *supra* note 230, at 13.

algorithms for bias, flaws, accuracy, *inter alia*.[282] In a 2016 report from the National Science and Technology Council, Andrew Moore, Dean of Computer Science at Carnegie Mellon University, stated that audits are the most effective way to minimize the risk of unintended outcomes.[283] However, each type of technology can be audited in different ways and look for different things.[284] This Note proposes specific audits that are guided by language provided by previous legislation from different sources.[285] As stated previously, the Algorithmic Accountability Act of 2019 sought to implement audits on A.I. generally to address bias and discrimination arising from the technology.[286] The language adopted in this legislation should be adopted as a framework for the EEOC in audits of employers' or vendors' A.I.[287] First, the audit must elicit a detailed description of the system and its purpose.[288] Second, the audit must assess the relative costs and benefits of the system, taking into account information available to "consumers."[289] Third, the audit should determine the risk that the A.I. may contribute to inaccuracies, bias, or discriminatory decisions.[290] Fourth, an explanation is needed of the steps taken to minimize such risks and if the vendor or employer had any safeguards.[291]

The audit itself could be completed by a vendor or employer through a form, an example of which has been entered into the legislative record of Int. 1894.[292] The form itself would ask the vendor or employer several questions regarding the use of the A.I. and provide

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282. Alex Engler, *Auditing Employment Algorithms for Discrimination*, BROOKINGS (Mar. 12, 2021), https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination [perma.cc/MY59-B64E].

283. EXEC. OFF. OF THE PRESIDENT NAT'L SCI. AND TECH. COUNCIL COMM. ON TECH., *supra* note 163, at 31-32 ("Ethical training for A.I. practitioners and students is a necessary part of the solution . . . [h]owever ethics alone is not sufficient . . . [it] needs to be augmented with the technical capability to put good intentions into practice."). In other words, research, ethics, and testing are necessary to have a truly fair A.I. system. *Id.* at 3, 31.

284. Engler, *supra* note 282.

285. *See supra* Part IV.

286. *See* H.R. 2231.

287. *See* Dille, *supra* note 189.

288. H.R. 2231.

289. *Id.* Fewer than half of Americans are actually familiar with the fact that A.I. can review job applications without any human involvement. Aaron Smith & Monica Anderson, *Automation in Everyday Life*, PEW RSCH. CTR. 1, 50 (2017). Furthermore, a majority of Americans are actually concerned about the use of A.I. to review job applications. *Id.*

290. H.R. 2231.

291. *Id.*

292. *Ethical Implications of Using Artificial Intelligence and Automated Decision Systems: Hearing on Int. 1894 Before N.Y. City Council Comm. on Tech.*, *supra* note 179; Memorandum from Frida Polli, Chief Exec. Off., Pymetrics, et al., to New York City Couns. Tech. Comm. (Nov. 13, 2020).

context and methods to prove the standards set forth above.[293] The questions would be designed to gather the sample of applicants, the use of race or gender, etc. in the process, the selection rate, and the rate at which an applicant is successful.[294] These information points would then be used to complete an adverse impact test to determine if the A.I. is causing a disparate impact.[295] Furthermore, the form would include explanatory questions, such as if the employer uses race, gender, *inter alia* as a direct factor, if they have ever undergone a third-party audit, as well as what characteristics the tools designed to assess.[296] This would allow for employers and vendors to quickly correct any discriminatory effects to ensure not only compliance with the law, but a fair and more equitable hiring process.[297] Audits can be influential and can lead employers to perhaps see their own mistakes and fix them, before further damage is done.[298] If an employer or vendor disagrees and believes that the audit is incorrect in its analysis, it might be subject to a form of audit anyway through court proceedings to show that the selection criteria has the least discriminatory impact, even if they could prove business necessity.[299] For instance, HireVue, the company mentioned previously, underwent a third-party audit in 2018 to analyze their use of A.I. in facial recognition during job interviews.[300] Although critics claim this audit was flawed due to the lack of assessment of some crucial elements,

293. *Id.*

294. *Id.*

295. *Id.* Under adverse impact testing, "a selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. § 1607.4(D). In addition, "smaller differences in selection rate may nevertheless constitute adverse impact where they are significant in both statistical and practical terms . . . ." *Id.* Adverse impact testing is considered a form of testing for "fairness" and is a "bedrock" of the UGESP. Trindel et al., *supra* note 267, at 251.

296. Memorandum from Frida Polli et al. to New York City Couns. Tech. Comm., *supra* note 292.

297. *See id.*

298. *See* Johnson, *supra* note 249.

299. Daniel Gyebi, *The Civil Rights Act of 1991: Favoring Women and Minorities in Disparate Impact Discrimination Cases Involving High-Level Jobs*, 36 HOW. L.J. 97, 105 (1993). Although the "four-fifths" rule is often criticized for its lack of effectiveness, it is still codified in the UGESP and used by parties in court, with mixed results. *See* Heriot, *supra* note 91, at 39, 41. *But see* 29 C.F.R. § 1607.4(D); Guardians Ass'n. of N.Y.C. Police Dep't, Inc. v. Civ. Serv. Comm'n., 630 F.2d 79, 86-88 (2d Cir. 1980); Johnson v. City of Memphis, 355 F. Supp. 2d 911, 915 (W.D. Tenn. 2005) (holding that the "four-fifths" rule can be used in analysis, but it cannot be the only piece of evidence; statistical proof has greater significance).

300. Johnson, *supra* note 249.

HireVue decided to halt their use of A.I.[301] The company stated that they hope their decision becomes the industry standard.[302]

D. Counterarguments

In response to U.S. Senators voicing their concerns about A.I. use in hiring, Brett A. Brenner, the Associate Director of Communications and Legal Affairs at the EEOC, issued an informal letter in response.[303] Brenner discounts the notion that there is growing discrimination through the use of hiring technology by stating that the EEOC had not received any charges from complainants.[304] However, as stated previously, this is partially due to the lack of knowledge most applicants have regarding the role A.I. plays in their application process.[305]

Secondly, Brenner states that even if the EEOC were to audit A.I., it would likely be unsuccessful because a tool exhibiting disparate impact for one employer might not have the same effect for another employer.[306] Indeed, there have actually been doubts raised about the scope of audits, lack of definable standards, and high costs, which may be particularly concerning to the employers who are actively reducing costs by using automated hiring systems.[307] However, the solution this Note proposes is individual audits based on specific employers, conducted not by the employers, but by the EEOC itself.[308] Proposed mandated audits across the board perhaps would fit into the scope of danger Brenner has warned about.[309] Nevertheless, the type of audit proposed in this Note would initially be voluntary and evaluate individual inputs each employer enters into the A.I., as well as how much they rely on the A.I. to make their decisions.[310] There would also

301. Zuloaga, *supra* note 230.

302. *Id.*

303. Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81.

304. *Id.*

305. EEOC, *supra* note 204.

306. Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81.

307. Engler, *supra* note 282 (expressing the concern that audits may not solve the problem they intend to root out because of the several different types of audits and the different effects they can cause); Ajunwa, *supra* note 20, at 683 (detailing the high costs of audits and the potential "undue" burden on employers).

308. *See supra* Part IV.C.

309. Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81 (arguing that audits or studies in general would expose trade secrets or confidential information); Ajunwa, *supra* note 20, at 626 (arguing for mandated external and internal audits to solve the issue of A.I. hiring discrimination).

310. *See* H.R. 2231; Sale of Automated Employment Decision Tools, N.Y.C. COUNCIL Int. No. 1894, *supra* note 217.

be definable standards set forth by the foundations laid by the Algorithmic Accountability Act as to avoid governmental overreach.[311]

Brenner also states that another challenge to the EEOC's involvement and subsequent regulation of A.I. use in hiring is that employers will refuse to voluntarily allow the EEOC to audit their technology due to trade secret and confidentiality concerns.[312] Although this may be true, this Note only proposes voluntary audits by the EEOC as a first resort in an effort to accomplish its purpose of rooting out discriminatory hiring practices under Title VII.[313] Nonetheless, the law imposes a duty of care on employers to ensure that their employment practices and decisions do not have any discriminatory effects.[314] Therefore, audits in any form would not be a burden to employers, but simply a check on whether their duty is being fulfilled.[315]

It has also been argued that even if audits can be effective in solving the issue of A.I. discrimination, including in the hiring process, they should be done technically, which is in contrast to a manual audit proposed in this Note.[316] As stated previously, algorithmic discrimination lies in biased inputs and design flaws.[317] These are social, human issues that cannot be resolved through a purely technical approach.[318] This is because a technical approach can only be successful to the extent that the technology can adequately address the sources of bias.[319] For example, a hiring algorithm may erroneously classify women candidates negatively because of a biased input, such as correlating physical strength with successful job performance, when physical strength may not actually cause more productivity.[320] A technical solution may be to add more data-points to include candidates who would be predicted to be poor employees, so the A.I. could learn to find the best candidate based on "randomness," which would emulate the real world.[321] However, this process fails to recognize the source of the

311. *See* H.R. 2231.

312. Letter from Brett A. Brenner to Hon. Michael Bennet, *supra* note 81.

313. *See supra* Part IV.C.

314. Ajunwa, *supra* note 20, at 683 (analogizing Professor Richard Thompson Ford's analysis on an employer's duty to care to the need for employers who utilize A.I to bear any type of burden that would arise out of audits, in order to ensure there would be no discriminatory outcomes).

315. *Id.* at 683-84.

316. Kroll et al., *supra* note 180, at 643-45. A technical approach is generally defined as using technology to tweak the design of an algorithm in order to create fair outcomes. *See id.* at 643.

317. *See* Ajunwa, *supra* note 20, at 636.

318. Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189, 196 (2017).

319. *Id.*

320. Kroll et al., *supra* note 180, at 684.

321. *Id.*

biased inputs, such as if the employer has a culture of sexual harassment or lack of growth opportunities.[322] A manual approach avoids this by asking the employer questions and trying to root out any issues with the inputs their A.I. is analyzing.[323] A technical approach by adding more data-points, in contrast, would either ignore the root of the issue, or worse still, further the discriminatory effect.[324]

There is also a growing call for legislative solutions, both on the federal and state level.[325] Texas, Washington, and Illinois have all passed laws protecting biometric privacy, which could have an impact on A.I. use in hiring due to the algorithm's reliance on biometrics to make decisions.[326] In addition, the previously mentioned Algorithmic Accountability Act, introduced in Congress, has attempted to address A.I. discrimination.[327] However, these solutions are either too vague to directly address disparate impact issues or unable to progress into becoming law.[328] Even if the Algorithmic Accountability Act, in its reintroduced form, were to pass into law, it may not fully encompass the issue of A.I. bias in hiring, specifically.[329] There is a concern that the law as a whole may not be strong enough and can simply be a "superficial" law with no real enforcement.[330] This Note argues for an administrative solution in the executive branch through the EEOC in order to directly audit and potentially investigate individual employers and vendors to ensure the erasure of disparate impact caused by A.I.[331]

V. CONCLUSION

A.I. has become an increasingly popular tool for employers to find potential employees.[332] While there are several advantages to A.I. use,

322. Kim, *supra* note 318, at 195.

323. *See* Memorandum from Frida Polli et al. to New York City Couns. Tech. Comm., *supra* note 292.

324. *See id.*

325. Martinez, *supra* note 21.

326. *Id.*

327. *See* H.R. 2231.

328. McGregor, *supra* note 150; Dille, *supra* note 189. Many lawmakers do not seem to fully understand how A.I. works and how it has a disparate impact on hiring practices. Mark Sullivan, *Fighting AI Bias Needs to be a Key Part of Biden's Civil Rights Agenda*, FAST CO. (Feb. 11, 2021), [hereinafter *Fighting AI Bias*], https://www.fastcompany.com/90599820/fighting-ai-bias-needs-to-be-a-key-part-of-bidens-civil-rights-agenda [perma.cc/9UGJ-W783]. This partially explains why there is a lack of urgency in passing these types of bills and why the legislature may not be the best body to solve this issue. *See id.*

329. Dille, *supra* note 189; *Fighting AI Bias*, *supra* note 328.

330. *Fighting AI Bias*, *supra* note 328.

331. *See supra* Part IV.A.

332. *See* LEGAL RESEARCH AND LAW LIBRARY MANAGEMENT § 5.19, *supra* note 1.

such as its efficiency and promise of equity, it is not without fault.[333] A.I. use in the form of personality tests, video interviews, and resume screening, as well as other tools, present issues of disparate impact, which are violations of Title VII.[334] Without proper oversight, the effects of unregulated A.I. hiring can be disastrous.[335] Examples include disproportionate unemployment, increased prevalence of unconscious racism, and a general exacerbation of inequalities in society.[336] For instance, the use of A.I. tools, if used on a large scale, can "lock out" those who do not fit the "norm," thereby limiting their options to work.[337] This widespread issue calls for a specific solution that would allow for innovation as well as accountability in the form of updated employer guidance and specific, manual audits to ensure a fair and effective hiring process.[338] EEOC Chairperson Burrows emphasized this point when she said that the EEOC "must work to ensure that these new technologies do not become a high-tech pathway to discrimination."[339] Technology and innovation must always be fostered and promoted, but there must be equal accountability when these technologies negatively impact groups of people, especially when it relates to the right to work and to provide for oneself.[340]

333. *See generally id.* (illustrating examples in which A.I. use exhibited error or bias).

334. *See* Friedman & McCarthy, *supra* note 4.

335. *See* Letter from Am. Ass'n of People with Disabilities et al. to Charlotte Burrows, *supra* note 55.

336. *Id.*; *see* Friedman & McCarthy, *supra* note 4 (stating that unconscious bias can manifest in A.I. because of its programming by humans with actual bias). David Lopez, former General Counsel at the EEOC, testified to this point by stating that responsible use of A.I. can lead to a growth in opportunity, but A.I. presents "an even greater potential for misuse if they lock in and exacerbate our country's longstanding disparities based on race, gender, or other characteristics." LEGAL RESEARCH AND LAW LIBRARY MANAGEMENT § 5.19, *supra* note 1.

337. *See* RIEKE ET AL., *supra* note 19, at 42.

338. *See supra* Part IV.

339. Vogel, *supra* note 268.

340. *See* Ajunwa, *supra* note 20, at 646.

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