

# Proliferating Predation: Reverse Redlining, the Digital Proliferation of Inferior Social Welfare Products, and How to Stop It

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Sam Gilman<sup>1</sup>

*Society is waking up to surveillance capitalism, the influence of digital advertising platforms on democracy, and discriminatory algorithms. However, academics have yet to emphasize the civil rights and consumer harm that results from ad targeting for inferior and harmful versions of essential consumer goods and services. This Article aims to fill that gap. It analyzes how reverse redlining—predatory and discriminatory targeting for harmful products—occurs through segmentation, targeting, and ad delivery. Providers of inferior social welfare products leverage these tools to manipulate low-income people and consumers of color to buy their products at a staggering efficiency and scale. The advertising platforms often play a role in reverse redlining through the process of optimizing the delivery of advertisements for particular audiences and amplifying advertisers’ message through look-alike tools.*

*Using the for-profit education industry as a case study, this Article decodes the technology, considers legal challenges to the harms that result, and proposes strengthening civil rights and consumer protections. For-profit education offers a paradigmatic example of an inferior social welfare product, because its higher price points and worse outcomes indicate that for-profit colleges and universities (“FPCUs”) can hardly compete for students without manipulative advertising. This Article offers new evidence of the ways for-profit universities identify consumers, leverage advertising platforms to find those consumers, and manipulate them to purchase a poor product, harming hundreds of thousands of consumers. Civil rights, consumer protection, and privacy laws each offer avenues to redress the harms that result, but a patchwork legal regime built in a different era makes redress difficult.*

*In conclusion, the article builds on the foundation of civil rights protections for social welfare products like housing, employment services, and credit to propose new laws to limit the reverse redlining of predatory products. Specifically, it recommends banning targeting, amplification, and ad-delivery optimization, increased transparency, clarified platform liability, and an updated civil rights regime. This social welfare product approach is designed to address First Amendment concerns and to be narrowly tailored to allow for beneficial uses of the technology.*

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## TABLE OF CONTENTS

INTRODUCTION .....	171
I. FROM ADVERTISING TO PURCHASE: SEGMENTATION, TARGETING, AND AD DELIVERY .....	174
A. <i>Targeting by Advertisers: The Art and Science of         Customer Segmentation</i> .....	175
B. <i>Platforms: Targeting Tools, Amplification, and         Optimization</i> .....	176
1. <i>Search Ads: Keyword- and Similar-Audience            Advertising</i> .....	178
2. <i>Social Ads: Attribute-based, Custom, and Look-Alike            Audiences</i> .....	181
C. <i>Data Brokers: Sharpening Targeting</i> .....	185
D. <i>Analyzing the Process: Assessing Responsibility for         Potential Harms</i> .....	186
II. MANIPULATING CONSUMERS THROUGH DIGITAL ADVERTISING .....	188
A. <i>Defining Manipulation</i> .....	188
B. <i>The Consumer Experience: Moving Consumers to Act</i> ..	190
III. FOR-PROFIT EDUCATION: A REVERSE REDLINING CASE STUDY .....	193
A. <i>Reverse Redlining in Practice</i> .....	193
B. <i>Centrality of Targeted Advertising to For-Profit Business         Models</i> .....	194
C. <i>Discriminatory Segmentation and Targeting: How For-         Profits Recruit</i> .....	196
1. <i>Past, Present, and Scope of Predatory Targeting by            FPCUs</i> .....	196
2. <i>Current Advertising on Google: FPCUs and Lead            Generators</i> .....	198
3. <i>Current Advertising on Facebook: A Case Study</i> ...	199
D. <i>Consumer Impact</i> .....	201
IV. CHALLENGING POTENTIAL CIVIL RIGHTS, CONSUMER, AND PRIVACY HARMS .....	204
A. <i>Anti-Discrimination: Disparate Treatment, Disparate         Impact, and Reverse Redlining</i> .....	204
1. <i>Disparate Treatment</i> .....	207
2. <i>Disparate Impact</i> .....	208
3. <i>Reverse Redlining</i> .....	210
B. <i>Consumer Protection: Unfair or Deceptive Acts and         Practices (“UDAP”) Statutes</i> .....	212
1. <i>Deceptive Acts and Practices</i> .....	214
2. <i>Unfair Acts and Practices</i> .....	215
C. <i>Privacy: Sectoral and Emerging Laws</i> .....	218

1.	<i>Federal Privacy Laws and Education Advertising</i> . . .	218
2.	<i>State Privacy Laws</i> . . . . .	219
D.	<i>Additional Limits on Liability</i> . . . . .	220
1.	<i>Additional Civil Procedure Barriers</i> . . . . .	220
2.	<i>Section 230: Potential Platform Defense</i> . . . . .	221
V.	CONCLUSION: REGULATING THE ECOSYSTEM OF PREDATION .	223
A.	<i>Analyzing the Four Complementary Ways to Reduce Reverse Redlining</i> . . . . .	225
1.	<i>Banning Technologies that Drive Digital Discrimination</i> . . . . .	225
2.	<i>Increasing the Efficacy of Litigation through Transparency, Liability, and Penalties</i> . . . . .	226
3.	<i>Exempting Social Welfare Advertisements from Section 230 Protection</i> . . . . .	227
4.	<i>Updated Civil Rights Liability</i> . . . . .	229
B.	<i>Benefits of a Comprehensive Social Welfare Product Approach to Regulation</i> . . . . .	230

## INTRODUCTION

Society is beginning to recognize the scope of surveillance capitalism and the influence that the major advertising platforms have on democracy, competitive markets, and civil rights.<sup>2</sup> It is also waking up to the discriminatory potential of algorithms<sup>3</sup> and the manipulative nature of digital advertising platforms (“ad platforms”).<sup>4</sup> However, researchers have focused less on the effects of ad targeting for social welfare products, essential goods and services like housing, employment search services, credit, and education.<sup>5</sup> This Article aims to fill that gap. It analyzes how the digital advertising

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<sup>2</sup> See, e.g., DIPAYAN GHOSH & BEN SCOTT, #DIGITAL DECEIT: THE TECHNOLOGIES BEHIND PRECISION PROPAGANDA ON THE INTERNET 2–4 (2018), <https://www.newamerica.org/documents/2077/digital-deceit-final-v3.pdf>, archived at <https://perma.cc/9XQ7-GXY2>; SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM 287 (2019); Lina M. Khan, *Amazon’s Anti-trust Paradox*, 126 YALE L.J. 710, 715 (2017).

<sup>3</sup> See, e.g., CATHY O’NEILL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671, 677–93 (2016).

<sup>4</sup> See, e.g., Shaun B. Spencer, *The Problem of Online Manipulation*, 2020 U. ILL. L. REV. 959, 972–77 (2020); Cass Sunstein, *Fifty Shades of Manipulation*, 1 J. MARKETING BEHAV. 213, 215–16 (2016); Tal Z. Zarsky, *Privacy and Manipulation in the Digital Age*, 20 THEORETICAL INQUIRIES L. 157, 169 (2019).

<sup>5</sup> Social welfare products are products that are critical to human flourishing in the twenty-first century; they include housing, credit, education, and legal services to name a few. While not a commonly used term, I chose it for its descriptive power over less approachable terms relating to the capabilities approach to human flourishing popularized by Martha Nussbaum and Amartya Sen. See R.J. Lawrence, *A Social Transaction Model for the Analysis of Social Welfare*, 3 AUSTRALIAN J. SOC. ISSUES 51, 54 (1968) (describing social welfare products as may take material form—money, food, drugs, a house—or be non-material, like information or various forms of professional and other services like counseling and legal services).

ecosystem enables reverse redlining—predatory targeting of largely low-income communities of color for inferior social welfare products—and the harms that result at a staggering efficiency and scale.<sup>6</sup> In this Article, the term “inferior” carries both a technical and colloquial meaning: it refers to a product that people buy more of as their incomes decline,<sup>7</sup> and denotes that something is worse in quality. Because the segmentation, targeting, and ad-delivery mechanisms that enable reverse redlining are invisible to consumers and operate largely out of view of policymakers, behind the high walls of corporate conference rooms and digital mazes of complex algorithms, this Article decodes the process, considers legal challenges to the resulting harms, and proposes policy changes to redress those harms.

Part II provides technical details that explain how manipulation through reverse redlining occurs. It evaluates various actors in the segmentation, targeting, and ad-delivery process, including advertisers, search and social ad platforms, like Google and Facebook, and data brokers. This deep dive is in service of a greater understanding of the ways advertisers can use digital advertising to influence people to purchase their products against their best interests, taking advantage of demand for, vulnerability to, and low information about superior alternatives to their products. Through segmentation, targeting, and ad-delivery mechanisms, advertisers can personalize and deliver ads to particular people and communities at particular moments when the algorithm has identified them as likely to engage with the advertisement for their product. Specifically, advertisers leverage ad platforms and data brokers to segment and target consumers who demonstrate valuable interests, tastes, and psychographic characteristics. The platforms identify the particular people at particular times with those traits who will receive the ads, exponentially amplifying advertisers’ reach.<sup>8</sup> They then deliver the ads

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<sup>6</sup> The term “reverse redlining” is useful to define. This article invokes the term reverse redlining to explain the intentional targeting of advertisements for inferior goods towards communities of color. While historically and technically used to refer to targeting for credit products, the term and legal theory may have broader applicability especially for products that require financing. *See* Hargraves v. Cap. City Mortg. Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000) (defining “reverse redlining” as the practice of targeting communities of color evidenced by intent or disparate impact and that the financial product sold had “unfair” or “predatory terms”); *see also* Second Amended Class Action Complaint at 4, Morgan v. Rich. Sch. of Health & Tech., Inc., 857 F. Supp. 2d 104 (D.D.C. 2011) (No. 1:11-cv-01066-GK) (applying reverse redlining theory to for-profit education) [hereinafter Second Amended Class Action Complaint].

<sup>7</sup> *See, e.g.*, N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 70 (Joseph Sabatino et al. eds., 6th ed. 2012).

<sup>8</sup> *See, e.g.*, Shaun B. Spencer, *Predictive Analytics, Consumer Privacy, and Ecommerce Regulation*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 492 (John A. Rothchild ed., 2016); Dirk Bergemann & Alessandro Bonatti, *Markets for Information: An Introduction*, 11 ANN. REV. ECON. 85, 88–89 (2018) (discussing segments in sponsored-search advertising where users are first identified in segments and then targeted for specific advertisements after identification); *see also* Till Speicher et al., *Potential for Discrimination in Online Targeted Advertising*, 81 PROCS. MACH. LEARNING RSCH. 1, 7 (2018) (explaining the process for targeting users on Facebook and the potential for discrimination therein).

to consumers, moving some to buy the product or service.<sup>9</sup>

Part III establishes a theoretical definition for manipulation and that segmentation, targeting, and ad-delivery practices can be manipulative. To make this case, it reviews empirical and industry evidence of digital advertising's ability to influence consumers to take action they may otherwise not have taken.

Part IV explores reverse redlining and manipulative advertising through a case study on the for-profit education industry. The industry spends hundreds of millions of dollars on digital advertising each year<sup>10</sup> to manipulate a student base of 1.5 million Americans that is disproportionately Black and Brown to attend their schools.<sup>11</sup> Despite minimal transparency from advertisers or ad platforms on targeting practices,<sup>12</sup> this Article finds new evidence of discriminatory targeting on Facebook and Google. After identifying the profiles of the consumers who are most likely to enroll, for-profit colleges and universities ("FPCUs") leverage ad platforms to find and deliver advertisements to prospects who match those profiles.<sup>13</sup> They manipulate some to purchase an education that cannot compete on cost or quality, with harmful outcomes for a majority of students. Massive civil rights and economic injuries result.<sup>14</sup>

Part V evaluates the legal theories that might challenge manipulative segmentation, targeting, and ad delivery under civil rights, consumer protection, and privacy laws. These practices take place within a legal regime built in an era when precise digital manipulation was science fiction. Civil rights,<sup>15</sup> consumer protection,<sup>16</sup> and privacy laws<sup>17</sup> each offer theories to

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<sup>9</sup> See Spencer, *supra* note 4, at 978–80 (discussing the ways digital advertising can exploit consumer vulnerabilities).

<sup>10</sup> See Jim Leichenko, *University of Phoenix Leads Online Education Advertisers in Paid Search*, KANTAR MEDIA (Apr. 27, 2017), <https://www.kantarmedia.com/us/thinking-and-resources/blog/adg-university-of-phoenix-leads-online-education-advertisers-in-paid-search>, archived at <http://perma.cc/UJ3E-663H> (finding over \$100 million in search advertisements in a half-year period from top 20 for-profit universities).

<sup>11</sup> See NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS tbl. 303.20 (2017), [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_303.20.asp](https://nces.ed.gov/programs/digest/d17/tables/dt17_303.20.asp), archived at <http://perma.cc/GTu7-ZH33>.

<sup>12</sup> See UPTURN, LEVELING THE PLATFORM: REAL TRANSPARENCY FOR PAID MESSAGES ON FACEBOOK 2 (2018), <https://www.upturn.org/static/reports/2018/facebook-ads/files/Upturn-Facebook-Ads-2018-05-08.pdf>, archived at <http://perma.cc/SM5E-PXQQ> (indicating the limited data available on audience targeting).

<sup>13</sup> See, e.g., *Southern Technical College: Reaching career-minded students using Facebook lead ads*, FACEBOOK FOR BUS., <https://www.facebook.com/business/success/southern-technical-college>, archived at <https://perma.cc/ZWH2-CHQT> (explaining how a for-profit college used Facebook tools to target segments that are likely correlated with race).

<sup>14</sup> See Spencer, *supra* note 4, at 991.

<sup>15</sup> See, e.g., Barocas & Selbst, *supra* note 3, at 694–98 (analyzing viability of civil rights claims in the context of data mining).

<sup>16</sup> See, e.g., Maura Dundon, *Students or Consumers? For-Profit Colleges and the Practical and Theoretical Role of Consumer Protection*, 9 HARV. L. & POL'Y REV. 375, 376 (2015) (discussing potential unfair and deceptive practices claims).

<sup>17</sup> See, e.g., 20 U.S.C. § 1232g (family educational and privacy rights); CAL. CIV. CODE § 1798.100–198 (2018) (California Consumer Privacy Act).

challenge these practices. These legal theories, however, particularly those that would challenge the platforms for enabling discriminatory targeting, are each probably limited by barriers that must be overcome by new regulation.<sup>18</sup>

In conclusion, this Article builds on the foundation of civil rights protections for basic needs such as housing, employment, and credit to propose new civil rights and consumer protection regulation to limit the reverse redlining of social welfare products. Specifically, it proposes four complementary policy approaches for regulating social welfare products. The first bans targeting, amplification, and optimization targeting for social welfare products; the second increases transparency; the third clarifies that platforms can be liable when their algorithms lead to discrimination; and the fourth argues for modernizing anti-discrimination law. This Article highlights the importance of an approach tailored to social welfare products and concludes by responding to First Amendment, evidentiary, inclusivity, regulatory path, and paternalism concerns.

#### I. FROM ADVERTISING TO PURCHASE: SEGMENTATION, TARGETING, AND AD DELIVERY

This Article begins with a technical analysis of the ad-targeting process, so attorneys and policymakers can have an in-depth understanding of how digital advertising can proliferate civil rights and economic harms. The technical analysis evaluates each participant in the three-step segmentation, targeting, and ad-delivery process: consumers, advertisers, ad platforms, and data brokers.<sup>19</sup>

It is useful to define the actors in this ecosystem. Advertisers are the retailers who market and deliver their products online. Digital ad platforms, like Google and Facebook, provide online services that connect users with information or communities. Although these platforms do not charge cash for their services, they monetize their consumers by transforming consumer behavior into a resource that drives precision advertising.<sup>20</sup> They accumulate, mine, and leverage data from billions of interactions to build sophisticated ad platforms, which, in turn, advertisers can use to precisely reach audiences likely to respond to their content.<sup>21</sup> For the purposes of this Article, we refer

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<sup>18</sup> See 47 U.S.C. § 230(c)(2); see also Catherine Tremble, *Wild Westworld: Section 230 of the CDA and Social Networks' Use of Machine-Learning Algorithms*, 86 *FORDHAM L. REV.* 825, 827–29 (analyzing the potential for platform immunity under Section 230 and arguing that platforms should not face immunity).

<sup>19</sup> See, e.g., Bergemann & Bonatti, *supra* note 8, at 88–89 (discussing segments in sponsored-search advertising where users are first identified in segments and then targeted for specific advertisements after identification); see also Speicher et al., *supra* note 8, at 1, 3, 5 (explaining the process for targeting users on Facebook and the potential for discrimination therein).

<sup>20</sup> See ZUBOFF, *supra* note 2, at 279 (describing Facebook's prediction engine).

<sup>21</sup> See *id.* at 78–97 (describing Google's discovery of the ability to mine user behavior to leverage for precision advertising and Facebook's subsequent adoption of this business model).

to two types of advertising: search advertising and social advertising. Search advertising presents consumers with advertisements as they look for goods, services, and information. Social advertising places advertisements in a user's social media feed between content produced by the pages and the people a given user follows. Data brokers supplement advertisers and ad platforms with even more data on prospective consumers generated from public and proprietary sources.

Through segmentation, the first step of the three-step process, a number of actors, including the advertisers themselves, ad platforms, and data brokers, use different machine learning technologies combined with human analysis to identify profiles and create lists of prospective consumers.<sup>22</sup> In the second step, targeting, advertisers and platforms interact to set advertising parameters that will reach prospective consumers that match the lists or look like the profiles generated in step one.<sup>23</sup> In the third step, platforms algorithmically optimize the advertisement, assessing an advertisements' relevance to each user, and deliver the advertisements to specific users, often identified and selected by the platforms alone.<sup>24</sup>

#### A. *Targeting by Advertisers: The Art and Science of Customer Segmentation*

Advertisers understand the advantages of leveraging ad platforms to find their ideal consumers. While there is a spectrum of intentionality behind customer segmentation and targeting, this Article categorizes advertisers as analytic and intuitive advertisers.

This process is “an art and a science,” according to Boston Consulting Group, which helps analytic advertisers design customer segmentation strategies.<sup>25</sup> For analytic advertisers, “[e]ach segmentation requires myriad judgment calls” based on “sifting through multiple segmentations” produced by quantitative analysis with advertisers “applying judgments based on qualitative research” until they create the ideal segments.<sup>26</sup> According to Bain & Company, another advisory firm, these analyses evaluate user information, behavioral insights, and financial data to identify the most profitable consumers and understand what makes them profitable.<sup>27</sup> For the most strategic efforts, advertisers purchase additional data to augment their understanding

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<sup>22</sup> See, e.g., THE BOSTON CONSULTING GROUP, CONSUMER SEGMENTATION: A CALL TO ACTION 1–2 (2008), <https://www.bcg.com/documents/file15287.pdf>, archived at <https://perma.cc/WJ4J-9RH6>.

<sup>23</sup> See Bergemann & Bonatti, *supra* note 8, at 140.

<sup>24</sup> See *id.*

<sup>25</sup> THE BOSTON CONSULTING GROUP, *supra* note 22, at 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Customer Segmentation*, BAIN & CO. (Apr. 2, 2018), <https://www.bain.com/insights/management-tools-customer-segmentation/>, archived at <https://perma.cc/T9J3-S5EG> (providing an overview of the segmentation process and Bain's ability to support for marketing managers and potential clients).

of their consumer base.<sup>28</sup> Analytic advertisers then create advertising creative (“ad creative”), which is the advertisement that consumers see that includes images and text, based on an advertiser’s insights about their ideal customers.<sup>29</sup> Ultimately, advertisers understand the underlying data, consider the strongest correlations, and target advertising knowing the contents of their segments. They then turn to the platforms for refined targeting, to find prospective consumers, and to deliver the advertisements. Intuitive advertisers skip the first step: they design ad creative based on broader knowledge and intuition about their target customers, and they rely on ad platforms for the science. For example, a start-up clothing company may design advertisements geared towards millennials with millennial models without doing any segmentations. Platform optimization algorithms “read” their ad creative and deliver the content to the audiences the algorithm judges will be most likely to engage, given an advertiser’s budget and targeting parameters.<sup>30</sup>

### B. Platforms: Targeting Tools, Amplification, and Optimization

In general, the ad platforms serve personally tailored advertisements to groups of users with twin goals in mind: selling profitable advertisements and maintaining user attention through relevant organic content and contextual advertisements.<sup>31</sup> These goals are self-fulfilling. The more time users spend on the platforms, the more platforms profit from advertising and the more precise behavioral data they can generate to refine their ad targeting.<sup>32</sup> Platforms top the list of the most profitable companies in the world, with

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<sup>28</sup> See Jonathan Hanson et al., *Predictive Analytics Can Widen the Aperture for Potential Sales*, BAIN & CO. (Dec. 12, 2017), <https://www.bain.com/insights/predictive-analytics-can-widen-the-aperture-for-potential-sales-snapchart/>, archived at <https://perma.cc/DZ8G-6XQS>.

<sup>29</sup> See, e.g., Muhammad Ali et al., *Discrimination Through Optimization: How Facebook’s Ad Delivery Can Lead to Skewed Outcomes*, 3 PROC. OF THE ACM ON HUM.-COMPUT. INTERACTION, Art. 199, at 3 (Nov. 2019), <https://arxiv.org/pdf/1904.02095.pdf>, archived at <https://perma.cc/AG7Z-9FLJ> (discussing relevance); see also Anne Brumbaugh, *How to Target Diverse Customers*, in CRACKING THE CODE: LEVERAGING CONSUMER PSYCHOLOGY TO DRIVE PROFITABILITY 66, 66–88 (Steven Posavac ed., 2015) (describing three target-marketing practices designed to appeal to non-white audiences and the use of ad creative to appeal to known segments of Black and Brown consumers).

<sup>30</sup> See, e.g., *Facebook Ads*, FACEBOOK FOR BUS., <https://www.facebook.com/business/ads/> (last visited Sept. 26, 2020), archived at <https://perma.cc/3ENQ-TKLX> (explaining the “simple” self-serve tools for advertisers at every level of expertise); see also Brief for Upturn Inc., as Amici Curiae in Support of Plaintiffs’ Opposition to Facebook’s Motion to Dismiss First Amended Complaint at 2, *Opiotennione v. Facebook Inc.*, No. 19-cv-07185-JSC, 2020 WL 5877667 (N.D. Cal. Oct. 2, 2020) [hereinafter Upturn Opiotennione Brief] (describing Facebook’s algorithm); *About Ad Delivery*, FACEBOOK FOR BUS. <https://www.facebook.com/business/help/1636814289727946> (last visited Sept. 26, 2020), archived at <https://perma.cc/YLE6-PQAC> (describing the delivery and optimization of ads).

<sup>31</sup> See, e.g., ZUBOFF, *supra* note 2, at 459–60 (explaining Facebook’s newsfeed design for user interaction and relevant advertising delivery).

<sup>32</sup> See CTR. FOR DATA ETHICS & INNOVATION, *ONLINE TARGETING: FINAL REPORT AND RECOMMENDATIONS* (2020), <https://www.gov.uk/government/publications/cdei-review-of-online-targeting/online-targeting-final-report-and-recommendations> (last visited Dec. 21, 2020).



Alphabet and Facebook ranking fifth and eleventh in 2020.<sup>33</sup> Advertising made up 83%<sup>34</sup> and 98%<sup>35</sup> of company revenues respectively.

Platforms optimize the delivery of advertisements to maximize the relevance of advertisements to consumers, and accrue increasing profits based on increasing relevance. The platforms use machine learning algorithms to predict their users' likelihood of clicking on an ad by comparing each user's behavior to its data on hundreds of millions of users and trillions of actions.<sup>36</sup> In this way, models continuously predict the most relevant advertisements for each user, ensuring the platform can deliver the most optimized advertisement for that user at that particular time.<sup>37</sup> Small accuracy improvements based on more user data lead to enormous profits. A study of Bing's advertising found that accurately choosing the most relevant ads for each user in the most relevant sequence order significantly increased the probability that a user would click on the ad.<sup>38</sup> "Even a 0.1% accuracy improvement" in predicting clicks—the outcome of most consumer targeting—"would lead to hundreds of millions of dollars in additional earnings."<sup>39</sup> To make these improvements, platforms must continuously acquire and feed their algorithms ever-increasing quantities of data, including personally identifiable information, user tastes, purchase history, locations, search behavior, app use, and email tracking.<sup>40</sup>

Platforms offer advertisers three types of tools that allow advertisers to set the parameters for audience selection through segmentation and targeting. Toggle tools allow advertisers to reach pre-defined segments created and curated by the platforms.<sup>41</sup> Custom Audience tools allow advertisers to upload lists of prospective consumers and target already identified people.<sup>42</sup>

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<sup>33</sup> *Fortune 500 Most Profitable*, FORTUNE, [https://fortune.com/fortune500/2020/search/?F500\\_profits=desc](https://fortune.com/fortune500/2020/search/?F500_profits=desc) (last visited Sept. 26, 2020), *archived at* <https://perma.cc/LRE6-R83P>.

<sup>34</sup> Press Release, Alphabet, Alphabet Announces Fourth Quarter Fiscal Year 2019 Results (Feb. 3, 2020), [https://abc.xyz/investor/static/pdf/2019Q4\\_alphabet\\_earnings\\_release.pdf](https://abc.xyz/investor/static/pdf/2019Q4_alphabet_earnings_release.pdf), *archived at* <https://perma.cc/HV4T-TGLG>.

<sup>35</sup> Press Release, Facebook, Facebook Reports Fourth Quarter and Full 2019 Results (Jan. 29, 2020), <https://investor.fb.com/investor-news/press-release-details/2020/Facebook-Reports-Fourth-Quarter-and-Full-Year-2019-Results/default.aspx>, *archived at* <https://perma.cc/SYJ5-SNHG>.

<sup>36</sup> See Ali et al., *supra* note 29, at 2 (describing how Facebook's advertising platform directs users to relevant advertising by using historical data to estimate future performance).

<sup>37</sup> See Speicher et al., *supra* note 8, at 5, 7, 11 (discussing the methods for targeting ads).

<sup>38</sup> See Xiaoliang Ling et al., *Model Ensemble for Click Prediction in Bing Search Ads*, WWW '17 COMPANION: PROC. OF THE 26TH INT'L CONF. ON WORLD WIDE WEB, Apr. 2017, at 689.

<sup>39</sup> *Id.*

<sup>40</sup> See ZUBOFF, *supra* note 2, at 77–79 (explaining Google's early patent for creating ad relevance on the basis of user search data); see also Arnold Roosendaal, *We Are All Connected to Facebook . . . by Facebook!*, in EUROPEAN DATA PROTECTION: IN GOOD HEALTH? 3–19 (Serge Gutwirth et al. eds., 2012) (explaining Facebook's use of cookies to track people across the internet, continuously gathering and augmenting their profiles on unique consumers).

<sup>41</sup> See Speicher et al., *supra* note 8, at 7 (discussing the use of toggle tools in "attribute-based targeting").

<sup>42</sup> See *id.* at 4–5 (discussing personally identifiable information-based targeting through Custom Audiences).

And, look-alike tools help advertisers find exponentially larger groups of users who share the demographic, behavioral, and psychographic similarities with a list provided by the advertiser.<sup>43</sup> To varying degrees of precision, these features allow advertisers to combine their own knowledge about their most profitable customers with the platforms' ability to draw upon their proprietary data and find similar prospective consumers on a massive scale.<sup>44</sup>

Then the platforms deliver the advertisements, in a process they alone control.<sup>45</sup> In a process called optimization, they use the relevance algorithms described in the previous paragraph to choose the specific consumers who see an advertisement on the basis of their likelihood to engage with that advertisement.<sup>46</sup>

To understand the potential for harm, the relative responsibility for such harm, and attempts to combat the harm, it is useful to study advertising through the lens of the two dominant players: Google and Facebook. In 2019, for example, they collectively hosted more than 60% of all spending on digital advertisements.<sup>47</sup> Google is the dominant search platform. Facebook earned over 80% of social ad revenues among U.S. social platforms, including LinkedIn, Snapchat, and Twitter.<sup>48</sup>

### 1. Search Ads: Keyword- and Similar-Audience Advertising

Search engines like Google contextualize advertisements within a user's search experience, granting primary real estate at the top of a search result to advertisers.<sup>49</sup> The advertisers bid for keywords, which are words or phrases that the algorithm matches with user searches. Platforms see the searches as a user's precise expression of their interest at a given moment and match those preferences with a product.<sup>50</sup> Installment lenders looking for desperate borrowers might, for example, bid on search terms such as "need a loan fast."<sup>51</sup> Search engines determine the cost for each keyword based on the

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<sup>43</sup> See *id.* at 11.

<sup>44</sup> See *id.* at 12 (describing scale of advertising reach using various digital targeting tools, including look-alike tools which can proliferate ad copy and a list of 10,000 people to a look-alike audience featuring 4.2 million people).

<sup>45</sup> See, e.g., Ali et al., *supra* note 29, at 13 (identifying Facebook's sole control over optimization).

<sup>46</sup> See *id.* (identifying the ad-delivery optimization process).

<sup>47</sup> Nicole Perrin, *Facebook-Google Won't Crack This Year*, EMARKETER (Nov. 4, 2019), <https://www.emarketer.com/content/facebook-google-duopoly-won-t-crack-this-year>, archived at <https://perma.cc/FHA5-Z3DG>.

<sup>48</sup> *U.S. Advertising Revenues of Selected Social Networks 2015-2018*, STATISTA, <https://www.statista.com/statistics/426520/us-social-networks-ad-revenues/> (last visited Nov. 20, 2020) (data on file with the author).

<sup>49</sup> See *About Keywords in Search Network Campaigns*, GOOGLE, <https://support.google.com/google-ads/answer/1704371?hl=EN> (last visited Sept. 26, 2020), archived at <https://perma.cc/X7VY-9EMQ>.

<sup>50</sup> See *id.*

<sup>51</sup> UPTURN, *LED ASTRAY: ONLINE LEAD GENERATION AND PAYDAY LOANS 13* (2015), [https://www.upturn.org/static/reports/2015/led-astray/files/Upturn\\_-\\_LedAstray\\_v.1.01.pdf](https://www.upturn.org/static/reports/2015/led-astray/files/Upturn_-_LedAstray_v.1.01.pdf), archived at <https://perma.cc/BJV6-LNCP>.

quality of the keyword and competition in the auction among advertisers bidding on that keyword.<sup>52</sup> Quality is determined based on expected click-through rate, relevance of the ad to searchers using that term, and experience on the landing page after a user clicks on the ad.<sup>53</sup> Almost instantaneously, consumers see an ad that looks like a search link.

To augment search-term bidding, Google offers toggle tools to refine targeting, custom-audience tools, and look-alike tools. The toggle tools draw on the search engine's user profiles that include personal information, location data, browsing history, and inferences about a user's wants.<sup>54</sup> For example, Google offers the ability to target based on "life events" or "detailed demographics."<sup>55</sup> It also offers custom audience tools, which it calls "Remarketing" and "Customer Match" that allow marketers to reach users who have previously engaged with their content and users for whom they have contact information.<sup>56</sup> Finally, it offers look-alike tools, through its "Similar Audiences" feature, enabling marketers to "connect with an audience that's already interested," based on Google's ability to locate users with similar characteristics and behavior to a list of people provided by the advertiser.<sup>57</sup>

Advertisers can use these tools to discriminate. The algorithm creates new audiences based on the express or proxy characteristics of the underlying population.<sup>58</sup> For custom audiences, an advertiser that knowingly uploads a list that targets or excludes people of color will likely see that skew in the delivery of their advertisement.<sup>59</sup> The Similar Audience tool creates additional discriminatory potential, as the algorithm can amplify underlying biases in the source data and make its own assessments that a particular ad will be more relevant to a population.<sup>60</sup>

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<sup>52</sup> See *Quality Score: Definition*, GOOGLE, <https://support.google.com/google-ads/answer/140351> (last visited Dec. 21, 2020), archived at <https://perma.cc/APB8-FSNZ>.

<sup>53</sup> See *id.* (describing Remarketing and Customer Match tools).

<sup>54</sup> See *About Demographic Targeting*, GOOGLE, <https://support.google.com/google-ads/answer/2580383?co=ADWORDS.IsAWNCustomer%3Dfalse&hl=EN> (last visited Dec. 21, 2020), archived at <https://perma.cc/Z3EY-UJ9R>.

<sup>55</sup> *About Audience Targeting*, GOOGLE, <https://support.google.com/google-ads/answer/2497941?hl=EN> (last visited Dec. 21, 2020), archived at <https://perma.cc/66BG-B3BY>.

<sup>56</sup> *Id.* (describing Remarketing and Customer Match tools).

<sup>57</sup> *About Similar Audiences for Search*, GOOGLE, <https://support.google.com/google-ads/answer/7151628?hl=EN> (last visited Dec. 21, 2020), archived at <https://perma.cc/FK5L-PUJV>.

<sup>58</sup> See *About Audience Targeting*, GOOGLE, <https://support.google.com/google-ads/answer/2497941?hl=EN> (last visited Dec. 21, 2020), archived at <https://perma.cc/2YJL-N99V> (detailing the characteristics that inform Google's segmentations, and that Google estimates which users have which traits).

<sup>59</sup> See, e.g., Speicher et al., *supra* note 8, at 5 (providing an in depth technical and empirical discussion about discrimination in a comparable tool, Facebook's Lookalike audiences tool).

<sup>60</sup> See e.g., Nathan Newman, *Racial and Economic Profiling in Google Ads: A Preliminary Investigation (Updated)*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/racial-and-economic-profi\\_b\\_970451](https://www.huffpost.com/entry/racial-and-economic-profi_b_970451), archived at <https://perma.cc/UFS7-QDX5> (describing the

Google has a series of policies designed to prevent advertisers from discriminating based on “sensitive interest categories.”<sup>61</sup> Google’s policies also prohibit advertising based on categories of identity, belief, and sexual interests.<sup>62</sup> Advertisers may still discriminate, however, by proxy through remarketing lists and look-alike targeting: if a list skews towards a certain demographic or interest, the advertisement likely will as well.<sup>63</sup> Google also does not allow advertisements based on personal hardships, financial struggles, or advertisements for predatory financial products like payday loans.<sup>64</sup> It is important to note that for-profit education does not fall under “sensitive interest categories” or predatory financial products.<sup>65</sup>

Despite efforts to eliminate the blatant malpractice from advertisers, Google’s algorithms can create discriminatory outcomes. For example, Google can discriminate in advertisement delivery, even when advertisers aim to be neutral. In one instance, Nathan Newman tested whether people with names stereotypically corresponding to non-white people would receive differential treatment than those with white-sounding names. He sent identical emails to and from their Gmail accounts discussing education.<sup>66</sup> Accounts with white-sounding names saw ads about graduate education; accounts with non-white sounding names received a higher proportion of ads for undergraduate and non-college education.<sup>67</sup> Only on the basis of the name, the platform’s ad-delivery algorithms made a determination that advanced education was relevant to those with stereotypically white names, and non-college education was relevant to those with non-white names.<sup>68</sup> Newman concludes that Google may be “magnifying and more precisely targeting that discriminatory treatment,” and analogizes these processes to “reverse redlining.”<sup>69</sup>

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ways in which Google’s own algorithm can amplify biases in the source audience and make assessments that a particular ad will be relevant to a population).

<sup>61</sup> *Personalized Advertising*, GOOGLE, <https://support.google.com/adspolicy/answer/143465#sensitive> (last visited Dec. 21, 2020), archived at <https://perma.cc/SK9A-ZHRD>.

<sup>62</sup> *See id.*

<sup>63</sup> *See* Datta et al., *Discrimination in Online Advertising: A Multidisciplinary Inquiry*, 81 PROC. MACH. LEARNING RSCH. 1, 12–13 (2018) (explaining the various opportunities for discrimination in search).

<sup>64</sup> *See Personalized Advertising*, GOOGLE, <https://support.google.com/adspolicy/answer/143465#sensitive> (last visited Dec. 21, 2020), archived at <https://perma.cc/SK9A-ZHRD>.

<sup>65</sup> *Id.*

<sup>66</sup> *See* Spencer, *supra* note 8, at 503 (citing Newman, *supra* note 60).

<sup>67</sup> *See id.*; *see also* Latanya Sweeney, *Discrimination in Online Ad Delivery*, DATA PRIV. LAB 22 (Jan. 28, 2013), <https://www.dataprivacylab.org/projects/onlineads/1071-1.pdf>, archived at <https://perma.cc/NUV8-47JT>. Based on name searches, Latanya Sweeney famously found a statistically significant differential in the number and percentage of ads suggestive of criminal records for white- and Black-sounding names on Google. The winning bidders bid on the individual name searches, and ads featuring arrest record searches surfaced at significantly higher rates for Black people. *Id.*

<sup>68</sup> *See* Spencer, *supra* note 8, at 503.

<sup>69</sup> Newman, *supra* note 60.

## 2. *Social Ads: Attribute-based, Custom, and Look-Alike Audiences*

Social media companies embed advertisements within a user's social interactions. Because social ads do not relate to precise queries, social advertising focuses less specifically on matching user desires in the moment and more specifically on the user's indicated and inferred identity, preferences, and behavior. As Facebook explains to prospective advertisers in its *Guide to Digital Advertising*, the platform enables advertisers to personalize messages to users who "share their true identities, interests, life events and more" on the platform in a contextual way.<sup>70</sup> It also algorithmically infers user attributes such as income and preferences based on what a user "likes" or engages with. Beyond their platform, Facebook uses tracking technologies known as "cookies"<sup>71</sup> and "pixels" to track its users across the internet and add that data to their profiles.<sup>72</sup>

Facebook offers three primary types of tools for targeting audiences.<sup>73</sup> First, it allows "detailed targeting," which allows advertisers to target audiences based on either pre-formed segments or free-form attributes<sup>74</sup> formed based on user-provided data, including location, behavior, and connections.<sup>75</sup> This means that an advertiser can target categories from "ethnic affinity," to purchase and financial history.<sup>76</sup> As the Department of Housing and Urban Development ("HUD") identified in its 2019 suit against Facebook, the platform allows targeting to segments that include "moms of grade school

<sup>70</sup> *Your Guide to Digital Advertising*, FACEBOOK, <https://www.facebook.com/business/help/1029863103720320> (last visited Sept. 26, 2020), archived at <https://perma.cc/KH58-SXEX>.

<sup>71</sup> Roosendaal, *supra* note 40 (describing the use of cookies to track user behavior on every website that features a Facebook for Business tool to gather more information).

<sup>72</sup> *About Website Custom Audiences*, FACEBOOK, [https://www.facebook.com/business/help/610516375684216?helpref=page\\_content](https://www.facebook.com/business/help/610516375684216?helpref=page_content) (last visited Sept. 26, 2020), archived at <https://perma.cc/9SYC-DKAJ> (explaining that pixels track who visits a website and give advertisers the ability to retarget the specific users who visit).

<sup>73</sup> See Speicher et al., *supra* note 8, at 3.

<sup>74</sup> *About Detailed Targeting*, FACEBOOK, <https://www.facebook.com/business/help/182371508761821> (last visited Sept. 26, 2019), archived at <https://perma.cc/EHU8-THDT>; see also Venkatadri et al., *Auditing Offline Data Brokers via Facebook's Advertising Platform*, INT'L WORLD WIDE WEB CONF. COMM., May 2019, at 2.

<sup>75</sup> See Spencer, *supra* note 8, at 498-99; see also Noam Scheiber, *Facebook's Ad-Targeting Problem, Captured in a Literal Shade of Gray*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/technology/facebook-ads.html>, archived at <https://perma.cc/F3YZ-BVF3> (explaining that Facebook audience categories are determined based on "a mix of human discretion and automated processes"); *Your Guide to Digital Advertising*, FACEBOOK, <https://www.facebook.com/business/help/1029863103720320> (last visited Sept. 26, 2020), archived at <https://perma.cc/KH58-SXEX> (noting that Facebook can "[r]each people based on . . . zipcode . . . gender . . . the interests they have shared, their activities . . . closely related topics . . . purchase behaviors or intents . . . and more.").

<sup>76</sup> Caitlin Dewey, *98 Personal Data Points That Facebook Uses to Target Ads to You*, WASH. POST (Aug. 19, 2016), [https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/?utm\\_term=.F26e10ba1397](https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/?utm_term=.F26e10ba1397), archived at <https://perma.cc/NGG7-8NCN>.

kids,” and those who like “Hijab fashion,” or “Hispanic Culture.”<sup>77</sup> Advertisers with a more precise understanding of their audiences can also find groups based on searching thousands of “free-form attributes.”<sup>78</sup> The attributes range from preferences for pizza and “niche interests” in space travel<sup>79</sup> to discriminatory groupings. Until 2017, for example, advertisers could target “Jew haters.”<sup>80</sup>

Second, advertisers can leverage Custom Audiences. This tool enables retargeting of pre-formed audiences in two ways. Facebook can generate a list of people that it knows have engaged with the advertiser’s webpage using its pixel technology.<sup>81</sup> Alternatively, the Custom Audience feature also allows an advertiser to upload a list and specify individual people that it wants to target for an advertisement.<sup>82</sup> Facebook matches that list with its users through phone numbers, email addresses, or other identifiers.<sup>83</sup>

Third, Lookalike Audiences allow advertisers to target people with similar attributes to an uploaded list.<sup>84</sup> Just like the Custom Audiences tool, the advertiser provides a list of prospects,<sup>85</sup> and Facebook will “identify the common qualities of the people” in the custom audience and an “audience of people who are similar to (or ‘look like’) them.”<sup>86</sup> The platform ranks all of its users in a selected geography based on similarity to the advertisers’ selected audiences and allows the advertiser to choose a percentile of the closest matching users up to 10%.<sup>87</sup> In other words, an advertiser could choose to show ads to the 2% of people who most closely match the list they upload.<sup>88</sup> Lookalike Audiences allow advertisers to transform a list of 10,000 people into a targetable audience of 4.2 million people.<sup>89</sup>

After targeting, the platform delivers the ads, and its proprietary algorithms select the particular users that will see an ad. In the selection of actual consumers who see an ad, only the platform participates.<sup>90</sup> Facebook auctions determine which advertisements—from among the ads seeking a par-

<sup>77</sup> Complaint at 4, *Sec’y of Dep’t of Hous. & Urb. Dev. v. Facebook, Inc.*, No. 01-18-0323-8 (Dep’t of Hous. & Urb. Dev. filed Mar. 28, 2019) [hereinafter Facebook Complaint], [https://www.hud.gov/sites/dfiles/Main/documents/HUD\\_v\\_Facebook.pdf](https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf), archived at <https://perma.cc/YKD5-WCMB>.

<sup>78</sup> Speicher et al., *supra* note 8, at 7.

<sup>79</sup> *Id.*

<sup>80</sup> Julia Angwin et al., *Facebook Enabled Advertisers to Reach ‘Jew Haters,’* PROPUBLICA (Sept. 14, 2017), <https://www.propublica.org/article/facebook-enabled-advertisers-to-reach-jew-haters>, archived at <https://perma.cc/54NL-MKZ7>.

<sup>81</sup> *See About Lookalike Audiences*, FACEBOOK, [https://www.facebook.com/business/help/164749007013531?helpref=page\\_content](https://www.facebook.com/business/help/164749007013531?helpref=page_content) (last visited Oct. 23, 2020), archived at <https://perma.cc/TRG4-XA5X> [hereinafter *About Lookalike Audiences*].

<sup>82</sup> *See* Speicher et al., *supra* note 8, at 3.

<sup>83</sup> *See id.* at 4–5.

<sup>84</sup> *See About Lookalike Audiences*, *supra* note 81.

<sup>85</sup> *See* Speicher et al., *supra* note 8, at 3.

<sup>86</sup> *About Lookalike Audiences*, *supra* note 81.

<sup>87</sup> Speicher et al., *supra* note 8, at 11.

<sup>88</sup> *See id.* at 11.

<sup>89</sup> *Id.* at 12.

<sup>90</sup> *See About Lookalike Audiences*, *supra* note 81.

ticular user—are shown to that user based on bid, estimated performance, Facebook’s knowledge of a user’s interests and past behavior, and whether similar users have engaged with the content.<sup>91</sup>

Researchers have documented how advertisers can discriminate using Facebook’s three primary targeting tools. Facebook’s toggle tools do not allow users to directly market based on race, ethnicity, or other protected classes,<sup>92</sup> but discrimination is possible due to associations between interests and protected categories.<sup>93</sup> For example, advertisers can target free-form segments where members were 90%+ of one racial affiliation.<sup>94</sup> As the researchers documented in the context of religious and LGBTQ+ targeting, free-form segments can feature audiences in the millions.<sup>95</sup> Using Custom Audiences, if the uploaded list is discriminatory—even if the list variables do not explicitly identify to Facebook that a list will target specific identities—discrimination can occur. Researchers who asked Custom Audience to target a list containing only Black voters, reached an audience that was 82.5% Black.<sup>96</sup> The Lookalike Audiences feature presents the greatest discriminatory potential because of its precision and scale. If a “source audience is discriminatory, its look-alike audience would also be discriminatory.”<sup>97</sup> Speicher proved this empirically, finding that biases over-represented in source-uploaded audiences remained in the audiences created using the Lookalike feature.<sup>98</sup> Biases present in a source audience of 10,000 can be propagated to a Lookalike population of 4.2 million.<sup>99</sup>

Like Google, Facebook restricts ad sales for the most controversial products and to explicit racial targeting. Facebook does not allow advertisements for guns or payday loans.<sup>100</sup> After a 2019 settlement with the American Civil Liberties Union (“ACLU”), Facebook agreed to further limit discrimination by creating a “separate advertising portal for creating housing, employment, and credit (‘HEC’) ads.”<sup>101</sup> The portal restricts targeting by

<sup>91</sup> See Upturn Opiotennione Brief, *supra* note 30, at 2 (describing Facebook’s algorithm); see also *About Ad Auctions*, FACEBOOK, <https://www.facebook.com/business/help/430291176997542> (last visited Sept. 26, 2020), archived at <https://perma.cc/D6GD-66TM>.

<sup>92</sup> See *About Detailed Targeting*, FACEBOOK, <https://www.facebook.com/business/help/182371508761821?id=176276233019487> (last visited Oct. 23, 2020), archived at <https://perma.cc/SP8U-CQJ5> (indicating that Facebook allows advertisers to target demographically using age, gender, and location but not including race, ethnicity, or other categories like religion).

<sup>93</sup> See Speicher et al., *supra* note 8, at 9–10.

<sup>94</sup> *Id.*

<sup>95</sup> See *id.*

<sup>96</sup> *Id.* at 6.

<sup>97</sup> *Id.* at 11.

<sup>98</sup> See *id.* at 13.

<sup>99</sup> *Id.* at 12–13 (indicating the size of the replication and the presence in the Lookalike Audiences).

<sup>100</sup> See *Advertising Policies*, FACEBOOK, <https://www.facebook.com/policies/ads/> (last visited Sept. 26, 2020), archived at <https://perma.cc/2KSA-RGL5?type=image>.

<sup>101</sup> Joint Statement, *Summary of Settlements Between Civil Rights Advocates and Facebook: Housing, Employment, and Credit Advertising Reforms*, NAT’L FAIR HOUS. ALL.

zip code and other options that “may relate to race, color, national origin, ethnicity, gender . . . among other protected characteristics or classes.”<sup>102</sup> It also bans Lookalike Audiences.<sup>103</sup> These restrictions address only a narrow class of products, failing to consider inferior social welfare products like for-profit education or credit-adjacent products like financial services. In addition to restrictions on advertising, Facebook has modest transparency tools that show all active advertisements and historical housing ads, but do not reveal any information about audiences size or targeting decisions.<sup>104</sup>

However, Facebook has admitted that the restrictions on HEC advertisers do little to reduce discriminatory outcomes on its platform. In its own July 2020 civil rights audit, Facebook acknowledged that despite its HEC portal, discrimination in housing, credit, and employment advertising continued.<sup>105</sup> It cited a follow-up study by Northeastern University and Upturn researchers and admitted “that Facebook’s Special Ad Audiences algorithms may lead to biased results despite the removal of protected class information.”<sup>106</sup>

The algorithm itself can drive discrimination. Ad delivery can lead to discriminatory results whether or not the advertisers aim to discriminate. A different Northeastern-Upturn study provides evidence of these results. Researchers found that ads referring to hip-hop can be delivered to an audience that is over 85% Black.<sup>107</sup> The researchers also found that the algorithm discriminated based on the pictures in advertising copy. The relevance algorithm’s analysis of user responses to pictures was so strong that, for example, ad creative targeted towards men with pictures designed to appeal to women were delivered to women.<sup>108</sup> The algorithm also discriminates based on the content of the ads. The researchers discovered that real-world employment and housing advertisements targeted with neutral, non-discriminatory, targeting parameters had skewed outcomes. Lumberjack positions delivered to a 90% male and 72% white audience; supermarket cashier ads were served to an 85% female audience; and janitor and taxi driver positions

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(Mar. 19, 2019), <https://nationalfairhousing.org/wp-content/uploads/2019/03/3.18.2019-Joint-Statement-FINAL-1.pdf>, archived at <https://perma.cc/RPS6-M4JU>.

<sup>102</sup> *Id.* at 1.

<sup>103</sup> *Id.* at 2.

<sup>104</sup> See UPTURN, *supra* note 12, at 2 n.10 (citing Rob Goldman (@robjective), TWITTER (Feb. 17, 2018, 10:30 AM), <https://twitter.com/robjective/status/964884872882982912>, archived at <https://perma.cc/GGV5-4YP8>); see also FACEBOOK, FACEBOOK’S CIVIL RIGHTS AUDIT—FINAL REPORT 73 (2020) (describing the housing ad library), <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>, archived at <https://perma.cc/99XT-3WB7> [hereinafter CIVIL RIGHTS AUDIT]).

<sup>105</sup> See CIVIL RIGHTS AUDIT, *supra* note 104, at 72.

<sup>106</sup> *Id.* at 74 (citing PIOTR SAPIEZYNSKI ET AL., ALGORITHMS THAT “DON’T SEE COLOR”: COMPARING BIASES IN LOOKALIKE AND SPECIAL AD AUDIENCES 8–9 (2019), <https://arxiv.org/pdf/1912.07579.pdf>, archived at <https://perma.cc/Q7QZ-TR2C> (evaluating the efficacy of Facebook’s Special Ad Audience tool and finding that they “do little to reduce demographic biases”)).

<sup>107</sup> See Ali et al., *supra* note 29, at 2.

<sup>108</sup> See *id.* at 9.



were delivered to a majority Black audience.<sup>109</sup> Among housing advertisements, Facebook determined that low-priced homes were more relevant for white people than Black people.<sup>110</sup> Black homebuyers were redlined away from ads for affordable homes due to the algorithm's assessment of relevance. Ultimately, the study shows that Facebook's ad-delivery optimization algorithm decides what opportunities people see and do not see.

### C. Data Brokers: Sharpening Targeting

In order to take maximum advantage of platform-based advertising, analytic advertisers purchase additional data from data brokers.<sup>111</sup> Brokers create consumer profiles based on “billions of data elements covering nearly every U.S. consumer.”<sup>112</sup> Their data includes bankruptcy information, voter files, purchase histories, browsing activities, social media information, and credit files among many other categories on virtually every American consumer.<sup>113</sup> Like the platforms, they then use machine learning technology to process this data<sup>114</sup> and create segments based on data and inferences about consumers.<sup>115</sup>

Data brokers sell lists of new, prospective customers as well as additional data on existing customers and prospects.<sup>116</sup> In this transaction, the advertiser identifies characteristics of its target audience—often based on internal data or survey analysis—and purchases a list of people who match those attributes.<sup>117</sup> The advertiser can also ask the broker to “fill in gaps” for lists that include only basic details like name, address, and/or zip code.<sup>118</sup> While Facebook discontinued its partnerships with data brokers,<sup>119</sup> advertis-

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<sup>109</sup> *Id.* at 12.

<sup>110</sup> *See id.* at 13.

<sup>111</sup> *See* EDITH RAMIREZ ET AL., DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY, FED. TRADE COMM'N 24–25 (2014), [http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf?utm\\_source=govdelivery](http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf?utm_source=govdelivery), archived at <https://perma.cc/S6NB-X279>.

<sup>112</sup> *Id.* at iv.

<sup>113</sup> *See id.* at 11–14 (The section describing data brokers presents three examples that paint a picture of the scope of third-party data: Acxiom, for example, has consumer information on 700 million people, including 3,000 data segments for almost every American consumer; Datalogix sells marketing data on almost every U.S. household; and eBureau specializes in predictive consumer ranking for marketers and financial services companies, promising to identify the most profitable potential consumers.).

<sup>114</sup> *See* Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating “Haves” from “Have-Nots”*, 2014 MICH. ST. L. REV. 1411, 1427 (2014).

<sup>115</sup> *See* RAMIREZ ET AL., *supra* note 111, at 19.

<sup>116</sup> *See id.* at 24.

<sup>117</sup> *See id.* at 25.

<sup>118</sup> *Id.* at 24.

<sup>119</sup> *See Shutting Down Partner Categories*, FACEBOOK, <https://about.fb.com/news/h/shutting-down-partner-categories/> (last visited Sept. 26, 2020), archived at <https://perma.cc/S9FH-KPDF>.

ers can still purchase lists from data brokers and use them with custom and look-alike audience tools.

When combined with platform targeting, third-party data can enable precision targeting of low-income people and people of color. Of course, many segments may be benign or used for benign purposes. However, data brokers sell segments that disproportionately include people of color and people struggling economically. While segments focused on these demographics typically do not have explicitly discriminatory names, the Federal Trade Commission (“FTC”) reports data brokers sell segments focused primarily on communities of color with lower incomes.<sup>120</sup> An advertiser could buy the segment “Metro Parents,” for example, to target low-income residents of color in a group that includes consumers “primarily in high school or vocationally educated” or “handling single parenthood and the stresses of urban life on a small budget.”<sup>121</sup> More explicitly, the FTC found that lenders were able to buy lists of “[u]nderbanked” or “[f]inancially challenged” consumers “to send them an advertisement for a subprime loan.”<sup>122</sup>

#### *D. Analyzing the Process: Assessing Responsibility for Potential Harms*

We now understand the targeting process and how the technology can target consumers in protected classes and with financial vulnerabilities. Advertisers select the broad audiences they want to target for advertising. For analytic advertisers, this is an intentional process that can involve segmentation and purchases from a data broker. Intuitive advertisers, on the other hand, give platforms broad instructions. After advertisers shape audiences for their targeted marketing, they make the active decision to advertise, design ad creative that will appeal to their target audience, and deliver their advertisements. Whether the advertisers manually select audiences through toggle features, handpick consumers through list uploads leveraging look-alike features, or a combination of each, the ad platforms provide targeting tools calibrated towards the most responsive audiences given the available data. For intuitive advertisers, the segmentation and targeting mostly occurs within the platform. For analytic advertisers, the platforms sharpen pre-constructed segmentations. For both, the platforms use predictive segmentations “to assess each consumer’s likely value to the company and to decide what

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<sup>120</sup> See RAMIREZ ET AL., *supra* note 111, at 20 n.52.

<sup>121</sup> *Id.*; see also MAJORITY STAFF OF OFF. OF OVERSIGHT & INVESTIGATIONS, S. COMM. ON COM., SCI. & TRANSP., 113TH CONG., REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES 24–26 (Comm. Print 2013) (staff report for Senator Rockefeller IV, Chairman, Senate Committee of Commerce, Science, and Transportation) (describing similar demographic categories, such as “Modest Wages,” which includes low-income single people without kids, as well as “financially challenged,” “fragile families,” and “vocational and technical degrees”).

<sup>122</sup> RAMIREZ ET AL., *supra* note 111, at 25.

offers and remedies each consumer deserves.”<sup>123</sup> It then delivers the advertisement to particular users selected by its algorithm based on targeting parameters, ad copy, and “relevance” optimization.<sup>124</sup> Based on targeting criteria and what the algorithm knows about its users, the algorithm may deem, for example, that a for-profit education ad is disproportionately “relevant” to Black users and deliver that advertisement to an audience that is disproportionately Black.

Three points require emphasis as we consider responsibility for these outcomes. First, contrary to popular narratives that algorithms alone drive segmentation and targeting, humans play key roles in the segmentation process especially for analytic advertisers. While some advertising processes can be automated, analytic advertisers that use and purchase segments understand that these segments do not form themselves. Instead, people—both the advertiser and the data broker—analyze the data, refine the segments, and therefore understand who is being targeted.<sup>125</sup> It is important for lawyers and policymakers to understand the human role: it opens the door for discovery questions, and it opens the imagination for improvements.

Second, the platforms are also responsible for disparate outcomes through targeting tools and optimized ad delivery. Recall the Northeastern-Upturn study finding empirical evidence of Facebook’s discriminatory ad delivery even in cases where advertisers did not try to discriminate,<sup>126</sup> which Facebook acknowledged in its civil rights audit.<sup>127</sup> Discrimination occurs even when advertisers input neutral targeting criteria because the algorithm deems content to be more relevant to certain audiences. Further, when advertisers use look-alike tools, platforms have complete control over the selection of the audience that sees the advertisements.<sup>128</sup> Policymakers must see that platforms do not merely publish ads on digital billboards; they drive outcomes, contributing directly to the redlining or reverse redlining of an advertisement if it occurs through the use of optimized ad-delivery or look-alike tools.

Third, platforms proliferate targeted advertisements. Through toggle and look-alike tools in particular, advertisers with sufficient budgets are guaranteed to reach massive audiences of new consumers that they could not otherwise reach. Facebook can multiply curated lists more than four hundred times the original list size. This means platforms can provide the means to exclude entire classes of people or proliferate a predatory product at a staggering scale.

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<sup>123</sup> Schmitz, *supra* note 114, at 1414.

<sup>124</sup> Ali et al., *supra* note 29, at 3 (explaining how Facebook delivers advertisements based on relevancy).

<sup>125</sup> See THE BOSTON CONSULTING GROUP, *supra* note 25, at 1.

<sup>126</sup> See Ali et al., *supra* note 29, at 25.

<sup>127</sup> See FACEBOOK, *supra* note 104, at 724.

<sup>128</sup> See *About Lookalike Audiences*, *supra* note 81.

## II. MANIPULATING CONSUMERS THROUGH DIGITAL ADVERTISING

Advertisers and platforms manipulate consumers. This section will draw upon the previous section's technical explanation to make the case that digital advertising can influence people to act, on the basis of targeting, in ways that are against their best interests. This analysis lays the theoretical and empirical foundation for this Article's discussion on reverse redlining by establishing manipulation as the framework for harm, and providing empirical evidence that digital advertising actually can cause this harm.

A. *Defining Manipulation*

Definitions of manipulation mostly agree that manipulation involves leveraging vulnerability to subvert rational decision-making processes.<sup>129</sup> Shaun B. Spencer outlines the robust academic debate in the context of digital advertising technologies in his article, *The Problem of Online Manipulation*.<sup>130</sup> He defines manipulation as “an intentional attempt to influence a subject's behavior by exploiting a bias or vulnerability.”<sup>131</sup> However, some definitions, like Spencer's, do not focus on the harm generated by a manipulative influence. For example, one can leverage biases to lead consumers to make decisions that they might make with full information. While not harmful, this would be manipulation under Spencer's definition.

For the purposes of this Article, I adopt a definition of manipulation that highlights the harm that manipulation causes. My definition builds on those of Tal Zarsky, Anne Barnhill, and Yochai Benkler. These definitions each emphasize the ways manipulation is tailored to overwhelm a person's self-interest, and they focus on assessing the nature of the influence. Zarsky, a scholar that has focused on digital manipulation explains: “[W]hen consumers are bombarded with specially tailored marketing pitches and advertisements that will capitalize on their vulnerabilities and take advantage of their weaknesses, their subsequent actions might not be those that they would have chosen should they have had the opportunity to reflect on these matters.”<sup>132</sup> Barnhill defines manipulation as “directly influencing someone's beliefs, desires, or emotions such that she falls short of ideals for belief, desire, or emotion in ways typically not in her self-interest or likely not

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<sup>129</sup> See, e.g., Daniel Suser et al., *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 12–13 (2019) (defining manipulation as an intentional and targeted attempt to influence a subject through hidden means, by attempting to exploit their vulnerabilities); Sunstein, *supra* note 4, at 218 (calling manipulation any effort that “does not sufficiently engage or appeal to [a subject's] capacity for reflection and deliberation”).

<sup>130</sup> See Spencer, *supra* note 4, at 990.

<sup>131</sup> *Id.*

<sup>132</sup> Tal Z. Zarsky, *Online Privacy, Tailoring and Persuasion*, in PRIVACY AND TECHNOLOGIES OF IDENTITY: A CROSS-DISCIPLINARY CONVERSATION 209, 209–24 (Katherine J. Strandburg & Daniela Stan Raicu eds., 2012).

in her self-interest in the present context.”<sup>133</sup> In order to understand manipulation, therefore, we must understand a person’s interests both prior to the intervention and after the intervention. Benkler introduces the idea of the empathetic observer as the evaluator of self-interest: “The empathetic observer takes the first-person perspective of the target of the communication and asks whether that person, knowing the entire situation, including the intentions and psychological techniques of the alleged manipulator, would welcome the allegedly manipulative communication.”<sup>134</sup> In other words, manipulation occurs when an empathetic observer would conclude that the influencer persuaded a person to act against her self-interest.<sup>135</sup>

Combining these approaches, this article defines manipulation as directly influencing someone’s beliefs, desires, or emotions by targeting her weaknesses or vulnerabilities<sup>136</sup> such that an empathetic observer would conclude that she falls short of ideals for belief, desire, or emotion in ways that are not in her self-interest. Digital advertising (1) can influence users to act (2) by targeting their vulnerabilities (3) in a manner that an empathetic observer would conclude was not in their best interest.

Centering the harm is essential because it helps distinguish between benign and malignant efforts to influence. Nudges, like making healthy food more accessible than junk food, can take advantage of cognitive biases to influence people to take action in socially beneficial ways.<sup>137</sup> Policymakers, playing the role of empathetic observers, should be less concerned with these nudges. Alternatively, anti-discrimination and consumer protection laws provide a mandate to protect people from harmful nudges, as the very nature of the technology makes it difficult for consumers to avoid influence or protect themselves.

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<sup>133</sup> Anne Barnhill, *What Is Manipulation*, in *MANIPULATION: THEORY AND PRACTICE* 51, 52 (Christian Coons & Michael Weber eds., Oxford University Press, 2014) (Barnhill emphasizes the importance of manipulation triggering a non-ideal response that is against the self-interest of the subject. This view is opposed to manipulation triggering a response that the influencer might believe is against the self-interest of the subject.).

<sup>134</sup> YOCHAI BENKLER ET AL., *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* 31 (2018) (citing Yochai Benkler, *Networks of Power, Degrees of Freedom*, 5 INT’L J. OF COMM’N 721, 727 (2011) (providing a conceptual framework for understanding freedom and power in multiple concurrently acting systems)).

<sup>135</sup> See Benkler, *supra* note 134, at 727 (detailing the role of the empathetic observer in understanding the exercise of power against the baseline of a subject’s preference prior to the intervention).

<sup>136</sup> While in the case of digital manipulation, most of the manipulation is covert or implicit, this definition focuses on the exploitation of biases or vulnerabilities. Some advertisements are clearly designed to target those vulnerabilities and are successful in doing so without being covert. See Barnhill, *supra* note 133, at 62–63 (discussing the ways that manipulation is broader than covert deceptive or covert influence).

<sup>137</sup> See, e.g., CASS SUNSTEIN & RICHARD THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 1–3 (2009) (discussing food example); *id.* at 5 (discussing benign influence through libertarian paternalism—nudges with opt-outs).

*B. The Consumer Experience: Moving Consumers to Act*

As this Article discusses extensively in Part II, platforms process people's online behavior into profiles that form the raw data used to target advertisements. In order to use a platform, individuals must consent to the processing and sharing of their data and to consequently receiving targeted, personalized ads.<sup>138</sup> Opting out is virtually impossible. For example, even non-Facebook users have profiles tagged to unique identifiers like their cell phone that activate upon profile creation.<sup>139</sup> Similarly, the FTC admits that it is basically impossible for consumers to opt out of data collection by data brokers because consumers do not even know they exist.<sup>140</sup> As the Cambridge Analytica scandal revealed, when the firm transformed ten thousand users who shared their contact lists into profiles on millions of American voters,<sup>141</sup> privacy conscious users can be made vulnerable to profiling and targeting by their friends. These users may experience "networked privacy harms" where they are harmed by associations with other people in their network.<sup>142</sup>

While advertisers and the platforms have closely guarded empirical evidence proving direct consumer influence, the tip of the iceberg is visible.<sup>143</sup> Digital advertisements are carefully targeted and optimized to influence consumers to act. Although society needs more scientific studies measuring the influence and effectiveness of behavioral advertising, early empirical research, financial logic, and corporate analysis demonstrate that these advertisements can induce action and are designed to induce action. Several examples help prove this point. A large 2016 study of paid search advertising for restaurants indicated that it increased page views, the percentage of consumers who intended to go to the restaurants, and likely real attendance at the restaurants.<sup>144</sup> Similarly, a randomized control trial proved that social influence through social media ads designed for peer pressure had a statisti-

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<sup>138</sup> See *Privacy Policy*, GOOGLE, <https://policies.google.com/privacy> (last visited Sept. 26, 2020), archived at <https://perma.cc/BF3P-9T84>.

<sup>139</sup> See Zeynep Tufekci, *Think You're Discreet Online? Think Again*, N.Y. TIMES (Apr. 21, 2019), <https://www.nytimes.com/2019/04/21/opinion/computational-inference.html>, archived at <https://perma.cc/88XY-NVAQ>.

<sup>140</sup> See Schmitz, *supra* note 114, at 1423.

<sup>141</sup> See, e.g., Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2019), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>, archived at <https://perma.cc/6LWX-XMV7>.

<sup>142</sup> Mary Madden et al., *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53, 56 (2017).

<sup>143</sup> See Zuboff, *supra* note 2, at 306 (describing Facebook's incentive for privacy after manipulation scandals).

<sup>144</sup> See Daisy Dai & Michael Luca, *Effectiveness of Paid Search Advertising: Experimental Evidence 1* (Harv. Bus. Sch. NOM Unit, Working Paper No. 17-025, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2847084](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847084), archived at <https://perma.cc/7W4H-E722>.

cally significant effect on voter turnout, moving hundreds of thousands of people to vote who may not have voted otherwise.<sup>145</sup>

The platforms leverage biases and vulnerabilities to influence action. In 2017, for example, *The Australian* leaked Facebook documents, revealing that it offered a top Australian bank the opportunity to advertise to Australian kids, college students, and young workers at vulnerable emotional moments—when they felt “insecure,” “need[ed] a confidence boost,” or felt “anxious.”<sup>146</sup> Facebook segmented an audience for a large bank, and it encouraged targeting based on psychographic information. This scandal has been linked to a massive study where Facebook demonstrated empirically that it could change the emotional states of its users “via emotional contagion.”<sup>147</sup> Through this technique, called “persuasion profiling,”<sup>148</sup> Facebook has the power to change emotions, and make a profit by selling ads on the basis of that emotional manipulation. Put generally, advertisers can design their advertisements to target specific emotional biases and the Facebook algorithm will find the targeted users based on its data profiles most likely to respond to the given emotional message.

While only the tip of the influence iceberg is visible through empirical studies, advertisers and platforms understand the platform’s power. Advertisers understand that these technologies allow them to manipulate. The top data scientist for a national drugstore chain explains that these nudges change behaviors: “[Y]ou can make people do things with this technology. Even if it’s just 5% of people, you’ve made 5% of people do an action they otherwise wouldn’t have done, so to some extent there is an element of the user’s loss of self-control.”<sup>149</sup> The financial returns to platforms also indicate the power of digital advertising to influence user behavior. If a 0.1% improvement in the power to predict which ads would lead which users to act can yield revenue increases of hundreds of millions of dollars, economic logic indicates that both advertisers and platforms know the technology influences users to act in ways they would otherwise not act.<sup>150</sup>

This evidence of consumer influence and technical analysis of digital targeting demonstrates that digital advertising can meet the first two ele-

<sup>145</sup> See Robert Bond et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 *NATURE* 295, 295–98 (2012), <https://www.nature.com/articles/nature11421.pdf>, archived at <https://perma.cc/MJM8-V5Z3>.

<sup>146</sup> Sam Levin, *Facebook Told Advertisers It Can Identify Teens Feeling ‘Insecure and Worthless’*, *GUARDIAN* (May 1, 2017), <https://www.theguardian.com/technology/2017/may/01/facebook-advertising-data-insecure-teens>, archived at <https://perma.cc/MQY2-SHR6>.

<sup>147</sup> Adam D. I. Kramer et al., *Experimental Evidence of Massive-Scale Emotional Contagion Through Social Networks*, 24 *PNAS* 8788, 8788 (Mar. 25, 2014), <https://www.pnas.org/content/111/24/8788.full>, archived at <https://perma.cc/T2KA-SZ4U> (proving through massive empirical study that if the Facebook-made consumer News Feeds show more negative posts, they could influence users to express more negative emotions and vice-versa).

<sup>148</sup> Ryan Calo, *Digital Market Manipulation*, 82 *GEO. WASH. L. REV.* 995, 1016–17 (2014) (citing various works by Maurits Kaptein & Dean Eckles).

<sup>149</sup> ZUBOFF, *supra* note 2, at 295.

<sup>150</sup> See Ling et al., *supra* note 38, at 689.

ments of manipulation: influence through the targeting of biases. Through the restaurant<sup>151</sup> and voting studies,<sup>152</sup> we understand that ad platforms can empirically influence users to act. As the Bing study proved, the more precise the targeting to a user's emotions, wants, and desires, as measured by clicks, the more likely it is that a user will respond to an advertisement.<sup>153</sup> The story in *The Australian* emphasizes that platforms can deliberately target consumers based on emotional vulnerabilities.<sup>154</sup> The Northeastern-Upturn studies demonstrate that Facebook's algorithm has mathematically calculated that female users are, on average, more likely than male users to click on ads featuring female models, meaning that platforms can influence women to act on the basis of biased advertisements—those that statistically appeal to their gender.<sup>155</sup>

In the context of an inferior social welfare product, the use of digital targeting tools harms consumers and therefore meets the third element of manipulation because they influence consumers to act against their self-interests. Harm results when these technologies discriminate, cause economic injuries, or violate people's privacy. This article emphasizes civil rights harms because of the centrality of discrimination to platform advertising and the compelling national interest in eradicating systemic racism in every form. It also emphasizes economic harms because behavioral advertising leads to greater financial harm on low-income groups.<sup>156</sup> While this article considers privacy law, it does not emphasize privacy harms. As Ann Bartow puts it, privacy law's "lack of blood and death, or at least of broken bones and buckets of money, distances privacy harms" from physical harm and "relegates privacy violations to a very low place in the taxonomy of immediate and visceral public policy concerns."<sup>157</sup> Ultimately, as Mary Madden and her coauthors write in *Privacy, Poverty, and Big Data*, this digital advertising technology has the potential to "injure the economic stability and civil rights of the poor, such as when they are targeted for predatory financial products, charged more for goods and services online, or profiled in ways that limit their employment and educational opportunities."<sup>158</sup>

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<sup>151</sup> See Dai & Luca, *supra* note 144, at 17.

<sup>152</sup> See Bond et al., *supra* note 145, at 295–98.

<sup>153</sup> See Ling et al., *supra* note 38, at 689.

<sup>154</sup> See Levin, *supra* note 146.

<sup>155</sup> See Ali et al., *supra* note 29, at 3–4.

<sup>156</sup> See Calo, *supra* note 148, at 1026 (citing OREN BAR-GILL, *SEDUCTION BY CONTRACT LAW, ECONOMICS AND PSYCHOLOGY IN CONSUMER MARKETS* (2012) (analyzing contracts designed to exploit behavioral biases)).

<sup>157</sup> Ann Bartow, *A Feeling of Unease About Privacy Law*, 154 U. PENN. L. REV. 52, 62 (2006) (analyzing Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477 (2006), and suggesting that it and privacy law in general fails to make the harms of privacy violations visceral).

<sup>158</sup> Madden et al., *supra* note 142, at 65; see also Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 96 (2014) (discussing deeper harms from data collection, aggregation, and marketing, including both redlining and reverse redlining among low-income people and people of color).



### III. FOR-PROFIT EDUCATION: A REVERSE REDLINING CASE STUDY

The for-profit education industry offers a case study of reverse redlining: it is an industry based on manipulating consumers to buy an inferior social welfare product through digital ad targeting. FPCUs reveal digital manipulation in its purest form. Without manipulative advertising, FPCUs could hardly compete in the free market against comparable nonprofit colleges and universities. They have worse outcomes at higher prices. While FPCUs offer a paradigmatic example with comparatively more data to analyze, this case study on the reverse redlining of an inferior social welfare product could apply to a range of products in the housing, employment search services, and credit spaces, as well as other critical products and services like pharmaceuticals,<sup>159</sup> financial services,<sup>160</sup> debt relief,<sup>161</sup> and rehabilitation services<sup>162</sup> that are critical for human flourishing and survival.

This section sets the stage for an analysis of the legal regimes that govern reverse redlining and uses negative space to identify the case for regulation of inferior social welfare products. Abiding by this Article's definition of manipulation, this section begins with a profile of Kareem Britt, an individual impacted by digital reverse redlining. It continues by analyzing how FPCUs systematically meet this Article's definition of manipulation through their reverse redlining practices. It demonstrates that FPCUs use digital advertising to influence consumers who are disproportionately low-income and people of color to enroll in FPCU programs. Then, it reviews the industry's outcomes to assert that an empathetic observer must conclude that enrollment in an FPCU is against the self-interest of students and society.

#### A. Reverse Redlining in Practice

Consider the allegations by the named plaintiff in a recent class action alleging reverse redlining by an FPCU filed by the Project on Predatory

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<sup>159</sup> See Nitasha Tiku, *Facebook Has a Prescription: More Pharmaceutical Ads*, WASH. POST (Mar. 4, 2020), [https://www.washingtonpost.com/technology/2020/03/03/facebook-pharma-ads/?utm\\_campaign=WP\\_main&utm\\_medium=social&utm\\_source=twitter](https://www.washingtonpost.com/technology/2020/03/03/facebook-pharma-ads/?utm_campaign=WP_main&utm_medium=social&utm_source=twitter), archived at <https://perma.cc/Q2K7-UKMZ> (discussing increased spending on pharmaceutical ads).

<sup>160</sup> See, e.g., Jonathan Stempel, *Facebook Sued for Age, Gender Bias in Financial Services Ads*, REUTERS (Oct. 31, 2019), <https://www.reuters.com/article/us-facebook-lawsuit-bias-idUSKBN1XA2G8>, archived at <https://perma.cc/U3WG-4VS9> (covering a lawsuit against Facebook for age and gender discrimination in financial services advertising which notably fell outside the March 2019 settlement terms).

<sup>161</sup> See UPTURN, *supra* note 12, at 14 (discussing student debt scams and the way that fraudulent student loan relief agencies use digital advertising to target overburdened borrowers who often came from FPCUs).

<sup>162</sup> See *Examining Concerns of Patient Brokering and Addiction Treatment Fraud: Hearing Before the H. Comm. on Energy and Com., Subcomm. on Oversight & Investigations*, 115th Cong. 1–2 (2017) (statement of Eric Gold, Assistant Att'y Gen. of Mass.).

Student Lending, *Britt v. IEC Corporation*.<sup>163</sup> Kareem Britt, a Black man working two jobs as a cook, responded to a Facebook advertisement by Florida Career College (FCC).<sup>164</sup> FCC is a private for-profit vocational school that asked in its ad, “[A]re you tired of working minimum wage jobs? Eating ramen noodles? Are you ready to step up to steak? HVAC degrees make \$16 to \$23/hr.”<sup>165</sup> The complaint documents specific FCC Facebook advertisements that featured people of color and reveals disproportionately high Black enrollment at FCC.<sup>166</sup> The complaint does not detail the advertising tools used by FCC, but we know the school used one of Facebook’s tools to select targeting parameters that included Mr. Britt. And, we know that FCC’s advertisements were likely delivered to people of color like Mr. Britt due to the presence of Black models in the ads.<sup>167</sup>

Mr. Britt, who allegedly fell victim to this reverse-redlining, agreed to interview for and enroll in FCC because of the Facebook ad and his “interview” with a sales representative.<sup>168</sup> After being pressured to take on debt—more than he thought—Mr. Britt enrolled in a school that did not provide adequate equipment or instruction.<sup>169</sup> Upon completing his program, Mr. Britt was not able to find HVAC work, allegedly receiving no assistance from the school. He again found work as a cook, just with more debt.<sup>170</sup> The school is allegedly withholding his diploma, as Mr. Britt was unable to stay current on his payments.<sup>171</sup>

### B. Centrality of Targeted Advertising to For-Profit Business Models

For-profit education is an industry defined by its reliance on advertising to get thousands of students like Mr. Britt to enroll. The industry works the way it sounds: businesses provide educational services to consumers, aiming to earn returns for primarily public or private equity investors.<sup>172</sup> Customer acquisition forms the foundation of the business model. According to a detailed study by The Brookings Institute (“Brookings”), FPCUs outspent public universities by \$300 per student on advertising controlling for a range

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<sup>163</sup> Complaint at 28, *Britt v. IEC Corp.*, No. 0:20-CV-60814 (S.D. Fla. filed Apr. 20, 2020) [hereinafter *Britt Complaint*].

<sup>164</sup> *See id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See id.* at 24.

<sup>167</sup> *See* Part IV.B.ii *supra* (discussing the skews that occur in ad-delivery optimization where Black models are used in ads).

<sup>168</sup> *Britt Complaint*, *supra* note 163, at 28.

<sup>169</sup> *See id.* at 29.

<sup>170</sup> *See id.* at 30.

<sup>171</sup> *See id.* at 31.

<sup>172</sup> *See, e.g.*, Ben Unglesbee, *Private Equity’s Role in the Rise—and Fall—of for-Profit Colleges*, EDUC. DIVE (May 6, 2020), <https://www.educationdive.com/news/private-equitys-role-in-the-rise-and-fall-of-for-profit-colleges/554077/>, archived at <https://perma.cc/UJ82-LTF6> (detailing that more than 75% of FPCU students attend a publicly traded or private-equity owned institution).

of factors.<sup>173</sup> Among FPCUs that spend more than \$1 million per year on advertising, 85% of student services spending went to advertising compared to 10% and 8% for nonprofit and public universities, respectively.<sup>174</sup> The 2012 Senate report on for-profit education, known as *The Harkin Report*, found that FPCUs allocate twice as much of their revenues to marketing and profits as they do to instruction.<sup>175</sup>

The discussion on business models is especially important for the identification of predatory actors in 2020 because FPCUs are transitioning to nonprofit status to avoid scrutiny.<sup>176</sup> It remains to be seen whether the resulting new entities will improve student outcomes, or whether they will remain inferior educational institutions, functioning as nonprofits in name only.<sup>177</sup>

Customer acquisition yields immediate financial rewards because FPCUs get up-front loan payments from the government. Broadly, the enrollment works as follows: A percentage of consumers, who viewed advertisements and spoke to enrollment advisers, enroll. Specialized teams of financial aid advisors help prospective students access federal aid.<sup>178</sup> The vast majority (96%) must secure financing in order to attend,<sup>179</sup> and nearly 90% of the financing comes in the form of upfront payments from the fed-

<sup>173</sup> Stephanie Riegg Cellini & Latika Chaudhary, *Commercials for College? Advertising in Higher Education*, BROOKINGS (May 19, 2020), <https://www.brookings.edu/research/commercials-for-college-advertising-in-higher-education/>, archived at <https://perma.cc/995H-H4XY>.

<sup>174</sup> *Id.*

<sup>175</sup> See S. COMM. ON HEALTH, EDUC., LAB. & PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT & ENSURE STUDENT SUCCESS 6 (Comm. Print 2012) [hereinafter HARKIN REPORT].

<sup>176</sup> See, e.g., Robert Shireman, *These Colleges Say They're Non-Profit, But Are They?*, CENTURY FOUND. (Aug. 24, 2018), <https://tcf.org/content/commentary/colleges-say-theyre-nonprofit/?session=1>, archived at <https://perma.cc/HAX6-9KZR> (detailing various FPCUs attempting a nonprofit transition).

<sup>177</sup> Grand Canyon University, for example, transitioned to nonprofit status, while hiring a for-profit company with the same CEO to manage the school. Its bid to be treated as a nonprofit was ultimately rejected by the Department of Education precisely because it did not change its model. See Rachel Leingang, *Grand Canyon University Must Follow For-Profit Rules Despite Its Return To Nonprofit Status, Feds Say*, ARIZ. REPUBLIC (Nov. 7, 2019), <https://www.azcentral.com/story/news/local/arizona-education/2019/11/07/grand-canyon-university-must-follow-for-profit-rules-despite-return-to-nonprofit-status-feds-say/2514914001/>, archived at <https://perma.cc/A7NJ-XADS>. Similarly, some FPCUs have been acquired by state universities in deals where they continue managing the online experience, and new nonprofit entities affiliated with the university manage recruiting and education. Marketing has continued with Purdue, for example, spending more than \$130 million on advertising last year for its online university. See, e.g., Jeffrey R. Young, *U. of Arizona Bought a For-Profit U. for \$1? Actually, the For-Profit Paid Millions to Be Acquired*, EdSURGE (Aug. 6, 2020), <https://www.edsurge.com/news/2020-08-06-u-of-arizona-bought-a-for-profit-u-for-1-actually-the-for-profit-paid-millions-to-be-acquired>, archived at <https://perma.cc/RU22-3UMD>.

<sup>178</sup> See, e.g., Terry Gross, *How For-Profit Colleges Sell 'Risky Education' to the Most Vulnerable*, NPR (Mar. 27, 2017), <https://www.npr.org/2017/03/27/521371034/how-for-profit-colleges-sell-risky-education-to-the-most-vulnerable>, archived at <https://perma.cc/EVH2-PF5P> (interviewing former enrollment counselor Tressie McMillan Cottom on enrollment practices).

<sup>179</sup> HARKIN REPORT, *supra* note 175, at 18 (comparing 96% at FPCUs to 13% at community colleges and 48% at four-year public universities).

eral government.<sup>180</sup> Students take on debt, and payments are made before the term begins, guaranteeing that FPCUs get paid in full for the first term even if a student drops out.<sup>181</sup> FPCUs “bear no risk,” as they get paid even if students drop out.<sup>182</sup>

### C. *Discriminatory Segmentation and Targeting: How For-Profits Recruit*

The demographic breakdown at FPCUs strongly suggests disproportionate targeting of students of color and low-income students. Based on 2011 numbers, Black and Latinx students comprise nearly half of FPCU student bodies. By comparison, these students are 28% of overall undergraduates.<sup>183</sup> According to a 2019 study from the Pew Research Center (“Pew”), non-white students were 58% of FPCU students, but 47% of students overall (a number inclusive of for-profit students).<sup>184</sup> The report also found that 61% of dependent undergraduates—those receiving financial support from their family—and 76% of independent undergraduates at FPCUs were poor or near poor.<sup>185</sup> Both figures are much higher than comparable and cheaper public two-year schools.<sup>186</sup> The following subsections consider the history of FPCU customer acquisition practices and case studies of their current search advertising and social advertising to make the argument that FPCUs’ demographic skews are the result of targeting.

#### 1. *Past, Present, and Scope of Predatory Targeting by FPCUs*

FPCUs have calibrated their sales funnels to take leads—who respond to advertisements—and manipulate them to enroll. While this article focuses on digital advertising, FPCUs generate leads through a variety of online and offline techniques.<sup>187</sup> After FPCU enrollment counselors reach a lead, they employ sales tactics designed to exploit consumer vulnerabilities.<sup>188</sup> Schools

<sup>180</sup> Jacob Alderdice, *The Informed Student-Consumer: Regulating For-Profit Colleges by Disclosure*, 50 HARV. C.R.-C.L. L. REV. 215, 228 (2015) (discussing the centrality of federal financial aid to the business model and the difficulty of earning revenues outside of federal aid, especially given that veterans’ financial aid does not count against the 90/10 rule).

<sup>181</sup> See *id.* (discussing that financing is equivalent to student debt).

<sup>182</sup> Dundon, *supra* note 16, at 380.

<sup>183</sup> *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges: Hearing Before the S. Comm. on Health, Educ., Lab. & Pensions*, 112th Cong. 32 (2011) (statement of Pauline Abernathy, Vice President, Institute for College Access and Success).

<sup>184</sup> RICHARD FRY & ANTHONY CILLUFFO, PEW RSCH. CTR., A RISING SHARE OF UNDERGRADUATES ARE FROM POOR FAMILIES, ESPECIALLY AT LESS SELECTIVE COLLEGES 4, 10 (2019), <https://www.pewsocialtrends.org/2019/05/22/a-rising-share-of-undergraduates-are-from-poor-families-especially-at-less-selective-colleges/>, archived at <https://perma.cc/HG8D-7WLW>.

<sup>185</sup> *Id.* at 8, 16.

<sup>186</sup> *Id.*

<sup>187</sup> See Riegg Cellini & Chaudhary, *supra* note 173.

<sup>188</sup> See Dundon, *supra* note 16, at 377; HARKIN REPORT, *supra* note 175, at 46–59 (detailing high-pressure sales tactics).

employ “high-pressure sales tactics,” psychological persuasion techniques, and “outright fraud” to enroll prospective students.<sup>189</sup> For example, *The Harkin Report* found that managers trained counselors to identify students’ pain about “a dead-end job, [their] inability to support their children, and failing [their] parents or relatives.”<sup>190</sup> After finding vulnerabilities, FPCUs push college as a solution to the pain points.<sup>191</sup> Once students commit to enrolling, FPCUs facilitate the financial aid process and enroll students in school.<sup>192</sup>

FPCUs explicitly target consumers based on vulnerability. A 2013 complaint against the Corinthian Colleges alleged that it deliberately targeted a segment of single-parent families near the poverty line with characteristics that identified them as “stuck” or “isolated.”<sup>193</sup> *The Harkin Report* analyzed the practice of “targeting sales to [the] most vulnerable populations,”<sup>194</sup> finding, for example, that Vatterott College trained recruiters to go after students using segments that included “Welfare Mom w/Kids. Pregnant Ladies. Recent Divorce. Low Self-Esteem. Low Income Jobs. Experienced a Recent Death. Physically/Mentally Abused. Recent Incarceration. Drug Rehabilitation. Dead-End Jobs-No Future.”<sup>195</sup> *The Harkin Report* does not explicitly associate targeting with racial discrimination.<sup>196</sup> However, lawsuits and academic publications have explicitly made the connection, identifying racial targeting by the FPCUs.<sup>197</sup>

FPCUs learned to leverage ad platforms to automate and increase the precision of lead generation, using both lead-generators<sup>198</sup> and directly purchasing advertisements.<sup>199</sup> Online lead generators are third-party data brokers that collect contact data for prospective students as described in Section II or market themselves as college comparison tools to unsuspecting consumers.<sup>200</sup> Lead generators were a primary customer acquisition channel in the 2000s,<sup>201</sup> and they are still serving FPCUs. As of September 2020, the lead generator educationconnection.com and its top five competitors have monthly budgets of \$2.9 million, generating nearly 300,000 monthly clicks.<sup>202</sup> Nevertheless, while digital advertising by FPCUs themselves has

<sup>189</sup> Dundon, *supra* note 16, at 377–78.

<sup>190</sup> HARKIN REPORT, *supra* note 175, at 60.

<sup>191</sup> *See id.*

<sup>192</sup> *See, e.g.,* Gross, *supra* note 178.

<sup>193</sup> *See* Alderdice, *supra* note 180, at 227 (citing Complaint at 2, California v. Heald Coll., LLC, No. 13-534793, 2016 WL 1130744 (Cal. Super. Ct. Mar. 23, 2016)).

<sup>194</sup> HARKIN REPORT, *supra* note 175, at 58.

<sup>195</sup> *Id.*

<sup>196</sup> *See generally id.*

<sup>197</sup> *See e.g.,* Second Amended Class Action Complaint, *supra* note 6, at 3; Anderson v. Virginia Coll., LLC, No. 3:12-cv-503TSL-MTP, 2012 WL 4052198, at \*3 (S.D. Miss. Sept. 13, 2012).

<sup>198</sup> *See* HARKIN REPORT, *supra* note 175, at 65–67.

<sup>199</sup> *See* Riegg Cellini & Chaudhary, *supra* note 173.

<sup>200</sup> *See* HARKIN REPORT, *supra* note 175, at 65.

<sup>201</sup> *See id.*

<sup>202</sup> *SpyFu PPC Keywords*, SPYFU, <https://www.spyfu.com/ppc/keywords> (last visited Oct. 27, 2020) (data on file with the author).

received far less coverage than lead-generators, it is now the dominant strategy.<sup>203</sup> *The Harkin Report* does not once reference Facebook and confines Google to a footnote.<sup>204</sup> This was an oversight, as the University of Phoenix (the nation's largest FPCU), spent more on Google ads than any other company in 2012—the year the report was released.<sup>205</sup> A half-year study suggests that Phoenix's spend increased slightly by 2016 and that FPCUs spent roughly \$200 million a year on search advertising alone.<sup>206</sup> No comparable statistics are publicly available for social advertisements,<sup>207</sup> but Facebook's ad library reveals the prevalence of FPCU advertisements on the platform.<sup>208</sup>

## 2. *Current Advertising on Google: FPCUs and Lead Generators*

FPCUs and lead generators continue to advertise on Google with some advertisements from lead generators continuing to target audiences of color. In September 2020, Spyfu's advertising tracking technology reveals that University of Phoenix and its four closest FPCU analogs from a targeting perspective, spent \$6.5 million on Google advertisements, generating almost 450,000 clicks.<sup>209</sup> None of this advertising spending went to ad words that

<sup>203</sup> See, e.g., APOLLO EDUC. GROUP, INC., FORM 10-K ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 10 (2016), <https://www.sec.gov/Archives/edgar/data/929887/000092988716000225/apol-aug31201610k.htm>, archived at <https://perma.cc/A4ZJ-ABDM> (describing University of Phoenix's decision to stop third-party lead generators).

<sup>204</sup> See HARKIN REPORT, *supra* note 175, at 66 n.227.

<sup>205</sup> See A. Ananthalakshmi, *U.S. For-Profit Colleges Spend Big On Marketing While Slashing Other Costs*, REUTERS (Nov. 28, 2012), <https://www.reuters.com/article/net-us-for-profitcolleges-analysis/u-s-for-profit-colleges-spend-big-on-marketing-while-slashing-other-costs-idUSBRE8AR0FJ20121128>, archived at <https://perma.cc/24BR-L8BW>.

<sup>206</sup> Jim Leichenko, *University of Phoenix Leads Online Education Advertisers in Paid Search*, KANTAR MEDIA (Apr. 27, 2017), <https://www.kantarmedia.com/us/thinking-and-resources/blog/adg-university-of-phoenix-leads-online-education-advertisers-in-pa>, archived at <https://perma.cc/2EUG-J8W9>.

<sup>207</sup> See generally *Ad Library*, FACEBOOK (last visited Sept. 26, 2020), <https://www.facebook.com/ads/library>, archived at <https://perma.cc/G69Q-R4TK> (indicating a lack of publicly available spending data on Facebook advertisements other than political advertising).

<sup>208</sup> See *What is the Facebook Ad Library and How Do I Search It*, FACEBOOK (last visited Sept. 26, 2020), <https://www.facebook.com/help/259468828226154>, archived at <https://perma.cc/W72Z-CLZR> (detailing that spending is only available for political, social cause, or election related advertisements, but all currently running advertisements—without statistics on their spend or reach—are visible in the ad library); see also *Ads from University of Phoenix*, FACEBOOK (last visited Sept. 26, 2020), [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=US&view\\_all\\_page\\_id=42149076048&sort\\_data\[direction\]=desc&sort\\_data\[mode\]=relevancy\\_monthly\\_grouped](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=42149076048&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped), archived at <https://perma.cc/W32Q-PC75> (showing active advertisements for University of Phoenix). But see *Facebook Ad Library Report*, FACEBOOK (last visited Sept. 26, 2020), [https://www.facebook.com/ads/library/report/?country=US&source=spend-tracker-link&campaign\\_tracker\\_active\\_race=President&campaign\\_tracker\\_custom\\_start\\_date=2020-01-02&campaign\\_tracker\\_custom\\_end\\_date=2020-06-16&campaign\\_tracker\\_active\\_toggle=bar\\_graph](https://www.facebook.com/ads/library/report/?country=US&source=spend-tracker-link&campaign_tracker_active_race=President&campaign_tracker_custom_start_date=2020-01-02&campaign_tracker_custom_end_date=2020-06-16&campaign_tracker_active_toggle=bar_graph), archived at <https://perma.cc/95MV-AAC3> (demonstrating that Facebook only reveals data on spending for social issues, elections or politics and not for FPCUs).

<sup>209</sup> See *PPC Competitors for Phoenix.edu*, SPYFU, <https://www.spyfu.com/ppc/competitors/domain?query=phoenix.edu> (last visited Oct 27, 2020) (providing data regarding Univer-

specifically reference Black or Latinx audiences.<sup>210</sup> This does not rule out more sophisticated targeting by the FPCUs through the use of custom or look-alike audiences—where targeting data is not publicly available—to reach predominantly Black audiences. Unlike FPCUs, lead generators spend on search terms dedicated to specific racial demographics. For example, in September 2020, educationconnection.com bid on forty-three search terms related to grants or scholarships for Black people, including “scholarships for [B]lack women” and “grants for single [B]lack mothers.”<sup>211</sup> These search terms account for meaningful traffic, amassing more than 19,000 views and costing advertisers over \$2,650 per month.<sup>212</sup> Lead generators like educationconnection.com then sell contact information generated by these search terms to FPCU buyers.<sup>213</sup> While Spyfu does not speak to whether FPCUs or lead generators use look-alike tools to reach audiences of color, purchases of ad words based on racially associated search terms suggests that an empirical investigation would be warranted.

### 3. *Current Advertising on Facebook: A Case Study*

A case study on Southern Technical College (“STC”), written by Facebook itself, demonstrates how an FPCU with a history of poor outcomes<sup>214</sup> and allegedly fraudulent enrollment behavior<sup>215</sup> used segmentation

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sity of Phoenix, Ashford.edu, Coloradotechonline.com, Coloradotech.edu, Devry.edu, and aiuonline.edu) (data on file with the author).

<sup>210</sup> See *Shared Paid Keywords (Kombat) for Phoenix.edu*, SPYFU, <https://www.spyfu.com/ppc/kombat/domain?query=Phoenix.edu&domains=Phoenix.edu,ashford.edu,coloradotechonline.com>, (last visited Oct. 27, 2020), archived at <https://perma.cc/GSY2-9LL5>.

<sup>211</sup> See *PPC Keywords for Educationconnection.com*, SPYFU, <https://www.spyfu.com/overview/domain?tour=true&query=educationconnection.com>, archived at <https://perma.cc/RV3M-W2HM> (last visited Oct. 27, 2020) (providing data by filtering for “[B]lack”) (data on file with the author).

<sup>212</sup> *Id.*

<sup>213</sup> See Chadwick Matlin, *The Reform of For-Profit Colleges: Can They Give Up Their Predatory Ways?*, ATLANTIC (Sept. 20, 2013), <https://www.theatlantic.com/business/archive/2013/09/the-reform-of-for-profit-colleges-can-they-give-up-their-predatory-ways/279850/>, archived at <https://perma.cc/49EW-W7WH> (describing lead generators like educationconnection.com selling leads to FPCUs).

<sup>214</sup> *Compare College Navigator—Southern Technical College*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/collegenavigator/?id=446552#enrolmt> (last visited Nov. 17, 2019), archived at <https://perma.cc/GDC4-BNKV> (click on “Retention and Graduation Rates”) (37% graduation rate for students who began studies in 2015–2016) [hereinafter *College Navigator—Southern Technical College*], with *Undergraduate Retention and Graduation Rates*, NAT’L CTR. FOR EDUC. STAT. (Apr. 2020), [https://nces.ed.gov/programs/coe/indicator\\_ctr.asp](https://nces.ed.gov/programs/coe/indicator_ctr.asp), archived at <https://perma.cc/6TQF-Z4GY> (indicating six-year graduation rate for public institutions was 61%).

<sup>215</sup> See *Heightened Cash Monitoring*, FED. STUDENT AID, U.S. DEP’T OF EDUC. (last visited Sept. 26, 2020), <https://studentaid.ed.gov/sa/about/data-center/school/hcm>, archived at <https://perma.cc/TB7Z-8T7K> (providing Excel data as of September 1, 2019 and December 1, 2019) (on file with the author) (citing Southern Technical College for heightened cash monitoring, a step the Federal Student Aid department can use to increase oversight for compliance issues).

and targeting tools<sup>216</sup> to target audiences that were likely disproportionately of color. STC is a for-profit two-year school based in Florida that features a student body that is 33% Black, 35% Latinx, and 25% white.<sup>217</sup> With its marketing agency, the college identified “job-hunting single parents,” among other categories, as prospects for Medical Assisting degrees<sup>218</sup> and people interested in “current rap artists” as among the best prospects for welding degrees.<sup>219</sup> After finding enough leads, STC used Lookalike Audiences to proliferate its message.<sup>220</sup> The campaign succeeded in influencing people to become education leads. In one week, it influenced 800+ people to become leads at a 75% lower cost than search advertising with a 200% return on investment.<sup>221</sup>

Based on STC’s tactics and the related research, we may credibly question whether the university disproportionately targeted audiences of color and hypothesize that the platforms delivered the advertisements to an audience of color. Although STC’s description of its segment does not specifically reference race, the underlying data available to the college and its marketing firm may.<sup>222</sup> Regulators or plaintiffs lawyers should have a factual basis to ask for discovery on the data used to create its segments. Moreover, even if the segments were created in a race-blind manner, the Northeastern-Upturn research suggests that STC’s advertisements probably disproportionately skewed toward a Black audience.<sup>223</sup> The campaign featured images of Black models, and it targeted audiences grouped around interests in “current rap artists.” Recall that the Northeastern-Upturn study found that images of Black people and ads targeted at those interested in “hip hop” disproportionately deliver to Black audiences.<sup>224</sup> If true, Lookalike Audiences would replicate and amplify these skewed ad deliveries, meaning that they would likely lead to a disproportionately higher rate of Black enrollees.

In sum, FPCUs and their lead generators use Google and Facebook<sup>225</sup> advertisements to influence prospective students who are disproportionately

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<sup>216</sup> See *Southern Technical College*, *supra* note 13.

<sup>217</sup> *College Navigator—Southern Technical College*, *supra* note 214.

<sup>218</sup> *Southern Technical College*, *supra* note 13.

<sup>219</sup> *Id.*

<sup>220</sup> See *id.*

<sup>221</sup> *Id.*

<sup>222</sup> See *id.*

<sup>223</sup> See Ali et al., *supra* note 29, at 3 (describing the effects of ad-creative featuring Black audiences and hip hop).

<sup>224</sup> See *id.*

<sup>225</sup> Two additional case studies emphasize this point. Facebook published another case study on Charter College where the advertiser admits to using Lookalike and Custom Audiences to target people below the age of fifty—which might itself constitute age discrimination because they excluded people above the age of fifty—with advertisements featuring diverse audiences that are likely to skew to non-white populations. The campaign was successful, finding more of, in Facebook’s words, “the right people” at lower costs. *Charter College: Promoting Programs To Interested Students With Facebook Slideshow Ads*, FACEBOOK FOR BUS. (last visited Sept. 26, 2020), <https://www.facebook.com/business/success/charter-college>, archived at <https://perma.cc/J6GX-MSLL>. Second, a digital marketing agency, OpenMoves,



people of color to enroll in school. Whether these entities intend to target Black and Latinx consumers, they use targeting tools that have discriminatory effects, contributing to disparate enrollment rates for people of color. To assess intent, regulators and plaintiffs' lawyers have reason to inquire about the composition of segmentations that were used to generate the target audiences. Were they based on lists that were known to skew towards people of color? They may also question how the ad platforms assessed which consumers would see the ads. Did the ad platforms assess "relevance" and optimize advertisements towards particular users on the basis of emotional isolation, proxies for race, or other predatory categories identified in *The Harkin Report*?

#### D. Consumer Impact

An FPCU education is an inferior social welfare product. In general, an empathetic observer should conclude that enrolling in an FPCU is not in the best interest of a prospective student. Granted, some graduates achieve success and good outcomes after attending an FPCU. But for the vast majority of students, attending FPCUs leads to poorer outcomes and higher costs than alternatives like community college or even no college.<sup>226</sup>

The 1.5 million Americans who are enrolled in a FPCU<sup>227</sup> are unlikely to graduate. They are far less likely to graduate than their peers at nonprofit and public four-year universities. Only 28.4% of four-year FPCU students graduate within six years.<sup>228</sup> For some of the larger FPCUs, the numbers are even worse. For example, a 2010 report cited the University of Phoenix for graduating 9% of first time, full-time bachelors' students within six years.<sup>229</sup>

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provides the third FPCU case study. OpenMoves constructed demographically targeted "Lookalike Audiences" that reached three million people and generated 15,000 total leads for a for-profit arts college. Alex Swerdlow, *Case Study: Education Leads at 10x Efficiency with Facebook Ads*, OPENMOVES, (Jan. 28, 2019), <https://openmoves.com/blog/case-study-generating-education-leads-at-1000-percent-efficiency-with-facebook-ads/>, archived at <https://perma.cc/HN8Y-QU7P>.

<sup>226</sup> See Stephanie Riegg Cellini & Nicholas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data 4–10* (Nat'l Bureau of Econ. Research, Working Paper No. 22287, May 2016), [https://predatorystudentlending.org/wp-content/uploads/2018/03/2016\\_-\\_NBER\\_-\\_worse\\_off.pdf](https://predatorystudentlending.org/wp-content/uploads/2018/03/2016_-_NBER_-_worse_off.pdf), archived at <https://perma.cc/AH56-UFHL>; see also David J. Deming et al., *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSPS. 139, 143 (2012), <https://www.aeaweb.org/articles?id=10.1257/jep.26.1.139>, archived at <https://perma.cc/NTX3-9Z7K> (detailing higher unemployment rates, lower earnings, higher default rates, and lower satisfaction compared to students in other schools).

<sup>227</sup> NAT'L CTR. FOR EDUC. STAT., *supra* note 11.

<sup>228</sup> David Halperin, *4-Year Students at For-Profit Colleges Graduate Less than Half as Often as Other Students, but Their Schools Do Create Jobs—For Lobbyists*, REPUBLIC REP. (Apr. 2, 2012), <https://www.republicreport.org/2012/4-year-students-at-for-profit-colleges-graduate-less-than-half-as-often-as-other-students-but-their-schools-do-create-jobs-for-lobbyists/>, archived at <https://perma.cc/E7KS-HSEF>.

<sup>229</sup> Tamar Lewin, *Report Finds Low Graduation Rates at For-Profit Colleges*, N.Y. TIMES, (Nov. 23, 2010), [https://www.nytimes.com/2010/11/24/education/24colleges.html?\\_r=0](https://www.nytimes.com/2010/11/24/education/24colleges.html?_r=0), archived at <https://perma.cc/9D75-F2FR>.

This compares to 61% and 67% at the average 4-year public and nonprofit schools respectively,<sup>230</sup> and the advantage holds even when limited to comparable open-admissions schools.<sup>231</sup> At two-year universities, FPCUs perform in line with nonprofit and better than public universities.<sup>232</sup>

From an outcomes perspective, students are likely to be worse off than when they enrolled and worse off than students at comparable universities. They are also less likely to find employment or a higher-paying job than if they had not enrolled. A National Bureau of Economic Research (“NBER”) study that controlled for demographic backgrounds found FPCU graduates *are less likely than high school graduates to secure comparable employment and salaries*.<sup>233</sup> This is true even though FPCU credentials cost between 30% and 40% more than the average nonprofit degree<sup>234</sup> and infinitely more than no degree.

On top of worse earning power, they leave school—often without degrees—with large and comparatively higher debt burdens. Half of FPCU students leave with at least \$31,000 in debt, triggered by much higher tuition than similar nonprofit schools.<sup>235</sup> FPCU students are often unable to pay off their student loan debt and disproportionately so. According to 2014 numbers, 12% of students attend FPCUs, but 44% of defaulters came from FPCUs.<sup>236</sup> Black students fare relatively worse. According to a Brookings analysis, nearly 70% of Black borrowers default within 10 years.<sup>237</sup> Default rates for FPCUs have been growing across the board, and they may reach 70% by 2023.<sup>238</sup> As another comparison point, FPCU students at two-year colleges default at four times the rate of students at public two-year colleges.<sup>239</sup>

<sup>230</sup> *Undergraduate Retention and Graduation Rates*, NAT'L. CTR. FOR EDUC. STAT. (Apr. 2020), [https://nces.ed.gov/programs/coe/indicator\\_ctr.asp](https://nces.ed.gov/programs/coe/indicator_ctr.asp), archived at <https://perma.cc/PEN2-AQHK>.

<sup>231</sup> NAT'L. CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS tbl. 326.10 (2018), [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_326.10.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_326.10.asp), archived at <https://perma.cc/H27A-W7D2>.

<sup>232</sup> See NAT'L. CTR. FOR EDUC. STAT., *supra* note 230.

<sup>233</sup> See Riegg Cellini & Turner, *supra* note 226 (emphasis added) (citing NAT'L. CTR. FOR EDUC. STAT., *supra* note 230).

<sup>234</sup> Bonadies et al., *For-Profit Schools' Predatory Practices and Students of Color: A Mission to Enroll Rather than Educate*, HARV. L. REV. BLOG (July 30, 2018), <https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate/>, archived at <https://perma.cc/9K82-4HTM>.

<sup>235</sup> Walter Hamilton, *For-Profit Colleges Face Federal Crackdown*, L.A. TIMES (Feb. 6, 2011), <http://articles.latimes.com/2011/feb/06/business/la-fi-for-profit-colleges-20110206>.

<sup>236</sup> Press Release, Inst. for Coll. Access & Success (Sept. 24, 2014), [https://ticas.org/sites/default/files/legacy/pub\\_files/CDR\\_2014\\_NR.pdf](https://ticas.org/sites/default/files/legacy/pub_files/CDR_2014_NR.pdf), archived at <https://perma.cc/8P6U-4996>.

<sup>237</sup> Judith Scott-Clayton, *The Looming Student Loan Default Crisis Is Worse Than We Thought*, BROOKINGS (Jan. 11, 2018), <https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/>, archived at <https://perma.cc/3D2K-2FMF>.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

The financial and social setbacks from failure to graduate and high levels of debt and default damage some FPCU students forever.<sup>240</sup> Defaults ruin credit scores, and borrowers cannot discharge student debt in bankruptcy unless they can prove “undue hardship,” making it difficult for consumers to recover.<sup>241</sup> Some even correlate high levels of debt with higher cases of deaths of despair.<sup>242</sup>

In sum, we can allege that the reverse redlining of an FPCU education meets the conditions of manipulation. FPCUs influence consumer preferences through digital advertising that is either intentionally targeted at or has the known effect of delivering to people of color and low-income consumers. They target the subset of consumers in the most compromised situations. This targeting leads some consumers to purchase an education that leads to inferior outcomes than alternative educations and even the alternative of no education.<sup>243</sup>

FPCU advocates contend that they provide universal access to a hard to reach population, and that FPCU students knew or should have known what they were getting into. FPCU advocates often use lower-quality outcomes to emphasize their access goals.<sup>244</sup> To be sure, it is also possible to ignore FPCU ads, understand the inferior quality of FPCUs, and enroll in higher-quality alternatives.

These contentions should be dismissed. The first concern is easily dispensed with based on the industry’s results, which are worse than non-enrollment.<sup>245</sup> The second argument can be dismissed based on FPCU behavior: intentional and platform-based reverse redlining has the effect of constraining the information set of prospective FPCU consumers, making it hard for them to engage with superior alternatives.<sup>246</sup> FPCUs typically target students who have the least information and are financially and emotionally constrained. The targeting technology allows FPCUs to reach these specific consumers with the least friction. As Nathan Newman’s research indicated,

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<sup>240</sup> See, e.g., Jodi C. Letkiewicz & Stuart J. Heckman, *Homeownership Among Young Americans: A Look at Student Loan Debt and Behavioral Factors*, 52 J. OF CONSUMER AFFS. 1, 90 (2018), <https://doi.org/10.1111/joca.12143>, archived at <https://perma.cc/777H-736U> (describing repayment costs); see also SUMMER & STUDENT DEBT CRISIS, BURIED IN DEBT 3 (2018), <https://www.meetsummer.org/share/Summer-Student-Debt-Crisis-Buried-in-Debt-Report-Nov-2018.pdf>, archived at <https://perma.cc/386N-3EH9> (describing the impacts of debt on marriage, homeownership, and decisions to have children).

<sup>241</sup> 11 U.S.C. § 523(a)(8).

<sup>242</sup> See Jamie Ducharme, *More Millennials Are Dying ‘Deaths of Despair,’ as Overdose and Suicide Rates Climb*, TIME (June 13, 2019), <https://time.com/5606411/millennials-deaths-of-despair/>, archived at <https://perma.cc/U3G8-3U4M> (citing a report by Trust for America’s Health and Well Being Trust arguing that generational specific stressors including student loan debt contribute to deaths of despair).

<sup>243</sup> See Riegg Cellini & Turner, *supra* note 226; see also Deming et al., *supra* note 226.

<sup>244</sup> See Alderdice, *supra* note 180, at 226 (providing examples of FPCU executives touting the social benefits of FPCU educations for historically marginalized groups).

<sup>245</sup> See Riegg Cellini & Turner, *supra* note 226.

<sup>246</sup> See Newman, *supra* note 60 (demonstrating that non-white users don’t have access to advertisements for better educational opportunities).

the platforms themselves create bubbles of ad-relevance that show particular users particular content on the basis of racial associations.<sup>247</sup> In other words, without the right search terms and discerning eyes to move past advertisements, consumers who see FPCU ads may not find better alternatives to FPCU content. Additionally, while this Article argues that digital reverse redlining introduces harms when misrepresentations are not present, digital advertising amplifies and delivers falsehoods.<sup>248</sup>

In short, FPCU advertising takes advantage of digital advertising to enroll tens of thousands of people for an inferior social welfare product. The civil rights and economic harms that accrue to students who end up worse off than if they had not enrolled call for enforcement and additional regulation.

#### IV. CHALLENGING POTENTIAL CIVIL RIGHTS, CONSUMER, AND PRIVACY HARMS

Government agencies and consumers like Mr. Britt can challenge manipulative digital advertising under anti-discrimination laws, consumer protection statutes with unfair and deceptive practices authority, and privacy laws. This section first identifies the relevant laws. Then it analyzes the viability of legal claims against advertisers, platforms, and data brokers using facts from the for-profit education industry. It reveals the difficulty of assigning and enforcing liability for a harm based on for-profit education targeting. The advertiser has the highest likelihood of facing a successful challenge, but platforms are highly unlikely to face liability. For simplicity, this section will isolate the segmentation, targeting, and ad-delivery process as the only alleged violations of the relevant law. However, in practice, these theories are additive to challenges against FPCUs that employ targeting alongside high-pressure sales tactics and deceptive statements.<sup>249</sup>

##### A. *Anti-Discrimination: Disparate Treatment, Disparate Impact, and Reverse Redlining*

In the education context, federal legal theories challenging discriminatory advertising must rely on general prohibitions on discrimination or discrimination in the provision of credit. The prohibition on discrimination in higher education derives from Title VI of the Civil Rights Act of 1964.<sup>250</sup> Title VI stipulates that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in,

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<sup>247</sup> See Newman, *supra* note 60.

<sup>248</sup> See, e.g., HARKIN REPORT, *supra* note 175, at 46–53 (detailing misleading and deceptive tactics and aggressive and deceptive recruiting by FPCUs).

<sup>249</sup> See, e.g., CFPB v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878, 886 (S.D. Ind. 2015) (alleging high-pressure enrollment tactics).

<sup>250</sup> See 42 U.S.C. § 2000d.

be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance,”<sup>251</sup> including colleges and universities.<sup>252</sup> Suits against FPCUs may also allege violations of the Equal Credit and Opportunity Act’s (“ECOA”) prohibition on discrimination in “any aspect of a credit transaction”<sup>253</sup> due to FPCUs’ facilitation of the student loan process.<sup>254</sup>

Disparate treatment, disparate impact, and reverse-redlining theories can be used to challenge discriminatory targeting.<sup>255</sup> Disparate treatment and disparate impact cases are predominantly brought in instances of predatory exclusion—cases where protected classes were denied opportunities on the basis of that protected class. However, both tools may be applied to predatory inclusion.<sup>256</sup> Disparate treatment refers to facially unequal discriminatory practices.<sup>257</sup> Disparate impact refers to facially neutral practices that lead to differential effects on protected classes.<sup>258</sup> Importantly, in *Alexander v. Sandoval*,<sup>259</sup> the Supreme Court prohibited private parties from bringing disparate impact cases under Title VI, limiting these suits to the government.<sup>260</sup> Under ECOA, both disparate treatment and disparate impact theories are available to private plaintiffs.<sup>261</sup> Reverse redlining theories apply to predatory inclusion.<sup>262</sup> They require a showing of both predatory lending practices as well as discriminatory targeting—proven by either disparate

<sup>251</sup> *Id.*

<sup>252</sup> See *Race and National Origin Discrimination: Frequently Asked Questions*, U.S. DEP’T. OF EDUC. (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html#racedisc4>, archived at <https://perma.cc/5CYF-HB8U> (indicating that Title VI applies to all actions of a college or university that receives federal financial aid dollars).

<sup>253</sup> 15 U.S.C. § 1691.

<sup>254</sup> See HARKIN REPORT, *supra* note 175, at 18.

<sup>255</sup> See, e.g., Charles L. Nier, III & Maureen R. St. Cyr, *A Racial Financial Crisis: Re-thinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 977 (2011) (identifying four analytical methods to challenge reverse redlining of subprime mortgages under the Fair Housing Act, including disparate impact, disparate treatment, and two different reverse redlining tests).

<sup>256</sup> See *id.* (discussing disparate impact theories for reverse redlining, including *Ramirez v. GreenPoint Mortg. Funding, Inc.*, 663 F. Supp. 2d 922 (N.D. Cal. 2008) and *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251 (D. Mass. 2008)).

<sup>257</sup> Barocas & Selbst, *supra* note 3, at 694 (discussing disparate treatment and disparate impact theories in the context of data mining); see also 12 C.F.R. § 1002.4(a)-1 (Supp. I 2018) (describing disparate treatment under ECOA).

<sup>258</sup> See 42 U.S.C. § 2000d; see also Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 135–44 (2014) (discussing the grounding for disparate impact liability under Title VI). While Title VI does not define discrimination or a disparate impact standard, the Department of Education has broad power to define discrimination and exclusion. This power led the Department to create a disparate impact standard by regulation that prohibits acts and practices that have “the effect of subjecting individuals to discrimination because of their race, color, or national origin.” See *id.*; see also 12 C.F.R. § 1002.6(a)-2 (Supp. I 2018) (indicating disparate impact liability under ECOA).

<sup>259</sup> 532 U.S. 275 (2001).

<sup>260</sup> See *id.* at 293.

<sup>261</sup> See, e.g., *Faulkner v. Glickman*, 172 F. Supp. 2d 732, 737 (D. Md. 2001); *A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chicago*, 962 F. Supp. 1056, 1060 (N.D. Ill. 1997).

<sup>262</sup> See *Nier & St. Cyr, supra* note 255, at 952.

treatment or disparate impact analyses.<sup>263</sup> Reverse redlining theories are available under ECOA and Title VI.<sup>264</sup> But they are difficult to win, as they rely on a broad definition of predatory conduct.

Before turning to an analysis of how to prove disparate treatment, disparate impact, reverse redlining, and public accommodations claims, we must first consider who is covered by the relevant law. Title VI only applies to “program[s] or activit[ies] receiving Federal financial assistance.”<sup>265</sup> The laws likely apply to FPCUs because they receive federal funding through financial aid payments. The case against ad platforms is difficult: platforms only receive federal funds indirectly through FPCU ad buys. Alternatively, ECOA only applies to creditors or entities that “regularly arrange[ ] for the extension, renewal, or continuation of credit.”<sup>266</sup> ECOA’s implementing regulation offers a relatively expansive definition of “creditor”, including “a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made.”<sup>267</sup> Thus, a plain language case can be made that platforms “refer” applicants to FPCUs, who are “creditors,” arranging for the credit transaction, assuming that courts accept platforms’ agency in ad delivery. That said, unlike Fair Housing Act (“FHA”) claims,<sup>268</sup> an ECOA claim against the ad platforms may be too attenuated to create liability,<sup>269</sup> and a Title VI claim is impossible under current applications.<sup>270</sup> Nevertheless, this article considers anti-discrimination arguments against platforms on the basis of its technical analysis that they contribute to discrimination, and the potential for liability under state public accommodation laws.<sup>271</sup>

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<sup>263</sup> See *Hargraves v. Cap. City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

<sup>264</sup> See, e.g., *Brook v. Sistema Universitario Ana G. Mendez, Inc.*, No. 8:17-CV-171-T-30AAS, 2017 WL 1743500, at \*4 (M.D. Fla. May 4, 2017) (noting the viability of a reverse redlining theory but dismissing the ECOA count because the plaintiffs did not allege predatory loan terms; also noting the viability of reverse redlining theories under Title VI).

<sup>265</sup> 42 U.S.C. § 2000d.

<sup>266</sup> 15 U.S.C. § 1691(a) (describing creditors as “any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit”).

<sup>267</sup> 12 C.F.R. § 202.2(l).

<sup>268</sup> 42 U.S.C. § 3603 (including language prohibiting discrimination by agents who participate in the sale or rental of property).

<sup>269</sup> Without a plain language ruling that a targeted advertisement with optimized ad delivery counts as a referral, ads that refer people to creditors are likely too attenuated to qualify ad platforms as creditors, as the chain includes two steps between advertisement and the ultimate extension of credit (a user click and FPCU enrollment). See, e.g., *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 980 (7th Cir. 2004) (discussing a “continuum of participation in a credit decision, from no participation to referring applications to a decision maker, to final decision-making”).

<sup>270</sup> See 42 U.S.C. § 2000e (defining employer and employment agency, perhaps including platforms if defined as an agency).

<sup>271</sup> See *Spencer*, *supra* note 8, at 515 (discussing the potential for public accommodation law to impose platform liability). The federal public accommodation law covers any “inn,” “restaurant, cafeteria, lunchroom,” and “motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.” 42 U.S.C. § 2000a. California’s

### 1. *Disparate Treatment*

Disparate treatment cases require proof of differential treatment and intent to discriminate.<sup>272</sup> Explicit intentions, proof of discriminatory motives,<sup>273</sup> or evidence of a “pattern or practice” of “racially premised discrimination” establish the predicate for disparate treatment liability.<sup>274</sup>

In the data analysis context, two moments might show discriminatory motives. Intent could be proven if an advertiser makes the choice to use segmentation tools that will categorize protected classes differently. It could also be proven if users of big data make the explicit decision to use disparate results after observing evidence of differential effects.<sup>275</sup> Courts would likely find that disparate treatment occurred if evidence revealed that advertisers intentionally chose to target a population based on a specific protected attribute or a proxy, or the evidence showed that the advertiser affirmatively stated an intention to pursue an advertisement with a known discriminatory bias because it was in their business interest to discriminate.

These smoking guns are hard to come by.<sup>276</sup> In the decision upholding the disparate impact theory under the Fair Housing Act, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*,<sup>277</sup> Justice Kennedy recognized that plaintiffs need discovery to find evidence of disparate treatment claims.<sup>278</sup> Disparate impact claims are often necessary to initiate that discovery.<sup>279</sup> Applying the case study of Southern Technical College, it seems unlikely that discovery would reveal an intent to segment and target for the explicit purposes of providing low-quality education to people of color. However, discovery could plausibly reveal evidence of knowledge that a segment that likes “current rap artists” is disproportionately Black and

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Unruh Civil Rights Act reaches online venues, as it entitles “full and equal accommodations . . . in all business establishments of every kind whatsoever” and prevents intentional discrimination in those venues. CAL. CIV. CODE. § 51(b) (2018). In Massachusetts, public accommodations theories cover both disparate treatment and disparate impact and reach “situations where services are provided that do not require a person to enter a physical structure.” Spencer, *supra* note 8, at 516 (citing *Currier v. Nat’l Bd. of Med. Examiners*, 965 N.E. 2d 829, 842 (Mass. 2012)). In 2019, for example, a class of plaintiffs brought a public accommodations claim against Facebook for intentional discrimination against women and older persons in the provision of financial services. *See* Complaint at 1, *Opiotennione v. Facebook Inc.*, No. 19-cv-07185-JSC, 2020 WL 5877667 (N.D. Cal. Oct. 2, 2020).

<sup>272</sup> *See* Barocas & Selbst, *supra* note 3, at 694–700; *see, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *modified on other grounds* *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

<sup>273</sup> *See* Barocas & Selbst, *supra* note 3, at 697 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003)).

<sup>274</sup> *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, 335 n.15 (1977).

<sup>275</sup> *See* Barocas & Selbst, *supra* note 3, at 694–700 (Disparate treatment doesn’t cover discriminatory data mining by employers who are analogous to advertisers. The “treatment” effect by platforms is even more attenuated.).

<sup>276</sup> *See id.* at 699–700.

<sup>277</sup> 576 U.S. 519 (2015).

<sup>278</sup> *See id.* at 538–39.

<sup>279</sup> *See id.*

Brown. If it revealed an affirmation of the targeting strategy understanding the racially disparate composition of the segment, motive could credibly be alleged. Disparate treatment theories will not work against platforms due to the lack of human agency in discrimination through the optimization of advertisements in the ad-delivery process.<sup>280</sup>

While rarely invoked and perhaps more properly brought under disparate impact theories, litigants can bring systemic disparate treatment cases relying on statistical analyses to assert motive.<sup>281</sup> In *International Brotherhood of Teamsters v. United States*,<sup>282</sup> the Supreme Court found that systemic discrimination can occur if it is the company's "standard operating procedure" rather than "isolated," "accidental," or "sporadic."<sup>283</sup> The Court highlighted the importance of "statistical proof" in disparate treatment cases and even indicated in a footnote that "discriminatory motive is critical . . . it can in some situations be inferred from the mere fact of differences in treatment."<sup>284</sup> Relying on *Teamsters* and decided a month later, *Hazelwood School District v. United States*,<sup>285</sup> an employment discrimination case, found that "where gross statistical disparities can be shown," using standard deviation analyses, "they alone may, in a proper case constitute prima facie proof of a pattern or practice of discrimination."<sup>286</sup> Under this theory and in the FPCU context, ad targeting, enrollment, and default rates of students of color several standard deviations away from white students, may furnish a disparate treatment claim.

## 2. Disparate Impact

The courts employ a three-step test to assess a disparate impact claim in higher education.<sup>287</sup> First, and most importantly, plaintiffs under both Title VI and ECOA must show that a specific policy or practice had a disproportionately adverse effect on a racial or ethnic group using statistical data.<sup>288</sup> Courts use several tools, including the 80% rule,<sup>289</sup> standard deviation analysis, and other statistical methods to establish disparate impact.<sup>290</sup> In *Watson*

<sup>280</sup> See Barocas & Selbst, *supra* note 3, at 694–700.

<sup>281</sup> See Nier & St. Cyr, *supra* note 255, at 962–66.

<sup>282</sup> 431 U.S. 324 (1977).

<sup>283</sup> *Id.* at 336.

<sup>284</sup> *Id.* at 335 n.15.

<sup>285</sup> 433 U.S. 299 (1977).

<sup>286</sup> *Id.* at 307–09.

<sup>287</sup> See Schmitz, *supra* note 114, at 1446 (citing Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class*, 43 LOY. L.A. L. REV. 1339, 1348 (2010) and Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 257, 297–98 (2011)).

<sup>288</sup> See *id.*; see also Rebecca R. Ramaswamy, *Bars to Education: The Use of Criminal History Information in College Admissions*, 5 COLUM. J. RACE & L. 145, 155 (2015).

<sup>289</sup> 29 C.F.R. § 1607.4(D) (clarifying that disparate impact occurs where a protected class is represented at less than 80% of the dominant class).

<sup>290</sup> See *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 n.3 (1988).



v. *Fort Worth Bank and Trust*,<sup>291</sup> the Supreme Court noted that a consensus had not yet developed around any one standard and recognized the viability of a case-by-case approach to evaluating statistics in context.<sup>292</sup>

Assuming an investigation yielded sufficient documentation of marketing lists, targeting, and demographics of ad recipients, it might have a plausible path to establish statistical evidence of a disparate impact.<sup>293</sup> Of course, such discovery has a high investigatory burden. The demand for statistical evidence and analysis increases the expense and technical difficulty of litigation before the pleading stages.<sup>294</sup> Perhaps initial statistical evidence of disparate student outcomes might lead to a discovery process, which could further reveal marketing lists purchased from third parties or assembled on the basis of clustering analyses. If discovery revealed segments like “Urban Scramble,”<sup>295</sup> interested in “hip-hop,”<sup>296</sup> or “current rap artists,”<sup>297</sup> it could facilitate a statistical argument for disparate impact. Per Justice Kennedy’s logic in *Inclusive Communities*, it might even furnish evidence for a discriminatory motive that might support a disparate treatment case.<sup>298</sup>

Second, assuming a viable claim of a statistically discriminatory practice, the burden shifts to the defendant who must demonstrate that the practice in question is or meets a legitimate business necessity under ECOA<sup>299</sup> or is “required by educational necessity” under Title VI.<sup>300</sup> In their seminal paper *Big Data’s Disparate Impact*, Solon Barocas and Andrew Selbst document the difficulty of overcoming the business necessity hurdle in the employment context.<sup>301</sup> They conclude that as long as models used in hiring have a basis in traits that relate to a business imperative, they pass the second prong.<sup>302</sup> While FPCUs may be able to make the case that targeted advertising practices meet business necessities of efficient customer acquisition, they may find it harder to justify that targeted advertising with discriminatory effects is an “educational necessity.” This suggests that a disparate impact claim under Title VI may have stronger merits than an ECOA claim.

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<sup>291</sup> 487 U.S. 977 (1988).

<sup>292</sup> *See id.* at 996.

<sup>293</sup> *See* Schmitz, *supra* note 114, at 1445.

<sup>294</sup> *See, e.g., id.* at 1446 (citing Lichtenstein, *supra* note 287, at 1367 (discussing the difficulty of bringing and pleading disparate impact suits under the Fair Housing Act)).

<sup>295</sup> RAMIREZ AT AL., *supra* note 111, at 20.

<sup>296</sup> Ali et al., *supra* note 29, at 12.

<sup>297</sup> *Southern Technical College*, *supra* note 13.

<sup>298</sup> *See* Tex. Dep’t of Hous. & Cmty. Affs. v. *Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015).

<sup>299</sup> *See* *Ramirez v. GreenPoint Mortg. Funding, Inc.*, 268 F.R.D. 627, 640–41 (N.D. Cal. 2010) (applying the business necessity rule under ECOA and citing *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

<sup>300</sup> *Ramaswamy*, *supra* note 288, at 155 (citing *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984)).

<sup>301</sup> *See* Barocas & Selbst, *supra* note 3, at 702–12.

<sup>302</sup> *See id.* at 709.

Third, even if defendant FPCUs prove educational or business necessity, plaintiffs may win on the disparate impact claim if an approach with less biased outcomes is available.<sup>303</sup> Certainly, under the third element of the test, the Department of Education can prove that alternative practices with less precise segmentation and targeting can reach the same *educational* goals. Proving that an FPCU could reach the same business or financial goals is a different matter.

Assuming the relevant statute covered ad platforms, the platforms should face liability under a disparate impact theory if discovery proved the advertiser used look-alike features or a platform disproportionately delivered ads to audiences of color. The advertiser has no means to identify or reach these specific, targeted consumers without the platform. If discrimination occurs, the platform, at a minimum, contributes to the discrimination. HUD alleged as much in its 2019 suit against Facebook for violations of the FHA.<sup>304</sup> Statistical evidence of discriminatory targeting may exist in the case of look-alike targeting if the underlying data substantially derives from a “highly biased source.”<sup>305</sup> As Speicher and his coauthors proved, Facebook can propagate a biased list to new audiences several hundred times the size of the original list.<sup>306</sup>

### 3. *Reverse Redlining*

Reverse redlining theories most closely track with this Article’s definition of manipulation, requiring proof that protected classes were targeted and that the product they purchased had extremely harmful effects. No reverse redlining theory exists by statute under Title VI or by regulations promulgated by the Department of Education. These suits may be brought, however, under ECOA’s prohibition on discrimination in “any aspect of a credit transaction.”<sup>307</sup> Under the *Hargraves v. Capital City Mortgage Corp.*<sup>308</sup> test, plaintiffs must prove that “defendants’ lending practices and loan terms were ‘unfair’ and ‘predatory’ and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race.”<sup>309</sup> Building on the *Hargraves* test, *M & T Mortgage Corp. v. White*<sup>310</sup> explains that reverse redlining claims can be proven where plaintiffs show they “(i) were members of a protected class; (ii) applied for and were qualified for the housing or the loan; (iii) received grossly unfavorable terms; and

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<sup>303</sup> *See id.*

<sup>304</sup> *See* Facebook Complaint, *supra* note 77, at 3.

<sup>305</sup> Speicher et al., *supra* note 8, at 11.

<sup>306</sup> *See id.* at 14.

<sup>307</sup> 15 U.S.C. § 1691.

<sup>308</sup> 140 F. Supp. 2d 7 (D.D.C. 2000).

<sup>309</sup> *See id.* at 20 (defining “reverse redlining” as the practice of targeting communities of color evidenced by intent or disparate impact and that the financial product sold had “unfair” or “predatory terms”).

<sup>310</sup> 736 F. Supp. 2d 538 (E.D.N.Y. 2010).

(iv) were intentionally targeted or intentionally discriminated against.”<sup>311</sup> *Hargraves* also allowed disparate impact to count as evidence of targeting.<sup>312</sup>

Several suits have credibly alleged reverse redlining claims against FPCUs.<sup>313</sup> A 2013 lawsuit against the Richmond School of Health and Technology, for example, alleged that deliberate reverse redlining of advertisements had a disparate impact on Black people.<sup>314</sup> According to the complaint, the FPCU placed advertisements on Black Entertainment Television (“BET”), during shows on other channels with disproportionately high Black viewership, and on radio stations that cater to Black people.<sup>315</sup> By contrast, the complaint alleged that they did not advertise on radio stations that catered to white people.<sup>316</sup> These advertisements led to the inducement of borrowing that had a disparate impact on Black people. Black students made up 75% of the student body despite making up only 30% of the region’s population.<sup>317</sup> Further, the complaint alleges that students enrolled in “an education the school knows is inadequate.”<sup>318</sup> The parties settled before the court could adjudicate the reverse redlining claim.<sup>319</sup>

Due to the predatory terms requirement in the *Hargraves* test, courts may not accept reverse redlining theories. In *Brook v. Sistema Universitario Ana G. Mendez, Inc.*,<sup>320</sup> plaintiffs alleged reverse redline targeting of Latinx populations.<sup>321</sup> The judge found “no reason why Plaintiff cannot pursue her Title VI claim using a theory akin to reverse redlining.”<sup>322</sup> However, the judge dismissed the reverse redlining claim under ECOA with the ability to amend because the plaintiff did not “describe the credit transaction she believes was unlawful” or specific loan terms that were “predatory or unfair.”<sup>323</sup> While the FPCU could qualify as a creditor because it provided referrals and marketing for loan applications,<sup>324</sup> the court found it “unlikely” that the plaintiff could allege sufficient facts to demonstrate unfair loan terms given that the federal government offers “loans to all eligible students

<sup>311</sup> *Id.* at 575.

<sup>312</sup> *See Hargraves*, 140 F. Supp. 2d at 20.

<sup>313</sup> *See Brook v. Sistema Universitario Ana G. Mendez, Inc.*, No. 8:17-cv-171-T-30AAS, 2017 WL 1743500, at \*2–3 (M.D. Fla. May 4, 2017); *see also* Second Amended Class Action Complaint, *supra* note 6, at 3; Press Release, Relman Law, Court Approves \$5 Million Settlement of Nation’s First Reverse Redlining Case Against a For-Profit College (July 25, 2013), <https://www.relmanlaw.com/news-RSHTsettlement>, archived at <https://perma.cc/D8MT-UU3Q>.

<sup>314</sup> *See* Second Amended Class Action Complaint, *supra* note 6, at 75.

<sup>315</sup> *See id.* at 3.

<sup>316</sup> *See id.* at 75.

<sup>317</sup> *Id.* at 4.

<sup>318</sup> *See* Relman Law, *supra* note 313.

<sup>319</sup> *See id.*

<sup>320</sup> No. 8:17-CV-171-T-30AAS, 2017 WL 1743500 (M.D. Fla. May 4, 2017).

<sup>321</sup> *See id.* at \*4.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at \*3.

<sup>324</sup> *See id.* (citing 12 C.F.R. § 202.2, which states that a creditor is “a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors” that set the terms of credit).

on the same terms.”<sup>325</sup> Plaintiffs pursuing a reverse redlining theory against an FPCU would likely meet all other elements of the test.

Future plaintiffs could make a number of arguments in favor of broadening the definition of unfavorable loan terms or credit transactions. The plaintiffs in *Britt v. IEC Corp.*<sup>326</sup> offer a roadmap of potential arguments.<sup>327</sup> They allege that the predatory enrollment process, including misrepresentations and racial targeting, qualifies as an aspect of a predatory, unfavorable “credit transaction.”<sup>328</sup> After all, universities provide information about federal financial aid, train their enrollment counselors in high-pressure sales tactics that often include misrepresentations about the quality of the education and job placements, facilitate loan applications, and receive nearly 90% of their funding from federal student aid.<sup>329</sup> Relying on *Hargraves*, where loans designed to fail were deemed predatory, the plaintiffs also argue that federal loan terms are predatory because the borrower is unlikely to be able to pay back the loan.<sup>330</sup> This theory tracks with the Obama administration’s payday lender rules that required lenders to assess ability to repay before issuing a loan (though these rules exempt student loans).<sup>331</sup> Alternatively, a court might broaden the *Hargraves* test to allow theories against sales practices for any predatory social welfare products that require financing.

### B. Consumer Protection: Unfair or Deceptive Acts and Practices (“UDAP”) Statutes

Unfair and Deceptive Acts and Practices (“UDAP”) jurisdiction forms the basis for consumer protection and privacy theories against advertisers and ad platforms. Both the federal government<sup>332</sup> and each of the fifty states have UDAP statutes.<sup>333</sup> These statutes generally prohibit both manipulation

<sup>325</sup> *Id.* at \*3.

<sup>326</sup> No. 0:20-CV-60814 (S.D. Fla. filed Apr. 20, 2020).

<sup>327</sup> See Plaintiffs’ Memorandum of Law In Opposition To Defendants’ Motion To Compel Or, In the Alternative, Motion To Dismiss at 24–26, *Britt v. IEC Corp.*, No. 0:20-CV-60814 (S.D. Fla. filed Apr. 20, 2020) [hereinafter Plaintiffs’ Memorandum of Law].

<sup>328</sup> *Id.* at 25–26 (arguing that targeting, overvaluations, and misrepresentations in enrollment constitute other matters as defined by 12 C.F.R. § 202.2(m) which sets out the definitions for what constitutes a credit transaction under ECOA).

<sup>329</sup> See HARKIN REPORT, *supra* note 175, at 62 (quoting an ITT Tech employee as providing quarterly training for financial-aid advisors in high-pressure sales tactics like the pain funnel); see *id.* at 137 (explaining how intricately tied the business models of FPCUs are to the provision of federal funding making it plausible that enrollment be seen as part of the credit transaction).

<sup>330</sup> See Plaintiffs’ Memorandum of Law, *supra* note 327, at 26 (citing *Hargraves v. Cap. City Mortg. Corp.*, 140 F. Supp. 2d 7, 18, 20–21, 23) (D.D.C. 2000).

<sup>331</sup> See 12 C.F.R. § 1041.5.

<sup>332</sup> See 15 U.S.C. § 45d.

<sup>333</sup> While the laws are similar in substance to the FTCA, each has its own set of protections with varying levels of strengths and weaknesses. Analyzing potential claims under state UDAP laws is the subject of another paper, but it is worth noting that some states have particularly favorable laws with robust protections that include private rights of action, payment of attorney’s fees, and authorization of state class action suits. Additionally, almost all state

by deception and manipulation by “unfair” acts that a reasonable consumer could not avoid.<sup>334</sup> To date, the FTC,<sup>335</sup> the Consumer Financial Protection Bureau (“CFPB”),<sup>336</sup> and dozens of state attorneys general<sup>337</sup> have sued FPCUs for unfair and deceptive practices related to their advertising and poor educational outcomes.<sup>338</sup>

Additionally, the Federal Trade Commission Act (“FTCA”), which is the federal UDAP statute, provides the justification for the federal government’s data privacy enforcement against large platform companies.<sup>339</sup> The FTC largely exercises this authority through consent orders, which are far-reaching settlements that establish tailored, enforceable data privacy rules for investigated companies.<sup>340</sup> Consent orders prohibit wrongful activities, require firms to follow stipulations, and allow the FTC to monitor corporate adherence to stipulated terms.<sup>341</sup> Lawyers consider these consent orders to be federal privacy jurisprudence, advising their clients to follow stipulations signed by other firms.<sup>342</sup> Privacy scholars have accordingly labeled these consent orders the “New Common Law of Privacy,” making the FTC the “de facto” privacy regulator.<sup>343</sup>

An analysis of UDAP and FTC consent order jurisprudence further reveals the difficulty of winning a legal challenge against advertisers and other enablers of predatory digital advertising. While deception is comparably easy to prove, it may not apply to the segmentation and targeting process because omissions, like the failure to disclose the parameters of targeting or ad delivery, typically do not constitute deception. Alternatively, unfairness liability probably applies, but proving unfairness may require a court to accept disparate impact theories or a behavioral economics-based theory that some consumers cannot reasonably avoid enrollment in a FPCU after seeing platform and search advertising.

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UDAP laws authorize attorneys general’s offices to conduct pre-suit investigations. For a comparison between these laws, see CAROLYN CARTER, NAT’L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 9 (2018), <http://www.nclc.org/images/pdf/udap/udap-report.pdf>, archived at <https://perma.cc/84TV-KS9L>.

<sup>334</sup> See, e.g., 15 U.S.C. § 45d.

<sup>335</sup> See, e.g., FTC v. DeVry Educ. Grp., Inc., No. CV-16-00579-MWF-SSX, 2016 WL 6821112, at \*1 (C.D. Cal. May 9, 2016).

<sup>336</sup> See 23 U.S.C. § 5511 (for CFPB authority, including abusive acts); see also Complaint for Injunctive Relief and Damages, CFPB v. ITT Educ. Servs. Inc., 219 F. Supp. 3d 878, 885 (S.D. Ind. 2015) (No. 1:14-cv-00292-SEB-TAB).

<sup>337</sup> See e.g., David Halperin, *Law Enforcement Investigations and Actions Regarding For-Profit Colleges*, REPUBLIC REP. (Apr. 9, 2014), <https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/>, archived at <https://perma.cc/6A4R-ZXSA>.

<sup>338</sup> See Dundon, *supra* note 16, at 385.

<sup>339</sup> See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 598–99 (2014).

<sup>340</sup> See *id.* at 620–21.

<sup>341</sup> See *id.* at 614–19.

<sup>342</sup> See *id.* at 620.

<sup>343</sup> *Id.* at 619–27.

### 1. *Deceptive Acts and Practices*

Consumer protection agencies generally pursue deception cases because of the ease of proof. After identifying an alleged deception, plaintiffs must prove two elements: (1) likelihood to mislead consumers acting reasonably under the circumstances, and (2) that such a deception was material.<sup>344</sup> Deception complaints can require a straightforward analysis about an advertiser's misrepresentations or omissions, especially if a deceptive advertisement features an express lie.<sup>345</sup> Importantly, reasonableness is assessed from the viewpoint of the targeted audience.<sup>346</sup>

Deception claims are the most common enforcement actions related to advertising.<sup>347</sup> They allow consumer protection authorities to challenge overt lies or nondisclosures without expending time and money on statistical analyses.<sup>348</sup> Similarly, the FTC's privacy jurisprudence focuses on deceptive privacy practices under UDAP authority.<sup>349</sup> The deception prong of the FTCA allows the FTC to pursue investigations and enforcement actions against companies for violating commitments they make to consumers in their privacy policies, terms of service, and public statements as well as providing insufficient notice of privacy violations.<sup>350</sup> These claims typically consider practices like fraudulent statements by FPCUs about job placement rates in their advertisements.<sup>351</sup> They may also reach nondisclosures of material information. The FTC can find violations for data gathered in contravention of privacy policies.<sup>352</sup>

Deceptive advertising claims are unlikely to reach the targeting and ad-delivery components of manipulative digital advertising because platforms inform users that they will see personalized ads. However, if Google states that it will "analyze your content to provide you with things like customized search results, personalized ads, or other features tailored to how you use our services," such practices cannot constitute deception.<sup>353</sup> Whether consumers misunderstand the extent of these data processing practices or completely

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<sup>344</sup> See G.S. Hans, *Privacy Policies, Terms of Service, and FTC Enforcement: Broadening Unfairness Regulation for a New Era*, 19 MICH. TELECOMM. & TECH. L. REV. 163, 171–72 (2012); see, e.g., *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006) (holding "practice falls within this prohibition (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material").

<sup>345</sup> See Dundon, *supra* note 16, at 390.

<sup>346</sup> See CAROLYN CARTER ET AL., UNFAIR AND DECEPTIVE ACTS AND PRACTICES, § 4.2.11.1 (9th ed. 2016).

<sup>347</sup> See *id.*

<sup>348</sup> See *id.*

<sup>349</sup> See Solove & Hartzog, *supra* note 339, at 628.

<sup>350</sup> See *id.* at 628–38.

<sup>351</sup> See Dundon, *supra* note 16, at 390.

<sup>352</sup> See Solove & Hartzog, *supra* note 339, at 671 (citing Complaint for Civil Penalties and Other Relief at 9–10, *United States v. Google, Inc.*, No. CV 12-04177, 2012 WL 5833994 (N.D. Cal. Nov. 16, 2012)).

<sup>353</sup> See *Google Privacy Policy*, GOOGLE, <https://policies.google.com/privacy> (last visited Sept. 26, 2020), archived at <https://perma.cc/2UXX-HEEF>.

understand that their privacy is being harmed, these practices do not meet the definition of deceptive conduct.

Additionally, they do not reach non-disclosures. According to the National Consumer Law Center, “pure omissions” like undisclosed ad targeting—where the seller is silent, offering “no explicit or implied meaning”—are not deceptive.<sup>354</sup> While omissions can be “unfair,” failing to mention targeting parameters is not deceptive. In contrast to cases where companies make fraudulent statements, the government has little recourse if an advertiser does not misrepresent its data or a platform company explicitly promises that it will use data in an extractive way. There would also be no legal basis for determining deceptive data collection and processing by a data broker for the purposes of marketing. According to the Government Accountability Office (“GAO”), “in relation to data used for marketing purposes, no federal statute provides consumers the right to learn what information is held about them and who holds it.”<sup>355</sup> Moreover, the FTC concludes that no laws beyond the Fair Credit Reporting Act, which considers the role of broker data in credit scoring, require data brokers to maintain consumer privacy.<sup>356</sup>

## 2. *Unfair Acts and Practices*

As opposed to deception claims, unfairness claims may address the targeting and ad-delivery processes that drive civil rights and economic harms caused by digital advertising. Successful unfairness claims under general UDAP authority have challenged high-interest private loans made to Corinthian and ITT Tech students and non-educational products like payday loans.<sup>357</sup> In the privacy context, Solove and Hartzog define unfairness jurisdiction as “quite limited,” finding that the FTC has brought unfairness claims fitting into only five distinct categories.<sup>358</sup> The categories include retroactive policy changes, deceitful data collection, improper use of data, unfair design, and unfair information security practices.<sup>359</sup> None of these groupings would directly address the segmentation and targeting process, as the FTC has not developed unfairness jurisdiction in the context of advertis-

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<sup>354</sup> CARTER ET AL., *supra* note 346, at § 4.2.15.3.

<sup>355</sup> U.S. GOV'T ACCOUNTABILITY OFF., INFORMATION RESELLERS: CONSUMER PRIVACY FRAMEWORK NEEDS TO REFLECT CHANGES IN TECHNOLOGY AND THE MARKETPLACE 16 (2013), <https://www.gao.gov/assets/660/658151.pdf>, *archived at* <https://perma.cc/PV7P-BKR6>.

<sup>356</sup> FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 68–70 (2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>, *archived at* <https://perma.cc/H835-KG7P>.

<sup>357</sup> *See* Dundon, *supra* note 16, at 391.

<sup>358</sup> Solove & Hartzog, *supra* note 339, at 638–40.

<sup>359</sup> *See id.*

ing or targeting.<sup>360</sup> This would require the FTC to chart new enforcement ground.

To prove unfairness, an act or practice must meet a three-part test that tracks closely to this Article's definition of manipulation.<sup>361</sup> An act is not "unfair" unless it (1) "causes or is likely to cause substantial injury to consumers," (2) is "not reasonably avoidable by consumers," and (3) is "not outweighed by countervailing benefits to consumers or to competition."<sup>362</sup>

Proving substantial injury is possible in the context of predatory digital advertising. The substantial injury factor is the most important and can even be dispositive.<sup>363</sup> The FTC focuses on "[m]onetary, health, and safety" impacts rather than emotional or subjective impacts.<sup>364</sup> Such a theory relies on proving that the segmentation, targeting, and delivery of advertisements led to poor financial and social impacts for students. As the empirical evidence about default rates and poor wage outcomes suggests, the FTC can likely prove such impacts. Moreover, the FTC can establish consumer injury based on the violation of other policies.<sup>365</sup> That is, when "presented with the discriminatory application of predictive analytics, the FTC could look to prohibitions against discrimination in credit, housing, education, and employment."<sup>366</sup> The FTC could establish liability under an anti-discrimination law like ECOA if, for example, it could show that an FPCU pursued acts or practices that had a disparate effect on a protected class.<sup>367</sup>

Proving non-reasonable avoidance may be more difficult, as doing so relies on deceptive conduct or behavioral economics theories. In proving that an act or practice is not reasonably avoidable, the FTC focuses on "seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making."<sup>368</sup> According to *Davis v. HSBC Bank Nevada*,<sup>369</sup> "[a]n injury is reasonably avoidable if consumers 'have reason to anticipate the impending harm and the means to avoid it,' or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact."<sup>370</sup> Courts evaluate rea-

<sup>360</sup> *See id.*

<sup>361</sup> *See id.* at 638.

<sup>362</sup> 15 U.S.C. § 45(n).

<sup>363</sup> *See* Marcia Hofmann, *Federal Trade Commission Enforcement of Privacy*, in PROSAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE § 4:1.2[A] (Kristen J. Mathews ed., 2d ed. 2016).

<sup>364</sup> Solove & Hartzog, *supra* note 339, at 639.

<sup>365</sup> *See* Spencer, *supra* note 8, at 504.

<sup>366</sup> *Id.*

<sup>367</sup> *See id.* at 505.

<sup>368</sup> Letter from Michael Pertschuk, Paul Rand Dixon, David A. Clanton, Robert Pitofsky & Patricia P. Bailey, Fed. Trade Comm'n, to Wendell H. Ford & John C. Danforth, Comm. on Com., Science, & Transp. (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>, archived at <https://perma.cc/M56W-EHFW>; *see also In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1074 (1984).

<sup>369</sup> 691 F.3d 1152 (9th Cir. 2012).

<sup>370</sup> *Id.* at 1168 (quoting *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988)).



sonableness by considering the characteristics of the target audience, including age, infirmity, and financial distress.<sup>371</sup>

Plaintiffs can make the case that some consumers could not avoid the harm. FPCUs use their own ads, platforms, and lead generators to constrain knowledge about other alternatives, deceiving consumers into a narrower set of options. Uninformed consumers cannot opt out of ad targeting, data collection, or platform use.<sup>372</sup> Consumers cannot control when look-alike tools select them for advertisements based on similarities to previous high-value consumers—people who were often enrolled based on their emotional vulnerabilities or targeted based on their race. Moreover, platforms choose the advertisements that consumers see. There is no clear way for those who receive ads from FPCUs to change their behavior to be targeted for ads from different, better universities.<sup>373</sup> But, on a population level, digital advertising moves some to act. Once consumers are in the pipeline, FPCUs use high-pressure sales tactics and “hand holding,” to ensure that many students enroll.<sup>374</sup> In short, a strong case can be made that digital advertising deceptively constrains consumers so that they only see advertisements from a particular university or class of universities, starting an enrollment process that has no off ramp.

To prove that consumer harm outweighs countervailing benefits to the competition, the FTC weighs the consumer injury against social costs, including burdens on information flows, costs to business and innovation, as well as benefits to other consumers.<sup>375</sup> Logically, the competitive benefits of the data-segmentation, targeting, and ad-delivery process may equal the costs. It personally tailors advertisements that have been mathematically deemed relevant to users, limiting inefficient ad-spending. It increases benefits to businesses like the University of Phoenix, which literally cut out lead-generator intermediaries in 2016, because platforms allow them to target effectively without employing data brokers.<sup>376</sup> Theories of consumer harm outweighing countervailing benefits are more likely to prevail in instances

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<sup>371</sup> See CARTER ET AL., *supra* note 346, § 4.3.2.3.2 (citing *Johnson v. Long Beach Mortg. Loan Tr.* 2001-4, 451 F. Supp. 2d 16, 38 (D.D.C. 2006) (finding a borrower’s age, limited education, economic resources, and other factors informed the lack of reasonable avoidance for a consumer)).

<sup>372</sup> See Schmitz, *supra* note 114, at 1419–23.

<sup>373</sup> See Newman, *supra* note 60 (describing a study about how Google profiled users with stereotypically Black names for non-college educations and those with stereotypically white names for graduate degrees).

<sup>374</sup> *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 916 (S.D. Ind. 2015) (citing allegations that pre-filled forms and enrollment advisors remove friction in the enrollment process).

<sup>375</sup> See Solove & Hartzog, *supra* note 339, at 639.

<sup>376</sup> See, e.g., *APOLLO EDUC. GROUP*, *supra* note 203, at 10 (describing the benefits of moving away from third-party lead generators, which include “manag[ing] its marketing message,” “improv[ing] its ability to identify those students more likely to persist in its educational programs,” targeting and “reduc[ing] cost”).

where a product class—like an education from an FPCU—clearly harms consumers and a disparate impact requires heightened scrutiny.<sup>377</sup>

As for third-party actor liability, if discovery revealed that an advertiser used a look-alike tool or toggle-based advertising that had a disparate impact, such liability could attach to the ad-platform under the same test to distinguish unfair acts.<sup>378</sup> The platform itself would have been complicit in causing the harm, the inability to avoid the harm, and the harm itself.

A creative argument could contend that ad platforms violate UDAP laws by only or disproportionately delivering FPCU ads to certain classes of consumers and failing to reveal ads for other alternatives. A federal Bankruptcy Court accepted a similar argument, holding that a lender acted unfairly when it did not mention to repeat borrowers that taking out new loans would be more economical than the refinancing.<sup>379</sup> The court, drawing on the holding in *Besta v. Beneficial Loan Co. of Iowa*,<sup>380</sup> determined that “a lender has the duty to at least disclose more economical feasible options to borrowers.”<sup>381</sup> Applying this logic, advocates could argue that the platform failed to disclose ads for nonprofit alternatives with better outcomes. The comparison is, of course, imperfect because ad platforms do not benefit as directly as a lender would when they fail to show ads for different products.

### C. Privacy: Sectoral and Emerging Laws

#### 1. Federal Privacy Laws and Education Advertising

Unlike Europe, the United States has no national digital privacy regulations. According to privacy scholar Daniel Solove, “federal privacy statutes form a complicated patchwork of regulation with significant gaps and omissions.”<sup>382</sup> The rules are pieced together through a blend of federal, state, and tort laws.<sup>383</sup> Any non-sectoral federal enforcement occurs, as discussed earlier, under “de facto” authority of the FTC through its ability to regulate deceptive practices, sign consent decrees, and enforce violations of such decrees.<sup>384</sup>

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<sup>377</sup> See Spencer, *supra* note 8, at 505 (“For practices that did not impact traditionally protected classes under other federal antidiscrimination statutes, the FTC would have difficulty meeting this element.”).

<sup>378</sup> See Facebook Complaint, *supra* note 77, at 3.

<sup>379</sup> *In re Milbourne*, 108 B.R. 522, 538 (Bankr. E.D. Pa. 1989) (using a catch all provision to establish UDAP liability, meaning a provision that covers all fraudulent and unfair activities).

<sup>380</sup> 855 F.2d 532 (8th Cir. 1988).

<sup>381</sup> *In re Milbourne*, 108 B.R. at 538 (citing *Besta*, 855 F.2d at 533).

<sup>382</sup> DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 71 (2006).

<sup>383</sup> See Solove & Hartzog, *supra* note 339, at 587.

<sup>384</sup> See *id.* at 600, 676.

The Federal Education Rights and Privacy Act of 1974 (“FERPA”) is the relevant education privacy statute.<sup>385</sup> It applies to all education institutions receiving federal funding.<sup>386</sup> It does not protect from use of data in educational advertising.<sup>387</sup> No law prohibits the acquisition of current or prospective student information or targeting based on that data.<sup>388</sup> And, no law prohibits data brokers from collecting, segmenting, and selling data for use by educational actors.<sup>389</sup>

## 2. State Privacy Laws

States have been developing laws to fill the void in federal privacy law. Like the discussion of state UDAP laws, an analysis of state privacy laws would be the subject of a separate article. However, both the California Consumer Privacy Act (“CCPA”)<sup>390</sup> and Vermont’s data broker legislation<sup>391</sup> are worth a brief mention. The CCPA aims to provide general consumer data protections.<sup>392</sup> It broadly gives California residents the right to know what personal information has been collected on them, what it is being used for, and whether and to whom it is or has been disclosed or sold.<sup>393</sup> The CCPA also allows residents the right to “opt-out” of sales,<sup>394</sup> the right to have their data deleted,<sup>395</sup> and the right to equal service.<sup>396</sup> It does not include a requirement to provide an easy means to opt-out of direct marketing.<sup>397</sup> Vermont’s data broker legislation requires all data brokers to register with the state, take identified security measures, provide notice of security breaches, and inform consumers of opt-out mechanisms (if they offer an opt out option).<sup>398</sup> Yet, the law does not require that brokers give people the right to opt-out of profiling and sale, or even the right to review their data profiles.<sup>399</sup>

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<sup>385</sup> See 20 U.S.C. § 1232g.

<sup>386</sup> See *id.*

<sup>387</sup> See *id.*

<sup>388</sup> See Madden et al., *supra* note 142, at 77–78.

<sup>389</sup> See Schmitz, *supra* note 114, at 1437.

<sup>390</sup> See California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100–.199 (2018).

<sup>391</sup> See VT. STAT. ANN. tit. 9, §§ 2430–2447 (2018).

<sup>392</sup> See CAL. CIV. CODE §§ 1798.100–.199.

<sup>393</sup> See *id.* § 1798.100.

<sup>394</sup> *Id.* § 1798.120.

<sup>395</sup> See *id.* § 1798.105.

<sup>396</sup> See *id.* § 1798.125.

<sup>397</sup> See generally *id.* § 1798.100–.198.

<sup>398</sup> See Steve Melendez, *A Landmark Vermont Law Nudges Over 120 Data Brokers Out of the Shadows*, FAST CO., (Mar. 2, 2019), <https://www.fastcompany.com/90302036/over-120-data-brokers-inch-out-of-the-shadows-under-landmark-vermont-law>, archived at <https://perma.cc/2SVK-4VSY>.

<sup>399</sup> See *id.*

*D. Additional Limits on Liability*

Two additional limitations on liability require emphasis. First, federal pleading standards and arbitration clauses impose significant barriers especially on private litigants.<sup>400</sup> Second, Section 230 of the Communications Act of 1934 (as amended by the Communications Decency Act) shields platforms from liability when they act as publishers and not content creators.<sup>401</sup>

*1. Additional Civil Procedure Barriers*

A plausibility-pleading standard can close the courtroom doors to those alleging civil rights or consumer harms. Indeed, plausibility pleading has significantly reduced the number of civil rights claims that move past the discovery stage<sup>402</sup> and may have particular effects on disparate impact cases.<sup>403</sup> This standard, established by the *Twombly*<sup>404</sup> and *Iqbal*<sup>405</sup> decisions, requires sufficient evidence to nudge claims “from conceivable to plausible.”<sup>406</sup> In the case of a disparate impact claim, specific facts must identify the practice in question, the impacted protected class, and the statistically disparate effect on the plaintiff or protected class.<sup>407</sup>

The specific data is hard to come by. FPCUs probably have documentation of data purchases, meeting notes discussing segment definitions, and data uploads given the human processes involved in targeting. However, FPCUs will possibly have sole access to the data needed to credibly allege the discriminatory practice.<sup>408</sup> Government agencies, through pre-litigation investigatory powers, would have consistent access to data to meet plausibility pleading standards;<sup>409</sup> gathering discovery on specific targeting activities is an expensive, time-consuming, and non-guaranteed battle for private plaintiffs.<sup>410</sup> Well-resourced plaintiffs may also have a path to meet plausibil-

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<sup>400</sup> See, e.g., Joseph A. Seiner, *Plausibility and Disparate Impact*, 64 HASTINGS L.J. 287, 304 (2013).

<sup>401</sup> See 47 U.S.C. § 230.

<sup>402</sup> See Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2182 (2015).

<sup>403</sup> See, e.g., *id.*; see also Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527–36, 556–62 (2010).

<sup>404</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>405</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>406</sup> *Twombly*, 550 U.S. at 570.

<sup>407</sup> See, e.g., Seiner, *supra* note 400, at 304.

<sup>408</sup> See *id.* at 303–04.

<sup>409</sup> See, e.g., Dundon, *supra* note 16, at 393 (citing the Department of Education’s investigatory power); see also 15 U.S.C. § 43 (FTC’s investigatory power).

<sup>410</sup> See, e.g., *Bradley v. T-Mobile US, Inc.*, No. 17-CV-07232-BLF, 2020 WL 1233924, at \*18 (N.D. Cal. Mar. 13, 2020) (issuing an order dismissing fourth amended complaint and granting limited jurisdictional discovery to establish facts about specific ad targeting that allows plaintiffs to refile with a fifth amended complaint and access to limited targeting data).

ity standards if they can conduct expensive statistical analyses in ECOA cases where disparate impact theories are available.

Additionally, if student enrollment agreements have arbitration clauses, as is the practice in almost every consumer industry, then arbitration requirements may make any private consumer suit difficult to bring in federal court.<sup>411</sup>

## 2. Section 230: Potential Platform Defense

Platforms often claim an additional defense under Section 230 of the Communications Act.<sup>412</sup> Under the Act, only the “information content provider,” the party “responsible for the creation or development” of content, faces liability as the “publisher or speaker” of that content.<sup>413</sup> Platforms and users are protected from liability for any content “provided by another content provider.”<sup>414</sup>

Courts liberally apply the Section 230 defense in cases where platforms host content.<sup>415</sup> “The prototypical service qualifying for [Section 230] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others.”<sup>416</sup> Congress designed the Section 230 protection to prevent platforms from facing liability for moderating content produced by their users.<sup>417</sup>

The Ninth Circuit case, *Fair Housing Council v. Roommates.com*,<sup>418</sup> helps distinguish between cases where Section 230 applies (hosted content) and cases where Section 230 should not apply (co-created content). In *Roommates.com*, fair housing advocates sued an internet platform for discrimination based on sex, sexual orientation, and family status.<sup>419</sup> The Roommates.com platform connected renters with potential roommates and required subscribers to answer questions, including those about their sexual identity, their sexual orientation, and whether they have children, and to provide their roommate preferences along those same dimensions.<sup>420</sup> The website then provided matching services for potential roommates on the basis of

<sup>411</sup> See, e.g., *Anderson v. Virginia Coll., LLC*, No. 3:12-cv-503TSL-MTP, 2012 WL 4052198, at \*1 (S.D. Miss. Sept. 13, 2012) (dismissing reverse redlining suit against a FPCU for predatory advertising due to a mandatory arbitration clause).

<sup>412</sup> See 47 U.S.C. § 230.

<sup>413</sup> *Id.* § 230(f)(3).

<sup>414</sup> *Id.* § 230(c).

<sup>415</sup> See Pauline T. Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 919–29 (2020) (citing a series of cases in which platforms avoided liability for, *inter alia*, defamation, common torts, and claims under the Fair Housing Act); see also Catherine Tremble, *Wild Westworld: Section 230 of the CDA and Social Networks’ Use of Machine-Learning Algorithms*, 86 FORDHAM L. REV. 825, 829 (2017).

<sup>416</sup> *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009).

<sup>417</sup> See *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1163 (9th Cir. 2008).

<sup>418</sup> *Id.*

<sup>419</sup> See *id.* at 1161–62.

<sup>420</sup> See *id.* at 1161.

those characteristics.<sup>421</sup> The Ninth Circuit held that in asking these questions and providing subsequent matching services, Roommates.com became the “information content provider” and was responsible, “in whole or in part, for the creation or development” of the discriminatory content.<sup>422</sup> However, it was immune from suit for the publishing of user comments, which the Ninth Circuit found to be hosted content.<sup>423</sup>

*Roommates.com* differentiates between content created by advertisers and ad platforms. The defense stops at the point at which the platform “contributes materially to the alleged illegality of the conduct.”<sup>424</sup> Platforms may be shielded from liability for custom audiences as these tools primarily require platforms to facilitate content decisions by others.<sup>425</sup> Where advertisers engage in voluntary discrimination by using custom-audience features to find people on the lists that the advertisers upload, *Roommates.com* suggests that platforms should have Section 230 immunity. In these cases, courts are likely to find that the platforms do not develop the offending content and merely publish advertiser content by finding people on the lists the advertisers provide.<sup>426</sup>

However, platforms should not be able to escape liability for the delivery of advertisements and look-alike tools. First, if an advertiser—who inputs neutral targeting parameters—cannot avoid a discriminatory offense due to the platform’s ad-delivery mechanism, the Section 230 defense should not protect the platform. If the platform were operating as a mere “publisher” following the wishes of the advertiser, no discrimination would occur in these situations. Alternatively, platforms using “allegedly unlawful criteria” to “force users to participate in its discriminatory process” is “something the law prohibits.”<sup>427</sup> Similarly, Section 230 defenses should not be available for look-alike targeting. The generation of targeted lists that are exponentially larger than an advertiser’s source list, matched exclusively by a platform’s algorithms, should constitute co-creation. In this case, the ad-platform selects not only the consumers who see the ad, but it also selects the specific features by which this audience is chosen, using data exclusively controlled by the platform.<sup>428</sup> Roommates.com’s inability to use Section 230 to immunize itself from liability for discrimination in its matching services

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<sup>421</sup> See *id.* at 1162.

<sup>422</sup> *Id.* (citing 47 U.S.C. § 230(f)(3)).

<sup>423</sup> See *id.* at 1173–74.

<sup>424</sup> *Id.* at 1168.

<sup>425</sup> See Datta et al., *supra* note 63, at 2.

<sup>426</sup> See Upturn, Inc.’s Motion for Administrative Relief for Leave to File Brief as Amicus Curiae in Support of Plaintiffs’ Opposition to Facebook’s Motion to Dismiss First Amended Complaint at 2–4, *Onuoha v. Facebook, Inc.*, No. 5:16-cv-06440 EJD (N.D. Cal. Mar. 19, 2019), [https://www.upturn.org/static/files/2018-11-16\\_Upturn\\_Facebook\\_Amicus.pdf](https://www.upturn.org/static/files/2018-11-16_Upturn_Facebook_Amicus.pdf), archived at <https://perma.cc/93MN-ULZP> [hereinafter Upturn Onuoha Brief].

<sup>427</sup> *Roommates.com*, 521 F.3d at 1167.

<sup>428</sup> See, e.g., Upturn Onuoha Brief, *supra* note 426, at 2–4 (relying on Speicher et al.’s research to detail the ways that Lookalike audiences are not neutral targeting tools and therefore Section 230 should not apply).

is analogous. Like people seeking roommates, advertisers do not control how their source audiences are matched to the larger group of consumers who see their advertisements.<sup>429</sup>

While this analysis suggests that liability should not attach for discriminatory list generation and ad-delivery harms, courts have yet to explicitly settle the issue. Rulings may turn on how narrowly courts construe the ad-platform's involvement in the advertising. Ad platforms may, for example, earn immunity for targeted advertising, if courts conclude that only the content, not the targeting, matters.<sup>430</sup> Similarly, courts might side with the ad platforms if they focus on the advertiser's voluntary decision to advertise.<sup>431</sup> Logically, this argument should fail under *Roommates.com* because platforms substantially control who sees advertisements and the delivery of the advertisements to those people. As opposed to a billboard where the host does not create any content, the generation of look-alike audiences and the assembly of the exact audiences who view an advertisement on the basis of data elements not available to the advertiser, are activities exclusively under the control of platforms. If this issue is settled in favor of the platforms, discrimination generated through neutrally targeted ads or look-alike audiences will likely be impossible to challenge through the courts.

## V. CONCLUSION: REGULATING THE ECOSYSTEM OF PREDATION

The United States needs additional regulation to protect the civil rights and economic wellbeing of low-income people and people of color. Personalized digital advertising may present benefits in many contexts, but in the context of social welfare products the costs severely outweigh the benefits due to the potential for civil rights and economic injuries. Regulation may proceed through legislation,<sup>432</sup> rulemaking,<sup>433</sup> and consent decrees.<sup>434</sup> The rel-

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<sup>429</sup> See *Roommates.com*, 521 F.3d at 1168.

<sup>430</sup> See, e.g., *Rosetta Stone Ltd. v. Google Inc.*, 732 F. Supp. 2d 628, 633 (E.D. Va. 2010), *aff'd on other grounds*, 676 F.3d 144, 149 (4th Cir. 2012) (reasoning that "Google simply assists third party advertisers in refining their selected keyword terms" and that consumers respond to the advertising content selected by the advertiser, not the targeting or delivery by the platform).

<sup>431</sup> See, e.g., Motion to Dismiss First Amended Complaint at 7, *Onuoha v. Facebook, Inc.* 5:16-cv-06440 EJD (N.D. Cal. Mar. 19, 2019), <https://www.courtlistener.com/recap/gov.uscourts.cand.304918/gov.uscourts.cand.304918.34.0.pdf>, *archived at* <https://perma.cc/4TXK-KWFM> (distinguishing between "content" directed at others and "conduct" directed by Facebook) (citing *Homeaway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019)).

<sup>432</sup> See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000d; Equal Credit Opportunity Act, 15 U.S.C. § 1691.

<sup>433</sup> See 15 U.S.C. § 46(g); see also *id.* § 57a (detailing the extensive but not insurmountable procedure for rulemaking); *Nat'l Petrol. Refiners Ass'n v. FTC*, 482 F.2d 672, 697–98 (D.C. Cir. 1973) (upholding the FTC's "authority to 'make rules and regulations for the purpose of carrying out'" its statutory mandate to regulate unfair and deceptive practices (quoting 15 U.S.C. § 46(g))); Ian M. Davis, Note, *Resurrecting Magnuson-Moss Rulemaking: The FTC at a Data Security Crossroads*, 69 *EMORY L.J.* 781, 787–803 (2020); Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at the Silicon Flatirons Conference at the University of

ative merits of a rulemaking or consent-decree approach as opposed to legislation is the subject of a separate legal and political analysis. However, policymakers should note the FTC's little used power<sup>435</sup> to issue regulations under its UDAP authority.<sup>436</sup> The FTC's power "to make rules and regulations for the purpose of carrying out" its unfair and deceptive practices jurisdiction may be a creative, nimble, and efficient means of regulating the proliferation of inferior social welfare products.<sup>437</sup>

This Article proposes a noun and verb approach: for a class of nouns—social welfare products—we should regulate certain verbs: digital discrimination and reverse redlining that are driven by targeted advertising, ad-delivery optimization, and look-alike amplification.

Four policy options would contain the verbs, reducing the proliferation of predation. The verb approach focuses primarily on regulating the ad platforms due to their market power.<sup>438</sup> They not only provide the portal that predatory actors use to manipulate consumers, but they also control tools like ad-delivery optimization and look-alike audiences that proliferate the harm. This Article considers four policy approaches that would each limit reverse redlining to varying degrees: transparency requirements, bans on discriminatory technology, increased liability, and updated civil rights laws. A comprehensive law, including each of these policy proposals would have the greatest effect in reducing digital reverse redlining. However, this Article argues that the best single approach is a ban on the use of targeting, optimization, and amplification for social welfare product advertising.

This Article concludes with the nouns, emphasizing the benefits of limiting regulation to social welfare products. The social welfare product approach builds on existing civil rights laws, precisely regulates harmful uses of technology that may be otherwise beneficial, and focuses on precise harms rather than broad policy concerns. It focuses the debate on the con-

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Colorado Law School (Sept. 6, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1543396/slaughter\\_silicon\\_flatirons\\_remarks\\_9-6-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf), archived at <https://perma.cc/QEB5-CDBE> (discussing the viability of rulemaking under the Magnuson-Moss Warranty Act).

<sup>434</sup> See Solove & Hartzog, *supra* note 339, at 615–27 (discussing the claim that, in the absence of rulemaking, the FTC has developed a "consent order regime" that has become the "New Common Law of Privacy," making the FTC the "de facto" privacy regulator with the ability to prohibit wrongful activities, require firms to follow stipulations, and monitor corporate adherence to stipulated terms). For example, Facebook is governed by a consent decree. See, e.g., Cecilia Kang, *F.T.C. Approves Facebook Fine of About \$5 Billion*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/technology/facebook-ftc-fine.html>, archived at <https://perma.cc/Q4JP-8DJE>. Nevertheless, we can question whether platforms would voluntarily agree to limit advertising for social welfare products; doing so would likely require the expensive task of editing or turning off their optimization algorithms.

<sup>435</sup> See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (detailing the requirements of Magnuson-Moss rulemaking, which extend beyond typical notice-and-comment rulemaking).

<sup>436</sup> See 15 U.S.C. § 46(g); see also *Nat'l Petrol. Refiners Ass'n*, 482 F.2d at 698–99.

<sup>437</sup> See *id.*

<sup>438</sup> See Perrin, *supra* note 47.



sumer and civil rights harms of this technology rather than subsuming the interests of consumers of color and low-income consumers in the emerging privacy debate. The approach is narrowly tailored to avoid First Amendment concerns, reduce evidentiary concerns, respond to questions about beneficial uses of the technology, consider regulatory paths, and address paternalism concerns.

A. *Analyzing the Four Complementary Ways to Reduce Reverse Redlining*

Four policy actions could reduce manipulation by way of the reverse redlining of inferior social welfare products. The first approach would ban the tools that target, amplify, and optimize predatory advertisements. The second approach aims to increase the efficacy of litigation through transparency requirements. The third approach creates an exemption to Section 230 that explicitly clarifies that platforms will face liability for social welfare product advertising if they materially contribute to violations of laws. The fourth approach updates and expands anti-discrimination causes of action through legislation to include publishing, disparate impact, and reverse redlining theories that apply to platforms and have meaningful penalties. This section evaluates the merits of each policy, concluding that a ban on targeting, amplification, and delivery would be the strongest policy to reduce the reverse redlining of inferior social welfare products. However, a comprehensive policy approach would include each policy option.

1. *Banning Technologies that Drive Digital Discrimination*

In effect, a ban on custom-audience targeting, look-alike amplification, and ad-delivery optimization would drastically reduce both digital reverse redlining and redlining, by banning the tools that draw the red lines. It would prevent advertisers and platforms from capitalizing on the discrimination that occurs during the look-alike amplification process that finds people who look like the source audiences.<sup>439</sup> By turning off optimization, this approach would require advertisements to be delivered randomly to people in a broad geography.<sup>440</sup>

In practice, this ban would limit advertisers to broad geographic targeting, making platforms the digital equivalents of billboards for the covered class of social welfare products.<sup>441</sup> Alternatively, platforms could create a separate user-directed interface that allows users to review all advertisements for social welfare products in their geography.<sup>442</sup> In these circum-

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<sup>439</sup> See Ali et al., *supra* note 29, at 6–7 (identifying the ad-delivery process).

<sup>440</sup> See *id.* at 19 (indicating the possibility of turning off optimization).

<sup>441</sup> See *id.*

<sup>442</sup> See *id.* at 26.

stances, FPCUs and other businesses with financial models designed around leveraging manipulative advertising could no longer rely on ad platforms to cheaply find the consumers most likely to engage, as advertisements would have higher costs per click on non-targeted content. This could incentivize predatory businesses to close or, in the alternative, compete on the basis of other factors like price and quality.

The effectiveness of this approach derives from the bluntness of the instrument coupled with the ease of enforcement. Instead of needing to prove the elements of a civil rights or UDAP violation in a court of law, regulators would only need to prove that an advertiser or platform failed to abide by this ban in order to stop the process. Technical and regulatory capability exist for such oversight, especially given the small number of platforms that have sufficient market power to offer these tools.<sup>443</sup> The case for a blunt policy is strengthened by evidence from Facebook's inability to remove bias in the delivery of housing, employment, and credit advertisements when it explicitly intended to do so.<sup>444</sup> In that circumstance, the potential for liability clearly did not incentivize the platforms to change their business practices or stop discriminatory ad delivery, suggesting the need for more directive measures.

## 2. *Increasing the Efficacy of Litigation through Transparency, Liability, and Penalties*

Demographic transparency requirements for social welfare advertising is a precondition for a regulatory approach based on liability and enforcement. Almost no transparency currently exists; even regulators do not have access to information about targeting and ad delivery.<sup>445</sup> The lack of transparency around digital targeting practices makes it virtually impossible to meet plausibility standards, closing the courtroom doors to litigants alleging digital discrimination by predatory advertisers or platforms.<sup>446</sup> As this Article discusses in Part V.D, transparency requirements could force platforms to see and confront predatory uses of their tools, giving activists and attorneys leverage in advocacy efforts.

A 2018 Upturn report analyzed Facebook advertising transparency practices and offered reasonable recommendations that could be applied to ad platforms.<sup>447</sup> For example, they conclude that ad platforms should be required to disclose metadata that might help researchers understand “impact

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<sup>443</sup> See, e.g., Perrin, *supra* note 47 (finding that Google and Facebook collectively are responsible for more than 60% of digital advertising in the U.S.).

<sup>444</sup> See SAPIEZYNSKI ET AL., *supra* note 106, at 8.

<sup>445</sup> See, e.g., UPTURN, *supra* note 12, at 2 (describing the minimal amount of data in the ad-library).

<sup>446</sup> See *Bradley v. T-Mobile US, Inc.*, No. 17-CV-07232-BLF, 2020 WL 1233924, at \*16 (N.D. Cal. Mar. 13, 2020).

<sup>447</sup> See UPTURN, *supra* note 12, at 16.

and intent.”<sup>448</sup> They should have to disclose audience size, the tools used to target the audiences, the rationale for ad delivery, and demographics of the audience reached.<sup>449</sup> The public should additionally have a searchable interface that queries ads running their platform, so they can learn about how they are being targeted.<sup>450</sup> Some comparable transparency requirements exist under the Fair Credit Reporting Act.<sup>451</sup>

Transparency requirements are easily enforceable—either platforms comply or they do not—and highly effective for exposing racially disparate outcomes. However, they are only as effective as the enforcement regimes they inform. For example, the identified transparency requirements would significantly increase the ability to bring disparate impact claims under ECOA for advertisers whose advertisements skew to particular racial demographics on the basis of exposing the necessary data. In the hypothetical case against STC, plaintiffs would know whether their targeting efforts did, indeed, disproportionately reach Black audiences. However, these requirements alone would not directly incentivize ad platforms to change behavior as many of the relevant anti-discrimination laws do not apply to ad platforms.<sup>452</sup>

### 3. *Exempting Social Welfare Advertisements from Section 230 Protection*

Clarifying that ad platforms are liable for harms created by the advertising of social welfare products would incentivize them to take corrective action where they face liability.<sup>453</sup> As Upturn researchers write in an amicus brief arguing that Section 230 should not apply to amplification and optimization technologies, “Facebook’s own conduct,” not the conduct of the advertisers, drives the discriminatory outcomes.<sup>454</sup> While courts should ultimately accept this reading of Section 230,<sup>455</sup> Congress could clarify that it agrees with this interpretation by carving out an exemption from the Section 230 protection for social welfare advertisements. Peter Romer-Friedman, an attorney who has litigated digital discrimination cases against Facebook,

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<sup>448</sup> *Id.*

<sup>449</sup> *See id.* at 18–19.

<sup>450</sup> *See id.* at 13.

<sup>451</sup> *See* Fair Credit Reporting Act, 15 U.S.C. § 1681.

<sup>452</sup> *See, e.g., id.* § 1691a (describing a creditor as “any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit”); 42 U.S.C. § 2000d (detailing Title VI’s application only to entities that receive federal funding).

<sup>453</sup> *See* Bertram Lee, *Where the Rubber Meets the Road: Section 230 and Civil Rights*, PUB. KNOWLEDGE (Aug. 12, 2020), <https://www.publicknowledge.org/blog/where-the-rubber-meets-the-road-section-230-and-civil-rights/> (discussing the benefits of exempting all advertising from Section 230 protections in the context of civil rights), *archived at* <https://perma.cc/GJF6-BC4P>.

<sup>454</sup> Upturn Opiotennione Brief, *supra* note 30, at 2.

<sup>455</sup> *See infra* Part V.D.ii (discussing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1161 (9th Cir. 2008) (citing 47 U.S.C. § 230)).

proposed specific language: ad platforms should be liable for harm that occurs through paid advertising and content where the ad platform was on “actual notice” or reasonably should have known about potential discrimination.<sup>456</sup> Liability would attach if the platform failed to take “reasonable affirmative steps” in a short timeframe.<sup>457</sup> This would apply if, for example, the ad platform contributes to civil rights or consumer protection harms through ad-delivery optimization or the amplification of look-alike audiences.<sup>458</sup>

Clarifying the Section 230 exemption offers two advantages: increasing liability on platforms and providing flexibility. This regime would align platforms’ financial interests with finding an efficient solution to discriminatory ad delivery while giving them the flexibility to try different methods. They may resort to turning off ad-delivery optimization or creating a separate user-directed portal for social welfare product advertisements,<sup>459</sup> likely outcomes under a ban on these technologies. Or they might find an algorithmic solution to rebalance the racial demographics of the intended audience so that any targeted advertisement would not have disparate results.<sup>460</sup>

Technical feasibility, transparency, and the applicability of underlying laws each limit the effectiveness of a Section 230 exemption. Technical feasibility is a challenge. Absent banning technology, platforms have yet to reduce algorithmic discrimination in large-data models even when they commit to trying.<sup>461</sup> Unless this policy is coupled with transparency requirements, effective enforcement may continue to elude regulators. Further, whether the underlying law applies to third-party advertisers will limit its effectiveness. In the context of discriminatory advertising, a clarified Section 230 exemption would make platforms responsible for discriminatory hous-

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<sup>456</sup> *The Future of Work: Protecting Workers’ Civil Rights in the Digital Age: Hearing Before the Subcomm. on C.R. & Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong. 22–23 (2020) (statement of Peter Romer-Friedman, Principal, Gupta Wessler PLLC) (discussing the considerations on limiting Section 230 immunity for platforms).

<sup>457</sup> *Id.*

<sup>458</sup> See, e.g., SAPIEZYNSKI ET AL., *supra* note 106, at 8–9 (demonstrating that Facebook contributes to discrimination even when it aims to create a non-discriminatory portal that removes look-alike audiences and proxies for race); Ali et al., *supra* note 29, at 1 (describing the ways that Facebook contributes to discrimination even when advertisers use neutral targeting parameters); see also Upturn Onuoha Brief, *supra* note 426, at 5–9 (distinguishing Facebook’s role in driving discrimination through ad-delivery optimization and Lookalike Audiences).

<sup>459</sup> See Ali et al., *supra* note 29, at 15.

<sup>460</sup> See, e.g., LODWIJK GELAUFF ET AL., ADVERTISING FOR DEMOGRAPHICALLY FAIR OUTCOMES 13–14 (2020), <https://arxiv.org/abs/2006.03983>, archived at <https://perma.cc/WS3H-Z5X9> (providing one example of advertisers’ ability to conduct racial rebalancing and implying that the technology may exist for Facebook to do this rebalancing itself).

<sup>461</sup> See, e.g., SAPIEZYNSKI ET AL., *supra* note 106, at 8–9 (evaluating the efficacy of Facebook’s Special Ad Audience tool and finding that it “do[es] little to reduce demographic biases,” *id.* at 1).

ing advertisements<sup>462</sup> but may not implicate them in predatory FPCU advertisements.<sup>463</sup>

#### 4. Updated Civil Rights Liability

Updated civil rights liability should include discriminatory publication prohibitions, disparate impact standards, expansions to reverse redlining standards, liability for platforms, and stiffer penalties. Until civil rights laws statutorily prohibit disparate impact and digital reverse redlining, enforcement against the targeting of consumers of color for inferior social welfare products will have to proceed through convoluted legal theories. Updated civil rights laws would change that.

First, the FHA's prohibition on publishing discriminatory advertising should be applied to all social welfare products. The FHA makes it unlawful to "print or publish . . . any notice, statement, or advertisement . . . that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin . . ." <sup>464</sup> This provision would prevent both discriminatory exclusion that targets marketing away from protected classes and reverse redlining practices that target marketing toward protected classes.

Second, a modernized Civil Rights Act should include a disparate impact standard. The statute could draw upon language in Title VII of the Civil Rights Act that prohibits practices that "cause[ ] a disparate impact on the basis of" protected class status.<sup>465</sup> While the Supreme Court has upheld disparate impact standards under the FHA, non-statutory standards risk substantial changes as administrations change.<sup>466</sup> The updated statute would create permanent incentives for both ad platforms and advertisers who use them to reduce unintentional discrimination.

Third, the statute should explicitly prohibit reverse redlining while broadening the definition to encompass instances of predatory targeting that do not include predatory loan terms. At a minimum, the broadened definition should allow suits against products that offer or require financing even if the loan terms themselves are not unfair. Recall that both *Hargraves*<sup>467</sup> and *M & T Mortgage Corporation*<sup>468</sup> place limitations on reverse-redlining theories, requiring plaintiffs to show that both the lending practices and the loan terms

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<sup>462</sup> See 42 U.S.C. § 3605 (applying the Fair Housing Act's prohibitions on discrimination in residential real estate transactions to "any person or other entity").

<sup>463</sup> See, e.g., *id.* § 2000d (including the applicability of Title VI).

<sup>464</sup> *Id.* § 3604(c).

<sup>465</sup> *Id.* § 2000e-2.

<sup>466</sup> See *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 533 (2015) (holding that the disparate impact theory applies to housing). *But see* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,859 (proposed Aug. 19, 2019) (demonstrating that disparate impact theories issued by rulemaking risk being watered down or neutralized by changing administrations).

<sup>467</sup> See *Hargraves v. Cap. City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

<sup>468</sup> See *M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 575 (E.D.N.Y. 2010).

were unfair or predatory. The requirement that loan terms must be predatory precludes otherwise blatant cases of reverse redlining from moving forward.<sup>469</sup> These cases often occur when the government sets loan terms but the targeting and the product itself are predatory, as is the case with FPCUs.

Drawing on the Fair Housing Act, Congress should also explicitly broaden the application of each relevant civil rights law to cover “any person or entity.”<sup>470</sup> Other civil rights laws such as Titles VI and VII of the Civil Rights Act apply antidiscrimination laws to narrower classes of people, which prevents them from applying to platforms and data brokers.<sup>471</sup> This broader definition will ensure that platforms are liable where they contribute to harm.

Finally, stronger remedies may further compel platforms to take anti-discrimination efforts seriously. Without strong minimum penalties, like penalties for each violation of the act, platforms can ignore the cost of enforcement actions as a cost of doing business.<sup>472</sup>

An updated civil rights regime could meaningfully augment enforcement efforts against predatory advertisers and platforms, but enforceability, efficiency, and the path to regulation each present challenges. Enforcement through litigation would still be, at best, a multi-year, resource-intensive process if this updated regime were in place. Technical and regulatory costs would be high, as enforcement would require a continual feedback loop of algorithmic audits, adjustments, and litigation. The regulatory path to new civil rights legislation is likely limited until congressional dynamics change.<sup>473</sup>

### *B. Benefits of a Comprehensive Social Welfare Product Approach to Regulation*

A regulatory focus on social welfare products protects low-income consumers and consumers of color while acknowledging that it would be unnecessary to apply the same regulations to the entire digital advertising economy. This approach has some implicit support on Capitol Hill. Although they do not explicitly use the term social welfare products, Maria

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<sup>469</sup> See, e.g., *Brook v. Sistema Universitario Ana G. Mendez, Inc.*, No. 8:17-CV-171-T-30AAS, 2017 WL 1743500, at \*3 (M.D. Fla. May 4, 2017).

<sup>470</sup> 42 U.S.C. § 3605 (providing the Fair Housing Act’s prohibitions on discrimination in residential real estate transactions apply to “any person or other entity”).

<sup>471</sup> See, e.g., *id.* §§ 3603, 2000d.

<sup>472</sup> See *The Future of Work: Protecting Workers’ Civil Rights in the Digital Age: Hearing Before the Subcomm. on C.R. & Hum. Servs. of the H. Comm. on Educ. & Lab.*, 116th Cong. 21–23 (2020) (statement of Peter Romer-Friedman, Principal, Gupta Wessler, PLLC) (arguing for minimum penalties per violation).

<sup>473</sup> See, e.g., Luke Broadwater, *After Death of John Lewis, Democrats Renew Push for Voting Rights Law*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/john-lewis-voting-rights-act.html>, archived at <https://perma.cc/82SY-FZAN> (describing political positions on updating the Voting Rights Act).

Cantwell and her fellow co-sponsors of the 2019 Consumer Online Privacy Rights Act take this approach.<sup>474</sup>

Specifically, there are three main benefits to this social welfare product approach and the associated policies. First, it builds on an existing framework of anti-discrimination laws. The Supreme Court has relied upon this framework to justify heightened safeguards for protected classes in sectors that especially affect human welfare, like access to quality employment, housing, credit, and education. In *Inclusive Communities*, Justice Kennedy relied upon the existing architecture of other anti-discrimination laws to uphold the availability of disparate impact liability under the Fair Housing Act.<sup>475</sup>

Second, the approach regulates harmful uses of technology that may otherwise have competitive and consumer benefits. The same technology that enables reverse redlining offers great benefits to consumers and industries in other sectors of the economy. For example, targeted advertising might allow a new energy-efficient technology or better-quality, lower-cost consumer goods to gain market share. Consequently, a more targeted approach might prevent economic and civil rights harms while enabling social and economic growth in other areas.

Third, it addresses targeting as consumer and civil rights issues distinct from emerging privacy debates. A national reckoning about the role of ad platforms may be impending, as both Democrats and Republicans are frustrated by the ad platforms.<sup>476</sup> But such an effort would require a once-in-a-generation political mobilization, and it would likely focus on the biggest political issues of the day: manipulated elections, misinformation, political radicalization, and anti-competitive behavior.<sup>477</sup> If the relative lack of literature, litigation, and legislative proposals on digital manipulation in social welfare products is any indication, this issue is unlikely to feature prominently in political debates and therefore may be shortchanged in any omnibus bill. This issue's lack of prominence and its commanding importance in social welfare conversations argues persuasively for finding separate solutions.

Nevertheless, support for curtailing the advertising of social welfare products would have to overcome five primary objections. Most of these objections counsel against regulating advertising in general. However, bans on optimization and amplification tools, as well as the social welfare product framework, address these criticisms.

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<sup>474</sup> See Consumer Online Privacy Rights Act, S. 2968, 116th Cong. § 108 (2019).

<sup>475</sup> See *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 529–33 (2015).

<sup>476</sup> See Alina Tugend, *Fervor Grows for Regulating Big Tech*, N.Y. TIMES (Nov. 11, 2019), <https://www.nytimes.com/2019/11/11/business/dealbook/regulating-big-tech-companies.html>, archived at <https://perma.cc/MY3V-JZT8>.

<sup>477</sup> See *id.*

First, regulations would have to overcome the First Amendment's protections for commercial speech. A product-specific approach that leverages anti-discrimination and unfair and deceptive practices laws is designed with First Amendment limitations in mind. As the Court ruled in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*:<sup>478</sup>

Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the government interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.<sup>479</sup>

Any statute or regulation aimed at reducing discriminatory ad targeting would likely acquire the *Pittsburgh Press* protections. The civil rights and consumer protection interest almost certainly outweighs the speech interest because of the predatory behavior of advertisers selling inferior social welfare products and discriminatory ad platforms. Adding credibility to this argument, the First Amendment probably allows regulation of ads for social welfare products under the *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*<sup>480</sup> test. The government can justify regulating speech (that is otherwise legal and not misleading) if the regulation supports a "substantial government interest," directly advances the asserted interest, and "is not more extensive than necessary to serve that interest."<sup>481</sup> Restrictions on targeted advertising for social welfare products should pass this test because digital advertising is by its nature manipulative, and the product-specific regime is precisely tailored to ensure equal access to beneficial social welfare products without affecting the free marketing of nonessential products.

The second criticism is practical: proving harm may continue to be difficult, particularly in consumer cases where plaintiffs do not allege discrimination. Because an advertisement—even an advertisement finely calibrated to induce a consumer to purchase a product—is attenuated from the ultimate purchase of a product, it can be difficult to prove that the ad itself caused an individual consumer's harm. For example, even if a targeted advertisement based on a community's TV habits increased sales amongst that group by a statistically significant margin, many people with the same habits might not respond to the ad. We also cannot know the counterfactual: whether the consumer would have purchased the product without that particular ad. There are two responses to these concerns. First, as discussed in Part III, empirical data indicates that on a population level, these ads do increase the percentage

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<sup>478</sup> 413 U.S. 376 (1973).

<sup>479</sup> *Id.* at 389.

<sup>480</sup> 447 U.S. 557 (1980).

<sup>481</sup> *Id.* at 566.



of people who act against their self-interest. Second, more practically, this criticism argues for transparency measures so that researchers can see the effects of influential ads on a population of recipients. More broadly, bans on optimization and amplification acknowledge the difficulty of an individual plaintiff proving harm by merely stopping the process. This approach relies on population level understanding that optimization and amplification can proliferate harm when used in the social welfare product context.

A third criticism might come from advocates who aim to use these technologies for inclusive purposes. From an access perspective, this concern is paramount. Reducing targeted advertising capabilities may increase expenses and reduce effectiveness for businesses, nonprofits, philanthropies, and governments conducting outreach to underserved populations. This concern merits more data and discussion from academics, activists, leaders, and public officials.

At least in the higher education context, the empirics point to a greater increase in social welfare in a regime that bans digital targeting. FPCUs have worse outcomes than nonprofit or public universities. And they even have worse outcomes for students, on average, than if the students had not gone to school at all, as discussed in Part IV. At the same time, they account for 40% of all spending on advertising in higher education while only educating 6% of students, a spending amount that is eight and twenty times greater than nonprofit and public universities respectively.<sup>482</sup> Without this advertising, students would have little reason to attend these schools that have higher costs and worse outcomes. Students would instead enroll at better nonprofit universities or not enroll in school at all, avoiding large debts and no degrees.

In an ideal world, regulators could limit predatory advertising and simultaneously create channels for inclusive digital targeting. This might look like bans on digital targeting for for-profit sellers of social welfare products and a separate advertising process for nonprofit service providers or governments to ensure that critical social welfare information gets into the hands of hard-to-reach groups. Policymakers should keep this concern and the potential for a nonprofit and government exception in mind as they fine-tune the specifics of any ban on optimization and amplification.

Fourth, critics might contend that the government should regulate products, not advertising. Product regulation has merits: usury caps are as old as money, and this argument carries additional weight given the results of for-profit universities. However, regulating discriminatory and manipulative advertising stops the upstream harms of product regulation. The regulation of targeted advertising for alcohol and tobacco is analogous.<sup>483</sup> While society has chosen against prohibition, we limit tobacco advertising because of the

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<sup>482</sup> See Riegg Cellini & Chaudhary, *supra* note 173.

<sup>483</sup> See, e.g., Olivia Li, *From Housing to Health: Imagining Antidiscrimination Provisions for Menthol Cigarette Marketing*, 9 COLUM. J. RACE & L. 369, 398 (2019).

manipulative potential of the ad and the vulnerability to harm. The same argument holds in the context of social welfare products: consumers would not be as attracted to FPCUs with poor outcomes if manipulative advertising did not drive enrollment or replace a comparative search process. Regulating targeted advertising would reduce the financial viability of capital-intensive, marketing-based business models, forcing them to compete with other universities on student outcomes rather than advertising spending. Perhaps the for-profit model would remain attractive, but it would have to compete on the merits.

Fifth, critics often contend that regulation of advertising is paternalistic. Americans, they argue, should have the freedom to choose which products they buy and which advertisements they respond to. However, this argument defies the logic of digital targeting. Digital ad targeting is by nature privatized paternalism. The science of manipulation and behavioral advertising persuasively demonstrates that platforms and the advertisers who use them paternalistically drive consumer action. Thus, government regulation of advertising is, at worst, a counterbalance to rampant privatized paternalism.

In the end, the facts are clear: reverse redlining practices generate prolific civil rights and economic harms. Digital advertising technology enables FPCUs and other providers of inferior social welfare products to reverse redline their products and reach unsuspecting consumers who are disproportionately people of color and low-income people. These practices manipulate people into buying products against their self-interests and often at huge personal and financial costs. Consumers deserve new civil rights laws and consumer protections to shield them from predation and manipulation as they seek opportunities to improve their lives.