ALGORITHMIC LIABILITY:
SOCIAL MEDIA COMPANIES AND BEYOND

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OUTLINE OF PRESENTATION

- 1. Algorithms are everywhere
  - What is an algorithm? An algorithmic system?
  - How do social media companies use algorithms (and why do we care)?
- 2. What is the current regulatory landscape, and what change(s) might be on the horizon?
  - Section 230
  - Congressional action
  - Judicial (re)interpretation
- 3. How will this impact other areas of law?

"A CHANGE IS GONNA COME:" DEVELOPING A LIABILITY FRAMEWORK FOR SOCIAL MEDIA ALGORITHMIC AMPLIFICATION

- By Amy B Cyphert and Jena T Martin
- **Forthcoming, UC Irvine Law Review**

Professor Jena T. Martin
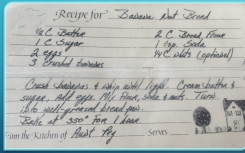
AN ALGORITHM IS SIMPLY A SERIES OF COMMANDS

- Algorithms are guidelines that tell you how to perform a task
- Recipes are algorithms, as are step-by-step driving instructions
- When an algorithm is directing a computer what to do, we call that code or a program

image credit Debra Cyphert, used with permission

MACHINE LEARNING

- A subfield of artificial intelligence
- The concept has been around for 60 years (but is "buzzy" now)
- Original use was to teach computers how to play chess better
- Used for pattern recognition and prediction; fuels Facebook's algorithms

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HOW DO SOCIAL MEDIA COMPANIES USE MACHINE LEARNING ALGORITHMS?

- Content moderation
- Recommendation systems and algorithmic amplification
- Newsfeed customization: the new Mad Men
- The business model of social media

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WHAT IS THE CURRENT REGULATORY LANDSCAPE?

- Section 230 of the Communications Decency Act of 1996
  - provides that "interactive computer services" shall not be treated as "the publisher or speaker" of information provided by another person.
  - Courts have consistently construed Section 230 broadly
  - *Force v. Facebook*

WHAT CHANGE IS ON THE HORIZON, AND WHAT MIGHT THE IMPACT BE?

- Proposed legislation
  - Protecting Americans from Dangerous Algorithms Act
  - Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms ("Safe Tech") Act
- Judicial action
  - Justice Thomas written decision concurring in the decision to deny certiorari in *Malwarebytes, Inc. v. Enigma Software Group, USA, LLC*
  - *In re Facebook* pending before Supreme Court

Former Facebook data scientist Frances Haugen, known as the "Facebook Whistleblower."
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IMPACT ON OTHER AREAS OF LAW

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- In our article, Professor Martin and I discuss how agency law principles might be a useful framework for thinking through algorithmic liability
- Traditional tort law concepts like direct and vicarious liability are already being reimagined for the algorithmic age
- The coming explosion of lawsuits against social media companies may serve as an accelerant that speeds up the development of law

FURTHER READING SUGGESTIONS

Karni A. Chagal-Feferkorn, *How Can I Tell if My Algorithm Was Reasonable?*, 27 MICH. TECH. L. REV. 213 (2021)

Force v. Facebook, Inc., 934 F.3d 53, 57 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020)

Marta Infantino, Weiwei Wang, *Algorithmic Torts: A Prospective Comparative Overview*, 28 TRANSNAT'L L. & CONTEMP. PROBS. 309 (2019)

Matthew Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies and Strategies*, 29 HARV. J.L. & TECH. 353 (2016)

Zeynep Tufekci, *Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency*, 13 COLO. TECH. L.J. 203, 207 (2015)

David Vladeck, *Machines without Principals: Liability Rules and Artificial Intelligence*, 89 WASH. L. REV. 117 (2014)