# WHY REGULATIONS MATTER: ADDRESSING ISSUES OF MISINFORMATION AND ACCOUNTABILITY IN ARTIFICIAL INTELLIGENCE

By: *Yessica Martinez Stewart, Staff Editor, Vol. 31*[1]

Artificial Intelligence ("AI") is the hottest topic that everyone is talking about, especially in the corporate world.[2] Businesses face a multitude of decisions that can be overwhelming and time-consuming—that is where AI comes in to save the day.[3] In fact, more than half of the largest firms in the country have plans to use AI to automate human tasks[4] with the goal of making quicker and better decisions.[5] By using AI to automate decision-making, businesses have been able to reduce spending, increase their profits, and improve employee productivity.[6] However, problems arise when AI is generated by inaccurate and biased data that produces flawed outputs known as "hallucinations."[7] When businesses rely on these hallucinations for their decision-making, it further perpetuates existing stereotypes and unfair practices related to the livelihoods of many marginalized communities.[8]

---

[1] Yessica Martinez Stewart is a third-year evening division student at Widener University Delaware Law School. Yessica currently serves as Staff Editor of *Widener Law Review*, Volume 31. Originally from Washington D.C., Yessica earned her B.A. in Sociology with a Legal Studies concentration at Bucknell University. Currently, Yessica is interested in Corporate Law. After graduation, Yessica intends to take the Maryland Bar.

[2] Matt Egan, *AI is Replacing Human Tasks Faster Than You Think*, CNN BUSINESS (June 20, 2024), https://www.cnn.com/2024/06/20/business/ai-jobs-workers-replacing/index.html.

[3] Mark Purdy & A. Mark Williams, *Decision Making and Problem Solving How AI Can Help Leaders Make Better Decisions Under Pressure*, HARV. BUS. REV. (Oct. 26, 2023), https://hbr.org/2023/10/how-ai-can-help-leaders-make-better-decisions-under-pressure.

[4] Egan, *supra* note 2.

[5] *How to Use AI in Decision Making*, UPWORK, (Aug. 22, 2024), https://www.upwork.com/resources/ai-in-decision-making (providing information on how different AI methods are used and a list of businesses who are currently using AI for decision-making).

[6] Egan, *supra* note 2.

[7] *How to Use AI in Decision Making*, *supra* note 5.

[8] *See generally* Olga Akselrod & Cody Venzke, Commentary, *How Artificial Intelligence Might Prevent You from Getting Hired*, ACLU (Aug. 23, 2023), https://www.aclu.org/news/racial-justice/how-artificial-intelligence-might-prevent-you-from-getting-hired (explaining how the vast capabilities of AI has negatively impacted the hiring process for candidates exhibiting protected characteristics).

With businesses turning to AI at a fast pace, the law has not caught up to provide a regulatory framework for assessing liability for the misuse and reliance on biased AI in decision-making.[9] By relying on hallucinations, rather than integrating human review in their final decision-making, businesses may seek an "abdication of [their] responsibility"[10] by creatively finding loopholes to escape liability and accountability[11] when harm ensues from their overreliance on AI. The lack of regulatory oversight[12] coupled with the fast evolution of technology highlights the urgent need for governments and businesses to work together on developing AI regulation and safety.[13]

## I.    LACK OF HUMAN REVIEW FURTHER EXACERBATES INEQUALITY

Meet Derek Mobley, an African-American male over forty years old who suffers from anxiety and depression.[14] He graduated with a bachelor's degree from Morehouse College, a Historically Black College and University, and graduated with honors from ITT Technical Institute.[15] In addition to his academic background, Mr. Mobley has years of experience in the financial, IT and customer service industries.[16] Mr. Mobley applied to over 100 positions with companies that use Workday for its application process.[17] One might think, over 100 applications, he surely must have interviewed for a few of those positions. Unfortunately, that was not the case—Mr. Mobley was rejected for every position he applied to.[18]

---

[9] Brian Joseph, *AI Decision-Making Poses Unique Challenge for State Legislators, Regulators*, LEXISNEXIS: STATE NET INSIGHTS (Apr. 21, 2023), https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/ai-decision-making-poses-unique-challenge-for-state-legislators-regulators

[10] *How to Use AI in Decision Making*, *supra* note 5.

[11] *See* discussion *infra* Part II.

[12] Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 59–62 (2019).

[13] *See generally* THE WHITE HOUSE, BLUEPRINT FOR AN AI BILL OF RIGHTS (Oct. 2022) https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf (identifying five principles for the use and development of AI and explaining how the private sector can proactively implement safeguards to protect people from its misuse while state, local and court decisions can extend statutory protections).

[14] Mobley v. Workday, Inc., No. 23-cv-00700-RFL, 2024 U.S. Dist. LEXIS 126336, at *3 (N.D. Cal., July 12, 2024).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See id.* at *4–5 (Mr. Mobley was also rejected for a position with the same company he was currently working for as a contractor).

Mr. Mobley sued Workday alleging that its AI algorithm-based screening tools relied on biased data leading to disparate impact discrimination because of his race, age, and disability.[19] The court found it plausible that Workday's overreliance on its automated AI screening tool could have led it to disproportionately reject applications based on race, age, or disability.[20] Specifically, it was the fact that Mr. Mobley was rejected by companies across different industries, and received most of those rejections at odd hours of the night.[21] Most notably, the court rejected Workday's argument that it cannot be held liable under agency law. The court reasoned it may be plausible to find Workday liable because businesses delegated their "traditional function" of the application and interviewing process to Workday's AI algorithm-based screening tools.[22] The court added that "[w]ithout agency liability . . . no party would be liable for intentional discrimination . . . . [I]gnoring this gap would allow companies to escape liability for hiring decisions by saying that function was handed over to . . . artificial intelligence."[23] One in four companies relies on AI automation for its hiring and talent acquisition process[24] and Workday is only one of many.

*Mobley*[25] could be a groundbreaking case impacting how courts across the country will address liability on companies that depend on AI for its automated decision-making.[26] This could be particularly insightful in cases where the lack of human review leads to adverse outcomes that promote inequality and unfair results. For example, a class of elderly patients insured under

---

[19] *Mobley*, 2024 U.S. Dist. LEXIS 126336, at *5.

[20] *Id.* at *26.

[21] *See id.* at *25–26 (Mr. Mobley received a rejection after midnight and within an hour of when he completed and submitted his application).

[22] *Id.* at *11–12.

[23] *Id.* at *13–14 (punctuation omitted).

[24] Joseph, *supra* note 9.

[25] *Mobley* is still pending final judgment. The referenced court opinion is about Workday's Motion to Dismiss for failure to state a claim. *Id.* at *1. The United States District Court for the Northern District of California granted the motion in part. *See id.* at *30 (finding that Mr. Mobley did not plausibly allege Workday intentionally discriminated against him in violation of Title VII, ADEA or ADA). The motion was also denied in part. *See id.* at *27 (allowing Mr. Mobley to move forward with his disparate impact claims under Title VII, ADEA or ADA).

[26] Hannah Albarazi, *These Are The High-Stakes AI Legal Battles to Watch in 2024*, LAW360 (Jan. 1, 2024), https://www.law360.com/articles/1774888/these-are-the-high-stakes-ai-legal-battles-to-watch-in-2024?copied=1.

UnitedHealth Group, Inc. allege that they have been wrongfully denied coverage for medically necessary care because the insurance company has relied on its AI algorithm to predict how much care is required—ultimately overriding their physician's recommendation for care.[27] Then there is Harbor Group, a property management company, that relied on its AI algorithm to decide whether to approve people for an apartment.[28] Its AI algorithm was automatically denying all rental applicants that possessed a Section 8 low-income housing voucher—further enforcing income discrimination and disproportionately impacting the Black community.[29] If decisions surrounding employment, healthcare, and housing were not impactful enough, AI has also been used to predict the likelihood an inmate may re-offend which has negatively led state parole boards to deny Black inmates parole at a disproportionate rate compared to white inmates.[30]

## II.   NAVIGATING THE PITFALLS

The above examples represent only a fraction of the growing number of cases in federal and state courts[31] regarding the use of AI. With the lack of guidance from federal and local legislators, courts are tasked with developing their own judicial interpretations in deciding how to assess the liability and accountability of businesses that over-rely on AI for decision-making.[32] As these cases

---

[27] *See* Class Action Complaint ¶¶ 1–3, Est. of Lokken v. UnitedHealth Group, Inc., No. 23-cv-03514, 2023 WL 9549666, (D. Minn. Nov. 14, 2023) (alleging UnitedHealth Group is aware that its AI algorithm has resulted in a ninety percent error rate in denying medically necessary care to elderly patients); *See also* Albarazi, *supra* note 26.

[28] Complaint ¶¶ 28–35, Open Communities v. Harbor Grp. Mgmt. Co., No. 23-cv-14070, 2023 WL 10997217 (N.D. Ill. Sept. 25, 2023) (local housing advocacy organization conducted a six-month investigation, finding Defendant used AI bot to deny all applicants who had a housing choice voucher).

[29] Jeff Hirsh, *Fair Housing Group Wins Voucher Discrimination Settlement*, EVANSTON NOW (Feb. 5, 2024), https://evanstonnow.com/fair-housing-group-wins-voucher-discrimination-settlement/.

[30] Katyal, *supra* note 12, at 84–86 (explaining the methodology behind the Correctional Offender Management Profiling for Alternative Sanctions algorithm and how it wrongly labelled black inmates as future criminals "almost 40 percent of the time . . . . 'at almost twice the rate as white [inmates.'"). *Id.* at 86.

[31] *DAIL – The Database of AI Litigation*, GEO. WASH. UNIV.: ETHICAL TECH, https://blogs.gwu.edu/law-eti/ai-litigation-database/ (last visited Oct. 26, 2024) (listing federal and state cases involving the use of AI implicating different areas of law); *Artificial Intelligence: Federal Litigation Tracker*, LEXISNEXIS, https://plus.lexis.com/api/permalink/9646af9b-8d84-4f2a-9923-fae6b833eabb/?context=1530671 (last visited Oct. 21, 2024) (providing a list of federal cases).

[32] *See generally* Joseph, *supra* note 9 (illustrating how businesses need to stay current not only with how each state is developing its own laws but also how courts are interpreting and applying these laws).

continue through the litigation process, it should provide legislators with "clarity on the gaps they will need to fill."[33] Some legal scholars argue that rather than only looking to the government for regulation, perhaps a better answer is to approach the private industry by imposing self-regulation policies.[34] However, allowing businesses to self-regulate their overreliance on AI without appropriate oversight would grant them the freedom to create harmful bad policies[35]—further promoting inequality in pursuit of higher profits, efficiency, and productivity.[36] For example, UnitedHealth Group, Inc. has allegedly disciplined and terminated employees who have deviated from its AI prediction recommending elderly patients be denied care.[37] There is also State Farm that has allegedly developed an AI algorithm built by biased housing and claims data to disproportionately discriminate against Black homeowners.[38] In its motion to dismiss, State Farm reasoned it could not be held liable for the disparate impact caused by its AI algorithm because the Disparate Impact Clause under the Fair Housing Act "has never been applied to insurers, and that even if the claims were cognizable, they'd be barred by the McCarran-Ferguson Act."[39] State Farm alluded to escaping liability for the harm it caused to Black homeowners because a federal law, that authorizes states to regulate insurance companies, can provide a safety blanket if that state does not have legislation in place to protect consumers from the overreliance on AI.[40]

---

[33] Albarazi, *supra* note 26 (statement of Peter Schildkraut, co-leader of the technology, media and telecommunications industry team at Arnold & Porter Kaye Scholer LLP).
[34] Katyal, *supra* note 12, at 108–09.
[35] Gary Drenik, *The Pitfalls of AI Self-Regulation*, FORBES (Oct. 22, 2024), https://www.forbes.com/sites/garydrenik/2024/10/22/the-pitfalls-of-ai-self-regulation/ (providing historical examples where technology companies yielded to competition oppose to honoring their ethical commitment of self-governance).
[36] Egan, *supra* note 2.
[37] Class Action Complaint, *supra* note 27, ¶7.
[38] Albarazi, *supra* note 26.
[39] *Id.*
[40] *See generally Artificial Intelligence Legislation Tracker (2024)*, LEXISNEXIS, https://plus.lexis.com/api/permalink/b81ce5db-18de-4561-9a69-23c33825f367/?context=1530671 (last visited Oct. 16, 2024) (providing a tracker of state and federal legislation related to the use of AI and highlighting how many states have failed to pass any legislation aimed towards business accountability).

Recent settlement agreements illustrate that the appropriate answer may be for businesses, local organizations, and legislators to work together on developing safeguards for accountability.[41] In the settlement agreement in *Open Communities v. Harbor Grp. Mgmt. Co.*, both parties agreed to work together to develop appropriate AI-produced responses for inquiring housing choice voucher applicants rather than automatically rejecting their applications.[42] Even the City of Detroit has agreed to require three separate sign-offs before it can rely on facial recognition,[43] and they will not make any arrests or conduct lineups based solely on facial recognition results generated by AI.[44] Additionally, they must also provide training on the high risk and disproportionate rate that facial recognition has misidentified people of color.[45] These two settlement agreements illustrate how human review is an integral part of safely using AI for decision-making purposes.

### III.   CONCLUSION

The fact that many marginalized communities are the most severely impacted by these automated practices could have us living in a system of "Algorithmic Jim Crow."[46] To avoid living in such a world, businesses cannot solely rely on and delegate control to AI for their decision-making without incorporating human review in its process. Geoffrey Hinton, a scientist who created the foundation of machine learning for AI and recipient of the Nobel Prize in Physics, warns that as AI continues to develop "we should be working hard now on how to make sure [AI]

---

[41] Drenik, *supra* note 35 (suggesting that collaboration among diverse stakeholders in establishing standards for data sourcing is key to building a sustainable foundation for ethical AI innovation).

[42] Consent Decree ¶¶ 11, 14, Open Communities v. Harbor Grp. Mgmt. Co., No. 23-cv-14070 (N.D. Ill. Jan. 23, 2024), ECF No. 28.

[43] Andrea May Sahouri, *Man Wrongfully Arrested by Detroit Police with Facial Recognition Tech Settles Lawsuit*, DETROIT FREE PRESS (June 28, 2024), https://www.freep.com/story/news/local/michigan/detroit/2024/06/28/man-wrongfully-arrested-with-facial-recognition-tech-settles-lawsuit/74243839007/.

[44] *Id.*

[45] *Id.*

[46] Katyal, *supra* note 12, at 88 (*quoting* Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 633 (2017)).

doesn't take control away from people, because what we care about is people."[47] Technology and AI will only continue to evolve, and we will find ourselves relinquishing some of our decision-making control in the name of living more conveniently. Before it gets too out of hand, businesses and governments must work together to develop legislation and regulations to prevent further marginalization as well as establish protocols to hold businesses liable for any disparate harm they cause.

---

[47] *Geoffrey Hinton, Canadian 'godfather of AI,' wins Nobel in physics*, CBC NEWS, https://www.cbc.ca/player/play/video/9.6529924 (last visited Dec. 16, 2024).