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Social Media Platforms' Reckoning: The Harmful Impact of TikTok's Algorithm on People of Color

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SOCIAL MEDIA PLATFORMS' RECKONING: THE HARMFUL IMPACT OF TIKTOK'S ALGORITHM ON PEOPLE OF COLOR

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ABSTRACT

Social media platforms have become an integral part of our daily lives. The growing societal reliance on these social platforms calls for a greater understanding of how they impact and engage with people of color. TikTok's innovative use of recommendation algorithms has disrupted the social media industry. This Article exposes the harm people of color face on TikTok using Professor Anita L. Allen's "Black Opticon" framework. Further, it uncovers instances of discriminatory predation and exclusion on the platform and expands the framework to distinguish between discrimination platforms perpetuate actively (platform predation) and passively (private predation). Due to a lack of transparency surrounding algorithms, the full extent of the issue of discriminatory exclusion and predation on TikTok is not yet fully understood. However, the findings of possible harms presented in this Article serve as a warning to other social media platforms using recommendation algorithms.

I. INTRODUCTION

[1]   Over the past decade, social media has become a ubiquitous presence in the lives of users, fundamentally reshaping how society communicates. Yet, despite the size and influence of many platforms,[1] the effects of social media use on society are not yet fully understood.[2] From posting updates on Facebook to creating content on TikTok, social media has the potential to shape the minds, aspirations, and lives of present and future generations.

[2]   Children now dream of becoming lawyers, doctors, and social media influencers.[3] As consumers shift their attention away from traditional media

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[1] *See* Helen Nissenbaum, Stewardship of Privacy, or Private Capture of a Public Value? – A Note 3 (Oct. 28, 2022) (unpublished note), https://nissenbaum.tech.cornell.edu/papers/ Stewardship_of_privacy.pdf [https://perma.cc/J6FS-Z7W6] ("It might be argued that the privacy, speech, and content policies set by private, commercial companies are matters of limited concern affecting a closed relationship between these companies and their customers. Facebook/Meta, Apple, and Google, however, given sheer size, have become infrastructure-like platforms, whose decisions and policies spread far beyond closed loops with individual customers. Instead, policies they adopt may spillover into the public sphere and impose constraints on other services built on top of their platforms. Stewardship of privacy, or private capture of a public value?").

[2] *See* W. Akram & R. Kumar, *A Study on Positive and Negative Effects of Social Media on Society*, 5 INT'L J. COMPUT. SCIS. & ENG'G 347, 353 (2017) ("Social media has different merits yet it likewise has a few faults which influence individuals contrarily."); Srishti Londhe, *Association Between Social Media Usage and Social Anxiety or Depression*, 5 INT'L J. L. MGMT. & HUMANS. 336, 338 (2022) ("[I]t is still unclear if some forms of [social media usage] (such as idle browsing and actively sharing data without contacting others) can make people feel lonelier.").

[3] *See* Matthew Townsend, *Influencer Nation: 86% of Young Americans Want to Become One*, BLOOMBERG (Nov. 5, 2019, 12:27 PM), https://www.bloomberg.com/news/ Articles/2019-11-05/becoming-an-influencer-embraced-by-86-of-young-americans?leadSource=uverify [https://perma.cc/XGF5-VRAW] ("No less than 86% of people ages 13 to 38 are willing to try out influencing[.]"); *The Influencer Report Engaging Gen Z and Millennials*, MORNING CONSULT, https://morningconsult.com/

and toward digital channels, marketers have turned to social media influencers to reach and engage with their target audiences.[4] This trend is expected to continue in the future, with the number of influencers growing as marketers continue to employ "micro-influencers" or influencers with smaller but highly engaged followings.[5] As social media becomes an increasingly vital part of daily life, it is essential to understand its impact on people of color to ensure that platforms are inclusive and equitable for all users.

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influencer-report-engaging-gen-z-and-millennials [https://perma.cc/TL2K-KPCG] ("Most young Americans are interested in becoming influencers . . . 54% would become an influencer, given the opportunity[.]").

[4] *See* Michael Haenlein et al., *Navigating the New Era of Influencer Marketing: How to be Successful on Instagram, TikTok, & Co.*, 63 CAL. MGMT. REV. 5, 6 (2020) ("The media consumption patterns of Generation Z (those born in the late 1990s, so aged about 25 or younger today) are fundamentally different from the ones seen in older generations. Instead of watching TV, Generation Z watches streaming services such as Netflix . . . These shifts have given rise to two main marketing channels: outdoor advertising such as billboards and mobile advertising, specifically on social media platforms such as Instagram or TikTok."). *Contra* Christine Moorman et al., *Why Marketers Are Returning to Traditional Advertising*, HARV. BUS. REV. (Apr. 29, 2022), https://hbr.org/2022/04/why-marketers-are-returning-to-traditional-advertising [https://perma.cc/L8TH-Y8YD] ("British and American consumers trust traditional advertising such as television, radio, and print more than social media advertising. As a result, marketers can use traditional advertising to build brand credibility and trust with jaded buyers.").

[5] *See* Jiwoon Park et al., *David and Goliath: When and Why Micro-Influencers Are More Persuasive Than Mega-Influencers*, 50 J. ADVERT. (2021) ("Social media influencer (SMI) advertising is on the rise . . . [T]he findings of four experimental studies show that micro-influencers (those who have 10,000 to 100,000 followers) are more persuasive than mega-influencers (those who have more than 1 million followers) because endorsements by micro-influencers (versus mega-influencers) bestow higher perceptions of authenticity on the endorsed brand, which 'rubs off' from the perceptions regarding influencer authenticity."); *see also* Rafael Schwarz, *Influencer Marketing Predictions For 2023*, FORBES (Dec. 21, 2022, 7:45 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2022/12/21/influencer-marketing-predictions-for-2023/?sh=7aae6a9e4994 [https://perma.cc/T6LN-F5L7].

[3]   Moreover, social media platforms' collection and usage of vast amounts of personal data raises privacy concerns. In their article, "The Right to Privacy," Warren and Brandeis argued that new technologies (i.e., photography) threaten individuals' right to privacy, framed as their "right to be let alone."[6] Today's video-media sharing platforms present analogous harm to individuals' right to privacy, as platforms generally allow users to share the images, voices, and intellectual property of others without their consent.

[4]   Countless scholars have raised privacy concerns regarding platforms' data collection practices. For example, researcher and Professor of Information Sciences and Technology, Daniel Susser, found that Big Data's digital surveillance and collection of user data may be used to manipulate users' needs and, in some cases, eliminate users' decision-making power.[7] Jack Balkin, a constitutional law professor at Yale Law School, found that social media platforms' data collection practices generate perverse effects and undermine other public institutions. [8] Woodrow Hartzog, a privacy and technology law professor at Boston University School of Law, found that a personal information approach to privacy, which focuses on regulating the use of personal information after it has been collected, fails to address the privacy concerns that arise from technological advances. [9] Danielle Citron, privacy law professor at

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[6] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[7] *See* Daniel Susser et al., *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 3 (2019) ("The information we volunteer and shed about our interests, preferences, desires, emotional states, beliefs, habits, and so on, provides everything a would-be manipulator needs to know about how to subvert our decision-making.").

[8] *See* Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media,* 1 J. FREE SPEECH L. 71, 83–84 (2021).

[9] *See* WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES 82 (2018).

University of Virginia School of Law, and Daniel Solove, privacy law scholar at George Washington University Law School, found that algorithms' discriminatory harm, which they describe as hindering people's ability to have an equal chance based on gender, race, and other characteristics, disproportionately harms marginalized communities.[10]

[5]   Helen Nissenbaum, a privacy law scholar at Cornell Tech, takes a context-specific approach to privacy.[11] Nissenbaum asserts that "privacy is neither a right to secrecy nor a right to control but a right to appropriate flow of personal information."[12] The theory posits that there are "no arenas of life not governed by [social] norms."[13] For example, social norms dictate that it is appropriate to share private information about one's medical conditions in the context of a hospital, however, this information may be inappropriate in a social context.[14] Understanding digital privacy through Nissenbaum's theory of contextual integrity allows for a more nuanced approach to privacy that is responsive to the specific needs and concerns of different individuals and groups online.

[6]   The Black Opticon framework, first introduced by Anita Allen, a privacy law professor at the University of Pennsylvania Carey Law School and leading authority on the legal and ethical dimensions of privacy, including its implications for issues of race and gender, provides a way of analyzing how different communities may be disproportionately affected by

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[10] *See* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 855–59 (2022).

[11] *See* Helen Nissenbaum*, Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 120, 138 (2004).

[12] HELEN NISSENBAUM, PRIVACY IN CONTEXT 127 (2010).

[13] Nissenbaum, *supra* note 11, at 137.

[14] *See id*. at 138.

Nissenbaum's theory of privacy.[15] In "Dismantling the 'Black Opticon,'" Allen argues that Black people could benefit from "race-conscious efforts to shape a more equitable digital public sphere through improved laws and legal institutions."[16] Allen identifies three forms of discrimination that Black people may experience: discriminatory oversurveillance, discriminatory exclusion, and discriminatory predation.[17]

[7]   Discriminatory oversurveillance refers to the excessive surveillance of communities of color by government and non-governmental bodies.[18] Discriminatory exclusion involves excluding people of color from beneficial opportunities based on race.[19] Discriminatory predation occurs when marginalized individuals are exploited through consumer scams, fraud, and deceit.[20] Nissenbaum's theory of privacy, which concerns the right to appropriate flow of personal information, provides a starting point for understanding privacy. What is the appropriate flow of personal information online and how does this information flow vary for people of color? The Black Opticon provides a framework for understanding and addressing this question.

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[15] Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907, 911 (2022).

[16] *Id.* at 908, 910. ("Digital-privacy and data-protection law proposals fashioned to promote equitable governance online must be responsive to calls for improved online governance made by and on behalf of African Americans relating to these forms of pervasive and persistent disadvantage.").

[17] *Id.* at 917.

[18] *See id.* at 918–20 (describing how police targeted Black people during Black Lives Matter protests using location data provided by social media platforms).

[19] *See id.* at 921, 924–25 (describing how Facebook permitted racial targeting in housing ads).

[20] *See* Allen, *supra* note 15, at 925–26 (describing how a fraudulent background check website targeted African Americans).

[8]   In this Article, I will focus on TikTok and on two data protection problems faced by people of color on social media platforms: the ban-optic problem of racially targeted exclusion from opportunities and the con-optic problem of targeted fraud and deception. The Article proceeds as follows: In Part I, I will provide a brief background on TikTok – a Chinese video-sharing platform. The Article focuses on TikTok because of the platform's approach to recommendation algorithms, which uses users' personal data to recommend content to maintain platform engagement.[21] TikTok's use of recommendation algorithms has revolutionized the social media industry, resulting in competing media platforms, such as Instagram,[22] Snapchat,[23]

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[21] *See infra* Part I; *see also* Gilad Abiri & Xinyu Huang, *The People's (Republic) Algorithms*, 12 NOTRE DAME J. INT'L & COMP. L. 16, 19 (2022) (citing Silvia Milano et al., *Recommender Systems and Their Ethical Challenges*, 35 A.I. & SOC'Y 957, 957 (2020)) ("Therefore, to be effective, recommendation algorithms 'collect, curate, and act upon vast amounts of personal data.'"); Constanza M. Vidal Bustamante et al., *Technology Primer: Social Media Recommendation Algorithms*, BELFER CTR. FOR SCI. & INT'L AFFAIRS (Aug. 25, 2022), https://www.belfercenter.org/publication/technology-primer-social-media-recommendation-algorithms [https://perma.cc/79Z3-QGFC] ("[A]lgorithms leverage complex, distributed machine-learning models, such as deep neural networks, to identify, rank, and serve the subset of all available posts that are predicted to be 'relevant' to each user based on how likely the user is to engage with it via views, clicks, likes, shares, and others.").

[22] *See Introducing Instagram Reels*, INSTAGRAM (Aug. 5, 2020), https://about.instagram.com/blog/announcements/introducing-instagram-reels-announcement [https://perma.cc/ME3T-LN88]; Jacob Sweet, *The Instagram Reels Gold Rush*, NEW YORKER (Jan. 3, 2023), https://www.newyorker.com/culture/rabbit-holes/the-instagram-reels-gold-rush [https://perma.cc/NRE4-D5MQ].

[23] *See Spotlight 101*, SNAP: SNAP CREATORS, https://creators.snap.com/en-US/learn-shine-in-the-spotlight-spotlight-101 [https://perma.cc/2FDZ-XJWA]; Amanda Silberling, *Snapchat? Trying to profit off its TikTok clone? Say it ain't so.*, TECHCRUNCH (Apr. 22, 2022), https://techcrunch.com/2022/04/22/snapchat-spotlight-ads [https://perma.cc/3HCQ-LCBZ].

and YouTube,[24] attempting to replicate TikTok's model.[25] Because of the proliferation of recommendation algorithms, the discrimination users of color face on TikTok may be replicated on other platforms.

[9]   In Part II, I analyze examples of discriminatory predation and discriminatory exclusion on TikTok. Discriminatory predation can be classified into private predation and platform predation. The distinction between private and platform predation seeks to illuminate how different actors may use social media platforms to prey on people of color. Private predation involves exploiting people of color by private individuals or companies, and platform predation involves the exploitation of people of color by the social media platform itself. I provide background on the use and functionality of recommendation algorithms. I also explore how TikTok's use of recommendation algorithms results in the discriminatory exclusion of people of color.[26]

[10]   In Part III, I present potential approaches to address the issues of discriminatory predation and discriminatory exclusion on social media platforms. I illuminate how current public efforts to expand child privacy laws and private efforts to include protective warnings on social media platforms do not provide adequate remedies. I suggest legal and legislative approaches to address discriminatory predation and exclusion. The legal approach seeks to limit the broad scope of legal protections afforded to

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[24] *See Create–and earn–with short form video on YouTube*, YOUTUBE, https://www.youtube.com/creators/shorts/ [https://perma.cc/9ZHJ-86YM]; Richard Nieva, *In The Age Of TikTok, YouTube Shorts Is A Platform In Limbo*, FORBES (Dec. 20, 2022, 9:00 AM), https://www.forbes.com/sites/richardnieva/2022/12/20/youtube-shorts-monetization-multiformat/?sh=117bd7026f41 [https://perma.cc/QJ7Q-VC27].

[25] *See, e.g.*, Sarah Perez, *Shopping app Temu is using TikTok's strategy to keep its No. 1 spot on App Store*, TECHCRUNCH (Jan. 23, 2023, 3:19 PM), https://techcrunch.com/ 2023/01/23/shopping-app-temu-is-using-tiktoks-strategy-to-keep-its-no-1-spot-on-app-store [https://perma.cc/3QKG-GQ4T] (describing how a Chinese e-commerce application used TikTok's strategy to maintain the number one position in U.S. app stores).

[26] *See infra* Part III.

social media platforms. The legislative approach examines the shortcomings of existing and proposed laws. However, to address discriminatory practices on social media platforms, policymakers must actively involve communities of color, who disproportionately experience the harm of human biases augmented by unregulated algorithms.

II. OVERVIEW OF TIKTOK

[11]   TikTok, a popular global social media platform, was initially created in The People's Republic of China ("China") under the name Douyin by ByteDance, a China-based company.[27] Douyin allowed users to create, edit, and share short-form videos and livestreams.[28] Following the success of Douyin in China, ByteDance sought to enter the American social media market and acquired Musical.ly, a Shanghai-based company already

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[27] *See* BYTEDANCE, https://www.bytedance.com [https://perma.cc/9BXJ-9NGQ].

[28] *See* Xing Lu et al., *Exploring TikTok Use and Non-use Practices and Experiences in China,* 12195 SOC. COMPUTING & SOC. MEDIA 57, 57 (2020) ("TikTok (or Douyin for its Chinese version) is a short-form video sharing mobile application launched in autumn 2016. As of January 2020, Douyin boasts 400 million daily active users in China, and TikTok is still gaining great traction around the globe, among the most downloaded non-game apps of iOS App Store and Google Play App Store globally.") (citations omitted).

popular with young children in the United States.[29] The result was that ByteDance provided Douyin in China and TikTok in the rest of the world.[30]

[12]   TikTok started gaining wide-spread popularity in the U.S. around the end of 2019.[31] Initially, TikTok followed Douyin's model and featured

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[29] *See* John Herrman, *Who's Too Young for an App? Musical.ly Tests the Limits*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/business/media/a-social-network-frequented-by-children-tests-the-limits-of-online-regulation.html [https://perma.cc/SVU8-MRKF] ("The Shanghai-based company founded in 2014 claims over 100 million users, most of whom, the company says, are in the 13-20 age bracket. . . . What is striking about the app, though, is how many of its users appear to be even younger than that. Musical.ly hasn't just found the coveted teenage audience — it may have gone lower."); Keshia Hannam, *A Chinese Media Giant Is Buying Lip-Sync App Musical.ly for Almost $1 Billion*, FORTUNE (Nov. 10, 2017, 5:53 AM), https://fortune.com/2017/11/10/toutiao-buys-app-musically-800-million [https://perma.cc/NTD7-XCAC].

[30] *See Social Media's Impact on Homeland Security: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 117th Cong. 8 (2022) (statement of Vanessa Pappas, Chief Operating Officer, TikTok, Inc.) ("As a global entertainment platform, TikTok spans most major markets except China, where ByteDance offers a different short-form video app called Douyin.") [hereinafter *Social Media's Impact on Homeland Security*]; Ruth Beatrice Green, The Weaponization of TikTok 12 (July 2021) (M.A. Thesis, Central European University) (on file with CEU Library, Central European University) ("ByteDance created two versions of the app, one for Chinese audiences called Douyin, and one to be exported to Western audiences called TikTok.").

[31] *See* Aparajita Bhandari & Sara Bimo, *Why's Everyone on TikTok Now? The Algorithmized Self and the Future of Self-Making on Social Media*, 8 SOCIAL MEDIA + SOC'Y 1 (2022) ("Since its release in 2016, the video-sharing platform TikTok has enjoyed a meteoric rise in popularity: as of February 2021, it has been downloaded over 2.6 billion times worldwide (with 315 million of these downloads occurring in the first quarter of 2020), and has approximately one billion monthly active users.") (Citations omitted); Pengda Wang, *Recommendation Algorithm in TikTok: Strengths, Dilemmas, and Possible Directions*, 10 INT'L J. SOC. SCI. STUDS. 60 (2022); Johan Moreno, *TikTok Surpasses Google, Facebook as World's Most Popular Web Domain*, FORBES (Dec. 29, 2021, 4:47 PM), https://www.forbes.com/sites/johanmoreno/2021/12/29/tiktok-surpasses-google-facebook-as-worlds-most-popular-web-destination/?sh=3dc540ae43ef [https://perma.cc/J8JH-WSHH].

videos of viral dances and pop songs.[32] However, since its launch, TikTok has become a "digital advertising juggernaut."[33] Many of the videos users encounter on the platform are sponsored advertisements. Unlike traditional television advertisements which are clearly distinguished from the media content being viewed, a significant portion of the advertisements on TikTok are seamlessly integrated into the media content. For example, instead of receiving a television advertisement for a makeup brand in between a television show, TikTok videos include content creator endorsements for makeup products, which they may have received directly from the makeup brand. [34] Yet despite the vast number of ads, which are usually a deterrent

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[32] *See* Darsana Vijay & Alex Gekker, *Playing Politics: How Sabarimala Played Out on TikTok*, 65 AM. BEHAV. SCIENTIST 712 (2021) ("TikTok is commonly known as a playful, silly platform where teenagers share 15-second videos of crazy stunts or act out funny snippets from popular culture."); Kalley Huang et al., *TikTok Builds Itself Into an Ads Juggernaut*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/14/ technology/tiktok-ads-social-media.html [https://perma.cc/Y9DB-ZUAQ] ("TikTok was once best known for viral dance videos and pop songs."); *see also Social Media's Impact on Homeland Security*, *supra* note 30, at 4 ("Our uniquely powerful yet easy-to-use tools democratize video creation, enabling everyday people to express themselves creatively and find their community on the platform. This approach has resulted in more authentic content[.]").

[33] *See* Huang et al., *supra* note 32 ("TikTok is on track to make nearly $10 billion in ad revenue, more than double what it generated last year, according to estimates from the research company Insider Intelligence. . . . Unlike other social media platforms, TikTok has ads appear like any other full-screen video on the platform, so they aren't always immediately discernible as ads. The app has pushe[s] brands to work with its content creators, making ads seem even more natural."); *see also Social Media's Impact on Homeland Security*, *supra* note 30, at 7 ("Like other platforms, we may also collect a limited amount of data related to user activity on advertiser's apps and websites when those advertisers elect to share such data with us.").

[34] *See Branded Content on TikTok*, TIKTOK, https://support.tiktok.com/en/business-and-creator/creator-and-business-accounts/branded-content-on-tiktok [https://perma.cc/JC34-RL4Z]; John Herrman, *Will TikTok Make You Buy It?*, N.Y. TIMES (Oct. 2, 2021), https://www.nytimes.com/2021/10/02/style/tiktok-shopping-viral-products.html? searchResultPosition=7 [https://perma.cc/E4DN-RJ5X] ("Give any social media platform long enough, and it turns into a mall.").

for users due to online advertisement avoidance, due to TikTok's algorithms, the app continues to appeal to users. On average, global TikTok users spend 45 to over 90 minutes on the app daily.[35] TikTok's algorithm has allowed TikTok, a foreign based company, to compete with Silicon Valley social media companies, such as Facebook, Instagram, Twitter, and YouTube.

[13]   TikTok is the subject of this Article for the following reasons. First, researchers have found that "recommendation algorithms are reshaping the ecology of digital video-sharing platforms," and TikTok is an "outstanding" example.[36] The sheer amount of content posted by users makes chronological systems, where content is arranged based on timestamps,

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[35] *See* Laura Cervi, *Tik Tok and Generation Z*, 12 THEATRE, DANCE & PERFORMANCE TRAINING 198, 199 (2021) (citing *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/17/where- millennials-end-and-generation-z-begins [https://perma.cc/5HAV-P93E]) ("According to the Pew Research Center (2019) findings, Generation Zers watch on average 68 videos in a day, meaning that they have the ability to sort through content faster than ever before, but indulge in watching a video considerably less."); Stephanie Chan, *Nearly One-Third of TikTok's Installed Base Uses the App Every Day*, SENSOR TOWER: CONSUMER INTEL. (July 2022), https://sensortower.com/blog/tiktok-power-user-curve [https://perma.cc/96DQ-H5D9] ("[A]n average of 95 minutes were spent on TikTok per day last quarter. This was more than four times the average duration spent on Snapchat (21 minutes), over three times the time spent on Twitter (29 minutes), and nearly twice as much as Facebook (49 minutes) and Instagram (51 minutes).").

[36] *See* Wang, *supra* note 31, at 60.

inefficient on most social media platforms.[37] Instead, platforms have started to use recommendation algorithms to determine the selection and order of the content their users see. [38] Generally, social media platforms' recommendation algorithms analyze active user behavior, including each users' following, friends, subscriptions, likes, and clicks.[39] On the other hand, TikTok's recommendation algorithm includes both active and passive user behavior.[40] So instead of just looking at a user's likes or followings, TikTok's recommendation algorithm also considers "how many times [users] let a video loop, how quickly [users] scroll past certain content, and whether [users] are drawn to a particular category of effects and sounds."[41] TikTok's success has led its competitors, such as Instagram and Snapchat, to copy parts of its model.[42] Additionally, recommendation algorithms have entered almost every aspect of online daily life, leading researchers to raise

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[37] *See* SACHIN HOLDHEIM, REGULATING CONTENT RECOMMENDATION ALGORITHMS IN SOCIAL MEDIA 3 (2022) ("[A]s social media use increased, the need for curated content increased as well. It became impossible for the average consumer to read all posts from all friends in the time a user spent online. Social media platforms thus began to roll out content recommendation algorithms that would reorder content to promote a business goal—generally, some form of user engagement."); Chris Meserole, *How do recommender systems work on digital platforms?*, BROOKINGS: TECHSTREAM (Sep. 21, 2022), https://www.brookings.edu/techstream/how-do-recommender-systems-work-on-digital-platforms-social-media-recommendation-algorithms [https://perma.cc/RJF2-75PY] ("[R]everse-chronological recommendation algorithms powered the first generation of social media feeds and are why most feeds are still known today as 'timelines.'").

[38] *See* Bustamante et al., *supra* note 21; Meserole, *supra* note 37.

[39] *See* Xueyin Zha, *The unique power of TikTok's algorithm*, LOWY INST. (Oct. 7, 2020), https://www.lowyinstitute.org/the-interpreter/unique-power-tiktok-s-algorithm [https://perma.cc/7736-TSK5].

[40] *Id.*

[41] *Id.*

[42] *See* Nieva, *supra* note 24; Sweet, *supra* note 22; Silberling, *supra* note 23.

concerns about the links between recommendation algorithms and societal harms, such as hate speech, foreign propaganda, and political extremism.[43] Analyzing examples of discrimination on TikTok, which serves as a blueprint for other social media platforms, allows for a more robust understanding of the issues faced by people of color on social media platforms.

[14]   Another reason TikTok is the focus of this Paper is because of TikTok's Chinese ownership and dominance, which raises concerns about user data control and algorithmic manipulation.[44] The first concern is that, although TikTok is privately owned, the Chinese government may access American users' data.[45] This concern raised by policymakers is not unfounded. In 2017, Beijing passed the National Intelligence law, which requires that Chinese companies comply with intelligence-gathering

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[43] *See* Meserole, *supra* note 37.

[44] *See* Alex W. Palmer, *How TikTok Became a Diplomatic Crisis*, N.Y. TIMES (Dec. 20, 2022), https://www.nytimes.com/2022/12/20/magazine/tiktok-us-china-diplomacy. html?searchResultPosition=4 [https://perma.cc/6GNN-E72L].

[45] *See* Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020) ("This data collection threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information—potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.").

operations.[46] TikTok assured policymakers and users that ByteDance, its Chinese parent company, did not have access to American users' data.[47] However, an internal investigation by ByteDance revealed that employees could inappropriately access American users' data.[48] The CEO of TikTok, Shou Chew, responded to the data breach by stating, "individuals involved misused their authority to obtain access to TikTok user data."[49] The data breach demonstrates that ByteDance employees in China can access American users' data. Given China's national intelligence law which requires Chinese technology companies to grant the government access to company data upon request, the Chinese government may request and

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[46] Guojia Qingbao Fa (中华人民共和国国家情报法) [Law on National Intelligence Law of the People's Republic] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective June 28, 2017) 2017 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 471, 475 (China) ("The state intelligence work organization shall carry out intelligence work according to law, and may require relevant organs, organizations and citizens to provide necessary support, assistance and cooperation."); Apratim Vidyarthi & Rachel Hulvey, *Building Digital Walls and Making Speech and Internet Freedom (or Chinese Technology) Pay for It*, 17 IND. J.L. & TECH. 1, 11 (2021) ("Article 14 of the Chinese National Intelligence Law states that national intelligence institutions 'may request that relevant organs, organizations, and citizens provide necessary support, assistance, and cooperation.'") (quoting *China's intellgence law and the country's future intelligence competitions*, GOV. OF CANADA (May 17, 2018), https://www.canada.ca/en/security-intelligence-service/corporate/publications/china-and-the-age-of-strategic-rivalry/chinas-intelligence-law-and-the-countrys-future-intelligence-competitions.html [https://perma.cc/87AD-RLU8]).

[47] *See Statement on the Administration's Executive Order*, TIKTOK (Aug. 7, 2020), https://newsroom.tiktok.com/en-us/tiktok-responds [https://perma.cc/9343-CFY2] ("We have made clear that TikTok has never shared user data with the Chinese government, nor censored content at its request.").

[48] *See* Andrew Small, *TikTok Employees Accessed American User Data*, BLOOMBERG (Dec. 23, 2022, 6:11 AM), https://www.bloomberglaw.com/bloomberglawnews/tech-and-telecom-law/X1020GH4000000?bna_news_filter=tech-and-telecom-law#jcite [https://perma.cc/Q65Z-ZUXH].

[49] *Id.*

receive access to American users' data, presumably without users' consent or knowledge.

[15]   Policymakers' second geopolitical concern is that TikTok may use its algorithm to manipulate American users by either promoting Chinese foreign policy or censoring content. These concerns have also been validated, as there is evidence of TikTok censoring content that paints the Chinese government negatively.[50]

[16]   As the first Chinese app to break into the Silicon Valley social media market, TikTok represents uncharted territory for policymakers, users, and the platform itself. In response, policymakers are closely scrutinizing TikTok's practices.[51]

[17]   Consequently, practices by all social media platforms that previously went unchecked are now under a microscope in Washington, D.C.,[52] which may have broader implications on the operations of future social media platforms in the U.S. and abroad.

[18]   The final reason TikTok is a salient topic for this Article is because TikTok's Chinese ownership has led the two administrations it has existed

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[50] *See* Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020) ("TikTok also reportedly censors content that the Chinese Communist Party deems politically sensitive, such as content concerning protests in Hong Kong and China's treatment of Uyghurs and other Muslim minorities.").

[51] Julia Mueller, *Biden administration threatens to ban TikTok if Chinese parent company doesn't sell stakes*, THE HILL (Mar. 15, 2023, 10:35 PM), https://thehill.com/policy/technology/3902609-biden-administration-threatens-to-ban-tiktok-if-chinese-parent-company-doesnt-sell-stakes [https://perma.cc/P2BK-QM8W]; Small, *supra* note 48.

[52] Senator Marco Rubio proposed legislation to "block and prohibit" the operation of certain social media platforms. The only social media platform listed in the Act is TikTok. Averting the National Threat of Internet Surveillance, Oppressive Censorship and Influence, and Algorithmic Learning by the Chinese Communist Party Act, S. 347, 118th Cong. (2023).

under to take distinct approaches to gain control. Following the #TulsaFlop, [53] President Donald Trump's administration took a hostile approach and issued an executive order banning TikTok.[54] The executive order cited data privacy concerns and alleged that TikTok's data-collection methods threatened national security.[55]

[19]   Ultimately, the Trump administration's efforts to ban TikTok were thwarted by federal courts.[56] In *Maryland v. Trump* and *TikTok v. Trump*, the courts invoked the International Emergency Economic Powers Act's ("IEEPA") informational materials exception to enjoin the executive order banning TikTok.[57] The IEEPA grants the President peacetime authority to address "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States."[58] However, Congress also

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[53] *See* Taylor Lorenz et al., *TikTok Teens and K-Pop Stans Say They Sank Trump Rally*, N.Y. TIMES (June 21, 2020), https://www.nytimes.com/2020/06/21/style/tiktok-trump-rally-tulsa.html [https://perma.cc/HCN6-Y3DG] ("TikTok users and fans of Korean pop music groups claimed to have registered potentially hundreds of thousands of tickets for Mr. Trump's campaign rally as a prank.").

[54] *See* Exec. Order No. 13,942, 85 Fed. Reg. 48637 (Aug. 6, 2020).

[55] *See id.*

[56] *See* Marland *v. Trump*, 498 F. Supp. 3d 624, 645 (E.D. Pa. 2020) (enjoining the implementation of Executive Order 13,942); TikTok Inc. v. Trump, 490 F. Supp. 3d 73 (D.D.C. 2020); Tiange Chen, *Digital Wild West: Foreign Social Media Bans, Data Privacy, and Free Speech*, 44 HASTINGS COMM. & ENT. L.J. 163, 165 (2022); Exec. Order No. 14,034, 86 Fed. Reg. 31423 (June 11, 2021).

[57] *Marland*, 498 F. Supp. 3d at 642 ("Granting [the Plaintiff's] injunction to prevent a violation of IEEPA's informational materials exception would be consistent with this congressional determination."); *TikTok Inc.*, 490 F. Supp. 3d at 86 ("TikTok (like a news wire, which is expressly identified in IEEPA's carveout) is primarily a conduit of 'informational materials.' In that sense, it is (among other things) a 'medium of transmission,' and IEEPA provides that this carveout applies 'regardless of format or medium of transmission.'").

[58] 50 U.S.C. §1701(a).

created an exception to the IEEPA that limits the President's power with respect to the importation or exportation of "any information or informational materials" irrespective of the "format or medium of [the] transmission."[59] Despite the government's claims that TikTok presents a national security threat, the court found that the executive order violated the informational material exception and the public interest in maintaining TikTok outweighed the risk presented by the government.[60]

[20]   Following Trump's attempt to ban TikTok, almost every major American tech company began talks to purchase TikTok.[61] Their efforts were impeded by the Chinese government. China responded by adding "interactive interfaces powered by artificial intelligence" and "personalized recommendations and notifications powered by data analysis" to its catalog of technologies subject to export restrictions just weeks after Trump issued his executive order.[62] The imposition of export restrictions complicated ByteDance's ability to sell TikTok to an American company, prompting some commentators to suggest that licensing arrangements may be the only viable option for such a transaction.[63] Despite the export restrictions, an agreement was reached where tech company Oracle purchased a stake in a new U.S.-based entity, while ByteDance remained the majority shareholder.[64]

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[59] 50 U.S.C. §1702(b)(3).

[60] *See, e.g.*, *Marland*, 498 F. Supp. 3d at 642; *TikTok Inc.*, 490 F. Supp. 3d at 84–85.

[61] *See* Palmer, *supra* note 44.

[62] *TikTok owner to 'strictly' obey China's tech takeover law*, BBC (Aug. 31, 2020), https://www.bbc.com/news/technology-53973279 [https://perma.cc/J4VR-PTLH].

[63] *See* Paul Mozur, et al., *TikTok Deal Is Complicated by New Rules From China Over Tech Exports*, N.Y. TIMES (Aug. 29, 2020), https://www.nytimes.com/2020/08/29/technology/china-tiktok-export-controls.html [https://perma.cc/KU5P-RETW].

[64] *See* Palmer, *supra* note 44.

[21]   Conversely, President Joe Biden's administration has taken an inconsistent approach to TikTok.[65] While the Biden administration has relied on the app to connect with young people by creating TikTok videos[66] and inviting some of the platform's most popular creators to the White House,[67] its support of the platform is unclear. The Biden administration reversed Trump's TikTok ban.[68] However, President Biden issued his own executive order expanding the definition of national security to allow the Committee on Foreign Investment in the United States (CFIUS) to review TikTok's data and technology practices. [69] Additionally, the Biden administration has been negotiating with ByteDance for over a year to address national security concerns.[70] One proposed solution, Project Texas,

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[65] *See id.*

[66] *See, e.g.,* NowThis News, *Jonas Brothers Film TikTok with Biden at White House #Shorts*, YOUTUBE (Dec. 17, 2021), https://www.youtube.com/watch?v=j_NgB6qdYXk [https://perma.cc/W9BP-8MMG].

[67] *See, e.g.,* Dylan Mulvaney (@dylanmulvaney), *Day 222 – Talking to the President at the White House with @nowthis (Interview Goes Live on Sunday Night) #trans #whitehouse #nowthisnews*, TIKTOK (Oct. 10, 2022), https://www.tiktok.com/ @dylanmulvaney/video/7156708652110449962?is_from_webapp=v1&item_id =7156708652110449962&lang=en [https://perma.cc/7G9F-A33B].

[68] Katie Rogers & Cecilia Kang, *Biden Revokes and Replaces Trump Order That Banned TikTo*k, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/us/politics/ biden-tiktok-ban-trump.html [https://perma.cc/QHE6-3X58].

[69] *See* Exec. Order No. 14,083, 87 Fed. Reg. 57369 (Sept. 15, 2022); *see also* (stating "CFIUS's review of TikTok has been delayed due to numerous national security concerns within the executive branch").

[70] *See, e.g.*, Letter from Michael T. McCaul, Ranking Member, House Foreign Affs. Comm., & Mike D. Rogers, Ranking Member, House Comm. on Armed Servs., to Janet Yellen, Sec'y of the Treasury, et al. (Dec. 19, 2022), https://armedservices.house.gov/ sites/republicans.armedservices.house.gov/files/TikTok%20Revised%20Letter%20Final. pdf [https://perma.cc/BP63-5RJW] ("The Committee on Foreign Investment in the United States (CFIUS) is currently in negotiations with TikTok[.]"); *Social Media's*

involves storing American users' data on foreign Oracle servers.[71] The Biden administration's embrace of TikTok as a method to engage with young Americans, yet critical examination of its practices, has sent a signal of indecisiveness to the rest of Washington.

[22]   Congress, state governments, and public universities have responded by taking matters into their own hands despite the ongoing negotiations between the Biden administration and ByteDance. [72]

Impact on Homeland Security, *supra* note 30, at 7 ("Access to U.S. user data by anyone outside of our new U.S. Data Security team will be limited by, and subject to, robust data access protocols that are being developed in close collaboration with Oracle and the U.S. government.").

[71] *See Social Media's Impact on Homeland Security*, *supra* note 30, at 7 ("We recently reached a significant milestone by changing the default storage location of U.S. user data to the Oracle Cloud Infrastructure. TikTok now stores 100% of U.S. user data by default in the Oracle cloud environment, and we are working with Oracle on new, advanced data security controls[.]").

[72] *See* Small, *supra* note 48 ("Senate Intelligence Chairman Mark Warner (D-Va.) said Congress and states may take further steps soon to limit TikTok because of security concerns if the Biden administration doesn't quickly come forward with a solution to protect American users."); Alex Barinka, *TikTok Bans at Major Colleges Aren't Going Over Well With Students*, BLOOMBERG (Jan. 23, 2023), https://www.bloomberg.com/news/newsletters/2023-01-23/tiktok-bans-at-college-aren-t-going-over-well-with-students [https://perma.cc/Z4U2-7VVH].

Maryland, [73] South Dakota, [74] South Carolina, [75] Nebraska, [76] Texas, [77] Alabama, [78] and Utah[79] have all banned TikTok on state-issued devices.

[73] *See* MD. DEP'T OF INFO. TECH., EMERGENCY DIRECTIVE 2022-12-001: REMOVE PROHIBITED PRODUCTS AND PLATFORMS (2022), https://governor.maryland.gov/wp-content/uploads/2022/12/Emergency-Directive-2022-12-001-Remove-Prohibited-Products-and-Platforms.pdf [https://perma.cc/5GUZ-YXA9].

[74] *See* S.D. Exec. Order No. 2022-10 (Nov. 29, 2022), https://governor.sd.gov/doc/GovNoem-EO_2022-10.pdf [https://perma.cc/47T3-XY7N].

[75] *See Gov. Henry McMaster Blocks 'TikTok' on State Government Devices*, SC.GOV (Dec. 5, 2022), https://governor.sc.gov/news/2022-12/gov-henry-mcmaster-blocks-tiktok-state-government-devices [https://perma.cc/4BZ3-26CG].

[76] *See* Pete Ricketts, *Gov. Ricketts Announces TikTok App Ban for State Devices*, FACEBOOK (Aug. 12, 2020), https://www.facebook.com/GovernorPeteRicketts/posts/1682593445228353 [https://perma.cc/YE9N-ZFD8] ("To maintain the security of data owned by the State of Nebraska, and to safeguard against the intrusive cyber activities of China's communist government, we've made the decision to ban TikTok on State devices.").

[77] *See* Letter from Gregg Abbott, Governor of Tex., to State Agency Heads (Dec. 7, 2022), https://gov.texas.gov/uploads/files/press/State_Agencies_Letter_1.pdf [https://perma.cc/MAL9-XGDY] ("Because of these threats, effective immediately, every state agency in Texas shall ban its officers and employees from downloading or using TikTok on any of its government-issued devices. This TikTok ban extends to all state-issued cell phones, laptops, tablets, desktop computers, and other devices.").

[78] *See* Memorandum from Kay Ivey, Governor of Ala., to All State Agency Heads (Dec. 12, 2022) https://twitter.com/GovernorKayIvey/status/1602517248924684289?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1602517248924684289%7Ctwgr%5E5fd3b7262d54a104d3c8bcb5d1ccce970e73b359%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fabc3340.com%2Fnews%2Flocal%2Falabama-montgomery-governor-ivey-tiktok-app-ban-government-devices-cyber-seucrity-issues-memo-sensitive-data-chinese-owned [https://perma.cc/X7XE-E9VL]) ("Use of TikTok involving state IT infrastructure thus creates an unacceptable vulnerability to Chinese infiltration operations.").

[79] *See* Utah Exec. Order No. 2022-06 (Dec. 12, 2022).

TikTok is also banned on military-issued devices [80] and U.S. federal government devices.[81] At the end of 2022, Senator Marco Rubio introduced the Averting the National Threat of Internet Surveillance, Oppressive Censorship and Influence, and Algorithmic Learning by the Chinese Communist Party Act (ANTI-SOCIAL CCP Act) to ban all apps "subject to substantial influence" by China and explicitly listed TikTok and ByteDance as banned companies.[82]

[23]   It is widely observed that there is a tradeoff between innovation and privacy.[83] The law lags behind innovation as legislators struggle to keep up with technology's fast-paced, evolving nature. The lack of a comprehensive federal privacy law,[84] the dominance of Silicon Valley, and weak privacy

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[80] *See* Palmer, *supra* note 44.

[81] *See* Justin Sink, *Biden's On Tik Tok Despite US Government Suspicions of Service*, BLOOMBERG LAW (Oct. 29, 2022), https://www.bloomberglaw.com/product/blaw/document/RKH21HDWRGG0 [https://perma.cc/MF6G-ASRE].

[82] Averting the National Threat of Internet Surveillance, Oppressive Censorship and Influence, and Algorithmic Learning by the Chinese Communist Party Act, S. 347, 118th Cong. (2023).

[83] Avi Goldfarb & Catherine Tucker, *Privacy and Innovation,* 12 INNOVATION POL'Y & ECON. 65, 66 (2012).

[84] *See US: Comprehensive Federal Privacy Legislation Can Build on State Privacy Laws,* BSA (Sept. 21, 2022), https://www.bsa.org/policy-filings/us-comprehensive-federal-privacy-legislation-can-build-on-state-privacy-laws [https://perma.cc/XU55-CVC7]; Qiuyang Zhao, *American Data Privacy and Protection Act: Latest, Closest, yet Still Fragile Attempt Toward Comprehensive Federal Privacy Legislation,* HARV. J.L. & TECH.: DIGEST (Oct. 19, 2022), https://jolt.law.harvard.edu/digest/american-data-privacy-and-protection-act-latest-closest-yet-still-fragile-attempt-toward-comprehensive-federal-privacy-legislation [https://perma.cc/8R5S-4BSK].

self-regulation by users suggest innovation won the trade-off.[85] TikTok presents unique challenges to users' data privacy and creates potential political implications due to its Chinese ownership. Therefore, it is critical to closely examine the most innovative model, which is presently TikTok, to understand how platforms impact privacy rights and influence future innovations.

III. DISCRIMINATION ON TIKTOK

[24]   TikTok is one of many social media platforms that users engage with daily. As Part I illustrates, TikTok's Chinese ownership and innovative practices have set it apart from other social media platforms. These innovations, such as its recommendation algorithm's use of active and passive user behavior, are one of the sources of TikTok's rapid growth.[86] However, this growth has had adverse consequences; TikTok's algorithm and platform moderation practices enable discriminatory predation and exclusion of people of color. Discriminatory predation involves exploiting people of color for gain. Discriminatory exclusion occurs when people of color are excluded from opportunities.

[25]   The lack of publicly available data and robust research on TikTok makes it difficult to draw generalized conclusions about the platform.

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[85] *See* Bennett Harrison, *Concentrated Economic Power and Silicon Valley*, 26 ENV'T & PLANNING 307, 308 (1994) ("Silicon Valley is a node within global webs of networked research and production facilities, governed mainly by concentrated, powerful organizations."); Olivia Solon & Sabrina Siddiqui, *Forget Wall Street – Silicon Valley is the new political power in Washington*, THE GUARDIAN (Sept. 3, 2017), https://www.theguardian.com/technology/2017/sep/03/silicon-valley-politics-lobbying-washington [https://perma.cc/DKC8-4C62]; Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation,* 51 U.C. DAVIS L. REV. 1149, 1154 (2018) (There is a saying in Silicon Valley that 'Big Data is the new oil.'").

[86] *How TikTok Recommends Videos #ForYou*, TIKTOK (June 18, 2020), https://newsroom.tiktok.com/en-us/how-tiktok-recommends-videos-for-you [https://perma.cc/P669-FBP9].

However, the examples discussed provide insight into the discrimination that people of color have experienced on the platform. It is important to note that while other users may face issues on TikTok and other social media platforms, this Article specifically examines the impact and harm that discriminatory practices have on people of color. Consequently, Part II illuminates how TikTok's algorithm and moderation practices result in discriminatory predation and exclusion of people of color, highlighting the need for the platform and policymakers to address discriminatory practices and algorithmic results.

A. Discriminatory Predation

[26]   In this Section, I describe the discriminatory predation experienced by people of color on TikTok, focusing on Black people. I distinguish between discriminatory predation that the platform actively participates in, which I term "platform predation," and passively allows, which I term "private predation." I will illuminate various ways TikTok enables entities to invade the right to privacy of people of color. First, I outline how private predation on TikTok is a product of internet culture's reliance on Black imagery,[87] resulting in the forced commodification of people of color. Second, I outline platform predation on TikTok, which describes the platform's prioritization of maximizing user engagement and profits at the expense of users of color.

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[87] *See* Jay Owens, *Post-Authenticity and the Ironic Truths of Meme Culture, in* POST MEMES: SEIZING THE MEMES OF PRODUCTION 77, 102 (Alfie Bown & Dan Bristow eds., 2019) (citing Lauren Michele Jackson, *We Need to Talk About Digital Blackface in Reaction GIFs*, TEEN VOGUE (Aug. 2, 2017), https://www.teenvogue.com/story/digital-blackface-reaction-gifs [https://perma.cc/M6TZ-XXHQ]); Doug Gordon, *Your Favorite Meme? Chances Are It Was Influenced By Black Culture*, WISC. PUB. RADIO (Jan. 25, 2020), https://www.wpr.org/your-favorite-meme-chances-are-it-was-influenced-black-culture [https://perma.cc/3ADC-A8X7].

1. Private Predation

[27]   Internet culture's acceptance of digital blackface enables individuals and companies to engage in discriminatory predation that exploits creators of color to increase profits and online visibility. Digital blackface is the practice of using images of Black people to convey one's feelings or expressions online and is a remnant of blackface minstrel shows.[88] It allows online users to use "the relative anonymity of online identity to embody blackness," which exploits and objectifies Black people.[89] A New York Times study found that "women of color" are regularly the subject of digital memes used by non-Black people to express emotions.[90]

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[88] Willajeanne F. McLean, *Who are you Wearing? Avatars, Blackface and Commodification of the Other*, 61 L. REV. FRANKLIN PIERCE CTR. INTELL. PROP. 455, 463 (2021) (explaining that blackface began in the 1800s when white actors painted their faces black to portray black characters with the aim of degrading and dehumanizing black people).

[89] ERINN WONG, DIGITAL BLACKFACE: HOW 21ST CENTURY INTERNET LANGUAGE REINFORCES RACISM 9 ("Thus, as Nick Young [a black basketball player] and Kayode Ewumi [a black actor] become popularized as "stock images" that people digitally exploit, consumers will subconsciously associate their black bodies with negative traits of dumbness and laziness, generating an attitude of black inferiority towards black males and the larger black community.").

[90] Amanda Hess & Shane O'Neill, *The White Internet's Love Affair With Digital Blackface*, N.Y. TIMES (Dec. 22, 2017), https://www.nytimes.com/video/arts/100000005615988/the-white-internets-love-affair-with-digital-blackface.html [https://perma.cc/R2RY-LR5Y] (referring to data from Giphy, a popular GIF database, a New York Times study found that the most popular way for online users to express happiness and sadness were through images of Black women).

[28]   The exploitation of Black people in the media existed long before digital platforms [91] as demonstrated by Uncle Ben and Aunt Jemima advertisements. These advertisements relied on racist caricatures of Black people to brand and publicize products.[92] This use of minstrel show imagery in marketing bears a striking resemblance to the present use of digital blackface on social media platforms.[93] Similar to how blackface minstrel shows profited from encouraging harmful and demeaning stereotypes of Black people, digital blackface forces Black people into searchable stereotypes for online users' amusement.

[29]   The exploitation of Black people using digital blackface on social media platforms is not novel.[94] This exploitation is evident in the open and shareable model of TikTok, where non-Black creators profit from the images and voices of Black creators without their consent. One example is the case of Victoria Sethunya, a Black woman who sued TikTok after the

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[91] Eden Osucha, *The Whiteness of Privacy: Race, Media, Law,* 24 CAMERA OBSCURA: FEMINISM, CULTURE, & MEDIA STUD. 67, 90 (2009) ("Davis's Aunt Jemima would be more than an illustrated trademark: she would be a living, breathing emblem, the pancake-mix packaging foregoing the merely 'amus[ing] counterfeit of drag and blackface . . . to persuade [customers] with the presence of a 'real' slave woman.'").

[92] Deborah R. Gerhardt, *The Last Breakfast with Aunt Jemima and Its Impact on Trademark Theory*, 45 COLUM. J.L. & ARTS 231, 243 ("A white male account manager grew the myth of Aunt Jemima as a Southern 'Mammy' that happily devoted all of her energy to raising white children so that Southern men could be served and their belles could live a life of fashionable leisure.").

[93] *Id.* at 259 (discussing recent backlash to decades-long use of minstrel show elements).

[94] *See* Jackson, *supra* note 87 ("But even a casual observer of GIFing would notice that, as with much of online culture, black people appear at the center of it all. Or images of black people, at least. The Real Housewives of Atlanta, Oprah, Whitney Houston, Mariah Carey, NBA players, Tiffany Pollard, Kid Fury, and many, many other known and anonymous black likenesses dominate day-to-day feeds, even outside online black communities.").

sound from her viral video was distributed despite her protests.[95] In the viral video, Sethunya responds to a user's critical comment, saying, "Yes, I am doing blasphemy."[96] Sethunya alleged that she asked TikTok to remove the sound, and TikTok continued to use her "I am Doing Blasphemy" sound clip for weeks "to profit [W]hite comedians at the expense of her mental health."[97] Ultimately, the court dismissed the case for failing to state a plausible claim for relief.

[30]   Even if Sethunya had stated a plausible claim for relief, it is unlikely the court would have found TikTok liable for copyright infringement for two reasons: first, TikTok's intellectual property policy and Terms of Service grant the platform broad rights to use, share, and reproduce user-generated content.[98] This means that even though Sethunya registered her "I am Doing Blasphemy" video as a motion picture with the U.S. Copyright

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[95] Sethunya v. TikTok Inc., No. 2:22-cv-00678, 2022 U.S. Dist. LEXIS 215947 at *2– 3 (D. Utah Nov. 29, 2022).

[96] Victoria Sethunya (@africanexmormon), *#yesiamdoingblasphemy #victoriasethunya #justiceforvictoriandchris*, TIKTOK (Sept. 22, 2022), https://www.tiktok.com/ @africanexmormon/video/7146238245439982894?is_from_webapp=1&sender_device= pc&web_id=7212453746446976558 [https://perma.cc/7WLD-T3KA].

[97] Rocio Hernandez, *Utah Mother, Opera Singer, Continues Fighting for Deported Son*, KUER (May 12, 2019, 6:00 AM), https://www.kuer.org/immigration/2019-05-12/utah-mother-opera-singer-continues-fighting-for-deported-son [https://perma.cc/F5RY-95Z5] (describing how Sethunya's son developed an opioid addiction from a back injury at work which eventually led to his arrest and deportation); Victoria Sethunya (@africanexmormon), *Replying to @africanexmormon*, TIKTOK (Sept. 25, 2022), https://www.tiktok.com/@africanexmormon/video/7147433127143771438?is_from_web app=1&sender_device=pc&web_id=7148221954649998890 [https://perma.cc/J6B4-VST3] (addressing TikTok's continued usage of her sound clip in relation to her attempt to be reunited with her son).

[98] *Terms of Service*, TIKTOK (Feb. 2019), https://www.tiktok.com/legal/terms-of-use?lang-en [https://perma.cc/PE4F-BL35].

Office, [99] TikTok's broad licensing rights likely would have shielded the platform from liability for copyright infringement.[100] By uploading a video to TikTok and agreeing to the Terms of Service, a user grants TikTok an "unconditional[,] irrevocable, non-exclusive, royalty-free, perpetual worldwide license" to use, modify, and distribute their content. [101] Additionally, the Terms of Service explicitly state that this non-exclusive license extends to other TikTok users.[102]

[31] TikTok's non-exclusive license for platform users has not been legally tested but a court is likely to find that it is valid because use of other users' content is integral to the functioning of the platform and clearly outlined in the Terms of Service.[103]

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[99] *Public Catalog: Yes, I am Doing Blasphemy, and I am Ready to Go to Hell - Yes*, U.S. COPYRIGHT OFF., https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=1&ti=1,1& Search%5FArg=Yes%2C%20I%20am%20doing%20blasphemy&Search%5FCode=TAL L&CNT=25&PID=YloX3e0Eyvkn40uA-8b94P0orgKVtER&SEQ=20230320005313& SID=1 [https://perma.cc/77KW-3BKF].

[100] *Terms of Service*, *supra* note 98.

[101] *Id.* (discussing the nature of TikTok's Terms of Service).

[102] *See* Ali Johnson, *Copyrighting TikTok Dances: Choreography in the Internet Age*, 96 WASH. L. REV. 1225, 1237 (2021); *See also* Jordan Meggison-Decker, *Viral TikTok or Copyright Infringement Lawsuit?*, BROWNWINICK L. (Jan. 5, 2022), https://www.brownwinick.com/insights/viral-tiktok-or-copyright-infringement-lawsuit [https://perma.cc/J28C-QMHK] ("[W]hen users create posts that use the content of an original user, the original user retains the copyright in the content, but cannot sue another user for using the content.").

[103] *Terms of Service*, *supra* note 98 ("Arbitration notice for users in the United States: these terms contain an arbitration clause and a waiver of rights to bring a class action against us.") (emphasis omitted).

[32]   In *Morel*, the court rejected the defendant's defense that it could use the plaintiff's copyrighted work because Twitter's Terms of Service granted it a license to use the plaintiff's photographs.[104] Twitter's Terms of Service state, "you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods…[t]his license authorizes us to make your Content available to the rest of the world and to let others do the same." [105] Twitter's Terms of Service thus grants users the ability to make "content available." It also states that Twitter has the right to "sublicense" but does not expand on what this means. The *Morel* court found that this language was "ambiguous" and failed to establish that Morel "understood that [Twitter] had [the] intent to confer a license onto other users." [106] Conversely, TikTok's Terms of Service explicitly confer a non-exclusive license to users, and states that users may "view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit [] User Content in any format and on any platform."[107]

[33]   *Morel* does not apply to Sethunya's case, and the court would likely find that TikTok's Terms of Service grant platform users a non-exclusive license to create videos using her sound. Although TikTok users retain the copyright to their content, the platform's non-exclusive licensing agreement limits their control over its use and distribution. However, copyright holders who do not upload content directly to TikTok are not bound by this agreement. TikTok allows copyright holders to report videos using their copyrighted material and subsequently removes infringing content, but

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[104] *See* Agence Fr. Presse v. Morel, No. 10-cv-2730, 2014 U.S. Dist. LEXIS 112436, *5 (S.D.N.Y. Aug. 13, 2014).

[105] *Terms of Service*, Twitter, https://twitter.com/en/tos [https://perma.cc/VU69-T9ZS].

[106] *See* Agence Fr. Presse v. Morel, No. 10-cv-2730, 2010 U.S. Dist. LEXIS 139103, *18 (S.D.N.Y. Dec. 23, 2010).

[107] *Terms of* Service, *supra* note 98.

TikTok's broad licensing agreement severely restricts the rights of users who upload their otherwise copyrightable material directly to TikTok.[108]

[34]   Additionally, sounds on TikTok may exist in multiple formats. Sethunya's sound exists under her original video, but users may also make their own videos using Sethunya's sound and create a distinct sound, which is not directly linked to Sethunya's account.[109] Creators, like Sethunya, may then encounter obstacles when attempting to control the use of their voice on the platform as their sound or otherwise.

[35]   An additional reason that Sethunya's claim likely would not have succeeded even if there was standing is because if TikTok's Terms of Service do not confer a broad non-exclusive license, TikTok's eventual removal of Sethunya's sound satisfied the Digital Millennium Copyright Act ("DMCA"). The DMCA requires the removal of infringing material from a platform if the infringement has been brought to the platform's attention.[110] The DMCA takedown provision requires a service provider to "expeditiously" take down or disable access to infringing content once given notice of its presence on their platform.[111] Courts have interpreted the term "expeditiously" to mean "promptly," which depends on the specific

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[108] *Intellectual Property Policy*, TIKTOK (June 7, 2021), https://www.tiktok.com/legal/page/global/copyright-policy/en [https://perma.cc/9SA9-KKA6].

[109] For example, the original "I'm doing Blasphemy" sound is linked to Sethunya's TikTok and directs users to her account page when one clicks on it. However, given the broad licensing terms, another user may use part or all of Sethunya's sound without crediting her. The "new" sound they create may be an identical copy to Sethunya's original, but it is now only connected to the user's account and not Sethunya's. This presents an issue for reporting infringement cases as a copyright holder would need to review the thousands of videos uploaded by users daily to ensure no one has used their copyrighted work under a new audio.

[110] 17 U.S.C. § 512(c)(3).

[111] *Id.* § 512(c)(1)(C).

circumstances of the case.[112] For example, in *Viacom v. YouTube*, the court considered the number of notices YouTube received and its ability to process them in determining the appropriate timeframe for responding to a takedown notice.[113] For reference, TikTok received over 10,000 copyright takedown notices in the first half of 2020.[114]

[36]   The platform has grown exponentially since then; the increasing amount of copyrightable content created by online users on TikTok contributes to the increasing volume of takedown notices the platform receives.[115] As a result, the DMCA's Takedown policy fails to provide an effective legal remedy for copyright holders seeking to protect their work on TikTok and other social media platforms subject to high content volumes.[116]

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[112] *See, e.g.*, Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1111 (9th Cir. 2007).

[113] Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 524, 527–228 (S.D.N.Y. 2010).

[114] *See* Ashley King, *TikTok Received 10,625 Copyright Takedown Notices in the First Six Months of 2020*, DIGIT. MUSIC NEWS (Sep. 22, 2020), https://www.digitalmusicnews.com/2020/09/22/tiktok-transparency-report-2020 [https://perma.cc/3JC2-X7Z4].

[115]*See* Daniel Seng, *Copyrighting Copywrongs: An Empirical Analysis of Errors with Automated DMCA Takedown Notices*, 37 SANTA CLARA HIGH TECH L.J. 119, 125 (2020) (noting that the copyrightable content created by online users is in the millions with this number increasing annually); *see also* MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 12B.04 (2022) ("The expectation under this 1998 amendment was that the number of notifications of claimed infringement to be filed would be modest. But then the peer-to-peer revolution hit, and copyright infringement on the Internet exploded. Millions upon millions of takedown notices have been served[.]").

[116] *See* Seng, supra note 115, at 141–42 (describing the difficulties platforms face trying to keep up with the high volume of takedown notices); Kyle Jahner, *No Easy Fix Seen for Digital Copyright Law Amid Content Flood*, BLOOMBERG L. (July 24, 2020, 5:50 AM), https://www.bloomberglaw.com/bloomberglawnews/ip-law/X9G3QMI0000000?bna_

[37]   In summary, Sethunya's attempt to use copyright law to protect her privacy and limit the distribution of her voice would fail due to the limitations of the DMCA's takedown policy[117] and TikTok's Terms of Service, [118] which grant the platform's users a non-exclusive license. Although the DMCA and TikTok's Terms of Service apply equally to all creators, internet culture's use of creators' content does not apply equally: Internet trends disproportionately rely on the images, voices, and videos of Black people.[119] A University of Chicago study found that Black young adults are more likely to create original content than any other racial group. [120] In "TikTok Cultures in the United States," Cienna Davis, a doctoral student at the University of Pennsylvania Annenberg School for Communication, states that "[t]he technological move toward video-based apps like TikTok where users mime and lip-sync audio memes has transformed the more passive sharing of racial affect into a participatory

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news_filter=ip-law#jcite [https://perma.cc/AF4K-5WA3] ("The Digital Millennium Copyright Act shields platforms from copyright liability if they remove infringing content posted by users when notified. But since 1998, the volume of internet content—and of infringement—has exploded beyond what the system was designed to handle.").

[117] *See* 17 U.S.C. § 512(c)(1)(C).

[118] *See Terms of Service*, *supra* note 98.

[119] *See* Cienna Davis, *Digital Blackface and the Troubling Intimacies of TikTok Dance Challenges*, *in* TIKTOK CULTURES IN THE UNITED STATES 28, 35 (Trevor Boffone ed., 2022) ("With Blackness treated as a fungible commodity from which to ex-tract value, what would it mean for the viral content of Black creators on TikTok to be regarded as non-fungible? Non-fungibility would mean that the value of the content cannot be transferred to others with- out consent and compensation of the creator.").

[120] *See* CATHY COHEN ET AL., PARTICIPATORY POLITICS: NEW MEDIA AND YOUTH POLITICAL ACTION 22 (2012) ("Black youth are more likely to give help, advice, or suggestions; create their own media to share online; or post an comment, review, or critique of someone else's media."); *see also* Davis, *supra* note 119, at 29 ("From Vine and Twitter to Dubsmash and TikTok, many of the most popular digital trends emerge from the local practices of Black youth who continuously innovate online.").

form of digital minstrelsy that has heightened its political impact through embodiment and expropriation of Black cultural expression."[121] TikTok's policies thus perpetuate the discriminatory practice of digital blackface by leaving creators of color without an effective means of removing and controlling their content. As a result, creators of color must accept and monetize their own content to avoid exploitation by others.[122]

[38]   Another example of private predation involves Tariq, a seven-year-old Black boy from South Dakota, who was interviewed by a YouTube channel.[123] In the interview, Tariq enthusiastically describes his love for corn.[124] His parents, who were not present during the interview, later discovered that their son had gone viral on TikTok after receiving messages from family members overseas.[125]

[39]   Neither Tariq nor his parents had TikTok accounts; Tariq's parents actively attempted to protect their son's privacy and keep him away from

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[121] Davis, *supra* note 119, at 31.

[122] *See* Davis, *supra* note 119, at 29 ("[TikTok] invites Black creators to their supposedly egalitarian platform on extractive terms, as well as cultural extraction, where Black digital innovation, play, and creativity become fungible, or commodities to freely exchange, within the digital attention economy. . . . Black creators are repeatedly alienated from the product of their labor without proper credit and compensation.").

[123] *See* Dustin Jones, *Meet South Dakota's New Corn-Bassador, A Boy Who Recently Found Out That Corn Is Real*, NPR (Sept. 8, 2022, 5:01 AM), https://www.npr.org/2022/09/08/1121544372/south-dakota-corn-bassador-tariq-corn-kid [https://perma.cc/TR67-4KS7].

[124] *See id.*

[125] *See* Madison Malone Kircher, *Corn Kid Is Doing Just Fine*, N.Y. TIMES (Sep. 27, 2022), https://www.nytimes.com/2022/09/21/style/corn-kid-tariq-tiktok.html [https://perma.cc/HDS4-DH76] (noting that Tariq's parents consented to having their son in a YouTube interview but did not consent to having his image spread on TikTok).

social media.[126] Despite these efforts, the Gregory Brothers[127] took Tariq's interview and turned it into a viral TikTok sound.[128] The sound's success on TikTok ultimately led the Gregory Brothers to release the TikTok sound as a song.[129]

[40]   Tariq's privacy was not respected. Under Nissenbaum's contextual integrity theory of privacy, social norms dictate that a parent has the right to control their child's image. For example, Tariq's mother met with her son's principal to limit his exposure after the sounds went viral.[130] The social norm of parents controlling their child's image and privacy was respected. Tariq's public exposure demonstrates how private predation may exploit the images of Black people without their knowledge, leaving them with few options other than acceptance and monetization once they become aware of the publicity surrounding their images.

[41]   The cases of Sethunya and Tariq involve private predation of a person of color's image and voice. However, one of the most common issues faced by creators of color on TikTok is not receiving credit for the dances

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[126] *See id.*

[127] *See generally* Ethan Hein, *The complicated case of Antoine Dodson*, ETHAN HEIN BLOG (Sept. 8, 2010), http://www.ethanhein.com/wp/2010/the-complicated-case-of-antoine-dodson/ [https://perma.cc/38ME-7YQN] (discussing the Gregory Brothers).

[128] *See* schmoyoho, *It's Corn - Songify This ft. Tariq and Recess Therapy*, YOUTUBE (Aug. 28, 2022), https://www.youtube.com/watch?v=_caMQpiwiaU&t=34s [https://perma.cc/3WUR-CYBN]; *see also* Kircher, *supra* note 125 (stating that the Gregory Brother's TikTok featuring Tariq's interview was viewed more than 76 million times and the audio has been used in more than one million videos, including by private individuals and public companies).

[129] Malavika Pradeep, *The 'Corn Kid' is a grim reminder of the internet's exploitative affair with marketing gimmicks*, SCREENSHOT (Sept. 1, 2022), https://screenshot-media.com/culture/internet-culture/corn-kid-exploited [https://perma.cc/E9RH-WY9T].

[130] Kircher, *supra* note 125.

and trends that they create.[131] A famous example of this is the "Renegade" dance, which was created by Jalaiah Harmon, a fourteen-year-old Black girl.[132] The Renegade is one of the most popular TikTok dances.[133] Initially, Harmon did not receive credit for her dance.[134] A social media journalist stated, "[t]o be robbed of credit on TikTok is to be robbed of real opportunities … virality means income."[135] Harmon's contributions went largely unrecognized while White creators received significant media attention and later secured million-dollar deals.[136]

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[131] *See* 17 U.S.C. § 102(a)(4) (explaining that the Copyright Act protects "pantomimes and choreographic works"); *Pantomimes and Choreographic Works*, U.S. COPYRIGHT OFF., https://www.copyright.gov/register/pa-pantomime.html [https://perma.cc/557C-MB9E].

[132] Taylor Lorenz, *The Original Renegade*, N.Y. TIMES (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/style/the-original-renegade.html [https://perma.cc/9BJD-8DHE] (noting that Jalaiah Harmon first posted her dance to Instagram and viewers later brought the dance to TikTok, where it grew to fame and had millions of users performing it).

[133] *See* Cervi, *supra* note 35, at 201; *see also History Behind Our Most Popular Dances*, TIKTOK, https://www.tiktok.com/tiktok-rewards/history-behind-our-most-popular-dances [https://perma.cc/5282-QQU6] [hereinafter *Popular Dances*] (providing a brief summary of the Renegades origins).

[134] *Popular Dances*, *supra* note 133.

[135] Lorenz, *supra* note 132; *id.*

[136] *See* Melanie Kennedy, *'If the rise of the TikTok dance and e-girl aesthetic has taught us anything, it's that teenage girls rule the internet right now': TikTok celebrity, girls and the Coronavirus crisis*, 23 EUR. J. CULTURAL STUD. 1069, 1071 ("It is significant that many of the most- followed stars of TikTok are not only young, but female, normatively feminine, white and wealthy."); Davis, *supra* note 119, at 28–29 ("Like many other Black girls creating dances on TikTok and Dubsmash, Wilson (3.2 M followers) enjoyed relatively modest success from the challenge while the greatest rewards were reserved for Megan, D'Amelio (128 M followers), and mega-influencer Addison Rae (85 M followers)."); Abram Brown & Abigail Freeman, *Top-Earning TikTok-ers 2022: Charli and Dixie D'Amelio and Addison Rae Expand Fame—and Paydays*, FORBES (Jan. 7, 2022, 6:30 AM), https://www.forbes.com/sites/abrambrown/2022/01/07/top-earning-

[42]   Notably, Harmon's case differs from Sethunya in that Harmon did not initially upload her intellectual property to TikTok. Instead, another dancer used Harmon's choreography in a TikTok video after seeing Harmon's Instagram video.[137] TikTok's broad non-exclusive licensing agreement did not apply to Harmon's original dance at that time. Harmon eventually did post her choreography to TikTok.[138] However, it is still unclear if TikTok's broad licensing agreement applies only to the videos (i.e., video images and sound) or the underlying intellectual property featured in the videos as well (i.e., choreography).[139] Regardless, Harmon's experience illustrates how choreographers of color who do not receive credit for their intellectual property on TikTok lose opportunities and income.

[43]   Harmon's situation is not unique. Creators of color have struggled to protect and receive credit for the dances and trends they developed on TikTok.[140] Creators of color develop a majority of TikTok's most popular

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tiktokers-charli-dixie-damelio-addison-rae-bella-poarch-josh-richards/?sh=14aa8d5b3afa [https://perma.cc/72W2-J4GB].

[137] *Popular Dances*, *supra* note 133.

[138] *See* Lorenz, *supra* note 132.

[139] *See* Johnson, *supra* note 102, 1238–39.

[140] *See* U.S. COPYRIGHT OFF., COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME 2 (2022) (emphasizing that copyrighting choreography presents unique challenges distinct from other forms of copyright such as images and videos), https://www.copyright.gov/circs/circ52.pdf [https://perma.cc/2SGS-KYEM]; Johnson, *supra* note 102, at 1252; Taiyler Simone Mitchell, *'They take our dances.' Black users demand TikTok combat cultural appropriation*, INSIDER (Aug. 21, 2021, 4:50 PM), https://www.insider.com/black-creators-call-out-tiktok-for-financial-loss-from-appropriation-2021-8 [https://perma.cc/QNR4-8MJ6] ("Across the app, artists and activists have demanded TikTok improve the experience from Black artists and creators, as well as entrepreneurs and entertainers looking to monetize their massive followings. Non-Black TikTok creators have been notorious for co-opting the content of their Black counterparts.").

dances, yet users fail to credit them.[141] In response, Black creators went on strike and refused to choreograph new dances until TikTok addressed the discrimination and exploitation they experienced on the app.[142] TikTok responded to the Black creators' strike by creating initiatives aimed at promoting Black and Latino content creators.[143] Nevertheless, inequities persist. Creators of color continue to develop most of TikTok's viral dance trends,[144] but White creators disproportionately earn more and receive more opportunities than creators of color.[145]

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[141] *See, e.g.*, *TikTok, Introducing the TikTok for Black Creatives Incubator Program*, TikTok: Newsroom (Jan 13, 2021), https://newsroom.tiktok.com/en-us/tiktok-for-black-creatives-incubator-program [https://perma.cc/9DPZ-4JWC] [hereinafter *Black Creatives Incubator Program*] ("Black creators on TikTok have been a driving force for our community, from starting trends to fostering connection to introducing new ways to entertain and inspire others").

[142] *See* Sharon Pruitt-Young, *Black TikTok Creators are on Strike to Protest a Lack of Credit for Their Work*, NPR (July 1, 2021, 11:00 PM), https://www.npr.org/2021/07/01/1011899328/black-tiktok-creators-are-on-strike-to-protest-a-lack-of-credit-for-their-work [https://perma.cc/R8CA-F269]; Catherine Knight Steele, *Black Feminist Pleasure on TikTok: An Ode to Hurston's "Characteristics of Negro Expression*, 44 Women's Stud. Commc'n. 463, 466; Cervi, *supra* note 35, at 203 (finding that white creators culturally appropriate the dances of creators of color).

[143] *See Black Creatives Incubator Program*, *supra* note 141 ("'TikTok for Black Creatives,' a new incubator program that will invest in and support emerging Black creators and music artists on TikTok. The three month program will focus on nurturing and developing 100 talented Black creators and music artists, helping to open doors for them to reach new heights in their careers.").

[144] *See Cervi*, *supra* note 35, at 203.

[145] *See* Venesa Coger, *It's Time For Black TikTok Creators To Be Paid Their Worth*, Refinery 29 (Jan. 18, 2022, 3:44 PM), https://www.refinery29.com/en-us/black-tiktok-creators-pay-paid [https://perma.cc/X3D3-TS9K]; Nathaly Yumi Da Silva, Participation, Appropriation, and Coexistence: TikTok Dance Challenges and the Real Challenges for Dance 4 (July 2022) (M.A. thesis, Tilburg University), http://arno.uvt.nl/show.cgi?fid=159629 [https://perma.cc/K2N3-KKXN].

[44]   Generally, choreographers have opted "to rely on professional norms and standards for licensing and protecting ownership of their work."[146] Professional norms in dance do not rely on copyright protections to safeguard choreographers' works. Instead, choreographers used their "personal control of dancers" to protect their choreography.[147] However, as Harmon's experience demonstrates, these community-based regulations fail to provide choreographers with an adequate remedy in the social media context, thus causing them to miss out on opportunities.[148] Consequently, there has been an increased number of choreographers, especially choreographers of color, seeking copyright protection for their works due to a lack of credit on social media platforms.[149]

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[146] *See* Johnson, *supra* note 102, at 1252 (citing Lauren B. Cramer, *Note*, *Copyright Protection for Choreography: Can It Ever Be 'En Pointe'? Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography*, 1 SYRACUSE J. LEGIS. & POL'Y 145, 155–60 (1995). *But see* Johnson, *supra* note 102, at 1235 ("In the summer of 2020, JaQuel Knight-one of the music industry's most sought-after choreographers-successfully copyrighted the choreography for Beyonce's 'Single Ladies' music video. This makes Knight one of the first commercial choreographers in pop music to successfully secure legal intellectual property protection for his work. Knight is already in the final stages of registering six other pieces, including his choreography for recording artists Cardi B and Megan Thee Stallion's 2020 collaboration, 'WAP,' and 'plans to register his entire catalog.'").

[147] Joi Michelle Lakes, *A Pas De Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1833 (2005).

[148] *See* Zito Madu, *The NBA invited Jalaiah Harmon to perform 'Renegade' and showed how to address Appropriation*, SB NATION (Feb. 17, 2020, 3:40 PM), https://www.sbnation.com/nba/2020/2/17/21141239/renegade-dance-nba-all-star-game-jalaiah-harmon-cultural-appropriation [https://perma.cc/XJD3-5EF3] (noting that although Harmon eventually received credit for her dance and was invited to perform the dance at the NBA All-Star Game, this recognition failed to confer the monetary benefits of the dances popularity to Harmon).

[149] *See* Riddhi Setty, *TikTok Dance Creators Struggle to Win Credit and Copyrights*, BLOOMBERG L. (Aug. 16, 2022, 5:12 AM), https://news.bloomberglaw.com/ip-law/tiktok-dance-creators-struggle-to-win-credit-and-copyrights [https://perma.cc/2SZT-KGL6].

[45]   A study conducted by MSL, a public relations firm, found that the racial pay gap between White and BIPOC (Black, Indigenous & People of Color) influencers is 29% and the gap between White and Black influencers is 35%.[150] These values nearly double the pay gap seen in the broader entertainment industry.[151] The researchers postulated that the pay gap results from the influencer industry's youth[152] and algorithmic augmentation of existing inequalities and biases.[153] The use of creators of colors' intellectual property on TikTok results in exploitation as creators of color produce intellectual property and White creators see the profits of their work.

[46]   In conclusion, discriminatory private predation is initiated by digital blackface, but TikTok further perpetuates this exploitation of creators of color, as demonstrated through the experiences of Sethunya, Tariq, and

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[150] *MSL Study Reveals Racial Pay Gap in Influencer Marketing*, MSL (Dec. 6, 2021), https://mslgroup.com/whats-new-at-msl/msl-study-reveals-racial-pay-gap-influencer-marketing [https://perma.cc/3GCR-THD4].

[151] *See id.*

[152] *See id.* ("The data shows that the forces driving the racial pay gap are similar to the drivers of pay gaps in other industries, where historic socioeconomic inequities create an unequal playing field, trapping a disproportionate number of Black workers in the lowest paying jobs with little chance of upward mobility. However, in the young and unregulated influencer industry where affluence and connections play an outsized role and with social platform algorithms perpetuating inequity, those forces are amplified by orders of magnitude.").

[153] *See* Balkin, *supra* note 84, at 1167 ("Using algorithms repeatedly and pervasively over large populations of people may inappropriately treat people as risky or otherwise undesirable, impose unjustified burdens and hardships on populations, and reinforce existing inequalities."); Taiyler Simone Mitchell, *Black creators say TikTok's algorithm fosters a 'consistent undertone of anti-Blackness.' Here's how the app has responded.*, INSIDER (Aug. 24, 2021, 5:01 PM), https://www.insider.com/a-timeline-of-allegations-that-tiktok-censored-black-creators-2021-7 [https://perma.cc/4VP2-6SZQ].

Harmon.[154] These experiences highlight how TikTok contributes to the harmful practice of digital blackface. Social media platforms must take more proactive measures to address and stop encouraging such exploitation on the platform.[155]

2. Platform Predation

[47]   Social media platforms have become an integral part of modern communication and information sharing. However, the relationship between social media platforms and users of color raises concerns of discriminatory predation. Platforms rely on maintaining user engagement to generate advertising revenue and increase profits, and the success of a platform is often determined by its ability to keep users engaged and on the platform. This raises concerns about the methods platforms use to maintain user engagement and the effects of these methods on users of color. Discriminatory platform predation occurs when a platform's moderation and use of users' personal data exposes targeted and vulnerable users of color to harm.

[48]   The TikTok Blackout Challenge provides an example of discriminatory platform predation, in which TikTok knowingly allowed a harmful trend to continue resulting in the deaths of several children of

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[154] *See* Jason Parham, *Tiktok and the Evolution of Digital Blackface*, WIRED (Aug. 4, 2020, 6:00 AM), https://www.wired.com/story/tiktok-evolution-digital-blackface [https://perma.cc/X2Z4-S5W6].

[155] Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179, 222–23 (2008) ("Two-side markets arise when network economic effects create demand interdependencies that cause the value that any one party derives from participating in the platform to depend not only on price, but also on the number of other platform participants.").

color. [156] The Blackout Challenge encouraged TikTok users to choke themselves with household items until they passed out and then post the video on TikTok, including the adrenaline rush from regaining consciousness.[157]

[49]   TikTok first became aware of the deadly effects of the challenge when ten-year-old Antonella Sicomero died in Italy after attempting the challenge and a subsequent lawsuit was filed.[158] The Bureau Europeen des Unions de Consummateurs filed a lawsuit against TikTok alleging that its practices harm children that are unable to recognize "potentially harmful content on the platform."[159] In the months that followed Sicomero's death, TikTok failed to take effective preventive measures and several U.S. children of color died attempting the TikTok Blackout Challenge.[160]

[50]   In the U.S., the parents of Lalani Erika Walton, a nine-year-old Black girl, and Arriani Jaileen Arroyo, an eight-year-old Latina, who died

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[156] *See* Olivia Carville, *TikTok's Viral Challenges Keep Luring Young Kids to Their Deaths*, BLOOMBERG: BUSINESSWEEK (Nov. 30, 2022, 12:01 AM), https://www.bloomberg.com/news/features/2022-11-30/is-tiktok-responsible-if-kids-die-doing-dangerous-viral-challenges [https://perma.cc/MNS8-KSCH] (identifying several of the children who have died as a result of the "blackout" trend).

[157] *Id.*

[158] *See id*. (detailing the Italian government's response and requirements following Sicomero's death).

[159] *See* Press Release, BEUC, BEUC Files Complaint Against TikTok for Multiple EU Consumer Law Breaches (Feb. 16, 2021), https://www.beuc.eu/press-releases/beuc-files-complaint-against-tiktok-multiple-eu-consumer-law-breaches [https://perma.cc/W2DP-QYAH].

[160] Carville, *supra* note 168 (discussing the continued deaths of young children due to the TikTok "blackout" challenge).

attempting the TikTok blackout challenge, brought claims of strict product liability against TikTok.[161]

[51]   A thirteen-year-old Black boy's parents also sued after their son died attempting the TikTok Blackout Challenge.[162] Neither court has issued a decision yet. However, there has been a decision issued in a similar case. In *Anderson v. TikTok*, the parents of a ten-year-old Black girl, Nylah Anderson, who died attempting the Blackout challenge, brought design defect and failure to warn claims under strict products liability and negligence theories.[163] The *Anderson* court found that these claims were barred by § 230 of the Communications Decency Act ("CDA").[164]

[52]   The CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." [165] Policymakers worried that crushing civil liability would stunt innovation,[166] so § 230 granted companies entering the young industry immunity "to maintain the robust nature of Internet communication and, accordingly, to

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[161] *Id.*; Complaint at 2, Smith v. TikTok, No. 22-CV-04551 (Cal. App. Dep't Super. Ct. July 4, 2022).

[162] *See* Jessica Barron, *Socorro family files lawsuit after son dies doing TikTok challenge*, KRQE: News (Sep. 27, 2022, 7:42 PM), https://www.krqe.com/news/new-mexico/socorro-family-files-lawsuit-after-son-dies-doing-tiktok-challenge [https://perma.cc/7C4P-BF8U].

[163] Anderson v. TikTok, Civ. No. 22-1849, 2022 U.S. Dist. LEXIS 193841, at *2–3 (E.D. Pa. Oct. 25, 2022).

[164] 47 U.S.C. § 230.

[165] § 230(c)(1).

[166] *See* Jeff Kosseff, The Twenty-Six Words That Created the Internet 9–10 (2019).

keep government interference in the medium to a minimum."[167] Congress created § 230 immunity in the late 1990s during the Dot Com Bubble, a decade before Myspace began the Social Media Age.[168] The policy has not been reevaluated since and *Anderson* demonstrates that in a time when social media and internet platforms are dominant players, § 230 presents obstacles to serious justice and recovery, such as parents attempting to hold platforms responsible for their children's death.

[53]   *Anderson* does not necessarily spell ruin for the parents of other Blackout Challenge victims though. There is a circuit split among the Third, Fifth, and Ninth Circuits regarding the scope of § 230 and social media platforms' algorithmic recommendation systems.[169] In *Lemmon v. Snap Inc.*, the Ninth Circuit found that social media companies may not invoke § 230 immunity when the claims are based on product liability for defective design.[170] The *Lemmon* court held that Snapchat failed to qualify for § 230 immunity because the claim involved the negligent design of Snapchat's "speed filter;" thus, Snapchat's action did not constitute publishing.[171]

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[167] *Anderson*, 2022 U.S. Dist. LEXIS 193841, at *5 (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

[168] *See id.* § 230(c); *see also* Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 46 (2019) ("Founded in 2003, MySpace quickly became an internet darling, especially in the wake of the dot-come bust of 2001.").

[169] *See, e.g.*, *id.* at *4 ("Section 230 precludes Anderson's products liability and negligence claims."); Doe v. Snap, Inc., Civ. No. H-22-00590, 2022 Dist. LEXIS 119560, at *38 (S.D. Tex. July 7, 2022) ("Doe's claims against Snap are barred by the Communications Decency Act."); Lemmon v. Snap, Inc., 995 F.3d 1085, 1093 ("CDA immunity is [] unavailable in this case because the Parents' negligent design claim does not turn on 'information provided by another information content provider.'").

[170] *Lemmon*, 995 F.3d at 1085.

[171] *Id.*

[54]   The *Anderson* court did address the holding in *Lemmon* and found that TikTok's actions related to the Blackout Challenge constituted publishing. Yet, the diverse nature of products liability laws among the states makes the outcome of § 230 platform products liability cases uncertain. For example, a Texas court found a defendant was entitled to § 230 immunity and dismissed a product liability suit against Snapchat, which claimed that the company facilitated sexual abuse of minors by allowing adult users to lie about their age in order to pose as minors.[172] But shortly afterward, an Oregon court denied a similar motion to dismiss by Omegle, an online video chat platform that pairs users with random strangers,[173] because the "[p]laintiff's contention is that the product is designed in a way that connects individuals who should not be connected (minor children and adult men)."[174] Thus, the courts are divided on how to apply § 230 immunity to design defect cases involving social media platforms.[175]

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[172] *See Doe*, 2022 Dist. LEXIS 119560, at *42–43.

[173] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 411 (2017) ("Omegle is, after all, a facilitator of other people's interactions. It creates chat rooms in which anyone can talk about anything.").

[174] A.M v. Omegle.com, LLC, No. 21-cv-01674, 123695 U.S. Dist. LEXIS, at *11 (D. Or. July 13, 2022).

[175] *See* Petition for Writ of Certiorari, Gonzalez v. Google, LLC, No. 21-1333, 2022 WL 1050223 (U.S. Apr. 21, 2022) (describing the circuit split on section 230 immunity for interactive computer service providers, such as Google); Gonzalez v. Google LLC, SCOTUS BLOG, https://www.scotusblog.com/case-files/cases/gonzalez-v-google-llc [https://perma.cc/QAM5-YSJK] ("Whether Section 230(c)(1) of the Communications Decency Act immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider[.]"); Brief for Petitioner, Twitter, Inc. v. Taamneh, No. 21-1496, 2022 WL 17384573 (U.S. Nov. 29, 2022) (describing the question presented of "Whether a defendant that provides generic, widely available services to all its numerous users and 'regularly' works to detect and prevent terrorists from using those services 'knowingly' provided substantial assistance under 18 U.S.C. § 2333 merely because it allegedly could have taken more 'meaningful' or 'aggressive' action to prevent such use.").

[55]   Following the children's deaths, TikTok took preventive measures and removed videos associated with the Blackout Challenge and included a brief safety warning in association with related videos. A search for the "Blackout Challenge" on TikTok now prompts users with a safety warning stating, "Your Safety Matters … Some online challenges can be dangerous, disturbing, or even fabricated. Learn how to recognize harmful challenges so you can protect your health and well-being."[176] The safety measure comes over a year too late for the families who lost their children to the TikTok Blackout Challenge.

[56]   Additionally, the warnings do little to ensure children on the app will not encounter harmful content in the future. For example, another TikTok trend, appeared after the Blackout challenge, in which users pretend to jump off a balcony or stairs. One video shows several minors lying lifeless on the floor after pretending to "jump[] off of a bridge."[177] TikTok indicates that they investigate reports of dangerous online challenges.[178] While there have been efforts to add warning labels to videos that are flagged as dangerous this is retroactive and relies heavily on users reports.[179] Moreover, in the midst of the TikTok Blackout Challenge, TikTok met with providers of facial age-estimation software but ultimately

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[176] *Assess challenges and warnings*, TIKTOK, https://www.tiktok.com/tns-inapp/pages/online-challenges?enter_from=discover_page_banner&container_color_auto_dark=1?lang=en [https://perma.cc/M66F-J4NY].

[177] *See* Maddie Herring (@maddieherring_), *were missing a few but love them to death…literally ;)*, TIKTOK (Dec. 25, 2022), https://www.tiktok.com/@maddieherring_/video/7181263231653055790 [https://perma.cc/Q9H6-QH57].

[178] *Online challenges*, TIKTOK, https://www.tiktok.com/safety/en-us/online-challenges/ [https://perma.cc/69H3-4AUA].

[179] *See Helping Our Community Stay Safe While Having Fun on TikTok*, TIKTOK (Nov. 17, 2021), https://newsroom.tiktok.com/en-africa/tiktok-launches-global-report-into-the-impact-of-potentially-harmful-challenges-and-hoaxes [https://perma.cc/QQW9-NX6W].

refused to adopt this safety measure. [180] Growing support for age verification is evident, as California has passed the California Age-Appropriate Design Code, and other state legislatures are considering requiring platforms to verify users' age.[181] However, Joy Buolamwini's, a digital rights activist, research illuminates the racial bias in facial recognition and its failure to properly detect individuals with darker complexions.[182] Thus, even if TikTok had adopted the facial age-estimation software, the software efficacy on preventing children of color from encountering harmful content is dubious.

[57]   Aside from the Blackout Challenge, TikTok faces several lawsuits from state governments and private citizens alleging that the platform harms children.[183] In one suit, involving the death of a fourteen-year-old Black girl, the deceased's parents' allege that TikTok's algorithm recommends violent videos to minorities. [184] The complaint states that TikTok's

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[180] *See generally* Carville, *supra* note 168 (describing how Facial age-estimation software works by scanning the faces of users for age cues and allows platforms to distinguish between a child and a teenager and how TikTok ultimately decided not to move forward with the technology despite peers', such as Twitter, Instagram and BeReal, use of age-estimation software).

[181] *See* Jenna Zhang, Lindsey Tonsager, Diana Lee, Madeline Salinas & Priya Leeds, *State, Federal, and Global Developments in Children's Privacy, Q1 2023*, Covington (Apr. 2, 2023), https://www.insideprivacy.com/childrens-privacy/state-federal-and-global-developments-in-childrens-privacy-q1-2023/ [https://perma.cc/8Q3X-U4DL] ("requiring social media companies to verify the age of all users to determine which are under eighteen").

[182] Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 Proc. Mach. Learning Rsch. 77, 88 (2018).

[183] *In re* TikTok, Inc., Consumer Priv. Litig., No. 20 C 4699, 2022 U.S. Dist. LEXIS 134177, at *18, *42 (N.D. Ill. Jul. 28, 2022); Complaint at 51, Roberts v. Meta Platforms, Inc., No. 22-CV-04210 (N.D. Cal. Jul. 20, 2022).

[184] Complaint at 2, *Roberts*, No. 22-CV-04210; *see also* Evan Peng, *TikTok Algorithm Pushes Violent Videos to Minorities, Lawsuit Says*, Bloomberg L. (July 20, 2022, 5:07 PM), https://www.bloomberg.com/news/articles/2022-07-20/tiktok-algorithm-pushes-

algorithm "steers more violent videos to minority subscribers than to White users."[185] The claim is confirmed in part by a Center for Countering Digital Hate report.[186] According to the report, TikTok's algorithm presents risks as it recommends harmful content about mental health, body image, eating disorders, and self-harm to young users in their first hours using the app.[187]

[58]   TikTok's algorithm disproportionally harms children. [188] The internal document for non-technical ByteDance employees explains that "in the pursuit of the company's 'ultimate goal' of adding daily active users, [TikTok] has chosen to optimize for two closely related metrics in the stream of videos it serves: 'retention' — that is, whether a user comes back — and 'time spent.'"[189] Additionally, TikTok's internal data revealed that more than a third of TikTok's almost 50 million daily users in the United States were minors.[190] The problem of minors on TikTok is not a new

violent-videos-to-minorities-suit-says [https://perma.cc/F3FR-FWSP] (discussing a lawsuit against TikTok regarding the effects its algorithms have on children).

[185] Complaint at 35, *Roberts*, No. 22-CV-04210.

[186] *See* CTR. FOR COUNTERING DIGITAL HATE, DEADLY BY DESIGN 7 (2022), (describing how TikTok has targeted teens and vulnerable users with more harmful content).

[187] *Id.* at 12.

[188] *See* FTC, SERVING COMMUNITIES OF COLOR: A STAFF REPORT ON THE FEDERAL TRADE COMMISSION'S EFFORTS TO ADDRESS FRAUD AND CONSUMER ISSUES AFFECTING COMMUNITIES OF COLOR 4 (2021) ("Fraud and other unlawful practices can target, or have a disproportionate negative impact on, communities of color.") (hereinafter *Serving Communites of Color*).

[189] Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html [https://perma.cc/B98B-KCWU].

[190] *See* Raymond Zhong & Sheera Frenkel, *A Third of TikTok's U.S. Users May Be 14 or Under, Raising Safety Question*, N.Y. TIMES (Sep. 17, 2020), https://www.nytimes.com/2020/08/14/technology/tiktok-underage-users-ftc.html [https://perma.cc/6QKW-PAQP].

issue.[191] When ByteDance purchased Musical.ly, which they later named TikTok, it was well documented that Musical.ly's user base mainly consisted of children under thirteen.[192] Given this, TikTok's ultimate goal of maximizing time spent on the app without implementing adequate safety measures results in children of color disproportionately encountering harmful content on the application, such as the Blackout Challenge.

[59]   Scholars have observed the discriminatory treatment and impact of social media platforms' moderation methods on users of color. Mary Madden, an expert on privacy and technology, found that foreign-born Latinos "feel exceptionally vulnerable online."[193] Charlton McIlwain, a race and technology scholar, observed that Black and Brown people are the users that accrue the most harm from technology.[194] An FTC report found

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[191] *See* Makena Kelly, *TikTok's parent company sued for collecting data on kids*, THE VERGE (Dec. 4, 2019), https://www.theverge.com/2019/12/4/20995974/bytedance-tiktok-musically-coppa-childrens-privacy-lawsuit-youtube [https://perma.cc/V5QS-8V2G] (explaining that TikTok's parent company had been collecting data from minors since at least 2014).

[192] Complaint at 6, United States v. Musical.ly, No. 19-cv-01439 (C.D. Cal. Mar. 27, 2019); *see* Eva Xiao, *How a Chinese startup won the hearts of American teens*, TECH IN ASIA (Nov. 21, 2016), https://www.techinasia.com/musically-lively-profile [https://perma.cc/4GZX-VR4V] (stating that Musical.ly quickly became popular with North American teens); *See* Biz Carson, *The Inside Story of TikTok*, BUS. INSIDER (May 28, 2016), https://www.businessinsider.com/what-is-musically-2016-5 [https://perma.cc/B5C3-USZA] (describing popular Musical.ly users who were only 13 years old).

[193] *See* MARY MADDEN, PRIVACY, SECURITY, AND DIGITAL INEQUALITY: HOW TECHNOLOGY EXPERIENCES AND RESOURCES VARY BY SOCIOECONOMIC STATUS, RACE, AND ETHNICITY 1 (2017) ("[T]here are significant racial disparities when looking at privacy-related concerns; in particular, foreign- born Hispanic adults stand out for both their privacy sensitivities and their desire to learn more about safeguarding their personal information.").

[194] *See* Charlton McIlwain, *Of course technology perpetuates racism. It was designed that way.*, MIT TECH REV. (June 3, 2020), https://www.technologyreview.com/2020/06/03/

that issues of fraud have a "disproportionately negative impact on communities of color, as compared to White communities."[195]

[60]   Empirical research also demonstrates how social media platforms' algorithms may harm children of color. Children of color, especially lower income children, spend more hours online than their White peers.[196] Studies have found that "more hours spent on social media were related to more depressive symptoms."[197] Additionally, studies have found that online racial discrimination has been associated with mental health problems among adolescents of color, especially Black children.[198] Black children under thirteen have a suicide rate that is nearly twice as high as that of White

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1002589/technology-perpetuates-racism-by-design-simulmatics-charlton-mcilwain/ [https://perma.cc/UKX7-S3BS] (discussing how the coronavirus and police brutality disproportionately harm black and brown people and both are animated by technology).

[195] *Serving Communities of Color*, *supra* note 201, at 1.

[196] Jess Berthold, *Adolescents' Recreational Screen Time Doubled During Pandemic, Affecting Mental Health*, Univ. Cal. S.F. (Nov. 1, 2021), https://www.ucsf.edu/news/ 2021/11/421701/adolescents-recreational-screen-time-doubled-during-pandemic-affecting-mental [https://perma.cc/6JU3-NW4T] ("We generally found higher screen time in Black and Latino/a adolescents and in those from lower-income households[.]") (internal quotes omitted).

[197] Kira E. Riehm et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, 76 JAMA Psychiatry 1266, 1267 (2019).

[198] Xiangyu Tao & Celia B. Fisher, *Exposure to Social Media Racial Discrimination and Mental Health Among Adolescents of Color*, 50 J. Youth & Adolescence 30, 40 (2022) ("The present study provided evidence on the extent to which youth of color are experiencing social media racial discrimination and online activities most associated with those experiences. Most (94%) adolescents in the sample have experienced vicarious social media racial discrimination… Prior research has shown that exposure to racial discrimination during adolescence period led to onset of mental health and substance use problems during young adulthood").

children.[199] Thus, children of color are at a higher risk of encountering harmful content. This is clearly demonstrated by the tragic deaths of children due to the Blackout Challenge.

[61]   The Blackout Challenge is just one example of how TikTok prioritized profits over the safety of children of color. Additionally, the decision in *Anderson* and coming Supreme Court holdings may severely limit the ability of social media users and victims to hold platforms accountable.

A. Discriminatory Exclusion

[62]   In this Section, I describe the discriminatory exclusion experienced by people of color on TikTok. Discriminatory exclusion involves "targeting [] people [of color] for exclusion from beneficial opportunities on the basis of race" and requires "obtaining information identifying a person as [] [a person of color]."[200] The Section describes how social media platforms' unregulated use of recommendation algorithms amplifies existing inequalities to levels that ultimately exclude people of color from the marketplace. I begin by providing a background on the harms of recommendation algorithms and how governments have addressed these harms. Next, I describe how TikTok's recommendation algorithm excludes and suppresses content which results in the discriminatory exclusion of creators of color.

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[199] Jeffrey A. Bridge et al., *Age-Related Racial Disparity in Suicide Rates Among US Youths From 2001 Through 2015*, 172 JAMA Pediatrics 697, 697–98 (2018).

[200] Allen, *supra* note 15, at 921.

1. Background on Government Response to Recommendation Algorithms

[63]   Recommendation algorithms impact almost every aspect of a user's online experience.[201] The algorithms work by collecting users' data and using this data to recommend content that is relevant to the specific user.[202] These algorithms have a broader impact than just determining which products or videos a user sees first, which was the primary effect of prior chronological sorting methods. Scholars have found that recommendation algorithms used on social media play a role in the political radicalization of users.[203] A former Facebook employee testified that recommendation

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[201] *See generally* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 3 (2017) ("We live in the age of the algorithm, and the algorithm knows a lot. With the rise of artificial intelligence, algorithms are bound to improve immeasurably.") (citation omitted); Srinivasan, *supra* note 178, at 42–43 (describing social media platforms use of users' information to sell more impression-targeted ads and more action-based ads).

[202] *See* SUNSTEIN, *supra* note 210, at 3 ("They will learn a great deal about you, and they will know what you want or will like, before you do, and better than you do."); YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 290 (2018) ("What drives us to see content that reinforcers our views were not our own choices, but algorithms that observed us, learned our responses, and fed us more of what increased our engagements.").

[203] *See* Silvia Milano et al., *Recommender Systems and Their Ethical Challenges*, 35 A.I. & SOC'Y 957, 964 ("[R]ecommendation systems . . . can become an arena for targeted political propaganda, as demonstrated by the recent Cambridge Analytical scandal in 2018, and the documented external interference in US political elections in recent years.") (citation omitted); The Backdrop, *Muhammad Haroon on How Social Media Algorithms Can Foster Political Radicalization,* UC DAVIS, at 10:49 (Dec. 13, 2022), https://www.ucdavis.edu/news/podcasts-and-shows/the-backdrop/episode/muhammad-haroon-social-media-algorithms-political-radicalization [https://perma.cc/JQD5-QETZ] ("[T]he issue here is not that these companies are either willingly creating systems that are radicalizing users. It's just how the model of that data-driven machine learning model is that's making these decisions based on what data it has seen coming from other users. That black box nature of the system itself leads to these issues."); BENKLER, ET AL., *supra* note 211, at 10 ("As with the case of the Russians, concern over the Facebook News Feed

algorithms allowed social media platforms to "choose [] what information billions of people see, shaping their perception of reality."[204] As a result, instead of users determining the content they see by following specific accounts and platforms ordering content chronologically, recommendation algorithms now give platforms a more active role in sorting and suggesting videos to users.

[64]   Due to the pervasiveness of algorithms, it is important to account for the inherent bias in them. Algorithmic bias is not a novel issue but government bodies are just now starting to address it.[205] The FTC has worked with healthcare providers to understand the use and impact of algorithms in the healthcare system.[206] Ahead of the Supreme Court's

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algorithm in particular, and over algorithmic shaping of reading and viewing habits in general, is legitimate and serious.").

[204] *Protecting Kids Online: Testimony from a Facebook Whistleblower: Hearing Before the Subcomm. on Consumer Prot. Prod. Safety, & Data Sec. of the S. Comm. on Com., Sci. & Transp.*, 117th Cong. (2021) (statement of Frances Haugen).

[205] Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 158, 161, 186 (2019) (arguing that artificial intelligence confirms rather than addresses existing human biases); *see* ELEC. PRIV. INFO. CTR., DISRUPTING DATA ABUSE: PROTECTING CONSUMERS FROM COMMERCIAL SURVEILLANCE IN THE ONLINE ECOSYSTEM 7 (2022), https://epic.org/wp-content/ uploads/2022/12/EPIC-FTC-commercial-surveillance-ANPRM-comments-Nov2022.pdf [https://perma.cc/QH4U-F7Y4] [hereinafter *Disrupting Data Abuse*] ("The United States faces a data privacy crisis. The lack of comprehensive privacy laws and regulations has allowed abusive data practices to flourish, creating a persistent power imbalance that threatens both individual rights and competition.").

[206] *Serving Communities of Color*, *supra* note 201, at 47–48 ("The FTC is committed to serving communities of color through vigorous law enforcement actions, meaningful community engagement and dialogue, and the pursuit of insightful research."); *see also* Elisa Jillson, *Aiming for truth, fairness, and equity in your company's use of AI*, FTC: BUS. BLOG (April 19, 2021), https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai [https://perma.cc/W2ZA-49T5] (describing how the FTC prohibits unfair or deceptive practices, including use of "racially biased algorithms"); ZIAD OBERMEYER ET AL., ALGORITHMIC BIAS PLAYBOOK 1 (2021), https://www.chicagobooth.edu/-

Gonzalez decision, the Biden administration urged the Court that § 230 should not immunize social media platforms from liability for recommendation algorithms.[207] The Department of Justice brought a case against Meta challenging algorithmic bias under the Fair Housing Act.[208] Congress passed the "No TikTok on Government Devices Act," which "prohibit[s] certain individuals from downloading or using TikTok on any device issued by the United States or a government corporation."[209]

[65]   Governments have proposed legislation to regulate the influential societal role played by recommendation algorithms. However, their success has been varying. The U.S. attempted to pass the Filter Bubble Transparency Act (FBTA) but the bill ultimately failed.[210] The FBTA was first introduced in 2019 by Senators Mark Warner and John Thune,[211] and a

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/media/project/chicago-booth/centers/caai/docs/algorithmic-bias-playbook-june-2021.pdf [https://perma.cc/52VW-NKZ6].

[207] *See* Brief for the United States as Amicus Curiae in Support of Vacatur at 12, Gonzalez v. Google, LLC, 143 S. Ct. 80 (2022) (No. 21-1333), 2022 U.S. LEXIS 3842 [hereinafter Biden Administration Gonzalez Brief] ("Properly construed, Section 230(c)(1) protects YouTube from asserting ATA liability for hosting or failing to remove ISIS-related content, but not for claims based on YouTube's own conduct in designing and implementing its targeted-recommendation algorithms.").

[208] Press Release, Dep't of Just., Off. of Pub. Aff., Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising (June 21, 2023) [hereinafter Groundbreaking Settlement], https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-formerly-known [https://perma.cc/QTV5-W96N] (stating that the Department of Justice alleged that Meta used its advertising tools to find users who "look like" an advertiser's desired audience).

[209] No TikTok on Government Devices Act, S. 1143, 117th Cong. (2022).

[210] *See* Filter Bubble Transparency Act, S. 2763, 116th Cong. (2019).

[211] *Id.*

bipartisan group of Senators reintroduced the bill in 2021.[212] The FBTA would have "require[d] that internet platforms give users the option to engage with a platform without being manipulated by algorithms driven by user-specific data."[213] These requirements would have been limited to large internet platforms with "more than 1 million users and gross more than $50 million per year."[214]

[66]   The controversial bill was never adopted. Critics found that the FBTA failed to adequately address the issues of "opaque algorithms," which are algorithms that are not understandable to the users affected by them.[215] The FBTA did not require platforms to reveal the details of their algorithms or effectively prevent the use of "manipulative" practices. Social media platforms could still train their algorithms with a user's list of friends, video channel subscriptions, or other willingly provided preferences.[216]

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[212] Filter Bubble Transparency Act, S. 2024, 117th Cong. (2021).

[213] *Id.*

[214] *Id.* ("Such term shall not include a platform that— is wholly owned, controlled, and operated by a person that— for the most recent 6-month period, did not employ more than 500 employees; for the most recent 3-year period, averaged less than $50,000,000 in annual gross receipts; and collects or processes on an annual basis the personal data of less than 1,000,000 individuals"); Press Release, John Thune, U.S. Senator for South Dakota, Thune, Colleagues Reintroduce Bipartisan Bill to Increase Internet Platform Transparency (June 10, 2021), https://www.thune.senate.gov/public/index.cfm/press-releases?ID=0CA78D6E-C0A8-4BDB-9AA9-1900238810E5 [https://perma.cc/554K-B52W].

[215] *See* Tabrez Y. Ebrahim, *Algorithms in Business, Merchant-Consumer Interactions, & Regulation*, 123 W. VA. L. REV. 873, 902 (2021) ("Another perspective, considering the use of algorithms as a blanket term since all digital search and recommendation systems employ such algorithms, argued that disclosing some aspects of algorithms would not reveal micro-targeting or data mining."); Alex Reinauer, *Ten Terrible Tech Bills from the 117th Congress: Filter Bubble Transparency Act*, COMPETITIVE ENTER. INST. (May 11, 2022), https://cei.org/blog/ten-terrible-tech-bills-from-the-117th-congress-filter-bubble-transparency-act [https://perma.cc/K8F9-PRLJ].

[216] *See* Adi Robertson, *The Senate's secret algorithms bill doesn't actually fight secret algorithms*, THE VERGE (Nov. 5, 2019, 9:01 AM),

[67]   Additionally, it is also unclear if the FBTA would have survived judicial review. In *NetChoice v. Paxton*, the Fifth Circuit struck down Texas House Bill 20 ("HB 20"), which aimed to regulate social media platforms' ability to censor user-generated content by requiring algorithmic moderation disclosures.[217] Algorithms and content moderation practices are generally considered trade secrets.[218] § 2 of HB 20 would have required social media platforms to meet "disclosure and operational requirements."[219] The court ultimately found that HB 20's constraints on social media platforms violated the First Amendment.[220] The court stated that § 2 was "replete with constitutional defects" and contained "onerously burdensome disclosure and operational requirements."[221] Given that the FBTA also involves the disclosure of a platforms' algorithms, it may be argued that it too violates platforms' First Amendment rights.

[68]   China passed the Internet Information Service Algorithmic Recommendation Management Provisions, which took effect in 2022 and aims to regulate the role recommendation algorithms play in disseminating information by requiring the registration of recommendation algorithms.[222]

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https://www.theverge.com/2019/11/5/20943634/senate-filter-bubble-transparency-act-algorithm-personalization-targeting-bill [https://perma.cc/G965-YN6J] ("The bill also allows personalization based on users' friends lists, video channel subscriptions, or other knowingly provided preferences, which would allow for pretty significant echo chamber. As for 'analytics,' the bill doesn't say anything about whether companies are allowed to mine personal data for purposes like secret consumer scores.").

[217] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1099 (W.D. Tex. 2021).

[218] Lothar Determann, *Social Media Privacy: A Dozen Myths and Facts*, 2012 STAN. TECH. L. REV. 7, 3 (2012).

[219] TEX. BUS. & COM. CODE ANN. § 120.051 (West, Westlaw through 2021 Reg. Sess.).

[220] *NetChoice, L.L.C.*, 573 F. Supp. 3d at 1092.

[221] *Id.* at 1116.

[222] *See* Hulianwang Xinxi Fuwu Suanfa Tuijian Guanli Guiding (互联网信息服务算法推荐管理规定) [Internet Information Service Algorithmic Recommendation

The purpose of the provision is to "[illuminate] algorithmic recommendation activities, safeguard national security and the social and public interest, protect the lawful rights and interests of citizens, legal persons, and other organizations."[223] Notably, compliance with China's regulation requires platforms to disclose the relevant rules for algorithm recommendation services and allow users to opt-out.[224]

[69]   Similarly, the EU proposed The Digital Services Act ("DSA") in 2022.[225] Before the passage of the DSA, the Internal Market and Consumer Protection Committee's[226] key demands included a requirement that social media platforms allow users to opt-out of recommendation algorithms that use their personal data.[227] However, the final draft of the DSA only requires

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Management Provisions] (promulgated by the St. Cyberspace Admin., Dec. 31, 2021, effective Mar. 1, 2022) art. 1, 15, https://digichina.stanford.edu/work/translation-internet-information-service-algorithmic-recommendation-management-provisions-opinon-seeking-draft/ [https://perma.cc/TU8Q-HM9N].

[223] *Id.* at art. 1.

[224] *See* Arjun Kharpal, *Chinese tech giants share details of their prized algorithms with top regulator in unprecedented move*, CNBC (Aug. 15, 2022, 8:25 AM), https://www.cnbc.com/2022/08/15/chinese-tech-giants-share-details-of-their-algorithms-with-regulators.html [https://perma.cc/UYH7-FWW3].

[225] *See* Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1.

[226] This committee is broadly responsible for coordination at Union level of national legislation in the sphere of the internal market and for the customs union. EUR. PARL., EUROPEAN PARLIAMENT RULES OF PROCEDURE 158–59 (2021), https://www.europarl.europa.eu/doceo/document/RULES-9-2021-01-18_EN.pdf [https://perma.cc/Q6H3-9YT4].

[227] *See* Press Release, European Parliament, MEPs spell out their priorities for the Digital Services Act (Sep. 28, 2020), https://www.europarl.europa.eu/news/en/press-room/20200925IPR87924/meps-spell-out-their-priorities-for-the-digital-services-act [https://perma.cc/R6H2-S942] ("The DSA should guarantee the consumer's right to be

that social media platforms comply with transparency measures, which entail "clearly present[ing] the parameters for such recommender systems in an easily comprehensible manner to ensure that the recipients of the service understand how information is prioritized for them."[228]

[70]   In summary, the widespread use and impact of recommendation algorithms has attracted global attention from governments. China requires the disclosure of the algorithm's relevant rules and allows users to opt-out and the EU requires compliance with transparency measures. However, the U.S. has failed to pass an algorithm transparency bill, and no branch of government has yet addressed these issues effectively. The AI Bill of Rights proposed by the Biden Administration does not effectively address the issue of transparency, as it lacks legal enforceability and provides limited guidance on how to address the issue in practice.[229] As scholars have noted, algorithms "often have disproportionate effects on minorities."[230] Given the impact and wide-spread adoption of recommendation algorithms, it is worth examining their use on TikTok and the impact on people of color.

2. Algorithm Exclusion and Suppression

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informed if a service is enabled by AI, makes use of automated decision-making or machine learning tools or automated content recognition tools, as well as their right to redress. They should be able to opt out and be given more control of the way content is ranked.").

[228] Regulation 2022/2065, *supra* note 238, at 70.

[229] *See* BLUEPRINT FOR AN AI BILL OF RIGHTS MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE, THE WHITE HOUSE (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [https://perma.cc/QFC9-Y5LM].

[230] Citron & Solove, *supra* note 10, at 857; Allen, *supra* note 15, at 914 ("Structural racism renders African Americans especially vulnerable to disparities and disadvantages online. Highlighting the problem of algorithmic bias, Dominique Harrison asserted that 'Black and Brown people are stripped of equitable opportunities in housing, schools, loans, and employment because of biased data.'") (citations omitted).

[71]   Despite the abundance of data available on social media platforms and their significant influence on our daily lives, little is known about the platforms' algorithms.[231] As mentioned, the U.S. failed to pass legislation that would require social media platforms to disclose some of this information. Consequently, the closely guarded nature of proprietary algorithms makes it difficult to understand the full extent of the algorithms impact on users' activity and TikTok is no exception. Despite the scarcity of information available, the examples provided below illustrate how algorithms perpetuate discrimination against people of color.

[72]   Knowledge of TikTok's recommendation algorithm is limited to what TikTok has publicly disclosed. In one statement, TikTok explained that their recommendation algorithm takes the following factors into account: "user interactions such as the videos you like or share, accounts you follow, comments you post, and content you create; video information, which might include details like captions, sounds, and hashtags; [and] device and account settings like your language preference, country setting, and device type."[232] These are active behaviors. TikTok also considers passive user activity, such as the time a user spends watching a video.[233] However, the extent to which TikTok relies on these passive user behaviors is unclear.

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[231] *See* Bustamante, *supra* note 21, at 16 ("Reports reveal that social media platforms can affect real-world behavior on a large scale, from purchasing trends and voter and protest turnout, to treatment of minorities and pandemic response.").

[232] *How TikTok Recommends Videos #ForYou*, *supra* note 85.

[233] *Id.* ("A strong indicator of interest, such as whether a user finishes watching a longer video from beginning to end, would receive greater weight than a weak indicator, such as whether the video's viewer and creator are both in the same country.").

[73]   Marc Faddoul, an AI researcher at U.C. Berkeley, found that TikTok's account recommendations were racially biased.[234] Users received suggestions to follow creators with profile pictures that matched the same race, age, and facial characteristics as the accounts the user already followed.[235] Although TikTok denied that profile pictures are used in the recommendation algorithm, others were able to replicate Faddoul's findings.[236]

[74]   BookTok presents a clearer example of how the recommendation algorithm compounds and expands an industry's existing racial inequalities. BookTok, which is the nickname for a subset of TikTok that features creators reviewing and recommending books to their followers, has catapulted several authors to the top of the New York Times bestsellers list.[237] However, every author is white.[238]

[75]   Black creators have suggested that authors of color are excluded from BookTok because the TikTok algorithm prioritizes White creators' content.[239] This alleged bias or White preference is theorized to result in greater visibility and reach for videos created by White creators that

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[234] *Algorithmic Transparency, and Marc Faddoul's Very Good Year*, BERKELEY SCH. OF INFO. (Jan 19, 2021), https://www.ischool.berkeley.edu/news/2021/algorithmic-transparency-and-marc-faddouls-very-good-year [https://perma.cc/W7JM-9JGB].

[235] For example, if a user follows a creator who wears a hijab in their TikTok profile picture, then TikTok will recommend other accounts with hijabs in their profile picture. *See id.*

[236] *See id.*

[237] *See* Tyler McCall, *BookTok's Racial Bias*, THE CUT (Nov. 18, 2022), https://www.thecut.com/2022/11/booktok-racial-bias-tiktok-algorithm.html [https://perma.cc/5E6Z-V6P9].

[238] *See id.*

[239] *Id.*

recommend White authors, while videos created by creators of color that recommend authors of color are suppressed and have limited visibility and reach. The scarcity of research and data on TikTok makes it difficult to conclude that this theory of algorithmic bias is the sole reason for authors of colors' exclusion from BookTok.

[76]   Despite the limited data, BookTok illustrates how TikTok's recommendation algorithm, which is influenced by both technology and human factors, exacerbates existing bias. BookTok demonstrates why an intersectional approach to algorithmic creation is necessary. [240] The publishing industry already perpetuates racial bias. [241] However, in the absence of the biases included in TikTok's algorithm, one would expect at least a few authors of colors to gain success from BookTok.[242] Yet the reality is that TikTok's recommendation algorithm expanded the publishing industry's human biases to a level that completely excluded people of color.

[77]   Creators of color outside of BookTok have also cited visibility concerns.[243] Social media algorithms' White preference and bias is a well-

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[240] *See* Allen, *supra* note 15, at 910 ("The new generation of laws would ideally include provisions specifically geared toward combatting privacy- and data-protection-related racial inequalities enabled by online platforms."); Ruha Benjamin, Race After Technology: Abolitionist Tools For The New Jim Code 1 (2019) (describing how new technologies perpetuate offline inequalities through biased code).

[241] *See WHERE IS THE DIVERSITY IN PUBLISHING? THE 2019 DIVERSITY BASELINE SURVEY RESULTS*, Lee & Low Books (Jan. 28, 2020), https://blog.leeandlow.com/2020/01/28/2019diversitybaselinesurvey/ [https://perma.cc/U7GK-4DUD].

[242] *See* McCall, *supra* note 250.

[243] *See* Brooke Erin Duffy & Colten Meisner, *Platform Governance at the Margins*: Social Media Creators' Experiences with Algorithmic (In)visibility, 45 Media, Culture & Soc'y 285, 295 (2022) ("[P]articipants alleged that those working for platform companies exhibited racist attitudes that structured who gets seen – and how."); Daniela Jaramillo-Dent et al., *Immigrant Influencers on TikTok: Diverse Microcelebrity Profiles and Algorithmic (In)Visibility*, 10 Media & Commc'n 208, 215.

documented issue. A report by the Electronic Privacy Information Center ("EPIC") found that algorithms perpetuate "racial biases in ways that disproportionately subject Black users to greater scrutiny, restrict their ability to participate in moderated spaces, and limit their creative expression." [244] A Harvard Kennedy School report found that recommendation algorithms may "reduce the recommendation (and visibility) of content created by women and ethnic minorities or disproportionately penalize certain groups in algorithmic detection and demotion of harmful content."[245]

[78]   An internal Twitter study found that the platform's face cropping algorithm favored White faces and was more likely to show the face of a White person over a Black person.[246] Recommendation algorithms' racially blind moderation results in discriminatory effects and denies people of color equal access to services and opportunities.[247]

[79]   Given TikTok's intellectual property and surrounding corporate secrecy laws, it is unlikely that the inner workings of TikTok's algorithm will ever be fully known. Nevertheless, the vast amount of research on algorithmic bias, combined with the experiences reported by creators, supports the conclusion that TikTok's algorithm disproportionately excludes people of color from visibility and reach on the platform.[248]

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[244] *Disrupting Data Abuse*, *supra* note 218, at 73.

[245] *See* Bustamante, *supra* note 21, at 18.

[246] Rumman Chowdhury, *Sharing learnings about our image cropping algorithm*, TWITTER: ENGINEERING (May 19, 2021), https://blog.twitter.com/engineering/en_us/topics/insights/2021/sharing-learnings-about-our-image-cropping-algorithm [https://perma.cc/SXA7-G3Q3].

[247] Allen, *supra* note 15, at 932; Citron & Solove, *supra* note 10, at 857 ("Algorithms that appear neutral often have disproportionate effects on minorities.").

[248] *See, e.g.*, Citron & Solove, *supra* note 10, at 857 n.402 ("There is a wealth of scholarship and research exploring the discriminatory impacts of algorithmic decision-making in the commercial sector.")

[80]   The most explicit evidence of TikTok's algorithmic bias comes from a 2019 investigation which found that TikTok suppressed videos from disabled, queer, and conventionally unattractive creators citing cyberbullying concerns.[249] TikTok admitted to the suppression, claiming the policy aimed to protect users at "high risk" for bullying.[250] The platform's privacy policy states that it collects data on image and audio information to identify objects and individuals in the videos uploaded to TikTok.[251] The videos uploaded by these creators did not violate TikTok's Community Guidelines, and although the creators agreed to have their data collected, they did not consent to having their data used to suppress their own content.[252]

[81]   Moreover, TikTok's algorithmic recommendations are not the only issue TikTok's algorithm presents. In 2021, a Black TikTok creator identified a problem he found in the app's Creator Marketplace, which

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[249] *See* Vijay & Gekker, *supra* note 32, at 713 ("An investigation of TikTok moderation by *The Intercept* has shown a range of 'undesirable' content bordering on the Kafkaesque, from merely mentioning a public official to censoring 'ugly' users.").

[250] *See* Markus Reuter & Chris Kover, *Cheerfulness and censorship*, NETZPOLITIK (Nov. 23, 2019), https://netzpolitik.org/2019/cheerfulness-and-censorship [https://perma.cc/UPN9-H2EX] (discussing how TikTok's moderation policies selectively limited the reach of users' content that did not violate the platform's Terms of Service).

[251] *Privacy Policy*, TIKTOK (Jan. 1, 2023) [hereinafter *TikTok Privacy Policy*], https://www.tiktok.com/legal/page/us/privacy-policy/en [https://perma.cc/E9DQ-BTDH] ("We may collect information about the videos, images and audio that are a part of your User Content, such as identifying the objects and scenery[.]").

[252] *See* Umberto Bacchi, *TikTok Apologises for Censoring LGBT+ Content*, REUTERS (Sep. 22, 2020), https://www.reuters.com/article/britain-tech-lgbt/tiktok-apologises-for-censoring-lgbt-content-idUSL5N2GJ459 [https://perma.cc/6TBM-ECK6] ("Bertram [TikTok's director of public policy in Europe the Middle East and Africa] said viewership of some LGBT+ videos, as well as posts from disabled or plus size users, was deliberately limited in a bid to reduce bullying on the platform.").

allows creators to create a profile and match with brands.[253] The Black creator found that the TikTok Marketplace did not allow him to include "Black Lives Matter" (BLM) or "supporting Black excellence" in his profile but "White supremacy" and "supporting White excellence" were permitted.[254] TikTok stated that the issue resulted from an error with its algorithmic hate speech detection system.[255] Issues of algorithms censoring the speech of people of color is present on other social media platforms.[256] Similarly, an alleged error made it so BLM and George Floyd hashtags on TikTok were showing up as having zero views.[257]

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[253] *See* Abby Ohlheiser, *How aspiring influencers are forced to fight the algorithm*, MIT TECH. REV. (July 14, 2022), https://www.technologyreview.com/2022/07/14/1055906/tiktok-influencers-moderation-bias/ [https://perma.cc/B6C5-EP5B].

[254] *Id.*

[255] *See* Shirin Ghaffary, *How TikTok's hate speech detection tool set off a debate about racial bias on the app*, VOX (July 7, 2021, 8:24 PM), https://www.vox.com/recode/2021/7/7/22566017/tiktok-black-creators-ziggi-tyler-debate-about-black-lives-matter-racial-bias-social-media [https://perma.cc/YR3W-ZTCB] ("These issues also connect to another criticism that's been leveled at TikTok, Instagram, YouTube, and other social media platforms over the years: That their algorithms, which recommend and filter the posts everyone sees, often have inherent racial and gender biases.").

[256] Maarteen Sap et al., *The Risk of Racial Bias in Hate Speech Detection*, *in* PROC. OF THE 57TH ANN. MEETING OF THE ASS'N FOR COMPUTATIONAL LINGUISTICS 1668, 1668 (2019) (finding that other algorithms processing hate speech were one-and-a-half times more likely to flag tweets as offensive or hateful when they were written by African Americans).

[257] Todd Spangler, *TikTok Blames 'Technical Glitch' for Suppressing View Counts on #BlackLivesMatter, #GeorgeFloyd Videos*, VARIETY (June 2, 2020, 4:55 AM), https://variety.com/2020/digital/news/tiktok-suppressed-view-counts-blacklivesmatter-georgefloyd-videos-1234622975 [https://perma.cc/M8BJ-AHFP].

[82]   In another example, TikTok removed the videos of users talking critically about the Chinese government.[258] Feroza Aziz, a teenager of Afghani descent, created a makeup tutorial video.[259] While doing her makeup, Aziz discussed the treatment of the Uyghurs in China.[260] Although Aziz's video did not violate any of TikTok's Community Guidelines,[261] TikTok removed her videos and blocked her account.[262] TikTok later issued an apology, stating that the removal of the video was due to a mistake made by a human moderator.[263] However, other TikTok users also reported that their content related to Chinese politics and the treatment of minority groups in China was also censored.[264] These examples demonstrate that TikTok

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[258] H.R. Doc. No. 116-148, at 1 (2020) ("Tiktok [] censors content that the Chinese Communist Party deems politically sensitive, such as content concerning protests in Hong Kong and China's treatment of Uyghurs and other Muslim minorities."); *see* Hong Kong Free Press, *Teen embeds message about Xinjiang Uyghurs in TikTok make-up vid*, YouTube (Nov. 27, 2019), https://www.youtube.com/watch?v=6E5nLp9_LKs [https://perma.cc/ZLH9-JCXP]; Brenda Goh, *TikTok apologizes for temporary removal of video on Muslims in China*, Reuters (Nov. 27, 2019, 11:28 PM), https://www.reuters.com/article/us-bytedance-tiktok-xinjiang/tiktok-apologizes-for-temporary-removal-of-video-on-muslims-in-china-idUSKBN1Y209E [https://perma.cc/5SYD-A4HC].

[259] *See* @ferorzaaziz, *Why won't anyone talk about this??? #fyp #foryoupage #for you #4u #muslim*, TikTok (Nov. 11, 2023) [hereinafter Ferozaaziz], https://www.tiktok.com/@ferozaaziz/video/6762657542972689670?is_from_webapp=1 &sender_device=pc&web_id=7202711917664192046 [https://perma.cc/9PTR-KX96].

[260] *Id.*

[261] *See generally Community Guidelines*, TikTok (Oct. 2022), https://www.tiktok.com/community-guidelines?lang=en [https://perma.cc/GY2J-9N2A] (stating TikTok's Community Guidelines).

[262] *See* Goh, *supra* note 271.

[263] *Id.*

[264] Alex Hern, *Revealed: how TikTok censors videos that do not please Beijing*, The Guardian (Sep. 25, 2019, 12:00 AM), https://www.theguardian.com/technology/2019/

could censor content disfavored by the Chinese government and that such biases may result from algorithmic and human systems.

[83]   In summary, while the total extent of the issue is not fully understood due to a lack of transparency surrounding social media algorithms, evidence of discriminatory exclusion and suppression exist. TikTok's algorithm has been shown to perpetuate and amplify existing biases, as seen in the BookTok example, where the algorithm excluded authors of color from publishing opportunities. Creators of color have also reported concerns about visibility on the platform. Other examples of "glitches" and "errors" on the app highlight how TikTok has excluded political content uplifting minority groups.[265]

[84]   TikTok's discriminatory exclusion is facilitated by the platform's unregulated use of recommendation algorithms. Other governments have recognized this harm and are taking steps to address the effects of social media platforms' use of recommendation algorithms. Although branches of the U.S. government have taken steps to address the lack of transparency in

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sep/25/revealed-how-tiktok-censors-videos-that-do-not-please-beijing [https://perma.cc/8RN5-HVNR] ("A ban on criticism of China's socialist system, for instance, comes under a general ban of 'criticism/attack towards policies, social rules of any country, such as constitutional monarchy, monarchy, parliamentary system, separation of powers, socialism system, etc.'"); Isabelle Sacks, *What do we actually know about TikTok's algorithm?*, FASHION J. (June 22, 2020), https://fashionjournal.com.au/ life/what-do-we-actually-know-about-tiktoks-algorithm/ [https://perma.cc/LLU9-BVHD] ("TikTok says it was a human moderation error, but there have been similar reports of TikTok censoring content related to other Chinese political issues, including references to Tiananmen Square, Tibetan independence, the Hong Kong protests, and the treatment of other Chinese minority groups.").

[265] Jaramillo-Dent et al., *supra* note 256, at 210 ("In response to censorship and moderation issues that disproportionally affect minority creators, TikTok has justified them as algorithmic glitches and errors. Meanwhile, minority creators have also pointed to problematic differences that allow phrases such as 'I am a neo nazi' to be accepted and 'Supporting Black voices' to be flagged as inappropriate.") (citation omitted).

algorithms,[266] these efforts fail to address and prevent discriminatory harm on social media platforms.

IV. RECOMMENDATIONS

[85]   Given the increasing popularity of TikTok's business model and the growing reliance on algorithms in daily life, it is important to consider the impact of social media platforms on people of color. TikTok and other social media platforms must address these issues to create a more inclusive and equitable environment for all users. In this Section, I offer suggestions for addressing discriminatory predation and discriminatory exclusion on social media platforms.

A. Recommendations for Addressing Discriminatory Predation

[86]   In Part III, I distinguish between platform predation and private predation. Here, I recommend solutions that platforms and government bodies can implement to curb the effects of such predation.

[87]   Discriminatory platform predation may be restricted through courts' limited reading of social media platforms' terms of service.[267] Terms of service come in three forms: shrinkwrap agreements, browsewrap

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[266] Jillson, *supra* note 215 (highlighting the FTC's commitment to address the issue of discriminatory algorithms); Biden Administration Gonzalez Brief, *supra* note 220 (urging the Supreme Court to find platforms liable for the use of recommendation algorithms); Groundbreaking Settlement, *supra* note 221 (outlining the Justice Department's case challenging algorithmic bias under the Fair Housing Act against Meta (formerly Facebook)).

[267] *See, e.g.*, *Terms of Service*, FACEBOOK, https://www.facebook.com/legal/terms [https://perma.cc/FV2C-XFD2]; *see also* Clifford Fisher et al., *Evolution of Clickwrap & Browsewrap Contracts*, 48 RUTGERS COMPUT. & TECH. L.J. 147, 154–55 (2022) (describing social media platforms use of browsewrap agreements); *see also* Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36 CAMPBELL L. REV. 31, 35–36 (2013).

agreements, and clickwrap agreements.[268] However, the two main forms of agreements used by platforms are clickwrap agreements and browsewrap agreements. Courts have upheld both browsewrap and clickwrap agreements, but clickwrap agreements' consent requirement makes them easier to uphold.[269]

[88]   To provide legal remedies to individuals who may experience private predation, courts may limit or invalidate social media platforms' use of these agreements to obtain non-exclusive licenses to users' content. The *Morel* court already limited the reach of Twitter's Terms of Service by holding that it did not grant Twitter users a license to use other users' photographs.[270] However, as previously noted, the *Morel* court held this because the express language of Twitter's Terms of Service did "not meet that standard" to establish that the defendants had a license to use the plaintiff's photos.[271] Instagram's Terms of Service may also not meet the standard as it does not explicitly grant "other users" a license.[272] TikTok's Terms of Service, however, explicitly grant users a non-exclusive license.[273]

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[268] *See* Robert Terenzi, Jr., *Friending Privacy: Toward Self-Regulation of Second Generation Social Networks*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1049, 1076 (2010) (citing Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 (2006)).

[269] *See* Fisher et al., *supra* note 280, at 151–52; Terenzi, *supra* note 281, at 1079 ("Clickwrap agreements are the most widely used type of electronic terms of use agreements and the most consistently upheld as enforceable by courts.").

[270] Agence Fr. Presse v. Morel, 769 F. Supp. 2d 295, 303 (S.D.N.Y. 2011).

[271] *Id.*

[272] *See Terms of Use*, INSTAGRAM: HELP CENTER, https://help.instagram.com/581066165581870 [https://perma.cc/R549-D3GV] ("When you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings.").

[273] *See Terms of Service*, *supra* note 97.

Courts' limitation of social media platform's ability to grant other users non-exclusive licenses through their Terms of Service would reduce the cases of private predation on social media platforms.

[89]   Additionally, to address platform predation, policymakers should pass legislation that requires social media platforms with known minor users to implement preventative safety measures to protect children of color from harmful content. As previously discussed in Part II, all children are at risk of encountering harmful content online; however, children of color may be at an even greater risk, as they spend more time online compared to their White peers.[274] Most social media platforms already have moderation policies that remove content inconsistent with its Community Guidelines and allows individual users to report harmful content.[275] However, these methods fail to offer preventive solutions that block children from encountering harmful content.

[90]   The Children's Online Privacy Protection Act (COPPA) is a law which seeks to fulfill these aims but it is insufficient in limiting platform predation.[276] Over the past decade, several social media platforms,

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[274] *See supra* Part III(A)(2).

[275] *See, e.g.*, Nathaniel Gleicher, *Removing New Types of Harmful Networks*, META (Sept. 16, 2021), https://about.fb.com/news/2021/09/removing-new-types-of-harmful-networks/ [https://perma.cc/3895-TYUT] ("We already remove violating content and accounts under our Community Standards, including for incitement to violence; bullying or harassment; or harmful health information."); *How We Address Potentially Harmful Content on Feed and Stories*, INSTAGRAM (Jan. 20, 2022), https://about.instagram.com/blog/announcements/how-we-address-harmful-content-on-feed [https://perma.cc/8MMC-WMEJ] ("[W]e only remove posts that break our rules and we tell people if their post has been removed."); *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/7S5W-AZZY] ("We [may] . . . remove Tweets disseminating manifestos or other content produced by perpetrators.").

[276] Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501, 6502 (1998) (requiring operators of commercial websites and other online services to obtain parental consent before collecting the data of users under the age of 13); *see Children's Privacy*, ELEC. PRIV. INFO. CTR., https://epic.org/issues/data-protection/childrens-privacy/ [https://perma.cc/Z4Y4-C3GU] ("The Act does not apply to general audience websites;

including TikTok, have violated COPPA.[277] Policymakers have responded with a bipartisan effort to expand COPPA protections through the Kids Online Safety Act ("KOSA") and the Children and Teens' Online Privacy Protection Act ("CTOPPA"). [278] KOSA aims to expand child privacy protections by requiring tech companies to offer easy-to-use safeguards to control the experience and personal data of minors online.[279] CTOPPA would amend COPPA by extending protection to all children under the age of sixteen, limiting the collection of minors' data, restricting targeted marketing, and requiring privacy dashboards for connected devices.[280] Additionally, CTOPPA addresses the issue of age verification by shifting the burden from an actual knowledge standard to a constructive knowledge standard. [281] Under the constructive knowledge standard, a platform may be held liable, despite not having actual knowledge, if they should have been suspicious of the user as a minor. [282] The constitutionality

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however, operators of such sites, who have specific sections for children or action knowledge of children using their site, must follow COPPA regulations.").

[277] *See generally* Press Release, FTC, Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law (Sep. 4, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law [https://perma.cc/6N9F-4XG7]; Press Release, FTC, Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law (Feb. 27, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc-allegations-it-violated-childrens-privacy [https://perma.cc/5NDT-B4J7].

[278] *See* Kids Online Safety Act, S. 3663, 117th Cong. (2022); Children and Teens' Online Privacy Protection Act, S.1628, 117th Cong. (2022).

[279] *See* S. 3663, *supra* note 292.

[280] S.1628, *supra* note 292.

[281] *Id.*

[282] *See* Victor Galson, *The Constructive Knowledge Standard of Command Responsibility*, 7 DARTMOUTH L.J. 223, 225 (2009) ("The concept of constructive knowledge, first introduced to command responsibility in the Tokyo Tribunals following

of the age verification requirement is unclear.[283] The proposed legislation is a step in the right direction, but as noted by the Electronic Privacy Information Center, it forces platforms to "over censor" young people and may censor the content of all users rather than parse through what users the Acts apply to.[284]

[91]   Another approach to address platform predation involves limiting the scope of § 230 immunity. Agnieszka McPeak, a legal scholar specializing in technology, borrows from tort law [285] and argues that "section 230 has gone too far in insulating platforms that actively engage in something resembling a joint enterprise with third parties."[286] McPeak suggests limiting § 230 based on the economic relationship between platforms and specific users.[287] Accordingly, McPeak's Joint

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World War II, implies that the commander may have had no actual knowledge of the commission of a war crime, but nevertheless should have been suspicious of criminal activity.").

[283] *See generally* NetChoice, LLC v. Bonta, No. 22-cv-08861 (N.D. Cal. Dec. 14, 2022) ("AB 2273 is facially unconstitutional on at least four grounds and is preempted by two federal statutes[.]"); Assemb. B. 2273, 2021–2022 Reg. Sess. (Cal. 2022) (stating it requires companies that offer digital products likely to be used by people under eighteen to estimate the age of a child user with a "reasonable level of certainty" going beyond the constructive knowledge standard under CTOPPA).

[284] *See* Jason Kelley & Aaron Mackey, *Dangerous "Kids Online Safety Act" Does Not Belong in Must-Pass Legislation*, ELEC. FRONTIER FOUND. (Dec. 15, 2022), https://www.eff.org/deeplinks/2022/12/dangerous-kids-online-safety-act-does-not-belong-must-pass-legislation [https://perma.cc/SGR4-SDEH].

[285] *See generally* RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (AM. L. INST. 1965) (finding that two entities are engaged in a joint enterprise if the following elements are satisfied: an agreement, a common purpose, a pecuniary interest or motive, and a shared right of control).

[286] *See* Agnieszka McPeak, *Platform Immunity Redefined*, 62 WM. & MARY L. REV. 1557, 1564 (2021).

[287] *Id.*

Venture approach to § 230 considers a platform's economic activity and involvement in transactions before granting it immunity.

[92] McPeak presents Uber and the platform's relationship with drivers as an example of a joint venture, because the driver and platform both gain monetarily.[288] Applying the approach to the social media context, a platform's algorithmic filtering and removal of content may not constitute a joint venture but a platform's paid program, such as TikTok's Creator Fund,[289] does create a relationship between the platform and influencers that resembles a joint venture.[290] Thus, under McPeak's approach, an influencer's relationship with a platform may give rise in a joint enterprise. McPeak's approach, while useful, has not been adopted by legislation or the courts and does not provide a comprehensive solution to platform predation and should be considered as one part of a multi-faceted approach.

[93] Discriminatory predation may also be addressed through private sector initiatives. There has already been a cultural shift where creators attempt to credit the originators of trends and dances.[291] However, social media platforms can take steps to structure their platforms in a way that

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[288] *Id.* at 1611 ("Uber's structure and involvement in each underlying transaction may support joint enterprise liability.").

[289] Vanessa Pappas, *Introducing the $200M TikTok Creator Fund*, TikTok: Newsroom (July 22, 2020), https://newsroom.tiktok.com/en-us/introducing-the-200-million-tiktok-creator-fund [https://perma.cc/7MRD-5WGY] ("[W]e're launching the TikTok Creator Fund to encourage those who dream of using their voices and creativity to spark inspirational careers. The US fund will start with $200 million to help support ambitious creators who are seeking opportunities to foster a livelihood through their innovative content.").

[290] *See* McPeak, *supra* note 300.

[291] *See Crediting Creators*, TikTok, https://www.tiktok.com/creators/creator-portal/en-us/foundations-for-success/crediting-creators/ [https://perma.cc/VR9U-MAZM]; Kris Holt, *Tiktok Nudges Users to Credit the Videos that Inspired Their Posts*, Engadget (May 18, 2022), https://www.engadget.com/tiktok-creator-credit-button-160042410.html [https://perma.cc/WJ9D-ZW4Q].

makes it easier for users to gives credit to creators of dances and trends. For example, Instagram launched "enhanced tags" in 2022.[292] Instagram's purpose for the improved tagging method was that "[a]s creators collaborate, inspire each other and drive culture forward on Instagram, proper crediting has never been more important … For many Black and underrepresented creators, crediting is an entryway to building a sustainable career as a creator."[293] TikTok and other social media platforms may follow Instagram's model and even require that users tag creators of trends and dances.

[94]   Discriminatory predation negatively impacts the experiences of people of color on social media platforms. To address these issues, there must be a concerted effort from both the private and public sectors. Private sector initiatives such as Instagram's "enhanced tags" can help to give credit to creators and deter private predation. Courts may also limit or invalidate social media platforms' use of browsewrap agreements and to interpret the language of terms of service narrowly to prevent predation. Additionally, policymakers must consider ways to expand child privacy protections and limit the collection of minors data.

B. Recommendations for Addressing Discriminatory Exclusion

[95]   In Part III, I discussed how social media platforms' unregulated use of recommendation algorithms amplifies existing inequalities to levels that exclude people of color.

[96]   One approach to address discrimination is through legislation and regulation as the EU and China have done.[294] Legislation requiring

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[292] *See* Alexis Michelle Adjei et al., *Instagram Launches Enhanced Tags to Encourage Better Creator Crediting*, INSTAGRAM FOR CREATORS, https://creators.instagram.com/ blog/instagram-enhanced-tags-creator-credits-announcement [https://perma.cc/4TNZ-DUCD].

[293] *Id.*

[294] See *supra* Part III(B)(1).

platforms to disclose certain aspects of their algorithms helps users better protect their privacy by informing them of the types of data that are collected and how they are used in a platform's algorithms. The U.S. tried to pass the FBTA, but as critics of the Act noted, it failed to ensure that platforms would not use the sensitive data they collect to harm users.[295] Additionally, as seen in *NetChoice v. Paxton*, there is a fine line between regulating algorithms and violating a social media platform's First Amendment rights.[296] Thus, it is important to ensure that future legislation not only requires transparency measures but also addresses the type of data platforms may collect.

[97]   Laura Donohue, a constitutional law scholar, proposes expanding consumer law "to cover algorithmic bias under anti-discrimination laws."[297] Such laws could "create private rights of action or be enforceable by existing or new regulatory agencies."[298] This solution presents consistency issues as there is already a circuit split on how to address products liability claims and social media platforms' use of recommendation algorithms.[299]

V. CONCLUSION

[98]   TikTok's approach to recommendation algorithms has revolutionized the social media industry, leading other platforms to

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[295] Reinauer, *supra* note 228.

[296] NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092, 1109 (W.D. Tex. 2021).

[297] LAURA K. DONOHUE, SOCIAL MEDIA: THE CANARY IN THE COAL MINE 44 (2022), https://www.law.georgetown.edu/national-security-center/wp-content/uploads/sites/6/2022/11/Social-Media-Report-Final.pdf [https://perma.cc/3H8W-4U29].

[298] *Id.* at 44–45.

[299] *See* Anderson v. TikTok, Civ. No. 22-1849, 2022 U.S. Dist. LEXIS 193841, at *2–3 (E.D. Pa. Oct. 25, 2022); Doe v. Snap, Inc., Civ. No. H-22-00590, 2022 Dist. LEXIS 119560, at *38 (S.D. Tex. July 7, 2022); Lemmon v. Snap, Inc., 995 F.3d 1085, 1093 (9th Cir. 2021).

replicate TikTok's model. However, this success has come at the expense of people of color. The platform's monetization model for individuals encourages the discriminatory treatment of people of color and its algorithms are biased against people of color.[300] The Article began with a brief overview of TikTok and then described the discriminatory predation and discriminatory exclusion people of color experience on TikTok.

[99]   First, people of color on algorithmic-based social media platforms experience discriminatory predation.[301] The platform's incentives for users to "go viral" and the opportunities that presents encourage the exploitation of people of color, as demonstrated by the examples of Sethunya, Tariq, and Harmon. The platform's Terms of Service and broad licensing agreement further inhibit creators' ability to control their images and intellectual property, making it easier for them to be exploited. Additionally, the platform has a financial incentive to exploit people of color, as seen in the TikTok Blackout challenge, as increased users and engagement translates into increased profits.

[100]   Second, the discriminatory exclusion of people of color on TikTok is facilitated by the platform's unregulated use of recommendation algorithms, which amplifies existing inequalities and excludes people of color from the marketplace.[302]

[101]   Finally, given the widespread replication of TikTok's business model and the increasing reliance on algorithms in daily life, it is crucial to understand the impact of these platforms on people of color. TikTok and other platforms must address these issues to create a more inclusive and equitable environment for all users.

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[300] Jess Kung, *What internet outrage reveals about race and TikTok's algorithm*, NPR: CODE SWITCH (Feb. 14, 2022, 12:57 PM), https://www.npr.org/sections/codeswitch/2022/02/14/1080577195/tiktok-algorithm [https://perma.cc/367B-3F25].

[301] *Id.*

[302] *Id.*

[102]   Discriminatory predation and exclusion may be addressed in a number of ways. Discriminatory predation may be limited through a limited reading of Terms of Service, the structure of platforms tagging and crediting, and adoption of more robust safety measures. Discriminatory exclusion may be addressed through legislation giving users a private right of action or regulation as the EU and China have done in regulating recommendation algorithms.

[103]   The issues addressed in this Article are not unique to TikTok. Social media platforms' current use of recommendation algorithms exacerbates societal biases, but these harms need not continue. Social media platforms play an increasingly vital role in the ways people find employment, remain politically informed, and engage with community. As social media platforms continue to expand and users generate vast amounts of content, platforms will need to rely on some form of algorithmic systems to maintain themselves. Banning TikTok or the use of recommendation algorithms merely provides a surface level solution to this critical problem. Addressing discriminatory predation and discriminatory exclusion requires public and private sector efforts; platforms must take active steps to address these issues in order to create a more inclusive and equitable environment for all users. Confronting the privacy concerns of people of color not only addresses the specific privacy concerns of this community, but also leads to more comprehensive and inclusive privacy protections for all.