

Who's to Blame When Algorithms Discriminate?

A proposed rule from HUD would make it harder to hold people accountable for subtler forms of discrimination.



By Emily Badger

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When the Fair Housing Act was passed in 1968, the injustice it aimed to root out in the housing market was often egregious: Real estate agents steered black families away from white neighborhoods; landlords refused to rent to them; and property managers' racism was plainly stated in apartment listings.

The culprits were clear and their intentions relatively simple to document. Today, civil rights groups warn, discrimination persists in subtler forms that raise a much trickier legal question: How do you prove discrimination, and hold anyone accountable, when the evidence of it is more likely to be seen in algorithms or government data than on a for-rent sign?

The Department of Housing and Urban Development published a proposed rule on Monday significantly raising the bar for housing discrimination claims that rely on such evidence.

Federal law prohibits not just outright discrimination, but also certain policies and decisions that have a "disparate impact" on groups protected by civil rights laws. It may be illegal, in other words, to design a rental app that has the effect of excluding minorities, even if no one meant to discriminate against them.

By raising the bar for such claims, the new rule would make it harder to hold banks accountable if their underwriting algorithms repeatedly deny mortgages to seemingly qualified black families, or if city zoning laws that make no mention of race still have the effect of racially segregating neighborhoods.

Housing discrimination today is largely a matter of such cases: ones where there is no racist actor, no paper trail of intent to discriminate, but where troubling disparities emerge between different classes of people.

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The long-expected move by the Trump administration to tighten disparate impact claims is part of a larger legal battle that extends beyond housing. Industry groups and conservative legal advocates have long warned that any landlord, company or city official could be accused of discrimination simply if data shows racial patterns that exist for reasons beyond their control.

"Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit," Justice Samuel A. Alito Jr. wrote in a dissenting opinion to a 2015 Supreme Court decision upholding disparate impact claims under the Fair Housing Act.

The new HUD rule responds to that Supreme Court ruling by redefining more strictly how a disparate impact claim might be proved.

If disparate impact becomes a less viable legal tool, civil rights groups counter that it will be almost impossible to curb policies and decisions that reinforce segregation and widen the racial wealth gap. If plaintiffs must prove that someone, somewhere, explicitly intended to discriminate, they'll never be able to police city officials who keep that intent silent — or

algorithms that have no “intent” at all.

“People don’t just say the things they used to say,” said Myron Orfield, a law professor at the University of Minnesota who directs the Institute on Metropolitan Opportunity there.

But some statistical patterns speak just as loudly.

“A black household that makes \$167,000 is less likely to qualify for a prime loan than a white household that makes \$40,000,” Mr. Orfield said, citing analysis of public mortgage data by the institute. “That looks funny. What the banks say in these cases is, ‘It’s the credit histories, and our models explain the differences.’ But you can’t look at those models. They’re proprietary.”

The proliferation of data has made it easier to identify such patterns. But HUD suggests that in all this data, the threat of legal challenges under the Fair Housing Act has grown, too.

The new rule “frees up parties to innovate, and to take risks to meet the needs of their customers, without the fear that their efforts will be second-guessed through statistics years down the line,” Paul Compton, HUD’s general counsel, said in a phone call with reporters.

The new rule, which enters a 60-day public comment period, rewrites a disparate impact standard published by the Obama administration in 2013 that put more onus on defendants to explain any practices that appear discriminatory. Under the new rule, plaintiffs will hold the burden of showing that any discrimination could have been averted by a different policy.

Where algorithms or models are accused of bias, the new rule also lays out arguments companies can use to defend them, including showing that a model is the standard in an industry, and that it was created and maintained by a third party. Those defenses may be insurmountable, civil rights groups say.

“The problem that we have is that more and more, industry players are relying on artificial intelligence,” said Lisa Rice, the president of the National Fair Housing Alliance. “They’re relying on machine learning. They’re relying on algorithmic-based systems for more and more of the functions of the housing market.”

Online ads for rental housing are targeted in ways that mean, for example, that African-American would-be tenants may never see them. Decisions are based on credit scores that perceive families who use payday lenders — who are more likely to be African-American — as having no credit at all.

“We’re just learning what the impacts are of these things,” said Greta Byrum, co-director of the Digital Equity Laboratory at the New School. “That’s why we’re seeing this battle to set policy precedent. HUD I think is trying to get ahead of what everyone is seeing on the horizon now as a big fight to set policy around algorithms.”

If the Fair Housing Act did not quite anticipate machine learning in the use of digital advertising, it did anticipate that many forms of discrimination would not announce themselves. The Fair Housing Act was written not just with the racist real estate agent in mind, but also with the subtler zoning laws and banking policies that are more consequential. And since the Nixon administration, the federal government has relied on disparate impact as a way to identify that discrimination.

“These structural practices that locked in segregation and exclusion were part of what the Fair Housing Act was targeting originally,” said Philip Tegeler, executive director of the Poverty & Race Research Action Council. “These are not new issues.”

But they take many new forms today.

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