Digital Footprints: Technology, Race and Justice Introduction

By: Cassandra Jones Havard*

Data aggregation is ubiquitous. To widen credit access, lenders now use non-conventional sources of personal technological information to measure borrower creditworthiness. Alternative data credit scoring is touted as a useful solution for borrowers with little or no credit history or "thin credit files." The supposedly neutral algorithm provides a predictive analysis of the borrower's ability to repay, thus allowing the borrower to obtain credit within the formal banking network.

Alternative data has the potential to expand access to financial services for underserved populations and make credit markets more competitive. Machine learning, or predictive behavioral analytics, collects and sorts the borrowers' social and business network identity data to assess a borrower's risk. The lender's perception [and assessment] of tangible factors, such as, educational level, internet browsing history, social media associations, health status, past and current employment, or even movies, all become relevant in assessing the borrower's repayment of credit. Proponents argue that these digital footprints or an individual's personal networks, choices, and habits are fairer, more transparent, even "color-blind," reducing discrimination in the decision-making process.

Protecting the algorithmic formulae and machine learning that produce digital footprint technologies is a claim of trade secrecy. Regulators routinely evaluate lenders for compliance with fair lending laws. Lenders, however, assert trade secrecy protections to shield their algorithmic scoring models. By directing, adopting, and using technologies created in-house or purchased from private companies, these lenders may intentionally or unintentionally obscure discriminatory conduct. How, then, do regulators determine if digital footprints algorithms fairly

assess creditworthiness? What if the underlying data of the algorithm is incomplete, or implicitly biased? What if a lender impermissibly designs the digital footprints algorithm to segment markets in legally prohibited ways, thereby perpetuating credit inequality?

Professor Havard's upcoming article questions a lender's broad ability to keep secret the alternative data relied upon and offers policy recommendations for regulating this new world of digital footprint algorithmic scoring.

Her article makes three contributions to the existing literature. First the article shows how the lender's choice of alterative data and its interpretation of that data may result in technological redlining in violation of existing fair lending laws. Second, the article participates in the ongoing critical race theory debate about algorithmic bias and how law and technology must combine to create algorithmic justice. Specifically, it posits that failure to police algorithms for bias prior to their use can contribute to systemic discrimination in lending.

Third, the article proposes protections for consumers' algorithmic network identity and recommends policies that regulators are uniquely positioned to implement. First, it recommends a specific, transparent lending disclosure when lenders use algorithmic network identity data. Unlike in the European Union, American consumers may be unaware that a lender has used alterative data in its creditworthiness evaluation. Lenders should disclose when alternative data has been used and how it is used. Furthermore, the banking regulatory system routinely places the burden of value-at-risk modeling on lenders. Consistent with that obligation, regulators should require 'pre-clearance' of digital data algorithms to ensure fair lending. Similar to other areas of law where prophylactic measures are appropriate, the history of redlining and sub-prime lending in minority communities dictates that a similar control is needed in this context. Consequently, a lender will bear the burden of ensuring fairness before the lending process

begins instead of providing the individual with an ineffectual *post-hac* remedy.

Keep a look out for Professor Havard's full article, coming soon!

*Professor at the University of South Carolina School of Law