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People Analytics and the Regulation of Information Under the Fair Credit Reporting Act

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PEOPLE ANALYTICS AND THE REGULATION OF INFORMATION UNDER THE FAIR CREDIT REPORTING ACT

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INTRODUCTION

People analytics—the use of big data and computer algorithms to make personnel decisions—has been drawing increasing public and scholarly scrutiny.[1] Software is now available for screening applicants to identify the most promising candidates, or searching online profiles to find top prospects for recruitment.[2] Algorithms claim to predict which workers will be most productive or which employees are most likely to leave their jobs.[3] These tools

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1. *See, e.g.*, EXECUTIVE OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES, 51–53 (May 2014), https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf [http://perma.cc/HF2G-F2A2]; Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014); Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93 (2014); FEDERAL TRADE COMMISSION, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf [http://perma.cc/H636-LGLS]; FRANK PASQUALE, THE BLACK BOX SOCIETY (2015); Danah Boyd & Kate Crawford, *Critical Questions for Big Data*, 15 INFO. COMM. & SOC'Y 662, 666–68 (2012); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016); Cynthia Dwork & Deirdre K. Mulligan, *It's Not Privacy, and It's Not Fair*, 66 STAN. L. REV. ONLINE 35 (2013); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. (forthcoming 2017); Alex Rosenblat, et al., *Data & Civil Rights: Employment Primer*, DATA & CIVIL RIGHTS CONFERENCE (Oct. 30, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2541512 [http://perma.cc/5HC2-PP8U]; Matthew T. Bodie, et al., *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769980 [http://perma.cc/W6DX-GDV3].

2. Josh Bersin, *Big Data in Human Resources: Talent Analytics (People Analytics) Comes of Age*, FORBES (Feb. 17, 2013), http://www.forbes.com/sites/joshbersin/2013/02/17/bigdata-in-human-resources-talent-analytics-comes-of-age [http://perma.cc/FD3U-7UTJ].

3. George Anders, *Who Should You Hire? LinkedIn Says: Try Our Algorithm*, FORBES (Apr. 10, 2013), http://www.forbes.com/sites/georgeanders/2013/04/10/who-should-you-hire-linkedin-says-try-our-algorithm/#18ffec042506 [http://perma.cc/UWD8-5WNL]; Claire Cain Miller, *Can an Algorithm Hire Better Than a Human?*, N.Y. TIMES (June 25, 2015),

are built by collecting and analyzing vast amounts of data about individual characteristics and behaviors that go far beyond traditional factors like education and training.[4] The datasets are subject to data mining, a process by which computers examine the data to uncover statistical patterns.[5] Those patterns are then used to make predictions about future cases and to inform decision-making.

As workplace use of data analytic tools expands, commenters are raising alarms about the potential unfairness of relying on them to make consequential employment decisions. Some concerns focus on the potential intrusiveness of the data gathering required to develop and use these tools.[6] People analytics depend on the collection of large amounts of information, some of it highly personal. Efforts to harvest health-related data, or information about off-duty behavior and activities on social media potentially threaten employees' personal privacy. Even relatively trivial bits of information—when aggregated with other data about an individual—can reveal highly sensitive personal information. For example, information recorded by electronic activity trackers and collected as part of employee wellness programs can be analyzed to reveal when an employee is pregnant or trying to conceive.[7]

Other commenters charge that people analytic tools can be unfair if the data contains errors or mischaracterizations.[8] Inaccurate information in individuals' consumer records may cause them to unjustifiably lose out on employment opportunities. Employees have alleged that inaccuracies in reports about their criminal records or credit histories caused employers to deny them

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http://www.nytimes.com/2015/06/26/upshot/can-an-algorithm-hire-better-than-a-human.html [http://perma.cc/L5GS-S4ET]; Steve Lohr, *Big Data, Trying to Build Better Workers*, N.Y. TIMES (Apr. 20, 2013), http://www.nytimes.com/2013/04/21/technology/big-data-trying-to-build-better-workers.html [http://perma.cc/99CX-QZYV].

4. Michael Fertik, *Your Future Employer Is Watching You Online. You Should Be, Too*, HARV. BUS. REV. (Apr. 3, 2012), https://hbr.org/2012/04/your-future-employer-is-watchi [http://perma.cc/38AG-Y66Y]; Jeanne Meister, *2014: The Year Social HR Matters*, FORBES (Jan. 6, 2014), http://www.forbes.com/sites/jeannemeister/2014/01/06/2014-the-year-social-hr-matters/#4b005ef362dc [http://perma.cc/X64A-3URC]; Don Peck, *They're Watching You at Work*, THE ATLANTIC (Dec. 2013), http://www.theatlantic.com/magazine/archive/2013/12/theyre-watching-you-at-work/354681/ [http://perma.cc/TV5U-ZVTP]; Ester Kaplan, *The Spy Who Fired Me: The Human Costs of Workplace Monitoring*, HARPER'S MAG., Mar. 2015, at 31–40.

5. Bart Custers, *Data Dilemmas in the Information Society: Introduction and Overview*, *in* DISCRIMINATION AND PRIVACY IN THE INFORMATION SOCIETY 3, 7 (Bart Custers, et al. eds., 2013).

6. Rosenblat, et al., *supra* note 1; FEDERAL TRADE COMMISSION, *supra* note 1, at 10.

7. Valentina Zarya, *Employers Are Quietly Using Big Data to Track Employee Pregnancies*, FORTUNE (Feb. 17, 2016, 5:36 PM), http://fortune.com/2016/02/17/castlight-pregnancy-data/ [http://perma.cc/XR26-RVR6].

8. *See, e.g.*, PASQUALE, *supra* note 1; Bodie, et al., *supra* note 1; Rosenblat, *supra* note 1.

jobs.[9] Similarly, when algorithms rely on error-ridden personal data, they may make inaccurate predictions that arbitrarily reduce individuals' employment opportunities. Even when personal information is technically accurate, it can be presented in ways that are misleading. And algorithms may draw inferences or make predictions that are unjustified, resulting in the arbitrary denial of employment opportunities.[10]

In addition, big data tools may produce discriminatory effects. Although workforce analytics may sometimes help to counter biased human judgments, data is not always objective or neutral. Scholars have documented numerous ways that reliance on algorithms can result in discrimination.[11] Relatively trivial information, such as zip code or Facebook "likes," may correlate closely with protected characteristics like race or gender, or reveal a person's political or religious views.[12] These types of data may operate as proxies, allowing a biased employer to hide its discriminatory intent behind a seemingly neutral data model. Even when no discrimination is intended, algorithms can produce discriminatory outcomes. If, for example, the underlying data reflects biased judgments about workers' performance, an algorithm built using that data may simply reproduce that bias. In other cases, the data used to create the algorithm may not be representative of the workforce, resulting in a skewed model that systematically disadvantages groups of workers along the lines of race or other protected classification.

In another article, one of us has explored how anti-discrimination law might limit the use of discriminatory algorithms in the workplace.[13] Others have similarly considered whether or how existing laws that protect employee privacy or prohibit discrimination apply to people analytics.[14] The purpose of this symposium contribution is to consider another source of regulation—one

9. Smith v. LexisNexis Screening Solutions, Inc., 76 F. Supp. 3d 651, 666 (E.D. Mich. 2014); Miller v. Johnson & Johnson Pharm., Inc., 80 F. Supp. 3d 1284, 1287 (M.D. Fla. 2015).

10. Because data mining uncovers statistical relationships that may not be causal, relying on those correlations to make predictions about future cases may result in arbitrary treatment of individuals. *See* Kim, *supra* note 1.

11. *See, e.g.*, Barocas & Selbst, *supra* note 1; Toon Calders & Indre Zliobaite, *Why Unbiased Computational Processes Can Lead to Discriminative Decision Procedures*, *in* DISCRIMINATION AND PRIVACY IN THE INFORMATION SOCIETY, *supra* note 5; Kim, *supra* note 1; Joshua A. Kroll, et al., *Accountable Algorithms*, 165 U. PA. L. REV. (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2765268 [http://perma.cc/3FWZ-FA6Q].

12. *See, e.g.*, Michal Kosinski, David Stillwell & Thore Graepel, *Private Traits and Attributes are Predictable From Digital Records of Human Behavior*, 110 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF THE U.S. 5802 (2013) (showing that records of an individual's Facebook Likes can be used to accurately predict personal characteristics such as race, gender and sexual orientation, religious and political views, and personality traits like intelligence).

13. Kim, *supra* note 1 (arguing how Title VII should be interpreted to address discriminatory algorithms at work).

14. *See, e.g.*, Barocas & Selbst, *supra* note 1; Bodie, et al., *supra* note 1.

which is often overlooked. The Fair Credit Reporting Act (FCRA) is not usually thought of as workplace regulation, and yet one of its purposes is to ensure that consumer information is used fairly when it informs employment decisions.[15] The FCRA thus places some restrictions on how an individual's personal information is communicated and imposes duties on employers. Because the FCRA focuses on regulating information flows, it might seem to be a promising avenue for preventing unfair uses of big data in the workplace. After all, people analytics requires lots of data about individuals, both to create the algorithms in the first place, and to use them to make predictions about particular individuals. Using these big data tools thus requires someone to collect the data, analyze it, and communicate findings to the employers who can use them to make personnel decisions—activities potentially regulated by the FCRA.

This essay examines the protections established by the FCRA and how they apply to employment decisions. It then considers whether and to what extent those protections address concerns about invasions of privacy, unfairness and discrimination that have been raised in connection with people analytics. The FCRA establishes certain procedural requirements, and these can sometimes help individual workers challenge inaccurate information about them. However, although employers face significant liability risks if they disregard the statute's requirements, the FCRA in fact does little to curb invasive data collection practices or to address the risks of discriminatory algorithms. Examining how the FCRA does and does not apply to people analytics reveals the limitations of a purely procedural approach. Given these limits, protecting employee privacy and preventing workplace discrimination will require looking to other models of regulation.

I. THE FCRA'S BASIC PROVISIONS

Congress enacted the FCRA in 1970 to regulate the credit reporting industry because of concerns about the fairness and accuracy of credit reports.[16] The statute acknowledged the "vital role" that consumer information provided by consumer reporting agencies plays in eligibility determinations made by commercial entities like banks, insurance companies and employers.[17] At the same time, it recognized the need for "fairness, impartiality, and a respect for the consumer's right to privacy."[18] Thus, the purpose of the FCRA was to require reporting agencies to "adopt reasonable procedures" to ensure that consumer information is used "in a manner which is fair and equitable to

15. 15 U.S.C. § 1681a (2012).
16. § 1681(b).
17. § 1681(a).
18. § 1681(a)(4).

the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."[19]

The FCRA permits the release of consumer information only in service of a limited set of enumerated purposes, one of which is employment.[20] The emphasis of the statute is on procedural protections. In order to protect consumers from inaccurate or unfair uses of their personal information, it relies heavily on mechanisms of disclosure and opportunities for challenging erroneous information. These procedural obligations are imposed on both companies that provide the information for these purposes—"consumer reporting agenc[ies]"—and entities like banks and employers that make use of the information.[21] The statute provides a private cause of action, permitting aggrieved individuals to bring suit for violations of many of the statute's requirements.[22] Federal agencies also have an important role in enforcement.[23] Since the FCRA's enactment, the Federal Trade Commission (FTC) has been the primary agency in charge of interpretation, implementation, and enforcement of the FCRA.[24] After the passage of the Consumer Financial Protection Act of 2010,[25] the FTC shares many of these responsibilities with the Consumer Financial Protection Bureau (CFPB), although it maintains its role as the primary enforcer of the statute.[26]

The provisions of the FCRA apply when a "consumer reporting agency" furnishes a "consumer report."[27] A company is a "consumer reporting agency" under the law if it "regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties."[28] The term "consumer reporting agency" is limited to entities that are engaged in the commerce of assembling or evaluating and distributing consumer information.[29] Excluded from the definition are entities that assemble and

19. § 1681(b).

20. 15 U.S.C. § 1681a (2012).

21. *Id.*

22. §§ 1681n, o. However, violations of § 1681m cannot be pursued through a private right of action. § 1681m(h)(8).

23. § 1681s.

24. FEDERAL TRADE COMMISSION, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT: AN FTC STAFF REPORT WITH SUMMARY OF INTERPRETATIONS 1 (2011), https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf [http://perma.cc/GEN2-7GCH] (last visited Nov. 14, 2016).

25. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

26. FEDERAL TRADE COMMISSION, *supra* note 24, at 1–2.

27. 15 U.S.C. § 1681a(f).

28. *Id.*

29. *Id.*

evaluate information for non-commercial uses as well as entities that assemble information about the entity's own interactions with its customers.[30]

A "consumer report" is defined as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes . . ."[31] Courts have generally found that information constitutes a consumer report under the law if it satisfies three elements that track the language of the FCRA: 1) the information was communicated by the consumer reporting agency; 2) it bears on the "consumer's credit worthiness, character, general reputation, personal characteristics, or mode of living"; and 3) it was "used or expected to be used or collected in whole or in part for one of the enumerated purposes."[32]

When employers request information from third parties about applicants or employees for purposes of making hiring, promotion, retention or other employment decisions, the procured information may be a "consumer report" subject to the FCRA's requirements. For example, employment background checks that include information about credit, employment and salary history, or criminal records are consumer reports when they are obtained from a consumer reporting agency.

Both the consumer reporting agencies that provide information and the businesses that use the consumer reports to make decisions are subject to certain requirements under the FCRA.[33] For the consumer reporting agency, these requirements include permitting consumers to review information in their files without charge,[34] investigating alleged inaccuracies,[35] and providing

30. *See, e.g.*, Porter v. Talbot Perkins Children's Services, 355 F. Supp. 174, 178 (S.D.N.Y. 1973) (holding that information collected and used by social service institutions such as child adoption agencies is not subject to obligations and liabilities provided by the FCRA which was intended to deal with the commercial uses of consumer reports); Tierney v. Advocate Health and Hospitals Corp., 797 F.3d 449, 451–54 (7th Cir. 2015) (dismissing the suit of a medical network's patients whose information was stolen on the grounds that the medical network did not assemble patient information for monetary fees and the information was based only on the network's experiences with its own patients which is not subject to the requirements of the FCRA).

31. 15 U.S.C. § 1681a(d)(1) (2012).

32. *See, e.g.*, Ernst v. Dish Network, LLC, 49 F. Supp. 3d 377, 381 (S.D.N.Y. 2014) (citing cases from the U.S. Courts of Appeals).

33. The Consumer Credit Reform Act of 1996 amended the FCRA to expand its reach beyond these entities, imposing obligations on the businesses that supply information to credit reporting agencies or "furnishers" of information as well. Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3444 (1996).

34. 15 U.S.C. §1681g(a)(1).

35. § 1681i(a)(1)(A).

information to consumers about their rights.[36] Consumer reporting agencies may only provide reports for one of the allowable purposes listed in the statute.[37] One of those allowed purposes is employment; however, before providing a report for employment purposes, the credit reporting agency must obtain certification from the employer that it will comply with its duties under the FCRA.[38] In addition, the consumer reporting agency may have to notify customers when it has released certain information that may adversely affect their ability to obtain employment.[39]

Businesses that use consumer reports for one of the enumerated purposes are also required to comply with the FCRA.[40] In particular, employers that use consumer reports in making personnel decisions are obligated to comply with certain statutory requirements at three different times: prior to accessing a consumer report, before rejecting an applicant or taking adverse action against an employee, and after taking the adverse action.

Before accessing a consumer report, an employer must provide a clear, conspicuous, and stand-alone disclosure that a consumer report may be obtained for employment purposes;[41] obtain written authorization from the applicant or employee for procurement of the report;[42] and certify to the consumer reporting agency its compliance with the requirements of the statute and that it will not violate any equal employment opportunity law.[43] If an employer intends to take an adverse action based on information in the report, it is required to provide notice before rejecting a job application, reassigning or terminating an employee, denying a promotion, or taking any other adverse employment action.[44] The employer must also provide a copy of the consumer report relied upon and a description of the individual's rights under the FCRA.[45] These requirements afford the affected individual an opportunity to review the report and attempt to correct any mistakes.

After taking adverse action based upon information in the consumer report, the employer must provide notice of the adverse action to the individual; provide the name, address, and phone number of the consumer reporting company that supplied the report; include a statement that the company that supplied the report did not make the decision to take the adverse action and

36. § 1681g(c).
37. § 1681b(a)(3).
38. § 1681b(b)(1).
39. 15 U.S.C. § 1681k(a).
40. § 1681b.
41. § 1681b(b)(2)(A)(i).
42. § 1681b(b)(2)(A)(ii).
43. § 1681b(b)(1).
44. 15 U.S.C. § 1681b(b)(3)(A).
45. *Id.* For more details on the information that must be included in the description of rights, see § 1681g(c)(1).

cannot provide specific reasons for it; and provide a notice of the individual's rights to dispute the accuracy or completeness of the report and to receive an additional copy of the report if requested within sixty days.[46] Furthermore, if an employer uses "investigative reports"—defined as reports based on personal interviews concerning an individual's character, general reputation, personal characteristics, and lifestyle—such investigations must meet additional obligations under the FCRA.[47]

The FCRA creates a private right of action for violation of its requirements. In cases of willful failure to comply, a consumer may recover actual damages or statutory damages between $100 and $1000.[48] A court may also allow punitive damages and attorneys' fees in such a case.[49] The Supreme Court has interpreted "willful" violations to include violations committed in "reckless disregard" of FCRA obligations.[50] In cases of negligent noncompliance, consumers may recover actual damages and attorneys' fees. Actual damages can include economic damages such as lost wages and non-economic damages such as monetary damages for emotional distress and humiliation.[51] A notable exception is that no private right of action is available when an employer fails to make the disclosures that are required *after* taking an adverse action based on a consumer report.[52]

Because the FCRA's procedural requirements are highly technical, a careless employer might easily run afoul of them—for example, by failing to put the pre-check disclosure "in a document that consists solely of the disclosure."[53] In recent years, employers have faced a rising number of FCRA claims. These cases are typically brought as class actions and allege that the employer failed to provide proper disclosure before procuring a consumer report, as required by section 1681b(b)(2), or failed to provide information before taking an adverse action based on the information, as required by section 1681b(b)(3).[54] Because many employers use standard forms and

46. § 1681m(a).

47. §§ 1681d, 1681a(e).

48. § 1681n.

49. *Id.*

50. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52 (2007).

51. *See, e.g.*, Miller v. Johnson & Johnson Pharm., Inc., 80 F. Supp. 3d 1284, 1296 (M.D. Fla. 2015); Smith v. LexisNexis Screening Solutions, Inc., 76 F. Supp. 3d 651, 666 (E.D. Mich. 2014).

52. Congress eliminated this private right of action under the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, providing for administrative rulemaking and remedies instead. 15 U.S.C. § 1681m(h)(8) (2012); *see also* Perry v. First Nat'l Bank, 459 F.3d 816, 823 (7th Cir. 2006) (holding that 15 U.S.C. § 1681m(h)(8) applies to all causes of action under § 1681m).

53. 15 U.S.C. § 1681b(b)(2)(A)(i).

54. *See* Pitt v. Kmart Corp., No. 3:11-cv-00697 (E.D. Va. May 24, 2013); *Kmart Agrees to Pay $3 Million to Settle Claims It Failed to Provide FCRA Notices*, DAILY LAB. REP. (Feb. 12,

processes for all applicants, these cases lend themselves to class treatment. For large employers dealing with thousands of applicants, damages for procedural violations can quickly add up. For example, recent cases against Home Depot, Publix Markets, and Wells Fargo have settled for $1.8 million, $6.8 million, and $12 million respectively.[55]

As described above, the FCRA relies heavily on procedural protections, requiring consumer reporting agencies and users of credit reports to provide notice when reports are provided or relied upon, and to disclose their contents upon request. The statute contains very few substantive limits on the *types* of information that can be collected or reported. The main restriction in this regard is that certain types of obsolete information are required to be excluded from a consumer report. For example, a consumer bankruptcy more than ten years old or a tax lien paid more than seven years earlier should be excluded unless certain exceptions apply.[56] In addition, the statute imposes a general duty on consumer reporting agencies to exercise reasonable care through adequate procedures to ensure the information they provide is accurate. Thus, the statute states that a consumer reporting agency "shall follow reasonable procedures to assure maximum possible accuracy of the information" about an individual.[57]

Case law indicates that the requirement of "reasonable procedures to assure maximum possible accuracy" does not impose strict liability for inaccurate reports, but it does require a consumer reporting agency to take steps that "a reasonably prudent person would do under the circumstances."[58]

2013), https://www.bloomberglaw.com/search/results/9abb5132a6ef11541a4c661d92eefba0/document/X30IH7BG000000?search32=p2rbCFAQyKzSo86dlZejzw%3D%3D_NSIJkogs4zfpP5N7zw8he3mc5WB_4UKSDZG83KhBa5DiJIAam_PTcmJWqsErck6E180TihqJYW9-RbTDtgahg%3D%3D [http://perma.cc/2Z4Z-LBGT]; Williams v. Amazon.com, Inc., 312 F.R.D. 497, 497 (N.D. Ill. 2015).

55. Fernandez v. Home Depot, U.S.A., Inc., No. 8:13-cv-00648 (C.D. Calif. April 24, 2016); Allison Grande, *Home Depot Pens Deal to End FCRA Class Action*, LAW360 (Apr. 21, 2015, 10:29 PM), http://www.law360.com/articles/645948/home-depot-pens-deal-to-end-fcra-class-action [http://perma.cc/42MS-CKGX]; Lisa Nagele, *Final OK Sought for $6.8 Million Settlement of Publix Job Applicants' FCRA Claims*, DAILY LAB. REP. (Oct. 29, 2014), https://www.bloomberglaw.com/search/results/71bcd07fdde938c940b6642547e8f171/document/X7P93N50000000?search32=JA-SLe7Eo3IklxngjHO1sg%3D%3Drirnq-0ZzJiMq6eUplhotV_QKjOXF11iF56x9N0QuJJI7u12XFhEgmxQ0VlHE-ktL6F6zdmmtqpZLT_7n6wqig%3D%3D [http://perma.cc/W648-ZGXM]; Manuel v. Wells Fargo Bank, No. 3:14-CV-238 (E.D. Va. 2015); Thomas Ahearn, *Wells Fargo Settles Background Check Lawsuit for $12 Million*, EMPLOYMENT SCREENING RESOURCES (Jan. 20, 2016), http://www.esrcheck.com/wordpress/2016/01/20/wells-fargo-settles-background-check-lawsuit-for-12-million/ [http://perma.cc/X9AK-WLZJ].

56. 15 U.S.C. § 1681c(a)-(b) (2012).

57. § 1681e(b).

58. Thompson v. San Antonio Retail Merchants Ass'n., 682 F.2d 509, 512–13 (5th Cir. 1982) (per curiam).

For example, the court in *Thompson* found that a consumer reporting agency failed to exercise reasonable care when it relied on a computer program to automatically capture information and include it in a consumer's record without adequate checks to confirm that the information was actually about that individual.[59] Similarly, in *Bryant*, the court held that a consumer reporting agency does not comply with the FCRA simply by reporting accurately what it was told by creditors.[60] Once a consumer disputes the accuracy of information contained in a report, the agency cannot continue to include that information unless it takes reasonable steps to investigate whether the information is in fact true or not.[61]

Thus, the FCRA does not guarantee that all information assembled and reported about consumers will be accurate. Instead, it provides certain procedural protections that can alert a consumer about the existence of errors and provide an opportunity to contest the accuracy of that information.

II. THE FRCA AND PEOPLE ANALYTICS

When the FCRA was enacted in 1970, its main focus was on the "Big Three" nationwide credit reporting bureaus—Equifax, Experian, and TransUnion—and other agencies that operated similarly.[62] As different types of entities have gotten into the business of collecting and sharing personal information, uncertainty has arisen as to exactly which ones fall within the definition of a consumer reporting agency such that the requirements of the FCRA apply to them and the businesses that use their services. This Part reviews recent developments and considers whether the statute's provisions are likely to address concerns about invasions of privacy, unfairness and discrimination that have been raised about people analytics.

As an initial matter, it is important to note that the FCRA will only come into play when an employer relies on information from a third party. To the extent that an employer collects and analyzes information about its own employees, it is not covered by the statute.[63] The FCRA places no limits on an employer's ability to gather data about its employees, whether through direct inquiry, surveillance or other forms of computer monitoring. People analytics, however, often rely on information collected outside the workplace and sold to companies to use for employment purposes. As discussed below, these types of transactions are likely subject to regulation under the FCRA. Even when an employer collects data about its own workers, the FCRA may still apply if it

59. *Id*. at 513.

60. Bryant v. TRW, Inc., 689 F.2d 72, 78 (6th Cir. 1982).

61. 15 U.S.C. § 1681i(a) (2012); *Thompson*, 682 F.2d at 513; *Bryant*, 689 F.2d at 78; *see also* Cortez v. Trans Union, LLC, 617 F.3d 688, 707 (3d Cir. 2010).

62. FEDERAL TRADE COMMISSION, *supra* note 24, at 38–39.

63. 15 U.S.C. § 1681a(d)(2)(A)(i).

contracts with an outside company to analyze the data and evaluate individuals for employment purposes.[64]

A growing number of companies are serving as data brokers, harvesting or purchasing large datasets and aggregating them in order to produce detailed profiles of consumers. These profiles are then provided to interested parties for a fee. For example, LexisNexis developed a product know as Accurint which provides detailed information for over 200 million individuals.[65] The reports include information such as

> where the consumer resides, the consumer's age, social security number, date of birth, economic profile data regarding the consumer's home and neighboring properties, whether the consumer has filed for bankruptcy, has any liens or judgments, public records, UCC filings, professional licenses, accident history, recreational permits, and general information about the consumer's assets and property.[66]

LexisNexis has sold millions of these reports each year for use in locating people and their assets and verifying information about particular individuals.[67] Another company, Spokeo, aggregates publicly available information from phone books, real estate listings, government records, and social networking sites in order to create detailed profiles about individuals, including assessments of their wealth, economic health and personal characteristics.[68] Individuals have sued these companies, alleging that the reports contain inaccuracies, harming their reputations and limiting their economic opportunities. Central to these lawsuits is the question whether these new types of businesses are "consumer reporting agencies" covered by the FCRA.[69]

The federal agencies responsible for enforcing the FCRA have concluded that a variety of entities beyond the original big three credit reporting bureaus are covered by the statute. The CFPB's list of consumer reporting agencies, released in 2016, includes nearly forty-five companies beyond the Big Three that are considered consumer reporting agencies by the Bureau.[70] The Federal Trade Commission has similarly interpreted the meaning of a "consumer

64. FEDERAL TRADE COMMISSION, *supra* note 1, at 15.

65. Berry v. Schulman, 807 F.3d 600, 605 (4th Cir. 2015).

66. Adams v. LexisNexis Risk & Info. Analytics Grp., Inc., No. 08-4708, 2010 U.S. Dist. LEXIS 47123, at *1 (D.N.J. May 12, 2010).

67. Berry v. LexisNexis Risk & Info. Analytics Grp., Inc., No. 3:11-CV-754, 2014 U.S. Dist. LEXIS 124415, at *10 (E.D. Va. Sept. 5, 2014), *aff'd*, *Schulman*, 807 F.3d at 619.

68. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546 (2016).

69. *See, e.g.*, *Schulman*, 807 F.3d at 605.

70. *See* CONSUMER FINANCIAL PROTECTION BUREAU, LIST OF CONSUMER REPORTING AGENCIES 1–3 (2016), http://files.consumerfinance.gov/f/201604_cfpb_list-of-consumer-reporting-companies.pdf [http://perma.cc/5KBD-FXHA].

reporting agency" to reach new products.[71] An illustrative example is the FTC's settlement with mobile app company Filiquarian Publishing.[72] Filiquarian advertised that its mobile app could conduct a "quick criminal background check for convictions" and that users could conduct searches on potential employees.[73] The FTC determined that Filiquarian was a consumer reporting agency within the meaning of the law and thus, it and companies using its app, were obligated to comply with the FCRA.[74] According to the FTC, the presence of a disclaimer on the company's website stating that "background screening reports weren't to be considered screening products for insurance, employment, loans, and credit applications" and that the company was not "FCRA-compliant" did not absolve the company of responsibility for complying with the statute.[75]

Private litigants have also pressed the issue of coverage under the FCRA. Although the FTC issued an Opinion Letter in 2008 stating that the Accurint reports are not "credit reports" under the FCRA, LexisNexis's practices were challenged in several private lawsuits.[76] In *Adams v. LexisNexis Risk & Information Analytics Group, Inc.*,[77] the plaintiff alleged that she was not allowed to view information contained in reports about her and that when she reported errors, LexisNexis refused to investigate or correct the disputed information in violation of the FCRA. Although LexisNexis argued that it was not required to comply with the statute, the district court denied the defendant's motion for judgment on the pleadings.[78] Instead, it found that the plaintiff's allegations were sufficient to raise a factual question whether

71. FEDERAL TRADE COMMISSION, supra note 24, at 108–110.

72. Consent Agreement at 1, Fed. Trade Comm'n v. Filiquarian Publ'g, LLC et al., No. C-4401 (Apr. 30, 2013).

73. Tony Rodriguez & Jessica Lyon, *Background Screening Reports and the FCRA: Just Saying You're Not a Consumer Reporting Agency Isn't Enough*, FED. TRADE COMM'N (Jan. 10, 2013, 2:00 PM), https://www.ftc.gov/news-events/blogs/business-blog/2013/01/background-screening-reports-fcra-just-saying-youre-not [http://perma.cc/3AA3-RVZ5].

74. Complaint at 3, Fed. Trade Comm'n v. Filiquarian Publ'g, LLC, No. C-4401 (Apr. 30, 2013).

75. Rodriguez & Lyon, *supra* note 73.

76. Letter from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to Marc Rotenberg, Exec. Dir., Elec. Privacy Info. Ctr. (July 29, 2008).

77. Civil No. 08-4708, 2010 U.S. Dist. LEXIS 47123, at *2–5 (D. N.J. May 12, 2010).

78. *Id.* at *28–29.

LexisNexis was a consumer reporting agency[79] and whether Accurint was a consumer report such that the requirements of the FCRA applied.[80]

In *Berry v. LexisNexis Risk & Information Analytics Group, Inc.*,[81] the plaintiffs similarly alleged that LexisNexis failed to comply with the FCRA when selling its Accurint reports. The case was brought as a class action, which ultimately settled.[82] The agreement called for the defendant to divide its Accurint report into two new products. One product will contain comprehensive information and be treated as a consumer report, such that LexisNexis must comply with all of the relevant FCRA requirements. The other, "Contact & Locate," will contain only limited information about individuals[83] and will not be treated as subject to the FCRA. Nevertheless, the defendant agreed to voluntarily provide some FCRA-like protections in connection with the product, such as the ability for a consumer to obtain free copies of their report once per year and to submit statements disputing information. After a hearing, the district court approved the settlement, and the Fourth Circuit affirmed on appeal.[84] Although no definitive rulings were issued on the core legal issue—whether LexisNexis is a consumer reporting agency under the FCRA—the courts' approval of the settlement agreement[85] suggests

79. *Id.* The court applied the following four-part test: an entity is a "consumer reporting agency" if it: (1) exchanges consumer information for compensation; (2) regularly engages in the practice of assembling consumer credit or similar information; (3) for the purpose of furnishing a consumer report to third parties; and (4) acts in interstate commerce to prepare or furnish the report. *Id.* at *14.

80. *Id.* at *28–29. The case subsequently settled. Berry v. Schulman, 807 F.3d 600, 605 (4th Cir. 2015).

81. No. 3:11-CV-754, 2014 U.S. Dist. LEXIS 124415, at *3–4 (E.D. Va. Sept. 5, 2014), *aff'd*, *Schulman,* 807 F.3d at 600.

82. *Schulman*, 807 F.3d at 606. The district court certified two settlement classes. One class, certified under Federal Rule of Civil Procedure 23(b)(3) provided monetary compensation for the approximately 31,000 individuals who tried unsuccessfully to get copies of their reports or to dispute information in them. That aspect of the settlement was not challenged on appeal. The second settlement class was certified under Federal Rule of Civil Procedure 23(b)(2) and provided injunctive relief in the form of LexisNexis' changed practices. Under the settlement, members of the (b)(2) class also waived their right to statutory and punitive damages, although they retained the right to seek actual damages on an individual basis. This (b)(2) settlement class was challenged in the district court and on appeal by objectors who sought to retain the right to seek statutory damages. *Id.* at 606–07.

83. The parties agreed that the "Contact & Locate" product would not include any of the "seven characteristic" information that makes a communication a "consumer report." *Id.* at 607. The seven specific consumer characteristics as defined in the statute are "a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d)(1) (2012).

84. *Schulman*, 807 F.3d at 607, 619.

85. According to the district court, the injunction implements a "substantial, nationwide program that . . . will result in a significant shift" in industry practices. *LexisNexis Risk & Info. Analytics Grp., Inc.*, 2014 U.S. Dist. LEXIS 124415, at *10.

that data brokers like LexisNexis are likely to be held to the requirements of the statute.

The FCRA's expanding coverage of consumer reporting agencies results in part because new types of products may fall within the statute's definition of a "consumer report." Communication about non-traditional information beyond employment and credit histories will qualify as a consumer report when it is used to assess an individual's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."[86] In advice offered to businesses, the FTC explained that it believes the FCRA's rules apply to reports derived from information on social media.[87] Thus, the FTC brought an enforcement action against Spokeo alleging that it failed to comply with the FCRA when it sold detailed personal profiles assembled from sources including social media.[88] The suit eventually settled with a consent decree requiring Spokeo to pay $800,000 in civil penalties.[89]

In addition, software that automatically assesses consumers' credit worthiness may also be a "consumer report." In *Zabriskie v. Fannie Mae*,[90] plaintiffs alleged that Fannie Mae was acting as a consumer reporting agency when it developed and licensed a software program called Desktop Underwriter for use by mortgage lenders. Lenders enter the personal information of a prospective borrower into the program and the Desktop Underwriter automatically combines that information with data from the Big Three credit reporting agencies and generates a report indicating whether the loan would be eligible for purchase by Fannie Mae. The plaintiffs alleged that the software erroneously reported a foreclosure on their home, and they sued, arguing that Fannie Mae had violated the FCRA by failing to follow reasonable procedures to ensure maximum possible accuracy of its reports.

In considering whether Fannie Mae was covered by the FCRA, the district court focused on two critical elements of the definition of a consumer reporting agency.[91] It considered whether Fannie Mae "assembl[es] or evaluat[es]"

86. 15 U.S.C. § 1681a(d)(1).

87. Lesley Fair, *The Fair Credit Reporting Act & Social Media: What Businesses Should Know*, FEDERAL TRADE COMMISSION (June 23, 2011, 10:23 AM), https://www.ftc.gov/news-events/blogs/business-blog/2011/06/fair-credit-reporting-act-social-media-what-businesses [http://perma.cc/ 6UV2-DR4U].

88. FEDERAL TRADE COMMISSION, *supra* note 1, at 13–14.

89. Consent Decree at 4, United States v. Spokeo, No. 2:12-cv-05001 (C.D. Cal. June 7, 2012).

90. No. CV-13-02260, 2016 U.S. Dist. LEXIS 26124, at *5–6 (D. Ariz. Feb. 24, 2016).

91. The court laid out the five elements of the statutory definition of a consumer reporting agency as follows: "(1) the company must be paid for its work or be working on a 'cooperative nonprofit basis,' (2) it must be in the business of (that is to say, 'regularly') (3) 'assembling or evaluating consumer credit information or other information on consumers' (4) 'for the purpose of furnishing consumer reports to third parties,' and (5) must use interstate commerce to achieve these aims." *Id.* at *7–8. There was no dispute as the first, second, and fifth elements. *Id.* at *8.

consumer credit information, and if so, "whether it does so 'for the purpose of furnishing consumer reports to third parties.'"[92] The court concluded that Fannie Mae satisfied both elements.[93] On the first question, the court held that because Fannie Mae had created the software based on its proprietary algorithms, it was "evaluating" consumer credit information when it licensed the software to lenders.[94] Even though the lender entered the data into the program, the lender could not have generated the report or its conclusions manually. Rather, Fannie Mae, was "evaluating" the consumer information through its proprietary algorithm incorporated into the software.[95] On the second question, the court concluded that because the Desktop Underwriter communicated new information about prospective borrowers, its purpose was to furnish a consumer report to third parties—the lenders.[96] Finding the elements satisfied, the court in *Zabriskie* concluded that Fannie Mae was a consumer reporting agency for purposes of the FCRA, although other courts have reached a different conclusion.[97]

What are the implications of these developments for people analytics? It might seem at first glance that FCRA offers a significant avenue for regulating the use of unfair or discriminatory algorithms in the workplace. When big data tools are used to make employment decisions, they appear to satisfy the definition of a consumer report, because they communicate information bearing on "character, general reputation, personal characteristics, or mode of living" that is used to determine eligibility for employment.[98] Thus, data brokers like LexisNexis that provide highly detailed personal profiles are likely to be considered consumer reporting agencies subject to the FCRA. And, like the defendant in *Zabriskie*, vendors who sell software programs that screen or evaluate applicants and employees may also be considered consumer reporting agencies. Even if the employer enters information about a particular individual into the software and makes the ultimate decision whether to hire or not, the vendor of the software is arguably "evaluating" the applicant and communicating that assessment to the employer through the algorithm it created. As a result, companies selling these types of software are likely to be regulated as consumer reporting agencies.

92. *Id.*

93. *Id.* at *14–15.

94. *Id.* at *11–12.

95. *Zabriskie*, 2016 U.S. Dist. LEXIS 26124, at *10–11.

96. *Id.* at *13–15.

97. *Id.* at *15; *contra* McCalmont v. Fannie Mae, No. 2:13-cv-2107, 2014 U.S. Dist. LEXIS 99368, at *12–13 (D. Ariz. July 21, 2014) (holding that Fannie Mae is not a CRA when licensing of its DU software because it does not "assemble or evaluate" information); Thomas v. Cendant Mortg., No. CIV.A. 03-1672, 2004 U.S. Dist. LEXIS 23081, at *13–15 (E.D. Pa. Nov. 15, 2004) (holding the same as *McCalmont*).

98. 15 U.S.C. § 1681a(d)(1) (2012).

However, even if the FCRA is interpreted expansively in these ways, it will do little to protect employees from privacy intrusions or unfair or discriminatory uses of their data. As explained above, the FCRA's requirements are largely procedural. So long as a data broker or employer complies scrupulously with the disclosure requirements, the FCRA imposes very few substantive limits on the types of information that can be collected or disclosed. The procedural requirements may help individuals learn what information is reported about them, and to challenge any inaccuracies, but they do little to restrict the vast data gathering that occurs or to protect against the sharing of highly personal or sensitive information. Even when the procedural requirements have been violated, individuals may not be able to recover under the FCRA. The Supreme Court recently suggested as much in *Spokeo v. Robbins*, noting that procedural violation of the FCRA may not result in any actual harm, such that the individual consumer would lack standing to sue.[99]

Nor does the FCRA provide any real substantive limits on how data collected about an individual is used. If an employer relies on inaccurate information to deny someone a job, but it did not violate any of the procedural requirements, the FCRA provides no relief. In cases involving procedural violations where applicants have been denied jobs based on erroneous information, the amounts recovered in damages are usually quite small.[100] And nothing in the statute prevents employers from relying on data profiles in ways that are irrational or unfair. Thus, the FCRA offers little recourse if an employer relies on biased algorithms. Although the statute requires an employer to certify that "information from the consumer report will not be used in violation of any applicable federal or state equal employment opportunity law or regulation," it does not appear to offer any mechanism for challenging employer use of credit reports in ways that might be discriminatory.[101] Instead, enforcement of anti-discrimination norms will depend upon how equal employment opportunity laws are interpreted and applied.[102]

CONCLUSION

When the Fair Credit Reporting Act was passed in 1970, Congress recognized that the personal information collected by credit agencies was

99. 136 S. Ct. 1540, 1549–50 (2016).

100. For example, in the Wells Fargo $12 million settlement mentioned above, 5840 class members received $75 and the remaining 229,393 class members only received a pro-rata payment after all expenses, including attorneys' fees, were deducted from the settlement fund. Manuel v. Wells Fargo Bank, Civil No. 3:14CV238, 2016 WL 1070819, at *2 (E.D. Va. Mar. 15, 2016).

101. 15 U.S.C. § 1681b(b)(1)(A)(ii).

102. *See* Kim, *supra* note 1, at 59–60.

playing a significant role in determining access to economic opportunities, including employment. The statute sought to address concerns about the accuracy and fairness of consumer data by imposing procedural requirements on the entities that sold or made use of this information. The expectation was that by providing individuals with notice and disclosures about their consumer reports, they would be able to protect themselves by correcting erroneous information.

Since the FCRA was passed, the volume of personal information available has increased exponentially. This vast and growing amount of data combined with improved computing has given rise to "people analytics," raising anew questions of whether and how business entities should be permitted to collect and use highly personal information for employment purposes. While the FCRA might appear to offer a model for regulating information flows, experience suggests that it imposes significant costs on consumer reporting agencies and employers, but is ill equipped to limit invasive data collection practices or to curb the use of unfair or discriminatory algorithms. Whether or not it met its original purpose, the FCRA's procedural model is clearly inapt in the era of big data. Addressing concerns about invasive, unfair or discriminatory uses of people analytics will require policy makers to grapple directly with questions about when and to what extent substantive regulation is warranted.