

# It's Time for an Updated Big Tech Civil Rights Regime

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**Abstract:** Structural racism and discrimination have seeped into the aspirations of the digital revolution, perpetuating systemic inequalities against historically marginalized communities and excluding them from the benefits of the online economy. Mass video and data surveillance, algorithmic oppression and biases, and technology companies' unfettered access to online consumer data perpetuate digital inequities while depriving people of access to opportunity. These realities are worsened by the absence of clear policy guardrails on technology and the lack of current and future interpretability of existing civil and human rights laws. This paper calls for policymakers, industry, and civil society leaders to establish a comprehensive civil rights framework in the digital economy that prevents the regression of progress that historically disadvantaged and other vulnerable populations have made in civil rights.

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# Introduction

Accelerated digitization has widened the existing digital divide and exacerbated systemic inequalities that maintain structural discrimination and racial exploitation. Historically disadvantaged and other vulnerable populations have been adversely impacted, incentivizing policymakers to lean in on digital equity and focus on access to high-speed broadband infrastructure, adoption, and digital literacy skills. Having access to the internet and a device are foundational when connecting to online products and services. But the path toward first-class digital citizenship must also require equitable access to and involvement with both the consumptive and productive aspects of the new digital economy.

Still today, members of historically disadvantaged populations simply cannot escape society's discrimination—whether in-person or online. Digital inequities, which include mass video and data surveillance and algorithmic oppression, are further compounded by technology companies' unfettered access to online consumer data. Meanwhile, emerging technologies, including machine-learning algorithms and other autonomous systems, threaten to undermine democratic processes while perpetuating developers' explicit and implicit biases. The absence of clear policy guardrails on the technology itself, and the lack of interpretability of existing civil and human rights laws further contribute to personal and social injustices. Policymakers and other civil society organizations must establish a comprehensive civil rights framework that applies to the new digital economy and clarify the extent to which it can be enforced.

This paper is focused on how structural racism and discrimination have seeped into the aspirations of the digital revolution, perpetuating systemic inequalities against individuals often excluded from the benefits of a biased online economy. As more decisions are made online about one's livelihood, eligibility determinations have resulted in the unjust denials of loans, higher education admissions, and employment. Given the propensity for machine-learning algorithms and other sophisticated computer models to drive such decision making, policymakers not only must investigate the fairness and ethical nature of these innovations, but also engage in a larger conversation around the protection of civil and human rights for historically disadvantaged and other vulnerable populations, including those from low-income, Indigenous, and rural populations. Before the modern-day internet, such civil rights violations were explicitly expressed through Jim Crow segregation and other acts of racism that denied people of color admission into public and private establishments, undermining basic constitutional rights decades after the abolition of slavery. Following many years of civil rights movements and protests, segregation was formally excised through national legislation outlawing the disparate treatment of Black people and other historically marginalized populations.

Yet, today's internet is opaque, emboldening the ability of providers of goods and services to discriminate with even greater precision in outcomes—whether intended or unintended. The lack of online transparency also complicates affected individuals' ability to identify and prove discrimination, especially as computer models obscure the online footprints and data trails of these activities. These reasons substantiate why both a review and possible update of existing anti-discrimination laws must be done in the U.S. to set lawful standards for artificial intelligence (AI) systems and other emerging technologies, especially those that pose threats to the social, economic, educational, and political well-being of people of color.

Irresponsibly created computer models like online search queries that misidentify Black people and perpetuate discrimination. In 2013, Google search matched “Black-sounding” names with the profiles of arrest records, even when false.<sup>1</sup> A couple of years later, an innocuous Google search for “happy teenagers” returned smiling faces of white teens, while Black youth were found in mugshots.<sup>2</sup> In late 2021, Facebook apologized for an AI model that model that asked viewers of a British tabloid video featuring Black men if they wanted to “keep seeing videos about Primates”—an all too familiar occurrence.<sup>3</sup>

Pre-screening tools have also been deemed as discriminatory, including racist health care algorithms that deny services to Black patients based on the amounts they pay into hospitalization and other medical services.<sup>4</sup> Computer programmers may not be deliberately engaged in malfeasance. But the collection and curation of individual and community preferences become “adaptive algorithms,” forming connections with existing societal biases.<sup>5</sup>

These and other examples point to the need for a civil rights framework that drives and governs the products, services, and decisions of Big Tech companies and other developers of these models. Big Tech companies also require diverse representation on their design teams to ensure that their products consider the lived experiences of their intended audiences—some of whom are disconnected from the online world and exist in systemic conditions of poverty, social isolation, and outright racism.

To amplify the timeliness and urgency of these issues, this paper offers other instances where computer models have surveilled and profiled historically marginalized groups. The concluding section offers a series of policy recommendations to counter such online biases that can begin the work toward a more equitable and just internet for all people.

## From “permissionless innovation” to forgiveness

What is commonly referred to as “Big Tech” was birthed in an environment of deregulation, or “permissionless innovation”, facilitated by the lack of governmental oversight. Thierer (2016), who coined the term, defined “permissionless innovation” as contrary to precautionary principles shaped by government which tend to have chilling impacts on innovation. But what created the internet has also broken parts of it. From undermining user privacy to allowing the spread of dangerous misinformation, Big Tech companies have begun to exercise what I call “permissionless forgiveness” while committing civil and human rights infractions. This shift was evident when Facebook founder, Mark Zuckerberg, repeatedly used the words “I’m sorry” when testifying before Congress on the Cambridge Analytica scandal, when a third-party app harvested the data of over 87 million Facebook users in 2018.<sup>6</sup> Nearly three years after Zuckerberg’s promise to investigate the Russians for meddling in the 2016 U.S. presidential election, consumers are still dealing with an internet that discriminates and meddles in the constitutional and civil rights afforded to them. Now, Facebook has since rebranded into a new company called Meta, relying upon the ambiguity of augmented and virtual realities to shift the conversation from these and other grievances.<sup>7</sup>

A comprehensive civil rights framework introduced by lawmakers for Big Tech companies can mitigate the consequences of technology companies’ unfettered access to consumer data, and the importation of that information into emerging computer models that aggregate, infer, and share without users’ consent. Such review of existing anti-discrimination laws, and their potential modernization or replacement, can establish the appropriate guidelines for fair and transparent online conduct, setting a path for the equitable treatment of federally protected groups. More importantly, an intentional and deliberative process for calling out civil rights violations can help avert the disturbing systemic and stereotypical associations generated online, moving the industry away from apologetic posturing on racist and discriminatory activities.

## How civil rights work in society

Countering explicit discrimination in the physical space has become a lot easier in the U.S. under federal laws that govern equal opportunities for protected classes in the areas of housing, employment, and the extension of credit or lending practices. Congress passed the Public Law 88-352, or the Civil Rights Act of 1964, which forbade discrimination based on sex as well as race in hiring, promoting, and firing.<sup>8</sup> The Civil Rights Act of 1968 was later amended to include the Fair Housing Act, which further prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions to federally mandated protected classes. Enacted in 1974, the Equal Credit Opportunity Act (ECOA) prohibited any creditor from discriminating against any applicant from any type of credit transaction based on protected characteristics.<sup>9</sup> However, such laws are inadequate in protecting civil rights in the digital space.

The effectiveness of the Civil Rights Act of 1964 in ending public segregation could be attributed to the formation of an agency facilitating enforcement of the new rules. Title VII of the Civil Rights Act created the Equal Employment Opportunity Commission (EEOC), which enforces federal law so that such discrimination does not occur, and has the authority to investigate charges of discrimination against employers.<sup>10</sup> If there is a finding of discrimination, the EEOC will either settle the charge or file a lawsuit to protect the right of the individual. These and other laws instituted at the time sought to eliminate unlawful employment discrimination. Other amendments have also been granted to the EEOC's power, including the abilities to deter discrimination against age, disability, pregnancy, and ensure fair pay. Unfortunately, with the plethora of distinctions on what discrimination looks like in employment, there is no one specified law to investigate and redress online discrimination that may fall into any of the categories stated above and more. When the facets of hiring and other employment algorithms were added to the EEOC's jurisdiction, the agency developed a test to gage their fairness.<sup>11</sup> They determined that employers are directly responsible for monitoring the use of biased algorithms in the hiring processes, and can have enforcements levied against them.<sup>12</sup> However, it still remains increasingly difficult to narrow down the grievance and who is behind it—whether the company or the computer model, or a combination of both—in other areas, like financial services, housing, or health care.

For example, the Fair Housing Act, which is under the jurisdiction of the Department of Housing and Urban Development (HUD), clearly states the illegalities behind differential treatment in the housing market.<sup>13</sup> The Act also prohibits discrimination specifically because of race, color, national origin, religion, sex, familial status, and disability. But it is unclear how these actions are tracked, traced, and litigated when the new digital economy is purposed on the micro surveillance of market data to refine online housing searches by consumers. In March 2019, HUD acted against Facebook for steering low-income consumers away from more competitive and mainstream housing markets. The case was then settled in June 2022. This case will be discussed more later in the paper.<sup>14</sup>

The Fair Credit Reporting Act (Title VI of the Consumer Credit Protection Act) under the Federal Trade Commission states that its mission is to “protect information collected by consumer reporting agencies such as credit bureaus, medical information companies and tenant screening services.”<sup>15</sup> This Act intends to protect consumers’ information and privacy in consumer credit bureau files, as personal credit history is an important aspect of privacy. It helps in the determination of loans from banks, annual percentage rates on credit cards, and general credit reports and worthiness (e.g., landlords may check to see if the person is reliable to pay rent on time). The Act also helps the consumer know their report, how it’s being accessed or used, and provides certain rights, such as the right to dispute inaccurate information. But even with stringent guidelines on the provision and proportion of credit allowed or denied for a lender, technology has enabled pre-eligibility screening which further complicates decision making among more biased lenders, who may factor in non-financial data such as online purchasing history or access the public photos of applicants to unblind their decisions.

Another important civil rights protection is voting. The Voting Rights Act of 1965 outlawed discriminatory voting practices after the Civil War, particularly in the southern states that had unfair prerequisites such as literacy tests.<sup>16</sup> However, this landmark law remains under attack. In recent years, unwieldy voter identification requests, reduced numbers of polling locations, and state, federal, and civil society lawsuits pushing for such changes have prompted national protests and resistance on all sides.<sup>17</sup> In the 2016 election, election integrity was further challenged by online trolls who used manipulative algorithms to persuade voters of color against going to the polls at all, leveraging deep fakes and other deterrents villainizing the Democratic presidential candidate.<sup>18</sup>

## And even today, civil rights laws may still be insufficient

Undoubtedly, historical civil rights laws should be applied to the digital space, despite the continuous backlash from certain societal actors. But existing civil rights laws are limited in protecting intersectional identities and newly-acknowledged protected groups, such as members of the LGBTQ+ communities. In 2020, Supreme Court justices ruled in a 6-3 vote that Title VII of the Civil Rights Act that bars employment discrimination based on sex now included the LGBTQ+.<sup>19</sup> However, online discrimination through algorithmic bias and hate speech has equally tested the liberties of these groups. For example, AI decision models tend to be derived from stereotypes and commercial data stacks that have been negative or narrow towards this group, causing the same types of exclusions imposed upon historically marginalized groups.<sup>20</sup>

Hate speech and related behaviors spread through online platforms often target the LGBTQ+ community; 64 percent of users in this community have stated that they have experienced harassment in some form, with 75 percent of such users reporting that it had occurred on Facebook.<sup>21</sup> Thus, even with the acknowledgement that a civil rights framework is needed on the internet, some groups will be left off and out, and there will be limits on enforcement that fall outside the definition of federally-protected individuals and groups and limits the jurisdiction of federal agencies.

In many respects, these new and intersectional frames of oppression are supported by the online inferential economy—where technology companies do not ask or directly draw upon discrete demographic attributes. Rather, they draw upon extensive and expansive online data trails that create comprehensive assumptions, or composite profiles, about the race, gender, sexual orientation, and online “proxies,” including zip codes and photos, among other things to infer one’s identity. Clarification of the civil rights laws and their applicability in these and other cases are important, especially as these inferential traits become attributes to substantiate distinctions in advertising and other sensitive use cases (e.g., housing, employment, credit, etc.). Further, without discrete proof that the algorithm or the developer were intentionally applying race or other proxy variables to facilitate exclusion, the person experiencing the harm will have a hard time making the case of malfeasance.

While existing civil rights laws dutifully address explicit biases, what about those that are implicit within the digital economy? The Kirwan Center for the Study of Race and Ethnicity defines implicit bias as “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”<sup>22</sup> Citing individuals’ common susceptibility to these biases, the Center found that it is the nature of people to use homogenous associations and relationships to harbor feelings and attitudes based on race, ethnicity, age, and appearance.<sup>23</sup>

In higher education, for example, sociologist Katherine Milkman identified the persistence of implicit bias when white professors were less likely to respond to students of color requesting office hours due to preconceived stereotypes about their background, status, and competencies.<sup>24</sup> In the 2016 campaign, former presidential candidate Hilary Clinton connected the implicit & explicit biases of law enforcement when referencing their harmful deviances that stereotype Black people based on deeply embedded historical perceptions about race.<sup>25</sup>

Compared to more explicit discrimination, implicit bias is equally harmful in the online economy and is more likely to present itself due to the lack of diversity in tech company workforces. That is, the lack of diversity and inclusion in tech companies can forfeit various perspectives on the same question and process. Moreover, implicit biases may be unknown to online users given their inability to know that their search results or purchasing recommendations are different from others. These reasons should implore more technical and social explainability of algorithmic models, audit tools, and other reviews of outcomes by both technologists and policymakers to address the range of explicit and implicit biases within new computer models.

## **Civil rights, the digital divide, and racial inequities**

Throughout this paper, I have made the argument that existing civil rights laws provide a context for articulating threats against people of color and other vulnerable populations, despite being harder to apply and discern in the digital space. *First*, acts of racism and other forms of structural exclusion have changed their appearances in the digital space, and the greater use of algorithms has made these biases more difficult to identify. *Second*, existing civil rights laws rest the burden of proof on individuals who feel threatened or harmed, but the opacity of the internet is making these revelations more and more difficult to discern. The following two examples shed light on this.

### **Loan and credit-scoring software**

Today, algorithms have largely replaced human loan officers in evaluating credit worthiness. In some ways, FinTech algorithms have reduced discrimination in loan approval and pricing, making credit more widely available to historically disadvantaged populations; but in other ways, they continue to perpetuate institutional racial biases. In 2019, 16 percent of African Americans and 11.6 percent of Hispanics who applied for mortgage loans were denied, in contrast to only 7 percent of white applicants.<sup>26</sup> Additionally, Latinx and African American borrowers paid as much as 7.9 basis points more on mortgage interest rates than other Americans, which is equivalent to an additional \$756 million in extra interest per year.<sup>27</sup> FinTech have helped to reduce this gulf in access to capital. As one prominent study shows, FinTech algorithms exhibited 40 percent



less price discrimination than face-to-face lenders and no discrimination on loan approvals.<sup>28</sup> But despite researcher findings that FinTech algorithms demonstrate less bias than their human counterparts in loan approval and pricing, low-income and disadvantaged populations are still less likely to generate the types of data used in credit-scoring because they have less internet connectivity and less capital to spend. In fact, 44 million Americans are “credit invisible” because they are disconnected from mainstream financial services, and thus do not have a credit history.”<sup>29</sup> In the largest study of real-world mortgage data to date, economists Laura Blattner and Scott Nelson find that lenders consequently “face more uncertainty when assessing default risk of historically under-served groups in US credit markets and that this information disparity is a quantitatively important driver of inefficient and unequal credit market outcomes.”<sup>30</sup> In this way, credit-scoring is deeply intertwined with other institutional inequalities—including the digital divide and the wealth gap—that prevent low-income and minority populations from having access to loans at the same rate as white and wealthy applicants.

## **Facial recognition systems and policing**

In 2019, the National Institute of Standards and Technology reviewed 189 commercial facial recognition algorithms and found that the lowest-performing algorithm was over 100 times more likely to accurately identify white males than Black females.<sup>31</sup> The best-performing algorithms were still 10 times more likely to generate false positives for Black females than white males. A review of eight widely used facial image databases found that *six of the eight contained between 81.2 and 94.6 percent lighter-skin individuals.*<sup>32</sup> This is problematic because facial recognition algorithms need to be trained on a diverse and representative database to accurately identify faces of different races and genders. In 2016, the Georgetown Law Center on Privacy and Technology found that law enforcement agencies across the U.S have access to facial image databases encompassing over 117 million Americans, or over half of all American adults.<sup>33</sup> They also found that a quarter of all local and state police departments had the ability to run facial recognition searches despite the fact that facial recognition software demonstrates clear algorithmic bias. The *New York Times* has identified three instances in which facial recognition technology has led to the wrongful arrests of Black men—though the real number is likely much higher since some states do not require law enforcement to disclose when facial recognition technology is used to identify a suspect.<sup>34</sup> As these wrongful arrests illustrate, facial recognition technology will continue to reinforce and exacerbate racial profiling and biased policing. These two examples—and countless others—demonstrate the challenges that vulnerable populations face when discerning biases online. Not only does the technology obscure the biases, but it also makes it more difficult to prove.

Online racial biases may also confuse the use of current civil rights laws. Companies like Facebook, Zillow, and Airbnb have been publicly shamed for discrimination. For example, HUD filed a complaint against Facebook in 2018 for allowing home sellers and landlords to pick and choose who could see their ads.<sup>35</sup> HUD stated that this practice of discriminatory housing ads violated the Fair Housing Act by allowing targeted advertising based on the Facebook user's race, color, religion, sex, familial status, national origin, disability, and zip code. Airbnb had a similar problem with a 2016 Harvard study, which found that African American-sounding names were 16 percent less likely to receive a positive response when requesting a room. According to a 2016 study by Stanford University, MIT, and the University of Washington, Uber drivers cancelled rides twice as often for men with Black-sounding names.<sup>38</sup> In each of these cases, there was some evidence of disparate impact that denied marginalized populations access to certain services.

In the past, tech companies have admitted fault, apologized, and improved their community standards, while deepening content moderation and consumer appeal strategies. Facebook and Airbnb conducted a civil rights audit and publicly released their results.<sup>39</sup> Facebook also established a product counsel and equity team for Instagram, in order to eliminate racial biases in algorithms.<sup>40</sup> Facebook settled with HUD and promised to create more fair and responsible algorithms- an action that has resulted in a new technical framework for tackling online bias. Facebook also created a new civil rights division.<sup>41</sup> Although Airbnb did not go to court for its discriminatory treatment of African American users, the company has since tried to implement new policies, such as Project Lighthouse, a research-based project in collaboration with civil rights groups to determine how harmful online discrimination is.<sup>42</sup>

All these companies did respond to such grievances with self-regulatory actions. But, their measures only lessened the volatility of the real-time complaints and did not directly solve them. In April 2021, a study found, once again, that Facebook's ad algorithms continue to exclude women from certain job opportunities.<sup>43</sup> While Uber recalibrated their algorithm to allow for more blind selection of drivers and riders, studies found that discrimination persists against LGBTQ+ and nonwhite people.<sup>44</sup> These companies failed to fully acknowledge that their products and services were contributing to more precise targeting and discrimination against people who have been unable to escape such realities.

Profit incentives in the tech marketplace also facilitate unfair outcomes for people of color. That is because there are civil rights issues that have more to do with marketplace competition, or lack thereof, and not just the behaviors of online platforms.<sup>45</sup> People of color experience economic consequences or competitive exclusion or isolation due to racially motivated discrimination, even when not online. For example, certain products and services are not offered at all, or in some cases are disproportionately represented.<sup>46</sup> Turner Lee and Chin argue that including racial equity

as a litmus test in antitrust should be plausible, pointing to companies like Google, Amazon, Apple, and Facebook who have cemented their respective market power in their industry sectors and may have less incentives to make advertising algorithms less discriminatory due to a lack of competition.<sup>47</sup>

Self-regulatory actions to counter discriminatory acts are laudable. But, just like historically disenfranchised voters cannot be dependent on outdated voting rights legislation to guarantee their inalienable rights, Big Tech cannot be the arbiter of these truths. In other words, self-regulatory corrections cannot be the norm or even an exception. Anti-discrimination laws must be updated to regulate the behaviors and conduct of online activities that skirt around these concerns.

## **Challenging racial discrimination is hard**

However, racial discrimination under the current regime is difficult to report and subsequently prove. The burden has been placed on users and consumers to show that such discrimination has occurred. It is nearly impossible with nontransparent proprietary algorithms to assert malfeasance. If individuals decide to come together around a class action that may have a better claim, they could not do so, as most Big Tech companies have terms and conditions that do not allow for forced arbitration against their companies.<sup>48</sup>

In the end, more work needs to be done to assess the applicability and compliance of these laws and encourage Big Tech companies to operationalize them as a floor for marketplace conduct. This is where Congress and other policymakers can address, or at least modernize, some of the civil rights laws to accommodate more consumers experiencing slights in the growing digital ecosystem. The remainder of the paper outlines these recommendations for Congress and provides additional strategies for the private sector to pursue a more just internet. The last section outlines recommendations for Congress, industry, and civil society actors.

# Recommendations

## For Congress

- **Congress must provide instructive language that espouses civil rights compliance for Big Tech companies as part of any legislation impacting the digital economy, including forthcoming U.S. privacy legislation.** There are current laws in the U.S. that impose data collection limits for companies under limited guidance and sectoral requirements. Some states, like California, Virginia, and Colorado, have pending drafts of privacy legislation, in cases in the American Data Privacy and Protection Act. In Congress, both the House and Senate chambers have pending drafts of privacy legislation. The Consumer Online Privacy Rights Act (COPRA), was introduced in 2019 by Senator Maria Cantwell (D-WA) to focus on establishing privacy rights, outlawing deceptive practices, and improving data security safeguards.<sup>49</sup> This includes establishing certain standards for how personal data is collected, used, and shared. In addition to positioning methods for improved individual data security and autonomy, COPRA also gives consumers a means to pursue claims against groups, including Big Tech, that may misuse their data in several ways. Senator Roger Wicker (R-MS) concurrently introduced the Safe Data Act that has provisions which coalesce online privacy and civil rights.<sup>50</sup> There is also Senator Ron Wyden's (D-OR) privacy bill, the Mind Your Business Act, that would enable the Federal Trade Commission (FTC) to regulate how companies use consumer data.<sup>51</sup> Now, the ADPPA encompasses aspects of these drafts and is so close in passage by the end of 2022. In all, these more prominent legislative activities suggest bipartisan movement on provisions that limit the processing and sharing of data in discriminatory manners.
- **Additional legislative and regulatory guardrails must be applied to technologies that will embolden and maintain persistent systemic inequities, including facial recognition technologies or credit scoring.** Technologies that are either inherently discriminatory or will intentionally embolden existing discrimination must have legislative guardrails on their use. Congress has currently turned its attention to facial recognition technologies used by law enforcement. Many legislative proposals have called for a ban on the use of technologies deployed by federal law enforcement, in order to avoid worsening criminal justice outcomes from overtly surveilling Black communities. Meanwhile, others are seeking more transparency and accountability on the algorithms used by these systems. Academics and civil society organizations have argued that the technical inadequacies of facial recognition models have over-represented people of color in law enforcement databases due to higher profiling and arrests indiscriminately made by the police. Meanwhile, others argue that problems originate from how faces of darker-skinned subjects are not representative of the broader diversity in

training data.<sup>52</sup> Whatever the reason, certain emerging technologies require guardrails and more interrogation as they are applied to already fractured systems like criminal justice. It is in these institutions where disparate decisions around people of color are being made, and such unequal treatment will only be deepened by the deployment of predictive analytics and other AI systems without enforceable consumer protections and training on their use.

- **Companies should be required to disclose if an app or other online product and service has the potential to generate increased civil rights harms, possibly in the form of a warning label for algorithms or an energy star rating on the model's effectiveness.** In separate research, I have developed an energy star rating, a certification process that evaluates market-based algorithms for their inclusiveness, trustworthiness, and lawfulness.<sup>53</sup> The fact that computer models are allowed to exercise permissionless forgiveness over systemic transparency is problematic. To remedy racial bias, tech companies should acknowledge technical vulnerabilities through either more testing off-the-market, or clear disclosures of the technology's fallibilities. Researchers like Joy Buolamwini, founder of the Algorithmic Justice League, have conducted independent studies amplifying racial discrimination in encoded algorithms, especially due to the inability of computer models to proficiently detect the faces of darker-skinned subjects.<sup>54</sup> Yet, companies continue to directly deploy such products to market without relevant disclaimers about its deficiencies, leaving Black people as probable subjects in criminal investigations that utilize flawed facial recognition technologies, or misidentifying Black congressional members as suspects in mug shot lineups.<sup>55</sup> In the same vein, eligibility determinations based on personally identifiable attributes should be explainable and communicated to applicants, whether through upfront disclosure that an algorithm is driving the decision, or explanation afterwards that an algorithm facilitated the final decision. The ubiquity of pre-screening machine-learning models in employment or educational decisions have increased in recent years. Yet many employers or admission counselors, who offload these tasks to AI, are not making it known to subjects. For example, researchers are quickly finding racial biases in these systems as Black and Latino men are more likely to be denied interviews as emotional AI tests tend to negatively evaluate their facial expressions.<sup>56</sup> However, applicants lack means for recourse due to a lack of transparency or disclosure of their use. Applicants also have limited agency in feedback about the effectiveness of these tools.
- **Existing civil rights laws must be reviewed and modernized for the new digital economy and encompass the range of newly acknowledged groups.** Any revamp of existing civil rights laws should take cues from updates to the public accommodations rule under Title III of the American with Disabilities Act (ADA) and the recent attention given to the intersectional sensitivities of the LGBTQ+ communities.<sup>57</sup> For example, the last update of the public accommodations law, revised in 2016 and implemented in 2017, focused on the requirement of entities that owned, operated, or leased movie theaters to provide closed captioning and audio description whenever

showing a digital movie.<sup>58</sup> This update not only recognizes the need to engage digital media as part of ADA law implementation, but also anticipates the urgency of such needs, which enables text captioning in new digital streaming platforms. President Joe Biden's recent signatures on several executive orders that expand and protect the civil rights of the LGBTQ+ communities are other examples where existing civil rights laws and norms can be updated to confront contemporary displays of discrimination.<sup>59</sup> From definitional updates in laws protecting credit, housing, and employment to rules of the road on appropriate anti-discrimination conduct directed at Big Tech companies, there needs to be an immediate and direct remedy to the laissez-faire models for redress. Without a floor of what is lawful in AI systems, tech companies will continue to operate unfair systems while maintaining apologetic posturing in instances of civil rights transgressions.

## For industry

- **Big Tech developers must be trained on existing civil rights laws and statutes to design, execute, and evaluate more responsible and lawful computer models.** Managing racial discrimination should not be the sole burden of civil society and civil rights organizations. In fact, Big Tech companies must prepare for and expect that the implicit and explicit values, norms, and assumptions of their developers will result in mistakes. Further, such mistakes will eventually degrade the trustworthiness of online products and services, leading to higher reputational risks. For Big Tech to fully understand the nuances of systemic inequalities, they must diversify their product teams and employ individuals who have the lived experiences of the subjects, places, and objects in full view of the model's design. Companies must also ensure that diverse individuals are represented within their workforces, bringing credibility to their investments in diversity and inclusion, as well as their mission to identify and mitigate biases at the onset of the algorithm's development. Many past online search query mistakes were made by eager technologists who couldn't account, predict, nor understand the sociological outcomes of their predictive models. Starting in undergraduate education, computer and data scientists should be trained in ethics, racial equity, and AI fairness, as well as civil and human rights laws, to be better prepared to contextualize their work and to avoid dismal outcomes for certain groups. Through this, technologists can achieve what Harvard researcher Jinyan Zang coined as "fairness through awareness," where a robust team of designers and decision makers who know the importance of context in the deployment of automated decision-making tools would be able to thoroughly analyze a full inventory of existing and potential threats.<sup>60</sup>
- **Unlawful, irresponsible online activities, especially in online behavioral advertising and other sensitive use cases from Big Tech companies, must be penalized.** Industry actors that violate civil rights in banking, health care, education, and other areas closely correlated with

improved life outcomes for marginalized groups, must be penalized. These algorithms should be evaluated with greater scrutiny than those making more innocuous predictions around one's next meal, movie, or clothing—despite market surveillance not being ideal. Having descriptive guardrails like the ones previously mentioned, and in some instances, proscriptive regulatory and legislative guidance for tech companies around behavioral, associational, and inferential models, can help avert massive online discrimination. In instances where there is value to collaborate with government to reduce discrimination, companies and policymakers should work together with proven regulatory tools and audits, such as sandboxes and safe harbors, to control for certain demographics in the experimentation phase to minimize the effects of racial biases.

## For civil society actors

- **Countering perceived forms of discrimination must involve individual citizens who need algorithmic and general digital literacy tools to reclaim their rights in the technological ecosystem.** Civil rights organizations must help consumers equip themselves with tools and information about the depth of the algorithmic economy to safeguard their civil rights. Black abolitionist Frederick Douglass once shared that: “Without vision, my people will perish.”<sup>61</sup> Painstakingly today, people of color are held hostage by their online search decisions, social networks, and online communities. Further, the persistent polarization that happens online when like-minded groups and individuals gather hampers the potential for full democratic participation, while demoting the use of human agency to break such cycles. As with any new and emerging communications infrastructure, citizens—especially those of color—must be equipped with the language and resources required to understand the log jam that these new models present. And they must be able to organize around these challenges to change the trajectory of online discrimination. In 2020, the NAACP, Color of Change, the Anti-Defamation League, and other national civil rights and advocacy organizations initiated the “Stop Hate for Profit” campaign to ban the hate and violent speech promulgating through Facebook’s platforms.<sup>62</sup> This coalition ultimately succeeded in getting the company’s attention, but there is still more work to be done to recalibrate the algorithms that set the conditions for such racism and discrimination.

## Conclusion

Technology cannot be relieved of its social and civic responsibilities to create safe spaces for everyday citizens. Big Tech companies must know that they bear the consequences for the foreclosure of opportunities on marginalized populations and for challenging the integrity of democracies and civil rights protections. While much of the ongoing debate focuses on using antitrust frameworks to make platforms more accountable, this will only solve part of these contemporary problems. What constitutes as civil rights has been identified and litigated in some of the nation's highest courts. These rights must be part of the foundation of existing and new technological products, to prevent the regression of progress that historically disadvantaged and other vulnerable populations have made.

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# Notes

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