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Combatting AI's Protectionism & Totalitarian-Coded Hypnosis: The Case for AI Reparations & Antitrust Remedies in the Ecology of Collective Self-Determination

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COMBATting AI'S PROTECTIONISM & TOTALITARIAN-CODED HYPNOSIS: THE CASE FOR AI REPARATIONS & ANTITRUST REMEDIES IN THE ECOLOGY OF COLLECTIVE SELF-DETERMINATION

*Maurice R. Dyson**

“There is a real world with real structure. The program of mind has been trained on the vast interaction with this world and so contains code that reflects the structure of the world and knows how to exploit it.”¹

ABSTRACT

Artificial Intelligence's (AI) global race for comparative advantage has the world spinning, while leaving people of color and the poor rushing to reinvent AI imagination in less racist, destructive ways. In repurposing AI technology, we can look to close the national racial gaps in academic achievement, healthcare, housing, income, and fairness in the criminal justice system to conceive what AI reparations can fairly look like. AI can create a fantasy world, realizing goods we previously thought impossible. However, if AI does not close these national gaps, it no longer has foreseeable or practical social utility value compared to its foreseeable and actual grave social harm. The hypothetical promises of AI's beneficial use as an equality machine without the requisite action and commitment to address the inequality it already causes now is fantastic propaganda masquerading as merit for a Silicon Valley that has yet to diversify its own ranks or undo the harm it is already causing. Care must be taken that fanciful imagining yields to practical realities that, in many cases, AI no longer has foreseeable practical social utility when compared to the harm it poses to democracy, privacy, equality, personhood and global warming.

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1. ERIC B. BAUM, WHAT IS THOUGHT? 169 (2004).

Until we can accept as a nation that the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914 are not up to the task for breaking up tech companies; until we can acknowledge DOJ and FTC regulators are constrained from using their power because of a framework of permissibility implicit in the “consumer welfare standard” of antitrust law; until a conservative judiciary inclined to defer to that paradigm ceases its enabling of big tech, then workers, students, and all natural persons will continue to be harmed by big tech’s anticompetitive and inhumane activity. Accordingly, AI should be vigorously subject to anti-trust monopolistic protections and corporate, contractual, and tort liability explored herein, such as strict liability or a new AI prima facie tort that can pierce the corporate and technological veil of algorithmic proprietary secrecy in the interest of justice. And when appropriate, AI implementation should be phased out for a later time when we have better command and control of how to eliminate its harmful impacts that will only exacerbate existing inequities.

Fourth Amendment jurisprudence of a totalitarian tenor—greatly helped by Terry v. Ohio—has opened the door to expansive police power through AI’s air superiority and proliferation of surveillance in communities of color. This development is further exacerbated by AI companies’ protectionist actions. AI rests in a protectionist ecology including, inter alia, the notion of black boxes, deep neural network learning, Section 230 of the Communications Decency Act, and partnerships with law enforcement that provide cover under the auspices of police immunity. These developments should discourage a “safe harbor” protecting tech companies from liability unless and until there is a concomitant safe harbor for Blacks and people of color to be free of the impact of harmful algorithmic spell casting.

As a society, we should endeavor to protect the sovereign soul’s choice to decide which actions it will implicitly endorse with its own biometric property. Because we do not morally consent to give the right to use our biometrics to accuse, harass, or harm another in a line up, arrest, or worse, these concerns should be seen as the lawful exercise of our right to remain a conscientious objector under the First Amendment. Our biometrics should not bear false witness against our neighbors in violation of our First Amendment right to the free exercise of religious belief, sincerely held convictions, and conscientious objections thereto.

Accordingly, this Article suggests a number of policy recommendations for legislative interventions that have informed the work of the author as a Commissioner on the Massachusetts Commission on Facial Recognition Technology, which has now become the framework for the recently proposed federal legislation—The Facial Recognition Technology Act of 2022. It further explores what AI reparations might fairly look like, and the collective social movements of resistance that are needed to bring about its fruition. It imagines a collective ecology of self-determination to counteract the expansive scope of AI’s protectionism, surveillance, and discrimination. This movement of self-determination seeks: (1) Black, Brown, and race-justice-conscious progressives to have majority participatory governance

over all harmful tech applied disproportionately to those of us already facing both social death and contingent violence in our society by resorting to means of legislation, judicial activism, entrepreneurial influential pressure, algorithmic enforced injunctions, and community organization; (2) a prevailing reparations mindset infused in coding, staffing, governance, and antitrust accountability within all industry sectors of AI product development and services; (3) the establishment of our own counter AI tech, as well as tech, law, and social enrichment educational academies, technological knowledge exchange programs, victim compensation funds, and the establishment of our own ISPs, CDNs, cloud services, domain registrars, and social media platforms provided on our own terms to facilitate positive social change in our communities; and (4) personal daily divestment from AI companies' ubiquitous technologies, to the extent practicable to avoid their hypnotic and addictive effects and to deny further profits to dehumanizing AI tech practices.

AI requires a more just imagination. In this way, we can continue to define ourselves for ourselves and submit to an inside-out, heart-centered mindfulness perspective that informs our coding work and advocacy. Recognizing we are engaged in a battle of the mind and soul of AI, the nation, and ourselves is all the more imperative since we know that algorithms are not just programmed—they program us and the world in which we live. The need for public education, the cornerstone institution for creating an informed civil society, is now greater than ever, but it too is insidiously infected by algorithms as the digital codification of the old Jim Crow laws, promoting the same racial profiling, segregative tracking, and stigma labeling many public school students like myself had to overcome. For those of us who stand successful in defiance of these predictive algorithms, we stand simultaneously as the living embodiment of the promise inherent in all of us and the endemic fallacies of erroneous predictive code. A need thus arises for a counter-disruptive narrative in which our victory as survivors over coded inequity disrupts the false psychological narrative of technological objectivity and promise for equality.

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I. INTRODUCTION

IT seems rather unthinkable that in the age of misinformation, accusations of fake news, and deep fakes that threaten our democracy, we would deploy Artificial Intelligence (AI) on a massive industry scale since surveillance and algorithmic systems of automated determinism are infected with misinformation they cannot dispel.² As increasing autocratic sentiment across the globe threatens democracies, we are entering an era in which autocracies will have their greatest weapon.³ The objectification and dehumanization of humanity began long before technological innovation, but AI will hasten its progress absent a course correction.⁴ This prospect may become more likely because the concept of equal justice under the law has already been wholly surrendered when voting rights are no longer rights enforceable in law or in personam due to voter roll purges, redistricting, gerrymandering, felony disfranchisement, voter

2. See Soojin Jeong, Margaret Sturtevant & Karis Stephen, *Responding to Deepfakes and Disinformation*, REGUL. REV. (Aug. 14, 2021), <https://www.theregreview.org/2021/08/14/saturday-seminar-responding-deepfakes-disinformation> [<https://perma.cc/LTU8-8E9N>] (“Bad actors can also exploit others by using deepfakes to commit identity theft, blackmail, and fraud. Deepfakes are uniquely effective at spreading disinformation, which raises critical concerns for democracy and national security. Effective democratic discourse requires that voters start from the same foundation of facts, but deepfakes can lead individuals to live in their own subjective realities and exacerbate social divisions.”); John Murray, *Racist Data? Human Bias is Infecting AI Development*, TOWARDS DATA SCI. (Apr. 24, 2019), <https://towardsdatascience.com/racist-data-human-bias-is-infecting-ai-development-8110c1ec50c> [<https://perma.cc/AF8C-KPRJ>] (“[T]raining data is created, selected, collated and annotated by humans. And therein lies the problem.”).

3. Martin Beraja, Andrew Kao, David Y. Yang & Noam Yuchtman, *Autocratic AI Dystopias: From Science Fiction to Social Science Fact*, VOX EU (Dec. 17, 2021), <https://voxeu.org/article/autocratic-ai-dystopias-science-fiction-social-science-fact> [<https://perma.cc/5ZQQ-ERM2>] (“As a technology of prediction, AI may be particularly effective at enhancing autocrats’ social and political control. Furthermore, because government data are inputs into developing AI prediction algorithms and can be shared across multiple purposes, autocrats’ collection and processing of data for purposes of political control may directly stimulate AI innovation for the broader commercial market, far beyond government applications.” (citation omitted)).

4. See, e.g., *With Autocrats on the Defensive, Can Democrats Rise to the Occasion?*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2022/autocrats-on-defensive-can-democrats-rise-to-occasion> [<https://perma.cc/C6BC-JK6W>] (“The conventional wisdom these days is that autocracy is ascendant, democracy on the decline. That view gains currency from the intensifying crackdown on opposition voices in China, Russia, Belarus, Myanmar, Turkey, Thailand, Egypt, Uganda, Sri Lanka, Bangladesh, Venezuela, and Nicaragua. It finds support in military takeovers in Myanmar, Sudan, Mali, and Guinea, and undemocratic transfers of power in Tunisia and Chad. And it gains sustenance from the emergence of leaders with autocratic tendencies in once- or still-established democracies such as Hungary, Poland, Brazil, El Salvador, India, the Philippines, and, until a year ago, the United States.”).

ID laws, and criminalization of providing food and water to voters standing in line at the polls.⁵ Yet a society that purports to abide by democratic principles should also endeavor to be clearly committed to what justice truly requires for all, not just for some of us. At the very least,

[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.⁶

A societal power dynamic is wholly bankrupt of virtue when it reinforces, wittingly or unwittingly, supremacist power paradigms of racial, gender, and class dominance and subdominance through its use of facial recognition technology (FRT).⁷ Such use of technology breeds cynicism in democracy, for a fundamentally authoritarian technology has no place in a free and open society.⁸ Its dangers become ever more apparent while its inner machinations remain ever more concealed.⁹

A. THE FALLACY OF RAWLS THEORY OF JUSTICE

We do not operate in a Rawlsian world, for there is no luxury of assuming all have an “initial position of equality.”¹⁰ Police violence against people of color reminds us of the need for policing and criminal justice

5. See *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 18, 2021), <https://www.aclu.org/news/civil-liberties/block-the-voter-suppression-in-2020> [<https://perma.cc/7EZV-3KSL>] (“Across the country, [one] in [sixteen] Black Americans cannot vote due to disenfranchisement laws. Counties with larger minority populations have fewer polling sites and poll workers per voter. In 2018, Latino and Black Americans were twice as likely as whites to be unable to get off work while polls were open. [Twenty-five] percent of voting-age Black Americans do not have a government-issued photo ID. Geographic isolation is a major barrier to Native American voters due to the inaccessibility of nearby polling locations in many reservations. In South Dakota, 32[%] of Native voters cite travel distance as a factor in deciding whether to vote. More than one-sixth (18[%]) of voters with disabilities reported difficulties voting in person in 2020. Nearly two-thirds of polling places had at least one impediment for people with disabilities.”).

6. *Title VI Legal Manual: Synopsis of Legislative History and Purpose of Title VI*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fcs/T6manual2> [<https://perma.cc/AU9H-MS2D>] (quoting H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)).

7. See Olga Akselrod, *How Artificial Intelligence Can Deepen Racial and Economic Inequities*, ACLU (July 13, 2021), <https://www.aclu.org/news/privacy-technology/how-artificial-intelligence-can-deepen-racial-and-economic-inequities> [<https://perma.cc/3D2H-EMC3>].

8. See Seth Lazar, Claire Benn & Mario Günther, *Large-Scale Facial Recognition Is Incompatible With a Free Society*, CONVERSATION (July 9, 2020, 3:59 PM), <https://theconversation.com/large-scale-facial-recognition-is-incompatible-with-a-free-society-126282> [<https://perma.cc/3RS9-LLLK>] (leading computer science organizations have come out against facial recognition technology).

9. See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015).

10. JOHN RAWLS, *A THEORY OF JUSTICE* 10 (rev. ed. 1999) (describing his famous thought experiment).

transformative change, of which AI must be an integral component.¹¹ Indeed, we are under no illusion that Rawls employs a credible exercise when he asks us to ponder what laws one would pass not knowing their individual status in society.¹² The very question rests on a misapprehension that law, as it is now conceived and enforced by the majority, exists for some reason other than to exercise power over the dominated, which is legalized violence upon the independent volition of the soul.¹³ “Legal interpretation takes place in a field of pain and death A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”¹⁴ And those with the power to exact that concession by no means operate under a Rawlsian “veil of ignorance.”¹⁵ Instead, we have inherited a de facto technological veil of ignorance as AI often obscures from programmers the larger systemic and nuanced racial lessons and insights that only lived experience can bring.¹⁶

The Rawlsian question we have ignored because there has been no reason for elites to oblige, is to ask: how would one govern if they were on the receiving end of inequality? Of course, such a question—like Rawls suggests—presupposes a system where the privileged would ever subject themselves to the denigration of their own inordinate influence and power to place themselves on the receiving end of anything unfavorable to their economic interest or status.¹⁷ The wealth of the rich is invisible, outside the rules of transparency, accountability, and oversight, and hid-

11. See generally Maurice R. Dyson, *Excessive Force, Bias & Criminal Justice Reform: Proposals for Congressional Action*, 63 LOY. L. REV. 27 (2017).

12. See generally RAWLS, *supra* note 10.

13. See Peg Birmingham, *On Violence, Politics, and the Law*, 24 J. SPECULATIVE PHIL. 1, 1 (2010); Christoph Menke, *Law and Violence*, 22 LAW AND LITERATURE 1, 7, 12–13 (2010).

14. Menke, *supra* note 13, at 1 (citing ROBERT COVER, *Violence and the Word, in NARRATIVE, VIOLENCE, AND THE LAW* 203 (Martha Minow, Michael Ryan & Austin Sarat eds., 1993)).

15. Rawls contends that if, by removing knowledge of status, abilities, and interests, one could eliminate the usual effects of egotism and personal circumstances on such decisions, just decisions could be made without self-interest. See RAWLS, *supra* note 10, § 3. Rawls argued that any society organized around this basis would respect (1) the principle of equal liberty, which accords each person the right to freedom to the extent it does not infringe upon the freedom of others, and (2) the maximum principle, which allocates resources and maximizes benefits for the least advantaged people. See *id.*; see generally John Rawls, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/rawls/#Ori-Pos> [<https://perma.cc/JNZ9-FLLF>].

16. See, e.g., Craig S. Smith, *Dealing With Bias in Artificial Intelligence*, N.Y. TIMES (Jan. 2, 2020), <https://www.nytimes.com/2019/11/19/technology/artificial-intelligence-bias.html> [<https://perma.cc/M4GX-4PZV>] (focusing on approaches taken by women, minorities, or other disadvantaged groups challenging traditional ways of thinking).

17. See generally BASTIAN OBERMAYER & FREDERIK OBERMAIER, *THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH & POWERFUL HIDE THEIR MONEY* (2016); see also Paul Constant, *When Rich People Don't Face the Same Consequences As the Rest of Us, The System Falls Apart—And It's Bad For Everyone*, BUS. INSIDER (Oct. 30, 2020, 8:12 AM), <https://www.businessinsider.com/rich-people-dont-face-same-consequences-us-system-falls-apart-2020-10> [<https://perma.cc/PNV7-W35Z>]; Agustino Fontevicchia, *The Koch Brothers Paradox: Dark Money, SuperPACs, And The Forbes 400*, FORBES (Oct. 2, 2015, 9:01 AM), <https://www.forbes.com/sites/afontevicchia/2015/10/02/the-koch-brothers->

den in offshore accounts yet tied to a larger context in which AI operates to produce that wealth.¹⁸ Their old, dark money, while hidden, is apparent in its impact on domestic and international political campaigns.¹⁹ Those of us on the receiving end are mindful that the rich billionaire tech class of leaders simply do not face the same consequences under the law that the poor do.²⁰ Though some have contended that blind governance with emphasis on protecting individual rights is the proper way forward in AI regulation,²¹ realists know that this approach falls flat for the same reasons colorblind governance has utterly failed to address social inequality.²² Against the backdrop of corruption, hate, and greed, AI does not bode well for relying on the government to protect the most vulnerable.²³ Turning a blind eye is not objectivity; it is hostile ambivalence to human suffering at the hands of state violence and racial repression aided and abetted by algorithms of injustice.²⁴ In essence, if our republic dispenses

paradox-dark-money-superpacs-and-the-forbes-400/?sh=63b3adec3406 [https://perma.cc/P7EA-HHT6].

18. Will Fitzgibbon & Michael Hudson, *Five Years Later: Panama Papers Still Having A Big Impact*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2021), <https://www.icij.org/investigations/panama-papers/five-years-later-panama-papers-still-having-a-big-impact> [https://perma.cc/7W3C-TZFS].

19. See Fontevecchia, *supra* note 17.

20. Constant, *supra* note 17 (“[T]he IRS has openly admitted to Congress that it audits poor Americans far more often than the wealthiest people and corporations. In the words of ProPublica’s Paul Kiel, ‘auditing poor taxpayers is a lot easier’ than it is to engage in a lengthy back-and-forth with the fleets of expensive lawyers and accountants that wealthy people can hire. Funding at the IRS has been repeatedly slashed over the last decade by trickle-downers, and so they literally don’t have enough money to handle the expenses incurred by auditing the wealthy. Without that fear of audits hanging over their heads, the wealthy are able to stash their money and move it around with relative impunity. Remove the consequences, Reich argues, and their actions become a lot more audacious.”).

21. See, e.g., Jessie Daniels, ‘Colorblind’ Artificial Intelligence Just Reproduces Racism, HUFFPOST (Jan 16, 2019, 8:00 AM), https://www.huffpost.com/entry/opinion-artificial-intelligence-policing-surveillance-taylor-swift_n_5c3eaa1de4b0922a21d9d704 [https://perma.cc/8A4X-4UUL].

22. Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1, 48, 57–58 (2015).

23. See Monique Mann & Tobias Matzner, *Challenging Algorithmic Profiling: The Limits of Data Protection and Anti-Discrimination in Responding to Emergent Discrimination*, BIG DATA & SOC’Y, July–Dec. 2019, at 1, 1–2 (harnessing algorithms means that data gathered at a particular place can be used to build models applied in different contexts to different persons).

24. See T. Douglas, J. Pugh, I. Singh, J. Savulescu & S. Fazel, *Risk Assessment Tools in Criminal Justice and Forensic Psychiatry: The Need for Better Data*, 42 EUR. PSYCHIATRY 134, 135 (2016) (existing data suggests that most risk assessment tools have poor to moderate accuracy in most applications); Steve Nouri, *The Role Of Bias In Artificial Intelligence*, FORBES (Feb. 4, 2021, 8:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2021/02/04/the-role-of-bias-in-artificial-intelligence/?sh=6c29dadb579d> [https://perma.cc/4NE9-6TWS] (explaining that AI is evolving exponentially, from driverless vehicles to voice automation in households, and is no longer just a term from sci-fi books and movies); Fahim Hassan & Helen Gezahegn, *Addressing Racial Bias in AI: A Guide for Curious Minds*, TOWARDS DATA SCI. (Aug. 9, 2020), <https://towardsdatascience.com/addressing-racial-bias-in-ai-a-guide-for-curious-minds-ebdf403696e3> [https://perma.cc/7CDP-R79V] (“As we realize the dangerous consequences of applying biased AI technology, we also realize our need to unlearn the racism we’ve all been taught.”).

justice fairly by its own stated principles, then equal protection guarantees equity for each individual and society.

But ours is a society far from the oft-espoused collective utilitarian values that John Stuart Mills and Jeremy Bentham would have us believe operate the greatest good for the greatest number.²⁵ As a tech predominate society, we have long rejected moral choices in AI that benefit the welfare of the masses. This is further evidenced by our rejection of the deontological, teleological form of ethics embodied Kant's universal categorical imperative.²⁶ That moral rejection of the collective good can be seen through tech repeatedly privileging the 1%, promoting AI automation over mass worker displacement, abandoning net neutrality and ignoring the enormous global warming caused by AI machine learning.²⁷ Further, AI tech has noticed and amplified the vilification of race in our society. In light of this track record, what is the reasonable person to conclude about technologies like the AI powered CRISPR-Cas9 gene editing²⁸ that allows humans to intervene in evolution in ways that can enforce White Supremacy social hierarchies. The tech uses RNA-guided protein found in bacteria to edit an organism's DNA quickly and inexpensively²⁹ for the benefit of some, but not others. Given these possibilities deeply impacting life expectancies, we should compel AI to respect the universal ethical principle that one should always respect the humanity in others, and that one should only act in accordance with rules that could hold for everyone, including the vulnerable?

Of course, it is difficult to determine what is fair and neutral in a nation never committed to implementing those principles without loopholes, caveats, half measures, or expiration dates.³⁰ It would be naïve to think that AI will not continue to follow this same path if nothing is done to correct the course soon. When it comes to the 1% among the ranks of a technocratic leadership, Adam Smith's so-called neutral, invisible hand in

25. For further discussion of these utilitarian principles, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1907); JOHN STUART MILLS, A SYSTEM OF LOGIC (1843).

26. See generally IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS. (Robert Stern ed., Christopher Bennett & Joe Saunders trans., Oxford Univ. Press 2019) (1785).

27. See Karen Hao, *We Read the Paper that Forced Timnit Gebru out of Google. Here's What it Says*, MIT TECH. REV. (Dev. 4, 2020), <https://www.technologyreview.com/2020/12/04/1013294/google-ai-ethics-research-paper-forced-out-timnit-gebru> [<https://perma.cc/7T7C-JEPK>].

28. See Stanford Center for Ethics in Society, *CRISPR, AI, and the Ethics of Scientific Discovery*, YOUTUBE (Nov. 22, 2019), <https://www.youtube.com/watch?v=61Uvlt8TUfY> [<https://perma.cc/ZUC5-TUZ7>].

29. See *id.*

30. Loopholes to slavery under the Thirteenth Amendment permitting involuntary servitude as a punishment for a crime, caveats limiting racial remedies from including privileged Whites who fled lawful court orders to integrate after *Brown v. Board of Education*, half measures adopted by courts and states following *Brown II* that demonstrated a highly equivocal commitment to integration, and expiration dates such as those suggested by the *Bollinger* cases on affirmative action are just some examples of the evasive actions taken to sidestep fairness in American jurisprudence.

the marketplace³¹ is now AI's invisible hand—only it is neither neutral nor invisible in market manipulation and appropriation of power. When our “republic” becomes technological tyranny, it directly contravenes the individual Bill of Rights and constitutional safeguards on which the republic was espoused to be founded.³²

Race is vilified in many instances yet deemed perfectly permissible in instruments, including AI instrumentalities with the tendency—if not the express purpose—to subjugate racially. Indeed, it is laughable that it is constitutionally taboo to use race as an outcome determinative factor when we have no compunction about using race as outcome determinative in algorithm development, AI predictive policing, and AI risk assessment tools, not to mention in AI gerrymandering and voter suppression tactics, housing segregation, school choice, medical treatment and beyond.³³ Race is conveniently donned like a Black face costume by White majoritarian power to justify *Brown v. Board of Education*³⁴ in order to mollify African Cold War nations and allies fighting for a democracy overseas when there was not one to be found in our own backyard. But when the time came for appearances to end, so did their cosmetic commitment to *Brown*.

Race is conveniently exacerbated in furious rhetoric from Barry Goldwater and Donald Trump to Russia operatives who win elections on our backs and at our expense and our families' safety through cyber-attacks, and racially provocative AI algorithms that conjure more digital reasons of suspicion and anger heaped onto the experience BIPOC people already must contend with. We did not ask for tech to be an enemy, but it would seem it has assumed that role by aiding and abetting oppressive agendas against us. Race is deployed by the powers when it suits their strategic interest and discarded as a prohibited racial quota or as impermissible racial balancing mandate when it is not. The legal hypocrisy of that jig has been up for some time, but of course, the most vulnerable have understood it was always a matter of raw power, not principle, that animates our American jurisprudence to enforce White supremacy. The question is how far the tech industry will go to be their technological handmaidens who perpetuate it? What will it take to stop it in its tracks? What will it take to hold it accountable to humanitarian concerns? How can we stop tech from becoming the unaccountable censors of content, especially when they censor content at odds with their business interests?³⁵

31. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (Penguin Grp. 1986) (1776).

32. See John Patrick, *Popular Sovereignty*, ANNENBERG CLASSROOM PUB. POL'Y CTR., https://www.annenbergclassroom.org/glossary_term/popular-sovereignty [<https://perma.cc/2UPE-HG25>].

33. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

34. 349 U.S. 294 (1955).

35. See, e.g., Geoffrey A. Fowler & Chris Alcantara, *Gatekeepers: These Tech Firms Control What's Allowed Online*, WASH. POST (Mar. 24, 2021), <https://www.washingtonpost.com>.

Colorblind advocates often seek to remove race (and BIPOC people with it) from public and private life,³⁶ except when it benefits their pockets to perpetuate involuntary servitude, the prison industrial complex, the pharmaceutical monopoly, or the monopolistic control and protection of all property along lines of race.³⁷ It seems cruelty is not without its irony.

II. AI IN A JURISPRUDENCE OF TOTALITARIANISM

Punishing individuals in risk assessment algorithms for the socially engineered conditions that Jim Crow and Jim Code intentionally created is beyond sadistic.³⁸ No just system of laws would rest on such a premise and model. We concede far too much, by acquiescence or ignorance, allowing enormous powers to invade our privacy through retailers, tech companies, and unknown commercial third parties that compile our biometrics the moment we walk into a brick-and-mortar store or click the keyboard. Their biometric scans determine our age, race, gender, and ethnicity, medical conditions, consumer practices and track our movement without mercy.³⁹ In the fight for social justice in policing, AI has

com/technology/2021/03/24/online-moderation-tech-stack/?itid=LK_inline_manual_21 [https://perma.cc/B7C4-U3KV] (reporting allegations that Facebook removed “members’ ability to share news articles in Australia because of a dispute over a law that forced the company to pay publishers”).

36. See Theodore R. Johnson, *How Conservatives Turned the ‘Color-Blind Constitution’ Against Racial Progress*, ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221> [https://perma.cc/6MY9-8UUQ].

37. See *id.* (“In a series of cases that tackle racial preferences and attempts at racial redress, the Court has found that a color-blind reading of the Constitution complicates or outright rejects color-conscious policies, even if they are implemented with the intent of furthering racial equality. For example, in *Adarand Constructors, Inc. v. Peña* [515 U.S. 200] (1995), a case challenging affirmative action in government contracts, the Court established that race-based classifications must meet strict scrutiny, the highest standard of judicial review. In *Shelby County v. Holder* [570 U.S. 529] (2013), the Court ruled that a measure intended to protect voters of color in jurisdictions with a history of racial discrimination was unconstitutional, effectively gutting the Voting Rights Act of 1965. The Court determined that Michigan’s affirmative-action ban was constitutional in *Schuetz v. Coalition to Defend Affirmative Action* [572 U.S. 291] (2014).”); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

38. See Sarah E. Bond & Nyasha Junior, *How Racial Bias in Tech Has Developed the ‘New Jim Code,’* HYPERALLERGIC (Oct. 8, 2020), <https://hyperallergic.com/593074/how-racial-bias-in-tech-has-developed-the-new-jim-code> [https://perma.cc/GD79-S2GF] (comparing Google searches on “black girls” and “white girls” to reveal how racism and sexism affect search results).

39. See Chris Burt, *FaceFirst Facial Recognition Coming to Thousands of U.S. Retail Locations*, BIOMETRIC UPDATE (Aug. 21, 2018, 12:25 PM), <https://www.biometricupdate.com/201808/facefirst-facial-recognition-coming-to-thousands-of-u-s-retail-locations> [https://perma.cc/RGB2-3UU7]; Esther Fung, *Shopping Centers Exploring Facial Recognition in Brave New World of Retail*, WALL ST. J. (July 2, 2019, 8:00 AM), <https://www.wsj.com/articles/shopping-centers-exploring-facial-recognition-in-brave-new-world-of-retail-11562068802> [https://perma.cc/V9DF-CQ3V]; see also Becca Whitnall, *Janss Mall Studying Shoppers Using Cutting-Edge Tech*, THOUSAND OAKS ACORN (July 18, 2019), <https://www.toacorn.com/articles/janss-mall-studying-shoppers-using-cutting-edge-tech> [https://perma.cc/N7KY-7KF6]; Elias Wright, *The Future of Facial Recognition Is Not Fully Known: Developing Privacy and Security Regulatory Mechanisms for Facial Recognition in the Retail Sector*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 647 (2019); Vincent Nguyen, *Shopping for Privacy: How Technology in Brick-and-Mortar Retail Stores Poses*

been used against protestors in the Freddie Gray demonstrations, which only chill lawful exercise of First Amendment rights.⁴⁰ These misuses and breaches of our data seen throughout our society reinforce racial totalitarian impulses by the government, technology, banking, insurance, health, and retail sectors and they remain with the tacit complicity of Congress and our Supreme Court. The Court's policing jurisprudence, particularly under the Fourth Amendment, makes clear we have neither a subjective expectation of privacy for our faces that remain exposed in public view nor an objective expectation of privacy given public surveillance.⁴¹ As Justice Douglas argued in his *Terry v. Ohio* dissent, "giv[ing] the police greater power than a magistrate is to take a long step down the totalitarian path,"⁴² and "if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime."⁴³ Similarly, Michelle Alexander notes,

History suggests Justice Douglas had the better of the argument. In the years since *Terry*, stops, interrogations, and searches of ordinary people driving down the street, walking home from the bus stop, or riding the train have become commonplace—at least for people of color. As Douglas suspected, the Court in *Terry* had begun its slide down a very slippery slope. Today it is no longer necessary for the police to have any reason to believe that people are engaged in criminal activity or actually dangerous to stop and search them. As long as you give "consent," the police can stop, interrogate, and search you for any reason or no reason at all.⁴⁴

Of course consent presumes equal relations of independent autonomous power exist between the parties without undue influence in the face of possible police terror. However, consent simply does not and cannot exist as a practical matter and AI has followed suit by not even bothering to seek our consent before exploiting our intimately personal data. Indeed, AI's algorithms and FRT have only hastened the ushering in of this racial totalitarian regime. Our jurisprudence has increasingly become totalitarian-enabling in ways that seem to forget history's worst atrocities, giving the vulnerable second-class, stateless status within their own coun-

Privacy Risks for Shoppers, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 535, 537–38 (2019); *Facial Recognition in Retail & Hospitality: Cases, Benefits, Laws*, INTELLECTSOFT (Apr. 17, 2019), <https://www.intellectsoft.net/blog/facial-recognition-in-retail-and-hospitality> [<https://perma.cc/KM9J-PAPK>].

40. See *Digital Tools Being Used to Track People As Never Before, Warns UN Rights Chief*, UN NEWS (June 25, 2020), <https://news.un.org/en/story/2020/06/1067112> [<https://perma.cc/WAA8-5Y7A>] (calling for a moratorium on the use of facial recognition technology during peaceful demonstrations).

41. See, e.g., *Florida v. Riley*, 488 U.S. 445, 449 (1989).

42. 392 U.S. 1, 38 (1968) (Douglas, J., dissenting); see also Paul Butler, "A Long Step Down the Totalitarian Path": Justice Douglas's Great Dissent in *Terry v. Ohio*, 79 MISS. L.J. 9, 23 (2009).

43. *Terry*, 392 U.S. at 39 (Douglas, J., dissenting); see also Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1012–13 (1999).

44. ALEXANDER, *supra* note 37, at 81.

try.⁴⁵ We are subject to virtual, computerized criminal lineups as the price of admission to public and private spaces; this, too, places the heaviest burden on those who must endure injustice daily.⁴⁶ The privileged are shielded and favored by White privilege, pedigree, association, or assimilation, without the undue burden of walking around vulnerable to the widely weaponized socialized hypnosis of constant suspicion.⁴⁷ Those racially privileged are rarely on the receiving end of that blunt violence, and angry force justified against people of color under the color of law. FRT and sentencing algorithms increase the likelihood of that force. As one observer put it,

I think people sometimes feel a sense of ease, like ‘That would never happen to me because I’m not somebody who has had a lot of interactions with the police But no one can guarantee that you don’t look a lot like somebody who committed a crime. Nobody is safe from poor facial recognition technology.’⁴⁸

A. AI’S BETRAYAL OF THE REASONABLE DOUBT STANDARD

The legal standard “beyond a reasonable doubt” is exacting and, indeed, the highest level of proof within our entire justice system. The standard is based on the belief that it is better to let many guilty go free than to imprison one innocent man.⁴⁹ By definition, this maxim means fairness to the individual’s legal rights. No society that values individual rights should tolerate FRT’s high error rates⁵⁰ when life and liberty interests are at stake for individuals who may become trapped in the criminal justice system. Nor should that society think it appropriate to issue harsher pen-

45. Some of the worst atrocities occurred by operation of nefarious targeted formulas of oppression. “The Reich Citizenship Law declared that only ‘Aryans’ were Reich citizens. As Jews were considered non-‘Aryan,’ this law stripped them of their German citizenship and made them stateless in their own country.” *Oppression, THE HOLOCAUST EXPLAINED*, <https://www.theholocaustexplained.org/life-in-nazi-occupied-europe/oppression/anti-semitic-laws> [https://perma.cc/W6PB-A4L3].

46. See, e.g., Letter from Howard Simon & Michael Pheneger to Mayor Dick A. Greco, *ACLU Calls For Public Hearings on Tampa’s “Snooper Bowl” Video Surveillance*, ACLU (Feb. 1, 2001), <https://www.aclu.org/press-releases/aclu-calls-public-hearings-tampas-snooper-bowl-video-surveillance> [https://perma.cc/HT4A-SXFQ].

47. See generally Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM (July/Aug. 1989); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713 (1993); DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021).

48. Khari Johnson, *The Hidden Role of Facial Recognition Tech in Many Arrests*, WIRED (Mar. 7, 2022, 7:00 AM), <https://www.wired.com/story/hidden-role-facial-recognition-tech-arrests> [https://perma.cc/XB53-Q4VB].

49. See generally SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (George Sharswood ed., Philadelphia: J.B. Lippincott Co. 1893) (1753).

50. Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACH. LEARNING RSCH. 8–9 (2018), <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf> [https://perma.cc/UH85-VQ5W]. In all three facial recognition technologies studied, the rate of error for darker skinned females was between 20 and 34% higher than for lighter skinned males. *Id.*

alties and longer sentences based on that data.⁵¹ Perhaps, if we were dealing with a majority White incarcerated demographic rather than people of color, we would not tolerate profit seeking behavior at the expense of White human liberty.⁵² But, we are more apt to value AI company profits over liberty interests in discriminatory AI sentencing risk assessment tools. We prioritize profit in for-profit prisons, debtors prisons, and municipal racial profiling fines and fees that generate higher city revenue sources on the backs of the vulnerable by keeping them in a trap of economic dependency and social desperation.⁵³ This is the context and the questionable goals in which AI technology may be leveraged by law enforcement to further such goals in several municipalities across the nation to fund their activities.

B. AI'S PROTECTIONIST IMPULSES: BLACK BOXES FOR BLACK BODIES

While efforts can be made to have active, engaged oversight for accountability to social justice in AI, different branches of machine learning reveal that, “[g]iven the right circumstances, quantum machine learning can outmaneuver classical algorithms.”⁵⁴ Indeed, not all algorithms of accountability or transparency are created equal.⁵⁵ Stealth code hides within the inner tracks of the algorithm that can attack, extract, and poison outcomes through tampering.⁵⁶ Nor are algorithms all effective or traceable through audits if deep neural networks hide justice, causation, and accountability in “black boxes”⁵⁷ that defy explanation or reasoning

51. See KATHERINE B. FORREST, *WHEN MACHINES CAN BE JUDGE, JURY, AND EXECUTIONER: JUSTICE IN THE AGE OF ARTIFICIAL INTELLIGENCE*, 1–21 (2022).

52. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 15 (2014) (noting the precipitous increase in incarceration from 300,000 in 1974 to 2.3 million in 2014).

53. See, e.g., Nicolas Kayser-Bril, *Google Apologizes After Its Vision AI Produced Racist Results*, ALGORITHM WATCH (Apr. 7, 2020), <https://algorithmwatch.org/en/google-vision-racism> [<https://perma.cc/SA5S-39PK>] (depending on skin tone on a given image, labels produced starkly different results); Jason Tashea, *Risk-Assessment Algorithms Challenged in Bail, Sentencing and Parole Decisions*, ABA J. (Mar. 1, 2017, 1:30 AM), https://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole [<https://perma.cc/X72G-NEDT>].

54. Max G. Levy, *Machine Learning Gets a Quantum Speedup*, QUANTA MAG. (Feb. 4, 2022), <https://www.quantamagazine.org/ai-gets-a-quantum-computing-speedup-20220204> [<https://perma.cc/P6N7-DHND>].

55. See *id.*

56. See Ivan Y. Tyukin, Desmond J. Higham & Alexander N. Gorban, *On Adversarial Examples and Stealth Attacks in Artificial Intelligence Systems*, ARXIV (Apr. 9, 2020), <https://arxiv.org/abs/2004.04479> [<https://perma.cc/FYB3-JRBY>] (“[S]tealth attacks, involve[] small perturbations to the AI system itself. Here the perturbed system produces whatever output is desired by the attacker on a specific small data set, perhaps even a single input, but performs as normal on a validation set (which is unknown to the attacker).”).

57. The term black box refers to the inability to have an effective, traceable audit trail to determine how decisions were made using machine learning. See Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023, 1039 (2017). Both vector machines and deep neural networks lack the ability to fully understand AI’s decision-making process, and the inability to predict AI’s decisions based upon a discretionary analysis of complex factors creates a black box problem. See Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J. L. & TECH. 889, 891–94 (2018).

for outcomes reached. That is, they defy explanation but somehow replicate and fit well within supremacist structural outcomes.⁵⁸ In these black boxes, machine learning can inhibit Black liberation impulses for freedom and anti-repressive approaches to human self-actualization and healing. Such healing is needed from the wounds of slavery,⁵⁹ sharecropping,⁶⁰ black codes,⁶¹ the Rosewood & Black Wall Street massacres,⁶² and mass incarceration⁶³ that, among other ongoing injustices, subjugate Black and Brown persons in a social condition of economic insecurity and racial vulnerability.⁶⁴

As a society, we are just beginning to reconcile our past historical roles and their moral implications through subsequent relief in reparations and transformative, restorative principles and the accompanying mindset.⁶⁵

58. See generally PASQUALE, *supra* note 9 at 61–62 (explaining the non-transparent use of data tracking and algorithms). Yet, “transparency in the design of the algorithm,” which Pasquale argues for, is not what we need; “What we need instead is a transparency of inputs and results.” Chander, *supra* note 57, at 1024.

59. See generally OLAUDAH EQUIANO, *THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO, OR GUSTAVUS VASSA, THE AFRICAN* (circa 1745–1797).

60. See *Sharecropping*, EQUAL JUST. INITIATIVE (Nov. 21, 2018), <https://eji.org/news/history-racial-injustice-sharecropping> [<https://perma.cc/U4D4-MRPH>].

61. See generally RODERICK VAN DANIEL, *UNJUSTIFIABLY OPPRESSED: BLACK CODES OF MISSISSIPPI* (1865) (2018). As the Civil War came to a close, southern states began to pass a series of discriminatory state laws collectively known as Black Codes which codified White supremacy by restricting the civic participation of freed people; the Codes deprived them of the right to vote, the right to serve on juries, the right to own or carry weapons, and, in some cases, even the right to rent or lease land, while judges forced many young Blacks as adult freedmen to sign contracts with their employers who were often their previous owners. See *id.*

62. See generally TIM MADIGAN, *THE BURNING: MASSACRE, DESTRUCTION, AND THE TULSA RACE RIOT OF 1921* (2001).

63. See JEREMY TRAVIS, BRUCE WESTERN & F. STEVENS REDBURN, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 58–59 (2014); see also Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country> [<https://perma.cc/H6NG-47XU>]. The United States has approximately 5% of the world’s population and about 25% of the world’s incarcerated population. *Id.* See generally ALEXANDER, *supra* note 37; Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1552–55 (2015).

64. See, e.g., *Bias, Racism and Lies: Facing Up to the Unwanted Consequences of AI*, UN NEWS (Dec. 30, 2020), <https://news.un.org/en/story/2020/12/1080192> [<https://perma.cc/2YK2-J2BR>] (explaining some of the devastating consequences of misusing AI).

65. See Ta-Nehisi Coates, *The Case For Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/48D2-U6KK>] (“One cannot escape the question by hand-waving at the past, disavowing the acts of one’s ancestors, nor by citing a recent date of ancestral immigration. The last slaveholder has been dead for a very long time. The last soldier to endure Valley Forge has been dead much longer. To proudly claim the veteran and disown the slaveholder is patriotism à la carte. A nation outlives its generations. We were not there when Washington crossed the Delaware, but Emanuel Gottlieb Leutze’s rendering has meaning to us. We were not there when Woodrow Wilson took us into World War I, but we are still paying out the pensions. If Thomas Jefferson’s genius matters, then so does his taking of Sally Hemings’s body. If George Washington crossing the Delaware matters, so must his ruthless pursuit of the runagate Oney Judge.”); RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 105 (1965) (“Practically all the relevant decisions of the United States Supreme Court during Reconstruction

We are gaining awareness as a collective and seem to be on the precipice of cognitive acceptance of what it means to be responsible for doing the inner work of self-transformation for racial justice. White Fragility⁶⁶ threatens that cognitive acceptance, but it is not the only deterrent. Recent studies demonstrate that quantum computers could speed up some unsupervised learning tasks in which algorithms must discover patterns on their own.⁶⁷ In a moment of racial reckoning and awakening across the nation, is it the time to delegate our hard won independence of judgment to unsupervised, independent code seeking algorithmic patterns in a socially acontextual manner? Moreover, are these the patterns the algorithm was designed to discover, or are they discernable because they evince the vestiges of legal and educational segregation, or both?

The math of AI and the physics of quantum computing science are seen as the panacea of real-life quantum learning and problem solving without any context of social justice, racial equality, or disempowering structures of institutional racism. But how can AI machine learning pick up on all subtle discrimination when its programmers are themselves sheltered from or influenced by racism in a racially homogenous tech field?⁶⁸

“Kernels”—measures of relatedness between two data points—are an ideal example of problem solving compatible with quantum physics in AI learning.⁶⁹ They do, however, present their own problems.⁷⁰ Kernels operate as a filtering lens that can classify data in different ways to find patterns that help distinguish future inputs, or that can evade equity consideration.⁷¹ As a former civil rights attorney, I am aware of the power to reclassify data in ways that evade detection from an investigation, or from

and to the end of the century nullified or curtailed those rights of Negroes which the Reconstruction ‘Radicals’ thought they had written into laws and into the Constitution.”); see also Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1075–79 (2009) (arguing the Court sabotaged civil rights by “signal[ing] open season on blacks and other racial minorities”).

66. See generally ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018).

67. The potential for AI to fix biased AI is always espoused as a hope for future improvements and technological breakthroughs. Cade Metz, *Using A.I. to Find Bias in A.I.*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/06/30/technology/artificial-intelligence-bias.html> [<https://perma.cc/8LZT-LTCG>].

68. See Murray, *supra* note 2.

69. Levy, *supra* note 54.

70. See *id.*

71. See *id.* See also Sam Corbett-Davies, Emma Pierson, Avi Feller, Sharad Goel & Aziz Huq, *Algorithmic Decision Making and the Cost of Fairness*, ARXIV (2017); Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671, 680–81 (2016); Ignacio N. Cofone, *Algorithmic Discrimination Is an Information Problem*, 70 HASTINGS L.J. 1389, 1394 (2019); Mark MacCarthy, *Standards of Fairness for Disparate Impact: Assessment of Big Data Algorithms*, 48 CUMB. L. REV. 67, 102 (2017); Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189, 189 (2017); Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1253 (2008); Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 444–45 (2020); Leah Wisser, *Pandora’s Algorithmic Black Box: The Challenges of Using Algorithmic Risk Assessments in Sentencing*, 56 AM. CRIM. L. REV. 1811, 1812 (2019); Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCI. ADVANCES 1, 1 (2018).

a Freedom of Information (FOIA)⁷² request when investigating school district patterns to predetermine future input differentials. AI can discover patterns on its own, but that should not obscure the fact that AI pattern recognition can just as easily be used to discriminate in input differentials. It can also be programmed to distinguish financial inputs in school funding formula allocations based on race and income. Accordingly, fiscal allocations among the social classes in public education are often designed to reward political constituents rather than being tailored to address educational needs.⁷³ If algorithms (or those who design them) are not sensitive to these nuances, what is to stop machine learning from finding alternative pretextual justifications for decisions that effectively justify discrimination?⁷⁴ What is to stop AI from similarly being tailored to the use of political constituents, rather than to overall social need?

72. Freedom of Information Act, 5 U.S.C. § 552 (2016).

73. *See* Campaign for Fiscal Equity Inc. v. State, 655 N.E.2d 661 (1995). Plaintiffs assert that allocating state education aid was

'an incoherent, unsystematic aggregation of 50 different formulas, categorical program fundings, flat grants, minimum aid ratios, caps, hold harmless guarantees and other inconsistent provisions which have emerged from decades of political compromises based on considerations unrelated to educational need or any principles of equity,' that are inevitably renegotiated every year depending on the political winds.

Id. at 691 n.12 (Smith, J. dissenting in part).

The Commissioner and Board of Regents have specifically discredited the current financing scheme because its formulation (a) do[es] not provide adequately for all students, especially the most needy; (b) [is] unduly complicated, with 53 separate formulas governing the distribution of aid; (c) inhibit[s] local flexibility, since many kinds of aid require specific programs whether or not such programs are the best use of the money; (d) entail[s] no accountability for results, because districts continue to receive the money no matter what; (e) do[es] not deal adequately with local differences in wealth and cost; (f) do[es] not adequately support needed improvements in teaching and learning; (g) do[es] not foster interagency collaboration, since funds are allocated agency by agency, and rules for their distribution are separately defined; (h) lack[s] public credibility, for all of these reasons.

Id. at n.13.

74. When a defendant's asserted nondiscriminatory reasons are not the true reasons behind a challenged action, they actually operate as a "pretext" for the exercise of prohibited discriminatory intent. *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1162–63 (11th Cir. 2006). A plaintiff can show pretext by pointing to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the defendant's proffered legitimate reasons for its action, such that a reasonable fact finder could rationally find them unworthy of credence. *Id.* at 1163 (quoting *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005)). While AI could presumably capture these inconsistencies, quantum machine learning can identify new kernels between two data points, giving defendants alternative plausible explanations on a post-hoc, bad faith basis. This would be very difficult to discovered or effectively challenge in AI black boxes. AI has the ability to delve deep into big data and extrapolate arguments that can be hard to challenge without similar command of AI big data analytics. This is true because once the plaintiff has established a prima facie case, the defendant can rebut it by either demonstrating through the manipulation of AI data analytics that the plaintiff based his or her statistical calculations on faulty data, flawed computations, or improper methodologies, or by introducing alternative statistical evidence. *See Int'l Bhd. Teamsters v. State*, 431 U.S. 324, 360, 394 n.46.

C. A PERFECT STORM OF AI PROTECTIONISM: SECTION 230, TRADE SECRETS, POLICE IMMUNITY, BILLION DOLLAR TAXPAYER PAYOUTS & 501(c)(4)s

If we continue to let profit motives prevail at the expense of justice, is it any wonder the debate already seems slanted in favor of AI companies? For instance, the relevant interests seek to protect industry trade secrets rather than individual liberty, and facial recognition profits and state contracts rather than industry accountability to equal protection, due process or diversity, equity, and inclusion (DEI) goals.⁷⁵ The debate becomes about how AI innovations can better exploit and convert freely available public information into private, protected property, but it is not a debate about our consent, personhood, or remuneration for our privately extracted data.⁷⁶ One can only speculate whether it was a strategic decision that facial recognition companies like Clearview AI—inundated with lawsuits over its technology and its allegedly questionable use—finally decided as a public relations tactic to let public defenders access its FRT in order to attempt to deflect public criticism as some journalists and advocates openly suggest.⁷⁷ Or perhaps it became clear that lawsuit magnet companies like Clearview were better off operating under the auspices and immunity of police departments to avoid legal liability.⁷⁸

As if the police immunity doctrine was not problematic enough with its deferential shielding of officers from even the most egregious civil and human rights violations,⁷⁹ tech companies now hide under its refuge and thus escape legal liability absent the rarest circumstances.⁸⁰ Consequently, the public's right to a private right of action must be protected as sacrosanct, but only when it has practical benefit and accessible levers of

75. See, e.g., *LivePerson, Inc. v. 24/7 Customer, Inc.*, 83 F. Supp. 3d 501, 515 (S.D.N.Y. 2015) (finding algorithms based on artificial intelligence eligible for trade secret protection); CAL. CIV. CODE § 3426.1(d); *accord XpertUniverse, Inc. v. Cisco Sys., Inc.*, No. 09-157-RGA, 2013 U.S. Dist. LEXIS 32711, at *6 n.3 (D. Del. Mar. 8, 2013) (“The definition [of a trade secret in California’s Civil Code] includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will *not* work could be of great value to a competitor.”).

76. See *The Rising Importance of Trade Secret Protection for AI-Related Intellectual Property*, QUINN EMANUAL TRIAL LAWYERS 6–7, <https://www.quinnemanuel.com/media/wi2pks2s/the-rising-importance-of-trade-secret-protection-for-ai-related-intellec.pdf> [<https://perma.cc/2KRY-4AAN>] (citing *N. Am. Deer Registry, Inc. v. DNA Sols., Inc.*, No. 4:17-CV-00062, 2017 WL 2402579, at *8 (E.D. Tex. June 2, 2017)) (“Training data itself may not be protectable as a patent, but a collection of data—even where that data comprises otherwise public information—can be protected as a trade secret.”).

77. See Kashmir Hill, *Clearview AI, Used by Police to Find Criminals, Is Now in Public Defenders’ Hands*, N.Y. TIMES (Sept. 18, 2022), <https://www.nytimes.com/2022/09/18/technology/facial-recognition-clearview-ai.html> [<https://perma.cc/7K84-N44Z>].

78. See *Clearview AI Agrees to Restrict Use of Face Database*, GUARDIAN (May 9, 2022, 2:56 PM), <https://www.theguardian.com/us-news/2022/may/09/clearview-chicago-settlement-aclu> [<https://perma.cc/ZM7C-MR74>].

79. See, e.g., *How the Law Shields Cops From Suit: Qualified Immunity Explained*, BLOOMBERG L. (June 5, 2020, 2:46 PM), <https://news.bloomberglaw.com/us-law-week/how-the-law-shields-cops-from-suit-qualified-immunity-explained> [<https://perma.cc/U7P5-HY4H>].

80. See *Order Granting Qualified Immunity*, 476 F. Supp. 3d 386 (2020).

access and influence in a nation that has a significant access to justice problem. Today, a claim must invoke “clearly established law” to overcome this blanket of immunity.⁸¹ Yet, in an area where the law lags so far behind tech advances and evolves slowly, how can clearly established law timely evolve to ever protect cyber civil rights and revoke police immunity for arrests that use algorithm risk assessments or FRT?⁸² The answer is that one cannot and that seems precisely the point of preserving the status quo. Whether that objective is acknowledged or not, the result remains the same. The regulatory reality of complacent acquiescence speaks volumes in itself. And one must truly wonder, when an officer with a body camera equipped with FRT misidentifies and shoots the wrong person because of the software’s high error rate for people of color, will the law uphold fairness?⁸³ If the streets are already dangerous enough for the bodily integrity of Black and Brown humans, such development in body cameras would only worsen our current societal state. Police immunity shields racial accountability and reconciliation much like § 230 of the Communications Decency Act (“Section 230”) inappropriately shields tech and social media platforms from liability for content that glorifies police abuse and vilifies civil rights, thereby further immunizing white supremacist structures in AI protectionism.⁸⁴ Until our courts logically conclude that content personalization manipulation through machine-learning algorithms intentionally calculated to promote racial hostility to maximize consumer engagement online does not and should not qualify for Section 230 immunity, AI equity cannot be discussed with any meaningful integrity. Instead, overlapping immunity doctrines in these arenas should be seen for what they are: the law’s fortress of walls that amount to a collective ecology of supremacist AI protectionism operationalized through algorithmic mechanisms for protecting privileged parties and the asymmetrical influence they wield at the expense of the vulnerable.

1. *Subsidizing Police Terror: Billion Dollar Taxpayer Payouts*

If AI’s formidable storm of protectionism did not bar racial or democratic accountability for black boxes, then Section 230, trade secrets, police immunity, and repeated taxpayer-funded payouts provide all the additional protection for abusive police practices to thrive in AI. For in-

81. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

82. See Devin Dwyer, *Supreme Court Won’t Revisit Qualified Immunity For Police, Leaving It To Congress*, ABC NEWS (June 22, 2020, 11:24 AM), <https://abcnews.go.com/Politics/supreme-court-wont-revisit-qualified-immunity-police-leaving/story?id=71374240> [<https://perma.cc/9PE4-N6J8>]; *Order Granting Qualified Immunity*, 476 F. Supp. 3d at 404. (“This ‘clearly established’ requirement is not in the Constitution or a federal statute. The Supreme Court came up with it in 1982.”)

83. *Qualified Immunity: Both Sides of the Debate*, FINDLAW (Sept. 21, 2021), <https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity-both-sides-of-debate.html> [<https://perma.cc/S4RX-WV37>].

84. See *Communication Decency Act of 1996*, 47 U.S.C. § 230.

stance, “[o]fficers whose conduct was at issue in more than one payment accounted for more than \$1.5 billion, or nearly half of the money spent by the departments to resolve allegations,” and “in Chicago, officers who were subject to more than one paid claim accounted for more than \$380 million of the nearly \$528 million in payments.”⁸⁵ New York, Chicago, and Los Angeles alone accounted for more than \$2.5 billion in taxpayer-funded payouts.⁸⁶ More than 5,000 New York officers were named in two or more claims, accounting for 45% of the city’s spending on misconduct cases allegedly involving poor training and problematic arrests.⁸⁷ In the city of brotherly love, six Philadelphia “officers in a narcotics unit generated 173 lawsuits, costing a total of \$6.5 million,” while in Palm Beach County, Florida, officials “paid out \$25.6 million in the past decade: One-third of that was generated by 54 deputies who were the subject of repeated claims.”⁸⁸ More than 100 officers in the D.C. region have been named in multiple suits with payouts, and

in Prince George’s County, [Maryland], 47 officers had their conduct challenged more than once, resulting in at least two payments each accounting for \$7.1 million out of \$54 million paid within the decade. Two in five payments involved an officer named in more than one claim. The totals are skewed by a \$20 million payment to the family of 43-year-old William Green, who was fatally shot while his hands were cuffed behind his back in the front seat of a police cruiser.⁸⁹

Based upon this evidence, some significant portion of our nation’s police execute, harass, and oppress Black and Brown lives as the perfunctory cost of doing business, backed by taxpayer dollars and quiet settlements.⁹⁰ We did not need predictive risk assessment tools and recommended AI-designated risk scores to know which officers become subjects of repeated abuse concerns, but we have yet to see AI turned inward on police accountability, prosecutorial misconduct, or even on the AI companies themselves. Once again, this is the one-sided, slanted context in which the conduct of AI companies themselves suggests their commitment to AI equality is to not to be taken as a credible proposition if nothing more substantial is done. Imagining that AI can do positive things to promote equality is a nice intellectual exercise, but proving that they actually will is entirely another; particularly in light of hegemonic structures of the patriarchal racism it has already repeatedly aligned itself

85. Keith L. Alexander, Steven Rich & Hannah Thacker, *The Hidden Billion-Dollar Cost of Repeated Police Misconduct*, WASH. POST (Mar. 9, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements> [<https://perma.cc/Z9HM-Q6P6>]. The Washington Post revealed that “more than 1,200 officers in the departments surveyed had been the subject of at least five payments. More than 200 had 10 or more. The repetition is the hidden cost of alleged misconduct.” *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.*

with. In fact, AI scrutinizes less the abusers, but the very people who regularly face abusive policing practices: Black and Latino people.⁹¹ That fact should speak volumes when we seek to discern rhetoric from reality. We respect those who have taken their oaths solemnly with all the degree of conscientious minded and utmost care for doing what is right reflected in their daily actions, even though the institutions they serve seek to perpetuate our subjugation for their profit. We honor those who do with that precious care requisite of a sacred duty they are entrusted with. And we wish to see more of those people come forward in all sectors, but especially in these areas where our life, liberty, and pursuit of happiness lies as a nation.

While AI companies seek million-dollar contracts with police departments across the nation, scholars and state legislatures rarely question when those contracts incentivize abusive or harmful AI companies or their practices to empower police departments with their ostensibly problematic practices. Whether the matrix of protectionist mechanisms shields police or settles litigation against their abusive practices with taxpayer dollars, police and their use of AI technology will likely continue to escape liability given current law. In the interest of justice, we seem all too willing to pierce the corporate veil of limited liability to protect shareholders, but we dare not pierce the juridical and technological veil of ignorance that is police immunity doctrine or the technological veil of AI protectionism to protect the public and our most vulnerable. When hypocrisy abounds in the law, what confidence can we rightfully place in the wolf guarding the flock of sheep with no meaningful oversight? Will police use of AI advance these purposes? Various levels of conscious and unconscious intent factor into the decisions regarding who sees, who is seen and not seen, and how they are seen and why. A society that continually demonstrates it operates from a level of consciousness and subconscious predatory, supremacist self-interest must not replicate this same consciousness in AI. Rather, it must place the development of AI's gaze in the hands of those who can navigate with respect and reverence for everyone's dignity.

But as Dr. King observed, that would require more leaders interested in justice than in gaining personal profit. It would require the political, economic and spiritual independence of the citizenry in a society still obsessed with fanciful distraction. It would require technological injunctions and cyber interventions. It would counteract the economic scarcity and insecurity artificially contrived with inflationary tools calculated to hypnotically induce the generation of the Great Resignation back to the hamster wheel of economic dependence. Who is seen and not seen, for what end, and through what values are important questions of self-reflection humanity should ask itself if it is to derive any useful value in AI data analytics. Such scrutiny of the AI companies themselves, their staffing,

91. *See id.*

and their code can only be as useful as the level of consciousness that oversees and programs it.

2. 501(c)(4)s: The Black Box of AI's Influence in Electoral Politics

Further complicating transparency, unlimited amounts of dark money funnel into electoral campaigns through 501(c)(4)s by virtue of the Supreme Court's *Citizens United* decision.⁹² These 501(c)(4)s operate in the government's political realm like black boxes in the digital realm—obscuring intentions, resources, power, organization, and outcomes.⁹³ The voter suppression efforts and laws in an increasingly large number of states further facilitate these political agendas to undermine our collective power,⁹⁴ and anti-civil rights sentiment is the backdrop against which decisions by engineers and developers operate consciously and unconsciously.⁹⁵ They do not operate on a clean slate; their implicit and express biases often remain unchecked and unquestioned such that they become programmed surreptitiously into these discriminatory codes.⁹⁶ The social engineering of Jim Crow and “New Jim Code”⁹⁷ has perpetuated an architecture of racist infrastructure throughout our nation, beginning well before AI.

D. RISK ASSESSMENT: ASYMMETRICAL POWER & ARBITRARY INPUTS & WEIGHTS

Exposing any quasi-accusatory evidentiary instrument, process, or outcome to full transparency, disclosure, and critical assessment is the starting point to enacting AI justice.⁹⁸ However, no industry standard regulates the weights and adjustments applied to risk assessment tools, so legitimacy and trust cannot be intelligently placed on such dubious, predictive results. In fact, there is no way of knowing what was done or by whom with full clarity.⁹⁹ Moreover, what audit trail has sufficient reliabil-

92. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

93. See Tom Simonite, *AI Experts Want to End 'Black Box' Algorithms in Government*, WIRED (Oct. 18, 2017, 3:00 PM), <https://www.wired.com/story/ai-experts-want-to-end-black-box-algorithms-in-government> [<https://perma.cc/U4Q9-KTMZ>].

94. See *Voting Laws Roundup: May 2022*, BRENNAN CTR. CRIM. JUST. (May 26, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022> [<https://perma.cc/4XFJ-BD6V>].

95. See generally Maurice R. Dyson, *Rethinking Rodriguez After Citizens United: The Poor as a Suspect Class in High Poverty Schools*, 24 GEO. J. POVERTY L. & POL'Y 1 (2016).

96. See *id.* at 36.

97. See Rebecca Koenig, *The New Jim Code? Race and Discriminatory Design*, ED-SURGE (Aug. 20, 2019), <https://www.edsurge.com/news/2019-08-20-the-new-jim-code-race-and-discriminatory-design> [<https://perma.cc/H2MP-BA4S>].

98. See *The Hidden Discrimination in Criminal Risk-Assessment Scores*, NPR (May 24, 2016, 4:32 PM), <https://www.npr.org/2016/05/24/479349654/the-hidden-discrimination-in-criminal-risk-assessment-scores> [<https://perma.cc/3F67-E9YA>].

99. See Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/J3Z6-TKXM>] (programming spat out a score predicting the likelihood of each committing a future crime); Agbolade Omowole, *Research Shows AI is Often Biased. Here's How to Make Algorithms Work for All of Us*,

ity when life and liberty are at stake, given that sophisticated deep fakes, voice spoofs, database hacking, and identity theft attack with increasing frequency and complexity?¹⁰⁰ Because of preexisting vulnerability, hacking, spoofing, and compromises in the chain of custody of biometric data, these problems become additional burdens on women and BIPOC who already carry a disproportionate burden of injustice in our justice system. When hacking is so routine and evidentiary chain of custody issues are legitimate concerns (not to mention the integrity of the underlying technology and its human operators), reliance on AI tools begins to resemble a disgraceful testament to a growing de facto racist techno-autocracy, regardless of any supposed benevolent intent.¹⁰¹

Our answers to coded equity issues seem to vary based on whose life and liberty interest are at stake. Those of a darker hue and lower net worth ostensibly matter less in a nation with “equal justice under law” as its banner. Those who are more vulnerable when automation threatens livelihood are more susceptible to machinations of continued predatory capitalist policies that punish poverty and past criminality. The predictive results are questionable, with no industry standard for data set selection and analytics. Furthermore, when police enforcement tactics change, or laws are repealed, data is not neutral. A particular “snapshot of a time period reflects the specific criminal laws on the books at that time,” which are not necessarily illegal or criminally punished today.¹⁰² Therefore, “[d]ata sets that reflect a world we no longer view as fair may not be the world we want the tool to build for us again, again and again.”¹⁰³ Yet we continue to accommodate immutable distinctions when historical trends of injustice support predictive analysis in the name of accuracy.¹⁰⁴ Under this reasoning, men will always be deemed more dangerous than wo-

WORLD ECON. F. (July 19, 2021), <https://www.weforum.org/agenda/2021/07/ai-machine-learning-bias-discrimination> [<https://perma.cc/4VSQ-GQL2>] (“Existing human bias is too often transferred to artificial intelligence.”).

100. See, e.g., Jesse Damiani, *A Voice Deepfake Was Used To Scam A CEO Out Of \$243,000*, FORBES (Sept. 3, 2019, 4:42 PM), <https://www.forbes.com/sites/jessedamiani/2019/09/03/a-voice-deepfake-was-used-to-scam-a-ceo-out-of-243000/?sh=2ca899042241> [<https://perma.cc/VAD7-JNGT>].

101. See Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, 61 NOMOS: POL. LEGITIMACY 201, 202 (2019).

102. FORREST, *supra* note 51, at 19–20 (noting the evolution of criminal law treatment of marijuana, sodomy or prohibitions of gay marriage can reflect a snapshot of what was once deemed unlawful and thus does not mean these should be deemed valid when taking into account today’s contemporary treatment and evolving thinking in criminology that is beginning to see a consensus emerge that rehabilitative and not penal treatment is necessary).

103. *Id.* at 21.

104. See Khari Johnson, *A Move for ‘Algorithmic Reparation’ Calls for Racial Justice in AI*, WIRED (December 23, 2021, 7:00 AM), <https://www.wired.com/story/move-algorithmic-reparation-calls-racial-justice-ai> [<https://perma.cc/8E93-GKP4>] (articulating that AI technology can be used to exclude, control, or oppress people and reinforce historic systems of inequality that predate AI); Jenny L. Davis, Apryl Williams & Michael W. Yang, *Algorithmic Reparation*, BIG DATA & SOC’Y, July–Dec., at 1, 1 (2021) (“[W]e present *algorithmic reparation* as a concept and a scaffold for Intersectional approaches to machine learning (ML) systems, displacing fairness in favor of redress.”).

men,¹⁰⁵ or Blacks more dangerous than Whites.¹⁰⁶ “[T]he principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities,”¹⁰⁷ yet we continue to cherry-pick characteristics for AI to exploit. The interest in promoting accuracy favors gender distinctions even when accuracy can become deadly in the hands of corrupt or unconcerned public servants who use risk assessment scores, and the courts seem all too willing to oblige.¹⁰⁸

Asymmetrical power relations are exacerbated in ways that demand explanation and justification when the state invokes its power to detain, imprison, and kill. When truly embodied in fair jurisprudence, justice could neither ethically nor morally deny this truth. Instead, it calls for reparative justice.¹⁰⁹ Danger is in the eye of the beholder, where racism lives in skewed inputs, weights, and data sets expressed in default code, perpetuating supremacist, antiegalitarian algorithmic structures.¹¹⁰ A sentencing court may consider an algorithmic risk assessment software like Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) at sentencing, subject to limitations.¹¹¹ One commentator noted, “Assessing the risk of future crime plays no role in sentencing de-

105. See, e.g., Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 813 (2014) (“For example, if the instrument includes gender, men will always receive higher risk scores than otherwise-identical women (because, averaged across all cases, men have higher recidivism rates.)”); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 416 (2006) (“That women commit violent acts at a much lower rate than men is a staple in criminology and has been known for as long as official records have been kept.”).

106. See, e.g., John Naughton, *Even Algorithms Are Biased Against Black Men*, GUARDIAN (June 26, 2016, 4:00 AM), <https://www.theguardian.com/commentisfree/2016/jun/26/algorithms-racial-bias-offenders-florida> [https://perma.cc/NH27-AU7D]; Rachael Revesz, *Criminal Justice Software Algorithm Used Across the U.S. Is Biased Against Black Inmates, Study Finds*, INDEPENDENT (June 27, 2016, 5:45 PM), <https://www.independent.co.uk/news/world/americas/northpointe-algorithm-propublica-biased-black-white-defendants-reof-fend-a7106276.html> [https://perma.cc/D5BR-LBDF]; Anthony W. Flores, Kristin Bechtel & Christopher T. Lowenkamp, *False Positives, False Negatives, and False Analyses: A Rejoinder to “Machine Bias: There’s Software Used Across the Country to Predict Future Criminals. And It’s Biased Against Blacks,”* 80 FED. PROB. 38, 44 (2016).

107. *Craig v. Boren*, 429 U.S. 190, 208–09 (1976).

108. See Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 255 (2015).

109. See Johnson, *supra* note 104 (articulating that AI technology can be used to exclude, control, or oppress people and reinforce historic systems of inequality that predate AI).

110. See generally FORREST, *supra* note 51, at 8.

111. These limitations may typically include: “(1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.” NORA DEMLEITNER, DOUGLAS BERMAN, MARC L. MILLER & RONALD F. WRIGHT, *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 398 (5th ed. 2022); see also PAMELA M. CASEY, ROGER K. WARREN & JENNIFER E. ELEK, *USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 1–3* (2011), https://www.ncsc.org/_data/assets/pdf_file/0019/25174/rna-guide-final.pdf [https://perma.cc/F66G-RMRV].

cisions based solely on backward-looking perceptions of blameworthiness, . . . is not relevant to deterrence and . . . should not be used to sentence offenders to more time than they morally deserve.”¹¹² Though one could argue that AI's data analytics help us see past the veneer of fake news to what is real and unbiased,¹¹³ we now know what is digitally real is only in the eye of the beholder; that is, the software code developer. And while it is said that AI can know you better than you know yourself with one click or a like, the insights gleaned from such data analytics can also be used to commodify, incarcerate, tax, invoice, exploit, or kill.¹¹⁴

This is the default impact of most corporate and governmental policies rooted in surveillance capitalism that remain in place despite their well-known adverse impacts on people of color.¹¹⁵ And the reason for that has become repeatedly evident. While industrial capitalism engages in profit seeking at the expense of natural resources and labor, surveillance capitalism extracts profits from capturing, rendering, and analyzing behavioral data through methods designed to cultivate “radical indifference[—] a form of observation without [a] witness.”¹¹⁶ In this way, accountability becomes null. Where invasive surveillance capitalism meets and converges with predatory racial capitalism to effectuate the most pernicious form of racial suppression, it seems rather disingenuous to argue that AI can operate as an equity machine.

III. DISPARATE IMPACTS & QUANTUM LEAPS

Surveillance capitalism did not turn us into commodities. Rather the economic structures of capital-markets, among other overlapping schemes did. They kept us beholden to antiquated, inefficient, and polluting technologies that seek profit at the expense of exacerbating social inequities. Fools rush in where angels dare to tread in matters of justice. But in commerce, no such shame exists. In commerce as in power, China and the United States remain in a heated global race for AI comparative

112. John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCH. 489, 492–93 (2016).

113. See, e.g., Neil Hogan, Ethan Q. Davidge & Gabriela Corabian, *On the Ethics and Practicalities of Artificial Intelligence, Risk Assessment, and Race*, 49 J. AM. ACAD. PSYCH. L. 326, 327 (2021) (mitigating bias by replacing subjective human judgements with unadulterated data-driven predictions).

114. See Elaine Kamarck, *Malevolent Soft Power, AI, and the Threat to Democracy*, BROOKINGS (Nov. 29, 2018), <https://www.brookings.edu/research/malevolent-soft-power-ai-and-the-threat-to-democracy> [<https://perma.cc/FJ5N-S3ZE>]; Angshuman Choudhury, *How Facebook Is Complicit in Myanmar's Attacks on Minorities*, DIPLOMAT (Aug. 25, 2020), <https://thediplomat.com/2020/08/how-facebook-is-complicit-in-myanmars-attacks-on-minorities> [<https://perma.cc/CNK9-YH32>]; Mark Scott, *Cambridge Analytica Helped 'Cheat' Brexit Vote and US Election, Claims Whistleblower*, POLITICO (Mar. 27, 2018, 5:46 PM), <https://www.politico.eu/article/cambridge-analytica-chris-wylie-brexit-trump-britain-data-protection-privacy-facebook> [<https://perma.cc/U35S-R9SS>].

115. See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE RIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

116. *Id.* at 379.

advantage.¹¹⁷ Software engineers, physicists, and computer scientists hunt for quantum speedups to AI while the rest of justice pleads for a thoughtful, empowering, slower pace to inclusive technology.¹¹⁸ Who is making sure machines are not racist before rushing into advanced AI?¹¹⁹ By the year 2030, AI is expected to be able to contribute up to \$15.7 trillion to the global economy.¹²⁰ The stakes could not be higher. Even Russia's President Putin has proclaimed, "Whoever becomes the leader in [AI] will become the ruler of the world."¹²¹ Technology is only the latest handmaiden of racial capitalism.¹²² The underlying rule in the understanding of code equity begins with a realist view that AI is designed largely by historically non-oppressed people, not by Blacks, people of color, or the poor.¹²³ Designers and coders often embody a limited worldview that leads to ambivalence at best and nefarious hostility to the most vulnerable at worst, all in the unquenchable pursuit of greed.¹²⁴

A. AI'S THEORIES OF CIVIL LIABILITY: NEGLIGENCE, DESIGN
DEFECT, BREACH OF WARRANTY, INVASION OF PRIVACY &
DECEPTIVE BUSINESS PRACTICES

There are clear tortious ramifications beyond the constitutional concerns implicated by AI's Due Process, Equal Protection, and First Amendment violations discussed. For instance, the Capitol and D.C. police wounded on January 6, 2021, could plausibly present negligence liability against online service providers for failing to act against concerted

117. Laura Dobberstein, *Today's Arms Race is All About AI and It's China vs America, Says US Defense Secretary*, REGISTER (July 15, 2021, 8:17 PM), https://www.theregister.com/2021/07/15/ai_arms_race_china_usa [<https://perma.cc/7MJC-8B6Z>] ("In the AI realm, as in many others, we understand that China is our pacing challenge' . . . China was already using AI for surveillance, cyberattacks, and autonomous weapons . . . DARPA's \$2m multi-year campaign 'AI Next' as paving the way for the 'third wave' of AI technology. The first was rooted in 1960s research, and the second wave is, presumably, now.").

118. See *Independent Rights Expert Says Emerging Technologies Entrenching Racism, Discrimination*, UN NEWS (July 15, 2020), <https://news.un.org/en/story/2020/07/1068441> [<https://perma.cc/U4UK-PR22>] (emerging digital technologies need greater scrutiny as it's being used to uphold racial inequality, discrimination and intolerance).

119. See Cade Metz, *Who Is Making Sure the A.I. Machines Aren't Racist?*, N.Y. TIMES (March 15, 2021), <https://www.nytimes.com/2021/03/15/technology/artificial-intelligence-google-bias.html> [<https://perma.cc/6BMC-GKZ5>] (detailing the "long-simmering research controversy" that surfaced when Google forced two well-known AI experts).

120. See *The Rising Importance of Trade Secret Protection for AI*, *supra* note 76; see also PRICEWATERHOUSECOOPERS, *SIZING THE PRIZE 3*, <https://www.pwc.com/gx/en/issues/data-and-analytics/publications/artificial-intelligence-study.html> [<https://perma.cc/VLC6-833Q>].

121. See James Vincent, *Putin Says the Nation That Leads in AI 'Will be the Ruler of the World'*, VERGE (Sept. 4, 2017, 4:53 AM), <https://www.theverge.com/2017/9/4/16251226/russia-ai-putin-rule-the-world> [<https://perma.cc/LNP6-R29E>].

122. See generally Maurice R. Dyson, *Algorithms of Injustice & The Calling of Our Generation: The Building Blocks of A New AI Justice In The Technological Era of Global Predatory Racial Capitalism*, 5 HOW. HUM. & CIV. RTS. L. REV. 81 (2021).

123. See *Bias, Racism and Lies*, *supra* note 64 (misusing AI can have devastating consequences).

124. See Pratyusha Kalluri, *Don't Ask if AI is Good or Fair, Ask How it Shifts Power*, 583 NATURE 169 (2020).

online recruitment and overt planning for violence that resulted in foreseeable injury.¹²⁵ Police could be sued for negligence for failing to exercise independent judgment and reasonable investigatory steps before relying on FRT if immunity statutes ever allowed it. As seen with false advertising and intentional addiction in big tobacco, tech entities could be liable for fraudulent or intentionally deceptive business and marketing practices.¹²⁶ Despite these implications, there is precious little time to wait for courts to clarify meaningful enforcement standards while lives are at risk. Legislatures must act now.

Law enforcement officials err, sometimes negligently, sometimes intentionally, and sometimes punitively. Public tort law should reflect this reality. Congress and the states can reform their tort claims acts to ensure monetary damages and injunctive relief at the proper governmental level—individual, department, or city—to incentivize better decision-making and encourage greater risk management. Lawmakers should look to eliminate payments through judgment funds and indemnification clauses to force the relevant stakeholders to internalize monetary awards and promote behavioral modification. Legislatures can further reexamine their own tort claims acts to evaluate whether punitive damages and jury trials would provide greater accountability.¹²⁷

However, the power of police unions and electoral power politics does not bode well for legislative action where there is little incentive to change the status quo. It also does not bode well for legislative change that the entities in power would never change this underlying paradigm in the AI world. By now, evidence has been amassed to show an intelligent neural network in classifying images of people of a darker hue.¹²⁸ AI analytical saliency maps of facial features analyzing each pixel might show that important features are often not adequately captured through feature-attribution methods, particularly in dark people.¹²⁹ As one observer put it,

125. See Thorin Klosowski, *Facial Recognition Is Everywhere. Here's What We Can Do About It*, N.Y. TIMES: WIRECUTTER (July 15, 2020), <https://www.nytimes.com/wirecutter/blog/how-facial-recognition-works> [<https://perma.cc/2SJW-67A2>].

126. See *id.*

127. See Paul Stern, *Hold Police Accountable by Changing Public Tort Law, Not Just Qualified Immunity*, LAWFARE (June 24, 2020, 11:34 AM), <https://www.lawfareblog.com/hold-police-accountable-changing-public-tort-law-not-just-qualified-immunity> [<https://perma.cc/5V7X-UNCU>].

128. See, e.g., JOY BUOLAMWINI, VICENTE ORDONEZ, JAIME MORGENSTERN & ERIK LEARNED-MILLER, ALGORITHMIC JUSTICE LEAGUE, FACIAL RECOGNITION TECHNOLOGY: A PRIMER 3 (2020), <https://frcommissionma.files.wordpress.com/2021/06/frtprimer.pdf> [<https://perma.cc/CN5D-T56Y>]; Joy Buolamwini, *How I'm Fighting Bias in Algorithms*, TED (Nov. 2019), https://ted.com/talks/joy_buolamwini_how_i_m_fighting_bias_in_algorithms [<https://perma.cc/CM9N-LGQE>] (highlighting facial recognition's shortcomings for people with darker skin).

129. See Baluomwini, *supra* note 128; Adam Zewe, *How Well Do Explanation Methods for Machine-Learning Models Work?*, MIT NEWS (Jan. 18, 2022), <https://news.mit.edu/2022/test-machine-learning-models-work-0118> [<https://perma.cc/8UH6-YFFJ>] (explaining that saliency maps in AI “show [] the concentration of important features spread across the entire image” and feature-attribution methods identify those important features).

Researchers and practitioners may employ explanation techniques like feature-attribution methods to engender a person's trust in a model, but that trust is not founded unless the explanation technique is first rigorously evaluated An explanation technique may be used to help calibrate a person's trust in a model, but it is equally important to calibrate a person's trust in the explanations of the model.¹³⁰

Yet explanations remain lacking in ways that do not comport with the most rudimentary analytical scrutiny required of meaningful First Amendment, Fourth Amendment, Equal Protection, and Due Process guarantees.¹³¹ This speaks nothing of the right to privacy that is allegedly routinely violated by companies like Clearview AI.¹³² Clearview AI has been the target of multiple million dollar lawsuits for scraping images off of Instagram, Facebook and LinkedIn without consent—not to mention its database has been declared illegal in Canada, Australia, Britain, France, Italy and Greece.¹³³ Only in America, where everything is motivated by voracious greed like no nowhere else, where aspects of human essentials like health care, clean water, and clean air are regularly poisoned by an appetite for profit over life, would such a company receive escape consequences and receive support.

Individuals should have sovereignty over their likeness and the fundamental right to define how they choose to show up in the world.¹³⁴ When one loses the fundamental right to appear or not appear, endorse or not endorse, or define how the intimate, unique personality traits associated with their identity's essence are used, we collectively discredit and further delegitimize the basic tenants of personhood and an equal justice system. We should view algorithms and FRT more similarly to product defects—defects and foreseeable user misuse by police should lead to liability. Indeed, if we were to analogize to the reasoning employed in the Restatement of Torts, we would allow a design defect claim where, compared to the plaintiff's proffered alternative design, the current design simply would not be appropriate.¹³⁵ Like a design defect, an AI risk assessment

130. Zewe, *supra* note 129.

131. See generally PASQUALE, *supra* note 9.

132. See, e.g., Mathieu Rosemain, *France Rebukes U.S. AI Company for Privacy Breaches*, REUTERS (Dec. 16, 2021, 12:56 PM), <https://www.reuters.com/technology/france-says-facial-recognition-company-clearview-breached-privacy-law-2021-12-16> [https://perma.cc/M5KM-XKB5].

133. See Hill, *Clearview AI, Used by Police to Find Criminals*, *supra* note 77.

134. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–99 (1890). As fundamental as signing one's own unique John Hancock, biometric data offers the individual uniqueness that a signature is supposed to represent, but misrepresentation can and does abound.

135. Foreseeable misuse was written into the products liability laws, resulting in Sections 2(b) and 2(c) of the Restatement Third and holding manufacturers liable for such misuse. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b)–(c) (AM. L. INST. 1998). Well before that, in *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 64 (1963), the California Supreme Court held that a manufacturer was liable only if the product was “unsafe for its intended use.” See RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

tool should not be deemed “reasonably safe” if the design’s foreseeable risks of harm outweigh its foreseeable benefits such that reasonable programmers, aware of the risks and benefits, would not deploy the algorithm or FRT. Of course, beyond tort theories, there are contractual theories for finding AI defective, such as the breach of the warranty of merchantability and fitness for the particular use intended.¹³⁶ It seems unwarranted and wrong for the tech industry to call for a liability “safe harbor” until there is likewise a safe harbor for those whose freedoms, lives, and reputations AI has harmed.

B. BIGGER THAN BIG TOBACCO: DOPAMINE ADDICTION & ALGORITHMIC MASS HYPNOSIS

Of course, whether AI risk assessment tools or facial recognition software fit a particular intended use is a loaded question, notwithstanding liability issues. AI can fundamentally alter geopolitical relations, what it means to be a human, and what digital conscious and subconscious rights humans will have in an increasingly rigid, predatory digital caste system infused with an insidious algorithmic consumer hypnosis. This assertion holds especially true when algorithms are neurologically calculated to induce purchases and consumer dependence through contrived addiction to dopamine deposits.¹³⁷ In this way, it is not unlike big tobacco. Yet society has not treated such addicting social media and harmful AI like big tobacco, which could substantially demonstrate how far society has been misled, managed, bribed, and duped into groupthink and conformity with marketing notions of American technological

136. See U.C.C. § 2-315 (AM. L. INST. & UNIF. L. COMM’N 1997). An “implied warranty of fitness for particular purpose arises when: (1) the seller knows, or should know, buyer’s purpose for the goods; and (2) the seller knows, or should know, that buyer is relying on seller to determine what the buyer needs for that purpose.” Nicholas J. Ellis, *Fit for What Purpose? Understanding the Warranty of Fitness for Particular Purpose*, FOLEY & LARDNER LLP (May 2, 2018), <https://www.foley.com/en/insights/publications/2018/05/fit-for-what-purpose—understanding-the-warranty-o> [<https://perma.cc/FSE2-XY5H>]. Imagine that a customer police department procurement officer approaches an AI company and tells the proprietor that he intends to use the tech to sort, identify, and police communities based on the technology and needs a monitoring surveillance system capable of accurately identifying people. The customer then asks the proprietor to recommend a software for that purpose. “In such circumstances, any recommendation by the proprietor almost certainly will be deemed to include a warranty” that the tech is largely error proof and otherwise suitable for policing. *Id.* “Second, the seller may expressly warrant in the contract that the [technology] will be fit for the [police department’s] intended purpose.” *Id.* “In such cases, the seller should take care to make sure that it really does know of buyer’s purpose and that the goods are, in fact, fit for that purpose. Unlike in the case of implied warranties, lack of knowledge generally does *not* allow the seller to avoid an express warranty that the goods are fit for buyer’s purpose.” *Id.* Likewise, according to U.C.C. § 2-314, “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” U.C.C. § 2-314(1) (AM. L. INST. & UNIF. L. COMM’N 1997). An implied warranty of merchantability may be excluded or modified by words or conduct subject to the provisions of U.C.C. § 2-316. *Id.* at § 2-316.

137. See Jamie Waters, *Constant Craving: How Digital Media Turned Us All Into Dopamine Addicts*, GUARDIAN (Aug. 22, 2021, 4:00 PM), <https://www.theguardian.com/global/2021/aug/22/how-digital-media-turned-us-all-into-dopamine-addicts-and-what-we-can-do-to-break-the-cycle> [<https://perma.cc/LTM2-ZXR8>].

exceptionalism.¹³⁸

Our habits, data, conversations, purchasers, and selves have become rich commodities susceptible to instigation, manipulation, provocation, commodification, and weaponization.¹³⁹ We can be compatible like algorithms and programmable like code by preying upon likes, biases, prejudices, preferences, and predilections. Ever so subtle and at times imperceptible, our news- and social media-fed cues are learned formulas designed to extract attention and loyalty, compelled not through the integrity of value added, but through the corruption of addictive ingredients for the enticement and entrapment of addicted repeat customers.¹⁴⁰ But algorithms did not code us. Rather, algorithms reveal the hidden code latent already within us: our assumptions, biases, and familiarities. Technology highlights and reveals us as much as it molds and manipulates us in a Faustian bargain for profits, territory, supremacy, and security in exchange for the deprivation of our privacy, equity, and liberty interests.

That lose–lose scenario should inform quantum reinforcement learning, which can be used in decoding our brain signals in neural interfaces intended to discriminate based on race, gender, or disability, to name just a few. AI can now see race and distinguish between Asian, Caucasian, and Black people just by the density and structure of their bones.¹⁴¹ Clearly, more than facial recognition regulation is needed. As we have seen, innovation for its own sake untethered to social utility and morality becomes a morass of code in a capitalist system where it extracts detailed data on participants to better capture them, their market potential, or their assets. But assets can now include information about one’s skin conductance and temperature, heart rate, activity levels, socialization, per-

138. See, e.g., *Twenty Years of Broken Promises in the Fight Against Tobacco*, CANCER ACTION NETWORK (Dec. 14, 2018), <https://www.fightcancer.org/what-we-do/big-tobacco-lawsuit> [<https://perma.cc/VFT5-ZW5W>]. Nearly \$246 billion as reimbursement compensation for the health costs related to treatment of ailments caused by tobacco products. See *id.* But progress has been questionable. As noted: “ACS CAN, Campaign for Tobacco-Free Kids, American Heart Association, American Lung Association, the Robert Wood Johnson Foundation, Americans for Nonsmokers’ Rights and Truth Initiative released the 20th annual *Broken Promises to Our Children: A State-by-State Look at the 1998 Tobacco Settlement*” report highlighting the “states’ failure to utilize the settlement funds to save millions of lives with tobacco prevention and cessation programs.” *Id.*

139. See Stephen Buranyi, *Rise of The Racist Robots—How AI is Learning All Our Worst Impulses*, GUARDIAN (Aug. 8, 2017, 2:00 PM), <https://www.theguardian.com/inequality/2017/aug/08/rise-of-the-racist-robots-how-ai-is-learning-all-our-worst-impulses> [<https://perma.cc/D6VE-EVFS>] (“When we feed machines data that reflects our prejudices, they mimic them—from antisemitic chatbots to racially biased software.”); Deborah Raji, *How Our Data Encodes Systematic Racism*, MIT TECH. REV. (December 10, 2020), <https://www.technologyreview.com/2020/12/10/1013617/racism-data-science-artificial-intelligence-ai-opinion> [<https://perma.cc/G27E-MC88>] (taking responsibility for the toxic ideologies that our data sets and algorithms reflect).

140. See Caroline Miller, *Is Internet Addiction Real?*, CHILD MIND INST., <https://childmind.org/article/is-internet-addiction-real> [<https://perma.cc/2C4E-U4V7>]; see also Lin Sternlicht & Aaron Sternlicht, *The 6 Most Common Types of Technology Addiction*, FAM. ADDICTION SPECIALIST, <https://www.familyaddictionspecialist.com/blog/the-6-most-common-types-of-technology-addiction> [<https://perma.cc/6ZR5-H85N>].

141. See *AI Systems Can Detect Patient Race, Creating New Opportunities to Perpetuate Health Disparities*, *infra*, footnote 232.

sonal assessment of depression, sleep patterns, dietary patterns, and more biometric properties that influence human behavior.¹⁴² Tech companies continue overstepping, and they continue to remain unrepentant in their usurpation of power that was never theirs to claim.

We hand over the instrumentality of our manipulation when we hand over our data or when it is outright taken in data piracy that instigates harms and inundates us constantly with suggested behavioral commands. And we are well beyond the days of canned commands like “act fast” and “order now!” One commentator noted, “The pervasive onslaught of advertising, political campaigning, and ideological seduction is already hammering on the critical, selective barriers of our perception, and we have to be very much aware of what a weakening of man’s selective barriers might do to his defenses against mental coercion and mass hypnosis.”¹⁴³ Manipulating the electorate to support Brexit or a domestic presidential election can often involve algorithms that introduce news feeds and ads that provoke conscious and subconscious emotional responses. These targeted methods are calculated to galvanize a particular demographic to the polls while discouraging others from showing up to vote by promoting a notion of defeatism that one’s vote, like one’s Black life, does not matter.¹⁴⁴ It can prompt a predisposed mass mob to take over the U.S. Capitol or encourage people to engage in hate crimes.¹⁴⁵ It has been said that TikTok’s recommendation algorithm promotes violence and hateful content from QAnon, the Patriot Party, Oath Keepers, and the Three Percenters, while Facebook’s algorithm promotes hate and misinformation in its quest for virality and user engagement.¹⁴⁶

The evidence demonstrates that post hoc, individual take-down notices are wholly insufficient to address systemic targeting and race-baiting.¹⁴⁷ For example, consider how a COVID conspiracy video mushroomed out of control on social media along with Stop the Steal, militia movements, and QAnon. The video reached over 20 million viewers before major market platforms sent out notices of terms-of-service violations and eventually removed the content.¹⁴⁸ But where are the quick and efficient algo-

142. See Allison Gold, Danny Gross & Abdul Latif Jameel, *Deploying Machine Learning to Improve Mental Health*, MIT NEWS (Jan. 26, 2022), <https://news.mit.edu/2022/deploying-machine-learning-improve-mental-health-rosalind-picard-0126> [<https://perma.cc/BU4S-NVF2>].

143. J.A.M. Meerloo, *Some Dangers of Hypnosis and Mass-Hypnosis*, 10 ACTA PSYCHOTHERAPEUTICA ET PSYCHOSOMATICA 361, 362 (1962).

144. See Janet Burns, *Whistleblower: Bannon Sought To Suppress Black Voters With Cambridge Analytica*, FORBES (May 19, 2018), <https://www.forbes.com/sites/janetwburns/2018/05/19/cambridge-analytica-whistleblower-bannon-sought-to-suppress-black-voters/?sh=742d82277a95> [<https://perma.cc/W6HA-KD4A>] (quoting a whistleblower who said his former employer deployed “voter disengagement” tactics against certain demographics).

145. Karen Kornbluh, *Disinformation, Radicalization and Algorithmic Amplification: What Steps Congress Can Take?*, JUST SEC. (Feb. 7, 2022), <https://www.justsecurity.org/79995/disinformation-radicalization-and-algorithmic-amplification-what-steps-can-congress-take> [<https://perma.cc/F8PZ-M2UA>].

146. See *id.*

147. See *id.*

148. See *id.*

rithms to spot and take down these posts?

We gradually and repeatedly expose ourselves to these vitriolic, hypnotic suggestions every time we log onto social media platforms. The hypnotic process is so gradual in AI that its threat to national security and personal autonomy is often overlooked or downplayed.¹⁴⁹ But “[t]he process of brainwashing and political mental coercion can be explained as a strategic, slow hypnosis, aimed at breaking the will and personal convictions of the victim.”¹⁵⁰ In this weary and dependent state, one “can become a traitor to his own system of values, for inadvertently he has taken over the values of his inquisitor and political suggestor.”¹⁵¹ These are revelations the Supreme Court unsurprisingly ignores (or so it may seem) in allowing police to use long, slow, and repeated interrogations in which they are allowed to lie and fabricate evidence to extract a confession, regardless of the person’s guilt or innocence.¹⁵² Totalitarian policing tactics combine with repeated hypnotic interrogative suggestions to achieve predetermined objectives unmoored from the sound administration of justice.

When one combines political or tribal groupthink with increased economic desperation and social dependency for the poor—such as during a devastating pandemic with severe economic depression followed by the highest and harshest inflation rates in the twenty-first century¹⁵³—mass hypnosis finds traction easily. Indeed, “[i]ncreased dependency need is the unwritten partner of all hypnotic procedure.”¹⁵⁴ Mass hypnosis can be learned and reinforced because algorithms, like formal economic structures and policies, become gatekeepers, denying promises and protecting monopolies while reinforcing neural connections through repeated exposure. Those who advocate for AI on equity grounds must recognize the need to address the unfair allocation of opportunity that code can reinforce. While no two experiences are identical, and each comes with its own biases, the examples proffered above behoove us to gather more diverse, authentic voices who have lived varied experiences of injustice to inform change. The collaboration will meaningfully inform AI development to promote fairness and inclusion in coding to reduce inequities.

149. See Meerloo, *supra* note 143, at 363.

150. *Id.*

151. *Id.*

152. See *id.*; see also Richard F. MacDowell, *Are the Police Allowed to Lie in Order to Get a Statement or Confession?*, MACDOWELL L. GRP. P.C., <https://www.macdowelllawgroup.com/faqs/police-officers-can-lie-to-get-a-confession.cfm> [<https://perma.cc/SZ8W-MDWQ>] (“There are many types of lies a police officer might tell in order to elicit a confession. Some of these include: [s]aying that you are being recorded (either via audio or video); [s]tating they have your DNA or fingerprints; [o]ffering you a beverage as a way to capture your DNA; [t]elling you that you’ve failed a test such as a polygraph or a drug test; [a]ffirming they have eyewitnesses; [s]aying that a victim identified you from a photo; [s]tating that an accomplice has confessed; [w]arning you that it’s your last chance to tell your side of the story.”).

153. See Chris Isidore, *This is the Worst Inflation in Nearly 40 Years. But It Was So Much Worse Back Then*, CNN (Jan. 12, 2022, 10:02 AM), <https://www.cnn.com/2022/01/11/economy/inflation-history/index.html> [<https://perma.cc/SXQ5-AB6B>].

154. Meerloo, *supra* note 143, at 371.

Not only is this imperative to informing criminal justice matters but also to the public education system that runs alongside it.

IV. ACADEMIC TRACKING AS ALGORITHMIC CODE GATEKEEPER

Unfortunately, students of color must navigate their racial identity through this distorted context of social injustice, mass algorithmic hypnosis, and bias. Academic tracking policies and school environments exacerbate this challenge by operating in a discriminatory algorithmic paradigm where opportunity is allocated through automated discretionary systems of racial bias and differential treatment.¹⁵⁵ In America's education system, I have lived within algorithms of control throughout my life as a person of color in general and as a tracked student in particular.

For instance, I was bussed across town to another school only to find another racially segregated tracking or tiered system. When I started school in New York City, most public schools bore bland, numerically sanitized abbreviations like "P.S.," short for public school. In Stuyvesant Park in New York's East Village, where we grew up well before its gentrification, my brother and I attended P.S. 19 for a short time until safety became a concern. Guns in schools were realities we had to contend with much earlier than now. Then, my parents scraped together what money they could and placed us in a prominent Catholic school. As young as I was, I can still recall the first grade. I recall being perhaps the only person of color at the school other than my brother. I recall sitting in class and being unengaged. I was gifted and talented with unchallenging work and undiagnosed ADHD. I also recall that this was less of a problem for my teacher so long as I was quiet about it. There was no dutiful teacher to pull me back into the class discussion if my mind strayed. There was only a "let him be" mentality that we often see in academic abandonment where class becomes only behavioral management for us and education for them.

I saw that when others grew bored or I engaged in discussion with them, the teacher welcomed that student back into the class lesson while I was purposely encouraged to be left alone. Even though we students wore the same tie and blue blazer for our school uniform, I felt different in how I was treated with my then-curly Afro hair. I was an oddity, a glitch that the code did not know how to anticipate except through its worst default instincts of exclusion and ostracism. The designers and developers of the program never designed me to be a part of the equation of opportunity and, having somehow slipped through the cracks into the

155. See Michelle Higgins, *Getting on the Right Track: How One School Stopped Tracking Students*, LEARNING FOR JUSTICE (2019), <https://www.learningforjustice.org/magazine/summer-2019/getting-on-the-right-track-how-one-school-stopped-tracking-students> [<https://perma.cc/8Q3R-333C>]; Sonali Kohli & Quartz, *Modern-Day Segregation in Public Schools*, ATLANTIC (Nov. 18, 2014), <https://www.theatlantic.com/education/archive/2014/11/modern-day-segregation-in-public-schools/382846> [<https://perma.cc/ZXH8-378L>].

program only by my parents' sheer determination, the system sought to rewrite the code over me, through me, for me, until I was able to stand in the defiant peace of self-determination.

I even recall my father being upset with me when he learned I failed a diagnostic assessment the school gave me, purporting to support their assessment that I was uneducable mentally retarded (EMR). That designation meant that my overall perceived life potential was only a little better than a street sweeper or gas pumper, as some of my own teachers often said. That may be surprising, unless you see this phenomena every day in life or understand its context. In connection with its invalidation of a discriminatory test used to track and label Black students as EMR, a federal court astutely noted in *Larry P. v. Riles*,

“Studies have found that a teacher will commonly tend to underestimate the abilities of disadvantaged children and will treat them accordingly in the daily classroom routine, in grading, and in evaluating these students' likelihood of achieving in the future. The horrible consequence of a teacher's low expectation is that it tends to be a self-fulfilling prophecy. The unfortunate students, treated as if they were subnormal, come to accept as a fact that they *are* subnormal.[] A noted expert, Professor Kenneth Clark, has summed up the problem thusly: “When a child from a deprived background is treated as if he is uneducable because he has a low test score, he becomes uneducable and the low test score is thereby reinforced.”¹⁵⁶

As noted, expectations shape behaviors and experiences that become infused in AI. Like the police department algorithms that assume reality and validity to predict danger for predictive policing and sentencing risk assessment, my teachers, zip code, parents' level of formal education, inherited conditions, and circumstantial truth overruled my promise, potential, and future in their estimation. When my father asked what questions they asked on the exam, all I could remember was one: What is bread made out of? At the age of five, I was supposed to know the answer was wheat. But I never had the occasion to bake bread from scratch by age five, so I selected the most obvious five-year-old answer: peanut butter and jelly. Naturally, that is a logical word association for a five-year-old, but that was not the test. In algorithmic lingo, and in the world of AI, I would be applauded as a machine able to make that kernel connection as a unique, relational concept, but as a human, I was labelled uneducable. That exam question and others liked it impacted the next nine years of my formal schooling before I escaped from the reach of its harmful clutches into the classes I should have been in all along. That is the power of labels and the often arbitrary scores that purport to justify them.

From my personal experience, I saw the instructions' encoded logic perpetuated a conveyor belt of the masses, sorting the perceived fit and unfit through academic tracking, ability grouping, school retention, discriminatory testing, excessive discipline, unfunded mandates, bussing, and

156. *Larry P. v. Riles*, 343 F. Supp. 1306, 1312 (N.D. Cal. 1972).

inappropriate referrals to special education—all policies of trial and fire I personally lived through. That lived experience has informed much of my scholarship as an academician, civil rights advocate, and survivor of the system, despite its patronizing hostility and racism. Unlike many of my colleagues in academia, my knowledge was not just theoretical. It was experiential, verifiable, and real. Theories are only as good as the realities that validate them as true. My life became the test suite in which I could examine and run hypotheticals not just based on book knowledge. I supplemented theories with a plethora of life knowledge that revealed important dimensional truths for policymaking often overlooked. And just what is that truth? Despite algorithms, I am. Despite predictions, I am. Despite all risk factors of perceived dangerousness and doom associated with race, poverty, schooling, and zip code, I am. And I stand in defiance of algorithms to reveal their false promises and their ability to falsely deny promise in us. I am the reality that defied their predictions, that broke the mold as a survivor of discriminatory educational and technological formulas. I survived anticipatory institutional racism encoded with bias at every level of instruction and engineered to lead to my moral, educational, social, and legal degradation. But many do not. We must testify on their behalf.

Guilt by association is not relegated solely to the criminal justice system. Like many written off in the criminal justice system to a longer sentence or no bail based on an arbitrary algorithmic score riddled with unconstitutional immutable characteristics and circumstance, my neighborhood, my classmates, and my school were prepared to condemn me by mere association with conditions of poverty and race. The rhetoric of equal opportunity and merit rang hollow in light of the realities we faced each day. In fact, that became our understanding of the fundamental difference between rhetoric and reality—rights without enforceable remedies could only amount to rhetoric and legal myth; the reality of technology, and not law, allocated life opportunities rather than the legal rhetoric of our Constitution masquerading as enforceable rights.

In reality, their perception of our danger facilitated by seductive mass hypnosis of Whites, biased codes, and the political tirades of White racial grievance meant our guilt by association became the order of the day. In reality, our propensity to certain conditions, neighborhoods, people, family, and acts became our legal noose in risk assessment tools, even while our Federal Rules of Evidence give lip service to banning such propensity evidence as inappropriate, prejudicial, and lacking in probative value.¹⁵⁷ We become the focus of political and algorithmic labels of danger, giving brainwashed Whites a Second Amendment right to declare open season on us even while, for all intents and purposes, that Amendment is off limits for us to defend ourselves if we are violently stopped, frisked, and shot before we can even raise our hands. Based on a risk assessment score, we can expect to be written off from society.

157. See, e.g., FED. R. EVID. 404(a)(1), 404(b)(1), 609, 403.

Based on that diagnostic test score, the school was similarly prepared to write me off, suggesting to my parents that I would be better off in an alternative remedial setting for the remainder of my educational career. They presented papers for my parents to sign that would have placed me in a restrictive environment that could never be justified under federal disability law.¹⁵⁸ Like Hosea Lorenzo Williams, C. Herbert Oliver, Rosa Parks, and countless others, I was seen by the system as a glitch in the code. Instead, my promise, despite their labels, revealed a real glitch in the system—one of academic classification, stratification, and marginalization. But one glitch in the code is easily routed into the dustbin of irrelevance—a racialized periphery of intentionally planned technological obsolescence.

Even after my parents relocated to Long Island in search of better schools, the stigma stayed with me for quite some time. Such is the power of labels, and not everyone overcomes the formidable power they have on the human psyche. Such is the power of self-efficacy, but not everyone has the resources to vote for their educational destiny with their feet. For these reasons, I had an understanding that other lawyers, advocates, and scholars could not. Yet as I excelled in my new school, the belief that I was not bright and did not belong stayed with. I did what I could to find a sense of pride and recognition through my grades, but I had to contend with gatekeepers all my life who professed to have a better sense of my potential than I did. Each time, I had to outmaneuver the algorithm of tacking, grading, and discrimination which operates like AI's gatekeeping algorithms in applications for a job, a promotion, or a home loan.¹⁵⁹

I eventually moved up through the academic ranks, from "Special Education," "Fundamentals," "Academic Low," "Academic High," "Regents," "Honors," to "High Honors," and eventually to "Advanced Placement," or AP courses. How ironic that the child who was labeled EMR would come this far, rising from the metaphorical seven circles of Dante's educational inferno to reach a place where I could be seen as a true counterpart.

The racial element of these classifications meant I no longer shared the same lunch period, the same classes, or the same gym period where my

158. See Individuals with Disabilities Act, 34 C.F.R. § 300.114(a)(2)(ii) (2006) (requiring that students be placed in the least restrictive environment). See also MARY WAGNER & JOSE BLACKORBY, OVERVIEW OF FINDINGS FROM WAVE 1 OF THE SPECIAL EDUCATION ELEMENTARY LONGITUDINAL STUDY (SEELS) 24 (2004), http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf [<https://perma.cc/69R6-SD6T>]. See also the "most integrated setting" mandate within the Americans with Disabilities Act and § 504 of the Rehabilitation Act. Specifically, 28 C.F.R. § 35.130(d) (2016), mandating that public entities "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." According to 28 C.F.R. § 35.130, app. A, the most integrated setting is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."

159. See RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 16–17 (2019) (exploring the myriad of ways in which technology reinforces systemic oppression in America, creating a digital dragnet which codes people by stigmatizing them for where they live, work, and play).

friends and I could come together for a little B-Ball or dodgeball and renew our social bonds. Indeed, society's lines are drawn with little regard for those who fall between the cracks or outside its predictive code. I was alienated from the friends I grew up with my whole life, all because my class schedule had precipitously changed. Code realigns new realities in accordance with the structures of its directives. Just as code's "either-or" binary paradigms leave little room for nuance or inclusion and create silos of exclusion and segregation, the different schedules were the system's way of ensuring the influence of the so-called undesirables never mixed with the privileged cream-of-the-crop class sections. But what is deemed cream of the crop is moral depravity. When you defy expectations of systemically encoded bias and inequity, ambivalence is sometimes the best one can hope for as an exception to the default rule of annihilation operating de facto in inner-city school communities and rural areas. Indeed, I did not fit into the clique of students in my higher-ranked classes. I was in the algorithms of segregation for some time before my rise from academic serfdom to academic elitism, while they had grown up with each other since the first grade. Little could rock the apple cart of their social glue that would form lifelong bonds.

When people are segregated, risk assessments are myopic; they lack the lived experiences that people of color possess. My BIPOC classmates and I were surveilled, suspected, and profiled by teachers and school resource officers—and now BIPOC students are subjected to this treatment by FRT, even though it is predominantly White schools where mass shootings occur.¹⁶⁰ Metal detectors are only seen in large numbers in Black and Brown schools, and our focus on where they are placed and not placed rest on racial assumptions that ultimately harm all students. But like "privileged code" for privileged folks, academic achievement's upper social echelon was free of criminal or mental stigmas and shared years of high-honors-academic tracking. This combination meant shared sleepovers, picnics, and outings to the amusement park. The upper social echelon was quite comfortable in its social circle of all Whites and one Asian-American. There was no room for me and one rightfully wonders whether there will be room for me and those like me in cyberspace.

160. See, e.g., *RealNetworks Provides SAFR Facial Recognition Solution for Free to Every K-12 School in the U.S. and Canada*, SAFR (July 17, 2018), <https://safr.com/press-release/realnetworks-provides-safr-facial-recognition-solution-for-free-to-every-k-12-school-in-the-u-s-and-canada> [<https://perma.cc/N6JC-39QE>]; Eli Zimmerman, *Company Offers Free Facial Recognition Software To Boost School Security*, EDTECH (Aug. 3, 2018), <https://edtechmagazine.com/k12/article/2018/08/company-offers-free-facial-recognition-software-boost-school-security> [<https://perma.cc/H2LT-4ULW>]; Alvaro M. Bedoya, *The Color of Surveillance*, SLATE (Jan. 18, 2016, 5:55 AM), <https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html> [<https://perma.cc/DC6R-TYW2>]; Drew Harwell, *Unproven Facial-Recognition Companies Target Schools, Promising an End to Shootings*, WASH. POST (June 7, 2018, 7:26 PM), https://www.washingtonpost.com/business/economy/unproven-facial-recognition-companies-target-schools-promising-an-end-to-shootings/2018/06/07/1e9e6d52-68db-11e8-9e38-24e693b38637_story.html [<https://perma.cc/38UL-YBCY>].

Where does an algorithm help us better understand these emotionally challenging transitions and how they impact human performance? It simply cannot—or probably will not—do so fairly. We do a disservice to education, AI technology, and ourselves when we water down such nuanced judgments with reductionist code that cannot and does not reflect the lived experiences of a growing majority in the nation in ways that can empower them rather than subjugate them. Yet my excellence was also my scarlet letter for those who saw my presence as an imposition, a disturbance in the natural social order and the class bell curve, given the algorithmic order's function of preserving the favored over the non-favored.

Accordingly, if the fundamentals of an underlying code do not close or make efforts to narrow the national racial achievement gap, AI has no place in our society. The same applies with the national racial housing gap, medical access and health gap, the wealth gap and so forth. In other words, a technology that does not better the world but instead makes its inequality worse is not one we should endorse with our patronage and dollars. For the just in heart, social ostracization is not intended to be a predictor for the putative incarcerator but is rather meant to serve as a warning sign to rectify environments to be most conducive to learning and well-being. Silicon Valley, as the apparent technological purveyor of hate and greed, has yet to give us a technology that promotes integration, quality education, acceptance, compassion, tolerance, and understanding on the same massive scale as its harmful algorithms. Like silo news feeds streaming to silos of online communities, I no longer saw my friends of color in school except in brief passing in the hallways, which only served as another cruel reminder that I was no longer part of the old crew.

Silos that lack any shared commonality and kinship with other groups lead to silos of cognitive dissonance, tribalism, and prideful ignorance. When we do nothing to address the intensive social peer pressure to fail in school in order to appear cool, will algorithms understand and ameliorate this oppositional culture in academic achievement, which I and countless others faced? Or will algorithms prey on cultural phenomena to categorize young individuals in ways that exacerbate social divisions for more social engagements that drive revenue streams?¹⁶¹ Just as algorithmically determined advertisement campaigns and platforms like Instagram can promote low self-esteem, my self-esteem took a hit in such academic isolation. Moreover, going to school in a rough neighborhood took all the energy I had to overcome demands from gangs to join them, drug runners to sell for them, and cops to help them when they tried to

161. Facebook and its parent entity, Meta, are said to engage in this type of business model. See Andrew Hutchinson, *New Reports Underline Facebook's Role in Exacerbating Political Divides—But Will Facebook Take Action?*, SOCIALMEDIATODAY (Aug. 10, 2020), <https://www.socialmediatoday.com/news/new-reports-underline-facebooks-role-in-exacerbating-political-divides-b/583262> [<https://perma.cc/JPI3-XRV2>]. Consequently, social controversies generated from algorithms often become the basis for heightened social engagement that drives advertising revenue. See *id.*

recruit me as a young teen to stand in their suspect line ups for an extra \$5.¹⁶² To promote educational success rather than stifle it, programmers and software engineers need to understand the complexities of what it means to succeed despite an environment shaped by drugs, guns, social pressure, bullying, public corruption, and poor domestic policy in inner cities over the past fifty years calculated to remove Black men and fathers from the home just to qualify for public compassionate assistance.¹⁶³

The reality for me was clear: I was in a school-within-a-school. The myriad marginalized ethnicities and races were on the periphery, while the core inside the school was composed of a clubby White nucleus, privileged in an exclusivity that I managed to transcend. In other words, embedded deep within the institutional code of academic testing and tracking was a stealth code of coveted privilege operating much like those quantum AI-advanced codes that can outmaneuver lower track classical algorithms and escape accountability altogether.¹⁶⁴ I encountered the same clubby White nuclei in public school, law school, corporate law practice, and beyond the cosmetic veneer of inclusivity.¹⁶⁵

Several risk assessment factors would have relegated me to a prison of presumptuous majoritarian bias that could neither understand nor see my potential. These factors include my neighborhood's crime, demographic, poverty, school ranking, school free lunch program; my parents' lack of college and professional education; and my family's background, race, and zip code. One can instantly see differences in White neighborhoods that have significantly less police presence, voting booths that remain open, voting lines that do not stretch for miles, and booster clubs, PTAs, and high-wealth property taxes that produce well-appointed schools. I too noticed a vast difference in how the teachers regarded the students in Special Education and then Advanced Placement. Yet a key difference I saw between these academic tracks was the pace of the courses. My first bump in the academic tracks from Special Education to Fundamentals was simply a pace increased by two weeks. Was this it? Were a mere two weeks separating my new status from the previous track? And while it was only a matter of weeks that distanced us as students, it was only a matter of blocks that spelled the vast difference between income brackets, life paths, and worlds altogether, within and well beyond the school-house gates. What meaningful difference lies between one risk

162. This was an experience I witnessed often growing up in the streets of New York City and Long Island. This practice was a trap for the unwary, but for the desperate, its monetary inducement was not insignificant.

163. See generally DANIEL PATRICK MOYNIHAN, *THE MOYNIHAN REPORT: THE NEGRO FAMILY, THE CASE FOR NATIONAL ACTION* (1965), <https://www.blackpast.org/african-american-history/moynihan-report-1965> [<https://perma.cc/2VM6-FY2V>].

164. See Levy, *supra* note 54.

165. I was a three-time Ivy League student, honors graduate, and worked eighty hours a week at a top mergers and acquisitions law firm. This was not enough to get invited to lunches with partners where deals were unofficially allocated to attendees deemed more worthy by their pedigree. Gatekeepers exist at every level but are by no means keepers of merit. Instead, they keep favor, advantage, and cliques.

assessment score and the next can seem as quixotic as the touted difference between academic tracks. Such is the power of a label and those who wield them often know this. To separate power, funding, teachers, computers, assistive AI technology, and nature enrichment programs of Black and Brown children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁶⁶

I still remember the doorway through which I darted quickly to avoid the stigma of being seen entering or exiting. Given its loathsome reputation for being the classroom for “fundies”—a derogatory term referring to the lowest fundamental classroom of special needs students often made fun of—I found it odd that an advanced pace of only a couple of weeks also distinguished my next series of bumps up to upper level classes. But I was reminded again that from track to track, it was a world of difference in the same way it was from gritty Freeport to ritzy Merrick.¹⁶⁷ An academic track, a zip code, and now an algorithmic code carries a better or worse fate based on the racial monopolization of resources enshrined in code proxies for race that are anything but race neutral. But there can be no substitute for justice when those without it have no input to change its makeup, structure, and enforcement.

The physical architecture of racism in bridges, roads, and tunnels that racially divided communities¹⁶⁸ have morphed into the super-highway of machine learning that, as shown, has many parallels to academic tracking. But in school, I could transcend my reality by breaking out of the lower tracking system. Still, there is no such opt-out provision for being identified, sorted, labeled, and tracked with algorithmic code that cannot see the challenges one must overcome or that afflict them even when they try. A code that does not care but merely predicts suggests prediction is power and those writing it are the ones monopolizing that power. Why would this not be a matter of antitrust when AI is bigger than Standard Oil ever was?

My parents’ move afforded me an opt-out feature that algorithmic code denies today’s youth through its biased outcomes.¹⁶⁹ But this opt-out feature is the exemption our Constitution provides from discrimina-

166. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954).

167. Freeport and Merrick are both on Long Island, but Merrick’s median household income in 2020 was nearly double that of Freeport. *Freeport, NY, DATA USA*, <https://datausa.io/profile/geo/freeport-ny> [<https://perma.cc/78XM-4A36>]; *Merrick, NY, DATA USA*, <https://datausa.io/profile/geo/merrick-ny> [<https://perma.cc/JF3W-4JAY>].

168. See Glenn Kessler, *Robert Moses and the Saga of the Racist Parkway Bridges*, WASH. POST (Nov. 10, 2021, 3:00 AM), <https://www.washingtonpost.com/politics/2021/11/10/robert-moses-saga-racist-parkway-bridges> [<https://perma.cc/T5A6-2T6Y>].

169. See Catherine Kenny, *Artificial Intelligence: Can We Trust Machines to Make Fair Decisions?*, UC DAVIS (Apr. 13, 2021), <https://www.ucdavis.edu/curiosity/news/ais-race-and-gender-problem> [<https://perma.cc/UXM7-Q4W2>] (growing body of research indicates that bias in artificial intelligence can lead to biased outcomes, especially for minority populations and women).

tory schemes if we are to truly understand the original intent of the Fourteenth Amendment. As the Supreme Court has noted,

It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.¹⁷⁰

With no legal exemption from unfavorable laws and code and with no true opt-out capability, AI runs counter to the long-established understanding of equal protection as interpreted in the classic *Slaughter House* cases.¹⁷¹ Prediction is a better business than personal restoration when the mindset is policing and control based on White privilege. Yet I was given a hall pass to a new eventuality that was only possible because I showed initiative in doing extra credit assignments at every possible turn. But is there any extra credit one can do to avoid an adverse risk assessment score, a negative algorithmic grade designation, or the false impression of risk factors not in one's control? Not only do algorithms fail to provide an opt-out, or to capture potential, but they also fail to recognize or honor self-efficacy. Programmers, all too eager to aid and abet punishing and criminalizing poverty in our criminal justice system, rarely ever assume self-efficacy for those in poverty.

The other key difference between the different academic tracks was the praise I saw heaped on students of the higher tracks and its absence in the lower tracks. I remember being told I was one of the future leaders of tomorrow in my Honors class but that I would make a great carpenter in my academically low-ranked class. What component of an algorithm can capture this intangible discriminatory factor in predicting success or danger without replicating it? What informal teacher expectations promote or destroy academic promise? The expectations were far different for each group; these words molded realities for countless others. Do algorithms designed to measure and predict success express these subtle motivations planted for the elite and withheld from BIPOC and poor students with all the richness of nuance that justice in context requires? Perhaps

170. *Strauder v. W. Va.*, 100 U.S. 303, 307–08 (1880).

171. *See Slaughter-House Cases*, 16 Wall. 36, 67–72 (1873).

success and self-actualization matter not where powerful elites and government actors design code only to track, control, or surveil. Because the donor class does not readily come forward to invest in research and development that would disrupt the status quo relations from which their profit is extracted, it is foolish to think otherwise.

V. INFORMING CODED INEQUITY: THE IMPORTANCE OF LIVED EXPERIENCE

When engaging in systems design, do code programmers ever consider the inequity of a two-tier, dual-track education system where problem solving skills are imparted to one group and denied to the other? How does code take this into account? And what are its implications for promoting equity? In my experience in public school, I saw that the instruction in the lower academic track never expected students to understand higher order thinking even though it was the same material taught in the higher tracks. In fact, I noticed that it was *how* the material was taught from track to track that truly mattered. We were told in the “academic low” track (yes, they called it that) that the sky is blue, so to speak. It was only in the honors classes that we were told *why* the sky is blue. We were asked to try and disprove hypotheses. The upper-level classes not only asked us to record our answers but also required us to show our work and thought processes as to how we arrived at the answer. Our society was preparing the next generation of coders and the coded.

In contrast, the lower academic track treated us like computer automatons, working through a system of memorized steps rather than using critical, imaginative problem solving. We were assumed incapable of such higher-order thinking and without encouragement, this assumption became a self-fulfilling prophecy in class—much as it is still in STEM educational opportunities (or lack of opportunities) for people of color today. In essence, the public education system that treats us like widgets on an assembly line is the kind of contrived environment that coaxes the modern mind to adopt the mass mental conformity of being treated as subhuman that the most invasive AI is now emerging from. Human sympathy for American industrialization and now AI robotic innovation in pattern recognition, calculation, and analytical dominance is best fostered by an education system that treats humans as robots and then extolls all the virtues of how robots can make our lives better when that is anything but the goal behind AI development and deployment.

We have known for some time that, without adequate STEM educational opportunities for BIPOC, there can be neither real diversity in tech nor any modicum of diverse lived experiences informing algorithmic code development.¹⁷² The high school’s Honors class may have expected explanations for our answers, but AI and facial-recognition-coded sensors

172. See, e.g., Carolina Milanesi, *STEM Education as a Diversity Driver in Tech*, AMAZON (Sept. 14, 2020), <https://www.aboutamazon.com/news/community/stem-education-as-a-diversity-driver-in-tech> [<https://perma.cc/9JUZ-7CKK>].

provide no explanation for their role in perpetuating mass incarceration in America. The higher academic track had an operating system with algorithms interested in cultivating, examining, challenging, and expressing my thought processes, not just rote automated memorization or suppression.

In college at Columbia, I had the privilege of working with students of color in Harlem. Not only did my experience as a student of color confirm that there were two worlds of education for the majority and the rest, but my experience as an educator also validated this observation. For example, I saw that students' experiences at their schools nearly two decades after my schooling had not changed much. I saw that schools still controlled and stifled students' exuberant energy or punished it rather than trying to channel it constructively as predominately White schools did. Conversely, in the Taft School, a predominantly White, upscale boarding school in Watertown, Connecticut, where I also had the privilege to teach, I saw parents who dropped in—literally, in helicopters—once a month to see their kids. As teachers, we were not only their dorm parents but also their actual parental figures.

While the rich can suffer some of the same family dysfunction as the poor, their ability to hire surrogates like me kept their children on track in ways that are neither available nor considered through a reparative mindset in an algorithmic code for the poor. As teachers, we were there for our students' first pimple, their first real girlfriend or boyfriend and the ensuing heartbreak that inevitably followed, and for all the flood of hormones and emotions confounding reason. What algorithm can adequately capture the nuances of these challenges students face and how they contend with them through educators who don't share their experiences? These students did not have to endure adolescence alone, nor did they have to navigate tough streets when they were sheltered on a private campus filled with lakes, springs, and plush greenery that rivaled my college campus.

I saw the difference between Harlem and Watertown as the stark difference between night and day. Students plowed through syllabi in Harlem, filled with rote knowledge, whereas students at the Taft School used creative problem-solving skills. At Taft, there was no rush to plow through a syllabus for its own sake or to meet a state mandate. All the "what ifs?" and "whys?" of students' and teachers' questions were explored with intellectual curiosity and wonder. I could see in this next generation of students the beginnings of the division between the programmers and the programmed. For the former, the pedagogy was not all that different from the Socratic Method I used as a law professor for most of my career. Simply change the facts of the hypotheticals used, and you have a new scenario that tests students' understanding of the material and shows them the real-life applications of what they were learning. It seems only reasonable that we should similarly demand coders be chal-

lenged on the real-life applications of what they are coding and the values in which they do so.

As a new teacher at Taft, I saw firsthand how the master teacher probed students' answers and made them question the underlying assumptions of their statements and positions. I saw students discover that they had to revise and refine the positions they had staked to accommodate new information or questioning by the teacher. Algorithms that seek to predict student success can never seem to capture those valuable intangibles that were instrumental in professional success, as affirmed in *Sweatt v. Painter*.¹⁷³ Such out-of-the-box creative, inductive thinking and reasoning is the demanding quest we seek to replicate with AI, where collaboration and mutual regard are modeled in problem-solving exercises as opposed to more typical punitive, hyper-adversarial, competitive means of structuring the world through code.

At Taft, in a class assignment where students were asked to resolve conflicts among various nations, their creativity and problem-solving skills were tested. The scenario involved a U.S. ship chartered by the Venezuelan government with a Chilean crew that discovered oil near, but just outside, the coastal boundaries of Iran. What should be done about who owns the oil? How were the students to navigate these complex and competing interests? Some students were savvy enough to separate the issues of the oil's actual ownership and who would have possessory rights granted. Others separated the issues of ownership and control over the amount of oil that could be discharged in any given economic cycle and market if it would affect the price of oil for other countries. In a matter of forty-five minutes, the students were able to compose a nuanced, well-thought-out treaty that represented the various parties' interests. Their introductions to commodification of resources were becoming complete. Little did we know that resource would be us.

But through that assignment, I saw the makings of critical thought and creative problem-solving skills being modeled, cultivated, and taught in a way I had never seen in Harlem or in most of its STEM offerings. I had only read about it in technology study of new advances in AI. Indeed, we support robot learning and privileged students' learning. But we do little, it seems, for the disadvantaged, the students who were ushered through a metal detector, a pat-down search, and playground aerial drone surveillance. These students received busywork in the form of ditto handouts and workbook assignments that required no critical thought, creative problem-solving, or cooperative learning, only recall skills and rote memorization. We offer more demanding challenges to AI robots than inner-city students tested for their recall. This rudimentary level of education seems hardly better than the former days, in which masters forbade their

173. 339 U.S. 629, 632–35 (1950) (noting that separate but equal is not met where intangibles such as professional networking are not available to the same degree in Black segregated law schools as in predominantly White flagship institutions).

slaves to read or else suffer the lash or worse.¹⁷⁴ But perhaps technological illiteracy in our schools and technological cultural exploitation in Silicon Valley remains its latest de facto incarnation.

In my schooling, there was little to no interaction between the teacher and students predicated on learning new concepts; rather, teachers interacted with students to instill robotic classroom behavior through discipline. In turn, this discipline often became an issue because it repressed rather than channeled the students' energies, and stifled rather than nurtured their interests and curiosities. There was no effort to make lessons interesting or relevant to students' talents, interests, or abilities in the same way AI has led to biased outcomes by excluding critical voices and diverse talents.¹⁷⁵ Drawing answers out of students was like pulling teeth because there was no real engagement with the child as a human being with enormous potential waiting to be unlocked. The class lessons were as drab and outdated as the paint peeling from the classroom walls. Yet what measure for boring instructional design gets factored into an algorithm designed to measure promise and merit? It is difficult to conceive that a programmer in Silicon Valley without this lived experience could ever capture these nuances and, more importantly, how to remediate, re-integrate, and restore lives to academic self-sufficiency and well-being.

In the end, the best way to predict success is to create it by promoting algorithmic structures that allow all the advantages of support with none of the disadvantages of racism, whether express or implicit.¹⁷⁶ AI cannot continue to implement White supremacy as digital fantasy compounding racial cognitive bias that results in the culmination of dominance and sub-dominance paradigms. The work of supremacist structures is self-executing, and AI promises more of the same in its ability to perpetuate such paradigms. The automation age that AI promises to usher in is a world of

174. "Between 1740 and 1834, Alabama, Georgia, Louisiana, Mississippi, North and South Carolina, and Virginia all passed anti-literacy laws." Peri Stone-Palmquist, *Still Not Free: Connecting The Dots of Education Injustice*, DIGNITY IN SCHS. (Feb. 13, 2020), <https://dignityinschools.org/still-not-free-connecting-the-dots-of-education-injustice> [https://perma.cc/WCH6-R3TW]. In fact, a nineteenth century Virginia law specified:

every assemblage of negroes for the purpose of instruction in reading or writing, or in the night time for any purpose, shall be an unlawful assembly. Any justice may issue his warrant to any office or other person, requiring him to enter any place where such assemblage may be, and seize any negro therein; and he, or any other justice, may order such negro to be punished with stripes.

V.A. CODE, tit. 54, ch. 198, § 31 (1849).

175. See Gary Shiffman, *We Need a New Field of AI to Combat Racial Bias*, TECH CRUNCH (July 3, 2020, 11:30 AM), <https://techcrunch.com/2020/07/03/we-need-a-new-field-of-ai-to-combat-racial-bias> [https://perma.cc/8WGD-4XSD] ("Training data in the [computer science] lab often lacks the context and complexity of the world you and I inhabit. This flaw perpetuates biases.").

176. See Charlene Chu, Kathleen Leslie, Rune Nyrup, & Shehroz Khan, *Artificial Intelligence Can Discriminate on the Basis of Race and Gender, and Also Age*, CONVERSATION (Jan. 18, 2022, 11:11 AM), <https://theconversation.com/artificial-intelligence-can-discriminate-on-the-basis-of-race-and-gender-and-also-age-173617> [https://perma.cc/4TY9-VTHA] ("The use of AI is inescapable in our modern society, and it may perpetuate discrimination without its users being aware of any prejudice.").

displaced laborers where demands for greater wages and quality of life are now rendered technologically irrelevant and irrevocably threatened with mass displacement. Today, our algorithms operate as automation of human consciousness. As we know, the question is, whose consciousness should be enshrined and memorialized in digital perpetuity?

Automated consciousness has shown that lust for profit and power comes at the expense of long-term responsible stewardship of humanity's existence on earth. We have seen reports of alleged retaliation for exposing AI's dramatic costs in exacerbating the global climate temperature.¹⁷⁷ The bidding of technological handmaidens of oppression has come to our reality's shores and has been here for some time.¹⁷⁸ But structures are truly a reflection of us, as they are the boundaries we have created in our minds. We have not reached a place of abolishing imaginary boundaries. We have not reached that place because we, as a societal collective, choose not to think independently beyond the software programmer's limited greed objectives enforced by coded neurolinguistic programming and subconscious cues through brain entrainment waves. We thrive on boundaries that create segregation and separation predicated upon oppression. Racial capitalism is oppression that leads to unchecked greed based upon exacerbating racial inequalities, and its latest manifestation is, without a doubt, AI.¹⁷⁹ AI currently remains the Wild West as a result of Congress's and the nation's failure to regulate this arena meaningfully for over twenty-five years or more.

Overlaid in this world of racial inequity is AI's veneer of objectivity. As discussed, America's allocation of opportunity is not based on one's constitutional rights or merit but on assumptions predicated in the algorithmic code, which excludes whole realities from recognition except in the most nefarious and destructive ways.¹⁸⁰ From the social engineering

177. AI is said to be contributing to global warming as Timnit Gebru allegedly tried to warn Google before being terminated. See Hao, *supra* note 27.

178. See, e.g., Will Douglas Heaven, *Predictive Policing Algorithms are Racist. They Need to Be Dismantled*, MIT TECH. REV. (July 17, 2020), <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice> [<https://perma.cc/CSN7-93BM>] (outlining AI tools' shortcomings for their intended purposes due to lack of transparency and biased training data); Rebecca Heilweil, *Big Tech Companies Back Away From Selling Facial Recognition to Police. That's Progress*, VOX (June 11, 2020, 5:02 PM), <https://www.vox.com/recode/2020/6/10/21287194/amazon-microsoft-ibm-facial-recognition-moratorium-police> [<https://perma.cc/CJ64-KWR8>] (explaining that Amazon planned to "institute a one-year moratorium on police use of Rekognition, the company's facial recognition software"); Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html> [<https://perma.cc/8NPL-VEUQ>] (telling the story of Nijeer Parks, the third Black man to be wrongfully arrested based on a bad facial recognition match); Anna Lauren Hoffmann, *Where Fairness Fails: Data, Algorithms, and the Limits of Antidiscrimination Discourse*, 22 INFO., COMMUN & SOC'Y 900, 900-01 (2019) (problems of bias and fairness are central to data justice, as they speak directly to the threat that algorithmic decision-making may worsen already existing injustices).

179. See, e.g., Kalluri, *supra* note 124, at 169 (using AI to predict our behavior, often motivated by power and profits).

180. See BENJAMIN, *supra* note 159.

that created Jim Crow, we have the birth of the American ghetto and all of its socioeconomic and legal tragedies.¹⁸¹ Jim Crow was the algorithmic social engineering of southern judges and White supremacist sympathizers. Still, it is the very consequences of supremacy that AI now seeks to penalize through risk assessment tools used to incarcerate, sentence, monitor, and predict policing. Put another way, the social engineering system, designed to isolate, segregate, miseducate, and ultimately subjugate, created the factors used to judge one's so-called dangerousness. How cruel an irony it is; we cripple people through nefarious legal and social policies and then use the natural and probable consequences of those crippling policies to target their victims for further harassment, profiling, and incarceration. The checks and balances of our democratic order have fallen to the wayside, but the checks and balances against human nature are in far greater peril. As AI systems become the global technological instigators of racial capitalism, what becomes of the conscientious social advocacy of a technology that does not discriminate, forgets mistakes, shows mercy and compassion, and helps to find the best in each other rather than the worse? As a society, we have a fundamental decision—one we make daily—to either confirm the structures of White supremacy or to embrace a reality that begins to dismantle it.¹⁸²

VI. DISMANTLEMENT, DIVESTMENT & RESISTANCE IN AI EQUITY

Dismantlement of supremacy can only begin in earnest when it addresses the psychological, emotional, spiritual, physical, social, economic, and legal costs of technological racism. As previously noted, we have paid those costs in teenage suicides, low self-esteem for young girls from Instagram posts, and Facebook harvesting and manipulating millions of users' data to rearrange geopolitical alliances in a domestic presidential election and in engineering Brexit.¹⁸³ But the cost of technological racism is more than that. It entails the manipulation of everyday people. It uses our likes, dislikes, thumbs ups, and hearts to facilitate the concatenation of our data into a profile that creates opportunities to sell our information to the highest bidder who may care little for the best interest of individuals or the nation. Again, the funneling of dark money into politics neither helps matters nor instills confidence in true democratic governance.¹⁸⁴ Neither does an unchecked technocratic state with no pretense of accountability or transparency to the very public in which it has wheeled so much power and abused so much trust. Thus, there is a clarion call for

181. See Dyson, *supra* note 95, at 15–16.

182. See *id.*

183. See Choudhury, *supra* note 114; Scott, *supra* note 114; Becky Upham, *Facebook Comes Under Fire After Whistleblower and Leaked Documents Reveal Negative Impact on Girls*, EVERYDAY HEALTH (Oct. 9, 2021), everydayhealth.com/public-health/facebook-comes-under-fire-after-whistleblower-and-leaked-documents-reveal-negative-impact-on-young-girls [https://perma.cc/9GMJ-Z63H]; Kornbluh, *supra* note 145.

184. See *supra* Section II.C.2.

collective and individual responsibility to address the status quo crisis we face in algorithmic discrimination and its impact on climate change, environmental justice, consumer protections, and racial equality in all public and private services and goods. While wholesale changes need to occur on the macro level of institutional regulation and monitoring, we do not have the luxury of waiting for external institutions to reflect our moral code before we put humanity first. We must be willing to finally accept the proposition that greed comes with a cost for our planet and ourselves that we are unwilling to pay, even in AI innovation that threatens this bigger picture.

As a society, we should endeavor to digress from the mass-algorithmic hypnosis of consumer hysteria brought about by tales of the danger among people of color across White America.¹⁸⁵ For the oppressed, there is no sane choice but to divest and resist our criminalization and commodification if there is any hope for inner peace, self-determination, and self-actualization without the digital imprint of the cyber world defining and occupying every moment of our innermost sanctuaries and self-concept. Reclaiming the sovereignty of the inner mind becomes imperative as the bulwark against massive hypnosis through social media feeds, biased algorithms, and an Instagram culture that operates on a conscious and subconscious level (as do most things we consume within our field of vision and attention). We are being profiled every second of the commercial operating day, which is never-ending for AI. Overcoming must persist in the inner life when the external life inevitably clashes with the unilaterally violent assumptions imposed by AI.

BIPOCs in America face an existential threat, as evidenced by George Floyd.¹⁸⁶ “To be or not to be—that is the question [even still in the world of AI]: Whether ‘tis nobler in the mind to suffer [t]he [digital] slings and arrows of outrageous [algorithmic] fortune [o]r to take up arms against a sea of [cyber] troubles, [a]nd by opposing end them.”¹⁸⁷ Our resistance as people of color is both divestment and reallocation of our collectively leveraged consumer power. Our resistance as conscientious people of this nation is divestment as an enterprise. Divestment from what, one may ponder? Divestment from the ubiquitous world of AI and tech in the modern world is not particularly feasible. Instead, I mean divestment in the most enlightened sense—divestment from the mentality, psychology, and economic reality sought to be imposed with values that do not reflect our inherent dignity.

185. See generally Mary Beth Oliver, *African American Men as “Criminal and Dangerous”: Implications of Media Portrayals of Crime on the “Criminalization” of African American Men*, 7 J. AFR. AM. STUD. 3, 3–18 (2003).

186. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/YCD6-8YA7>] (“Mr. Floyd, a Black man, died in May 2020 after being handcuffed and pinned to the ground by Minneapolis police officers in an episode that was captured on video, touching off nationwide protests.”).

187. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, l. 1750–54.

What we feed with our thoughts, dollars, and energy only grows. Concomitantly, what we starve with our attention and energy in dollars will dissipate. Simply put, money and energy flow where attention goes. Which wolf we choose to feed is entirely up to us as a nation. The love within us offers a power beyond our own that we can borrow and lean on to bring healing within ourselves and those around us as the basis for social justice reform; when we realize this, we can begin stepping into our power. In the face of White Fragility, the study of critical race theory poses a significant threat through the destruction of ego and the unintended imposition of White guilt.¹⁸⁸ But fragility must not result in censorship or distortion in social medial platforms, as we see with the current critical race theory debate. We must remember, however, that this is neither education's purpose nor goal, though we should understand that this fragility is the foreseeable result of becoming aware of our collective complicity in a historical trend simply by operating in the monetary system designed to perpetuate paradigms of racial dominion.

The Supreme Court essentially sanctioned White flight in *Millikan v. Bradley*,¹⁸⁹ and the ramifications are evident in the nation's segregation of computer program coders today who write AI programs from segregated suburbs. This trend affirms, yet again, the reticence and recalcitrance of those Whites who do not wish to share power or resources, even with the vulnerable victims they created through their exclusionary schemes. Such schemes include zoning, magnet schools, education, academic tracking, testing, restrictive placements for disabled students of color, the school to prison pipeline, restrictive covenants, bank redlining practices, and neighborhood financing.¹⁹⁰ With this history of discrimination, which data will be free of racial bias such that it can be included in algorithmic formulas intended to objectively determine issues of innocence or guilt, danger, or future potential? As AI progresses in the monopolized hands of White America and police departments—infused with White nationalists and KKK affiliations¹⁹¹—the exercise of public power and states' use of public violence cannot rest in hands that have not evolved in the genuine and true consciousness of equal justice under law.

Advocates and communities must choose our survival and determination by reaching for the higher consciousness of unconditional love in practice and in coding. Unconditional love in practice and policy means not using criminal risk assessment tools to increase sentencing penalties based upon characteristics and conditions a person has no control over. Unconditional love in policy, as in law, means promoting rehabilitation

188. See Robin DiAngelo, *White Fragility*, 3 INT'L J. CRITICAL PEDAGOGY 54, 56 (2011).

189. See generally *Milliken v. Bradley*, 418 U.S. 717, 746–47 (1974).

190. DiAngelo, *supra* note 188, at 56.

191. See Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR CRIM. JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [<https://perma.cc/KN9Z-93CL>].

spiritually, mentally, emotionally, physically, socially, and legally at every turn so the person is reintegrated successfully into society. Successfully integrating offenders back into families and communities that are also empowered can produce untold profits for the national GDP if only the chance were granted.¹⁹² Economic prosperity and wealth, it turns out, do not have to come at the expense of BIPOCs in this nation.

That said, money, in itself, is not the end all be all; there are more important matters to consider.¹⁹³ The purity of one's own breathing air and the ability to have consumable drinking water—the lifeblood of humanity's existence—are examples. Instead, we see the predatory allocation of natural resources from a delicately balanced ecosystem predicated on a global and domestic racial capitalist structure that AI is in a quantum race with global powers to perpetuate and exploit further. Therefore, to exercise the individual's ability to truly have self-determination in their affairs and those of this planet, divestment by reallocating our resources and attention must begin with nonparticipation and redirection in the economic, data, political, and spiritual schemes that continue to seek our enslavement. We define ourselves for ourselves; we speak for ourselves; we promote those agendas that help promote not just ourselves but our values which are reflected in the Nguzo Saba principle of a collective sense of responsibility for the well-being of all.¹⁹⁴

What good is transparency in tech without accountability? After all, we had videos of Rodney King, but it took deviation from routine in a nationwide quarantine to see George Floyd.¹⁹⁵ What good is accountability in tech when it is one-sided and enforcement is racially favored? After all, a tech company can set up its own Tech Supreme Court, but how can we ensure its so-called accountability will not be slanted toward those who write the checks in the same way we see ex-judges as arbitrators take bribes to look the other way for repeat business that favors industry over humanity. What good is accountability in tech when there is no racially-diverse oversight? What good is oversight in tech when people of color, women, and the poor have been excluded from the entire technology industry in Silicon Valley? What good are racially-diverse angel investors for a company if there is no real change in the paradigm by which investment systems and profits are predicated on exacerbating racial inequality? What good are AI federal privacy laws when massive data extracted

192. See Alex Muresianu, *Criminal Justice Reform Is Also Good Economics*, FEE (Aug. 16, 2018), fee.org/articles/criminal-justice-reform-is-also-good-economics [<https://perma.cc/MZH6-URVU>].

193. See P.R. Lockhart, *How Slavery Became America's First Big Business*, VOX (Aug. 16, 2019, 9:00 AM), [vox.com/identities/2019/8/16/20806069/slavery-economy-capitalism-violence-cotton-edward-baptist](https://www.vox.com/identities/2019/8/16/20806069/slavery-economy-capitalism-violence-cotton-edward-baptist) [<https://perma.cc/SEJ2-J7HF>].

194. See *Nguzo Saba (The Seven Principles)*, US ORG., <https://www.us-organization.org/nguzosaba/NguzoSaba.html> [<https://perma.cc/2JMK-QFLY>].

195. Rory Fleming, *How to Go After Rogue Prosecutors*, ATLANTIC (Dec. 29, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/consent-decrees-rogue-prosecutors-defendant-rights/620988> [<https://perma.cc/886P-6B3S>] (noting “the general public’s cries for accountability” after “the world saw Los Angeles police officers beat Rodney King on camera in 1991”).

from our schools and offices violates their purpose?¹⁹⁶

VII. AN EQUITABLE AI MANIFESTO FOR COLLECTIVE SOCIAL ACTION

I am calling for an era to move past performative allyship to see positive systemic changes genuinely sought rather than just going through the motions. To be clear, this is not just a protest about the inaccuracy of technology, though that is a central consideration for achieving justice.¹⁹⁷ The fact is, FRT poses the same problems as risk assessment tools susceptible to an arbitrary developer or user manipulation and modification that can catch Blacks up in a digital dragnet.¹⁹⁸ Getting a clear-image face print is not as straightforward as proponents suggest.¹⁹⁹

A. MISSING FROM AI & CRIMINAL JUSTICE: POLICE TIES TO WHITE SUPREMACY

As noted, scholars have rightly focused on accuracy as a fundamental

196. See Andrew Ujifusa, *School Officials Urge Congress to Update Student-Data Privacy Law*, EDUC. WK. (May 17, 2018), <https://www.edweek.org/policy-politics/school-officials-urge-congress-to-update-student-data-privacy-law/2018/05> [<https://perma.cc/7YJY-KRD7>]; Henry Kronk, *Student Data Security Is at Risk. We Need To Update FERPA*, ELEARNING INSIDE (Nov. 25, 2018), <https://news.elearninginside.com/student-datasecurity-is-at-risk-we-need-to-update-ferpa> [<https://perma.cc/T2CW-D6YR>].

197. See SPECIAL COMMISSION TO EVALUATE GOVERNMENT USE OF FACIAL RECOGNITION TECHNOLOGY IN THE COMMONWEALTH: FINAL REPORT 24 (2022) [hereinafter MASS. COMM'N] (“Image quality can significantly impact accuracy of matches . . . Bad lighting, indirect angles, distance, poor camera quality, and low image resolution all make misidentifications more likely. These poor image conditions are more common when photos and videos are taken in public, such as with a CCTV camera. But these low-quality images often serve as probe images for face recognition scans, without due consideration for their diminished utility.”); *id.* at 10 (“Once an image is taken and a face is detected in the image, characteristics of the face may be stored in a numerical format called a faceprint. When a machine compares two faceprints, a similarity score, also referred to as a confidence level, may be computed to represent the similarity of the faceprints (e.g., 0–100%). This score is not perfect though ‘generally speaking, the higher the similarity score the more likely the faceprints being compared belong to the same individual.’” (citations omitted)).

198. *Id.* at 11 (“A developer or user of a facial recognition system can set a threshold similarity score to only produce close matches. For example, ‘if a system returns a similarity score between 0 and 100 and a threshold of 80 is set, only faceprints with similarity scores at or above 80 are considered a match.’ For face verification (1-to-1 comparison), the results of a search will be either a match or no match based on the threshold set. For face identification (1-to-many comparison), a query may return zero matches, one match or multiple matches. If a search generates multiple matches, a human reviewer is often utilized to examine the results more closely and determine whether any are actual or likely matches.” (citations omitted)).

199. *Id.* at 24 (“The [Massachusetts] Commission [on Facial Recognition Technology] noted general concerns about the accuracy of facial recognition technology as well as specific concerns relating to accuracy rates based on race and gender. With respect to general accuracy concerns, Commissioner Learned-Miller and his colleagues cautioned: ‘Since a particular person’s appearance may vary significantly from one time to another, two faceprints of the same person are rarely exactly the same Conversely, two different people with similar superficial features (say, a certain style of beard), or whose photos were taken under similar conditions may, in some cases, have nearly identical faceprints The inability for any technology to generate a unique faceprint for each individual is at the heart of many face recognition system errors.’”).

challenge to the administration of justice.²⁰⁰ But even if the technology were more accurate for darker phenotype individuals, accuracy is not equality. Accuracy is not fairness. And too often, legal scholars and policymakers overlook that accuracy can also be deadly when in the wrong hands with the wrong motives. Indeed, we have enough experience with the infiltration of White supremacist groups in our police forces to know that nefarious motives in the wrong hands can be tragic.²⁰¹

In the one-sided narrative of tech reform, algorithms and FRT are always pointed with intense scrutiny at BIPOCs. Yet, we never hear its proponents suggest using this technology to smoke out officers with secret KKK affiliations who are unfit “to serve and protect” in Black and Brown communities.²⁰² Deference to police immunity or notions of reasonable officer conduct seems misplaced in light of the forces’ infiltration by White supremacists.²⁰³ It is ironic that, before becoming an attorney, a character and fitness examination is required, but those in policing, though similarly sworn to uphold the law, never face similar scrutiny even when they wield a gun. As within tort law, those who operate in the public trust with public taxpayer funds in a public capacity should be held to a higher standard of integrity, character, and care, not a lesser one.²⁰⁴ When it comes to AI in the hands of law enforcement, where does AI get deployed, and where does it not? The questions we never ask are just as important as the ones we do.

B. POLICE OVERRELIANCE ON FACIAL RECOGNITION TECHNOLOGY

Consider Willie Allen Lynch, convicted in part based on facial recognition and sentenced to eight years in prison in 2016 for selling fifty dollars’ worth of crack cocaine.²⁰⁵ Lynch reasonably argued he should be permit-

200. See *supra* notes 128–30 and accompanying text.

201. See Steve Volk, *The Enemy Within Race and White Supremacy in American Policing*, ROLLING STONE (May 12, 2021), <https://www.rollingstone.com/culture/culture-features/racism-white-supremacy-american-policing-1167304> [<https://perma.cc/A57V-Y95K>]; MINN. JUST. RSCH. CTR., TRUST IN POLICING: THE ROLE OF WHITE SUPREMACY (2021), https://mn.gov/mdhr/assets/Trust%20in%20Policing%20The%20Role%20of%20White%20Supremacy_tcm1061-471173.pdf [<https://perma.cc/94VL-JMTW>] (noting “incidents in which police officers were found expressing their overtly racist beliefs or their direct connections to hate groups spread across 40 states and 100 police departments”); Danielle Schulkin, *White Supremacist Infiltration of US Police Forces: Fact-Checking National Security Advisor O’Brien*, JUST SEC. (June 1, 2020), <https://www.justsecurity.org/70507/white-supremacistinfiltration-of-us-police-forces-fact-checking-national-security-advisor-obrien> [<https://perma.cc/3QAJ-N63U>]; Kenya Downs, *FBI Warned of White Supremacists in Law Enforcement 10 Years Ago. Has Anything Changed?*, PBS NEWS HOUR (Oct. 21, 2016, 4:10 PM), <https://www.pbs.org/newshour/nation/fbi-white-supremacists-in-law-enforcement> [<https://perma.cc/5N4E-CXRK>].

202. See Michael German, *White Supremacist Links to Law Enforcement Are an Urgent Concern*, BRENNAN CTR. FOR JUST. (Sept. 1, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/white-supremacist-links-law-enforcement-are-urgent-concern> [<https://perma.cc/E8VS-XF3G>].

203. See *id.*

204. See *id.*

205. Johnson, *supra* note 48; Aaron Mak, *Facing Facts: A Case in Florida Demonstrates the Problems with Using Facial Recognition to Identify Suspects In Low-Stakes Crimes*,

ted to cross-examine the facial recognition scan and the analyst who conducted the scan and sent a single photo of Lynch to case investigators.²⁰⁶ Shockingly, in a pretrial deposition, the analyst testified that she did not fully understand how the facial recognition program operated.²⁰⁷ After the Florida Court of Appeals denied his claim in 2018 because he failed to demonstrate that photos of other potential subjects would have changed the outcome, Lynch appealed to the Florida Supreme Court. He drew support from advocates such as the ACLU, Electronic Frontier Foundation, Georgetown Law Center on Privacy and Technology, and the Innocence Project who asserted facial recognition analysis was akin to eyewitnesses who said they were unsure they would recognize the person who committed a crime.²⁰⁸ The Florida Supreme Court declined to take the matter, although the Pinellas County Sheriff's Office maintained a facial recognition system utilized thousands of times yearly over fifteen years that disproportionately affected Black people. Pinellas County Sheriff's Office never advised the Public Defender's Office about the technology's use.²⁰⁹ Of course, equity advocates have come to understand that all-White or nearly all-White institutions incapable of diversifying their ranks on their own accord have, for centuries, been turning a blind eye with willful blindness at best. Rather, the eye looks favorably at the policy outcomes and determines forbearance and deference are proper since such outcomes are acceptable manifestations of maintaining White supremacist social order, given that they do not threaten the status quo but rather reinforce it. Pinellas County is not alone, as New York has also denied defendants' request for details surrounding the use of FRT.²¹⁰

Predictive policing, risk assessment, and FRT are built from algorithms that create significant deprivations of liberty and threats to life. One need only ask Robert Williams, who was wrongfully arrested and faced criminal condemnation because of a faulty facial recognition match and shoddy police investigation work blamed post hoc.²¹¹ Individuals' liberty should not be wrongfully deprived from police forces' overreliance on alleged defective facial recognition in lieu of questioning witnesses, reviewing security camera footage, or following leads.²¹² Michael Oliver and Nijeer Parks were similarly wrongly arrested in 2019 after being misidentified by FRT.²¹³ These three Black fathers were each arrested in

SLATE (Jan. 25, 2019, 12:49 PM), <https://slate.com/technology/2019/01/facial-recognition-arrest-transparency-willie-allen-lynch.html> [<https://perma.cc/GY38-JTYZ>].

206. Johnson, *supra* note 48.

207. *See id.*

208. *See id.*

209. *See id.*

210. *See id.*

211. *See* Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html> [<https://perma.cc/RV8M-WQMR>].

212. *See* Khari Johnson, *How Wrongful Arrests Based on AI Derailed 3 Men's Lives*, WIRED (Mar. 7, 2022, 7:00 AM), <https://www.wired.com/story/wrongful-arrests-ai-derailed-3-mens-lives> [<https://perma.cc/GH2G-DK4F>].

213. *See id.*

front of family, friends, or neighbors and spent time in jail, sometimes waiting months or a year to have their names cleared.²¹⁴ Their ordeals extended well beyond the time they spent wrongfully jailed; blunders like these can negatively and permanently impact real people's lives.²¹⁵ Try telling Robert Williams, Michael Oliver, and Nijeer Parks that a computer "doesn't have any intent."²¹⁶

Computers carry the conscious and subconscious intent of their programmers, the intent embedded in their code, the intent of selecting one set of data as more important than others, and the intent of the human operator who reviews the results and determines which are valid and credible and which are not. Perhaps there is no starker contrast nor more poignant example of how justice is perceived by those impacted versus those who code Supreme Court jurisprudence but have no clue they are emperors who wear no clothes. For only the foolish and ardently racist share an agenda to deny the ubiquitous world of subjective intent is all around technology, especially in computer code and the FRT in which it is embedded.

214. *See id.*

215. *See id.*

216. See Transcript of Oral Argument at 87, *Merrill v. Milligan*, 142 S. Ct. 879 (2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1086_f204.pdf [<https://perma.cc/YC4T-H934>].

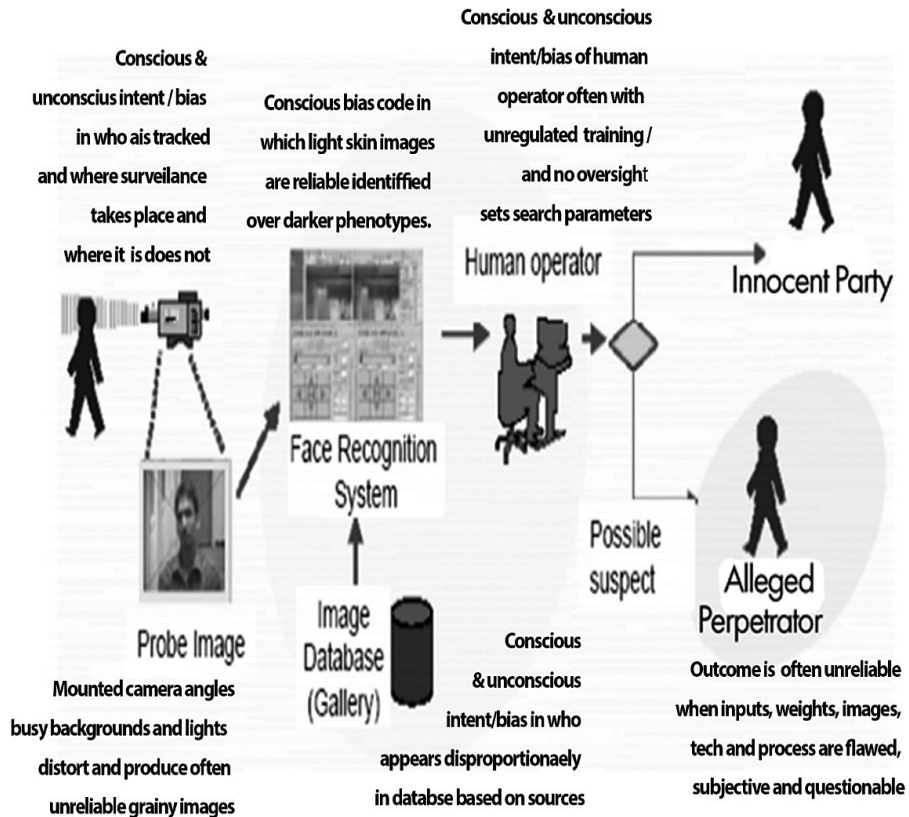


Figure 1

C. ASSUMED DANGER: MISRECOGNITION & POLICE GUNS

I know the impact of misrecognition firsthand. Once again, my experiences have afforded me a front-row seat to the policies I examine as an academic and advocate. Such experiences have given me unique perspectives and verified experiences that cannot be so easily dismissed as purely hypothetical conjecture or acontextual intellectual exercise. I distinctly remember getting stopped by the police one afternoon, just as the car I occupied with my mother, brother, and seven-year-old nephew entered an intersection. Police traffic cameras identified our faces and vehicle as a “high match” for a suspect who just robbed a store. A group of officers ordered us out of the car and encircled us with guns drawn and trained upon each one of us. A very nervous rookie cop, whose shaking hand held a gun against the back of my brother’s skull, ordered my brother not to move as he was lying against the hood of our car. My brother, although six foot two, was a harmless, soft-spoken Columbia University dental student. But his dangerousness was prejudged, as many people of color often are, by police officers feeling threatened just by our very existence. This encounter underscores that, the greater the allegation, the greater the

tenseness of officers, and the greater the likelihood of harm. AI technology and those who wield it have a sacred duty to get this right or not do it at all.

With this current enforcement mindset and approach now codified and protected in law through police immunity, it finds its expression in programmed code. After a long, harrowing ordeal, I still carry memories of my mother's desperate, tearful pleading that my brother remain absolutely still. I knew she was calming my brother, who could feel the cold metal trembling against the back of his head. But I also knew it was her way to remind the rookie officer that this man was a son who had a mother, and that mother was now bearing witness with tender, soft spoken words and gentle energy that we were not a threat, but a family. The anguish, intensity, and fear that his life could have been snuffed out with the slightest move or twitch of an officer's hand is just the kind of precarious condition the police state induces and which false identifications risk.

Perhaps such a precarious condition is one exactly intended to foreclose social justice activism. This very issue arose again on a recent trip to New York City. There I saw streets filled with more mentally ill and petty offenders than I had ever seen pre-COVID. Conventional wisdom on the streets suggested that with hospital budget cuts and the need for hospital beds, the mentally ill were abandoned on the streets to fend for themselves in the same way the public was learning to do for itself. In fact, the consensus of fellow New Yorkers I surveyed was of the impression that, by passive abandonment of their sworn duties to protect and serve, the believed officers were making known their displeasure with "defund the police" movements, as they enjoyed riding around in new department-issued Teslas and showcasing AI robotic police dogs in tactical operations.²¹⁷

Police departments like those in New York and California were accused of "reshuffling" monies around for the appearance of performative allyship to invest further in AI policing tech rather than truly "defunding." Ironically, at some point as all of this occurred, the police may have caught on to the fact that their alleged tactics of noncompliance could backfire on them. Indeed, as the public became increasingly frustrated with perceived police abandonment of posts with little help, the "defund" movement became more attractive, not less. To stem that tide quickly by proving value and garnering support, a former law cop was elected mayor to clean up conditions in New York that many believe were exacerbated by the informal strike police undertook to ensure their place in the funding hierarchy in the first place. Its purpose may have been to instill fear of public safety issues and with it the convenient desire in the public for the protection of law enforcement once again. Crises may be manufactured for recalibrating the public's desire in ways that are advantageous for

217. See Fox 5 New York, *NYPD Uses Robot Dog During Police Operation*, YOUTUBE (Feb. 24, 2021), <https://www.youtube.com/watch?v=24jufNhuUSI> [<https://perma.cc/24MJ-VGFS>].

usurping more power. Thus, the tragedy of 9/11 gave us the Patriot Act, and the COVID pandemic and war on Ukraine gave elites pretext to extract more profit out of greed rather than need. AI companies tout the convenience and need for FRT for the most sympathetic and most frightening causes to garner public support. They have learned all too well never to let a good crisis go to waste.”²¹⁸

D. DOUBLE SPEAK: POLICY MANDATES & SUBSEQUENT NON-COMPLIANCE

FRT is a pernicious tool of supremacy for several reasons: it fosters greater risk for dangerous encounters with police, inappropriately increases plea deals and conviction rates, and helps get prosecutors re-elected with police union endorsements and contributions. Is there no code to account for that bias and influence in a crime coded algorithm? Until we can be sure, it is best to err on the side of justice and liberty than to betray these sacred causes for the false promise of guided algorithmic objectivity. Nor is there any accounting for exploitation, within and without the system, that flouts its very governance.

For instance, in July 2019, Detroit Police Chief James Craig confirmed to police commissioners that his officers would never use facial recognition identification as the sole reason for an arrest. But less than a week later, Michael Oliver was falsely arrested on that very basis.²¹⁹ A few months later, the commissioners adopted a new policy and made any violation a fireable offense.²²⁰ The new policy limited the use of FRT to “investigations involving home invasions or violent crimes, like homicides.”²²¹ Yet Robert Williams was arrested four months later for shoplifting, and facial recognition composed the weight of the police’s grounds.²²² Williams says the police “didn’t even do any investigative work,” and no one checked for a potential alibi or asked him about his whereabouts on the day in question.²²³ While Congress can be misidentified with criminal mugshots based on faulty FRT software Amazon sold to the public and law enforcement alike,²²⁴ they *are* still criminally negli-

218. British Prime Minister Sir Winston Churchill is credited for having once said, “Never let a good crisis go to waste.” If Churchill said it (it cannot be found in his recorded speeches, personal notes, or his books), he was probably using it in a wartime context, such as the Battle of Dunkirk.

219. *See id.*

220. *See id.*

221. *Id.*

222. *See id.*

223. *See id.*

224. Jacob Snow, *Amazon’s Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU (July 26, 2018), <https://www.aclu.org/news/privacy-technology/amazons-face-recognition-falsely-matched-28> [<https://perma.cc/G7J3-5G5L>] (“In a test the ACLU recently conducted of the facial recognition tool, called ‘Rekognition,’ the software incorrectly matched 28 members of Congress, identifying them as other people who have been arrested for a crime.”); Alfred Ng, *Amazon Is Selling Facial Recognition Technology to Law Enforcement*, CNET (May 22, 2018, 9:09 AM), <https://www.cnet.com/news/politics/amazon-is-selling-facial-recognition-technology-to-law-enforcement> [<https://perma.cc/6GM3-96SW>].

gent for failing to regulate the technology because its impact flouts the notion of justice. Facial identification is the most common type of facial recognition used by law enforcement and is the application most criticized for its shortcomings.²²⁵

VIII. REGULATORY CONSIDERATION IN FACIAL RECOGNITION TECHNOLOGY

A. TORT LIABILITY REVISITED: THE CASE FOR A NEW AI PRIMA FACIE TORT

The need for legislation on the state level will persist until Congress finally decides to take action. What would such legislation look like across the nation?

Again, context matters, and it is significant that the recent authoritarian culture wars exacerbated by exclusionary algorithmic design cast doubt on its unchecked use and its ability to realize its promise and potential. When it comes to tech companies, we must verify there was a robust, good faith, effective institutional implicit bias check conducted of the organizational culture, the staff, internal processes employed, and the final design of the AI algorithm, product, or service by independent auditors.²²⁶

In determining what is “robust” for purposes of implicit bias check, it should be determined in reference to both the procedural and substantive mechanisms and safeguards involved in all decision-making impacting data outcomes.”²²⁷ There must also be interpretative policy guidance for determining procedural and substantive robustness that is clear and accountable.²²⁸

For instance, we must know whether a defendant established a diverse engineering staff involved in algorithm development or if there are equalizing decisional mechanisms for all staff to have an equal voice in the design process. We must know if there is an implicit bias check of data driving machine learning. We must ask, was there [] an “algorithmic impact assessment statement” after a trial period of ad-

225. It is against this backdrop that the National Institute of Standards and Technology released a report analyzing 189 facial recognition algorithms from 99 companies which revealed that it saw higher rates of false positives for Asian and African American faces relative to images of Caucasians. *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, NIST (Dec. 19, 2019), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software> [https://perma.cc/242R-L2VE]. The differentials often ranged from a factor of 10 to 100 times in errors—that is, errors on African American and Asian faces were 10–100 times more than errors on Caucasian faces. *See id.* Their study revealed that African American female faces were most likely to be misidentified, and thus subject to the greater possibility of false accusations. *See id.* Additionally, the Gender Shades Project and the great work of the Algorithmic Justice League have shown significant disparities in facial recognition technologies for people of color, often preferring a lighter phenotype. *See* Buolamwini & Gebru, *supra* note 50, at 1–2.

226. Dyson, *supra* note 122, at 96.

227. *Id.*

228. *Id.*

ministration and monitoring before being formally adopted? Was there a “diverse human check” to ensure that no reckless indifference or knowledge to bias (either actual or constructive) exists? Is there retained court jurisdiction with court appointed masters to see that the technology and its uses are periodically and randomly reviewed and audited?²²⁹

Is there a nexus of accountability that prohibits problematic police departments with a history of racial profiling and abuse from being permitted to use this dangerous technology without first remediating their practices, personnel, and purging White nationalist influences from its ranks?

A plaintiff should prevail in challenging the AI formula if she can show that there are equally effective algorithm formulas or more reliable vetted metadata that could have been employed. Evidence of machine learning that would lead to less or no adverse discriminating consequences would matter. A plaintiff can also prevail if she can show that the coder failed to provide “verifiable decisional tracing” technology to allow reverse engineered analysis of algorithm formulas or that the defendant employed spoof technology to subvert and conceal the true operating classifiers embedded in its AI deep neural networks.²³⁰

Because AI is a tool of sophisticated inference, it makes sense to use the legal tools of inference in our arsenal to combat its harmful impact. In this vein, I have advocated for some time that we propose a new AI prima facie strict liability tort. That claim, when adapted, could adequately capture the nebulous harms of AI that escape legal detection and accountability using the inferential frameworks of *res ipsa loquitur* and Title VI of the Civil Rights Act. A key reason business owners and managers choose to form a corporation or limited liability company, or LLC, is so that they will not be held personally liable for debts should the business be unable to pay its creditors. But while we know courts will sometimes “pierce the corporate veil” to hold an LLC or corporation’s owners, members, and shareholders personally liable for business debts, what about its cyber debts incurred through AI’s predatory discriminatory harm? A prima facie strict liability tort will have not only the ability to pierce the corporate veil of AI company leaders’ assets to fund AI reparations, but also the ability to “pierce the technological veil” of AI black boxes to ensure accountability and remediation.

These combined legal doctrines provide the beginning of a conceptual framework that recognizes we don’t know what we don’t know when it comes to the sophistication of nebulous deep neural networks and the little nuances of microaggressions and discrimination can be magnified exponentially with the power AI can harness. It thus behooves us all as counsel and advocates to take our antiracist roles and duty of care seri-

229. *Id.* at 97.

230. *Id.*

ously and with the utmost urgency in organizations that employ AI. Every institution should be able to honestly subscribe to what I will simply call an “AI Anti-Discrimination Policy” in HR, benefits, hiring, and all operational aspects.

Of course, I am aware that a new AI prima facie tort is a bit ahead of its time for most jurisdictions, especially when based on an inferential framework like *res ipsa loquitur* and piercing the veil. I am also aware that this proposed model’s reliance on our courts is problematic given their preconceived notions that modulating or relaxing the burden of proof for plaintiffs should come as a last resort, not to mention the courts’ hostility to race and now to disparate impact law.²³¹ It is also clear we have a national issue with access to justice because even hiring an affordable, competent, and ethical lawyer is a major obstacle. The right to a private right of action is important, but rendered meaningless without addressing these issues in the American bar. Punitive damages and annual compliance fees can support the creation and perpetuation of a fund held in trust for educating and advocating on behalf of the public and hiring new civil rights technologist lawyers to effectively represent the indigent. We know informational warfare in AI predicated upon asymmetrical power structures of race and income will likely yield a state of emergency for our nation, and its most vulnerable—legally, technologically, socially, and morally.

B. THE CASE FOR IMPOSING STRICT LIABILITY FOR AI HARMS

The time for last resorts is now. The time for half measures is over. More specifically, the time has come to recognize that plaintiffs are disadvantaged to uncover hidden cyber evidence that primarily rests in the hands of defendant tech companies and those who employ them. Already injured plaintiffs suffer at the wrong end of this power dynamic, forced to explain issues of technological causation, the evidence of which lies mainly in the defendants’ custody. Thus, it is appropriate to invoke the doctrine of *res ipsa*, Title VI, or other burden-shifting tools. That major shift in power between plaintiffs on one side and defendant tech companies and police on the other justifies a concomitant shift in the burden of production, the burden of persuasion, and the removal of all AI protectionist walls that immunize abusive practices with FRT, algorithms, and more.

This “more” involves making room to hold accountable new AI discoveries that pose additional, nonreciprocal risk to justify strict liability. For instance, bone density fracture analysis from radiological images alone reveals AI can now see race in ways that even the researchers do not understand.²³² Failure to fix errors of bias can cause substantial harm. As

231. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001).

232. See Emory University, *AI Systems Can Detect Patient Race, Creating New Opportunities to Perpetuate Health Disparities*, EMORY NEW CTR. (May 27, 2022), https://news.emory.edu/stories/2022/05/hs_ai_systems_detect_patient_race_27-05-2022/story.html

one researcher notes,

If an AI model starts to rely on its ability to detect racial identity to make medical decisions, but in doing so produces race-specific errors, clinical radiologists will not be able to tell, thereby possibly leading to errors in health-care decision processes. That will worsen the already significant health disparities we now see in our health care system.²³³

When AI can make racial inferences on its own without any other information, that affects education, housing, environment, and criminal justice, not just healthcare. The implications for CRISPR gene editing and cloning using AI enhanced DNA and bone density targeting can mean a return to human eugenics where people of color are sterilized for population control while certain privileged Whites are endowed with superior fertility and gene selectivity that gives them a biological opt-out of all the horrific diseases their actions have visited upon the rest of humanity. Further, given the unreasonably dangerous harm that can result if no algorithmic impact statement is conscientiously examined before its implementation, the need to impose a strict liability standard for the prima facie tort should be available along with other theories of liability where apposite, including crimes against humanity at the International Hague.

But the reason for imposing strict liability also mirrors the reasons a *res ipsa loquitur* approach to causation and questions of burdens of proof makes sense. Both doctrines support the notion that systematic proof problems are a serious concern that justifies burden-shifting and burden-lightening on the plaintiff. With respect to most overt and covert activities in AI, plaintiffs with little access or expertise in technology cannot develop technological forensic evidence. This supports the notion that the kind of cyber harm or personal injury or accidents that result can be technologically complex, layered, and hidden; it seems only fair to relieve the plaintiff of the burden of showing how the accident happened. This helps reduce the transactional costs to the plaintiff in obtaining technological justice. In the interest of fairness to the plaintiff, and given the extraordinary harm AI can and already has inflicted in pernicious Facebook algorithms across the globe, the public cannot afford anything less than a strict liability standard in protecting their interest against malevolent AI.

Everyone contributes a certain level of risk to society, but we see now that certain activities in AI increase risks beyond those people impose on each other. Higher than expected risk that the public cannot adequately guard itself against should be compensated by requiring defendant tech

[<https://perma.cc/47AL-NWT9>]. Researchers were stunned to learn that AI programs developed to expedite reading and detecting fractures in bones among other things could permit it to identify the race of a patient from a radiologic image alone with extraordinary accuracy. *Id.*

233. *Id.*

companies to pay a revenue stream in reparative strict liability objectives for AI harms inflicted upon their victims.

A third policy justification for imposing strict liability relates to activity effects. The fact is that strict liability gives actors an incentive to shift to another kind of practice that does not present the same unavoidable risks to the same extent. It may place an incentive on tech companies to be extra careful with the technology they propose and sell to law enforcement like Amazon's Rekognition program.²³⁴ Under this theory of liability, the damages need not necessarily include only damages normally anticipated and associated with the dangerous activity of algorithmic profiling and discrimination. Damages also need not be limited to physical injury. They can include emotional pain and even loss of business profits or income in ways that the Court has recently short circuited when it comes to antidiscrimination law.

There is also a fourth policy justification to consider—that of market deterrence. AI is not a marketplace fit for amateurs dabbling in code development that can risk life, limb, and opportunity. There is a great need for market deterrence in AI so that risky activities that we would like to suppress can be the bases for defendants' strict liability; they can internalize all costs of the harms, accidents, and costs thereby generated by tacking them onto the market price. AI products and services that cause greater harm should be priced higher than products that cause lesser harm so to direct purchases to the product best suited for the individual consumer. Of course, the billions of dollars being invested in the global AI arms race has led to a desire to rush, not a desire to be careful to individual consumer privacy or liberty interests.

A quasi civil and criminal prima facie tort will also impose market share liability which has broad utility as a concept.²³⁵ It seems incapable as a matter of justice that the respective market shares of AI companies will be employed to allocate abatement responsibilities among them should they be found to have created a cyber nuisance. But the only way to curb such broad and naked profit ambition that exhibits deliberate and wanton indifference to the Black body and mind is to impose strict liability with no transaction costs to victims. Rather, we must award damages reflective of that entity's market share and impose personal criminal sanctions for all involved as a deterrent. Otherwise, we will see more of the same noted earlier in this article. Taking life as a perfunctory cost of doing business in violation of a sacred duty.

Consistent with principles we find in constitutional defamation analysis, punitive damages would also be appropriate where AI amplifies harms to private citizens who have little recourse to self-help, less access to the megaphone of public opinion that can be manipulated by plat-

234. See *supra* note 224 and accompanying text.

235. See Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C. L. REV. 115 (2006).

forms, and little ability to effectuate the technological mitigation of their damages. Given AI companies' technological supremacy and comparative advantage, they are in the best position possible to effectuate massive market change when tort liability is imposed. This observation underscores yet another tort policy justification, courtesy of Judge Calabresi. It is that of placing the burden of liability on AI companies because, when it comes to harms they generate, they are the least cost avoider in effectuating their prevention.²³⁶

Tomorrow will have new daunting technological capabilities and legal frameworks must be flexible, fast tracked, and agile enough to meet them. Informational supremacy that seeks to enforce White supremacy must be met with every available legal tool to check its enormous power to weaponize and harm people in general, and poor Whites as well as Blacks and people of color in particular. Formalism must give way to substantive justice, seductive rhetoric of rights must give way to realization through enforceable mechanisms. As people of color, we have seen the racialized manufacturing of "probable cause" to justify offensive and harmful batteries against us. We have seen child caseworkers help police circumvent "probable cause" with invasive home searches. We have seen the racial manufacturing of "self-defense" to justify extrajudicial legal killings of Black and Brown people. That lived experience reveals to us power's repeated impulse to find loopholes in law to maintain control. Turning our experiences with the law into legally cognizable remedies that go beyond performative miming will be the real test of any justice system and the redress it can provide.

The courts are only part of that equation for redress. As a school finance advocate, I saw firsthand how brilliant victories at the New York Supreme Court and Court of Appeals can get stymied in the legislative appropriation process. What good is a multi-billion dollar judgment to reclaim public funds stolen from Black and Latino students in New York City schools and given to White students in upstate New York if that judgment cannot be funded by the legislature? And because no legislature wants to touch the so called "third rail of politics" by raising taxes to fund a judicial mandate, proposed legislative remedies can be just as problematic as judicially created ones. None of this comes as a surprise to people of color. For one must ask, what good is a hard-fought legislative victory to appropriate funds only to be defeated when a governor refuses to sign the bill into law? Or what good is a governor's signature if funds are watered down and siphoned off by power interests and suburban cartels? White supremacy outcomes are so aptly called because its influence captures our courts, our legislators, our governors, our police, our school

236. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585 (1985); John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984).

resource officers, our risk assessment scores, our diagnostic school placement scores, school discipline, health, housing, environment, and more.

The notions of separation of powers taught in hallowed halls of constitutional law classes from generation to generation of law students perennially perpetuate mere rhetoric when our daily racial reality makes clear there is a malevolent consolidation of powers in White supremacy in and beyond all three branches of government. Likewise, notions of judicial restraint and those grounded in the political question doctrine become mere rhetoric when our daily reality makes clear courts regularly mingle gender, race, and religious politics into their decisions regarding campaign finance laws, voting rights laws, the reversal of *Roe v. Wade*, and attempts to preserve White racial gerrymandering.²³⁷ We BIPOCs are under no disillusionment that AI is an equality machine, particularly when the courts cannot protect us and Silicon Valley will not hire us—at least not with all of our sovereign personhood and morality intact. Tech companies should not follow the courts or a law already profoundly flawed and stained with supremacy friendly objectives and outcomes. This is because the courts' hostility to considerations of race *is* hostility to race and what is that but more of the same Jim Crow we have always known enshrined in legal pretextual justifications masquerading as objectivity in the same way technology attempts to do?

Technology advertises objectivity, efficiency, and reliability that have always fallen short when it comes to protecting our rights. Regulation of AI on our current legal structures of supremacy is only a good idea for those who will benefit from it, but we cannot stand idly by in our demise. For this reason, I have called for an all-hands approach through every avenue of governance, but principally in self-governance through grassroots ecology of self-determination for all moved by the authentic spirit of justice. As Bob Marley aptly put it, “none but ourselves can free our minds”²³⁸ from the mental, legal, and technological colonialism that is American culture. Our patriotic service is in the tradition of Frederick Douglass's “patriotic protest” to make the country in which we live rise to the level of its espoused rhetoric.²³⁹ Until such time, we cannot make the perfect the enemy of the good; change must begin in all corners. That includes the legislative arena despite all its possible shortcomings. Advocates who engage in this work know full well it is an endurance run as much as it is a sprint, with successive iterations of refinement.

237. See, e.g., *Merrill v. Milligan*, BRENNAN CTR. FOR JUST. (July 18, 2022), <https://www.brennancenter.org/our-work/court-cases/merrill-v-milligan> [https://perma.cc/9634-ZKJW]; Transcript of *Merrill*, *supra* note 216; *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

238. BOB MARLEY AND THE WAILERS, *Redemption Song, on UPRISING* (Island Records & Tuff Gong 1980).

239. See generally YUVAL TAYLOR, *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS* (Philip S. Foner ed. 1999).

C. THE FACIAL RECOGNITION ACT OF 2022

When it comes to FRT, several considerations factor into effective regulation. To explore these, the state of Massachusetts appointed the Commission to Evaluate Government Use of Facial Recognition Technology, which held detailed deliberations over multiple sessions.²⁴⁰ However, given the limitations of the Commission's charge,²⁴¹ no consideration was given to private, nongovernmental uses of technology—a comprehensive approach would address the use of this technology in the private sector.

In the work my fellow Commissioners and I completed in connection with the Special Commission on Facial Recognition Technology, we leveraged the Commission's bipartisan membership to reach consensus on practical grounds. In its final report, the Commission adopted our innovative proposed model which Congress itself took up just a few weeks ago at the time of this writing. The proposed Facial Recognition Technology Act of 2022 sets forth our recommendations in the following proposed provisions:

(1) limits law enforcement use of FRT to situations when a warrant is obtained that shows probable cause that an individual committed a serious violent felony;

(2) prohibits law enforcement from using FRT to create a record documenting how an individual expresses rights guaranteed by the Constitution, e.g. lawfully protesting;

(3) prohibits an FRT match from being the sole basis upon which probable cause can be established for a search, arrest, or other law enforcement action;

(4) prohibits law enforcement from relying on race, ethnicity, gender, sexual orientation, national origin and other protected classes in selecting which person to subject to FRT;

(5) bans the use of FRT in conjunction with databases that contain illegitimately obtained information and body cameras, dashboard cameras, and aircraft cameras;

(6) bans the use of FRT to track individuals with live or stored video footage;

(7) ensures that nothing in the Bill preempts state or local governments from FRT bans or moratoriums;

(8) establishes a private right of action for individuals harmed by the use of FRT;

(9) requires law enforcement to provide notice to individuals who are subjects of an FRT search and a copy of the court order and/or other key data points;

(10) requires law enforcement to purge the photos of individuals who are younger than eighteen, were released without charge, had charges

240. See MICH. COMM'N, *supra* note 197, at 5–6, 30.

241. *Id.* at 5–6.

dismissed, or were acquitted of the charged offense from FRT arrest photo databases every six months;

(11) requires regular auditing of FRT systems used by law enforcement agencies and suspensions for agencies that fail audits;

(12) requires annual, independent testing of any FRT system that law enforcement employs; and

(13) requires detailed FRT judicial and prosecutorial reporting as well as data collection.

As a general matter, FRT should be banned from law enforcement for reasons already made ostensibly clear. But if we choose regulation instead of outright prohibition, the above model comes as a reasonable alternative if it is enforced by those most impacted by it, Blacks, people of color, and the poor. Nonetheless, these protections represent the first solid steps in the direction of accountability, though more work must be done. An all hands on deck approach to collective self-determination welcomes governance where reasonably prudent elected leaders can play their part.

IX. THE BLACK TECH AGENDA & RACIALLY STACKED POWER: BUILDING TRUST THROUGH ANTI-TRUST TOOLS

Recently, Color of Change, an advocacy organization, put forth a Black Tech Agenda in Congress calling for a number of changes.²⁴² These include a call for Congress to:

(1) pass antitrust laws that address issues impacting Black workers, small business owners, and consumers;

(2) pass a comprehensive federal privacy law that incorporates antidiscrimination and anti-surveillance principles and a federal ban on law enforcement agencies' use of biometric surveillance technology;

(3) pass legislation requiring the evaluation of bias in algorithms and remedies for discrimination;

(4) invest in expanding broadband infrastructure, support broadband alternatives and provide grants for broadband access;

(5) classify the internet as a Title II common carrier and designate the Federal Communications Commission (FCC) as its regulatory body; and

(6) incentivize online platforms to attack disinformation by increasing competition and reducing the spread of viral misinformation by regulating optimization algorithms.²⁴³

The foregoing proposals are much needed and provide an important context in which AI and the tech industry can be more equitable. As it currently stands, control over internet content is predicated on the following hierarchical stack structure where only a few companies exercise

242. COLOR OF CHANGE, THE BLACK TECH AGENDA, https://colorofchange.org/wp-content/uploads/2022/09/22-09_BLACKTECHAGENDA.pdf [https://perma.cc/R78F-6AZA].

243. *Id.*

dominant control over one layer in the stack and few have enough diversity in their ranks to be as vigilant as they should in shutting down harmful content:

Stacked power

By controlling critical services, companies within the stack all play a role in online moderating. The further a company is down the stack, the more fundamental role it plays in operating the Internet.

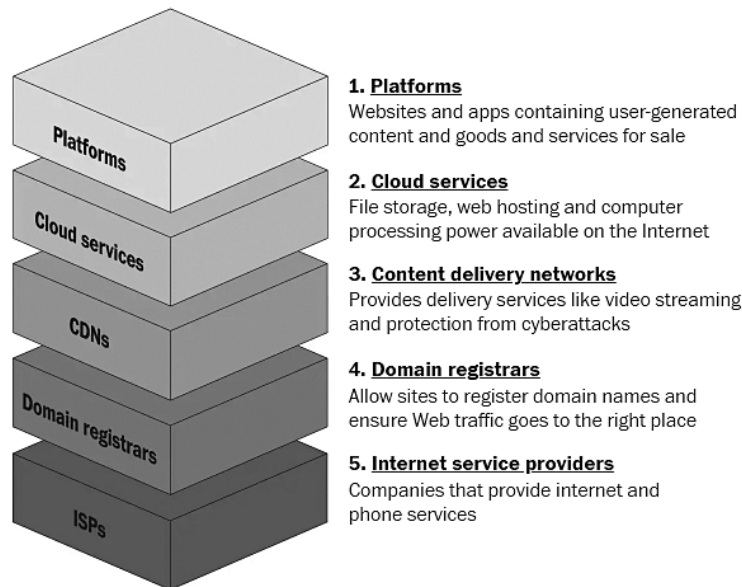


Figure 2²⁴⁴

A. PLATFORMS

These digital communities have the right to cut a user off from an audience of billions of users, but will this power be used responsibly in accordance with First Amendment protections, or will social activists find themselves shut out? When platforms consist of websites and apps that make money by running ads around selling paramilitary equipment to White supremacists or instigating racial hostility, they immorally take a profit from those posts or products sold on their platform by the likes of Alex Jones and others who have been antagonistic to humanity. When companies at the top of the stack such as Facebook are slow to remove harmful posts or products, “pressure shifts down to critical service companies such as GoDaddy and WordPress to shut white supremacist websites, fundraising systems and chat forums.”²⁴⁵ The power to include also carries with it the power to exclude. When that power is not wielded consistent with constitutional values, who is able to intervene timely, effectively, and equitably? Willy-nilly censorship without oversight is far from

244. Fowler & Alcantara, *supra* note 35.

245. *Id.*

ideal or legal, especially when these communities are often the only access protestors have to get their message out in countries where internet access has been significantly curtailed.

B. CLOUD SERVICES

Over the years, I have noticed that videos showing police killings of citizens, particularly White citizens, were disappearing off the internet at an alarming rate. Technological censorship by omission rather than addressing the underlying causes of the issues of police violence seemed to have become a viable PR strategy. Moving to a different cloud provider comes with a great deal of technical and financial investment and this is an option only the wealthy can afford to exercise.

C. CONTENT DELIVERY NETWORKS

Content delivery networks (CDNs) operate through invisible politics behind the scenes as internet traffic controllers of web content that we rarely get to see or question. This fact, of course, must be remembered in debates about whether infrastructure companies should make content decisions about hate speech. CDNs like Cloudflare often tout they are akin to a public utility, but public utilities are regulated, publicly owned, meet certain required quality standards, and provide the same resources, such as water and electricity, for everyone on the network. None of these assumptions hold true for CDNs like Cloudflare where individual preferences or values are factored into what is delivered. For a network like Cloudflare, which allows websites to deliver the particular content users request, the analogies to a public utility simply does not hold water. Not only does the public utility comparison not make sense because CDNs hide the real interests of the parties whom the internet's infrastructures serve, but it is inapposite insofar as CDNs determine what content they decide to make available to users. "Content moderation does not just happen at the moment of termination: It happens every day a website is kept up and available by the infrastructure below it."²⁴⁶

As further evidence of this point, an online White supremacist message board showcasing the manifesto of gunmen in three separate shootings appeared on a Cloudflare site prior to their attacks, and these White supremacists had relied on the Cloudflare's content delivery network to keep its message board online, visible, and accessible.²⁴⁷ After initially claiming no legal obligation to remove the site, Cloudflare eventually relented and denied the use of its services.²⁴⁸ These are not the actions of a neutral traffic controller, a public utility, or a responsible CDN. If there

246. Suzanne van Geuns & Corinne Cath-Speth, *How Hate Speech Reveals the Invisible Politics of Internet Infrastructure*, BROOKINGS (Aug. 20, 2020), <https://www.brookings.edu/techstream/how-hate-speech-reveals-the-invisible-politics-of-internet-infrastructure> [<https://perma.cc/4MV6-BPQD>].

247. *Id.*

248. *See id.*

were greater inclusive representation in the staff who make these decisions, BIPOCs would not have had to suffer at the hand of deliberate indifference to our humanity.

D. DOMAIN REGISTERS

Domain registration represents a critical juncture with the ability to shut down websites in the twinkling of an eye if a new domain registrar is denied. As previously noted, websites like the one I used to track the number of police killings annually suddenly disappeared online.²⁴⁹ I also previously sponsored a site calling for police reform that contained proposed legislation regarding use of force with links to statistic sites only to find that social activists online protesting police brutality were often targeted—not just for harassment, but for deletion. Their content and sites were gone, leaving me inoperable links and little content to provide the needed context for my proposals. Censorship deletion is not technological innovation at its finest. Rather, it is the invocation of supremacist power at its worst.

E. INTERNET SERVICE PROVIDERS

Governments like China and Iran can use internet service providers (ISPs) as their most direct means of control. The Iranian dissidents who have no access to the internet for the world to see and hear their voice or the atrocities inflicted upon them is perhaps the most powerful tool of censorship and the bottommost powerful rung of stacked racial power across the globe.²⁵⁰ Iran used this same playbook when it saw worldwide access to the internet was inflaming the world stage during the sympathetic calls for freedom during the Arab Spring revolution. Elon Musk recently announced he could his satellite system Starlink to provide an ISP connection to Iranian dissidents.²⁵¹ However, for Iranians to actually use the internet, they would have to purchase and install physical satellites.²⁵² Musk's promise rings hollow when it would benefit him financially and is unrealistic in application—it is not feasible for Iranians to smuggle sufficient satellites in under their government's nose.²⁵³

In China, the government forces ISPs to block connections to Facebook and others.²⁵⁴ In the United States, despite the fact that net neutrality is a bipartisan issue, tech's ability to slow internet traffic to

249. *See supra* Section IX.B.

250. Sophie Bushwick, *How Iran Is Using the Protests to Block More Open Internet Access*, SCI. AM. (Oct. 13, 2022), <https://www.scientificamerican.com/article/how-iran-is-using-the-protests-to-block-more-open-internet-access> [<https://perma.cc/QU7M-6W2A>].

251. *See* Sam Biddle, *No, Elon Musk's Starlink Probably Won't Fix Iranian Internet Censorship*, INTERCEPT (Sept. 27, 2022), <https://theintercept.com/2022/09/27/elon-musk-iran-protest-starlink-internet> [<https://perma.cc/TX6W-6KLE>].

252. *See id.*

253. *See id.*

254. Kristina Zucchi, *Why Facebook Is Banned in China and How to Access It*, INVESTOPEDIA (Dec. 21, 2021), <https://www.investopedia.com/articles/investing/042915/why-facebook-banned-china.asp> [<https://perma.cc/T7Y5-SNPR>].

Black businesses in favor of those it deems better aligned with their interest is not so far-fetched. In a world where Black and Brown communities are given disproportionate share of substandard lead water, uncertified teachers, and problematic officers, why is it foolish to think the same would hold true for net neutrality? Where ISPs are able to set tolls for access to better quality, the more richly capitalized companies will be able to pay those tolls more easily and those with less capitalization, mainly the poor and people of color, will have less access to building on-line entrepreneurship, wealth, community, and agency. It is already hard for Black or Brown tech startups to find their way in Silicon Valley. But that task is made harder if these startups have to compete with tech behemoths when it cannot afford the bribes necessary to stay on a relatively level internet traffic playing field nor carry the prominent clout sufficient to warrant inclusion in a zero-rated package. In an industry where racial and gender diversity is dearth, Silicon Valley should not be adopting ISP policies that will make tech Whiter, richer, and more exclusionary than it already is.

X. THE HIDDEN RISKS IN AI RISK MANAGEMENT FRAMEWORKS

The National Institute of Standards and Technology has proposed a structure for the AI Risk Management Frameworks (RMF) that consists of three components: (1) Core, (2) Profiles, and (3) Implementation Tiers.²⁵⁵ This structure and its intended definitions for Core, Profiles, and Implementation Tiers, are similar to the structure used in the NIST Framework for Improving Critical Infrastructure Cybersecurity.²⁵⁶ The Core provides a granular set of activities and outcomes that enable organizational dialogue about managing AI risk. The three elements of the Core are as follows: functions, categories, and subcategories. NIST's concept paper proposes the following functions:

- (1) Map: "The purpose of this function is 'to find, recognize, and describe risks' posed by an AI system."²⁵⁷ Under this component, the goal is to establish context and enumerate "risks related to the context."²⁵⁸ The mapping function gathers baseline information pertinent to model management. This information informs decisions like

255. See generally AI RISK MANAGEMENT FRAMEWORK: INITIAL DRAFT (2022) [hereinafter NIST DRAFT], <https://www.nist.gov/system/files/documents/2022/03/17/AI-RMF-1stdraft.pdf> [<https://perma.cc/EC6L-TH3L>]; NIST, AI RISK MANAGEMENT FRAMEWORK CONCEPT PAPER (2021) [hereinafter NIST CONCEPT PAPER], https://www.nist.gov/system/files/documents/2021/12/14/AI%20RMF%20Concept%20Paper_13Dec2021_posted.pdf [<https://perma.cc/5BD4-KSX3>].

256. Compare NIST, FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY 3–4 (2018), <https://nvlpubs.nist.gov/nistpubs/cswp/nist.cswp.04162018.pdf> [<https://perma.cc/6TGX-GQX2>] with NIST DRAFT, *supra* note 255 and NIST CONCEPT PAPER, *supra* note 255.

257. NIST CONCEPT PAPER, *supra* note 255, at 4.

258. *Id.*

“qualitative or more formal quantitative analys[es] of benefits, costs, and risks,” whether “an AI solution is unwarranted or inappropriate versus the status quo,” and whether its development or deployment should be halted.²⁵⁹

(2) Measure: “The purpose of this function is to comprehend the nature of risk or impact.”²⁶⁰ These “[e]numerated risks are analyzed, quantified, or tracked where possible,”²⁶¹ creating a body of information to inform risk-management decisions.

(3) Manage: Through this function, “[r]isks are prioritized, and either avoided, mitigated, shared, transferred, or accepted based on measured severity.”²⁶² This should account for both enumerated risks and detecting and incorporating unenumerated risks into the plan.²⁶³

(4) Governance: This function helps “ensure the risk responses are effectively and consistently carried out.”²⁶⁴ This component “should be part of each function *and* a function of its own.”²⁶⁵

(5) Profiles: In the application of the above functions, “[p]rofiles enable users to prioritize AI-related activities and outcomes that best meet an organization’s values, mission, or business needs and risks.”²⁶⁶

259. *Id.*

260. *Id.* at 5.

261. *Id.*

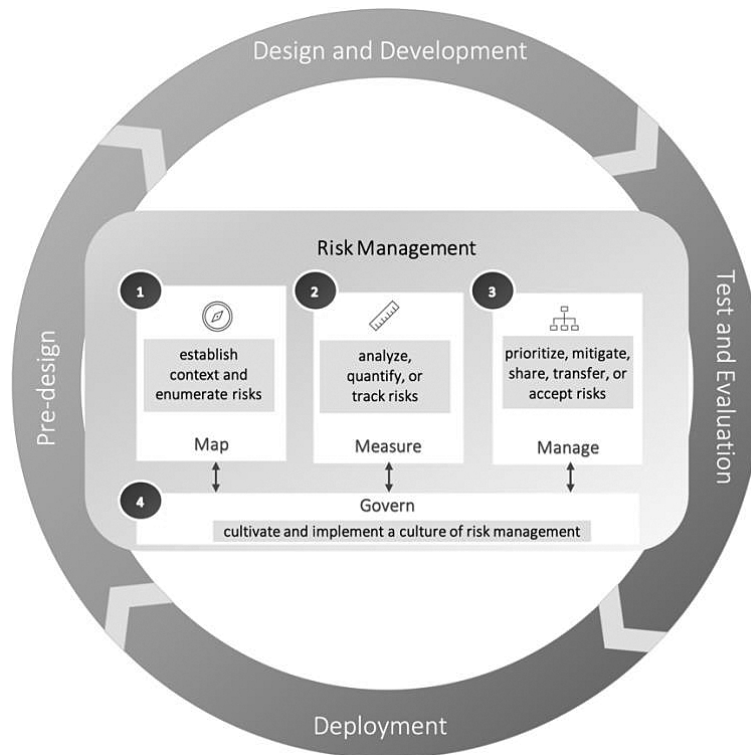
262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 6.

Figure 3²⁶⁷

In the Map function, the predictable outcome of an AI system is measured against cost–benefit analysis. Still, if risks and benefits are weighed and framed without reference to a benchmark tied to social justice and environmental preservation, this process can result in technology ill-equipped to address the urgent crises of our time. Regarding the Measure function, “[e]numerated risks are analyzed, quantified, or tracked where possible,”²⁶⁸ but the organization or business’s interests determine which risks are identified. This is often framed in financial incentives, as we have seen. Perverse financial incentives have thwarted civil rights protections in AI. Without a full and transparent analysis of the organization, its financial objectives (both contemplated and foreseeable) there might not be a reliable metric against which to measure unenumerated risks that have the potential to present a conflict of interest between civil rights and quarterly earnings.

In the Manage function, the risks posed by an AI system are prioritized “based on measured severity.”²⁶⁹ Yet perceived severity is often predicated upon impact on the privileged. How is severity to be measured,

267. *Id.*

268. *Id.* at 5.

269. *Id.*

prioritized, and ranked? If risks primarily affect people of color or the poor, such risks are deemed less severe in our society. Indeed, this imbalanced analysis results in management priorities and resource-allocation that is inappropriate or ineffective in addressing cyber civil rights and equity. While the Governance function “should be part of each function *and* a function of its own,”²⁷⁰ decentralized governance can also complicate transparency, accountability, and oversight. Without centralized governance, a single state could have more than 350 face-surveillance networks operated by more than 350 police departments subject to more than 350 forms of oversight and accountability. Effective governance requires tight control over who uses this technology, when, why, and how.

Profiles within AI systems “enable users to prioritize AI-related activities and outcomes that best meet an organization’s values, mission, or business needs and risks.”²⁷¹ But this beckons the question: What values, mission, or business needs and risks are pursued when AI-related activities push the financial bottom line at the expense of broader democratic values and risks? Finally, NIST suggests Implementation Tiers in applying the above process to “support decision-making and communication about the sufficiency of organizational processes and resources.”²⁷² Impact statements could be effectively used here which should receive consistent feedback; have clear detectable audit trails, even in deep neural networks, that cannot be undermined or obfuscated; and maintain consensus on factual and legal proximate causation. The causation standard should be predicated on inferential disparate impact as *res ipsa loquitur* evidence of algorithmic bias.

The harmful impact or projections from the deployment of an AI formula should “speak for itself” of the bias embedded in the code. We have inferential, burden-shifting statutes in the World Trade Appellate Body dispute rules,²⁷³ Title VI of the Civil Rights Act,²⁷⁴ Title VII of the Civil Rights Act,²⁷⁵ and Title IX of the Higher Education Amendments.²⁷⁶ Like *res ipsa loquitur*, these can benefit from the power of AI to build inferential case liability for civil rights violations. But implementation requires the industry’s makeup to change with respect to the designers themselves, as well as AI systems to be redesigned. While the lived experience varies, the more diverse experiences brought into coding and STEM, the better the world of AI and, concomitantly, our world at large. As I hope some of my own lived experiences, shared here, demonstrate, code is not the only thing programmable—we are as well.

270. *Id.*

271. *Id.* at 6.

272. *Id.* at 6.

273. *See* WORLD TRADE ORGANIZATION: APPELLATE BODY, UNITED STATES-MEASURE AFFECTING IMPORTS OF WOVEN WOOL SHIRTS AND BLOUSES FROM INDIA 12–14 (1997).

274. 42 U.S.C. § 2000(d) (1964).

275. 42 U.S.C. § 2000(e) (1964).

276. 20 U.S.C. § 1681 (1972).

XI. WHEN IS AN OFF-RAMP FOR AI APPROPRIATE?

Algorithmic bias is yet another manifestation of a refusal to treat individuals as individuals. Ironically, you hear conservatives argue that there should be no group rights and that the proliferation of group rights has made this country run amok. But we cannot have it both ways; that is, we cannot say that a person should be treated as an individual and then treat them as a member of a racial group and claim the connection is irrelevant to the context of their treatment. Lynchings and brutal beatings were often direct results of the victims' affiliation and membership with a certain racial group.²⁷⁷ That group affiliation overshadows the individual, and the individual becomes invisible. But the African-American who remains invisible to the levers of opportunity is entirely visible when it comes to believers of oppression. People of color are invisible when it comes to opportunity and the allocation of benefits. Still, they are entirely visible when their skin color alone, rather than the content of their character, engenders assumptions of dangerousness and fitness to occupy any particular privileged space. The privileged police the racial spaces for those who do not appear to readily conform to preconceived racial stereotypes of appropriateness in our communities, schools, neighborhoods, and homes.

Every categorization of humanity in our current society attempts to expedite and extrapolate the cogwheels of commerce that seek to extract labor and wealth at the expense of privacy and personality. We have often seen the reality that AI in the school-to-prison pipeline context can exacerbate racial inequality.²⁷⁸ Where AI does not improve the national racial achievement gap, it should not be used. AI technology that is supposed to know you better than you know yourself is already a scary thought for schemes of manipulation in a racially cavalier system—it creates a whole host of terrifying possibilities. We have before us a fundamental choice: Will we use our resources and technology to promote humanity and its well-being? We can just as easily decide to use our algorithms to target critical areas for intervention rather than penalization. The same risk factors used to determine erroneously whether someone is dangerous are also (ironically) the characteristics that can pinpoint where the intervention of resources is most needed. And, if we readily and accurately train systems with full transparency, accountability, and diversity permeating every stratum of development, AI can help inform how those resources could be best used.

Ironically, there was significant public uproar over net neutrality being

277. See, e.g., *The Murder of Emmett Till: Lynching in America*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/emmett-lynching-america> [<https://perma.cc/4VXG-B7KA>].

278. See, e.g., Toni Smith-Thompson, *Here's What Happens When We Allow Facial Recognition Technology in Our Schools*, NYCLU (Aug. 15, 2018, 10:45 AM), <https://www.nyclu.org/en/news/heres-what-happens-when-we-allow-facial-recognition-technology-our-schools> [<https://perma.cc/Z3M2-DCQ2>]; Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103 (2020).

threatened,²⁷⁹ but few seem to recognize that our own infrastructure of realities has been threatened by algorithmic bias and discrimination determining the digital highways and byways of opportunity and exclusion.²⁸⁰ Further, technology can distort the actual source, separating the essence of the presence from its manifesting appearance, which is a deception to society and ourselves. It violates our fundamental right to be and define who we are and how we choose to show up in this world, to our jobs, relationships, friendships, marriages, and children. It is a defining vessel. This danger, of course, gives rise to yet another danger—that of fraudulent spoofing.²⁸¹ When we no longer have control over our voices, faces, or how they are used, we lose our essential essence.

A. ESCAPE FROM EXISTENTIAL ALGORITHMIC MANIPULATION

Our biometric data may no longer be uniquely ours when it is now routinely collected, stored, manipulated, sold, resold, and put to any other number of purposes for which you have no knowledge, input, or control. I have often wondered, if our faces, names, and voices can be distorted, manipulated, sliced and diced, packaged and repackaged to say whatever or convey whatever, then what trust can we have in anything? Ironically, “fake news” was once a prolific term used to renounce bad press that was very unflattering to a presidency.²⁸² Now fake news is the reality when algorithms rearrange geopolitical structures and alliances of nations. Ethnic cleansing, teen depression, and racial discrimination in the electoral manipulation of preferences suggest that sanitized, scholarly, abstract discussions of algorithmic fairness must yield to lived experiences of those communities adversely impacted by an algorithm designer’s myopic vision. That discussion must also consider the demonstrated immoral conduct and conflicts of interests in corporate stewardship of tech profits.

There is no greater threat to democracy and to humanity itself than the power of a very addictive technology aimed to replicate and exacerbate inequality and destroy nature for narrow, ill-conceived, self-serving ends. When we can no longer identify, define, or re-define who we are, we lose a critical part of our personhood; our sense of privacy and publicity rights as our property interests. But in another enlightened sense, perhaps all

279. See, e.g., *More Than 1 Million People Call on FCC to Save Net Neutrality*, COLOR OF CHANGE, https://colorofchange.org/press_release/more-1-million-people-call-fcc-save-net-neutrality [https://perma.cc/V5EV-46ZY].

280. One can expect to pay higher prices based on your gender, your browsing habits, your ZIP Code, your spending habits, and the entire concatenation of data and assumptions developed about you. One example of this “coded inequity” is the fact that test prep for standardized tests costs more in areas with higher density of Asian residents. BENJAMIN, *supra* note 159, at 17.

281. See, e.g., Damiani, *supra* note 100.

282. See, e.g., Margaret Sullivan, *What It Really Means When Trump Calls a Story ‘Fake News,’* WASH. POST (Apr. 13, 2020, 1:34 PM), https://www.washingtonpost.com/lifestyle/media/what-it-really-means-when-trump-calls-a-story-fake-news/2020/04/13/56fbc2c0-7d8c-11ea-9040-68981f488eed_story.html [https://perma.cc/Z5EK-Z7TL].

these concepts are inextricably tied to ego and thus must become abandoned to the extent that the truth of the soul and its true essence can begin to become genuinely known. In such a state of awareness, one is freed from manipulation.

Loving with the heart, we can see in universality that there is no separation of the soul from others. Those who see with only their eyes and agendas can see nothing but separateness.²⁸³ With separateness comes selfishness, and where there is selfishness, there is greed, racism, and manipulation of the law.²⁸⁴ But to be clear, oneness is not the same as color blindness; interrelated oneness calls us to greater compassion for the sufferings of the whole, not indifference to human suffering.

Technology's threat calls us back to spirituality for two primary reasons: First, turning inward to oneself is the only escape from the mass hypnosis of anger, hate, frustration, and hurt that permeates the world stage and—either consciously or subconsciously—impacts us when we are not mindful. Training in relation to the sacredly sovereign silent nobility within is to find a place where one can only find inner peace and thus the ability to know and define oneself without reference to comparisons on social media profiles. From a position of self-acceptance and self-love, the profound self-esteem issues AI and social media create in our young adults can be overcome.

The second reason technology will call us to commune with our own spirituality is the recognition that truth invites us into closer community with one another. Only in knowing one another can mistruths be dispelled with personal knowledge, history, and experience. Such closeness counteracts digital falsehoods and creates the cohesive community grounded in mindfulness needed to withstand and overcome the addictive world of technology. The world shouts, and technology distracts, while the divine within us whispers. The silence within beckons to release us from the conditioned responses inculcated by algorithms.

There are harmful ramifications and implications of a technology that allows the concealment of identity—whether race, gender, or any other protected status—in public or private. If we can no longer trust our faces and voices with deepfake avatars online, then race can be manipulated by individuals masquerading in the racial sphere without learning what it means to walk in those shoes every day. Or, more likely, reinforcing racial stereotypes and derogatory, syndicated images that perpetuate subjugation. Bad actors can easily facilitate racial hoaxes and blatant racist

283. Alice Calaprice, *THE NEW QUOTABLE EINSTEIN* 206 (2005) (“A human being is a part of the whole, called by us “Universe,” a part limited in time and space. He experiences himself, his thoughts and feelings as something separate from the rest—a kind of optical delusion of his consciousness. The striving to free oneself from this delusion is the one issue of true religion. Not to nourish it but to try to overcome it is the way to reach the attainable measure of peace of mind.”).

284. *See generally* *Dred Scott v. Sandford*, 60 U.S. 393, 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537, 537 (1896); Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58, ch. 126 (repealed 1943); *Shelby County v. Holder*, 570 U.S. 529, 529 (2013).

revivals through impersonating technology that allows them to step into avatars' skin digitally yet escape the reality of what it means to walk each day in that skin in America. If our faces were our publicity right, would we have licensed them without our consent? Nowhere is this more apparent than in law and technology that indiscriminately scrapes faces, surveils protesters, and wrongfully incarcerates in a power dynamic that is bankrupt of virtue while reinforcing, wittingly or unwittingly, White supremacist power paradigms of dominance and sub-dominance.

B. TECHNOLOGICAL REPARATIONS & BLACK LIBERATION

As the foregoing has demonstrated, the negative impact of AI is pervasive and powerful. However, these harmful impacts should help inform how algorithmic reparations are conceptualized and executed. If systemic racism can be built, it can be dismantled. "The data goes both ways—to help us analyze and create good policies and remove disparate impacts, but also to hold companies accountable."²⁸⁵ Reform in AI only places a cosmetic Band-Aid on unjust enrichment without changing power obtained through bloodshed and force. Basic human rights that the world is supposed to understand, in theory, serve as AI's standard for effective outcomes.²⁸⁶ But reparations should ensure and further extend their guarantees to be meaningful, accessible, and enforceable by affirming freedom of expression, right to dignity, quality of life, and well-being.

Reparations would calibrate algorithm formulas to be trained on promoting proper and timely referrals to specialists when Blacks and Latino people with comparable health insurance policies permit it. They would promote the restoration of stolen lands and disgorging profits from stolen copyrights, trademarks, and patents from Black artists and inventors.²⁸⁷ They would restore language, culture, and history—including the systemic mistreatment and discrimination of BIPOCs in the classroom—to raise awareness. They would end academic tracking, excessive discipline, biased testing, unequal funding, and inaccessible learning and promote AI equity in STEM as a transfer exchange to inner city communities. They would map, measure, and manage the removal of lead water, lead paint, and environmental toxins that harm cognitive development and academic performance. They would help financially by building new technology academies and expanding mutual aid societies that pool collective resources for the well-being and health of Black and Brown communities

285. Lakshmi Sarah, *From Credit Scores to Job Applications: California's Reparations Task Force Looks to Algorithms*, KQED (Feb 3, 2022), <https://www.kqed.org/news/11903718/from-credit-scores-to-job-applications-californias-reparations-task-force-looks-to-algorithms> [https://perma.cc/5CM6-R59M].

286. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948); Charter of Fundamental Rights of the European Union (EU) 2000/C 364/01, 2000 O.J. (C 364) 1, 8; Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222; International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

287. See generally Kevin J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615 (2022).

in education and farming oxygen enriching foods that promote cognitive development in young children. They would support and encourage vegetarianism in our communities to cleanse our bodies of carcinogenic agents and promote better communion with the sacred balance mother nature demands. They would leverage authentically based, socially conscious public finance litigation supporting the development of a new generation of cyber civil rights technologists. They would leverage the support of churches and sanctuaries to nurture a more inclusive compassion in our communities and others'. They would willingly subject their hiring, retention, and promotion practices to those most harmed by coded bias.

Effective technological reparations would help reject stereotypes in search engine queries and banner ads and promote enlightened decision-making and awareness to counteract AI's destructive data redlining, insidious hypnosis, and racist propaganda. They would cease tracking our conversations, purchases, and whereabouts and cease selling the information to the highest bidder without our consent. They would help align humanity with the earth and each other, adorned with compassion rather than hate and greed as the operating default in algorithmic paradigms. Real reparations are not rooted in performative allyship. Rather they identify, track, and recommend solutions like the most ideal school finance resource allocation patterns to achieve the most desirable educational outcomes for the most vulnerable students as they do for the rich. These reparations recommend that the highest resolution facial recognition cameras not be located in the property rich neighborhoods. They recommend the removal of officers from the force who swore to uphold and protect but who have disgraced that oath with avowed and informal affiliations with the KKK and criminal gang enterprises that have infiltrated its ranks.

All who repent sincerely in deed and in heart will always find redemption in our code as long as they respect all human life, while punitive institutions will need to be dismantled in spirit, mind, brick, and mortar. Our algorithmic code and code of resistance respects and ensures that AI vets recruitment and hiring of new teachers and officers. If AI is going to be in the business of deciding fates, why not use it to identify, train, and promote teachers that are most effective in cultural competency as much as subject matter competency in high poverty schools to boost academic proficiency and community? If AI is going to be in the business of predictive technology, it should predict which officers will threaten Black public safety and prevent their hiring or guide their way back to authentic and verifiable transformative reformation along with their institutions. Technological reparations can trace money trails of racial oppression and reveal their illicit sources and destinations in electoral politics that secretive 501(c)(4) super PACs and offshore accounts hide. Algorithms can restore affordable housing to the Black and Brown communities targeted, taxed,

and displaced by Silicon Valley.²⁸⁸ Reparation progress is best measured using the metric and not just the rhetoric of equity. As one news report notes,

CalEnviroScreen uses equity indicators like poverty, unemployment and exposure to pollution to identify marginalized communities that are eligible for increased investment from the state's Greenhouse Gas Reduction Fund. With the help of this algorithm, over \$4.5 billion in state funding has gone toward investments in Black and Latino communities.²⁸⁹

But here again, the notion of reparations takes on different meanings when viewed through the eyes of the oppressed versus the oppressor. After World War II, America was in search of “‘intellectual reparations’ in the form of documents, blueprints, and patents rather than equipment.”²⁹⁰ It was said that about fifty-five tons of such material was transported back to the United States with tens of thousands of investigative reports.²⁹¹ Operation Paperclip was an initiative that imported Nazi experts and scientists to the United States and the United Kingdom. One U.S. historian believes the operation brought around \$10 billion in value to the Anglo-American countries.²⁹² In contrast, after the war, the French exchange of technical know-how resulted in a policy of “exploitation in place,” whereby French students trained in German institutes and German experts visited French industries so that culture, mindset, and environment were also reciprocally shared and exchanged.²⁹³ As one observer noted, that approach “enabled the French to monitor the Germans while learning directly from them.”²⁹⁴ Thus, not all Allied Powers deployed technological reparations in the same way. In a very real sense, technological reparation in this context is a euphemism for exploiting the plunders of war. Perhaps no country better typified that characterization than the Soviet occupiers, who employed both “exploitation in place” and “the literal transfer to the Soviet Union of entire buildings together with all the equipment and the people who worked in them, willingly or not.”²⁹⁵

Reparations in the aftermath of war are viewed as the right of power to take rather than to offer, compensate, or correct the inequity created by America's war on Black and Brown people. Given this predatory notion

288. See Sarah, *supra* note 285; Mia Stern, *Big Tech: You Owe the Bay Area Reparations*, THE BOLD ITALIC (Mar. 24, 2021), <https://thebolditalic.com/the-tech-industry-owes-reparations-to-the-bay-area-c69be9c3a1c3> [https://perma.cc/R6J7-9Y9G].

289. Sarah, *supra* note 285.

290. David Cassidy, *Technological Reparations In The Aftermath of World War II*, 72 PHYSICS TODAY 61 (2019).

291. See *id.*

292. PAUL T. HELLYER, *THE MONEY MAFIA: A WORLD IN CRISIS* (2014), <https://avalonlibrary.net/ebooks/Paul%20Hellyer%20-%20The%20Money%20Mafia.pdf> [https://perma.cc/MT4R-GB6X].

293. Cassidy, *supra* note 290.

294. *Id.*

295. *Id.*

of reparative technology exchange, we would do well to keep what Frederick Douglass and Malcolm X admonished about raw power. Douglass observed, “Power concedes nothing without a demand,”²⁹⁶ and Malcolm reminded us that power does not back down, except in the face of more power.²⁹⁷ But power cannot be exercised until we, as a society and as BIPOCs, first know that it is ours to wield.

That power is, in fact, the power of our collective self-determination. It, along with our emotional and psychological well-being rests in our own hands since the Supreme Court has now denied even recognizing our right to emotional distress damages for discrimination. It is also the power of our own spiritual redemption and fortitude in commitment that keeps us free from financial corruption and the racial snares of cruel epigenetics where chronic racial fatigue can give way to renewal, rejuvenation, and reinvention.

We must cleanse our own consciousness of mental pollutants of racial and sexual abuse the Supreme Court now allows to be perpetrated against us with impunity after its decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*²⁹⁸ Although that case dealt with disability discrimination under the Rehabilitation Act and the Affordable Care Act, its ruling also applies to Title VI of the Civil Rights Act of 1964 (prohibiting race discrimination) and Title IX of the Education Amendments of 1972 (prohibiting sex discrimination). If there was any doubt that the Supreme Court saw us—the victims of discrimination—as subhuman, there is no better example than denying our humanity when emotional distress is the natural and probable consequence of racial terror inflicted and permitted without consequence or accountability for that emotional harm. Now that the Supreme Court has declared open season on us yet again by opening

296. (1857) Frederick Douglas, “If There Is No Struggle, There Is No Progress,” BLACKPAST (Jan 25, 2007), <https://www.blackpast.org/african-american-history/1857-frederick-douglass-if-there-no-struggle-there-no-progress> [https://perma.cc/U52C-KEJK] (“This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.”).

297. Malcolm X, *Prospects for Freedom in 1965 (January 7, 1965)*, in MALCOLM X FILES, <http://malcolmxfiles.blogspot.com/2013/07/prospects-for-freedom-in-1965-january-7.html> [https://perma.cc/ZY62-DLVX] (“So all these little advances were made by oppressed people in other parts of the world during 1964. These were tangible gains, and the reason that they were able to make these gains was they realized that power was the magic word—power against power. Power in defense of freedom is greater than power in behalf of tyranny and oppression, because power, real power, comes from conviction which produces action, uncompromising action. It also produces insurrection against oppression. This is the only way you end oppression—with power. Power never takes a back step—only in the face of more power. Power doesn’t back up in the face of a smile, or in the face of a threat, or in the face of some kind of nonviolent loving action. It’s not the nature of power to back up in the face of anything but some more power. And this is what the people have realized in Southeast Asia, in the Congo, in Cuba, in other parts of the world. Power recognizes only power, and all of them who realize this have made gains.”).

298. See *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022).

the door for AI technology to inflict all manner of harm on BIPOCs, LGBTQIA, poor people, and women without recourse for emotional distress damages resulting from algorithmic discrimination, what is one to do?

It is imperative that we master our inner sanctum with mindfulness to be cognitively and emotionally free from algorithmic spell casting and violence as much as can be managed in the supremacist state. Our collective power to reimagine and reinvent resides within us as we engage in our own projects of self-transformation whilst in the belly of the beast. That beast is continually exhibited in Sigmund Freud's primordial id, today embodied in White-supremacy-friendly AI technology.²⁹⁹ It is enacting its conscious and unconscious psychic energy across the world stage that works to satisfy basic deep fears, deep urges, and deep desires to hold onto White power for fear of a browning America. The perceived loss of White power is frightening to majoritarian elites who appear all too willing to turn to AI and police force to help enforce this agenda. Meanwhile, Black and Brown people must adeptly navigating the White primordial id in majoritarian AI culture to survive. In that quest for survival, we are also tasked with demystifying a Carl Jungian conception of the collective unconscious developing in AI technology platforms.³⁰⁰ The Jungian unconscious first requires us to recognize someone and something, in Silicon Valley, is pulling our unconscious strings and then to decide for ourselves whether to live our lives in accordance with its directives or not.

But the things that direct us as beings are often things we cannot consciously choose. No such choice can ever exist unless the Pinocchio in each of us can extricate itself from its marionet strings through our mindful consciousness. People of color, and Black Americans uniquely, have become the representative of those traits White society dislikes or would rather ignore. We have, in essence, become the metaphorical and biological form of their Jungian "shadow"—the side of the psyche kept hidden away.³⁰¹ Yet Jung saw the shadow as necessary; light necessarily casts a shadow, a proposition that Afropessimism has embraced.³⁰² In other words, Afropessimists conceive Black oppressive violence as unique and more resilient than other minority groups; such violence is a necessary predicate to define and give value to Whiteness as a structure otherwise rendered incoherent without Black vulnerability.³⁰³

Therefore, how we allow AI to define the space and cyberspace around us becomes critical as we seek self-determination within the contextual

299. See generally Sigmund Freud, *The Ego and the Id*, 17 TACD J. 5 (1989).

300. See generally CARL GUSTAV JUNG, 9 THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS pt. 1, 118.

301. See Christopher Perry, *The Jungian Shadow*, SOC'Y OF ANALYTICAL PSYCH. (Aug. 12, 2015), <https://www.thesap.org.uk/articles-on-jungian-psychology-2/about-analysis-and-therapy/the-shadow> [https://perma.cc/PCL8-PW9D].

302. See FRANK R. WILDERSON III, AFROPESIMISM 245, 252 (2020).

303. *Id.*

equivalent of their Jungian technological shadow. Yet we crusaders of the spirit of truth, justice, and love hail from all racial backgrounds and we are the light in their darkness. They see their own shadow and think it is us because they see through their distorted eyes filtering reality to see the consequence of themselves, their thoughts, and their actions that have given rise to the notion of fragility in the first place. The thought of us makes them want to ban us and criminalize all who would speak of their past and present unrepentant evils so that none should see the true nature of their wickedness as White supremacists.

But unlike them and the self-avowed Black capitalists, we are not here to save their world but to save our souls, minds, families, housing, health, communities, values, and destinies from their corruptive id; from their racial monster consciously and unconsciously unleashed upon us and enabled more and more by supremacist AI and law with each passing day. We witnessed White backlash after the First Reconstruction with the presidential election of Rutherford B. Hayes and removal of federal troops from the South, and again after the Voting Rights Act and its gutted carcass under Justice Roberts and now Justice Alito. We saw it again after President Obama followed by the hate of President Trump. Each time we were left vulnerable and unprotected to the ensuing racial terror in Charlottesville and elsewhere.

So, it is reasonable to assume that technological AI innovation will not protect us from supremacists because it is simply not being developed with that goal in mind. Any appeasement tech companies may perform to ban groups may be subject to the same cosmetic considerations that led to *Brown v. Board of Education's* hollow legacy. We have witnessed a White technological backlash unconsciously projecting us as their racist subconscious selves in constant cyber racial profiling and surveillance. Often these tactics are intended to further delegitimize Blacks and justify misallocating critical life opportunities, privileging others, and discouraging our online activism for social justice. Americans of humble life stations are technological pawns in a battle of naked raw power in the reality of might over right. That is the political party structure in Congress that will have oversight over AI and it is the structure in which all laws, customs, and rights will be filtered through as the contextual lens for AI. What mental sky is free from her flight of drone air superiority? What respite can one find from AI's egress into all of our daily doings? We hope against hope for meaningful antitrust legislation with a Congress that is largely in the pockets of big tech?³⁰⁴

304. There is always hope in reform given the House Judiciary Committee's passage of a package of six antitrust bills recently with bipartisan support. Senator Amy Klobuchar (D-MN), chair of the Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights, advanced Senate versions of some of those bills with Republican colleagues. She along with Senator Tom Cotton (R-AR) also introduced the Platform Competition and Opportunity Act that would make it harder for Big Tech to acquire rival companies. Senator Klobuchar and Senator Chuck Grassley (R-IA), the ranking member of the Senate Judiciary Committee, introduced the American Innovation and Choice Online Act, a bill that would prohibit big technology platforms from giving their own products and ser-

If this seems cynical, consider the fact that we seem all too willing to undo fifty years of precedent of personhood to overturn *Roe v. Wade* but we are loath to update an over-one-hundred-year-old antitrust law to protect our digital personhood. Until we as a nation can accept that the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914 are not up to the task for breaking up tech companies; until we can acknowledge DOJ and FTC regulators are constrained from using their power because of a framework of permissibility implicit in the “consumer welfare standard” of antitrust law; until a conservative judiciary inclined to defer to that paradigm ceases its enabling of big tech; workers, students, and all natural persons will continue to be harmed by big tech’s anticompetitive and inhumane activity. The state’s legitimacy is already precarious and now this technology may increasingly find its way in the hands of wrongdoers who can inflict as much emotional and psychological harm in discriminatory cyber assaults as they wish. And that, among other frightening possibilities, should give us pause to proceed with caution, rather than to race ahead imprudently.

C. AN ECOLOGY OF RACIAL SELF DETERMINATION IN AI EQUITY

In the midst of hate, I found there was, within me, an invincible love. In the midst of tears, I found there was, within me, an invincible smile. In the midst of chaos, I found there was, within me, an invincible calm. I realized, through it all, that in the midst of winter, I found there was, within me, an invincible summer. And that makes me happy. For it says that no matter how hard the world pushes against me, within me, there’s something stronger—something better, pushing right back.³⁰⁵

The expansive and invasive scope of AI activity in our world will likewise require an expansive and vigilant self-determination in a collective ecology of reclaiming ourselves, our spaces, and our voices. Antitrust legislation and other reforms requiring a sweeping change in laws also require sweeping influence in a congressional system that only values significant political donations and electoral survival. To make our voices heard, our votes and dollars must be heard. Abstention from technology serving White supremacy, to the extent practicable in our modern age, is challenging, if not near impossible, to be sure. But we must nonetheless call for abstention from all oppressive structures baked into the system as much as possible.

We do not need to feed the AI machine further profits for Black and Brown bodies, votes, data, or for their greed. This requires mighty fortitude of personal conviction, but the governing order is perpetuated by our complicity. It requires fortitude because it requires us to abstain from allowing our bodies, desires, and dollars to be the implements of war,

vices preferential treatment. And with the Merger Filing Fee Modernization Act, there may be greater enforcement capability for antitrust activity with the DOJ and FTC.

305. Albert Camus, *Invincible Summer*.

disease, and death. It requires us to understand that, to shape AI, we must shape both AI itself and the world in which it operates. This proposition goes far beyond a de facto “exploitation in place” model that has been used against us because it is the clarion call for a compassionate consciousness as the new governing paradigm in civil AI deployment. It proclaims the supremacy of humanity over machines, and the supremacy of love in algorithmic codes of redemption, restoration, and reconciliation over surveillance and constricting codes of cyber incarceration. In effect, our healing mission of collective self-determination is to abstain from algorithms’ pervasive, punitive, and negative commodifying influence in our minds and souls—to be in the world but not of the world.³⁰⁶ We who choose not to “conform our minds to the patterns of this world, but to renew” and enrich them must make our own empowering social news outlets built on algorithms of integrity that transcend all corrupt ends.³⁰⁷ Our healing mission requires us to build our own bodies and farms free of genetically modified Monsanto seeds that impact our life, health, and our environment subject to AI manipulation.³⁰⁸ It requires us to build our own minds free from the poison of hate that consumes them. We must free our homes from the homage paid to subscriptions that demonize, mock, and castigate us in syndicated media that may implicitly bias and shape criminal justice systems, societal attitudes, and AI’s assumptions.³⁰⁹

If separation causes selfishness, care must be taken to clarify. This call to self-determination rooted in compassion is similarly a call to collective determination to live with collective compassion. Commodification should not be the goal if we are to honor the spirit of Kujichagulia. But if that be so, then at the very least, our self-determination requires our control of our own commodification, dictating that it be on our terms that affirm our values and toward accomplishing the ultimate goal of the economic liberation of our families and communities. Any commodification of our labor and talent will be wholly voluntary and only affirm those ventures that provide for our own substantive survival and prosperity in natural resource wealth for generations to come. It will cultivate the moral fiber of reciprocal care and respect for all. These values that promote spiritual well-being by living and standing in our empowering truth with supportive acceptance cannot be built by those antagonistic to it in spirit, law, politics, life, or code.

306. See *John* 15:19 (King James).

307. See *Romans* 12:2 (King James).

308. See Jordan Wilkerson, *Why Roundup Ready Crops Have Lost Their Allure*, HARVARD (Aug. 10, 2015), <https://sitn.hms.harvard.edu/flash/2015/roundup-ready-crops> [<https://perma.cc/SS8D-MTDJ>] (explaining the “Roundup Ready soybean,” cotton, corn, and other crops, genetically engineered by Monsanto to resist the plant-lethal chemicals in Roundup).

309. See generally Valerie N. Adams-Bass, Howard C. Stevenson & Diana Slaughter Kotzin, *Measuring the Meaning of Black Media Stereotypes and Their Relationship to the Racial Identity, Black History Knowledge, and Racial Socialization of African American Youth*, 45 J. BLACK STUD. 5, 367–388 (2014).

In this way, our truth in being is protected, appreciated, and magnified with opportunity and benefits once foreclosed. In this new paradigm, with our collective support, Black actors can finally afford to financially refuse to take roles and syndication that perpetuate bias and destructive stereotypes in online media platforms. Lawyers refuse roles that perpetuate politics and policies of violence, gentrification, and coerced silence that no doubt contribute to the profession's high alcohol and suicide rates—some things not even the psyche can deny. They find work and support in our communities that affirm their worth rather than compromising it to make a living. Basketball players refuse to participate in games where their state has passed discriminatory bans.³¹⁰ In short, our spiritual and consumer power is leveraged.

Martin Luther King Jr.'s Montgomery bus boycott reflected this collective mobilization. Dr. King and his followers refused to board segregated buses until they eventually bankrupted the city, forcing it to reverse course with the help of a favorable ruling.³¹¹ Perhaps it was a strategic mistake to reboard the busses when the boycott's resilient spirit created their own makeshift Uber service decades before there ever was one.³¹² While we have earned and deserve our just due, giving our value away to benefit others is a far better option than allowing it to be stolen for corrupt ends that enslave us. Thus, it is not divestment alone we need in this perilous time. We must also give our value only to those enterprises that reinforce our liberation and our humanity and its intrinsic value that is above being sold for corrupt or materialist ends. The enlightened social justice advocate who is neither seeking to be rich nor afraid of losing status built on material values has the mindset best suited for this collective social movement. That soul is free to pursue unadulterated justice, which holds real promise for our liberation.

The path that demands our whole being is where change within becomes the change we see without. It rejects cancel culture and the carceral state as symptoms of a punitive mindset in favor of compassion, always making room for the repentant heart to find its way back home to love. This is the ecology of love in which a just AI can emerge. For Blacks, we bring value to companies whose stock reflects the commodification of our value and yet only profits primarily White investors. We increase the underlying stock valuations for companies like Facebook,

310. See, e.g., Scott Cacciola & Alan Blinder, *N.B.A. to Move All-Star Game From North Carolina*, N. Y. TIMES (Jul. 21, 2016), <https://www.nytimes.com/2016/07/22/sports/basketball/nba-all-star-game-moves-charlotte-transgender-bathroom-law.html> [<https://perma.cc/A5VN-TTGF>] (“The National Basketball Association on Thursday dealt a blow to the economy and prestige of North Carolina by pulling next February’s All-Star Game from Charlotte to protest a state law that eliminated anti-discrimination protections for lesbian, gay, bisexual and transgender people.”).

311. See *Montgomery Bus Boycott*, STANFORD: THE MARTIN LUTHER KING JR. RSCH. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/montgomery-bus-boycott> [<https://perma.cc/SP9B-77KK>].

312. See *id.* ([T]he [Montgomery Improvement Association] developed an intricate carpool system of about 300 cars.”).

Twitter, and Instagram. Yet, we are shut out of the Initial Public Offerings of Facebook and others under the Securities and Exchange Acts of 1933 and 1934 which require individual “accredited investors” to have a net worth of \$1,000,000 or more.³¹³

We deserve algorithms, laws, and technological enforcement that promote and protect our Black Wall Street wealth, contributions, personhood, and dignity. We bring valuable talent to the NCAA and the NBA, yet we are shut out from enjoying the fruits of our labor as team owners, stock holding shareholders, or media channel owners. We provide value to Coca-Cola in our consumer dollars, yet BIPOCs are the ones who paid the price when the company’s general counsel was forced out for demanding just accountability in outside counsel’s diversity hiring and representation levels³¹⁴ As people of color, we are the ones who provide the cultural capital in advertising and sales revenue for Nike, McDonald’s, and more. Yet, they refuse to make space for our voices in corporate governance, diversity retention metrics, human rights practices overseas, and community economic development at home. Many have not respected our voices in changing policies that do not displace our communities at home.³¹⁵

Companies like McDonald’s, and Coca-Cola sponsored the Sochi Olympic Games in Russia despite the attack on gay activists.³¹⁶ Nike, Apple, Amazon, and Coca-Cola made us all complicit in their schemes to use or benefit from forced labor in China.³¹⁷ It should give us all pause that a number of U.S. technology companies have profited off of the vulnerable in the Chinese government’s “authoritarian surveillance industry.”³¹⁸ People of color bring value to many companies, but often they peddle carcinogenic agents in their products for us to consume and poison our communities.³¹⁹ Through our labor and talent, we are taxed to the utmost in ordinary income tax rates, yet the privileged—who maneuver their way into lower, passive income tax rates that keep our wealth in

313. See Securities Act of 1933, 15 U.S.C. § 77b(a)(15) (1934); 17 C.F.R. § 230.501(a)(5) (1934) (defining “accredited investor” under the Act).

314. See Matt Kempner, *With Top Lawyer Out, Coke Reviewing Diversity Mandate for Law Firms*, ATLANTA J.-CONST. (Apr. 23, 2021), <https://www.ajc.com/ajcjobs/with-top-lawyer-out-coke-reviewing-diversity-mandate-for-law-firms/M3ESQZ2FIZB7RI2GPDILIRYTV6Y> [<https://perma.cc/327T-LKEJ>].

315. See Jessica Guynn & Brent Schrottenboer, *Why Are There Still So Few Black Executives in America?*, USA TODAY (Feb. 4, 2021), <https://www.usatoday.com/in-depth/money/business/2020/08/20/racism-black-america-corporate-america-facebook-apple-netflix-nike-diversity/5557003002> [<https://perma.cc/WT2S-WURG>].

316. See Alan Draper, *Learn From Coke And McDonald’s Social Media Hate Storm*, BUS. 2 CMTY. (Sept. 19, 2022), <https://www.business2community.com/social-media-articles/learn-coke-mcdonalds-social-media-hate-storm-0771477> [<https://perma.cc/2JS8-C3J5>].

317. See Michael Martina, *U.S. Senator Slams Apple, Amazon, Nike, for Enabling Forced Labor in China*, NASDAQ (June 10, 2021), <https://www.nasdaq.com/articles/u.s.-senator-slams-apple-amazon-nike-for-enabling-forced-labor-in-china-2021-06-10>.

318. *Id.*

319. See Linda Villarosa, *Pollution is Killing Black Americans. This Community Fought Back*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html> [<https://perma.cc/U4SD-4F6K>].

their passive pockets—are the ones who profit.³²⁰ AI products for banks, merchants, and customers only reinforce these schemes.

As noted, AI has become increasingly protectionist under the color of law. And we have seen what fake protectionist arguments look like too; no doubt they are not too far behind in the tech world. In professing to protect the vulnerable with legislation, the powers that be now exclude and alienate the vulnerable from the fruits of our labor. The Securities and Exchange Commission must protect the public from whom? The likes of those who allowed the regulatory failures of Enron, Arthur Andersen, Lehman Brothers, and Worldcom, who will likely fall deficient in addressing AI manipulation of capital markets now.³²¹

It is said we must protect the public from incompetent lawyers. They mean us. Because the LSAT and bar exam serve a gatekeeping function, obstructing highly talented attorneys of color from becoming barred en masse and promoting racial homogeneity in the profession.³²² Our reparative algorithms would undo these assumptions and their effects. In protecting NCAA athletes, we have raised the standards in the name of protecting the public again,³²³ making it more costly, and therefore more difficult, for Black agents and those of color to represent them. Since the Supreme Court finally recognizes that NCAA athletes have a publicity right,³²⁴ perhaps that should say something about the growing importance of our legal rights to our own images and right to control their commercial exploitation, including in AI facial recognition databases. Protectionist arguments, like protectionist AI tools, shield White privilege, block Black empowerment, and perpetuate the myth of exceptionalism to justify exclusion in a tech industry that still does not know how to diversify.

That does not mean hair-splitting niceties of judicial invention won't threaten that principle of personhood, and we are routinely expected to surrender our publicity rights to AI companies. But barriers and walls

320. See generally OBERMAYER & OBERMAIR, *supra* note 17; Constant, *supra* note 17.

321. See Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA (Nov. 26, 2021), <https://www.investopedia.com/updates/enron-scandal-summary> [<https://perma.cc/8R2A-B6MP>] (holdings and off book accounting led to the fall of a wall street darling).

322. See generally Lauren Hutton-Work & Rae Guyse, *Requiring A Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System*, APPEAL (July 6, 2020), <https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system> [<https://perma.cc/Q5Z7-Z5RX>] (gatekeeping function during a pandemic and economic crisis means putting aspiring lawyers at risk and making it harder for nonwhite and low-income people to enter the legal profession).

323. See Tucker Higgins, *Supreme Court Rules Against NCAA in Compensation Battle with College Athletes*, CNBC (June 21, 2021, 10:14 AM), <https://www.cnbc.com/2021/06/21/supreme-court-rules-for-college-athletes-in-compensation-dispute-with-ncaa.html> [<https://perma.cc/7VM2-YVL3>] (summarizing the Supreme Court's removal of the NCAA's ban against student-players receiving payment); *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

324. See Kristi Dosh, *What Does Supreme Court Decision Against NCAA Mean For College Athletes' Name, Image And Likeness Rights?*, FORBES (June 21, 2021, 11:59 AM), <https://www.forbes.com/sites/kristidosh/2021/06/21/what-does-supreme-court-decision-against-ncaa-mean-for-name-image-and-likeness/?sh=45344d75500c> [<https://perma.cc/G7SS-S35U>].

like this have arisen before, similar to those restricting Black teachers and segregating classroom resources after the so-called public education integration mandates following *Brown v. Board of Education*.³²⁵ We are the ones who provide invaluable biometric data and faces for companies to steal, misappropriate, package, and resell to law enforcement, who in turn use it to perpetuate the incarceration of our people, and people of color.³²⁶ We are the ones who provide underlying value to artistic musical compositions. Yet, the privileged rob Black music artists in slanted contracts, denied royalties, and unethical, unilateral registrations leading to a significant, unspoken transfer of billions in wealth.³²⁷ AI algorithms facilitate this racist money laundering.

The truth does not have to be sold or argued; it need only be revealed. Once revealed, we need only have the courage to do what is right and recognize fear itself is a tool of the oppressor. The dependent hopelessness the oppressor relentlessly peddles through violent news designed to rob us of our beatitude in agency, dignity, and vesture of power to effectuate change within and without. The right to one's name or likeness is found in publicity law, but its misappropriation constitutes an invasion of privacy if privacy is understood to include the dignitary rights of personhood and the inalienable, sovereign right to the integrity of one's face not to be used for dark, repressive ends. Invasions and misappropriations of our biometrics violate the absolute essence of both our personhood and those we make a conscious choice to respect as equals in the family of humanity. Thus, we must protect the sovereign soul's sacred choice to decide which actions it will implicitly endorse with its own biometric property.

Where religious exemptions for COVID shots are permitted, we should similarly regard our body as our temple, and we do not morally or legally consent to give you the right to use, compare, or exploit our biometrics to harm another in a line up, arrest, or worse. These should be seen as lawful exercise of our right to remain a conscientious objector under the First Amendment to how our biometrics may be used. Our biometrics should not bear false witness against our neighbors in violation of our First Amendment right to the free exercise of religious belief, sincerely held convictions, and conscientious objections thereto.³²⁸ For equity advocates in AI, these are important arguments rooted in religious freedom. Because it appears the Supreme Court has been more inclined to uphold religious freedoms over civil rights, it is a path worth further examination

325. See Dyson, *supra* note 95 at 24–25.

326. See Kalluri, *supra* note 124, at 169.

327. See generally Greene, *supra* note 287; Matt Stahl & Olufunmilayo Arewa, *Denying Black Musicians Their Royalties Has a History Emerging Out of Slavery*, CONVERSATION (May 12, 2021, 1:18 PM), <https://theconversation.com/denying-black-musicians-their-royalties-has-a-history-emerging-out-of-slavery-144397> [<https://perma.cc/9BND-JFSN>] (arguing for economic justice in the recording industry, Black Music Action Coalition (BMAC) demands industry executives account for inequities in the treatment of black artists).

328. See generally U.S. CONST. amend. I.

for AI equity activism.³²⁹ AI today shuns equality for materiality. But in a movement of collective self-determination, we do not consent to egregious violations of the Fourteenth Amendment's equal protection guarantees to all.³³⁰

Denying our privacy right predicates that flesh is fungible. As Black and Brown people, we have enough experience to know something about this topic that coders do not. For example, Clearview AI packages and sells LinkedIn profile photos to law enforcement without our consent for massive profit, placing individuals in the functional equivalent of virtual criminal photo lineups with untold implications in criminal matters.³³¹ This is beyond unethical. Avarice knows no end, and entities employing AI "increasingly monitor and predict our behavior, often motivated by power and profits," with little consideration for the integrity of individuals' rights or collective responsibilities.³³²

After Freddie Gray and George Floyd's inflammatory deaths,³³³ denying this privacy right resulted in tech companies' First Amendment rights being privileged over the First Amendment rights of the protestors of color they surveilled, chilling them into repressed silence for fear of arrest. And despite any protestations to the contrary, that is exactly the point, is it not? The First Amendment was also never intended as a loophole to get around constitutional Fourth Amendment searches with the probable cause it requires from government actors and those who act at their behest.³³⁴ Recently, Facebook provided records of users' direct messenger chats to law enforcement, leading to a teenager's arrest and prosecution for an abortion.³³⁵ Often, invasions of privacy go hand in hand with criminal prosecutions when the vulnerable have little to no recourse,

329. See generally Rene Reyes, *Religious Liberty, Racial Justice, and Discriminatory Impacts: Why the Equal Protection Clause Should be Applied at Least as Strictly as the Free Exercise Clause*, 55 IND. L. REV. (forthcoming, 2022).

330. See generally U.S. CONST. amend. XIV, § 1; *Statement of Concern About Predictive Policing by ACLU and 16 Civil Rights Privacy, Racial Justice, and Technology Organizations*, ACLU (Aug. 31, 2016) [hereinafter ACLU Statement of Concern], <https://www.aclu.org/other/statement-concern-about-predictive-policing-aclu-and-16-civil-rights-privacy-racial-justice> [https://perma.cc/44VT-2N8F] ("[P]redictive policing must not be allowed to erode rights of due process and equal protection.").

331. See *Google, YouTube, Venmo and LinkedIn Send Cease-and-Desist Letters to Facial Recognition App That Helps Law Enforcement*, CBS News (Feb. 5, 2020, 6:52 PM), <https://www.cbsnews.com/news/clearview-ai-google-youtube-send-cess-and-desist-letter-to-facial-recognition-app> [https://perma.cc/6MJQ-ZK43].

332. See Kalluri, *supra* note 124.

333. See John Woodrow Cox, Lynh Bui & DeNeen L. Brown, *Who Was Freddie Gray? How Did He Die? And What Led to the Mistrial in Baltimore?*, Wash. Post (Dec. 16, 2015), https://www.washingtonpost.com/local/who-was-freddie-gray-and-how-did-his-death-lead-to-a-mistrial-in-baltimore/2015/12/16/b08df7ce-a433-11e5-9c4e-be37f66848bb_story.html [https://perma.cc/QEU3-MJ6N]; *How George Floyd Died, and What Happened Next*, *supra* note 186.

334. See generally U.S. CONST. amends. I, IV; ACLU Statement of Concern, *supra* note 330 ("Computer-driven hunches are no exception to [the reasonable suspicion requirement], and a computer's judgment is never a further reason (beyond articulable facts that intelligibly caused that judgment) for a stop, search, or arrest.").

335. See Jason Koebler & Anna Merlan, *This Is the Data Facebook Gave Police to Prosecute a Teenager for Abortion*, VICE (Aug. 9, 2022, 1:44 PM), <https://www.vice.com/en/arti>

which makes our digital communications, location data, period app tracking information, or other private data fair game in a punitive mindset.

We do not consent to any technology or unchecked authority that may lead to foreseeable misuse under product liability law or one that is egregious to our life and liberty interests under the Fifth Amendment.³³⁶ When life and liberty are at stake, invoking the trade-secrets doctrine to make biased algorithms opaque has no place. Why are we in the business of covering up business secrets in the dark for profits rather than promoting transparency for justice in the light of day? We must rethink doing business with companies that cannot or will not respect or work for the benefit of humanity and our highest well-being. And we must hold accountable our leaders who do.

If racial subjugation is necessary for the operation of the economic capitalist system to survive and thrive, that is also a central consideration in the repressive means deployed with technologically racist usage. Police drones continue to fly primarily over Black and Latino neighborhoods.³³⁷ They do not fly as often over White neighborhoods. They do not fly as often over affluent neighborhoods. One of the first rules we learn in military strategy is first to gain air superiority over your enemy.³³⁸ Perhaps our domestic equivalent is police drones flying over Black and Latino neighborhoods to establish air superiority over a perceived enemy in a “net-widening correctional strategy,” as one commentator put it.³³⁹ These neighborhoods are constantly surveilled, monitored, harassed, profiled, arrested, and incarcerated by police departments often infiltrated with White supremacists.

Who but the majority sitting on high at the U.S. Supreme Court would say this is race neutral? We know their demand for “racially neutral principles” in the face of White fragility to past and present racial injustices often means “avoiding the very hard work that moral judgment in any sphere requires, the constant balancing—whether we act as voters, jurors, parents, lawyers, or lay people—of rules, precepts, principles and

cle/n7zevd/this-is-the-data-facebook-gave-police-to-prosecute-a-teenager-for-abortion [https://perma.cc/GB2G-SG4K].

336. See ACLU Statement of Concern, *supra* note 330. The ACLU and sixteen other organizations expressed disapproval of the trend that “[v]endors are shrouding their products in secrecy,” as well as concerns about “technology’s racial biases, lack of transparency, and other deep flaws that lead to injustice” in America’s law enforcement. *Id.*

337. See generally Faine Greenwood, *How to Regulate Police Use of Drones*, BROOKINGS (Sept. 24, 2020), <https://www.brookings.edu/techstream/how-to-regulate-police-use-of-drones> [https://perma.cc/47UC-FHNN] (“Worryingly, one recent study found that participants were more likely to approve of law enforcement using drones over primarily African-American neighborhoods that they were to approve of drone flights over primarily white neighborhoods.”).

338. See ENTERPRISE CAPABILITY COLLABORATION TEAM, AIR SUPERIORITY 2030 FLIGHT PLAN 2 (2016), <https://www.af.mil/Portals/1/documents/airpower/Air%20Superiority%202030%20Flight%20Plan.pdf> [https://perma.cc/FKL6-9E25] (“In modern military operations, achieving . . . control of the air is a critical pre-condition for success.”).

339. See generally Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641 (2019).

context.”³⁴⁰

Given that the United States incarcerates more people than any other country and Black and Latino people disproportionately account for that number,³⁴¹ police and technology serve to further that purpose and academic and tech debates devoid of these realities do not serve the public good. However, the same digital images that use virtual reality for constructive use rather than graphic violence also show what is possible with interracial collaboration and cooperation on shared goals beyond stereotypes and fear.³⁴² Virtual reality could help illustrate positive ways to end housing and public-school segregation. It could help us imagine the world with more compassionate policies, honest and healing communication, and interpersonal relationships. It could allow us to see ways to close the national racial gaps in achievement,³⁴³ healthcare,³⁴⁴ housing,³⁴⁵ income,³⁴⁶ and fairness in criminal justice.³⁴⁷ A fantasy world only has utility when it allows us to see a good we previously thought impossible. But if AI does not close these national gaps, it no longer has practical social utility compared to the harm of mass delusion and exacerbation of mass incarceration it causes. Therefore, AI should be phased out, especially when it exacerbates these gaps. Resistance against unjust uses of AI means using our spheres of influence to give voice to the voiceless and taking collective action for social justice to hold companies accountable for their practices. We can finally be heard when we realize and act on

340. Patricia J. Williams, *Blockbusting the Canon*, Ms. Sept.–Oct. 1991, at 64.

341. See Drew Kahn, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019, 3:50 PM), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html> [<https://perma.cc/J8NL-U6K9>].

342. See Lori Friedman, *Valerie Taylor: Using Virtual Reality to Improve Interracial Interactions and Diversity in STEM*, LEHIGH UNIV. (May 26, 2021), <https://www2.lehigh.edu/news/valerie-taylor-using-virtual-reality-to-improve-interracial-interactions-and-diversity-in-stem> [<https://perma.cc/JKC9-8J89>].

343. See, e.g., *Racial and Ethnic Achievement Gaps*, STANFORD CTR. FOR EDUC. POL'Y ANALYSIS, <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race> [<https://perma.cc/P56T-NNXB>].

344. See, e.g., Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, AM. BAR. ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care [<https://perma.cc/HS4X-4VHM>]; *Achieving Racial and Ethnic Equity in U.S. Health Care: A Scorecard of State Performance*, COMMONWEALTH FUND (Nov. 18, 2021), <https://www.commonwealthfund.org/publications/scorecard/2021/nov/achieving-racial-ethnic-equity-us-health-care-state-performance> [<https://perma.cc/B6N6-TDLT>].

345. See, e.g., Brandi Snowden & Nadia Evangelou, *Racial Disparities in Homeownership Rates*, NAT'L ASS'N OF REALTORS (Mar. 3, 2022), <https://www.nar.realtor/blogs/economists-outlook/racial-disparities-in-homeownership-rates> [<https://perma.cc/9PHP-ACVH>].

346. See, e.g., Greg Rosalsky, *Why the Racial Wealth Gap Is So Hard to Close*, NPR (June 14, 2022, 6:30 AM), <https://www.npr.org/sections/money/2022/06/14/1104660659/why-the-racial-wealth-gap-is-so-hard-to-close> [<https://perma.cc/T4D9-AH4S>]; Ellora Deroncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The US Racial Wealth Gap, 1860–2020*, VOX EU (July 4, 2022), <https://voxeu.org/article/us-racial-wealth-gap-1860-2020> [<https://perma.cc/S57D-L9DM>].

347. See, e.g., *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT'G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities> [<https://perma.cc/65C3-WVTN>].

our collective power.³⁴⁸

XII. CONCLUSION

If the use of AI does not eradicate or mitigate the racial achievement gap and other national indicators of racial disparities that flow from the legal and educational vestiges of Jim Crow, sharecropping, slavery, mass incarceration, and privatized racism, then racist capital structures embedded in code will use these disparities to further marginalize, discriminate, and oppress poor White and BIPOCs. Dirty data rests on dirty laws with dirty intents that enable and unleash algorithmic colonialism, either by acquiescence or express judicial protection. We must now move from the Black Codes of southern slavery to the Black Codes of sovereign dignity. Ours must be a collective movement that recognizes those most adversely impacted by AI have a greater right, greater demand, and greater stakes to be in control of its development, oversight, and implementation. A bottom-up, top-down approach to AI ethics and equity necessitates a struggle for existential sovereignty, reinforced by an ecology of collective resistance, even if only in our domains of influence and in our own sanctuaries of peace.

We need effective and sustained community organization; authentic and diverse voices coding, regulating, and overseeing from lived experience of injustice who know deeply and intuitively what justice truly requires. We need collective moral integrity of economically and technologically enforced boycotts in the face of perverse financial incentives. We need consistent, powerful, and informed advocacy that dismantles all totalitarian impulses in technology and law through vigilant consumer activism, social media campaigns, legislative advocacy, judicial intervention, and political activism within and beyond formal mechanisms of participation.

But Professor Derrick Bell's observations on the interest convergence dilemma should leave us with no illusions that White majoritarian society will serve as a reliable coalitional ally in the struggle unless there is something in it for them.³⁴⁹ I stand here as a man with Black, Native Blackfoot, Egyptian, Neapolitan-Sicilian Italian roots, mixed with Irish and Scottish blood in my veins, calling for the spiritually enlightened and talented among all races to unite above our bodily, political, and racialized

348. See, e.g., Nitasha Tiku, *Google Walkout Is Just the Latest Sign of Tech Worker Unrest*, WIREd (Nov. 1, 2018, 6:14 PM), <https://www.wired.com/story/google-walkout-just-latest-sign-tech-worker-unrest> [<https://perma.cc/R4E6-CUVE>] (In response to "a recent *New York Times* article about Google awarding multimillion-dollar exit packages to top male executives accused of sexual misconduct," thousands of Google employees worldwide staged a walk-out "to protest Google's handling of sexual harassment claims and other workplace issues."). Additionally, there is evidence that collective social action can make a difference, such as when Google's work on Project Maven for the Pentagon and U.S. Department of Homeland Security sparked enough outrage from employees that Google chose not to renew the project. See *id.*

349. See generally Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

realities that supremacy socially engineered in order to guide the heart and principles of this movement in ways that even lower consciousness is neither equipped, disposed, or inclined to address. For Blacks who suffer, in the words of Frank Wilderson, the “gratuitous violence of social death” and other coalitional partners “subject to the contingent violence of colonial, class, and gendered subjugation” only when they resist, our relative realities must not give way to the cynicism of being relegated to merely a “genealogical isolate.”³⁵⁰ We are far more than that, even if we are the only ones who know it—we know it thoroughly within ourselves.

To be clear, we are not working to build interracial coalitions for some binary dialectic of a White Ideal or against any Black Imago. Nor do we let the ideological straight jacket of pessimism stop us from striving, because we do not define ourselves from an outside-in paradigm as tech, capitalism, and societal supremacy urge us to. Despite the harshness and cruelty of the world on Black and Brown minds and bodies, our hearts remind us the noble soul has reverence for the divine within. Rather, we exercise our sovereign prerogative and duty to submit living our lives from an inside-out, presence-centered, heart-centered paradigm of higher awareness, for organizing life and coalitions in tech and beyond.³⁵¹

Only from the inside-out can we see the divine agency for self-transformative change within each of us for “the Almighty God is a living man.”³⁵² Nor do we seek allies in tech just to appease narrow cosmetic purposes similar to those that animated the *Brown v. Board of Education* decision. As Professor Derrick Bell noted, in the face of the cold war to win the support of African nations and allies in the industrial developing world, cosmetic incentives lead to cosmetic outcomes.³⁵³ In fact, such dilemmas in interest convergence arise only when that cosmetic appeasement is the predominate goal, so it behooves us to strive higher with whom we ally in law and tech.

But finding allies who can work honestly and with moral integrity from the inside-out for and on behalf of the people without hurting the people is easier said than done in Silicon Valley. Such multiracial coalitional challenges fail to provide the critical metonymic nexus and praxis for multiracial justice we seek. That is, unless they are lead by those possessed with the self-evident commitment of loving cooperation to humanity’s harmonious coexistence on this planet on non-differential terms and values that empower all. Likewise, demanding corporate governance changes through AI companies’ shareholder activism might reflect our

350. WILDERSON, *supra* note 302, at 245, 252.

351. See DR. JOE DISPENZA, *BECOMING SUPERNATURAL: HOW COMMON PEOPLE ARE DOING THE UNCOMMON* (2019); see also HEARTMATH INSTITUTE, <https://www.heartmath.org/training/heartmath-experience> [<https://perma.cc/NC59-9S3W>].

352. BOB MARLEY AND THE WAILERS, *Get Up Stand Up, on BURNIN'* (Island Records & Tuff Gong 1973) (“Get up, stand up . . . Lord We know and we understand Almighty God is a living man. You can fool some people sometimes, but you can’t fool all the people all the time. So now you see the light. We’re gonna stand up for our rights.”)

353. See Bell, *supra* note 349.

values, but this option seems far less feasible, especially when there is no large class of public shareholders, let alone of color to speak of. Market share liability through market deterrence policies in tort law dictates that companies are responsible, but what of their customers, as well as the purveyors and enforcement enablers? It must be clear whom we should hold responsible for AI harms, and it must include institutional and private market customers who enable their unjust enrichment.

This collective approach to movement change is key in order to effectuate the necessary contextual understanding and policy environment for meaningfully enforced personal and vicarious liability in cyberspace. It must be substantial enough to compel behavioral change of technological racist tyrants who have not yet been moved by moral integrity to do so. We seek to build a coalition of interest convergence based on the inner values of mutual respect in the supremacy of humanity over machines. But it is also with the clear understanding that the supremacy of humanity is only a laudable goal when it best reflects the agape love of all in the family of humanity, not just to the exclusion of the descendant of the American slave who still seeks to disentangle himself from the racist meta aporia that is American constitutionalism enforced with terror. As light workers in the cause for justice, we must engage in the spiritual abolishment of imaginary boundaries within us that are used, abused, and exploited by the purveyors of algorithms to conquer and divide us.

Indeed, before we were Democrat or Republican, we were human. Before there was CNN, Fox News, or MSNBC, we were human. Before we were pilgrim or native, we were human. Before we were citizen or immigrant, we were human. Before we were slave or slave master, we were human. Before we were data, pixel, or algorithmic score, we were human. We are human—we always have been human, yet many have not accepted us in our common humanity.

Because we understand our true nature as eternal souls having a human experience, we are no longer blinded by political loyalty at the expense of our souls' loving compassion for our fellow human being and we seek to inform algorithmic code development and reparative measures with these values. And if there is to truly be an equality machine, the time for proving that intent actually exist and bringing forth those effective and transformative measures is now. Otherwise, we whose knowledge is not just theoretical, hypothetical, or philosophical, but experiential, legal, and metaphysical, and who elect, in our sacred consciousness, to rise in love and wisdom, in spite of, and not because of, the hateful technological shackles of White supremacy, should be at the helm (if there is to be any further steering of tech in Silicon Valley at all).

If Silicon Valley seeks to immunize itself from the Me Too and BLM awakened consciousness, or refuses even still to effectuate meaningful industry diversity and realign its mission with sanity, then the idea of introducing context and justice into technological innovation is moot. We do not need more hypothetical pro-tech propaganda, subliminal advertising,

and brainwashing tactics the likes of which Aldous Huxley warned us would attack our subconscious faculties below our protective conscious level of choice and freedom.³⁵⁴ This is what makes the modern field of neurolinguistic programming so effective, because it is realized that beliefs and emotions do not need to be rational or in reasonable self-interest to be fundamentally accepted in one's psyche.³⁵⁵ This is because the subconscious rules belief and emotional systems and, once the fear, anger, and hate is implanted in the subconscious and accepted, it has enormous affect and control over one's perceptions and behavior.

Technology in the wrong hands and mindset leads to nefarious ends—Hitler used the microphone effectively, and North Korea and Iran astutely censored television and internet. Propaganda and subliminal advertisement urges an automatic buy-in to Silicon Valley without the necessity of undertaking the requisite action to support equality grounded in our experiential realities and values; we need something far more than symbolic, hypothetical, and hollow gestures. To be clear, we are not anti-tech. We are simply not totalitarian supremacists in our sensibilities and prefer our tech not to be either. We reject that we are three-fifths of a person. We simply prefer our tech does so too.

Ours is a collective movement, accepting in all of our varied multitude, yet with an epistemological and ontological understanding rooted in transformative social justice, acting under mutual accord in the reciprocity of concern for all. It has no membership rolls or bylaws, only a common unspoken sentiment that guides actions animated in the authentic spirit of justice made manifest. It excludes those whose counterfeit commitment to justice cannot be faked with any successful result because they already exclude themselves from any agendas of corrective justice.

In essence, we seek: (1) our majority participatory governance over all harmful tech applied to those of us facing both social death and contingent violence in our society by means of legislation, judicial activism, entrepreneurial influential pressure, algorithmic enforced injunctions, and community organization; (2) a prevailing reparations mindset in all anti-trust oversight and industry sectors of AI development—including in all internet stacks comprising invisible but racialized political power that endeavor to break up monopolistic AI protectionism; (3) the establishment of our own counter AI tech, as well as tech, law, and social enrichment educational academies, technological knowledge exchange programs, victim compensation funds, as well as the establishment of our own ISPs, CDNs, cloud services, domain registrars, and social media platforms provided on our own terms to facilitate positive social change in our communities; and; (4) personal daily divestment from AI companies' ubiquitous technologies, to the extent practicable, to avoid their hypnotic and addic-

354. See, e.g., someoddstuff, *Aldous Huxley interviewed by Mike Wallace: 1958 (Full)*, YOUTUBE (Sept. 28, 2011), <https://www.youtube.com/watch?v=alasBxZsb40&t=75s> [<https://perma.cc/9NBE-Z2XA>].

355. See DISPENZA, *supra* note 351.

tive conscious and subconscious effects which should be banned and rendered technologically impotent. In this way, we can continue to define and submit to an inside-out perspective that informs our work where the superconscious awareness can transcend the racist egoic mind. This is necessary to foster our mindful spiritual intuition from which comes superior superconscious awareness of what is possible in a world that shouts to us constantly what is not.

We recognize we are engaged in a battle of the mind and soul of AI and ourselves. The *Cummings* decision makes the stakes of that battle even higher for the vulnerable whose emotional well-being is legally incognizable in a legal system that see us as subhuman. We endeavor to boycott noncooperative companies that unrepentantly deploy harmful AI and collectively make their machinations known. We engage in building our own AI and social media platforms that are not for sale or subject to technological manipulation but are kept in encrypted perpetuity as an institution of our own empowering story telling for future generations. In this movement, we do not cancel people for being imperfect incarnate souls clumsily navigating the human experience, but applaud those in their conviction when it is genuinely demonstrated they rise above their imperfectness to do what is morally right so that no technological stumbling block is put in the way of those striving to be better in life.

We engage in building mindfulness which minimizes divisive ego identification to race, fear, and greed so that it allows us to truly see the spirit of our own inner character. Such awareness has the effect of thus disarming and counteracting the hypnotic effect of seductively harmful algorithmic content when we are not paying close attention. Without mindfulness, the sentinel of the mind surrenders us over to operate on autopilot in ways emotionally and physically suggested to us consciously and subconsciously by tech that are often most harmful to us.³⁵⁶ For those who possess no mindfulness, they have no recourse of awareness with which the sovereignty of peace and loving acceptance allows one to escape the algorithmic spell. And those without sovereignty of peace and loving acceptance of self and others are not free within. Consequently, they have no plans or desires of individual or collective self-determination rooted independently from external pressures or identity concepts, or at least none that are harmonious with all of humanity as it is with itself. And those who have no plan for themselves will find themselves snugly fit into the plans of code overseers and officers who do not have our collective best interest at heart.

This inner work is imperative since we know that algorithms are not just programmed—they program us and the world in which we live. In the face of increasingly pervasive technology, we need to return to nature literally and metaphorically, as nature restores us, protects us, and like-

356. See generally RHONDA V. MAGEE, *THE INNER WORK OF RACIAL JUSTICE: HEALING OURSELVES AND TRANSFORMING OUR COMMUNITIES THROUGH MINDFULNESS* (2019).

wise needs us and our protection.³⁵⁷ With loving acceptance and understanding peace within, there comes the stillness of silent noble awareness. But until we realize what scientists already have, namely that wave motions are necessary to manipulate matter, we fail to fully comprehend what this means for their manipulating our emotional and physical vibrations to shape the emotional, physical, and now cyber world around us to our collective detriment.³⁵⁸ That is a rather unfortunate proposition when one considers it could just as easily be for our collective benefit if inclination in tech was so willing.

But when the reverberations of contentious social waves are born, exacerbated by being hypnotized through algorithmic spell casting and the hateful vibration of supremacist race baiting, then we cannot, and do not, see the still and sober truth of ourselves from a clarity that comes within peace needed in a racially violent world. Without it, we cannot see ourselves objectively without knee jerk ego defensiveness and fragility that, in turn, inflicts oppressive racial violence or silence on Blacks and other allies. Meaning, unless you have been oppressed, then that authentic spiritual, substantive truth of racial transformative justice must come from those most impacted by predatory racial capitalism now being enshrined in code.

It is those of us deemed so comprehensibly racially undesirable who are among the best positioned to speak about how to correct its bias, guide its discretion, and, where appropriate, ban it outright until a higher consciousness in humanity is prepared to wield that discretion wisely and judiciously for the benefit of all. This is especially for the oft-excluded Black, Brown, or poor American. We must reclaim our power, both from within and without, held in the consent of the governed and in the inalienable right to exist unmolested in our dignity and personhood. If we continue to neglect this ethos of commitment behind a much needed and long overdue collective action of moral, transracial, or conscientious consumer resistance, society will continue to cede the right to have any meaningful say in the kind of true justice we should endeavor to protect and preserve for all in the age of AI.

357. *See generally* Hao, *supra* note 177.

358. *See* DISPENZA, *supra* note 351.

