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Public (Al)ccomodations

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INTRODUCTION

Suggesting that it is possible to determine a person's interior characteristics or future social outcomes based on their facial expressions, body movements, and other characteristics is not backed by scientific consensus.[1] Technologies that aim to do so often reflect discredited and racist

[1] *See, e.g.*, Lisa Feldman Barrett, Ralph Adolphs, Stacy Marsella, Aleix M. Martinez, & Seth D. Pollak. *Emotional Expressions Reconsidered: Challenges to Inferring Emotion From Human Facial Movements*, 20 PSYCHOL. SCI. PUB. INT. 1, 68 (2019) (concluding in meta-study that it isn't possible to judge emotion by just looking at a person's face); *see also*

pseudoscientific practices, including physiognomy, phrenology, and other forms of race science.[2] These practices interpret physical differences between people as signs of their inner worth and character, and use this to justify oppression, subjugation, and inequality.[3] As such, the proliferation of AI surveillance in critical social institutions and decision-making has raised serious concerns among local, state, and federal lawmakers;[4] civil rights and

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Angela Chen & Karen Hao, *Emotion AI Researchers Say Overblown Claims Give Their Work a Bad Name*, MIT TECH. REV. (Feb. 14, 2020), https://www.technologyreview.com/2020/02/14/844765/ai-emotion-recognition-affective-computing-hirevue-regulation-ethics [https://perma.cc/L5FR-FJ3Y].

[2] *See, generally* Luke Stark & Jevan Huston, *Physiognomic Artificial* Intelligence, Social Science Research Network, (Sep. 24, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927300; Luke Stark, *Facial Recognition Is the Plutonium of AI*, 25 XRDS 50, 52, 55 (2019) https://dl.acm.org/doi/pdf/10.1145/3313129 [https://perma.cc/D2RZ-K4YC]; *see, e.g.*, Blaise Aguera y Arcas, Margaret Mitchell, & Alexander Todorov, *Physiognomy's New Clothes*, MEDIUM (May 7, 2017), https://medium.com/@blaisea/physiognomys-new-clothes-f2d4b59fdd6a (describing usage of outer appearance to infer internal character) [https://perma.cc/64G4-GA9V?type=image]; Sahil Chinoy, *The Racist History Behind Facial Recognition*, N.Y. TIMES (Jul. 10, 2019), https://www.nytimes.com/2019/07/10/opinion/facial-recognition-race.html (describing physiognomy and phrenology respectively as using "facial structure and head shape to assess character and mental capacity.") [https://perma.cc/K5U2-KSLQ]; *see also* Sam Biddle, *Troubling Study Says Artificial Intelligence Can Predict Who Will Be Criminals Based On Facial Features*, INTERCEPT (Nov. 8, 2016) ("phrenology [is] just using modern tools of supervised machine learning instead of calipers. It's dangerous pseudoscience'").

[3] *See* Stark, supra note 11, at 53 ("In the case of facial recognition, the schematization of human facial features is driven by a conceptual logic that …theorists have identified as fundamentally racist because it is concerned with using statistical methods to arbitrarily divide human populations."). Critical race scholars continue to articulate the connections between systems of racial oppression and quantification. *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. R. 1241, 1299 (1991).

[4] *See, e.g.*, H.B. 2856, 66th Leg. Reg. Sess. (Wash. 2020) (moratorium on the use of facial recognition in public accommodations as well as by government agencies in Washington State); *Facial Recognition Technology (Part 1): Its Impact on Our Civil Rights and Liberties: Hearing Before the H. Comm on Oversight and Reform*, 116th Cong. (2019); Drew Harwell, *San Francisco Becomes First City in U.S. to Ban Facial-Recognition Software*. WASH. POST (May 14, 2019), https://www.washingtonpost.com/technology/2019/05/14/san-francisco-becomes-first-city-us-ban-facial-recognition-software [https://perma.cc/FNN5-6HXS].

civil liberties advocates;[5] AI researchers;[6] data ethics scholars;[7] and business leaders.[8] For example, the legislative intent of the AI Profiling Act, introduced in the Washington State Legislature in 2020, captures these concerns plainly:

The legislature finds that Washingtonians are increasingly subjected to automated forms of surveillance and classification in order to participate in public life and access basic social goods, services, and opportunities. The use of artificial intelligence-enabled profiling in sensitive social and political contexts and in important decisions that impact people's lives and access to opportunities is a matter of increasing concern. These practices not only threaten the fundamental rights and privileges of Washingtonians, but they also menace the foundation and supporting institutions of a free democratic state.[9]

Despite the threats of AI surveillance to core values such as freedom from discrimination, freedom of association, and due process, policy solutions proffered by industry leaders[10] that purport to reign in the harmful impacts of

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[5] *See* Stanley, *supra* note 1, at 54–55.

[6] *See, e.g.*, Whittaker, *supra* note 4; Sarah Myers West, Meredith Whittaker & Kate Crawford, *Discriminating Systems: Gender, Race and Power in AI*, AI NOW INST. (Apr. 2019), https://ainowinstitute.org/discriminatingsystems.html [https://perma.cc/89CD-4YAK].

[7] *See, e.g.*, S. Costanza-Chock. *Design Justice, A.I., and Escape From the Matrix of Domination*. 3.5 J. DESIGN SCI. (2018), https://jods.mitpress.mit.edu/pub/costanza-chock [https://perma.cc/P784-M5UR]; L. Dencik, F. Jansen, & P. Metcalfe, *A Conceptual Framework for Approaching Social Justice in an Age of Datafication*, DATAJUSTICE PROJECT (2018), https://datajusticeproject.net/2018/08/30/a-conceptual-framework-for-approaching-social-justice-in-an-age-of-datafication/ [https://perma.cc/N3PW-HAND]; J. Cinnamon, *Social Injustice in Surveillance Capitalism*, 15 SURVEILLANCE & SOC'Y 609, 625 (2017).

[8] In July 2018, Brad Smith, President and General Counsel of Microsoft, called for both vigorous regulation of and heightened corporate social responsibility toward facial recognition systems. See Brad Smith, *Facial Recognition Technology: The Need for Public Regulation and Corporate Responsibility*. MICROSOFT ON THE ISSUES (2018), https://blogs.microsoft.com/on-the-issues/2018/07/13/facial-recognition-technology-the-need-forpublic-regulation-and-corporate-responsibility [https://perma.cc/2P4H-QQEY].

[9] H.B. 2644, 66th Leg. Reg. Sess. § 1 (Wash. 2020).

[10] *See, e.g.*, Julie Brill, *The New Washington Privacy Act Raised the Bar for Privacy in the United States*, MICROSOFT ON THE ISSUES (2019), https://blogs.microsoft.com/on-the-issues/2020/01/24/washington-privacy-act-protection/ [https://perma.cc/PQ3V-8JCL]; Brad Smith, *Finally, Progress on Regulating Facial Recognition*, MICROSOFT ON THE ISSUES (2019), https://blogs.microsoft.com/on-the-issues/2020/03/31/washington-facial-recognition-legislation/ [https://perma.cc/manage/create?folder=23971]. *But see, e.g.*, Khari Johnson, *From Washington State to Washington, D.C., Lawmakers Rush to Regulate Facial Recognition*, VENTUREBEAT (2020), https://venturebeat.com/2020/01/19/from-washington-state-to-washington-dc-lawmakers-rush-to-regulate-facial-recognition/ (critiquing Washington Privacy Act's permissive framework as a result of "outsized influence" of technology companies that would profit from the deployment of facial recognition)

AI surveillance are consistently limited to the frame of privacy and data protection law.[11] Such myopia has been deplored as "[in]adequate to the task of managing a system whose purpose is discrimination."[12] Instead, civil rights and anti-discrimination law and legislation are the more appropriate tools to combat data-intensive discriminatory systems, as they actualize "effort[s] to correct the bias and distortion that prejudice, disregard, animus, and own-group favoritism [that] humans often introduce into the calculus of social choice."[13]

The risks of AI surveillance are even more present in the context of public accommodations.[14] Increasing AI surveillance in this context not only imperils the just distribution of rights, opportunities, and material resources,[15] but also supercharges the "legitimating, discursive, [and] dignitary dimensions of data and information ...." [16] AI's creep into critical public and social institutions necessarily invokes U.S. civil rights and antidiscrimination law because AI surveillance shapes not only our full enjoyment of and meaningful access to public life, but also the world's understanding of who we are, who we might be, and what we might do.

This Note discusses the use of AI surveillance in places of public accommodations and its implications for civil rights and antidiscrimination law. Part I documents the extensive AI surveillance employed in areas of public accommodation, where American antidiscrimination laws explicitly provide for elevated protection. Part II uses critical race theory to explore how contemporary antidiscrimination law marries two approaches to antidiscrimination in a way that undercuts its own ability to remedy injustice. Part III reveals how antidiscrimination law fails to address issues implicated

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[https://perma.cc/6UQQ-PXBF]; Tom Simonite, *Microsoft Looms Over the Privacy Debate in Its Home State*, WIRED (2019), https://www.wired.com/story/microsoft-looms-privacy-debate-home-state/ (describing influence of Microsoft in drafting Washington Privacy Act) [https://perma.cc/F4RH-66WB].

[11] *See, e.g.*, S.B. 6280, 66th Leg. Reg. Sess. (Wash. 2020); S.B. 6281, 66th Leg. Reg. Sess. (Wash. 2020).

[12] Oscar H. Gandy, *Engaging Rational Discrimination: Exploring Reasons for Placing Regulatory Constraints on Decision Support Systems*, 12 ETHICS AND INFO. TECH. 29, 31, 32 (2010); *see also* Anna Lauren Hoffmann, *Where Fairness Fails: Data, Algorithms, and the Limits of Antidiscrimination Discourse*, 22 INFO., COMM., & SOC'Y 900, 900 (2019) [hereinafter Hoffmann, *Fairness*].

[13] Gandy, *supra* note 21, at 29, 31, 32; Hoffmann, *Fairness*, *supra* note 21, at 909.

[14] Generally, a place of public accommodation is a place that is open to and accepts the patronage of the general public, such as a hotel, restaurant, theater, store, or park. We provide a deeper dive into the nature of public accommodations and the laws which protect them in Part I of this Note.

[15] *See, e.g.*, Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 701 (2016).

[16] *See* Hoffmann, *Fairness*, *supra* note 21, at 908.

by AI surveillance in areas of public accommodations, and Part IV proposes a simple solution: abolish it.

I. THE RISE OF AI SURVEILLANCE IN PUBLIC ACCOMMODATIONS ACROSS THE U.S.

AI surveillance is deployed in virtually every category of public accommodations, despite the threat it poses to federal and state antidiscrimination laws that guarantee equal access to places of public accommodation. For example, one of these laws, Title II of the Civil Rights Act of 1964, guarantees everyone "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."[17] This Part defines what a public accommodation is, how AI surveillance is deployed in public accommodations, and the proposed justifications for its use.

Generally, the term "public accommodations" refers to entities that are privately owned and operated that hold themselves out as providing services to the public.[18] Public accommodations include educational institutions, transportation services, retail stores, entertainment venues, hospitality establishments, and service establishments.[19] Some states define places of public accommodation more broadly to cover state and local government entities as well. For example, in Washington state, a place of public accommodation is more broadly defined to include "any place of public resort, accommodation, assemblage, or amusement," which includes government offices.[20]

AI surveillance is deployed widely in all the above categories of public accommodations. An oft-cited reason for this deployment is the fear of violence and crimes and the need for broader security systems. For instance, many schools have begun deploying facial recognition technology to "predict"

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[17] 42 U.S.C. § 2000a(a). However, there is no concise definition of a "place of public accommodation." Title II of the Civil Rights Act defines public accommodations by using an inclusive list of establishments, divided into three principal categories: (1) inns and motels; (2) restaurants and lunch counters; and (3) places of exhibition or entertainment, such as theaters, concert halls, or stadiums. 42 U.S.C. §2000a(b). Later, Title III of the Americans with Disabilities Act explicitly added a more comprehensive list by including twelve categories of privately-operated facilities. *See* 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104.

[18] *See Americans with Disabilities Act: ADA Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities*, ADA.GOV https://www.ada.gov/taman3.html (last visited Apr. 22, 2021) [https://perma.cc/A2DU-QVK2].

[19] *Id.*

[20] *See* WASH. REV. CODE § 49.60.040(2) (2019).

and "prevent" threats of mass shootings,[21] and some have gone as far as requiring students, parents, and teachers to use facial-recognition technology to gain access to the school.[22] Some government programs utilize AI surveillance in order to identify "subjects of interest" engaging in possible criminal activity.[23] Many retailers, service establishments, and hospitality establishments have followed suit, deploying AI surveillance to immediately identify and apprehend suspected wrongdoers.[24] The most salient and broad-ranging use of AI surveillance for security, however, can be seen in entertainment venues. Venues that can host thousands for concerts and sports games utilize facial-recognition technology to scan and identify attendees as known fans or as troublemakers who need to be ejected or apprehended.[25] The

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[21] Marybeth Gerdelmann, *ZeroEyes Uses AI to Identify Guns in Mass Shooter Situations. Here's How the Tech Works*, TECHNICALLY MEDIA (Feb. 17, 2020), https://technical.ly/philly/2020/02/17/zeroeyes-artificial-intelligence-identify-guns-mass-shooter-situations-pennovation [https://perma.cc/M3K7-H25T].

[22] Drew Mikkelsen, *Two Seattle Schools Among First to Use Facial Recognition Software in US*, KING5 NEWS (Oct. 31, 2018), https://www.king5.com/article/news/education/two-seattle-schools-among-first-to-use-facial-recognition-software-in-us/281-609937626 [https://perma.cc/UZF9-PHKB].

[23] *Which Government Building is Piloting Facial Recognition Technology?*, GOVERNMENT TECH. (Dec. 6, 2018), https://www.govtech.com/question-of-the-day/Question-of-the-Day-for-12062018.html [https://perma.cc/D23M-9GDC]; *see* Jennifer S. Mann, *St. Louis Courthouse Becomes Test Site for Facial Recognition Security Program,* ST. LOUIS POST-DISPATCH (Feb. 24, 2014), https://www.stltoday.com/news/local/crime-and-courts/st-louis-courthouse-becomes-test-site-for-facial-recognition-security/article_6d131536-b1f8-591c-a495-7137fc9bf5db.html [https://perma.cc/3UUF-X5M5].

[24] *See, e.g.*, *How Retailers Are Using Biometrics to Identify Consumers and Shoplifters*, EMARKETER (Oct. 3, 2019), https://www.emarketer.com/content/how-retailers-are-using-biometrics-to-identify-consumers-and-shoplifters [https://perma.cc/5GMS-JTCZ]; Chavie Lieber, *Your Favorite Stores Could Be Tracking You with Facial Recognition*, RACKED (May 22, 2018, 4:00 PM), https://www.racked.com/2018/5/22/17380410/facial-recognition-technology-retail [https://perma.cc/5WKR-AU2A]; *Pechanga Resort Casino Beta Tests Facial Recognition on Security Robots*, HOSPITALITY TECH. (Apr. 10, 2019), https://hospitalitytech.com/pechanga-resort-casino-beta-tests-facial-recognition-security-robots [https://perma.cc/A3PK-U6QC]; Morgan Romero, *Portland Gas Station Using Facial Recognition Technology to Curb Crime*, KGW8 (Jun. 17, 2019, 6:53 PM), https://www.kgw.com/article/news/local/portland-gas-station-using-facial-recognition-technology-to-curb-crime/283-8ce9f30a-2ac8-4c07-9ea9-11518a75e40a [https://perma.cc/NQF6-P3E9]; Michael Spears, *'Look at Camera for Entry': Tacoma Convenience Store Using Facial Recognition Technology*, KIRO7 (May 21, 2019, 6:05 PM), https://www.kiro7.com/news/south-sound-news/tacoma-convenience-store-uses-facial-recognition-technology/950979811 [https://perma.cc/GV3B-TL48].

[25] *See, e.g.*, Eric Chemi, *Sports Teams Are Using Facial Recognition To Learn More About Their Fan Bases*, CNBC (Apr. 21, 2018, 11:42 PM), https://www.cnbc.com/2018/04/21/facial-recognition-helps-teams-and-advertisers-learn-about-fans.html [https://perma.cc/X4YP-KZ99]; Ryan Rodenberg, *Sports Betting and Big Brother: Rise of Facial Recognition Cameras*, ESPN (Oct. 3, 2018),

latter practice proved so controversial that a campaign calling for a ban on facial recognition in live events received the backing of a group of artists such as Tom Morello, The Glitch Mob, and Atmosphere.[26]

Another reason cited for the extensive deployment of AI surveillance is commercial convenience. For instance, some retailers see promise in using behavioral tracking and facial and voice recognition for marketing purposes. By collecting information like shoppers' age, sex, and iris movement, retailers can deliver hyper-personalized, real-time advertisements.[27] Many public and private entities such as airports,[28] cruise ships,[29] grocery stores,[30] concert

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https://www.espn.com/chalk/story/_/id/24884024/why-use-facial-recognition-cameras-sporting-events-the-rise (discussing United States Tennis Association's use of facial recognition technology to detect "courtsiders," or individuals breaking the sport's official betting rules) [https://perma.cc/4WYY-KLX5]; Laura Snapes, *Taylor Swift Used Facial Recognition Software to Detect Stalkers at LA Concert* (Dec. 13, 2018, 7:58 AM), https://www.theguardian.com/music/2018/dec/13/taylor-swift-facial-recognition-stalkers-rose-bowl-concert (discussing Taylor Swift cross-referencing attendee faces to those of her known fans) [https://perma.cc/SS3P-S6SA].

[26] Sean Burns, *Artists Call on Ticketmaster to Drop Facial Recognition Tech Plans*, TICKET NEWS (Sep. 10, 2019), https://www.ticketnews.com/2019/09/artists-ticketmaster-end-facial-recognition [https://perma.cc/9F6P-43R8].

[27] *See, e.g.*, Lieber, *supra* note 33; Joseph Pisani, *Coming to Store Shelves: Cameras That Guess Your Age and Sex*, AP NEWS (Apr. 23, 2019), https://apnews.com/bc0080f3cf4f4eae9f886ec7dfcd5235 [https://perma.cc/4P7M-MCKJ].

[28] *See* David Oliver, *Facial Recognition Scanners Are Already at Some US Airports. Here's What to Know*, USA TODAY (Aug. 16, 2019, 11:40 AM), https://www.usatoday.com/story/travel/airline-news/2019/08/16/biometric-airport-screening-facial-recognition-everything-you-need-know/1998749001/ [https://perma.cc/8SEL-X3V6].

[29] *See Facial Recognition Comes to the Cruise Industry*, MARITIME EXECUTIVE (Apr. 18, 2019), https://www.maritime-executive.com/article/facial-recognition-comes-to-the-cruise-industry [https://perma.cc/H2R4-HQZ6].

[30] *See, e.g.*, Tom Chivers, *Facial Recognition…Coming to a Supermarket Near You*, THE GUARDIAN (Aug. 4, 2019, 4:00 AM), https://www.theguardian.com/technology/2019/aug/04/facial-recognition-supermarket-facewatch-ai-artificial-intelligence-civil-liberties [https://perma.cc/9GFK-KDV5]; Melissa Hellmann, *When Convenience Meets Surveillance: AI at the Corner Store*, SEATTLE TIMES (Jun. 30, 2019, 6:00 AM), https://www.seattletimes.com/business/technology/when-convenience-meets-surveillance-ai-at-the-corner-store/ [https://perma.cc/67YH-27J3].

venues,[31] banks,[32] and gyms[33] utilize the technology for convenience in lieu of ticketing, entry systems, and service access points.

Many of these entities have gone beyond simple identification to predicting affect and mental state. For example, some schools have deployed AI technology that can monitor students' level of attentiveness and can report that information to the teacher in real time.[34] Affectiva, an AI surveillance company, is developing a technology that can monitor a driver's "emotional and cognitive state" in order to detect distracted or drowsy driving;[35] the technology could easily be used by rideshare apps to flag potential disputes with riders. Similarly, Airbnb developed an AI-powered "trait analyser" that analyzes social media and public records data to make sweeping conclusions about whether a potential guest is a psychopath.[36]

The foregoing illustrates the shocking pace at which AI surveillance is increasingly being used throughout public accommodations. Corporations and governments alike are fine-tuning a data-intensive infrastructure to collect and observe our every movement and expression in public institutions. Soon, AI surveillance will enable seamless tracking of individuals across public accommodations. The consequences of this dizzying, seemingly unchecked proliferation are already being seen in countries like China, which employs around 170 million CCTV cameras nationwide.[37] Many of the cameras use AI surveillance from concealed aerial vantage points to spot a person in a crowd

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[31] *See* Jacob Kastrenakes, *Ticketmaster Could Replace Tickets with Facial Recognition*, VERGE (May 7, 2018, 6:41 PM), https://www.theverge.com/2018/5/7/17329196/ticketmaster-facial-recognition-tickets-investment-blink-identity [https://perma.cc/TLC7-LLQX].

[32] *See* Penny Crosman, *Will Banks Get Caught Up in Facial Recognition Backlash?*, AM. BANKER (Feb. 18, 2020, 3:47 PM), https://www.americanbanker.com/news/will-banks-get-caught-up-in-facial-recognition-backlash [https://perma.cc/LVM4-FM8R].

[33] *See* Sarah Morse, *Gyms Are Using Tech to Track You in Unexpected Ways*, MEDIUM (Jun. 15, 2017), https://medium.com/thrive-global/gyms-are-using-tech-to-track-you-in-unexpected-ways-2eaaa147fa06 [https://perma.cc/XX5E-N3Y9].

[34] *See, e.g.*, Paula Ebben, *Catholic Memorial Students Use Headbands to Harness Brainpower*, CBS BOSTON (Dec. 16, 2019, 5:35 PM), https://boston.cbslocal.com/2019/12/16/catholic-memorial-brainco-headset-technology [https://perma.cc/KJ6J-AF3H].

[35] Eric Walz, *Affectiva Launches Automotive AI Software to Track the Emotional State of Passengers*, FUTURECAR (Mar. 21, 2018, 11:54 AM), https://www.futurecar.com/2057/Affectiva-Launches-Automotive-AI-Software-to-Track-the-Emotional-State-of-Passengers [https://perma.cc/2KM4-SXQD].

[36] James Bourne, *Airbnb Uses AI-enabled Trait Analyser to Check if its Customers Are Psychopaths*, AI NEWS (Jan. 9, 2020), https://artificialintelligence-news.com/2020/01/09/airbnb-uses-ai-enabled-trait-analyser-to-check-if-its-customers-are-psychopaths [https://perma.cc/2MSD-MZJ3].

[37] *Id.*

of thousands and identify them by their gait alone.[38] China's social credit system utilizes this extensive surveillance data in order to rank them and consequently restrict where they can live, travel, study, and work.[39] China's AI surveillance has also been used in furtherance of human rights abuses and arbitrary detention of Muslim minority groups like the Uighurs and Kazakhs.[40]

In addition, the global COVID-19 outbreak has fueled the rise of AI surveillance and tracking. Russia, China, and Israel have used the technology to assess contagion risks and enforce quarantine orders.[41] One Chinese firm developed technology capable of detecting body temperature and faces partially obscured by masks. [42] The U.S. government is considering partnerships with companies like Google and Facebook in order to use personal data to track and contain COVID-19 infections.[43] Once this AI-surveillance infrastructure is installed, it is hard to imagine that the parties in control would proactively dismantle it in a post-pandemic world. Extrapolating from the current state of affairs paints a bleak picture of a world in which principles of privacy are severely degraded.

II. THE CHALLENGES OF ANTIDISCRIMINATION LAW

The use of AI surveillance in places of public accommodation necessarily implicates antidiscrimination law.[44] Algorithmic decision-making is wrought with problems of bias and unfairness; accordingly, some have advocated employing existing antidiscrimination frameworks to analyze data injustice.[45] Yet, Professor Kimberlé Crenshaw argues that antidiscrimination

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[38] Anthony Cuthbertson, *China Invents Super Surveillance Camera That Can Spot Someone from Crowd of Thousands*, INDEPENDENT (Oct. 2, 2019, 6:40 PM), https://www.independent.co.uk/life-style/gadgets-and-tech/news/china-surveillance-camera-facial-recognition-privacy-a9131871.html [https://perma.cc/U6CF-2LBA].

[39] *Id.*

[40] Zak Doffman, *China's 'Abusive' Facial Recognition Machine Targeted by New U.S. Sanctions*, FORBES (Oct. 8, 2019, 3:24 AM), https://www.forbes.com/sites/zakdoffman/2019/10/08/trump-lands-crushing-new-blow-on-chinas-facial-recognition-unicorns/#2c0ceb38283a [https://perma.cc/BT46-5LQR].

[41] Josephine Wolff, Opinion, *How to (Carefully) Use Tech to Contain the Coronavirus*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/opinion/coronavirus-privacy-phone-data.html [https://perma.cc/YJ4U-F3YR].

[42] Tony Romm, Elizabeth Dwoskin & Craig Timberg, *U.S. Government, Tech Industry Discussing Ways to Use Smartphone Location Data to Combat Coronavirus*, WASH. POST (Mar. 17, 2020, 9:15 PM), https://www.washingtonpost.com/technology/2020/03/17/white-house-location-data-coronavirus/ [https://perma.cc/HG83-TJDN].

[43] Wolff, *supra* note 50.

[44] *See* Hoffmann, *Fairness*, *supra* note 21, at 900.

[45] *See, e.g.*, *id.* at 900–01 (discussing concerned experts' approval of using the antidiscrimination framework as a safeguard against data injustice). *But see id.* at 901

discourse is "fundamentally ambiguous" and can be used to justify both restrictive and expansive approaches to antidiscrimination.[46] The prevailing antidiscrimination framework, which she terms the "restrictive view," unduly emphasizes procedural fairness over egalitarian outcomes, prioritizes deterrence over structural repair, and limits judicial remedies to addressing only future wrongdoing.[47] In contrast, the less-prevalent "expansive view" of antidiscrimination law progressively treats equality not as a process but as the result itself.[48] Modern antidiscrimination law reflects elements of both approaches, but its failure to fully embrace the expansive approach leaves glaring holes in its efficacy as a tool to remedy racial injustice in America.[49]

After the passage of civil rights laws in the 1960s, Americans were convinced that enough had been done to achieve racial equality since formal barriers were removed.[50] Yet, institutions continue to disregard the needs of historically-marginalized people. Antidiscrimination law cannot provide effective relief because it limits itself to notions of fault and causation, disadvantages between social groups without context, and allocation of goods.[51] Since enforcement of antidiscrimination law requires engaging with this restrictive vision of civil rights,[52] using current antidiscrimination discourse to limit the discriminatory impact of AI surveillance in public life is not only futile but also potentially devastating.[53]

In studying how antidiscrimination law fails to protect against the pernicious threats of AI surveillance, this Part will examine antidiscrimination law through a critical race theory lens. Part II.A will describe the restrictive and expansive views of antidiscrimination and give examples of how the Supreme Court has incorporated principles from each view into its decisions. Part II.B will describe how modern antidiscrimination law, a combination of the two competing views, necessarily fails to achieve justice.

A. Courts interpret antidiscrimination law using two competing views.

Professor Kimberlé Crenshaw describes the tension underlying the definition of equality in antidiscrimination law as a conflict between its stated

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(discussing how past application of antidiscrimination frameworks was ineffective to bring about structural change and social justice).

[46] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335, 1341–42 (1988).

[47] *Id.* at 1331, 1341–42 (1988).

[48] *Id.* at 1341–42.

[49] *See. e.g., id.*

[50] *See id.* at 1347–48.

[51] Hoffmann, *Fairness*, *supra* note 21, at 900.

[52] Crenshaw, *supra* note 53, at 1346.

[53] *See infra* Part III.

goals—rejecting white supremacy and committing to eradicating Black subordination.[54] Before civil rights reforms, Black people were formally subordinated both symbolically and materially by the state.[55] After the reforms, society decided that equality was obtained: they interpreted the removal of those formal barriers and symbols of subordination as the adoption of racial equality.[56] Part II.A.1 will describe the restrictive view adopted by courts that saw the objective of antidiscrimination law as the rejection of a formal system of racial domination.[57] Contrarily, Part II.A.2 will detail the expansive view, which interpreted the reforms as a step to eradicate the conditions of inequality.[58]

1. The restrictive view limits the objectives and mechanisms of antidiscrimination law.

The Supreme Court's antidiscrimination jurisprudence can be traced back to its decision in *Brown v. Board of Education*, a landmark decision that ended formal segregation in public schools.[59] In *Brown I*, the Court addressed procedural inequality by removing barriers to education, which they described as the "very foundation of good citizenship."[60] *Brown II*, a subsequent decision discussing how courts should provide relief for the constitutional violation identified in *Brown I*, addressed substantive equality by requiring implementation of an integrated school system "with all deliberate speed" under the Equal Protection Clause.[61] However, widespread segregationist opposition responded to *Brown* by strategically obstructing efforts to eradicate racial inequality.[62] And in its own attempt to remedy racial discrimination, the Court compromised with segregationists rather than guaranteeing equality

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[54] Crenshaw, *supra* note 53, at 1336. Professor Crenshaw identifies two goals of antidiscrimination law as the (1) "rejection of white supremacy as a normative vision" and (2) "societal commitment to the eradication of the substantive conditions of Black subordination." *Id.*

[55] *Id.* at 1378.

[56] *Id.*

[57] *See infra* Part II.A.1.

[58] *See infra* Part II.A.2.

[59] *See* Brown v. Bd. Of Educ., 347 U.S. 483 (1954); Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 371 (2008) [hereinafter Powell, *Schools*].

[60] *See Brown*, 347 U.S. at 493 [hereinafter *Brown I*]. *Brown I* held that "separate but equal" segregated public school systems were unconstitutional under the Equal Protection Clause of the 14th Amendment. *Id.* at 495. *See also* Powell, *Schools*, *supra* note 68, at 391–92.

[61] Powell, *Schools*, *supra* note 68, at 392, n.101 (citing Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 300–01 (1955) [hereinafter *Brown II*]).

[62] Katie R. Eyer. *The New Jim Crow is the Old Jim Crow*, 128 YALE L.J. 1002, 1024, 1027 (2019).

through integration, thereby restricting the objectives and mechanisms of antidiscrimination law.[63]

While common narratives view opponents to *Brown* as unidimensional—Southern whites motivated by racial animus—historians have made significant efforts to uncover the breadth and diversity of the moderate segregationist opposition to *Brown*, which has been erased from the popular collective memory.[64] Some opponents responded with violence out of racial animus, but many others[65] responded not with violence but with a sincere belief that segregation was reasonable and promoted harmony between races.[66] Those "moderates" did not channel the raw racial animus used to terrorize Black people during the Civil Rights era but rather argued, for example, that violence and criminality were more common among Black people because the Black community possessed different moral beliefs.[67] The moderates also suggested that desegregation would decrease the quality and quantity of available goods and services, an argument that was successful at not only winning over the South but also influencing the North.[68]

The moderates were essential in obstructing *Brown*,[69] because they deployed theories of colorblindness and tokenism strategically.[70] The strategies used were not new. To circumvent pre-*Brown* antidiscrimination

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[63] *Id. at* 1043–44. *See also* Powell, *Schools*, *supra note* 68, at 392.

[64] Eyer, *supra* note 71, at 1023–24.

[65] *Id.* at 1024. Historical accounts show that the latter "moderate segregationist" belief dominated the viewpoints of elected Southern officials. *Id.*

[66] *Id.* at 1026.

[67] *Id.* at 1027, 1029–30. Another justification segregationists cited was that because African American children are allegedly academically incapable, they cannot perform in integrated schools. *See id.* at 1029–30. This assumption was shared across spheres of public life and across party lines as "Democrats and Republicans in the 1960s and 1970s paired federal assistance to urban neighborhoods of color with surveillance, militarized policing, harsh sentencing laws, and prison expansion, based on shared assumptions of innate black criminality." Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 14–15 (2019).

[68] Eyer, *supra* note 71, at 1029–30 ("Many in the North, like those in the South, stereotyped African American children as academically incapable and unprepared and stereotyped the broader African American community as permeated with violence, criminality, and questionable values. So too many in the North viewed their own "entitlements" as homeowners and parents as being unfairly challenged by efforts to address segregation and discrimination.").

[69] *See id.* at 1026, 1030–31 ("Such 'moderates' were so successfully obstructionist that only tiny numbers of African American students were attending schools with whites in many Southern states.").

[70] *Id.* at 1027. Tokenism is "the policy or practice of making only a symbolic effort (as to desegregate)." *Tokenism*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/tokenism (last visited May 31, 2020) [https://perma.cc/NQ2L-RWE7].

measures, the South used "colorblind" Jim Crow laws such as the poll tax to disenfranchise Blacks.[71] At the time, intentional discrimination could not be used as a basis for striking down laws, so Southern politicians were open about their motive to disenfranchise the Black community through facially neutral laws. [72] Moderate segregationists agreed that "colorblindness" was the standard to resist *Brown*. For example, they passed pupil placement laws that required Black students to pass onerous testing and gain administrative approval—both of which fell under the vast discretion of racist institutions—before transferring to a newly desegregated school. [73] Though courts eventually required the South to implement far-reaching remedies to address its history of explicit discrimination under Jim Crow, the North's colorblind Jim Crow policies evolved to uphold segregation and discrimination while continuously denying that they ever existed.[74]

The restrictive view of antidiscrimination law came to dominate American society and embodied the following principles: (1) the objective of antidiscrimination law is to correct discrete, particularized harm; (2) courts have no role in redressing harms from America's racist past; (3) equal outcomes are not important as long as there is equality in process; (4) even if there are violations of proscribed discriminatory practices, the violations must "be balanced against, and limited by, competing interests of white workers—even though those interests were actually created by the subordination of Blacks."[75]

Just as the Civil Rights Cases rendered the Civil Rights Act of 1875 dead-letter law, the Court ignored "the badges and incidents of slavery" that once anchored antidiscrimination law and took a familiar rhetorical posture in adopting moderate segregationist viewpoints shortly after *Brown*. [76] In

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[71] Eyer, *supra* note 71, at 1033.

[72] *Id.*

[73] *See id.* at 1035.

[74] *See id.* at 1037–38. Many Northern jurisdictions denied their schools were ever segregated and thus affected by *Brown*, and yet they explicitly had maintained segregated schools by "drawing district lines, strategically siting new school buildings, busing children, and assigning teachers." *Id.* at 1038. Governments used redlining to make sure that minority residential communities remained separate and distant under the guise of "colorblindness"—the result is racially separate neighborhoods and schools without any explicit Jim Crow laws on the books. *Id.*

[75] Crenshaw, *supra* note 55, at 1342; *see* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–24 (1980) (discussing Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (explaining that achieving true equality for Blacks requires "the surrender of racism-granted privileges for whites," so courts and policymakers have eliminated remedies for racial discrimination when it threatens enjoyment of those privileges)).

[76] *See* Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS U. PUB. L. REV. 255, 277 (2012) [hereinafter Powell, *New*

Milliken v. Bradley, the Court held that although an official gubernatorial policy racially segregated the Detroit public school system and the districts around it, the *Brown* decision did not authorize federal courts to impose racial balance among the districts without first finding evidence of de jure segregation in each school district.[77] In doing so, *Milliken* "constitutionalizes process over substantive results": The remedy offered in *Brown*—the opportunity to attend integrated schools—is limited to only within the district lines where de jure segregation is found.[78] Thus "[d]iscrimination is not viewed as a manifestation of structural inequality or systemic bias; rather, discrimination is discrete and particularized."[79]

The Court's rejection of the vision for substantive equality in *Milliken* allowed it to deliver a killer blow in *Washington v. Davis*, where the Court concluded that the disproportionate number of Black candidates who failed their police cadet examination is rational because the absence of discriminatory intent indicates that they all had equal opportunity.[80] The reasoning was that formal barriers to equality in process were removed with Civil Rights legislation, and colorblind policies served only to further ensure equality, so "differences in outcomes between groups would not reflect past discrimination but rather real differences between groups competing for societal rewards."[81]

Furthermore, as exemplified in the context of Title VII's disparate-impact doctrine, the Court has shown that when it considers the effects of structural inequality, it weighs those effects against competing interests, though those interests were created by a regime of white supremacy.[82] Under Title VII, which provides a remedy for facially neutral laws that have a discriminatory impact, courts are not required to find discrimination if the defendant successfully proves that the challenged practice is related to the job and consistent with a business necessity, but plaintiffs may still win if there

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Equality]. The Civil Rights Cases imposed a state-action requirement for antidiscrimination claims under the 14th Amendment; it held that the Constitution does not protect against discrimination "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." Civil Rights Cases, 109 U.S. 3, 17 (1883). The Cases held that the 13th Amendment is also an improper Constitutional authority for the Civil Rights Act of 1875 because the Amendment prohibits slavery, not "ordinary civil injury." Civil Rights Cases, 109 U.S. at 24.

[77] Powell, *New Equality*, *supra* note 85, at 279–83; Milliken v. Bradley, 418 U.S. 717, 717, 745 (1974). *See also* Washington v. Davis, 426 U.S. 229, 240 (1976) (quoting Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1983) ("The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action.'")).

[78] Powell, *New Equality*, *supra* note 85, at 278.

[79] *Id.* at 278, 280.

[80] *See id.* at 284–85.

[81] Crenshaw, *supra* note 55, at 1344.

[82] Powell, *New Equality*, *supra* note 85, at 261–62.

exists a less discriminatory alternative.[83] But the Court in *Ricci v. DeStefano*, in its full-throated restrictive review of antidiscrimination law, fashioned yet another near insurmountable barrier for aggrieved plaintiffs.[84]

Ricci involved a firefighter-promotion process, which included written and oral exams, that found no eligible African-American, and only two Hispanic, candidates for promotion.[85] The City of New Haven threw out the exam results due to possible Title VII liability for the statistical disparity, and adversely affected white and Hispanic firefighters subsequently sued the City. [86] The Court held that the City's actions actually intentionally discriminated against eligible firefighters on the basis of race without disparate impact liability having a "strong basis in evidence," and thus the City's dismissal of the exam results was not justified.[87] In doing so, the Court presumed that race-conscious remedies against the present day effects of past discrimination are illegal as long as they procedurally undermine the ability of others to secure their interests in the workplace. [88] *Ricci*, along with *Washington* and *Milliken*, epitomize how the restrictive view severely limits the extent to which antidiscrimination law can repair structural inequality.

2. The rarely used expansive view provides a hopeful vision of how antidiscrimination law can remedy structural inequality.

A broad interpretation of *Brown* is rooted in, and has created, an expansive view of antidiscrimination law. The principles of this view are: (1) equality is measured by outcomes and real consequences; (2) the remnants of systemic oppression must be identified and removed; and (3) courts should be used actively to eliminate the effects of systemic oppression.[89] Although the majority of decisions retreated to the segregationist framework of colorblindness and tokenism, the expansive viewpoint has appeared in antidiscrimination jurisprudence.

According to this broader interpretation, *Brown II* held that integration is required to meet the Fourteenth Amendment's Equal Protection guarantee because if *Plessy*'s separate but equal standard is inherently unequal,[90] then the substantive remedy is to abolish the segregated school system as a symptom of that inequality.[91] Dr. Martin Luther King, Jr. described the

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[83] Barocas & Selbst, *supra* note 24, at 701.
[84] Powell, *New Equality*, *supra* note 85, at 310–16.
[85] Ricci v. DeStefano, 557 U.S. 557, 561–66 (2009).
[86] *Id.*
[87] *Id.* at 580–85.
[88] Powell, *New Equality*, *supra* note 85, at 310–312.
[89] *See* Crenshaw, *supra* note 55, at 1341.
[90] Brown I, 347 U.S. at 495 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).
[91] Powell, *Schools*, *supra* note 68, at 392 (citing Brown II, 349 U.S. at 301).

expansive promise of that holding: "although the terms desegregation and integration are often used interchangeably...[w]e must always be aware of the fact that our ultimate goal is integration, and that desegregation is only a first step on the road to the good society."[92]

Even in *Milliken*, Justice Marshall's dissent articulated the expansive view by stressing full integration, or equality as a result, as the goal of the law.[93] He interpreted the Fourteenth Amendment to require examination of the effects of institutional racism on Black lives and subsequently determine whether equality exists.[94] Therefore, according to Marshall, race-conscious, not "colorblind," laws must be used to remedy and eradicate the present day effects of historical racial discrimination because a more neutral stance risks preserving the racist status quo.[95]

In one of its rare expansive view-oriented decisions, *Griggs v. Duke Power Co.*, the Supreme Court acknowledged the role of structural inequality.[96] In that case, requirements to complete high school and pass a standardized test excluded Blacks from higher paying jobs at a power plant, and even though there were no findings of express discriminatory intent, the Court invalidated the exclusionary requirements because there was a missing link to job performance.[97] The Court identified the invidious effects of structural inequality by noting that the history of racism in schools was responsible for the difference in standardized test performance in the first place.[98] Though *Griggs* serves as an example of how the expansive view could be deployed to repair structural inequality, courts and policymakers merged both expansive and restrictive views into a wholly ineffective antidiscrimination framework.

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[92] A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 118 (Melvin Washington ed., 1991).

[93] *See* Powell, *New Equality*, *supra* note 85, at 281.

[94] *See id.*

[95] *Id.*

[96] Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see also* Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality after* Ricci *and* PCS, 16 MICH. J. GENDER & L., 397, 399 (2010) (defining structural inequality) ("[S]tructural inequality refers to existing conditions of inequality that are not directly attributable to a specific past act of governmental discrimination that would give rise to a right to race-conscious relief under the Equal Protection Clause. It includes 'the institutional defaults, established structures, and social or political norms that may appear to be . . . neutral, non-individual focused, and otherwise rational, but that taken together create and reinforce' segregation and inequality."); Lewis v. City of Chicago, Ill., 560 U.S. 205, 210–13 (2010) (emphasizing the Court's active role in remedying effects of discrimination); Powell, *New Equality*, *supra* note 85, at 328–29 (discussing Lewis v. Chicago).

[97] *See* Powell, *New Equality*, *supra* note 85, at 294; Griggs, 401 U.S. at 429.

[98] *See* Powell, *New Equality*, *supra* note 85, at 294; Griggs, 401 U.S. at 429.

B. Antidiscrimination law is an inappropriate vehicle to remedy structural inequality.

Contemporary antidiscrimination law, a combination of both the expansive and restrictive views, uses equal opportunity rhetoric to decide whether institutional change is required. Part II.B.1 will discuss how equal opportunity rhetoric dominates the current legal discourse. Part II.B.2 will specify how the rhetoric of equal opportunity creates a self-defeating antidiscrimination regime. The resulting legal framework places too much importance on assigning fault, reimagines discrimination as the manifestation of disadvantage, and focuses on the distribution of goods instead of dignitary needs.

1. Underlying antidiscrimination law is the rhetoric of equal opportunity.

General societal understanding, unlike scholarship, does not differentiate between multiple views of antidiscrimination. Instead, it has "accommodated and obscured contradictions that led to conflict, countervision [sic], and the current vacuousness of antidiscrimination law."[99] At the forefront is "the rhetoric of equal opportunity," which dismantles the potential for an expansive interpretation of *Brown* and antidiscrimination generally.[100] Professor Crenshaw puts it bluntly: "the very terms used to proclaim victory contain within them the seeds of defeat."[101]

The myth in antidiscrimination jurisprudence—that Civil Rights-era legislation established a new "color-blind society" offering equal opportunity to all—obscures the history of oppression used to build that society.[102] Institutions that merely promote equal opportunity theoretically meet the legal standard of equality, which is tied to the narrow view of equality as a process, instead of a result, and constitutionalized by the Court in *Davis*.[103]

Equal opportunity rhetoric limits application of the law to removal of formal barriers instead of a probing deconstruction of structural inequality.[104] Even though removal of those barriers was meaningful,[105] the Civil Rights Movement was coerced into accepting the rhetoric to secure survival,[106] while the judiciary became free to use equal opportunity language to reduce their

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[99] *See* Crenshaw, *supra* note 55, at 1346; Powell, *Schools*, *supra* note 68, at 412–16.
[100] *See* Crenshaw, *supra* note 55, at 1346.
[101] *Id.* at 1347.
[102] *Id.* at 1346–47.
[103] *See id.* at 1347.
[104] *See id.*
[105] *See id.* at 1348.
[106] *See id.* at 1384–85.

commitment to racial equality.[107] Thus, codified in antidiscrimination law is the assumption of a meritocratic system, which necessarily renounces present day effects of past discrimination.[108]

2. Equal opportunity rhetoric makes it legally impossible to achieve equality.

First, to receive relief for discrimination, the law requires blameworthy individuals who caused an injury.[109] Reflecting the theoretical shift towards colorblindness, the focus on fault removed any contextual understanding of discrimination.[110] If discrimination cannot be traced to a discrete, individualized action, or if individual perpetrators cannot be found, then the law is unavailing.[111] Because this doctrinal obstacle is likely a natural result of moderate segregationist thinking—and historians have shown that opponents of racial equality thought they were acting on fundamental truths instead of racial animus[112]—a perpetrator-based logic is doing exactly what it is meant for: to protect segregationists from legal culpability.[113]

Second, the law reduces the question of discrimination to whether a single group has been disadvantaged.[114] The problem with this is twofold: the law produces social categories without accounting for intersectionality, and it focuses on disadvantage without examining the advantages created by, and for, the privileged group.[115] To the first point, as Professor Anna Lauren Hoffmann interprets Crenshaw: "Black women are vulnerable to discrimination not merely by virtue of being Black women, but because the law's single-axis thinking explicitly produces vulnerabilities for those, who like Black women, are multiply-oppressed."[116] To the second point, the focus on disadvantage ignores the creation of privilege, which is used in turn to subordinate vulnerable groups.[117] This was made apparent in *Milliken*, where the Court's narrow interpretation of disadvantage limited its inquiry to the existence of de jure segregation and led them to ignore the structural inequality

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[107] *See id.* at 1348.
[108] *See id.* at 1380.
[109] Hoffmann, *Fairness*, *supra* note 21, at 903–04.
[110] *Id.* (citing Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978)).
[111] *Id.*
[112] *See* discussion *supra* Part II.A.1.
[113] *Id.*
[114] *Id.* at 905.
[115] *Id.* at 905–06.
[116] *Id.*
[117] *Id.* at 906.

pervasive in the school system.[118] As a result, the moderate segregationist logic that motivated policies and preserving privilege for white people continued to be "further submerged in popular consciousness" under the guise of colorblindness.[119]

Third, the law focuses on distributive justice, which fails to account for the structures and social attitudes that control how goods—rights, opportunities, and resources—are distributed.[120] The focus on distribution is ineffective: it has not worked to stop violence against people of color or reduce racial wealth gaps, for example.[121] That mere distribution of goods can remedy discrimination also works maliciously to promote further discrimination: courts distribute goods in a way that protects white interests and delegitimizes systemic oppression. Evidenced by the Court's bolstering of the business necessity defense in *Ricci*, [122] white race consciousness preserves the legitimacy of the free market, even in the face of inequality.[123] Courts use equal opportunity rhetoric to conjure a formal dedication to equality but simultaneously justify the reinforcement of oppressive structural inequalities through the false notion that the market is an impartial judge.[124] Then, after all the goods have been distributed, Crenshaw summarizes the legal conclusion when there is an unequal outcome: "if Blacks are on the bottom, it must reflect their relative inferiority."[125] An antidiscrimination regime used to regulate AI surveillance would rely on the dangerous principles outlined above to make equality similarly impossible in that context.

III. ANTIDISCRIMINATION LAW'S FAILURES IN PUBLIC ACCOMMODATIONS

Antidiscrimination law fails to fully address the issues presented by extensive AI surveillance in places of public accommodation. The technology obscures the mechanisms used to search for perpetrators, exacerbates

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[118] *See* discussion *supra* Part II.A.1.
[119] Crenshaw, *supra* note 55, at 1379.
[120] *See* Hoffmann, *Fairness*, *supra* note 21, at 907.
[121] *Id.* at 908. Long after the Civil Rights Movement, police torture of suspects is routinely deployed to confirm the presumed criminality of Blacks. *See* Roberts, *supra* note 76, at 24, 27 ("Law *enforcement* continues to enforce the logic of slave patrols, to view black people as a threat to the security of propertied whites, and to contain the possibility of black rebellion.").
[122] *See* discussion *supra* Part II.A.1.
[123] Crenshaw, *supra* note 55, at 1380.
[124] *See id.*
[125] *See id.*

oppressive norms beyond repair, and reinforces the lie that equality is merely tied to the equal distribution of goods and rights.

The current discussion around AI surveillance technology focuses on the harm of inaccurate results that might cause innocent people to be put on "government watchlists, deprived of due process in court, [and] prevented from accessing places they should be allowed to enter."[126] Furthermore, because false positives and false negatives would especially discriminate against people of color, the technology should be banned even under contemporary antidiscrimination law.

Even if AI surveillance technology produced accurate results, contemporary antidiscrimination law still does not afford protection because its restrictive view necessarily requires some coherent articulation of an unfair process. With AI surveillance, the mechanism that searches for individual perpetrators is neither purely a human nor a machine, but rather a joint, blended effort that works to uphold discriminatory social structures.[127] Discrimination litigation around AI surveillance inevitably will replicate the *Milliken* Court's finger-pointing contest that only offers remedies to victims if cause-and-effect can be easily ascribed to individuals under particular fact patterns.[128] Presently, there is no adequate liability regime that can appropriately determine fault in AI development.[129] But more crucially, to blame the unfairness of an algorithm on human error "ignores the structuring role of technology, instead reducing a system's shortcomings to the biases of its imperfect human designers."[130] The "bad data" argument[131] is an extension of this line of thought, as it rejects a structural examination of the relationship between human discrimination and algorithmic discrimination for a suggestion that the results were simply anomalous and can be fixed with a shiny new data set.[132]

Furthermore, developing more "accurate" versions of AI surveillance technology also poses significant threats.[133] Beyond the surveillance

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[126] Evan Selinger & Woodrow Hartzog, *The Inconsentability of Facial Surveillance*, 66 LOY. L. REV. 101, 110 (2020) [hereinafter Selinger & Hartzog, *Inconsentability*].

[127] Hoffmann, *Fairness*, *supra* note 21, at 903–04.

[128] *See id.*; *supra* Part II.A.1.

[129] *See, e.g.*, Frank Pasquale, *Data-Informed Duties in AI Development*, 119 COLUM. L. REV. 1917, 1917–18 (2020).

[130] Hoffmann, *Fairness*, *supra* note 21, at 903–04.

[131] *Id.* at 905. Under this argument, "bias is externalized and transformed into something that, as Linda Hamilton Krieger once put it, 'sneak[s] up on' us from the outside, as opposed to something that is variously, but systematically cultivated and maintained." *Id.* (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, STAN. L. REV. 1161, 1188 (1995)).

[132] *See id.* at 904–05.

[133] *See* Selinger & Hartzog, *Inconsentability*, *supra* note 135, at 111.

nightmare that could infringe on rights to due process, free association, and free expression,[134] the technology could reinforce and reproduce structural violence by attaching historically oppressive norms to facial data, predicting emotional and behavioral states, and making consequential decisions.[135] As more predictions are coded and learned from facial data, more people could be sorted into groups that state and private actors have historically created for exploitative purposes,[136] whether the individual identifies with those groups or not.[137] If technology that perpetuates oppressive norms is presumed "accurate," then *Davis*'s implication that structural discrimination is irremediable could become an invariable truth.[138]

Antidiscrimination law's treatment of distributive justice obfuscates the true, violent potential of AI surveillance. When data is collected and artificially ascribed meaning, it has the potential to do harm immediately upon collection, especially if an individual is defined by or otherwise bound up in the data. The dignitary harm one endures when reduced to a category not of their choosing is called administrative violence,[139] or "erasure,"[140] and for many vulnerable groups increases their risk of physical violence and oppression.[141] For example, the U.S. Census data alone has been used to commit a variety of atrocities against vulnerable groups, such as the internment of Japanese-Americans.[142] These abuses, which Professor Hoffmann refers to as "data violence,"[143] can happen on a massive scale and

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[134] *See id.*
[135] *See id.*
[136] *See id.*
[137] *See id.*
[138] *See supra* Part II.A.1.
[139] *See* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (Duke Univ. Press 2015).
[140] *See* Os Keyes, *The Misgendering Machines: Trans/HCI Implications of Automatic Gender Recognition*, PROC. OF THE ACM ON HUM.-COMPUTER INTERACTION 1, 3–11 (Nov. 2018), https://doi.org/10.1145/3274357 [https://perma.cc/V7G4-W937].
[141] *See id.*
[142] J.R. Minkel, *Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WW II*, SCI. AM. (Mar. 30, 2007), https://www.scientificamerican.com/article/confirmed-the-us-census-b [https://perma.cc/5BQD-NUQ5].
[143] *See* Anna Lauren Hoffmann, *Data Violence and How Bad Engineering Choices Can Damage Society*, MEDIUM (Apr. 30, 2018), https://medium.com/s/story/data-violence-and-how-bad-engineering-choices-can-damage-society-39e44150e1d4 ("'Violence' might seem like a dramatic way to talk about these accidents of engineering and the processes of gathering data and using algorithms to interpret it. Yet just like physical violence in the real world, this kind of 'data violence'… occurs as the result of choices that implicitly and explicitly lead to harmful or even fatal outcomes. Those choices are built on assumptions and prejudices about people, intimately weaving them into processes and results that reinforce biases and, worse, make them seem natural or given.") [https://perma.cc/TV2H-RYPT].

at stunning speeds when aided by even minimal computational power.[144] AI and other algorithm technologies increase this threat proportionally. Meanwhile, when administrations or businesses leverage informational power and subject people to dignitary abuses on a massive scale, courts continue to protect those institutions in order to preserve the legitimacy of the free market, even if it results in unequal distribution of goods or violations of rights.[145]

IV. ABOLISH AI SURVEILLANCE IN PUBLIC ACCOMMODATIONS

Because AI surveillance triggers all of the major landmines of current antidiscrimination discourse, legislatures are ill-equipped to use antidiscrimination law to curb the technology's devastating nature. Indeed, if anything less restrictive than a ban on this technology is implemented, any hope for addressing structural oppression is likely to be erased because of the technology's aforementioned attributes. However, one area where lawmakers could address this issue immediately—with broad support—is an area where AI surveillance is becoming more pervasive and where legal protections for individuals are at their highest: places of public accommodation. Thus, we propose a simple approach: abolish AI surveillance in places of public accommodation.

Places of public accommodation support the ability to access critical social goods, free of prejudice and discrimination; they support the ability to live with dignity and self-respect. The use of AI surveillance to determine who can enter and enjoy these important social institutions is fundamentally incompatible with this proposition. These technologies inherently implicate profiling and discriminatory action, and their use would be a contradiction in terms. The value proposition of AI surveillance is its ability to profile and differentiate by invisible and unaccountable means. Analyzing and classifying the features and patterns of human faces or bodies to make predictions and decisions at scale is how categories like "race," "gender," "ability," "normal," and "dangerous" are constituted and made consequential.

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[144] Infamously, IBM and its subsidiaries provided computational support to Hitler and Nazi Germany's WWII genocide of Jewish people. *See, e.g.*, EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001); Jesse F. Dillard, *Professional Services, IBM, and the Holocaust*, 17 J. INFO. SYS. 1, 2 (2003). Technologies that aid in group classification assist and accelerate genocide, ethnic cleansing, and other eliminationist policies. *See* Jim Fussell, *Group Classification on National ID Cards as a Factor in Genocide and Ethnic Cleansing*, PREVENT GENOCIDE INT'L (Nov. 15, 2001), http://www.preventgenocide.org/prevent/removing-facilitating-factors/IDcards/index.htm#0 [https://perma.cc/SF9E-AKSL].

[145] *See, e.g.*, SANDRA BRAMAN, CHANGE OF STATE: INFORMATION, POLICY, AND POWER 26 (MIT Press 2006).

Antidiscrimination laws must be rectified to account for structural algorithmic harm—both distributive and dignitary. To that end, we posit broad-based prohibitions on AI surveillance in public accommodations.[146] An individual's ability to go about and participate in public life and access basic social institutions should not depend on technological systems that make predictions about who they are, what they feel and think, and what they might do. Such systems should not make important decisions that impact an individual's life and opportunities.

The authors, while participating in the University of Washington School of Law's Technology Law & Public Policy Clinic on the Facial Recognition & AI Policy team, proposed the "AI Profiling Act" in the Washington State House of Representatives in January of 2020 as a jumping-off point for abolishing AI surveillance in public accommodations. House Bill 2644 (the "AI Profiling Act") "prohibits operation or installation of equipment that incorporates artificial intelligence-enabled profiling in any place of public accommodation" and "prohibits the use of artificial intelligence-enabled profiling to make decisions that produce legal effects or similarly significant effects."[147] The bill also declares the use of artificial intelligence-enabled profiling in places of public accommodation and in legally significant decision-making to be a per se unfair and deceptive act in trade or commerce and an unfair method of competition [148] for the purpose of applying Washington's consumer protection act.[149] Ultimately, the AI Profiling Act leverages state antidiscrimination and consumer protection law to effectuate the abolition of AI surveillance in public life.

V. CONCLUSION

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[146] Hartzog & Selinger, *Perfect Tool*, *supra* note 3 ("[W]hen technologies become so dangerous, and the harm-to-benefit ratio becomes so imbalanced, categorical bans are worth considering."); *see also* Stark, *supra* note 11, at 52 ("Facial recognition, simply by being designed and built, is intrinsically socially toxic, regardless of the intentions of its makers; it needs controls so strict that it should be banned for almost all practical purposes.").

[147] *See* H.B. 2644, 66th Leg. Reg. Sess. (Wash. 2020); Washington State Legislature Office of Program Research House Bill Analysis for H.B. 2644, 66th Leg. Reg. Sess. (Wash. 2020); *see also* Khari Johnson, *From Washington State to Washington, D.C., Lawmakers Rush to Regulate Facial Recognition*, VENTUREBEAT (Jan. 19, 2020, 1:09 PM), https://venturebeat.com/2020/01/19/from-washington-state-to-washington-dc-lawmakers-rush-to-regulate-facial-recognition/ ("[T]he AI Profiling Act ... would outlaw the use of AI to profile people in public places; in important decision-making processes for a number of industries; and to predict a person's religious affiliation, political affiliation, immigration status, or employability.") [perma.cc/JS9H-8JSL].

[148] H.B. 2644, 66th Leg. Reg. Sess. § 4 (Wash. 2020).

[149] *See* WASH. REV. CODE §§ 19.86.010–19.86.920 (2021).

People are increasingly being subjected to automated forms of surveillance and classification in order to participate in public life and access basic social goods, services, and opportunities. The use of AI surveillance in important and sensitive social and political contexts, in important decisions that impact people's lives, and in permitting access to opportunities threatens not only the rights, liberties, and proper privileges of individuals, but it also menaces the foundation and supportive institutions of a free democratic state. As such, the widespread deployment of AI surveillance in public accommodations requires urgent attention from lawmakers at all levels of government.

Public life and the essential social institutions that underpin it should not depend upon invisible systems that determine who we are, who we might be, or what we might do. Our policy recommendations resist an "uncritical mirroring of the limits of liberal antidiscrimination discourses [that] risk[] undermining efforts to move beyond talk of 'bad data' and 'bad algorithms' and towards an intersectional commitment to upending the processes by which institutions, norms, [and] systems generate unjust social hierarchies."[150] To that end, we aim to summon the radical spirit of expansive antidiscrimination law to amplify and articulate red lines around AI in public life—not how AI surveillance should be used in public accommodations, but whether it should be used at all.

[150] Hoffmann, *Fairness*, *supra* note 21, at 911.