IS PRIVACY REALLY A CIVIL RIGHT?

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ABSTRACT

Sixty years ago, President Lyndon Johnson signed the Civil Rights Act of 1964. Civil rights laws aimed at curbing discrimination and inequality in federal programs, public accommodations, housing, employment, education, voting and lending faced opposition before the Act and continue to do so today. Nevertheless, a swell of legal scholars, policy analysts and advocacy groups in the United States now assert with favor a vital connection between privacy and civil rights. Historically, civil rights legislation was enacted to combat group-based discrimination, a problem exacerbated by contemporary approaches to personal data collection, artificial intelligence, algorithmic analytics and surveillance. Whether privacy is a civil right, protects civil rights, or is protected by civil rights, the novel pairing of civil rights and privacy rights commends itself. Yet, as we show, the pairing of privacy and civil rights is complex, consequential, and potentially disappointing. Privacy and civil rights have a mixed history of celebrated, but also ambivalent and condemnatory, partnerships. Little direct support for conceptualizing privacy or data protection as a civil right resides in the intricate history of U.S. civil rights laws. Still, civil rights law is a dynamic moral, political and legal concept adaptable to the demands of new justice initiatives. With that in mind, this Article critically examines the implications of legal interventions premised on pairing privacy rights and civil rights. We trace the contentious but paramount ideas of civil rights and privacy rights far back in time, revealing that important conceptual and historical issues muddy the waters of the recent trend freely characterizing privacy rights as civil rights or as rights that protect or are protected by civil rights. We conclude that one can sensibly contend today that privacy rights do and ought to protect civil rights, exemplified by the right to vote and freely associate; civil rights do and ought to protect privacy rights, exemplified by fair housing and employment rights that support material contexts for intimate life; and crucially, that privacy rights are civil rights, meaning that they are aspirational moral and human rights that ought to be a part of society's positive law protections to foster goods that go to the heart of thriving lives and effective civic participation for everyone. By illuminating the remote and recent sources of what we term the "privacy-and-civil-rights" movement and its practical significance, we hope to empower those who pair privacy and civil rights with greater clarity and awareness of context, limitations, and likely outcomes.

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I. INTRODUCTION

Sixty years ago, President Lyndon Johnson signed the monumental Civil Rights Act of 1964.[1] Hard fought and won, the Act was aimed at curbing discrimination on the basis of race, color, religion, national origin, and sex in federal programs, public accommodations, housing, employment, education, and voting. Fueled by the successful enactment of twentieth-century and subsequent civil rights legislation, what might be termed a "privacy-and-civil-rights" movement has taken hold.[2] A swell of legal scholars, policy analysts

1. Pub. L. No. 88-352, 78 Stat. 241.

2. *See generally* Tiffany C. Li, *Privacy as/and Civil Rights*, 36 BERKELEY TECH. L.J. 1265 (2021) (discussing trends advocating privacy or more broadly, data protection, as a civil right). As inspiring the current trend, Li identifies the Civil Rights Act of 1964, the Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2003) (limiting uses of genetic information available to employers and health insurers); the Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (limiting discrimination in employment and public accommodations based on disability status); and the

and advocacy groups in the United States assert with favor a vital connection between civil rights and privacy protection.[3] Hoping to advance public policy combating discriminatory digital data practices, they contend that privacy is a civil right, that privacy protects civil rights, and that civil rights protect privacy.[4] All three claims represent arresting new possibilities for the law, none more so than the contention that privacy or, alternatively, the right to privacy, *is* a civil right standing on par with other rights in the pantheon of American civil rights enshrined in federal legislation starting with the 1964 Act.[5] If privacy is a civil right, it could mean that Americans are entitled to something we currently lack but deserve. We deserve both privacy without discrimination and freedom to enjoy as a matter of law privacies needed for our robust civil participation in society and our human flourishing.[6]

The claims of the "privacy-and-civil-rights" movement have definite appeal. Historically, civil rights legislation was enacted to combat demographic group-based discrimination,[7] a problem exacerbated today by contemporary approaches to personal data collection, use, and sharing, artificial intelligence,

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Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (requiring equal pay for equivalent employment regardless of gender). *Id.* at 1271–72.

3. *See infra* notes 76–90.

4. *See, e.g.*, DANIELLE K. CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE 106–10 (2022) (exploring comprehensive federal approach to intimate privacy as a civil right); Alvaro M. Bedoya, *Privacy as Civil Right*, 50 N.M. L. REV. 301, 305 (2020) (situating privacy and data protection in a civil rights framework); LAW. COMM. FOR C.R. UNDER THE L., ONLINE CIVIL RIGHTS ACT (2023), https://www.lawyerscommittee.org/wp-content/uploads/2023/12/LCCRUL-Model-AI-Bill.pdf (draft privacy and data protection bill includes a "Civil Rights" section prohibiting the use of algorithms that discriminate).

5. Civil Rights Act of 1964, *see supra* note 1. Just as one can say, setting aside philosophical subtleties that *voting* is a civil right or that the *right to vote* is a civil right, one can say that *privacy* is a civil right or that the *right to privacy* is a civil right, meaning roughly the same thing. Here we will speak of privacy as a civil right meaning to include the possibility that the *right to privacy* rather than *privacy* as such is the right in question. *See infra* note 101 and accompanying text.

6. *See* ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 170–76 (2019) (mounting compelling jurisprudential argument that beyond rights grounded in positive laws mandating nondiscrimination, civil rights are aspirational natural rights calling for positive law fostering freedom to participate in civil life and exploit our human capabilities). West did not broach the issue of whether privacy is a civil right.

7. *But see id.* at 178. Professor West cautions against a truncated version of civil rights history, offers an alternative history, and argues that our tendency "to conflate civil rights and the idea of civil rights with antidiscrimination laws" is a mistake.

algorithmic analytics, and surveillance.[8] In a society grown dependent on digital technology, the novel pairing of civil rights and privacy discourses commends itself.[9] However, the idea of privacy as a civil right—or as a right to protect or be protected by civil rights—is more complex, consequential, and potentially disappointing than it likely first appeared. Privacy rights and civil rights have a mixed history of celebrated,[10] but also ambivalent[11] and condemnatory,[12] partnerships. For this reason, we believe pairing them today must not be uncritically presumed right-minded. Moreover, circumspection is called for if, as some suggest, reliance upon civil rights-based legal strategies

8. *Cf.* Press Release, Off. of the Atty. Gen. for the D.C., AG Racine Introduces Legislation to Stop Discrimination In Automated Decision-Making Tools That Impact Individuals' Daily Lives (Dec. 9, 2021), https://oag.dc.gov/release/ag-racine-introduces-legislation-stop (comparing laws for District of Columbia combating digital era discrimination to traditional civil rights laws).

9. *See* BECKY CHAO, ERIC NULL, BRANDI COLLINS-DEXTER & CLAIRE PARK, CENTERING CIVIL RIGHTS IN THE PRIVACY DEBATE 8 (2019), https://d1y8sb8igg2f8e.cloudfront.net/documents/Centering_Civil_Rights_in_the_Privacy_Debate_2019-09-17_152828.pdf (quoting panel remarks by Alisa Valentin, "Privacy is not just transactional. Privacy is a civil right.").

10. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958) (First Amendment associational privacy rights countermand allowing Alabama to demand disclosure of the NAACP's membership list). *See generally*, Anita L. Allen, *First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885 (2012) (arguing that the First Amendment has been a powerful source of privacy protections).

11. *See* Aliyyah Abdur-Rahman, *Capture, Illegibility, Necessity: A Conversation on Black Privacy*, 51 BLACK SCHOLAR 67–72 (2021) ("When Black appears (or is indicated) alongside and in relation to privacy, are we insinuating privacy's merit, its obliteration, its potentiality, its abjuration, its radical remaking or unmaking altogether? . . . Speaking as a person who embodies and navigates the world under the sign and signal of racial blackness, I find extraordinarily painful its inherent publicness and attendant vulnerability to intrusion, surveillance, removal, extermination."); *see* generally Lior Strahilevitz, *Privacy versus Antidiscrimination*, 75 U. CHI. L. REV. 363 (2008) (African Americans may be better off without criminal history record privacy, so that others will not believe it rational to use race as a proxy for criminality).

12. *See, e.g.*, Hannah Arendt*, Reflections on Little Rock*, 6 DISSENT MAG. 45, 52 (1959) ("[T]he realm of privacy—is ruled neither by equality nor by discrimination, but by exclusiveness."). Arendt argued that the privacy rights of White families oppose compulsory public-school desegregation. *Cf.* Michael D. Burroughs, *Hannah Arendt, 'Reflections on Little Rock,' and White Ignorance*, 3 CRITICAL PHIL. OF RACE 52–78 (2015) (arguing that "white ignorance" rather than racism better explains Arendt's opposition to federally enforced school desegregation).

potentially suppresses calls for robust community empowerment and self-determination.[13]

Advocacy for privacy in a civil rights framework must contend with the fact that little direct support for conceptualizing privacy or data protection rights as civil rights resides in the complex history of U.S. civil rights laws.[14] The great mid-twentieth century African American Civil Rights Movement remains a pivotal chapter in the story of the quest for civil rights in the United States,[15] but leading legal historians of the era have had little to say about privacy and data protection.[16] They certainly have not told the story of privacy and data protection in a civil right frame.[17] Historically, the right to privacy was rarely termed a civil right, and it was only occasionally associated with the African American struggle for civil rights.[18] As it was happening, the general public was kept from knowledge of the extent to which private and public entities wary of civil rights activism were placing leaders of the Civil Rights

13. Hasan Kwame Jeffries, *What's Old is New Again: Recentering Black Power and Decentering Civil Rights*, 1 J. CIV. & HUMAN RIGHTS 245 (2015). *Cf.* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 15–17 (1992) (expressing skepticism about whether civil rights will ever go far enough to achieve equality for Black people unless they converge with the interests of dominant White people). *But see* PETER H. HUANG, DISRUPTING RACISM: ESSAYS BY AN ASIAN AMERICAN LAW PROFESSOR 60 (2023) (citing Martin Luther King, Jr.'s Speech at Western Michigan University, December 18, 1963, in which he remarked that "There is a need for civil rights legislation on the local scale within states and on the national scale from the federal government.").

14. *See, e.g.*, CHRISTOPHER W. SCHMIDT, CIVIL RIGHTS IN AMERICA: A HISTORY 8–9 (2012) (Africans Americans ambivalent about "civil rights" discourse and "generally avoided, resisted, and sometimes even attacked a term whose primary role . . . was to differentiate rights that government would protect from those it would not.").

15. *See generally* THOMAS C. HOLT, THE MOVEMENT: THE AFRICAN AMERICAN STRUGGLES FOR CIVIL RIGHTS (2021) (historical account of Civil Rights Movement stressing contributions of women and other unsung individuals).

16. *See, e.g.*, MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE 25 (2014) ("NAACP's campaign against racial violence is critical to reframing the long civil rights movement."); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 5–12 (2007) (broad conception of civil rights at play in the 1940s before *Brown*, addressed workers' labor and economic problems as well as ones tied to racial classifications).

17. *But see* legal historian and University of Pennsylvania Carey School of Law Dean and Professor Sophia Lee, who is working on a history of the right to privacy with attention to racial justice issues in the telling. *Cf.* Sophia Z. Lee, *The Reconciliation Roots of Fourth Amendment Privacy*, 91 U. CHI. L. REV. 2139 (2024) (proposing a new history of the right to privacy in a civil liberties and Fourth Amendment frame).

18. *Cf.* WEST, *supra* note 6. West's very comprehensive discussion of the jurisprudence and history of American civil rights did not mention of privacy or data privacy as a possible or actual civil right.

Movement under privacy-invading covert surveillance. A leading civil rights leader, who might in theory have leapt on information privacy as a vital civil rights protectant but did not, was Martin Luther King Jr., who was under constant surveillance by the Federal Bureau of Investigations.[19] When a judge ordered the National Association for the Advancement of Colored People (NAACP) to turn over its sensitive membership list to the state of Alabama,[20] historians relate that Thurgood Marshall—the future Supreme Court Justice and one of the nation's most celebrated civil rights lawyers—urged compliance.[21] Marshall also initially opposed bringing the lawsuit against Alabama that led to a milestone of privacy jurisprudence, *NAACP v. Alabama*.[22] Further illustrating the seeming disconnect between civil rights and privacy rights on the ground in the civil rights era, the renowned early privacy scholar Alan Westin raised concern that the Civil Rights Act of 1964 problematically "produced a requirement for more personal data about individuals" to flow to the government than in the past.[23]

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19. *See* SARAH E. IGO, THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA 228 (2018) (discovery of "a series of covert, illegal FBI surveillance operations trained on dissidents ranging from Martin Luther King junior and the Black Panther Party to anti-war activists and feminist"); MICHAEL MAYER, RIGHTS OF PRIVACY (1972) (FBI admitted wiretapping telephone of M.L. King, Jr.); ALAN F. WESTIN, PRIVACY AND FREEDOM 115 (1967) ("The struggle over segregation and civil rights has prompted considerable electronic surveillance of Negro and white integrationist groups by some private segregationist organizations in southern states."); *see also id.* at 132 ("[P]olice officials commit trespass into homes, apartments, offices and businesses, without judicial warrants authorizing such entries, in order to install wiretaps and room microphones.").

20. *See generally* Anita L. Allen, *Associational Privacy and the First Amendment:* NAACP v. Alabama*, Privacy and Data Protection*, 1 ALA. C.R. & C.L. L. REV. 1, 6 (2011) (membership list was too sensitive for disclosure because "civil rights advocates faced death, injury, and loss of property or jobs").

21. *See* KEN MACK, REPRESENTING THE RAGE: THE CREATION OF THE CIVIL RIGHTS LAWYER 260 (2012, Kindle ed.) (top NAACP civil rights lawyers Robert Carter and Thurgood Marshall clashed over whether the NAACP should comply with Alabama's request for its membership list or bring a lawsuit, with Marshall urging compliance); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 258–59 (1998) (because of his success advancing civil right through the courts, Marshall worried defying a judicial order would appear to be disrespect for the courts and therefore urged his colleagues to surrender the NAACP membership list to Alabama authorities as commanded).

22. *See* MACK, *supra* note 21; NAACP v. Alabama, 357 U.S. 449 (1958) (holding that the First Amendment protects associational privacy of members of a leading civil rights organization).

23. *See* WESTIN, *supra* note 19, at 161 (The Act expanded the reach of government data surveillance because it, for example, requires the federal government to obtain personal voter

Still, "civil rights" is a dynamic moral, political and legal concept validated by the Supreme Court,[24] and it is often adaptable to the demands of new justice and legal initiatives.[25] Protecting the interests of vulnerable communities adversely affected by the invasive and discriminatory data practices that mar the digital economy is precisely such a new justice initiative. Interventions aimed at protecting the privacy and related data protection interests of vulnerable groups are of great importance.[26] With that in mind, we critically examine the results so far of interventions premised on privacy as a civil right or a right protecting or protected by civil rights. We believe important conceptual and historical issues muddy the waters of the recent trend characterizing privacy and the right to privacy as civil rights. Building on earlier efforts by other scholars, we wade in, aiming to illuminate the sources and practical significance of what we will refer to as the "privacy-and-civil-rights" movement.

Our aims grow increasingly urgent. The data privacy of vulnerable populations, of which African Americans are but one example, is threatened by algorithmic bias and other group-based discrimination in business and governmental data practices.[27] Despite the current rhetorical elevation of privacy to a civil rights concern, data protection legislation enacted on the state

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registration information, racial data on employees to show compliance with equal opportunity legislation, and pupil data pertinent to school desegregation).

24. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (unanimous holding that Congress has the authority under the Commerce Clause to ban racial segregation in restaurants and other places of public accommodation affecting interstate commerce).

25. *Cf.* Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 759–60 (2013) (starting 35 years ago, the environmental justice movement invested heavily in establishing Title VI as an effective tool for achieving what are now deemed environmental civil rights such as freedom from toxic exposures). *See* Barbara J. Evans, *Commentary, HIPAA's Individual Right of Access to Genomic Data: Reconciling Safety and Civil Rights*, 102 AM. J. HUM. GENETICS 5, 5–8 (2018); Barbara J. Evans, *The Genetic Information Nondiscrimination Act at Age 10: GINA's Controversial Assertion That Data Transparency Protects Privacy and Civil Rights*, 60 WM. & MARY L. REV. 2017, 2109 (2019) (characterizing the Genetic Information Nondiscrimination Act of 2008 as a civil rights statute).

26. *Cf.* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1956–57 (2013) (discrimination jeopardizing constitutional and civil rights is an important risk of privacy-invading surveillance).

27. *See* Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J. FORUM 907, 950 (2022) (African Americans are vulnerable in the digital economy to discriminatory oversurveillance, exclusion, and predation); *see also* Christopher Muhawe, *The (In)visible Immigrant's Privacy*, 9 GEO. L. TECH. REV. (forthcoming May 2025).

level—sometimes with nominal anti-discrimination provisions included to protect consumer data privacy—continues to draw criticism as lax and ineffective.[28] On the national level, comprehensive data protection legislation, with or without civil rights provisions, has defied enactment altogether.[29] Provisions attacking algorithmic bias under the rubric of "civil rights" were stripped from a recent bill introduced in the House of Representatives.[30] While at times the "privacy-and-civil-rights" perspective promoted by data privacy advocates seems to hold promise as a strategy for advancing strong state and federal data protection,[31] emphasizing civil rights is politically fraught. As it was sixty years ago, when the 1964 Civil Act was passed with a struggle, and a hundred and sixty years ago, during the Reconstruction era, when federal civil rights statutes were enacted but struck down,[32] "civil rights" discourse is still subject to conservative backlash,[33] and the language of privacy remains mired in partisan politics.[34] Indeed the movement may have peaked. It is telling that an open letter dated June 12, 2024, submitted to the Federal Trade Commission by "30+ civil rights organizations," in response to proposed

28. *See* Suzanne Smalley, *State Privacy Laws Have Been Crippled by Big Tech, New Report Says*, RECORD (Feb. 1, 2024), https://therecord.media/state-privacy-laws-big-tech-lobbying-report (advocacy group report describes state laws as "lax"). The *American Privacy Rights Act of 2024*, H.R. 8818, 188th Cong., contained civil rights provisions when introduced, and nondiscrimination provisions appeared in state laws enacted or introduced in California, Colorado. Virginia, Washington, DC., Maryland and Georgia. *Cf.* Ari Ezra Waldman, *Privacy Law's False Promise*, 97 WASH U. L. REV. 773, 773 (2020) (privacy law fails because its requirements are toothless and symbolic).

29. According to Bloomberg Law, twenty states have consumer privacy statutes, and their provisions vary. *Which States Have Consumer Data Privacy Laws?*, BLOOMBERG L. (Sept. 10, 2024), https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/#:~:text=Currently%2C%20there%20are%2020%20states,data%20privacy%20laws%20in%20place. Failed federal bills include the once promising American Data Protection and Privacy Act of 2022, H.R. 8152,117th Cong.

30. *See infra* notes 288–291 and accompanying text.

31. *Cf.* Danielle Keats Citron, *Intimate Privacy in a Post-Roe World*, 75 FLA. L. REV. 1033, 1066 (2023) (exploring comprehensive federal approach to intimate privacy as a civil right).

32. *See infra* Part III, at 161–74.

33. *Cf.* Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-Conservative Backlash to the Civil Rights Movement*, 6 ALA. C.R. & C.L.L. REV. 81, 83 (2015) ("[N]eo-conservative elites used . . . discursive practices to nurture and institutionalize backlash to the civil rights movement," producing tangible victories to the detriment of Black people, other minorities, and poor and working-class White people).

34. *See* Anita L. Allen, *Privacy, Critical Definition, and Racial Justice*, *in* OXFORD HANDBOOK OF APPLIED PHILOSOPHY OF LANGUAGE (Luvell Anderson & Ernie Lepore eds., 2024) (describing even scholarly efforts to define privacy neutrally and objectively as implicating political debates).

rulemaking on commercial surveillance and data security, stressed the data privacy vulnerabilities of women and people of color without actually directly invoking the idea that privacy is a civil right in the text of their letter.[35]

Given the current and historical intonations of civil rights in the United States, and the history of the African American Civil Rights Movement, we ask whether privacy is really a civil right as a way to realistically probe what gains to expect from privacy-and-civil-rights discourse. As a clear positive law matter, neither data privacy nor any other forms of privacy have been fully embraced as a civil right in the United States' core legislation. We consider whether it could be in the current context. This Article shines a light on what it means for privacy to be a civil right (or to protect or be protected by civil rights) and whether one can expect the recent civil rights frame to effectively advance contemporary interests of marginalized groups in equal treatment and freedom from discrimination required by their autonomy and self-determination.

Part II of this Article presents a chronological overview of the sources of the contemporary "privacy-and-civil-rights" movement. We suggest that though the arrival of the movement was in some respect sudden, it was not without inchoate precursors. We show that, within a concentrated ten-year time frame, a wide array of scholars, civil rights organizations, civil society groups, and lawmakers in the United States joined forces and began to characterize privacy either as a civil right, civil rights protectant, or beneficiary of civil rights protection. We credit, among others, Danielle Citron, Mary Anne Franks, and Federal Trade Commissioner Alvaro Bedoya, with prominent roles in popularizing the idea of privacy as a civil right.[36] Other researchers with fresh thoughts about privacy and data protection have concluded that close inspection of the usual ways of thinking about the various forms of privacy reveal that protection from non-discrimination associated with civil

35. Lina Khan, Alvaro Bedoya, Andrew N. Ferguson, Melissa Holyoak & Rebecca Kelly Slaughter, Letter from 30+ Civil Rights Organizations to F.T.C. Commissioners (June 12, 2024), https://www.fightforthefuture.org/news/2024-06-12-letter-30-civil-rights-organizations-call-on-ftc-chair-khan-to-put-privacy-protections-in-place/.

36. *See* BEDOYA, *supra* note 4; Citron, *supra* note 4; Danielle Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

rights requires protecting forms of privacy.[37] Civil rights include access to the polls,[38] public accommodations,[39] public education,[40] employment,[41] housing,[42] and pay equity,[43] and more newly emphasized civil rights, such as disability rights,[44] transgender equity,[45] and environmental safety.[46] We also

37. *See* Li, *supra* note 4 and *infra* Part II, pp. 114–18. *Cf.* ANITA L. ALLEN & MARK ROTENBERG, PRIVACY LAW AND SOCIETY 4–7 (2017) (various forms of privacy protected by constitutional, tort and/or statutory law in the United States include informational, decisional, physical, associational, proprietary and intellectual privacy).

38. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; *see Voting Rights Act (1965)*, NAT'L ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/voting-rights-act ("It outlawed the discriminatory voting practices adopted in many southern states after the Civil War, including literacy tests as a prerequisite to voting."). *Cf.* Ian Vandewalker, *Digital Disinformation and Vote Suppression*, BRENNAN CTR. FOR. JUST. (Sept. 2, 2020), https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression (deliberate efforts through the use of digital and social media discourage specific demographics from voting, often through restrictive voter ID laws, gerrymandering, or misinformation about polling locations and procedure).

39. *Civil Rights Act (1964)*, NAT'L ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/civil-rights-act (prohibiting "discrimination in public places, provided for the integration of schools and other public facilities, and made employment discrimination illegal.").

40. *Id.*

41. *Id.*

42. Fair Housing Act, 42 U.S.C. § 45 (1968) (rendering it illegal to "discriminate in the sale or rental of housing, including against individuals seeking a mortgage or housing assistance, or in other housing-related activities"); *see Fair Housing Rights and Obligations*, DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_rights_and_obligations.

43. Equal Pay Equity Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (providing that no employer "shall discriminate . . . between employees on the basis of sex by paying wages to employees… at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."), *see Equal Pay Act of 1963*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/equal-pay-act-1963.

44. *Guide to Disability Rights Laws*, ADA.GOV., (Feb. 28, 2020), https://www.ada.gov/resources/disability-rights-guide/ ("overview of Federal civil rights laws that ensure equal opportunity for people with disabilities").

45. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 201 (2012) ("Discrimination on the basis of gender identity or expression—encompassing discrimination against transgender people because they are transgender and also discrimination against people of all identities whose appearance or actions do not conform to the gender expectations of those around them—has emerged as a major focus of civil rights reform.").

46. Marianne Engelman-Lado, Camila Bustos, Haley Leslie-Bole & Perry Leung, *Environmental Injustice in Uniontown, Alabama, Decades After the Civil Rights Act of 1964: It's Time for Action*, 44 HUM. RTS. 7, 7–8 (2019) (whether "policies that lead to the disproportionate exposure of people of color to pollution from landfills and other toxic sources [are] a denial of equal protection, which civil rights laws were designed to address.").

consider whether greater definitional and jurisprudential clarity aimed at facilitating scholarship, activism and lawmaking focused on the practical aims of social justice could benefit the movement.

Part III describes the pervasiveness of privacy-related wrongs and the elusiveness of rights denominated as civil rights throughout America's history. We first focus on African American enslavement as a condition of life antithetical to personal privacy, as well as on the post-Civil War Reconstruction and Jim Crow eras. These were the dominant impetus behind major nineteenth and twentieth century federal civil rights legislation combating racial and other forms of discrimination. Divorced from any notion of civil rights pertinent to African Americans, Native Americans, Asian Americans, low-income individuals, and immigrants, the formal recognition of moral and legal rights to privacy emerged in the Gilded Age, as a response to problems of privileged White men and women.[47]

Part IV describes the mid-and-late-twentieth-century developments that propelled recognition of privacy as a global human and civil right. Article 12 of the United Nations Declaration of Human Rights (1948) and Article 17 of the International Covenant on Civil and Political Rights (1966) are presented as significant landmarks adjacent to the Black Civil Rights Movement.[48] We also consider here the diverse ways in which civil rights ideals of non-discrimination and equality intersected with African Americans' privacy and federal constitutional law. Starting in the late 1950s, African Americans began to rely on constitutional privacy doctrines and the federal courts to protect their civil rights activism and address civil rights concerns such as marriage inequality and discriminatory police abuses.[49] Improved wiretapping regulations enacted through the Omnibus Crime Control and Safe Street Acts of 1968 were prompted in part by warrantless surveillance abuses of civil rights leaders and minority dissidents.

Part V elaborates the contemporary peril to minority civil rights associated with digital transactions and AI. Proponents placing privacy rights in a civil

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47. *See generally*, Anita L. Allen & Erin Mack, *How Privacy got its Gender*, 10 N. ILL. U. L. REV. 441 (1991) (demonstrating that the privacy protected by early legal theory and cases was a luxury of the well-to-do and traded on the felt need to protect women's modesty and domesticity).

48. *See infra* notes 189 and 192.

49. *See infra* Section IV.B.

right framework invoke the values and achievements of the twentieth-century civil rights movement toward combating forms of discrimination and inequality associated with applications of technology in government, business, and social life.[50] Discriminatory oversurveillance, exclusion, and predation plague online transactions.[51] Discrimination, disproportionately affecting racialized minority groups, women, and the poor, mars automated and biometric decision-making processes in housing, public assistance, healthcare, policing, criminal sentencing, advertising, insurance, employment, and education.[52] Biased predictive practices reliant on personal data manipulated by automated algorithmic systems have perpetuated and, in some cases, exacerbated existing inequities. We advance a skeptical perspective concerning whether to expect meaningful change for the better through privacy and data protection laws, now that privacy has been coupled with civil rights and legislative changes on the state and federal level are underway. As a practical matter, it might be easier to deploy existing civil rights laws to address privacy harms than to elevate privacy as the basis of an entirely new civil right requiring its own new law. But, we conclude, without political will to tackle discrimination premised on overall respect for the affected communities, no variety of purely legal civil rights discourse strategy promises success.

II. THE TREND BEGINS

In this Section, we trace the origins of the recent "privacy-and-civil-rights" movement. The novel pairing of privacy and civil rights has neither been an isolated phenomenon nor lacked an array of distinguished proponents. Nor is

50. *See, e.g.*, Gaurav Laroia & David Brody, *Privacy Rights Are Civil Rights. We Need to Protect Them*, FREE PRESS (Mar. 14, 2019), https://www.freepress.net/blog/privacy-rights-are-civil-rights-we-need-protect-them.

51. *Cf.* Allen, *Dismantling the "Black Opticon"*, *supra* note 27 (African Americans online face discriminatory oversurveillance, exclusion, and predation).

52. *See* VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE AND PUNISH THE POOR 201–17 (2018); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION 3–14 (2016) (computer-generated scores inform decisions in policing, criminal sentencing, insurance, advertising, housing, and education); Filippo A. Raso, Hannah Hilligoss, Vivek Krishnamurthy, Christopher Bavitz & Levin Kim, *Artificial Intelligence & Human Rights: Opportunities & Risks*, BERKMAN KLEIN CTR. (Sept. 25, 2018), https://cyber.harvard.edu/publication/2018/artificial-intelligence-human-rights (justice system using automated decision-making tools). *Cf.* Artificial Intelligence Accountability Act, H.R. 3369, 118th Cong. (2023) (federal legislation to improve transparency and accountability of automated decision making).

the innovative new pairing entirely new. The strong version of the pairing—declaring that the right to privacy *is* a civil right, along the lines of the right to equal employment opportunity, access to public accommodations, voting, or fair housing—is less than a decade old. But the idea that the right to privacy and civil rights are mutually protective has a longer history of implicit and inchoate manifestation.

A. WHO STARTED THE TREND

Although the privacy-and-civil-rights trend began in earnest after 2000, earlier efforts laid its foundation. Twentieth century privacy law researchers briefly remarked on invasions of privacy experienced by African Americans, civil rights leaders, and allied groups.

The Naked Society. Published the same year the Civil Rights Act of 1964 was signed into law, investigative journalist Vance Packard's *The Naked Society* prompted the House of Representatives to convene a Special Subcommittee on Invasion of Privacy in 1965 and influenced the enactment of privacy legislation a few years later.[53] Packard touched lightly on African American life in his book, mentioning that mass-arrested college student Freedom Riders unfairly wound up with criminal records. He also mentioned that an Arkansas state law compelling public school and university teachers to disclose their organizational affiliates "was presumably aimed primarily at smoking out teachers sympathetic to the work of the National Association for the Advancement of Colored People."[54] In a chapter on police mistreatment, Packard discussed the mistreatment of Black people, noting the "particular frequency" with which "heavy handed and often illegal tactics" are used on African Americans in the South. He ended with frankness: "These abuses of constitutional rights may meet no serious criticisms from the general public if prejudice runs high."[55]

Early Legal Scholars. Mid-twentieth century privacy law scholars acknowledged privacy-related civil rights concerns. Alan F. Westin launched the modern era of privacy scholarship with the publication of *Privacy and*

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53. *See generally*, VANCE PACKARD, THE NAKED SOCIETY (1964). The Privacy Act of 1970 and the Omnibus Crime Control and Safe Streets Act of 1968 added to federal law protections against access to personal matters contained in federal records, and warrantless wiretapping.

54. *Id.* at 143–45.

55. *Id.* at 146–63.

Freedom in 1967.[56] Westin specifically mentions Black people several times in his landmark book in connection with mores of distancing and disclosure,[57] government surveillance of civil rights activities,[58] and personality, ability, and employment testing.[59] Westin noted the landmark precedent, *NAACP v. Alabama*, in which the prominent Black civil rights group used associational and informational privacy arguments to resist segregationist Alabama's efforts to oust the organization from the state by requiring disclosure of its membership list.[60]

After Westin, Arthur R. Miller was the next American legal scholar to publish a book about privacy.[61] Miller broached African Americans by mentioning *NAACP v. Alabama*. Attorney Michael F. Mayer's 1972 book, *Rights of Privacy*, was the first written by a U.S. practicing lawyer.[62] Mayer discussed *NAACP v. Alabama*,[63] African American Supreme Court Justice Thurgood Marshall's majority opinion defending privacy of thought in *Stanley v. Georgia*,[64] the privacy of persons dependent on government housing and other benefits,[65] and the unlawful wiretapping of Dr. Martin Luther King, Jr.[66]

The First African American Privacy Scholars. Privacy and civil rights pairings continued lightly in the air in the 1980s and 1990s.[67] In 1988, Anita L. Allen

56. *See* WESTIN, *supra* note 19, at 7 (stating that "[p]rivacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.").

57. *Id.* at 54.

58. *Id.* at 115, 131–32 ("[S]urveillance by White state officials investigating subversion" and "[t]he struggle over segregation and Civil rights has prompted considerable electronic surveillance of Negros and White integrationist groups . . . by segregationist . . . ").

59. *Id.* at 257, 275–78. *Cf.* Kelly Cahill Timmons, *Pre-Employment Personality Tests, Algorithmic Bias, and the Americans with Disabilities Act*, 125 PENN ST. L. REV. 389 (2021) (employment testing can be biased against persons in protected class).

60. *See* WESTIN, *supra* note 19, at 351.

61. *See generally* ARTHUR MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS (1970).

62. *See generally*, MAYER, *supra* note 19.

63. *Id.* at 63, 81.

64. *Id. See* Stanley v. Georgia, 394 U.S. 557 (1969).

65. MAYER, *supra* note 19, 54–60 (chapter entitled "Privacy and Poverty," anticipating KHIARA BRIDGES, THE POVERTY OF PRIVACY (2017).

66. *Id.* at 87 (Dr. King was subjected to "humiliation and indignity" of illicit government surveillance).

67. *See, e.g.*, *Freedom from Harassment: A Civil Right?*, OFF OUR BACKS, at 7 (May 1985), http://www.jstor.org/stable/25775450 (unsigned editorial arguing that right to abortion privacy should be protected using civil rights laws).

published a book connecting privacy ideals to ideals of non-discrimination, invoking civil rights under Title II and Title VII of the Civil Right Act of 1964 in a chapter concerning sexual harassment framed as an invasion of privacy.[68] In 1993 African American information policy scholar Oscar H. Gandy published *The Panoptic Sort*, a recently re-released book connecting modern information practices with discrimination.[69] In 2009, Gandy published a second book connecting ideals of nondiscrimination to information practices.[70]

Other Scholarly Precursors. A more distinct precursor of a privacy-and-civil-rights movement in legal circles, a law review article published by privacy scholar Danielle Citron in 2009, framed a group of wrongs committed by "mobs" against marginalized people online as civil rights injuries amenable to civil rights remedies.[71] In an important 2013 precursor, Neil Richards alluded to civil rights against discrimination, arguing that intellectual privacy demands freedom from excessive surveillance, which should be protected as a civil liberty and constitutional right.[72]

Diverse Voices Join Together. As exemplified by Allen, Citron, Gandy, and Richards, the groups and individuals responsible for the privacy-and-civil-rights movement are diverse, and heavily female and people of color. One of the movement's first explicit pronouncements, Citron's 2014 book, *Hate Crimes in Cyberspace*, used a civil rights framework for tackling online sexual harassment.[73] She and Mary Anne Franks, today the President of a Cyber Civil

68. ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 144–45, 151 (1988).

69. OSCAR GANDY, THE PANOPTIC SORT (1993) (describing the use of consumer databases to sort individuals into categories and then discriminate among them).

70. OSCAR GANDY, COMING TO TERMS WITH CHANCE: ENGAGING RATIONAL DISCRIMINATION AND CUMULATIVE DISADVANTAGE (2009) (application of probability and statistics to life-decisions reproduces, reinforces, and widens disparities in the quality of life enjoyed by different groups).

71. Danielle K. Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63–64 (2009) ("The Internet raises important civil rights issues . . . . anonymous online mobs "attack women, people of color, religious minorities, gays, and lesbians . . . "). Citron offered a host of reasons why a civil rights approach was needed to complement tort and criminal law approaches to online attacks. *See id.* at 89–94.

72. *See* Richards, *supra* note 28 at 1935 (illustrating how surveillance hampers the freedom to think).

73. DANIELLE K. CITRON, HATE CRIMES IN CYBERSPACE (2014). *Cf.* Anita L. Allen, *Gender and Privacy in Cyberspace*, 51 STAN. L. REV. 1175, 1179 (2000) ("I conclude that the

Rights Initiative founded in 2013, advanced the idea of cyber civil rights as protection for privacy and other values implicated in sexual harassment and "revenge porn."[74]

In 2016, two Obama White House and the Federal Trade Commission reports raised concerns about the impact of Big Data on civil rights.[75] That same year, President Joseph Biden's future appointee to the Federal Trade Commission, Peruvian-American Alvaro Bedoya, published an opinion piece linking discriminatory government surveillance to race and civil rights activism, exemplified by federal surveillance of African American and Mexican American civil rights leaders, Martin Luther King Jr. and César Chávez.[76] Shortly thereafter, the Center on Privacy & Technology, founded by Mr. Bedoya at Georgetown University Law Center, held a conference entitled *The Color of Surveillance: Government Monitoring of the African American Community*.

In 2019, Becky Chao and co-authors made the pitch for "centering civil rights in the privacy debates,"[77] and a panel sponsored by Color of Change and New America's Open Technology Institute explored how to protect the civil rights of marginalized communities "disproportionately harmed by data practices and privacy infringements."[78] Free Press Action and the Lawyers' Committee for Civil Rights Under Law drafted and circulated privacy protection legislation in 2019. They premised their draft law on their belief that "privacy rights are civil rights" and we ought to protect them: "And it means

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privacy of women in cyberspace is more at risk than that of men. Some of the worst features of the real world are replicated in cyberspace, including disrespect for women and for the forms of privacy and intimacy women value.").

74. *See generally* Danielle Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

75. EXEC. OFF. OF THE PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS (2016), https://obamaWhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf; F.T.C., BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES (FTC REPORT) (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

76. Alvaro M. Bedoya, *The Color of Surveillance: What an Infamous Abuse of Power Teaches us About the Modern Spy Era*, SLATE (Jan. 18, 2016), https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html.

77. Chao et al., *supra* note 9, at 5 (advocating for civil rights laws to apply to wrongs committed in the digital economy).

78. *See* Francella Ochillo, Gaurav Laroia, Erin Shields, Miranda Bogen, Alisa Valentin, Priscilla Gonzalez, Brandi Collins-Dexter, *Centering Civil Rights in the Privacy Debate*, OPEN TECH. INST. (May 9, 2019), https://www.newamerica.org/oti/events/centering-civil-rights-privacy-debate/.

protecting non-discriminatory access to places of digital commerce for everyone, regardless of their identities and demographics—just as we have protected such access to lunch counters, buses, schools, shops, libraries and theaters since the Civil Rights Movement desegregated them."[79] Focusing on voter issues, Dominique Harrison published an article in 2019 on an Aspen Institute Blog concerned with civil rights violations and technology developments.[80]

Black Lives Mattered. The year 2020 was like few others. In early March 2020, the planet was overtaken by the COVID pandemic, whose public health countermeasures some defended as dire necessities while others criticized them as draconian privacy invasions. George Floyd was murdered in May 2020. That spring and summer, his death in the hands of police and those of Ahmaud Arbery and Breonna Taylor, catapulted the Black Lives Matter Movement, one of the largest social protest movements in American history.[81] Peaceful marches and rallies, protests, violent rebellions, and racial reckoning made plain that the project of African American civil rights had been incomplete.[82] The law unevenly protects Black people who in everyday life aspire to be safe, productive and free. On cue, the data protection community's emerging privacy-and-civil-rights movement sought to make sure the next big conversation about harms in need of redress on behalf of Black people and other minority groups would include technological harms implicating their civil rights.

Privacy Declared a Civil Right. In a speech published in the summer of 2020, Mr. Bedoya crowned privacy not simply as the basis of a right capable of

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79. *See* Laroia & Brody, *supra* note 50. Gaurav Laroia & David Brody, *Privacy Rights Are Civil Rights. We Need to Protect Them*, FREE PRESS (Mar. 14, 2019), https://www.freepress.net/blog/privacy-rights-are-civil-rights-we-need-protect-them.

80. Dominique Harrison, *Civil Rights Violations in the Face of Technology Change*, ASPEN INST. (Oct. 22, 2020), https://www.aspeninstitute.org/blog-posts/civil-rights-violations-in-the-face-of-technological-change/#:~:text=Black%20and%20Brown%20people%20are%20stripped%20of%20equitable%20opportunities%20in,raise%20privacy%20concerns%20for%20all (observing that communities of color battle to uphold civil rights abridged through online platforms).

81. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in US History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

82. *Cf.* West, *supra* note 6, at 178–81 (using highly publicized cases of police and private violence against African American men as examples to demonstrate what it would mean for civil rights to be understood as rights to positive law that protects against such violence).

protecting civil rights, but as itself a civil right.[83] In 2021, Brookings researcher Cameron Kerry argued in a policy paper that privacy laws should protect civil rights.[84] Tiffany Li published a law review article providing context through the lens of marginalized communities' experiences for the concept of privacy as a civil right.[85] Other researchers extended their support to the mounting privacy-and-civil-rights movement in 2022.[86] In her widely-recognized 2022 book advocating, *inter alia*, for better legal protections for women's privacy, Danielle Citron expressly defended "intimate privacy" as a civil right.[87]

Lawmakers Advance the Trend. A number of lawmakers moved to embrace the idea that privacy is a civil right or civil rights protectant. In late 2021, District of Columbia Attorney General Karl A. Racine introduced legislation to strengthen "civil rights protections for District residents and prohibit companies and institutions from using algorithms that produce biased or discriminatory results and lock individuals, especially members of vulnerable communities, out of opportunities, like jobs and housing."[88] The never-enacted Data Protection Act of 2021, introduced into Congress by Senators Kristen Gillibrand (D-NY) and Sherrod Brown (D-OH), would have created a federal Data Protection Agency with a "Civil Rights Office" to help regulate

83. Bedoya, *supra* note 4, at 305–06 ("Yes, privacy is a civil liberty. I am here to tell you that privacy is also a civil right. When we talk about privacy only as a civil liberty, we erase those patterns of harm, that color of surveillance. And when we talk about privacy only as a civil liberty, we also ignore the benefits of privacy: Surveillance threatens vulnerable people fighting for equality. Privacy is what protects them and makes it possible."); *cf.* Alvaro M. Bedoya, *A License to Discriminate*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/op; Alvaro M. Bedoya, *The Cruel New Era of Data-Driven Deportation*, SLATE (Sept. 22, 2020), https://slate.com/technology/2020/09/palantir-ice-deportation-immigrant-surveillance-big-data.html.

84. Cameron F. Kerry, *Federal Privacy Legislation Should Protect Civil Rights*, BROOKINGS INST. (July 16, 2020), https://www.brookings.edu/articles/federal-privacy-legislation-should-protect-civil-rights/.

85. Li, *supra* note 2, at 1275–85.

86. *See* Samatha Lai & Brooke Tanner, *Examining the Intersection of Privacy and Civil Rights*, BROOKINGS INST. (July 18, 2022), https://www.brookings.edu/articles/examining-the-intersection-of-data-privacy-and-civil-rights/.

87. CITRON, *supra* note 4, at 106–10.

88. *See* Press Release, Off. of the Atty. Gen. for the D.C., AG Racine Introduces Legislation to Stop Discrimination In Automated Decision-Making Tools That Impact Individuals' Daily Lives (Dec. 9, 2021), https://oag.dc.gov/release/ag-racine-introduces-legislation-stop.

"high-risk" data practices, defined to include automated decision systems and data respecting protected classes.[89]

On May 25, 2022, the promising but ill-fated Americans Data Protection and Privacy Act (ADPPA) was taking shape on Capitol Hill. A diverse consortium of fifty-seven old and new civil society organizations, including the Leadership Conference on Civil and Human Rights, the Lawyers' Committee for Civil Rights Under Law, and the NAACP Legal and Education Defense Fund signed an open letter to then-Speaker of the House Nancy Pelosi in support of a comprehensive consumer privacy law aimed at safeguarding what they characterized as civil rights of privacy crucial to the digital economy.[90]

It is not only privacy and data protection harms narrowly conceived that legislators are linking to civil rights.[91] Harmful deployment of algorithms and data analytics are generally characterized as implicating and imperiling civil rights. A bicameral bill introduced by Senator Cory Booker and co-sponsors, including Representative Yvette Clarke (D-NY), the Algorithmic Accountability Act of 2023, would have created protections for people adversely affected by AI systems. Alluding to civil rights concerns, Booker remarked in announcing the bill that "[w]e know of too many real-world examples of AI systems that have flawed or biased algorithms: automated processes used in hospitals that understate the health needs of Black patients; recruiting and hiring tools that discriminate against women and minority candidates; facial recognition systems with higher error rates among people with darker skin; and more."[92] Co-sponsor Clarke alluded to civil rights and

89. Data Protection Act of 2021, S.2134, 117th Cong. (2021). *See* Allen, *supra* note 27, at 950–51 (discussing the DPA and Civil Rights Office proposal).

90. *See* American Data Privacy and Protection Act (ADPPA), H.R. 8152, 117th Cong. (2022); Letter from 48 Civil Society Organizations to Congressional Leadership (May 25, 2022), https://civilrights.org/resource/support-a-comprehensive-consumer-privacy-law-that-safeguards-civil-rights-online/ (written in support of a comprehensive consumer privacy law to safeguard civil rights online).

91. *Cf.* Adeline Chan, *Can AI Be Used for Risk Assessments?*, ISACA (Apr. 28, 2023), https://www.isaca.org/resources/news-and-trends/industry-news/2023/can-ai-be-used-for-risk-assessments# (explaining how artificial intelligence uses data and patterns related to past incidents can be turned into risk prediction).

92. *See* Press Release, Sen. Cory Booker, Booker, Wyden, Clarke Introduces Bicameral Bill to Regulate Artificial Intelligence to Make Critical Decisions like Housing, Employment, and Education (Sept. 21, 2023), https://www.booker.senate.gov/news/press/booker-wyden-clarke-introduce-bicameral-bill-to-regulate-use-of-artificial-intelligence-to-make-critical-decisions-like-housing-employment-and-education.

"civil liberties" when she commented that: "Americans do not forfeit their civil liberties when they go online . . . No longer can lines of code remain exempt from our anti-discrimination laws . . . [T]hrough proper regulation, we can ensure safety, inclusion, and equity are truly priorities in critical decisions affecting Americans' lives."[93]

As a final example of the new pairing of data practices and civil rights, in December 2023, Senator Edward J. Markey (D-Mass) introduced a bill into Congress requiring any federal agency that uses AI automated decision-making processing to have an office of civil rights.[94] The bill sought to address the problem of bias and discrimination in government stemming from its use of automated decision-making grounded in the collection and use of data about individuals, a problem that has mounted as the embrace of the use of AI in federal government agencies has increased.[95]

While we observe the trend pairing privacy and civil rights, we must also note that civil rights and data protections appear to be a low priority for the current White House and Congress. Although President Biden's 2023 Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence named "equity and civil rights" as among the goals advanced by the Order, President Trump quickly replaced Biden's Order with one of his own, focusing on aspirations of US global AI dominance.[96] Civil Rights provisions were

93. *Id.*

94. Press Release, Sen. Ed Markey, Senator Markey Introduces Legislation to Demand Civil Rights Offices in Federal Agencies that Handles Artificial Intelligence (Dec. 12, 2023), https://www.markey.senate.gov/news/press-releases/senator-markey-introduces-legislation-to-mandate-civil-rights-offices-in-federal-agencies-that-handles-artificial-intelligence#. *Cf.* Allen, *supra* note 27, at 951 (praising proposed legislation creating a Federal Data Protection Agency that would include a Civil Rights Office).

95. A 2016 report by the Executive Office of the President National Science and Technology Council Committee on Technology, PREPARING FOR THE FUTURE OF ARTIFICIAL INTELLIGENCE (2016), enthusiastically embraced AI "to foster and harness innovation in order to better serve the country." *Id.* at 15.

96. Fact Sheet, White House, FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence (Oct. 23, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/ ("Today, President Biden is issuing a landmark Executive Order to ensure that America leads the way in seizing the promise and managing the risks of artificial intelligence (AI). The Executive Order establishes new standards for AI safety and security, protects Americans' privacy, advances equity and civil rights, stands up for consumers and workers, promotes innovation and competition, advances American leadership around the world, and more."). President

included in the original House and Senate versions of the American Privacy Rights Act of 2024.[97] As noted earlier, the bill's civil rights provisions included data nondiscrimination and algorithmic accountability provisions.[98] Both sets of limits and requirements were removed in their entirety from the House bill.[99] The removal raised an alarm concerning whether the privacy-and-civil-rights movement can hope to achieve its legislative aims if civil rights regulation imposes what some in Congress or the business community deem to be untenable monetary costs on industry.

In summation, this section has served to identify some of the key developments in what we believe has become a privacy-and-civil-rights movement. We believe African Americans and other people of color have been focal points of the movement because they experience both high rates of racial discrimination (a civil rights problem) and impairments of their efforts to thrive without the adequate protection of law as human beings and members of a polity (also a civil rights problem). In the past ten years, major scholars, civil rights and civil liberty non-governmental organizations (NGOs), think-tank researchers, legislators and government officials have all linked securing privacy and data protection aims to protecting civil rights. The idea that the right to privacy is a civil right has loosely taken hold nationally but is very strongly supported by many advocates for people of color. We are unambiguous in our support for advancing the privacy of African Americans and other marginalized communities. Nonetheless in the next sections we consider complications attached to depicting privacy or the right to privacy as

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Donald Trump rescinded Biden's order, thereby shifting the direction of AI policy. *See* Exec. Order No. 14179, 90 Fed. Reg. 8741 (Jan. 23, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence/.

97. The Lawyers Committee for Civil Rights Under the Law withdrew support for the House of Representatives version of The American Privacy Rights Act of 2024, H.R. 8818, 118th Cong. (2024) after the unanticipated complete removal of civil right provisions from the bill. *See* American Privacy Rights Act of 2024, H.R. 8818, 118th Cong. (2024), https://www.lawyerscommittee.org/lawyers-committee-opposes-new-draft-of-american-privacy-rights-act-urges-representatives-to-vote-no/#:~:text=The%20new%20draft%20strips%20out,opportunities%20like%20housing%20and%20credit.

98. THE AMERICAN PRIVACY ACT OF 2024: SECTION BY SECTION SUMMARY, https://www.commerce.senate.gov/services/files/E7D2864C-64C3-49D3-BC1E-6AB41DE863F5.

99. Suzanne Smalley, *With Protections Against AI Bias Removed from Data Privacy Bill, 'Impossible for Civil Society to Support'*, RECORD (June 25, 2024), https://therecord.media/ai-bias-removed-data-privacy-law.

a civil right and whether doing so is likely to lead to inclusively better privacy laws. We start with complications relating to the terminology of alternative rights discourses and then move to complications of history.

B. THE TERMINOLOGY OF CIVIL RIGHTS AND LIBERTIES

Does characterizing privacy or the right to privacy as a civil right make sense? Signaling its normative importance, the right to privacy was described as a "natural right" suited for positive law recognition in 1905 in the first U.S. state supreme court common law right to privacy decision.[100] Faced with thin positive law precedent for recognizing a right to privacy, Georgia Supreme Court Judge Andrew Jackson Cobb expressly appealed to natural rights as the source of a right against non-consensual use of a man's photograph in an advertisement for life insurance.[101]

Natural Rights and Human Rights. Also signaling its normative heft, the right to privacy was declared a "human right" in the wake of World War II by the United Nations in 1948.[102] As philosophical constructs of ancient origin, "natural rights" are often described as rationally discernable, universal, and inalienable entitlements of natural law that belong to human beings by virtue of their essential natures and merit protection by good government.[103] Like natural rights, human rights are also universal philosophical ideals, but

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100. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905) ("A right of privacy in matters purely private is therefore derived from natural law.").

101. *See generally* Anita L. Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187 (2013) (detailed analysis of the *Pavesich* case as a landmark grounding privacy rights in natural law).

102. G.A. Res. 217A (III), art. 12, U.N. Doc. A/810, Universal Declaration of Human Rights (Dec. 10, 1948) ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."). *See* Beate Roessler, *X—Privacy as a Human Right*, 117 PROC. ARISTOTELIAN SOC. 187 ("The idea of a right to a protected private life is thus encountered for the very first time in the 1948 Universal Declaration of Human Rights.").

103. *Cf.* Margaret MacDonald, *Natural Rights*, 47 PROC. ARISTOTELIAN SOC. 225, 233 (1947) (stating that being a person is sufficient for having natural rights and that natural rights attach to every person just like their legs and arms). Philosophers debate the precise relationship between natural law, natural rights, and human rights, *see, e.g.*, J. Roland Pennock, *Rights, Natural Rights, And Human Rights–A General View*, 23 NOMOS 1 (1981).

distinguished by assent through modern international declarations, agreements, and treaties.[104]

Civil Rights Contrasted. In contrast to natural or human rights, civil rights have been described as "those personal rights granted by governments that individuals enjoy as a matter of citizenship within their state's territorial jurisdiction."[105] Civil rights are thus positive rights secured by government action, typically through legislation or basic law, and are enforced by the authoritative power of government.[106] In the United States, state and federal governments have conferred civil rights by statute to protect individuals from unfair discrimination in areas such as voting, employment, education, housing, and public accommodations based on race, sex, gender, national origin, disability, veteran's status, religion, sexual orientation, or other personal characteristics.

The Jurisprudence of Civil Rights. Civil rights in the United States may have other purposes, those pertaining to their status as aspirational ideals and not necessarily adopted into positive antidiscrimination law. Robin West has forcefully argued for a broad conception of civil rights, as rights that should be conferred by law specifically to enable civil life and support the flowering of human capabilities.[107] If she is correct, one can say—borrowing West's words and vocabulary and applying them to privacy—that a civil right of privacy is a right "to be free of unjust impediments" to vital privacy goods that facilitate our participation in civil life and enjoyment of our human capabilities.[108]

Proponents of the privacy-and-civil-rights movement have not always been clear when they are making positive law as opposed to aspirational law

104. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 23–35 (2009). *Cf.* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993) (examining historical role of natural rights and natural law concepts in American jurisprudence), https://doi.org/10.2307/796836. *Cf.* JOHN GOLDBERG & BENJAMIN C. ZUPURSKY, RECOGNIZING WRONGS 37–43 (connecting ideal of civil recourse to the idea of civil rights that emerged after the civil war).

105. Simmons, *supra* note 104, at 159.

106. *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1326–31 (1951–1952); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote,* 41 AM. J. POL. SCI., 245–268 (1997) (civil rights statutes enacted when more direct democracy results in the tyranny of the majority).

107. West, *supra* note 6 at 149–53.

108. *See id.* at 149–53, 157.

(natural law) claims. In any event, West's proposed jurisprudence of civil rights offers a historically grounded framework for deepening the civil rights rationale for better and new privacy law. Such a rationale would explain *how*, with privacy-protection law, we are more effective citizens of our polity and can experience a better quality of human life overall.

It turns out that rationales along these lines for privacy protection have been extensively fleshed out and debated by moral and legal theorists for decades.[109] Of relevance to aspirational civil rights are arguments that privacy benefits society insofar as it "supports the common good," "protects from power imbalances between individuals and government," "supports democracy, political activity and service," and "provides space in society for disagreement."[110] It also has been argued, of relevance to aspirational civil rights, that privacy benefits individuals by facilitating autonomy[111] and relationships of love, friendship, and trust.[112] We endorse these general lines of argument. But the proponents of the privacy-and-civil-rights movement have not drawn systematically on this body of thought to make the case that privacy protection via law is really a civil right. Given the pervasiveness of the antidiscrimination paradigm of civil rights, anyone's failure to expand the public understanding of civil rights beyond antidiscrimination rights to other vital political and ethical requirements of civic community is understandable. Indeed, the best interpretation of the bulk of the privacy-and-civil-right movement to date may be as a modest effort within positive antidiscrimination law to include privacy protections for vulnerable groups.

Ambiguities of the Movement. Until recently, privacy was not described as the basis of a civil right and civil rights were not heralded as the basis of privacy protections. The precise novel thing that proponents of privacy-and-civil-rights assert to be the relationship between privacy and civil rights is often unclear.[113] In her generally helpful discussion of the movement, Tiffany Li did

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109. *See* Trina J. Magi, *Fourteen Reasons Privacy Matters: A Multidisciplinary Review of Scholarly Literature*, 81 LIBR. Q. 187 (2011) (citing leading privacy scholars as sources).

110. *Id.* at 202–06.

111. *See, e.g.*, BEATE ROESSLER, THE VALUE OF PRIVACY (2005) (arguing that privacy is vital to autonomy).

112. *See, e.g.*, Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968).

113. We will not linger long to discuss here whether the relevant issue is "privacy" or "the right to privacy" as a civil right. Some philosophers believe the distinction is an important one. We characterize privacy as a condition or state of affairs, whereas the right to privacy is a claim

not tightly delineate the relationships she sees between privacy and civil rights. She asserts that privacy *protects* civil rights ("[p]rivacy protects the conditions necessary for a society to recognize, fight for, and protect civil rights"); that privacy *is* a civil right ("[p]rivacy is . . . a core civil right"); and that civil rights protect privacy ("[i]t is now time to take from the nascent doctrine of cyber civil rights to help solve technological privacy violations in the offline space as well").[114] She also characterizes expressive privacy performances as a form of "privacy activism."[115] On the level of legal theory, the cluster of claims that privacy or the right to privacy is a civil right or is protected by or protects civil rights is beset with initial uncertainties and ambiguities concerning how "civil rights," "privacy" and "privacy rights" are defined, and how these claims relate to one another and other categories of values, rights and liberties. Muddy conceptual waters might be thought to call for the prescription of precise abstract definitions and are in no case fatal to the movement. Yet a focus on prescriptive definitional analysis aimed at dictating how terms and concepts ideally ought to be used for maximal clarity, potentially sidelines other, more important tasks.[116] An alternative focus on "critical definitional facilitation" seeks to ascertain what people from all walks of life mean when they make justice claims—for example, about their privacy and civil rights—and facilitates their just causes.[117] We are applying the critical definitional facilitation methodology here. Thus, we started by identifying the central tenets of the privacy-and-civil-rights movement and we have sought to understand and explicate what their exponents have meant by them, relative to the

grounded in law or values. We believe the privacy-and-civil-rights movement ambiguously advocates both that (1) valued forms of privacy are apt bases for civil rights protection and (2) the right to privacy could be aptly considered a civil right if it addressed non-discrimination. To fend off claims of confusion, academics and researchers can take care to distinguish privacy *per se* from the right to privacy; and privacy rights and civil rights as normative, aspirational ideals, from privacy rights and civil rights as a distinct set of existent rights established in positive law.

114. *See* Li, *supra* note 2 at 1279. All four assertions could be true.

115. *Id.* at 1274–76, 1279.

116. Allen, *supra* note 34, at 353, 360 (characterizing "critical definitional facilitation" as "explaining the value of the things that people call privacy, and then offer[ing] analytical clarification of the terms as needed to get practical work done. The shift from prescriptive meaning to practical significance is a shift from mere linguistic analysis to political analysis that includes linguistic analysis.").

117. *Id.* at 359.

contexts of felt injustice in which the tenets have arisen.[118] In the next sections we elaborate on the injustices at issue in the resort to civil rights discourse. The fruits of this approach may include stipulated definitions and practical strategies for stakeholder collaboration, coordinated activism and policymaking.

Civil Liberty or Civil Right. Years before it was popular to describe privacy as the basis of a civil right, it was often described as the basis of a civil liberty.[119] Civil liberties are typically understood as legal protections that shield individuals from government interference with, for example, freedoms of speech, assembly, or religion. By contrast, civil rights are protections that shield individuals from discrimination, extending their protection, in a well-functioning democracy, beyond government actions to encompass both public and private entities.[120] The privacy-and-civil-rights movement may reflect the felt jurisprudential limitations of the more established civil liberties framework to broadly redress data protection harms relating to group-based discrimination.[121] Recognizing that "a civil rights gloss on privacy rights can help us understand privacy in a way that might one day match protection for civil liberties,"[122] Tiffany Li ultimately argued that, "[w]hen we talk about privacy only as a civil liberty, we erase patterns of harm from privacy violations that amount to or exacerbate discrimination and disparate impacts on marginalized populations."[123] We believe, more specifically, that to speak of privacy only as a civil liberty threatens to elide the massive deprivations of all forms of privacy during the African American enslavement and undermines the ongoing quest for civil rights, as well as the role civil liberties have played—and continue to play—in addressing injustice.

118. *See generally*, Li *supra* note 2 (attaching the rise of privacy and civil rights discourse to Black Lives Matter, the Covid pandemic, police violence, facial recognition and other technology); *see also supra* note 91.

119. *See, e.g.*, *infra* note 229 (privacy better viewed as civil liberty than a civil right).

120. Christopher W. Schmidt, *The Civil Rights-Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1 (2016).

121. *But see Privacy & Technology*, AM. C.L. UNION (Oct. 4, 2024), https://www.aclu.org/issues/privacy-technology; Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 495–96 (2006) (surveillance and interrogation are forms of social control privacy rights might address, citing example of unlawful FBI surveillance of civil rights leader Martin Luther King, Jr.).

122. Li, *supra* note 2, at 1269.

123. *Id.* at 1275.

III. ROOTS IN EMANCIPATION

African Americans' privacy has been a contentious issue, and concerns about their privacy have fanned the flames of the privacy-and-civil-rights trend.[124] The belief that privacy is something African Americans both need and should be wary of is a widely shared sentiment.[125] In an edition of *Black Scholar* devoted to what it termed "Black privacy," privacy is described with ambivalence as "a necessity *and* a loss that is mourned."[126] Exploring enslavement, surveillance, police violence, seclusion, silence, records, histories, and civil rights through the lens of Black race reflects a degree of "skepticism of technology and its ability to bring about racial justice, as well as cautious attachments to privacy as potentially protective and healing."[127] With the experiences of African Americans in mind, the trend of characterizing privacy as a civil right (or as a right protecting or protected by civil rights) warrants explanation and assessment. Our efforts continue by recalling American history and pinpointing the privacy implications of enslavement.

A. ENSLAVEMENT WAS ANTITHETICAL TO PRIVACY

Although occasional discussions of the privileges and immunities of U.S. citizens used the term "civil rights," there was no formally recognized category of "civil rights" in U.S. jurisprudence early on.[128] Calls for the protection of "civil rights" in the United States postdate the Declaration of Independence and the framing of the Constitution, the Emancipation Proclamation, and the end of the Civil War.[129] We center the underemphasized experience of Black privacy in a brief overview of the highlights in the history of African Americans in North America prior to the Civil War, and during the period of Reconstruction.

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124. *See, e.g.*, Press Release, Off. of the Atty. Gen. for the D.C., AG Racine Introduces Legislation to Stop Discrimination In Automated Decision-Making Tools That Impact Individuals' Daily Lives (Dec. 9, 2021), https://oag.dc.gov/release/ag-racine-introduces-legislation-stop.

125. *See, e.g.*, Samantha Pinto & Shoniqua Roach, *Black Privacy: Against Possession*, 51 BLACK SCHOLAR 1, 1–2 (2021).

126. *Id.* at 2.

127. *Id.*

128. *See generally* G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755 (2014).

129. *Id.* at 755.

The involuntary enslavement in North America of Black peoples originating from Africa commenced as early as 1609.[130] A stain on American history, millions of Black people were coercively traded, bought, and sold in a regime of racial capitalism.[131] From its colonial period through to the end of the Civil War in 1865 and beyond, sectors of the American economy built fortunes on the labor of enslaved men, women, and children.[132] The lack of the social and political freedoms enjoyed by their captors was slavery's principal deprivation.[133] The lack of privacy was another key deprivation.[134] Whatever protection for privacy that may have been implied by the Constitution and the Bill of Rights[135] did not apply to Black persons in

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130. *1619: Virginia's First Africans*, HAMPTON HISTORY MUSEUM (Dec. 14, 2018), https://hampton.gov/CivicAlerts.aspx?AID=3701&ARC=6623; *see* Nikole Hannah-Jones & N.Y. Times Mag., *The 1619 Project*, 1619BOOKS.COM, https://1619books.com/ ("In late August, 1619, 20–30 enslaved Africans landed at Point Comfort, today's Fort Monroe in Hampton, Va., aboard the English privateer ship *White Lion*. In Virginia, these Africans were traded in exchange for supplies. Several days later, a second ship (*Treasurer*) arrived in Virginia with additional enslaved Africans. Both groups had been captured by English privateers from the Spanish slave ship *San Juan Bautista*. They are the first recorded Africans to arrive in England's mainland American colonies.").

131. Ken Olende, *Cedric Robinson, Racial Capitalism and the Return of Black Radicalism*, 169 INT'L SOCIALISM (Jan. 6, 2021), http://isj.org.uk/cedric-robinson-racial-capitalism/; *see also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013) (defining "racial capitalism" as the "process of deriving social and economic value from the racial identity of another person"); Angela P. Harris, *Foreword: Racial Capitalism and Law*, *in* HISTS. OF RACIAL CAPITALISM vii, xiii (Destin Jenkins & Dustin Leroy eds., 2021) (asserting that legal engagement with racial capitalism potentially addresses economic inequality, discrimination, algorithmic discrimination, violation of civil rights, and exclusion).

132. *See* HENRY BENNING, 1 PROCEEDINGS OF THE VIRGINIA STATE CONVENTION OF 1861, 62–75 (George H. Reese ed., 1965); *see generally* LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS IN THE COLONIAL PERIOD (1978); EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY (1965) (A stunning defense of slavery and racial capitalism).

133. *See generally* Rose E. Vaughn, *Black Codes*, 10 NEGRO HIST. BULL. 17 (1946).

134. *See generally* ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO (2008); ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMMINGS: AN AMERICAN CONTROVERSY (1997) (describing intimate relations between owners and the human beings they were permitted by law to own as property); *cf.* LESLIE HOWARD OWENS, THIS SPECIES OF PROPERTY: SLAVE LIFE AND CULTURE IN THE OLD SOUTH 114–15, 136–63 (1976) (describing the intimacies and privacies of plantation life).

135. Although the United States Constitution does not contain the word "privacy," the Supreme Court has held that the Bill of Rights and the Fourteenth Amendment protect privacy interests relating to religion, thought, and opinion; political, social, and civic association; reasonable expectations respecting private spaces and information; and decision-making about education, child-bearing and rearing, marriage, health, sexuality, and lifestyles. *But see* Dobbs

bondage.[136] If anyone stood to benefit under the law on account of common ideas of privacy, it was not the enslaved. In *State v. Mann*, the North Carolina Court found that the criminal conviction of a man who wounded an enslaved woman lent to him by her owner could not be sustained since the power of the master must be unquestioned to achieve the perfect submission of the slave.[137] Customary privacy puts the conduct of masters toward their captives beyond practical legal reach. Privacy was no friend to Black interests.[138]

The profound deprivations of slavery included privacy deprivations of every conceivable sort. Blacks lived in a state of perpetual restriction, compulsion, and surveillance.[139] Privacy of body, intellect, sex, family, association, religion, and home were denied to the enslaved as a matter of course. The enslaved person's lack of privacy rights was everywhere manifest: in the slave auction,[140] marriage practices, and scientific research.[141] Enslaved Black people faced severe limitations on bodily privacy and decisional autonomy, extending into their personal and intimate lives.[142] Legal restrictions and societal norms denied them the physical privacy of the body, subjected their personal communications to constant monitoring, enforced continuous surveillance at home, and stripped away privacy protections in matters such as

v. Jackson, 597 U.S. 215, 330–36 (2022) (Thomas, J., concurring) (casting doubt on the rationale of leading privacy cases).

136. The original U.S. Constitution, Article 1, Section 9, continued the slave trade. Article 1, Section 2 includes the "3/5th Compromise," fixing how Indigenous Americans and enslaved persons were to be counted for purposes of apportioning representatives from the States to Congress.

137. 13 N.C. (1 Dev.) 263 (1829).

138. Or the interests of White women, for that matter. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (explaining that "[m]en who assaulted their wives were often granted formal and informal immunities from prosecution, in order to protect the privacy of the family and to promote 'domestic harmony.'").

139. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 31–55 (2015).

140. *See* Oscar Sherwin, *Slave Auctions and Jails*, 8 NEGRO HIST. BULL. 101–19 (1945).

141. *See* KARLA F.C. HOLLOWAY, PRIVATE BODIES, PUBLIC TEXTS 26–27, 29–30 (2011); Lanier v. President and Fellows of Harvard Coll., 191 N.E.3d 1063 (Mass. 2022) (enslaved research subject's images at Harvard).

142. *See generally* Collen Campbell, *Medical Violence, Obstetric Racism, and the Limits of Informed Consent for Black Women*, 26 MICH. J. RACE & L. 47 (2021) (enslaved Black women subjected to medical exploitation and could not legally consent or object to the violence of White male physicians).

residence, travel, courtship, and child-rearing privileges.[143] The institution of slavery, bound by its perverse ethics, systematically denied and ignored the feelings and sensibilities of Black men, women, and children, so crucial to the sense of privacy.[144]

Dred Scott v. Sandford exemplified the historical reluctance and inadequacy of the legal system to safeguard Black people from the atrocities of slavery through federal law.[145] Petitioner Scott, an enslaved person in Missouri, had previously resided in Illinois, a free state, and the Louisiana Territory, where slavery was prohibited by the Missouri Compromise of 1820.[146] Upon returning to Missouri, Scott filed suit for freedom, asserting that his residence in a free state and territory rendered him a free man. After losing in state court, he pursued a federal suit. Justice Roger B. Taney, writing for the majority, agreed that a Black person "whose ancestors were imported into this country, and sold as slaves," whether enslaved or free, could not be an American citizen.[147] Justice Taney additionally asserted that enslaved people were private property under the Fifth Amendment, emphasizing that any law seeking to deprive an enslaver of their property would be deemed unconstitutional.[148] African-Americans lacked privacy of their own but were the embodiment of the privacy of others. The *Dred Scott* decision underscored racial capitalism and discrimination baked into the constitutional system, ultimately contributing to the eruption of the Civil War.[149]

As the nation neared the third year of the devastating and bloody Civil War, Abraham Lincoln issued the Emancipation Proclamation in 1863,

143. *See* Chaz Arnett, *Race, Surveillance, Resistance,* 81 OHIO ST. L.J. 1103, 1112 (2020) ("slave catchers" constantly surveilled Blacks using different strategies and constantly monitored communities of free Blacks).

144. *Cf.* Vassar College v. Loose-Wiles Biscuit Co., 197 F. 982, 984–85 (W.D. Mo. 1912) (citing with approval assertion that "the entire basis of the right of privacy cases is an injury to the feelings or sensibilities of the party.").

145. 60 U.S. 393 (1857).

146. Missouri Compromise, 3 Stat. 545 (1820). The legislation admitted Missouri as a slave state and Maine as a non-slave state at the same time so as not to upset the balance between slave and free states in the nation. It also outlawed slavery above the 36' 30' latitude line in the remainder of the Louisiana Territory.

147. Dred Scott, 60 U.S. at 393, 403, 452.

148. *Id.* at 450.

149. Paul Finkelman, Scott v. Sandford*: The Court's Most Dreadful Case and How it Changed History*, 82 CHI.-KENT. L. REV. 3, 3 (stating that while other forces caused the civil war, the Dred Scot decision is often viewed as the primary catalyst, though this perspective may be somewhat exaggerated).

declaring all enslaved people in the revolting Confederate states to be free.[150] After the Civil War, the nation entered the challenging period of Reconstruction,[151] aiming to rebuild the country, reintegrate former Confederate states into the Union, and extend civil rights to the newly freed slaves.[152] Despite the official abolition of slavery with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, systemic racial discrimination persisted after the Civil War, relegating African Americans to, at best, second-class citizenship,[153] and by entailment, few privacy protections.

B. EMANCIPATION CAME WITHOUT CIVIL RIGHTS

The taproot of a robust American civil rights discourse grew out of campaigns to abolish slavery and the subsequent Reconstruction Era legislative efforts to end mistreatment of African Americans.[154] The legal system provided uneven protection for Black people before the Civil War,[155] when

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150. *See* The Emancipation Proclamation, Proclamation No. 17, 12 Stat. 1268 (Jan. 1, 1863), announcing "that all persons held as slaves" within the rebellious states "are and henceforward shall be free." Following the collapse of the Confederacy and with the Emancipation Proclamation, slavery was abolished.

151. *See generally* A. B. Moore, *One Hundred Years of Reconstruction of the South*, 9 J. S. HIST. 153 (1943) (explaining the "Reconstruction" period that followed the Civil War).

152. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1861–77 (1988); PAUL H. BUCK, ROAD TO REUNION 1865–1900 (1937) (illustrating the reconciliation process of the Northern States and a move past their disagreements to embark on the project of a unified nation and national life with formerly enslaved people as citizens).

153. *Cf.* Glenn C. Loury, *An American Tragedy: The Legacy of Slavery Lingers in Our Cities' Ghettos*, BROOKINGS (Mar. 1, 1998), https://www.brookings.edu/articles/an-american-tragedy-the-legacy-of-slavery-lingers-in-our-cities-ghettos/ (explaining that despite the heavy price paid in the civil war to end slavery, African American had to continue their fight for equality); Reginald Oh, *Black Citizenship, Dehumanization, and the Fourteenth Amendment*, 12 CONLAWNOW 157, 162–66 (2021) (illustrating how African Americans were treated as second-class citizenship through racial segregation); Naim v. Naim, 87 S.E.2d 749 (1955) (upholding a ban on interracial marriage on grounds that interracial marriages would undermine good citizenship).

154. *See generally* MICHAEL JAY FRIEDMAN, FREE AT LAST: THE U.S. CIVIL RIGHTS MOVEMENT (2008) (explaining how African Americans with their White compatriots employed varied tactics to stop slavery and fight for the blacks' civil rights and how concerted efforts led to the abolition of state-sanctioned discrimination); Juliet R. Aiken, Elizabeth D. Salmon & Paul J. Hanges, *The Origins and Legacy of the Civil Rights Act of 1964*, 28 J. BUS. PSYCH. 383, 383–84 (2013) (explaining a long-standing attitude of institutionalized discrimination against African Americans).

155. *See, e.g.*, the Fugitive Slave Act, 1 Stat. 302 (1793) (spelling out the heavy fines on federal marshals who did not arrest on demand any alleged runaway slave and similar fine plus six months in prison for anyone who helped a runway by giving them shelter, food, or any assistance whatsoever).

"civil rights" lacked a clear definition as a distinct category of protection in the United States.[156] Seeds of a civil rights movement were arguably sowed in every act and instance of resistance to discrimination and injustice by the enslaved, free Blacks, and their allies.[157] After the war, the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were adopted, which, along with civil rights statutes passed by Congress, aimed to bring the promises of emancipation and equal citizenship into full bloom.[158]

The Civil Rights Act of 1866 was the first among the civil rights statutes, declaring all persons born in the United States citizens without distinction of race, color, or previous condition of slavery or involuntary servitude.[159] The law explicitly extended to all people the equal benefit of all laws and proceedings for the security of persons and property enjoyed by White citizens. The 1866 Act was resisted, leading to a long-debated Civil Rights Act of 1875,[160] first introduced into Congress as the Civil Rights Act of 1870. Persistent violent resistance to Black civil rights led Congress to enact the Ku Klux Klan Act in 1871.[161]

Federal civil rights legislation faced opposition from former slave-holding states. The Supreme Court gutted key provisions of the laws in *The Slaughterhouse Cases*[162] and *The Civil Rights Cases*.[163] *The Slaughterhouse Cases* raised the question of whether the Privileges and Immunities Clause "refer[red] to the natural and inalienable rights which belong to all citizens" or new privileges

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156. *See generally* Grace Hemmingson, *The Fourteenth Amendment & the African American Struggle for Civil Rights*, 3 VA. TECH. UNDERGRADUATE HIST. REV. 47 (2014) (it was after enacting legislation, court intervention through decisions, and the commentary about the category of civil rights as a category of rights civil rights to protect Blacks was established).

157. *See* MILTON MELTZER, THERE COMES A TIME: THE STRUGGLE FOR CIVIL RIGHTS 16–19 (2000).

158. The Civil Rights Act was enacted in 1866 and reenacted in 1870. It was the first federal Law to define citizenship and affirm that all citizens are equally protected.

159. The Civil Rights Act of 1866, Ch. 31, 14 Stat. 27 as reenacted by the Enforcement Act of 1870, Ch. 114, § 18, 16 Stat. 140, 144 and codified as amended at 42 U.S.C. §§ 1981 (2012).

160. 18 Stat. 335 (the Enforcement Act of 1870 was passed in response to efforts by the Southern states to undermine the rights granted to African Americans under the Civil Rights Act of 1866).

161. FONER, *supra* note 152, at 454–55.

162. 83 U.S. 36 (1873) (striking down the public accommodations provision of the Civil Rights Act of 1875).

163. 109 U.S. 3 (1883).

conferred by the Fourteenth Amendment.[164] The legal challenge emerged in response to a Louisiana law granting a monopoly to a single slaughterhouse company.[165] In its ruling, the Court narrowed the scope of the privileges or immunities protected by the Fourteenth Amendment, limiting them to federal citizenship rights and excluding those granted by individual states.[166] *The Slaughterhouse Cases* had major consequences. For example, they were held to invalidate school desegregation efforts relying on the Fourteenth Amendment and New York state's civil rights laws enacted in 1873.[167]

The Civil Rights Cases further shifted the trajectory of legislative and judicial attempts to address the segregation and exclusion of formerly enslaved people.[168] The cases emerged from challenges to the Civil Rights Act of 1875 as applied to privately owned businesses. The main argument in the cases was that, though privately owned, facilities closed to Black people provided functions that benefit the public and thus were subject to public regulation. The Supreme Court ruled that the Thirteenth Amendment did not allow the federal government to prohibit discrimination by private parties.[169] Congress exceeded its mandate by purporting to regulate the conduct of private owners of places of public accommodations.[170] By nullifying the Civil Rights Act of 1875 in 1883 and permitting segregated public accommodations directly challenged in *Plessy v. Ferguson* in 1896,[171] the Court set the stage for the

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164. 83 U.S. at 44, 96 ("The Legislature of Louisiana, on the 8th of March 1869, passed an Act granting to a corporation, created by it, the exclusive right, for twenty-five years to have and maintain slaughterhouses, landing for cattle, and yards for inclosing cattle intended for a sale or slaughter within the state." The Privileges or Immunities Clause states that no state shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

165. *Id.* at 43.

166. *See id.* at 75 (holding that the privileges and Immunities Clause did not alter the police power of the state, but instead affected only the rights of citizens of the United States and not the citizens of the particular state).

167. People *ex. rel.* King v. Gallagher, 93 N.Y. 438, 438 (1883).

168. 109 U.S. at 3 (1883) (the Civil Rights Cases encompassed five consolidated cases: *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson and Wife v. Memphis & Charleston* R.R. *Co.*).

169. *Id.* at. 25–27.

170. *See generally* Stephen Robinson, *African American Citizenship, The 1883 Civil Rights Cases and the Creation of the Jim Crow South*, 102 HIST. 225 (2017) (explaining how the Civil Rights cases initiated civil rights activism that marked the filing of subsequent cases, including *Plessy v. Ferguson* in 1896, challenging the concept of separate-but-equal).

171. 163 U.S. 537 (1896).

implementation of Jim Crow laws in the South, institutionalizing state-mandated racial segregation.[172]

C. A PRIVACY RIGHT FOR GILDED AGE ELITES

Privacy, a noted intellectual E. L. Godkin surmised in 1890, was a refinement enjoyed by the civilized and well-off.[173] The familiar origin story of the "right to privacy" tort credits its invention that same year to Harvard-educated Boston lawyers, Samuel D. Warren and Louis D. Brandeis. The right to privacy thus came about in "The Gilded Age," an era characterized by high concentrations of wealth, urbanization, and culture, all fueled by the growth of the railways and heavy industry. A patina of affluence and sophistication covered the grim reality experienced by factory workers, waves of poor immigrants, Black people terrorized by lynchings and segregation, Native Americans subjected to genocide, and Mexican, Chinese, and Japanese Americans subjected to multiple modes of economic social, and political discrimination. Warren and Brandeis in no way linked their "right to be let alone" to the ongoing struggle of their generation for civil rights. Their right of "inviolate personality" protecting "the sacred precincts" of family and domestic life was far removed from the civil rights that had been vigorously debated in Congress and the courts during the preceding twenty-five years.[174]

Federal and state courts, as well as the Supreme Court, took quick notice of the Warren and Brandeis article.[175] The first state to recognize the right to privacy by statute was New York in 1903.[176] The enactment of the statute was triggered by public outrage, after a New York Court of Appeals decision in

172. *See id.*; ROBINSON, *supra* note 170, at 227 (illustrating the Southern White States' campaign for the enactment of Jim Crow laws, which the Supreme Court later sanctioned in the cases of *Louisville, New Orleans, and Texas Railway Company v. Mississippi*, 133 U.S. 587); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

173. Edwin L. Godkin, *The Rights of the Citizen: IV to His Own Reputation*, 8 SCRIBNER'S MAG. 58, 65 (1890) ("Privacy is a distinctly modern product, one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies. The savage cannot have privacy and does not desire or dream it.").

174. *See* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890) (landmark law review article arguing for express recognition of a common law right to privacy).

175. The Supreme Court cited the Warren & Brandeis article in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891). Meanwhile, the New York courts examined the parameters of the right to privacy in *Schuyler v Curtis*, 42 N.E. 22 (1895).

176. 1903 N.Y. Laws Ch. 132, §§ 1–2, subsequently N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2024).

Roberson v. Rochester Folding Box Co.[177] refused to recognize an invasion of privacy claim brought by a young White woman whose photograph had been used without her consent on flour packaging. The first state to recognize the right to privacy in a decision of its highest court was Georgia in 1906.[178]

Notably, these early New York and Georgia right to privacy developments related to what we would today term rights of publicity against appropriation of name, likeness or identity. The question may arise as to why and how New York's right to privacy, originally "N.Y. Laws Ch. 132, §§ 1-2 (1903)," came to be codified as "New York Civil Rights Law §§ 50, 51."[179] The right has no anti-discrimination purpose, but it is a right closely related to the basic demands of human well-being. The purpose of sections 50 and 51 was and remains to provide a remedy to persons offended by commercial appropriation of their identities. This right to publicity law was enacted to benefit individuals like Abigail Roberson, the plaintiff in *Roberson*, whose identity attributes are used without their permission for commercial purposes. For a plaintiff to assert a claim under sections 50 and 51, they must demonstrate not discrimination, but that a defendant used a plaintiff's name, portrait, picture, or voice for advertising or trade without the plaintiff's written consent.

We find no evidence that the reasons New York's right to privacy came to be codified as part of "New York Civil Rights Law" are related to the story of the Gilded Age battles that raged in New York over the states' anti-discrimination legislation, enacted with the support of the Black community, to make racial equality promised by the Fourteenth Amendment a reality on the state level.[180] Black civil rights activists in New York did not advocate for

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177. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (1902); *cf. The Right of Privacy*, N.Y. TIMES (Aug. 23, 1902), § 1, at 8, col. 3 (reflecting public outrage).

178. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905).

179. *See* N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2024) (held to be constitutional in *Rhodes v. Sperry & Hutchinson Co.*, 220 U.S 502 (1911)); Dana v. Oak Park Marina, Inc., 660 N.Y.S.2d 906, 909 (1997) (holding that the right to privacy in New York is governed exclusively by the Civil Rights Law 50 and 51 and where there is no additional common law protection.); Stephano v. News Group Publications, Inc., 474 N.E.2d 580, 584 (1984) (writing for the New York court, Chief Judge Wachtler stated: "Since the 'right to publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, . . . the plaintiff cannot claim an independent common-law right of publicity.").

180. *See* David McBride, *Fourteenth Amendment Idealism: The New York State Civil Rights Law, 1873–1918*, 71 N.Y. HIST. 207, 207, 233 (1990) ("In May of 1873, New York became one of the first states to implement its own civil rights statute. The law was designed to complement

the protections of sections 50 and 51 to advance their fight for equal citizenship.[181] Ironically, the Georgia court in 1906 analogized privacy violations like the one that inspired sections 50 and 51 to enslavement; violations rendering the individual to a degree like a slave to a merciless master.[182] And interestingly, the contemporary Chapter 6 of the New York Consolidated Laws, designated as "Civil Rights Laws," includes sections 50 and 51, as "[p]rivacy" law but also, separately, classic civil rights.[183]

IV. PRIVACY AS AN INTERNATIONAL AND AMERICAN CIVIL RIGHT

A. GLOBAL CIVIL RIGHT

The international human rights community has played a crucial role in championing the right to privacy, deeming it an ideal civil right, a fundamental right for the protection of individual autonomy and dignity.[184] From a human rights perspective, the right to privacy is like the right to life, freedom of speech, freedom from torture, and the right to a fair trial.[185] We believe it should be included among the basic and civil rights guaranteed at the state

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the Fourteenth Amendment . . . The New York statute established that no state citizen, 'on the basis of race, color or previous condition of servitude,' was to be excluded from the equal enjoyment of accommodations or facilities provided by inn-keepers, common carriers, theaters or common schools and public educational institutions.") *Cf.* People *ex rel.* Cisco v. School Board of the Borough of Queens, 161 N.Y. 598 (1900) (holding that separate equal schools for the different races of children did not violate the Constitution or penal code).

181. *Cf.* Ali v. Playgirl, 447 F. Supp 723, 726 (S.D.N.Y. 1978) (illustrating that African Americans benefit from the protections of §§ 50, 51, like any other demographic of plaintiffs potentially can).

182. Anita L. Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187, 1204 (2013).

183. N.Y. CIV. RIGHTS L. (Consol. 2023) (providing equal right in places of public accommodation and amusement (§§ 40–45), change of sex designation (§§ 67–67-b), equal rights to public aided housing (§§ 18-a-19-b), employment of persons with certain genetic disorders (§§ 48–48-b), rights of persons with a disability accompanied by guide dogs, hearing dogs or service dogs (§§ 47–47-C)).

184. *See* Jaunius Gumbis, Vytaute Bacianskaite & Jurgita Randakeviciute, *Do Human Rights Guarantee Autonomy?*, 62/63 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL 77 (2011) (arguing that each state is internationally obliged to ensure fundamental human rights through legitimate means, including legislation and law enforcement); Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS AAPSS 10, 11 (1989) (affirming the concept of human rights as a declaration of dedication to the intrinsic worth of every individual, asserting the value stands independently of their community with the principle of equality being the end goal).

185. Henkin, *supra* note 184, at 11.

level. The United Nations and its various agencies are instrumental in promoting and overseeing the implementation of human rights.[186] When national remedies prove inadequate, some individuals may seek recourse through international bodies, highlighting the importance of international monitoring and enforcement in upholding human rights.[187] U.S. persons do not typically appeal directly to international bodies for civil rights recourse, relying instead on the American courts.[188]

The right to privacy gained express acknowledgment under Article 12 of the Universal Declaration of Human Rights (UDHR).[189] It prohibits arbitrary interference with the privacy of a home, correspondence, and unlawful attacks on one's honor and reputation.[190] In 1966, the United States and other members of the U.N. General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR)[191] which used essentially the same language as the UDHR in recognizing the right to privacy as a civil and political right. Article 17 of the ICCPR protects everyone from arbitrary or unlawful interference with their "privacy, family, home or correspondence."[192] While the ICCPR is not self-executing, and its application may be modified domestically by reservations, understandings, and declarations (RUDs), it establishes a global standard for fundamental rights and freedoms including privacy protection. The expansive concept of privacy under ICCPR Article 17

186. *See Protecting Human Rights*, UNITED NATIONS, https://www.un.org/en/our-work/protect-human-rights.

187. Lisa J. LaPlante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22 NETH. Q. HUM. RTS. 347, 359 (decrying the inadequacy and ineffective enforcement of international human rights, especially in Latin America which often requires the intervention of the inter-American Court).

188. *Cf.* Jacques Delisle, *Damage Remedies for Infringement of Human Rights Under US Law*, 62 AM. J. COMP. L. 457, 457 (2014) ("U.S. law provides damages remedies for human rights violations primarily through general laws concerning civil rights, constitutional torts and tort or tort-like suits against state entities and officials.").

189. *See* G.A. Res. 217A (III), *supra* note 102, at Art. 12.

190. *Id.* at Art. 5 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.").

191. The 1966 International Covenant on Civil and Political Rights (ICCPR) went into effect in 1977.

192. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (Under the ICCPR, parties must refrain from arbitrary interference with individuals' privacy (negative obligation) and ensure all necessary legal tools for protecting the enjoyment of privacy (positive obligation). A Human Rights Committee was formed under the Covenant to hear complaints brought by party states or individuals claiming human rights violations).

has evolved to encompass many forms of privacy, enabling the freedom of choice and protection of human dignity.[193] In tandem with ICCPR Article 2,[194] Article 17 expresses a shared commitment among nations to protect individuals from arbitrary actions and uphold the principles of justice, equality, and freedom. The right to privacy under Article 17 was augmented by General Comment No. 16 of the ICCPR by the U.N. Human Rights Committee (UNHRC) in 1988 to guide the interpretation and implementation of the right to privacy and other human rights.[195] The ICCPR, ratified by the United States in 1992, with reservations, understandings, and declarations, enshrines the essential rights and freedoms fundamental to any democratic society, including the right to privacy.[196]

In the wake of the Edward Snowden affair, in 2013, the UN General Assembly adopted the resolution "The right to privacy in the digital age," calling on all States to respect and protect the right to privacy, including in the context of digital communication and government surveillance.[197] In 2014, the American Civil Liberties Union issued a report advocating that General Comment No. 16 should be amended to reflect the current realities of the digital economy with its aggressive collection of personal information by many states and business entities.[198] As new technologies advance, the human rights regime has the potential to play a significant role in advocating for privacy rights, fostering a more privacy-respectful world both at national and

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193. *See generally* Toonen v. Australia, U.N. Human Rights Comm., Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (emphasizing that the right to have consensual sex is an activity protected under Article 17 of the ICCPR); Hertzberg et al. v. Finland, U.N. Human Rights Comm., Communication No. 61.1979, Appendix, U.N. Doc. CCPR/C/15/D/61/1979(1982) (finding that the right to privacy is part of the right to be different and to live as one wishes).

194. ICCPR, *supra* note 191, at Art. 2 (providing that "[a]ll persons are equal before the Law and are entitled, without any discrimination, to the equal protection of the Law. In this respect, the Law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

195. *See* UNHRC, General Comment No. 16: Article 17 (Right to Privacy), 32d Sess., U.N. Doc. HRI/GEN/Rev.

196. *See* 138 CONG. REC. 8068–71 (1992) (ratifying the ICCPR with reservations).

197. G.A. Res. 68/167 (Jan. 21, 2014).

198. *See* AM. C.L. UNION, INFORMATIONAL PRIVACY IN THE DIGITAL AGE: A PROPOSAL TO UPDATE GENERAL COMMENT 16 (RIGHT TO PRIVACY) TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2015) (calling on the United Nations Human Rights Committee to update the General Comment No. 16 in light of increased potential for technological abuses of privacy in violation of human rights standards).

international levels.[199] Characterizing privacy as an aspirational civil right in the United States is consonant with its broad global understandings.

Originating prominently within African American churches and Southern colleges, the African American Civil Rights Movement unfolded through a tapestry of marches, boycotts, and civil disobedience sit-ins.[200] The Movement importantly included voter education initiatives symbolizing agency and autonomy, which are key privacy ideals.[201] The international prescription of privacy as an ideal civil right was still in the early stages of development during the peak years of the African American Civil Rights Movement, or for our purposes, 1950–1970.[202] The right to privacy, as outlined in the International Covenant on Civil and Political Rights (ICCPR), represented a relatively new legal concept.[203] Synergistic ties between the pronouncement of the ICCPR and the Civil Rights Movement would seem to be natural in the abstract. Yet the arduous task of translating international privacy protection standards into American politics and law might not have seemed urgent to civil rights leaders. Moreover, the popular American notion that privacy is a liberal, individual right entrenched in property rights and middle-class expectations was closer to home and lived in tension with the Movement's focus on collective interests and community action.

B. PRIVACY AND BLACK AMERICANS' CIVIL RIGHTS: MUTUALLY PROTECTIVE

When the Social Security system was erected in the mid-1930s, African American leaders opposed the idea of a Social Security benefits application or identification card classifying persons by color or race. Understanding that

199. *See generally*, Oliver Diggelmann & Maria Nicole Cleis, *How the Right to Privacy Became a Human Right*, 14 HUM. RTS. L. REV. 441, 448 (2014) (highlighting the process by which privacy gained recognition as an international human right before being firmly established as a guaranteed human rights principle within national constitutions and statutes of various nations).

200. *See generally* Vaughn Booker, *Civil Rights Religion?: Rethinking 1950s and 1960s Political Activism for African American Religious History*, 2 J. AFRICANA RELIG. 211, 215 (2014) (explaining the different activism approaches that African Americans deployed in the civil rights movements and campaigns).

201. MELTZER, *supra* note 157, at 34.

202. Diggelmann & Cleis, *supra* note 199, at 449 (detailing how the ICCPR incorporated provisions on privacy, noting that it was adopted 17 years after the UDHR and that its privacy provision was worded identically to the one in the UDHR).

203. *Id.* at 449–51.

privacy rights are civil rights protectant, New Deal era Black Americans predicted the state would use race information to target individuals for harm, including discrimination.[204] That data privacy can be a civil rights protectant became even more evident in the 1950s, contemporaneous with the African American Civil Rights Movement.[205] Civil rights strategists employed a judicial strategy, asking courts to overturn segregation laws sustained by the "separate but equal" doctrine of *Plessy v. Ferguson.* The litigation approach found success in 1954 in the pivotal civil rights decision, *Brown v. Board of Education*, which held that state laws allowing and enforcing racial segregation in public schools are unconstitutional.[206] *Brown* overturned the precedent set by *Plessy*,[207] marking the legal abolition of the "separate-but-equal" doctrine.[208]

Another landmark Supreme Court decision*, NAACP v. Alabama* (1959),[209] shut down Alabama's effort to quash organized civil rights work.[210] The Court found that associational privacy rights are implicit in constitutional guarantees of free association. Opposition to government demands for personal information was voiced long before the Civil Rights Movement took hold.

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204. IGO, *supra* note 19, at 72–73 (2018) (Black leaders opposed the inclusion of a race designation on the social security application form, fearing it would lead to more discrimination against Black people); *Cf.* BRIAN JEFFERSON, DIGITIZE AND PUNISH: RACIAL CRIMINALIZATION IN THE DIGITAL AGE 7, 18, 192–93 (2020) ("One of the key functions of the modern nation-state is assigning racial classifications to groups of people in census tabulations, cartographies, and now database systems. In the United States, racial classifications have been used by courts, law enforcement, public officials, and military personnel to justify enslaving Africans and their descendants, confiscating indigenous territories, barring Chinese immigrants, interning Japanese citizens, incarcerating poor Black and Latinx people, and banning Muslims.").

205. *See* Edia Kayyali, *The History of Surveillance and the Black Community*, ELEC. FRONTIER FOUND. (Feb. 13, 2014), https://www.eff.org/deeplinks/2014/02/history-surveillance-and-black-community (detailing government surveillance programs, notably the FBI "COINTELPRO," which targeted Black Americans advocating against segregation and structural racism during the 1950's and 1960 Civil Rights era); Juan F. Perea, *An Essay on the Iconic Status of the Civil Rights Movement and Its Unintended Consequences*, 18 VA. J. SOC. POL'Y & L. 44 (2010) (explaining how the 1950s up to the 1960s were pivotal in the civil rights movement period).

206. 347 U.S. 483, 495 (1954); *see also* Derrick A. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (influential original analysis of extra- judicial factors that led Court to overturn *Plessy v. Ferguso*n).

207. 163 U.S. 537, 552 (1896).

208. 347 U.S. at 495.

209. 357 U.S. 449 (1958).

210. *Id.*

The Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968,[211] were momentous achievements in U.S. civil rights history, widely recognized as some of the most important legislation ever enacted by the U.S. Congress.[212] The later and less acclaimed Fair Equal Credit Opportunity Act of 1974 prohibited discrimination against credit applicants based on race, color, religion, national origin, sex, marital status, age, or sources of income.[213] Right to privacy discourse was not a player in the social activism that led to these laws.

Although Civil Rights Movement activists did not typically advance the right to privacy per se as a civil right, there was awareness in the era that associational privacy, limits on data collection, freedom from government surveillance, and freedom from arbitrary police interference, search, and seizure were vital African American interests.[214] Even White journalists, scholars, and lawyers of the era, who gave scant attention to racial dimensions of privacy, could see that Blacks had important civil rights-adjacent interests in privacy protection.[215]

Privacy Against Civil Rights. Not only did activists fail to view privacy as a civil right in the early Civil Rights Movement, but the concept of privacy was capable of being deployed in opposition to civil rights. Notions of privacy rights could also be weaponized against Black civil rights, as illustrated by Hannah Arendt's essay, *Reflections on Little Rock*.[216] Arendt's perspective was that, far from being a civil right or civil rights protectant, privacy is a civil rights antagonist.

In her essay, Arendt emphasized that the federal decision to initiate integration in public schools placed the burden of working out a complex

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211. 42 U.S.C. § 3604 (prohibiting discrimination in the rental or sale of housing based on race, color, religion, national origin, sex, disability, or familial status).

212. Kareem Crayton, *The Voting Rights Act Explained*, BRENNAN CTR. FOR JUST. EXPLAINER (July 17, 2023), https://www.brennancenter.org/our-work/research-reports/voting-rights-act-explained (arguing that the Voting Act is the most successful Civil Rights Act but the Supreme Court has weakened it); JANICE H. HAMMOND, A. KAMAU MASSEY & MAYRA A. GARZA, AFRICAN AMERICAN INEQUALITY IN THE UNITED STATES (2019) (revised Dec. 2022) (explaining the that the 1965 Voting Rights Act was passed to expressly prohibit intentional discrimination in voting by using disqualifying practices states imposing qualifications or practices to deny the right to vote on account of race literally tests).

213. 15 U.S.C. § 1691.

214. *See* discussion of this point, *supra* notes 137–138 and accompanying text.

215. *See* discussion of this point, *supra* notes 111–115 and accompanying text.

216. ARENDT, *supra* note 12.

problem on children, both Black and White.[217] But Arendt's main argument against *Brown* was not child welfare but parental privacy.[218] Arendt's defense of White people's right to racially segregated public schools was grounded in their right to privacy. Whatever is appropriately private is governed neither by equality nor discrimination but by exclusiveness, she maintained. According to Arendt, individuals should have the freedom to choose with whom to spend time with, live with, or marry, and objective standards or rules ought not to guide such choices. Compelling parents to send their children to an integrated school against their will involves stripping them of rights inherent in all free societies—specifically, the private right over their children and the social right to free association. Her argument that the government can legitimately take no steps against social discrimination in the use of tax-funded public facilities implied relegating African Americans to secondhand citizenship without meaningful civil rights. Fortunately, Arendt's views had no direct influence on the direction of public policy.

Privacy Concerns Intersected Civil Rights Concerns. In the transformative period of the 1950s and 1960s, the quest for civil rights to secure equality became a focal point of the nation's attention.[219] The Movement's resources and strategies were predominantly directed toward grassroots mobilization, organizing mass protests, and securing legal victories, diverting attention from immediate privacy concerns.[220] Despite the limited attention given to privacy rights *per se* within the civil rights movement, there were major instances where privacy concerns patently intersected with the Movement's broad goals.

For example, unlawful police search and seizure leading to criminal prosecutions was a common civil rights era concern. A Black woman named Dollree Mapp fought conviction on an obscenity possession charge based on the argument that police—who forcibly broke into her home looking for someone who did not reside there, violently restrained her, reached into her bra to recover their fake search warrant, ignored her request for her attorney,

217. *Id.* at 50.

218. *Id.* at 55.

219. *See generally* Leland Ware, *Civil Rights and the 1960s: A Decade of Unparalleled Progress*, 72 MD. L. REV. 1087 (2013).

220. *See generally*, Steven F. Lawson, *Freedom Then, Freedom Now: The Historiography of the Civil Rights Movement*, 96 AM. HIST. REV. 456, 457 (1991) (revisiting the different strategies used by the civil rights activities to advocate for equality). Privacy concerns were not top on the list of what was important at the time, but that is not to say that it was not important.

and then searched her home—violated her Fourth Amendment privacy rights. Her case established the exclusionary rule that evidence obtained pursuant to an unlawful search cannot be used as evidence in a criminal trial.[221] The court concluded that "[h]aving once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise."[222]

Another example is *Loving v. Virginia*, in which the Supreme Court unequivocally declared that laws prohibiting interracial marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Marriage, the court asserted, is a "basic civil right of man."[223] Originating from the challenge to the Virginia Racial Integrity Act of 1924, which prohibited marriages between White individuals and those with "one-eighth or more of Negro blood," the case centered on Mildred Loving, an African American woman, and Richard Loving, a White man.[224] After being convicted and sentenced to a year in prison for violating Virginia's anti-miscegenation law, the Lovings appealed, resulting in a unanimous Supreme Court decision in their favor.[225] *Loving v. Virginia* carried profound privacy and marriage equality implications.[226] Through invalidating regulations governing interracial relationships, the Court upheld the right of individuals to make personal choices unburdened by government racial bias and discrimination.

Although it did not lead to a singular historic Court decision, the surveillance and information gathering to monitor civil rights activism and activists constituted significant privacy concerns. The F.B.I. employed various surveillance methods, such as covert listening devices, undercover operatives, wiretapping, and blackmailing, to deflect the civil rights leader, Dr. Martin Luther King, Jr.[227] Congress enacted Title III of the Omnibus Crime Control

221. Mapp v. Ohio, 367 U.S. 643 (1961).

222. *Id.* at 660.

223. Loving v. Virginia, 388 U.S. 1, 12 (1967).

224. VA. CODE ANN. § 20-54 (1960 Repl. Vol.) (prohibiting a "White person" from marrying other than another "White person"), *invalidated by* Loving.

225. Loving, 388 U.S. at 12.

226. *Id.* ("Under our constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

227. *See* Federal Bureau of Investigation (FBI), MARTIN LUTHER KING, JR. RSCH. & EDU. INST., https://kinginstitute.stanford.edu/federal-bureau-investigation-fbi.

and Safe Streets Act in response to congressional investigations and studies finding that "extensive wiretapping had been conducted by government agencies and private individuals without the consent of the parties or legal sanction" and that "the contents of these tapped conversations and the evidence derived from them were being used by the government and private individuals as evidence in court and in administrative proceedings."[228] Though enacted during the Civil Rights Movement to address problems experienced by Dr. King and other civil rights activists, the privacy protections of Title III were not cast as "civil rights" legislation. A civil rights protectant, Title III required that federal, state, and other government officials obtain judicial approval for intercepting communications and regulated the use of information secured through wiretapping.

It is worth noting that the Justice Department Bureau of Justice Statistics has described Title III (now revised as Title I of the Electronic Communications Privacy Act of 1986) as protection for "Privacy and Other Civil Liberties." In fact, as recently as 2012, the Justice Department distinguished "civil liberties" from "civil rights" asserting that privacy is best understood as a "civil liberty" and not as a "civil right."[229] However, in 2011, the Justice Department described the connection between privacy, civil rights, and civil liberties less definitively: "Privacy, civil rights, and civil liberties interests—or 'privacy' interests—embrace all privacy interests, whether rooted in civil rights law, civil liberties guarantees, or the protection of information privacy interests of individuals or organizations."[230] The 2011 characterization

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228. *Title III of The Omnibus Crime Control and Safety Act of 1968 (Wiretap Act)*, U.S. DEP'T OF JUST., https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1284 (explaining the background of the Wiretap Act).

229. U.S. DEP'T OF JUST., PRIVACY, CIVIL RIGHTS, AND CIVIL LIBERTIES POLICY DEVELOPMENT GUIDE FOR STATE, LOCAL, AND TRIBAL JUSTICE ENTITIES 13 (2012) ("The term "civil liberties" generally means the freedom from intrusive or undue government interference, while "civil rights" refers to the rights of individuals to participate fairly and equally in society and the political process. Civil liberties are generally spoken of in the negative—what the government cannot do—whereas civil rights are generally positive (or affirmative)—what the government must or should do to ensure equality and fairness. Civil liberties offer protection to individuals from improper government action and arbitrary governmental interference. Privacy is coupled more naturally with civil liberties because privacy is a concept about prohibiting certain intrusions.").

230. *Executive Summary for Justice Decision Makers: Privacy, Civil Rights, and Civil Liberties Program Development*, U.S. DEP'T OF JUST. (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/Executive_Summary_for_Justice_Decision_Makers.pdf.

is more consistent with the current trend of regarding the right to privacy as protected by both civil rights and civil liberties or as itself a civil right.[231]

Other Civil Rights era privacy statutes enacted by Congress were the Privacy Act of 1974, exemptions to the Freedom of Information Act of 1974 (FOIA), and the Family Education and Right to Privacy Act (1974) (FERPA). Exemptions to FOIA require the federal government to withhold certain disclosures that would offend privacy, but civil rights groups, civil society groups, journalists, and scholars have frequently used FOIA requests and litigation to compel government disclosure of otherwise non-transparent activities that they deem potentially violative of rights and liberties.[232]

Minority Interests and Privacy Law Can Conflict. Cases brought under FERPA reveal the potential for conflict between individual privacy secured by statute and civil rights goals. The privacy protections of FERPA will sometimes align

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231. U.S. DEP'T OF JUST., *supra* note 229, at 13 n.11–12 (The Justice Department here distinguished civil rights and civil liberties a bit differently: "According to the U.S. Department of Justice's Global Justice Information Sharing Initiative, the term "civil liberties" refers to fundamental individual rights such as freedom of speech, press, or religion; due process of law; and other limitations on the power of the government to restrain or dictate the actions of individuals. They are the freedoms that are guaranteed by the Bill of Rights–the first ten amendments–to the Constitution of the United States. Civil liberties offer protection to individuals from improper government action and arbitrary governmental interference. The term "civil rights" refers to those rights and privileges of citizenship and equal protection that the state is constitutionally bound to guarantee to all citizens regardless of race, religion, sex, or other characteristics unrelated to the worth of the individual. Protection of civil rights imposes an affirmative obligation upon the government to promote equal protection under the law. These civil rights to personal liberty are guaranteed to all United States citizens by the Thirteenth and Fourteenth Amendments and by acts of Congress.").

232. *See, e.g.*, Council on Am.-Islamic Rels.-Washington v. United States Customs & Border Prot., 492 F. Supp. 3d 1158 (W.D. Wash. 2020) (FOIA request for information from Customs and Border Protection regarding screening individuals of Iranian heritage not barred by FOIA personnel and medical files exemption); Leadership Conf. on C.R. v. Gonzales, 404 F. Supp. 2d 246 (D.D.C. 2005) (action against the United States Attorney General and Department of Justice (DOJ), alleging that defendants improperly withheld information, which concerned records of communications transmitted by the Department of Justice relating to the monitoring of federal elections); Muslim Advocs. v. U.S. Dep't of Just., 833 F. Supp. 2d 92 (D.D.C. 2011) (Plaintiff Muslim Advocates brings this action under the Freedom of Information Act (FOIA), seeking the complete and unredacted final version of certain chapters of the Domestic Investigations and Operations Guide (the "DIOG") of the Federal Bureau of Investigation (FBI), which were previously shown to plaintiff and other civil right and civil liberties groups during two meetings at FBI headquarters in November 2008); Campbell v. U.S. Dep't of Just., 164 F.3d 20 (D.C. Cir. 1998), as amended (Mar. 3, 1999) (summary judgment against denial on national security grounds of FOIA request by James Baldwin biographer for "the FBI file" on Baldwin).

with civil rights and sometimes not. Black parents of minority children have sought to use FERPA's privacy protections to further their children's civil right to equal educational opportunity by preventing schools from disclosing sensitive, erroneous, and misleading information.[233] In *Rios v. Reid*, class action plaintiffs were Puerto Rican and other Hispanic school children, and their parents, residing in Suffolk County, New York. Their complaint alleged that the defendant school officials violated the plaintiffs' right to equal educational opportunity, protected by the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, "by failing to provide programs, curriculum and teaching personnel adequate to remedy the plaintiffs' English language deficiencies."[234] The defendants objected to plaintiffs' discovery requests for information concerning Hispanic pupils in the school district on the grounds that disclosure of the information sought would violate FERPA, which "prohibits them from disclosing the names, or other identifying information, of individual students."[235] The Court found that FERPA exceptions permitted the federal courts to allow disclosures for judicial purposes where the party seeking disclosure can "demonstrate a genuine need for the information that outweighs the privacy interest of the students" and that in this case "the plaintiffs have shown such a need."[236]

FERPA's need-based exception potentially limits its effectiveness by allowing disclosures that can undermine students' privacy rights. This issue is especially pressing today, given the high-tech monitoring of students in schools. As surveillance technologies become more prevalent in schools, their negative impacts could disproportionately harm children of color and children with disabilities. Nonetheless, at the same time, FERPA has increasingly become an important legal tool in advancing students' civil rights to equality

233. *See* Najarian R. Peters, *The Golem in the Machine: FERPA, Dirty Data, and Digital Distortion in the Education Record*, 78 WASH. & LEE L. REV. 1991 (2022) (arguing that K-12 school records may contain data that is inaccurate, incomplete, or misleading, the disclosure of which can promote racial inequity).

234. Rios v. Reid, 73 F.R.D. 589, 590 (E.D.N.Y 1977).

235. *Id.*

236. *Id.* at 597; *see also* Ragusa v. Malverne Union Free Sch. Dist., 549 F. Supp. 2d 288, 293 (E.D.N.Y. 2008) (need for sensitive information outweighed privacy interests of student alleging national origin and disability interests).

in education by reinforcing their statutory privacy rights.[237] Black men are prone to discriminatory racial profiling. Black male college students attending the State University of New York College at Oneonta ("SUCO") sued after the school released a list of the names and addresses of SUCO's Black male students to law enforcement officers who were looking for an unidentified armed, young, possibly Black male suspect in a violent crime who might have fled onto the campus.[238] The students unsuccessfully alleged the public defendants conspired to violate FERPA in violation of civil rights statutes 42 U.S.C. §§ 1983 and 1985(3) and failed to prevent the § 1985(3) conspiracy in violation of 42 U.S.C. § 1986. The court agreed with the school that it "unclear whether FERPA's emergency exception allowed the release of the list" and that, therefore, "they are entitled to qualified immunity on that ground."[239]

Not Yet Really a Positive Civil Right. In sum, our examination of privacy and civil rights through time in the United States has led to the conclusion that privacy is not really a civil right expressed as such in the positive law. Notably, its appearance in the ICCPR, to which the United States is a signatory, did not much propel the concept into common usage. When advocates have asserted that privacy is a civil right, they have asserted claims with which we can agree, namely that carefully designed privacy rights would be capable of fighting discrimination and fostering equality, hence meriting recognition in the

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237. Nila Bala, *The Danger of Facial Recognition in Our Children's Classrooms*, 18 DUKE L. & TECH. REV. 249, 257 (2019–2020) ("Unfortunately, not all children are likely to be monitored in the same way. Current inequities within the classroom start as early as preschool, where black children are viewed as criminal (rather than childlike) early on. Studies have found that black children, relative to their White counterparts, are disproportionately suspended as preschoolers. Children with disabilities also suffer from disproportionate suspensions. Suspensions only exacerbate learning gaps and create more opportunities for children to engage in criminal conduct and enter the juvenile justice system. Surveillance is already employed as a tool to punish misbehavior, specifically targeting children of color. In the wake of the Sandy Hook Elementary shooting, many schools enhanced their surveillance procedures, but not at equal rates. Schools with a majority of students of color were far more likely to include more surveillance. Professor Jason Nance, the researcher who conducted the study, concluded that "schools with higher concentrations of minority students are more inclined to rely on heavy-handed measures to maintain order than other schools facing similar crime and discipline issues.") (footnotes omitted).

238. Brown v. City of Oneonta, N.Y., Police Dep't, 106 F.3d 1125 (2d Cir. 1997), *abrogated by* Gonzaga Univ. v. Doe, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002), was unclear whether FERPA's emergency exception allowed the release of the list; we find that they are entitled to qualified immunity on that ground.

239. Brown v. City of Oneonta, N.Y., Police Dep't, 106 F.3d 1125, 1131 (2d Cir. 1997), *abrogated by* Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

positive laws of our nation. They mean that rights to privacy could bolster the civil rights agenda and should be adopted into the civil rights family, alongside, inter alia, the right to vote, the right to use public accommodations, the right to fair housing, and the right to equal employment opportunity. The right to privacy isn't yet a civil right but it can be transformed into a civil right. In the meantime, privacy rights under the First and Fourth Amendments, the Fourteenth Amendment, and statutes, including Title III and FERPA, are important civil rights protectants. And efforts to insert civil rights provisions into proposed new legislation continue.

V. CHALLENGES FOR THE CIVIL RIGHTS FRAMEWORK

In this final section, we discuss some of the ways lawmakers have attempted to incorporate civil rights protections into privacy and data protection law to address characteristic vulnerabilities, and some limitations and challenges we have observed. Hortatory recognition of privacy as a civil right has not led to immediate enhancements to the privacy of people most in need of protections.

Scott Skinner-Thompson has explained that those "in the most precarious social positions are disproportionately vulnerable to privacy violations, while the privacy of the privileged is more protected."[240] As recounted in Part III, "[i]mpossible privacy is one of the tormenting dimensions of slavery and its afterlives."[241] As seen in Part IV, Black people are among those Skinner-Thompson refers to as most vulnerable to privacy violations. Members of other population groups are highly vulnerable, too.[242] Despite the strides made

240. SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 2 (2020); *cf.* Petal Samuel, *The Sound of Luxury: Antiblackness, Silence and the Private Island Resort*, 51 BLACK SCHOLAR 30 (2021) (arguing that the trend of marketing "silence" as a luxury afforded the privileged by travel to the Caribbean "is situated amidst this . . . colonial fantasies that include servile and unobtrusive Black and Brown peoples who are nearby but yet invisible and inaudible, and a notion of 'privacy' . . . ").

241. Christen Smith, *Impossible Privacy: Black Women and Police Terror*, 51 BLACK SCHOLAR 20 (2021) (elaborating that "[l]iving under the constant physical and metaphysical gaze of whiteness is more than just inconvenience; it's terrorizing.").

242. *See, e.g.*, Julia Anguin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race,* PROPUBLICA (Oct. 28, 2016), https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race; Harper Neidig, *Civil Rights Lawyer Accuses AT&T of Discrimination Against Low Income Communities*, HILL (Aug. 24, 2017), https://thehill.com/policy/technology/347818-civil-rights-lawyer-accuses-att-of-discriminating-against-low-income/. *See generally*, CITRON, THE FIGHT FOR PRIVACY, *supra* note 4.

by the Civil Rights Movement, significantly driven by African Americans in the pursuit of equality, there is a looming threat of regression brought about by digital practices.[243] Of course, civil rights continue to be threatened by privacy violations offline, especially in the law enforcement context[244] and public services.[245] Since avoiding the police or digital transactions is nearly impossible, and because racialized minorities benefit both from respectful policing and the social, political, and economic opportunities digital life has to offer,[246] safeguards against the discrimination and inequalities fostered by these systems are essential.[247] After briefly describing a selection of problems calling for intervention—problems treated at length elsewhere in the authorities we cite—we assess proposed legislative interventions.

A. SOME THREATS AND PROBLEMS

Oversurveillance. Individuals subjected to prolonged surveillance can encounter hardships, including physical and mental distress, financial

243. *See, e.g.*, SARAH BRAYNE, PREDICT AND SURVEIL: DATA, DISCRETION, AND THE FUTURE OF POLICING 2 (2021) (warning of dangers posed by the intersection of big data and the criminal justice system).

244. *See, e.g.*, ALLISSA V. RICHARDSON, BEARING WITNESS WHILE BLACK: AFRICAN AMERICANS, SMARTPHONES, AND THE NEW PROTEST JOURNALISM 181 (2020) (Obama directed federal dollars at the states to purchase body cameras but raised privacy invasion issues).

245. *See generally*, DEVON CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER AND THE FOURTH AMENDMENT (2022); KHIARA BRIDGES, THE POVERTY OF PRIVACY (2017).

246. *Cf.* ANDRE BROCK JR., DISTRIBUTING BLACKNESS: AFRICAN AMERICAN CYBERCULTURES 6–7, 210 (2020) (exploring how "Black people make sense of their existence as users and as subjects within advanced technological artifacts, services and platforms"); *See* Taiyler S. Mitchell, *Black Creators Say Tik Tok's Algorithm Fosters a 'Consistent Undertone of Anti-Blackness.' Here's How the App Has Responded*, BUS. INSIDER (Aug. 24, 2021), https://www.businessinsider.com/a-timeline-of-allegations-that-tiktok-censored-black-creators-2021-7.

247. *See* SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 160, 169 (2018) ("The web is characterized as a source of opportunity for oppressed and marginalized people . . . . The rise of big-data optimism should be a Wake-up call for people living on the margins and people aligned with them to engage in thinking through the interventions we need."); *see* Simon Kemp, *Digital 2023: The United States of America*, DATAREPORTAL (Feb. 9, 2023), https://datareportal.com/reports/digital-2023-united-states-of-america (reporting that there were 311 internet users in the United States at the start of 2023, and the internet penetration stood at 91.8% at the start of 2023); *Penetration Rate of E-Commerce in the U.S. 2020-2029*, STATISTA (Aug. 26, 2024), https://www.statista.com/statistics/273958/digital-buyer-penetration-in-the-united-states/ (reporting that 77.88% of the American population purchased goods online in 2022, with the number predicted to reach 87.9% by 2025).

problems, as well as "data marginalization."[248] Modern digital surveillance includes practices that collect a wide array of personal information: names, dates of birth, social security numbers, health records, religious affiliations, political party affiliations, banking histories, location data, shopping histories, and home addresses.[249] Consumers unwittingly participate in mass surveillance systems.[250] With the emergence of generative artificial intelligence (AI) and Big Data analytics, the data collected is utilized to unveil previously unknown patterns, connections, trends, links, identities, likes, dislikes, practices, traditions, and beliefs of individuals and groups to which they belong or identify with.[251]

Many proponents of the recognition of privacy as a civil right do so because they believe minority communities experience extremes of oversurveillance, which result in feelings of disrespect, arrests, political intimidation, and suppression of free speech and expression.[252] Oversurveillance of marginalized groups is a global phenomenon.[253] As

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248. Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 255 (2018). *See generally*, Richards *supra* note 26.

249. *See* DANIEL J. SOLOVE, THE DIGITAL PERSONAL TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (2004).

250. WINIFRED R. POSTER, *Racialized Surveillance in the Digital Service Economy*, *in* CAPTIVATING TECHNOLOGY (Ruha Benjamin ed., 2019) 133, 160–62 ("consumers and digital users have a heightened role in the digital service economy, including an empowered agency to conduct racial surveillance. A frame of multi-surveillance redirects our thinking around this dynamic. It posits that consumers, often overlooked by traditional accounts of surveillance, are one of the many groups participating in critical acts of observing. Moreover, as they are co-opted into massive systems of matching and communication in digital services, they are increasingly watching each other."); *see also* DAVID LYON, SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK AND DISCRIMINATION 9 (2023) (sociological studies of group-based discrimination and data practices).

251. *See* Andreas Holzinger, Anna Saranti, Alessa Angerschmi, Bettina Finzel, Ute Schmid & Heimo Mueller, *Toward Human-Level Concept Learning: Pattern Benchmarking for AI Algorithms*, 4 PATTERNS 1 (2023).

252. *See* Allen, *supra* note 27, at 917–92 (noting that the oversurveillance is a principal vulnerability of African Americans); *see also* Nicol Turner Lee & Caitlin Chin-Rothmann, *Police Surveillance and Facial Recognition: Why Data Privacy is Imperative for Communities of Color*, BROOKINGS (Apr. 12, 2022), https://www.brookings.edu/articles/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/ (explaining that both government and private entities share a long and common history of surveillance and data collection data from individuals).

253. *See, e.g.*, Craig Proulx, *Colonizing Surveillance: Canada Constructs an Indigenous Terror Threat*, 56 ANTHROPOLOGICA 83, 83 (2014) ("Canada has a long history of surveilling indigenous

Simone Browne has documented, the earliest instances of African Americans encountering surveillance tools date back to the branding with hot metal by slave traders, a dehumanizing practice aimed at identification and surveillance, treating them as private property.[254] Extremes of discriminatory surveillance continue today.[255] Black people's data is disproportionately collected, analyzed, and used for profiling, and disproportionate surveillance results in violations of not only civil rights but also economic, social, and cultural rights.[256]

Exclusion and Predation. Discriminatory exclusion and predation are other digital age vulnerabilities that have led to calls for recognition of privacy protection as a civil right.[257] People of color are targeted for exclusions that deprive them of opportunities relating to basic goods such as housing, ride-sharing, and employment and for predatory business schemes that affect their finances, education, and mental repose.[258] Major tech companies, including Facebook and Google, have been reported to use discriminatory practices in advertising housing, employment, and loans.[259] Facebook's legendary targeted

peoples"); *see also Chinese Persecution of the Uyghurs*, U.S. HOLOCAUST MUSEUM, https://www.ushmm.org/genocide-prevention/countries/china/chinese-persecution-of-the-uyghurs (explaining how oppressed Muslim minority group in Chinese is subjected to extremes of surveillance); Angelica Mari, *Facial Recognition Surveillance in São Paulo Could Worsen Racism*, AL JAZEERA (July 13, 2023), https://www.aljazeera.com/economy/2023/7/13/facial-recognition-surveillance-in-sao-paulo-could-worsen-racism (noting that a recent plan to install a network of security camera in Sao Paolo, Brazil was opposed on the grounds that it would have a disparate impact on Black people. The plan is to install up to 40,000 cameras equipped with AI technology in the city, and this raises privacy concerns on security and privacy).

254. *See* SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 90–97 (2015).

255. *See* Allen, *supra* note 27, at 907 (noting how discriminatory over surveillance, exclusion and predation comprise a "Black Opticon" of privacy and data protection problems for African Americans exacerbating the marginalization and endangerment of Black technology users); *see also* RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 108, 124, 125, 127 (2019) (explaining how racist structures marginalize but also forcibly center and surveil racialized groups); *see also* Barton Gellman & Sam Adler-Bell, *The Disparate Impact of Surveillance,* CENTURY FOUND. (Dec. 21, 2017), https://tcf.org/content/report/disparate-impact-surveillance/ ("Mass surveillance society subjects us all to its gaze, but not equally so. Its power touches everyone, but its hand is heaviest in communities already disadvantaged by their poverty, race, religion, ethnicity, and immigration status").

256. *See* NOBLE, *supra* note 247.

257. *See* Allen, *supra* note 27, at 921, 951 (noting that a federal agency with a civil rights office could potentially address discriminatory surveillance, exclusion, and predation).

258. *Id.* at 921–28; *cf.* EUBANKS*, supra* note 52, at 178, 179, 181, 184–88, 197 (digital poorhouses as automated social exclusion).

259. *See* Allen, *supra* note 27, at 914.

housing advertisements resulted in federal prosecution.[260] Such practices contribute to systemic inequalities by excluding communities of color based on their ethnic affinity. Existing safeguards, such as Title VII[261] and the Fair Housing Act[262] have helped but may not be enough. People of color are discriminatorily excluded but also discriminatorily included for purposes of predation. With predation in mind, the personal data of people of color are "gathered and used to induce purchases and contracts through con-jobs, scams, lies, and trickery."[263] Specific groups are targeted for predation of sorts to which they are known to be vulnerable, which may include pyramid business schemes, expedited educational certifications, magazine subscriptions for prison inmates, or reputation defense services.[264] The FTC has identified such predation as a major data abuse problem that existing privacy laws do not reach, and they have brought fair trade practice actions.[265]

Algorithms and Automated Decision Making. Proponents of automated decision-making facilitated by generative AI and algorithmic processes contend that these approaches improve efficiency, consistency, neutrality, and accuracy in decisions of societal importance.[266] Computer-generated decisions leverage massive amounts of personal information collected from individuals

260. *Id.* at 924 (Fair Housing Act litigation brought by FTC against Facebook (Meta)).

261. Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. The Civil Rights Act of 1991 (Pub. L. No. 102-166) and the Lilly Ledbetter Fair Pay Act of 2009 (Pub. L. No. 111-2) amend provisions of Title VII.

262. Fair Housing Act, *supra* note 211.

263. Allen, *supra* note 27, at 925–927.

264. *Id.*

265. *See supra* notes 7, 85 and accompanying text.

266. *But see* Daniel J. Solove, *Artificial Intelligence and Privacy*, 77 FLA. L. REV. 1, 51-56 (2025) (elaborating the many ways in which AI compromises privacy). *See also* Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1696 (2019); *cf.* Joe McKendrick & Andy Thurai, *AI Isn't Ready to Make Unsupervised Decisions*, HARV. BUS. REV. (2022) (discussing how AI models were trained using tainted data that were not gender-neutral in some circumstances); Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753 (2023) (arguing that algorithms used in the administration of criminal law can lead to adverse racial and societal outcomes that disadvantage the already marginalized); Ifeoma Ajunwa, *Race, Labor, and the Future of Work*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Emily Houh & Khiara M. Bridges eds., 2022), https://doi.org.10.1093/oxfordhb/9780190947385.013 (arguing that algorithms that automate important hiring decisions can exacerbate inequality).

from which automated scores are generated.[267] Unfortunately, these decisions have been found to disproportionately harm the poor, reinforce racism, and amplify inequality because they reflect the biases of their human creators.[268] This has, over time, has resulted in discrimination against people of color, especially Black and Brown populations, immigrants, LGBTQ+ individuals, religious minorities, and other marginalized groups.[269] Black and Brown populations are discriminated against in areas of law enforcement, housing, national security, insurance, education, child welfare, health care, education, and civic participation.[270] Such discrimination has resulted in the push to designate privacy as a civil right.

Inequality resulting from automated processes has not spared the criminal justice system, as the use of predictive policing algorithms by law enforcement has resulted in discriminatory practices.[271] For example, the Chicago Police Department's use of predictive policing algorithms has been reported to perpetuate racist practices in law enforcement.[272] The reliance on policing algorithms has reportedly perpetuated biased policing because the machine learning policing tools draw from historical data, which may perpetuate human

267. *See* Lee Rainie & Janna Anderson, *Code-Dependent: Pros and Cons of the Algorithm Age*, PEW RSCH. CTR. (Feb. 8, 2017), https://www.pewresearch.org/internet/2017/02/08/code-dependent-pros-and-cons-of-the-algorithm-age/.

268. *See* Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 915 (2021) (arguing that pretrial uses of risk assessment algorithms misclassify Black people as high risk and White people as low risk); *see also* Pranshu Verma, *These Robots Were Trained on AI. They became Racist and Sexist*, WASH. POST (July 16, 2022), https://www.washingtonpost.com/technology/2022/07/16/racist-robots-ai/.

269. *Cf.* NOBLE, *supra* note 249, at 4 (explaining "the structural ways that racism and sexism are fundamental" to automated decision-making and how those mask and deepen social inequality); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1576–84 (1996).

270. *See Privacy & Racial Justice,* ELEC. PRIV. INFO. CTR., https://epic.org/issues/democracy-free-speech/privacy-and-racial-justice/ ("marginalized communities are disproportionately harmed by data collection practices and privacy abused from both government and private sector").

271. Richard A. Berk, *Artificial Intelligence, Predictive Policing, and Risk Assessment for Law Enforcement*, 4 ANN. REV. CRIMINOLOGY 209, 224 (describing how emphasizing crime forecasts results in a social focus on preemptive policing, often casting a shadow of suspicion and causing oversurveillance on already disadvantaged neighborhoods).

272. Jeff Cockrell, *Law and Order and Data: Will Algorithms Fix What's Wrong with American Justice or Make Things Worse,* CHI. BOOTH REV. (2023), https://www.chicagobooth.edu/review/law-order-data.

biases and thus amplify and reinforce historical inequalities and unfair treatment in the justice system.[273]

Disenfranchisement. Integration of civil rights discourse with privacy becomes particularly relevant at a time when citizenship and democracy face challenges. A form of discriminatory predation, data privacy violations, facilitated by modern digital technology have created civic issues such as disinformation campaigns,[274] voter suppression,[275] social media manipulation,[276] and social engineering.[277] During national elections, manipulative tactics, including the dissemination of false and alarmist information, have targeted specific demographics, particularly Black and Brown communities, with the aim of influencing their voting preferences for or against candidates while utilizing data surveillance tools.[278] This compromises a key American civic process of elections, which threatens the pillars of democracy. According to a 2017 PEW research report, the Black voter turnout rate in the 2016 national elections experienced a significant and

273. *Id.*

274. Gabriel R. Sanchez & Keesha Middlemass, *Misinformation is Eroding the Public's Confidence in Democracy*, BROOKINGS (July 26, 2022), https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ (spreading false or misleading information through platforms like social media and fake news websites, or through foreign influence and the like erode the public's trust in election processes).

275. Shane Harris & Ellen Nakashima, *With a Mix of Covert Disinformation and Blatant Propaganda, Foreign Adversaries Bear Down on Final Phase of Presidential Campaign*, WASH. POST (Aug. 21, 2020), https:// www.washingtonpost.com/national-security/with-a-mix-of-covert-disinformation-and-blatant-propaganda-foreign-adversaries-bear-down-on-final-phase-of-presidential-campaign/2020/08/20/57997b7a-dbf1-11ea-8051-d5f887d73381_story.html; *see* Vandewalker, *supra* note 38 (explaining that there are always deliberate efforts through digital and social media platforms to discourage specific demographics from voting, often through restrictive voter I.D. laws, gerrymandering, or misinformation about polling locations and procedure).

276. Karen Kornbluh, Ellen P. Goodman & Eli Weiner, *Safeguarding Democracy Against Disinformation*, GERMAN MARSHALL FUND OF U.S. (Mar. 24, 2020), https://www.gmfus.org/news/safeguarding-democracy-against-disinformation (explaining how the targeted use of social media platforms to spread divisive content, create echo chambers, or micro-target specific groups with tailor-made political messaging).

277. *Id.* (explaining how disinformation creates alternate realities that are untrue using psychological manipulation techniques, including micro-targeting behavioral profiling, to influence individuals' political and voting behavior).

278. Yash Jain & Trey Walk, *Disinformation About US Elections Targets Communities of Color: Safeguarding Accurate Information Needed to Ensure Free and Fair Elections*, HUMAN RIGHTS WATCH (Aug. 15, 2024), https://www.hrw.org/news/2024/08/15/disinformation-about-us-elections-targets-communities-color.

unprecedented decline after two decades of consistent participation.[279] The widespread dissemination of misinformation through online platforms disproportionately affected African Americans as a voting bloc as a direct result of voter suppression tactics that ultimately benefited President Trump's 2016 campaign.[280] The decline in Black voter turnout was partially attributed to the role of misinformation in the campaign.[281]

The civil right to vote is foundational to citizenship and guarantees an equal stake in the democratic dispensation of society.[282] Citizenship is underscored by its crucial connection to the enjoyment of individual liberties. As the civil rights discourse converges with privacy and data protection in the context of voting rights, this convergence becomes especially pertinent when the very foundations of democracy encounter significant threats through technology.

B. INTERVENTIONS

The need to address the overlapping oversurveillance, exclusion, predation, algorithmic bias, and disenfranchisement highlighted above helps explain the new pairing of privacy rights and civil rights. Existing legal frameworks have fallen short in addressing vexing contemporary forms of discrimination.[283] This has led to some interesting self-help proposals. In general, self-help proposals have not been specifically designed to address systemic racial discrimination or empower profoundly marginalized

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279. Jens Manuel Krogstad & Mark Hugo Lopez, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots*, PEW RSCH. CTR. (May 12, 2017), https://www.pewresearch.org/short-reads/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots/.

280. Dominique Harrison, *Civil Rights Violations in the Face of Technological Change*, ASPEN INST. (Oct. 22, 2020), https://www.aspeninstitute.org/blog-posts/civil-rights-violations-in-the-face-of-technological-change/#:~:text=Black%20and%20Brown%20people%20are%20stripped%20of%20equitable%20opportunities%20in,raise%20privacy%20concerns%20for%20all (stating that the Russian internet Agency (I.R.A.) utilized online platforms such as Facebook, Twitter, and YouTube to suppress African American voters during the 2016 election. This trend continued in the 2020 election, with ongoing disinformation targeting African Americans and the Latino community).

281. *See* Sanchez & Middlemass, *supra* note 274.

282. MELTZER, *supra* note 157, at 34 (highlighting the importance of voting within the Black community as a critical tool for effecting necessary change and as a symbol of equality).

283. *See* CHAO ET AL., *supra* note 9, at 5.

communities.[284] Some clever self-help proposals would be unwise for African American consumers and citizens to adopt.[285] A growing consensus is that privacy law should be strengthened or newly enacted to protect traditional civil rights interests threatened in the digital economy—either because privacy is or should be a civil right or because privacy rights do or should protect civil rights.[286] Calls for state and federal data privacy legislation that explicitly addresses civil rights violations in the digital commerce domain are widespread.[287] However, some legal strategists have argued that instead or in addition to new privacy legislation, existing civil rights laws of twentieth-century origin—initially designed to protect individuals from unjust treatment across various domains like employment, access to credit, housing, and public education—could be applied to the digital economy.[288] It is true that

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284. CARISSA VÉLIZ, PRIVACY IS POWER: WHY AND HOW YOU SHOULD TAKE BACK CONTROL OF YOUR DATA 86 (2020) (offering a panoply of self-help solutions to protect privacy, but without addressing the issue of online discrimination and racism in relation to the proposed solutions) ("It is because we are treated differently that algorithms end up being sexist and racist . . .").

285. *See, e.g.*, FINN BRUNTON & HELEN NISSENBAUM, OBFUSCATION: A USER'S GUIDE FOR PRIVACY AND PROTEST 9 (2016) (suggesting that people introduce "noise" into data systems by lying, misrepresenting themselves, refusing, and sabotaging). Given the stereotypes of dishonesty and criminality that plague the Black community, it might backfire for a Black person to misrepresent themselves or deploy sabotage to protect their privacy.

286. *See* Letter from 48 Civil Society, *supra* note 90 ("The time has come to enact a comprehensive consumer privacy law that safeguards civil rights online.") ("We believe successful legislation would accomplish the following: Prohibit using personal data to discriminate on the basis of protected characteristics; Ensure that automated decision-making systems are tested for bias and other risks, especially in matters concerning housing, employment, education, credit, and public accommodations; Empower enforcement by the Federal Trade Commission and state attorneys general and include a private right of action.; Preserve state civil rights laws and other types of state laws that are important for the protection of consumers and marginalized communities; Require companies to minimize the data they collect and give clarity on permissible and impermissible data uses; Provide individuals the right to access, correct, and delete their personal data; Regulate the data broker industry; Create transparency mechanisms that are helpful to consumers and enable robust oversight, research, language accessibility, and accountability."); *see also* Kerry, *supra* note 84.

287. *See* Paige Collings & Adam Schwartz, *Digital Privacy Legislation is Civil Rights Legislation*, ELEC. FRONTIER FOUND. (May 18, 2023), https://www.eff.org/deeplinks/2023/04/digital-privacy-legislation-civil-rights-legislation (making a case for digital privacy legislation as civil rights legislation with a view that surveillance is a civil rights issue and, therefore, legislation to protect data privacy can help protect civil rights).

288. *See, e.g.*, *Centering Civil Rights in the Privacy Debate*, NEW AMERICA (May 9, 2019), https://www.newamerica.org/oti/reports/centering-civil-rights-privacy-debate/privacy-is-a-civil-right/

discriminatory practices traditionally confined to physical spaces have since migrated to digital spaces with real-world consequences.[289] Under a "public accommodations" approach, civil society groups and advocates suggest that civil rights laws must be adapted to fight discrimination and inequality discerned in the digital landscape.[290] Efforts along either of these lines potentially hold promise for advancing African American interests in nondiscrimination and equality.

GDPR Inspiration. New state and federal consumer privacy legislation reportedly draws inspiration from the European Union's General Data Protection Regulation (GDPR).[291] An imperfect global model for legislative privacy protection, the European Union empowers individuals in E.U. member states with comprehensive rights, including rights of access, rectification, erasure, restriction of processing, data portability, and objection.[292] Protection of the data subjects' privacy rights is at the center of the GDPR.[293] These rights aim to give individuals a degree of control over their personal information, allowing them to understand how it is used and demand correction, deletion, or restricted information processing. Through its comprehensive framework, the GDPR attempts to advance the cause of data privacy protection within the European Union.

The GDPR neither proclaims privacy as a civil right nor expressly provides for civil rights protection in personal data handling. However, the GDPR does

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#:~:text=Centering%20Civil%20Rights%20in%20the,precondition%20for%20freedom%20of%20thought.

289. *See* CHAO ET AL., *supra* note 9, at 9 (explaining the contemporary wave of civil rights violations through certain data practices biased against marginalized groups in society).

290. *Id.* at 8 (explaining types of discrimination under different circumstances).

291. *See* Robert D. Williams, *To Enhance Data Security, Federal Privacy Legislation is Just a Start*, BROOKINGS (Dec. 1, 2020), https://www.brookings.edu/articles/to-enhance-data-security-federal-privacy-legislation-is-just-a-start/ (stating that the CCPA and the EU's GDPR are the privacy standards for users worldwide without a federal data privacy law).

292. Article 8(1) of the Charter of Fundamental Rights of the European Union, together with Article 16(1) of the Treaty on the Functioning of the European Union, provides that everyone has the right to the protection of personal data. Bart Custers & Gianclaudio Malgieri, *Priceless Data: Why the EU Fundamental Right to Data Protection is at Odds with Trade in Personal Data*, 45 COMPUT. L. & SEC. REV. 1 (2022) (stating that "both under the EU Charter of Fundamental Rights and the General Data Protection Regulation (GDPR), the legal rights to data protection are inalienable.").

293. For the data subject's rights, see Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

embody an approach that prioritizes individual control and aligns with human rights and non-discrimination principles. Specifically, the GDPR prohibits automated individual decision-making, including profiling.[294] Given that civil rights violations in the digital economy often result from automation and data profiling, the GDPR's provision allowing data subjects to object to automated decision-making is a step toward what we would think of as civil rights protection in the United States. This provision of the GDPR is the closest attempt to safeguard and protect individuals against discrimination in automated digital processes.

The GDPR indirectly promotes fairness and prevents discriminatory practices through various mechanisms. For example, the GDPR prohibits processing personal data in a way that causes unfairness to individual data subjects.[295] This broad provision leaves room for interpretation and potentially encompasses discriminatory practices based on protected characteristics, which include race and ethnicity. A major challenge of the GDPR in protecting civil rights is that its limited scope focuses on personal data processing by businesses, leaving broader privacy concerns, such as government surveillance, unaddressed.[296] The GDPR does not extend its applicability to government bodies and law enforcement when they collect and process data for what they would designate as preventing, investigating, detecting, or processing criminal offenses, executing criminal penalties, or protecting public safety. Many of the state laws recently adopted in the United States similarly exempt public entities from their coverage.

State Laws. About twenty U.S. states have "comprehensive" consumer protection privacy statutes, and the number is growing. None can be heralded as especially strong on civil rights. The California statute is the prime example. The California Consumer Privacy Act (CCPA) has often been hailed as the inaugural comprehensive consumer privacy legislation in the United States, with proponents considering it a potential blueprint for federal data privacy

294. Article 22 prohibits automated individual decision-making, including profiling, which has legal effects on an individual. Regulation 2016/679, art. 22 (EU).

295. Article 5 provides that "personal data shall be processed fairly and in a transparent manner about the data subject ('lawfulness, fairness and transparency'); collected for explicit and legitimate purposes and not further processed in a manner incompatible with those purposes." Regulation 2016/679, art. 5 (EU).

296. The GDPR does not apply to the processing of personal data by Member States for activities falling under Chapter 2, Title V of the Treaty on European Union.

regulation.[297] The CCPA was designed to bolster privacy rights and protect consumers residing in the state. Despite its acclaim as a comprehensive model law on the model of the GDPR, the CCPA has notable shortcomings in addressing discrimination in digital commerce. This deficiency poses a challenge to safeguarding civil rights within the dynamic landscape of the evolving digital economy. Section 1798.125 is the sole provision in the CCPA that addresses non-discrimination, explicitly prohibiting businesses from discriminating against California consumers based on their exercise of certain rights under the statute. Data subjects are safeguarded by various rights outlined in the CCPA. These rights include (a) the right to know about the personal information a business collects about an individual and how it is shared; (b) the right to delete personal information collected from them (with exceptions); and (c) the right to opt-out of the sale or sharing of their personal information. The CCPA was amended in January 2022 to include (a) the right to correct inaccurate personal information that a business has about an individual and (b) the right to limit the use and disclosure of sensitive personal information collected about an individual.[298] However, this provision is limited to the rights delineated in the CCPA and does not extend to the broader spectrum of the services requested and provided in digital commerce, which may be tainted with civil rights violations.

In some cases, inspired by the example of the CCPA and the GDPR, lawmakers in both Congress and the state legislatures have intensified their efforts to do something about the privacy problems caused by business and commercial practices. Anti-discrimination provisions appear almost *de rigueur* in new and proposed state and federal consumer privacy laws. Anti-discrimination provisions are evident in legislation such as the Consumer Data

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297. *See* Williams, *supra* note 291 (stating that the CCPA and the EU's GDPR are the privacy standards for users around the world in the absence of a federal data privacy law); Covington & Burling LLP, *Senate Examines Potential for Federal Data Privacy Legislation*, INSIDE PRIVACY (Oct. 1, 2018), https://www.insideprivacy.com/uncategorized/senate-examines-potential-for-federal-data-privacy-legislation/ (exploring legislative responses and considering lawmakers' perspectives on utilizing the CCPA and the GDPR as templates for forthcoming federal legislation on privacy).

298. CAL. CIV. CODE § 1798 (CPRA). The Amendment was born out of a November 2020 ballot initiative aimed at expanding the CCPA through Proposition 24, the CPRA. The statute was amended by adding new privacy legislation, including the right to correct inaccurate information and the right to limit the use and disclosure of sensitive information. The amendment became operational on January 1, 2023.

Protection Act 2022, enacted in the Commonwealth of Virginia, a former slave state with Jim Crow laws.[299] Furthermore, anti-discrimination provisions were incorporated in proposed legislation like the American Data Privacy Protection Act (ADPPA), introduced in 2022 by the House Energy and Commerce Committee in the 117th Congress.[300]

The Virginia Consumer Data Protection Act (VCDPA) of 2023 aims to protect consumers from discrimination by prohibiting the processing of personal data in a manner that violates state or federal anti-discrimination laws.[301] The VCDPA does not designate privacy as a civil right but focuses on promoting respect for civil rights by prohibiting discrimination against consumers. Under the VCDPA, businesses are required to recognize and respect consumer rights related to their data. These rights include (a) the right to know and confirm whether a controller is processing the consumer's data and accessing the data; (b) the right to correct inaccuracies in the personal data; (c) the right to delete personal data of the consumer subject to several exemptions; and (d) the right to obtain a copy of the personal data in a readily usable format. Similar to the CCPA, the VCDPA concentrates on safeguarding consumer privacy. However, a notable key difference is found in the consumer opt-out rights, whereby the VCDPA grants additional rights beyond those offered by the otherwise more stringent CCPA, including (a) the right to opt out of the processing of personal data for targeted advertising purposes; (b) the right to opt out of the sale of personal data; and (c) the right to opt out of profiling based upon personal data.

Federal Bills. The House of Representatives recently stripped civil rights provisions from a bill to enact the American Privacy Rights Act (APRA) of 2024.[302] The bill's civil rights provisions included (1) limits on collecting,

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299. VA. CONSUMER DATA PROT. ACT §§ 59.1-575–59.1-585.

300. American Data Protection Act, H.R. 8152. The bill was voted 53-2 to advance.

301. § 59.1-575. The Section provides in part that businesses may not process personal data in a way that violates federal or state anti-discrimination laws.

302. The Lawyers Committee for Civil Rights Under Law withdrew support for the House of Representative's version of the American Privacy Rights Act of 2024, H.R. 8818, 118th Cong. (2023–2024) after the unanticipated complete removal of civil right provisions from the bill. See Press, *Lawyers' Committee Opposes New Draft of American Privacy Rights Act, Urges Representatives to Vote* No, LAWYER'S COMM. FOR C.R. UNDER L. (June 24, 2024), https://www.lawyerscommittee.org/lawyers-committee-opposes-new-draft-of-american-privacy-rights-act-urges-representatives-to-vote-no/#:~:text=The%20new%20draft%20strips%20out,opportunities%20like%20housing%20and%20credit.

processing, retaining, or transferring covered data in a manner that discriminates on the basis of race, color, religion, national origin, sex, or disability, with exceptions for measures to prevent unlawful discrimination, diversifying an applicant or customer pool, or advertising economic opportunities or benefits to underrepresented populations; and (2) requirements that large data holders using covered algorithms in manners that pose a consequential risk of harm must conduct publicly shared impact assessments and evaluations prior to deploying the algorithms.[303] Both sets of limits and requirements, which imposed significant new obligations on the business sector, were removed in their entirety from the House bill.[304] The move against provisions of critical value to groups arguably in need of antidiscrimination civil rights protections resonates with nationwide trends seeking to expel diversity, equity and inclusion mandates from public policy and business practices.[305]

The American Data Privacy Protection Act (ADPPA) of 2022[306] was introduced by the House Energy and Commerce Committee in the 117th Congress and faltered. While the ADPPA did not explicitly frame privacy as a civil right, its non-discrimination provisions represent a crucial step toward cultivating a data ecosystem grounded in fairness and inclusivity. Prioritizing transparency, accountability, and collaboration in these provisions can harness the power of personal data without compromising civil rights. This kind of prioritization sets the stage for a future where technology becomes a force for inclusivity and empowerment, benefitting all individuals rather than a select few.

303. House Committee on Energy & Commerce, *The American Privacy Rights Act of 2024: Section-by-Section Summary*, https://www.commerce.senate.gov/services/files/E7D2864C-64C3-49D3-BC1E-6AB41DE863F5.

304. Suzanne Smalley, *With Protections Against AI Bias Removed,Data Privacy Bill 'Impossible for Civil Society to Support'*, RECORD (June 25, 2024), https://therecord.media/ai-bias-removed-data-privacy-law.

305. *See, e.g.*, Lea Watson, *Anti-DEI Efforts are the Latest Attack on Racial Equity and Free Speech*, AM. C.L. UNION (Feb. 14, 2024), https://www.aclu.org/news/free-speech/anti-dei-efforts-are-the-latest-attack-on-racial-equity-and-free-speech (DEI related to speech and equality); *The Assault on DEI*, CHRON. OF HIGHER EDUC., https://www.chronicle.com/package/the-assault-on-dei#:~:text=We've%20documented%20actions%20taken,of%20minority%20staff%20and%20students (DEI in higher education); Kenji Yoshino & David Glasgow, *DEI Is Under Attack. Here's How Companies Can Mitigate the Legal Risks*, HARV. BUS. REV. (2024) (DEI in business).

306. H.R. 8152, 117th Cong.

Section 207 of the ADPPA was titled "Civil Rights and Algorithms." This pivotal section explicitly prohibited a covered entity or a service provider from collecting, processing, or transferring data in a manner that results in discrimination or otherwise makes unavailable equal enjoyment of goods or services based on race, color, religion, national origin, sex or disability.[307] While refraining from explicitly categorizing privacy as a civil right, the ADPPA took a transformative approach with its non-discrimination provision, aiming to reshape data privacy within the U.S. by protecting civil rights in the digital economy.

At the core of the ADPPA was the non-discrimination provision, restraining covered entities—those surpassing specific data metrics—from using personal data in ways that perpetuate discrimination based on protected characteristics like race, sex, and religion.[308] This provision mandated proactive efforts to mitigate algorithmic bias, ensuring fairness in their data-driven practices. The potential impact of this provision was extensive, providing individuals a means to challenge opaque algorithmic decision-making and fostering transparency and accountability to safeguard individual rights within a more equitable data ecosystem.

While some data privacy statutes provide for a private right of action, others do not.[309] The ADPPA bill introduced a deferred private right of action

307. H.R. REP. NO. 117–669, at § 207(a)(1).

308. *Id.*

309. The statutes that provide for a private right of action include; Electronic Communications Privacy Act of 1986, 100 Stat. 1848 (1986) (including federal wiretapping and electronic eavesdropping provisions after revisions); Stored Communications Act, 18 U.S.C. § 2701; Pen Register Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970); Fair Credit Reporting Act, 15 U.S.C. § 1681; Privacy Act of 1974, 5 U.S.C. § 552(a) (protecting records of individuals retrieved by personal identifiers such as names, social security numbers, or other identifying numbers or symbols). Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 (prohibiting accessing a computer without authorization or in excess of authorization). The CFAA is augmented by amendments found in Pub. L. No. 110-326, 122 Stat. 2560 (2008) Identity Theft Enforcement and Restitution Act. The CFAA provides for a civil cause of action for victims of crimes created under this statute under 1030(f). The Act creates a cause of action for compensatory damages and injunctive relief for the benefit of victims of any violation of the statute resulting in any loss or damage. Under 1030(c)(4)(A)(I) to (V), the CFAA provides that "[a]ny person who suffers damage or loss because of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." Data privacy statutes that do not provide for a private right of action include the following: Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C.A. § 1302; Children's Online Privacy Protection Act (COPPA), 15

commencing two years after the law's enactment.[310] A private right of action is defined as the "right of a private party to seek judicial relief from injuries caused by another's violation of the legal requirement."[311] This right empowers a private individual to directly file a claim in courts of law based on the provision of a statute, the Constitution, or federal common law.[312] Under the ADPPA, injured individuals or groups could have brought suits against covered entities in federal court, seeking damages, injunctions, litigation costs, and attorneys' fees. Before filing a suit, individuals were required to notify the FTC or their state attorneys: for small or medium-sized businesses, individuals must allow the violator to address the violation.[313] Notably, the bill invalidated pre-dispute arbitration agreements or joint-action waivers with individuals under eighteen in disputes under the ADPPA.

In the arena of civil rights law, the Americans With Disabilities Act (ADA) and the proposed ADPPA serve as examples of statutes that explicitly provide for a private right of action. The ADA states in part that "the remedies and procedures" outlined in the Act are provided to "any person who is being subjected to discrimination on the basis of disability in violation [of the Act.]"[314] Meanwhile, incorporating a private right of action in the ADPPA marked a significant advancement in symbiosis with civil rights.[315] A private right of action enhanced the ADPPA's effectiveness in safeguarding individual privacy and set a precedent for future data privacy legislation to prioritize individual empowerment through a private right of action.[316] Agencies and

U.S.C.A. §§ 6501–6506; Family Education Rights and Privacy Act (FERPA), 20 U.S.C.A. § 1232g (regulating access to education information and records held by public entities); and Genetic Information Non-Discrimination Act (GINA), 40 U.S.C.A. § 2000ff (protecting the privacy and guards against the misuse of genetic information); *see* Lauren Henry Scholz, *Private Right of Action in Privacy Law*, 63 WM. & MARY L. REV. 1639 (2022) (discussing examples of privacy statutes and regulations that are enforced by public agencies).

310. H.R. REP. NO. 117-669, at § 403(a).

311. Cannon v. Univ. of Chi., 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

312. *See* Caroline Bermeo Newcombe, *Implied Private Right of Action: Definition, and Factors to Determine Whether a Private Right of Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. (2017).

313. H.R. REP. NO. 117-669, at § 403(a)(3).

314. 42 U.S.C. § 12188(a)(1).

315. H.R. REP. NO. 117-669, at § 403.

316. *But see* Cameron F. Kerry & John B. Morris, Jr., *In Privacy Legislation, a Private Right of Action is not an All-or-Nothing Proposition*, BROOKINGS (July 7, 2020) (recommending "a targeted remedy allowing individuals to sue for some but not all violations). *Cf.* Sierra Club v. SCM

regulators are often troubled with limited resources, and they are therefore forced to cherry-pick which matters to enforce.[317] This grossly disadvantages the individuals who suffer privacy violations under statutes. This shift towards empowering individuals represents a positive stride in the pursuit of data privacy in the digital age, laying the groundwork for a future where individuals are not just informed but empowered to safeguard their fundamental rights. A further point in favor of the express private rights of action approach is that the injury-in-fact requirement, as dictated by Article III standing requirement, is satisfied.[318]

AI Bill of Rights. The U.S.'s neoliberalist approach to data protection has favored profit-making by commercial entities, yet these entities demonstrate limited commitment to transparency and accountability.[319] The social cost borne by the dependence on automation in critical decision-making has resulted in automated inequality.[320] This inequality manifests in compromised information privacy, as well as ensuing problems such as racial discrimination, misinformation, and targeted political manipulation against the poor and marginalized segments of society.[321] In 2022, the Biden administration

Corp., 580 F. Supp. 862, 863 n.1 (W.D.N.Y. 1984) (observing that "because there is no private right of action for damages under the Federal Water Pollution Act 'F.W.P.C.A' any fines levied would be payable to the government and not the plaintiff.").

317. *See* David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014) (arguing that agencies are often charged with many responsibilities and yet with frail resources that affect the execution of their duties).

318. *See* Wright v. United States, No. 4:17-CV-02101, 2018 WL 485037, at *8 (N.D. Ala. Oct. 5, 2018) (dismissing Privacy Act claims because the plaintiff did not satisfy standing requirements for lack of particularized injury-in-fact suffered after the loss of their personal information); *see also* Senne v. Village of Palatine, 784 F.3d 444, 448 (7th Cir. 2015) (holding that a plaintiff could not enforce a private cause of action for the violation of the Drivers Privacy Protection Act (DPPA) because the plaintiff could not demonstrate injury).

319. *See* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 9 (2015) (explaining how corporate entities have unfettered knowledge and insights of our most guarded intimate overs, and yet we know little to nothing about how they use this knowledge); BRIDGES, *supra* note 245, at 65–68, 73, 85–86 (explaining how needy families must permit unconstitutional state intrusions into their lives because of their waived rights to privacy as a condition to receive social welfare benefits).

320. *See* EUBANKS, *supra* note 52 (illuminating the paradoxical outcome of technology as a tool that exacerbates punishment rather than offering assistance to the underprivileged).

321. *See* Collings & Schwartz, *supra* note 287 (explaining discriminatory use of data in automated decision making); Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133 (2017) (explaining how digital platforms promote volatility, polarization and manipulation for their selfish interests).

introduced the "Blueprint for an AI Bill of Rights," a significant document that articulated the administration's approach to regulating algorithms.[322] Amidst the rapid advancements in artificial intelligence (AI), a comprehensive AI Bill of Rights addressed the critical concern of ethically and responsibly using this powerful technology while supporting policies and practices that safeguard civil rights.[323] Although the AI Bill of Rights is non-binding, it represents a commitment to protecting individual rights in the era of AI, incorporating a deep understanding of the civil rights implications associated with AI.[324]

The Blueprint for an AI Bill of Rights outlined five fundamental principles that aim to prevent algorithmic discrimination, promote transparency in decision-making, and empower individuals with control over their data.[325] By acknowledging the right to be free from algorithmic bias, the right to explanation, and the right to human oversight, the AI Bill of Rights sought to ensure that the benefits of AI are distributed fairly and do not infringe fundamental rights. It further provided equal access to opportunities that include equitable access to education, housing, credit, employment, health care, financial services, safety, social services, non-deceptive information about goods and services, and government services.[326] The principles articulated in the Blueprint collectively underscored the Biden administration's commitment to fostering an AI landscape that upholds ethical standards and protects the civil rights of individuals.

The AI Bill of Rights also underscored the critical importance of robust civil rights enforcement, symbolizing a steadfast commitment to ensuring responsible AI development and use. The Biden administration's dedication to establishing a whole-of-government approach to detect and address civil

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322. WHITE HOUSE, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

323. *See id.* at 8. This Section offers a blueprint on rights, opportunities, or access to AI and defines these rights as "civil rights, civil liberties, and privacy, including freedom of speech, voting, and protections from discrimination, unlawful surveillance, and violations of privacy and other freedoms in both public and private sector context."

324. *Id.* at 2. The section on legal disclaimer states that "the Blueprint for an AI Bill of Rights is non-binding and does not constitute U.S. government policy).

325. *Id.* at 12–53. The bill's five principles include (1) safe and effective systems, (2) algorithmic discrimination protections, (3) data privacy, (4) notice and explanation, and (5) human alternatives, considerations, and fallback.

326. *Id.* at 8.

rights violations related to AI demonstrated a nuanced understanding of the potential for discriminatory harms that may result from the use of AI. By holding those responsible for such harms accountable, the administration sent a compelling message that ethical AI development is imperative.

Finally, the Biden administration's AI Bill of Rights represented a comprehensive and forward-thinking approach to addressing the complex ethical challenges AI poses from a civil rights perspective. Through prioritizing individual rights and implementing vigorous civil rights enforcement, the AI Bill charted a course toward a future where AI serves as a tool for good, empowering individuals and contributing to creating a more just and equitable society.

Biden Executive Order. After announcing the visionary Blueprint for an AI Bill of Rights in 2022, which outlined aspirational principles for ethical AI development and use, President Biden signed the Executive Order (EO) on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.[327] Unfortunately President Trump rescinded the Biden order, and issued one of his own.[328] The Biden EO had addressed a spectrum of critical civil rights concerns in digital technology, taking a pivotal step in acknowledging and rectifying discrimination practices facilitated by AI systems.[329]

Section 7 of the Biden Order was dedicated to advancing equity and civil rights. It assigned federal agencies the responsibility of proactively addressing discrimination in AI systems by developing guidance and tools. Notably, the Order emphasized the justice system's need to strengthen civil rights in the application of AI.[330] Furthermore, the Order underscored the significance of data privacy, particularly for marginalized communities vulnerable to data breaches and discriminatory data practices.[331] The Order directed agencies to ensure that individuals have access to the data used in AI systems and the

327. Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

328. Exec. Order No. 14179, 90 Fed. Reg. 8741 (January 23, 2025).

329. *See id.* § 1(d)–(f) (providing for the protection of civil rights in the development and use of AI); Alec Tyson & Emma Kikuchi, *Growing Public Concern About the Role of Artificial Intelligence in Daily Life,* PEW RSCH. CTR. (Aug. 28, 2023), https://www.pewresearch.org/short-reads/2023/08/28/growing-public-concern-about-the-role-of-artificial-intelligence-in-daily-life/ (reporting that 52% of Americans feel more concerned than excited about increased use of AI).

330. Exec. Order, *supra* note 327, § 7.1.

331. *Id.*

ability to rectify inaccuracies. The order encourages responsible data collection and sharing practices to prevent the creation of biased or discriminatory datasets.

Section 7 also mandated that agencies integrate AI fairness and civil rights considerations into their activities.[332] It emphasized the need for collaborative efforts by agencies to effectively address civil rights violations in the realm of AI. Moreover, the Order explicitly called for developing legal frameworks and best practices to comprehensively address civil rights harms arising from AI applications. To ensure that AI development aligns with the needs and concerns of diverse communities, the Order required government agencies to actively engage with stakeholders, including communities of color. Additionally, it promoted training and educational opportunities for underrepresented groups in AI fields, aiming to create a more inclusive workforce. Transparency and accountability within private-sector AI development processes were also highlighted to foster responsible and diverse AI ecosystems.

We believe Section 7 of the Biden AI Executive Order embraced a holistic and comprehensive approach to confront potential risks and challenges associated with AI technology, specifically focusing on equity and civil rights. By addressing issues such as bias mitigation, data privacy protection, strengthened enforcement, and inclusivity promotion, the now-abandoned Order set the stage for a future where AI benefits all communities and fosters a more equitable and just society.

The imperative of transparency in AI decision-making lies in empowering individuals to comprehend the potential impact of AI on their lives. The Order underscored this by endorsing research endeavors to mitigate AI bias, acknowledging the continual need for advancements in this critical area. Moreover, the Order placed significant emphasis on ongoing reporting for companies developing AI models striving to ensure transparency and accountability. Such emphasis is especially crucial in cases where AI technologies disproportionately affect specific communities, thus safeguarding the civil rights of vulnerable populations.[333]

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332. *Id.*
333. *Id.* §§ 6(b)(B), 8(A), 10(e).

By mandating companies to conduct preemptive testing and report potential safety concerns, the Biden Order demonstrated a keen recognition of the societal implications of AI systems.[334] This approach aligned with the overarching goal of protecting civil rights, particularly in areas where biased or harmful AI outputs could perpetuate discrimination or exacerbate existing inequalities. The emphasis on safety and accountability becomes crucial to civil rights protection in the ever-evolving landscape of artificial intelligence.

Moreover, the Order placed a premium on safeguarding the rights and well-being of workers, acknowledging the potential impact of AI on employment dynamics.[335] The Order's directive for federal agencies to collaborate with labor unions and workers in developing principles and best practices demonstrated a commitment to mitigating potential employee harm. In addressing technology-based hiring systems, the Biden EO prohibited discrimination in employment processes, aligning with civil rights principles that seek to eliminate bias and foster equal opportunities for all individuals.[336] As AI continues to shape the workforce, such policies are pivotal for protecting workers' civil rights and ensuring fair and equitable employment practices.

In sum, President Biden's now-rescinded Executive Order signified a comprehensive effort to confront civil rights challenges arising from developing and deploying AI technologies. By prioritizing accountability, transparency, and proactive measures, the Order establishes a robust framework that acknowledges the potential societal impact of AI and seeks to safeguard the civil rights of individuals and communities affected by these advancements. The emphasis on ongoing reporting, safety measures, and equitable employment practices demonstrates a commitment to fostering an AI landscape that upholds civil rights.

Algorithmic Accountability Act of 2022. The Algorithmic Accountability Act of 2022 was introduced in the 117th Congress, updating an earlier similar bill from 2019.[337] This act might have addressed problems of algorithmic bias

334. *Id.* §§ 2(a), 4.5(v). The testing involves evaluations that include post-deployment performance and monitoring and testing software used for authenticating and labeling synthetic content, among other uses.

335. *Id.* §§ 2(c), 5(2)(e), 5(3)(a), (b)(ii), (6).

336. *Id.* § 6.

337. Algorithmic Accountability Act, S. 3572, 117th Cong. (2022).

experienced by African Americans on account of their race.[338] The bill directed the Federal Trade Commission to require that companies assess the impacts of automated critical decision-making. The Algorithmic Accountability Act of 2022 required new assessments where "automated decision systems and augmented critical decision processes" are utilized, impacting areas of life of core concern to civil rights laws, such as housing, education, employment, health, and credit. The new law would have increased transparency and accountability by deploying automated decision-making trends and establishing a repository of information. The repository would allow consumers and advocates to review which critical decisions have been automated by companies along with information such as data sources, high-level metrics, and ways to contest decisions, where applicable.

Eliminating Bias in Algorithmic Systems Act. In December 2023, the Eliminating Bias in Algorithmic Systems (BIAS) Act was introduced into the 118th Congress by Senator Edward J. Markey (D-Mass.),[339] a member of the Senate Commerce, Science, and Transportation Committee.[340] This short bill would require federal agencies that use, fund, or oversee algorithms to have an office of civil rights focused on bias, discrimination, and other harms of algorithms and for other purposes. An agency's office of civil rights would

338. Huskey v. State Farm Fire & Cas. Co., No. 22 C 7014, 2023 WL 5848164 (N.D. Ill. Sept. 11, 2023) (alleging that State Farm's use of a discriminatory algorithmic claims-processing system scrutinized Black homeowner policyholders' claims more than White policyholders' claims leading to disparate impact violations under the Fair Housing Act).

339. Eliminating Bias in Algorithmic Systems Act, S. 3478, 118th Cong. (2023). Chair of the Senate Health, Education, Labor, and Pensions (HELP) Subcommittee on Primary Health and Retirement Security, Senator Markey, has also asked Federal Drug and Administration (FDA) Commissioner Robert Califf to ensure that its new Digital Health Technologies Advisory Committee include members with civil rights, medical ethics, and disability rights backgrounds. The Lawyers' Committee for Civil Rights Under Law supported the bill. *See, e.g.*, Press Release, Laws. Comm. for C.R. Under L., Lawyers' Committee Endorses the Eliminating Bias in Algorithmic Systems Act (Dec. 12, 2023), https://www.lawyerscommittee.org/lawyers-committee-endorses-the-eliminating-bias-in-algorithmic-systems-act/.

340. Co-sponsors in the Senate include Senators Cory Booker (D-N.J.), Ben Ray Lujan (D-N.M.), Jeff Merkley (D-Ore.), Elizabeth Warren (D-Mass.), Peter Welch (D-Vt.), and Ron Wyden (D-Ore.). The *Eliminating BIAS Act* is endorsed by Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil and Human Rights, Center for Democracy and Technology, National Urban League, Electronic Privacy Information Center (EPIC), Free Press Action, Public Knowledge, Accountable Tech, Demand Progress, Fight for the Future, Common Sense Media, Center for Digital Democracy, Common Cause, Open Technology Institute, Upturn, National Hispanic Media Coalition, Asian Americans Advancing Justice (AAJC), Unidos US, The Trevor Project, National Action Network, Fair play, National Urban League, National Council of Negro Women, and Access Now.

employ "experts and technologists focused on bias, discrimination, and other harms resulting from covered algorithms."[341]

Legislative and Executive Letdown. As elaborated here, in the United States, some but not all newly proposed data protection and AI legislation boasts provisions expressly aimed at tackling discrimination violative of civil rights.[342] As of February 2025, nineteen states, including California and Virginia, have enacted consumer privacy laws.[343] The background of national advocacy and scholarship pressing privacy as a civil right may have propelled some of this state consumer privacy legislation. However, none of the statutes provide exemplary anti-discrimination provisions. Some have been described as Big Tech friendly, but none as especially civil rights friendly. None provide for a private right of action that vulnerable groups could use to enforce their rights, for example. Interestingly, despite the pervasive privacy-is-a-civil right movement, neither New Jersey Governor Phil Murphy nor any of the law's sponsors characterized privacy as a civil right when announcing their State's law, nor did they mention how the opt-out rights, which they especially touted, might advance civil rights.[344]

It may be too soon to gauge the effectiveness of recent interventions pairing privacy and civil rights. There is politics to privacy discourse that may hinder the pairing in the current national and local climates.[345]The practical utility of depicting privacy as data protection rights, civil rights, or civil rights protections in the United States is unclear. The experience of other countries may be instructive.

In Brazil, a 2014 law, translated from Portuguese into English as "Civil Rights Framework for the Internet Act," did not result in practices that restrained the use of facial recognition and surveillance cameras despite

341. Eliminating Bias in Algorithmic Systems Act, *supra* note 339, § 3(a).

342. *See, e.g.*, Section 207(a) of the ADPPA bill provided that "[a] covered entity or a service provider may not collect, process, or transfer covered data in a manner that discriminates in or otherwise makes unavailable the equal enjoyment of goods or services on the basis of race, color, religion, national origin, sex, or disability."

343. Andrew Folks, *US State Privacy Legislation Tracker*, IAAP (Feb. 12, 2025), https://iapp.org/resources/article/us-state-privacy-legislation-tracker/.

344. *Governor Murphy Signs Legislation Protecting Consumer Data*, OFF. SITE OF THE STATE OF N.J. (Jan. 16, 2024), https://www.nj.gov/governor/news/news/562024/20240116k.shtml.

345. Allen*, supra* note 34, at 349, 356–59.

rampant concerns about racial discrimination.[346] The language of "civil rights" was not part of the national debates surrounding Brazil's passage of its EU-inspired comprehensive law in 2020, the General Law for the Protection of Privacy (LGPD).[347] The passage of the LDPR has not quieted concerns about discriminatory uses of surveillance technologies.[348] Yet Article 2 of the LGPD states that personal data protection is grounded in seven pillars that Americans might consider consonant with civil rights: respect for privacy; informational self-determination, freedom of expression, information communication and opinion; inviolability of intimacy, honor, and image; economic and technological development and innovation; free enterprise, free competition, and consumer defense; and human rights, free development of personality, dignity, and exercise of citizenship by natural persons.[349]

In sum, interventions at the state and federal level have failed to advance the aspirations of privacy as a civil right. State consumer privacy protection laws are neither comprehensive nor designed to strongly attack the discriminatory dimensions of private sector practices. Numerous federal proposals out of Congress, some promising, have fallen dead in the water. The jury is still out of some recent executive branch measures mandated by President Trump, whose policy priorities do not include robust new protections for civil rights.

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346. *See Marco Civil da Internet – "Brazilian Civil Rights Framework for the Internet"*, WILMAP (Apr. 23, 2024), https://wilmap.stanford.edu/entries/marco-civil-da-internet-brazilian-civil-rights-framework-internet.

347. *See* Luiz Fernando Marrey Moncau, Felipe Octaviano Delgado Busnello & Joan Barata, *Law n.º 13.709, General Data Protection Law*, WILMAP (Aug. 14, 2018), https://wilmap.stanford.edu/entries/law-no-13709-general-data-protection-law.

348. Brazil's Data Protection Authority issued an official report in 2024 (available in Portuguese), seemingly seeking to take a balanced approach to the issue of biometric technology, while noting concerns about discrimination. *See* Joel R. McConvey, *Brazil's Data Privacy Regulator Looks at Biometrics and Facial Recognition in New Report*, BIOMETRICUPDATA.COM (June 26, 2024), https://www.biometricupdate.com/202406/brazils-data-privacy-regulator-looks-at-biometrics-and-facial-recognition-in-new-report. *Cf.* Gabrielle Alves, Renata Martinelli Rodrigues, Isabela de Araújo Santos & Thiago Nascimento, *Brazilian Favelas need racial Justice, not Facial Recognition*, S. VOICE (July 25, 2022), https://southernvoice.org/brazilian-favelas-need-racial-justice-not-facial-recognition/; Leonardo Coelho, *FEATURE-Brazil Turns Facial Recognition on Rioters Despite Racism Fears*, REUTERS (Jan. 12, 2023), https://www.reuters.com/article/business/media-telecom/feature-brazil-turns-facial-recognition-on-rioters-despite-racism-fears-idUSL8N33311N/ (pointing out discriminatory uses of facial recognition in favelas (poor urban communities) and targeting Black Brazilians claimed).

349. *See* Moncau et al., *supra* note 347.

VI. CONCLUSION

This Article has illuminated the remote and recent sources of what we have termed a privacy-and-civil-rights movement, described its practical significance, and increased awareness of its context, limitations, and likely possibilities. Is privacy really a civil right? Against the background of history, the answer is layered.

Looking back in time, as we have underscored, privacy has not been expressly framed as a civil right and did not function as such across the board. The sacrosanct privacy norms of the nineteenth century worked against the interests of enslaved people in *State v. Mann*.[350] The troubled Reconstruction Era federal civil rights laws focused on vital rights but not, with distinction, on privacy. The first lawyers to call for the right to privacy did not associate their aims with the civil rights debates of their Gilded Age generation raging in Congress and the states.[351] The first state supreme court recognizing the right to privacy considered it as a self-evident natural right, ripe for express recognition by positive common law.[352] Without privacy, a man is like a slave to a merciless master, the court observed.[353] On the international level, privacy was recognized as a human right in 1948 and as an ideal civil right in the 1960s. However, privacy was not pervasively depicted as an actual or ideal civil right in mainstream civil rights discourses in the United States during the heart of the Civil Rights Movement. In this light, one might credibly assert that privacy has not been incorporated as a civil right in US positive law.

Yet, paramount ties bind the ideals of civil rights and privacy. Privacy is aspiring to be a civil right. Securing the freedom through law to live meaningful and flourishing *private* lives of their own and to participate in civic life was the implicit and sometimes explicit goal of the Reconstruction Era Civil Rights

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350. State v. Mann, 13 N.C. 263 (1829) (bloody vengeance of slave masters generally escape public notice or redress "by reason of its privacy").

351. Professor Citron maintains that concerns about the disclosure of Warren's brother's homosexuality might have propelled the article. *See* Citron, *supra* note 31, at 111. The article did not mention Ned Warren (of course) and lacked the language of civil rights readily available to its authors (but why?).

352. *Pavesich*, s*upra* note 100, at 70 ("A right of privacy . . . is therefore derived from natural law").

353. *Id.* at 80 ("[A]nd, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master.").

Movement and the more successful Black Civil Rights Movement of the 1950s through 1970s. Moreover, in the context of the Civil Rights Movement, recognition of statutory privacy rights and constitutional privacy rights against (a) interference with free association in *NAACP v. Alabama*, (b) discriminatory policing abuses in *Mapp v. Ohio*, (c) marriage inequality in *Loving v. Virginia*, and (d) targeted FBI surveillance in the King surveillance case, proved necessary to advance African American civil rights. Privacy rights have unquestionably served as vital civil rights protectants. This may be grounds enough for some to term the right to privacy as a civil right. Moreover, the importance of privacy and rights to privacy to fulsome lives within a civil society, beyond their status as rights protectants, warrants the aspirational designation as civil rights.

There are tensions between ideals of individual privacy rights and group civil rights, manifest in *State v. Mann*, in Hannah Arendt's response to Little Rock, in concerns about the extent of federal data collection required to monitor civil rights compliance, and in the *Rios* objection to the deployment of FERPA privacy to thwart education equality for Hispanic ethnicity children. If one chooses to characterize privacy as a civil right, one must, at the same time, understand that privacy is not an absolute or unqualified social or individual good. It can clash with other important rights and claims.

Today, one can sensibly contend, in accord with the privacy-and-civil-rights movement, that (1) privacy rights do and ought to protect civil rights, exemplified by the right to vote and freely associate; (2) civil rights do and ought to protect privacy rights, exemplified by fair housing and employment rights that materially sustain contexts for intimate life; and (3) that privacy rights are civil rights, meaning that they are aspirational moral and human rights that ought to be a part of society's positive law fostering goods that go to the heart of thriving lives and effective civic participation for everyone. In the digital arena, privacy rights framed as civil rights would constrain business and government calling, *inter alia*, for privacy and non-discrimination with respect to collecting, processing, analyzing, sharing, storing, and using personal information. We all have interests in being treated respectfully and as equals without regard to our race, ethnicity, gender, sex, sexual orientation, disability, right national origin or other status, when it comes to applications of digital technologies.

The trend of declaring that privacy is a civil right is understandable, given that data scoops, AI, and surveillance enabled by digital technology can have

discriminatory purposes and deleterious impacts. Protecting privacy is crucial to prevent the unjust use of people's identities, characteristics, and behaviors against them. In essence, if we understand privacy as a civil right, we acknowledge that the protection of interests in equal treatment is a foundational requirement of justice and good government. It is hoped that new or newly focused privacy and AI legislation will empower communities of color and create and partake of opportunities that are available to all. Robust legislation can potentially convert privacy as a civil right from mostly aspiration to substantial reality. Without a strong political will to protect the vulnerable, no set of effective laws grounded in any variety of civil rights discourse is likely to come about.