Addressing Challenges at the Intersection of Civil Rights and Technology

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Summary

Modern civil rights challenges are technically complex. Today, decisions made by algorithms, rather than people, limit opportunities for historically disadvantaged groups in critical areas like housing, employment, and credit. The next administration should establish a broad new task force, led by the U.S. Chief Technology Officer (CTO), to address issues at the intersection of civil rights and emerging technologies. The task force should encourage federal agencies to prioritize regulatory and enforcement activities where tech and civil rights overlap, and to increase temporary exchanges of staff between agencies to facilitate cross-pollination of civil rights and tech expertise. The next administration should also prioritize appointment of key agency personnel who are committed to addressing tech/civil rights challenges.

Challenge and Opportunity

There is growing recognition that bias and discrimination can creep into data-driven practices, such as facial recognition algorithms or targeted advertising.[1,2] Designers and adopters of "big data" applications often lack the awareness and expertise to identify biased datasets in a timely fashion and make appropriate adjustments. This complicates the tech policy landscape and the civil rights landscape alike. Tech policy issues—from online privacy to self-driving cars to encryption—must now be examined through a civil rights lens. Civil rights issues—from housing and employment discrimination to redlining to voter suppression—must now be examined through a technology lens. Both lenses are needed to uncover how historically marginalized communities might be impacted by novel uses of data, algorithms, and technology. With technology transforming every aspect of our lives, policymakers need to be able to detect how data and algorithms are creating and shaping civil rights violations.

Unfortunately, the White House and federal agencies lack capacity to address issues at the intersection of civil rights and tech policy. This is due to five related problems:

(1) **Agencies administering equal opportunity laws lack technical expertise.** This problem was observed in a 2014 White House report, which recommended that "[t]he federal government's lead civil rights and consumer protection agencies…expand their technical expertise to be able to identify practices and outcomes facilitated by big data analytics that have a discriminatory impact on protected classes, and develop a plan for investigating and resolving violations of law in such cases."[3]

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[1] Buolamwini, J.; Gebru, T. (2018) Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification. Proceedings of Machine Learning Research, 81: 1–15. https://dam-prod.media.mit.edu/x/2018/02/06/Gender%20Shades%20Intersectional%20Accuracy%20Disparities.pdf.

[2] Latanya Sweeney, L. (2013). Discrimination in Online Ad Delivery. (Jan. 28, 2013) Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208240.

[3] The White House (2014). Big Data: Seizing Opportunities, Preserving Values. [Hereinafter cited as White House 2014 Big Data Report]. https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

(2) **Agencies that frequently handle tech issues lack civil rights expertise.** For example, the Federal Trade Commission (FTC) has observed that data practices generating discrimination or disparate impact could implicate the Equal Credit Opportunity Act (ECOA), Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Housing Act, and the Genetic Information Nondiscrimination Act. However, the FTC's own civil rights expertise and authority only extend to ECOA.[4]

(3) **Even when agencies have the necessary expertise to understand issues at the intersection of tech and civil rights, they are reactive instead of proactive.** For example, the Department of Housing and Urban Development recently charged Facebook with violating the Fair Housing Act and later moved to update its regulations in an attempt to address online housing discrimination. But these actions came only after the problem of online housing discrimination was extensively researched and documented by outside advocates.[5]

(4) **Proprietary platforms and data are opaque in a way that often frustrates government oversight.** As the White House acknowledged in 2014, "The technologies of automated decision-making are opaque and largely inaccessible to the average person."[6]

(5) **There is a lack of interagency coordination around technology and civil rights.** When the FTC noted that data practices could run afoul of several anti-discrimination laws, for example, it was unclear whether the other agencies administering those laws would launch relevant investigations.

Solutions to all five of these problems must be developed and executed in order to bring civil rights into the modern era. The next administration should establish a task force that sits in the White House Office of Science and Technology Policy (OSTP) and is led by the U.S. CTO to do just that.

This task force could easily build on efforts launched during the Obama administration. Following a coordinated advocacy effort in 2014–2015 by civil rights and tech policy organizations regarding threats to civil rights from big data and algorithmic decision-making, the White House and the FTC both adopted efforts to further study the issue. The White House and the FTC issued reports in 2014 and 2016, respectively, explaining how big data could lead to bias, disparate impact, and discrimination.[7] These reports recommended additional government-supported research into algorithmic discrimination and techniques for mitigating discrimination. They also called for ongoing public-private dialogue regarding civil rights and technology with an eye

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[4] Federal Trade Commission (2016). Big Data: A Tool for Inclusion or Exclusion?. [Hereinafter cited as FTC 2016 Big Data Report]. https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

[5] Tobin, Ariana. "HUD Sues Facebook Over Housing Discrimination and Says the Company's Algorithms Have Made the Problem Worse." (March 28, 2019). https://www.propublica.org/article/hud-sues-facebook-housing-discrimination-advertising-algorithms

[6] White House 2014 Big Data Report.

[7] White House 2014 Big Data Report; FTC 2016 Big Data Report.

toward informing public policy.[8,9] Unfortunately, little progress has been made in the intervening four years. The next administration should pick up where past efforts left off and then go even further—expanding civil rights and tech capacity across all relevant agencies.

Plan of Action

The next administration must first ensure that OSTP and federal agencies are led by people committed and prepared to prioritize challenges at the intersection of civil rights and technology. The right leadership will do much to address the problems outlined above, even without establishing new programs or allocating new resources. Under the direction of the U.S. CTO, committed leadership can increase interagency communication and collaboration: thus, ensuring that potential civil rights issues identified by one agency will be studied and addressed by any other appropriate agencies. Committed leadership (along with the soft pressure of regular engagement with a White House-led task force) can also direct the hiring of agency staff with interest and expertise in civil rights and technology, prioritize regulatory and enforcement activities that fall at the intersection of civil rights and technology, and reallocate some existing resources within each agency to support complementary efforts.

The next administration should also establish a new task force charged with (1) sharing information and ideas regarding civil rights and technology, (2) further investigating the five problems outlined above, and (3) developing and carrying out recommendations for executive and agency actions to address all five problems. This task force should include representatives from relevant federal agencies and should carry out its responsibilities under the guidance of the U.S. CTO. The task force should frequently consult with national and local civil rights organizations and should periodically also meet with organizers and members of the public, especially those hailing from historically disadvantaged communities.

Though the task force will inevitably develop its own ideas on how to address issues at the intersection of civil rights and technology, we urge the task force to explore the three recommendations below as starting points.

First, the task force should encourage use of federal staff "detail" assignments to achieve greater circulation of personnel with civil rights and technology expertise across agencies. Circulation of staff across agencies is already a well-established practice. Agency employees frequently

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[8] White House 2014 Big Data Report at 22 ("Moving forward, it is essential that the public and private sectors continue to have collaborative conversations about how to achieve the most out of big data technologies while deliberately applying these tools to avoid—and when appropriate, address—discrimination."); id. at 24 ("How big data is used ethically to reduce discrimination and advance opportunity, fairness, and inclusion should inform the development of both private sector standards and public policy making in this space.").

[9] FTC 2016 Big Data Report at 33 ("Given that big data analytics can have big consequences, it is imperative that we work together—government, academics, consumer advocates, and industry—to help ensure that we maximize big data's capacity for good while identifying and minimizing the risks it presents.").

undertake a detail, or temporary assignment, to another agency or to the Hill. This practice can and should be expanded upon, with special effort made to encourage staff with civil rights and/or technology expertise to complete details with agencies generally seen to be lacking in that area of expertise.

Second, the task force should recommend changes to agency structures to ensure that each civil rights agency has embedded technologists and each technology agency has embedded civil rights specialists. Because each agency structure is different, there is no "one size fits all" solution to ensure that all agencies possess both civil rights and technology expertise. But as an example, consider calls in recent years for the FTC to build on its existing Office of Technology Research and Investigation by establishing a new Bureau of Technology.[10] The task force could recommend that civil rights experts be embedded in any forthcoming Bureau of Technology (or similar entity) at an individual agency. The task force could also recommend creation of a federal civil rights fellowship program modeled after existing fellowship programs such as the Presidential Innovation Fellows program or the TechCongress fellowship program. Participants in this new program would be placed at participating agencies to provide in-house civil rights expertise.

Third, the task force should encourage agencies that administer civil rights laws to evaluate and clarify application of existing civil rights laws to digital contexts. For example, agencies could draft new guidance and/or regulations clarifying how disparate impact provisions of civil rights laws apply to automated distribution of advertisements and other online content that, due to the nature of dynamic content distribution, do not reach users in all demographic groups equally. Agencies could also report to the U.S. CTO their assessment of whether and how existing civil rights laws may be insufficient to address discrimination and disparate impact in digital contexts. The U.S. CTO could then aggregate agencies' findings on deficiencies in existing civil rights laws so that the Administration can propose legislative solutions as appropriate.

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[10] McSweeny, T. (2018). Psychographics, Predictive Analytics, Artificial Intelligence, & Bots: Is the FTC Keeping Pace? Georgetown Law Technology Review, 514.

Frequently Asked Questions

Where is the evidence that issues at the intersection of civil rights and technology are not being adequately addressed at the Federal Government?

In studying this issue, we spoke with a number of advocates from organizations that work with federal agencies, as well as some former federal employees. Two examples from these conversations are illuminating.

First, in 2019 the Department of Housing and Urban Development (HUD) filed a lawsuit against Facebook regarding discriminatory advertising on the platform.[11] Advocates explained that HUD would not have even addressed the issue of algorithmic discrimination if it had not been raised by outside advocates.[12] Moreover, advocates reported that in conversations with HUD staff, it seemed apparent that HUD was ill-equipped to evaluate the problem, due to lack of technical sophistication at HUD combined with the fundamental opacity of algorithmic content distribution.

Second, the FTC has struggled to apply its existing legal enforcement framework to algorithmic bias. The undisclosed presence of bias in an algorithmic product could likely constitute an unfair or deceptive trade practice under the FTC Act,[13] but the FTC has never issued a complaint on this matter. The FTC discussed algorithmic bias in a major 2016 report and has periodically hosted public events on the topic, but advocates argue that, like HUD, the agency these only things at the urging of outside advocates. A larger in-house civil rights presence at the FTC could make the agency more proactive and aggressive when it comes to combating algorithmic bias and similar issues.

Which federal agencies should be represented on the task force?

On the civil rights side, the task force should include representatives from the Commission on Civil Rights and from agencies that enforce civil rights laws: the Department of Justice, Department of Education, Department of Labor, Department of Health and Human Services, HUD, Equal Employment Opportunity Commission, Department of Homeland Security, Environmental Protection Agency, Department of Transportation, Department of Veterans Affairs, Department of Agriculture, Department of the Treasury, and Department of the Interior.[14] On the technology side, the task force should include representatives from the Department of Commerce, Federal Communications Commission, FTC, and Small Business Administration. The

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[11] Benner, K., et al., Facebook Engages in Housing Discrimination with Its Ad Practices, U.S. Says, N.Y. Times, Mar. 28, 2019.

[12] Tobin, Ariana. "HUD Sues Facebook Over Housing Discrimination and Says the Company's Algorithms Have Made the Problem Worse." (March 28, 2019).

[13] Remarks of Commissioner Rebecca Kelly Slaughter on "Algorithms and Economic Justice" at UCLA School of Law, Jan. 24, 2020 (offering theories as to how the agency's Section 5 authority might be used to target algorithmic injustice).

[14] Commission on Civil Rights (2019). Are Rights a Reality: Evaluating Federal Civil Rights Enforcement at i-ii (listing agencies that enforce federal civil rights laws).

Consumer Financial Protection Bureau has strong stakes in both civil rights and technology and should also be included.

Why should the Chief Technology Officer and Office of Science and Technology Policy lead this effort rather than the Department of Justice, which has clear civil rights expertise?

The Chief Technology Officer is better positioned to coordinate the Federal Government's response to issues at the intersection of civil rights and technology. Leadership from the Office of Science and Technology Policy—a component of the White House—will signal the next administration's commitment to addressing data-driven discrimination.

What does a proactive regulatory landscape on technology and civil rights look like, as contrasted to a reactive regulatory landscape?

In a proactive regulatory landscape, federal agencies actively monitor the tech landscape to identify potential civil rights violations, conduct investigations, and bring enforcement actions. This is preferable to a reactive landscape in which agencies act only when external public advocates impose pressure.

Shouldn't tech companies be included as stakeholders to consult on this initiative?

The civil rights community has pushed tech companies for years to address problems at the intersection of technology and civil rights, such as voter suppression, discriminatory advertising, and hate speech. Responses by tech companies have been underwhelming at best, with many tech companies outright refusing to preemptively incorporate civil rights protections on their platforms. It is reasonable to expect that tech companies will seek to oppose or limit expansion of the Federal Government's capacity to strongly enforce civil rights or technology protections.

What effect will the actions outlined in this memo have on the innovation ecosystem? In other words, will a proactive regulatory environment make it harder for small companies to survive?

The task force must take care to ensure that its recommendations do not create additional significant barriers for startups to remain in or enter the market. Under a proactive regulatory environment, the Federal Government should provide clear guidance for small businesses and new market entrants on compliance. An emphasis on civil rights may actually foster innovation by creating market opportunities for equitable technology.

About the Authors

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About the Day One Project

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