DIGITAL GAZE AND CONSTITUTIONAL DEMOCRACY AT 250

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The panopticon of digital surveillance undermines identity formation and realization of our authentic selves. This Essay offers a new insight by conceptualizing alienation from genuine selfhood as a form of "double consciousness." W.E.B. Du Bois formulated the notion of double consciousness—the dual awareness inherent in negotiating between a self-defined identity and an externally imposed one. Just as Du Bois speaks of "double consciousness" for African Americans, the ever-present digital gaze to which we are now all subject—regardless of our race—creates a similar duality. I call this duality "online double consciousness," which is compounded for people of color and other historically disadvantaged groups and individuals.

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INTRODUCTION

> One ever feels his two-ness . . . two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.[1]

America's 250-year anniversary provided a moment of reflection for the past, present, and future of constitutional democracy. As Princeton Professor Eddie S. Glaude Jr. notes, "these anniversaries are these telescoped moments where the country has to tell a story about itself."[2] Having given birth to interlocking concepts of self-government and the inherency of basic rights, the Declaration of Independence proclaimed that "all men are created equal" and "are endowed by their Creator with certain unalienable Rights."[3]

Yet, the panopticon[4] of digital surveillance infringes on our equality and personal autonomy in ways that undermine identity formation and actualization of our authentic selves.[5] This Essay offers a new insight by

1. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 8 (Oxford Univ. Press 2007) (1903).

2. ON THE MEDIA: *The Fantasy of America at 250*, at 14:44 (Pandora, June 26, 2026) (interview with Eddie Glaude).

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

4. In its simplest form, the panopticon is an architectural idea for a prison featuring a central guard surrounded by an outer ring of prisoners. *See* JEREMY BENTHAM, *Letter II: Plan for a Penitentiary Inspection House*, *in* THE PANOPTICON WRITINGS 35, 35 (Miran Božovič ed., Verso 1995) (1791) ("The building is circular. The apartments of the prisoners occupy the circumference . . . . The apartment of the inspector occupies the centre; you may call it if you please the *inspector's lodge*."); JEREMY BENTHAM, *Letter V: Essential Points of the Plan*, *in* THE PANOPTICON WRITINGS, *supra*, at 43, 43 [hereinafter *Letter V*] ("The essence of [the panopticon] consists then in the *centrality* of the inspector's situation, combined with the well-known and most effectual contrivances for *seeing without being seen*."); *see also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 170–72 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (discussing hierarchy, power, and disciplinary effects of surveillance); Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907, 913 n.28 (2022) ("A panoptic society enables personal data to be deployed for surveillant social control.").

5. For a helpful analysis of the importance of privacy and personal autonomy, and the threats to these values in our current digital age, see Neil Richards, Privacy's Social Dimensions 12 (Dec. 30, 2025) (unpublished manuscript) (on file with the *Fordham Law*

analyzing this alienation from genuine selfhood as a form of "double consciousness."[6] W.E.B. Du Bois famously formulated the notion of double consciousness, which describes the dual awareness inherent in negotiating between a self-defined identity and an externally imposed identity.[7] Just as Du Bois speaks of "double consciousness" as a mechanism through which African Americans are forced to continually view ourselves through both our own eyes and through the eyes of a white, external, and oppressive lens, the ever-present digital gaze to which we are now all subject—regardless of our race, and now amplified by artificial intelligence (AI)[8]—creates a similar duality. I call this duality "online double consciousness," which is compounded for people of color and other historically disadvantaged groups and individuals.[9]

This Essay proceeds in three parts. Part I examines how online double consciousness affects everyone in our contemporary digital society. Part II analyzes how this duality is compounded for historically disadvantaged groups and individuals. Part III illustrates that the "second-sight"[10] provided by this double consciousness is more of a curse than a gift.

Review) (stating that, "[i]n addition to individual personal, professional, and economic relationships, privacy enables social life more broadly. Indeed, the very nature of human society can be seen as a bustling process of boundary management and selective information exchange"—a process that is undermined by technologies, such as facial recognition); Woodrow Hartzog & Jessica Silbey, *How AI Destroys Institutions*, 77 U.C. L.J. 727, 737–51 (2026) (analyzing the "destructive affordances of AI" through a discussion of how AI undermines our acquisition of expertise, short circuits our decision-making, and isolates humans by displacing and degrading human-to-human relationships, thereby disrupting identity formation in institutional settings).

6. DU BOIS, *supra* note 1, at 8.

7. *See id.*

8. For the purposes of this Essay, I follow the definition of AI reflected in 15 U.S.C. § 9401(3) ("The term 'artificial intelligence' means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.").

9. Sociology Professor Karen S. Glover applies Du Bois to experiences of racial profiling, largely focusing on the period prior to the explosion of social media following the launch of the first-generation iPhone in 2007. *See* Karen S. Glover, *Citizenship, Hyper-Surveillance, and Double-Consciousness: Racial Profiling as Panoptic Governance*, *in* 10 SOCIOLOGY OF CRIME, LAW AND DEVIANCE: SURVEILLANCE AND GOVERNANCE: CRIME CONTROL & BEYOND 241 (Mathieu Deflem ed., 2008). While Glover's focus is on "[i]ncorporating Du Bois's concept of a racial 'double-consciousness'" to examine "racial profiling processes and the effects of hyper-surveillance on communities of color," her treatment largely precedes—and therefore does not grapple with—the complexities of social media and AI. *Id.* By contrast, the focus of the instant Essay is to suggest the double consciousness triggered in the digital context has disparate impacts on communities of color, even while it is also a universal experience for nearly everyone who sees themselves anew through the lens of technological surveillance. The fact that the digital age forces this experience of double consciousness on us all—even while disproportionately on people of color—creates a convergence of interests and potential basis for solidarity to push back on digital surveillance.

10. DU BOIS, *supra* note 1, at 8 (as discussed further in Part III, Du Bois defines this notion of "second-sight" by explaining that "the Negro is . . . born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world").

I. A UNIVERSAL EXPERIENCE: THE DIGITAL GAZE CREATES AN ONLINE FORM OF DOUBLE CONSCIOUSNESS FOR ALL

Digital surveillance creates a phenomenon akin to double consciousness for everyone, not only disadvantaged groups, as it subtly and insidiously forces us to see our online selves through the eyes of the surveillant. Part I explores this phenomenon.

A. Forced to See Our Online Selves Through the Eyes of the Surveillant

The omnipresence of digital surveillance is a near-universal experience for anyone not living completely off the grid.[11] Indeed, online surveillance is nearly constant for anyone engaged in economic, social, political, and other digital transactions and engagements. Of course, our online activity and data are tracked by advertisers, businesses, political candidates and their operatives, as well as nonprofits (as many universities and other organizations disclose that their websites now use cookies and other tracking devices).[12] Further, the proliferation of video and still cameras—on many city streets, at airports, in mass transit, in private businesses, in workplaces, in private as well as public housing, and beyond—provides a basis for surveillance that is further amplified by facial recognition technology.[13]

We are painfully made aware of this surveillance. Terms and conditions of service typically disclose that they collect user data, making users aware that their activity will be tracked, though few people have the time to actually read the details in such privacy notifications.[14] Thus, consent to such terms ends up being performative, creating a theater of consent,[15]

11. After spending a year trying to erase her own digital footprint, journalist Julia Angwin concluded that dropping off the grid is nearly impossible for the ordinary person. *See generally* JULIA ANGWIN, DRAGNET NATION: A QUEST FOR PRIVACY, SECURITY, AND FREEDOM IN A WORLD OF RELENTLESS SURVEILLANCE (2014) (advocating, instead, for "threat modeling"—identifying specific parts of your life you seek to protect, rather than fruitlessly fighting all data-gathering mechanisms).

12. For a discussion of various forms of online surveillance, see DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE 1–63 (2022). For a quintessential book on how digital surveillance undergirds contemporary capitalism, see SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 122–23 (2019).

13. *See, e.g.*, KASHMIR HILL, YOUR FACE BELONGS TO US: A SECRETIVE STARTUP'S QUEST TO END PRIVACY AS WE KNOW IT 228–36 (2023); Woodrow Hartzog, Evan Selinger & Judy Hyojoo Rhee, *Normalizing Facial Recognition Technology and the End of Obscurity*, 6 EUR. REV. DIGIT. ADMIN. & L. 163, 171 (2025).

14. Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & POL'Y FOR INFO. SOC'Y 543, 563 (2008) (outlining that based on one study, if an individual were to skim every privacy policy they encountered in a given year, it would take roughly 154 hours).

15. For a discussion of the superficial performativity of such terms and conditions, see Cory Doctorow, *Consent Theater*, MEDIUM: ONEZERO (May 20, 2021), https://onezero.me

leading privacy expert and Professor Woodrow Hartzog to argue that "privacy policies in fact usually end up being *antiprivacy* policies."[16] Even in circumstances where we may be offline or not otherwise fully aware that digital surveillance is, nonetheless, a possibility, we are often tracked, such as through: surveillance cameras in public spaces and at entertainment venues,[17] Amazon Ring doorbells, Alexa for Residential that landlords can install in rental apartments, smart assistants in hotel rooms, dating apps, work surveillance technologies ranging from nanny cams to work entry and exit digital logs to various forms of monitoring of computer use, and more.[18] In sum, the digital age is pushing us into a post-privacy era.[19]

B. Data Doubles: Our Authentic Selves and Our Datafied Selves

More to the point, as Professor Danielle K. Citron points out, "[w]e all have Data Selves."[20] In collecting data about our lives, data processors create "data doubles" of each of us.[21] Our "datafied" selves exist separately from our physical selves, though the two remain inherently intertwined. This can create a dual sensibility in which we perceive ourselves both

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dium.com/consent-theater-a32b98cd8d96 [https://perma.cc/LTD4-QVWB] (using the term "consent theater" for agreements that secure formal assent without meaningful choice).

16. WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES 211 (2018) ("[T]hey usually provide a liability shield for companies looking to take advantage of users' failure to actually read the policy they agree to.").

17. *See, e.g.*, Sophia Fox-Sowell, *AI Cameras Will Flag 'Problematic Behavior' in New York Subways, MTA Says*, STATE SCOOP (Apr. 30, 2025), https://statescoop.com/mta-ai-cameras-ny-subway/ [https://perma.cc/3W9K-W3A6]; The Brian Lehrer Show, *Surveillance at Madison Square Garden*, WNYC (July 10, 2026), https://wnyc.org/browse/shows/episode/simplecast/4d32f068-3a41-4e27-82e4-cae34dc26eca [https://perma.cc/22DB-VHEG] (discussing an interview with Noah Shachtman outlining his investigation into how Madison Square Garden owner James L. Dolan has surveilled his arenas and compiled databases of high-profile guests, allegedly tracking a trans woman, lawyers, and protesters).

18. *See generally* CITRON, *supra* note 12 (detailing these types of surveillance); IFEOMA AJUNWA, THE QUANTIFIED WORKER: LAW AND TECHNOLOGY IN THE MODERN WORKPLACE (2023) (same).

19. *See* Tony Dokoupil, *Researcher Who Inspired Cambridge Analytica's Data Harvesting Says Era of Privacy Is Over*, CBS NEWS (Mar. 28, 2018), https://www.cbsnews.com/news/michal-kosinski-researcher-who-inspired-facebook-data-harvesting-says-era-of-privacy-is-over/ [https://perma.cc/NU3Q-MD9Y] (referring to the view of Professor Michal Kosinski that the era of privacy is over).

20. CITRON, *supra* note 12, at 23. Citron notes that "[i]n an ad for its credit-monitoring service, Experian explains, 'there exists another version of you made up of your financial data. Your Data Self.'" *Id.* at 3. Citron continues by clarifying that "far more surveillance is afoot than just of your financial data. Your Data Self includes a comprehensive view of the most intimate aspects of your personal life." *Id.*

21. *See* Julie E. Cohen, *The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy*, 31 PHIL. & TECH. 213, 224 (2018) ("Cultivated and extracted data enter an industrial production process during which they are refined to generate data doubles—information templates for generating patterns and predictions that can be used to target consumers with particular characteristics."); Simon Biggs & Ana Carvalho, *All Watched Over by Our Data Doubles*, 57 LEONARDO 272, 272 (2024) ("The term *data double* denotes information generated by and collected from users of networked communications to construct relational databases in marketing and other domains.").

through our firsthand, authentic experience of ourselves and through our secondary, datafied selves, created by digital surveillance.

Because this data can be used to inform credit scores and insurance rates, and has other material consequences, awareness of digital surveillance plays a disciplinary function.[22] Surveillance of one's credit card balance may affect one's credit score negatively, thereby disciplining individuals to make timely payments toward their credit card balance. Surveillance of one's driving speed or seat belt use might affect one's car insurance rates, thereby disciplining individuals to drive within the speed limit and wear a seat belt.

Even instances of voluntary[23] self-surveillance can shape our behavior. When we post on social media, for example, we often share experiences that we appreciate not only as we view them through our own in-the-moment, genuine self-awareness, but also as we know others will view them once we post them to social media.

For instance, take the common experience of going on vacation. Rather than simply enjoying the firsthand, authentic awareness of being in the moment, many also experience the vacation through the lens of an endless stream of photos to get that "perfect" social media moment that all of one's friends will envy and view as being part of the perfect vacation and perfect life. Such experiences create a dual awareness of authentic selfhood and the self we imagine will be perceived through the eyes of others who view our social media posts. Therefore, in taking photos, we might look for a perfect angle, wear makeup, or take other such steps we might not otherwise take on vacation, in light of our awareness of the external other who will view these photos.

Similarly, if you wear a Garmin, an Apple Watch, or another wearable to track your steps, pace, or other aspects of fitness, you might experience your body and health through your own firsthand sense of increased strength, endurance, and well-being. But you might also view your body and your fitness through the data and trendlines that are collected and

22. Note that in his discussion of the panopticon, Jeremy Bentham spoke about the system of social control and discipline inherent in constant (or potentially constant) surveillance by those whom the surveilled cannot see, which subtly coerces the surveilled to self-regulate. *See Letter V*, *supra* note 4, at 43–45.

23. Research suggests that self-surveillance, for instance through social media engagement, may not be entirely "voluntary," given the power of divergent social expectations (by gender) and socioeconomic circumstances (by race). *See* Jennifer Gerson, *The Complicated Ties Between Teenage Girls and Social Media—and What Parents Should Know*, THE 19TH (Sep. 13, 2023, at 06:00 ET), https://19thnews.org/2023/09/social-media-teenage-girls-mental-health-body-image/ [https://perma.cc/8NN2-T9WK] ("Girls are more likely than boys to say they spend too much time on social media—41 percent to 31 percent—and also are more likely than boys to say that it would be hard for them to give up social media, 58 percent compared to 49 percent."); Michelle Faverio & Olivia Sidoti, *Teens, Social Media and AI Chatbots 2025*, PEW RSCH. CTR. (Dec. 9, 2025), https://www.pewresearch.org/internet/2025/12/09/teens-social-media-and-ai-chatbots-2025/ [https://perma.cc/HP9C-A5N7] (noting that higher shares of Black and Hispanic teens report using image-based social media platforms, such as TikTok, Instagram, and YouTube "almost constantly").

reflected, along with rankings of where you fit in comparison to others (for example, if you enter a challenge to compete with others through a fitness app).[24] Your wearable lets you know how physically fit you are beyond your own organic sense of fitness. While such surveillance might be beneficial in terms of health accountability, it too has a disciplinary function, albeit perhaps one that could be deemed as positive. However, in light of surveillance capitalism,[25] fitness app data can be shared with advertisers and potentially other third parties[26]—expanding the external other to audiences of which we may only be vaguely aware.

II. DISPARATE EXPERIENCE: THE BURDENS OF THE DIGITAL GAZE ARE NOT DISTRIBUTED EVENLY

Digital surveillance disproportionately affects historically disadvantaged communities and individuals, compounding online double consciousness. As Professor Anita L. Allen notes, digital surveillance disproportionately affects such marginalized communities and individuals through discriminatory oversurveillance, discriminatory exclusion, and discriminatory predation.[27] Drawing on Allen's digital surveillance framework, this part offers examples of how oversurveillance and exclusion—based on simultaneous hypervisibility and invisibility—are two sides of the same coin.

A. Uber: Race and the Platform Economy

Consider a "hypothetical" analysis of how Uber's digital surveillance resulted in a longer wait time for Jamal, a Black attorney, than similarly situated white attorneys at his firm.[28] Jamal regularly used Uber when

24. *See* CITRON, *supra* note 12, at 1 ("Amazon Halo looks like a watch, but time isn't the point. The wearable health device has sensors that monitor your heart rate, oxygen level, and daily steps."); ZUBOFF, *supra* note 12, at 245–47.

25. *See* ZUBOFF, *supra* note 12, at 245–47. Surveillance capitalism "unilaterally claims human experience as free raw material for translation into behavioral data." *Id.* at 8.

26. *See* CITRON, *supra* note 12, at 10 (noting that (1) "US health privacy laws mostly don't apply to" health apps; (2) to the extent the Federal Trade Commission (FTC) took a different view in 2021, "health apps just need to notify subscribers that their data will be shared"; and (3) one FTC analysis of "twelve health apps and two wearable devices" demonstrated that "subscriber information was sent to no fewer than 76 different companies").

27. *See* Allen, *supra* note 4, at 907 (noting that "African Americans online face three distinguishable but related categories of vulnerability to bias and discrimination that I dub the 'Black Opticon': discriminatory oversurveillance, discriminatory exclusion, and discriminatory predation"). For further discussion of Allen's framework offering several concrete examples, see Catherine Powell, *How AI Reinforces Caste: Creating and Amplifying Systemic Inequality*, 85 MD. L. REV. 243, 254–70 (2025).

28. *See* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1273 n.3 (2017). In an analysis on how public accommodations law might apply to the platform economy, the article explains that "Jamal" is an acquaintance of the authors whose "first name is not really

traveling home late at night, and he noticed that his wait times were consistently long.[29] On one night, Jamal waited nearly thirty minutes for a car that never came, and upon checking with similarly situated white colleagues who took late-night Ubers home, he learned that none of them experienced similar problems.[30] Puzzled, Jamal called Uber, and the rideshare company's "representative [told] him that his passenger rating is only a 3.2 out of 5," though "Jamal had not even realized he was being rated" (and similarly situated white colleagues reported to him that their scores ranged from 4.6 to 5.0).[31] In fact, Jamal learned that drivers could "see his first name and his passenger rating whenever he requests a ride and that some drivers hesitate to pick up passengers with ratings below 4.0."[32]

Going forward, Jamal would experience double consciousness, given his view of himself as a responsible professional but knowing that he was potentially being viewed by the rideshare app and its drivers as a Black man with a low passenger rating, despite his limited opportunity to rebut the rating.[33] This duality results from his being simultaneously oversurveilled (due to his Black-sounding name and resulting low passenger rating) and excluded from prompt Uber rides on discriminatory grounds. He is hypervisible, in that his name registers as Black, even while he is invisible to drivers who screen out lower passenger ratings (in this case, tied to Jamal's Black-sounding name).

As discussed in my prior work, once embedded, such negative ratings are amplified.[34] In Jamal's case, the negative stereotype of a rider with a Black-sounding name and low rating becomes a self-fulfilling prophecy for potential drivers: Their negative view of picking up a Black passenger with a low rating is sticky and therefore hard to rebut, leading to additional low ratings. Professor Allyson E. Gold has explained similar entrenchment and amplification of negative ratings based on race in the context of Airbnb.[35]

Jamal, but his real name is also a name that most people would identify as the name of a [B]lack man." *Id.*

29. *See id.* at 1273.

30. *See id.*

31. *Id.*

32. *Id.* (noting "some drivers might hesitate to pick up a passenger with a name most would associate with a [B]lack man"); *see also id.* at 1274 ("Studies have shown that it's harder to get a taxi to pick you up when you're [B]lack . . . . Why would Uber be different?").

33. *See generally* Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV 1 (2014) (discussing the pervasive use of predictive algorithms and the need for safeguards based on due process, including an ability to challenge adverse decisions and allowing regulators to test scoring systems).

34. *See* Powell, *supra* note 27, at 267–70.

35. *See* Allyson E. Gold, *Redliking: When Redlining Goes Online*, 62 WM. & MARY L. REV. 1841, 1865–67, 1903–08 (2021) (explaining how negative ratings stemming from discrimination based on the perceived race of a host featured in their Airbnb photo was amplified and entrenched through algorithms used by the platform).

B. Uber: Gender and the Platform Economy

A second scenario also involves Uber but implicates *gender* equality concerns for *drivers*. Uber's chief economist himself conceded that the rideshare app's algorithm led to pay inequity for female drivers, based in part on their slower driving speed and geographical limitations on where they were willing to pick up passengers,[36] which was often for safety reasons tied to gender and gender-based violence.[37] Digital surveillance of such driver behaviors factored into algorithms that determine wages (whether surge wages or lower wages).[38] A female driver learning about such research would experience double consciousness: She sees herself as a responsible driver who picks up passengers in low-crime areas and maintains a safe driving speed out of concern for the well-being of both herself and her passengers, while the rideshare app views her as opting for less remunerative rides (based on driver "choice"). Again, this duality results from simultaneous oversurveillance—through digital surveillance of driver choices tied to gender—and exclusion from higher wages, determined algorithmically by factors tied to gender, with a disproportionate impact on women.

C. Amazon: Gender Bias in Algorithmic Hiring

While the two examples above focus on Uber, algorithmic bias—and the dual consciousness that such discriminatory surveillance facilitates—goes beyond the rideshare sector. Amazon acknowledged that an AI hiring tool it had used to rate candidates for software developer jobs had promptly "taught itself" to discriminate against women.[39] The AI tool "penalized resumes that included the word 'women's,' as in 'women's chess club captain'" and "downgraded graduates of two all-women's colleges."[40]

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36. *See* Cody Cook, Rebecca Diamond, Jonathan V. Hall, John A. List & Paul Oyer, *The Gender Earnings Gap in the Gig Economy: Evidence from Over a Million Rideshare Drivers*, 88 REV. ECON. STUD. 2210, 2236–37 (2021) (documenting pay inequity for female Uber drivers in a study in which one of the authors, Professor John A. List, was chief economist at Uber when the study was initiated and was chief economist at Lyft when the paper was published). The study notes that, "driving speed alone can explain nearly half of the gender pay gap" and that "men tend to drive in more lucrative locations. . . . largely because . . . men earn a compensating differential for their willingness to drive in areas with higher crime and more drinking establishments." *Id.* at 2211–13.

37. *See* Avivah Wittenberg-Cox, *Uber's Gender Pay Gap Study May Show the Opposite of What Researchers Were Trying to Prove*, FORBES (Sep. 24, 2018), https://www.forbes.com/sites/avivahwittenbergcox/2018/09/23/gender-paygap-uber-case-study/ [https://perma.cc/7XEC-C8SC].

38. *See* Cook et al., *supra* note 36, at 2226 n.28.

39. Jeffrey Dastin, *Insight—Amazon Scraps Secret AI Recruiting Tool That Shows Bias Against Women*, REUTERS (Oct. 10, 2018, at 20:50 ET), https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-thatshowed-bias-against-women-idUSKCN1MK0AG [https://perma.cc/3CY3-MZYJ].

40. *Id.*

In fact, Amazon's computer models had been trained to vet applicants based on a pool of resumes that had been submitted to the company over a ten-year period, when the tech industry was overwhelmingly male, and therefore predicted that successful candidates for future roles would have similar male profiles.[41] A female applicant learning about Amazon's admission would experience double consciousness of herself as a high-achieving applicant with leadership skills (for example, as captain of a women's sports team), even while being viewed by the hiring tool as less desirable, as she would be screened out because she would not fit the profile of a successful (male) candidate. Once again, this duality results from her being simultaneously oversurveilled, due to the AI tool's screening of female leadership roles, and excluded from job opportunities on discriminatory grounds. Women were hypervisible, based on gendered terms appearing on their resumes, even while they were invisible for job opportunities in the technology sector.

* * *

The fact that Uber and Amazon themselves have disclosed that their algorithms learned to discriminate suggests that the scope of algorithmic bias across technology platforms may be far more extensive than what has been revealed to the public. Powered by algorithms, AI surveils, sorts, and ranks us, and in so doing, creates and amplifies hierarchies, including raced, gendered, and other forms of caste.[42] As I have noted in prior work, "due to the asymmetric power inherent in the political economy of AI—and the 'black box' nature of algorithms that power AI—the reification of caste through AI is at once opaque, unfolding almost invisibly, but powerfully."[43] In addition to the implications for governance and equality, the "panoptic sort" and social ordering[44] inherent in our digital society makes us aware of

41. *Id.* This provides an example of the well-known garbage-in/garbage-out problem, wherein relying on bad data produces unreliable outcomes. For a classic analysis of this problem, see Rashida Richardson, Jason Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 15, 16–21 (2019).

42. *See* Powell, *supra* note 27, at 243 ("[A]lgorithmic discrimination is not just a bug, it is an essential feature of the system that powers the digital economy.").

43. *Id.* at 246 (noting that this "modif[ies] how we view governance and the social contract" (quoting Margaret Hu & Catherine Powell, Reconstruction for the Digital Age 8 (Apr. 25, 2025) (unpublished manuscript) (on file with the *Fordham Law Review*))); *see also* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 7–8 (2015); Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 61 (2019) (noting, however, that despite the opacity of the black box, "it is also necessary for us not to think of AI as an abstract set of black boxes, but rather as a specific set of granular opportunities for analysis and reflection . . . to encourage greater transparency"); Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 638 (2017).

44. *See generally* OSCAR H. GANDY, THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION (1993) (discussing the deep logic of hierarchical classification embedded in even the early days of computerized collection and processing of data). *See also Panopticons and Leviathans: Oscar H. Gandy, Jr. on Algorithmic Life*, LOGIC(S) (Dec.

the duality between our own sense of self-worth and the value we are assigned in our ordinal society[45]—in which we are ranked for preferred Uber pickups, preferred prices,[46] and preferred dating options.[47]

III. IS THIS SECOND-SIGHT A GIFT OR A CURSE?

These experiences of double consciousness, discussed above, offer a dual way of seeing ourselves and our place in the world—a form of "second-sight." In this part, I discuss whether this form of second-sight is a gift or a curse. Drawing on W.E.B. Du Bois and Frantz Fanon, I conclude that this second-sight is more of a curse, and I apply their work to our current age of AI.

A. Du Bois: Double Consciousness as Second-Sight

According to Du Bois, racial hierarchy forces Black Americans to negotiate between a self-defined identity and an externally imposed, white perspective—yielding both the burdens of this struggle and the gift of "second-sight":

> [T]he Negro is . . . born with a veil, and gifted with *second-sight* in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity.[48]

In this view, double consciousness is simultaneously a gift of "second-sight" and a source of deprivation which yields "contempt and pity."[49] As discussed further in this part, inevitably, this duality prevents full self-knowledge and self-actualization. As Du Bois notes, "[t]he history of the American Negro is the history of this strife,—this longing to attain

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20, 2020), https://logicmag.io/commons/panopticons-and-leviathans-oscar-h-gandy-jr-on-algorithmic-life/ [https://perma.cc/VNB8-W2Y3].

45. *See* MARION FOURCADE & KIERAN HEALY, THE ORDINAL SOCIETY 1–2 (2024) (describing the ordinal society as a social order "oriented toward, justified by, and governed through" classification and ranking, resulting in a "rationalized stratification" that orders people's lives).

46. *See* Curtis Fuller, *Your Shopping Cart Is Watching You: What New York's Algorithmic Pricing Law Means for Everyone*, ROMANO L. (Dec. 22, 2025), https://www.romanolaw.com/your-shopping-cart-is-watching-you-what-new-yorks-algorithmic-pricing-law-means-for-everyone/ [https://perma.cc/K2MP-47TW].

47. *See* SOLANGEL MALDONADO, THE ARCHITECTURE OF DESIRE: HOW THE LAW SHAPES INTERRACIAL INTIMACY AND PERPETUATES INEQUALITY 4 (2024) (discussing how filters and algorithms on dating apps virtually place white men at the top of the dating hierarchy, Black women and Asian men at the bottom, and multiracial Americans at the very top—even above white men).

48. DU BOIS, *supra* note 1, at 8.

49. *Id.*; *see also* SARAH JACKSON, A SECOND SIGHT: HOW THE WONDER AND VISION OF BLACK MEDIAMAKERS PUSH AMERICA TOWARD FREEDOM 2 (2026).

self-conscious manhood, to merge his double self into a better and truer self."[50]

Similarly, digital surveillance forces us to view ourselves in such a way that one is "always looking at one's self through the eyes of others"[51]—whether the external other is the Uber driver whose algorithmically curated app assists him in deciding whether to accept a ride from a presumed Black rider, an AI hiring tool that learned how to discriminate against women, or a predictive policing system that embeds flawed or racially biased data inputs that lead to unreliable, unlawful predictive outputs.[52] Such surveillance has implications for privacy, personal autonomy, and equality—each of which supports and sustains self-actualization.

Du Bois's theory of double consciousness stemmed from his late nineteenth-century social research concerning the challenge of dual consciousness for the development of one's authentic, autonomous selfhood. In the twenty-first century, we can apply his theory to the alienating and marginalizing effects of the digital gaze. With Du Bois's foundation for the ways we view ourselves through the mask of race, French thinker Frantz Fanon helps deepen our understanding of why the second-sight afforded through double consciousness frame may be more curse than gift in the digital context.[53]

B. Fanon: White Gaze and Double Consciousness

Linking the scholarship of Du Bois and Fanon is useful not only because of the ways their ideas are parallel, but also because the French and American Revolutions occurred within basically a decade of each other. The eighteenth-century Enlightenment thinking that informed both revolutions paved the way for the contemporary ideas concerning rights and equality that are at the heart of this Essay.[54] It is no coincidence, then, that while Du Bois's work emerged in the midst of the Black Consciousness Movement in the United States, Fanon's work arose in the parallel context of the French counterpart, called the Négritude Movement.[55] Du Bois posited the idea of "double consciousness" in 1903. Nearly half a century later, Frantz Fanon situated a similar idea—that of the "white gaze" (as

50. DU BOIS, *supra* note 1, at 9.

51. *Id.* at 8. While Du Bois was obviously not addressing the digital context, which came later, his analysis applies with equal force in this context.

52. *See* Richardson, Schultz & Crawford, *supra* note 41, at 15 (examining how flawed or racially biased data inputs in predictive policing systems can lead to flawed or unlawful predictive outputs, which perpetuates additional harm).

53. *See* FRANTZ FANON, BLACK SKIN, WHITE MASKS 73 (Richard Philcox trans., Grove Press 2008) (1952).

54. Here, I am referring to the ways in which the French and American Revolutions helped secularize the belief in God-given rights by grounding the rights idea in social contract theory, a framework that underlies the U.S. Constitution, including the notion that all people have certain inherent (prepolitical) basic rights—equally and in equal measure—secured, but not provided by, the Constitution.

55. *See* Kwame Anthony Appiah, *Foreword* to FANON, *supra* note 53, at viii.

translated from French)—within the broader structures of colonialism and white supremacy, providing a framework that applies not only to African Americans, but also to colonized peoples more broadly.[56]

In a sense, Fanon's notion of the "white gaze"[57] may be understood as an extension of Du Bois's notion of divided racial subjectivity. It is also a precursor to the notion of the digital gaze, or, to use Joy Buolamwini's related terminology, "coded gaze."[58] Buolamwini coined the term "coded gaze" in her critique of how facial recognition technology misidentifies women and people of color—and especially women of color—because facial recognition technology was trained by mostly white male computer scientists and programmers using white faces.[59] In this sense, facial recognition technologies were quite literally developed through the gaze of white men, offering the surveilled a sense of twoness: viewing one's firsthand experience of self as well as the surveilled self.

Using the example of facial recognition, we can understand how Fanon's work helps sharpen my analysis of the ways digital surveillance creates dual consciousness concerning selfhood. Fanon scholar Marc Black offers Fanon's descriptions of the colonized intellectual caught between "two determinations,"[60] and of the Black American being given "two frames of reference within which he has to place himself" as clear expressions of Du Boisian twoness.[61] As discussed above, the coded gaze provides those surveilled with a sense of twoness. Fanon deepens this analysis by demonstrating that double consciousness is a structural condition of colonial domination.[62] So too, scholars of generative AI have viewed the colonial gaze as embedded in algorithms that power AI.[63]

On Du Bois's account, the "second-sight" which emerges from double consciousness may be a gift.[64] For Fanon, by contrast, reconciling double consciousness could lead to surrender to the white gaze—or assimilation—

56. *See* Marc Black, *Fanon and DuBoisian Double Consciousness*, 5 HUM. ARCHITECTURE: J. SOCIO. SELF-KNOWLEDGE 393, 393 (2007). Note also that feminist and postcolonial scholars have, more broadly, analyzed the external, oppressive lens of not only the white gaze, but also the male gaze, the postcolonial gaze, heteronormative gaze, and the intersections of these (and other) lenses of subordination.

57. FANON, *supra* note 53, at 90 (while different translations use different phraseology, the phrase "white gaze" is used in this translation).

58. Joy Buolamwini, *How I'm Fighting Bias in Algorithms*, TED (Nov. 2016), https://www.ted.com/talks/joy_buolamwini_how_i_m_fighting_bias_in_algorithms [https://perma.cc/LFG7-DBXQ].

59. *See id.*

60. Black, *supra* note 56, at 396. Note that I rely here on secondary sources offering both translation from Fanon's original French as well as an interpretation of how to situate these passages in relation to Du Bois's ideas, given the differences in language.

61. *Id.* at 397 (quoting FRANTZ FANON, BLACK SKIN, WHITE MASKS 110 (Charles Lam Markmann trans., Grove Press 1967) (1952)).

62. *Id.* at 396–97.

63. *See* Arsenii Alenichev et al., *"We Can See a Savage": A Case Study of the Colonial Gaze in Generative AI Algorithms*, 41 AI & SOC'Y 3413, 3414 (2025); *see also* SAFIYA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 66–86 (2018) (examining racist and sexist bias built into Google searches).

64. DU BOIS, *supra* note 1, at 8; *see also* JACKSON, *supra* note 49, at 1–2.

which forces the colonized to internalize colonial perceptions and experience psychological alienation.[65] Fanon, in particular, explores how the internalized "white mask" forces colonized people to adopt the culture of the oppressor.[66] Similarly, in viewing oneself through the digital gaze, many internalize negative perceptions of themselves as overweight or otherwise not fitting into traditional beauty norms (colonized by the male gaze), which has led to an uptick in the use of beauty filters, particularly by young women.[67]

Drawing on his own experience, Fanon describes being on a train when a child yelled, "[l]ook! A Negro!" illustrating how the Black body not only belongs to itself but is also the property of the racist gaze.[68] So, too, our digital data is the property of data processors and data brokers.

C. The Digital Gaze and Double Consciousness

Applying Du Bois and Fanon to today, the digital sphere heightens the sense of being under the gaze and scrutiny of others in ways that can be oppressive, particularly when there are material consequences, such as with police, immigration, or reproductive surveillance. Further, even while the digital sphere is a space to rebel and transgress boundaries, it also risks socializing users to conform. For example, the common experience of "fear of missing out" (FOMO) often prompts online viewers to want to conform to the fun activity viewed online.

Unlike Du Bois, who potentially envisions the possibility of integration without the erasure of Black cultural identity, Fanon insists that true liberation requires a complete break from colonial validation.[69] Double consciousness highlights the internal conflict imposed by colonial power, but Fanon moves beyond Du Bois by arguing that psychological liberation cannot occur through coexistence or reform.[70] Instead, decolonization must dismantle both the structural and psychological foundations of colonial domination.[71] Thus, Fanon fundamentally challenges the reformist

65. *See* Martina Maslovski, *Frantz Fanon's Critique of Colonial Structures: The Importance of Psychological Liberation*, 10 POL. SCI. UNDERGRADUATE REV. 101, 102 (2025) (noting that Fanon rejects the possibility that such duality can be harmonized within colonial frameworks). For Fanon, the colonized lack "ontological resistance" within colonial society, making integration structurally incapable of preserving authentic identity. *Id.* at 103.

66. *See* FANON, *supra* note 53, at 89.

67. *See* Tate Ryan-Mosley, *Beauty Filters Are Changing the Way Young Girls See Themselves*, MIT TECH. REV. (Apr. 2, 2021), https://www.technologyreview.com/2021/04/02/1021635/beauty-filters-young-girls-augmented-reality-social-media/ [https://perma.cc/T8G6-YX7U].

68. *See* FANON, *supra* note 53, at 89.

69. *See* Maslovski, *supra* note 65, at 102–03.

70. *See id.*

71. *See id.* at 104–05.

implications of Du Bois and advances a more radical theory of liberation grounded in total decolonization.[72]

By analogy, just as colonialism has structural and psychological foundations, so too do AI and related technologies.[73] AI magnifies the broader panopticon of digital surveillance and the associated challenge of the disciplinary and discriminatory effects of surveillance.

Even as Du Bois and Fanon outlined the challenge of negotiating between a self-defined identity and an imposed identity—given double consciousness and the white gaze, respectively—privacy scholars today note a similar challenge. As Professor Neil Richards asserts, "when we take off the 'masks' of our social roles we are our true selves 'backstage' (as it were)."[74] Thus, Citron argues, surveillance disrupts private identity development, intimacy, and autonomy.[75] Pervasive digital surveillance undermines this genuine identity formation and, thus, personal autonomy, as we seem to be continuously surveilled—whether through our online purchases, social media engagement, video surveillance cameras in the streets and subways, geolocation data, or through our wearables and other portable devices.[76]

CONCLUSION

Just as W.E.B. Du Bois spoke about the double consciousness inherent in negotiating between a self-defined identity and an imposed identity, the continuous digital gaze under which our lives operate creates a similar duality, one of "online double consciousness." This online form of double consciousness operates on two levels simultaneously. It is universal insofar as nearly everyone now experiences life through systems of digital surveillance, categorization, and ranking. Yet this digital surveillance is unequal because the burdens of surveillance are not distributed evenly. Communities that have been historically subject to racial, gender, and other forms of social hierarchy encounter a digital environment that often creates and amplifies inequalities. Further, navigating this dual awareness of one's genuine and digital selves undermines fuller self-actualization, so that whatever benefit is derived from this duality is undercut by the

72. *See id.* at 103–05.

73. *See* Alenichev et al., *supra* note 63, at 3431.

74. Richards, *supra* note 5, at 13.

75. *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1884 (2019) (relying on Erving Goffman to discuss how surveillance disrupts private identity development, intimacy, and autonomy).

76. While beyond the scope of this Essay, the European Union has protections offering users the right to opt out of data collection, request a copy of any of their personal data that is being processed, as well as secure portability of data. Further, data collectors must protect sensitive data and erase data upon request ("the right to be forgotten"). However, scholars are critical of the narrow scope of these protections and ways they place the burden on users to engage in individual data management. *See, e.g.*, Daniel J. Solove, *Limitations of Privacy Rights*, 98 NOTRE DAME L. REV. 975, 975–78, 990–91 (2023); *see also* Powell, *supra* note 27, at 249–50 (summarizing critiques provided by Professor Daniel J. Solove and other scholars).

psychological toll. Understanding digital surveillance through the lens of double consciousness allows us to appreciate both dimensions at once: the common threat to personal autonomy for all and the distinctive harms imposed on historically marginalized groups and individuals.[77]

77. As I explore at greater length elsewhere, the coalescing of these universal and differential experiences of surveillance creates opportunities for a convergence of interests, along the lines that Derrick Bell theorized. *See* Catherine Powell, We the People in a Digital Age: AI Federalism in a Divided Nation 6 & n.13 (n.d.) (unpublished manuscript) (on file with the *Fordham Law Review*) (citing Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976)).