Unveiling Faces: Navigating the Legal and Ethical Landscape of Police Facial Recognition Technology

Adava Jefferson

In an age where every face has a different story to tell, facial recognition technology is a silent watchman which opens the door to convenience and controversy alike. Facial recognition is "a way of identifying or confirming an individual's identity using their face."[1] It falls into the category of "biometric security," which includes things like fingerprint recognition and eye retina recognition.[2] Biometric security is an identification method which uses physical traits to verify a person's identity.[3] Facial recognition technology is used for many reasons including, but not limited to, ease of access on cellphones, social media algorithms to suggest tagging friends, and in businesses for security purposes.[4] In the hands of the police, facial identity technology could open the door to constitutional challenges, mistaken identity, and biased algorithms which disproportionately target marginalized communities.[5] In this blog, I will discuss the current state of biometric facial technology, constitutional implications, ethical considerations, and a real life example of police implementation of facial recognition technology in law. It is important to know the potential harms of facial recognition technology and how that may impact the average American citizen.

Biometric facial recognition technology has improved over the years and can now identify individuals faster than it could in the past.[6] While this advancement is exciting for everyday uses, like unlocking your phone, it is also the source of a few concerns. These concerns include mistaken identity, inaccuracy, bias, and security risks.[7] In 2022, a 61-year-old man was falsely identified, by facial recognition technology, as the suspect of a robbery.[8] This accusation then led to time in jail where he was beaten and raped.[9] Inaccuracy and the perpetuation of gender and racial bias represent significant potential issues inherent in facial recognition technology. While facial recognition technology works best on middle-aged white men, it is less accurate for people of color, women, children, and elderly individuals.[10]

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[1] *What is Facial Recognition – Definition and Explanation*, KAPERSKY, https://usa.kaspersky.com/resource-center/definitions/what-is-facial-recognition (last visited Mar. 17, 2024).
[2] *See Id.*
[3] *Biometric Security*, INNOVATRICS, https://www.innovatrics.com/glossary/biometric-security/#:~:text=Biometric%20security%20is%20a%20modern,to%20verify%20a%20person's%20identity (last visited Mar. 17, 2024).
[4] Clare Stouffer, *What is Facial Recognition and How Does it Work?*, NORTON: INTERNET OF THINGS (July 21, 2023), https://us.norton.com/blog/iot/how-facial-recognition-software-works#:~:text=Facial%20recognition%20uses%20technology%20and,but%20also%20raises%20privacy%20issues.
[5] *Id.*
[6] *Advances in Facial Recognition Technology Have Outpaced Laws, Regulations; New Report Recommends Federal Government Take Action on Privacy, Equity, and Civil Liberties Concerns*, NAT'L ACADEMIES (Jan. 17, 2024) https://www.nationalacademies.org/news/2024/01/advances-in-facial-recognition-technology-have-outpaced-laws-regulations-new-report-recommends-federal-government-take-action-on-privacy-equity-and-civil-liberties-concerns.
[7] Stouffer, *supra* note 4.
[8] Drew Harwell, *Man Sues Macy's, Saying False Facial Recognition Match Led to Jail Assault*, WASH. POST: TECH (Jan. 22, 2024, 6:24 PM) *https*://www.washingtonpost.com/technology/2024/01/22/facial-recognition-wrongful-identification-assault/.
[9] *Id.*
[10] Rachel Fergus, *Biased Technology: The Automated Discrimination of Facial Recognition*, ACLU MINN. (Feb. 29, 2024, 11:45 AM), https://www.aclu-mn.org/en/news/biased-technology-automated-discrimination-facial-

A final, and arguably most important risk is the security risk that comes with the data collection required for facial recognition technology. The personally identifiable information that is collected and stored is a potential target for hackers. This information can then be used for bypassing security checks for online services, like a bank account.[11] While there are many risks associated with this technology, there are also a few constitutional considerations.

One constitutional consideration stems from the First Amendment which provides a right to free speech.[12] With the implementation of facial recognition technology in police departments, citizens may begin to feel their first amendment rights will be violated. This can be illustrated using the example of peaceful demonstrators. Demonstrators may fear retaliation during protests as police employ facial recognition technology, which may raise concerns about surveillance and potential repercussions.[13] Citizens may question their right to free speech when they know police will have the ability to monitor their every move at a demonstration. Another constitutional consideration stems from the Fourth Amendment, which protects against unreasonable searches and seizures.[14] This means individuals have protection from the police or other authorities searching your property or taking belongings without good reason, like a warrant. With facial recognition technology in the mix, the question at hand is whether this technology will provide sufficient justification for infringing upon the right to be free from unreasonable searches or seizures.[15] These constitutional considerations also bring additional ethical considerations into the picture.

Certain ethical concerns include deportation, privacy infringement, and unjust profiling. Fear of deportation is already a concern for many undocumented individuals living in America. With the use of facial recognition technology in police departments, undocumented individuals may be identified.[16] This poses and even greater risk, given the inaccuracy of this technology.[17] Another concern is the violation of privacy which may occur when police are allowed to use this technology. Due to the fact that individuals are unable to control how their data is gathered through use of this technology, individuals cannot determine how this data is used in most jurisdictions.[18] In 2008, Illinois passed the Biometric Information Privacy Act (BIPA), which guarantees individuals control over their own biometric data, bu is not a federal law.[19] A final ethical concern is unlawful profiling which may result from police use of facial recognition technology. This technology's struggle to differentiate darker faces could contribute to unlawful

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recognition#:~:text=Associate%20Munira%20Mohamed.-,Racial%20and%20Gender%20Biases,published%20by%20MIT%20Media%20Lab.

[11] *What is Facial Recognition – Definition and Explanation*, *supra* note 1.

[12] U.S. Const. amend. I.

[13] *See* Capital News Service, *Drones Used in Law Enforcement Raise Privacy Concerns*, SPARTAN NEWS ROOM: ELECTIONS AND POL. (Dec. 8, 2023), https://news.jrn.msu.edu/2023/12/drones-used-in-law-enforcement-raise-privacy-concerns/.

[14] U.S. Const. amend. IV.

[15] *See* Capital News Service, *supra* note 13.

[16] Fergus, *supra* note 10.

[17] Fergus, *supra* note 10.

[18] Liz Mineo, *Reporter Examines Secretive Firm Whose Product Allows Law Enforcement, Others to Uncover Your Identify Based on Picture*, HARV. GAZETTE: NATION (Oct. 26, 2023), https://news.harvard.edu/gazette/story/2023/10/how-facial-recognition-app-poses-threat-to-privacy-civil-liberties/.

[19] *Id.*

racial profiling.[20] Implementing this technology in areas which are currently over-policed, namely minority neighborhoods, can lead to enforcing the stereotype of minority criminality.

Facial recognition technology is an issue that is being taken up on state ballots. Recently in San Francisco, Proposition E (Prop. E) was approved by a 55% to 45% vote.[21] Included in Prop. E were some problematic provisions which concern police use of cameras, along with facial recognition technology. First, police drones and surveillance cameras would be exempt from the city's technology ordinance, meaning they would not require approval before being used by the department.[22] Additionally, this proposition would provide a loophole to San Francisco's ban on the use of facial recognition, unless proven otherwise by administration or a court.[23] Finally, this proposition would expand police access to cameras beyond the access which is already provided when needed to assist in investigating crimes.[24] With approval for police implementation of facial recognition technology and additional cameras in San Francisco, this city will be one to look at for development in this area of law.

Facial recognition technology, which identifies or verifies individuals by analyzing patterns in their facial features, has become increasingly prevalent, particularly in law enforcement. Despite its potential benefits in enhancing security and streamlining identification processes, there are concerns regarding its use by police forces. The foremost risk lies in its propensity for misidentification, especially among individuals with darker skin tones, aggravating issues of racial bias and wrongful arrests. Additionally, there are constitutional worries, notably regarding the First Amendment's right to free speech and the Fourth Amendment's protection against unreasonable searches and seizures. Ethically, the technology raises questions about privacy invasion, deportation, and the perpetuation of discrimination. Looking ahead, the trajectory of facial recognition technology remains uncertain. While advancements may address some current concerns, the necessity for strict regulation to mitigate risks and uphold civil liberties becomes increasingly critical in shaping its future applications.

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[20] Thaddeus L. Johnson & Natasha N. Johnson, *Police Facial Recognition Technology Can't Tell Black People Apart*, SCI. AM. (May 18, 2023), https://www.scientificamerican.com/article/police-facial-recognition-technology-cant-tell-black-people-apart/.

[21] J.D. Morris & Aldo Toledo, *San Francisco Election: Here are the Tinal Results for Every Proposition*, S. F. CHRONICLE, https://www.sfchronicle.com/sf/article/sf-election-props-ballot-measures-18699102.php (last updated Mar. 11, 2024 11:49 AM).

[22] Eleni Balakrishnan, *Here's How Prop. E Could Change Police Surveillance in SF*, MISSION LOC. (Feb. 20, 2024, 6:00 AM), https://missionlocal.org/2024/02/prop-e-police-surveillance-sf/.

[23] *Id.*

[24] *Id.*