Request for Information (RFI) on Public and Private Sector Uses of Biometric Technologies: Responses

DISCLAIMER: Please note that the RFI public responses received and posted do not represent the views or opinions of the U.S. Government, the Office of Science and Technology Policy (OSTP), or any other Federal agencies or government entities. We bear no responsibility for the accuracy, legality, or content of these responses and the external links included in this document. Additionally, OSTP requested that submissions be limited to 10 pages or less. For submissions that exceeded that length, the posted responses include the components of the response that began before the 10-page limit.
The Innocence Project is pleased to respond to the White House Office of Science and Technology Policy's (OSTP) Notice of Request for Information (RFI) on Public and Private Sector Uses of Biometric Technologies. Our submission focuses on the racially disproportionate harms that artificial intelligence (AI) enabled biometric technologies may generate in their application to the criminal legal system and their capacity to increase risks for wrongful convictions. Police surveillance technologies based on biometric data for use in recognition or for inferences of cognitive and/or emotional state are not currently required to meet scientific or social impact standards. Consequently, even if a biometric technology was proven to be highly accurate, the social implications of its use and any disparities it exacerbates cannot be fully understood without evaluating its application in the context of the American criminal legal system.

For nearly 30 years, the Innocence Project¹ has worked to exonerate the innocent and to prevent wrongful convictions through systemic reform. In cases where we have proven innocence, misapplied forensic science contributed to 52% of the wrongful convictions.² The vast majority of our exonerations were achieved by the power and strength of forensic DNA evidence. However, we have watched with concern as—through technologies like Rapid DNA and familial searching—DNA applications have expanded beyond truth seeking instruments into tools of surveillance that target innocent people, exacerbate racial disparities, and promote the unsupported notion that criminality is genetic.³ Based on these decades of experience, the Innocence Project takes the position that, in addition to meeting scientific metrics of validity and reliability, the research and development of criminal legal system applications must simultaneously assess social impact, considering ethical, legal, and social implications, and capacity for just and equitable implementation. Any framework for implementing AI enabled biometric information for

¹ The Innocence Project works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. Founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University, the organization is now an independent nonprofit. Our work is guided by science and grounded in antiracism.
investigative purposes in the criminal legal process must simultaneously address both the scientific underpinnings of the technology as well as their social consequences.

The Innocence Project’s primary concern with blanket intelligence systems and surveillance technologies is the impact these tools have on suspect development. Because the possibility for wrongful conviction begins once an innocent person becomes a person of interest, expansive surveillance increases wrongful conviction risk exposure.

Many extant and emerging biometric technologies have been criticized for their lack of evidence base and/or lack of accuracy. However, even if scientific advancements fine tune the accuracy of these tools, we must also consider their potential harm to society. With respect to biometric technologies and suspect development specifically, that potential harm includes profoundly racially disparate impacts. Indeed, emerging technologies must be considered in the context of how surveillance has historically been used in this country as a tool of social control, one which has had the effect of disproportionately criminalizing Black people in America by baking racial biases into the structure of our criminal legal systems.  

Biometric data based on speech, facial images, and genomic information have also largely been collected without consent from socially targeted groups and stored for law enforcement use. These structural racial biases feed back into the administration of law enforcement and shape the crime data generated. These data are then fed into algorithmic technologies. Regardless of the quality of the algorithm or the AI tool, the use of systematically biased data may generate skewed or inaccurate outcomes that promote false narratives regarding the criminality of entire communities of color. Such false narratives create or reinforce cognitive biases that further impact how these communities are perceived (as “trouble zones”) and then treated by law enforcement.

The use of technology to process biometric data is erroneously promoted as “objective,” able to bypass cognitive biases and the frailties of human learning. But biometric technologies cannot be separated from either the biases that inform their creation or from the policing systems that administer them. Their applications to society and the data these technologies collect will reflect

---

4 See Simone Browne, Dark Matters: On the Surveillance of Blackness (2015)(provided examples of how lantern laws and branding were used as early forms of surveillance of Black and indigenous people and that racializing surveillance “signals those moments when enactments of surveillance reify boundaries, borders, and bodies along racial lines, and where the outcome is often discriminatory treatment of those who are negatively racialized by such surveillance.”); See Khalil G. Muhammad, The Condemnation of Blackness: Race, Crime and the Making of Modern Urban America (2010) (“New statistical and racial identities forged out of raw census data showed that African Americans, as 12 percent of the population, made up 30 percent of the nation’s prison population. Although specially designed race-conscious laws, discriminatory punishments, and new forms of everyday racial surveillance had been institutionalized by the 1890s as a way to suppress black freedom, white social scientists presented the new crime data as objective, color-blind, and incontrovertible”).


the disparities, flaws, and biases of those law enforcement practices. Accordingly, big data-driven technology can promulgate a vicious cycle that amplifies rather than solves systemic racial biases.

Biometric technologies play an especially troubling role in criminal investigative applications to the extent they serve as “suspect development systems” which the government uses to “manage vague or often immeasurable social risks based on presumed or real social conditions” and “subjects targeted individuals or groups to greater suspicion, differential treatment, and more punitive and exclusionary outcomes.” The damage done by front-end technologies which expose communities of color to greater suspicion can be extraordinarily difficult to undo. Once an innocent person becomes a person of interest through the use of blanket intelligence systems and surveillance technologies, tunnel vision routinely sets in and no amount of exculpatory evidence can derail an investigator's conviction of the innocent person’s guilt. Exonerations demonstrate this dynamic: Pre-trial exculpatory DNA results had been explained away or dismissed in 28 of the first 325 DNA exonerations in the United States between 1989-2014.

In order to narrow the entry point for innocent people into a criminal legal system, it is the Innocence Project’s position that investigative biometric technologies must meet the same standards of accuracy and reliability expected of court admissible evidence and must further demonstrate their capacity for just and equitable application prior to their implementation in the criminal legal system. To require anything less is tantamount to facilitating the experimentation of these technologies on society. This is a painful and intolerable risk. The narrative that policing strategies and due process will weed out innocent people prior to conviction has been disproven by thousands of wrongful convictions. That narrative also dismisses the seriousness and harm of collateral consequences of arrests. There is no dispute that Michael Oliver, Robert Williams, and Njeer Parks’ wrongful arrests and pretrial detention were the byproduct of both a flawed facial recognition system as well as flawed policing. But for the fact these men held tightly to their innocence and their unjust arrests were recognized, they could have been wrongfully convicted. At this time, we cannot know how many people were wrongfully arrested based on these technologies

---

7 Id.
and the fact that Mr. Oliver, Mr. Williams, and Mr. Parks were eventually able to demonstrate their unjust arrests should provide no comfort that these errors can be comprehensively surfaced.

Given this Administration's emphasis on scientific integrity and racial equity, future federally funded research initiatives in the criminal legal system should support not only evaluations of validity and reliability, but also of justice and equity measures.

Precedent exists for evaluating emerging technologies for measures beyond validity and reliability. In 1993, when the National Human Genome Research Institute was created, Congress mandated that not less than 5% of the budget be set aside for research on the ethical, legal, and social implications (ELSI) to address the issues raised by rapidly advancing genomic technology. Over the years, the ELSI research program focused on public education, clinical integration, and regulation of genomic technologies, as well as on issues of privacy and consent. However, the ELSI program left the critical evaluation of genomic technologies understudied from another critical perspective: the social and political environment in which these technologies are developed, the role of discriminatory design, the dynamics of power that shape them, and the inequalities they breed. Academics and advocates have called for or have developed privacy, surveillance, equity, as well as racial justice impact assessments for surveillance technologies.

The Innocence Project believes that ethical, legal, and social implications; civil liberties; and racial justice and equity should be centered in the evaluation of surveillance technology and evaluated as justice & equity (JE) impact assessments. We also recommend that assessments be developed through a process that integrates the perspectives of affected communities and should be mandated for surveillance technologies before they are implemented. JE impact assessments can include, among other evaluations:

- **Efficacy and accuracy.** Even if a technology is used for investigative purposes only, what degree of accuracy would we demand?

---


- **Privacy and civil liberties.** Does the technology impact privacy, civil liberties, or constitutional rights?

- **Discrimination, disparate impact, and harms to groups of people based on their identity or poverty status?** Does the technology subject people to harm based on their immutable characteristics or life circumstances?

- **Duty to correct and notify.** Are there procedures in place to identify, correct, and remediate errors as well as a process to notify affected parties?

- **Transparency and accessibility.** When this technology is used against a person, what information is disclosed and are there meaningful opportunities and resources available to verify or challenge the result?

- **Less invasive alternatives.** What is the stated problem that this technology aims to address? Are there less invasive alternatives or alternatives that promote the legitimacy of police investigations and the fairness of the criminal legal system?

- **Procurement and institutional policies.** The manner in which a technology is procured or contracted can create institutional incentives for performance or limit public access. How do these institutional practices affect the technology’s implementation?

The evaluations should be developed by a task force of technologists, racial justice experts, civil liberties experts, researchers, community members, and other criminal legal system stakeholders. No amount of validation testing, standards development, or technical solutions will ensure the just and equitable application of surveillance technologies in the American policing system. While the development of a framework is an important first step to raising awareness regarding the harms that these technologies can impose on society, the application of the framework will always be limited when the social, political, economic, and structural solutions required for justice are out of the scope of a proposal. As JE impact assessments are conceptualized, they can facilitate the establishment of justice and equity measures that researchers can use to guide the development and testing of emerging technologies.

The International Association for Chiefs of Police (IACP) acknowledged in its 2014 Technology Policy Framework that “[t]echnological advances have made it possible to monitor and record nearly every interaction between police and the public” and police agencies are faced with how to select technologies that will achieve the greatest overall public safety benefits.16 Critically, the IACP policy states, “just because a technology *can* be implemented, does not mean that it *should* be.” As a society, we would do well to remember these words.

---

Thank you in advance for your consideration of the feedback we respectfully offer. The Innocence Project looks forward to working with OSTP and the Biden Administration to advance equity in science and technology in the criminal legal system to ensure their simultaneous contributions to public safety, strengthening communities, and the just and equitable administration of justice.