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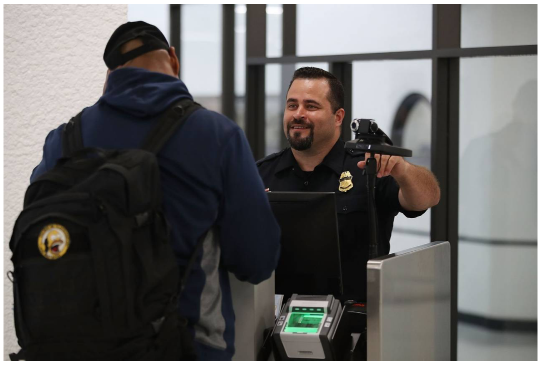
Lawmakers Set Their Sights on Facial Recognition

As the technology has become more widespread, critics question whether it threatens privacy—or if it is accurate enough to be reliable



Some proposed bills would require organizations that use facial-recognition technology to obtain people's consent before using the technology on them. PHOTO: JOE RAEDLE/GETTY IMAGES

By Adam Janofsky

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The U.S. Customs and Border Protection agency uses facial-recognition software at airports to identify impostors. Stadiums and arenas use it to enhance security. Law-enforcement agencies deploy it to spot suspects.

But as the technology has become more widespread—from catching shoplifters at malls to presenting consumers with targeted ads—critics are questioning whether it threatens privacy and whether it is accurate enough to be reliable.

"The ultimate nightmare is that we lose all anonymity when we step outside our homes," says Jay Stanley, a senior policy analyst for the American Civil Liberties Union. "If you know where everyone is, you know where they work, live, pray. You know the doctors they visit, political meetings they attend, their hobbies, the sexual activities they engage in and who they're associating with."

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These concerns led San Francisco last month to ban the use of facial-recognition tools by the police and other city agencies. Other cities, including Somerville, Mass., and Oakland, Calif., are considering similar laws.

The escalating push to regulate the technology has also reached Congress, which held a hearing on the topic on June 4, the second such discussion in two weeks. The ACLU, meanwhile, is developing a step-by-step playbook for communities interested in setting restrictions on facial-recognition systems.

"You've now hit the sweet spot that brings progressives and conservatives together," Rep. Mark Meadows (R., N.C.) said at the first hearing on May 22.

“That’s music to my ears,” Rep. Elijah Cummings (D., Md.) responded.

“I was hopeful this would spark a conversation about the pernicious misuse of technology, and to my pleasure it has not only sparked a statewide conversation but a national one,” says Aaron Peskin, the San Francisco supervisor who led the city’s effort. About a dozen state and city lawmakers from around the country have reached out to him for information and advice, he says.

Pushing for regulation

As these regulation efforts gain momentum, though, they face strong opposition.

For one thing, law-enforcement groups argue that the technology is a valuable tool for identifying suspects and efforts to ban it could leave many crimes unsolved.

The groups have already won some concessions. For instance, Mr. Peskin says that he added a handful of amendments to San Francisco’s bill after negotiations with law-enforcement advocates.

At the same time, some makers of facial-recognition technology are working with legislators to propose weaker bills. Microsoft , MSFT **-0.66%** ▼ for example, was involved in crafting a failed Washington state proposal that would have put several limits on facial recognition without calling for a ban, among other things.

Still, critics argue that strong restrictions are necessary to protect privacy and civil rights. And they’re pushing a number of different types of regulations to reach their goal.

Some advocacy organizations argue that facial-recognition technologies reinforce bias in the criminal-justice system and are likely to be used to target certain communities. The technologies could also lead to many incorrect arrests in certain communities, critics argue: Researchers have documented how some facial-recognition systems are more likely to misidentify people with dark skin, for instance.

So, some civil-rights groups are proposing regulations that would require makers of facial technology to have it independently tested for accuracy and bias.

A broad coalition of nonprofits are working together to support bills limiting the use of biometrics, such as AB-1215 in California, which would prohibit the use of facial recognition for data collected by police body cameras.

Another major issue for advocates is consent. Some proposed bills would require organizations that use facial-recognition technology to obtain people’s consent before using the technology on them.

Organizations like the Electronic Frontier Foundation are opposing bills with what they see as weak rules, such as requiring businesses to post signs that they’re using facial-recognition technology instead of requiring opt-in consent or banning the technology altogether, says EFF senior staff attorney Adam Schwartz.

But before those ideas make it into law, they must overcome questions about how exactly they might work in practice.

Take the consent issue. “That simply doesn’t make sense in many places,” says Daniel Castro, vice president of the Information Technology and Innovation Foundation, a Washington, D.C.-based think tank. “Stores want to use this technology to catch shoplifting. A shoplifter is not going to opt in.”

Stadiums, hotel lobbies and other spots may also present logistical problems, says Alan Raul, partner at law firm Sidley Austin LLP and former vice chairman of the White House Privacy and Civil Liberties Oversight Board.

Consent will likely need to be contextual, with certain large venues requiring signs that inform people that facial-recognition software is being used, instead of obtaining permission from every customer, he says.

Still, there is at least one major facial-recognition system in place that uses consent. The U.S. Customs and Border Protection agency, which has been developing facial-recognition systems for airports since 2013, gives arriving and departing U.S. citizens the option of doing a manual verification of identity instead of a facial-recognition scan. (The agency also uses a manual verification if its recognition system spots a potential impostor.)

Another potentially thorny issue in the regulation effort: Lawmakers may find it difficult to agree on what exactly facial recognition is and what they are trying to regulate, says Clare Garvie, a researcher who studies facial recognition at the Center on Privacy and Technology at Georgetown Law.

For example, eye-tracking technology that analyzes what advertisements people pay attention to, or face-scanning tools that gauge emotional reactions without identifying individuals, make facial recognition hard to define.

“Facial recognition encompasses a wide array of possible technologies, and you don’t want regulations to be so broad that it effectively regulates nothing,” she says.

The record so far

Currently, three states have passed bills to protect people’s biometric privacy. One—Illinois’s Biometric Information Privacy Act, passed in 2008—requires companies to get consent before collecting biometric data, including face scans.

The law has led to a wave of class-action lawsuits alleging that companies *didn’t* obtain consent —a result that has likely given other states pause over enacting similar legislation, says Ms. Garvie.

Bills in Texas and Washington have similar privacy provisions, but allow only state attorneys general to sue for violations. And Washington’s law doesn’t include facial-recognition data in its definition of biometric information.

As lawmakers and activists wrestle with regulatory issues, some critics say there should be a moratorium on the technology until concerns are addressed and the public forms a consensus on what guardrails are appropriate.

But those efforts might backfire if people view it as a crackdown on a technology that can help prevent crime, says Mr. Raul.

For example, 41% of people said they favored using facial-recognition software in schools to protect students, compared with 38% who found it unfavorable, according to a September Brookings Institution survey of 2,000 people in the U.S. Half of the respondents said they didn’t favor the use of facial recognition in stores to prevent theft, and 44% said they didn’t favor it in airports to establish identity and in stadiums to improve security.

“The technology has so many beneficial uses that it’s hard to see the public will feel comfortable stopping something that will be useful in deterring, investigating and apprehending criminals,” says Mr. Raul.

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