

March 5, 2019

The Honorable Janice D. Schakowsky, Chair
The Honorable Cathy McMorris Rodgers, Ranking Member
U.S. House Committee on Energy and Commerce
Subcommittee on Consumer Protection & Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairwoman Schakowsky and Ranking Member McMorris Rodgers:

We write to you regarding tomorrow's hearing on "Inclusion in Tech: How Diversity Benefits All Americans."¹ EPIC appreciates your timely attention to the key issues of algorithmic decision-making, profiling, and the misuse of personal data.

EPIC is a public-interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC is a leading advocate for consumer privacy and has appeared before this Committee on several occasions.³ Since 2014, EPIC has promoted "Algorithmic Transparency" to address concerns about bias with AI.⁴ This is a core principle in the field of data protection as it helps ensure that automated decisions about individuals are fair, transparent, and accountable. We also believe that Internet firms should be accountable for their business practices and that the Federal Trade Commission could do far more to protect American consumers.

EPIC, Color of Change, the Open Markets Institute and others recently urged the FTC to enforce the Consent Order against Facebook – but we said more than just fines are necessary.⁵ Our groups called for equitable remedies, including reforming hiring and management practices at Facebook. EPIC and others said, "Part of the problem with the company arises also from its failure to hire and maintain a diverse work force. The algorithmic bias of the news feed reflects a

¹ *Inclusion in Tech: How Diversity Benefits All Americans*, 116th Cong. (2019), H. Comm. on Energy & Commerce, Subcomm. on Consumer Protection & Commerce, <https://energycommerce.house.gov/committee-activity/hearings/rescheduled-hearing-on-inclusion-in-tech-how-diversity-benefits-all> (Mar. 6, 2019).

² EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

³ See, e.g., Marc Rotenberg, EPIC Executive Director, Testimony before the U.S. House Energy & Commerce Subcommittee on Communications and Technology, *Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows* (November 13, 2015), <https://epic.org/privacy/intl/schrems/EPIC-EU-SH-Testimony-HCEC-11-3-final.pdf>; Marc Rotenberg, EPIC Executive Director, Testimony before the U.S. House Energy & Commerce Subcommittee on Communications and Technology, *Communications Networks and Consumer Privacy: Recent Developments* (April 23, 2009), https://epic.org/privacy/dpi/rotenberg_HouseCom_4-09.pdf; Letter from EPIC to the U.S. House Committee on Energy and Commerce on FCC Privacy Rules (June 13, 2016), <https://epic.org/privacy/consumer/EPIC-FCC-Privacy-Rules.pdf>.

⁴ EPIC, *Algorithmic Transparency*, <https://epic.org/algorithmic-transparency/>.

⁵ Letter from EPIC et al. to Joseph Simons, Chairman, Federal Trade Comm'n (Jan. 24, 2019), <https://epic.org/privacy/facebook/2011-consent-order/US-NGOs-to-FTC-re-FB-Jan-2019.pdf>.

predominantly Anglo, male world view.”⁶ We recommended that the FTC require Facebook to add an independent director who represents the interest of users and also examine the civil rights impacts of Facebook’s products and policies. “If the company wishes to connect the world,” we said, “it must also be prepared to reflect the world in all of its decision-making.”⁷

EPIC also recently joined 43 civil society organizations in a letter calling on Congress to protection civil rights, equity, and equal opportunity in the digital ecosystem.⁸ The organizations wrote that any privacy legislation must be consistent with the Civil Rights Principles for the Era of Big Data⁹, which include: stop high-tech profiling, ensure fairness in automated decisions, preserve constitutional principles, enhance individual control of personal information, and protect people from inaccurate data. The groups said: “Platforms and other online services should not be permitted to use consumer data to discriminate against protected classes or deny them opportunities in commerce, housing, and employment, or full participation in our democracy.”

The Need for Algorithmic Transparency

The use of secret algorithms based on individual data permeates our lives. Concerns about the fairness of automated decision-making are mounting as artificial intelligence is used to determine eligibility for jobs, housing, credit, insurance, and other life necessities.¹⁰ Bias and discrimination are often embedded in these systems yet there is no accountability for their impact. All individuals should have the right to know the basis of an automated decision that concerns them. And there must be independent accountability for automated decisions.

Without knowledge of the factors that provide the basis for decisions, it is impossible to know whether government and companies engage in practices that are deceptive, discriminatory, or unethical. The Pew Research Center recently found that most Americans are opposed to algorithms making decisions with consequences for humans, and 58% think algorithms reflect human bias.¹¹ Examples of algorithmic errors that have recently been uncovered include:

- Amazon was forced to abandon its artificial intelligence-based recruiting tool after discovering that, based on the data it had “learned” from, it preferred male candidates.¹²
- A Google image matching algorithm identified people of color as “gorillas.”¹³

⁶ *Id.*

⁷ *Id.*

⁸ Letter from Lawyers Comm. for Civil Rights Under Law, EPIC, et al. to The Honorable Frank Pallone, Jr. et al. (Feb. 13, 2019), <http://civilrightsdocs.info/pdf/policy/letters/2019/Roundtable-Letter-on-CRBig-Data-Privacy.pdf>.

⁹ The Leadership Conference on Civil & Human Rights, *Civil Rights Principles for the Era of Big Data*, <https://civilrights.org/2014/02/27/civil-rights-principles-era-big-data/>.

¹⁰ Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014).

¹¹ Pew Research Center, *Public Attitudes Toward Computer Algorithms* (Nov. 2018), <http://www.pewinternet.org/2018/11/16/public-attitudes-toward-computer-algorithms/>.

¹² Jeffrey Dastin, *Amazon scraps secret AI recruiting tool that showed bias against women*, Reuters (Oct. 9, 2018), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

¹³ Maggie Zhang, *Google Photos Tags Two African-Americans As Gorillas Through Facial Recognition Software*, Fortune (July 1, 2015), <https://www.forbes.com/sites/mzhang/2015/07/01/google-photos-tags-two-african-americans-as-gorillas-through-facial-recognition-software/>.

- Facial recognition software was 34% less accurate for dark-skinned woman than for white men.¹⁴
- Amazon, Verizon, UPS excluded older workers from job opportunities with ads on Facebook.¹⁵
- In 2017, Facebook pledged to change its advertising procedures to prevent rental companies from discriminating against tenants based on race, disability, gender, and other characteristics. However, Facebook was sued in 2018 for allegedly still allowing the practice.¹⁶
- Google searches involving black-sounding names were found to be more likely to display ads suggestive of a criminal record than in searches of white-sounding names.¹⁷

“Algorithmic Transparency” must be a fundamental principle for consumer protection.¹⁸ The phrase has both literal and figurative dimensions. In the literal sense, it is often necessary to determine the precise factors that contribute to a decision. If, for example, a government agency or private company considers a factor such as race, gender, or religion to produce an adverse decision, then the decision-making process should be subject to scrutiny and the relevant factors identified.

Some have argued that algorithmic transparency is simply impossible, given the complexity and fluidity of modern processes. But if that is true, there must be some way to recapture the purpose of transparency without simply relying on testing inputs and outputs. We have seen recently that it is almost trivial to design programs that evade testing.¹⁹ And central to the science and innovation is the provability of results.

Europeans have long had a right to access “the logic of the processing” concerning their personal information.²⁰ That principle is reflected in the U.S. in the publication of the FICO score, which for many years remained a black box for consumers, establishing credit worthiness without providing any information about the basis of score.²¹

The continued deployment of AI-based systems raises profound issues for democratic countries. As Professor Frank Pasquale has said:

¹⁴ Joy Buolamwini, *When the Robot Doesn't See Dark Skin*, N.Y. Times (June 21, 2018), <https://www.nytimes.com/2018/06/21/opinion/facial-analysis-technology-bias.html>.

¹⁵ Julia Angwin, Noam Scheiber, and Ariana Tobin, *Dozens of Companies Are Using Facebook to Exclude Older Workers From Job Ads*, ProPublica (Dec. 20, 2017), <https://www.propublica.org/article/facebook-ads-age-discrimination-targeting>.

¹⁶ Julia Angwin and Ariana Tobin, *Fair Housing Groups Sue Facebook for Allowing Discrimination in Housing Ads*, ProPublica (Mar. 27, 2018), <https://www.propublica.org/article/facebook-fair-housing-lawsuit-ad-discrimination>.

¹⁷ Latanya Sweeney, *Racism is Poisoning Online Ad Delivery, Says Harvard Professor*, MIT Tech. Rev. (Feb. 4, 2013), <https://www.technologyreview.com/s/510646/racism-is-poisoning-online-ad-delivery-says-harvard-professor/>.

¹⁸ *At UNESCO, Rotenberg Argues for Algorithmic Transparency*, EPIC (Dec. 8, 2015), <https://epic.org/2015/12/at-unesco-epics-rotenberg-argu.html>.

¹⁹ Jack Ewing, *In '06 Slide Show, a Lesson in How VW Could Cheat*, N.Y. Times, Apr. 27, 2016, at A1.

²⁰ Directive 95/46/EC—The Data Protection Directive, art 15 (1), 1995, <http://www.dataprotection.ie/docs/EU-Directive-95-46-EC--Chapter-2/93.htm>.

²¹ Hadley Malcom, *Banks Compete on Free Credit Score Offers*, USA Today, Jan. 25, 2015, <http://www.usatoday.com/story/money/2015/01/25/banks-free-credit-scores/22011803/>.

Black box services are often wondrous to behold, but our black box society has become dangerously unstable, unfair, and unproductive. Neither New York quants nor California engineers can deliver a sound economy or a secure society. Those are the tasks of a citizenry, which can perform its job only as well as it understands the stakes.²²

Solutions: Universal Guidelines for Artificial Intelligence

EPIC recommends legislative solutions based on the Universal Guidelines for Artificial Intelligence (UGAI). Over 250 experts (including former world chess champion Garry Kasparov) and 60 associations (including the American Association for the Advancement of Science, the world's leading scientific association) have endorsed the UGAI.²³

The Universal Guidelines “are intended to maximize the benefits of AI, to minimize the risk, and to ensure the protection of human rights.”²⁴ The “Guidelines should be incorporated into ethical standards, adopted in national law and international agreements, and built into the design of systems.” The Guidelines set forth twelve principles to guide the design, development, and deployment of AI. These principles can provide the framework for any successful legislative efforts. Broadly, the guidelines address the rights and obligations of AI systems to ensure 1) fairness, accountability, and transparency; 2) autonomy and human determination; 3) data accuracy and quality; 4) safety and security; and 5) minimization of scope.

Congress should enact legislation, based on the Universal Guidelines for AI, to address concerns about bias and establish accountability for companies who collect personal data.

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Subcommittee on these issues.

Sincerely,

Marc Rotenberg
Marc Rotenberg
EPIC President

Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

²² Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* 218 (Harvard University Press 2015).

²³ A full list of endorsers is available at The Public Voice, *Universal Guidelines for Artificial Intelligence: Endorsement*, <https://thepublicvoice.org/AI-universal-guidelines/endorsement>.

²⁴ The Public Voice, *Universal Guidelines for Artificial Intelligence*, <https://thepublicvoice.org/AI-universal-guidelines>.