

# White/Flatirons Conference on AI and the Constitution

## 1. Final Version

- I was one of the first professors involved in the Silicon Flatirons Center, so I'm delighted to be part of this first-ever bringing together of two of the very best law school centers in the country.
  - It's so important and timely to be exploring this intersection.
  - I'm really looking forward to the day.
- As a computer programmer as well as law school professor, I've become accustomed to certain styles of argument that repeatedly recur whenever we talk about the collision of law and CS.
- The argument has three steps:
  - Step 1: The law—sometimes ancient law—focuses on a particular kind of fact or pattern or organizing principle or central reason.
  - Step 2: Technological advancements put pressure on the work that fact or pattern or reason is important.
  - Step 3: Many call for us to rewrite the law. To search for a new kind of fact or pattern or organizing principle or central reason.
- Let me give you three examples from AI law
  - 1. Intent
    - Step 1: Many laws say that humans who take certain actions **with intent** are civilly liable or criminally culpable. For example, the securities laws forbid certain forms of intentional market manipulation.
    - Step 2: When AIs take those very actions, the question of whether they acted with the requisite **intent** is either philosophically dubious or completely nonsensical. If you train a smart stock trading bot with the goal of maximizing profit, it may take the same steps that, had they been taken by a human, would have amounted to market manipulation. Has the AI violated the law? Did it (or its human creator) act

with the requisite intent?

- Step 3: Let's rewrite market manipulation law.
- 2. Understanding the reasons behind important decisions.
  - Step 1: Many legal notions of fairness in decisionmaking require the decisionmaker to explain the reasons for its decision. Professor Goodman has written persuasively about the implications for Due Process Law. Under Judge Friendly's list of elements of a fair hearing, one is a "statement of reasons."
  - Step 2: AIs are opaque decisionmakers. Many have written about the problems of interpretability and explainability. If a state government uses an algorithm to decide how to allocate Medicaid benefits, those denied benefits may never receive an accurate explanation for that decision, because not even the designers of the system can provide one!
  - Step 3: Let's redefine Constitutional due process law.
- 3. The third example is the one I am writing about, and it finally brings me to the theme of this panel: privacy.
- I am an information privacy law scholar, which means I focus on both Constitutional and statutory rules that seek to protect people from harm due to the collection, use, and sharing of information about them.
- Step 1: Many, if not all, of these information privacy rules define boundaries between types of information.
  - HIPAA, the Health Information Portability and Accountability Act, governs health information.
  - The Colorado Privacy Act provides special protection for "sensitive information" defined as racial or ethnic origin, religious beliefs, mental and physical health condition or diagnosis, sex life or sexual orientation, or citizenship, among a few other things.
  - And the Fourth Amendment protects information for which we are entitled to enjoy a reasonable expectation of privacy.
- Step 2: One of AI's oldest powers is the power to infer unknown fact B from known fact A.
  - With access to your grocery list, even a human may be able to infer that your religion or

your health condition, because you avoid certain foods.

- Because I can infer you have celiac disease from your shopping list, should I be regulated by HIPAA?
- Because I can infer your religion and religious practices, should I be regulated by the heightened sensitivity rules of the CPA?
- Because I can infer from your cell-site location data that you visited a planned parenthood location and might have obtained an abortion, does the Fourth Amendment protect that data?
- So we can predict the calls for step 3.
  - If everything reveals everything, let's stop tailoring privacy law to individual categories.
  - Let's get rid of HIPAA, and let's delete the sensitive categories of the CPA.
  - Let's interpret the Fourth Amendment to obtain cell-site location information without a warrant, even if they can use it to infer something sensitive.
- This is not a straw man argument. In my latest article, I am taking on one of the most respected and preeminent information privacy law scholars in the country, Daniel Solove, my good friend and Spencer's colleague at George Washington University.
  - In an article recently published in the Northwestern University Law Review entitled "Data is What Data Does," Dan argues that the increasing power of inference means that we should stop writing privacy laws that tailor their protections to the sensitivity of information.
  - Explaining the many ways my good friend Dan is wrong will take too long and goes beyond the scope of the contribution I am trying to make today. Stay tuned for my longer article to see those.
  - Today, I'm making both a narrower contribution: challenging the step 3 move.
    - But it's a standalone point about the AI style of argument, and I'd love to talk to the editors of the Colorado Law Review about possibly publishing it in this symposium issue.
- Embedded in step 3 is a value judgment about the "proper" roles played by law and by the development of technology in our democratic system.

- People making step 3 arguments seem to suggest that we are relatively helpless to do much about the march of technological progress.
- Technology is regarded as the fixed part of the conversation.
  - Not because we have naturalized technology. We understand that other people are responsible for the shape of this technology.
  - But I think it stems from two different attitudes about how these people operate:
    - More defensibly is just the idea that technology is shaped by "someone else". Those of us in law think of technology of the province of nerds who live in a few zip codes in California and Washington. They create, and the best we can do is watch carefully.
    - Much more perniciously is a widespread technological determinism: the idea that even though people create these technological advances, technology is just something that happens to all of us.
      - We implicitly seem to feel that technology "marches on" or it "evolves".
      - We could better tride to hold back the tides than to try to shape or predict the twists and turns.
- Whatever the source, in the face of all of this evolving and marching and shaping is the law.
  - We regard the law, even Constitutional Law, as much more pliable than technology.
  - We understand that the law is shaped by society.
  - We teach elementary school children how a bill becomes a law.
  - We study the influence of money and the incentives of politicians and the logic of judges.
- So on one side:
  - technology marches
- And on the other side:
  - law bends.
- It's no wonder that Step 3 has such allure.

- My argument is that we remember that we hold the power to reshape technology too.
  - It is made by humans, and it is the direct product of the choices of humans responding to incentives.
  - Those incentives come from economic drivers, which our institutions create.
  - They also come from social norms, which we can help shape.
  - And they come from law.
  - We should stop accepting arguments that rest on the march of technology.
  - And we should develop new tools and institutions to give people voice in the way these technologies can be reshaped.
- In the longer article I am writing, I argue that we should be expanding sensitive information laws, and we should write new ones.
  - At the very least, we need new federal legislation protecting:
    - precise geolocation information
    - information revealing people seeking reproductive health services and information
    - remote biometric identification information
- But Rebutting Step 3 isn't just for sensitive information.
  - Rather than reshaping securities laws to accomodate robots that manipulate markets without intent, maybe we should prohibit robots that manipulate markets?
  - Rather than reshape due process rules to accommodate benefits allocation algorithms that can't explain themselves, maybe we should tell states to wait until algorithms can be trained to explain.
- I don't harbor illusions that these arguments will all succeed. The march of technology is an alluring story, one that powerful people embrace with near-religious zeal.
  - The point of my intervention is to at least push back on arguments like these.

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