

The Confrontation Clause and Artificial Intelligence

by Brian Sites

Once, courts eschewed “the spector [sic] of trial by machine” and the possibility that “each man’s sworn testimony may be put to the electronic test.” Judges worried “jurors w[ould] abdicate their responsibility for determining credibility, and rely instead upon the assessment of a machine.” Forty years later, that fear has metamorphosed into welcoming machine evidence in place of human accusers. But these “machine accusers,” as creations of the imperfect, are fallible. And as tools operated by imperfect human agents, even an otherwise neutral machine can advance an ulterior agenda. Courts across the nation, however, seem unconcerned as case after case is handed down without permitting the defendant to peer behind the circuit-board curtain.

The number of potential machine accusers directly relevant to criminal proceedings is staggering, and today’s robotic offerings look increasingly like the science fiction of years past. But their ascendance has only just begun. A far-from-exhaustive list of potential machine accusers now includes: machines that map crime scenes; biometric-based recognition tools such as facial recognition and tattoo recognition programs; devices that locate cell phones (e.g., Stingrays); automated license plate readers; drug-, firearm-, and general crime-detecting devices; software that estimates a defendant’s “future dangerousness” in the context of sentencing and parole; and innumerable laboratory machines that produce increasingly automated results. Sometimes machines do what humans can do as well; in that situation, should a criminal defendant’s rights turn on whether the prosecution employs a man instead of a machine? But machines allegedly also do what even skilled humans generally cannot; against such an accuser, the right to test the evidence is essential. In short, “trial by machine” is now quite present, but that trial favors the machines over the human defendants.

In a world where machines increasingly assume the “accuser” roles previously filled primarily by human actors in criminal proceedings, how should courts and legislatures respond? The goal, as in most things, is finding the right balance. Machines are vital tools for investigating crimes. In this digital age, they make crime prevention possible in ways previously inconceivable. They offer the potential of a brighter, safer future, and courts and rulemakers must strike a balance between due scrutiny and an acknowledgment of the realities of how machines are used.

Achieving that balance is, however, easier said than done. What rights does a criminal defendant have as to robotic accusers? What does the Confrontation Clause demand from such machines—which we cannot simply place on the witness stand and cross-examine? How can a defendant “confront” the machine while still protecting any relevant intellectual property rights? Are the rules of evidence a better solution to managing machine accusers? And, more generally, are existing legal norms sufficient when applied to robotic accusers, or does the evolution in technology warrant a similar evolution in law?

This poster, building on the presenter’s articles in these areas, explores these questions.