CONSTITUTIONAL LAW AND ARTIFICIAL INTELLIGENCE: THE POTENTIAL LEGAL RECOGNITION OF COMPUTERS AS "PERSONS"

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ABSTRACT

American Constitutional law grants the status of "person" to the members of certain groups, but denies that status to other groups. Various legal analogies could be used to determine whether such status should be extended to computer systems and, if so, what limitations should be placed upon that recognition.*

The concept of legal "personality" in United states constitutional law has changed considerably over the years. An ever-increasing number of groups of ascertainable entities have been recognized as persons under the law, and the rights and obligations accruing to the members of those groups have changed more than they have remained constant. The general question is thus presented of whether computers might be recognized as persons; it is submitted that the correct answer is a qualified "yes."

The legal histories of several groups, such as olacks and women, have followed the pattern of their initial "recognition" as legal persons, followed by a slow accretion of rights and obligations. Viewed another way, the initial recognition of the members of these groups started a lengthy period during which the legal gap between them and previously-recognized persons narrowed.

Decision-makers have used various rationales over the years in extending legal recognition to new groups. The individual decisions tend to reflect the values of their times and do not shed much light on the essence of legal personality. Each such extension, however, constituted an acknowledgment that the individual entities being considered were more like the persons doing the considering than like the property belonging to those

persons. As a group, those extensions mark an expanding societal definition of "pet son."

It may fairly be said that, as time has passed, the test of personality has focused more on behavior than on appearance, and more on mental traits than on physical ones. Western thinking has come to disfavor tests of personality based on "status" (ownership of property, religious affiliation) or "structure" (gender, race); those tests were invoked, and defeated, almost every time a new group was added to the roster of persons. Accordingly, recognition has generally been extended to groups whose members have demonstrated the capacity to behave in a manner indicating that they _think_ more like legal persons than like anything else.

The initial question is therefore whether there could exist circumstances such that a decision-maker could examine the behavior of a computer system and decide that the machine had crossed the threshold of legal personality. It seems nearly inevitable that the issue will arise in our increasingly computerized society; science fiction literature abounds with proposed factual scenarios in which that legal issue could be presented. The real question is whether current or foreseeable law provides a plausible foundation for a determination of computer personality.

It is possible that a decision concerning computer personality could come from the executive or legislative branches of government. Popular opinion can find expression through those channels when the judiciary is unwilling or incapable of treating ascertainable entities as persons even though society as a whole perceives them as such. An example of such a legislative determination is the Twenty-sixth Amendment (forbidding discrimination against 18-21 year olds).

Perhaps the most obvious historical example of recognition by executive mandate was the freeing of black slaves who had previously been considered

lawfully recoverable items of property. Congress at one time declared iisielf incapable of emancipation, and the courts mainly addressed the impact of local recaption statutes and the Fugitive slave Laws upon local kidnapping laws. An essentially <u>Executive</u> action (a larity in the field of extensions of legal personality), swiftly followed by a series of Constitutional amendments, presumed to change the slaves' legal status in one step from that of ascertainable individual items of property to that of fully franchisee! persons.

In common law systems, however, most, "law" comes from the decisions of courts. Disputes arising from novel circumstances are reconciled by courts that attempt to draw comparisons between the facts of the cases before, them and the facts of cases previously decided. Touched on below are a few of the possible analogies provided by history that could be seized upon by courts seeking to resolve the question of computer personality. Which analogy is utilized in a given case could well determine the result of the legal dispute.

It is submitted that the first computers to attain "personhood" will do so individually, if at all, because they will be forced to prove that they are more than the "mere machines" they will be presumed to be. Courts are likely to hesitate before extending to computers the legal precept that "all men are created equal," because even today they can be purposefully designed to have any of a broad range of operating characteristics and capabilities.

Given the enormous variety of the machines: called "computers," even proponents of computer personality will probably concede that some will possess the necessary characteristics for that status while others will not. Many problems, such as the evaluation of computers of the same model, the impact of a capacity for significant machine learning, etc., remain to be addressed. Such questions, however, will most probably be decided through use of the terminology and tests developed in other legal disputes.

Courts seeking a definition of "person" might look to the abortion decisions, which draw distinctions based on the degree of individual development (trimesters); by analogy, any individual computer <u>exceeding</u> a minimum behavioral capacity roughly equating fetus "viability" would be <u>presumed</u> to be a person. As with the abortion decisions, a single such decision concerning computer personality could affect many more persons than the parties before the court.

When a human person dies, he loses all of his rights. The law in this area tends to set an over-inclusive minimum, so that any human but one who can oe shown to have died tends to be defined as "alive." Given the recent emergence of "brain death" as a critical factor, and since many computers today can exhibit far more "intelligent" behavior than that of comatose human beings (who do enjoy legal recognition), a legal minimum standard test of personality could probably be satisfied by a computer system in the proper circumstances.

The emergence of the modern corporation provides the most subtle means by which computer systems might achieve legal recognition. Corporations have names, can buy and sell property, and can commit crimes, but they cannot be drafted, be married, or vote. They are persons, but they are owned, constituting a recognized class of non-human persons that has legal rights and obligations peculiarly tailored to the unusual attributes of its members.

An analogy between such "artificial" persons and computer systems will appear less strained than comparisons with human beings. Additionally, to the degree that the operations of a corporation can be computerized, the corporation and the computer would effectively be the same entity: no legal change would be required for such de <u>facto</u> recognition of computer personality.

Corporations provide an example of the concept of <u>partial</u> personality, whereby an ascertainable entity may be recognized as a legal person for one purpose but not another. The concept has many applications and is not limited to non-humans; certain laws treat fetuses *as* "persons" for the purpose of inheritance, while others provide that the abortion of such fetuses is not generally to be considered murder.

The concept is applied in many ways in modern society. Minors, for example, slowly accrete rights and obligations as they grow older because of their pres<u>um</u>ed capacities, while rights are removed 1r or the retarded and the insane when their behavior proves to be too far below or outside the societal minimum. The legal system is thus equipped with a variety of approaches with which to decide the extent and variety of rights that should be given to computers that are recognized as persons.

Computer systems that perform increasingly complicated tasks in an increasingly competent manner will be thrust onto these shifting sands of constitutional presumptions, tests, and standards.

Since there does not seem to be an analytically sound test of "personality" that will exclude computer systems which behave intelligently, the question of legal recognition will remain one of "when" and not "if" until and unless some absolute limitations on the abilities of such machines can be demonstrated. Once computer systems can satisfy established legal tests of personality, either a valid ground of distinction between them and humans will have to be found, or the distinction will have to be abandoned as mere prejudice.

Current artificial intelligence research increases the need for a prompt examination of these problems. Courts have already begun to impose on certain professionals the requirement of use of certain computer systems.* As applied artificial intelligence techniques cause computer systems to behave in ways traditionally associated with human intelligence, the likelihood of legal scrutiny of the status of those systems increases.

No uniformly recognized definition exists for intelligence, so it is not surprising that there are at least four different (and largely contradictory) definitions of "artificial" intelligence. While there appear to be many instances in which measurable intelligence is unnecessary to recognition of legal personality (corporations, comatose humans, etc.), such recognition appears to be mandated under modern tests wherever such intelligence it* present

A traditional legal test asks whether "reasonable men could differ" as to a proposed question. If they could, the test allows the question to be submitted to a judge or jury as a question of fact rather than one of law. Given the many legal tests of personality, it is submitted that there is (or soon will be) a question of fact as to whether a computer which appears to be exhibiting intelligent behavior is a "person" under the law. Given the appropriate facts and a sympathetic jury, that question will at some point be answered in the affirmative.

Developments in biotechnology could lead to recognition of certain computer systems even if society proves unwilling

*For a citation-saturated discussion of the ramifications of professional computerization, see Willick, Professional Halpractice and the Unauthorized Practice of Professions: Some Legal and Ethical Aspects *of* the Use of Computers as Decision-Aids, which is due to be published this Fall in Rutgers Computer and Technology Law Journal.

to recognize computers per se. humans do not endanger their legal recognition by using devices to enhance or replace parts of themselves; the Jegal test is subtractive, and it presumes continued recognition. Metaphysical considerations aside, only technological (as opposed to scientific) barriers appear to exist to the eventual direct integration of human brains and computers. No recognition-endangering event would occur by such integration; a "computer-enhanced" person would retain recognition.

Presuming that the computer could be made able to perform various tasks as the human lost the ability to do so, no behavioral differences would appear as the human parts failed. Because the traditional legal test looks to behavior, might the mechanical remnant of such a person retain legal recognition?

Those arguing otherwise would face the difficult task of convincing a court that the combination had lost its right to recognition at some time of biological failure, despite its continuation of its normal activities. The law abhors the removal of rights absent behavior outside of or below certain minimum requirements, going so far as to rule that permanently comatose humans remain person.'.. Given the foreseeable behavioral capacity of computer systems, it is submitted that mechanical remnants of human/computer combinations will retain legal recognition, at least where the takeover of once-human functions is gradual.

Such developments would present the difficult legal question of how to distinguish between two computer systems, one or which slowly took over the functions of a human brain, and the other of which simply rolled off of an assembly lino. Presuming equal behavioral capacities (or even close ones; the law recognizes both geniuses and idiots), no valid ground appears to exist for the denial of legal recognition to the system that was never connected to a human brain.

CONCLUSION

Computers today are increasingly behaving in ways traditionally identified as exhibiting consciousness, understanding, and learning, it may prove impossible in the future to draw a valid legal distinction between humans and computers, either because of the increased behavioral capacity of the latter group, or because the two groups will be literally, physically, inseparable. At that time, constitutional law will recognize at least some computer systems as "persons."