

Identifying Information

Name:	Fromer, Jeanne
School:	NYU School of Law

Paper Information

Title:	Minds, Machines, and the Law: The Case of Volition
Abstract:	<p>With the increasing prevalence of ever sophisticated technology—which permits machines to stand in for humans in an increasing number of contexts—the questions of whether, when, and how the so-called actions of machines can incur legal liability will also become more practically pressing. Although the law has yet to fully grapple with whether machines are (or can be) sufficiently human-like to be the subjects of the law, philosophers have spent decades contemplating such questions. Philosophers have long considered, for instance, whether human minds are simply a kind of machine—such that it is in principle possible for future artificial intelligences to possess all the properties of human minds, including consciousness, semantic understanding, deliberation, intention, and even morality and empathy—or if humans and machines are instead fundamentally different types of things and always will be, no matter how sophisticated artificial intelligence (AI) becomes. It is thus unsurprising that, in thinking through how the future of the common law should accommodate and govern an AI-filled world, the lessons to be gleaned from these classic philosophical dialectics will have undeniable relevance. Indeed, this relevance—and the need for an answer to these questions—has been a long time coming. Consider, for example, the case of copyright law: the phenomena of mechanical and mass copying—as opposed to copying at the direct hands of humans—already has a long history, and has had an enormous influence on the creation and subsequent development of copyright law itself, as to whether copies made by a machine might count as copyright infringement. More generally, these questions will also inevitably bear on a wide variety of areas of law: in assessing mens rea and actus reus in criminal law; whether there is agreement requisite to form a contract; whether an act is foreseeable so as to underpin liability in tort; and any areas of the law in which intent and volition underpin legal liability. Take copyright law, in which the law has long considered the volition of machines. In that context, courts have consistently ruled that humans possess the requisite volition to copy that underpins copyright infringement, whereas machines lack it. In a foundational case involving internet servers creating copies of messages uploaded by an individual, the court refused to assign liability to the entities deploying those servers: “Although copyright is a strict liability statute, there should still be some element of volition ... which is lacking where a defendant’s system is merely used to create a copy by a third party.” The Second Circuit advanced this reasoning to a similar conclusion against finding infringement liability for an entity that designed a machine that makes copies: “In determining who actually ‘makes’ a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct.” These courts’ discussions distinguish volitional conduct from automatic conduct, with the first court phrasing the question presented by the case to be “whether possessors of computers are liable for incidental copies automatically made on their computers using their software as part of a process initiated by a third party” and holding that the answer to this question is a resounding “no.” In</p>

other words, the courts say that only conduct which involves some conscious or volitional thought or intention can form the basis of legal liability; and in the case of machine-based operations, the courts conclude this requirement cannot be met. This essay will argue against courts' assumption that, although the actions of humans are always volitional in the legally relevant sense, the operations performed by machines inevitably lack the volition required for legal liability. We will begin by recounting the famous "Chinese Room" argument, an incredibly influential thought experiment put forth by the philosopher John Searle in 1980, and which has entirely shaped the course of philosophical thinking about computers, minds, and mental content for the nearly forty years since. Searle's thought experiment led him to conclude that because computers are capable only of syntactical rule-following, computers—unlike human minds—will never possess true understanding. Searle's conclusion provoked reactions from numerous philosophers, psychologists, and computer scientists, ultimately triggering a persistent debate regarding the possibility of "strong" AI—or, AI that genuinely possesses contentful mental states—versus only "weak" AI—or, AI which has the capacity to perform all human functions (and, indeed, perhaps to surpass human functionality) but which still lacks the capacity to understand. The essay will then argue that—whether or not we ultimately regard the "Chinese Room" argument as a successful challenge to the possibility of "strong" AI—courts, in assuming that a machine-based operation is not "volitional" in the sense required for legal liability, are making a mistake. The essay will utilize the "Chinese Room" argument and the reactions to it to demonstrate this mistake. In particular, we will argue that the courts' assumption about machine-based volition presupposes an unjustifiably limited conception of what constitutes the relevant "system" performing the operation, and what forms this "volition"—at least for the functional purposes of the law—might take. The essay will also analyze the reasons that the common law frequently requires volition and whether or not machine-based volition accords with these reasons. Building on these strands of analysis, the essay will put forth two important doctrinal conclusions. First, a business entity should not avoid legal liability for illegal conduct simply because the conduct was performed by a machine rather than a human, because it ought to be sufficient in the eyes of the law for the requisite volition to be located in an entity's system as a whole. Second, a machine might itself count as having something which is close enough to volition in the eyes of the law—even if what it possesses is different from the human volition the law is accustomed to accommodating—so long as it possesses the capacity to evaluate the relevant operation before moving forward with completing it, and even if it does not actually exercise this capacity. These conclusions thus show that machinery—and the AI of the future—might be far more amenable to legal governance than courts have so far appreciated, and that the common law is perhaps already more equipped to handle the technology of the future than we might have thought.