



14-Aug-2020

BMJ-2020-059371

Artificial Intelligence, Covid-19 and Law: The Need for Evaluation in the Age of Many Models

Dear Prof. Ho,

Thank you for sending us your paper and giving us the chance to consider your work as part of our collection on Covid-19 and artificial intelligence. We sent it out for external peer review, as for all the articles in this collection, and discussed it at our editorial committee meeting on 6 August. Present were Paul Simpson, Cat Chatfield, Henry Scowcroft, and myself.

We sought advice from two peer reviewers and one patient reviewer, whose comments are enclosed below. I hope you find the reviews constructive. In the editorial meeting, the editors agreed that we would like to consider this paper further for inclusion in the proposed Covid-19/AI collection. However, we did consider that some changes would need to be made to address the specific issues highlighted at the end of this letter.

Therefore, we would like to invite a revision, addressing the reviewers' and editors' comments below, which would then be considered for potential publication in this collection.

We hope that you will be willing to revise your manuscript and submit it within 4 weeks by Friday, 11 September 2020. Either I or the other editors would be happy to liaise with you to discuss deadlines and how to address reviewers' or editorial feedback on this timescale if there are any issues.

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I hope you will find the comments useful. Please don't hesitate to contact me if you wish to discuss this further.

Yours sincerely,  
Diana

Diana Lucifero, PhD  
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**Editorial Committee's Comments to the Authors:**

The editors would like to acknowledge the commendable efforts made in the preparation of this manuscript. We thought that this was an interesting article and we hope that these comments will be helpful to the authors.

**Specific points:**

- Please add missing author positions.
- Please revise the title to reflect that the focus of the article is the US.
- A clinical colleague suggested that the structure of the article should be reconsidered and perhaps flipped around given that the focus on impacts to individuals and communities would be of greater interest to our readers than those on courts and policymakers.
- Reviewer 3 is a patient reviewer and we have contacted her to try and get some clarity about her comments.

**Reviewers' Comments to Authors:**

Reviewer: 1

**Recommendation:**

**Comments:**

This piece addresses an interesting area: the legality of AI-powered tools used by governments in the response to the COVID-19 pandemic. It raises the issues of privacy and bias, notes potential concerns, and presents a very brief framework for evaluation. While the piece is intriguing, several areas of concern stood out.

It is unclear what government uses, specifically, the authors view as potentially concerning. The uses they cite all appear to be either research uses, products in commercial development, or, in one instance, a use by the Chinese government. Are there proposals for U.S. government use of AI related to COVID-19 with real consequences (e.g., denial of benefits, denial of care, or the imposition

of sanctions)? If so, the authors should be clear about those examples. If not, the authors should indicate why they think such uses might be plausibly on the horizon.

There is a tension between the article's theoretically international focus—the first example of AI COVID-19 software is from China, and the second paragraph references "governments"—and the reference to U.S. privacy law only, which is vastly different from Chinese privacy law and substantially different from EU, which notably has the GDPR rather than the substantially restrained HIPAA Privacy Rule or the Fourth Amendment. Similarly, the only antidiscrimination law mentioned is American. Certainly, a survey of international laws is of broad scope, but the authors should be clear that the analysis really only applies in the U.S.

It would be useful for the authors to justify why Fourth Amendment jurisprudence is the right frame to evaluate any government acquisition of interest. Is public health surveillance typically regarded as a search? Making this point explicit would be helpful.

Are the authors suggesting that the use of AI tools in a pandemic for public health purposes has any realistic chance of failing rational basis review? Or are they suggesting some other level of scrutiny is appropriate? The legal analysis is hazy.

Who is doing the evaluating? Do these AI uses go through FDA or something else? The authors suggest in a single line that "review should be distributed and decentralized," but what does that mean?

In general, the proposed framework for evaluation is extraordinarily brief. This is unfortunate, because the framework is sensible, and the concerns raised are real; there are significant tradeoffs involved. The article would be better served with less text devoted to unlikely-to-materialize constitutional challenges and more text addressed to the underlying policy tensions and a more fleshed-out set of solutions for addressing them.

Finally, the piece has some strange references. It cites multiple U.S. Supreme Court cases that are only moderately on point, but essentially no legal scholarship on, e.g., algorithmic governance, medical AI, health privacy, or discrimination. Prince and Schwarcz on proxy discrimination by AI (2020) is particularly on point.

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Reviewer: 2

Recommendation:

Comments:

This is a well-written paper on a timely and important topic. It captures well the key issues related to US privacy and discrimination law raised by the use of AI models in the context of COVID19. The analysis is also broadly relevant for other jurisdictions. This is a short commentary, and many issues could obviously be more developed, but the purpose of the paper is to sketch the general framework under which the use of AI should be assessed, focusing particularly on issues of effectiveness, and the paper succeeds in that. The question whether the privacy invasions related to AI are not burdening more than necessary is not really discussed, but that seems to be outside of the scope of the paper (and is a very complex question in the context of the uncertainty surrounding COVID19). The only substantial comment I have is that the final recommendations could benefit from some further elaboration: the NIST model of evaluation of facial recognition technology is recommended, but summarized in one sentence. Is more to be said about this model? I would also suggest to add to the recommendations the need for fully independent evaluation. This speaks for itself, and I know the authors themselves subscribe to this, considering their work on these issues. But in light of the conflicts of interest that have become apparent again in publications of COVID19-related studies, it is worth repeating.

Hereafter some suggestions and questions related to the text.

p. 3: L57: government "infringes on" : I read 'infringes' as referring to a violation. But there are instances where the disclosure of information over which one has a reasonable expectation of privacy is legitimate. So better 'intrudes upon'? Or is this the language used in the case?

p. 4

Line 11: Governments 'may violate': doesn't the term 'excessive' indicate a situation where there is a violation of privacy?

Line 12: 'excessive': I'm not so familiar with the terminology used in the US privacy statutes, but is 'disproportionate' not a better term? Perhaps this is why the term 'may' is used: excessive may not be disproportionate if the goal of information gathering is to deal with an extraordinary risk

Line 58-59: 'In the context of a constitutional violation': perhaps better 'In the context of an allegation of' or 'to decide whether there is a "constitutional violation" [not so clear also why 'constitutional' is used here. Perhaps better: In the context of an allegation of violation of fundamental rights"... This may be jurisdictional difference in phrasing.

p. 5: line 57: 'more dangerous to possess': the term dangerous seems odd here. Authors mean that it is more likely to be considered a violation. Alternative: 'problematic' [if 'more likely to be considered a violation...' is too long]

p. 6: line 14: 'failure to deploy AI can itself harm dignity". Odd phrasing: the failure not to use a technology is in and of itself not causing a dignitary harm. It indirectly may lead to it, in the authors' opinion, when it results in a failure to deal with pandemic control differently than through other more intrusive measures.

Line 43: I don't understand well point a: can this be stated differently? (after 'conditional on...' is the issue that may not be so clear)

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Institution: University of Toronto

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Reviewer: 3

Recommendation:

Comments:

My main feedback is there needs to be more tangible examples cited, rather than what may happen under the Privacy Law section.

I recommend reviewing the following sources:

<https://www.acpjournals.org/doi/10.7326/M19-0366>

<https://missingconsent.org/facebook-patient-ftc-complaints/>

<https://www.statnews.com/2019/07/31/facebook-ftc-settlement-health-information-privacy/>

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**Date Sent:** 14-Aug-2020