The Public Safety Case

Bryant Walker Smith

Assistant Professor
*University of South Carolina School of Law
and (by courtesy) School of Engineering*

Affiliate Scholar
Center for Internet and Society at Stanford Law School

law of the
newly
Possible

newlypossible.org

Why do we regulate safety?

To correct market failures, particularly those that could undermine safety or trust.

- Safety: Where developers lack internal or external incentives to act reasonably safely.

- Trust: Where the public lacks information, time, or other resources to decide if something is reasonably safe.

This regulation involves the exercise of a government's *authority* and *credibility*.

law of the
newly
Possible
newlypossible.org

How safe is safe enough?

- We don't know, and we won't know!

- The public expects perfect safety.

- But nothing is perfectly safe today (including humans).

Today's regulation is also imperfect

- These imperfections might advance or stymie automated driving.

- Automated driving might ameliorate or exacerbate these imperfections.

law of the
newly
Possible
newlypossible.org

Trust matters

Shift from assessing the product to assessing its developer/deployer, as products will be:

- – Diverse.
- – Complex.
- – Dynamic.
- – Part of broader systems.
- – Services!

Benchmark for assessing performance may shift from point of sale to point of use!

Diversity in assessment

- There is no single universal method of safety assessment.

- Some philosophical disputes may never be resolved empirically.

- Assessment is also a subject of innovation! And its high cost provides an economic incentive.

- This innovation is critical for driving automation and other technologies.

The public safety case

- To manage public expectations.

- To obtain an approval or exemption.

To manage public expectations

- **A developer shares its safety philosophy with the public through data and analysis:**

- How does the developer define, design for, establish, and monitor reasonable safety over the lifetime of its system?

- What are the system's risks and opportunities?

law of the
newly
Possible
newlypossible.org

To obtain an approval or exemption

- A developer seeks a regulatory approval or exemption.

- The developer makes a *public* argument for the safety of its system.

- The regulator, with input from the public, evaluates the reasonableness of that argument.

- The regulator exercises substantial discretion and receives substantial deference.

law of the
newly
Possible
newlypossible.org

Why a public safety case matters

- Regulators can't have all the answers – but they can get better at asking key questions.

- Developers need space for technical innovation.

- Regulators need space for *regulatory* innovation.

- The public is an essential partner.

Why public expectations matter

- Legislators and regulators act in the context of public opinion.

- Civil liability often depends on the perceived reasonableness of a company or product.

law of the
newly
Possible
newlypossible.org

Public safety case as option or obligation

- A lot is already legal!

- Developers can always choose to comply with or seek to change existing law.

- Nonetheless:
  - There are some regulatory gates.
  - There may be some legal obstacles.
  - There will be a post-crash minefield.

- A public safety case can be a stick or carrot.

law of the
newly
Possible
newlypossible.org

Predicates for a public safety case

- More expansive and explicit exemption authority (federal and state).

- Cultivation of technology-agnostic safety expertise.

- More robust *public* disclosure mechanisms.

law of the
newly
Possible
newlypossible.org

Evaluating the public safety case (Metaregulation)

Reasonableness rather than correctness.

- Substantial evidence (agency action).

- Arbitrary and capricious with hard look (same).

- Daubert (expert witnesses).

- Materiality (securities disclosures).

- Exclusively public data.

law of the
newly
Possible
newlypossible.org

My prediction

When an automated driving developer shares its safety philosophy with the public through data and analysis…

…automated driving will be truly imminent.

law of the newly Possible

newlypossible.org