

Cooperative Control
Autonomous Vehicles, AV 4.0, and Soft Law Regulatory Regimes

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Abstract

Over the last ten years, autonomous vehicles scholars have been meeting at conferences throughout the world to discuss all manners of legal issues. And while those scholars have presented proposals of all sorts, the fundamental background principle animating virtually all of them has been incredibly simple: “The law is lagging behind.” Indeed, while law and technology scholars may disagree about how law should adapt to autonomous and semi-autonomous vehicles, virtually everyone agrees these vehicles are emerging onto the consumer market so quickly that laws and regulations are years behind where they should be.

The reasons for this lag are manifold. First, the knowledge gap between regulators and industry is often vast. To some extent, this gap may be, if not deliberate, the function of calculated choices on the part of industry innovators who are highly protective of their intellectual property and thus reticent to share information with outside parties. This gap may also be the product of scientific and technological literacy issues on the part of lawmakers and judges, who frequently hail from non-STEM backgrounds. Second, the legal and regulatory issues raised by autonomous vehicles are not always as apparent as they might seem. Lawmakers attempting to keep pace with technological development are often forced to create regulatory frameworks based on highly speculative risk assessments and limited data. In such an environment, many lawmakers are inclined to wait rather than risk unduly stymieing emerging technologies by rushing to pass poorly conceived legislation. Indeed, many states have already discovered that hastily drafted autonomous vehicle laws and regulations can be outdated within months of passage.

Governance of autonomous vehicles thus presents a formidable challenge for modern states and governmental entities. Given the problems articulated above, this paper explores whether “soft law” self-regulation approaches offer a solution. In particular, it explores whether industry self-regulation via accreditation and certification requirements can offer effective short-term (or even long-term) solutions to regulatory lag. Drawing on two major case studies—(1) industry self-regulation of fixed-site amusement parks in the United States and (2) professional self-regulation of healthcare professionals—this paper discusses the advantages and risks of soft law regulatory regimes and explores, in particular, how careful government oversight and consumer pressures can significantly mitigate the inherent conflicts of interest that arise when an industry is tasked with regulating itself.

This analysis is particularly important and relevant given the “AV 4.0” guidance issued by the U.S. Department of Transportation on January 9th of this year. In that guidance, the U.S. government declined to issue anything other than extremely broad and voluntary guidelines for the development of autonomous vehicles and requested that the industry self-regulate until further notice. The contours of what self-regulation should look like in this industry are thus important to establish. More broadly, autonomous vehicles may provide an excellent test case for the efficacy of soft law approaches in the emerging technology context more generally.