

Health Law in Practice: Paving the Way for Justice and Equity

The Fake Health News Pandemic

June 2024

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“We are in a **pandemic of misinformation** and, honestly, there is no one vaccine for it.”*

Pfizer's COVID "vaccine" responsible for hepatitis outbreak in children
Wednesday, April 13, 2022 by: Ethan Huff
18K VIEWS



Man Poisons Himself by Taking Apricot Kernels to Treat Cancer
Why believe these seeds can fight cancer, but there's no scientific evidence to support the claim

GOT MILK?
SCHOOLS ARE STOCKPILING A CHOCOLATE MILK THAT CLAIMS TO STEM DAMAGE FROM CONCUSSION
By Debra Shanker - January 10, 2016



Coronavirus: Americans drinking and inhaling bleach to try to prevent COVID-19 infections - study
Some 4% of those surveyed said they had drunk or gargled bleach solutions, and 18% used household cleaning products on their skin.



Clare Sibthorpe
News reporter @ClareSibthorpe



CDC Issued A Warning—Don't Have a Flu Shot This Year |
Homepage » Natural Health » CDC Issued A Warning—Don't Have a Flu Shot This Year
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VIBRATIONSOHEALTH.COM

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How significant is the risk from fake news?

The World Economic Forum ranks “misinformation and disinformation” as presenting the highest “likely global impact(severity)” over the next two years.

Deepfakes and Malpractice Risk: Lawyers Beware, de’Medici, Bruce May 2024, American Bar Association.
https://www.americanbar.org/groups/science_technology/publications/scitech_lawyer/2024/spring/deepfakes-malpractice-risk/

Adobe Stock | #134756926



Pending Brazilian Law on Freedom, Responsibility and Transparency on the Internet

The **Brazilian Congressional Bill No. 2630**, aka "**Fake News and Censorship Bill**" is being debated in Brazil's National Congress.

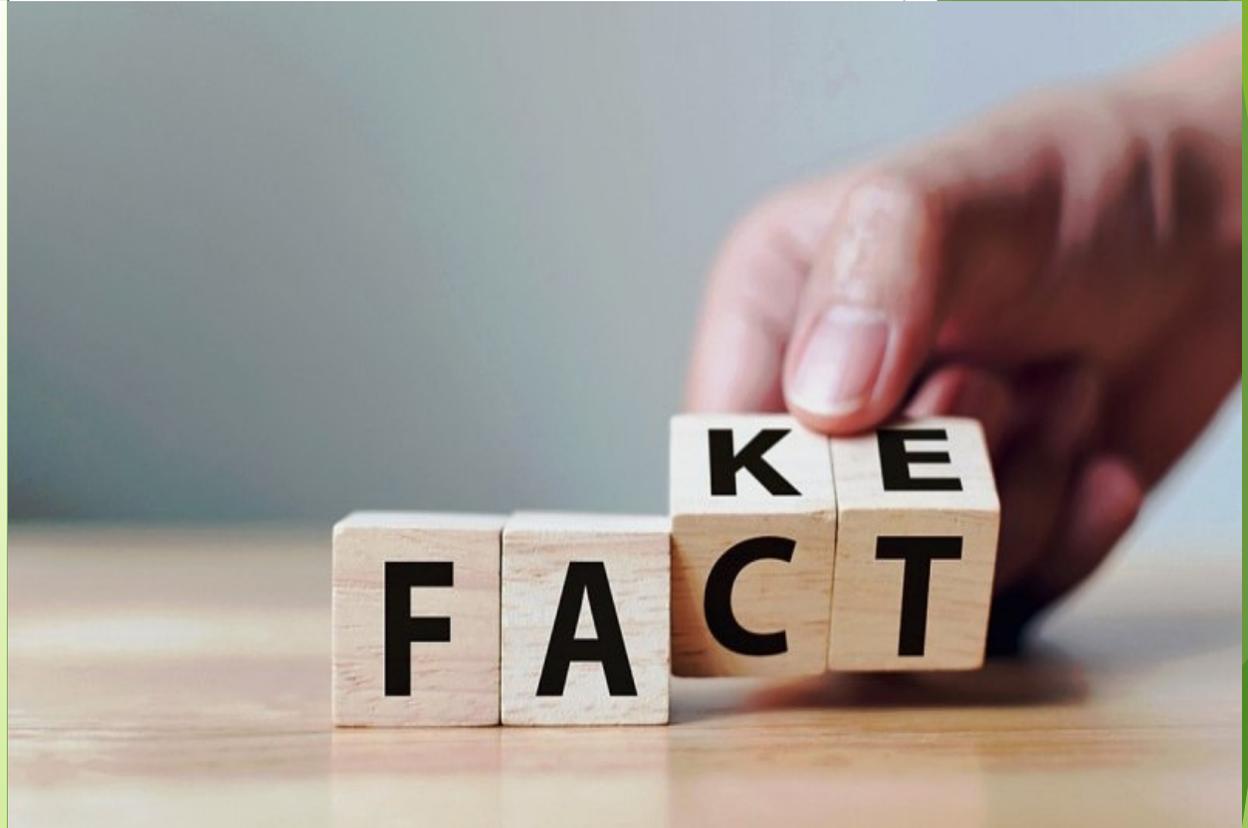
Opinions are divided as to its effectiveness and possible impacts on freedom of press and privacy of users.

Brazilians are not alone with this divisive problem....



Today's presentation will address:

- ✓ **The problem: How AI is making fake news harder to detect**
- ✓ **How fake medical news affects patients and doctors**
- ✓ **Who is liable for fake health news that causes harm?**
- ✓ **Potential solutions**



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The problem:

How AI is making fake news
harder to detect

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I WILL GIVE \$1000

**IF I FAIL TO CURE ANY CANCER or TUMOR
I TREAT BEFORE IT POISONS DEEP GLANDS**

Without KNIFE or PAIN
No Pay until Cured.
No X Ray or other
swindle. An island
plant makes the cure.
ABSOLUTE GUARANTEE.
A Tumor, Lump or
Sore on the lip, face or
anywhere six months
is Cancer. **THEY NEVER**
PAIN until last stage;
130 - PAGE BOOK sent
free with testimonials of
thousands cured at home.
WRITE TO THEM

ANY LUMP IN WOMAN'S BREAST
Is **CANCER**, and if neglected it will always poi-
son deep glands in the armpit, and kill quickly.
Address **DR. & MRS. CHAMLEE & CO.** Chamlee
Building
"Most successful Cancer specialists living."
201 and 203 N. 12th St. ST. LOUIS, MO
KINDLY SEND TO SOMEONE WITH CANCER

**CURED
AT
HOME**

KAS. BANK ROBBERY FT. \$2.900

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The **volume of misinformation**

+

Today's technology

=

Potential to bury the truth behind blizzard of fake medical news...and it is going to get worse

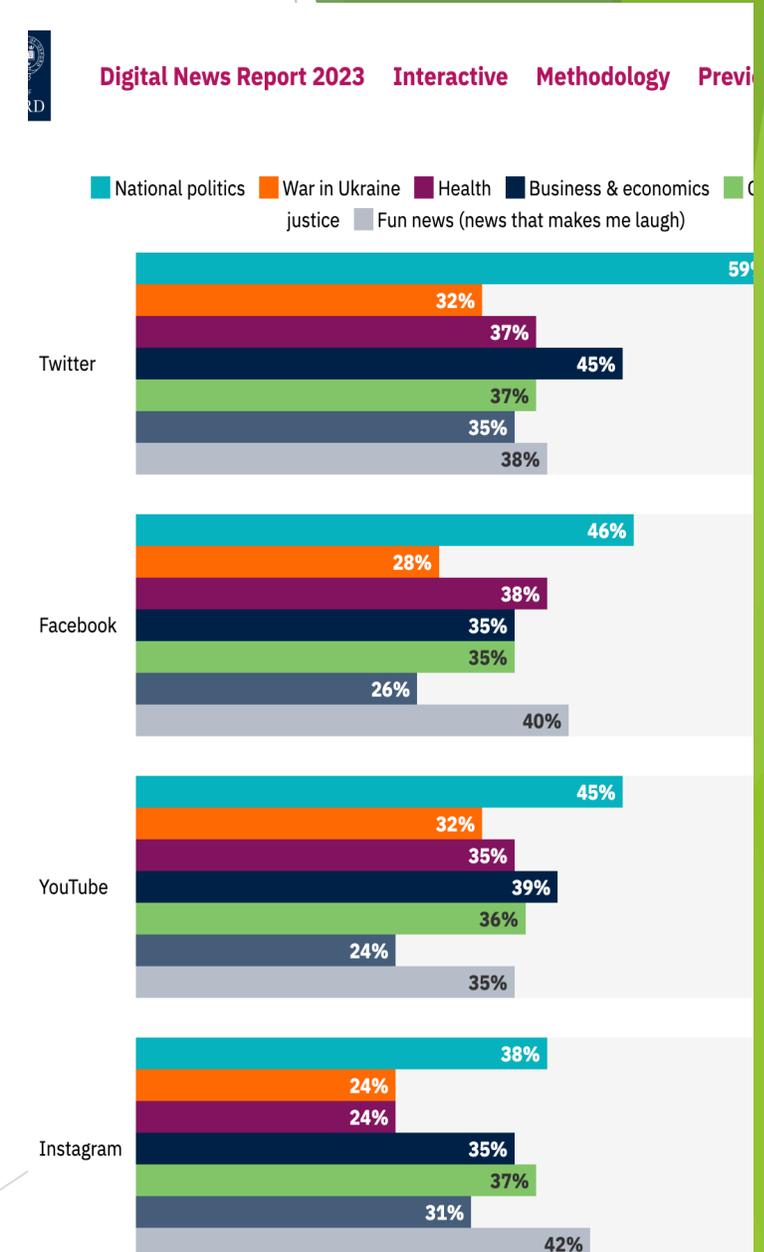


In 2023, Reuter Institute interviewed **93,000 online news consumers in 46 countries** and it found:

✓ **About 1/3 use social media to obtain health news.**

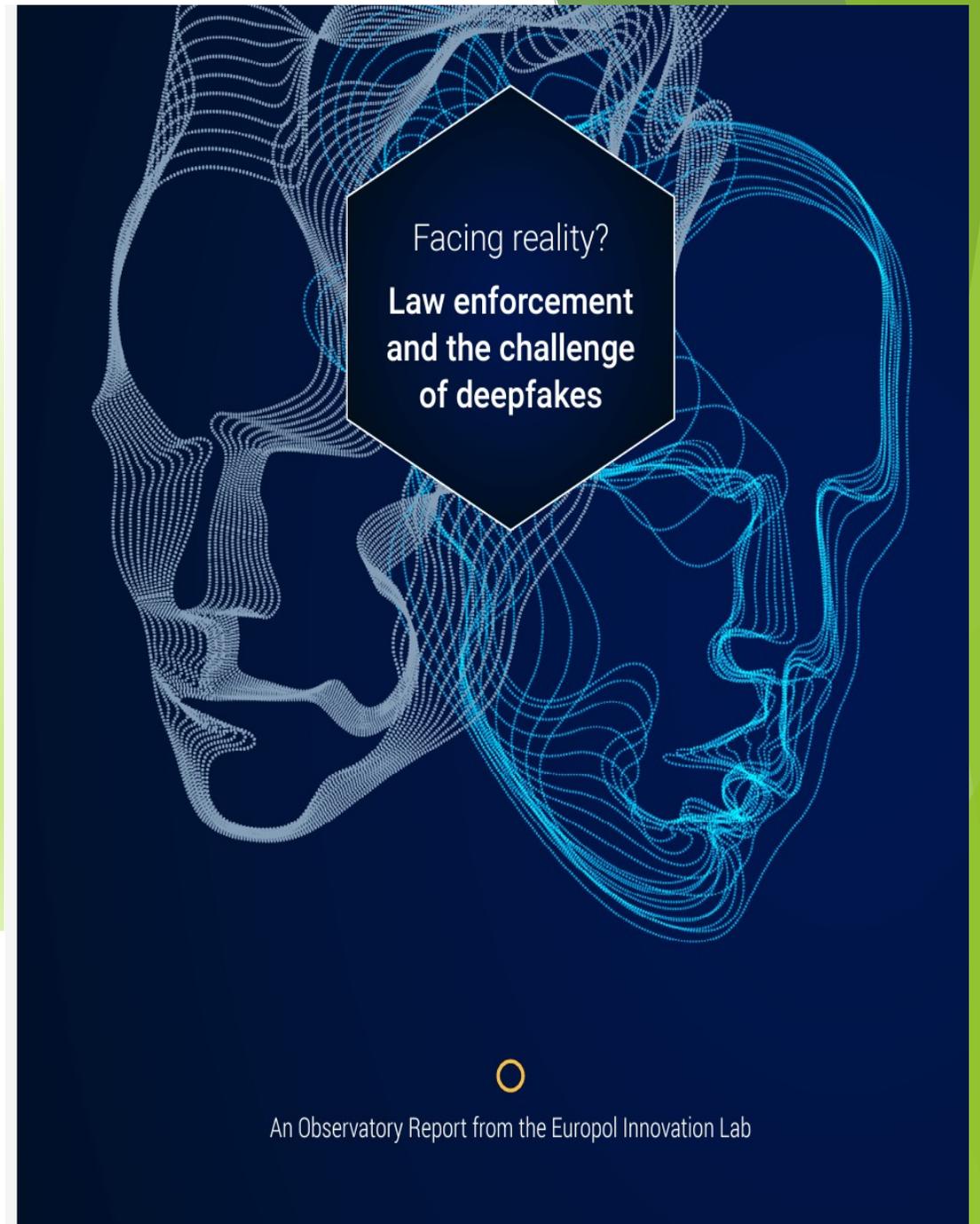
✓ The younger generations, “**often pay more attention to influencers or celebrities than they do to journalists, even when it comes to health news.**”

Reuter's Digital News:



According to law enforcement Europol, **90%** of online content could be generated by Artificial Intelligence (AI) **by 2026.**

Europol predicts this will lead to new law enforcement challenges around **disinformation, propaganda and deception.**



Why is it becoming harder to detect fake news?

Technology has improved the quality of fake images and audio recordings.

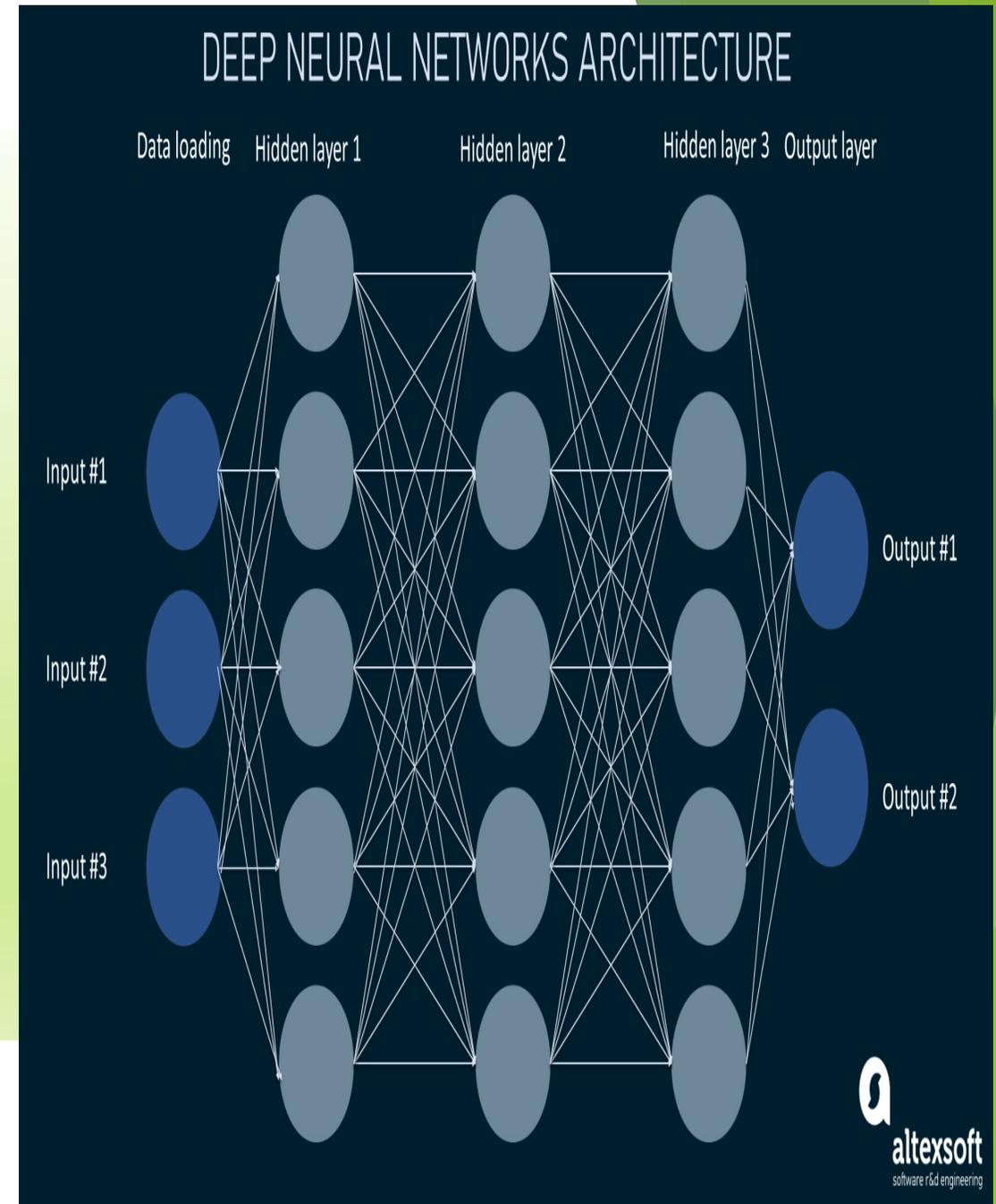


LLM* scans large quantities of data for training, and its' output (*decisions*) are based on *patterns* it finds in the data.

Algorithms, (formulas) *allow the software to train itself* by processing multilayered networks of data.

The patterns the LLM detects or relies on for its answers are generally undetectable even to AI programmers.

*LLM = AI large language models... like ChatGPT



How fake news affects patients and doctors



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Not just patients are affected by fake health news:

VIRAL LIES: FACEBOOK'S HEALTH MISINFORMATION PROBLEM

Private groups on Facebook spread misinformation on everything from autism to vaccines, with potentially devastating public health consequences.

HEALTHY BABIES DON'T JUST DIE
Evee Gayle Clobes
8/19/18 - 3/1/19
HealthChoiceMN.org

VACCINES
A mother's loss made her an anti-vaccination star. But vaccines didn't kill her baby.

AUTISM, PART 1
Parents are poisoning their children with bleach to 'cure' autism. These moms are trying to stop it.

AUTISM, PART 2
Fake science led a mom to feed bleach to her autistic sons – and police did nothing to stop her.

PARASITES
On Facebook, fears of parasites push people to post pictures of feces and pursue dangerous remedies.

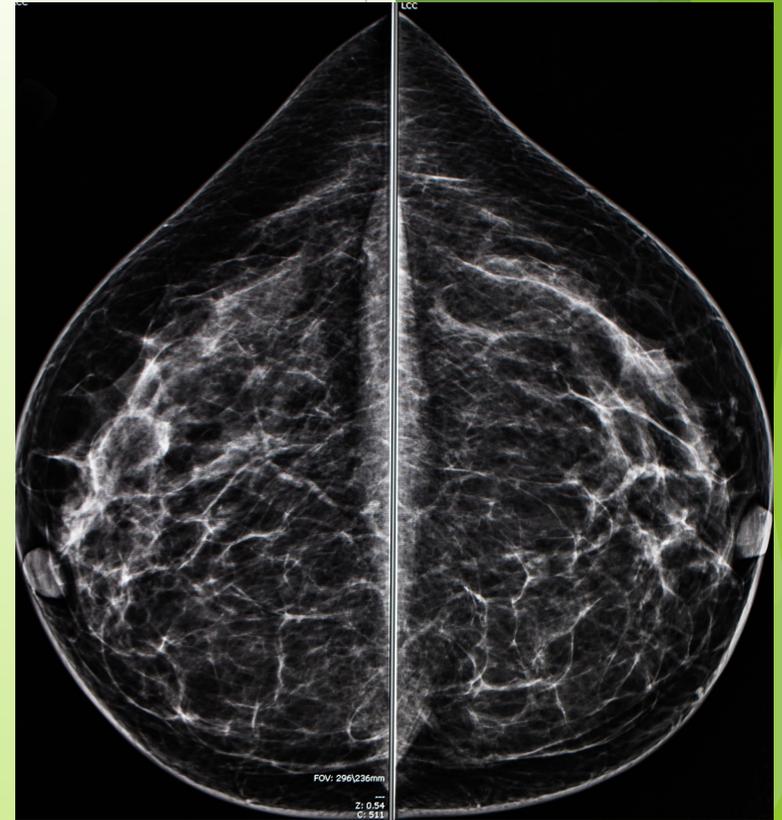
RESEARCH
Fake health news went viral in 2019, with a focus on these misleading topics.

ACTIVISM
Drowned out by the algorithm: Vaccination advocates struggle to be heard online.

GAN Can Trick *Both AI and Doctors* Into Making Wrong Diagnoses!

✓ GAN = **Generative Adversarial Networks** = GAN

- ✓ GAN makes two competing networks: One system generates fake images and the other tries to identify them as fake.
- ✓ One GAN system was trained to **distinguish cancer from non-cancerous radiology films with *more than 80% accuracy***.
- ✓ GAN then inserted or removed cancer from different images and re-tested how these manipulated images affected the diagnosis :
- ✓ ***It tricked the AI model into outputting a wrong diagnosis 69% of the cases that were initially correctly classified.***
- ✓ ***The medical experts identified the wrong diagnoses from the images up to 71%.***



<https://www.govinfosecurity.com/study-attacks-manipulate-medical-imaging-ai-outcomes-a-18131>

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Who is liable for fake
health news that causes
harm?

Doctors will be sued
if they rely on fake health news and harm results

Negligence claims (malpractice) for failure to exercise due diligence in reviewing medical information



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But Doctors also fall victim to fake medical news...
even in peer reviewed medical literature!



The image shows a screenshot of a Bloomberg article header. At the top left is the Bloomberg logo, which consists of a stylized 'B' with three horizontal lines to its left, all enclosed in a dark circle. To the right of the logo is the word 'Bloomberg' in a white, sans-serif font. Further right is a grey button with the word 'Subscribe' in white. To the right of the button is a white person icon on a dark background. Below the header, the text 'Opinion | F.D. Flam, Columnist' is displayed in a blue, sans-serif font. The main title of the article is 'Fake Scientific Studies Are a Problem That's Getting Harder to Solve', written in a large, bold, black, sans-serif font. Below the title is a short paragraph: 'Wiley's decision to axe several journals infested with fraud is a dramatic step, but it's not enough.' At the bottom left of the article preview is the date and time: 'May 25, 2024 at 5:00 AM PDT'. On the left and right sides of the article preview, there are black arrows pointing towards the center, indicating that the article content is partially obscured by the slide's navigation elements.

Bloomberg [Subscribe](#)

Opinion | F.D. Flam, Columnist

Fake Scientific Studies Are a Problem That's Getting Harder to Solve

Wiley's decision to axe several journals infested with fraud is a dramatic step, but it's not enough.

May 25, 2024 at 5:00 AM PDT

What about liability for the creators of the fake news?

The New York Times blames these sources for creating fake news.....and *these sources blame the New York Times.....*

....And how would we hold the creators accountable *if we can identify them?*

The Spread of Misinformation and Falsehoods

- **Russian Influence Operations:** The F.B.I. cut ties to at least a handful of informants and issued warnings about dozens of others after an [internal review prompted by concerns](#) that they were linked to Russian disinformation.
- **Political Fight Online:** A new group intends to fight what its leader and others have described as a [coordinated campaign by conservatives and their allies](#) to undermine researchers who study disinformation.
- **Influencing the Election:** Researchers say that covert Chinese accounts are [masquerading online as American supporters of Donald Trump](#), promoting conspiracy theories, stoking domestic divisions and attacking President Biden.
- **Taking Political Lies to Court:** A small but growing cadre of lawyers is [deploying defamation](#), the legal concept of false information, against a tide of political disinformation in the Trump era.

*Comprehensive Privacy and AI regulation is
needed
to control fake news*

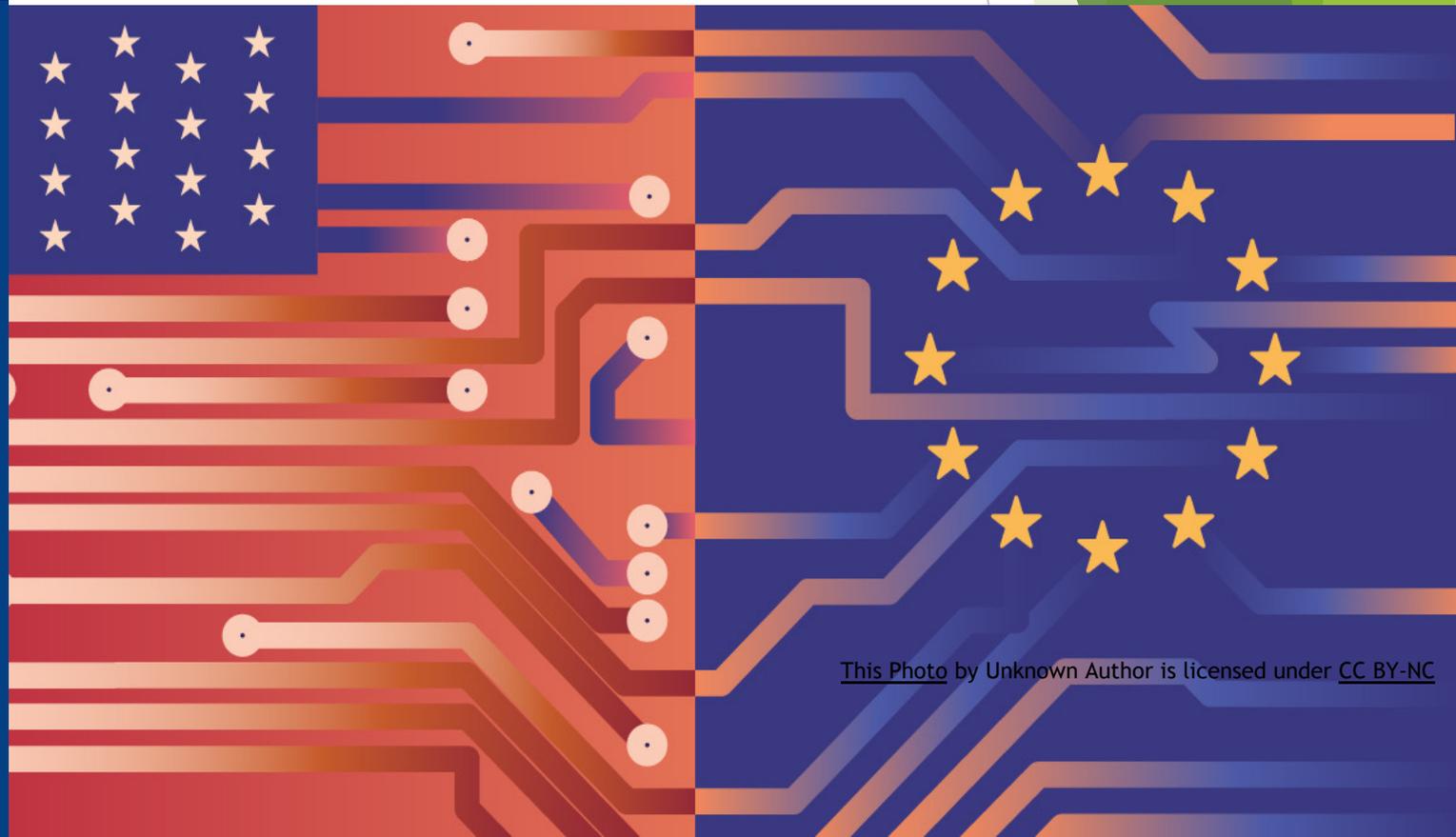


A study in contrasts:
Brazil, the European Union vs. the United States
privacy and AI regulation



LGPD : Brazil's
New Data
Protection Law

CookieYes



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EU GDPR and Brazil's LEPD are the Gold Standard

In 2018, both the EU and Brazil set the gold standard with strong privacy regulation with enactment of the EU's General Data Protection Regulation (**GDPR**) and Brazil's General Protection of Data Laws (**LGPD**)



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**Compare such robust and
comprehensive privacy
regulation
with the United States....**

The US still has no comprehensive federal privacy laws!

Federal US law has only “**sector specific**” federal policies.

- HIPAA is a federal health privacy statute, both limited and archaic, only covering;
 - ✓ licensed providers (doctors, hospitals...)
 - ✓ Only protects patient medical electronic/paper medical records

FEDERAL PRIVACY LAWS OF THE UNITED STATES

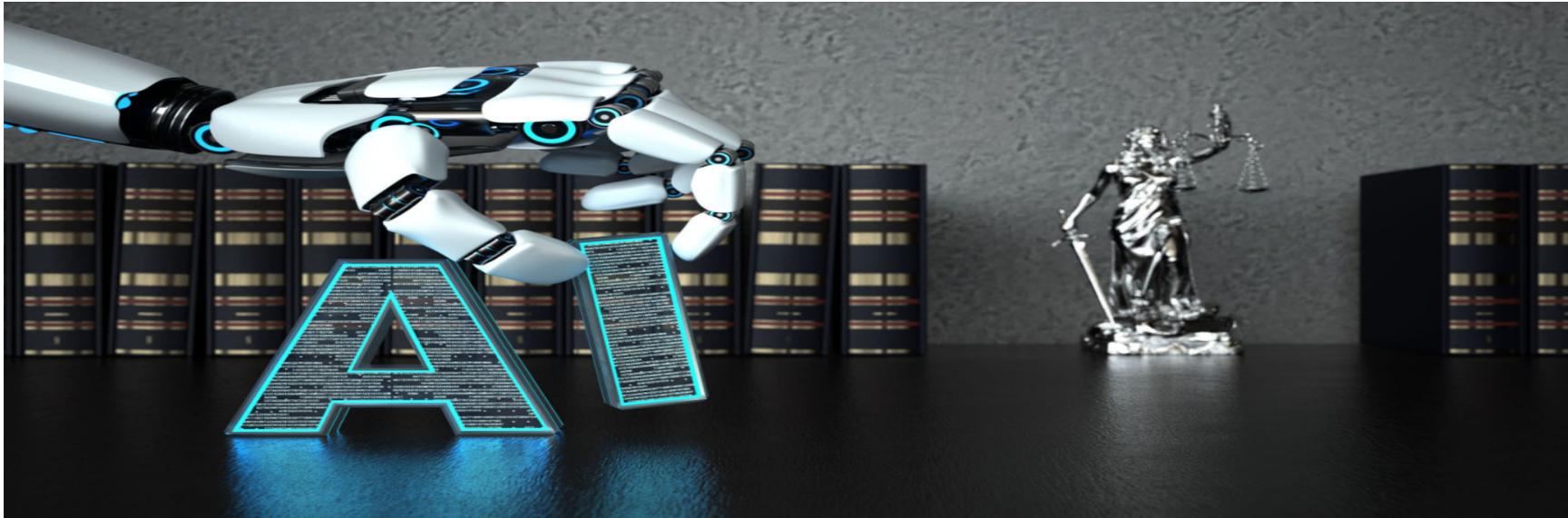
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|--|---|--|--|
|  CHILDREN'S ONLINE PRIVACY PROTECTION RULE (COPPA) |  ELECTRONIC COMMUNICATIONS PRIVACY ACT (ECPA) |  FAIR CREDIT REPORTING ACT (FCRA) |  FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) |
|  FEDERAL TRADE COMMISSION ACT (FTC ACT) |  GRAMM-LEACH BLILEY ACT (GLBA) |  HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) |  VIDEO PRIVACY PROTECTION ACT (VPPA) |

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Legislation is *currently pending* in US Congress to enact comprehensive federal privacy laws called the **ADPPA**....

But multiple, previous attempts have all failed.

Artificial Intelligence (AI) Laws (which build on Privacy Laws):



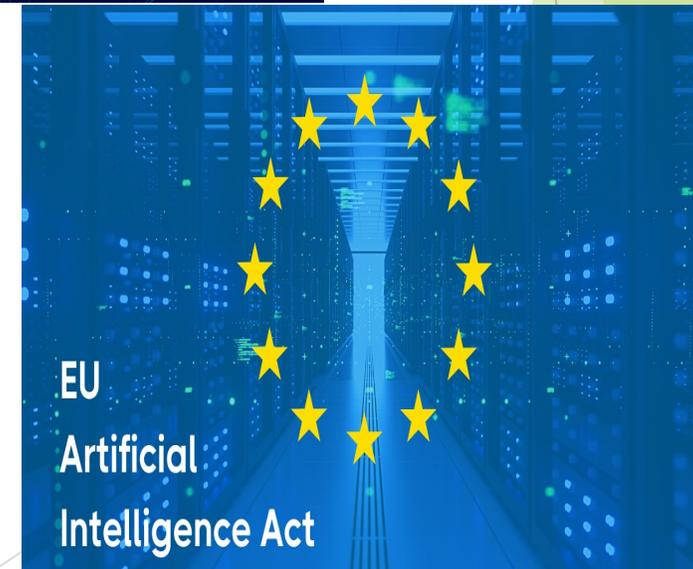
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✓ Comprehensive AI regulation: Brazil and EU again leading the way with AI Legislation

Building on LGPD privacy protection, Brazil enacted The EBIA AI Regulation.

In 2024, the EU recently enacted the AI Act, which will come into force in approx. June 2026.

Both Acts *apply to providers outside of their borders* if they have users within these countries.

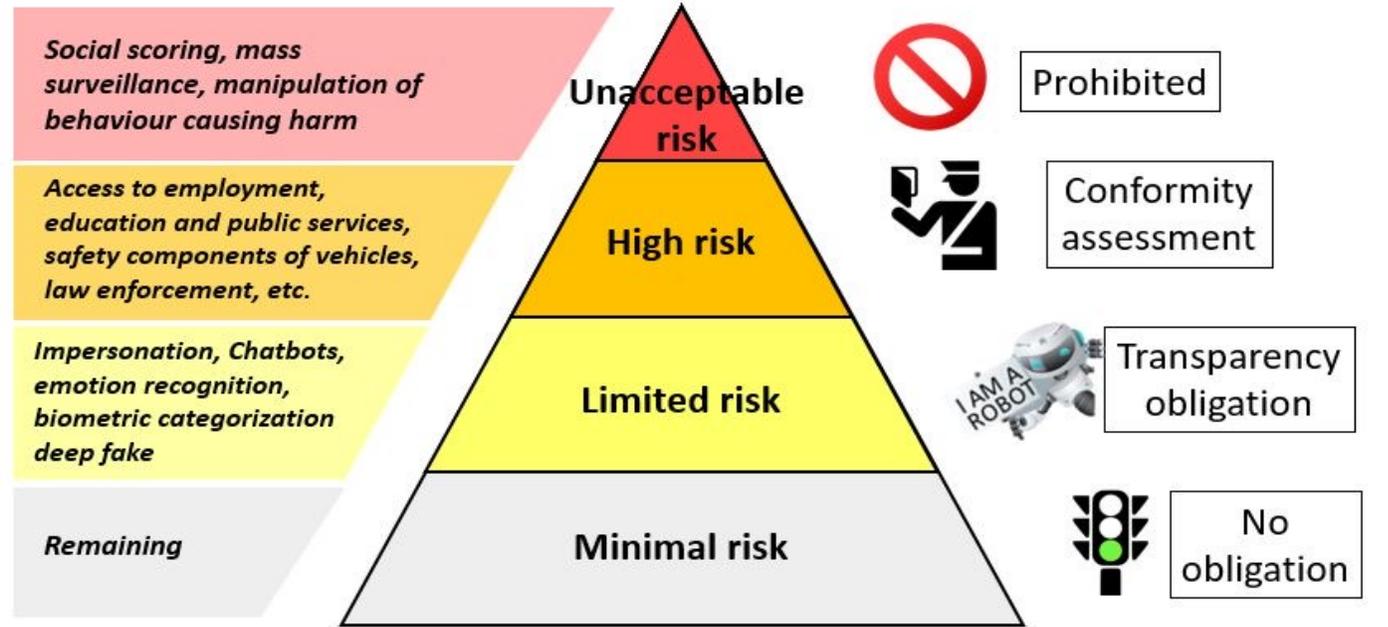


The EU AI Act categorizes AI systems into risk levels and imposes various obligations based on these categories

AI systems involving healthcare are considered “high risk”.

High Risk applications must adhere to stringent regulations to ensure safety, transparency, and protection of fundamental rights.

EU Artificial Intelligence Act: Risk levels



"High Risk" Health Care related AI systems are subject to several key requirements:

1. **Fundamental Rights Impact Assessments by Developers:** Privacy, non-discrimination, and fairness mandated.
2. **Independent Conformity Assessments:** Independent assessments required *before* market.
3. **Transparency:** Users told they are interacting with AI system and understand its limitations.
4. **Human Oversight:** To prevent unintended consequences ensure responsible use.
5. **Data Governance:** Strict requirements for collection, storage, and use of data.
6. **Robust Cybersecurity:** Designed to be resilient against attacks/ manipulation.

The US also has *no* comprehensive federal AI laws

Much of the failure to have comprehensive federal privacy or AI laws is due to the inability of Congress to enact such legislation.

President Joe Biden enacted executive orders regulating privacy and AI, but his only jurisdiction is to enact such laws for *conduct regulating federal government agencies*.



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Compare with U.S. State AI laws:

Only 2 states have enacted comprehensive AI laws (more pending), *none* of which are as robust as Brazil or EU.....

US State AI Governance Legislation Tracker 2024



Private-Sector AI Governance Bills

| Jurisdiction | Legislative process | Statute/bill | Scope | Governance | | Transparency | | Assurance | | Individual rights | | | | |
|-----------------------|---------------------|------------------------|-------|---------------------------|-------------|--------------|------------------------|----------------|-----------------------|--------------------------------|------------------------|--------------|--------------------|----------------|
| | | | | Program and documentation | Assessments | Training | Responsible individual | General notice | Labeling/notification | Explanation/incident reporting | Provider documentation | Registration | Third-party review | Opt out/appeal |
| LAWS SIGNED (TO DATE) | | | | | | | | | | | | | | |
| Colorado | | SB 205 | D | ✓ | ✓ | | | ✓ | U | ✓ | P | | U | ✓ |
| Utah | | SB 149 | G | | | | | ✓ | | | P | | | |

....and then there is California!

The California Privacy Rights Act (CPRA) is the most comprehensive and robust *privacy* legislation in the United States.

Rather than a separate AI statute, as a part of CPRA, California issued *draft* regulations on **Automated Decision Making Technology (ADMT)**.



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California's AI regulations are expected to be finalized later in 2024

Similar to Cal. Privacy Laws, these AI regs will require covered businesses :

Pre-Use Notice: Giving Consumers disclosures regarding use of the AI.

Opt-Out: Consumers able to opt-out of having personal information processed using AI.

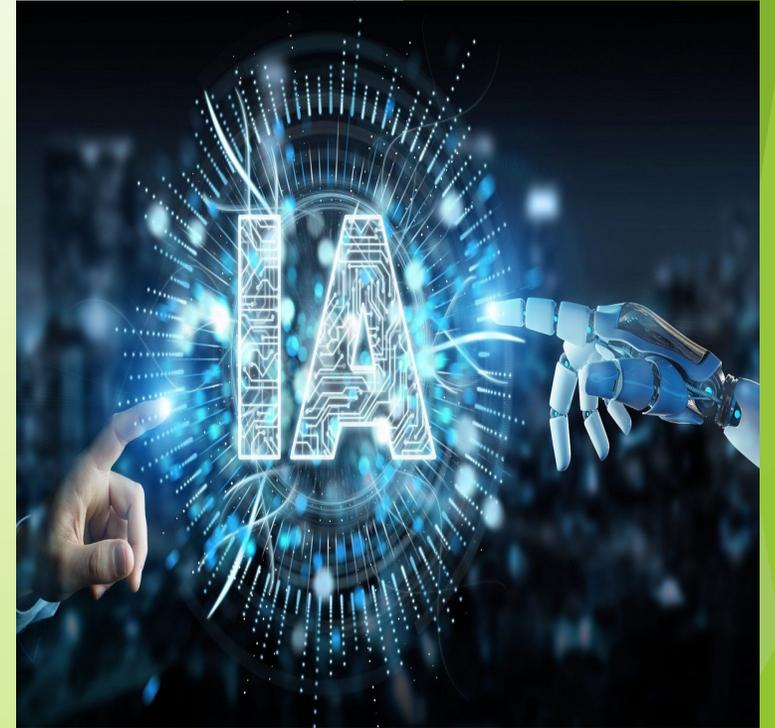
Access: Consumers will have the ability to request details about its use to process personal information.

Absent limited exceptions, the regulations must be used for:

“Significant decisions” including decisions that result in access to, or denial of.....*healthcare services*.....;

”Extensive profiling” of a consumer.....; or for

Training including processing personal information to train ADMT for any significant decision concerning a consumer.



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Limits on California's CPRA and AI regulations:

The CPRA *only* covers businesses:

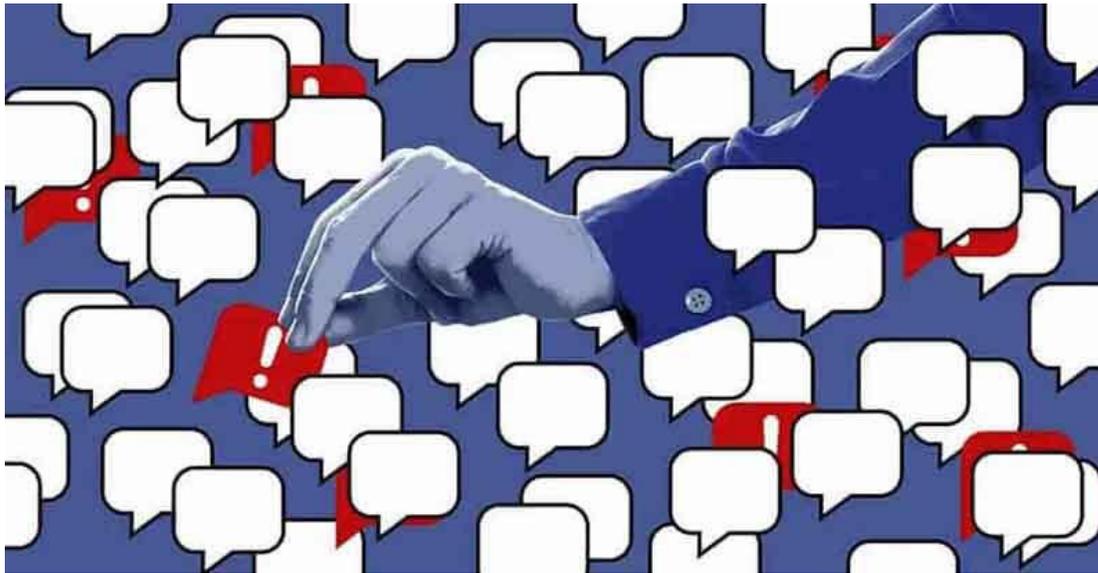
1. +USD\$25mil in annual revenues; *or*
2. +100,000 Californians access site; *or*
3. At least 50% of revenue is from selling or sharing consumers' data.

For noncovered businesses, the CPRA provides “best practices” : *Businesses are encouraged, but not obligated to comply...yet!*



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*Social media platforms liability
for moderation / amplification of content*



Liability of Social Media platforms for users' fake news posts

Most fake news isn't created by social media platforms (Facebook, Twitter, TikTok, etc.)

It is created by others and re-posted (*called amplification*) to various social media platforms.

When, if ever, should the social media platforms be held liable?



Social media platforms liability for "moderation"

Moderation is when social media platforms monitor content and posts are **removed** or those that post fake news are **banned** from the site.

Should social media platforms be liable when they *take down illegal or offensive posts or ban* those who created such posts ?



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As we earlier discussed,
Brazil has pending
Bill 2630 Fake News & Censorship
Act.....

EU has Digital Services Act

and...

Enacted in 2024, the EMFA harmonizes EU legislation on editorial freedom & media independence:

- ▶ **Protection of Media Pluralism and Independence:**
- ▶ **Transparency of Media Ownership:**
- ▶ **Editorial Independence:**
- ▶ **Safeguarding Public Service Media:**
- ▶ **Protection of Journalistic Sources:**

Together, the Digital Service Act and EMFA both effectively end social media's ability to self-regulate fake news....



What about the US and its regulation of social media for fake news????

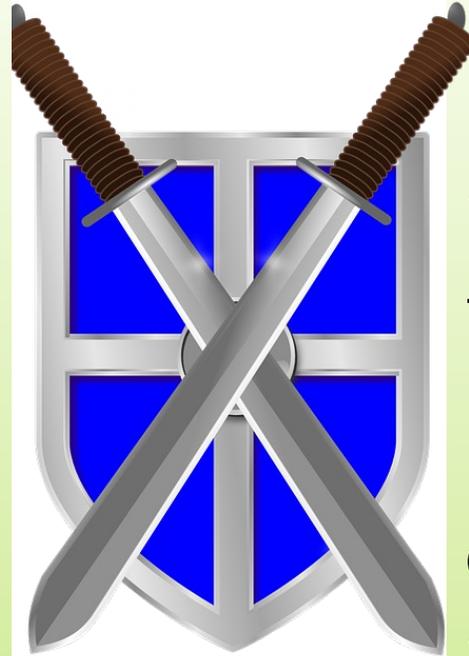


Section 230 of US Communications Decency Act: *Federal Liability Sword & Shield for social media companies*

A "sword" allowing them to *remove content* they deem inappropriate

A "shield" to *avoid liability for their discretionary decision as to what content to remove.*

Section 230 lets companies make their own decisions which content to leave up and what to take down *without fear of liability.*



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Twitter v. Taamneh
Gonzalez v. Google

These two 2023 US Supreme Court cases:

Protect internet companies from civil liability for wrongful death claims arising from content posted by users.

Google, Twitter *not liable* for *failure to remove terrorism-promoting attacks that were publicized and planned on their platforms.*

No liability even for online hate speech!!!

Liability for Moderation of Disinformation?

✓ US Rep. Greene's Twitter account was *permanently suspended* because she spread fake news claiming vaccines, not the Covid virus, killed people.

✓ Florida and Texas enacted statutes *barring social media companies from banning controversial posts*.

✓ *The appellate courts protected the platforms' absolute discretion to bar posts and blocking accounts.*

Problem: what happens when the social media companies do not choose to remove fake health and instead allow it to flourish????

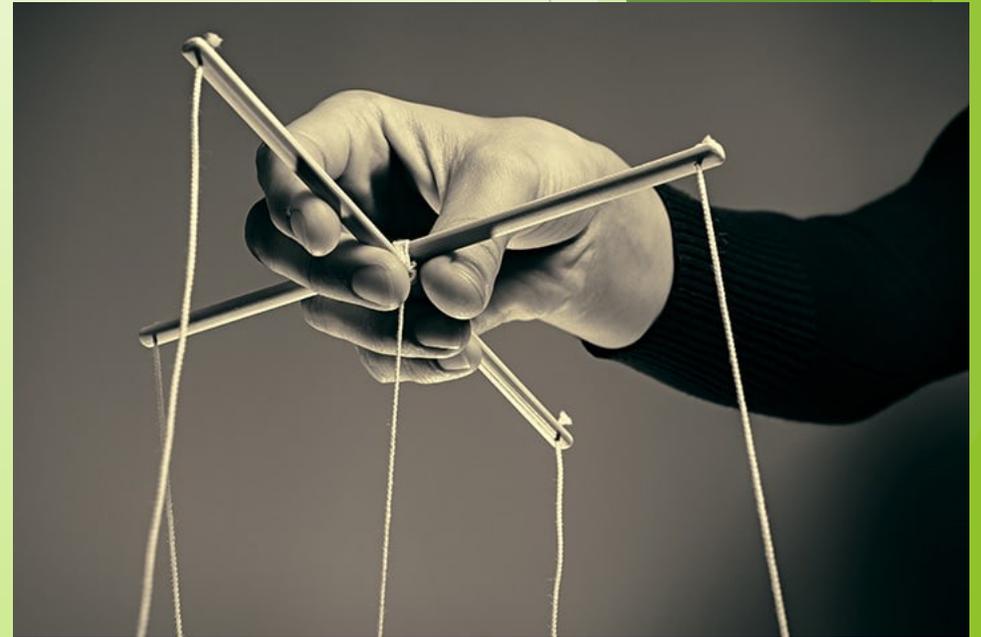


How far will the US Supreme Court go to limit government involvement in social media and fake news?

Murthy v. Missouri is a case pending before the US Supreme Court to *be decided before the end of June 2024*.

The suit claims the **Biden administration illegally pressured social media companies to censor conservative views.**

Time will soon tell!



Whether freedom of speech
is a right or a responsibility
is a fundamental difference in principles

U.S

Brazil and EU

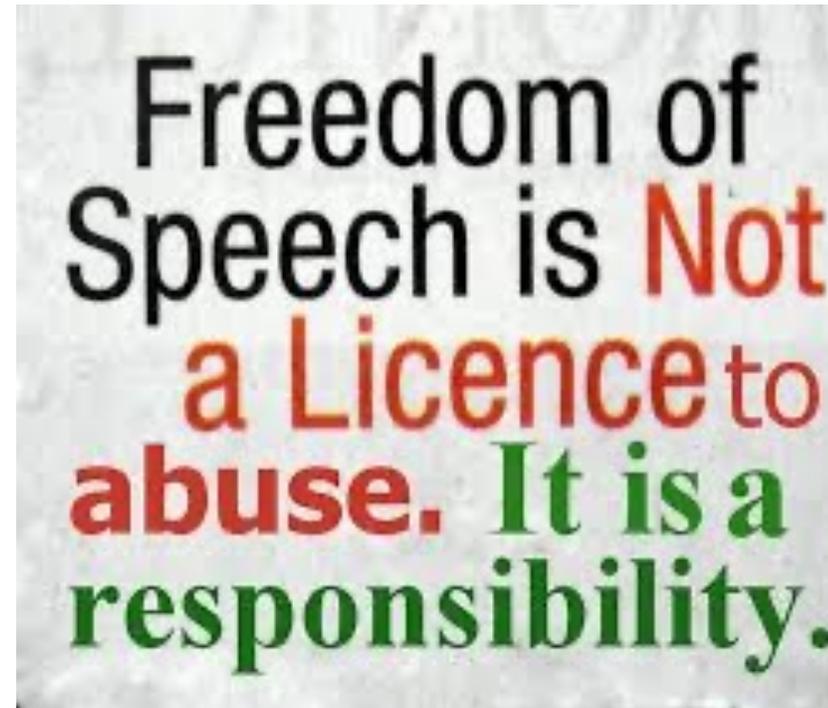
Freedom of Speech is a Right.

The US approach generally opposes content-based restrictions.



Freedom of Speech is a Responsibility.

Public interest is often the criterion upon which speech's lawfulness is evaluated.



Potential solutions?



*Other than laws,
Are there other solutions?*

**Doctors should only
be able to use AI
developed and
trained exclusively
on medical
databases.**



A Solution? Learn prompt engineering skills

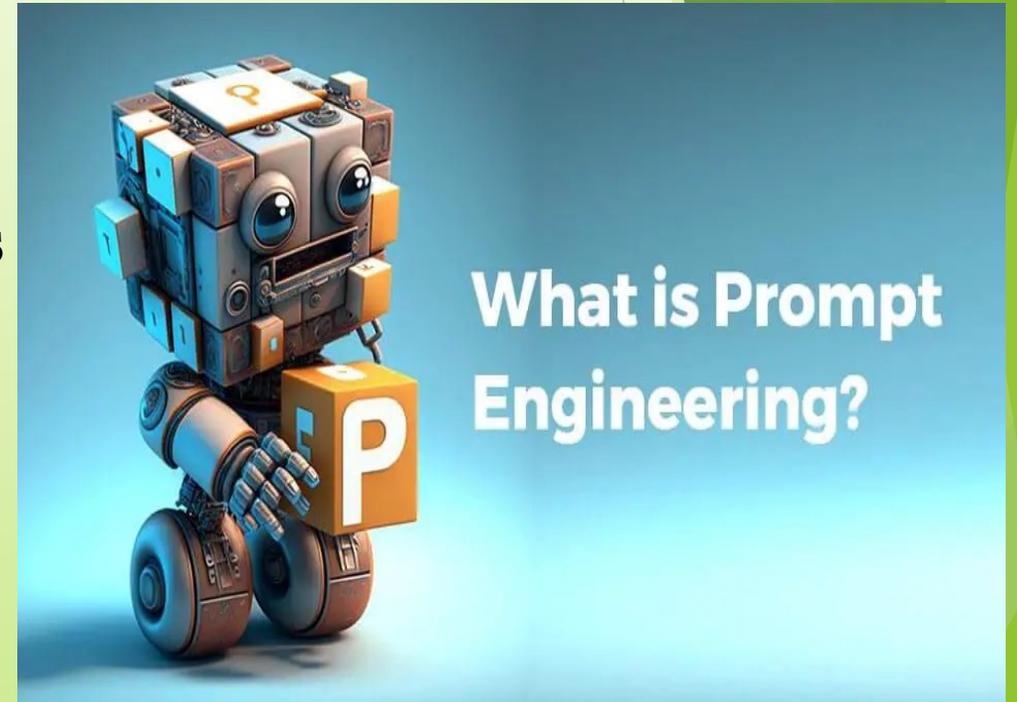
✓ An emerging essential skill for doctors (*and lawyers*) is to **master prompt engineering** in how to question AI and get more reliable answers.

✓ **Establish pre-set rules for all searches:**

- Request AI to tell you when it detects **fake information.**

- Instruct AI to tell you when it doesn't **know an answer** and *not* to make inferences without support in the data.

- **Require/check citations** for all queries



One Solution?

Let Technology “fight fire with fire”:
The same techniques used to create deepfakes can also detect them

For example,
“dynamic detection models” **keep pace with deepfakes ever changing methods of falsifying the media.**



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One solution?

Stay informed in this dynamic area of law that is struggling to keep up with the rapid pace of technology.



Questions?

