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An 'Existential' Shift? Technology and Some Questions for the Legal Profession

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ABSTRACT

Technology is changing the world in which we live and this includes the legal profession. This change has been remarked from many different standpoints. However, as technology is increasingly integrated into the fabric of legal practice, the very act of lawyering is likely to change and this will give rise to very important ethical questions.

KEYWORDS: Technology, legal professions, legal codes of conduct, existential change, legal ethics

A great deal has been written recently about the growing influence of technology on legal practice. [2] Those offering opinions can be segmented into a number of different groups. The 'pragmatists' look at the benefits of technology in helping those working in legal practice, especially with routine tasks such as discovery. [3] The 'evolutionists' point to the general development of technology and argue that legal practice does not exist in a bubble and that it is inevitable it will be affected by changes in technology. [4] The 'traditionalists' claim that legal practice is essentially human and that technology threatens work and the quality of legal services [5] There are other groups. All of them, to some degree, have a point – and, indeed, some have points in common.

Certainly, over the last two decades, there has been an increase in the range of technology that is available. [6] Tablets, smartphones, drones, three-

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[2] For example, read the speech given by the President of the Law Society, Jonathan Smithers, to the Union Internationale des Avocats (UIA) Conference: 'Lawyers replaced by robots: will artificial intelligence replace the judgement and independence of lawyers?', The Law Society, 30 October 2015, at http://www.lawsociety.org.uk/news/speeches/lawyers-replaced-by-robots-artificial-intelligence-replace-judgment/ (accessed on 16 September 2016)

[3] For instance, see Baron, Jason R. "Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search." *Rich. JL & Tech*. 17 (2011): p.9

[4] An example of this would be Yoon, Albert H. "The post-modern lawyer: Technology and the democratization of legal representation." *University of Toronto Law Journal* 66.4 (2016): 456-471

[5] See, for example, review at Lee, Kevin P. "Citizen Lawyer in the Coming Era: Technology is Changing the Practice of Law, but Legal Education Must Remain Committed to Humanistic Learning, The." *Ohio NUL Rev*. 40 (2013): pp.3-4

[6] Audirac, Ivonne. "Information technology and urban form: challenges to smart growth." *International Regional Science Review* 28.2 (2005): p.122

dimensional printers – day-to-day behaviours and customs have been transformed by affordable and accessible innovations. However, the change has certainly not been limited to just hardware. To use an analogy, for every driverless car that companies make, there is a super engine under the bonnet – and arguably, as impressive as the kit is, the driving force has been the software within it. [7] Computer programmers and software developers are the catalyst for much of the wide scale change that we are witnessing in the world today. Algorithms, for example, are slowly becoming the new lingua franca of a new, technological world, one that is interconnected at the blink of an eye.

The pragmatists, evolutionists and traditionalists may all look at this same phenomena from different standpoints, but what they have in common is that they all see change. [8] The likelihood is that technology will continue to shape the legal profession – and even more so in the future. This, of course, has a number of implications, for example, for legal education, for those who wish to access legal services and for the professions.

Another aspect of this is the potential for it to change the very perception of the legal profession. Hitherto, the take on the profession has largely been what I would, of course, term 'human-based'. Lawyers are human. Those who draft contracts are human. Those who assist in the buying and selling of houses are human. Those who prosecute cases are human. This is the assumption underlying various codes of conduct – human beings are rational, can reflect, act ethically etc. – and the codes require them to act with 'integrity' and in the 'best interests' of their lay client. [9] Some would argue it would be absurd to expect a machine to act in the same way! Until now, there have been no major challenges to the notion that the legal profession is, indeed, human. [10]

However, now another group can be introduced, the 'existentialists'. [11] Unlike the traditionalists, who focus on the impact that technology is likely to have on the make-up of the profession, the existentialists go further and contend that the legal profession 'is' changing. [12] The very act of lawyering is no longer mainly human. The human interaction and the technology are hand-in-hand.

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[7] Kitchin, Rob. "The real-time city? Big data and smart urbanism." *GeoJournal* 79.1 (2014): pp.13-14

[8] Surden, Harry. "Machine learning and law." *Wash. L. Rev.* 89 (2014): pp.87-88

[9] See, for example, 'The Core Duties' at The Bar Standards Board Handbook, 2ns Edition, 2015 at https://www.barstandardsboard.org.uk/media/1731225/bsb_handbook_sept_2015.pdf (accessed 16 September 2016), p.22

[10] See, for example, Matthew Kay, 'Robot lawyers: how humans can fight back', *The Times*, 26 May 2016 at http://www.thetimes.co.uk/article/robot-lawyers-how-human-ones-can-fight-back-8qmwqlfwx (accessed 16 September 2016).

[11] See, for example, Katz, Daniel Martin. "Quantitative Legal Prediction-or-How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry." *Emory LJ* 62 (2012) p.912

[12] McGinnis, John O., and Russell G. Pearce. "The great disruption: How machine intelligence will transform the role of lawyers in the delivery of legal services." *Fordham Law Review*, 82:6 (2014) P.3042

We are now in the era of the 'techno-lawyer'. [13] What 'hand-in-hand' actually means in this context, is very interesting – and will have massive regulatory ramifications in the future. [14] For example, when the Core Duties in the Bar Standard's Board Handbook say 'you must', how should 'you' be interpreted? Would it be open to a barrister to reasonably shift the blame for any ethical violation to the machine? Can a machine 'act in the best interests of each client', or indeed, 'act with honesty and integrity'? Will this require some re-writing of the ethical rules?

Moreover, suppose that client confidentiality is breached because of some technological malfunction: who would be held responsible for any loss? Should the human interaction and technology be seen as completely distinct, so that if any damage was to arise, the developer of the machine could potentially be held accountable? [15] At what point does technology become such an integral part of the very existence of the practice that it would be reasonable to hold the lawyer responsible? Further, does the pooling of client data in non-proprietary databases, held at arms-length from the firm, pose questions of confidentiality and legal privilege? When may redacted details of clients' cases be input into machine learning programmes to assist with future outcome prediction in similar cases? May firms input details of past cases into their own proprietary machine learning software to allow algorithms to be developed from the material they hold on file from historic cases? These ethical questions, and the apportionment of any liability and damages, are likely to vex lawyers, software developers, the professional bodies, insurance companies, the state and others in the future.

Technology is a part of our everyday life and it is not going away. If anything, its usage and modality is likely to increase. What is certain is that all four groups – and there may be more – pose important questions. Who should be liable if something goes wrong and the ethical codes are breached? Where should the locus of risk lie? What effect will technology have on legal training? What does it mean to be a lawyer? These questions that need to be considered, not simply from practical and legal education standpoints but from ethical ones too.

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[13] There is a website, Technolawyer, at http://www.technolawyer.com (accessed 16 September 2016) that provides advice on using technology in legal practice

[14] Alarie, Benjamin, Anthony Niblett, and Albert Yoon. "Law in the Future." *Available at SSRN* (2016) at https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=2787473 (accessed on 16 September 2016)

[15] Passmore, Crispin. "The Solicitors Regulation Authority: looking to the future." *Legal Ethics* 19.1 (2016): pp.148-149

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