

Disruption in Legal Practice

Erika Ly, NSW President of The Legal Forecast, discusses disruption in the legal practice, especially as a result of AI technology.

*"If I question the adequacy of legal practice, it is not to serve us individually as legal practitioners. It is to serve the profession so that it may better serve the ends of justice, for the furtherance of which all in our profession are commissioned."*¹

*"I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism...I trust that no one will understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind...But one may criticise even what one reveres."*²

Arriving on the waves of increased computational capacity, the legal profession is confronting something of an existential crisis with the emergence of artificial intelligence (AI) becoming a reality in legal practice. Since the 1980s, literature on AI and the law has focused on scholars addressing the technology from a largely regulatory perspective: dealing with issues of liability arising from expert systems;³ the prevention of discrimination and bias in automated systems;⁴ the tensions within big data and privacy;⁵ and machine ethics.⁶ For those few scholars writing on the legal profession, Macfarlane writes that legal practitioners may evolve into 'legal coaching roles'.⁷ Others such as Alarie, Niblett and Yoon observe that predictive analytics will not only have the capacity to tell us what the law is but can also inform us to what the law should be,⁸ and McGinnis and Pearce have warned that the 'great disruption'⁹ is imminent.

It is not my place to don the headdress of the futurist and divine where these

changes in artificial intelligence will lead. Instead, I hope to speak to you on a much more urgent and personal note. I hope to suggest problems and raise doubts, to disturb thought, rather than to resolve confusion. Whatever the more distant future holds, my present and much more deeply felt concern is this: "What does our own future look like in this rapidly changing profession in the next century? And are we doing enough to prepare legal practitioners entering the profession for the challenges of the future?"

As applied to law, predictive algorithms to an extent, embed what lawyers already intuitively do.¹⁰ That is, to code the ability to estimate the likelihood of legal outcomes and remedies available for clients. In areas of litigation, predictive technologies have already been able to outperform humans in e-discovery,¹¹ determining court decisions,¹² uncovering legal strategies and analysing types of arguments to win over specific judges,¹³ and to some success, predict likely winners of cases even before

trial.¹⁴ Lawyers generally create such assessments drawing from their technical expertise and knowledge of the law, reasoned judgement, training and intuition.¹⁵ While senior and expert lawyers have a heightened sense to make accurate predictions from their sharpened experience, it is a reality that no lawyer has complete knowledge of all the relevant data. This is where the promise of artificial intelligence reveals its potential and also from where many of the imaginatively threatening headlines draw their inspiration.

On comparing notes with now established practitioners, it strikes me as odd that my experiences progressing through law school today remain largely unchanged from those graduating a decade ago - especially in the context of this AI empowered landscape, notwithstanding the fact that academics have been reflecting on its use in the law since the 1980s. Moreover, it appears to me that the bulk of the profession and our educational institutions are

- 1 Marvin Frankel, 'The Search for Truth: An Umpireal View' (1975) 123 *University of Pennsylvania Law Review* 1031
- 2 Oliver Wendell Holmes, 'The Path of the Law', *Collected Legal Papers* (1920), pp 167, 194.
- 3 Janet Zeide and Jay Liebowitz, 'Using expert systems: the legal perspective' (1987) 108(8) *IEEE Expert* 19; Philipp Leith, 'The rise and fall of the legal expert system' *European Journal of Law and Technology* (2010) 1.
- 4 Laura Carmichael, Sophie Stalla-Bourdillon and Steffan Staab, 'Data Mining and Automated Discrimination: A Mixed Legal/Technical Perspective' (2016) 31(6) *IEEE Intelligent Systems* 51; Solon Barocas and Andrew Selbst, 'Big Data's Disparate Impact' (2016) 104(3) *California Law Review* 671.
- 5 Woodrow Hartzog et al, 'Inefficiently Automated Law Enforcement' (2015) 1(5) *Michigan State Law Review* 1763; Elizabeth Joh, 'The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing' (2016) 10(1) *Harvard Law & Policy Review* 15; Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Penguin Books, 2016).
- 6 Anthony Casey and Anthony Niblett, 'The Death of Rules and Standards' (2017) 92(5) *Indiana Law Review* 1401; Burkhard Schafer et al, 'A fourth law of robotics? Copyright and the law and ethics of machine co-production' (2015) 23(3) *Artificial Intelligence and The Law* 217.
- 7 Julie Macfarlane, 'The New Lawyer: How Clients Are Transforming the Practice of Law' (University of British Columbia Press, 2017) 120.
- 8 Benjamin Alarie, Anthony Niblett and Albert Yoon, 'How artificial intelligence will affect the practice of law' (2018) 68(1) *University of Toronto Law Journal* 106, 5.
- 9 John McGinnis and Russell Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services' (2014) 82 *Fordham Law Review* 3041
- 10 Harry Surden, 'Machine learning and law' (2014) 89 *Washington Law Review* 87, 103-104.
- 11 *Da Silva Moore v Publicis Groupe*, 287 FRD 182 (SD NY, 2012); *Rio Tinto Plc v Vale SA*, 306 FRD 125 (SD NY, 2015); *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch).
- 12 Daniel Katz, Michael Bommarito and Josh Blackman, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States', (2017) 12(4) *PLoS ONE* 1; see also Theodore Ruger et al, 'The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision Making' (2004) 104 *Columbia Law Review* 1150.
- 13 Lex Machina, *What We Do* <<https://lexmachina.com/what-we-do>>.
- 14 Premonition, *Legal Analytics* <https://premonition.ai/legal_analytics/>.
- 15 Surden, above n 10, 102.

dismissive of or simply ignoring these broader technological changes in the hope that they will leave the legal profession untouched. While there are exceptions and certainly pockets of excellence to develop this area, much more awareness needs to be driven across the whole profession.

After we hear the diagnoses of futurists and technologists, it is not unnatural to ask two broader questions: "Can anyone really predict the future? Can anything be done about it anyway?"

The first question is easily dispensed with. Future forecasting is, in one characterisation, a series of thoughtful hunches reflecting global trends at best. The exercise takes into account the multiplier effect of all areas across society and examines their total sum impact. Its true value however, lies in providing us a reference point to cast our gaze ahead. The art of the long view alerts us to the changes occurring at a grand scale and provides context for the role that we might have as individual lawyers within society. Importantly, it shifts our perspective from the here and now, to what may be.

As to the second question, I have come to believe that the answer is affirmative. We live in a time when innovator-entrepreneurs are not only building brilliant new enterprises but are swiftly changing the expectations of what society demands from technology. Especially given the speed at which information travels, deep and rapid changes of markets are possible, and so too are significant changes to social norms. In such circumstances, our role as lawyers and law students in this exercise is to be responsive to our social and technological fabric, to look at where the future may lead, and work (with others) towards building our preferred vision of it which embeds our expertise, training and knowledge of the law as well as its foundational principles.

The ways in which artificial intelligence and more broadly,

technology, can and ought to be applied in the legal profession are fruitful topics for wide discussion. Yet as we have observed in recent years, it is often the case that creators of such applications and programs have vastly different priorities and concerns from those that we, as lawyers would have. They have done so at the risk of throwing ethics, and in recent cases, democracy out the door. This is a much greater concern when it comes to legal applications. While there is great potential in combining vast volumes of private client data with public judicial and legislative records, for example, to leverage strategic business advice and legal counsel,¹⁶ when you create the ship - you also create the shipwreck.

Critically (albeit, dangerously) - as Lessig's famous thesis postulates - code can become law.¹⁷ Taken further, predictive technologies may create a scenario where ex post adjudication evolves into ex ante regulation.¹⁸ While Justice Oliver Wendell Holmes was not speaking with AI in mind, he once defined law to be: "prophecies of what the courts will do in fact." While the limitations of biased code and data have been discussed by scholars and commentators extensively,¹⁹ it is crucial to keep lawyers front and centre, especially in the creation of legal applications relying on artificial intelligence.

What will be uncomfortable is for those in our profession to work with 'non-lawyers'²⁰ and to be proactive in engaging on projects that may be perceived as antithetical to our immediate billable interests and often with outcomes that may very well cannibalise the way that we currently practise law. Such a direct plug into another discipline can be awkward but requires acting in the interests of long-term thinking of the legal system and its function as a whole. "Technologies focused on human outcomes," as Carroll writes, requires "the inclusion of people in the processes of developing, implementing, and

regulating technology, directly and through agents under their control."²¹ If we intend to maintain or attempt to enhance our ability to practise law, we must be confident in working with interdisciplinary teams and constantly assessing and modifying the ways in which we perform our role as lawyers.

Even as technology marches on, I am optimistic that the essential functions of lawyering remain. Embedded here are the tasks of creating social order, safeguarding relationships, increasing access to justice, upholding bargains, and advocating client interests -- no matter what the format. We are still close enough in this current wave of legal technology expansion to look at the history of the present to interpret it with first-hand experience. Our contribution in actively creating the legal technology systems of the future is important as well as practical. As the rapid transformation of the legal industry unfolds in its transformation, perhaps it is our role - if not obligation - to also narrate it and safeguard its future.

I have no doubt that we will find that opportunities abound if we choose to look, and that there will be no shortage of not only intellectual challenges but also moral and ethical ones. We must be sure not to let them slip away. As lawyers, our imperial confidence in the law and the vital role that we serve demands us to engage with the world around us. In working towards our preferred vision of the legal profession, we must be attentive, self-aware and conscious of the water in which we are immersed. In the absence of deliberate choice, the alternative is unconsciousness, a passive default and autonomous setting -- which may very well be a stroke of bad luck not only for our profession and our clients, but the whole of society as well.

Erika Ly is an LLB student at The University of Sydney, she is also the NSW President of The Legal Forecast.

16 Joe Daysart, 'The dawn of Big Data' (2013) 99(5) ABA Journal, 42-45, 47; Alex Smith, 'Big Data Technology, Evolving Knowledge Skills and Emerging Roles' (2016) 16(4) *Legal Information Management* 219.

17 See generally, Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books: 1999).

18 Benjamin Alarie, Anthony Niblett and Albert Yoon, 'How artificial intelligence will affect the practice of law' (2018) 68(1) *University of Toronto Law Journal* 106, 5.

19 Linda Skitka, Kathleen Mosier and Mark Burdick, 'Does automation bias decision-making?' (1999) 51 *International Journal Human Computer Studies* 991; Juliane Reichenbach, Linda Onnasch and Dietrich Manzey, 'Misuse of Automation: The Impact of System Experience on Complacency and Automation Bias in Interaction with Automated Aids' (2010) 54(4) *Proceedings of the Human Factors and Ergonomics Society Annual Meeting* 374.

20 a term that this author loathes.

21 James D Carroll, "Participatory Technology," *Science* 171 (February 19, 1971) pp 647-653.