



Will the increasing use of technology in law invigorate or diminish legal professionalism as the nature of information in the Digital Society changes?

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“Law involves using information to control behaviour, challenges to existing legal processes can be expected to occur [...] when information is used differently.”

The Electronic Media and the Transformation of Law (Katsh)

(I) EXECUTIVE SUMMARY

The ability to control information in the Digital Age is power as the nature of how information is shared and controlled transforms.¹ In order to assert that the increasing use of technology in providing legal services poses a threat to the ‘legal profession’, first, I will briefly discuss the claim to exclusive authority over information that the profession has. An appreciation of the way it is perceived in society is important to aid our understanding of why the increasing use of information technology is a positive turning point for what I define as ‘legal professionalism re-aligned as a public good.’ I will then demonstrate that the nature of information changing affects the profession’s traditional role and authority as the ‘gatekeepers’ that control legal expertise and this in turn threatens ‘legal professionals.’

I will then explore the consequences of the recent trend in big law firms in particular becoming increasingly business-orientated and commercial in their structure. Although, it is not an issue for law firms to be managed and organized efficiently, an increasing emphasis on firms being commercial entities that focus on big businesses threatens the idea of legal professionalism as a public good through limiting access and increasing costs. I will demonstrate that the increasing use of technology will serve as a catalyst by rejuvenating the way in which such ‘legal professionals’ have come to view themselves. As the material on this subject is vast this discussion undertakes a historical analysis of these developments and is intentionally narrowed towards the effects of technology on information rather than the various

¹ 'Fuel of The Future' [2017] *The Economist*, May 6th 2017

technologies themselves, and towards big law firms rather than the whole industry in general e.g. the effect that technology may have on barristers.

(II) THE QUESTION PRESENTED

Will the increasing use of technology in law invigorate or diminish legal professionalism as the nature of information in the Digital Society changes?

(III) STATEMENT OF THE FACTS / CASE

Legal Professionalism and The Grand Bargain

Traditionally, Law has been viewed as the mechanism by which our values are defined, enforced and protected under what may be termed as the social contract.² This perception has further enabled legal professionals to control their work and the power in relationships with clients and society.³ In “*The Future of the Professions*” Richard and Daniel Susskind (*the Susskinds*) describe this as being one of the benefits of ‘*the Grand Bargain*’ that the professions have struck with society.⁴ This social contract functions as a way of acknowledging that due to “*their expertise, experience, and judgment*” such professionals are afforded “*independence, autonomy, rights of self-determination and...respect and status.*”⁵ In return, the professions serve the wellbeing of society at large under a commitment to “*preserve, refine and elaborate that knowledge and [those legal] skills to do good work, and [especially] where it has application to worldly problems, to perform it well for the benefit of others - to do Good*

² John Rawls, ‘*Legal Obligations and the Duty of Fair Play*’. In Law and Philosophy, S. Hook. (New York University Press 1964), 3-18

³ Maryam Kouchaki, ‘*Professionalism and Moral Behavior: Does a Professional Self-Conception Make One More Unethical?*’ (2013). Academy of Management Proceedings

⁴ Richard Susskind and Daniel Susskind, ‘*The Future of the Professions: How Technology Will Transform the Work of Human Experts*’, (Oxford University Press, 2015) Ch.1

⁵ *ibid.* p22

Works.”⁶ However, in recent years, large commercial law firms have dominated the economic footprint of the modern legal profession.⁷ As the world has become more globalized, complex and regulated, law firms have grown to reflect their clients by taking advantage of economies of scale and scope to keep up with the growing demand for corporate legal services.⁸ Various firms’ websites and rhetoric, and the continuing emphasis placed on graduate applicants of understanding the importance of having commercial awareness, indicate an increasing perception of the legal profession forsaking their roots by viewing a career in law more as a business rather than a calling which is undertaken for the public good. Such an increasing emphasis on commercialization redefines how lawyers view their work and conduct and this can threaten the idea of legal professionalism as a public good. The “*mystique, power and income*” of the legal profession has depended on the public acceptance of lawyers being exclusive controllers and providers of legal expertise, therefore scrutinizing the profession that concerns itself with justice and the idea of the rule of law is vital when the actions of a portion of the profession potentially limit access to such expertise.⁹ Here, the process of professionalization seems to have been nothing more than an exercise or process that has enabled scarce resources, in this case legal knowledge or expertise, to be translated into a venture that produces socio-economic rewards rather than justice.¹⁰ The concept of ‘legal professionalism’ only recovers substance and utility under the ‘Grand Bargain’ if it is re-aligned to a lawyer’s understanding of the legal profession’s role within society as being exercised in service to the public rather than a purely economic venture. The increasing use of

⁶ Eliot Freidson, *Professionalism Reborn* (University of Chicago Press 1994) 2002 210

⁷ R. Moorhead and S Vaughan, *The Business of Law*, forthcoming

⁸ Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System* (2000). Michigan Law Review, Vol.98, No.4

⁹ Ethan M. Katsh, *The Electronic Media and The Transformation of Law* (Oxford University Press, 1989) Ch5

¹⁰ Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977)

technology facilitates in a re-alignment by re-defining this social contract for the Digital Age in a defensible way and it slowly dismantles the high-profit pyramid structure that has thrived with the non-digital society.

(IV) THE ARGUMENT

From Atoms to Bits

In 1989, Professor Katsh suggested that the development of the legal profession had always been facilitated by technology and this enabled society to form an opinion about legal professionals.¹¹ This was primarily achieved through the development of print since “*the nature of legal literature, [often] reflect[ed] the nature of legal practice.*”¹² Prior to the invention of the Gutenberg press in the 15th century, information (or expertise) was shared orally and writing was considered a specialist task.¹³ The idea of the ‘legal professional’ only fully developed as a growing literate group of people who were able to control and understand this information increasingly recorded their work through writing. It resulted in the nature of legal literature and work changing qualitatively and quantitatively as it shaped the public perception of the profession and those involved in its formation.¹⁴ Consequently, the legal profession was ‘invigorated’ as the form in which legal expertise or knowledge appeared had changed. Technological advancement in this form allowed a common and unified identity for legal practitioners to develop where they were able to create and control the information and understand the same complex language which was segregated to them.¹⁵ In this way the professionalization of lawyers was ‘invigorated’ by the recording and communication of

¹¹ Katsh (n9) Ch5

¹² *ibid.* 206

¹³ *ibid.* 206

¹⁴ *ibid.* 213

¹⁵ *ibid.* 218

information through the printing press as they were able to create and capture a body of knowledge, that ordinary laymen were unable to master or learn.¹⁶ Technology in this form served as a catalyst for the ability to harness and organize both the information and the people required to establish a profession.

Until recently we were in the post industrial era where value was traditionally seen as residing in physical objects such as land or goods produced. In 1995, Professor Negroponte described and visualized how digitization would change the future of our economic and social structures.¹⁷ He argued that we were moving from an ‘atomic world’ where value was placed in atoms (the physical) to living in a ‘digital world’ where the value was contained in bits. He captured the idea that there was a ‘movement in value’ from the physical to the informational. Value was no longer a matter of what we own (bricks and mortar) but in what we knew in the ‘Information Economy.’ For Negroponte, the digitisation of our world represented a shift from the ownership of things to the ownership and control of information being more important. It presented a new and revolutionary model to market, trade and deliver products or services. For legal knowledge and expertise, the emerging shift of value held in the physical, to value held in the digital means that the way in which legal professionals control expertise is being changed as they are slowly displaced from being the sole ‘gatekeepers’ of legal ‘information’ in the digital society.¹⁸ The Susskinds suggest that the four characteristics of information illustrate how the traditional model of the legal profession and their monopoly on expertise is under threat, arguing that a “*shift from a print based Industrial Society to a technology-based Internet Society is particularly transformative for the professions and the work they do.*”¹⁹ Professor Cate originally provided the four generic reasons for the growth of digital information and its

¹⁶ *ibid.* 205

¹⁷ Nicholas Negroponte, ‘*Being Digital*’ Knopf (1995)

¹⁸ Susskind (n4) Ch3

¹⁹ *ibid.* 189

management and how the law was going to have to change in order to reflect the growth of data.²⁰

Firstly, information unlike physical goods has a non-rivalrous nature which means it cannot be diminished like physical rivalrous goods, it doesn't necessarily 'run out' or disappear once it has been consumed or shared. Secondly, information has a tendency towards non-excludability meaning that it can be difficult to exclude non-payers from knowledge since it is difficult to contain.²¹ A clear illustration of this can be seen in the context of copyright and the fight against piracy. Thirdly, information has a cumulative nature. The more that you use information, the more valuable it becomes because by using knowledge, new and improved knowledge can be created. Lastly, in line with my earlier points, unlike physical goods, information can be digitized.²² This means that information in other words can be represented as 1's and 0's or to use the technical term, 'bits'. This process means that information can easily be collected, stored, reproduced and transmitted online.

These four characteristics are of great importance to the legal profession as it trades on information or in other words the special legal expertise that they lay a claim on. It is clear that how and who controls information is a consistent and important consideration for the control that professionals have over their work. However, new means of accessing information are being created which threaten this model of the legal profession that benefits from exclusivity and endures with the era of print. Even in 1989, Katsh observed that "*the current era of transition to electronic modes of communication*" was a part of "*a lengthy historical process of definition and redefinition of who and what lawyers are.*"²³ The development of a new mode of storing, processing and organizing information that employs novel principles, and processes

²⁰ Fred Cate, *Privacy in The Information Age*, Brookings Institution Press (1997) 14-16

²¹ *ibid.*

²² *ibid.* 192

²³ Katsh (n9) 202

bears a resemblance to the scene of when the press was invented - albeit in a modern context. Arguably, because the technology is more 'advanced' the position of legal professionals is truly threatened due to the fact that what is considered exclusively 'legal' and reserved for the profession is shifting as the control over information is diminished. Yet this will invigorate the way in which legal professionals currently operate. This in turn will force the profession to return to a model of legal service that is truly focused on the public good rather than simple commercial interests. The monopolistic control that the profession has enjoyed over legal expertise, or 'information', is slowly being diminished.

However, a distinction can be made. Although laypeople may now have greater access to legal knowledge, they may not possess the ability to interpret and act upon that information on the other hand. The internet and information technology may make legal information and services more accessible, however, they do not make the comprehension of them any easier. Moreover, the threats of technology in this way may be smaller than critics have suggested. Considering the library has always existed for the people, the only difference is that the library of information is now online. The understanding however is still held by the 'gatekeepers': legal professionals. It is therefore important to consider and evaluate what a move from print to electronic forms of communication entails for the practice of law and the role of lawyers in society in the short and long term.

The Effect of Technology on The Legal Profession

As demonstrated, the nature of information changing through technological advancements is diminishing the concept of the 'legal professional' but re-aligned for the benefit, of 'legal professionalism' as a public good. Firstly, the growing use of technology will change the existing methods of delivering and understanding expertise. This is essential for improving access to justice at an affordable cost. One of the biggest changes introduced in the

UK, which threatens the exclusive claim of legal expertise by the legal profession, was the Legal Services Act 2007 which permitted the creation of Alternative Business Structures (ABS). Although the introduction has been met with great skepticism, the reforms were introduced in order to encourage innovation and a new way of delivering services to clients by allowing non-lawyers to invest in and to own law firms. Opening up the market in this way is important as it responds to consumer demand for transparency and fixed prices for legal expertise. ABSs have enabled new participants to enter the market who are often seen as being prone to innovate and drive business away from traditional law firms by starting with the buyer. This is also seen as an answer to the “*more for less challenge*” i.e. the way in which the public and corporate clients purchase legal services has been changing as they become more focused on value.²⁴

However, ABSs may pose a threat through the increasing focus on the ‘consumer’ and ‘buyer’ rather than the ‘client’ of legal services. If in the course of making the market more competitive strict monitoring is not undertaken to ensure that such alternative models do still comply with the high ethical standards that are required of the profession, it may also hinder the idea of legal professionalism as a public good. However, the introduction of ABSs reflect the reality that increasingly, businesses choose different providers for the different issues they may face. The Susskinds argue that this reflects the unbundling of legal services in the market.²⁵ They argue that this will be facilitated through increasingly capable machines and systems which will replace the legal professional. They suggest that as machines and software become increasingly capable, e.g. being able to reason in the same manner as humans to respond to legal queries through technology, the need for lawyers will diminish as we see an eventual rise of new mediums for legal expertise to be delivered such as virtual law firms. Although it is

²⁴ Richard Susskind, *Tomorrow's Lawyers* (Oxford University Press 2013). Ch1

²⁵ Susskind, ‘The Future of the Professions’ (n4)

likely that such machines will displace only *some* legal professionals by outsourcing legal reasoning to machines, it will encourage access and lower costs. This doesn't necessarily diminish legal professionalism in its realignment as a service for the public good. Instead, it poses a threat which excludes those in the profession who are unable or unwilling to change or develop new specialist skills to fit this new environment and move away from the traditional. A coding of the law is likely to invigorate the provision of legal services rather than displacing the need for legal professionals entirely. Any technological system that is developed would still require legal experts who have the expertise to create and the ability to maintain the software's parameters.²⁶ Like the Law, software requires continual updates.

The increasing use of technology will benefit those lawyers who are able to articulately translate their expertise to digital systems. In order to produce effective software such as automated virtual systems, high quality legal writing and expertise will still be needed to ensure an accurate result is returned to users. Lawyers who market themselves as having the ability to understand software *and* legal knowledge are those who will benefit greatly. This would not only produce a new market but also an alternative avenue of sufficient profits being generated in this new environment and a market for legal expert system authors and engineers will inevitably grow. Moreover, reflecting on the concept of the 'social contract', any technology that aims to disrupt the provision of legal services would still need to be constructed by those who have the authority to interpret, reason and analyze the law: legal professionals. There is a danger of low quality or fraudulent scam websites appearing as the market for virtual online legal services grows. However, Johnson suggests that the "*accuracy and reliability of legal-expert system[s] [of] advice will likely be assured by the creation of interactive trust marks.*"²⁷ This means that electronic seals would guarantee the accuracy and reliability of online

²⁶ David Johnson, 'Serving Justice with Conversational Law' (Futurist Sep/Oct 2012), Vol. 46 Issue 5, 21

²⁷ *ibid.*

providers, whilst effectively monitoring fraudulent websites. By producing the code and granting encrypted digital seals, the profession would still be in control, regulate and maintain high standards of ethics and legal professionalism. This will be another important avenue through which legal professionals will assert dominance by controlling and regulating *who* can bear such seals of digital approval for example.

The increasing standardization and commoditization of legal services has been marked out as diminishing the work of legal professionals.²⁸ However, the relationship between the increasing use of technology and actual job displacement is nuanced and more complex than pessimists have suggested.²⁹ It is important to consider instead that the increasing use of technology tends to eliminate jobs rather than work and the distinction here is important.³⁰ Introducing more technological systems is likely to transform rather than eliminate jobs. There is a distinction between ‘task automation’ and ‘job automation’ since the automation of a task doesn’t necessarily translate into conclusions about occupations.³¹ In relation to the legal profession, this means that the increasing standardization and commoditization of legal tasks doesn’t necessarily translate as signaling the end of the legal profession. It is more likely that as certain tasks become increasingly automated, such as document assembly systems or software that carries out legal research, it will lead to the tasks currently performed by lawyers to be transformed and redefined. When we speak of automation it is usually in relation to these routine and repetitive tasks. At the highest level of complex legal work that requires specialist expertise, technology is more likely to augment than to diminish the need for human lawyers

²⁸ Susskind, *‘Tomorrow’s Lawyers’* (n24)

²⁹ (McKinsey & Company, 2015) <<http://www.mckinsey.com/business-functions/business-technology/our-insights/four-fundamentals-of-workplace-automation>>

³⁰ Harold R. Bowen (Chairman) *‘Report of the National Commission on Technology, Automation, and Economic Progress’* Volume I. Washington: U.S. Government Printing Office (1966)

³¹ McKinsey (n29)

and their input. It is more likely to amplify the value of the expertise and service provided by humans. Once freed up from standard tasks such as administrative work that can be automated, lawyers will be able to focus on work of higher value. *“The automation of lawyering tasks may address this latent market rather than replacing existing lawyer labor. Alternatively, it may push lawyers to serve this latent market as a means of finding new work.”*³² If lawyers are relieved due to the adoption of, or because the technology is able to address the needs of more consumers, this also means that the latent demand of the current 75% of civil legal need that goes unaddressed in the United Kingdom, for example, would also be met.³³

Furthermore, the need for creativity in searching for solutions and sensing emotions are difficult qualities to automate which lie at the core of human expertise and interaction. In relation to legal work David Autor contends: *“we know more than we can tell...some tasks cannot be substituted by computerization but generally are complemented by it.”*³⁴ The Susskinds appear to dismiss this point especially in relation to the idea that it may be difficult for machines to learn implicit or procedural knowledge that lawyers learn and know how to perform due to observation, reflection and practice. Despite this, they maintain that machines will still in the long term replace lawyers as Artificial Intelligence systems such as Watson become more developed.³⁵ However, it misses the point that there is great potential for the profession in the short term. Rather than simply being overrun by the threats of increasingly capable machines the profession can take advantage of the current limitations of such technologies and use this time to redefine themselves as they did through print in the 15th century.

³² Dana Remus and Frank Levy, *'Can Robots Be Lawyers? Computers, Lawyers, and The Practice of Law'* (2015) SSRN Electronic Journal.

³³ Ibid.

³⁴ David Autor, *'Polanyi's Paradox and The Shape of Employment Growth'* NBER Working Paper No. 20485 (2014)

³⁵ Susskind, (n4) Ch4

In the short term, there are many human activities that cannot be described formally, fully simulated or programmed. The main limitations of software are that it requires structure for a computer to be able to carry out a function. The programmer has to first fully understand the sequence themselves in order to write the programme that the computer follows. If programmers cannot programme the computer to simulate a process because they themselves do not explicitly understand it or know how to make it happen, then the computer cannot replace that task. Unless the legal profession is passive to this change they will not be diminished entirely like the Luddites of the 19th century who refused to accept the development of technology.

The legal profession will be forced to evolve in order to fully capture and control the process of change that is currently taking place. Most likely, it will be difficult to automate structured tasks such as monitoring junior lawyers or dealing with parties who are in breach as it requires unstructured human interactions of the kind that computers cannot currently replace.³⁶ Moreover, a distinction has to be made for example between legal writing and document drafting, the latter is more structured and can be automated easily. One only has to look at the growing number of online platforms that offer to undertake such structured tasks.³⁷ Contrastingly, legal writing is of a different nature as “*the articulation and explanation of an argument is the product of conceptual creativity and flexibility that computers cannot exhibit*” currently.³⁸ Experienced lawyers would still be needed initially to classify the sample of documents, to train and set the parameters of the software that operates these increasingly capable machines. Although the age of the ordinary worker is coming to an end as technology acquires skills and abilities at an extraordinary rate, an increasing reliance on automating tasks is likely to increase the demand and value of non-routine and interpersonal skills that a human

³⁶ Remus and Levy, (n32)

³⁷ *Such as:* 'Lawxero' (lawxero, 2017) <<http://www.lawxero.com/>> accessed 14 April 2017

³⁸ Remus and Levy, (n32)

lawyer can provide.³⁹ Clients will be more likely to value lawyers who can make assessments based on emotional intelligence and an understanding of their situation, goals and interests helped by technology.

Ultimately, in the context of this discussion the increasing use of technology will have a positive effect on legal professionalism as a public good. It is more likely in the short term that additional factors together with technology are what will inevitably change the legal profession as shown in a report by the Law Society.⁴⁰ A decline in the numbers of lawyers practicing independently or within firms and an increase in the number of lawyers employed by corporations and institutions will help to change the legal landscape.⁴¹ For example, between 2000 and 2012, the in-house solicitor population had doubled, and the majority of in-house solicitors (60 per cent) worked in the private sector, with many concentrated in the financial services sector. The report also outlined other key drivers of change other than technology that would change the legal services market, such as foreign emerging markets and investors. Further, national economic factors will impact the market considering the uncertainty that has been created regarding whether the United Kingdom remains a part of the European Union. Leaving the EU will affect the legal profession as the talent and client pool for UK based legal services will be diminished. Yet, other nations such as Russia do not rely on the EU to bring their cases there. The effects of this might be mitigated if technology and soft skills that only human interaction can provide were used in order to provide our legal expertise to markets beyond the UK.

³⁹ Erik Brynjolfsson and Andrew McAfee, 'The Second Machine Age' (W.W. Norton & Company, 2014).

⁴⁰ 'The Future of Legal Services' (Lawsociety.org.uk, 2017)

⁴¹ Richard Abel, 'The Decline of Professionalism' (1986) 49, Modern Law Review 1

Moreover, technology usually requires workers to learn new skills rather than eliminating professions entirely.⁴² Although 45% of work tasks could be automated by current technologies, in the near or medium term, few occupations will actually be automated.⁴³ Instead, the automation of certain tasks undertaken by lawyers does not pose a devastating threat when considering a central economic mechanism. By affecting the demands for labor, technology raises the value of the tasks that only valuable and efficient workers can uniquely supply. At the higher end of complex legal work, legal expertise provided normally by lawyers would be needed to help clients who having consulted a virtual system, still need assurance and assistance in interpreting the results to their case. Technology will serve to complement legal work by raising output and meeting the demand for legal services whilst also improving the inefficient costly structure that currently exists. Automation will increase the efficiency and demand for legal professionals that are more flexible, creative and better at problem solving. Increasing efficiency means that lawyers will be able to focus on these tasks and provide human interaction of value. Further to this, reducing the barriers to access by embracing ABSs for example and adopting new technologies encourages a competitive market for services to be established by dismantling the power of the traditional ‘gatekeepers’ of expertise. However, this market competitiveness would need to be observed to ensure that rather than simply being an alternative and lucrative commercial enterprise, it does not deviate away from legal professionalism as a public good.

(V) Conclusion.

⁴² J Bessen, *How Computer Automation Affects Occupations: Technology, Jobs, and Skills*, (2015) Boston University, School of Law, Law & Economics Research Paper No. 15-92

⁴³ Chui M, Manyika J and Miremadi M, *Four Fundamentals of Workplace Automation* (McKinsey & Company, 2015) <<http://www.mckinsey.com/business-functions/business-technology/our-insights/four-fundamentals-of-workplace-automation>>

Ultimately, technological changes bring about a positive effect for ‘legal professionalism’ firmly realigned as a public good. ‘Increasingly capable systems’ are currently limited as designing and defining the parameters, interpreting the results, advising clients who might still want human interaction still requires lawyers who have expertise. There is opportunity in this period for the profession to redefine their work. Conversely, in the long term, increasingly capable technologies are more likely to trim the size of the profession as they are removed by new entrants as the *exclusive* ‘gatekeepers’ of legal expertise. However, it will ensure that the concept of legal professionalism remains as a public good through improving access and costs for clients.

The important determining factor on what the impact of technology will be is whether the legal profession actively addresses and regulates these changes. Although it is estimated that 13% of all legal work might fall prey to automation, such change will be gradual particularly given that much of the work that lawyers do still requires human interaction that clients might still favor over software. Rather than completely diminishing the legal profession, new technologies will eventually adjust the way in which we train and invest in human capital so that we are complemented rather than substituted for by technology. More importantly, it will aid in realigning the concept of legal professionalism as a public good and not simply a lucrative business and career option.

A change in the makeup of legal professionals doesn’t necessarily mean that the concept of legal professionalism is being diminished. In the same way that the printing press revolutionized legal practice, the increasing use of technology does not diminish the legal profession where it actively develops, adapts and harnesses technology in order to once again define and set the parameters of what legal professionalism as a public good entails in the Digital Age.