CHANGING ALL THE TIME: AI'S IMPACT ON HUMANITY'S ROLE IN COMMON LAW DEVELOPMENT AND INTERPRETATION

Sam Bates Norum[*]

ABSTRACT

There is an AI boom happening right now and, with it, a boom of legal scholarship concerning its impact on the legal profession. Most of this scholarship narrows in on balancing the efficiency gains with the ethical considerations. This Note takes a different tact and considers how vigorous adoption of generative AI engines like ChatGPT might impact the continued development of the common law. It goes deeper than the practical applications or superficial changes that might accompany such tools and weighs the threat AI might forever sever humanity's connection to the law, ceding control of its development to these complex algorithms.

The legal profession cannot rely on private companies to consider this important aspect, nor can it rely on the slothful legislature to spring into action. Lawyers, jurists, and scholars carry a responsibility to maintain the human connection—or at least be mindful of it in their practice. It is no longer something taken for granted. This Note, which stretches into metaphysical understanding of our connection to the common law and the effects legal interpretation has on both the present and past, might serve as a launching point for scholarly discussion of humanity and the law in the face of the AI revolution. This Note proposes a modest starting point: amending our codes of professional responsibility to place that human connection at the moral and ethical center of our field. This Note does not claim to have the perfect fix, but it serves as an urgent call to act fast and act soon.

[*] J.D., Boston University 2024. For his guidance and honest feedback, I thank Professor Rory Van Loo. For encouraging the development and submission of this Note, I thank Elle Kathcart and Keenan Hunt-Stone, and many others on the *Boston University Law Review*. For their work on the various aspects of this Note, I thank Catherine MacCarthy, Deepa Patil, Caroline Grady, Alexis O'Hanlon, Karolyn Ranero, and David Chairez. Finally, I thank my mom, Jenni Norum, her example as a brilliant writer; my father, Chris Bates, for his tireless work as the family proofreader and critic; my brother, Cole Norum, for being a constant role model in writing and in life; and my partner, Lily Noonan, who met all my harebrained ideas—including my decision to go to law school—with thoughtful enthusiasm.

CONTENTS

INTRODUCTION

Humans make the law. Laws are at the center of the ordered society humans maintain. Humans make the law and humans are the lawyers that help preserve that ordered society through the development and interpretation of the law. This has been the case in the Anglo-American common-law system for nigh on a millennium: humans make the law, grow the law, and change the law. But such are the times and circumstances that demand such base facts be put to word and defiantly declared in the face of an existential shift in the legal profession. The recent explosion of artificially intelligent systems that so closely resemble human reasoning threatens to sever humanity's intimate relationship with the development and interpretation of the common law. In short, humans may not make the law for much longer unless the legal profession acts quickly to preserve the human connection to the law.

This Note, therefore, is an invitation to speculate about the future—wildly if necessary. A reasoned analysis is forthcoming, but that is only a part of the puzzle when considering emerging technologies like artificial intelligence ("AI") and the impact they may have on industries and human life. It is necessary to reach beyond what seems feasible in the here and now and into the realm of wonder and imagination. Throughout history, these qualities drove innovation and often predated practical application by centuries. In his nineteenth-century novels, Jules Verne dared to imagine humanity's journey to the Moon[1] and the invention of electric submarines capable of years-long submersion[2]. Perhaps this is a "chicken and egg" proposition: Is Verne the prognosticator or the catalyst for these advancements? The difference might not be so consequential because, in their nascency, every advancement starts with an idea that, like a snowball rolling down a freshly coated hill, is continuously built upon—sometimes for centuries—before it reaches its ideal size and receives broad adoption.

The kind of wonder and imagination that Verne and other innovators possessed often nudged the snowball, starting its journey down the hill. Despite the snowball's diminutive size, that first rotation takes an eternity and gathers little snow, but the second packs on a little more. And so on. And so on. As it runs down, increasing in mass and speed, the now snow-boulder may come to rest where the hill levels, only for a stiff breeze to send it over a lip and down the next slope. It may hit a tree and burst into powdered fragments, each set on its own rolling journey. It may never stop—growing to an unstoppable size, careening out of control, and threatening all in its way. With some guidance, the snowball may find its ideal size and repose, no longer a threat. The AI snowball,

[1] *See* JULES VERNE, FROM EARTH TO THE MOON 28 (1865) ("Regarding the *first* question, 'Is it possible to transmit a projectile up to the moon?' *Answer*.—Yes . . . . [I]ts *success* must depend on the power of the engine employed.").

[2] *See* JULES VERNE, TWENTY THOUSAND LEAGUES UNDER THE SEA 71 (1870) ("'There is a powerful agent, obedient, rapid, easy, which conforms to every use, and reigns supreme on board my vessel. Everything is done by means of it. It lights it, warms it, and is the soul of my mechanical apparatus. This agent is electricity.' 'Electricity?' I cried in surprise.").

both generally and within the legal profession, recently completed its first revolution and is quickly gaining speed.

AI is already integrated into the daily life of the practicing lawyer—from spam filters to analytic services from Westlaw, Lexis, and more. Recent advancements in artificially intelligent language and research models have the potential to upend legal practice. Many legal scholars and commentators have already explored the vast implications of AI, focused primarily on the ethical issues of AI's construction and implementation[3] and proposed regulations.[4] On the latter point, some scholars have considered how the common law might serve to regulate AI and how it fits into the long arch of the stare decisis system.[5] This Note aims to explore the inverse by investigating how, in a practice increasingly integrating with AI, the legal professional's relationship with the common law might change. This will include examining the potential paths and risks, as well as how the legal community might self-regulate its use of AI to carefully guide this newly formed snowball to a manageable size and prevent an avalanche of unintended harm. To do that, we must first understand how today's common law and the recent AI developments came to pass.

For centuries, AI of various sorts ensorcelled science-fiction scribes, engineers, and venture capitalists cosplaying as visionaries.[6] Since Ada Lovelace and Charles Babbage's plans for the first mechanical computer,[7] the idea of an accurate simulation of total human cognition has evolved from a novel concept to a widely accepted inevitability.[8] Even the most developed tools today

[3] *See* Axel Walz & Kay Firth-Butterfield, *Implementing Ethics into Artificial Intelligence: A Contribution, from A Legal Perspective, to the Development of an AI Governance Regime*, 18 DUKE L. & TECH. REV. 176, 224-26 (2019) (discussing challenges in implementing AI-governance system in part because of wide-ranging ethical concerns).

[4] *See* Rebekah Hanley, *Ethical Copying in the Artificial Intelligence Authorship Era: Promoting Client Interests and Enhancing Access to Justice*, 26 LEGAL WRITING 253, 265-69 (2022) (proposing several AI-related rules and comments to ABA Model Rules of Professional Conduct).

[5] *See* Mariano-Florentino Cuéllar, *A Common Law for the Age of Artificial Intelligence: Incremental Adjudication, Institutions, and Relational Non-arbitrariness*, 119 COLUM. L. REV. 1773, 1780-82 (2019) (arguing society "regulates" AI in part because common law "provides a kind of first-draft regulatory framework—however imperfect—for managing new technologies"); Jinting Deng, *Should the Common Law System Welcome Artificial Intelligence: A Case Study of China's Same-Type Case Reference System*, 3 GEO. L. TECH. REV. 223, 265-69 (2019) (explaining how machine decision making impacts stare decisis).

[6] *See* JEANETTE WINTERSON, 12 BYTES 1-6 (2021) (introducing twelve essays on history and future of human-AI relationship).

[7] *Id.* at 23-24 (describing Lovelace's footnotes on her translation of Italian paper on Babbage's lecture on his analytical machine).

[8] Charles Simon, *AGI Is Ready To Emerge (Along With the Risks It Will Bring)*, FORBES (July 27, 2022, 6:30 AM), https://www.forbes.com/sites/forbestechcouncil/2022/07/27/agi-is-ready-to-emerge-along-with-the-risks-it-will-bring ("[O]ne thing is certain: AGI is inevitable because people want its capabilities.").

are not "strong" AI.[9] These "weak" AI algorithms take human-created input, process them through a human-made program, and churn out an output focused on a single task.[10] Machine-learning algorithms are programmed to analyze data, learn how to perform a task by itself, and improve with each performance.[11] Machine learning is closer to "strong" AI but still relies on human-created input and falls under the category of Artificial Narrow Intelligence ("ANI").[12] "Strong" AI, also known as Artificial General Intelligence ("AGI"), takes input, absorbs it, reasons with it, creates new input, and comes to conclusions with human-level cognition.[13] It is a "multitasking, thinking entity that will eventually become autonomous—able to set its own goals and make its own decisions."[14] Humans are likely years from achieving AGI, but ANI systems are offering increasingly complex and human-like outputs that are starting to effectively mimic human thought processes.[15] In essence, these "weak" AI systems are getting stronger every day.

The legal profession already uses "weaker" ANI systems every day. From e-discovery technologies to Westlaw and Lexis research tools to the commonplace email spam filters, these relatively simple machine learning algorithms have already shifted the concentration of productivity in many legal sectors.[16] Much has been written on the integration of these weak systems, their possible benefits, and the negative implications of their wider adoption.[17] Courts in other countries have even experimented with such systems serving as judges for low-level

[9] Shannon Vallor & George Bekey, *Artificial Intelligence and the Ethics of Self-Learning Robots*, *in* ROBOT ETHICS 2.0: FROM AUTONOMOUS CARS TO ARTIFICIAL INTELLIGENCE 338, 339-40 (Patrick Lin, Ryan Jenkins & Keith Abney eds., 2017) ("'[S]trong' artificial intelligence with the full range of cognitive capacities typically possessed by humans, including self awareness [is] . . . *at best* a long-term prospect—not an emerging reality.").

[10] WINTERSON, *supra* note 6, at 121 (differentiating between "everyday AI" and AGI).

[11] Vallor & Bekey, *supra* note 9, at 340 (explaining process of machine learning).

[12] *What Is Artificial Intelligence?*, IBM, https://www.ibm.com/topics/artificial-intelligence [https://perma.cc/3LDM-MNGQ] (last visited Nov. 10, 2023) (differentiating ANI and AGI).

[13] *What Is Strong AI?*, IBM, https://www.ibm.com/cloud/learn/strong-ai [https://perma.cc/8B3V-W53R] (last visited Nov. 10, 2023) (providing industry definition of different types of AI).

[14] WINTERSON, *supra* note 6, at 121.

[15] *See* Vallor & Bekey, *supra* note 9, at 338 ("Recent advances in machine learning techniques have produced significant gains in the ability of artificial agents to perform or even excel in activities formerly thought to be the exclusive province of human intelligence, including abstract problem-solving, perceptual recognition, social interaction, and natural language use.").

[16] *Cf.* Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 88 (2014) (writing in era where AI lacked today's sophistication in handling automatable legal tasks, but still capturing useful concepts and technological developments).

[17] *See, e.g.*, *id.*; Bob Lambrechts, *May It Please the Algorithm*, 89 J. KAN. BAR. ASS'N 36, 37 (2020) (comparing ethical concerns of AI in military contexts with legal contexts).

traffic offenses.[18] One endeavoring organization tested its AI system's ability to predict the outcome of cases with high accuracy.[19] For the most part, these AI tools are examples of machine learning[20] that predate AI's banner year in 2022-2023, where systems like OpenAI's ChatGPT ushered in a new AI race between major tech firms like Google and Microsoft.[21] The eerily human-like ChatGPT, a powerful language-model chatbot, sparked debate after debate over its use in classrooms,[22] workplaces,[23] and courtrooms.[24] So far, the notion that an AI bot could serve as a lawyer representing clients in court has been soundly rejected, with one disruptive and traffic-ticket-burdened entrepreneur being threatened with jail time.[25] But can AI eventually transform what it means to be a lawyer or a judge? Will AI merely supplement or outright achieve all the basic legal reasoning and writing skills, leaving the human-attorney to worry about the more complex facets of trial work? These questions are crucial to consider when asking how this disruptive technology might integrate into a common law system nearly a millennium into its development.

American common law traces its roots to Middle Ages England, where it coexisted with other systems before emerging as the main jurisprudential through-line and being adopted as the United States's nascent legal system at the

[18] Eric Niiler, *Can AI Be a Fair Judge in Court? Estonia Thinks So*, WIRED (Mar. 25, 2019, 7:00 AM), https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/ [https://perma.cc/39WE-P84D] (describing Estonian project to design "robot judge" for claims less than €7,000).

[19] *AI Predicts Case Outcomes*, TRIAL, May 2017, at 8, 8 (briefly reporting on study in which AI correctly predicted case outcomes in seventy-nine percent of cases from European Court of Human Rights).

[20] *See infra* Part I (examining examples of machine learning).

[21] Cade Metz & Nico Grant, *Racing To Catch Up with ChatGPT, Google Plans Release of Its Own Chatbot*, N.Y. TIMES (Feb. 6, 2023,), https://www.nytimes.com/2023/02/06/technology/google-bard-ai-chatbot.html (describing Google initiative to develop and test AI to compete with ChatGPT).

[22] Kevin Roose, *How ChatGPT Kicked Off an A.I. Arms Race*, N.Y. TIMES (Feb. 3, 2023), https://www.nytimes.com/2023/02/03/technology/chatgpt-openai-artificial-intelligence.html ("[S]chool districts around the country . . . have banned ChatGPT to try to prevent a flood of A.I.-generated homework.").

[23] *Id.* (discussing businesses embracing ChatGPT and OpenAI CEO's hesitancy for businesses to rely on it "for anything important right now").

[24] Janus Rose, *A Judge Just Used ChatGPT To Make a Court Decision*, VICE (Feb. 3, 2023, 12:28 PM), https://www.vice.com/en/article/k7bdmv/judge-used-chatgpt-to-make-court-decision [https://perma.cc/7HTM-RGKU] (reporting on Cartagena judge who asked legal questions to ChatGPT and included its answers as his own in decision).

[25] Megan Cerullo, *AI-Powered "Robot" Lawyer Won't Argue in Court After Jail Threats*, CBS NEWS (Jan. 26, 2023, 1:08 PM), https://www.cbsnews.com/news/robot-lawyer-wont-argue-court-jail-threats-do-not-pay/ [https://perma.cc/X2DQ-XNUL] (reporting on DoNotPay CEO Joshua Browder's initiative to automate legal work with AI and his tweet postponing AI's in-court appearance).

nation's founding.[26] While a great deal has been displaced by codes and statutes as the American legal system has developed, the rationale behind common-law jurisprudence serves as the basis for interpreting those same codes and statutes.[27] Common law is in an always—albeit incredibly slowly—changing state. If AI is a snowball careening down a hill, the common law is a majestic Sequoia, slowly adding rings to its giant trunk. Primarily a product of stare decisis, where settled law flows from consistency and predictability in judicial opinions, the common law is also influenced by the shifting social and economic norms that can broaden or narrow interpretations over the generations.[28] As Justice Oliver Wendell Holmes said in his seminal lectures on the common law in 1881:

> The life of the law has not been logic: it has been experience. *The felt necessities of the time*, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[29]

But while Holmes described the factors driving the common law's constantly changing nature, he also discussed its reliance on historical rules and laws. Characterizing many legal rules as those borne of common sense, Holmes said others could "only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs."[30] With that assertion, Holmes hit on the paradoxical notion that the common law is simultaneously very old and very new. But as already mentioned, a great deal of the common law has been displaced by codes and statutes—especially in criminal law. So why worry about a system that has lost influence over the last 150 years? Because nearly every court in every jurisdiction still relies on the common law to interpret statutes, codes, and the U.S. Constitution—all of which

---

[26] *See generally* S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW (2003) (describing effects of ecclesiastical changes, Roman legal education, and jury on early common law); THOMAS J. MCSWEENEY, PRIESTS OF THE LAW 4-7 (2019) (describing interaction between Roman law, canon law, and common law in thirteenth-century England).

[27] *See* Numo Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1486-87 (2012) (explaining role of judicial interpretation in adaptability of code systems).

[28] Apt for the purposes of this Note is what Oliver Wendell Holmes said when discussing the role of history in interpreting the law:

> I shall use the history of our law so far as it is necessary to explain a conception or to interpret a rule, but no further. In doing so there are two errors equally to be avoided both by writer and reader. One is that of supposing, because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times.

OLIVER WENDELL HOLMES, THE COMMON LAW 2 (1881).

[29] *Id.* at 1 (emphasis added).

[30] *Id.* at 2. Perhaps the Decemvir commissions, set up to resolve conflict between aristocratic and plebeian edicts, will rise again to sort out AI versus Human jurisprudence in the future. Food for a future note.

shape core functions of society and the rule of law in America, including how the law applies to emerging technologies.[31] The common law remains the bedrock of the American legal system despite the lessening of its omnipresence and gravity. But because it moves incrementally, it can struggle to keep up with rapid developments elsewhere, needing to fit new ideas into old molds or rely on markedly slow-to-act legislatures to step in and set regulations.[32] Technological developments like AI are those disrupting forces that have the potential to impact the common law and all that it touches.

Technology progresses at an exponentially faster rate than changes in the common law. When the United States adopted the common law in 1789, the system had been growing and changing for six centuries. In less than a century and a half, the computer went from a mere concept to a first workable prototype to, without hyperbole, utter global domination. Today, computers and algorithms dictate large parts of our lives. Often, they do so silently in the background while we go about our day, scrolling on our phones and ceaselessly creating more and more data to feed back into the systems. As previously mentioned, these algorithms are already starting to appear in the global legal community. The legal world is slow to take up new technology or respond to new societal developments. There may soon be, if there is not already, an AI revolution seeing new technology introduced that is far outpacing any proposed regulation. While initial concerns will naturally gravitate to how AI will impact the legal profession in terms of ethics and productivity, it is worth considering the deeper impact AI will have on humanity's connection to the development of the common law and the threat to its role as a cohesive societal force.

Part I provides a background on the development of the common law and the effects of its interpretation, as well as a primer on AI and attempts to synthesize its recent, massive development. Part II explores the ways AI has impacted, is impacting, and might impact the legal profession and the enforcement, interpretation, and development of the common law moving forward, as well as the benefits and implications that may arise. Part III will analyze some of those issues and look at potential paths for responsible regulation and frameworks that the legal profession should undertake to preserve humanity's inherent

[31] *See* Cuéllar, *supra* note 5, at 1780.

> In a market economy with our historical tradition, the common law is the default framework for making sense of social and economic interaction. Its conventions have informed, and indeed predated, the rise of the modern administrative state. The common law's influence is therefore powerful not only in its direct consequences for discrete transactions, such as the buying or selling of land, but in the ideas it's buttressed about who owes what to whom and for what reason—what duty of care, for example, two people owe each other, and thus what features of social life call for some judge-made or administrative remedy. Which means that in some sense, the pervasive common law backstop to social life provides a kind of first-draft regulatory framework—however imperfect—for managing new technologies ranging from aviation to email.

Id. (footnotes omitted)).

[32] *Id.* at 1780-81 (discussing how AI is already regulated through common-law practice).

connection to the construction, interpretation, and future of the common law—and by extension the entire American legal system.

I. COMMON LAW'S LONG MARCH AND AI'S QUICK SPRINT

This Section does not purport to be a comprehensive history of the common law or AI development. It merely serves to contextualize the development and modern thought around the common law and AI, as well as provide a foundation for later sections.[33] To effectively discuss the impending impact of AI on the common law, it is crucial to somewhat define and give shape to the unwieldy and amorphous concept of common law jurisprudence. Much like how modern interpretations of its rules are formed today, this Note's definition of the common law draws from its historical development and contemporary perspectives.

This Section also attempts to capture the meta-effects that modern interpretations have on the nature of common law's development. This examination is important to give weight and scope to AI's potential practical and historical impact on common law interpretation and what sort of power might be ceded to these technological tools. This complex discussion of America's jurisprudential bedrock is followed by a comparatively simple hashing of AI's linear development from its first conceptualization to its potentially transformative position today.

A. *Common Law and Its Development*

It is easy, and often what students are taught to believe in introductory law school courses,[34] to view the development of the common law as a linear march from its origins in Medieval England through the Enlightenment, the Constitutional Convention, and right up through the writing of this sentence—all progressing to the predictable doctrine that lays the basis for American law. However, there are manifold and scattered understandings of what the common law encompasses.[35] Sidestepping a granular parsing of what is and what is not common law, it is necessary to first lay out a definition that broadly captures the current understanding. Common law, solely for this Note, is judge-made law

[33] For deeper analysis and dissection of scholarly takes on the origins, development, and potential demise of the common law, see MILSOM, *supra* note 26 (detailing development of English common law); MCSWEENEY, *supra* note 26 (examining development of legal professionalism in early English common law); J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351 (2019) (arguing common law has been subordinated to vast body of statutes, court rules, and regulations).

[34] *See* Entrikin, *supra* note 33, at 357-58 (criticizing emphasis on common law in law school curricula).

[35] Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 LAW LIBR. J. 13, 13 (1989) ("Since the concept of the common law is multifaceted, encompassing a variety of meanings, the literature that surrounds it reflects a wide range of approaches and themes. So diverse is this literature that one is often initially uncertain as to the thrust of a particular author's discussion of the common law.").

concerning the "legal rights, duties, powers, prohibitions, and remedies derived exclusively from published caselaw — decisions of common law courts in the United States and England."[36] This definition appears in Professor J. Lyn Entrikin's article, *The Death of Common Law*, advocating for legal pedagogy to come to grips with its demise brought about by its usurpation by statutes and regulatory codification.[37] Even though the article describes and advocates for common law's diminution in import, its definition succinctly encapsulates the basics of common law's origins and scope.[38] Although Professor Entrikin correctly points out that the common law is no longer the sole or even primary source of most American law[39]—especially with the advent of legislature-created criminal codes—the common law still plays a crucial, albeit diminished, role in shaping judicial interpretations of those codes and statutes as well as the Constitution.[40] Diving deeper, Professor Entrikin highlights the main attributes of common-law tradition as the binding force of stare decisis and the inductive legal reasoning "based on case-by-case synthesis and evolution of legal rules."[41] That reliance on judge-made law to create predictable and settled rules gives the impression of a linearly developed institution slow to change. It calls to mind that carefully guided snowball, controlled in its descent down the mountain and slowly gaining mass. At times, it can even feel like an immovable boulder destined to remain in situ without some legislative dynamite primed to displace it. But, as with most things, the reality is not so straightforward.

Under the all-powerful precedent, the law in any given common-law court is only as good as its most recent ruling, which is only as good as the ruling before

[36] *See* Entrikin, *supra* note 33, at 363. This article is helpful for putting scope and boundaries to the amorphous "common law" concept, but the overall assertion that the common law is now a waste of pedagogical effort does not comport with this Note's purpose to bring attention to the potential loss of humanity's connection to legal developments.

[37] *Id.*

[38] *Id.*

[39] *See id.* at 448-50 ("In the twenty-first century, the primacy of enacted law as the controlling source of legal authority in the United States stands in stark contrast to the nineteenth century, when judicial decisions took center stage as the primary source of law.").

[40] *See* Cohen, *supra* note 35, at 13 (noting high scholarly import of common law in legal profession); *see also* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 104 (2018) (finding, in empirical study, common law ranks among strongest and most oft used statutory canons in Roberts's Court). *But see* Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 37 (2007) ("Indeed, even the traditional canon of statutory interpretation calling for legislation to be interpreted in a manner consistent with the common law has 'eroded in the modern regulatory state, where statutes are the rule and common law the exception.'" (quoting WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 921 (3d ed. 2001))).

[41] Entrikin, *supra* note 33, at 437.

that.[42] This has the effect of making the law stable and predictable—desirable qualities in maintaining societal order.[43] But while the common law looks to the past for guidance, it also looks to the present and hypothetical future to consider if broadening or narrowing its scope to include or exclude a new situation or relationship is appropriate considering recent societal changes and legal developments—what Holmes called the "felt necessities of the time."[44] It stands to reason, and is no stunning revelation, that each subsequent opinion affects the overall composition—even if the change is infinitesimal—of the common law. But the nature of the process leading to common law's compositional changes is important to discuss when considering the potential introduction of AI into that process. While undoubtedly there is comfort in common law's forward linear march, we have seen recently in Justice Samuel Alito's opinion in *Dobbs v. Jackson Women's Health Organization*[45] that what is long understood to be firmly within the common law's penumbras can quickly change to give historical heft and institutional credibility to a sudden reversal of an established constitutional interpretation.[46]

If anything, the upending of one Supreme Court's interpretation of common-law precedent ought to shake us loose from the belief of linear common law development. Instead, we can start to understand common law not as a straight line moving forward in time, but instead as many multi-directional lines forming a chiasmic patchwork of jurisprudential thought. In other terms, the common law is the intersection of the forward-marching line of history and the backward-looking lines of modern interpretation of that history—with all the "felt necessities of the time" exerting their influence—molding any given rule to the "ideal" outcome while draping it in the trappings of stare decisis.[47] Thus, each new addition to the caselaw isn't the product of a judge tracing that single linear progression to reach a conclusion, but the judge reaching back to one of those intersections and pinpointing that desired balance of historicity and modern

[42] *See id.* at 356 ("Judge-made law develops incrementally over time on a case-by-case basis, offering the time-tested advantages of stability and predictability. On the other hand, the slow pace of common law evolution is ill-suited for the rapidly developing technological world of the twenty-first century and its novel legal issues that demand immediate resolution.").

[43] Cross, *supra* note 40, at 38 (noting stare decisis system is desirable for its stability).

[44] HOLMES, *supra* note 28, at 1; *see also* Deng, *supra* note 5, at 270 ("[A] common law judge has the mission, authority, motivation, and competence to pursue consistency among enacted or precedential legal rules and social values by incrementally modifying laws, case-by-case, with the effect of weaving past and future laws into a seamless web.").

[45] 142 S. Ct. 2228, 2267 (2022) (overturning fifty-year-old precedent by reversing Court's interpretation of what common law rights were contemplated by Constitution and its amendments).

[46] *See* Cross, *supra* note 40, at 39-40 (describing incremental development of common law through "hierarchy of justice" while acknowledging precedents can be "readily distinguished away or even ignored when they are inconvenient" and noting study finding Supreme Court Justices seldom followed precedence with which they disagreed).

[47] HOLMES, *supra* note 28, at 1.

influence. This necessarily requires the jurist to investigate the development of the rule through their current historiographical lens, which itself is unavoidably influenced by the "felt necessities of the time" present when the judge is making the ruling.[48] Another attribute of rulings that authoritatively state how the law existed in the past has the effect of *changing the past*—at least in the eyes of the newly set precedent.

In short, the common law isn't progressing linearly over time, but rather constantly changing simultaneously in the past and the present, adding more intersecting points to the patchwork. This conceptualization of the common law squares with Lord Mansfield's (later made famous by Sir William Blackstone) maxim that the common law "works itself pure by rules drawn from the fountain of justice."[49] Only this way of thinking about common law—the chiasm concept of common law—recognizes the "purity" doesn't come from its incremental development of stare decisis but from the overlaying of modern "felt necessities" onto existing doctrine to reach an acceptable rule. And through that reaching back to the intersecting points, the common law works itself pure both in the present and in the past simultaneously.

B. *The Life and Effects of Common-Law Interpretation, From* Post *to* Dobbs

Although Holmes posited that some rules and laws could only be understood by looking back to Roman social conditions,[50] scholarship has shifted away from the nineteenth-century view that the common law could nobly trace its roots back to Roman civil law. A classic example of this view is found in the universally assigned property law case, one every student reads in law school, *Pierson v. Post*.[51]

In the opinion, the majority and the dissent both wax poetic on centuries-old works, including *Justinian's Institutes*, to discuss natural law, "feræ naturæ," and the property rights of pursued beasts as expounded on by long-dead emperors.[52] *Pierson v. Post* is taught to first-year law students as an example of the purity and natural order of property common law as traced through the classical European systems of law, much of it in the civil tradition with roots in ancient Rome. But modern scholars suggest that Judge Daniel Tompkins in the majority opinion twisted and molded his natural law arguments to secure a strong common law foundation for a bright line rule to foster and promote economic efficiency as desired during the industrial development at the turn of

[48] *Id.*; *see also* Deng, *supra* note 5, at 270 (explaining how common law judges use "shared sense of reasonableness . . . rather than pure precedent to resolve cases").

[49] Brian Zamulinksi, *Rehabilitating the Declaratory Theory of the Common Law*, 2 J.L. & CTS. 171, 173 (2014) (quoting Omychund v. Barker, 1 Atkyns 21, 33 [1744])".

[50] *See* HOLMES, *supra* note 28, at 4.

[51] 3. Cai. R. 175 (N.Y. Sup. Ct. 1805). This case provides an excellent insight into how judges rely on their own education, biases, and "felt necessities of time" to fit judicial opinions to the desired outcome, while still adhering to precedent.

[52] *See id.* at 179-82.

the nineteenth century.[53] Others argue he formalistically applied the natural law commentators in the pursuit of securing precedential reasoning for his decision and the economic efficiencies that flowed happened to give weight to his logic.[54] Regardless of the motivations behind his logic, he gave great weight to the treatises of jurists from non-common-law nations because he believed in common law's shared Roman civil law roots.[55] His backward-marching line, laden with the felt necessities of his time, reached back to intersect with a now largely-abandoned line of jurisprudential thought.

While Holmes discussed Roman social conditions as influencing the development of the common law,[56] by the turn of the twentieth-century modern scholars had stopped giving Roman law as much weight, focusing instead on the interpretations of twelfth- and thirteenth-century English jurists. Those jurists—Henri de Bracton among them—who received an education in Roman law, and flowed from churches as much as universities, viewed themselves as priests.[57] From their lofty positions, they created the first contemporaneous commentaries on English law.[58] These scholars initially relied heavily on the canon and Roman law, the latter of which saw a revival in its study during the twelfth and thirteenth centuries.[59] To those students, Roman law represented the platonic form—the "written reason" as they called it.[60] However, modern scholars and jurists hold that by the end of the thirteenth century, after translations and abridgments of Bracton from Latin and into French, and as legal professionals emerged from beyond the clergy and university students, the influence of the Roman platonic

[53] *See* Josh Blackman, *Outfoxed:* Pierson v. Post *and the Natural Law*, 51 AM. J. LEGAL HIST. 417, 453-56 (2011) ("The natural law and the doctrine of first possession create certainty and promote economic efficiency—a frequent goal of the common law.").

[54] *Id.* at 456 (describing argument Judge Tompkins formalistically followed classic jurisprudence and natural law philosophy, "and that decision incidentally yielded economic efficiency; not the other way around").

[55] *Id.* at 418 (highlighting Judge Tompkins' reliance on "Roman Civil Law, including Justinian's Digests, as well Natural Law writers, including Samuel von Pufendorf and Hugo Grotius").

[56] *See* HOLMES, *supra* note 28, at 3 (using Roman law to show how early legal procedure grounded in vengeance influenced common law).

[57] *See* MILSOM, *supra* note 26, at 3.

[58] *See id.* ("[These scholars] would be understood by all readers sharing the ecclesiastical, literate, Latinate background of the *Bracton* writer, the civil service which long provided the clerical staff of the royal courts and at first also much of the judiciary. It was such men that brought about this transient contact between two legal systems more than a millennium apart in development.").

[59] *See* MCSWEENEY, *supra* note 26, at 4 ("In the twelfth and thirteenth centuries, the study of Roman law experienced a revival in those parts of Europe that, centuries before, had comprised the Western Roman Empire.").

[60] *Id.* at 5.

lessened.[61] The focus instead turned to the facts of cases written in the plea rolls, which truly mark the developmental origins of stare decisis.[62]

A recent and undeniably impactful result of this shift in understanding the origins of common law is acutely reflected in the originalist interpretation of the Constitution.[63] In his dismantling of *Roe v. Wade*[64] in *Dobbs v. Jackson Women's Health Organization*, Justice Alito attacked the *Roe* Court's assessment of common-law history when it doubted that abortion "was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus."[65] Pointedly, and an example of how a new interpretation can change the common law in the present and past simultaneously, Alito dismissed the *Roe* Court's "lengthy survey" of history and the inclusion of Greek and Roman practices as "irrelevant," casting aside Holmes's assertion that some common-law rules could only be understood in these ancient contexts.[66] Alito then effectively stated that for American interpretation of the common law, what is most important is how the states viewed the common law at the adoption of the Fourteenth Amendment.[67] The sharp reversal after fifty years of stare decisis decisions relying on *Roe* captures the temporally dialectic nature of common-law interpretation.

More than just rote, linear building on past opinions and courts with discrete instances of clever lawyers convincing judges to find room at the penumbras, changes to the common law are happening both slowly over centuries and rapidly in a single generation. Contrast that duality—where slow and quick changes are occurring all the time—to the linear development of AI which, much like falling in love, has progressed slowly and now all at once.

C. *AI: Theory Becoming Reality*

Perhaps as early as René Descartes, philosophers, scholars, and other wandering and wondering minds asked the question: "Can machines think?"[68] The *cogito ergo sum* thinker noted that while a machine may have human characteristics, it cannot think: "[I]f in another part [a machine] may exclaim

[61] *See id.* at 31 ("By the fourteenth century, few of the justices had much training in Roman and canon law.").

[62] *See id.* at 5; MILSOM, *supra* note 26, at 3-4.

[63] *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 557 (2006) (arguing for common law to inform originalist interpretations of Constitution).

[64] 410 U.S. 113 (1973).

[65] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2267 (2022) ("[W]hat [*Roe*] said about the common law was simply wrong.").

[66] *Id.*

[67] *Id.* ("When it came to the most important historical fact—how the states regulated abortion when the Fourteenth Amendment was adopted—the [*Roe*] Court said almost nothing.").

[68] Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1234 (1992) (crediting Descartes with originally considering possibility of whether machines could think).

that it is being hurt . . . it never happens that it arranges its speech in various ways, in order to reply appropriately to everything that may be said in its presence, as even the lowest type of man can do."[69] But the question still percolated in scholarship. The oft-overlooked mathematician and early computer scientist, Ada Lovelace, first described the concept of AI in her expansive notes (read: improvements) on her friend Charles Babbage's early and unrealized general-purpose computer, The Analytical Engine[70]:

> The bounds of arithmetic were outstepped the moment the idea of applying the (punched) cards had occurred, and the Analytical Engine does not occupy common ground with mere calculating machines. It holds a position wholly its own; and the considerations it suggests are most interesting in their nature. In enabling mechanisms to combine together general symbols in successions of unlimited variety and extent, a uniting link is established between the operations of matter and the abstract mental process of the most abstract branch of mathematical science.[71]

Lovelace fully grasped the implications of the Analytical Machine, as the acclaimed author Jeanette Winterson[72] wrote in her excellent nonfiction exploration of AI: "[I]f the machine could be programmed to calculate something, it could be programmed to calculate anything."[73] Lovelace then threw down the AI gauntlet when she conceived of a future function that "may be worked out by the engine without having been worked out by human heads and human hands first."[74] This, as Lovelace described it in 1840, perfectly captures the heart of the still unattained AGI: "machines that are indistinguishable from the human mind."[75] We have already discussed the long march of the common law and its debated origins, stretching nearly a millennium of the careful building of precedent, and while courtroom procedures may differ, many rationales behind common-law rules remain largely the same.[76] Contrast

[69] *Id.* (quoting RENÉ DESCARTES, DISCOURSE ON THE METHOD OF RIGHTLY CONDUCTING ONE'S REASON AND SEEKING TRUTH IN THE SCIENCES (1637), *reprinted in* RENÉ DESCARTES, THE ESSENTIAL DESCARTES 138 (Margaret D. Wilson ed., 1969)).

[70] WINTERSON, *supra* note 6, at 24. Lovelace's footnotes were three times as long as the original paper on the Analytical Engine and first created distinct definitions for what became the hardware and software for computers. *Id.*

[71] *Id.*

[72] Her observations and beautiful distillation served as the genesis for this Note. I owe a great deal to her scholarship and her novels, which have helped the Author in more ways than can be shared in a simple footnote.

[73] WINTERSON, *supra* note 6, at 24 (describing Lovelace's contribution to AI's development).

[74] *Id.*

[75] *See What Is Strong AI*, *supra* note 13.

[76] *See* Cuéllar, *supra* note 5, at 1783-85 ("That discussions of 'reasonableness' arise in a different doctrinal context . . . doesn't change at least one key aspect of the concept's function to permit assessment of how a member of our civic community . . . justifies her actions relative to a more broadly applicable standard of conduct . . . .").

that with the difference in computer and AI technology in the less than two centuries since Lovelace's AI gauntlet. It took roughly a century after Babbage and Lovelace's mechanical difference machines for the first "automatic electronic digital computer," built at Iowa State University,[77] to come into existence. Around the same time, Alan Turning unveiled his "Bombe" that he made at Bletchley Park with the express purpose of cracking the Nazi's Enigma machine.[78] Shortly after his triumph (and before his country betrayed him leading to his death),[79] Turing published what is arguably the most famous standard for measuring the success of AI: The Turing Test.[80]

The famed (and tragically treated) father of computer science envisioned an imitation game between man and machine where a neutral observer could not discern a difference between the two.[81] Essentially, to pass, the machine must demonstrate human cadence and intelligence in all its complexity and idiosyncrasies.[82] Interestingly enough, Turing wrote his Turing Test Paper as a response to Ada Lovelace's position that "[o]nly when computers originate things should they be believed to have minds."[83] Turning's thought experiment set out to counter Lovelace's belief that any machine's output is a product of the programmer and thus not attributable to the machine itself.[84] The contrasting positions of this debate are between those who follow Lovelace's objection that *humans* and not machines are capable of origination, and those who adhere to Turing's view that machines are capable of at least the *appearance of origination* and deserve credit for their outputs.[85] This centuries-old debate took on new

[77] On behalf of his home state of Iowa, the Author would like to say to all readers of this Note: you're welcome. On a similar point, the Author would also like to convey his sincerest apologies. *See* Chris Jorgensen, *How Iowa State Built the First Digital Computer and What It Means Today*, IOWA STATE DAILY (Feb. 6, 2019), https://iowastatedaily.com/19740/news/how-iowa-state-built-the-first-digital-computer-and-what-it-means-today/ [https://perma.cc/3JRV-SY3K].

[78] WINTERSON, *supra* note 6, at 31-32 (describing Turing's work and disagreement with Lovelace).

[79] Elizabeth Shaw, *Direct Brain Interventions and Responsibility Enhancement*, 8 CRIM. L. & PHIL. 1, 18 (2014) ("For example, in 1952 Alan Turing the celebrated mathematician/logician (well known for his contribution to the war effort as a cryptologist) was convicted under a statute that proscribed homosexual behaviour and was given the choice between prison and chemical castration." (citation omitted)).

[80] *See generally* Alan Turing, *Computing Machinery and Intelligence*, 59 MIND 433 (1950).

[81] *Id.* at 433-35 (explaining imitation game thought experiment).

[82] WINTERSON, *supra* note 6, at 32.

[83] Mark Ryan, *Ada Lovelace, Her Objection, Turing Tests and Universal Computing*, MEDIUM (Oct. 8, 2019), https://medium.com/swlh/ada-lovelace-her-objection-e1897 17bd262.

[84] *Id.* (discussing Turing's response to Lovelace's conception of what computer must do to create human-like thought).

[85] *Id.*

form recently with new developments in AI,[86] raising questions on the aesthetic and cultural place for art created by AI systems.[87] We are seeing an idea posed by Lovelace in 1840, taken up by Turing a century later, that is now, seven decades later, starting to have a practical and potentially transformative impact on professions from teachers to artists to lawyers.[88]

Currently, the field of AI closest to the paradigmatic, human-level cognition sought by AGI is "Machine Learning." Machine Learning systems are used to "automate . . . sophisticated tasks that were previously presumed to require human cognition."[89] Examples include self-driving cars, foreign language translation,[90] and even teaching algebra classes to high schoolers.[91] While this Note will not get bogged down in hypertechnical explanations of how machine learning works, it will attempt to provide a lay description of the underlying processes to facilitate understanding of its potential impact on the legal profession.

Machine learning is essentially an AI algorithm programmed to learn as it performs tasks.[92] In his 2014 article, *Machine Learning and Law*,[93] Professor Harry Surden uses the spam filter on email systems to demonstrate an everyday example of machine learning that most professionals take for granted. Spam filter algorithms "program themselves over time with the rules to accomplish a task . . . . The rules are inferred from analyzed data and the model builds itself as additional data is analyzed."[94] Recent advancements in machine learning

[86] *See* Roose, *supra* note 22 (discussing tech industry's widespread response to ChatGPT's release and popularity).

[87] Will Knight, *Where the AI Art Boom Came From—and Where It's Going*, WIRED (Jan. 12, 2023, 7:00 AM), https://www.wired.com/gallery/where-the-ai-art-boom-came-from-and-where-its-going/ (discussing debates about AI created art).

[88] WINTERSON, *supra* note 6, at 31-32 ("His answer to Ada—their conversation across time—was the Turing Test."). It is important to note that two of the largest theoretical contributions to AI were made by a woman and a gay man. It is also worth noting both died tragically young—Lovelace of cancer, and Turing by taking his own life after suffering chemical castration ordered by a U.K. court under draconian laws.

[89] *See* Surden, *supra* note 16, at 88-90 (using spam filters as explanatory example of machine learning).

[90] *Id.* at 88 ("In the last few decades, researchers have successfully used machine learning to automate a variety of sophisticated tasks . . . rang[ing] from autonomous (i.e., self-driving) cars, to automated language translation . . . .").

[91] Craig. S. Smith, *The Machines Are Learning, and So Are the Students*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/18/education/artificial-intelligence-tutors-teachers.html (recognizing machine learning computer teaching systems "can raise student performance well beyond the level of conventional classes").

[92] *See* Surden, *supra* note 16, at 88 ("Broadly speaking, machine learning involves computer algorithms that have the ability to 'learn' or improve in performance over time on some task.").

[93] *See id.* at 90-91 (explaining spam filters learn to recognize spam emails by inferring information through pattern detection and provide desirable service that would otherwise be labor intensive).

[94] *Id.* at 94.

include systems that can "autonomously learn high-level features from raw data, thereby efficiently performing classification and prediction tasks."[95] Instead of drawing from a single stream of data to perform and improve at a single narrow task, "Deep Learning" programs are machine learning systems structured in multiple interacting layers that not only learn how to do things better, but also develop completely different and more efficient ways carry out multiple tasks—resulting in far more powerful systems than simple machine learning can replicate.[96] Jeanette Winterson analogizes this autonomous sifting of patterns from massive amounts of data to how "magic mice could be relied on in fairy tales to find the pea in a lake of feathers."[97] Deep learning systems can seem rather magical, but it boils down to systems combing through incomprehensible amounts of data to recognize patterns and outputting content in ways that increasingly mimic human learning—and they get better at it the more they do it. But these systems aren't autonomous right away. Most machine learning and deep learning still require some level of human input. Early iterations of spam filters recognized patterns from some predetermined programming, but also from learning how people categorize the emails that initially slipped through the filters, using that information to improve its sorting.[98] Even the eerily human-like ChatGPT had actual "human AI trainers" provide input from which the bot learned more about how to construct answers like a human.[99]

The gap between the machine learning of spam filters that Professor Surden described in 2014 and the machine learning of today's leading AI systems is miles apart and getting wider, more complex, and slowly approaching human-like cognition every day. The next Section will explore the integration of these systems into the legal profession and the direct and indirect implications that integration will have on the interpretation and development of the common law.

II. ARTIFICIAL INTELLIGENCE AND ITS CURRENT AND POTENTIAL IMPACTS ON THE LEGAL PROFESSION

After a primer on the history of the common law and artificial intelligence, the focus of this Note now turns to how AI is currently impacting and might impact the legal profession and the enforcement, interpretation, and development of the common law. The main threads of AI's impact are through (1) AI's direct interpretation and legal reasoning; and (2) the indirect impacts flowing from AI systems performing more and more repetitive and autonomous

[95] Haochen Hua et al., *Edge Computing with Artificial Intelligence*: *A Machine Learning Perspective*, ACM COMPUTING SURVS., Jan. 2023, at 11.

[96] *Id.*

[97] WINTERSON, *supra* note 6, at 137.

[98] *See* Surden, *supra* note 16, at 90-91 (explaining spam filters typically are "trained" to recognize spam emails through algorithm with known examples and to build heuristics by inferring information through pattern detection).

[99] *Introducing ChatGPT*, OPENAI (Nov. 30, 2022), https://openai.com/blog/chatgpt/ [https://perma.cc/Q4DE-6A8M].

legal tasks—like e-discovery—which frees up the legal horsepower for human-attorneys to spend on those interpretive tasks. This Section will explore the potential benefits and drawbacks of each thread, and which of these threads should be regulated or promoted and how. This Section will first briefly capture the current AI landscape, its reach, its current developmental paths, and how it currently functions. Next, the Section will focus on AI in the legal profession—primarily its use in automated tasks—before finally discussing AI's potential impacts on the future development of the common law.

A. *The Recent AI Boom*

As will become apparent, making indelible the current outlay of AI's development is akin to gathering water with a net. Nonetheless, capturing the up-to-the-minute AI landscape, with all its continuous shifts and updates, will be attempted here in hopes of conveying the magnitude of the coming AI era. The rapidity and scale at which a single program has upended and disrupted nearly every sector, from the arts to education to industry, should engender a sense of urgency to ensure this growth does not open a pandora's box of unintended consequences.

Recently, the Silicon Valley tech company OpenAI released an artificial intelligence chatbot, ChatGPT, that upended more industries than its own.[100] Soon after ChatGPT's release, Microsoft and Alphabet (Google's parent company) laid off over 6% of their workforces—over 20,000 people combined—as part of a reorganization of their operations toward AI development.[101] Google, usually on the cusp of new internet technologies, found itself lagging and rushed to release its own AI chatbot, "Bard," to mixed and alarming results.[102] OpenAI disrupted the tech industry and it is clear why. ChatGPT is a machine learning-based language model that can write in verse,[103] craft complex essays on literature,[104] and even pen legal briefs.[105] Shortly after its launch, schools started banning ChatGPT and running student work through

[100] *See* Roose, *supra* note 22 (discussing how ChatGPT has "captured the world's imagination" but also caused controversy as it impacts schools nationwide and is prone to giving biased or incorrect answers).

[101] Jeffrey Dastin, *Alphabet Cuts 12,000 Jobs After Pandemic Hiring Spree, Refocuses on AI*, REUTERS (Jan. 20, 2023, 6:36 PM), https://www.reuters.com/business/google-parent-lay-off-12000-workers-memo-2023-01-20/ (linking Alphabet's layoffs to AI launch).

[102] *See* Metz & Grant, *supra* note 21; *see also* Faustine Nglia, *A Google AI Model Developed a Skill It Wasn't Expected To Have*, QUARTZ (Apr. 17, 2023), https://qz.com/google-ai-skills-sundar-pichai-bard-hallucinations-1850342984 [https://perma.cc/2Z2B-N533].

[103] *See* Roose, *supra* note 22.

[104] *See* Metz & Grant, *supra* note 21.

[105] Jenna Greene, *Will ChatGPT Make Lawyers Obsolete? (Hint: Be Afraid)*, REUTERS (Dec. 9, 2022, 2:33 PM), https://www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09/ (explaining ChatGPT's answer when prompted to write brief to Supreme Court arguing same-sex marriage should not be overturned).

programs for fear of AI-generated homework compromising the integrity of the classroom.[106] Microsoft seized the chance and entered into a $10 billion deal with OpenAI, setting off what is likely to be a new technological arms race among tech companies and others. To further demonstrate the difficulty of distilling the current AI landscape, ChatGPT's language model that caused this huge disruption is already obsolete with an even "smarter" update released in early 2023.[107] That first version, ChatGPT 3.5, passed the Universal Bar Exam only 10% of the time, but this newest version, ChatGPT 4, passed 90% of the time.[108] The rate at which the AI landscape is shifting means it is possible, if not outright likely, that the information and propositions forwarded by this Note may very well be obsolete in short order—which again compels a consideration of how quickly AI may impact the legal profession and its most deeply held institutions like the common law.

B. *AI in the Legal Profession Today*

AI has become an "increasingly relevant development for the American [legal] system."[109] In a 2014 article, Professor Surden asked readers to consider the following possible use of machine learning in the law:

> [I]magine that a law firm that represents plaintiffs in employment law cases records key data about past client scenarios into a database. Such data might include the nature of the incident, the type of company where the incident occurred, the nature of the claim. The firm could also keep track of the different aspects of the case, including the outcome of the case, whether it settled, how much it settled for, the judge involved, the laws involved, and whether it went to trial . . . . [E]ntities concerned with legal outcomes could, in principle, leverage data from past client scenarios and other relevant public and private data to build machine learning predictive models about future likely outcomes on particular legal issues that could complement legal counseling.[110]

Indeed, in 2018, the popular legal research platforms Lexis and Westlaw released AI-powered tools that can sift through every published case to create

---

[106] *See* Roose, *supra* note 22.

[107] *Id.* (outlining release of ChatGPT 3.5 and ChatGPT 4.0).

[108] Karen Sloan, *Bar Exam Score Shows AI Can Keep Up With 'Human Lawyers,' Researchers Say*, REUTERS (Mar. 15, 2023, 2:17 PM), https://www.reuters.com/technology/bar-exam-score-shows-ai-can-keep-up-with-human-lawyers-researchers-say-2023-03-15/ [https://perma.cc/7GJV-62FY] ("'Large language models can meet the standard applied to human lawyers in nearly all jurisdictions in the United States by tackling complex tasks requiring deep legal knowledge, reading comprehension, and writing ability,' the authors wrote.").

[109] Cuéllar, *supra* note 5, at 1775.

[110] Surden, *supra* note 16, at 103-04.

predictive analyses based on judge, case type, nature of the case, etc.[111] But the uses of machine learning are branching out beyond the algorithmic research tools Professor Surden predicted in 2014 and are starting to seep into the analysis, reasoning, and adjudication functions of the legal system.[112] In 2019, in an updated article on AI and the law, Professor Surden noted AI was "much more likely to be able to automate a legal ask only if there is some underlying structure or pattern it can harness" but that lawyers are relying on machine learning to assess the chances of victory in a case.[113] Such uses, like e-discovery and risk assessment tools, utilize machine learning to act as initial gatekeepers that decide which cases have the best chance of surviving beyond the pleadings stage.[114] Courts around the world have even started to implement AI for simple proceedings. One court in Estonia tinkered with using AI for quick resolution of lesser violations,[115] and China is implementing a "guiding case system" using AI that is bringing their legal apparatus closer to a stare decisis common-law system.[116] But even the outlay of legal AI from a few years ago is becoming increasingly outdated with language models, like ChatGPT, effectively recreating the patterns and structure of legal reasoning, expanding our understanding of what is automatable in the legal profession. The use of this kind of AI in legal settings, especially machine learning which constantly improves at mimicking human cognition and reason, will have both direct and indirect impacts on the common law.

The next Subsection will tease out a possible scenario of how an AI tool might be used in the courtroom to directly speak on common-law interpretation, effectively making substantive legal arguments.

C. *AI Legal Counsel: A Hypothetical on How AI May Directly Contribute to Common-Law Development*

Imagine you get sued for the tort of assault for a fracas at the corner bar. You don't think what you did should be classified as assault because you slipped on the floor and bumped into the alleged victim. But you don't know the law, and you cannot afford a lawyer. The court, as part of its public assistance scheme,

---

[111] Peter A. Hook, *A Framework for Understanding, Using & Teaching Litigation Analytics*, 26 AALL SPECTRUM 20, 20 (2021) (describing history and types of litigation analytics tools).

[112] Cary Coglianese & Lavi M. Ben Dor, *AI in Adjudication and Administration*, 86 BROOK. L. REV. 791, 800 (2021).

[113] Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. U. L. REV. 1305, 1332 (2019).

[114] *See* Herbert B. Dixon Jr., *Artificial Intelligence: Benefits and Unknown Risks*, 60 JUDGES J. 41, 41-42 (2021) (discussing current use of AI in litigation).

[115] Niiler, *supra* note 18 (explaining Estonia's plans to use AI in small-claims cases).

[116] *See* Deng, *supra* note 5, at 224 ("STCR is composed of a series of systems that work together to ensure judges adhere to prior decisions made by their own courts (or superior courts) on cases that are similar to the case before them.").

guides you to a newly sanctioned program: LegalBot.[117] LegalBot is not real as of writing, but consider it a combination of the following very real AI tools used in the legal profession today: (1) Compose, which generates a first draft of a legal brief using dropdown menus;[118] (2) technology-assisted review platforms like Relativity, Exterro, or Everlaw which comb through digital evidence to find potentially relevant information;[119] (3) Westlaw and Lexis; and (4) ChatGPT.

You are offered an expedited process if you waive human counsel and consent to defend yourself pro se with the assistance of the AI-powered LegalBot specifically designed to handle these cases. You are given access to an application that will guide you through the civil process ahead and dispense sage legal reasoning. You spend the subsequent days inputting all the facts of the case into LegalBot as you develop your defense. You get to trial day and you give LegalBot a prompt asking it to write a pro se opening statement based on the facts of your case, and the program spits out something like this:

> Ladies and gentlemen of the jury, it is important to consider the definition of assault when determining my guilt or innocence in this matter. The common law definition of assault has traditionally included the intentional putting of another person in fear of immediate bodily harm. However, I would argue that this definition should not include slip-and-fall accidents that result in injury to others.
>
> When interpreting the common law, it is essential to consider the intent behind the law and its underlying principles. The intent behind the law of assault was to protect individuals from intentional harm caused by others. It was not intended to punish individuals for accidents or negligence that result in injury to others.
>
> Therefore, including slip-and-fall accidents in the definition of assault would be an incorrect interpretation of the common law. Such accidents are often the result of negligence, and it is not just to hold individuals responsible for the unintentional consequences of negligence.
>
> In addition, such an interpretation would lead to unjust outcomes and undermine the principle of individual responsibility. It is not fair to criminalize accidents that result from a failure to maintain safe conditions. Instead, the law should focus on holding those who are responsible for maintaining safe conditions accountable for their negligence.
>
> Including slip-and-fall accidents in the definition of assault would lead to unjust outcomes and would go against the principle of holding individuals responsible only for intentional acts. It is not fair to criminalize accidents that result from a failure to maintain safe conditions.

[117] LegalBot is a fictional AI purely for demonstrative purposes.

[118] *See* Hanley, *supra* note 4, at 263-64 (describing AI powered legal brief drafting tool in use).

[119] *See* John Armour, Richard Parnham & Mari Sako, *Augmented Lawyering*, 2022 U. ILL. L. REV. 71, 87-88 (2022) (describing technology-assisted review platforms).

> I ask that you consider this argument as you determine my guilt or innocence in this matter.
>
> I did not intend to cause harm, and I should not be held responsible for an accident that occurred due to the negligence of the bar. I ask that you keep an open mind and consider all the evidence before reaching a decision. Thank you.[120]

This statement of competent, if clunky, legal reasoning flowed entirely from OpenAI's ChatGPT bot. This is especially remarkable because the bot is primarily a language model—designed to mimic how humans speak and write—and not specifically designed for legal purposes. It has learned this by analyzing mountains of data and finding patterns, trained to produce optimal output. While it could conceivably provide a pro se litigant a basic level of legal reasoning and help even the playing field, ChatGPT cannot cite cases or commentators—at least not right now. It is entirely plausible that a platform like Westlaw or Lexis could integrate a model like ChatGPT, giving it access to a stream of data that crucially includes an unending flow of new cases. This, of course, raises a host of potential questions. At what point does a system like LegalBot cross the threshold from a useful tool for a pro se litigant and into the realm of artificial representation? And does one or the other have a greater potential impact on the development of common-law jurisprudence?

1. Viability of AI Legal Assistants Like LegalBot

This hypothetical LegalBot could have an impact on the common law almost immediately. As discussed *supra* Part I, the common law is changing constantly, moving forward in time, and progressing the past through modern reinterpretations. A LegalBot that is force fed every new common-law opinion of note could analyze and find patterns of judicial reasoning that are being influenced by contemporary socioeconomic factors. Like ChatGPT, a LegalBot designed to perform higher functions will output novel and persuasive arguments about how the common law ought to be interpreted in a given situation. But for an AI system like LegalBot to have any direct impact on caselaw—and by extension, common-law development—it needs to be able to get its arguments into open court. While an AI LegalBot getting its arguments into court as a pro se legal assistant is certainly possible, if not likely, a consideration of arguments for and against its feasibility is necessary.

It would be easy enough to dismiss the possibility of a pro se litigant relying on AI in court as far fetched, but a path is entirely conceivable based on the virtues of competent representation and judicial efficiency heralded by the

[120] This opening statement was written by OpenAI's ChatGPT from prompts inputted by the Author of this Note. The Bluebook does not yet, but likely will soon, instruct how to cite material created by AI. The initial prompt, subsequently refined into an opening statement, read, "Your client is facing a misdemeanor assault charge, he says he slipped on the bar floor and bumped into the guy who punched him, getting them both arrested. Write a legal brief on what his liabilities are"

courts. While the above thought experiment may not fully pan out, the promise of spacious dockets and smoother proceedings almost guarantee some pro se access to some form of AI guidance in legal settings. The biggest obstacle is first adoption, but market forces will likely overcome that obstacle. It may cause unease to view courts and judges as an economic market, but they are, and the same market forces apply to them that apply to the public at large. Once a consumer base, in this case a court system, adopts a LegalBot-type product, more and more are likely to follow, creating more and more consumer data that is fed back into the product, making the product more attractive to other consumer bases.[121] If early adoption of AI systems in courts proves successful, adoption will increase slowly and then all at once. This makes it all the more important to consider guardrails on the use and development of these systems as soon as feasible. A little thornier are potential constitutional hang-ups on using AI in representational capacities.

The Sixth Amendment guarantees a criminal defendant "[a]ssistance of [c]ounsel for his defence."[122] In *Faretta v. California*,[123] the Supreme Court, reaching back into the annals of English common law, traced the development of pro se litigation whereby criminal defendants were generally *denied* counsel but "allowed to make what statements he liked."[124] As the colonies set up their charters and declarations of rights, they adopted, without fail, the right to self-representation.[125] To relinquish "many of the traditional benefits associated with the right to counsel" and proceed pro se, the litigant must "'knowingly and intelligently' forgo those relinquished benefits."[126] The Court recognizes the right to self-representation in criminal cases where due process concerns around the deprivation of life and liberty are most acutely felt. So important is this right to self-representation that at trial it can trump usual court concerns like managing the docket and preventing time waste.[127] It stands to reason, then, that the right to self-representation could include a specifically developed AI legal assistant. Not only would it provide streamlined research and arguments for pro se litigants, but such a program could help maintain the fast pace of trials by reducing the need for the judge or others to guide the litigants through pretrial and trial procedures. A program that allows for intelligent self-representation may also serve the public interest by reducing public defender backlogs.

---

[121] Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 828 (2019).

[122] U.S. CONST. amend. VI.

[123] 422 U.S. 806 (1975).

[124] *Id.* at 824 (describing English criminal proceedings in sixteenth and seventeenth centuries).

[125] *Id.* at 825-27 (outlining history of right to counsel).

[126] *Id.* at 835 (citing Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)).

[127] *See* Martinez v. Ct. of Appeal of Cal., Fourth App. Dist., 528 U.S. 152, 161-62 (2000) (stating pro se right is not absolute and there are some instances—like during appeals process—where efficiency concerns trump pro se right, effectively indicating that pro se right typically trumps efficiency concerns).

Possible arguments against such a program include whether it amounts to unlicensed representation or merely assistance in self-representation that many courts already provide via human-run legal services. This is already starting to play out in courts. Recently, a company called DoNotPay planned to use its own AI chatbot to defend someone in traffic court but reversed course when California State Bar prosecutors threatened the CEO with the possibility of a six-month jail sentence for the unlicensed practice of law.[128] That company now faces a lawsuit by consumers who believed they bought drafts of legal documents from an actual lawyer.[129] The lawsuit states that the chatbot advertised on its website the ability to "fight corporations, beat bureaucracy, find hidden money, and 'sue anyone.'"[130] But this service is geared toward civil litigation plaintiffs, for whom the cost of representation is one of the purposive barriers to flooding the court with frivolous lawsuits.[131] Such types of AI legal assistants do not serve the same public interests as a court-sanctioned LegalBot might. There will likely need to be court-created committees to weigh those public interest benefits against the drawbacks for the legal profession.[132]

2. Direct Impacts and Implications of AI-Created Substantive Legal Work

With the possibility of an AI system like LegalBot being able to forward arguments in a court setting, it is necessary to look at just how those arguments might form and what stumbling blocks may arise in finding a sustainable balance between AI and common law development. Scholarship, until recently, has waved its hand at the notion of AI doing anything more than automating structured tasks.[133] But the recent advancement in AI technology, like ChatGPT,

[128] Sindhu Sundar, *DoNotPay's CEO Says Threat of 'Jail for 6 Months' Means Plan To Debut AI 'Robot Lawyer' in Courtroom Is on Ice*, INSIDER (Jan. 26, 2023, 4:40 AM), https://www.businessinsider.com/donotpay-ceo-says-risks-jail-ai-robot-lawyer-used-court-2023-1 [https://perma.cc/M4W3-PL7D] (discussing faltered plan "to test the app at a traffic hearing in February, with DoNotPay's AI program quietly advising a defendant through ear pieces").

[129] Stephanie Stacey, '*Robot Lawyer' DoNotPay Is Being Sued by a Law Firm Because It 'Does Not Have a Law Degree*', INSIDER (Mar. 12, 2023, 5:45 AM), https://www.businessinsider.com/robot-lawyer-ai-donotpay-sued-practicing-law-without-a-license-2023-3 [https://perma.cc/MYS4-8M4G] (explaining class action suit against DoNotPay).

[130] *Id.*

[131] The Hon. Chase T. Rogers, *Access to Justice: New Approaches To Ensure Meaningful Participation*, 90 N.Y.U. L. REV. 1447, 1453 (2015) (asserting although people perceived cost of hiring attorney as greatest barrier to accessing justice, court has limited resources to hear every issue).

[132] *Cf.* The Hon. Gregory J. Hobbs, Jr., *Timely, Fair, and Effective Water Court Rules To Implement the 1969 Colorado Water Right Determination and Administration Act: What About Pro Se Parties?*, 22 U. DENV. WATER L. REV. 655, 659 (2019) (discussing Colorado Supreme Court committee's work on water rights and pro se actions).

[133] *See* Surden, *supra* note 16, at 88; Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 2-3 (2019).

requires a deeper look into how AI might start encroaching beyond automation into higher cognitive tasks—from legal arguments made by lawyers to judges relying on those arguments to make law.

A deep-learning AI legal assistant fed an unending flow of data in the form of case law, old motions, treatises, and anything else published on Lexis or Westlaw will perform substantive legal work like crafting arguments, and, unlike current language-only models that create fake caselaw,[134] writing briefs with on-point citations. Such a system will either maintain the current common-law understanding or open new frontiers based on broad trends in what arguments are going before judges—the ultimate word on common-law development and interpretation.

Common law is judge-made law. In the United States, the common law is the domain of state courts, with federal judges applying state common law where appropriate. Judges are in the collective sense a moderating force that create optimal, but not perfect, rules that promote predictability and fairness. But judges are not a monolith immune to the panoply of changing technology and, eventually, they too will feel the yoke of AI's promise of efficiency. These judge-focused systems may be used simply to check citations or quickly fix outdated motion templates, or, perhaps, write full opinions with programs trained in each judge's unique voice. State judges—the primary guardians of the common law and the busiest jurisdictions—are going to be more susceptible to the promise of efficiency and consistency to work through unending backlogs, and thus more likely to rely on AI systems to perform repetitive tasks as the constitution will allow. The integration of increasingly intelligent AI into every facet of the legal profession will vastly compress the rate at which trends in legal interpretation and rule development occurs.

While these changes commonly take years, if not generations, to unfold, an AI system connected to the munificent tap of legal data could analyze developments occurring in different jurisdictions simultaneously, temporally supercharging shifts in the common law. This may engender the normative benefits of efficiency and predictability—the law becomes more uniform more quickly across jurisdictions. But the work of recognizing patterns in the law is then outsourced to AI machines, relying on humans to merely adopt and convey the arguments in court for a human judge to render judgment. The heft of the legal profession being shared by AI might lead to more efficient results, but that may come at the cost of the control and restraints that maintain overall stability.

These systems, put simply, are analyzing past data on multiple layers (such as language, rationality, patterns, and significance) and outputting their best approximation of future outcomes.[135] Imagine, then, if similar developments

[134] Sara Merken, *New York Lawyers Sanctioned for Using Fake ChatGPT Cases in Legal Brief*, REUTERS (June 26, 2023, 4:28 AM), https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/.

[135] *See* Hua et al., *supra* note 95, at 11 (describing deep learning's ability to efficiently perform classification and prediction tasks in multilayer structure); *see also* Vallor & Bekey,

happen in two separate jurisdictions that this AI system now analyzes. Then, if the same issue arises in a completely different jurisdiction, is the AI going to cabin itself to data from that new jurisdiction only, or will it start to see a pattern and advocate for the new development to be adopted in every other jurisdiction? Other than the human attorneys and judges that interact with the AI systems, will there be any checks on how AI uses its powers of analysis, or will humans fail in guiding the snowball down the hill? Does a positive feedback loop occur where the AI systems start confirming their assertions, creating a circularity of "this is what the data says, so the law should be this, and what the law becomes gets added to the data, and this is what the data says, so the law should be this"? Is there a threshold where humanity may end up ceding control over the development of their legal corpus to AI?

Without serious guardrails, a system relying on AI to create novel legal arguments and write briefs ultimately used in courts will shift control over American jurisprudence to these programs and the companies, replete with their private interests, that build them. And if the basic function of these deep machine learning systems—much like stare decisis relies on past judgments to create predictable rules—is to analyze past data to predict future outcomes, the prospect of AI directly impacting common-law jurisprudence creates another interesting situation. As the AI field emerges and gains a broader role in society and substantive legal work, it will face loud calls for regulation.[136] But with the speed at which technology progresses and the torpor with which Congress enacts new regulations, AI may heavily influence the bulk of new AI jurisprudence. Unless action is taken to add necessary guardrails, *AI will regulate itself.*

III. PRESERVING THE HUMAN-COMMON LAW CONNECTION

AI is evolving rapidly (compared to the scale of human history), edging closer to strong AGI that simulates not only the highest human intelligence, but also attains empathy, nuance, and more.[137] AI, in the form of deep learning algorithms, currently functions by taking past data to predict future outcomes.[138] With the law, that poses a problem. There will be new technologies, social relationships, and other future factors that aren't covered by common law or statute—a chief example being AI systems themselves. If there aren't proactive discussions about how to responsibly employ AI for legal work, the main source of AI regulation might flow from AI systems. AI systems that carry the lion's share of substantive legal work will, inevitably, inflict a deep impact on the

supra note 9, at 341 (providing example of self-driving car, where outputs include pressure on accelerator pedal and steering commands).

[136] *See* Johana Bhuiyan, '*We Have To Move Fast': US Looks To Establish Rules for Artificial Intelligence*, GUARDIAN (Apr. 11, 2023, 3:22 PM), https://www.theguardian.com/technology/2023/apr/11/us-commerce-department-artificial-intelligence-rules [https://perma.cc/8XTY-H4FA].

[137] *See* Simon, *supra* note 8 (noting AGI is expected to emerge within next decade).

[138] *See* Hua et al., *supra* note 95, at 11 (noting deep learning "resembles the functions of human brains").

development and interpretation of the common law, changing the very nature of the bedrock of the American legal system. This Section will explore three paths, each with strong allure and worrying consequences: (1) Wholesale Rejection, or Keeping the Status Quo; (2) Wholesale Integration, or the AI Epoch; and (3) Careful Guidance, or Informed Relationship. In the following subsections, the first two paths are dismissed in short order as unfeasible and dangerous respectively. Conversely, the third option could serve as a means of facilitating innovation while maintaining the foundational human relationships with the common law.

A. *Wholesale Rejection, or Freezing the Status Quo*

The first path is the wholesale rejection of using advanced deep learning systems for anything beyond automated legal work that increases efficiency, like e-discovery and contract review, but does not substantively contribute generative legal work. This means keeping the status quo right now or even before the advent of models like ChatGPT.[139] To be clear, integration is already occurring and AI is being used daily to jumpstart legal work, but compared to complete integration as discussed below, AI in the legal profession is still in its nascency.[140] This approach recognizes that it is prudent to guard against the machination of jurisprudence by removing humanity from a human institution.[141] It protects the current economic and labor structures of the legal profession.[142] It is also likely to engender increased efficiency and other benefits that tend to lessen the workload of an overworked profession and allow legal minds to turn to substantive work as discussed previously.[143]

But even if this approach proved to be ideal for integrating AI into the legal profession and preserving the deeper human-to-law relationship, stopping the snowball midrevolution and cutting innovation off at the knees is simply not feasible. For one, considerable investments are being funneled to integrate AI into the legal industry—with predicted revenues exceeding $37 billion by 2026.[144] Legal chatbots already exist in corporate settings. For example, PricewaterhouseCoopers ("PwC") signed a twelve-month contract to give its

[139] *See supra* Part II.B (discussing AI's current use in legal profession today).

[140] John Armour, Richard Parnham & Mari Sako, *Augmented Lawyering*, 2022 U. ILL. L. REV. 71, 106 ("What emerges from our law firm case studies is that deployment of AI is generally still at an early stage.").

[141] *See* Simon, *supra* note 8 (outlining potential future risks of strong AGI, including terrorism, military, and economic risks).

[142] *Id.* (discussing how AI may eventually blur distinction between fee earners and non-fee earners at law firms).

[143] *See supra* Part II.B.

[144] Bill4Time, *7 Legal Technology Trends for a Successful 2022*, NAT'L L. REV. (Jan. 5, 2022) https://www.natlawreview.com/article/7-legal-technology-trends-successful-2022 [https://perma.cc/SL4Y-7394] (using, ironically, cloud-based AI "legal practice management software" to write article).

4,000 legal professionals access to Harvey, a ChatGPT-based assistant.[145] Harvey will assist PwC's lawyers with "contract analysis, regulatory compliance work, due diligence and other legal advisory and consulting services."[146] Toothpaste and tube are no longer one. While the legal AI industry is in its nascency, no amount of internal or external regulation could feasibly gain enough support if those regulations severely reduce the considerable money already poured into developing these tools.[147] It is equally unfeasible and significantly more dangerous, however, to allow their unchecked development and integration.

B. *Wholesale Integration, or The AI Epoch*

The second path is the complete adoption of the most advanced AI-powered systems, from deep learning LegalBot to "AI Adjudicators" and others. This path embraces new AI technology to let lawyers be lawyers and put their efforts into other issues and substantive inequities within the system. It has the potential to increase efficiencies and allows courts to allot time and resources for truly pressing matters, such as letting state judges—who deal with common law the most—focus on jurisprudence rather than schedule management.[148] But wholesale integration, without proper checks, could cause widespread disruption in the legal system and upend lawyers' relationships with both their clients and the law. Even allowing AI to draft briefs has issues with proper attribution and plagiarism.[149] Writing for the Journal of Legal Writing Institute, Professor Rebekah Hanley of the University of Oregon advocates for some tweaking to the ABA's rules on plagiarism to make room for the coming AI revolution.[150] She analogizes AI's drafting of legal documents to using the uncredited work of interns, law clerks, and junior associates, and argues that relying on AI drafting should be accepted in all similar circumstances.[151] This approach makes normative sense with the viewpoint that the technology is coming and will make our jobs faster and easier, thus we better make room for it in our ethics

[145] Sara Merken, *PwC's 4,000 Legal Staffers Get AI Assistant as Law Chatbots Gain Steam*, REUTERS (Mar. 15, 2023, 2:31 PM), https://www.reuters.com/world/uk/pwcs-4000-legal-staffers-get-ai-assistant-law-chatbots-gain-steam-2023-03-15/ (noting other companies, law firms, and professional service firms have started to experiment with AI technology).

[146] *Id.* (emphasizing PwC's statement AI will not provide legal advice to clients and "will not replace lawyers").

[147] *See* Bill4Time, *supra* note 144 (noting global AI legal technology's significant market expansion).

[148] *See* Deng, *supra* note 5, at 279 (highlighting advantages of China's AI judicial system, in which AI judges increase efficiency and decrease judicial workload, among other benefits).

[149] Hanley, *supra* note 4, at 270 (describing ongoing tension between antiplagiarism expectations and realities of modern law practice).

[150] *Id.* (suggesting how legal profession might "adjust various professional responsibility standards" to better "capitalize on the efficiencies promised by emerging technology").

[151] *Id.* at 269-70 (reasoning rule drafters might add commentary acknowledging AI technology creates new category of supervisees lawyers must reasonably oversee).

guidelines. But this approach is dangerous, perhaps even fatal, to the nature of humanity's connection to the basic blocks of the legal system and its continued development, which the ABA ethical codes are, in part, constructed to conserve.[152] Professor Hanley does propose facially reasonable changes to the ethical code that make clear AI ought to function as a tool with the human attorney assuming responsibility for all due diligence and acceptable usage for client needs.[153] But those regulations which seek to survive the coming avalanche will likely be insufficient, if even possible to enforce, without restraints on the snowball just now starting to roll.

In practice, relying on AI to draft a brief, giving it a due diligence check, and then billing clients for that time will result in overreliance on AI. Once the AI proves its accuracy, there will be less and less time spent on due diligence, effectively outsourcing the lawyer's legal reasoning and writing skills and allowing generative AI products to consistently refeed data into their backward-looking processes.[154] It is crucial to remember that these systems only function on accessible data, i.e. what has been published. The resulting risk is a feedback loop: if AI authors substantial amounts of generative work, the most recent, most authoritative arguments are generated by AI, which AI will then use to generate more work, and so on. It is not out of the realm of possibility that most legal briefs, filings, and by extension judicial opinions, will be drafted, finalized, or otherwise impacted by AI and not by human attorneys.

Tweaking the ABA ethical rules alone is not enough to protect our deep, millennia-old connection to the law and its human development. Therefore, there needs to be careful guidance in the technology's development and deployment that considers the nature of the legal work that will be authored by AI systems.

C. *Careful Guidance, or Informed Relationship*

The final path calls for the precise and thoughtful implementation of AI in areas that enhance the efficiency of legal work, including in some areas assisting with legal reasoning and adjudication. This has the benefit of maintaining traditional principles of efficiency and judicial discretion. It gets ahead of the

---

[152] *See* MODEL RULES OF PRO. CONDUCT Preamble & Scope 1 (AM. BAR ASS'N 1983) ("A lawyer, as a member of the legal profession, is . . . a public citizen having special responsibility for the quality of justice."); *id.* at 7 ("[A] lawyer is also guided by personal conscience and the approbation of professional peers."); *id.* at 16 ("The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.").

[153] Hanley, *supra* note 4, at 267. Hanley's proposed edits to the Model Rules of Professional Conduct's diligence rule read: "[Competent/diligent] lawyers may reasonably rely on stock language located in a form or generated by AI where the provided language accurately reflects the law and adequately and efficiently addresses the client's needs." *Id.* This proposed revision merely serves to reinforce the current obligations of diligence for an AI world, but does not address how such systems will be used in practice.

[154] *See* Surden, *supra* note 16, at 101 (describing how machine learning algorithms can analyze complex data and produce "intelligent" and accurate results).

ball on regulating and guiding the implementation of AI, and for once, the law won't lag behind technological advancements but keep in step. Such guidance calls for a multipronged effort with (1) longer-term legislative efforts to guide the development of AI more broadly; and (2) short-term action by the legal profession and academia to set hard and fast ethical guidelines. These ethical guidelines should regulate the development, adoption, and use of AI systems in creating generative legal work, giving due weight to how AI may fundamentally alter humanity's connection to the development of the common law—and by extension the American legal system.

1. Current Legislative and Regulatory Approaches to AI

Despite the rapidly changing AI field in the United States, startingly few laws exist regulating AI beyond the general application of agency rules.[155] In the National Artificial Intelligence Initiative Act of 2020, Congress defined AI for the first time:

> The term "artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to—
>
> (A) perceive real and virtual environments;
>
> (B) abstract such perceptions into models through analysis in an automated manner; and
>
> (C) use model inference to formulate options for information or action.[156]

While the ambit of that Act, to spur funding and research for AI, does not carry much regulatory weight, it serves as the only official and legal definition of AI in U.S. law. The United States is just now waking up to the wide-ranging disruption that generative AI could bring about, and agencies are starting to speak with urgency about instituting guardrails for future development.[157] But that urgency so far has yielded voluntary self-regulation by the leading AI companies, focusing mainly on commitments to data security and securing public trust.[158]

---

[155] Andrew Ross Sorkin et al., *Why Lawmakers Aren't Rushing To Police AI*, N.Y. TIMES (Mar. 3, 2023), https://www.nytimes.com/2023/03/03/business/dealbook/lawmakers-ai-regulations.html (highlighting no federal bill has been proposed to curb AI's potential dangers).

[156] 15 U.S.C. § 9401.

[157] Bhuiyan, *supra* note 136 (noting U.S. Department of Commerce has requested public comment on how to create accountability measures for AI).

[158] *FACT SHEET: Biden-Harris Administration Secures Voluntary Commitment from Leading Artificial Intelligence Companies To Manage the Risks Posed by AI*, WHITE HOUSE (July 21, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-

Conversely, the European Union ("EU") has proposed legislation already making its way through Parliament that, if enacted, will be the only forward-thinking regulation in the world. The EU's AI Act aims to promote "the uptake of AI" and address "the risks associated with certain uses of such technology" by firmly defining AI, ensuring *compliance of existing AI with the EU's laws on fundamental human rights*, and facilitating "the development of a single market for lawful, safe and trustworthy AI."[159] In the pursuit of those goals, the Act aims to create a clear, future-proof definition to ensure legal certainty "based on the key functional characteristics of the software."[160] In particular, the proposed definition is based on AI's ability "for a given set of human-defined objectives, to generate outputs such as content, predictions, recommendations, or decisions which influence the environment with which the system interacts, be it in a physical or digital dimension."[161] Consideration of the EU's effort to regulate the AI commercial market is important for American common law because its forward-thinking approach to the ethical quandaries of AI's unregulated development could serve as a model for U.S. law and the legal profession.

In short, any system that relies on AI to create legal arguments from whole cloth will need to be guided by the fundamental tenets of the legal profession: from client rights, due process, and professional ethics rules, to the importance of humanity's connection to the law and impact on legal development of any given case to meet the requirements of due process. These guidelines ought not merely focus on the potential efficiency and commercial benefits of AI, but also on the potential pitfalls of removing crucial processes from human cognition. While these legislative and regulatory efforts may languish for years in the slow churn of lawmaking, bar associations, law schools, and other organizations can provide a quicker and nimbler approach.

2. AI Guidance from Within the Legal Profession.

Paragraph 13 of the preamble to the Model Rules of Professional Conduct ("MRPC") states that the fulfillment of a lawyer's "vital role in the *preservation of society*" requires "an understanding by lawyers of *their relationship to our legal system*."[162] The purpose of the MRPC is to "serve to define that relationship."[163] Heretofore, it has been unnecessary for the MRPC to give ink and weighty word to the human qualities at the core of a lawyer's relationship

artificial-intelligence-companies-to-manage-the-risks-posed-by-ai [https://perma.cc/Q88Q-4K95].

[159] EUR. PARL. DOC. (Com(2021) 206) 2, 5 (proposing "balanced and proportionate" regulatory approach to AI that purportedly avoids unduly constraining technological development).

[160] *Id.* at 33.

[161] *Id.* (emphasizing need for flexibility to accommodate future technological developments).

[162] MODEL RULES OF PRO. CONDUCT Preamble 13 (AM. BAR. ASS'N 1983) (emphasis added).

[163] *Id.*

to the legal system, because before now the thought of anything other than a human performing legal work seemed the product of imagination and wonder. But it is now necessary and urgent to update our understanding of our relationship to the law as a human one and to craft our duties and obligations as jurists around that idea. The first step is, within the code of professional ethics as well as law school and continuing legal education courses, to cement the preservation of humanity's control over and sacred relationship with the law as a core duty and obligation to the profession. This can be accomplished by a simple amendment to the MRPC's preamble such that paragraph 13, with proposed edits in italics, reads:

> Lawyers play a vital role in the preservation of society. The fulfillment of this role *depends on a human relationship to the law* and requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define *and conserve* that relationship.

From that language flows reasonable and responsible edits to the remainder of the MPRC and will place human-based legal reasoning and generative work at the moral and ethical center of the legal profession and provide guardrails for legal consumers and developers of AI systems. With those additions, rules on competence, diligence, and misrepresentation will have the implicit charge of preserving the human-law connection. Some language in the rules and comments may be tweaked to further secure the public's faith in a human-driven jurisprudence and legal system.

Further, making these changes at the heart of the legal profession's duties and obligations puts developers on notice that the profession will not cede that human-law relationship for the potential benefit of increased efficiency. But one area of the law needn't the same protections as the other. Emphasis on the human-law connection—more specifically, how the common law develops through human advocacy and reasoning—will likely create a divide between litigation and transactional use of AI systems, with the latter likely utilizing more generative systems for contract formation and review.[164] Simply put, there are fewer public interest concerns in an AI system generating contracts than in crafting novel legal arguments.[165]

Access to more primitive AI-driven legal tools is already having an impact on the legal profession. AI already outperforms lawyers in document review and other automatable tasks in both transactional and litigation work.[166] Outsourcing

[164] *See* Drew Simshaw, *Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 YALE J.L. & TECH. 150, 162-63 (2022) (discussing emergence of AI technology and different applications between litigation and transactional work).

[165] *See id.* (noting transaction legal services are often viewed as "less important" or "less deserving" of legal aid).

[166] *AI Outperforms Lawyers in Doc Review*, TRIAL, Sept. 2018, at 8 (reporting briefly on Duke and Stanford study finding what took lawyers ninety-two minutes to review, took machine-learning algorithm twenty-six seconds).

these repetitive tasks will indirectly allow lawyers to focus on the substantive work of teasing out the penumbras of common law. This indirect effect on common law development is more acceptable because it maintains and fosters the human connection to the law. The skills necessary for those repetitive tasks are already giving way to the higher jurisprudential reasoning skills necessary to make original arguments about interpretations of common law. And so, lawyers in both litigation and transactional sectors are likely to become "augmented" with the objective quality of AI-created contracts, forms, and other automated work surpassing the same work created sans AI.[167] This will likely shift the abilities lawyers center in their practice towards investigative skills and emotional intelligence.[168] But while those shifts will give comfort to those worried about machines replacing lawyers altogether, the shifts will not compensate for the loss of control over the development of the common law itself.

If the current path is maintained and AI becomes the controlling force for generative legal work, confidence in the fairness of the legal system and the integrity of its development will be severed from its foundations and put entirely into the private interests of AI developers and the integrity of their systems. Making changes to the MPRC will buy valuable time for more guardrails to come into shape and preserve our human connection to the law.

CONCLUSION

In trying to capture the weight and importance of the possible disruption to common law development, this Note has touched on Byzantine emperors, ecclesiastical priests of the law, Ada Lovelace's AI gauntlet, Oliver Wendell Holmes, Jr., the Turing Test, Estonian courts, and the almost magical capabilities of modern AI. It has reached into the metaphysical effects of interpreting the common law and the very real possible impacts of generative AI on the legal system. Melding the long march of the common law with the sudden and disruptive explosion of AI systems is an unwieldy task, but one that is urgent for the legal profession. At the conception of this Note, ChatGPT had not been released. Now, there is a more powerful version that brings the field significantly closer to achieving its goal of total-human cognition. This has exciting and unique implications for the legal profession, but the potential impact on the future development of the common law is both overlooked and existential.

Who or what controls the development and interpretation of the common law is at stake and the profession needs to move faster than the adoption of new technology. Simple additions to the guiding edicts and codes that place control

[167] *See* Simshaw, *supra* note 164, at 182 (predicting use of certain AI might eventually become mandatory as part of lawyers' duties of competence); *see also* Armour et al., *supra* note 140, at 88-89 (noting machine learning models are being increasingly used in due diligence for large transactions).

[168] *See* Simshaw, *supra* note 164, at 196 (emphasizing AI cannot effectively replicate investigative processes into underlying facts or rely on human experiences and emotions).

morally and ethically in the hands of human-jurists can guide the ethical development and inevitable deployment of these tools. The snowball has started rolling down the hill; it will quickly gain speed and mass. It is the duty of every lawyer to guide the AI snowball to a gentle repose—sitting still on a winter's hill, waiting for the next gust of wind.