

## Robot, Esq.

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Advances in artificial intelligence are transforming many aspects of our society, from Google's autonomous cars to IBM's Watson defeating the Jeopardy! world champion. The legal profession, as well, is evolving from today's time-consuming, customized labor-intensive legal market to tomorrow's on-demand, commoditized law's information revolution.

In the not-too-distant future, artificial intelligence systems will have the ability to reduce answering a legal question to the simplicity of performing a search. Imagine a program similar to the iPhone's Siri app—call it *Harlan*, your personalized virtual litigation assistant. A would-be litigator could tell *Harlan* about the case at hand: the relevant parties, the facts, the merits, the remedy sought, and share any relevant documents. Based on an advanced algorithm that mapped out the relationship between all of the relevant case law, statutes, and regulations, *Harlan* could generate forecasts of how the case would be resolved with different judges in different courts, and perhaps even recommend an ideal forum (call it fantasy-forum-shopping).

*Harlan* could explain how best to strategize the litigation, what types of motions would be most successful, and how to structure arguments. With advances in artificial intelligence, it is not difficult to conceive of *Harlan* even using document-assembly methods to draft the briefs (many sections of briefs today are copied from boilerplate), or at least check the persuasiveness of the arguments against other successful arguments already accepted by courts.

*Harlan* would also work wonders for non-lawyers. A person could download the app, talk to *Harlan* in plain-English, explain his or her problem, and listen to possible remedies. This process may or may not involve paying a lawyer. *Harlan* would improve access to justice.

As transformational as this technology may be, it raises fundamental questions about how we view our legal system, the representation of clients, and the development of our law. Before we proceed to develop, implement, and rely on this technology, we must first grapple with three important issues inherent in this change. First, what are the ethical implications of this technology to the traditional attorney-client relationship? Second, what are the jurisprudential implications of non-humans making and developing legal arguments? Third, how should we, or not, develop the legal and regulatory regimes to allow systems to engage in the practice of law?

Before considering whether we *can* develop *Harlan*, we must pause to consider whether we *should* develop *Harlan*? Will it actually improve conditions for attorneys, non-attorneys, and the rule of law? This article explores how advances in artificial intelligence will impact the practice of law, and lays out a framework that considers key issues with this important technology. This article begins the discussion of Robot, Esq.

### **I. Ethical Issues**

Allowing *Harlan* to dispense legal advice without a human intermediary raises several very important questions. Would an attorney-client relationship be possible if a networked-distributed algorithm is used by many robots? What about the rules of confidentiality if the robot's algorithms are improved by sharing and aggregating litigation strategies from other cases (think of how Google improves his search accuracy by discerning trends and patterns in usage)? What about conflicts of interest? If two opposing parties are both represented by *Harlan*, how would the algorithms handle that conflict? What about asking *Harlan* to do "the right thing"? Can we program the ethos of Atticus Finch? How would these systems embody zealous advocacy and representation? Would *Harlan* have an obligation to report unethical conduct by a client? Would *Harlan* withdraw under the circumstances where a real lawyer would withdraw? How would this technology be used to promote access to justice, and provide representation to indigent clients?

Today, predictive coding algorithms are already replacing document review attorneys. If clients become accustomed to *Harlan* providing instant, customized answers, the desire to procure attorneys may be further diminished. This shift in demand will result in changing the structure of the legal profession, and modifying the workforce. How will people react to robots taking jobs once reserved for humans?

## II. Jurisprudential Issues

Beyond the ethical considerations, attorneys must confront what it would mean to have computer systems arguing, and perhaps even resolving cases or controversies. A primary concern is the potential for bias. Algorithms are not transparent. How Google orders search results narrowly avoided an antitrust suit by the FTC. The ability of these algorithms, perhaps influenced by biases—overt or implicit—will have a great impact on what we see and think. Applied to the law, the risk of bias in an algorithm could be pernicious. It would be quite easy—and lucrative—for certain interests to capture the algorithm and make the results skew in one direction. The very transparency that is the sine qua non of the adversarial process would have to apply to this technology in order to give it any legitimacy of unbiased assisted-decision-making.

Another possible problem is the potential ossification of the law. If a system is simply producing the best argument based on previous precedents (especially if that was a winning argument), the precedents will not evolve and change. Courts, being fed the same arguments over and over again, will have less space to advance the jurisprudence. This iterative process can result in a legal stagnation. Courts that already reuse boilerplate language in unpublished orders are already contributing to this ossification. We would need to consider how this technology impacts our fundamental notions of fairness and due process—and how courts would respond to this formulaic recitation of the same arguments over and over again. Many flesh-and-blood jurists may reject these positions to assert judicial independence from predictive algorithms.

## III. Legal and Regulatory Issues

The final issue is likely to be the first problem confronted—*can* computers solve legal problems. Although the ethical and jurisprudential implications are significantly more important, developers and technologists are already forging ahead with this technology, and are on a collision course with a number of legal and regulatory regimes that will serve as barriers to the proliferation of this technology.

First and foremost, this technology will have to grapple with state unauthorized practice of law (UPL) regimes. Today in the United States, the practice of law is regulated by state bar associations. The definition of engaging in the practice of law is quite vague, and ill-defined. While early iterations of this technology are unlikely to be challenged, future, more sophisticated algorithms that can dispense legal advice may constitute practicing law. Bar associations and attorneys will challenge such programs as engaging in the unauthorized practice of law and try to shut them down—similar to the suits against LegalZoom in the United States.

This regulatory issue is not limited to the practice of law. Nurses, doctors, architects, professional engineers, and a host of other regulated professions—all subject to various occupational licensing regimes, and all professions that can be automated—will need to contend with the specter of robots performing these tasks. Entrenched interests will, to some degree, avail themselves of the regulatory arm of the state to block robotic competition. These dynamics will apply in the United States, and around the world.

Second, issues of liability are quite uncertain. What happens if *Harlan* gives bad legal advice? Would a product liability suit, or malpractice suit lie? If so, against whom? The developer of the software? Would *Harlan* obtain malpractice insurance? Who would insure that? Would *Harlan* be subject to malpractice in the same fashion an attorney would? What if *Harlan* prepares an invalid document that results in material losses? Liability analyses for autonomous cars provides relevant frameworks to consider these issues.

This article opens the first chapter in this process of building Robot, Esq., and sets forth an agenda of issues to consider as the intersection between law, technology, and justice merges.