

# AI: SURREALITY IN THE LAW

By

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*"Faith can move mountains. . . , but it can't beat a faster draw!" ~ The El Dorado Rule*

It is well-established that the African grey parrot can learn and repeat hundreds of words that it has heard. Similarly, the recent expansion of chatbot program capabilities leads to machines that can “learn” many different languages and retain them at the same time for use in translations. Certainly, this could be a very positive step forward in enabling people to have access to a wide range of literature and other information from other parts of the world. Indeed, it may even present a potential for translational capabilities that can bridge cultural gaps. The question remains, however, whether the chatbot is superior to, or is merely catching up to, the African grey.

On a somewhat more technological level, it was recently announced that a robotic device had set a new world's record for solving a Rubik's Cube.<sup>1</sup> It should be noted that it took Rubik, the inventor of the puzzle, about a month to solve it the first time. With the aid of a machine and an algorithm of enormous speed, the robot solved the Rubik's Cube in 0.305 seconds, approximately ten times faster than the previous human record. This was hailed as an example of what can be accomplished if the proper programming is employed with a machine that can accommodate it. In other words, it may be an

accommodate it. In other words, it may be an indication that the limitations on artificial intelligence software may be a function of the hardware available.

Yet, there is also an increasing pressure toward having artificial intelligence available as an educational tool. It has recently been suggested as a means for teaching young children what it means to be a “child”. Obviously, the inherent biases of the programmer will impact the nature of the picture that the machine presents to the student-viewer. Indeed, the definition of “child”, in terms for example, of gender, could very well create a distorted image to the student-viewer of what the world really is. This Orwellian potential needs to be considered in relation to the ability of AI to blur the line between education and indoctrination. Put another way, the pace with which technology is overtaking conventional definitions of “reality” puts into sharp focus *cyberethics* and what the practical impact of such definitions could well be. The

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problem addressed by *cyberethics* is best defined as "the relationship between the

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<sup>1</sup>Smithsonian Magazine (May 29, 2024).

ethical and legal systems that have been developed by human beings to undergird civilization from ancient times to the present as expressed in societal norms of right and wrong and justice and injustice and the ability of computer driven technology to operate outside those conventions with almost no limits."<sup>2</sup>

To an extent, it can be said that the current environmental relationship between AI technology and human society may be on the verge of becoming a “post-Truth” world.<sup>3</sup> The general skepticism in the modern world as applied to government, media, and science, while healthy in the Socratic sense, may have evolved into a sort of acceptance of “untruth”. This is in part a function of the ability of technology to fabricate a result based upon its own interpretation of what is fed into it. Indeed, because of this, “[society] now stumbles along in the dark, plagued by uncertainty. . . . But if we take the function of information as the thread leading out of the labyrinth, we can still advance, however haltingly, in the direction of truth.”<sup>4</sup>

In this context, the concept of “virtual reality”, already in vogue with some in the legal community, effectively has been translated by the imposition of AI into a *surreality* that may or may not enhance the accuracy of the perception of the viewer.<sup>5</sup> Surrealism, as an artistic doctrine, rejects logic, reason and natural order. It uses

techniques such as dreamlike or ghostly qualities, juxtaposition (a method for rejecting harmony in their work), and incorporates surreal objects and subject matter.<sup>6</sup> In fact, what may be happening is an increasingly rapid, and unstructured, intellectual revolution, the end of which is not readily foreseeable. . . .in other words *surreality* fueled by machine technology rather than human artistic input.

In effect, the traditional view of the “Turing test” is now operating in reverse. The machine is attempting to speak to human beings without knowing to whom it is speaking or why. While the machine is working according to its programming and its technological limits, the human being may not be able to understand what it is saying. To that extent, the linguistic gap automatically limits the ability of the machine and the human being to interact on a meaningful level. The machine employs its internal logic, which may or may not relate to the world external to it, and, in some cases, may “hallucinate”. For example, one problem inherent in the use of chatbots as “research assistants” is their ability to “hallucinate” facts or even “create” other “books” internal to the programming unbeknownst to the user. The result of such “hallucination” can well be erroneous conclusions, at variance with what is sought in the inquiry.<sup>7</sup> As a result, the product of the AI programming, quite simply, may be unreliable as a mechanism for describing “the truth” in the context of a judicial process.

Alongside this rush of technology is a societal system known as the “law” that must

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<sup>2</sup>This concept was originally articulated by the author in the paper “The Terminator Missed a Chip!: Cyberethics”, presented at the International Astronautical Congress of 1995, Oslo and originally published by the American Institute of Aeronautics and Astronautics, Inc. with permission. Released to IAF/AIAA to publish in all forms. The corollary is the ability of technology to drive alterations in those conventions without regard to human input in a societal “default” to the machines.

<sup>3</sup>See Martin Gurri, “How society survives the world after the Truth is set on fire”, *New York Post* (June 17, 2024), first published in *Discourse* magazine.

<sup>4</sup>*Id.*

<sup>5</sup>*Surreality* can be defined as the modification or morphing of objective reality into a substitute, alternative reality generated by AI software, impacted of course by the inherent biases of the creators.

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<sup>6</sup>For an example of the distortion of reality through the influence of surrealism, see Salvador Dali’s famous paintings *The Persistence of Memory* (1931) and *The Melting Watch* also known as *Soft Watch at the Moment of First Explosion* (1954).

<sup>7</sup>See John McClellan Marshall, “AI and the Ants: The Post-Industrial Revolution”, *Artificial Intelligence and Computational Technologies: Innovations, Usage Cases and Ethical Considerations*, Near East University (NEU), Turkey (November 2024).

acknowledge this chaos while retaining some semblance of order. At its most basic, the judicial process is engaged in a search for “the truth” of the matter at hand. This, of necessity, involves the collection of information on what happened. The information thus gathered, and the result derived therefrom, is, in turn, based upon the perceptions of human beings as to what was seen, heard, smelled, or felt at the time and place in question.

The problem is made even more complex if the subject of the legal proceeding involves a technical component, such as medicine or technology. In such a situation, there may be a portion of the evidence that is not available without technology, that is *technoevidence*.<sup>8</sup> The point is that, if the evidence is technologically generated by necessity, it will be vulnerable to technological manipulation and morphology, thus rendering it potentially unreliable. . . *surreal*.

For example, a photograph taken in the 19<sup>th</sup> Century is, for all practical purposes, not susceptible to alteration or manipulation without it being apparent. By contrast, an “image” created by a digital “camera” or on a video is highly vulnerable to alteration with the aid of software currently available. The authentication of such a digital document in the context of a court proceeding is highly suspect. In the current judicial process, if the witness testifies that the “image” accurately reflects what he saw, then the “image” is admissible. The problem arises if the image has been altered unknown to the witness in some detail that is significant, yet the overall result “looks like” what the witness saw. In

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<sup>8</sup>See John McClellan Marshall , "Technoevidence: The Turing Limit 2020", *Journal of AI and Society* (2021), Springer Nature. DOI 10.1007/s00146-020-01139-z. *Technoevidence* is defined simply as "information that would not be available to the trier of fact (whether judge or jury) no matter how smart the witness, in the absence of modern technology".

other words, there is now a potential for “deep fake” evidence to come into court with neither the attorney nor the judge knowing it, simply by following established rules without any background authentication. The danger to the search for “the truth” is obvious.

The problem confronting the judge in the modern courtroom is: “How can the court [or the jury] rely upon the presentation of evidence that may have been created by AI?” That, of course, begs the question of how can the judge even guess that what is being presented is AI-generated. The solution lies in part in the process by which lawyers and, therefore judges, are trained in law schools. By extension, that training goes beyond the passing of the bar examination into the day-to-day practice of law. The ethical component of that training is at the root of the human side of the equation. It becomes the foundation of the relationship between the client, lawyer, and the court that, in the case of litigation, involves evidence of “the truth”. As a result, when an attorney appears in court, the judge must be able to presume the high level of integrity expected of lawyers from the very outset of their careers.

In the modern day, it is this intersection between *cyberethics* and *surreality* that creates and defines what happens next. On the one hand, what can happen is the result of what technology *can* permit. At the same time is presented the question of whether that result *should* be permitted. This discussion is an echo in the judicial context of the rise of what was known in the mid-20<sup>th</sup> Century as “situational ethics”. Simply put, situational ethics takes into account *only* the particular context of an act when evaluating it *ethically* , with no fixed standard. This finds an extension into the current debate over the definition of “woman”. In such a context, reality in the traditional sense has

little meaning, with the result that the judicial process is crippled.

For example, in a probate action, normally the court requires the original of a will to proceed. Most experienced attorneys have such documents signed in blue ink to authenticate the original. Modern copying machines, not even AI-inspired ones, can make copies that are properly multicolored and are superficially indistinguishable from the original. Only if there is a challenge to the will would there be a need for an expert to examine the “blue” to determine the composition of the ink. The result of such an examination would undoubtedly define one as a copy and the other as an original. In such a case, the court also must depend upon the integrity of the attorney to accept the document as “authentic”.

If, however, it is not merely the appearance of the document that is an issue as to authenticity, then the analysis is dramatically altered. As a function of the “adversarial” system of litigation in the Anglo-American system, it becomes the duty of opposing counsel to initiate an appropriate inquiry. The first step would be to look at the wording of the document. The current influx of chatbot technology into the drafting of court pleadings and other documents may provide examples of malapropisms that arise from the ignorance of the machine as to language.<sup>9</sup> The attorney and the court must pay very close attention to the wording of documents that are brought forward, and the failure to detect the chatbot could grossly mislead the court and jury.<sup>10</sup> One of the simplest ways to blunt the impact of this problem is to require the attorney to certify that the document in

issue is an original work, not a product of chatbot or other AI mechanism. If it should be shown that the item was in fact AI-fabricated, either the attorney can be subject to discipline or the item disallowed as “non-evidence” or both.

Similarly, voice recordings brought forward to show a confession or compromising statement are already capable of fabrication by even a few syllables of a person’s voice.<sup>11</sup> The result cannot be distinguished by present voiceprint technology from an authentic recording, yet the content could be overwhelming in its impact on the outcome of a case. In such a situation can the court accept any voice recordings without further, and detailed, authentication as to the origin, equipment used, etc.?

In the current litigation environment, there likely would be a need for expert testimony on a much wider scale than before now. The *Daubert* standard would probably need some fine-tuning in order to accommodate the forensic capabilities of AI.<sup>12</sup> Even in those jurisdictions that still allow expert testimony to be guided by the *Frey* standard, there can no longer be a “general acceptance test” of what cannot be proven authentic in the first place.<sup>13</sup>

In short, there already exists an immediate need to review the traditional rules of evidence and procedure to establish the criteria for admissibility of evidence, whether physical or verbal. Normally, this would be the province of state or federal court systems and their rules of procedure. That, however, overlooks the need to educate law students at the entry to law school, as well as practicing

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<sup>9</sup>See Brenda Derouen, “The Future of Law? How Chat GPT Is Changing My Law Practice”, 86 *Tex.BarJ.* 542 (September 2023).and John G. Browning, “New and Improved? The Risks of Using ChatGPT”, 86 *Tex.BarJ.* 544 (September 2023).

<sup>10</sup>*Mata v. Avianca*, Case No. 1:22-cv-01461 (US District Court for the Southern District of New York) June 2023, cited in *Law 360*, June 23, 2023.

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<sup>11</sup>Such “voice replicator” software is currently available at nominal cost for cloning a voice in almost any language.

<sup>12</sup>*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) [credentials of the witness and methodology used to reach the conclusion].

<sup>13</sup>*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923),

attornies, and judges already on the bench. This would require some mandatory course offerings not merely in computer science, but also in the forensics of AI manipulation and modification of evidence. Further, the rules of professional conduct would need to be expanded to prohibit lawyers from using in any way or knowingly offering AI-fabricated evidence.

Failure to abide by such restrictions would carry severe penalties. The reason is very simple: in order to uphold the integrity of the judicial search for “the truth” in the real world, as opposed to a world that is increasingly accustomed to “untruth”. Because justice to be just must be authentic. . .and be seen to be authentic, there must be zero tolerance of any excursion into *surreality* merely for the purpose of “winning”.<sup>14</sup>

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<sup>14</sup>Paraphrase of “Justice should not only be done, but should manifestly and undoubtedly be seen to be done. Lord Chief Justice Hewart, *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

