EMERGENT *SURREALITIES*: The Post-pandemic Collision of the Law and the Arts

By

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***"But where are the snows of yesteryear?"* ~ François Villon**

The term "emergence" is used to describe the cause-effect behavior of systems. In a simple system, the action of A results in B. For example, by changing the context in which A exists, the resultant B is different from its predecessor, but the operation of the system is clear to the observer. By contrast, in complex systems that combine billions of humans and billions of computers and cell phones the causality effect will be different. For example, A causes B, but if C happened before and D happens somewhere else, E has never happened. In other words, an "emergent reality" is not necessarily one that is readily imaginable or predictable because of the variables inherent in complex systems.

In the broad view of societal change, the impact of the pandemic of 2020-2022 cannot be minimized. In effect, the human historical dynamic has been divided into pre-COVID and post-COVID concepts, the one radically different from the other. the COVID virus appeared to strike According to the CDC in its 2023 "COVID-19 Mortality Update",_the over-45 age groups most heavily, a total of 1,091,715 deaths during the period. The disruption to the health care system was dramatic, sending ripples throughout the society, most notably in the reduction of in-person education and workplace activities. The governmental response of distancing and face mask wearing during the pandemic period contributed to a subtle dissociation among the population. This led further to the rise of highly subjective views of

reality, as exemplified by the conflation of situational ethical conduct. Without going into the discussion of whether this is a "good" thing or a "bad" thing, the reality is that such an approach can give rise to a skewed view of reality that can be defined as *surreality.* As a concept, *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. 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). If a subjectively based situation presented as factual should be unchallenged with factually-based and rational responses, such self-definition can lead an individual to deal with an employer on a "I will work only this much, and then I want to have my own time" basis.

In 1920, Warren G. Harding ran for President of the United States on a platform that advocated a "Return to Normalcy". In that case, it referred to the aftermath of World War I as "not normal". In modern times, there has been a disconnect between what was "normal" and what "is" that occurred in the period 2020-2022. This is commonly referred to as "the pandemic". As a result, there may be a tendency to look at the pre-COVID world as what is "normal", but in the light of what has happened during the past two years, that may not be true. Indeed, any notion of a "return to normalcy" in 2025 may well be ephemeral. Put another way, the "emergent" world may well have moved from an established set of norms to one that is not just flexible, but possibly non-existent at the moment and in search of a new "normal", revealing a much more complex system than had been thought.

This is compounded by the expansion of self-definition and its impact on society at large. This may have in effect created a "new norm" for some individuals to assert a special status in society, and society, frankly, has been unable, in some cases openly unwilling, to accommodate them. In effect, because of this "new norm", they have placed themselves outside of mainstream society. From a practical, employment and career, perspective, this creates problems both for the individual and society at large at a time when society should be looking to see if this is a component of a new "reality", a sort of social *surreality*. The effort to bend society to the "new norm" is, likewise, surreal and disruptive in its appearance. Yet, this may well be a facet of the emergent society that is inherited from the pandemic.

At their most basic, the norms that have historically defined whatever society looks like have contained some element of reality. As long ago as 1625, Francis Bacon wrote "'What is Truth?', said jesting Pilate, and would not stay for an answer." When considering this rather basic question in the context of the law, the Rules of Evidence are the first place to look. The key word is "relevance". The question that must be asked as to any item, document, or testimony offered in open court, or otherwise, is whether or not it is "relevant". Simply put, evidence is relevant if it tends to prove that a fact. i.e. "reality", did or did not exist. Indeed, it is central to the search for "Truth" that defines the judicial process. Historically, there has been debate about whether the evidence adduced in a trial actually leads to a finding of objective truth or merely to a truth that is simply more likely than not. Juridically, there is no difference, because the verdict, whether from a judge or jury, becomes the judgment that is the objective truth in the case.

In law school, it is a commonplace that students are taught that the law is a reflection of the society that it serves. Whether this is contained in a course involving the philosophy of the law or some other topic, the result is that it creates a sense of security in the mind of the lawyer that is carried forward beyond graduation and the bar examination into private practice. The reality is, however, that fundamentals of the law and its processes that were learned in law school, seen from fifty years later, was law that may reflect a society that no longer exists. Nowhere is this more important than as applied to the post-COVID world. Put another way, the annual requirement of most licensing entities that govern lawyers for a certain number of "continuing legal education" hours simply provides and attorney or a judge a catalogue of legislative and case-law updates without taking into account the fundamental changes that have taken place over the past decades since graduation.

Among those changes is the growth in the experiential gap between elements of the legal community in the practice of law as it is today. For example, many practicing lawyers graduated from law school prior to 1981, the date of the introduction of CD technology. Their younger associates, by contrast, come from the smartphone age where access to the information base is both considerably larger and faster. As Daniel Boorstin noted in 1994, "We have gone from an age that was meaning rich but data poor, to one that is data rich but meaning poor. . . [, and] this is an epistemological revolution as fundamental as the Copernican revolution."

The 2024 study by the Pew Research Center of this potential

demographic change indicates quite clearly that by 2054 the number of centenarians in the United States alone will quadruple. At the other end of the population spectrum, according to the December 31, 2024 issue of the *Wall Street Journal,* just over half of Americans between the ages of 30 and 40 were married as of last year, citing an analysis of American Community Survey data by Aspen Economic Strategy Group economist Luke Pardue. This is down from more than two thirds in 1990, when those in the middle of the cohort were born. The share of women in this age range who had ever given birth fell 7 percentage points between 2012 and 2022 alone, Current Population Survey data show, from 78% to 71%. "Part of this is social expectations, part of this is shifting priorities and part of this is economic realities, but all together they seem to be pushing in the same direction, which is increased rates of staying single and staying childless." Says Prof. Melissa Kearney of the University of Maryland, who has looked at how the same dynamic is playing out in high-income countries around the world.

The implication of this is unmistakable. The pool of incoming law [and other professional] graduates will shrink, just as their parents age into an octogenarian bracket. Indeed, there already is a large group of practicing lawyers who have recently emerged from law school whose seniors have little or no working knowledge of the technology that is the *lingua franca* with which they have grown up in their formal education. That educational background has, necessarily, involved familiarity with what algorithms can do, now sometimes referred to as "artificial intelligence". More to the point, those algorithms have the ability to draw a subtle, indeed shady, line between what is "real" and what is "virtual" and thus skew the presentation of information. Similarly, the presence of AI in the professional equation can create a barrier between the professional, whether lawyer or physician, and the client/patient. Indeed, the traditional justification of "efficiency" is no excuse to deny justice.

An example of the response to some of the problems that are creeping into the legal system is the trend, indeed the requirement in an increasing number of jurisdictions, that all papers to be filed with the court must be filed electronically, in part as a matter of "efficiency". Such "efficiency" is not to be confused with an enhancement of "authenticity". This places the litigant who wishes to represent himself who does not have a pre-arranged electronic filing account in the court at a tremendous disadvantage. By extension, court clerks and administrators are sometimes ignorant of what to do with paperwork that is filed either in person

or by mail. While this at first appears to be merely a logistical issue, the underlying reality is that such requirements arguably deny access to the courts and due process to litigants who cannot afford an attorney. Similarly, if an attorney should respond to a request for a large number of documents by sending a link instead of copies of the documents themselves, the link must be in a form that allows it to operate. If it cannot be opened, then juridically there may have been no response, and the consequences could be dire. Again, while this appears to be merely a matter of logistics, the implications for the ultimate operation of the judicial system are enormous.

The case of *Mata v. Avianca, Case No. 1:22-cv-01461* (US District Court for the Southern District of New York) June 2023, concerned documents that were presented in court that in fact had been created by chatbots. This seems to arise when the attorney simply has become "too busy". Either the lawyer or an assistant simply utilized the AI that was available to do the "research" and "drafting" of the document. At the present time, in some jurisdictions there is a requirement that the signature of the attorney on documents filed with the court is a certification that it was not the creation of AI. The question must be asked, however, if that is enough to establish its *bona fides* in the court as a basis for the ultimate presentation of evidence.

While that may seem rather prosaic to the non-lawyer observer, such "creation" by AI software actually has the potential, if undiscovered or undisclosed to the court, to skew the judicial process beyond recognition particularly in jury trials. For example, much evidence in modern trials is the product of the examination of physical items by machines, such as the extraction of DNA from blood or hair samples.[1]

If presented to the court without full disclosure of the origins of the item, the result may well be, in effect, a false official statement to the court. When discovered, the consequences, depending upon the judge, of course, can range from a slap on the wrist, such as a fine or the disallowance of the evidence, to something more catastrophic, such as jail for contempt of the court, loss of law license, striking of pleadings, entry of judgment against the offending party, as to the client, the lawyer, or both.

One of the most overlooked elements of the proof in such a case is whether there has been any modification [not to say "manipulation"

[1]See John McClellan Marshall, "Technoevidence: The 'Turing Limit' 2020", *Journal of AI and Society*, 2021, doi:10.1007/s00146-020-01139-z

by AI] of the examination process to reach a desired result. In the format prescribed by the standard articulated in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under this criterion, once the qualifications of the witness have been established, the methodology becomes secondary, if not outright ignored. There is, therefore, little, if anything, to clarify that issue before the trier of fact, whether judge or jury. As a result, the "evidence" is possibly seriously tainted and may become the foundation of an erroneous verdict and judgment.

It is the multi-generational confluence of the traditional underpinnings of the practice of law and the technological revolution of the 21st Century that creates what might be termed the characteristics of the "emergent" practice of law. The ability of the technology to manipulate the factual data that is under examination facilitates the possibility of manipulation, indeed falsification, of the outcome. Put another way the evidentiary line between what is definably "real" and what is seemingly real, that is "virtual" is much more easily crossed if ethical standards are ignored. Simply because it is technologically possible to do so does not make the result any the less *surreal*. By extension, a judgment based upon such flawed evidence will perforce bear little resemblance to reality. In other words, the justice system that is supposed to reflect, and support, society, will simply not do so in such a situation.

The solution to this aspect of the "emergent" problem lies in the education of lawyers and judges, particularly those born after the CD, in the need to reconcile technological possibility and "efficiency" with traditional notions of due process and justice. This would begin, of course, in "pre-law" courses at the undergraduate level and extend to including technological components in the usually mandatory professional responsibility course in law school. At the post-graduate level, whether for lawyers or judges, at least an hour of "continuing education" should be included for licensure. For the judicial system to continue in its role as a reflection of a society that is undergoing such tectonic change, it should demand such an intellectually and ethically sound foundation lest it simply become a surreal reflection of what might be. To that extent, the legal/judicial system may be merely an example of the changes that the "emergent" world presents.

On a very pedestrian level, the shift between pre- and post-COVID realities, when combined with technology, has fostered an economic revolution in the workplace. The pre-COVID worker characteristically had to carry our his or her work tasks in a

controlled environment such as an office or other workplace. As a consequence of the pandemic, the definition of "workplace" was modified to "work from home" or other form of "distancing". Societally, this has tended to foster a dissociation that only linked one worker to another through an impersonal computer network.

The correlative impact of the pandemic in the new workplace environment was to increase the dependence of workers on technology. By extension, this meant that various AI softwares entered normal usage as research tools. While the introduction of AI in various contexts has been uneven, its presence is not subject to debate. For example, in the medical community, there is an increasing use of AI as a diagnostic tool.[2] When combined with increased use of communication technology such as iPads, AI further removes the physician from direct interaction with the patient.

Once the pandemic ended, workers were confronted in many cases with a "return to the office or find another job", as the office management model did not transition to the emergent reality of the post-COVID world. This contemporary shift from cities to suburbs is discussed in "Working from Home Has Changed the Economic Landscape", Purdue University Mitchell School of Business, November 5, 2024. Many workers liked working from home, being with their families, and not having to dress formally in order to make a living. As a result, many have been confronted with employers, as diverse as Amazon and the federal government, who are invested in, and defined by, the "old" model. It is now an issue as to the prospect of continued employment that perhaps there needs to be a "new" model of employment management. Part of the problem is that the pace with which challenges to what was "normal", together with technological advances, works to further the dissociation that came about during the pandemic.

By way of contrast with the law, in the art and design industry the concept of "transition design" has emerged due to the work of Terri Irwin. Irwin advocates that design should be informed by knowledge outside its traditional disciplinary boundary to form a deeper understanding of how to design for change and transition within complex systems.

It is one thing to do iterative design to improve the law with time and adjust it to novel situations, such

[2]See Yogesh Kumar, Apeksha Koul, Ruchi Singla and Muhammad Fazal Ijaz, "Artificial Intelligence in Disease Diagnosis: A Systematic Literature Review, Synthesizing Framework and Future Research Agenda", *Journal of Ambient Intelligence and Humanized Computing,* January 13, 2022, 8459-8486, doi: 10.1007/s12652-021-03612-z

as cybercrime. However, when the whole context of society changes, iterative design cannot accommodate the new situation. Both the law and the arts need transition design to make sense in the post-pandemic world.

The existential problem that has emerged in the post-pandemic world is the question of how to reconcile what was thought to be a simple system with what has been revealed as a complex one. This calls for the application of both iterative and transitional design philosophies to achieve a practical result/effect.[3] A possible evolution in the employment management model, an existential surprise if you will, has been the appearance of "hybrid" job descriptions. This is characterized by a work week schedule that is partly a work-from-home and a work-in-the-office scenario. The problem, however, is that there seems to be little "stability" in the selection of which days to work in the office and which days to work from home. This system is clearly still in "transition".

The arts and humanities have ways other than the law to 'make sense of' and "improve" human behavior. As with the legal system, the pandemic triggered sudden, unanticipated cultural changes. For instance, the attendance at student clubs on school campuses has been dropping year by year as people learned to enjoy themselves within walking distance of their homes and not going to a campus. The pandemic shook up cultural systems and they are not returning to their state before. Movie theater and museum in person attendance also took a pause during the pandemic and has now returned, but with a double-digit decline in annual visits.

It may well be that iterative design-based improvements will be inadequate, given the speed of change in the post-pandemic "context'. Changing a context is very problematic, but redesigning it to adapt to the new context is feasible using Terri Irwin's methodologies. For example, if people stop using their mouths to eat, redesigning a fork won't be adequate. It would be necessary to design a new device so that people can ingest nutrients otherwise.

In the arts there are parallel problems to the impact of AI not unlike those in the law or medicine. The simple solution is redesigning the concept of "intellectual property" in light of the new digital culture that exists. Some sources estimate that nearly 60% of modern art museums in the U.S. have incorporated AI-based installations or exhibitions as of 2022. Similarly, an estimated 35% of fine art auctions now include AI-created

[3]"Iterative design" is required when the context/the world stays the same, but the observer wants to change/improve something. "Transition design" results when the context/the world changes, and the observer wants to define the impact of the change. See Dr. Terry Irwin, Carnegie Mellon University, various works.

artworks. AI has been used to recreate or complete unfinished works of art with an 85% accuracy rate according to expert reviews. In effect, the question is presented as to "who is the creator of the artwork?" Is it the original artist or the designer of the software that acts upon the artwork. In the art world Non Fungible Token [NFT] art and art galleries are booming, although there has been a recent small decline.

There is a need for caution that the idea that the 'pandemic' caused these changes should not be over emphasized. The science of complex networks and systems, however, tells us that when a system is shaken up, for whatever reason, it is unlikely to settle back in the same configuration but changes can emerge unexpectedly. This will require not so much improving the law or the arts, but rather transition designing them to new modes and functionalities. In addition, there would be a contemporaneous need to re-educate people on an ongoing basis as they progressively enter surreal situations.

Clearly, the surrealities' collision with the law triggered by the pandemic also apply to other systems that are changed when human behaviors and habits change suddenly. It is likewise obvious, indeed almost axiomatic, that the evolution of societal institutions and the norms that have defined them for decades, if not centuries, will undoubtedly move at a pace that accelerates with technology. While that may be a part of the definition of "emergent", it is important that the society that does emerge is not *surreality.*