

Rise of the Machines: Judging in the Age of Automation

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Technology continues to change nearly every facet of life. The law, like other social institutions, is experiencing dramatic changes due to the introduction of new technologies, the effects of which are far from settled. While new technologies solve age-old problems in the judicial system, they seem inevitably posed to create new problems. It also poses hard questions for the judicial system. Can automation be a threat to judicial discretion and judicial independence?

By the end of the session participants will be able to:

1. Describe how technology has changed the operation of courts;
2. Identify applicable law pertaining to technology and the operation of courts; and,
3. Explain potential legal and ethical dilemmas stemming from court-based technology.

I. Historical Perspective:¹ Milestones and Seminal Events

- A. 1876 – MILESTONE: Alexander Graham Bell Patents the Telephone
- B. 1888 – MILESTONE: The 1880 Census
- C. 1944 – MILESTONE: World War II and the Invention of the “Modern” Computer
- D. 1970s – Advent of Custom Case Management in Texas
- E. 1980s – Case Management Software Vendors Begin Focusing Less Populated Cities and Counties in Texas
- F. 1981 – MILESTONE: IBM Personal Computer (PC)
- G. 1985 – The Texas Legislature Creates the Office of Court Administration
- H. 1989 – Berners-Lee Proposal for “World Wide Web”
- I. 1990 – OCA Introduces DOS-Based Case Management Software
- J. 1991 – MILESTONE: First Website
- K. 1995 – MILESTONE: Microsoft Internet Explorer
- L. 1995 – Texas Supreme Court establishes Texas Commission on Judicial Efficiency
- M. 1997 – The Legislature Specifies Membership of Judicial Committee on Information Technology (JCIT)
- N. 2001 – JCIT begins Laying Groundwork for E-Filing
- O. 2002 – MILESTONE: “Web 2.0”
- P. 2003 – OCA Discontinues DOS-Based Case Management Software
- Q. 2007 – MILESTONE: “The App Revolution”

¹ This chronology is mostly derived from Peter Vogel’s “Impact of Information Technology, The Internet, and Social Media on the Courts,” *South Texas Law Review*, Volume 5, Number 4 (Summer 2010) at 1003. I want to thank Peter for his assistance in preparing this presentation. Similarly, I want to thank Hilda Cuthbertson, Carl Reynolds, David Slayton, and Seana Willing for helping explore different avenues of this topic.

II. Examples of Applicable Law Pertaining to Technology and the Operation of Courts

- A. Authorization for Digital Signatures and Application of Penal Offenses (Art. 2.26, CCP)
- B. Video Magistration (Art. 15.17(a), CCP)
- C. Conditions of Bond
 - 1. Secure Continuous Remote Alcohol Monitoring as a “Reasonable Condition” (Art. 17.40(a), CCP)
 - 2. Electronic Monitoring: Curfew (Art. 17.43, CCP) & Home Detention (Art. 17.44, CCP)
 - 3. Ignition Interlock Devices (Art. 17.441, CCP)
 - 4. Family Violence: Global Positioning Monitoring System (Art. 17.49, CCP)
- D. Issuance of Capias in Electronic Form (Art. 23.031, CCP)
- E. Electronically Created Records in Municipal and Justice Courts (Art. 45.012, CCP)
 - 1. Any Document Required to be Written
 - 2. Record/Instrument Required to be Recorded/Filed
 - 3. Docket
 - 4. Court Seal
 - 5. Signature of Judge, Clerk, Defendant
- F. Capias Pro Fine Commitment Hearing by “Electronic Broadcast System” (Art. 45.046(c), CCP)
- G. Municipal Court Technology Fund Created by Ordinance (Art. 102.0172, CCP)
 - 1. Computer Systems
 - 2. Computer Networks
 - 3. Computer Hardware
 - 4. Computer Software
 - 5. Imaging Systems
 - 6. Electronic Kiosks
 - 7. Electronic Ticket Writers
 - 8. Docket Management Systems
- H. Confession: Admissibility of a Statement of a Child (Sec. 51.095(a)(5), Family Code)
- I. “Good Quality Recording Device” in Lieu of Court Reporter in Municipal Courts of Record (Sec. 30.00010(d), Govt. Code)

III. Predicting the Future: Principle Features of Different Models and Visions

- A. Next Generation Court System²
 - 1. The Electronic File (No More Paper)
 - 2. The Workspace (An Outlook-System, Assignments Appear as E-mails with Clickable Links)
 - 3. The Calendar (Work Assignments are Automated to Maximize Efficiency)
 - 4. E-Filing (Remote Filing and Online Service of Process of Court Documents)
 - 5. Task Assignment (Can Occur Automatically or “Performers” can be Prompted; Positive Accountability)
- B. “The Courtroom of Tomorrow”³

² Orna Rabinovich-Einy, “Beyond Efficiency: The Transformation of Court through Technology” *UCLA Journal of Law and Technology*, Volume 12, Issue 8 (Spring 2008).

³ Wolters Kluwer, “The Courtroom of Tomorrow”

<http://reports.wolterskluwer.com/2011/ar/theworldofourcustomers/innovation/thecourtroomoftomorrow.html> (last visited October 17, 2014).

1. “Point-in-time capabilities are an important aspect for any legal research. When is something occurring and which documents are, were, or will be applicable at that selected moment of time? Legal information solutions can help with that ‘time-travel.’”
2. “Automatic digital recording of court proceedings increases efficiency in court reporting and allows for greater transparency through more timely availability of court proceedings and more effective management of court resources. Recordings can be automatically backed-up in multiple locations.”
3. “Video conferencing systems are used in courtrooms today to make it possible for persons in remote locations to be a witness without having to travel to the courtroom. Remote witnesses can see and hear the court proceedings and respond to questions.”
4. “Use of mobile devices are helpful for looking up a case, regulation, law, etc. that might be relevant in a court proceeding without having to leave the room. It’s also useful to communicate with office staff to request that a document be sent via email or in-person to the court.”
5. “New methods to present evidence digitally, for example an iPad connected to a digital projector, could display images or videos for a jury or presiding judge – particularly useful in accident reconstruction or for medical illustrations. One day we might see jurors accessing tablet computers to consider evidence.”
6. “eJustice management supports the digital exchange of information such as dates, memorandums, events as well as transactions between lawyers and courts on procedures or payment of court fees.”
7. “Expert Systems are computerized systems that replicate the thinking of a human expert and can support lawyers preparing for a court hearing. Exciting possibilities lie ahead in integrating artificial intelligence into the legal practice.”

IV. “Human Error”

A. Resistance to Technological Change

1. Public Expectation and Technology
 - a. “People get the government they deserve.”
 - b. At what cost will government save a dime?
 - c. Is it the technology or is it you?
2. Why the Resistance? Inadequate “User-Centered” Implementation⁴
 - a. “A technology must be readily *evident* to users as to how it can make their lives or tasks easier.”
 - b. “A technology must be *easy* to use and avoid rousing feelings of inadequacy.”
 - c. The technology must become *essential* to the user in going about his or her business.”
3. Technology Pushes Efficiency, Humans Push Back
 - a. Judge are Obligated to be Efficient. (Canon 3B(9), Code of Judicial Conduct)
 - b. What about Other Values?
 - i. Integrity and Impartiality at All Times (Canon 2(A))
 - ii. Duty (Canons 3B(1)) and 3B(5))

⁴ Tom Haymes, “The Three-E Strategy for Overcoming Resistance to Technological Change” *Educause Quarterly*, Number 4 (2008) at 67. <https://net.educause.edu/ir/library/pdf/EQM08411.pdf> (last visited on October 17, 2014).

B. “Garbage In, Garbage Out”

1. “Dallas County Data-Entry Errors Could lead to More Wrongful Arrests like Walter Rothgery's”⁵
2. Automation Bias (It’s Real.)
 - a. “The impulse to follow a computer’s recommendation flows from human ‘automation bias.’ ... Automation bias effectively turns a computer program’s suggested answer into a trusted final decision.”⁶
 - b. “A judge shall perform judicial duties without bias or prejudice.” Canon 3B(5)
 - c. Procedural Protections Imperiled by Automation⁷
 - i. Combining Adjudication and Rulemaking in Automated Systems
 - ii. Threats to Due Process: Notice and the Opportunity to be Heard
3. Vendor Issues
 - a. What Do They Know and How Do They Know It?
 - b. How Close is Too Close? Ethical Concerns(Canon 2B)
 - c. When Systems Fail?
 - i. HEADLINE: “20 Get out of Jail Free after New Dallas County Records System Debuts”⁸ (Dallas, Texas)
 - ii. HEADLINE: “Clerk: Lorain Municipal Court Records become Computer Nightmare”⁹ (Lorain, Ohio)
 - iii. HEADLINE: “Computer System Dropped after almost \$500 Million”¹⁰ (San Francisco, California)

V. “Old Wine in New Bottles”

- A. 21st Century Signature Stamps - A judge may not delegate authority to affix her or his signature unless the signature is affixed under the judge’s personal supervision. A judge must review and approve the document before his or her signature is affixed. *Daniels v. Stovall*, 660 F. Supp. 301 (S.D. Tex. 1987), citing Attorney General Opinion *JM-373* (1985) regarding the presence of the person whose signature is being stamped. But see, *Clay v. State*, 391 S.W.3d 94 (Tex. Crim. App. 2013) where telephonic administration of oath for a

⁵ Scott Henson, *Grits for Breakfast*, <http://gritsforbreakfast.blogspot.com/2008/06/dallas-county-data-entry-errors-could.html> (last viewed October 17, 2014). (Grits for Breakfast is inedible. It is a Texas criminal justice blog.)

⁶ Danielle Keats Citron, “Technological Due Process” *Washington University Law Review*, Volume 85, Issue 6 (2008) at 1271-1272. http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1166&context=law_lawreview (last visted on October 17, 2014).

⁷ *Id.* at 1278-1281.

⁸ Tristan Hallman, *Dallas Morning News* (June 18, 2014) <http://www.dallasnews.com/news/metro/20140618-20-get-out-of-jail-free-after-new-dallas-county-records-system-debuts.ece> (last viewed on October 17, 2014).

⁹ Richard Payerchin, *The Morning Journal* (July 14, 2014) <http://www.morningjournal.com/general-news/20140714/clerk-lorain-municipal-court-records-become-computer-nightmare> (last visited on October 17, 2014).

¹⁰ Phillip Matier and Andrew Ross, *San Francisco Gate Chronicle* (October 2, 2013)

<http://www.sfgate.com/bayarea/matier-ross/article/Computer-system-dropped-after-500-million-spent-3450186.php> (last visited on October 17, 2014).

search warrant was deemed to have occurred “before” a magistrate “without the necessity of presenting himself corporally.” *Clay* at 103.

B. “Problems at the Courthouse”

1. Impacts on the Public:
 - a. The Rights of Parties Before the Court
 - b. The Rights of the Public
 - c. Perception of the Court
 - d. Legal Outcomes
2. Impacts on the Individual
 - a. Legal Liability
 - b. Allegations of Judicial Misconduct
 - i. “Subject to Judicial Direction and Control” (Canons 3B(8)¹¹ and 3C(2)¹²)
 - ii. Cooperation in the Administration of Court Business (Canon 3C(1))¹³
 - iii. Judges with Administrative Oversight of Other Judges - While there are no reported Texas cases of Canon 3C(3) violations, the language of the Canon easily lends itself to application in municipal courts with a presiding judge and other judges. Presiding judges with supervisory and performance oversight over other judges should be mindful of the requirements imposed by Canon 3C(3).¹⁴
 - iv. Constitutional Misconduct - The Texas Constitution¹⁵ authorizes the removal of judges from office for *willful or persistent* conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice (emphasis added).

¹¹ A judge *shall* accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge *shall* require compliance with this subsection by court personnel subject to the judge’s direction and control (emphasis added).

¹² A judge *should* require staff, court officials, and others subject to the judge’s direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties (emphasis added).

¹³ A judge *should* diligently and promptly discharge the judge’s administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and *should* cooperate with other judges and court officials in the administration of court business (emphasis added).

¹⁴ A judge with supervisory authority for the judicial performance of other judges *should* take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

¹⁵ Texas Constitution, Article V, Section Section 1-a(6) also allows for removal of judges from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct.

- C. The Law Lags – Unlike substantive criminal law, procedural law has historically lagged behind the times. Example: Texas law authorized transmittal or warrant information by *telegraph* until 2009. The last *telegram* message sent in the USA was transmitted on January 27, 2006.¹⁶
1. Exits to Paper: Even in an age of automation and paperless courts, there are plenty of places where the process can “exit to paper” (court personnel print off the electronic file, clerks/judge send paper notices, etc.)
 2. “Paper Law” Issues in a Digital Age: There are a lot of statutes and legal concepts that were written for a paper world. (Examples: laws requiring that documents be mailed by first class postage or “The Four Corners Doctrine.”)
- D. Threats to Judicial Independence
1. Independence is Not Incompatible with Accountability¹⁷
 - a. Threat to Privacy and Autonomy of Judges
 - b. Limits Judicial Control over Scheduling
 - c. Makes Calendars Visible to Court Administrators
 2. Impediments to Judicial Decision Making
 - a. Computers “Not Allowing” Judicial Discretion
 - b. Technology Reflects Values
 - c. Question Becomes Who’s Values? Which Values?
 - i. Solely Efficiency, Predictability, and Stability?
 - ii. Other Values: (1) Fairness and Equality, (2) Truth, (3) Due Process, (4) Integrity
 - d. See, above, IV. “Human Error”

¹⁶ Shelly Freierman, “Telegram Falls Silent Stop Era Ends Stop” *New York Times* (February 6, 2014). http://www.nytimes.com/2006/02/06/technology/06telegram.html?_r=0 (last visited on October 19, 2014).

¹⁷ *In re Lowry*, 999 S.W2d. 639 (Tex. 1998).