

Ordering of Human-Artificial Intelligent Constructs

Matilda Arvidsson

Lund University, Sweden

Kieran Tranter

Queensland University of Technology, Australia

Abstract

The Ordering of Human-Artificial Intelligent (AI) Constructs symposium in Volume 8(2) of *Law, Technology and Humans* does one simple, yet entirely immodest, thing. It is trying to shift the frame of how law, humans and AI is being understood. This introduction argues that contemporary AI-law discourses rest upon particular imaginaries of order and legal ordering. It outlines these dominant imaginaries as well as why the framework-shifting work is necessary. And it showcases how more relational, creative, and socio-technically grounded understandings of AI-human constructs allow for new ways of understanding what order and ordering is and can be, as well as the many possibilities such new imaginaries open for reimagining legal order(ing) in the present-future.

Order

One of the fundamental questions of the present relates to how the maturing of the digital is changing humans, human society and the planetary system. There is a popular sense of destabilisation, of change, of known orders that have endured suddenly losing purchase, meaning and sense. For example, the widely repeated concerns on how the digital with its de-ordering of knowledge to ‘content’ is eroding institutions and cultures of liberal democracy.¹ In law there are concerns that the digital is leading to the undermining of the rule of law. Various phrases have been put into common circulation: ‘disruption,’² ‘revolution,’³ crisis.⁴

However, there is a parallel sense of ordering. There is the emergence of populist leaders with simplistic policies targeted at ‘ordering’ perceived chaotic and under-regulated human movements.⁵ There is a sense of ‘ordering’ in the digital, of platforms providing an iron structure that sets expectations relating to dataflows that lock or unlock material resources.⁶ There is talk of changing geopolitical orders and expectations, not a de-ordering, just different logics, language and expectations.⁷ Order, whether imposed by code, the threat of physical violence, or observable in the patterns that humans and data make, seems remarkably resilient.

¹ Fukuyama, “Delivering for Democracy”; Coeckelbergh, “LLMs, Truth, and Democracy.”

² Tranter, “Disrupting Technology Disrupting Law.”

³ Schwab, *The Fourth Industrial Revolution*.

⁴ Leslie, “Future Shock.”

⁵ Moffitt, “The Populist Radical Right in Australia”; Bonansinga, “‘Stop the Boats.’”

⁶ Srnicek, *Platform Capitalism*; Chimenti, “Platforms, Infrastructures and the Futures of Market Society.”

⁷ Gao, “What Is Decoupling and Where Is Our World Headed?”



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It is into this milieu of ordered disordering that the recent hype/boom/crisis about AI has catalysed a further sense of bubblingly uncertainty. AI is not new.⁸ Concerns about the social, and economic impact of AI is not new.⁹ And AI and law is equally not new.¹⁰ Nevertheless the ‘crisis event’¹¹ of public awareness of semi-decent large language models in 2021-2022 has thrust AI into the cultural consciousness causing an ‘AI race’ between geopolitical powers and within Big Tech. For the moment it is AI that is identified as a prime disorder of human life. There are endless oracles and soothsayers claiming radically different AI futures quantum phasing off from the present. As is often the pattern these claims rest, not necessarily on hard evidence of AI disruption, but on bedrock cultural imaginaries of humans and ‘made life’ that have been told, retold and sustained for centuries.¹² These imaginaries matter as they shape public expectations about AI, as well as what kind of legal and political responses become imaginable and legitimate.

The characterising of AI as disordering immediately invokes law. Law is ordering. Humans are cruelly impelled, every second, to enter an unknown future. Law can offer a sense of control; generate expectations, make predictable the actions of others, provide some security. This was the message in Lon Fuller’s parable of Rex and ways not to make law – that governing through law depends on rules being public, coherent and capable of guiding human conduct.¹³ It was manifest in the utter decentring chaos of Franz Kafka’s *Trial* – where law becomes opaque, unknowable and impossible to navigate.¹⁴ It was why Robert Cover’s *communities*, rather than just courts and legislatures, engaged in jurisgenerative and jurispathic processes – the continuous process of creating and contesting legal meaning.¹⁵ Humans facing the terrible unknown of the future try to contract, dictate, legislate and regulate order and control.

This is why the imaginary of AI futures is an essential engagement with law. AI imaginaries are about how things, processes, flows, resources, energy and people are to be arranged and organised into the future. It is law-talk.

As such the third decade of the twenty-first century has witnessed substantial discourse about AI and law; what can be termed the ‘orthodox AI and law discourse.’ There are two dominant imaginaries underpinning this.¹⁶ The first is the AI imaginary informed by cornucopian narratives and tropes of technological progress. Innovation in the means of production and in consumer products drives better futures. Futures of material wellbeing, increased leisure and increased profits. The legality at play here are the laws of intellectual property, contract and the corporation. AI is a thing made predominately by corporations for profit to be deployed by corporations and nation states to enhance ‘efficiencies’ and ‘productivity,’ to boast the ‘bottom-line’; to help with competitiveness and sovereign security.¹⁷ AI’s alleged cornucopian potential is unlocked through ‘robust intellectual property protection,’¹⁸ commercial agreements, the corporate form and stock exchanges. AI is a creature of capital and the market sustained by the forms of legality that sustain capital and the market.

The second dominant imaginary of AI and law is the narrative of harm. AI as a creature of capital and the market it is not regarded as a beneficent creation possibly heralding a new ‘gilded age,’ but rather as the harbinger of dystopian future of harm and human obsolescence. Tapping into the cultural narratives of the threats of human-made creations,¹⁹ this imaginary, rendered material in the EU’s Artificial Intelligence Act (AI Act),²⁰ identifies that AI requires the regulatory state. AI, in this imaginary, requires risk assessments and forms of management; possibly licencing and supervision from specialist regulatory agencies. It requires a ‘New Deal’²¹ of the strong regulatory state to ensure safe and ethical AI can deliver on its cornucopian potential while avoiding dystopian catastrophes. And with this comes the legal form of regulatory legislation, standards, protocols, ‘sandboxes’²² and bureaucratic decision making.

⁸ Minsky, “Steps Toward Artificial Intelligence.”

⁹ Samuel, “Artificial Intelligence.”

¹⁰ Buchanan, “Some Speculation About Artificial Intelligence.”

¹¹ Tranter, “The Law and Technology Enterprise.”

¹² Goding, “The Robot and Human Futures.”

¹³ Fuller, *The Morality of Law*.

¹⁴ Kafka, *The Trial*.

¹⁵ Cover, “Nomos and Narrative.”

¹⁶ Casas Samper, “Imaginaries.”

¹⁷ Guihot, “Ideology.”

¹⁸ Arnaudo, “Generative AI and Intellectual Property.”

¹⁹ Korhonen, “Subjecthood in Cyberspace.”

²⁰ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L 2024/1689.

²¹ Werbach, *Supervising Risk*.

²² Buocz, “Regulatory Sandboxes in the AI Act.”

These imaginaries and the legal discourses that they ground might seem antithetical. The first sees AI as needing property and contract. The second the regulatory state to tame the harms from the unbridled effects of property and contract. Nothing here is particularly new. These are the familiar tensions at play within the legalities of Western capitalism for the past 150 years, that have been evident whenever there is a crisis event about an emergent technology. There is something else not new about these. Both are unified in presenting an objective, external vision of the technology. AI is a thing that could herald cornucopia provided the state gets out of the way of the free working of property and contract. Or AI is a thing that could render dystopia, needing that state to regulate.

The thingness of AI that holds together the two competing dominant imaginaries limits how AI and law is conceived. In so doing the orthodox legal discourse on AI tells only a partial story. There are two dimensions to this, that generate two alt narratives of humans, law and AI. The first is the identifying that ‘modern law,’ the contemporary doctrines, principles and processes of contract, property, the regulatory state and the mechanisms for dispute resolution and enforcement – the legalities engaged with by AI and law discourse – orbit the ‘Gutenberg galaxy.’²³ Following Cornelia Vismann and Fredrich Kittler²⁴ it is possible to identify that with the digital, and positioning AI as a maturing of the digital, the material and mental practices of reading, writing, printing and managing paper that underpin modern law, are becoming displaced.²⁵ This is inherent in the dystopian-sounding claims that AI heralds an end of law. What is being grasped for within these statements of juris-apocalypse, is that AI, or more properly the maturing digital of which AI is part, marks a cosmic shift in informatics. The ways that humans tried to make order with reading, writing, paper and files are changing. These are imprints and cultural techniques that change as culture, technology and media infrastructures change. AI represents emergent forms and logics, imprints, and cultural techniques of ordering that don’t just need the old legalities to keep the resources flowing to Big Tech or to protect a vulnerable humanity from AI harms but which *occupy law*. We are experiencing a moment of informatic ‘juris-generation,’ not just in the sense of the forging of new stories by a community that was Cover’s core understanding when developing the term,²⁶ but instead an informatic juris-generation about how the fundamental function of law’s capacity to order humans and resources in time happens.

This first ‘alt-narrative’ can head in two directions. It provides the intellectual grounding for forward-looking technical projects within the discipline of ‘computational law’²⁷; of how to build ‘Rules as Code,’²⁸ smart contracts and automated decision-making systems. It also contains, which has been under-explored, the forging and justifying fundamental values. If the digital is law, then what values are becoming hardwired into the architecture,²⁹ and moreover, what values *should* be hardwired into AI’s architectures? The legal academy, notwithstanding being the institutional custodial of a 3000-year-old tradition of ‘jurisprudence,’ of wisdom about ordering human communities in time, has seemingly abdicated this responsibility to the liberal design disciplines with their incipit, under theorised, apolitical accounts of ‘fairness,’ ‘accountability,’ ‘transparency,’ ‘explainability.’

The second alt-narrative is to take Donna Haraway seriously, or more precisely the traditions emerging in the twenty-first century that identify her and her cyborgs³⁰ as progenitors. In this narrative the human is less stable and the machines and technologies less object-like than manifest in the grounding commitments of orthodox AI and law discourse. Rather, the shifting, fluxing location of the human *is*, and always *was*, technically mediated and therefore always co-constituted, by technical discourses, of which modern law was one, and also in the intimate possibilities that sociotechnical assemblages are capable.³¹ In a world without hard distinctions, and unhelpful binaries, there are possibilities to narrate differently and imagine anew.³² Not just to imagine what sort of values and principles that *should* be hardwired into the digital/AI as law, but also a possibility to imagining who the ‘humans’ trying to ordering their own futures are and can be. These are creative callings, a command to engage in the Heideggerian identified origins of technology of the ‘bringing-forth’ of *poiesis*, the artistic drive to reveal the world to its itself.³³ It is to this creative calling of the ordering of, not humans and AI, but a messier, less state-centred, vision of human-AI socio-legal constructs that the articles in this symposium respond to.

²³ McLuhan, *The Gutenberg Galaxy*.

²⁴ Vismann, *Files*; Kittler, *Gramophone, Film, Typewriter*.

²⁵ Tranter, “Sisyphus and the Present”; Condello, “Interpreting and Writing the Law in Digital Society.”

²⁶ Cover, “Nomos and Narrative.”

²⁷ Chau, “Computational Legal Studies Comes of Age.”

²⁸ Wong, *Rules as Code - Seven Levels of Digitisation*.

²⁹ Noting that there has been substantial critique identifying the ‘values’ encoded by Big Tech in the digital. But less on what *should* be the values. See Cohen, *Between Truth and Power*.

³⁰ Haraway, “A Manifesto for Cyborgs.”

³¹ Braidotti, *Transpositions: On Nomadic Ethics*.

³² Arvidsson, “Posthuman Feminism.”

³³ Heidegger, “The Question Concerning Technology.”

Creative (Dis)Order

There is a creative (dis)order to the articles in this collection. There is, like all good art, a breaking, the breaking of the narrow conventions that underpin orthodox law and AI discourse, and with that the breaking of the norms of modern legal scholarship. Each contribution both creates and deals with some form of material *poiesis*; whether that is the creation of something in itself such undertaken by **Joaquín Santuber**, **Mariana Costa Moraes** and **Kristina Tica** and **Chris Dent**. Or the cultural legal working of exemplars of Japanese popular culture as done by **Quinn Edwards** and **Kaif Siddiqui**. **David Tilt** imagines Human-AI construct as a ‘phantasm’ that will come to inhabit a world that already is phantasmagorical.

Santuber, Moraes and Tica take has their start ‘human oversight’ as specified by article 14 of the EU AI Act.³⁴ Informed by I Gilbert Simondon’s *On the Mode of Existence of Technical Objects*,³⁵ they argue that:

[T]he role of human oversight ... can articulate the process of individuation between individuals, communities, society and AI systems ... in this setting becomes increasingly blurred and less discernible, due in part to the rapid and unrestrained advancement of responsive technologies. This acceleration fosters a persistent condition of alienation, intensifying human discomfort with AI systems.³⁶

However, rather than just intellectually mapping this process whereby enforced AI oversight could intensify alienating individualisation and discomfort with AI systems, they enact this relationship through the installation artwork ‘HUMAN OVERS[A]UGHT: THE OPS ROOM.’ The installation comprising ‘big red’ buttons, screens and software that is identifying and cataloguing video images according to perceived ‘threats’ while simultaneously responding to human inputs via the buttons. The experience is ‘individualising’ and with it a sense of alienation, and exhausting, but there is also affirmed the alternative that the human-AI construct emerges through the ‘relational processes in which human, sociotechnical objects and culture are continually constructed in reciprocal and simultaneous ways.’³⁷

David Tilt ostensibly is focused on patent law and superficially on the tired debates on whether AI inventions should be patentable. But their paper actually engages in the process whereby phantasms, the human, the inventor, the AI-human construct are made real through entanglements with law.³⁸ Drawing inspiration from Jacques Derrida’s slippery notion of the phantasm³⁹ and Judith Butler’s further deployment⁴⁰, Tilt exposes hauntings of patent law, of how phantasms of ‘nature’, and the ‘human’ make real, seemingly self-evident, distinctions between ‘discovery’ and ‘invention.’⁴¹ They emphasise that increased togetherness of humans and AI in the process of making, of human-AI constructs, will lead to an immediate pragmatic process ‘that envisions an inventor who, at a certain percentage or presence of AI, would cease to be an inventor’⁴² However, this tightening will also highlight the phantasmagorical nature of patent law’s categories and how patent law is another site where state power draws the boundaries of ‘humanity.’⁴³

Quinn Edwards and **Kaif Siddiqui** both approach the AI-Human construction through cultural legal studies of a Japanese anime text, continuing an established practice of reflecting on the complexities of technoculture often at the forefront of Japanese popular culture.⁴⁴ Edwards examines the Digimon franchise, identifying how the ‘Digital Monsters’ of the series change through relationships with humans. Further, they note how both the Digital Monsters, and the human children who are trapped in the digital universe of the franchise, manifest a fluid and interconnected legal personality where rights and capacities change across time. Edwards concludes that Digimon provides complex AI narratives that emphasis, not one size fits all forms of ordering of humans and AI but located, dependent and sui generis arrangements.⁴⁵ Siddiqui examines the critically acclaimed Psycho-Pass franchise focusing on its imaginary of AI governances and the ‘numeric imagination’⁴⁶ of AI systems. They focus

³⁴ Santuber, “Dis/Ordering AI–Human Oversight.”

³⁵ Simondon, *On the Mode of Existence of Technical Objects*.

³⁶ Santuber, “Dis/Ordering AI–Human Oversight,” 15.

³⁷ Santuber, “Dis/Ordering AI–Human Oversight,” 21.

³⁸ Tilt, “(Pre)Configured and (Pre)Ordered.”

³⁹ Kochhar-Lindgren, *Philosophy, Art, and the Specters of Jacques Derrida*.

⁴⁰ Butler, “The Force of Fantasy.”

⁴¹ Tilt, “(Pre)Configured and (Pre)Ordered,” 26.

⁴² Tilt, “(Pre)Configured and (Pre)Ordered,” 33.

⁴³ Tilt, “(Pre)Configured and (Pre)Ordered,” 29.

⁴⁴ Pearson, “From Crime Fighting Robots to Duelling Pocket Monsters.”

⁴⁵ Edwards, “Digital Monsters.”

⁴⁶ Siddiqui, “Law and Algorithmic Futures in Psycho-Pass,” 51.

particularly on the representations of ordering by AI where ‘individuals ... conditions of compliance derived from their algorithmic approximations of their own mental states.’⁴⁷

The final contribution to the symposium is by **Chris Dent**.⁴⁸ Dent goes further than the cultural legal approaches of Edwards and Siddiqui of examining a creative text, to presenting an original work of fiction and an exegesis. Dent’s story, reminiscent of Philip K Dick, recounts the ‘assessment’ of an AI of the phantom comprised of the memories of a deceased human drifting in space. The exchange is one of repeat, of the AI trying to befriend the phantom, inserting herself (the AI presents as female), into the recurrent memory/experience of the phantom. However, as is revealed in the final report by the AI, and expanded on by Dent in the exegesis, the focus is on forms of decision. The lonely interactions between the AI and the ‘soul’ show the cascades of calculation, the numeric imagination, of AI decision making: ‘From that point, the probability of Harry [the soul] being a journeyer [aware of his phantastic existence] and, after that, his capacity, would have been calculated and recalculated with each interaction. The assessment, then, is not a singular event, and not at an identifiable point of time.’⁴⁹ Dent contrasts this with the timestamped ‘decision’ of modern law characterised by a human decision maker declaring a decision at a point in time, that interrupts and redirects flows of human resources highlighting that this template is ill-suited to AI decision making.

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⁴⁷ Siddiqui, “Law and Algorithmic Futures in Psycho-Pass,” 60.

⁴⁸ Dent, “To Die, to Sleep No More.”

⁴⁹ Dent, “To Die, to Sleep No More,” 81.

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