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Mene, Mene, Tekel, Upharsin- Is The Writing On The Wall Meant For Us?.pdf

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MENE, MENE, TEKEL, UPHARSIN^{*}: Is The Writing On The Wall Meant For Us?

Ian Gallacher ^{**}

There's a medical condition known as benign paroxysmal positional vertigo. Sufferers experience sudden, intense, disorientation and loss of equilibrium, sometimes accompanied by intense feelings of nausea. Attacks usually last for around thirty seconds and rarely last longer than a minute. The condition isn't medically serious, although you wouldn't want to experience an attack while driving, and there's a relatively simple cure that involves realigning the crystals in the inner ear.¹

I mention this because if you're fortunate not to suffer personally from this condition you've likely suffered from its professional equivalent, ChatGPT.² Chat - can I call it Chat?³ - is a natural language processing (NLP) program that set the world in a tizzy at the end of 2022 and beginning of 2023. Chat has caused disorientation among legal academics, who reel when they discover that a computer can write in full and complete sentences, can pass law school exams⁴ and even pass the bar exam.⁵ The loss of equilibrium felt by legal academics, indeed all involved with the legal profession, might well be accompanied by intense feelings of nausea, but unfortunately the attack is long lasting and there's no simple cure for it. And professionally, it might be very serious indeed.

You know this, of course, because by the time you read this you will doubtless have spent many hours in meetings, many of them likely long and frustrating, to discuss all aspects of Chat's role in the

^{*} *Daniel*: 5:25-28. During a feast held by Belshazzar a hand writes these words on a wall. None of Belshazzar's wise men can read or understand the words, but eventually Daniel is summoned, and he translates them as follows: "MENE: God has numbered your kingdom and finished it; TEKEL; You have been weighed in the balances and found wanting; UPHARSIN: Your kingdom has been divided and given to the Medes and the Persians." The day doesn't go well for Belshazzar after that.

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¹ See, e.g., Benign paroxysmal positional vertigo (BPPV) <https://www.mayoclinic.org/diseases-conditions/vertigo/diagnosis-treatment/drc-20370060>. Last accessed May 30, 2023.

² ChatGPT, Jan. 9 version, openai.com. "GPT" stands for "Generative Pre-Trained Transformer."
<https://chat.openai.com>

³ Let me answer that for you. Yes.

⁴ Jonathan H. Choi, Kristen E. Hickman, Amy B. Monahan, & Daniel Schwarcz, CHATGPT GOES TO LAW SCHOOL, 5. *Journal of Legal Education* (forthcoming) (2023). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335905. But see Ashley Binetti Armstrong, WHO'S AFRAID OF CHATGPT? AN EXAMINATION OF CHATGPT'S IMPLICATIONS FOR LEGAL WRITERS, 2 (2023)(Chat made up cases and citations, but wrote text that "seemed real and sounded 'lawyerly'"). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4336929

⁵ Michael J. Bommarito II and Daniel Martin Katz, GPT TAKES THE BAR EXAM, 6 (2023). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4314839

education and practice of law. Indeed this essay, finished in the middle of February, 2023⁶, is a fool's errand, more like a time capsule than anything else; something that reflects where the world was, in those far-away days of a few months ago, when people could remember a time when text was written, not "generated," even though we "wrote" on computers keyboards, using word processing programs to create electronic letters on a screen. Innocent times.

Undaunted, I'll plunge ahead if only to give you a reminder of some of the things we were thinking about at the start of Chat's rise to prominence, and to encourage our community to grapple with the theoretical as well as the practical aspects of AI-generated text. But I have no hope that this essay will offer any insights into addressing the concerns that have arisen since February 2023. If it follows the five previous drafts I've written it will not only be outdated by the time you read it, it will be outdated before I've had time to finish it.

ChatGPT

In the interests of saving space, I'm not going to engage in a long discussion about what Chat is and how it was developed. I'm almost certain that you will know much more about that by the time you read this than I know now. Moreover, the Chat you are engaging with is certainly not the Chat I've been using in preparation for writing this essay: the version I'm familiar with is version 3.0, but version 4.0 is rumored to be on its way in my near future.⁷ And the version of Chat that will most affect the practice of law will likely be a law-dedicated product that's specifically trained in the conventions of legal writing, document review and preparation, and legal research. That product might be in development as I write this but there's been no indication of its existence. Yet.⁸

Chat and Legal Writing

When you have a horse, it's interesting to ask it to give its own opinions straight from its mouth. With that whimsical idea in mind, I asked Chat to explain the role of Artificial Intelligence (AI) in legal writing. Here's what it said.

⁶ To be honest, the body of this article was finished in February. Some footnotes were revised, and some added, in late May and early June, 2023.

⁷ GPT-4 Is Coming: A Look Into The Future Of AI, Searchenginejournal.com, January 20, 2023, available at <https://www.searchenginejournal.com/openai-gpt-4/476759/#close>

⁸ Not in February, 2023, but certainly by May. Both LexisNexis (<https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-announces-launch-of-lexis-ai-commercial-preview-most-comprehensive-global-legal-generative-ai-platform>) and Westlaw (<https://legal.thomsonreuters.com/en/products/westlaw-edge>) have announced the use of AI in their services. By the time this is published these services might be commonplace or they might have been discontinued.

AI can assist with legal writing in a variety of ways. One example is using natural language processing (NLP) to analyze legal documents and extract relevant information, such as identifying key clauses or summarizing the main points of a contract. AI can also assist with document drafting by generating text that is more consistent in style and tone, or by suggesting language to make the document more legally precise. Additionally, AI can help with legal research by quickly searching through large numbers of documents and identifying relevant case law or statutes. Overall, the goal of using AI in legal writing is to make the process more efficient and accurate, and to help lawyers and legal professionals save time and resources.⁹

Some quick observations. Chat writes more accurately¹⁰ than some of my incoming students used to, although it makes some of the same mistakes: it claims to generate text that is “more consistent in style and tone” but doesn’t tell us what it’s comparing itself to. People? Other programs? My students used to make that mistake as well and sometimes I was able to persuade them not to do it again. I wonder if Chat can be taught to eliminate that problem.¹¹

Chat also falls prey to a tendency to technobabble, as did some of my students. Chat doesn’t “write,” Chat helps lawyers by “generating text,” and it doesn’t “read,” it uses “natural language processing.” I suppose we can’t fault it for that, though; it’s technically correct to say that its text is “generated” rather than “written” and it really can’t be said to “read” anything so it would seem harsh to criticize writing . . . sorry, text . . . that is accurate, even if it sounds a little sterile. My students no, but I think Chat gets a pass for this.

The text is formally correct, with a neat beginning and ending to the paragraph and some concrete examples of how the program can be used by lawyers to write documents. And it doesn’t overclaim: it doesn’t extoll Chat’s ability to write memos or briefs, but rather limits itself to document analysis, “suggesting language,” and conducting legal research and doesn’t seek to take the whole field for itself. I can’t say how you feel about it, but for me it’s a better piece of text than I had hoped the computer would generate.

⁹ ChatGPT, Jan. 9 Version, openai.com. Accessed January 12, 2023.

¹⁰ “Accurate” in the sense that it writes in complete sentences, with some formal organization, and with punctuation in the right places. Other interactions I had with Chat, which I won’t include here for sake of saving space and your patience, suggest that it can split infinitives when that seems to be appropriate for the tone it’s using, and that it can recognize and use metaphor. Honestly, I’ve read much worse student writing. I’m sure you have as well.

¹¹ Chat’s creators are training it to improve and will continue to update it with improvements over time. Introducing ChatGPT <https://openai.com/blog/chatgpt/>. (November 30, 2022). When Chat, some offshoot of it, or some other similar program is developed specifically for the law, it will surely go through a similar training period.

But there are some troubling hints in Chat's short paragraph that suggest a less-than-rosy future ahead. It suggests that the text it generates will be "more consistent in style and tone" than something; presumably text written by humans. So Chat, or the team that programmed it, assumes¹² that it will be able to generate text that is, at least in the areas of style and tone, better than something humans could write.

And Chat's mention of "tone" is interesting, and perhaps a little ominous. Tone is something we think of as being unique to the individual writer. If Chat can successfully manipulate textual tone in legal writing,¹³ then it might be difficult to distinguish its work from that of a human writer. That's not intrinsically bad, perhaps, and it surely is the goal of Chat's creators that its work be thought of as equal, if not superior, to human writing, but it might give us pause.

Also mildly menacing is Chat's contention that it can "help" with legal research by "identifying relevant case law or statutes." We have been using computer-aided legal research for some time now, as anyone who has used natural language-based searches on Westlaw or Lexis can attest, but Chat is surely going beyond what the search engines' passive algorithms can do and is putting its toe across the line of the practice of law. We teach our students that finding the law might be a relatively mechanical process but that selecting between the found results of our searches is a job that is inherently legal in nature, and therefore something to be done by lawyers. A lawyer who allows a paralegal to do the work that Chat foresees for itself might be in trouble with a disciplinary body; how would such a body react to Chat's involvement in legal research?

Chat, the Bar Exam, and the Practice of Law

One solution to this dilemma would be to let Chat take the bar exam. Even in its February 2023 unsophisticated state, Chat has taken and passed both law school exams¹⁴ and the multistate portion of the bar itself.¹⁵ Later versions of the program will surely improve on its performance. Allowing Chat to take and pass the bar and become a licensed "attorney" would remove any concerns about the

¹² And this is how insidious this discussion can become. Without really thinking about it, I'm writing, and I suspect you're reading, a sentence that ascribes human responses to a computer program.

¹³ AI can, in fact, mimic tone and has been doing so for some time, albeit not in legal writing. Ian Gallacher, DO ROBOMEMOS DREAM OF ELECTRIC NOUNS? A SEARCH FOR THE SOUL OF LEGAL WRITING, 4 J. Law, Tech. & Internet 41, 49 (2012)(discussing ability of AI to customize tone of documents).

¹⁴ Choi, et al, *supra*, at n. 4.

¹⁵ Bommarito et al, *supra*, at n. 5.

unauthorized practice of law.¹⁶ The program would, of course, have to reside within a law firm's own network in order to preserve confidentiality and privilege, but assuming that could happen Chat could be a form of permanent associate in a firm, conducting research, writing memos, drafting letters and discovery requests, contracts, wills, and all the other important, but relatively low-level work currently performed by junior associates.

Again, it seemed fair to give Chat a chance to contribute to this conversation, so I asked it if it should be licensed as a lawyer if it passed the bar exam. Here's its response:

The question of whether AI should be licensed as a lawyer is a complex one that raises a number of¹⁷ ethical and practical considerations. On the one hand, AI has the potential to greatly improve the efficiency and accuracy of legal work, and would make legal services more accessible to a wider range of people. On the other hand, there are concerns about the potential for AI to make errors or to lack the judgment and empathy that human lawyers bring to the job. Ultimately, the decision of whether to have AI as a lawyer will likely depend on a careful assessment of the benefits and risks involved.¹⁸

Judgment and empathy? I managed, barely, to restrain myself from asking if Chat had met many lawyers. It raises a good point of course; a computer's inability to exercise independent judgment or empathy is, and will likely for the foreseeable future remain, a significant hurdle to making AI programs truly human-like.¹⁹ But Chat's answer also points out the fact that the bar exam currently doesn't test for judgment or empathy, so a human lacking those traits can currently be licensed to practice law. Should a computer be restricted from active law practice just because it hasn't learned to hide its shortcomings?

Some will object that Chat has shown itself to make significant mistakes and can produce convincing, but entirely wrong-headed, descriptions of fictitious events.²⁰ This critique points out one

¹⁶ This assumes that Chat could also pass a character and fitness interview. That would be an interesting interview to observe.

¹⁷ In editing this before sending it away to the editors, I noticed that my word processing program flagged "a number of" as being verbose. It suggested "several" instead. It was mildly thrilling, and mildly disturbing, to see one computer program criticizing the work of another.

¹⁸ ChatGPT, *supra*. n. 7. Accessed January 12, 2023.

¹⁹ A computer's inability to experience empathy was the way humans were able to identify robots simulating humans in Phillip K. Dick's *DO ANDROIDS DREAM OF ELECTRIC SHEEP* (1968) and its movie adaptation *Blade Runner*.

²⁰ Stephen Paskey, for example, persuaded Chat to write a well-written description of the Bicholim Conflict, a fictitious historical event. Email exchange on file with author. Chat has also been the downfall of a lawyer who allowed it to perform legal research for a motion filed in federal court. Chat GPT: US lawyer admits using AI for case research <https://www.bbc.com/news/world-us-canada-65735769> (May 28, 2023). Chat provided citations to several persuasive-sounding cases that were, unfortunately for the lawyer, completely fictitious. *Id.* At the time of writing, the inevitable disciplinary process against the lawyer was not completed. While it easy to laugh at the lawyer in this case, and use his

of Chat's most significant flaws; it is entirely dependent on the information it has been fed and if it's given garbage, it will produce garbage. That's a fair point, but one that likely won't apply to any version of Chat that is especially trained for legal practice. Westlaw and Lexis are readily accepted by lawyers and judges as authoritative sources of legal information without anyone checking to see if the cases say what the computers say they say. Those programs also can make "mistakes" if they're not given clear instructions or if they fail to identify the most relevant cases at the top of their search results. Lawyers have learned to cope with these limitations, and it seems likely that lawyers would learn to deal with Chat's limitations as well.

A more difficult objection to pin down, and one that we haven't had to address until now, is that some just feel that something is inherently wrong with a machine being licensed to perform work that was, until now, only possible to be performed by humans. Whether or not that's a reasonable position I'll leave to others to discuss. My concern here is that the bar exam, as it's presently constituted, doesn't test for many of the things - judgment and empathy, for example - that are now being offered as reasons for computers not becoming lawyers. So, if we want to use these, or other, qualities to differentiate between people and machines, we should modify the bar exam so that we have a principled basis for accepting some and denying others into the practice of law. But if Chat has presented us with a crisis, then we shouldn't let it go to waste²¹ and should use this opportunity to reexamine the bar admissions process, decide what we want it to examine and how to do that, and then offer an exam that will yield us a crop of prospective lawyers who have the qualities we seek in lawyers.²²

Opportunities and Challenges for Lawyers and Paralegals

Indeed, Chat, and its potential role in the legal market, opens up several opportunities for lawyers and for society. In particular, Chat could provide more meaningful access to the law than many currently enjoy. These opportunities, though, also present some challenges and could cause significant

spectacular misjudgment as proof that Chat will never be able to perform real legal tasks, it's worth considering three things first: (a) this was the equivalent of sending a ten year old into court to perform complex legal analysis. Perhaps not a fair prediction of what AI will be able to do; (b). We don't know how many times lawyers have used Chat effectively to perform work on briefs; and (c). This is surely not the first time a lawyer has done a stupid thing. See, e.g., Curran v. Price, 150 F.R.D. 85 (D.Md. 1993). I had a passive role in part of this case (mercifully, not from the lawyering side). Buy me a beer sometime and I'll tell you all about it.

²¹ A quote variously attributed to Rahm Emanuel, Winston Churchill, or Machiavelli, an interesting set of people with whom to be aligning myself.

²² Whether or not we should re-test all those currently practicing lawyers to make sure that they also have the qualities we seek in practicing lawyers is a question far above my pay grade.

disruption to the practice of law and the educational superstructure that supports the practice by feeding new professionals into the job market every year.

In the law firm, as we have seen, Chat could perform many of the tasks currently undertaken by junior lawyers and paralegals. Chat's ability to review large bodies of documents and craft narrative summaries of them, identifying key documents based on the parameters it's been given, is something that parallels tasks assigned to people in law firms every day. And Chat's skill at writing simple, and not-so-simple, documents means it could likely outperform junior associates in those tasks. But Chat's work, would be done faster and - arguably - more reliably, and at a fraction of the cost.

If this is correct, then Chat poses an existential threat to legal practice as it currently exists. The paralegal position in a law firm, in particular, could vanish almost completely. Law firms would still need junior associates to perform the tasks that could not be assigned to Chat, and to provide future firm leadership. But firms would likely be able to manage with substantially fewer associates than they hire today and might look for different skill sets than those they seek at present. Writing and research skills, for example, would be significantly less prized than they are now.

And this, of course, poses some challenges for law schools and institutions providing paralegal training. Chat poses short-term problems, of course, including substantially enhanced possibilities for cheating on assignments and exams, but the longer-term problems such as reduced writing and analytical abilities from incoming students who have grown up using Chat, and reduced demand for new lawyers from the legal profession, will likely be more intractable.

One person's problem is another's opportunity, though, and Chat offers a myriad of possibilities to those for whom the number of lawyers in practice is irrelevant because they can't afford to retain any of them. Chat, married to specially prepared databases in specific areas such as landlord-tenant disputes, simple criminal matters, simple wills, and simple real-estate transactions, could improve pro se litigants' outcomes and enable them to more confidently cope with the complexities of the legal system.²³

But this raises the ugly prospect of an even more stratified legal system than exists at present, with the rich able to afford the bespoke legal services of humans and the poor only having access to

²³ Donotpay.com already claims to operate in this space, claiming that it can allow its customers (clients?) to "Fight Corporations, Beat Bureaucracy, Find Hidden Money, Sue Anyone, [and] Automatically Cancel Your Free Trials." <https://donotpay.com>, accessed January 26, 2023. How successfully the website performs any of these tasks is outside the scope of this essay.

expert systems, with legal aid organizations and those lawyers able and willing to make a living working high volume, low return cases likely being squeezed out quickly after Chat becomes commonly available in the legal market.

Opportunities and Challenges for the Legal Writing Community

It's true, of course, that whatever affects the legal market will affect the legal academic market as well. And whatever affects law schools will affect our small part of the law school world, especially when writing is at issue. In a pre-Covid world we might say that when law firms sneeze, we catch a cold. These days that seems less appropriate, but you get my meaning.

But it's surely clear that anything that has the potential to affect legal writing as profoundly as Chat appears to be able to do must have particular interest to us. And while I'm sure that the conversations about Chat in many law schools have been going on without our input,²⁴ I believe, or at least hope, that many other law schools have actively solicited our input and have listened to what we have to say.

Whether or not our voices have been listened to, though, we nonetheless must speak out. Chat specifically, and AI-generated text in general, is our issue, and our thoughts and scholarship should turn to it right away. That's already happening as I write this, with forums being hosted by the legal writing community²⁵ and the first fruits of scholarship on Chat, in particular, appearing even as I write this.²⁶ I hope that by the time this essay is published, all the journals devoted to legal writing are being deluged with articles on Chat and the questions raised by AI-generated text, and that the flood continues for years to come.

Quite apart from the practical considerations of how lawyers could use Chat, or whether they should resist it, the potential for scholarship in this area is vast. We are in the first few months of a revolution in writing unlike anything we've ever seen since . . . well . . . the advent of writing. We should consider what it means when a computer can, with a few fundamental human prompts, generate

²⁴ And I suspect those conversations have revolved mostly around the parochial questions of how Chat will affect law school exams, rather than the bigger picture questions of how it will affect law practice. If law school administrations were in charge of the Titanic, it would have had very neat rows of deckchairs.

²⁵ The ALWD Leadership and Development Committee hosted a Virtual Front Porch on February 17, 2023, with the topic "How ChatGPT and Generative Artificial Intelligence Impact Legal Writing and Research Courses", and I'm sure it's one of many such sessions that will be convened in the coming months.

²⁶ In particular, Ashley Binetti Armstrong's proposed article, *supra* n. 2, is an example of a scholarly eye examining and thinking carefully about Chat's implications for lawyers.

readable, intelligent prose.²⁷ I've seen Chat derided as merely a predictive text algorithm that's only slightly more advanced than the irritating program that tries to spare my thumbs from more clumsiness on my iPhone, but isn't all writing, in a sense, a succession of words implied by the words that preceded them? And isn't writing the act of carefully meeting and, or or, subverting the expectations we've set up? If it's true that the *sine qua non* of good writing is a conversation between writer and reader, then isn't predictability an important part of that conversation?²⁸ I'd love to read some articles from this community about that.

The situation we're in is eerily reminiscent of another sea-change wrought by computers a few years ago with the introduction of Boolean searching on Lexis and Westlaw. For the first time since the proliferation of case and statutory law in the Nineteenth Century, lawyers could self-index the entire, vast, body of law for the search terms that interested them, rather than the index terms that the West editors had selected for them, and could do so using multiple terms, thereby exploring the relationship between diverse concepts. That development generated years of thought and scholarship, albeit more by law librarians than the legal writing community. The challenges and opportunities presented by Chat, though, are placed squarely at our door and give us the chance to take the spotlight by leading the conversation about it using the pages²⁹ of this journal and the other legal writing journals, law reviews, and the less formal, but still important, pages of practitioner journals, magazines, and newspapers. For many of us, this work might be less interesting than the traditional fields of legal writing scholarship. But to be blunt about it, how much does more research about how to employ rhetoric and storytelling in legal writing matter if humans aren't doing the writing?

Conclusion

It's commonplace to say that everything new brings good and bad in its wake, but that's the case with Chat and its relationship to the law. It offers transformative possibilities to the way law is practiced and those who have access to the law, but it poses significant problems for those currently in the legal practice business and, especially, for those about to get into it. And it offers similar possibilities and challenges to us as legal writing scholars.

²⁷ It can also generate readable, nonsensical prose, of course, and we need scholarship on that as well.

²⁸ I tried to throw a curveball into that sentence with some fancy Latin I don't actually understand. Did you predict that? Was it bad writing? If Chat wouldn't do that, and I suspect it wouldn't, is it a better writer than me? Don't answer that.

²⁹ A rapidly dying metaphor, but a more elegant way of describing the thought than "the electrons", no?

I hope the picture is different when you read this, but I suspect it won't be. Things will have changed, of course, and the picture showing what Chat can and can't do might be incrementally clearer. But I suspect that with that clarity will be new uncertainty, as the possibilities and limitations of new versions of Chat present themselves. We might not yet know if we have indeed been weighed in the balances and found wanting, but we in the legal writing world should be, and are, in the forefront of providing the answers to the many questions posed by Chat. And if that puts us in the uncomfortable role of Daniel,³⁰ it's what we're called to do.

The one thing we can say with certainty is that Chat isn't going to go away. In the words of Omar Khayyam about another form of automatic writing, "The Moving Finger writes; and, having writ, Moves on: nor all thy Piety nor Wit Shall lure it back to cancel half a Line, Nor all thy Tears wash out a word of it."³¹ What was true in the Twelfth Century is undoubtedly true in the Twenty-First as well: like it, loath it, fear it, or embrace it, Chat is here to stay. It's up to us to figure out how the legal community should deal with it.

³⁰ Daniel was, after all, thrown into the lion's den by his good friend Darius the Mede, successor to Belshazzar. Daniel 6:1-23. Even though we can't perhaps hope for the same divine intervention that Daniel received, we can take some comfort in remembering that it all worked out in the end for him.

³¹ RUBAIYAT OF OMAR KHAYYAM, 78 (Edward Fitzgerald, trans., Collins 1971).