Could a Robot Be District Attorney?

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Artificial intelligence—AI—is all the rage. We constantly hear about it in one form or another. Automation. Big data. Machine learning. Autonomous vehicles.

But let’s make this personal: will AI affect lawyers? Replace us?

Today we are pitched ‘AI legal research’ that hardly seems impressive, but progress is sustained. Like everyone, we react with equal measures of awe and trepidation when Google Duplex schedules an appointment at a hair salon, peppering its conversation with just the right measure of ‘mm-hmm’ so that the involved human has no clue that she is speaking with a...what, exactly? A computer? A robot? An intelligent machine? Is Google Duplex—an in-development appointment scheduler of impressive talent—intelligent? As lawyers, we know the answer is always the same: it depends.

Specifically, it depends upon what is meant by ‘intelligent.’ Google’s AlphaGo could absolutely destroy me at the game Go...but let’s see it put on hiking boots and beat me up the mountain. No body? That’s a problem. Besides, it doesn’t know anything about mountains, and certainly doesn’t understand why humans love to climb them. Ditto for composing music, or even conversation. Like all AIs ever developed, Google’s variant is, for now, narrowly intelligent. It can beat the socks off any human in one narrow area, but is absolutely clueless when it comes to other aspects of human competence.

Thus, the holy grail of AI: a computer that is at least as intelligent as a human across the very broad expanse of human competence. Artificial general intelligence, or AGI, it is often called. We don’t have it. And we may never have it. Yet, what if we did? (And plenty of experts think that we might within decades to a century.)

Should these AGI robots become lawyers? I hardly see why not. Take an area of the law near to my own heart: criminal defense. As I point out to my students, criminal defense has at its core a wonderful, elegant simplicity: when the State comes in all its might against a single person—it is, after all, United States v. Henderson...sucks
to be Henderson—it is rather easy to appreciate being a friend to the friendless. A comforter to the comfortless. An advocate for the oppressed. “I was in prison, and you came to visit me,” many might readily quote from Matthew. (And even for the I-like-to-lay-blame sort, there is this: “It is not the healthy who need a doctor, but the sick.”)

Thus, in the words of the Supreme Court, a defense lawyer “best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the undivided interest of [her] client.” Within the bounds of the law, then, a criminal defense lawyer owes a firm and unyielding duty of loyalty to her client, along with duties of investigation, confidentiality, communication and consultation, learning, consideration, and zealous advocacy. A daunting list, to be sure, but a list containing nothing that an artificial general intelligence might not be able to do.

And, if it could, how our criminal justice system might improve! I hardly have space here to convince anyone that American criminal justice is seriously flawed, but, fortunately, I can’t imagine an informed American in 2019 thinking otherwise. Hence, it is hard not to get at least a bit excited about the potential of an army of AGI criminal defense lawyers who could bring human-level—or even superhuman—competence to every minute (and even every microsecond) of every representation. Clarence Earl Gideon would have been quite pleased with that.

At least so I argue in a forthcoming article in the Oklahoma Law Review. But when I turn the lens to criminal prosecution, and the picture clouds considerably. Whereas the criminal defense lawyer has a narrow focus—the interests of her client—the criminal prosecutor, as we have (ill?)defined the role, has an impossibly large one: to do justice. That’s the gist of what Robert H. Jackson—United States Solicitor General Jackson, Attorney General Jackson, Supreme Court Justice Jackson, Chief Prosecutor at Nuremberg Jackson, that Jackson—famously said, because “with the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.” And that from a guy who didn’t live to witness the greatest legislative criminal explosion in history. So, a prosecutor is to do justice. That’s what the United States Supreme Court has said, the American Bar Association has said, the National District Attorneys Association has said, and commentators have said. Returning to Jackson, “The citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches [her] task with humility.” We replace the singular zeal of a criminal defense attorney with a much more nebulous moral humility and a herculean, ill-defined task: to do justice.

So, how about it? Ought we to allow an artificial general intelligent robot to run for DA? I argue there is good reason to answer in the negative. It is in the very nature of the prosecutorial role—at least as we’ve currently defined it—not merely to
discern (what are the facts and the law?), and to advocate (how should we feel about them?), but to judge. Given our levels of criminalization and penalty, we expect the prosecutor to decline many winnable prosecutions, and if she did not, we would not only further swamp our already inadequate adjudicatory systems, but we would needlessly destroy more lives. And if, as colleague Kiel Brennan-Marquez and I argue elsewhere, democracy requires judgment that is role-reversible, there is reason to refuse robot prosecutors...at least until we also have robot defendants.

This does not mean that intelligent machines could not radically improve our systems of human prosecution. I suspect that they could. But that, as we say, is a topic for another day.