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Law, authority, and respect: three waves of technological disruption

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ABSTRACT

This article identifies and discusses three waves of technological disruption to the authority of law and, concomitantly, to the demand for respect for the law.

The first wave disrupts the claim made by national legal systems to recognise their authority and the demand that their decrees and decisions should be respected. This disruption, which is particularly associated with cybertechnologies and actions in cyberspace, is likely to occur whenever technologies develop significant new regulatory spaces in which humans (or their extensions) transact and interact (such as the metaverse).

The second wave disrupts the debate about the demand that the law should be respected, simply because it is the law and any reservations notwithstanding. Traditionally, this demand is justified by reference to a picture of law as a *rule*-based *order* or as an aspiration for *just* order. However, this is disrupted by the prospect of technologies that promise to 'do governance' better than humans with rules, this generating a picture of law as governance by smart technologies and, in opposition, a picture of law as self-governance by *humans*. Instead of a debate between two modes of governance by rules, we now have a debate between various modes of human governance by rules and governance by technologies.

The third wave disrupts the conceptual scheme that underlies our thinking about the authority of, and respect for, the law. In particular, the picture of law as governance by smart technologies throws into doubt the relevance of questions about the authority of law (when law is no longer governance by humans and governance by rules) and about respect for the law (when the reservations that we have about governance by fellow humans are no longer applicable).

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1. Introduction

In our technologically sophisticated societies, we act, interact, and transact in environments that are located at various points on a spectrum running from

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offline (analogue) to online (digital). Typically, the more that we move away from offline environments, the more that technologies bear the weight of governance; and, concomitantly, the greater the range and intensity of questions about the authority of law's governance and why we should respect it. To be blunt: why should we respect the governance of law simply because it is the law? It is a question that persists whether our societies are low-tech or high-tech.

Given today's setting for this question, the purpose of this article is to open up a research agenda relating to three technologically-provoked waves of 'disruption'[1] to traditional ideas about both the authority of law (the authority of the rules and institutions of Westphalian legal systems) and respect for the law. Although, in the present article, I will not explicitly address a further related form of disruption, namely disruption to various forms of *discontent* with law's governance, it is implicit in my discussion that such disruption is also taking place.[2]

Having already experienced the first of these waves of disruption, we are currently experiencing the second; and, the third is on the horizon. While the first wave has brought with it a significant disruption, an amplification of discontent with the law, it is not a game-changer. However, the second wave is a game-changer, rewriting the terms of the traditional debate. In that debate, law is presented as better than various kinds of arbitrary and disordered alternatives; but, if technologies are able to 'do governance' better than law, the challenge to law comes from a different direction—instead of law looking down on worse alternatives, it now has to look up at arguably better options. This presages a third wave of disruption when governance

[1]There are many ways in which Law might be 'disrupted'. It might be that the application of traditional legal doctrines, concepts, templates, classifications, and the like, to novel phenomena or circumstances associated with a new technology is problematic. Or, it might be that the disruption impacts on legal practice, on what we do and how we do it. Or, as in the current paper, the disruption might impact on our conceptual thinking, our values, or our attitudes, and so on. For discussion, see, e.g., Roger Brownsword, 'Law and Technology: Two Modes of Disruption, Three Legal Mind-Sets, and the Big Picture of Regulatory Responsibilities' (2018) 14 *Indian Journal of Law and Technology* 1, 'Law Disrupted, Law Re-imagined, Law Re-invented' (2019) 1 *Technology and Regulation* 10, and 'Political Disruption, Technological Disruption, and the Future of EU Private Law' in Mateja Durovic and Takis Tridimas (eds), *New Directions in EU Private Law* (Hart, 2021) 7.

[2]This related line of disruption, not so much to law itself but to discontent with law's governance, is something that I am currently working on in 'Law's Imperfect Governance: Discontent, Disruption, and Reconstruction' (forthcoming). Briefly, even without recent technological disruption, there are many reasons to be discontent with law's governance. First, there might be a deep-rooted discontent with the credentials of those who are undertaking governance. This is not a matter of competence in the sense of capability but of mandate. By what right, on what basis, do *these* particular humans subject other humans to their regime of governance? Secondly, there is a broad sweep of discontent where governance is judged to be 'bad' or ugly' relative to an ideal of 'good governance'. For example, the complaint might be that governance makes no attempt to serve the interests of the governed, or that it is inconsistent in its administration, or that its lacks flexibility, and so on. Thirdly, even if governance is guided by the relevant desiderata, it might provoke discontent, either because of the way in which it interprets a particular desideratum or translates it into practice, or because of its handling of tensions between conflicting desiderata. Once we add new technologies back into the mix, we might find that some of our discontent is exacerbated but, in other respects, as we put our faith in governance by technologies, some might find that their discontent with governance is relieved.

is predominantly by machines and technological management rather than by humans with rules; in this changed context, the question is whether it remains meaningful to employ concepts that were designed for a human rule-based enterprise and, indeed, whether the questions that we have about authority and respect are any longer relevant. If not, this third wave is more than a game-changer, it is a game-ender.[3]

Potentially, the first kind of disruption can occur whenever technologies create new but controversial options for humans; and, it is particularly when new and alternative regulatory spaces are created (such as the spaces now being promised by the development of the Metaverse[4]) that this kind of disruption is provoked. Indeed, it has been particularly with the development of the online social spaces of the Internet that we have experienced the first wave of challenges as doubt is cast on which system of legal rules has authority and whether legal rules are to be respected *at all* by agents who act in cyberspace. In cyberspace, land-based and territorially-defined legal systems no longer are controlling; cyber-borders do not map onto land borders; it is not obvious that land-based orders maintain their monopoly on authority and jurisdiction.[5] While this development foreshadows a radical challenge to legal authority and to respect for the law, even in its more aggressive cyber-libertarian forms, it does not depart from the traditional paradigm of governance by humans and governance by rules.

[3]Compare William Lucy, 'The Death of Law: Another Obituary' (2022) 81 *Cambridge Law Journal* DOI: https://doi.org/10.1017/S0008197321001021. Concluding his essay on the 'death of law', Lucy observes (footnotes omitted):

> Will the death of law be a cause for regret? The existence of technologies that ensure regulatees comply with the law, often regardless of their agency, is surely a good thing. Golf carts or shopping trolleys that cannot be stolen, cars that cannot exceed the speed limit and contracts that cannot be breached, look like positive developments, a protection of or increase in human well-being. How can more of this kind of regulation, which deprives those so inclined of the opportunity to do bad things, be objectionable? Jurists have nevertheless objected to it on a number of grounds. The most common is that technological management seems prone to transgress the principles that inform the rule of law. Slightly less common are the objections that technological management undermines human dignity, on the one hand, and freedom, on the other, since it either treats human beings as objects or illegitimately limits their sphere of action. I do not doubt the weight of some versions of these objections, but wish instead to highlight another worry additional to or possibly latent within them. It is this: if technological management is generalised as a means of regulation, then the space for human agency will contract and, as a result, agency may wither and die.

[4]https://en.wikipedia.org/wiki/Metaverse.

[5]Anticipating such radical change, see David R. Johnson and David Post, 'Law and Borders—The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367. Opening their paper, Johnson and Post state (at 1367):

> Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility—and legitimacy—of laws based on geographic boundaries. While these electronic communications play havoc with geographic boundaries, a new boundary, made up of the screens and passwords that separate the virtual world from the 'real world' of atoms, emerges. This new boundary defines a distinct Cyberspace that needs and can create its own law and legal institutions. Territorially based law-makers and law-enforcers find this new environment deeply threatening.

However, the first disruptive wave is followed by a second, this time raising the prospect of governance by machines and technological management that present more fundamental questions about modes of governance and, with that, about how we now view the idea of the authority of law, its institutions and officials, and respect for the rules of law.

Lest this prospect seems a bit fanciful, we should note how governance by technologies has insinuated itself into many professional sports. Once upon a time, horse races were started by an official who dropped a flag; and, at the finishing line, an official called the winner of the race. Nowadays, we have mechanical starting stalls and, at the finishing line, we have cameras. More significantly, in soccer, rugby, cricket, and tennis, off-pitch officials and technologies play a role in supporting and correcting on-field decisions. In some sports, the authority of human officials (umpires) is open to limited challenge—interestingly, with the appeal being from solely human on-field decisions to off-field technological review rather than (as Article 22 of the EU General Data Protection Regulation contemplates) this being an appeal from the technology to a human[6]; and, in other sports, off-field humans assisted by technology make the decisions. In professional soccer, where on-field respect for officials had reached an all-time low, the players now submit to the technology. Whether or not the players respect the technology and whether or not spectators prefer their sport (like their music) 'unplugged' or technologically-assisted is another matter.

In these sports, it seems like a time of technological transition and, for our purposes, the question is this: what are the implications for legal authority and respect for legal rules and officials if a similar transition takes place in the law? To the extent that legal authority and respect for the law hinge on law being better than the alternative, what are the implications of a technological alternative?

While this second wave of disruption is currently in the spotlight, it presages a third wave. In his influential book, *After Virtue*, Alasdair MacIntyre argued that, even though the language of morality might persist, its concepts lose their meaning when the context in which they have been developed itself changes.[7] So, updating this argument, we might say that the concept of moral virtue loses its meaning where, in technologically managed contexts, agents are free to act only in the way that the technology permits. Where technological management forces or disables a particular action, this might not reflect

[6]Regulation (EU) 2016/679. To claim the protection of Article 22, the data subject must show (1) that there has been a decision based solely on automated processing (2) which has produced adverse legal effects or (3) which has significantly affected him or her. This is a provision that poses more questions than it answers. For discussion of several nice points of interpretation, see Roger Brownsword and Alon Harel, 'Law, Liberty and Technology—Criminal Justice in the Context of Smart Machines' (2019) 15 *International Journal of Law in Context* 107.

[7]Alasdair MacIntyre, *After Virtue* (Duckworth, 1981).

badly on the agent, but there is no virtue in so acting.[8] Accordingly, the third wave of disruption impacts on a raft of concepts that are meaningful when the context is governance by humans and by rules but not so once the context is governance by technology—and, moreover, not so even though we might persist in trying to transplant the language of one context to the other.

While the article is specifically about technological disruption to the authority of law and to its demand for respect, it supports the view that the disruption of law is rarely a single occurrence at a particular point in time.[9] Rather, we have different technologies contributing in different ways and at different times to the ongoing disruption of law and, in this case, disrupting its foundational ideas, claims and demands (as well as, implicitly, the reservations and discontent that we have with its governance).[10]

Starting with Section 2, in which we sketch the first disruptive wave with its amplification of disrespect for the law, the article has six principal sections.

In Section 3, the traditional debate about the authority of, and respect for, the law is outlined. That debate, I will suggest, bottoms out on whether we have prudential or moral reasons to treat law as 'preclusionary'[11] in the way that the claims to authority and for respect have it—that is to say, in the way that it is claimed that we should recognise the authority of legal rules simply because they are 'the law'; and that we should respect legal requirements and prohibitions simply because they are provided for by 'the law'. Crucially, such respect is demanded even though we might have reservations about the prospectus for law or about its performance, or discontent with its particular decrees and decisions.

Section 4 engages with the traditional justifications, prudential and moral, for such demands. Here, I will suggest that the plausibility of the traditional justifications is context dependent. In some contexts, the prudential case

[8]See, e.g., Roger Brownsword, 'Lost in Translation: Legality, Regulatory Margins, and Technological Management' (2011) 26 *Berkeley Technology Law Journal* 1321; Ian Kerr, 'Digital Locks and the Automation of Virtue' in Michael Geist (ed), *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda* (Irwin Law, 2010) 247; and Shannon Vallor, *Technology and the Virtues* (Oxford University Press, 2016).

[9]Compare Hin-Yan Liu, Matthijs Maas, John Danaher, Luisa Scarcella, Michaela Lexer, and Leonard Van Rompaey, 'Artificial Intelligence and Legal Disruption: A New Model for Analysis' (2020) 12 *Law, Innovation and Technology* 205; and, taking this forward, see Hin-Yan Liu, 'Rule-following Robots? Transitional Legal Disruption through Regulatee Design and Engineering' (2022) 14 *Law, Innovation and Technology* (this special issue).

[10]See (n 2).

[11]By 'preclusionary', I mean that the imprimatur of 'Law' (in relation to an institution, official, rule, decisions, requirement, and so on) is decisive; there is nothing further to be said; Law precludes debate. Law, per se, has authority, and commands unquestioning respect and compliance. Compare the analysis of 'authority' in Joseph Raz, *The Authority of Law* (Oxford University Press, 1979). Raz devotes only one chapter, Ch 13, to 'respect' for the law. His position is (i) that, because (so he contends) there is no general obligation to obey the law, this cannot be the basis for an attitude of practical respect for the law, but (ii) it is nevertheless permissible (optional) for a person to adopt an attitude of respect for the law (in a way analogous to friendship) which then gives reasons for obeying the law (other things being equal).

looks plausible; in others, the moral case looks plausible; but, in too many contexts today, neither case looks plausible. In contexts of plurality and scepticism, I will identify two pressure points for the plausibility of either of the traditional views. One pressure point is revealed when individuals question the sense of particular legal requirements; and the other arises when a hard look is taken at the supposed source of legal authority.

In Section 5, we get to the second wave of challenges and questions, as the prospect of governance by technical measures and technology disrupts the traditional debate. On one analysis, the debate still rests on a choice between prudential and moral justifications, but the relevant considerations are now quite different. Instead of comparing law with a worse alternative, we now have to compare it with a seemingly better-performing alternative. However, on another analysis, this does not capture the nature and significance of the disruption. Prefiguring the third wave of disruption, the thought is that what is disrupted is not so much the terms of the debate but the context in which the traditional debate is located—a context in which it is meaningful to ask whether law has 'authority' and whether we should 'respect' it, and which supports human communities to exercise their prudential and moral judgments.

In Section 6, I characterise the choice that our communities now face as one between, on the one hand, human-centric governance, not perfect but always an expression of human striving and, on the other, a technological form of governance that is human protective in a paternalistic way but not truly human-centric. Stated shortly, this is a choice between some version of governance by humans (self-governance) and benign governance for humans (but not by humans). On this analysis, we need to be very careful about paving the way for governance by machines, no matter how well such governance seems to serve our collective interests and how well it seems to articulate the community's morality.

Section 7 introduces the third wave of disruption. Here, I start by sketching a short agenda of questions that are prompted by this wave of disruption; and, this is followed by some reflections on how we might consider relaxing the demand for respect or even reimagining it. In particular, we might ask: how far do the conceptual ideas and the questions that accompany governance where humans are still the authors of regulatory measures remain meaningful once that context changes to governance by technologies? Is it helpful or appropriate to try to transplant the language of authority, respect, trust, justice, and so on that is characteristic of human governance to governance by machines? And, should we try to rework the ideas that stand behind this language or start again with a conceptual scheme that fits a world of governance by technology?

Finally, in some short concluding remarks, I underline the significance of these disruptions. It would be no exaggeration to say that, in what are still the

early years of our technological societies, humans face some fundamental choices about how they relate to technology.[12]

2. The first wave of disruption

Where agents act in cyberspace in ways that have some connection with more than one legal system, there is an obvious question about which rules of which legal system will be treated as applicable. However, this is not a radically disruptive question; this is a question that conflicts lawyers are used to asking in offline cross-border disputes.[13] The radical challenge is provoked by the question: why should we recognise the rules of any legal system as having authority, why not treat our own codes of conduct as authoritative?

Perhaps the most evocative articulation of this radical challenge is to be found in John Perry Barlow's declaration of independence which, memorably, opens in the following terms:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.
>
> We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.
>
> Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.[14]

Picking up this thread, Chris Reed and Andrew Murray[15] argue that, whatever the plausibility of claims to authority in offline analogue legal systems, these do not translate across to the online environments of cyberspace. In the latter, where individuals are presented with a plurality of authority and legitimacy claims, the self-validating claims of national legal systems will

[12]Compare Victoria Sobocki, 'Avoiding the Gilded Cage of Tech, Striking the Balance Between too Little and too Much Technology: Artificial Intelligence and Legal Disruption' paper presented at conference on 'Law, Technology, and Disruption' held at City University Hong Kong, March 19–21, 2021.
[13]Compare Uta Kohl, *Jurisdiction and the Internet: Regulatory Competence over Online Activity* (Cambridge University Press, 2007).
[14]https://www.eff.org/cyberspace-independence (last accessed September 16, 2021).
[15]Chris Reed and Andrew Murray, *Rethinking the Jurisprudence of Cyberspace* (Edward Elgar, 2018).

not suffice. Summing up their analysis in four key points, Reed and Murray say:

> The first [point] is that law has two main sources of authority: that deriving from the lawmaker's constitution, which in the case of state law is clear authority only for persons physically present in the state's territory; and the authority which comes from acceptance of a rule by a community. The second is that jurisprudence in cyberspace is exclusively concerned with the second source of authority, and needs to identify it at the level of individual rules rather than considering the authority of the entire body of the lawmaker's output. Third, laws compete for authority in cyberspace, and they compete with social and other norms as well as other laws, so that the authority of a law and also the demands it is able to make depend on how well it does in that competition. Finally, although lawmakers may be able to do little to enhance their authority claims, they can certainly weaken them by failing to establish the legitimacy of those claims and by impairing the rule of law through making authority claims which go beyond the boundary of the lawmaker's community.[16]

This critique of authority is closely related to Reed and Murray's analysis of legitimacy and the Rule of Law.[17] Taking acceptance by the individual as focal, their 'message' is that 'the legitimacy, efficacy and normative acceptance of law norms in the online environment are predicated upon their acceptance by the community and by the individual in that community.'[18] In other words, claims to authority are not vindicated by constitutional declaration or by the practice of officials who are authorised by such declaration, but depend on recognition and acceptance by the community and its individual members.

Once those who act in cyberspace question the authority of national legal systems, respect for the law is thrown into jeopardy; and, whatever commitment there is to the Rule of Law, it does not align with the rule of national legal systems. Now, it might be argued that respect per se has been done no favours by cyberspace. For example, a decade ago, in their book, *The Offensive Internet*, Saul Levmore and Martha Nussbaum highlighted concerns about the way in which online anonymity seemed to encourage a level of incivility and offence that one would not expect to encounter offline where those acting in such a manner could be identified.[19] Since then, it has become all too easy to point to the culture of online disrespect for others—indeed, the Internet has brought us a whole lexicon of disrespectful acts, such as 'flaming', 'trolling', and 'doxxing'—as well widespread disrespect for IP laws such as copyright and trade marks (witness, for example, illegal peer-to-peer file sharing and the thousands of web sites that trade

[16]Ibid., at 234–35.
[17]For legitimacy, see ibid. Ch 7, and for the Rule of Law, see ibid Ch 8.
[18]Ibid. p 228.
[19]Saul Levmore and Martha C. Nussbaum(eds), *The Offensive Internet* (Harvard University Press, 2010).

in counterfeit designer goods). However, it is specifically a lack of respect for the law that is at issue.

What is at issue, is the disrespectful attitude that Joel Reidenberg detected amongst the 'Internet separatists',[20] who seemed to think that the Rule of Law (and national rules of law) simply do not apply to their on-line activities. This seems to be the case, for example, when millions of youngsters engage in unlawful file-sharing, when thousands of users of Twitter conspire to disclose the identity of persons in defiance of protective court orders,[21] and when trolling and online racial abuse is rampant. Hence, as Reidenberg says:

> The defenses for hate, lies, drugs, sex, gambling, and stolen music are in essence that technology justifies the denial of personal jurisdiction, the rejection of an assertion of applicable law by a sovereign state, and the denial of the enforcement of decisions … . In the face of these claims, legal systems engage in a rather conventional struggle to adapt existing regulatory standards to new technologies and the Internet. Yet, the underlying fight is a profound struggle against the very right of sovereign states to establish rules for online activity.[22]

Not only that: what is also at issue is Yahoo's famous refusal to accede to the order of the French court in the LICRA case.[23] What is at issue is Mark Zuckerberg's well-publicised reluctance to appear before parliamentary committees concerned about Facebook, fake news, disinformation, and data privacy issues.[24] In other words, what is at issue, too, is the attitude and culture of big tech.[25]

So, whether we focus on the attitude of cyberlibertarians who deny that the writ of legal authority extends to cyberspace, or the disrespect of the Internet separatists, or the attitude of the big tech CEOs, we have a direct challenge to traditional demands made for the authority of and respect for the law. In all these instances, the question is: why should we recognise the authority of your rules simply because they are presented as 'the Law'; why should we respect the requirements and prohibitions of your rules simply because they are presented as 'the Law'?

[20] Joel R. Reidenberg, 'Technology and Internet Jurisdiction' (2005) 153 *University of Pennsylvania Law Review* 1951.

[21] See, e.g., Frances Gibb, Anushka Asthana, and Alexi Mostrous, 'Paper Faces Legal Threat over Picture of Footballer' *The Times*, May 23, 2011, p1 (the Ryan Giggs case).

[22] Reidenberg (n 20), at 1953–1954.

[23] The story has been told many times but, for one of the best renditions, see Jack Goldsmith and Tim Wu, *Who Controls the Internet?* (Oxford University Press, 2006) Ch 1.

[24] See. e.g., Lauren Feiner, 'Mark Zuckerberg turns down UK Parliament Request to Answer Questions about Fake News and Data Privacy on Facebook', CNBC November 7, 2018: available at https://www.cnbc.com/2018/11/07/mark-zuckerberg-declines-uk-parliament-invite-to-discuss-privacy.html (last accessed March 6, 2021). For further discussion, see Howard Davis, 'Obtaining Information from an Over-Mighty Subject: The Parliamentary Experience' in Maurizio Borghi and Roger Brownsword (eds), *Informational Rights and Informational Wrongs: Questions of Law, Regulation and Governance* (Routledge forthcoming).

[25] Compare the critique in Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books, 2019).

Disruptive though these questions provoked by cyberspace are, they are still posed within the traditional paradigm of governance by humans and governance by rules. In this article my question is: if we move away from governance by humans and by rules to governance by technologies, how does this impact on our traditional questions about authority and respect for the law? If we do move to a more technological mode of governance, we come to a second wave of challenges to traditional thinking about law, authority, and respect. Here, the main challenge to the authority of law and respect for the law is not so much a failure by citizens to comply with the legal rules, or a problem about knowing which set of rules is authoritative, or even to press for self-governance, but the replacement of governance by rules by governance by technology.

3. The second wave I: the traditional debate

The backcloth to traditional jurisprudential debates about either the authority of, or respect for, the law is the opposition between legal positivist and legal idealist conceptions of law. While the former relies on prudential reasons (law being favourably compared with less well-ordered alternatives, primarily some 'lawless' alternative),[26] the latter relies on moral reasons (law being viewed as an essentially moral enterprise and, if comparisons are being made, being favourably compared with an enterprise that simply has no aspiration systematically to do justice).

Broadly speaking, the shape of the arguments is similar whether we are focusing on legal authority or on the question of respect. In both cases, the key question is why we should defer to the directives, decrees and decisions of others simply because they come with the imprimatur of 'the Law'. Even if we disagree with the sense of the position taken by lawmakers, or if compliance raises questions of conscience, the demand to recognise the authority of the law and to respect its rules is unqualified. In this part of the article, we will outline the salient features of the two positions, the prudential and the moral, that purport to justify such a demand.

3.1 The legal positivist/prudentialists' view

The paradigmatic setting for the legal positivist/prudentialist view is that of a community that treats law and morals as independent spheres, each being a discrete department of practical reason, each being a distinct practical

[26]Often, the moral alternative is also compared unfavourably with the order promised by the legal positivist version of legal order. However, the reasons given for the supposed practical superiority of a legal positivist conceptualisation of law do not stand up to close examination: see Deryck Beyleveld and Roger Brownsword, 'The Practical Difference Between Natural-Law Theory and Legal Positivism' (1985) 5 *Oxford Journal of Legal Studies* 1.

discourse. Like planets that occupy the same Universe but orbit independently of one another, law and morals are always separate and distinct although there will be cases where they come quite close to one another. If law is to be respected in such a community, this is not to be understood to be an appeal to good morals (although, no doubt, the moral high ground will be taken by those who demand respect if the opportunity presents itself).

This is not to say that law is not valued in this community of legal positivist prudentialists; and, indeed, by and large, members of such a community might happily comply with legal rules. Nevertheless, to use HLA Hart's terminology[27], the internal aspect of those who comply for prudential reasons is not the same as the internal aspect of those who comply for moral reasons. The question is: what is it about law so conceived, the positive requirements of which will quite possibly conflict with an individual's sense of their (at any rate, short-term) self-interest, that reasonably commands not just a modicum of respect but unquestioning compliance?

In the 1970s, E.P. Thompson shocked some fellow left-leaning intellectuals when he declared that the Rule of Law, the rule of rules, was an unqualified good.[28] What Thompson meant was that the rule of rules was a better option than the alternative, where that alternative was the arbitrary rule of the powerful. At least, with the rule of rules, the powerful would be constrained by their own rules; and, given a reasonable warning of what the sanctions would be for breach of the rules, the less powerful would have a chance of avoiding unanticipated penalties and punishments. In this way, Thompson echoed not only Lon Fuller—who argued that the procedural constraints of his idea of legality would tend to discourage the exercise of arbitrary power[29]—but also Judith Shklar who had already highlighted the virtues of legalism in preference to the lawlessness of both fascist and Stalinist regimes.[30]

Similarly, we might hear echoes of this line of thinking in Alain Supiot's commentary on the replacement of law with governance, the flattening of relevant considerations for governance, and the decline of respect for law.[31] Once the 'law' ceases to offer any resistance and is used merely as a tool, those who are subjected to its instrumentalism no longer have any reason to pledge their allegiance to it.

So, from a prudential perspective, it is arguable that the rule of rules is unquestioningly to be preferred to the lawless and order-less alternative (the rule-less Wild West); and, it is also arguable that, where people want

[27]HLA Hart, *The Concept of Law* (Clarendon Press, 1961).
[28]EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books, 1975) at 266.
[29]Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969).
[30]Judith N. Shklar, *Legalism* (Harvard University Press, 1964).
[31]Alain Supiot, *Governance By Numbers* (trans by Saskia Brown) (Hart, 2017).

to know where they stand, the legal positivist version of rule by rules is to be preferred to any moral conception that invites contestation around its central idea of a *just* order.[32]

3.2 The legal idealist/moralists' view

The paradigmatic context for the legal idealist/moralist view is an aspirant moral community, its members not only committed both individually and collectively to doing the right thing, but also sharing a view as to the guiding principles for the community. Such principles might be founded on a religious code or credo, as in the Thomist tradition.[33] Equally, though, the picture might be entirely secular.[34] In such a context, the Law, as a direct translation of the Moral Law, would necessarily be regarded as authoritative and it would command respect.

Where the life and times of a community are fairly static, where little changes from one generation to the next, and where there is little communication or interaction with other communities, then the moralists' picture might be both plausible and sustainable.

Crucially, in this picture, the members of a moral community respect the Law not only when, by their lights, the Law's prescriptions guide correctly towards doing the right thing but even when it is either unclear or controversial whether they are guiding in the right direction. The argument is that, because those who are responsible for making the Law are attempting in good faith to maintain the community's moral commitments, this suffices to treat the mere fact that this is the Law as a good reason for respecting the institution, respecting its officials, and respecting its prescriptions. Moreover, members are reminded that the consequences of not respecting the Law might be to undermine and destabilise the moral aspiration of the

[32]Such a preference is in line with both 'exclusive legal positivist' thinking (as, commonly associated with Joseph Raz's conceptualisation of law and authority) and Scalian 'originalism'. On the latter, see, Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 *U. Cin LR* 849, at 862:

> I take the need for theoretical legitimacy seriously, and even if one assumes (as many nonoriginalists do not even bother to do) that the Constitution was originally meant to expound evolving rather than permanent values … I see no basis for believing that supervision of the evolution would have been committed to the courts. At an even more general theoretical level, orginalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system. A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well. The purpose of constitutional guarantees … is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.

[33]The leading example in modern jurisprudence is John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980).

[34]As argued, for example, in Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sweet and Maxwell, 1986; reprinted by Sheffield Academic Press, 1994).

community. For the legal enterprise to command our respect, to appreciate why Law really matters, it must be conceived of as an integral part of the practice of an aspirant moral community.[35] So viewed, the legal enterprise does not need to align perfectly with the Moral Law but it must represent a good faith and serious attempt to do the right thing.[36] The reason why Law should be respected is not because it is the perfect articulation of the Moral Law but because it is a very human enterprise guided by moral aspirations. Communities that fully commit to Law are making a moral, not a prudential, declaration.

Accordingly, as this sketch would have it, respect for the law is largely a matter of respect for moral aspiration and integrity. Respect for the authority of legal officials is respect for persons who are trying to do the right thing, and respect for their rules and decisions is respect for an enterprise that is predicated on translating moral pluralism into provisional regulatory positions and determinations.

4. The traditional views: plausibility and context

Once we take the traditionally opposed views out of their paradigmatic contexts, the plausibility of their respective justifications for deference to legal authority and respect for the law is reduced. In communities that are secular, where citizens are used to forming their own judgments (prudential and moral, individual and collective), and where 'ethics' is widely thought to be 'just a matter of opinion', these views come under strain. Once citizens start to question the good sense of legal positions, processes, and decisions, or once citizens start to doubt the moral guidance offered by the law, the claims to authority and for respect can look over-demanding or simply implausible.

In what follows we can identify two pressure points at which either view is likely to come apart. In both cases, we are assuming a context in which a hard look is being taken at the demands made by the law. The first pressure point, found in a context of plurality, is revealed where individuals want to make up their own minds about the prudential or moral sense of the law's particular demands; and the second pressure point, found in a context of scepticism, is revealed when citizens ask questions about the source of legal authority.

4.1 In a context of plurality: individuals making their own prudential and moral judgments

In 2022, many societies exhibit high levels of plurality, of competing views about what is in the community's best interest. For example, there have

[35]Here, readers might detect some echoes from Alon Harel, *Why Law Matters* (Oxford University Press, 2014).

[36]This is the thrust of the legal idealist position argued for in Deryck Beyleveld and Roger Brownsword (n 33).

been many different (prudential) judgments about the timing and extent of the legally imposed restrictions on freedom of movement and association at the time of the Covid-19 pandemic. Few would question that their governments have the general authority to respond to public health emergencies and have legal authority to introduce measures of the kind adopted; but, that is not the issue. The question is why one should comply with the particular restrictions that have been imposed simply because they are the law. Indeed, in the United Kingdom, where the government's response was clearly open to question, the former Supreme Court Justice, Jonathan Sumption, was reported as saying that 'people should make their own decisions in the light of their own health and that the law should be a secondary consideration for them.'[37] We might ask: did this evince 'disrespect' for the Law? Would such 'disrespect' be justified or excused if it were based on a good faith and reasonable belief that the 'most draconian of the government's interventions … [were] imposed under an Act that [did not] appear to authorise them' and with 'limited [or no] parliamentary scrutiny'?[38] If not, would such disrespect be mitigated if those who made their own decisions freely submitted to the penalties where their conduct involved the commission of criminal offences? How high is the bar for respect? How easy is it to evince disrespect?

In such a setting, it is tempting to introduce a proviso that licenses citizens, in exceptional circumstances, to back their own prudential judgments so long as they submit to whatever legal penalties there might be. This seems to be Sumption's position. However, this throws into doubt the background prudential judgment on which the preclusionary demands for respect for the law are made. Once this background judgment is up for debate, it is unclear how broad the proviso should be and where the exceptional case begins and ends. In fact, this is analogous to the familiar vulnerability of the default rules prescribed by rule utilitarians: once (act) utilitarians start reassessing the utilities case-by-case, the benefits of the default rule are compromised.[39]

At the same time, in the world as we know it in the present century, one of the many disruptive effects of emerging technologies is to the conditions that sustain the moralists' picture. When the context for community life changes rapidly, when the application of the guiding principles is moot, it is the task

[37]C.J. McKinney, 'Coronavirus laws a "secondary consideration", says Sumption', *Legal Cheek* (September 14, 2020): available at https://www.legalcheek.com/2020/09/coronavirus-laws-a-secondary-consideration-says-sumption/ (last accessed September 16, 2020). Similarly, Sumption has suggested that people should make their own decisions about whether or not to assist family or friends with assisted suicide (although, in this case, the reasons for breaking the law would be a matter of conscience rather than prudence): see Joshua Rozenberg, *Enemies of the People?* (Bristol University Press, 2020) 97–98.

[38]For the context in which the laws were made and for these particular reservations about their legality, see, Jonathan Sumption, *Law in a Time of Crisis* (Profile Books, 2021) Ch 12 and pp 228 and 233.

[39]Compare Raz's example of the traffic signals, (n 11) at 16 and esp 25.

of the law to take a position, a position with which some members might (as the community would see it) reasonably disagree. For example, developments in modern biotechnology have provoked huge challenges for the law—not least in provoking new debates about the interpretation of human dignity[40]—as it is compelled to arbitrate between religious and secular views and between the ethics of prohibition and the ethics of permission.[41] Again, developments in neuroscience and neurotechnologies have raised questions about the fairness of the criminal justice system, especially about penal practice.[42] Nevertheless, in this context, the traditional demand for respect for the law insists that, such disagreement notwithstanding, a positive attitude towards legal prescriptions and legal institutions should be maintained.

Moreover, modern moral communities might be even more pluralistic than this. There might be disagreement not only about the application of guiding principles to particular hard cases but also about which principles should be treated as guiding.[43] Where the reference standards or values for doing the right thing are themselves contested, the law faces a greater challenge because the best attempt at accommodating moral disagreement might mean that very few or even no-one in the community actually supports the (compromise) position that is adopted.[44] Once again, though, to

[40]See, e.g., Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press, 2001).

[41]See, e.g., Roger Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford University Press, 2008); 'Human Dignity, Human Rights, and Simply Trying to Do the Right Thing' in Christopher McCrudden (ed), *Understanding Human Dignity* (Proceedings of the British Academy 192) (The British Academy and Oxford University Press, 2013) 345; 'Regulatory Coherence—A European Challenge' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Essays in Honour of Hans Micklitz* (Springer, 2014) 235; and 'Developing a Modern Understanding of Human Dignity' in Dieter Grimm, Alexandra Kemmerer, and Christoph Möllers (eds), *Human Dignity in Context* (Nomos and Hart, 2018) 299.

[42]See, e.g., Joshua Greene and Jonathan Cohen, 'For the Law, Neuroscience Changes Nothing and Everything' (2004) 359 *Philosophical Transactions of the Royal Society B: Biological Sciences* 1775; and, for the counter-view, see, Stephen A. Morse, 'Lost in Translation? An Essay on Law and Neuroscience' in Michael Freeman (ed), *Law and Neuroscience* (Oxford University Press, 2011) 529, and 'Law, Responsibility, and the Sciences of the Brain/Mind' in Roger Brownsword, Eloise Scotford, and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation, and Technology* (Oxford University Press, 2017) 153.

[43]In those parts of the world where 'identity politics', fostered by online technologies, has entered the mix, the nature of plurality is likely to be even more complex and problematic. See, e.g., Matthew D'Ancona, *Identity, Ignorance, Innovation* (Bloomsbury, 2021) Chs 1–4. According to D'Ancona, there needs to be 'a new progressivism which respects group identity and … seeks to negotiate the differences that arise from the (endless) collisions of rights that take place in a diverse society' (at 111). Likening such a plural society to a dodgem rink, 'the challenge is to avoid collision … [and] the duty of rink managers is to ensure that nobody sustains injury' (at 112). In this context, we 'must assume that network politics is now the norm and that most of its battles will be fought online' (113). Moreover, we must 'take as read the fact that public trust in most institutions … has plummeted and that one of many formidable tasks facing [new progressivism] is to restore confidence in the organisations, agencies and public bodies that, in the end, will enact it' (113).

[44]Compare Roger Brownsword, 'Regulating the Life Sciences, Pluralism, and the Limits of Deliberative Democracy' (2010) 22 *Singapore Academy of Law Journal* 801.

demand respect for the law is to demand that all members of the community continue to view the law and its prescriptions in a positive light.

As with the prudential view, the default moral argument will be put under stress unless a conscientious objection clause is recognised; and, again the dilemma is the same. Should we decline to recognise an exception and then risk being accused of overclaiming and inviting rejection of the claim as wholly unreasonable? Or, should we create an exception but then risk underclaiming and compromising the preclusionary effect of the imprimatur of Law?[45]

4.2 In a context of scepticism: the question of the source of legal authority

For both legal positivists and legal idealists claims to legal authority (particularly where it is a matter of title that is at issue) are validated by reference back to their source.

According to legal positivists, the answer to a question about the authority (title) of a body or person undertaking a legal function (or claiming to act in a legal capacity) hinges on whether there is an appropriate mandate in a recognised authorising rule. In the case of legislative and judicial bodies, this authorisation might be explicitly declared in the founding constitutional rules; in other cases, the authorisation will be found in rules that have themselves been made by authorised rule-makers. On this account, the chain of title takes us back to the constitution, or the rule of recognition, or the last norm of positive law, or some such apex rule within the particular legal system. This means that, in the final analysis, the system purports to be self-validating. It means that the plausibility of all claims to authority within the system are contingent on acceptance of the apex rule as the ultimate test of authority. Ultimately, the authority of law rests entirely on a convention. Such a contingency is the Achilles Heel of the legal positivist/prudentialist view of legal authority.

There a number of responses to this problem, to the apparently unauthorised nature of the apex authorising rules themselves. One response, famously advanced by Hans Kelsen, treats this as a logical problem because there seems to be no end to the chain of authorisation. Kelsen's proposal is that we should presuppose a hypothetical rule (the 'Basic Norm' in Kelsen's terminology) that stands just outside the legal system and which authorises the apex rule or norm.[46] However, even if we accept the fictitious Basic Norm as a kind of logical full-stop, it does nothing to answer the practical and

[45]See, further, the discussion in 7.2.

[46]Hans Kelsen, *The Pure Theory of Law* (2nd ed) (University of California Press, 1967). For critical assessment, see Beyleveld and Brownsword (n 33) Ch 6, 'Methodological Syncretism in Kelsen's Pure Theory of Law' in Stanley L Paulson and Bonnie L Paulson (eds.) *Normativity and Norms: Critical Perspectives on*

normative questions raised by citizens. Another response is to present the apex rule as the agreed reference point for testing authority, the agreement taking the form of a social contract. Those who are parties to the contract are then precluded by their consent from disputing the apex rule as the test. Again, though, while this might be sound in principle, in practice it is also something of a fiction.[47]

For legal idealists, the last norm of positive law is never going to be the ultimate source of legal authority. Law has to be connected to some external moral standard or order and this is where the source of legal authority eventually will be found. While this narrative might be plausible in some contexts, it lacks plausibility where communities have stopped believing in the divine right of Kings, or similar justificatory tales. Particularly in those communities where there is a pragmatic acceptance that the authority of law rests only on a convention, the moral account will be rejected as a legacy of primitive thinking.

While there is a great deal more that could be said about these much-debated jurisprudential puzzles, the bottom line is that the traditional views are in trouble once we take a hard look at them. As Scott Shapiro says of this puzzle (the 'Possibility Puzzle' as he terms it):

> Legal philosophers, therefore, face a terrible dilemma: they are damned if they do ground the law in moral facts and damned if they don't.[48]

In my view, if we are not to give up on the idea of a compelling foundation for law, we should be looking instead at a prospectus that is fully committed to maintaining the 'global commons',[49] understood as the preconditions for humans to exist and to be viable as agents—whether they are forming their own communities with their own distinctive collective values and aspirations, or debating the mode of governance for their community, or developing a sense of their own identity and interests, or having regard to and debating the legitimate interests of fellow humans.[50] Although this is of

Kelsenian Themes (Clarendon Press, 1998) 113, and 'Normative Positivism: The Mirage of the Middle-Way' (1989) 9 *Oxford Journal of Legal Studies* 463.

[47]Compare Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart, 2007).

[48]Scott J. Shapiro, *Legality* (The Belknap Press, 2011) at 49.

[49]Let me emphasise that this term is not to be limited to, or equated with, those international spaces that lie beyond the limits of national jurisdiction, open to use by the international community and closed to appropriation by treaty or custom; and, nor is it to be equated with the *jus cogens* or obligations *erga omnes* that happen to be recognised at any one time by international law. Rather, the comparison should be with Karen Yeung's remark that a failure to include adequate safeguards in the governance of new technologies (such as AI), 'may erode our moral, cultural, and political foundations (the "commons") which could fatally undermine our democratic political system and with it our individual freedom, autonomy, and capacity for self-determination which our socio-cultural infrastructure ultimately seeks to nurture and protect […]' (see Karen Yeung, 'Why Worry about Decision-Making by Machine?' in Karen Yeung and Martin Lodge (eds) *Algorithmic Regulation* (Oxford University Press, 2019) 21 at 42).

[50]See, further, Roger Brownsword, *Law, Technology and Society: Re-imagining the Regulatory Environment* (Routledge, 2019) Ch. 4, *Law 3.0: Rules, Regulation and Technology* (Routledge, 2020) Chs 17 and 20 (the

the first importance, because any picture of law that does not treat this commitment as non-negotiable is certainly not worthy of our respect, for our immediate purposes we do not need to take it any further.[51]

For present purposes, the point is that both sides in the traditional debate might wobble but the shape of the debate has not yet been radically disrupted. It is when we contemplate a switch from governance by rules to governance by rules together with technical measures and governance by machines and 'technological management' that we get to the radically disruptive second wave of challenges and questions.[52]

5. The second wave II: the traditional debate disrupted

The disruption brought about by governance by technology impacts on both sides of the traditional debate. On the one side, the prudential case for law is challenged by technologies that promise to outperform humans and rules in achieving order. It is no longer enough to argue that law, albeit less than perfect, is preferable to a lawless and disordered Wild West. Governance by technology claims that it can put in place a form of order that is closer to perfection.[53] On the other side, technologies promise to outperform

latter for the idea of a triple licence authorising a particular technological application), and *Rethinking Law, Regulation and Technology* (Elgar, 2022) Ch. 6. It should be understood that the conditions that make up the commons are neutral as between humans and as between human projects, whether they are projects for individuals or communities; and, in the same way, the infrastructural conditions are impartial as between particular views of self-interest and particular criteria for moral judgments. Infrastructural conditions that are not neutral and impartial in this way might well be important but, ex hypothesi, they will not be part of the critical infrastructure that supports human social existence. So, the global commons is not the only infrastructure but its conditions are relatively thin, setting the minimum conditions for human social existence. Quite simply all humans have a stake in these minimum conditions; the conditions themselves are neutral between humans but necessary if humans are to flourish; from which it follows that human agents must be positively disposed towards a project that focuses on assuring the conditions for humans to exist and for them to develop their capacity for, and their free exercise of, agency.

[51] For application of this scheme of thinking in a context that is not technological, and where the line between cosmopolitan responsibilities and local sovereignty can be more clearly drawn, see Roger Brownsword, 'Migrants, State Responsibilities, and Human Dignity' (2021) 34 *Ratio Juris* 6. One way of understanding the significance of this kind of scheme is that enables us to apprehend the depth of values as well as their breadth and plurality: see Roger Brownsword, 'Informational Wrongs and Our Deepest Interests' in Borghi and Brownsword (n 24).

[52] Broadly speaking, by 'technological management' I mean the use of technologies—typically involving the design of products or places, or the automation of processes—with a view to managing certain kinds of risks by excluding (i) the possibility of certain actions which, in the absence of this strategy, might be subject only to rule regulation or (ii) human agents who otherwise might be implicated (whether as rule-breakers or as the innocent victims of rule-breaking) in the regulated activities. See, further, Roger Brownsword, *Law, Technology and Society: Re-imagining the Regulatory Environment* (n 50) 40–42. Compare Ugo Pagallo, *The Laws of Robots* (Springer, 2013) 183–92, differentiating between environmental, product and communication design and distinguishing between the design of 'places, products and organisms' (185).

[53] Compare, e.g., Allan C. Hutchinson, *Cryptocurrencies and the Regulatory Challenge* (Routledge 2022) at 81:

> [R]ather than seek to remain within [an old-style] regulatory mind-set or renovate the regulatory tools available, the better option by far is to strike out in new directions with a broader institutional imagination and with a better toolbox of regulatory tools … .As regards

humans in computing the features of, and realising, their aspirant moral order of law. Whether we are thinking just about *order* (as in the legal positivist and prudentialist picture of law), or about order that aspires to be *just* (as in the legal idealist and moral picture of law), the argument for the machines is that they can outperform the human enterprise of law; what we should be deferring to is the judgment of the machines.

According to Karen Yeung and Martin Lodge, what is distinctive about contemporary debates relating to the 'rise of the machines' is:

> the almost limitless domains in which algorithmic systems may be shown to 'outperform' humans on a very wide range of tasks across multiple social domains that have previously been understood as requiring human judgement and intelligence.[54]

To be sure, there will be a debate about whether governance by technology can live up to its promise.[55] If we assume that it can, though, then the traditional debate—which sets one version of human governance against another—is displaced by a quite new debate about authority and respect where the choice is between either governance by humans and rules or governance by technologies.

In a world of rapid technological development and increasing automation, and in the shadow of disruption, we find another picture forming, a picture of law that seeks to preserve self-governance by humans. Relative to Lon Fuller's idea of the legal enterprise as that of subjecting human conduct to the governance of rules,[56] the emphasis in this picture is not so much on rules as on *humans*; and the reasons for respecting law all relate to the virtues of governance by humans rather than governance by machines.[57]

> cryptocurrency and other Fintech innovations, it would seem best to generate a regulatory way of proceeding that is itself more technological and adaptive—*Regtech*. In a world of super-technology, regulation runs the definite risk of not only missing the opportunities to stay up-to-date, but also of missing the mark unless it becomes more technological and adaptive.

[54] Karen Yeung and Martin Lodge, 'Algorithmic Regulation: An Introduction' in Yeung and Lodge (n 48) 1 at 12.

[55] See, e.g., Alex Griffiths, 'The Practical Challenges of Implementing Algorithmic Regulation for Public Services' in Yeung and Lodge (n 48) 150, especially at 159–169 where the failure of an intelligent monitoring tool employed by the Care Quality Commission and similarly, of an algorithmic approach employed by the Quality Assurance Agency (for higher education) is analysed. For doubts about the claimed superior moral governance by smart machines, see Robert Sparrow, 'Why machines cannot be moral' (2021) *AI & Soc*, available at https://doi.org/10.1007/s00146-020-01132-6; and, Hubert Etienne, 'The Dark Side of the "Moral Machine" and the Fallacy of Computational Ethical Decision-Making for Autonomous Vehicles' (2021) 13 *Law Innovation and Technology* 85.

[56] Lon Fuller (n 29).

[57] See, e.g., Mireille Hildebrandt, *Smart Technologies and the End(s) of Law* (Elgar, 2015). On which, see Roger Brownsword, Disruptive Agents and Our Onlife World: Should We Be Concerned?' (2017) 4 *Critical Analysis of Law* 61. Similarly, emphasising the centrality of *human* agency to the idea of law, see Amnon Reichman and Giovanni Sartor, 'Algorithms and Regulation' in Hans-W Micklitz, Oreste Pollicino, Amnon Reichman, Andrea Simoncini, Giovanni Sartor, and Giovanni De Gregorio (eds), *Constitutional Challenges in the Algorithmic Society* (Cambridge: Cambridge University Press, 2021) 131, at 158:

> Moreover, central to the notion of law in a liberal democracy is its human nature: it is a product of human agency, its values and goals should reflect care for human agency, and its application should ultimately be at the hands of humans exercising agency … .[To be sure, as some jurists

This human-centric picture is one of a community that now not only has at its disposal a range of technologies that can be deployed for regulatory purposes but also an appreciation that such tools might be more effective than rules. This is a community that has come to realise that, far from being a regulatory challenge, technologies can be a regulatory opportunity. In other words, this is a community in which 'law 3.0' (as I would term it) is already part of the conversation.[58] However, where the functions of law are automated, we are being asked to respect an enterprise that takes humans out of the loop.

From a prudential perspective, the automation of legal functions, the replacement of human officials with machines, might seem risky relative to one's interests. Teething problems are to be expected and over-reliance on the technology might leave both individuals and communities ill-prepared for situations in which there are technological malfunctions or breakdowns. Without reassurance about the reliability and resilience of the technology, it is unclear whether one should prefer, so to speak, a West coast regulatory approach with its aspiration of total technological management that will guarantee perfect control and compliance or the traditional East coast approach where compliance is far from perfect, where decisions can suffer from human bias and inconsistency, and where detection and enforcement is also far from perfect.[59] In this light, we might recall Samuel Butler's *Erewhon*[60] where the Erewhonians—concerned that their

suggest,] the question of legal validity, scope, and operative meaning of a particular rule as considered for application in a given set of facts cannot be fully separated from the underlying values embedded in the rule (as part of a set of rules and principles, governing a given field of human interaction). If this is indeed the case, discretion is a feature, not a bug. It is not clear that we can fully separate the question of 'what is the operative meaning of the rule with respect to a particular set of facts' from the question 'should we enforce that meaning in the given set of facts'. In that respect, would we rather have bureaucrats fully automated, without seeing the unique circumstances before them – the human being (not only the case number), applying for the exercise of state power (or its withdrawal) in a particular case? Certainly, there is a risk that relaxing the technical commitment to the conventional meaning of rules will result in biases or favouritisms, as may be the case when human judgment is exercised. But the alternative, namely removing all ambiguity from the system, may result in detaching law from its human nature, by removing agency and by supposing that codes can adequately cover all circumstances, and that human language is capable of capturing 'the reality' in a transparent, technical manner. The latter assumption is difficult to support.

[58] See Roger Brownsword, *Law 3.0: Rules, Regulation and Technology* (n 50), and 'Law 3.0: A Conversation for the New Decade?' (2020) *Georgetown Journal of International Affairs*, available at https://gjia.georgetown.edu/2020/07/21/law-3-0-a-conversation-for-the-new-decade/ (last accessed February 2, 2022).

[59] Seminally, see Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999). Compare, Roger Brownsword, 'Code, Control, and Choice: Why East is East and West is West' (2005) 25 *Legal Studies* 1. See, too, Martin Ebers and Marta Cantero Gamito, 'Algorithmic Governance and Governance of Algorithms: An Introduction' in Martin Ebers and Marta Cantero Gamito (eds), *Algorithmic Governance and Governance of Algorithms* (Springer, 2021) 1 at 3, who observe that 'while it is true that human decision-making is not immune to mistakes and biases, algorithmic decisions can have a much larger effect, as the software not only decides dozens or hundreds of cases, but rather tens of thousands or more.' On this basis, we might judge that it is prudent to stick with human governance as a strategy for limiting the damage that might be caused by the machines.

[60] Samuel Butler, *Erewhon* (Penguin, 1970; first published, 1872).

machines might develop some kind of 'consciousness', or capacity to reproduce, or agency, and fearful that machines might one day enslave humans—decided that the machines must be destroyed. The Erewhonians, so to speak, preferring the devil they knew, opted for the East coast.

Similarly, from a moral perspective, it is unclear whether submitting to governance by smart machines is doing the right thing. If we value human discretion in the application of rules, we might worry that, with automation, this is a flexibility that we will lose.[61] Moreover, to the extent that the morality inscribed in machines tends to be utilitarian, this will be unattractive to those moral constituencies that do not subscribe to such reasoning.[62] As with the prudential rejection of governance by machines, conserving governance by rules, made by humans and administered by humans, might seem to be the morally indicated option.[63]

However, let us suppose that we do radically revise our conceptual thinking so that we come to view law as an expert system, not so much an assembly of philosopher kings as an assemblage of smart machines that can outcalculate, out-compute, and out-perform even the most intelligent and wisest of humans. If this is the relevant picture of law, then would it not be crazy for humans to back their own judgments, both prudential (for order) and moral (for just order), against the machines? Yet, this is exactly what is proposed by the human-centric picture in which the law seems to be celebrated as an expression of (probably) inferior governance simply because it retains its human character. Like a see-saw, the dialectic between those who argue for respect for the law and those who are discontent will move up and down but, as the weight of discontent increases, we might come to think that the form of governance to be respected by humans is after all the law of the machines; given time, even humans will come to realise that relative to governance by humans, it is governance by machines that is better than the alternative.[64]

[61] For some pertinent examples, see Robert Veal and Michael Tsimplis, 'The integration of unmanned ships into the lex maritima' [2017] LMCLQ 303.

[62] Again, compare Hubert Etienne (n 55).

[63] Compare Hildebrandt (n 57) where we find this kind of picture of law, with on the one side 'legality' (due process and justice) being valued against mere 'legalism' (mechanical application of the rules) and, on the other, governance by rules being valued against rule by technologies.

[64] Compare the drift of the discussion in Ryan Abbott, *The Reasonable Robot* (Cambridge University Press, 2020); similarly, see Daniel Kahneman, Olivier Sibony, and Cass R. Sunstein, *Noise* (William Collins, 2021) at 337 where, having discussed many examples of the performance of algorithms relative to intuitive human judgments (such as judgments about the appropriate level of punishment for a convicted criminal), the authors conclude that:

> [A]lthough a predictive algorithm in an uncertain world is unlikely to be perfect, it can be far less imperfect than noisy and often-biased human judgment. This superiority holds in terms of both validity (good algorithms almost always predict better) and discrimination (good algorithms can be less biased than human judges). If algorithms make fewer mistakes than human experts do and yet we have an intuitive preference for people, then our intuitive preference should be carefully examined.

Taking stock, whereas in the traditional debate, the principal fault line is between positivist and idealist conceptions of law (where, on both sides of the line, law is characterised as governance by rules), the new fault line (after disruption) is between, on one side of the line, modes of governance that are directed by humans who use rules and, on the other side, governance by technologies where humans no longer direct and rules are no longer the instruments of direction.

6. The second wave III: the new debate

So, to put the question starkly, if our choice is between human-centric governance (with humans making their own decisions) and governance that is designed to ensure that humans come to no harm, then which version of governance should we choose, why so, and what price or risk might there be in making the choice?[65]

First, which version should we choose? Should we choose imperfect self-governance by humans or more perfect governance for humans? If we choose the latter, it makes little sense to worry about authority and respect: the context is no longer one of trusting the judgments of other humans above one's own prudential or moral judgments; it is no longer a matter of deferring to the judgments of other humans. If we choose the former, we still have the traditional question to tackle. To be sure, we might think that we need to cut some more slack to individuals to follow their own prudential judgments or conscience. However, there is still a live question to be asked about why deference to the law should be the default.

Secondly, is there any reason why we should choose one mode of governance rather than another? For moralists, it might seem self-evident that there is no virtue in doing the right thing simply because this is indicated by smart machines or compelled by technological management. For moralists, the inclination might be towards the former version (the East coast). For prudentialists, the inclination might be towards the latter version (the West coast) but some might follow the moralists in thinking that it is important for humans to make their own prudential judgments. What we have here are different conceptions of our humanity and, subject to the critical caveat in the next point, I see no compelling reason to say that one conception is better than the other.

Thirdly, although we might not yet have a clear reason to prefer one conception over the other, human agents should never make choices that compromise the essential conditions for their existence and agency. So, whatever

[65]Of course, this is not to suggest that the choice actually will be presented in such stark terms. The governance designs that are available are likely to be far more nuanced and it will not be a matter of voting for one mode of governance rather than the other. It will not be like a decision to switch off analogue and commit to digital, or vice versa. But, if that were the nature of our choice, how should we decide between the two modes of governance?

we choose we must not adopt a mode of governance that irreversibly compromises the conditions for our human social existence (that is to say, the global commons).

Finally, to return to the nature of the second wave of disruption, we can detect three prongs of disruption. One is the disruption to the prudential case for deference to the Law. The relevant alternative to legal order is not now disorder, but a better technologically controlled regime of governance. The second prong is the disruption to the moral case for deference to the Law. The relevant alternative now is not an inferior order that does not aspire to be just, but a better form of governance by moral machines coupled with technological management. Thirdly, the opposition between the prudential and moral justifications for governance by legal rules is de-centred and disrupted. In place of this traditional opposition, we now have, on one side, advocacy in support of governance by rules (implicating a conception of human-centric governance) and, on the other side, advocacy in support of governance by machines (implicating a conception of human-protective governance).[66] While the traditional jurisprudential question retains its vitality on one side of this new opposition, on the other, it seems to be redundant. If this is correct, then we can already sense the nature and significance of the third disruptive wave.

7. The third wave of disruption: an agenda for debate

As was indicated in my introductory remarks, the second wave of disruption presages a third wave. The disruptive impact that we are highlighting in this

[66]In para 1.1 of its Explanatory Memorandum to the proposed Regulation on AI, Brussels 21.04.2021, COM(2021) 206 final, the European Commission remarks that the purpose of the Regulation is to deliver 'an ecosystem of trust by proposing a legal framework for trustworthy AI. The proposal is based on EU values and fundamental rights and aims to give people and other users the confidence to embrace AI-based solutions, while encouraging businesses to develop them. AI should be a tool for people and be a force for good in society with the ultimate aim of increasing human well-being. Rules for AI available in the Union market or otherwise affecting people in the Union should therefore be human centric, so that people can trust that the technology is used in a way that is safe and compliant with the law, including the respect of fundamental rights.' Does this suggest a human-protective approach, with the emphasis on increasing human well-being as well as the take-up of AI, or does it suggest an approach where humans continue to rely on rules and remain in control?

Of course, in practice, governance might involve elements that are human-protective while also reserving some elements of human-centric oversight and control. Compare, e.g., Saverio Puddu, Ana Isabel Rollán Galindo, and Kay Firth-Butterfield, 'What the EU is doing to foster human-centric AI' (May 3, 2021) (available at https://www.weforum.org/agenda/2021/05/ai-and-ethical-concerns-what-the-eu-is-doing-to-mitigate-the-risk-of-discrimination/)/. Their reading of AI governance in the EU is that the 'strategy … is clear and it places people at the centre of the development of AI, thus designing a human-centric AI.' In particular, the EU's proposed Regulation on AI (COM/2021/206 final) 'is part of a wider effort to develop human-centric AI by eliminating mistakes and biases to ensure it is safe and trustworthy.' It 'includes requirements to minimise the risk of algorithmic discrimination, in particular in relation to the quality of data sets used for the development of AI systems'; and it 'introduces human oversight of certain AI systems to prevent or minimise risks to health, safety or fundamental rights that may emerge when an AI system is used.' For the human oversight provisions in the original draft of the EU Regulation, see Article 14.

third wave is on a raft of concepts that are meaningful when the context is governance by humans and by rules but not so once the context is governance by technology[67]—and, moreover, not so even though we might persist in trying to transplant the language of one context to the other.

In this article, I will start by sketching an agenda of questions that are prompted by the third wave of disruption and then I will speak to the disruption of the idea that we should respect the law—simply because it is the law and our reservations notwithstanding.

7.1 An agenda of questions

The third disruptive wave provokes many questions. In the agenda sketched below, the questions that are put forward are primarily about the disruption to a conceptual scheme of thinking that is associated with governance by rules and by humans.

First, to state the general question: how far do the conceptual ideas and the questions that accompany governance where humans are still the authors of regulatory measures remain meaningful once humans are out the regulatory loop? Similarly, how far do the conceptual ideas and the questions that accompany governance where it is rules that are the instruments of choice remain meaningful once that context changes to governance by technologies?

Secondly, following up on the general question, if and when governance is no longer by rules, how meaningful is it to persist with the idea of 'legality', an idea that is predicated on a commitment to governance by rules?[68] If the mode of governance is no longer rule-based, what will it mean to say that governance is guided by the principles of 'legality'? Possibly, we might be able to derive some generic sense of fair dealing from the rule-based notion of legality; if so, should we persist with it?[69] Or, should we

[67] If a community is fully committed to governance by technology, there will also be disruptions to the back-up layers of governance (in which humans and rules are no longer employed). In other words, the logic of this level of reliance on technologies implies (i) that, in place of primary rules directed at human conduct, we have (primary) technologies doing the governance and (ii) that, in place of the secondary rule structure, we have oversight governance of the operation of the primary technologies by a secondary layer of technologies. How far a particular community will want to back up these technologies (to a third and fourth layer of oversight and checking) will depend initially on its assessment of risk and its prudential judgments. But, this might be the last act of human involvement. From this point on the technologies also undertake risk assessment of their own governance.

[68] See Fuller (n 29).

[69] Seminally, see Lodewijk Asscher, '"Code" as Law. Using Fuller to Assess Code Rules' in E. Dommering and L. Asscher (eds), *Coding Regulation: Essays on the Normative Role of Information Technology* (TMC Asser, 2006) 61, at 86:

> Code can present constraints on human behaviour that can be compared with constraints by traditional laws. We have argued that even though code is not law, in some instances it can be useful to ask the same questions about code regulation as we do about traditional regulation. Code as law must be assessed by looking at the results of regulation in terms of freedom and individual autonomy and compared to the balance struck in traditional law.

abandon this idea lest it should 'legitimate' a quite different mode of governance? Certainly, for communities that are anxious to retain rule-based governance, it would be a hostage to fortune to allow the *language* of legality to be translated without qualification to governance by technologies.[70]

Thirdly, there is the parallel question of whether it is meaningful to persist with the idea of the Rule of Law, understood as the rule of rules, when governance is no longer by rules. Bearing in mind the important thought that it is the Rule of Law that stands between law's governance and a techno-managed future[71], communities need to be very careful (as with legality) about licensing these rule-based ideas—or, at any rate, the language associated with these ideas—to legitimate very different modes of governance.

Fourthly, beyond legality and the Rule of Law, there is a raft of concepts—including authority, respect, trust, justice, due process, and so on that are characteristic of *human* governance—about which we might ask: is it meaningful or smart to transplant these concepts, or this vocabulary, to governance by machines?[72] In each case, the language might persist but the underlying concepts will have undergone a radical change.

Fifthly, if we suppose that the discourse of law's governance is distinctively a discourse of justification, that the power exercised through law is always subject to justification, then should we accept that this discourse is no longer appropriate or required once governance is by machines? In particular, even if it is acknowledged that humans have a right to an explanation where decisions are automated,[73] should we accept that this is merely a (technical) 'explanation' that describes how the system works and, perhaps, gives some assurance that the technology has functioned as per its specification?[74]

For my own attempts to derive some generic guidance from the Fullerian principles, see Roger Brownsword *Law, Technology and Society: Re-imagining the Regulatory Environment* (n 50) 118–32, and *Rethinking Law, Regulation and Technology* (n 50) Ch 4.

[70] In this context, we should heed Mireille Hildebrandt's warning (n 57 at xiii):

> If we do not learn how to uphold and extend the legality that protects individual persons against arbitrary or unfair state interventions, the law will lose its hold on our imagination. It may fold back into a tool to train, discipline or influence people whose behaviours are measured and calculated to be nudged into compliance, or, the law will be replaced by techno-regulation, whether or not that is labelled as law

[71] See, e.g., Mireille Hildebrandt (n 57).

[72] We should note Frank Pasquale's apt remark in 'Inalienable Due Process in an Age of AI: Limiting the Contractual Creep toward Automated Adjudication' in Micklitz et al (n 57) 42, at 43: 'At some point, agencies will adopt automated processes that courts can only recognize as simulacra of justice.'

[73] For discussion of the vexed question of whether data subjects have a right to an explanation under the GDPR, see Sandra Wachter, Brent Mittelstadt, and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 *International Data Privacy Law* 76. See, further, Jyh-An Lee, 'Algorithmic Bias and the New Chicago School' (2022) 14 *Law Innovation and Technology* (in this special issue).

[74] See, e.g., Joshua A. Kroll, Joanna Huey, Solon Barocas, Edward W. Felten, Joel R. Reidenberg, David G. Robinson, and Harlan Yu, 'Accountable Algorithms' (2017) 165 *University of Pennsylvania Law Review* 633. Compare, too, OECD/LEGAL/0449, adopted on 22/5/2019, available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449 (last accessed June 21, 2019). Here, Article 1.3, headed 'transparency and explainability', states that 'AI Actors should commit to

If so, this is a long way short of the kind of justificatory explanation that we expect from human decision-makers.[75]

Sixthly, do we now face a Copernican revolution in our conceptual thinking, reworking the ideas that stand behind human-centric self-governance and, if so, where do we centre our thinking? For example, Ethan Katsh and Orna Rabinovich-Einy, having rightly observed that 'new forms of resolving and preventing disputes will move us even further away from the idea that the legal system is at the centre of the dispute resolution solar system',[76] then say:

> Adopting technology in the courtroom opens up new opportunities not only for making our existing processes less expensive and cumbersome and more accessible at all hours. It could also change the very nature of court processes, with software playing an increasingly significant role in streamlining, resolving, and preventing claims. Indeed, there is promise for transforming our very understanding of the meaning of *justice*.[77]

This prompts the response, echoing the fourth question above, that our sense of justice is not what needs to be transformed; for sure, unequal justice is not justice,[78] but it is our practice that needs to be transformed not the ideals to which we aspire.

Seventhly, should we now view law as just one kind of patterned order? When we read familiar characterisations of law as governance by rules, should we, instead of putting the emphasis on 'rules', put it on 'governance'? To be sure, an order that emerges from humans who are self-consciously following rules is a distinctive kind of order; and, as traditional jurisprudence

transparency and responsible disclosure regarding AI systems.' Hence, such actors 'should provide meaningful information, appropriate to the context, and consistent with the state of the art:

1. to foster a general understanding of AI systems,
2. to make stakeholders aware of their interactions with AI systems, including in the workplace,
3. to enable those affected by an AI system to understand the outcome, and
4. to enable those adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors, and the logic that served as the basis for the prediction, recommendation or decision.'

[75] See, Roger Brownsword, 'The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons' (published by the Legal Services Board, London, July 4, 2019). Especially para 3.1.3.3 (transparency as justification) and the case of *CCN Systems Ltd v Data Protection Registrar* (Case DA/90 25/4/9, judgment delivered 25 February 1991) on the use of unrelated third-party data. Available at https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/Professions-RB-Report-VfP-4-Jul-2019.pdf (last accessed January 22, 2022). Compare, too, Michael Veale and Irina Brass, 'Administration by Algorithm?', in Yeung and Lodge (n 47) 121, at 131.

[76] Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice* (Oxford University Press, 2017) 20.

[77] Ibid., at 164–65.

[78] Compare Jerold S. Auerbach, *Unequal Justice* (Oxford University Press 1976) at 12: 'In the United States justice has been distributed according to race, ethnicity, and wealth rather than need. This is not equal justice.' Similarly, see Benjamin H. Barton and Stephanos Bibas, *Justice Rebooted* (Encounter Books, 2017) at p. 4: 'Mothers seeking child support, tenants fighting eviction, and laid-off workers claiming unemployment or disability benefits usually cannot afford lawyers. They routinely endure long delays and great difficulty navigating courts by themselves before they can receive justice.'

emphasises, the internal attitude of those who are following the rules is distinctive.[79] Nevertheless, if the predictability of order is the key characteristic of governance, then (given the unpredictability of human responses to rules) legal order is hardly the paradigm. Rather, the paradigm of governance is technologically secured order.

So much for a sample of questions that flag up the disruption to our conceptual thinking. However, we can add to our list three further questions that are prompted by the narrative that anticipates a third wave of disruption.

One question is this: although we have suspended doubts about the superior performance of machines and technological management, a significant number of humans surely will push-back against this kind of governance.[80] They will contest the claim that machines do governance better than humans. Already, in some sports, there is a push-back against some forms of technological arbitration; for both players and spectators, the technology is an unwelcome interruption.[81] Indeed, some see the technology as exacerbating the inconsistencies in human on-field decisions that were one of the reasons for entrusting the decisions to off-field technologies and human interpreters aided by such tools.[82] Given such resistance, why should we assume that the third wave of disruption will take place? Perhaps, it will always remain on the horizon.

A second question concerns the point at which we should say that governance is no longer an essentially human enterprise. To be sure, humans might not figure in the foreground but how far out of the background loop can they be taken before the enterprise loses its human character? How deep and how broad must be our reliance on machines and technologies? How difficult must it be to identify accountable humans? Should we treat governance as crossing from human to technological when this is recognised de jure or is de facto reliance (when there is no longer a willingness by human reviewers to override the decisions made by machines) sufficient?[83]

Finally, should our working assumption be that, in the bigger picture, most communities will learn to live with (and accept) the rise of, but not

[79] Classically, see Hart (n 27).

[80] Compare, e.g., Roger Brownsword, 'From Erewhon to Alpha Go: For the Sake of Human Dignity Should We Destroy the Machines?' (2017) 9 *Law, Innovation and Technology* 117. See, too, various lines of resistance in Brett Frischmann and Evan Selinger, *Re-Engineering Humanity* (Cambridge University Press, 2018); and my remarks in n 59.

[81] Compare, e.g., Matthew Syed, 'VAR is football's passion killer—it's time to bin it' *The Times*, November 6, 2019, 64.

[82] See, e.g., Mark Clattenburg's assessment in the *Daily Mail* (October 20, 2019) available at https://www.dailymail.co.uk/sport/football/article-7594255/Inconsistent-VAR-losing-credibility-PGMOL-need-basics.html (last accessed January 22, 2022); and, recently, 'Arsenal fume over "inconsistent" VAR decisions after Man City loss' ESPN, January 1, 2022 available at https://www.espn.co.uk/football/arsenal-engarsenal/story/4560251/arsenal-fume-over-inconsistent-var-decisions-after-man-city-loss (last accessed January 22, 2022).

[83] See Rebecca Crootof, '"Cyborg Justice" and the Risk of Technological–Legal Lock-In' (2019) 119 *Columbia Law Review Forum* 233.

necessarily the rule of, the robots?[84] Should we assume that human communities will typically adopt a mode of governance that relies on both humans and technologies? Indeed, this might appeal as the optimal mode of governance, a happy conjunction of humans and machines.[85] In this picture, the outliers will be, at one end of the spectrum, the few communities that either reject governance by machines and hold on firmly to governance by humans and rules and, at the other end of the spectrum, the communities that embrace a brave new world of technological governance. For the latter, and possibly also for those communities that rely on hybrid modes of governance, the challenge would seem to be to articulate a theory of 'good governance' that is neutral between particular modalities of governance.[86]

7.2 Respect relaxed

A question that arises some time before we get to the third wave of disruption is whether the demand for respect for the law is simply too demanding. Particularly in a context of prudential and moral plurality, should we not relax the demand?[87] This is not a proposal to go from all to nothing; the demand can be relaxed by degrees.

Relaxing the demand for respect by one notch, it might be accepted that non-compliance or non-acceptance is permissible provided that this is 'for good reasons', that the circumstances are 'exceptional', that non-compliance is a 'last resort', and that those who do not comply submit to their penalty. There is plenty of scope for interpretation here but let us suppose that the good reasons can be either prudential or moral. Even so, this is a very limited relaxation; the expectation is that citizens will be positively disposed towards law's governance, that they will default to compliance, and that the idea of respect is still largely intact.

[84] Borrowing, here, from Martin Ford, *Rise of the Robots* (London: Basic Books, 2015) and *Rule of the Robots* (London: Basic Books, 2021). In his more recent book, Ford compares AI with electricity as a generic utility, indeed as 'an electricity of intelligence' (p. 4). The applications of AI's cognitive capability are, thus, virtually limitless 'from medicine to science, industry, transportation, energy, government and every other sphere of human activity' (ibid).

[85] Compare Frank Pasquale, *New Laws of Robotics* (The Belknap Press, 2020), the subtitle of which is 'Defending Human Expertise in the Age of AI'. According to Pasquale, the question is not whether robots can outperform humans, or whether (and when) humans should not use robots, but 'What sociotechnical mix of humans and robotics best promotes social and individual goals and values?' (at 29). What then follows is 'the case that AI supplementing, rather than replacing, human expertise realizes important human values' (ibid). Further, at 32, 'We can uphold a culture of maintenance over disruption, of complementing human beings rather than replacing them. We can attain and afford a world ruled by persons, not machines.' For discussion of machines judging humans, see ibid Ch 5.

[86] Compare, e.g., the Council of Europe's *12 Principles of Good Democratic Governance* (available at https://rm.coe.int/12-principles-brochure-final/1680741931, last accessed January 10, 2022). Although there are some excellent ideas in these principles, their particular focus is local governance and, more importantly, they are predicated on governance by rules and regulations.

[87] See 4.1. above.

Without further relaxation, the law might also be smart in relieving potential tension, for example, by making sympathetic provision for conscientious objectors[88] and for those who contest the prudential judgments made by those who govern (so smart design will favour pilots, provisionality, reviews, and precautions where the evidence is contested).

Taking up the call for relaxation, we might progressively relax the demand, notch by notch, until we get to a point where we find the concept of 'respect' so attenuated that we can no longer think it appropriate to dignify either the law or the attitude of citizens with that term. To identify in this way the minimum conditions for a meaningful claim that the law should be, and is, respected would not be theoretically or practically insignificant. Disrespect, after all, is the other side of the coin.

As a starting point, it might be agreed that respect for the law demands more than going along with its rules only where it suits one's interests. To respect the law is to go along with its requirements even though one might have some reservations about doing so. Respect is a willingness to comply with, to be guided by, and to support the law, such reservations notwithstanding. Indeed, if it is not already apparent, it is the friction between the demand for compliance and our reservations about law that make respect such a significant idea.

For those whose picture of law's governance (and its particular promise) is one of good *order*, it will not matter whether the reservations are prudential or moral: one does not respect the law if one lets one's reservations override the needs of good order. So, when Lord Denning famously rejected the accusation that he did not respect the precedents by saying that this was not so, that he followed the precedents *wherever he agreed with them*, some might have (and, indeed, did) respond to the effect that this was no kind of respect for the law. However, Lord Denning did not depart from the precedents because it suited him; he did so because he judged that justice in the individual case was more important than consistency in decision-making (order).

For those whose picture of law's governance (and its particular promise) is one of *just* order, Lord Denning's approach could be argued to be in line with respect for the law—or, at any rate, his approach was not disrespectful. From this perspective, the reservations that matter are moral reasons; and what might, from another perspective, seem like an act that evinces disrespect for the law, from a moral viewpoint is seen as respectful. Nevertheless,

[88]See, e.g., Davide Paris, 'Reckoning with Growing Pluralism. Potentials and Limits of Conscientious Objection: Conscience Clauses in Abortion Laws in Europe' in Lucia Busatta and Carlo Casonato (eds), *Axiological Pluralism* (Springer, 2021) 89, esp at 101 (on the importance of making space for conscientious objection in 'contemporary democratic and pluralistic societies' and criticising recent decisions at the European Court of Human Rights where challenges to Swedish abortion law, making no allowance for conscientious objection, have been rejected as 'manifestly ill-founded').

even with a moral picture of the law's governance, respect for the law cannot be a licence to act on one's own moral judgments in the face of a moral judgment arrived at through legal processes. The challenge for that kind of picture is to specify the conditions in which one's moral reservations can be acted on without this involving disrespect for the law; or, putting this the other way round, the conditions in which one should respect the law by setting aside one's moral reservations.

In a community that aspires to *just* order, if the Denning response to a charge of disrespect is recognised as acceptable, would it be available to agents other than judges? In particular, would it be available to lawbreakers who maintained that they respected the law by complying with those laws with which they agreed, or by cooperating with the authorities in the event that they broke laws that they judged to be unjust? And, what should we make of the classic Socratic dilemma of whether one should submit to one's punishment even though one might judge that punishment to be unjust? If the community collectively agrees a licence for individuals to act on their own judgments of justice without this amounting to disrespect for the law, the answer to these questions will depend on the terms of this licence. Relative to the community's own lights, an individual who acts on their judgment of justice in circumstances that fall within the terms of the licence should not then be treated as having shown disrespect for the law. Conversely, if their acts fall outwith the protection of the licence, this should be treated as a case of disrespect and the individual will then need to resort to some other standard (such as the licence that some ideal-typical moral community would accord to its members) or find a different line of response altogether (for example, one that argues that the performance of those who govern in the community is so poor that the demand for respect has been forfeited). If the community has not collectively agreed a licence of this kind, then there are likely to be as many different views about whether an act (guided by an individual's sense of justice) evinces disrespect for the law as about the background question of justice itself—which might or might not be a sustainable situation given that the aspiration is to both *order* and justice.[89]

This leaves us with a debate to be continued. If we doubt that the two traditional pictures of respect for the law's governance can sustain the kind of strong demand for respect that we have been considering, then we can articulate the way in which each of those pictures can set the minimum conditions for respect. Each picture treats respect for law's governance as

[89]Similarly, if the aspiration of the Law is simply for order, then there might be a collectively agreed licence to act on one's own judgment that the legal provisions suffer from a deficit in rationality. However, if order is to be maintained, the terms of this licence to act on a judgment that the law is 'irrational' would need to be carefully circumscribed. In this context, compare Jonathan Sumption (n 38) Ch 12 and pp 228 and 233.

requiring compliance with the particular decrees of law even though one has reservations about this. However, as we have seen, these articulations are not identical and, in the end, what we make of respect for the law, and of disrespect, is driven by what we make of the concept of law itself.

That said, while rule-based legal systems that manage plurality more successfully than others might seem to be worthy of greater respect, there is still the headline question of whether they can match the performance of governance by technologies. Moreover, when the machines govern, we might expect plurality to become less problematic. On the East coast, humans might continue to state their own minds, there might be differences of opinion, and plurality will persist; but, on the West coast, such matters will be of less import—for the machines, the opinions of humans, their differences and pluralities will no longer matter.

7.3 Respect reimagined

All our questions about respect for law's governance (or for any other form of human governance) are engaged when we have reservations about acceptance or compliance. On the one side, we might have doubts about the prospectus for law or discontent with its performance; on the other side, we have the call for respect, such reservations notwithstanding. If reservations were taken out of this equation, if we entertained no doubts or discontent, and if respect for the law (or any other mode of governance) signalled 'no reservations' and 'no second thoughts about acceptance or compliance', then the tension that troubles us would be resolved. But, how plausible is this reimagination of respect for the law?

This article is not written on the basis that respect for law's governance entails both an unquestioning attitude and unfailing compliance. Rather, it is based on the assumption that humans who respect the law should have a questioning attitude but should nevertheless comply and be unswervingly loyal their reservations notwithstanding. The reason why equating respect with no reservations lacks plausibility is that it assumes that one group of humans (who submit to the law) will be prepared to put blind faith in a governing group. We do not need to agonise about whether there are some contexts in which this might be plausible; even if there are such contexts, they are special cases. In general, I take the context to be the familiar one of humans having their reservations and there being questions about acceptance and compliance where other humans are responsible for governance. Certainly, if we are assuming an East coast form of law, this seems appropriate. What, though, about the West coast which is emblematic of governance by code and other technologies?

Where governance is by machines, we have wondered whether it is meaningful to continue to ask questions about the authority of law or respect for

the law. We sense that we need to have accountable humans in control of the governance to bottom out these questions. However, if a West coast community reaches a point where governance has been left to the machines, and where humans no longer doubt the direction given by the machines or think about compliance or non-compliance in technologically managed environments, then if respect means anything it connotes that humans have given up on having their own ideas about the governance of their communities. On the East coast, and particularly where self-governance is central to our picture of law's governance, this is simply unthinkable; but, on the West coast, perhaps the logic of the evolving form of governance is precisely that of the idea of respect *without reservation*. Dismissing that idea was surely sound in relation to East coast forms of governance; but we should not so easily dismiss this idea of respect where governance is in a West coast form. What, to East coast citizens, might seem like an Alice in Wonderland inversion might be perfectly normal on the West coast.

In an analogous way, we can detect a similar inversion in our conceptualisation of 'trust' (and 'trustworthiness'). On the East coast, to trust a person to do the right thing (or indeed to do anything) is to rely on them without any security or insurance even though one has reservations about doing so and even though one is aware that there is a risk in doing so. To trust another human in such circumstances might or might not be judged to be prudential, but trust belongs in a moral world and it expresses a moral view of a relationship. Trust and trustworthiness come first, reliance on others follows. By contrast, on the West coast, to trust a person or a technology is to rely on them without any security or insurance because one has no reservations about doing so and because one treats such reliance as risk-free (or subject only to acceptable risks). Here, humans calculate prudentially: if fellow humans or machines seem to behave in predictable ways, then (with appropriate hedging of risk) they can be relied on; and, in this sense, they can be trusted. Risk assessment and risk management come first, trust follows. Whereas, on the East coast, to judge that a person is 'trustworthy' is to judge that a person will do the right thing even when they are disposed to (and have the opportunity to) do otherwise, on the West coast it is a proxy for reliability.[90]

[90]Compare the EU's idea of an ecosystem for trust in AI (n 64). It is striking that so much of the EU's background thinking about AI hinges on 'the development of human-centric, sustainable, secure, inclusive and trustworthy AI' (see, e.g., the Commission's press release of April 21, 2021 (on Europe being fit for the digital age) (available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1682). Quoting Margrethe Vestager, Executive Vice-President for a Europe fit for the Digital Age, the press release says: 'On Artificial Intelligence, trust is a must, not a nice to have. With these landmark rules, the EU is spearheading the development of new global norms to make sure AI can be trusted' (ibid). Despite this commitment to trustworthy AI, the draft Regulation does not explicitly elaborate this desideratum (although, implicitly, the conspicuous focus on managing risks suggests that AI is trustworthy when it would be reasonable to judge that the risks it presents are acceptable). Moreover, when the focus shifts to trustworthy *humans* (in the provisions on the social scoring of humans), there

In an insightful analysis, Christoph Kletzer hits this nail on the head when he says:

> There are entirely different stakes at play in reliance and trust. Whilst reliance is a mundane and technical issue, trust is a morally laden issue that potentially concerns our very human essence. This makes it crucial to keep these two concepts neatly separated. Failing to do so leads to a host of misunderstandings not only about trust and reliance itself but also about the relationship of technology and law.[91]

So, on this analysis, parties who commit their transaction to a blockchain, do not place their 'trust' in the technology, they merely rely on it; and, although we should not jump too quickly to this conclusion, we might infer that, by relying on the technology rather than their human counterparty, they do not trust the latter (or regard the latter as trustworthy). Moreover, following through with this, we might say that it is not so much the difference between trust and trustworthiness that is critical—although it is no doubt true that we can mistakenly place our trust in one who is not trustworthy and fail to place our trust in one who is trustworthy[92]; rather, what matters is the difference between reliance based on trust (or trustworthiness) and reliance based on the judgment that the level of (managed) risk to which one is exposed is acceptable.

Finally, to return to respect, what this exercise reveals is that there is an intimate relationship between the form of governance that we presuppose and our conceptualisation of respect for the law, for its operators and its operations. On the East coast, respect means different things depending on whether we conceive of law's governance just as *order* or as *just* order; and, what respect for law's governance means on the West coast is radically different to any East coast conception of respect. As Kletzer says of the need to separate reliance (on machines) from trust (in humans), we also need to separate mere reliance on governance by machines from respect for governance by humans.[93]

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is again no definition or elaboration: see, Michael Veale and Frederik Z. Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' (2021) 22 *Computer Law Review International* 97, at 100. Should we assume that the criteria for judging a human to be trustworthy are identical to those that are relevant to judging that AI is trustworthy? Or, is this trying to compare, so to speak, apples with oranges?

[91] Christoph Kletzer, 'Law, Disintermediation and the Future of Trust' in Larry A. DiMatteo, André Janssen, Pietro Ortolani, Francisco de Elizalde, Michel Cannarsa, and Mateja Durovic (eds), *The Cambridge Handbook of Lawyering in the Digital Age* (Cambridge University Press, 2021) 312, at 322.

[92] For some interesting reflections on trust, trustworthiness, and transparency, see the British Academy 'Future of the Corporation' briefing on that topic by Onora O'Neill and James Bardrick (January 2017) (available at https://www.thebritishacademy.ac.uk/documents/2563/Future-of-the-corporation-Trust-trustworthiness-transparency.pdf); and, see David Archard's blog on trustworthiness and 'doing ethics' (April 20, 2020) (available at https://www.nuffieldbioethics.org/blog/trustworthiness-and-doing-ethics) and the comments thereon.

[93] In this context, we should also note the difference between the East coast understanding of human 'autonomy' in any of its contested conceptions and the West coast notion of 'autonomous' technologies. Whereas the former connotes a degree of human control, the latter connotes independence

8. Concluding remarks

There is no doubting that the prospect of efficient and effective governance by technology disrupts the traditional debate about the authority of law and respect for the law—a debate where the background choice is restricted to various versions of governance by rules.[94] However, the precise nature and significance of the disruption invites further analysis.

If the choice between governance by rules and governance by machines is to be made on prudential grounds, the choice seems to be between imperfect order and perfect (or near perfect) order; and, if we are to push back against the latter it has to be on the apparently unpromising basis that we believe our self-interest (whether as an individual or as a member of the collective) is better served by imperfect order. If the choice is to be made on moral grounds, and if we are to push back against governance by technology it seems to be on the unpromising basis that we think that we do the right thing by backing our own moral judgments against the more perfectly realised moral order of the machines. In the end, what matters to humans with the capacity for agency is the process, not the product. How irrational, how typically human, technologists might reflect.

However, we might think that there is more to it than this. Governance by machines is not just another version of legal order demanding recognition of its authority and respect for its operation; it is not just another articulation of law to which prudential and moral reason is to be applied. Arguably, governance by machines is radically different to governance by humans; and

from human control. So, any reference to 'trustworthy autonomous systems' should not be taken to signal that such systems are either trustworthy or autonomous in the sense that humans might be trustworthy and autonomous. On 'autonomy' in relation to AI, see the European Group on Ethics in Science and New Technologies, *Statement on Artificial Intelligence, Robotics, and 'Autonomous' Systems* (Brussels, 2018) esp. at 9–10, where we read:

> It is therefore somewhat of a misnomer to apply the term 'autonomy' to mere artefacts, albeit very advanced complex adaptive or even 'intelligent' systems. The terminology of 'autonomous' systems has however widely gained currency in the scientific literature and public debate to refer to the highest degree of automation and the highest degree of independence from human beings in terms of operational and decisional 'autonomy'. But autonomy in its original sense is an important aspect of human dignity that ought not to be relativised.
>
> Since no smart artefact or system - however advanced and sophisticated - can in and by itself be called 'autonomous' in the original ethical sense, they cannot be accorded the moral standing of the human person and inherit human dignity. Human dignity as the foundation of human rights implies that meaningful human intervention and participation must be possible in matters that concern human beings and their environment. Therefore, in contrast to the automation of production, it is not appropriate to manage and decide about humans in the way we manage and decide about objects or data, even if this is technically conceivable. Such an 'autonomous' management of human beings would be unethical, and it would undermine the deeply entrenched European core values. Human beings ought to be able to determine which values are served by technology, what is morally relevant and which final goals and conceptions of the good are worthy to be pursued. This cannot be left to machines, no matter how powerful they are.

[94] Even where the debate moves away from the non-moral/moral dimension of law's governance, and the choice becomes one between traditional Westphalian, transnational, or pluralistic versions of governance, all orders are normative (rule-based).

technological management is radically different to governance by rules. The technological performance simply cannot be compared with the human performance. There might be some functional similarities but the performances are fundamentally different.[95] In that light, we come to see that a key feature of the traditional debate about the authority of, and respect for, the law is that it is predicated on a context in which the enterprise of subjecting human conduct to the governance of rules is an essentially human enterprise that uses rules as its regulatory tools. Once we take humans and rules out of the picture, this is a very different context and, concomitantly, a very different debate. In this context, while we can still ask whether we should defer to the machines, arguably, it no longer makes sense to conceive of law in terms of authority (this being characteristic of human relations) and respect (this being characteristic of situations in which the option of non-compliance is available).

We might also wonder whether the disruption goes even deeper, beyond the terms of the traditional debate, beyond our understanding of law as a human rule-based enterprise, reaching back to the context that supports the human capacity to make our own individual and collective judgments, whether guided by prudential reason or by moral reason. To be sure, if we commit to the authority of law and if we habitually respect it, we have put our prudential and moral trust in the law. In principle, we can recall questions for our own judgment and, as we have seen, that can be problematic. However, if we put our trust in governance by machines, recall might not be so easy. In dystopian scenarios, the machines might have other plans for humans;[96] and, even without dystopias, if governance by machines has disrupted the context in which humans develop their capacities for prudential and moral reason, the retrieval of governance by rules might not be so simple,

Finally, in what I have flagged up as the third disruptive wave, we have reason to wonder whether it is meaningful to question the authority of and respect for the law when the context is no longer one of governance by humans and rules. In the very different context of governance by technology, we might need to modify a broad sweep of our conceptual thinking. If we are reluctant to make such modification, then we need to resist the momentum behind governance by smart machines, lest we find ourselves irreversibly in a place that we humans do not want to be. In an ideal world, this would be the moment to take time out—time out to ask ourselves precisely that question: where do we want to be, what kind of societies do we wish to inhabit, do we want a world of imperfect self-governance or a world

[95]Compare Lyria Bennett Moses, 'Not a Single Singularity' in Simon Deakin and Christopher Markou (eds), *Is Law Computable?* (Hart, 2020) 205.
[96]Nick Bostrom, *Superintelligence* (Oxford University Press, 2014); and, Martin Ford, *Rule of the Robots* (n 83) 253–61.

of benign technological governance? Sadly, our rapidly changing technological societies are not designed for moments of this kind.

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