

Professor Nicholas Nugent's Comments on Professor Weldon's Presentation

I'm not checking my Facebook messages by using my phone. I'm disciplining myself with the timer here because I will go over if I don't. Thank you, Professor Weldon. That was very educational. I learned quite a bit. I really appreciated all of those anecdotes and developments. That said, I'm going to comment more on your article's abstract because, well, I'm in the midst of writing my own articles right now, and so everything looks like a nail.

I'm interested in the normative or theoretical foundation underlying everything you said. Your presentation, like your abstract, covered many topics. Ethics, legal practice considerations, algorithmic bias, access to justice, privacy, intellectual property, and many others. And so I'm very interested in seeing how all these topics can be weaved together using a common thread—a sort of normative or theoretical thread.

Obviously, there are many different threads you could choose. But selfishly, I would love to get your perspective on the fundamental issue of agency or delegation, which was certainly highlighted in your presentation, concerning what lawyers can and cannot outsource. And it seems to me that one of the main things that distinguishes AI from previous disruptive technologies is, quite obviously, intelligence. In the past, we outsourced transportation to horses and then later to automobiles, but we still retained judgment over the route that we took to get from A to B. Later, we outsourced *that* task to turn-by-turn navigation systems like Garmin or Google Maps, but we still retained judgment as to when we would leave and where we would ultimately go.

The inventive step of artificial intelligence, really, is its ability to exercise judgment writ large. We can ask ChatGPT to identify and formulate the best arguments in a legal case. We can ask it to interpret data or to draw conclusions from a set of facts. And, at least in my opinion, all of these are exercises in core judgment.

To offer a personal anecdote, I was at one point serving as in-house counsel for a technology company. And I had the opportunity to engage in a course of conduct that would have benefited me greatly but that my

employer might have disapproved of. I studied the ethics rules diligently. I looked carefully at my employer's policies. And as far as I could tell, my conduct would have satisfied the letter of the law. But when I asked a colleague for advice, he said something that's always stuck with me. He said,

Nick, we're not really paid as in-house counsel to be legal experts. We're ultimately paid for our judgment. Our high judgment. That is the coin of the realm for in-house lawyers. And even if your planned course of conduct would technically be ethical, would technically be kosher with your employer's policies, would your managers, your peers, and your clients within the company think that it evidenced strong judgment on your part?

He was right. But his insights apply not just to in-house counsel, but to outside counsel, to litigators and transactional lawyers, to those who dedicate themselves to public service. High judgment, not legal expertise, really is the coin of the realm in our profession. It's what distinguishes our profession from other professions that aim to outsource more and more of their cognitive processes to systems such as AI for efficiency.

There's been a lot of talk recently about the Supreme Court and whether it is poised to roll back the administrative state by resurrecting a strong form of the non-delegation doctrine. As we all know from Con Law I, the non-delegation doctrine holds that Congress cannot delegate its power to another branch of the government. It holds that there is some line beyond which Congress may not divest itself of its responsibility. Now, where that line should be drawn, I don't profess to know. But in much the same way, artificial intelligence can trigger concerns about the delegation of core legal judgment if used in certain ways and for certain tasks. Perhaps there is a line beyond which our judgment as lawyers should never be delegated, no matter how capable AI systems become, and even if AI becomes *more* legally competent than we are.

Perhaps we can look to other areas of law to help us determine where that line lies. For example, in intellectual property law, the concept of volition can come into play. Yes, a system may technically be infringing a copyright

by copying or distributing content, but to what degree is human volition involved in those processes as opposed merely automated processes? Liability can turn on the requisite level of volition. Likewise for criminal law, with its insistence on *mens rea*, or anti-discrimination law, which can distinguish in some contexts between invidious intent and mere disparate impact. And so, can these other areas of law, including their doctrinal treatment of AI, help us to formulate our own non-delegation doctrine with respect to the ethical implications of outsourcing legal judgment to AI?

Of course, I apologize if I've interpreted your abstract in a manner that's very different from the direction you plan to take your project. But if nothing else, perhaps I've given you a footnote. And I'd be very interested to see what thread you do weave through your very ambitious project.

Thank you.

