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The Anti-Enlightenment Mentality in the Law

Honorable Xiąże John McClellan Marshall[1,2,3*]

[1]Senior Judge, Fourteenth Judicial District of Texas, USA

[2]Honorary Professor of the University, UMCS, Lublin, Poland

[3]Academician, International Academy of Astronautics

***Corresponding author**

Xiąże John McClellan Marshall, Senior Judge, Fourteenth Judicial District of Texas, USA & Honorary Professor of the University, UMCS, Lublin, Poland & Academician, International Academy of Astronautics.

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"***Everything we hear is an opinion, not a fact. Everything we see is a perspective, not the truth***." ~ **Marcus Aurelius**

If Europe imagined the Enlightenment, it was America that realized it [1]. In one of his many letters to Thomas Jefferson, John Adams wrote that "the 18th century, notwithstanding all its errors and vices, has been, of all that are past, the most honorable to human nature [2]." The period from the last quarter of the 16th Century through the end of the 18th Century has often been characterized as "The Enlightenment." During this period, various *philosophers* began the intellectual detachment from medieval scholasticism and its mystical base [3]. The result was an emphasis on an empiricism that supported what was viewed as a healthy skepticism. The leaders of this movement included such writers as Copernicus, Galileo, John Locke, David Hume, Voltaire, Montesquieu, and scientists such as Benjamin Franklin. Collectively, particularly in the 18th Century, they were known as *philosophes* and were acknowledged as the intellectual leaders of the time. Their work began with inquiry into the natural sciences and its extension into politics and economics that were at least as impactful. While it is easy to suggest that they were anti-clerical, indeed to some extent hostile to religion, that sells them short. It is true that they did not concern themselves with extensive religious debates, but they never completely divorced thought from its traditional religious origins. They simply went beyond it in their thought process, driven as it was with an emphasis on the distinction between what is "material" and "mental or ideal". Put another way, the "empirical" view of the *philosophes* was grounded in observation of factually definable phenomena. Samuel Johnson pointed this out in the act of kicking a stone as a means to refute the arguments of Bishop Berkeley as to what exists and what does not [4].

The Enlightenment was a period in which intellectual inquiry became proactive, divorced from the reactive processes and viewpoints of the Middle Ages. Now, the influence of AI on the process of inquiry is subtly moving humans toward a reactive posture in which machines are analyzing the situations, not humans. Indeed, it is the shift from the reactive to the proactive view that defined the Enlightenment, and consequently, the modern reliance that puts machines in the reactive, pre-Enlightenment, position that humans were in is anti-Enlightenment in its origins.

The machines, including those based on AI platforms, have yet to become proactive because a possible future doesn't exist yet in the data bases. The absence of the data base, however, may well keep the machines in a reactive posture for the foreseeable future to the benefit of humans. As an example of the importance of context and location, the power of music is that it activates specific substructures in the human brain and is very location specific. Humans can, therefore, proactively create and reactively respond to music and other manifestations of the æsthetic aspects of the brain, but AI cannot do either unless programmed to do so [5]. Put another way, music is not simply algorithmic. It is that distinction that keeps the Enlightenment alive in the modern world. The Enlightenment view became the basis for much of the scientific inquiry and progress that evolved during the 19th and 20th Centuries. It fostered an expansion of the boundaries of what was thought to be "real", though without divorcing that definition from observable limits. In other words, the observation of a given item expanded and the understanding of its properties expanded accordingly. For example, the element uranium was well-known even in ancient times as useful for coloring glass yellow. By the end of the 19th Century, its radioactive properties were revealed, setting the stage for the experimentation in fission research leading to nuclear reactors as a source of electrical generation. The uses to which it was put differed with the passage of time, but that was a function of an empirical process of observation that altered the perception of what uranium could be and do. The point is that the observation was conducted by human beings engaged in a painstaking process that ultimately redefined what uranium "is". As a result, the uses to which it could be put were expanded dramatically, ranging from medicine to weaponry.

In such an example, it is clear that human observations may require significant amounts of time in order to clarify at what a person is looking. To some extent, this may require an exercise of imagination such as looking at a cocoon and imagining the butterfly that will emerge in time. In such a situation, the reality of

the creature is not limited by its appearance or characteristics at any given time, only by the processes that inhere in the development of the final product. In effect, the "reality" to some extent exists in the mind of the observer as well as the physical cocoon. It is with the advent of the technological revolution of the last quarter of the 20th Century that that definitional process begins to step outside of human perception.

The transition away from human-based to machine-based analysis became clearly represented by the work in computer development of Alan Turing. His intention was to create a machine capable of mimicking a human so effectively that a human would not know it was dealing with a machine, the "Turing test" ("the imitation game"). While not fully realized in his lifetime, Turing's work set in motion a break with the empirical past of the *philosophes*, positing the potential existence of an "artificial intelligence", or AI [6]. In other words, it can be asserted that this was the beginning of the Post-, or Anti-, Enlightenment period of human intellectual inquiry.

Certainly, this was not overtly obvious to the average citizen outside of the scientific community, but there is no mistaking that the ferment had begun. At its most extreme, in the words of a famous film maker who said, "Reality doesn't interest me." What becomes of "interest" is what "reality" can come from technology. The base of culture and creativity within that culture moved from the human imagination to supplementation of human imagination by machines. We now have not just AI which has passed the Turing Test, but we already have rudimentary AI characters living in the virtual world with whom we can interact [7]. "While we can debate what is outside our cave, it's our own rapid progress with AI that makes it more likely than ever that we are already inside something virtual like *The Matrix*" [8].

The most obvious example of the technology-driven creative extension of Turing's work became the 20th Century computer, starting in mid-century. Almost imperceptibly, "computers" grew in numbers, varieties, and capabilities unimagined during the latter half of the 20th Century. The size of the machines diminished from the early UNIVAC that took up hundreds of square feet and considerable electrical energy to the wristwatch that monitors heartbeat, blood pressure, and serves as an international telephone. For example, the computers used to prepare the launch of the Apollo missions to the Moon occupied a rather large building at the Kennedy Space Center in the 1960's and '70's. The creation of the internet, starting in the late 1960's, led to the explosive expansion of information availability that, combined with computer technology, created another step away from the empirical model. Indeed, it has been noted that "we have gone from an age that was meaning rich but data poor, to one that is data rich but meaning poor. . . [, and] this is an epistemological revolution as fundamental as the Copernican revolution [9]." By the end of the century, an individual cell phone no larger than a pack of cigarettes had greater computing and memory capacity than Apollo.

It should be no surprise that the technological impact of the 20th Century should penetrate virtually every aspect of society in the 21st. For example, in the field of medicine, the use of computers to analyze and "dissect" the DNA molecule opened the door to the possibility of the correction of congenital defects in an unborn child prior to birth. The impact of such a capability is obvious in terms of the improvement of the human species. In the field of bioengineering, the recent "de-extinction" of the prehistoric dire wolf (and possibly the dodo bird and wooly mammoth), thanks to technological reconstruction of the DNA molecule involved offers some interesting, if controversial, potential as to other extinct species. So far, at least, these capabilities are limited to the "reality" of what can be found in the natural world, and so to a limited extent still has roots in the empirical process. Such abilities, while not exactly AI, however create ethical issues that follow in the train of the technology as it moves through society and so should not be ignored or swept aside in the name of "science".

It is when the technology "crosses the line" toward the defeat of the Turing test that genuine societal problems, both practical and ethical, arise, and that day may not be too far into the future. The practical problems appear most clearly in those areas of endeavor that are inherently human in origin and effect. For example, most human cultures contain some form of legal structure, regardless of how it operates on a day-to-day basis. Indeed, the concept of the rule of law is unique to human society, both in terms of setting boundaries as to what is "proper" behavior and defining the consequences of exceeding those boundaries. One does not find courts as a means of dispute resolution in an anthill. Until recently, society depended upon the members of the government to legislate those boundaries and to have a judicial system to handle disputes. The legal profession in recent years has tended to adopt the use of AI devices slowly, but uncritically, to facilitate the practice of law, particularly as a research tool. To an extent, part of the modern problem is the tension between the relatively slow processes of the law and the ability of technology to push those processes to accelerate.

A French philosopher most directly associated with the impact of acceleration on society is Paul Virilio, who developed *dromology*, the study of speed and its social consequences, arguing that technological acceleration reshapes politics, warfare, and everyday life [10]. Applied to law (as well as other aspects of modern society) acceleration creates a profound *mismatch of tempos* wherein legal systems that once evolved incrementally, responding step by step to gradual social change, now struggle to keep pace with fast-moving technologies and cultural shifts. This can lead to outdated legal categories, regulatory lag, and jurisdictional fragmentation, that forces reliance on stopgap solutions such as judicial activism in an effort to close the temporal gaps. As a result, whereas law's traditional slowness once stabilized society, under conditions of rapid acceleration driven by technology, it risks overreacting without reflection.

Certainly, chatbots can be useful as research assistants, but to allow the machine to draft documents that are submitted to the court without review can have very unfortunate consequences. For example, the attorney and the court must pay very close attention to the wording of documents that are brought forward, and the failure to detect the chatbot could grossly mislead the court and jury [11]. Even now, there are examples of "hallucination" by the chatbot in the creation of documents or in response to research assignments that are fictitious or misleading quotations of the law. Unfortunately, "hallucination" is not unique to the law. Even in a case of simple critical review of a document, the chatbot may, and sometimes does, provide a response that it believes the author wishes to hear.

An interesting example of the collision of law with societal acceleration arises in the case of *technoevidence* [12]. The simplest example is DNA evidence, which could not exist without the availability of technology to detect and define the molecules involved. Particularly in the field of medicine this type of evidence is critical in the presentation of cases in court. To be admissible, the authenticity of the evidence must be established prior to its being offered or else it simply is not relevant, and the outcome of the case may be impacted by that determination. Further, medical records

that are obtained through the use of chatbot research potentially violate many regulations concerning the confidentiality of the patient information. One problem with the "chatbot as research assistant" model is that the platform may not be able to include all of the patient information that the physician would otherwise include in the record. In such a situation, the chatbot could well "hallucinate" a diagnosis that is what it thinks the physician wants to hear, rather than objectively examining the case. Not only is this an ethical failure that potentially violates the oath "to do no harm", but it literally can impact life and death for the patient.

In the presentation of evidence to a judge or jury in court, though, there is an increasing use of AI for the purpose of "re-creating" an incident such as an automobile accident. The problem is providing sufficient information to the platform to enable it to create an accurate depiction of the event. To put it bluntly, there may be not enough space in the AI platform to accept all of the information needed to be accurate, so there is a risk of "hallucination" to create a "product". In effect, the machine can be lying without the knowledge of the attorney. It has been pointed out that the bigger the lie the more likely it is to be believed. The danger is the attribution of accuracy to the machine that it may not deserve. Similarly, there has been a proposal to allow "holographic" presentation of deposition testimony of deceased witnesses, using AI to create the image and voice from photos and voice recordings. In both of these situations, it is the judge who must make the decision whether to accept the evidence and allow it into the record or not [13].

What is not readily apparent in this process is that in the vast majority of courts, the judge has not had extensive training in computer science such that the detection of flaws in the proffered evidence is clear. Obviously, the potential for dishonest manipulation of the evidence is both real and costly to the integrity of the judicial process. The point is that, whether it is at the start of a legislative process or in the judicial system once a law has been passed, the use and presence of AI in the process must be closely monitored and verified as objectively ["empirically"?] as possible in order to maintain the human factor in the outcome.

At its foundation, the solution to much of the problem raised in the anti-Enlightenment milieu can be resolved through the educational process. In the case of legal training, it would be worth considering adding a mandatory course in computer science in law school, if only to catch those liberal artists who have avoided such inquiry in undergraduate school. Similarly, in medical school or in residency training it would be appropriate to encourage computer-based research techniques that expanded diagnostics and innovation in treatments to the more precise benefit of the patient.

From a societal perspective, the technological revolution of the past seventy or so years represents not so much a rejection of the Enlightenment model as it is simply ignoring it as the human basis for intellectual inquiry in a headlong rush toward a machine-driven world. The failure to do so amounts to an abdication of the untidiness of humanity in favor of the cold efficiency of the machine [14]. To that extent it is flawed in not only in its potential lack of authenticity, but also the misdirection in decision-making that it allows. An apocalyptic example is presented in the motion picture Fail-Safe, in which a failure of the machine misleads those dependent upon it into risking a nuclear war [15]. In the "real world", the uncritically unexamined presence of AI in these situations severs the process from "reality" so as to give the film maker an opening.

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