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New Frontiers

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The Evolving Law Firm Food Chain

Building the Justice Layer of the Internet

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Although it enjoys a reputation as one of the most fair, efficient, and effective in the world, is the United States of America's judicial system, like the rest of our country's aging infrastructure, badly outdated and in need of an overhaul? Many think so. A recent report prepared by the Columbia Law School Human Rights Clinic put it this way:

> Legal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system. Yet, in the United States, millions of people who are poor or low-income are unable to obtain legal representation when facing a crisis such as eviction, foreclosure, domestic violence, workplace discrimination, termination of subsistence income or medical assistance, and loss of child custody. Indeed, only a small fraction of the legal problems experienced by low-income and poor people living in the United States—less than one in five—are addressed with the assistance of legal representation.

COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC, ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES 1 (Aug. 2013), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Access%20to%20Justice%20Shadow%20Report%20-%20Final%20(small%20size).pdf.

The report was endorsed by several other civil and human rights groups, including the National Legal Aid and Defender Association and the Brennan Center for Justice. *See id.*

Part of the problem can be attributed to the difficulty in handling large numbers of civil cases awaiting access to the court system and to the fact that criminal cases take priority. A *Wall Street Journal* article described a federal employment discrimination lawsuit filed in 2007 that was still on the docket in 2015 as one example in an avalanche of cases piling up in the federal courts, where the number of civil cases left unresolved for three years or more exceeded 30,000 five times in the past decade. Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J., Apr. 6, 2015, www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746. We all know that justice delayed is justice denied.

Not only are the formal justice systems overloaded, inaccessible, and unaffordable, but also, people with justiciable needs often do not even know to ask for help from a lawyer. One study concluded that the American justice system is not doing a good job in meeting identified civil justice needs. *See* People for the American Way, *Overloaded Courts, Not Enough Judges: The Impact on Real People* (July 29, 2015), www.pfaw.org/sites/default/files/lower_federal_courts.pdf. Another indicates that people don't even think of lawyers anymore to

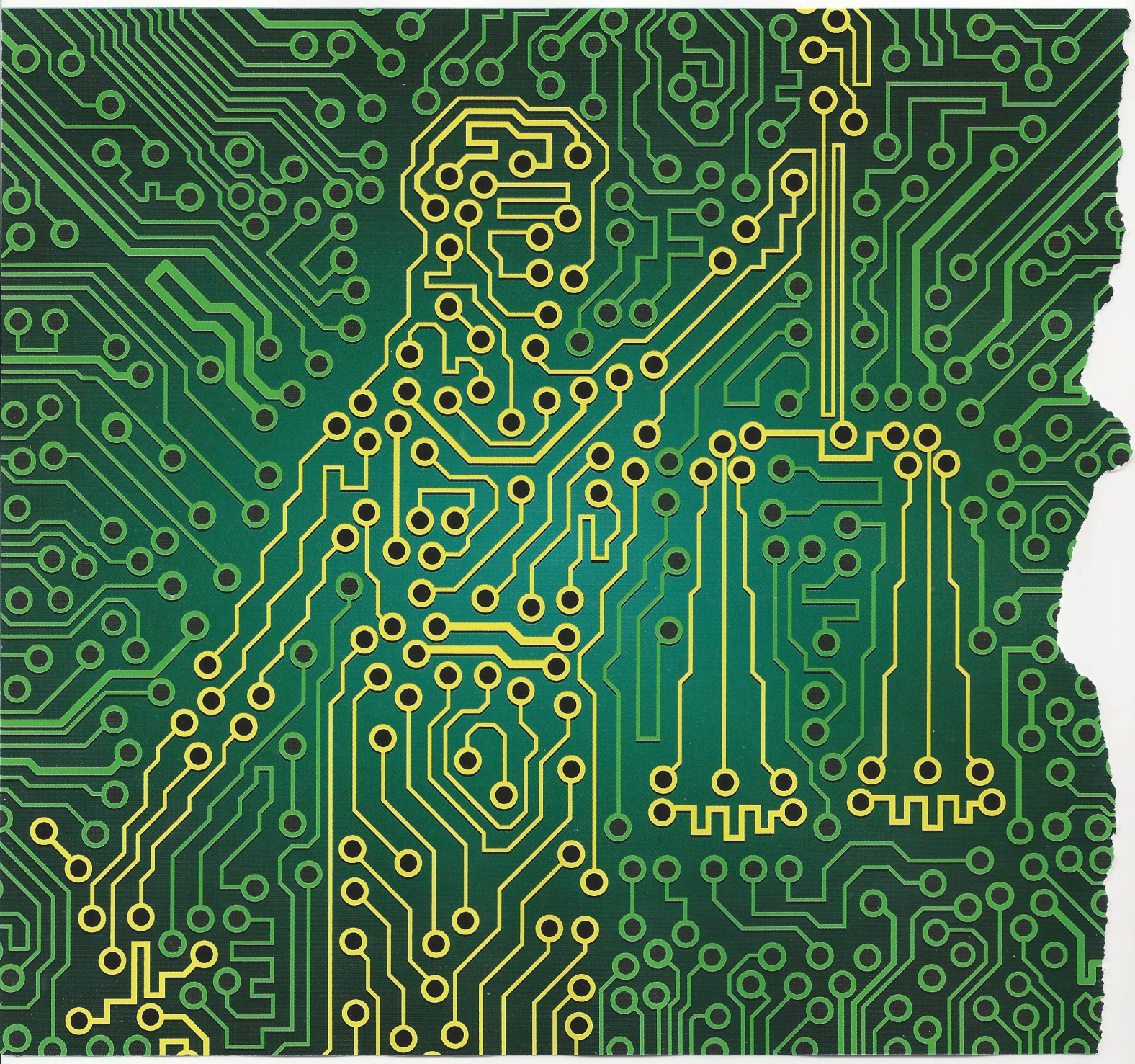
solve their justice problems. *See* REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 16 (2014), www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf.

The World Justice Project's Rule of Law Index Factor 7, which is used to rank countries' civil justice systems, states:

> Civil justice requires that the system be accessible, affordable, effective, impartial, and culturally competent. Accessibility includes general awareness of available remedies; availability and affordability of legal advice and representation; and absence of excessive or unreasonable fees and hurdles. . . . Effective civil justice also implies that court proceedings are conducted in a timely manner and judgments are enforced without unreasonable delay.

See http://worldjusticeproject.org/factors/effective-civil-justice.World Justice Project, ROL Category: Factors, http://worldjusticeproject.org/content/effective-civil-justice.

Although most American lawyers think highly of our justice system, we rank only 21st in the world when it comes to providing effective access to a civil justice system. *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2015, http://data.worldjusticeproject.org/#/groups/USA. The American Bar Foundation



also looked at the same issue in its 2014 report and found that over 100 million people in the United States have civil legal issues that could result in loss of homes, jobs, benefits, or custody of children—yet, only 14 percent of these issues were taken to a court. *See* SANDEFUR, *supra*, at 14.

Options Other Than Attorneys

If most Americans aren't taking their civil justice problems to attorneys, what are they doing with them? Years ago, the woman whose marriage was falling apart would either call a lawyer (if she could afford one) or represent herself in her divorce. But now, because of the Internet, there is a widely used third option. The same woman now knows she can go online and do some research on her own—after the kids go to sleep, while her husband is out on the town. She knows about the legal service Avvo from TV ads. She can look at its legal guides and Q&A forum—where people can either pose their own question to Avvo's pool of experienced attorneys or search the 6.75 million previously posed questions and attorney-provided answers, all for free. She will find answers to her questions on the legal process and steps involved in her divorce, and if she still wants to talk to a lawyer for advice, Avvo Advisor will connect her to one for a 15-minute legal advice session for a flat fee of $39.

Technology applications like this, which bring law directly to the client or disintermediate the lawyer altogether, have been touted at conferences and legal technology events over the past few years. They include Reinvent Law, ABA Techshow's Appathon, and Tech for Justice, to name a few.

The legal aid industry is also dealing with the justice gap and, out of necessity, has done a better job at both innovating and adopting technology early on than the rest of the system. With a mission to protect the vulnerable and establish rights, legal aid providers have embraced technology as an obvious answer in a technology-driven world. Legal aid websites are using video and online intake forms. One of the biggest transformations has been the movement to lead people who need justice services step by step through interactive "guided pathways," which make the power of self-help a reality. State courts have also been adopting technology to ameliorate their paper-based and face-to-face systems by shifting the paradigm to virtual courts in some civil and criminal proceedings, managing cases remotely, preventing data security failures, and managing electronic discovery. Governments and nonprofits are working to reduce the costs of legal services by using tools such as online dispute resolution.

As the justice gap continues to drive innovation, many more tools will emerge to reach underserved populations with specific services. Because these justice problems exist across borders, so too will the innovations. Tech for Justice convenes hackathons for legal professionals across the country, with the goal of generating innovative technologies to increase access to justice. Rather than creating one application that replicates the existing legal system, hackathon solutions connect computer scientists, lawyers, academics, and others to solve problems involving domestic violence, family law, criminal justice, and many others, holistically and across borders.

In Texas, for example, participants partnered with several institutions (the Texas Supreme Court, the Office of Court Administration, the Legal Services Corporation, and others) to create applications to help people accomplish routine legal tasks—prepare paperwork relating to guardianships, say, or shared parenting schedules—without involving the court system. This reduces the load on public resources and increases access to justice.

In New Mexico, domestic violence is one of the biggest issues for legal aid workers. Hackathons there are looking to develop an application that provides information that victims would have trouble finding without calling a legal aid organization (which are closed during off hours, when domestic violence typically happens). The app may also point the way to a guided pathway out—that is, what to do with the children, whether to take money out of the bank account, whom to contact for help, and so on.

There is other movement toward problem solving without lawyers that skirts the current and established legal system. In addition to Avvo, companies like Legal Zoom and Rocket Lawyer are lining up investors willing to infuse hundreds of millions of dollars into legal service tools for underserved populations. Rocket Lawyer allows its customers to prepare customized legal documents, with or without legal support, and provides document storage for a fixed price. Legal Zoom provides commoditization of legal services and now handles 10 percent of trademarks in the United States. These companies have flourished despite slaps on the wrist from those who think the unauthorized practice of law regime can stop them. Penalties for unauthorized practice of law have become a cost of doing business: Fines are paid, but the services continue.

But these are the leading edge. As recently as last year, Jason Krause, writing in the *ABA Journal*, listed 100 "Innovations in the Law," all of which were ways to automate or "virtualize" current practice. *See* Jason Krause, *Innovations in the Law*, A.B.A. J., Apr. 2015, at 34–43. In a sense, these so-called innovations were merely enabling a fundamentally broken, or at least fatally crippled, system. This exemplifies how the legal community has largely followed a pattern of limited adoption of information and communications technology, using it only as a way to make things we already do easier, faster, or virtual.

The New Social "Operating System"

Despite the legal community's neglect, information and communications technology has transformed social and professional relationships. Lee Rainie and Barry Wellman have argued that a

Illustration by Daniel Hertzberg

new social "operating system" that affects all parts of our lives, including work, has arisen from three "revolutions": the social network revolution, the Internet revolution, and the mobile revolution. LEE RAINIE & BARRY WELLMAN, NETWORKED: THE NEW SOCIAL OPERATING SYSTEM (MIT Press 2012). These revolutions began after the online network created by the early developers of the Internet offered a way to improve communication between and among researchers. Opening that network to the public created a layer of expanded communication and information-sharing for societies at large. The National Science Foundation's move to open the Internet to online commerce in 1992 added yet another layer, exploding commercial possibilities, creating some of the largest corporations in the world, and making the concept of venue and location all but irrelevant. As each of these layers has developed—with artificial intelligence, expanding communication channels, and ever more complex networked interaction—justice systems have largely remained frozen in place, locked into particular geographic places and paper.

This has left a conspicuous empty layer—a layer that, if developed, would enable people anywhere and everywhere to access the justice system. Even poor people have access to information and services of all kinds through multiple channels accessed through traditional computing and, more important, through "simple" mobile devices and smartphones. Yet, access to justice remains illusory for them. This wouldn't be the case if access did not depend on systems created in a barely post-Medieval world.

Even though many of us became lawyers in order to do good and shape society, most in our profession were mere spectators at these revolutions, doing very little to protect, preserve, and defend the rights of the vast majority of people, businesses, and social structures we swore to protect. For the most part, we've been slow to adopt and have even resisted innovative technologies. The problem for the legal community is that these changes will happen whether we help shape them or not. All users of the Internet acting together will begin to define organic norms for online interaction as they continue to communicate, trade, and sign agreements. The justice layer will form on its own. If we want to do more than witness the process unfold, we must consciously and actively build the justice layer of the Internet. Globally, this means we must not only reinvent how we make law in cyberspace but also catalyze the creation of justice-related technologies.

It is hard for litigators to think about forming or working with laws in a place that is jurisdiction-less, such as the Internet. So much of what we do is based on jurisdiction. It determines where we file our cases and what rules of evidence and procedure apply. But the finer points of state and local jurisdiction are of little moment to a lawyer advising clients in a substantive federal practice such as patent law. Similarly, focusing on jurisdictional issues misses the mark when one's client is trying to function in the emerging global society in cyberspace.

How to make laws for all of us who are interacting with each other on the Internet has been the subject of many gatherings, including global ones such as the World Summit on the Information Society and the Internet Governance Forum. Not only is it beyond the reach of traditional nation-state jurisdictions, but because of its global nature and ability to touch each person on the globe, no sovereign can legitimately claim primacy and, hence, the power to define the rules of cyberspace. Internet governance—not only the substantive rules of interaction in cyberspace but also the power and legitimacy to determine those rules—is being fought over by nation-states, multinational corporations, nongovernmental organizations, and individuals. This battle exists on many planes, including human rights, property rights, and e-commerce. The struggle over who defines the rules is being fought in domestic and foreign courts and legislatures, the United Nations, and business and academic circles. What a tremendous waste of time and resources when the global citizens of the world are looking for some order in their interactions with each other online.

A Virtual Silk Road

Increasingly, global citizens acting online behave like the merchants of the Silk Road era. The Silk Road trade route linked East and West over vast regions and cultures many thousands of years ago. It was a critically important route for merchants to sell their goods and for governments to collect fees and duties. Various methods of protection developed, both internal and external to the traders who crossed vast territories in caravans. Internally, caravans became very large and learned how to protect themselves from attacks by nomad tribes. They armed themselves and learned how to use intermediate cities along the way to exchange goods and reduce their risks. Many of these intermediate cities formulated rules to protect merchants because trade was good for them too. In other words, a merchant culture began to develop across political frontiers to support an exchange of goods that benefited everyone.

Similarly, today's global citizens privately order their affairs in trusted virtual settings by agreeing to the terms of private contracts, which operate across borders. eBay is such an example and one of the earliest forms of a virtual community self-organizing into an electronically linked network of people anywhere in the world. eBay's almost 150 million registered users come together for a shared purpose—to buy and sell goods in an online auction marketplace. "Transactions there give rise to some 60 million disputes a year. Virtually all are handled through eBay's own [online dispute resolution] process. Ninety percent of the disputes are resolved through the software alone, without a need for human intervention." Robert Ambrogi, *Tax Boards Use an Online System to Resolve Disputes*, A.B.A.

J., Mar. 1, 2015, www.abajournal.com/mobile/mag_article/tax_boards_use_an_online_system_to_resolve_disputes.

This occurs because, by clicking "I accept" the terms of service, potential disputants are bound to each other by one contract in a trusted network with its own online dispute resolution mechanism. As these networks proliferate and move into all types of interactions—from gaming to dating to inspiring revolution—people will reach consensus on the values and normative behavior that are acceptable for cyberspace. Behavioral and societal values will be fleshed out through the "marketplace of interaction." When individuals are allowed to participate in social aggregations they trust, a market emerges for openness and fair dealing. The transparency of the Internet permits the rules set by community organizers to be monitored by community members in a much more direct way than exists in the analog world.

Who is successful in building virtual communities? Commercial marketplaces, for sure, and revolutions that have toppled dictators. But these lack an end game. It is interesting, though, perhaps the most successful of all are the *anti*-justice community—cyber criminals who use the dark web to commit crime in intelligently structured, systematic processes such as the growing global human trafficking network, examples of which take place right in our own backyards. Cyber crime has rocked the foundation of our banking system and even our law firms.

Consider the Sony breach, which has now been shown to be a not particularly sophisticated hack sponsored by North Korea. A single computer at a high executive level inside Sony was infected by malware, which allowed the hackers to control it. Little by little, they ultimately infected 3,000 computers and 800 servers and gained access to all of Sony's intellectual property and employee data. Then, having copied everything, they disabled Sony's computer system and thereby its access to the world.

The idea of organized hackers operating with a set of rules to accomplish a singular purpose in a completely lawless environment brings to mind the gangs of the old Wild West. And what is the response of the legal community? We pass laws after the fact and can't agree on the types of security needed to protect us all from harm. Laws aren't working. We need to act as global citizens to create trusted online communities to take back our space.

The opportunity for lawyers now is to participate in the creation of an online design for justice and determine where a new definition of justice is needed (behaviorally and philosophically) and which sectors are already working together (or against one another) to define it. The World Wide Web Consortium has defined community protocols for communications. Doesn't justice require the same type of collaboration?

We can use our strengths as lawyers to guide this process. As we become open to helping people use the Internet to protect their rights, we also should become open to using this tool to accelerate our own business. There is a space for the legal profession to do good, increase opportunity, and participate with others to contribute to a new market economy online. The justice layer is going to become a necessity in the protection and preservation of a new justice model that is fair and works for those who need it most.

Building the justice layer of the Internet requires us not only to rethink how we make law in a global, technologically based system; it also requires that we invent technologies that work in real time, across borders, across disciplines, and across a huge mass of stakeholders, all looking to protect their interests. Our challenge is to act as a profession and acknowledge not only that access to justice for the most vulnerable is restricted but also that the capacity of traditional legal institutions is lacking. Mobilizing the power of technology to reduce the gap is our opportunity.

> If we want to do more than witness the process unfold, we must consciously and actively build the justice layer of the Internet.

Lawyers can be involved in translating the basic tenets of the current justice system to adapt them to online processes. We can specialize in the rule of law in cyberspace, including rules to govern online interaction and business and the harmonization of cross-border dispute policy. We can learn how to conduct trials online. We can teach citizens about the existing, traditional legal system and come up with ways for them to navigate it faster. Above all, we must educate ourselves about current justice needs that aren't being met. If we don't, the online system will build up around us, and people will look to it for justice. Not only will this harm our profession—it will leave the public at the mercy of those all too eager to define the emerging online justice system based on their private interests.

There is no area in greater need of legal presence than the formation of the justice layer of the Internet. ▪