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Five conversations and new directions for law and technology

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ABSTRACT

This article introduces five conversations that we might have about law and its imperfect governance. These conversations prompt a new direction for inquiry in law and technology which, broadly speaking, asks questions about the characteristics of governance projects (whether legal, regulatory, or technological), about the limits, problems, and challenges faced by those projects, and about the prospects for those projects and for governance itself. The article concludes by underlining the significance, both practical and theoretical, of this direction of inquiry, where we view law as a particular kind of governance project and where we are guided by an aspiration for good governance that builds from the foundational conditions for human social existence.

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KEYWORDS Law and technology; governance; good governance; foundational conditions

1. Introduction

Over the last thirty or forty years, lawyers have become progressively more engaged with breakthrough technologies, with the questions that they pose for the application of traditional legal rules, principles, concepts, and classifications, with the challenges that they present to regulators and regulatory regimes, and with the tools that they offer for undertaking various kinds of legal and regulatory functions. In this article, which is based on the fifth Hans Franken lecture that I gave at the University of Leiden in June 2024 – a lecture given under the title of 'Law's Imperfect Governance'[1] – it will

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[1]The text of this article is an edited and expanded version of the original lecture. For the original lecture, see, https://www.youtube.com/watch?v=2lyorScwm5c.

be suggested that it is time to reassess this initial arc of development and consider new directions for law and technology.

Remarkably, it was in the mid-1980s that Hans Franken was instrumental in founding the Centre for Law and Digital Technologies in Leiden. At that time, very few lawyers – possibly with the exception of some intellectual property lawyers – viewed breakthrough technologies as something in which they, as lawyers, needed to take a serious interest. Back then, if a meeting had been arranged at which lawyers and technologists were invited to exchange thoughts on matters of mutual professional interest, I imagine that the conversation would have stalled quite quickly. The e-initiative in Leiden was way ahead of the curve. Today, the situation is quite different. Law and tech research centres (including centres for digital law) are commonplace, and law and tech books and journals are everywhere. Moreover, this burgeoning interest in law and tech is a global phenomenon. Today, it would be surprising to meet a lawyer, whether a legal practitioner or an academic lawyer, who treated technologies – or, at any rate, artificial intelligence (AI) – as something that only technologists should be interested in.

Relating this to the topic of the Leiden lecture, while in the 1980s I could have spoken or written about 'law's imperfect governance' – especially on its relative ineffectiveness and its unintended effects[2] and on the 'ideological tensions' in judicial decision-making[3] – it would have been all about law and its imperfections and not at all about breakthrough technologies. By contrast, what I say in this article about law's imperfect governance is as much about technologies as it is about law.

The article takes the form of an introduction to five conversations – and it must be emphasised that these are no more than starting points for conversations – that we might have about law and its imperfect governance. Broadly speaking, these are conversations about governance projects (specifically, governance by law and governance by technology), about their problems and responses, and about their prospects. Accordingly, while the first conversation focuses on how lawyers engage with technology, in the second the focus is on the problems faced by law's governance, in the third it is on the tension between governance projects that rely on rules and those that rely on tools and technological management, in the fourth it is on respect for law and for good governance, and in the fifth it is on the prospects for law's governance and for governance more generally.

In short, the purpose of the article is to provoke ideas about the next arc of development in law and technology. No doubt, there will be more than one view about this – not only about whether this is the right time for a

[2]Compare D Goddard, *Making Laws that Work* (Oxford: Hart 2022).
[3]See, e.g. JN Adams and R Brownsword, *Understanding Contract Law* (London: Fontana 1987).

reassessment but also, if there are to be new directions, about the directions that should now be taken. The proposal in this article is not so much that lawyers should be 'more techy' in their approach. Already, and understandably, there is a view that it is not enough for lawyers to take an interest in the tools that are being developed; lawyers need to be much more hands-on in the development of these tools.[4] Rather, the proposal that I am sketching is that we should view both law and technologies through the larger window of governance[5] guided always by an aspiration for good governance that builds from respect for the foundational conditions for human social existence.

Putting this in other words, we might say that, in an effort to broaden the study of law from *within*, there was a well-known move to place law in context;[6] then, still seeking to broaden the study of law from *within*, law was placed in a technological (and an increasingly regulatory) context;[7] but now, in a decisive change of direction, what is being proposed is that we should place both law and technology in a context of governance (and good governance) that reflects an attempt to broaden the study of law from *without*.

2. The first conversation

The first conversation is about the way in which we lawyers express our engagement with emerging technologies. Insofar as any one of the conversations is 'methodological' this is it.[8] 'Law and technology' takes an inclusive approach to the relevant 'field' of interest – any type of law, any kind of technology, any intersection or conjunction between the two, suffices; but, there is more than one way of 'framing' our inquiries and, of course, more than

[4]Moreover, it might be argued, the training of lawyers needs to pay attention to both the language of law and the programming language of the digital tools that lawyers will use. For an elegant articulation of this view, see, AE Cinar, 'The Language of the Law vs the Language of the Computer: A Bilingual Model of Legal Education in the Age of Technology and Artificial Intelligence' (2024) 16 *Law, Innovation and Technology* 558.

[5]Although my thinking has taken shape in the embryonic field of law, regulation, and technology, some who are working outside this field have already seen 'governance' as a bridgehead for conversations between lawyers and researchers in other disciplines and as common ground between some disciplines: see, e.g. P Zumbansen, 'Governance: An Interdisciplinary Perspective' in D Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford: Oxford University Press 2012) 83; and, S Borrás, 'Three Tensions in the Governance of Science and Technology' in D Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford: Oxford University Press 2012) 429. In the same vein, see S Lazar, 'Lecture 1: Governing the Algorithmic City' <https://arxiv.org/pdf/2410.20720> in which a governance-centred (rather than a law-based) approach is advocated.

[6]Compare, W Twining, *Law in Context: Enlarging a Discipline* (Oxford: Clarendon Press 1997).

[7]As in R Brownsword and M Goodwin, *Law and the Technologies of the Twenty-first Century* (Cambridge: Cambridge University Press 2012) which was published in the 'Law in Context' series.

[8]Compare R Brownsword, 'Field, Frame and Focus: Methodological Issues in the New Legal World' in Rob van Gestel, Hans Micklitz, and Ed Rubin (eds), *Rethinking Legal Scholarship* (Cambridge: Cambridge University Press 2016) 112.

one focus for our inquiries. This first conversation is particularly about the way in which we frame our inquiries.

Initially, it is natural for lawyers to say that they are interested in law and some specified stream or kind of technology – for example, in law and information technology, or law and the Internet, or law and biotechnology, or law and human genetics, and so on.[9] In some cases, lawyers might also apply ethics to new technologies and their applications[10]; but, in all these instances, law (with or without ethics) is the platform from which we view and assess developments in some specified technology.

In these initial (and continuing) iterations, it is the concepts, principles, and classifications of tort, contract, property law, and the like, that are directed at emerging technologies. To this extent, although lawyers are reacting to developments in technology, their application of traditional rules and principles is pretty much business as usual.[11] However, in many places, and particularly in the EU, the response to new technologies is to articulate bespoke regulatory frameworks, such as the GDPR and the AI Act, where we have rules and principles in a legislative form informed by background policy.[12] Following public consultation, and informed by relevant policy considerations, a regulatory deal is done. This practice encourages lawyers to include, or even to emphasise, 'regulation' in their expression of interest. Accordingly, we might say that we are interested in the law and regulation of new technologies,[13] or in the law and regulation of particular technologies (such as biotechnologies, nanotechnologies, additive manufacturing, blockchain, AI, quantum computers, and the like),[14] or in the law and regulation of particular applications (such as the application of technologies for human enhancement, smart contracts, the Metaverse, and so on).[15]

[9]Compare, e.g. R Brownsword, WR Cornish, and M Llewelyn (eds), *Law and Human Genetics* (Oxford: Hart Publishing, in conjunction with the *Modern Law Review* 1998), and R Brownsword and M Goodwin (n 7).

[10]Compare, e.g. D Beyleveld and R Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press 2001).

[11]Famously, compare the remarks of Judge Easterbrook at one of the early conferences of 'cyberlawyers' in FH Easterbrook, 'Cyberspace and the Law of the Horse' (1996) *University of Chicago Legal Forum* 207.

[12]For the 'brutality' of the EU's approach to the regulation of digital technologies, see V Papakonstantinou and P de Hert, *The Regulation of Digital Technologies in the EU* (Abingdon: Routledge 2024) 98 et seq.

[13]Compare, e.g. R Brownsword, E Scotford, and K Yeung (eds), *The Oxford Handbook of Law, Regulation and Technology* (Oxford: Oxford University Press 2017).

[14]Compare, e.g. R Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford: Oxford University Press 2008); G Hodge, DM Bowman, and AD Maynard (eds), *International Handbook on Regulating Nanotechnologies* (Cheltenham: Edward Elgar 2010); D Mendis, M Lemley, and M Rimmer (eds), *3D Printing and Beyond: The Intellectual Property and Legal Implications Surrounding 3D Printing and Emerging Technology* (Cheltenham: Elgar 2019); P De Filippi and A Wright, *Blockchain and the Law* (Cambridge, MA: Harvard University Press 2018); K Yeung and M Lodge (eds), *Algorithmic Regulation* (Oxford: Oxford University Press 2019). For early engagement with quantum computing, see A Lukoseviciene. 'Regulating Quantum Computers: Insights into Early Patterns and Trends in Academic Regulatory Conversations on the "Quantum Revolution"' (2025) 17 *Law, Innovation and Technology* (this volume).

[15]See, e.g. R Brownsword, 'Regulating Human Enhancement: Things Can Only Get Better?' (2009) 1 *Law Innovation and Technology* 125, 'Smart Contracts: From a Legal Perspective' in DM Vicente, DP Duarte, and C Grandeiro (eds), *Fintech Regulation and the Licensing Principle* (European Banking Institute

At this point, we might sharpen our framing by saying that there are two dimensions to our regulatory interest. One dimension is the regulation *of* technologies but the other dimension is regulation *by* technologies.[16] Whereas the primary question in relation to the former is about the terms of the regulatory framework for a particular technology – with the standard question being about whether the right regulatory balance has been struck, neither over-regulating and stifling potentially beneficial innovation nor under-regulating and exposing citizens and consumers to unacceptable risks[17] – the questions in relation to the latter are about the technological options that we now have for the performance of regulatory functions. Putting these two dimensions together, we might express our interest as being in ensuring that the regulatory environment is fit for purpose (both with regard to its regulatory content and the tools that it deploys).[18]

Thus far, 'governance' has not figured in our expressions of interest or our framing. To be sure, we might follow Lon Fuller in characterising law as the enterprise of subjecting human conduct to the governance of rules,[19] from which it follows that law is a rule-based form of governance. However, where the emphasis is on law as *rules*, we tend to under-appreciate the significance of law being about *governance*.[20] Indeed, for many, governance is something to be contrasted with law, whether because it is associated with less formal codes and guidance, or transnational or sub-national rules, or because it is about technical standards, and so on. On this view, we have law, and we have regulation, and then we have governance. If, however, we treat law as a particular kind of governance project, we can invert this so that our general interest is in governance projects and, as lawyers, specifically in the legal form of governance (that is, in governance that has 'law-like' characteristics).[21]

If we now frame our interest, not in terms of law and some kind of technology, but in terms of governance projects, then we will view law, ethics, and technology – as well as, for example, social norms, markets, and religion

January 2023) 140, and 'Law's Imperfect Governance: Is the Metaverse the Solution?' (2023) 25 *Media and Arts Law Review* 241.

[16]See, e.g. R Brownsword and K Yeung (eds), *Regulating Technologies* (Oxford: Hart 2008).

[17]See, R Brownsword, 'Legal Regulation of Technology: Supporting Innovation, Managing Risk and Respecting Values' in Todd Pittinsky (ed), *Handbook of Science, Technology and Society* (New York: Cambridge University Press 2019) 109.

[18]As in R Brownsword, *Law, Technology and Society – Re-imagining the Regulatory Environment* (Abingdon: Routledge 2019).

[19]LL Fuller, *The Morality of Law* (New Haven: Yale University Press 1969).

[20]But, seminally, compare KN Llewellyn, 'The Normative, the Legal and the Law Jobs: The Problem of Juristic Method' 49 *Yale Law Journal* 1355.

[21]Compare, e.g. R Brownsword, 'Law, Regulation, and Technology: The Bigger Picture of Good Governance' in B Brozek, O Kanevskaia, and P Palka (eds), *Research Handbook on Law and Technology* (Cheltenham: Elgar 2024) 12; and, 'Governance, AI, and Consumers: Looking Forward' in L DiMatteo, C Poncibó, and G Howells (eds), *The Cambridge Handbook of Artificial Intelligence and Consumer Law* (Cambridge: Cambridge University Press 2024) 296; and, *The Future of Governance: A Radical Introduction to Law* (Abingdon: Routledge 2024).

– as particular types of governance project. Taking this approach, we do not need to agonise about whether 'code' or other designs that have regulatory effects are 'law';[22] code, like law, is a particular kind of governance project albeit one to be distinguished from law. In other words, the suggestion is that, as lawyers, we should be interested in the full range of governance projects – whether they are normative projects (like law, ethics, or regulation), non-normative projects (like technological governance, or governance by code), or hybrid projects (where governance relies on both rules and tools) – and we should be particularly interested in the contrast between projects that govern in a human-centric way by rules and projects that are techno-centric.[23]

At this point, the conversation might continue in more than one way – for example, by pondering the nature of the governance matrix that obtains in particular places (whether in public or private governance, whether relying on rules or tools, and so on) or by exploring how governance is experienced by particular groups (particularly, self-governing groups that are also subject to imposed public regulation[24]), by reflecting on the virtues of, respectively, the Rule of Law and 'good governance' as our aspiration, by considering which institutional designs seem to be fit for purpose relative to different governance projects (especially hybrids), and so on.[25] There is much to discuss. However, we will now move on to the second conversation.

3. The second conversation

The second conversation takes us to problems faced by law's governance. It focuses on the imperfections in law's governance and the roots of our discontent with law.[26]

There are many features of law's governance that we (whether as members of the public or as legal professionals[27]) might judge to be less than perfect. In particular, we might be discontent with law's promise (of order, or justice, or democratic processes), thinking that it promises either too little or too much. Or, we might be discontent with law's performance, or the positions,

[22]Compare, seminally, L Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books 1999).
[23]Compare, e.g. R Brownsword, 'Law, Technology and Our Governance Dilemma' (2024) 13(3) *Laws* (on line) (special issue).
[24]Compare K Yeung, 'Regulation by Blockchain: the Emerging Battle for Supremacy between the Code of Law and Code as Law' (2019) 62 *Modern Law Review* 207.
[25]Compare, in general, H Addink, *Good Governance* (Oxford: Oxford University Press 2019); and R Brownsword, *Generative AI and the Rule of Law* (Oxford University Press forthcoming).
[26]This draws on R Brownsword, *Technology, Humans and Discontent with Law: The Quest for Better Governance* (Abingdon: Routledge 2024).
[27]On the latter possibility, see, for example, R Ellison, *Red Tape* (Cambridge: Cambridge University Press 2018). As Ellison puts it, we can have too much law, as a result of which 'we have too many rules, inadequately briefed rule makers, over-zealous regulators and under-trained and too few judges. It is also clear that the over-government evident in many countries causes irritation, substantial cost, and unintended and adverse consequences for us all' (ibid 433).

principles, or policies that it adopts, or the authority that it claims, or with its officials and practitioners, or its institutions, and so on. In some cases, our discontent might run deep; but, in other cases, although we judge law to be imperfect, our expectation is not that it will be perfect. Moreover, this is nothing new: this reduced expectation colours our view of law's governance long before new technologies appear on the scene to amplify and extend our discontent.

If we attempt to identify the roots causes of law's imperfections, we are likely to start with the fact that law is a human enterprise and that its reliance on rules to guide conduct implicates both interpretive and practical affordances. As a human enterprise, law's governance reflects the self-interested tendencies of humans – law is a mirror of human imperfection; and, as a rule-based project, there are too many opportunities for lawyers to seize on ambiguities and vagueness in the prescriptive formulations, and too many opportunities for the self-interested to elect non-compliance. Moreover, because law primarily reacts to non-compliance rather than tries to anticipate, prevent, or preclude it, we know that law's corrective efforts will always be a second-best. If we are to vote for law's governance, we know that we have to price-in these factors.

Over and above these considerations, we also have to take into account the increasing plurality of modern societies and the stress occasioned by technological disruption. Where those who are governed form a relatively homogeneous group, the prospects for law's governance are better than where law has to try to accommodate a plurality of preferences, priorities, and principles. In the latter case, law will not be able to please everyone and a degree of discontent is inevitable. Frequently, those who govern, whether as lawmakers or in a judicial capacity, will feel that they are caught between a rock and a hard place.[28] As for technological disruption, while we know that fast-moving technologies can challenge regulatory connection and sustainability, it is also the case that they prompt a tension between interests vested in the current order and interests that are invested in a new order. It is one thing for law's governance to try to maintain order in stable conditions but it is entirely a different matter to manage the transition from one level of technological order to another.[29]

[28] See, R Brownsword, 'Between Rocks and Hard Places: Good Governance in Ethically Divided Communities' (2023) 29 *The New Bioethics* 247.

[29] Compare, TL Friedman, *Thank You for Being Late: An Optimist's Guide to Thriving in the Age of Accelerations* (London: Penguin 2017). With a focus on accelerations in technology, globalization, and climate change, Friedman underlines the significance of this phenomenon at 29:

> [T]here is a mismatch between the change in the pace of change and our ability to develop the learning systems, training systems, management systems, social safety nets, and government regulations that would enable citizens to get the most out of these accelerations and cushion their worst impacts. This mismatch … is at the center of much of the turmoil roiling politics and society in both developed and developing countries today. *It now constitutes probably the most important governance challenge across the globe.* (emphasis added)

Before moving on to the third conversation, we should note that, in many places, the responsibility for managing technology-driven transitions has shifted from the judicial to the political branch. We see this, for example, with technologies for assisted conception and embryology, data protection, e-commerce, platforms, AI, and so on. Typically, judges have neither the mandate nor the resources to manage these transitions, making policy calls and priorities, and so this kind of governance is left to the political branch where an openly regulatory approach is mandated.[30]

Despite the common political claim that the right regulation has been introduced at the right time, good governance is not so easy; and discontent might well persist. For, although politicians, thinking in a regulatory way, are not constrained by ideals of doctrinal coherence in the way that judges are, they are still constrained by the constitution and by the fundamental values of their community. Regulatory policy, for example, might be constrained by whatever fundamental rights are recognised in the community. Where the application of these rights is contested, and where the rights pinch on policy, it will be the judges who are brought back in to settle the matter. In such cases, despite judicial protestations that they are not making political decisions, they are likely to face criticism. When some see the adjudication of constitutional disputes as political and others see it as legal, we have a problem – and, we have a problem whether, like Stephen Sedley, we see it as being 'the politicisation of legal issues' or, to the contrary, 'the legalisation of political issues'.[31]

4. The third conversation

It is trite that industrialisation and technological developments cause economic and social disruption – and it is also trite, but important to keep uppermost in mind, that such disruption does not necessarily impact in a good way.[32] The starting point for the third conversation is the disruption that technological developments and applications bring to projects of legal and regulatory governance.

In *Law 3.0*,[33] I sketched two waves of technological disruption. The first wave of disruption encourages a legal mind-set that is more policy-focused

In the pages that follow, Friedman, drawing on a graphic analysis by Eric 'Astro' Teller (director of Google X) contrasts the gentle upwards slope of the human capacity for adaptability with the steep upward curve of technological innovation.

[30]Compare, e.g. R Brownsword, 'Political Disruption, Technological Disruption, and the Future of EU Private Law' in M Durovic and T Tridimas (eds), *New Directions in EU Private Law* (Oxford: Hart 2021) 7; and, 'Private Law, Technology, and Governance' in Damian Clifford, Kwan Ho Lau, and Jeannie M Paterson (eds), *Data Rights and Private Law* (Oxford, Hart 2023) 19.

[31]S Sedley, *Law and the Whirligig of Time* (Oxford: Hart 2018) 134.

[32]Compare, the insightful analysis in D Acemoglu and S Johnson, *Power and Progress* (London: Basic Books 2023).

[33]R Brownsword, *Law 3.0: Rules, Regulation and Technology* (Abingdon: Routledge 2020); and 'Law, Authority, and Respect: Three Waves of Technological Disruption' (2022) 14 *Law, Innovation and Technology* 5.

and regulatory than traditional doctrinal reasoning based on legal principles. For the first time, with the development of this new mind-set, lawyers ask whether their rules, principles, and practices are 'fit for purpose' – that is, fit to serve specified policy purposes. The second wave of disruption encourages a more technological mind-set in which we take a hard look at the efficiency and effectiveness of our reliance on rules. From here, it is a short step to our third conversation in which we focus on the possibility of developing and applying new tools for governance purposes.[34]

Accordingly, in our third conversation, we consider the initiation of governance projects that rely on new tools either alongside rules or to replace rules, either with humans or to replace humans by automated processes. There is much to discuss here but we can say a few words about the tension that is likely to arise between, on the one hand, human-centric and, on the other, hybrid and techno-centric forms of governance.[35]

In communities where a recognised fundamental value (along with respect for human rights and human dignity) is that applications of technology should always be 'human-centric', we can expect a jurisprudence to develop around the interpretation of 'human-centricity' (and how it relates to human compatibility and the like) as well as the weight of this value when in conflict with other fundamental values of the community. Where human-centricity does not have this privileged status in the community's regime of governance, it might still show up in the legitimate preferences of those who are subject to governance and where it is recognised that the application of new technologies (including their application for the purposes of governance) must be 'socially acceptable'.[36] So, for example, in the EU, where governance is always subject to the community's fundamental values, we might expect there to be some contestation around human-centricity (possibly pegged to human dignity) at this constitutional level[37]; but we might also expect contestation about human-centricity to provoke everyday interpretive questions with regard to the AI Act which, in effect, is a complex

[34]See R Brownsword, 'Law 3.0: A Conversation for the New Decade?' (2020) *Georgetown Journal of International Affairs* <https://gjia.georgetown.edu/2020/07/21/law-3-0-a-conversation-for-the-new-decade/>.

[35]Brownsword (n 23).

[36]Compare, R Brownsword, *Law 3.0* (n 32). For example, in an interview with *The Times*, Tony Blair has recently argued that the government should 'introduce a national digital ID system and roll out live facial recognition cameras to tackle illegal immigration, crime and benefit fraud'. Insisting that government should be reordered around the latest technologies, he said:

> You should be able to have a state that is smaller, more strategic and providing greater efficiency at lower cost. That is the holy grail of governing, which people have always aspired to. Technology is the instrument that allows you to do it.

See, Rachel Sylvester, 'Britain Needs Digital IDs and Facial Recognition to Defeat the Populists' *The Times* (1 February 2025) 32–33.

[37]Compare, S-A Teo, 'Human Dignity and AI: Mapping the Contours and Utility of Human Dignity in Addressing Challenges Presented by AI' (2023) 15 *Law, Innovation and Technology* 241.

and calibrated set of terms and conditions for the socially acceptable application of AI.

With regard to such contestation, there will be two principal sites for debate. One site concerns the automation of governance functions and the other concerns governance by technological management.

With regard to automation, the question is how far it is judged that taking humans out of the loops of governance is compatible with the fundamental values of the community; or, if not that, then to what extent automation is socially acceptable. To be sure, in the EU, Article 22 of the General Data Protection Regulation[38] puts down a marker against solely automated decision-making. There is a red line here and where there are bad experiences with automated governance, as there already have been in some places, including in the Netherlands and Australia, this line might hold for some time.[39]

With regard to technological management, the governance strategy is to reduce reliance on rules as the signals of prohibitions, permissions, and requirements and, instead, prevent or design out the practical possibility of non-conforming conduct.[40] In practice, it might be much more challenging to introduce governance by technological management into off-line environments as compared with on-line and virtual environments. However, the community might, once again, try to hold a normative red line (whether as a matter of fundamental values or as a default that reflects community preferences) that limits how far a techno-centric style of governance may go.

My best guess is that this tension between two very different styles of governance will be a perennial topic of debate. I do not expect the matter to be resolved in a decisive once-and-for-all manner. There will be turbulence around the red lines which will be constantly reviewed and negotiated.[41] While, in this article, we can put the conversation on hold at this point, in governance circles and in the public square it will not be so easy. This surely will be a conversation that runs and runs.[42]

[38]Regulation (EU) 2016/679.

[39]See, M Heikkilä, 'Dutch Scandal Serves as a Warning for Europe Over Risks of Using Algorithms' *Politico* (29 March 2022) <https://www.politico.eu/article/dutch-scandal-serves-as-a-warning-for-europe-over-risks-of-using-algorithms/>; and S Starcevic, 'Australian Robodebt Scandal Shows the Risk of Rule by Algorithm' *Reuters* (15 December 2022) <https://www.reuters.com/article/australia-tech-ai/feature-australian-robodebt-scandal-shows-the-risk-of-rule-by-algorithm-idINL8N3340SN/>.

[40]Compare, R Brownsword, 'Lost in Translation: Legality, Regulatory Margins, and Technological Management' (2011) 26 *Berkeley Technology Law Journal* 1321; 'In the Year 2061: From Law to Technological Management' (2015) 7 *Law, Innovation and Technology* 1; and, 'Technological Management and the Rule of Law' (2016) 8 *Law, Innovation and Technology* 100.

[41]The care that needs to be taken with the governance of transitions is nicely illustrated by the UK plans for (voluntary) digital driving licences. See, M Kendix and B Clatworthy, 'Digital Driving Licences to be Introduced in UK this Year' *The Times* (January 19, 2025) 3.

[42]For a continuation, see my conference presentation on 'Law's Imperfect Governance' (University of Tallinn, October 2024) <https://www.youtube.com/watch?v=aKRvMyKxXZY>; and 'Law's Imperfect Governance, Technological Governance, and a Trojan Horse' (forthcoming).

5. The fourth conversation

Where we are discontent with, or have reservations about, law's governance, we can expect defenders of the law to argue that we should respect legal rules, officials, and institutions simply because they represent the law, or the Rule of Law. In some contexts, it might be obvious that, in the absence of respect, the alternative to law is to be avoided. However, in many contexts, we might be so discontent with law that the claim for respect rings hollow; our reservations are just too serious; and appeals to the Rule of Law, especially where this commits to no more than governance by rules, simply do not cut it.[43]

Following the suggestion made in the first conversation, that we should frame our thinking in terms of governance, the claim might be that, for the sake of good governance, we should respect the law. What, though, do we understand by good governance? Do we know it when we see it?[44] Is our focus on governance process or governance substance; is the priority agility and flexibility, or is it certainty and consistency; is the emphasis on effective governance or its legitimacy; and, are we aspiring to the universal applicability of good governance or assuming its cultural relativity, and so on?[45]

Elsewhere, I have argued that, within particular communities, there might be a shared understanding of good governance but that we will only find a cross-community standard if we recur to the foundational conditions on which all governance and the viability of all human communities is predicated.[46] These are conditions (and, correlatively, imperatives) that relate to respect for the planetary boundaries, peaceful co-existence, and a context that is supportive of human agency.[47]

Following up on this, I suggest that good governance places responsibilities on both those who govern and those who are governed, and especially

[43]Compare M Schaake, *The Tech Coup: How to Save Democracy from Silicon Valley* (Princeton: Princeton University Press 2024) 66:

> Good governance is needed to shore up and regulate our digital infrastructure, which requires that governments and corporations discuss these issues in the light of day rather than behind closed doors. That is the cross-roads of our current moment: the public needs greater insight to provide greater oversight.

[44]According to Addink (n 25), 'the rule of law, democracy, and good governance are the cornerstones of the modern state' (at 3). Precisely, how these cornerstones relate to one another is unclear – indeed, we might think that, where the rule of law and democracy are observed, then that takes care of good governance. Moreover, given the multitude of lists of governance desiderata that have been issued, it is not clear what we should treat as the essence of good governance. Nevertheless, Addink suggests that the following six general principles can be taken to represent the ideal of good governance: properness, transparency, participation, effectiveness, accountability, and human rights. This is not the end of things because, on closer analysis, each of these principles is an umbrella for a number of more specific sub-principles.

[45]Compare B Rothstein, 'Good Governance' in D Levi-Faur (ed) (n 5) 143, 146–50.

[46]See, R Brownsword, *Technology, Governance and Respect for the Law: Pictures at an Exhibition* (Abingdon: Routledge 2023).

[47]ibid Chs 16–18 and (n 26) Ch 16.

responsibilities in relation to the maintenance of the foundational conditions.

So, in order to build a culture of respect for good governance, for those who have governance responsibilities, the responsibilities might be specified as follows:

- to act with integrity;
- to govern in the interests of the community;
- to govern in a way that resists prioritising efficiency and effectiveness over legitimacy;
- to recognise and observe the constraints provided for by the fundamental (constitutive) values of the community; and,
- to maintain the foundational conditions for viable governance of human communities (namely, respect for the planetary boundaries, peaceful co-existence, and protecting the context for human agency (purposive self-direction)).

Similarly, for those who are subject to governance, the responsibilities might be specified in the following terms:

- notwithstanding the reservations that one might have about law's governance, to recognise the limits of law's governance and the stresses it has to deal with, and to act appropriately;
- to respect the best efforts of those who govern;
- to demand that the fundamental values of the community are respected;
- to raise questions about respect for the foundational conditions (of viable governance); and,
- to ensure that practical expressions of discontent, or resistance based on one's reservations, are compatible with sustaining the foundational conditions for viable governance and human community.

There is much more to be said about both the foundational generic conditions, which must be strictly neutral between particular humans and their purposes and values[48] – crucially, the conditions do not offer a detailed blueprint for the good society but simply provide the essential platform for the formation of a plurality of human groups and communities – as well as the responsibilities that constitute a culture (or eco-system) of respect for governance.

However, in what follows, I will expand on just one matter, namely the distinction between foundational conditions and fundamental values,

[48]Compare B Rothstein and J Teorell, 'What is Quality of Government: A Theory of Impartial Political Institutions' (2008) 21 *Governance* 165.

which is material to developing and sustaining a culture of respect for governance whether we are viewing the responsibilities of those who govern or those who are governed. In the short remarks that take this up, I will focus, first, on the Swiss climate change case at the ECtHR[49] and then on the Council of Europe's recently published Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law.[50] In both cases, it seems to me that an opportunity to advance our appreciation of good governance has been missed.

5.1. The Swiss case

I am pretty sure that *Verein Klimaseniorinnen Schweiz and others v Switzerland*[51] – in which the Court ruled that Switzerland's failure to engage fully with the impact of climate change (and especially with the level of heat experienced during the Summer months) amounted to a breach of the applicants' Article 8 right to privacy – will go down as a landmark decision. This ruling surely will be seen either as a brave decision by the Court or as an egregious overreaching of its competence. In the event of the former, its bold approach might or might not open a new expansive chapter in its jurisprudence; in the event of the latter, the Court's overreaching might be forgiven, or it might be seized on by some states as a further reason to push-back against its interventions and to weaken is authority.[52]

To my mind, the case exemplifies a rather different kind of failure. First, there is a failure to differentiate explicitly between questions about the breadth and scope of particular human rights and questions about the depth of claimed rights.[53] Secondly, there is a failure to differentiate explicitly between fundamental rights, the binding nature of which depends upon their recognition within a particular community, and foundational rights, the binding nature of which is categorical and independent of recognition by humans (although, of course, their practical implementation does depend on humans recognising these critical infrastructural conditions and their imperatives for what they are). As a result, the Court might or might not have reached the right outcome in what were non-ideal circumstances but my point is that an opportunity to elaborate the shape of good governance has been missed.

[49]The case of *Verein Klimaseniorinnen Schweiz and others v Switzerland* (Application 53600/20, 9 April 2024) <https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-233206%22]}>.
[50]CM(2024)52-final, 17 May 2024 <https://rm.coe.int/1680afae3c>.
[51](n 49).
[52]Compare S Flogaitis, T Zwart, and J Fraser, *The European Court of Human Rights and its Discontents* (Cheltenham: Elgar 2013).
[53]Compare R Brownsword, 'Informational Wrongs and Our Deepest Interests' in M Borghi and R Brownsword (eds), *Law, Regulation and Governance in the Information Society* (Abingdon: Routledge 2023) 199.

So, in short: (i) when the majority say that 'Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life',[54] it would be clearer if they were to say that Article 8 is 'predicated' on such a 'foundational' right; (ii) when the minority judge criticises the majority for having

> created a new right (under Article 8 and, possibly, Article 2) to "effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change",[55]

he should have added that both Articles 2 and 8 are predicated on a number of foundational rights which inter alia protect against these adverse effects; and (iii) if the Court had had the distinction between foundational and fundamental rights clearly in view, it would have aligned Article 2 with foundational environment protection and Article 8 with foundational agency protection.

Relating this to my remarks about the aspiration for good governance, in an ideal world we would have clearly identified the foundational conditions, recognised their importance, and we would have established institutions that were charged with stewardship of these conditions. It would also be clear which bodies should deal with questions (and disputes) concerning whether particular practices or acts were compatible with the foundational conditions. In this ideal world of good governance, if questions about the *foundational* conditions (or deviation from their imperatives) were put to courts that were charged within particular communities with responding to questions about *fundamental* values, then they would refer any such issues (concerning the foundational conditions) to the appropriate forum or stewards. Sadly, this is not our world.

In the absence of good governance and idealised stewardship of the foundational conditions, I suggest that it should be open for any human or any group to raise a question about the foundational conditions before any governance body, including a court whose competence is limited by reference to the fundamental values of the community. In these non-ideal conditions, humans can have two kinds of human rights claims: first, they have a right to make claims concerning the human rights that are recognised as fundamental values by their particular community; and, secondly, they have a right to raise questions about the foundational conditions which are presupposed by their own human rights community or, indeed, by any community of humans. In other words, simply by virtue of being a human, there is a right

[54]Judgment, para 519.
[55]Para 4 of the minority judgment.

to demand that governance is responsive to concerns that one has about the foundational conditions; and, within particular communities that treat human rights as their constitutive value, humans should be recognised as having rights to raise questions concerning both the fundamental values of their community and respect for the foundational conditions on which governance is predicated.

It follows from these remarks that there is a very important sense in which all courts are 'human rights courts'. All courts have a residual jurisdiction to receive and deal with questions about governance in relation to the foundational conditions. In ideal conditions, this jurisdiction will be simply to receive and then to refer the questions to the appropriate court or forum; but, in non-ideal conditions, it is arguable tha the court has a responsibility to decide such questions.[56]

Applying this analysis, in the Swiss case, while the view of the minority judge fits with good governance in ideal conditions, the view of the majority fits with governance that has not yet articulated a jurisprudence and a jurisdiction for stewardship of the foundational conditions. Given the inadequate state of international governance of the foundational conditions, we can say that, all things considered, the view of the majority is to be preferred as an exercise of the Court's residual human rights jurisdiction.

Finally, to repeat, if we were to criticise the majority in the Swiss case, it would not be because the Court lacked competence to deal with the governance question raised. Rather, it would be because the Court should have explicitly recognised its residual jurisdiction to deal with foundational questions; and because it should have engaged with the question in that way rather than by trying to deal with it as if it were a question that was routinely within its community human rights competence and, specifically, its competence to hear cases that are pleaded as violations of recognised privacy rights.

[56]Compare, too, EE Johnson, 'The Black Hole Case: The Injunction Against the End of the World' (2009) 76 *Tennessee Law Review* 819, 908 (for the author's closing remarks on concerns about particle accelerators such as the Large Hadron Collider):

> My conviction is that, when a blackhole case arrives on a docket, no court should abdicate its role as a bursar of equity, even where, as here, the socio-political pressure to abstain will be immense, the factual terrain will be intensely intellectually challenging, and the jurisprudential conundrums are legion. At the end of the day, whether the LHC represents an intolerable danger is, in my view, an open question. I have not endeavored to provide a definitive answer. But I think the courts should.It is part of our 21st Century reality that we must take seriously a number of surreal planetary disaster scenarios. In that sense, the synthetic-black-hole disaster is not unique. For some time now, we have been confronted with the possibility of nuclear war and global climate change. In the future, we may have to remove still more scenarios from the science fiction category and place them on a list of real worries. Someday, we may need to seriously consider catastrophic threats from nanotechnology, genetic engineering, or artificial intelligence. Each one of these human-made global disaster scenarios involves incredibly complex questions of science, engineering, and mathematics. Courts must develop tools to deal meaningfully with such complexity. Otherwise, the wildly expanding sphere of human knowledge will overwhelm the institution of the courts and undo the rule of law – just when we need it most.

5.2. The framework convention on AI

Alongside the Swiss case, we can also say a word or two about the Council's new Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law.[57]

In an ideal world, where there are clear institutional responsibilities for sustaining and protecting the foundational conditions, a Convention of the kind published by the Council would merely need to say in its Preamble that it is 'mindful of' these institutions, their responsibilities, and the importance of the foundational conditions, or some form of words to that effect. However, in our non-ideal circumstances, it seems to me that we should go out of our way to underline the distinction between the fundamental rights that we recognise and the foundational conditions upon which all human governance is predicated. Like the Court, the Council does not do this; and, again, this strikes me as a missed opportunity.

According to Article 1, the main purpose of the Convention is 'to ensure that activities within the lifecycle of artificial intelligence systems are fully consistent with human rights, democracy and the rule of law' – the Preamble also affirms that the Parties are committed to 'fostering the trustworthiness of artificial intelligence systems'. The Convention does not create or recognise any new human rights in relation to AI[58]; and, given the Preambular recognition 'of the fact that human rights, democracy and the rule of law are inherently interwoven', it is not entirely clear what added value Article 5 (on the integrity of democratic processes and respect for the rule of law) brings to the Convention.

No doubt, there are other points that merit comment – such as Article 12's reduction of trust in AI to the 'reliability' of AI systems[59] – but my central criticism is that an opportunity to differentiate explicitly between human rights as fundamental values and the preconditions for human rights as foundational values has been missed. Had this opportunity been taken, Article 1 and similar Articles would have made it clear that AI systems should be consistent not only with human rights as fundamental values but also, and above all, with the foundational preconditions for humans to claim, to act on, and to question (inter alia) human rights. Similarly, in Article 14, the provision for 'the availability of accessible and effective remedies for violations of human rights' arising from AI would also provide for

[57](n 50).

[58]For discussion of how far we can go with existing human rights, see S Alegre, *Human Rights, Robot Wrongs* (London: Atlantic Books 2024).

[59]For insightful critique, see C Kletzer, 'Law, Disintermediation and the Future of Trust' in LA DiMatteo, A Janssen, P Ortolani, F de Elizalde, M Cannarsa, and M Durovic (eds), *The Cambridge Handbook of Lawyering in the Digital Age* (Cambridge: Cambridge University Press 2021) 312. See, too, M Schaake (n 43) at 88: 'The painful reality is that the more trust that is placed in software and other tech companies, the vaster the risks, vulnerabilities, and opportunities to attack become'.

the availability of accessible and effective remedies in relation to violation of the foundational values that demand respect for the preconditions of the enjoyment of human rights.

My point is that, had the Convention been so worded, it would not be necessary in future for claimants who fear the existential threat of AI (or, for that matter, of other technologies) to rest their argument on the protection of privacy and data protection (Article 11 in this particular Convention) or, indeed, on some other provision that they find in recognised fundamental values.

6. The fifth conversation

The final conversation is about the prospects for law's governance. Here, the stage is set by a foreground tension (between governance by law and governance by technology) and a background threat (a threat to civilised human existence because any kind of governance project is compromised).

The foreground tension between governance by law and governance by technology might be resolved by one side overcoming the other. However, echoing my earlier remarks in relation to the third conversation, it is more likely to be a continuing negotiation between these two kinds of project with more or less acceptable and more or less successful hybrids being adopted. About this, we might be more or less sanguine.

Some will take an optimistic view, anticipating a productive synergy between law, ethics, and technology with law maintaining a workable order, technology being applied where order can be maintained more efficiently and effectively, and ethics being the 'conscience of law' constantly pushing for governance to be directed at doing the right thing. For example, as Abdi Aidid and Bejamin Alarie would have it, although there will be no shortage of resistance, there is the real possibility of 'elevating the capabilities and ambitions of our laws and legal institutions to the highest practical level by leveraging technology, human ingenuity, and our collective moral imagination'.[60]

By contrast, those who are less optimistic might worry that governance will break down or that a dystopian technological solutionism will prevail (undermining distinctive features of human relationships, such as trust in others, and generally relegating moral reasoning to the margins of community life). For example, as Scott Shapiro concludes:

> In addition to making us less secure, solutionism eclipses our agency and sense of responsibility. Treating security and privacy as mere technical obstacles, solutionists delegate difficult political questions to engineers. Engineers know how computers work. They are technologically literate. But they are

[60] A Aidid and B Alarie, *The Legal Singularity* (Toronto: University of Toronto Press 2023) 31.

> also *engineers*. They are trained to build and operate machines; they are not taught to ponder the ethical costs and consequences of their creations. Solutionists not only put political questions in the wrong hands; they also leave us with the impression that there are no interesting moral issues even to discuss. Politics becomes engineering; moral reasoning becomes software development.[61]

So, in the end, it is ethical governance in conjunction with legal rules that is the answer. This is not to say that it will be easy. Many of our rules are outdated and we are vulnerable; there needs to be some patching. 'But how to patch it is not a matter of technology. It is a matter of morality'.[62]

Meanwhile, the background threat resides in a diminution in respect for law's governance coupled with investment in technological development which puts new tools in the hands of those who are 'outlaws' or who are prone to act irresponsibly in compromising the foundational conditions. In this scenario the risk of abusive use of technologies is amplified and there is an existential threat to humanity of the kind that has troubled some leading developers of AI recently.[63] It is one thing to try to contain the use of new technologies within those communities that are broadly supportive of governance projects but it is quite another matter to control those who see themselves as having no stake in the continuation of civilised human life.[64]

In the life and times of law's governance, this conversation assumes that we find ourselves at a special time. It is special not only because humans have a dazzling array of new tools but because those tools can be applied for both great good but also extreme harm.[65] In line with this reading, Toby Ord[66] suggests that we are in a unique period of human history, an era when there is an existential risk to the future of humanity that is created not only by natural phenomena (asteroid strikes, volcanic eruptions, and so on) but also by our own human practices and technological innovation. This risk could materialise in the extinction of humans or in the unrecoverable collapse of civilisation. According to Ord:

> Understanding the risks requires delving into physics, biology, earth science and computer science; situating this in the larger story of humanity requires

[61] SJ Shapiro, *Fancy Bear Goes Phishing* (London: Allen Lane 2023) 323.
[62] ibid.
[63] See, e.g. ND Lawrence, *The Atomic Human* (London: Allen Lane 2024) 362 (reporting a conversation with Geoff Hinton).
[64] Among others, see, B Wittes and G Blum, *The Future of Violence* (New York, Basic Books 2015); P Mishra, *Age of Anger* (London, Penguin 2018); T. Ord, *The Precipice* (London: Bloomsbury 2020); R Skidelsky, *The Machine Age* (London: Allen Lane 2023); and M Suleyman (with M Bhaskar), *The Coming Wave* (London: The Bodley Head 2023).
[65] See, too, A Dafoe, 'AI Governance: Overview and Theoretical Lenses' in JB Bullock, Y-C Chen, J Himmelreich, VM Hudson, A Korinek, MM Young, and B Zhang (eds), *The Oxford Handbook of AI Governance* (New York: Oxford University Press 2024) 21, 34–39.
[66] Ord (n 64).

> history and anthropology; discerning just how much is at stake requires moral philosophy and economics; and finding solutions requires international relations and political science.[67]

In other words, we need to call on all our resources if we are to engage effectively with this kind of risk. And, yet, in his list of resources, Ord makes no mention of law, regulation, or governance (although, towards the end of his book, he does speak to legal initiatives that might be taken at the international level). This cannot be right. To put this right, we need to talk about how law and lawyers can play their part.

If the perception is that law is not relevant to preventing the collapse of civilised human life, then this (both the perception and the practice) needs to be corrected as a matter of urgency. It needs to be understood by everyone – those who are about to study law, those who are already studying or practising law, and those who are not in law – that human communities need governance to engage with these risks; and that they might well need law and regulation to prevent the collapse of civilisation. Law and lawyers need to be central to maintaining civilised life in our increasingly technological world. We need to view the law in a radically different way and we need to be introduced to law in a radically different way. That way, as I have suggested, starts by viewing law and technology from the perspective of (good) governance.[68]

7. Conclusion

In my introductory remarks, I suggested that we might be seeing the beginning of a new arc of development in tech law. No doubt, there will be more than one view about where we should be going with law and technology. The view that I am proposing is orthogonal to our initial legal thinking: what I am proposing is that, as lawyers, we should start with governance projects (including governance by technologies) and then think about law and think about good governance.

There are a number of ways in which this might be theoretically significant. For example, it might now be easy to find coherence in the scholarship

[67] ibid 7.

[68] Nb S Lazar (n 5), who (in footnote 115) contrasts what he reads as my approach, taking 'governance by laws as fundamental, and explor[ing] how the affordances of technological governance enable or limit fulfilment of principles of legality', with his own view, namely that 'the values underpinning procedural legitimacy are fundamental, and principles of legality are just one possible expression of those values for one technology of governance'. In fact, my intention in *Rethinking Law, Regulation and Technology* (Cheltenham: Elgar 2022) was to assume for the sake of argument a Westphalian view of law and, and among other things, to consider how far the guiding ideals of legality and the Rule of Law could be coherently reworked if the regulatory instruments were technological rather than rules, principles, or standards. However, this earlier book reflects what I now see as the end of the first arc of development in law and technology; and, as the present article makes clear, the governance approach that I see as central to the new arc of development brings my position very close to that advocated by Lazar.

of technology law.[69] Essays in 'law and technology' would no longer be so many exercises in applying legal rules and principles or regulatory thinking to emerging technologies, rather they would be exercises grounded in the human need for governance. The question for lawyers would no longer be 'What, as a lawyer, do you make of such and such a technological development or application?' but, rather, 'From a governance perspective, what should we make of law's role in relation to such and such a technological development or application?' Again, if governance is where our thinking about 'law and technology' should start, then governance is where we should start with all our thinking about law, irrespective of whether technology is part of our interest. So long as doctrinal law is the paradigm, 'law and technology' will seem to be a marginal interest but, with governance as the paradigm, both law and technology are of mainstream interest to the extent that they represent distinctive kinds of governance projects. Most importantly, perhaps, the aspiration for good governance both challenges and enables lawyers to join their fellow humans in developing their thinking about the critical vantage point(s) from which the adequacy of governance is to be assessed. Not only is there a new foundational jurisprudence waiting to be elaborated,[70] if governance is a bridgehead to open conversations with other disciplines, good governance (albeit a contested idea) opens the way to blue skies critical thinking.[71]

But, the new direction is also practically significant. Having opened our conversations, we find that we should not be complacent about the prospects for any kind of governance. If this is right, then lawyers need to play their part in defending the importance of governance for the sake of civilised human existence. And, in our law schools, this means that we should focus less on training young people to think like doctrinal lawyers and more on understanding why law's governance, imperfect though it is, really does matter.[72]

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[69]For discussion, see M Guihot, 'Coherence in Technology Law' (2019) 11 *Law, Innovation and Technology* 311.

[70]For some indicative discussions, see, e.g. R Brownsword, '*Law as a Moral Judgment*, the Domain of Jurisprudence, and Technological Management' in P Capps and SD Pattinson (eds), *Ethical Rationalism and the Law* (Oxford: Hart 2016) 109; W Lucy, 'The Death of Law: Another Obituary' (2022) 81 *Cambridge Law Journal* 109; and S Veitch, The Sense of Obligation (2017) 8 *Jurisprudence* 415, 430–32 (on the collapse of obligation into obedience) and 'The Perfect Storm: Artificial Intelligence, Financialisation, and Venture Legalism' (2024) 35 *Law and Critique* 609.

[71]For an inspiring analysis, see M Bhaskar, *Human Frontiers* (London: The Bridge Street Press 2021).

[72]See, further, R Brownsword, *The Future of Governance: A Radical Introduction to Law* (Abingdon: Routledge 2024); and W Lucy, 'Law School 2061' (2022) 85 MLR 539.

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