Of Data and Dissent: Labour and Human Rights at the Crossroads of the Automation Agenda

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Cynthia Khoo, JD, LLM
(Principal Lawyer, Tekhnos Law | Senior Fellow, The Citizen Lab)

Introduction

When was the last time that you refused power? This could mean, when did you last decline power that was offered to you, whether in the form of an elevated position or in a key decision impacting others; or when did you deny or resist someone trying to impose their power on you, either coercively or through influence; or when did you last vocally or publicly refuse to go along with power or condone it being wielded in a way you disagreed with or thought was unethical or unjust? (And I know you're all human rights or labour lawyers here, so… opposing counsel doesn't count.)

If you can't think of a time, why is that, or what stopped you? If you are reflecting on such a time, what was at stake for you or others, and what about the situation or what was it inside yourself that drove that refusal?

Whatever feelings, sensations, or memories those questions brought up for you, hold onto that for the next thirty minutes or so.

Because thinking about human rights, technology, and the law is inseparable from thinking about the people who bear the brunt of legal and technological power gone wrong. While lawyers and technologists operate at the level of case law, legislation, data, and code, where those four things intersect is where we find countless stories of people crushed or poised to be crushed, by the power of flawed but seemingly inexorable technocratic systems, and refusing it however they can — whether it is low-income tenants stopping their landlord from installing facial recognition cameras;[1] racialized individuals resisting wrongful arrests from predictive policing;[2] chronically injured Amazon warehouse workers organizing against punitive data-driven quotas;[3] or female truck drivers suing Meta for discriminatory targeting in job advertisements.[4] What these groups have in common is a sustained refusal to accept that how things are, is how they must or ought to be.

That space between is, and could or ought, is what I'll be delineating in the rest of this speech, by outlining five ways that the impacts of AI and algorithmic decision-making on labour and human rights

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[1]	Yasmin Gagne, "How we fought our landlord's secretive plan for facial recognition—and won," *Fast Company* (22 Nvember 2019), online: <https://www.fastcompany.com/90431686/our-landlord-wants-to-install-facial-recognition-in-our-homes-but-were-fighting-back>.

[2]	Will Douglas Heaven, "Predictive policing algorithms are racist. They need to be dismantled." *MIT Technology Review* (17 July 2020), online: <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice>.

[3]	Mostafa Henaway, "Amazon is quitting Quebec to 'shock and awe' workers worldwide," *Breach* (23 January 2025), online: <https://breachmedia.ca/amazon-quitting-quebec-shock-and-awe-workers-worldwide>.

[4]	Paresh Dave, "Facebook accused by female truckers of skewing job ads," *Reuters* (1 December 2022), online: <https://www.reuters.com/technology/facebooks-skewed-audience-job-ads-draws-new-complaint-2022-12-0>.

destabilize or highlight fault lines in the law, reveal fundamental issues in our socioeconomic ordering, and potentially undermine rule of law.

Each of these points represents a set of legal and political crossroads arising from what I'll refer to as the Automation Agenda. I use this term to capture how, in Astra Taylor's words, "automation is both a reality and an ideology".[5] I should note my thinking throughout this talk is informed by the work of journalists, technology critics and researchers, and legal and political economy scholars who have thought far more deeply about these issues than I have, such as Ed Ongweso Jr,[6] Paris Marx,[7] Timnit Gebru,[8] Meredith Whittaker,[9] Ali Alkhatib,[10] Ed Zitron,[11] and others I'll be citing later on.

The automation agenda encompasses both the reality of AI and algorithmic decision-making systems already materially impacting people's human rights, labour rights, and well-being, and the ideology that we *should* be engaged in a society-wide experiment to integrate AI and algorithmic automation into every part of our personal and professional lives, and that doing so is a good and needful thing.

In a nutshell, the automation agenda does the following:

1. It invisibilizes existing legal harms and introduces new harms that escape current legal frameworks.
2. It forces us to rethink where the liability analysis for illegal discrimination and other algorithmic harms should occur.
3. It exacerbates and reveals with particular starkness the legally reified undervaluation of labour.
4. It provides both an incentive and excuse to ignore root causes of societal injustices and other systemic problems, such that governments, private actors, and the law may avoid confronting them head-on.
5. It eliminates room for dissent at microcosmic levels, in ways that ripple out to the macrocosmic and threaten to undermine rule of law.

Let's dive in.

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[5]   Astra Taylor, "The Automation Charade," *Logic(s)* (1 August 2018), online: < https://logicmag.io/failure/the-automation-charade/>.

[6]   See e.g., Edward Ongweso Jr, "AI Scams Are the Point," *New Republic* (21 November 2024), online: <https://newrepublic.com/article/188313/artifical-intelligence-scams-propaganda-deceit>; Edward Ongweso Jr, "The Silicon Valley Consensus & AI Capex (Part 1)," *Tech Bubble* (2 March 2025), online: <https://thetechbubble.substack.com/p/the-silicon-valley-consensus-and>; Edward Ongweso Jr, "AI, slavery, surveillance, and capitalism," *Tech Bubble* (4 November 2024), online: <https://thetechbubble.substack.com/p/ai-slavery-surveillance-and-capitalism>; and Edward Ongweso Jr, "Uber's Bastards," *Tech Bubble* (29 January 2025), online: <https://thetechbubble.substack.com/p/ubers-bastards>.

[7]   See generally Paris Marx, *disconnect*, online: <https://disconnect.blog>; and *Tech Won't Save Us*, online (podcast): <https://techwontsave.us/>.

[8]   Timnit Gebru & Émile P Tores, "The TESCREAL bundle: Eugenics and the promise of utopia through artificial general intelligence" (2024) 29:4 *First Monday*, online: <https://firstmonday.org/ojs/index.php/fm/article/view/1363>.

[9]   See e.g., Meredith Whittaker, "Origin Stories: Plantations, Computers, and Industrial Control," *Logic(s)* (17 May 2023), online: <https://logicmag.io/supa-dupa-skies/origin-stories-plantations-computers-and-industrial-control/>.

[10]   Ali Alkhatib, "Defining AI" (6 December 2024), online: Ali Alkhatib <https://ali-alkhatib.com/blog/defining-ai>; Ali Alkhatib, "Destroy AI" (24 June 2024), online: Ali Alkhatib <https://ali-alkhatib.com/blog/destroy-ai>; and Ali Alkhatib, "To Live in Their Utopia: Why Algorithmic Systems Create Absurd Outcomes" (Paper delivered at the CHI Conference on Human Factors in Computing Systems, Yokohama, Japan, 8-13 May 2021), online: <https://ali-alkhatib.com/papers/chi/utopia/utopia.pdf>.

[11]   See e.g., Edward Zitron, "There Is No AI Revolution," *Where's Your Ed At?* (24 February 2025), online: <https://www.wheresyoured.at/wheres-the-money/>.

I.   The automation agenda invisibilizes, automates, and entrenches existing legal harms and introduces new harms that escape current legal frameworks.

Algorithmic discrimination is a perfect example of this. Imagine job applicants being screened out by a company because they used an interview video analytics tool that didn't account for disabilities or neurodiversity—the ACLU is suing Hirevue for that right now.[12] Or Black or Indigenous university students counselled away from STEM majors because EAB Navigate's "student success predictor" takes the student's race into account, but not the STEM field's historical and present-day racism.[13] No longer do people have to be turned away one by one; thanks to the mathwashing of historical oppression and unconscious bias,[14] we now live in the age of automated discrimination at scale.

At first, it seems we need no new laws for this. Both federal and provincial human rights legislation focuses on outcomes regardless of intent.[15] Applying a rigid mathematical algorithm across the board to determine someone's future appears little more than a software coded variant of classic adverse impact discrimination. Professors Jacquelyn Burkell and Jane Bailey, however, point out several potential challenges where algorithmic discrimination might escape the law where "traditional" employment discrimination and similar would not.[16] Specifically, it may be difficult to make a case in the first place, if the protected trait is one of many factors buried inside the opacity of an unexplainable machine learning algorithm.[17] The software may also be subconsciously granted undue authority and deference by the adjudicator because it is a machine, a phenomenon known as automation bias, or automation complacency.[18]

Additionally, in *Zurich Insurance*,[19] the Supreme Court of Canada upheld that the kind of statistical profiling that forms the basis of much of the insurance industry could sufficiently meet the defence threshold of "reasonable and *bona fide* grounds" for identity-based discrimination, at least under an Ontario legislated exception for insurance. However, algorithmic screening and sorting tools have now injected a measure of statistical profiling, even if deeply questionable, into spheres beyond insurance.[20] Therefore, extending the majority's reasoning in *Zurich* to them could "effectively eviscerate human rights protections in many areas".[21] This concern is compounded if that justification is combined with

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[12]   American Civil Liberties Union, Press Release, "ACLU Files FTC Complaint Against Major Hiring Technology Vendor for Deceptively Marketing Online Hiring Tests as 'Bias Free'" (30 May 2024), online: ACLU < https://www.aclu.org/press-releases/aclu-files-ftc-complaint-against-major-hiring-technology-vendor-for-deceptively-marketing-online-hiring-tests-as-bias-free>.

[13]   Todd Feathers, "Machine Learning Major Universities Are Using Race as a 'High Impact Predictor' of Student Success," *Markup* (2 March 2021), online: <https://themarkup.org/machine-learning/2021/03/02/major-universities-are-using-race-as-a-high-impact-predictor-of-student-success>.

[14]   Elizabeth E Joh, "Feeding the Machine: Policing, Crime Data, & Algorithms" (2017) 26:3 William & Mary Bill of Rights J 287 at page 292.

[15]   *Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536, 1985 at paras 13-14, CanLII 18 (SCC); and *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para 134.

[16]   Jacquelyn Burkell & Jane Bailey, "Unlawful Distinctions?: Canadian Human Rights Law and Algorithmic Bias" (2016/2018) Can YB of Human Rights 217 at pages 224-227.

[17]   *Ibid* at page 224.

[18]   Bradley Henderson, Colleen M Flood & Teresa Scassa, "Artificial Intelligence in Canadian Healthcare: Will the Law Protect Us from Algorithmic Bias Resulting in Discrimination?" (2022) 19:10 Can JL Tech 475 at page 480.

[19]   *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 [*Zurich Insurance*].

[20]   See generally Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (Stuttgart, Germany: St Martin's Press, 2018); and Susie Lindsay et al, "Accountable AI" (June 2022), online (PDF): Law Commission of Ontario <https://www.lco-cdo.org/wp-content/uploads/2022/06/Accountable-AI-reduced-size.pdf>.

[21]   Burkell and Bailey, *supra* note 16 at page 227.

insufficient technological literacy among counsel or adjudicators to explain or apprehend relevant elements such as dirty data;[22] proxy data;[23] flawed benchmarking;[24] overfitting;[25] contextual, representative, and numerous other types of data bias;[26] and further sources of embedded discrimination and unreliability in such algorithmic programs.

Moreover, algorithmic discrimination may not always be apparent or provable in any single person's case, but becomes glaringly obvious at the community level.[27] But how is any given individual supposed to know they're part of a pattern, let alone prove liability? That brings us to…

II. The automation agenda forces us to rethink where the liability analysis for illegal discrimination and other algorithmic harms should occur.

There has been a growing body of work by legal scholars specialized in these issues suggesting the discriminatory harms of algorithmic decision-making may have reached escape velocity from the liability orbit of traditional anti-discrimination law.[28] Though I will note there's a class action case proceeding right now in Quebec, though you'd have to confirm with those involved, *Beaulieu v. Facebook*, where the plaintiffs are suing Facebook for discriminatory targeting of housing and employment ads under the *Quebec Charter of Human Rights and Freedoms*.[29]

Responses have ranged from reforming anti-discrimination law, to moving algorithmic harms into other areas of law for redress instead, such as product liability or negligence.[30] So there's a question here of where in the law, what area of practice and under what test, does the harm go?

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[22]   Rashida Richardson, Jason M Schultz & Kate Crawford, "Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice" (2019) 94 NYU L Rev, online: < https://nyulawreview.org/online-features/dirty-data-bad-predictions-how-civil-rights-violations-impact-police-data-predictive-policing-systems-and-justice/>.

[23]   Burkell & Bailey, *supra* note 16 at page 219.

[24]   See e.g., Inioluwa Deborah Raji et al, "AI and the Everything in the Whole Wide World Benchmark" (Paper delivered at the 35th Conference on Neural Information Processing Systems [NeurIPS 2021], Virtual), online (PDF): <https://sites.rutgers.edu/critical-ai/wp-content/uploads/sites/586/2022/01/Bender_AI-and-Everything-in-the-Whole-Wide-World-Benchmark.pdf>.

[25]   Henderson, Flood & Scassa, *supra* note 18 at page 490.

[26]   See e.g., *Ibid* at pages 481-485.

[27]   See e.g., "A widely used health care algorithm that helps determine which patients need additional attention was found to have a significant racial bias, favoring white patients over black ones who were sicker and had more chronic health conditions…" Quinn Gawronski, "Racial bias found in widely used health care algorithm," *NBC News* (6 November 2019), online: <https://www.nbcnews.com/news/nbcblk/racial-bias-found-widely-used-health-care-algorithm-n1076436>; and Emmanuel Martinez & Lauren Kirchner, "The secret bias hidden in mortgage-approval algorithm," *Toronto Star* (25 August 2021), online: <https://www.thestar.com/life/the-secret-bias-hidden-in-mortgage-approval-algorithms/article_cead50cc-5244-5aef-84a9-7bb7dad787fc.html>.

[28]   See e.g., Andrew D Selbst, "Artificial Intelligence and the Discrimination Injury" (2026) 78 Florida L Rev [forthcoming]; and Pascale Chapdelaine, "Algorithmic Price Personalization and the Limits of Anti-Discrimination Law" (2024) 69:4 McGill LJ 491.

[29]   Elizabeth Thompson, "Facebook class action lawsuit gets green light to go ahead," CBC News (1 September 2023), online: <https://www.cbc.ca/news/politics/facebook-lawsuit-discrimination-ads-1.6954993>.

[30]   See e.g. Selbst, *supra* note 28; and Cynthia Khoo, "The sum of all (un)intentions: reasonable foreseeability, platform algorithms, and emergent systemic harm to marginalized communities" in Ryan Calo, A Michael Froomkin & Kristen Thomasen, eds, *Robot Law: Volume II* (Gloucestershire, UK: Edward Elgar Publishing Ltd, 2025) 106.

Then, there's where in the chain of events leading up to the discriminatory harm, do we focus on for the purposes of the relevant legal analysis?[31] Is it the moment the bank, landlord, manager, or hospital denied the impacted person? The moment the software developer decided to train their algorithmic model on a biased dataset? Or are plaintiffs expected to somehow be able to obtain the source code to the defendant's likely proprietary algorithm through discovery, then hire someone to reverse engineer exactly how it landed on a discriminatory output?

One key recommendation that I and others have proposed, is this: we have to move the liability analysis upstream in the AI to discrimination lifecycle. The analysis wouldn't revolve around the moment harm occurred to a specific person, because that's too late and you can't open the black box. Instead, the legal question would be: was the company, bank, landlord, or hospital legally discriminatory, reckless, or negligent, or even strictly liable, in its decision to *implement an opaque algorithmic tool at all, in the first place, for anyone*, knowing what we know about such tools' likelihood to propagate systemic discrimination and attendant material harms to historically marginalized groups?[32]

This would enforce more upfront responsibility and foresight in developing, testing, and evaluating any proposed algorithmic system, or reconsidering if it is being used for an appropriate purpose with full consideration of the stakes involved, before being test-driven on vulnerable groups. It may also relieve potential plaintiffs from being asked to meet an unreasonable evidentiary burden in a context where both information asymmetry and power imbalances reach extreme levels.

Speaking of which…

III. The automation agenda exacerbates and reveals in particular starkness the legally reified undervaluation of labour.

Perhaps the bluntest example of this is what Veena Dubal has described as algorithmic wage discrimination among app-based platform workers. This is "a practice in which individual workers are paid different hourly wages—calculated with everchanging formulas using granular data on location, individual behavior, demand, supply, or other factors—for broadly similar work."[33] Algorithmic wage discrimination occurs without any transparency to the workers themselves, amounting to a form of automated, real-time dynamic wage extraction and automated worker control.[34]

Ontario's *Digital Platform Workers' Rights Act* comes into force this July 2025 and it remains to be seen to what extent it will address, in practice, any of the core automation-related harms that these workers face.[35] However, it already further reifies the lack of an effective minimum wage that takes into account drivers' active wait times,[36] and even had there been a meaningful attempt, rideshare companies may have

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[31]   See generally Greg Blue, "Report on Artificial Intelligence and Civil Liability," BCLI Report no 96 (April 2024), online (PDF): *British Columbia Law Institute* <https://www.bcli.org/wp-content/uploads/Report-AI-and-civil-liability-final.pdf>.

[32]   Khoo, *supra* note 30.

[33]   Veena Dubal, "On Algorithmic Wage Discrimination" (2023) 123 Columbia L Rev 1929.

[34]   *Ibid*; see also Steven P Vallas et al, "Prime Suspect: Mechanisms of Labor Control at Amazon's Warehouses" (2022) 49:4 Work and Occupations 421.

[35]   *Digital Platform Workers' Rights Act, 2022*, SO 2022, c 7.

[36]   Ontario, Legislative Assembly, "Bill 88, An Act to enact the Digital Platform Workers' Rights Act, 2022 and to amend various Acts", 3rd reading, *Hansard Transcripts*, 42-2 (5 April 2022) at 1530-1539 (Hon Peggy Sattler); and Jeremy Appel, "After UFCW-Uber revelation, gig workers ramp up fight for decent work," *Breach* (16 September 2022), online: <https://breachmedia.ca/after-ufcw-uber-revelation-gig-workers-ramp-up-fight-for-decent-work/>.

responded with driver lockouts like they did in response to New York City's law,[37] throwing political, social, and financial capital into obtaining favourable legislative outcomes—whether Proposition 22[38] in California or Bill 88 here.

What is additionally concerning is that this type of extractive employment model and its underlying predatory logic and surveillance elements have been rapidly expanding into other sectors, as Katie Wells and Funda Spilda demonstrate in their "Uber for Nursing" report;[39] and Alexandra Mateescu showed with respect to electronic visit verification and home care workers.[40] Mateescu writes in another report on generative AI, with Aiha Nguyen, that "A critical dimension of the devaluation of work has been the reduction of people's labor to data".[41] This results in a perverse situation where workers' own personal data is used against them to strip them of agency, authority, fair pay, privacy, and bargaining power.

Generative AI and algorithmic decision-making systems further devalue labour through the sheer amount of unacknowledged and underpaid labour that are needed for such technologies to even exist in any functional way. This includes training data collected from creative labour or workers' personal data;[42] those who label, annotate, and clean the data until the algorithm is ready to be released;[43] and those who scour the data of traumatizing content, performing a content moderation function.[44] Mary Gray and Siddarth Suri have called this ghost work,[45] while Nguyen and Mateescu note that ghost workers are "often recruited from vulnerable populations" such as refugees and prison inmates.[46]

Despite all of the above, it would be a mistake to consider algorithmic decision-making, automated management, or generated AI as marking the start of a massive devaluation of human labour. They in fact represent the *culmination* and logical end point of a centuries-long project of devaluing labour in an attempt to reduce the price of it back to zero. Yes, I did say *back* to zero.

Present-day automated management and worker surveillance cannot be separated from the context of racial capitalism and the history of slave labour and indentured servitude in the US and Canada, respectively. Simone Browne, in her book *Dark Matters*, traces the origins of biometric worker surveillance not to Ford's factories, nor to Bentham's Panopticon, but to transatlantic slave ships and

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[37]   Natalie Lung, Leon Yin, Aaron Gordon & Denise Lu, "How Uber and Lyft Used a Loophole to Deny NYC Drivers Millions in Pay," *Bloomberg* (10 October 2024), online: <https://www.bloomberg.com/graphics/2024-uber-lyft-nyc-drivers-pay-lockouts/>.

[38]   Aarian Marshall, "With $200 Million, Uber and Lyft Write Their Own Labor Law," *Wired* (4 November 2020), online: <https://www.wired.com/story/200-million-uber-lyft-write-own-labor-law/>.

[39]   Katie J Wells & Funda Ustek Spilda, "Uber for Nursing: How an AI-Powered Gig Model Is Threatening Health Care" (17 December 2024), online (PDF): Roosevelt Institute <https://rooseveltinstitute.org/wp-content/uploads/2024/12/RI_Uber-for-Nursing_Brief_202412-1.pdf/>.

[40]   Alexandra Mateescu, "Electronic Visit Verification: The Weight of Surveillance and the Fracturing of Care" (November 2021), online (PDF): Data and Society <https://datasociety.net/wp-content/uploads/2021/11/EVV_REPORT_11162021.pdf˃.

[41]   Aiha Nguyen & Alexandra Mateescu, "Generative AI and Labor: Power, Hype, and Value at Work" (December 2024), online (PDF): Data and Society <https://datasociety.net/wp-content/uploads/2021/11/EVV_REPORT_11162021.pdf>.

[42]   *Ibid* at pages 12-13.

[43]   *Ibid* at page 13.

[44]   *Ibid* at page 14.

[45]   Mary L Gray & Siddharth Suri, *Ghost Work: How to Stop Silicon Valley from Building a New Global Underclass* (New York: Harper Business, 2019).

[46]   Mateescu & Nguyen, *supra* note 41 at page 14.

colonial plantations.[47] Her research establishes early examples of surveillance technologies used to categorize, control, commodify, and dehumanize Black bodies,[48] and this is context that must inform those seeking to understand why US labour and employment law is what it is today.[49]

Similarly, at a recent robotics and AI law conference in Windsor, Vasanthi Venkatesh traced the connections between indentured servitude of Indigenous, racialized, and migrant labour in early Canada, to the impacts of agricultural robotics, precision agriculture, and high-tech greenhouses on migrant workers in Ontario today.[50] So these issues may seem state of the art due to the tech involved, but their historical roots run deep. Unfortunately…

IV. The automation agenda provides both an incentive and excuse to ignore root causes of societal injustices and other systemic problems, such that governments, private actors, and the law may avoid confronting them head-on.

For example, the European Digital Rights Initiative, EDRi, has referred to AI as a tool of austerity, even calling it austerity-tech,[51] responding to research by Human Rights Watch showing how algorithmic decision-making systems are offered as "cost-cutting efficiency measures"[52] coming to the rescue of broken and underfunded government functions,[53] such as social welfare, education, public housing, and health care. Well-intentioned but beleaguered and overburdened staff may see throwing AI or a tech company at a problem as better than nothing. Katie Wells and her co-authors found in a longterm study of how Uber reshaped governance, politics, law, and residents' everyday sensibilities in Washington, DC, that it was made possible in part due to Uber's "ability to exploit gaps in the city's social safety net".[54]

The automation agenda is further facilitated by what Blayne Haggart and Natasha Tusikov describe as "a belief in data as a higher form of knowledge",[55] which then becomes belief in "tech companies as experts outside of their narrow, technical domains … in ways that express social, economic and political structural power. Facility with data has become synonymous with all-purpose expertise, displacing old-fashioned subject-matter proficiency. If you understand data, you can understand the world."[56]

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[47] Simone Browne, *Dark Matters: On the Surveillance of Blackness* (Durham, North Carolina, USA: Duke University Press, 2015).

[48] *Ibid*.

[49] See e.g., Matthew Desmond, "In order to understand the brutality of American capitalism, you have to start on the plantation," *New York Times Magazine* (14 August 2019), online: <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>; and Rebecca Dixon, "Juneteenth and the Struggle for Workers' Rights" (19 June 2020), online: National Employment Law Project <https://www.nelp.org/juneteenth-struggle-workers-rights/>.

[50] Vasanthi Venkatesh, "The Racialized Treadmill of Robotic Agriculture: Colonial Legacies, Legal Exceptionalism, and Labour Control" (Paper delivered at We Robot 2025, Windsor, ON, 3 April 2025) [unpublished].

[51] "Artificial intelligence – a tool of austerity" (10 November 2021), online: EDRi <https://edri.org/our-work/artificial-intelligence-a-tool-of-austerity/>.

[52] *Ibid*.

[53] "How the EU's Flawed Artificial Intelligence Regulation Endangers the Social Safety Net: Questions and Answers" (10 November 2021), online: Human Rights Watch <https://www.hrw.org/news/2021/11/10/how-eus-flawed-artificial-intelligence-regulation-endangers-social-safety-net>.

[54] Katie J Wells, Kafui Attoh & Declan Cullen, *Disrupting DC: The Rise of Uber and the Fall of the City* (Princeton, NJ: Princeton University Press, 2023) at page 9.

[55] Blayne Haggart & Natasha Tusikov, *The New Knowledge: Information, Data and the Remaking of Global Power* (New York: Rowman & Littlefield Publishers, 2023) at page 23.

[56] *Ibid* at page 137.

Data can be useful; no one denies that. The problem is when data is assumed to be a more reliable narrator than it is or can be. So what happens when ground truth differs from what the data inaccurately dictates? Is it possible to dissent from data-driven decisions that are automatically issued at the speed of a light-based chip? I would argue…

V. The automation agenda eliminates room for dissent at microcosmic levels, in ways that ripple out to the macrocosmic and threaten to undermine rule of law.

When decisions that must be legally sound are delegated to machine learning algorithms, whether by state actors bound by administrative and constitutional law or private actors bound by human rights, employment and labour law, that delegation raises rule of law implications. To quote Katie Szilagyi, "As automation continues to displace human discretion in legal control mechanisms, it reveals an authoritarian character: the rule of law risks conversion into a rule by law."[57] But it's not rule by law as we know it, but as encoded and executed by rigid automated formulas, whose decrees over our lives we cannot look behind, object to, or appeal.

There is something more abstract but perhaps more profound at stake here as well. In their article, "Ten Theses on Dissent", Marie-Claire Belleau and Rebecca Johnson outline the various functions of judicial dissent in our legal system, focusing on the Supreme Court of Canada.[58] The functions most pertinent to us, in the context of a potential rule of algorithms, include: to lay necessary legal groundwork towards a future that the majority also agrees with but cannot currently find a reasonable legal path to; and to provide what the authors describe as a "noetic space" of imagination that allows justices, and by extension, us, to "test the limits of the possible" and "explore other visions of justice".[59]

Algorithmic decision-making tools by nature eliminate this noetic space, foreclosing on even the possibility of dissent, and auto-deleting alternative futures at the level of individuals and communities. These micro decisions are multiplied to the macro level of funneling our legal system and society as a whole down paths we may not have chosen through either informed consent or open democratic debate.

Dissent also plays the crucial role of expanding a court's perspective beyond hegemonic understandings of the law. Belleau and Johnson found that at one point at the Supreme Court, the top three justices with the highest rates of dissent were Justices L'Heureux-Dubé, Wilson, and McLachlin—i.e., the first three women on the court.[60] Their dissents were not aligned; what united them was "a higher than average propensity to see something different in a given case and then write about it", dissenting as a result of "the majority that cannot incorporate the insight".[61] Perhaps not unlike how models such as gender classification algorithms or so-called sentiment analysis tools cannot incorporate the insight of, say, the

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57   Katie Szilagyi,"Maintaining the Rule of Law in the Age of AI," *Just Security* (9 October 2024), online: <https://www.justsecurity.org/103777/maintaining-the-rule-of-law-in-the-age-of-ai/>.

58   Marie-Claire Belleau [&] Rebecca Johnson, "Ten Theses on Dissent" (2017) 67:2 U of Toronto LJ 156.

59   *Ibid* at pages 162-63, 159-161.

60   *Ibid* at pages 167-168.

61   *Ibid*.

existence of transgender people,[62] or the gendered and racialized dynamics of emotional labour and social affect in the workplace.[63]

In separate and even more fascinating findings, Johnson and Belleau sorted all Supreme Court dissents from 1982-2004 by area of law.[64] (Sorry, that's not the finding, that's coming up.) What they found was a marked *lack* of dissent, and rarely any on substantive principles, in areas of law associated with private economic ordering, such as property, contracts, and business associations.[65]

To no one's surprise, *Charter*, constitutional, and human rights cases were towards the top for number of dissents. David Rankin and Mahmud Jamal, now Supreme Court Justice Jamal, noted in a paper on *Charter* dissents that their high number reflects, among other things, the living tree nature of our constitution, where dissents can represent prophesies of future law.[66]

But for business law, in contrast, Johnson and Belleau note there is such a "seeming unanimity of presumptions" that it amounts to "a certainty so thoroughgoing that it prevents even the articulation of alternatives."[67] They suggest that this fossilization of business law among the judiciary might trickle down to how lawyers on the ground approach business law as well[68]. If the law often progresses through dissent, then what happens to areas of law where there is little to no dissent, over decades?

Algorithmic discrimination in the private sector crosses the highly dissented area of human rights with the rarely dissented area of business and economic interests. This invites the question: in the long run, which will prevail? Can or will we force the latter to evolve so that human rights protections can keep pace, or will this aspect of antidiscrimination law turn into a relic of the past, left in the dust of a rapacious algorithmic race to the bottom?

Perhaps *Zurich Insurance* holds the answer. Recall that the majority held that discriminatory statistical profiling was acceptable under a legislated insurance exception, because insurance is basically statistical profiling all the way down. Well, there were two dissents in that case—by none other than Justices McLachlin (as she then was) and L'Heureux-Dubé. Justice L'Heureux-Dubé wrote: "The mere statistical correlation between a group and higher risk cannot suffice to justify discrimination on prohibited grounds. Such correlation accepts the very stereotyping that is deemed unacceptable by human rights legislation."[69] We might one day look back on this dissent as prophetic, in how algorithmic insurance discrimination is eventually treated under human rights law. But to a certain extent, that is up to us to make it so.

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[62] See e.g., Morgan Klaus Scheuerman, Jacob M Paul & Jed R Brubaker, "How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis and Image Labeling Services" (2019) 3 Proceedings of the ACM on Human-Computer Interaction 144:1.

[63] See e.g., Luke Stark & Jesse Hoey, "The Ethics of Emotion in Artificial Intelligence Systems" (Paper delivered at the ACM Conference on Fairness, Accountability, and Transparency [ACM FAccT], Virtual, 3-10 March 2021); and Kat Roemmich, Florian Schaub & Nazanin Andalibi, "Emotion AI at Work: Implications for Workplace Surveillance, Emotional Labor, and Emotional Privacy" (Paper delivered at the Proceedings of the 2023 CHI Conference on Human Factors in Computing Systems, Hamburg, Germany, April 2023).

[64] Rebecca Johnson, "Topics of Dissent: Some Questions" (19 September 2016), online: Judging Dissent <https://judgingdissent.wordpress.com/2016/09/19/topics-of-dissent-some-questions/>.

[65] Belleau & Johnson, *supra* note 58 at page 165.

[66] W David Rankin & Mahmoud Jamal, "Dissents and Concurrences: Seven Debates in Charter Jurisprudence" (2013) 63:5 Supreme Ct L Rev: Osgoode's Annual Constitutional Cases Conference 89 at page 91.

[67] *Ibid* at page 166.

[68] *Ibid*.

[69] *Zurich Insurance*, *supra* note 19, L'Heureux-Dubé J, dissenting.

Conclusion

These five crossroads I've discussed require us to decide, not just as lawyers but also as humans—two mutually exclusive categories, as everyone knows—if we are content with a dystopic future being hastily pushed onto us as collateral damage so tech companies can continue riding a dangerously large bubble of buzzwords and venture capital. *Or* if we will engage in what data scientists Chelsea Barabas et al call the "politics of generative refusal",[70] and register our dissent from the hype-cycle-driven program of AI, spice, and everything nice, as long as you don't listen too closely for the telltale heartbeat of exploited labour and thinly veiled phrenology behind every other algorithmic inference, generated image, or training data set.

I'll close with this challenge. In his book *The Mechanic and the Luddite: A Ruthless Criticism of Technology and Capitalism*, Jathan Sadowski encourages readers to follow both figures as role models of critical analysis. In his words, "The mechanic knows how a machine is put together, how its parts function, and what work it does. The Luddite knows why the machine was built, whose purposes it serves, and when it should be seized—in both senses of stopped or taken, destroyed or expropriated."[71]

I would suggest that in the legal profession, we have too many mechanics, and not enough Luddites. We know how to wield the law as a tool, and we can take apart and put back together legislation and jurisprudence in our sleep. But navigating through the automation agenda with human rights and worker dignity intact requires more of us. It requires understanding the why and who behind these sociotechnical systems and how they fit into, slip between, jam up, or undermine our laws and levers of justice. It requires, to add a third sense of the word, that we consider *ourselves seized* of this matter, and expand our legal and political imaginations accordingly.

Or, in other words, just say no to the Torment Nexus.[72]

Thank you.

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[70]   Chelsea Barabas et al, "Studying up: reorienting the study of algorithmic fairness around issues of power" (Paper delivered at the ACM Conference on Fairness, Accountability, and Transparency, Barcelona, Spain, 27-30 January 2020).

[71]   Jathan Sadowski, *The Mechanic and the Luddite: A Ruthless Criticism of Technology and Capitalism* (Oakland, California: University of California Press, 2025) at page 33.

[72]   "Torment Nexus", online: Know Your Meme <https://knowyourmeme.com/memes/torment-nexus>.