

BOOK REVIEW

Digital Demons and Lost Lawyers

Law in a Digital World, by M. Ethan Katsh, Oxford University Press, Inc. (1995) 294 pages.

Review by Bruce A. Markell(1)

Where is the Life we have lost in living?

Where is the wisdom we have lost in knowledge?

Where is the knowledge we have lost in information?

—T. S. Eliot(1)

Information tends to drive out knowledge. Information is just signs and numbers, while knowledge has semantic value. What we want is knowledge, but what we often get is information. It is a sign of the times that many people cannot tell the difference between information and knowledge, not to mention wisdom, which even knowledge tends sometimes to drive out.

—Heinz R. Pagels(2)

Will the increased use of computers and networks to process legal information affect lawyers? This is a question every lawyer ought to ask. Professor Ethan Katsh answers it with an emphatic "yes" in *Law in a Digital World*. Professor Katsh, of the University of Massachusetts, sees computers and networks radically changing the world lawyers inhabit. He sees lawyers sifting, sorting, analyzing, and delivering more information faster. His vision has lawyers changing the ways in which they accumulate and use information.

So far, so good. Lawyers will have to adapt to the new technology to better serve their clients. However, Professor Katsh also sees a fundamental change in the core definitions and conceptions of the legal profession. "The underlying theme of this book is that new tools for communicating and working with information not only affect our ability to express ourselves, but ultimately bring about changes in what law is and does."(3)

I disagree with this prediction primarily because I believe Professor Katsh extrapolates too much from questionable premises to arrive at his view of fundamental change. In particular, Professor Katsh predicts doubtful changes to the concept of a contract along with fundamental changes in the work of lawyers who work with contracts.

In assessing these predictions, I explore two of Professor Katsh's premises: his conception of contract law and his view of what lawyers do. I first want to show that his view of contract law is insufficiently broad to support the weight of his predictions. Building on this examination, I then want to contrast his view of lawyers' roles with that found in Dean Anthony Kronman's *The Lost Lawyer*,(4) in order to show that Professor Katsh's predictions are based on what I perceive as an incomplete perception of lawyers and the legal profession.

Even with these weaknesses, however, the book is important and accurately captures many of the coming changes in the legal profession,(5) even if some of these changes will not result in revolution. Rather than revolutionary, the changes wrought may be no more problematic to the profession that the changes introduced by the photocopier, the fax machine, or Federal Express.

I.How Lawyers Use Computers and Networks

Law in a Digital World richly details the ways in which computers affect and will affect lawyers' professional lives. In particular, Professor Katsh notes factors that will both increase and decrease lawyers' power and prestige. As an example, he charts, in the first three chapters, the rise of electronic publishing services such as Westlaw and LEXIS, and, in chapter four, devices to exchange information such as LEXIS Counsel Connect.(6) He correctly observes that these electronic media give lawyers unparalleled access to legal information as well as the text of the law. They can be better lawyers, so the argument goes, with more information.(7) The rise of the Internet and the increasing amount of legal information that it carries will further proposition.

This shift to electronic sources, Professor Katsh argues, also has the potential to disperse or lessen the status of many legal institutions. With transportable information, for example, the physical importance of law libraries recedes. Libraries which do not grasp this shift or displacement are destined to lose their prominence.

The shift also has grave implications for copyright and other methods of intellectual property protection, as Professor Katsh notes in chapter nine. He predicts that the combination of several elements—the near-zero marginal cost of copying, the discretionary enforcement of copyright law, and the high cost of enforcement—will change significantly the ways in which parties protect their intellectual labors.

Professor Katsh finds this shift to electronic resources to be a process of displacement—as opposed to replacement—of the traditional modes of getting at the text of the law and of protecting legal interests.(8) With the text of the law more widely available, lawyers' control over the interpretation of the law, and of things legal generally, will lessen.(9) And he argues, more by implication than by direct evidence, that those lawyers who ignore this displacement and continue on in traditional roles may be relegated to a status of legal troglodytes. Is Professor Katsh right? Before answering this question, one first needs to look at his conception of what lawyers do.

II. What Lawyers Do

Professor Katsh describes the legal profession "as actually being an organ of mass communication, as being the means by which law is communicated from state to citizen."(10) Under this view, each lawyer serves as "an intermediary who guides the process of learning about legal matters and who serves as a significant conduit for legal information."(11) In short, he believes that lawyers primarily provide information to their clients, filling the role of brokers of legal information.

With this perception of lawyers in hand, Professor Katsh attempts a grand historical analogy to assess the effect of modern technology on the practice of law. He first examines the effect on law when Western culture migrated from an oral culture to one which used and relied on the written word.(12) He then compares these observations to the introduction of digital text and networks. He concludes that Western culture is at the advent of a grand displacement of the sort introduced by the advent of the written word.

Professor Katsh's analysis first crystallizes in his examination of the modern hallmark of the written word's primacy—the contract. If he is correct that technology and digital law will force society to reconceptualize contracts and contractual relations, then a revolution is indeed underway. An examination of Professor Katsh's argument demonstrates that such a revolution is not likely.

III. Computers and the Law of Contracts

Professor Katsh sees one of the fundamental activities of lawyers—advising with respect to contracts—as an area that technology will radically change. His notion, however, rests on a view of contracts that is not necessarily universally adopted or even well-suited to his point. He promotes the view that contracts are the interconnected web of relationships between parties, thus adopting the position of Professor Ian Macneil.(13) The onset of digital technology provides a perfect extension of this view; lawyers can now draft contracts in which the parties' performance can be monitored in "real" time, thus lessening the possibilities of default and conflict.(14)

This insight and its expansion to envelop the entirety of contract law are, however, two different things. As influential as Professor Macneil's work is, it is but one of the current theories of contract. Other theories underscore the static nature of contract. Professor Randy Barnett's theory of contract as promise or consent(15) and other theories(16)

emphasize the binding nature of what one has said. Other interpretations of contract abound.(17)

Professor Katsh does not dismiss this role, but he does discount it. He sees the rise of "contracts that exist only in cyberspace and that also cannot really be duplicated on paper."(18) These electronic contracts will displace paper contracts because of their superiority in dispensing with time and place restrictions; an electronic contract has no "original," and, thus, no spatial dimension, and will be dynamic and interactive, and, thus, have no temporal restrictions.(19) In short, whereas "[p]aper contracts bind parties to an act . . . [t]he electronic contract binds parties to a process."(20) The process, I surmise, is one of ongoing compliance and adjustment to changes in assumptions and conditions.

The consequences of this change, if it occurs with sufficient robustness to endure, are dangerously oversimplified. One goal of the Uniform Commercial Code over the last forty years has been to recognize the importance of continuing relations and the background mores against which parties act.(21) Professor Katsh offers no compelling reason to believe that his electronic contracts cannot be handled by current law and lawyers. Instead, he concludes: "[T]he new technologies put law in touch with an information environment that is more dynamic, interactive, and multidimensional, and that can more accurately represent the kinds of complex and delicate relationships that permeate our lives."(22)

However, history shows that lawyers will always be consulted to unravel troubling cases.(23) Unless artificial intelligence or cognitive science makes inroads that some think are impossible,(24) there will always be a role for humans. Technology's capacity to create complex models does not mean that those models can imitate our lives or any of our relationships; it simply means that we can crunch more approximations in less time. The computer and the network it is connected to are only as good as the software or programming each has. Inevitably, the complex monitoring and adjusting have to be thought out by humans, and differences about how to do such programming have to be mediated by humans.

Professor Katsh seems to miss this point because his brittle model of lawyers as information brokers cannot accommodate it. This is odd; the role of lawyers in drafting contracts is venerable.(25) Lawyers advise not only on the consequences of breach, but more often on the ways in which breach can be avoided or on how to structure relations so that breach is not an issue. It is more than massaging a lot of information and monitoring compliance. But Professor Katsh's oversight on this point is part of his larger misconception of lawyers' roles, and it is to his conception of lawyers that I now turn.

IV. Lost Lawyers and Digital Demons: Will Law and Lawyers Change?

Certain computer programs are called "demons" because they run continuously in the background, ready to operate on any preprogrammed cue. In some sense, law is like that, providing a background context to the activities of humans in civil society, ready to offer a remedy if some precedent provides for it. Digital law may simply make this connection more transparent; as Professor Katsh notes, the accessibility of law will increase, and the dream and premise of due process—that citizens know the law—will move closer to realization.(26)

Two things disrupt that dream, however. First, training in the law beyond high school civics is necessary to understand both the statutory and the judicial law that modern society produces. This is not just a phenomenon of modern times. Non-lawyers have historically held feelings of jealousy and antipathy for the apparent hegemony the profession claims on understanding people, politics, and the interaction of the two.(27) It is unclear that improvements in computer technology will increase this level of understanding. The need for a class of individuals who understand and know the context for law may always exist.

A further analogy to computer demons is apt. Such programs act without discretion, according to fixed preprogrammed sets of instructions. Law may similarly provide a set of outcomes for every act, but humans decide, on a case-by-case basis, whether to invoke the law's protections. Not every crime is detected, and not every detected crime is prosecuted. Professor Katsh notes this phenomenon and quotes studies that show that not all contract breaches are the subject of lawsuits.(28) From this, however, he concludes that electronic monitoring provided by the electronic contract—of which he gives us no example—can increase the well-being of clients, thus displacing some of the lawyer's current role. As Professor Katsh puts it, "the core change in the digital lawyer is an understanding of the value of information

in an environment where new tools for processing and communicating information make adding value to information and using information to develop new relationships the central concern of the economic system."(29)

This goes too far. It misperceives the lawyer's role in drafting contracts and counseling clients. It also undervalues the role of discretion in daily affairs and the role that lawyers play in the exercise of that discretion by clients. The value placed on how lawyers advise clients to exercise this discretion is intricately linked to the value placed on the legal profession. In short, the question evolves into an inquiry as to what technology will do to the status of lawyers.

That status is the subject of a recent and valuable book: Dean Anthony Kronman's *The Lost Lawyer*. In this book, Dean Kronman examines the role of the lawyer, not only as information broker, but as statesman and as counselor. While the book is deserving of its own review, it is interesting to note Dean Kronman's chronicling of the demise of the lawyer-statesman, the person who "is not simply an accomplished technician but a person of prudence or practical wisdom as well."(30) The hallmark of these lawyers is that it is "judgment, not expertise, that count[s], and it is this quality of judgment that the ideal of the lawyer-statesman values most."(31)

Does Professor Katsh's vision contribute to this demise? Perhaps so, and that may be reason enough to struggle against allowing Professor Katsh's predictions to come to fruition. As Professor Katsh writes, "the successful digital lawyer knows that he or she is in the information business as well as the legal business and that he or she is competing with others in the information business, some of whom are lawyers and some of whom are not."(32) Lawyers will move into the area not just of drafting contracts and assessing whether some actions breach a contract, but in monitoring compliance on an ongoing basis.(33) In the future, if not now, a lawyer's "function [will be] to guide the relationships that are formed between people and institutions, in a sense to promote the recombining of people and interests using the new technologies' model of information processing as a paradigm."(34) In short, lawyers will be opportunity brokers. As Professor Katsh states, "the digital lawyer views himself or herself not simply as a person with expertise in law but as an information worker whose focus is law."(35) The lawyer as "information worker" seems a far cry from the person of prudence and judgment Dean Kronman extolls. I think a lawyer is more than that.

Information can be broadly defined as anything which makes a possible state of the world more or less likely.(36) Lawyers certainly provide this type of information. They can, for example, advise that a particular statute makes a client's planned activity expensive or illegal.(37)

Do they do more? My answer to that question is that they provide not just information, but judgment as well. By judgment I mean not only information—relevant rules, customs, and the like—but also a related opinion on how the particular facts presented will be resolved or advice as to the client's best option under the circumstances. To use current lingo, lawyers not only package and transmit raw information, they add value to it in the form of their opinions and judgment on how to fit rich facts into a meager legal landscape.

Moreover, I believe that clients pay primarily for judgment. The better the judgment, the higher the price. Clark Clifford, in his better days, was once reputed to have charged and received \$10,000 for a brief telephone call.(38) The client paid not for the raw information provided by Clifford—his assessment of the what the relevant legal rules or customs were—but rather for Clifford's assessment of the situation—his judgment of how matters were likely to be concluded.

In short, treating lawyers as "information workers" seems based on a view that law is a set of rules that can be made known simply upon inquiry. This view, however, is brittle and insufficiently expansive of what law is and can be. As every first-year law student soon discovers, the richness of human experience is no match for the coverage of legal rules. There are gaps, and lots of them, with each gap full of close cases. As Dean Kronman puts it:

In some cases, of course, a lawyer's main task is simply to inform his client about the legal consequences of pursuing a particular objective that the client has already identified and chosen. But often the client's objective is hazy, or in conflict with other objectives, or clear but impetuously conceived. What is the lawyer's job then? Most lawyers I think would say that at a minimum it is part of their job in such cases to help clarify the client's goal by pointing out ambiguities in its conception and by identifying latent conflicts between it and other of the client's ends. . . . I believe that . . . most lawyers would . . . agree that their responsibilities to a client go beyond the preliminary clarification of

his goals and include helping him to make a deliberately wise choice among them.(39)

But perhaps that is Professor Katsh's point:

Lawyers need to understand . . . that what differentiates them from others, and the distance that may be said to exist between lawyers and non-lawyers, is declining. It is not that lawyers are losing their expertise or not being trained as well, but that the role and expertise of lawyers overlap more with others.(40)

In short, lawyers are lost if they cling to the past. If, as Dean Kronman suggests, lawyers do more than just transmit information because, in part, the law is more than just rules, then their expertise, their judgment, their prudence—indeed, their vision—are needed more now than before. Just because decisions can be made faster does not mean they must be.(41)

I indicated at the beginning of this review that digital technologies may have no more impact on lawyers than have photocopiers, fax machines, or Federal Express. When I entered practice, I was trained by lawyers whose notion of status in the firm was that they got something better than the "sixth carbon." Before xerographic technology became commonplace, all copies of a letter or document were fed into a manual typewriter interspersed with carbon paper. Although sometimes as many as ten copies were desired, typically only the first through fifth copies were legible. Receipt of a legible copy indicated rank in the pecking order.

The introduction of xerographic technology made that reference an anachronism.(42) The subsequent introduction of the fax and Federal Express made the transmission of such information fast. Lawyers had to grapple with the fact that as the time for communication decreased, clients' expectations of responsiveness increased. They adapted and continued to advise with prudence and to temper information with judgment. They may not like it, and some parts of the profession may have sold their souls trying to adapt to it, but books like *The Lost Lawyer* remind us of the noble core of the legal profession and that we must take action to preserve it in the face of ignoble influences.

In the end, Professor Katsh has given us a good and provocative look at what new technologies may mean for the day-to-day practice of law—the interplay of judgment, advice, and action. But technologies, read broadly, have changed radically before, yet lawyers still remain; lawyers have endured in part because these changes have not invaded the core of what they do.(43) They still ply the profession of dispensing advice, of giving information tempered by judgment. Professor Katsh has shown that the information part of this description is bound to change, but has not convincingly demonstrated that the core of the profession—the judgment or wisdom applied to the information—will follow.

(1)Professor of Law and Louis F. Niezer Faculty Fellow, Indiana University School of Law—Bloomington. Thanks are due to Julie Veach for excellent research assistance. Errors which remain are mine alone.

(1)T.S. Eliot, Choruses from 'The Rock' (1934), *reprinted in* *Collected Poems*

1909-1962 145, 147 (1963).

(2)Heinz R. Pagels, *The Dreams of Reason: The Computer and the Rise of*

the Sciences of Complexity 149 (1988).

(3)M. Ethan Katsh, *Law in a Digital World* 25 (1995).

(4)Anthony T. Kronman, *The Lost Lawyer* (1993).

(5)In this respect, the book builds on Professor Katsh's earlier work, *The Electronic*

Media and the Transformation of Law. M. Ethan Katsh, *The Electronic Media and the Transformation of Law* (1989).

And also in this respect, other reviews of *Law in a Digital World* seem a little harsh. See Eugene Volokh, *Technology and the Future of Law*, 47 *Stan. L. Rev.* 1375 (1995) (review essay); Paul Reidinger, *Lost in Cyberspace: Does the*

High-tech Explosion Make "Thinking like a Lawyer" Obsolete?, A.B.A. J., Aug. 1995, at 104, 104 (book review). *But see* Thomas G. Walker, *Walker on Katsh, Law in a Digital World*, The Law and Politics Book Review, <http://h-net.msu.edu/~books/reviews/0143.html> (Nov. 1, 1995).

(6) *See also* Katsh, *Law in a Digital World*, *supra* note 3, at 175-78. On February

2, 1996, American Lawyer Media L.P., who originally started LEXIS Counsel Connect, announced it would buy out LEXIS's minority ownership and will return the name of the service to its original, Counsel Connect. *American Lawyer Regains 100 Pct of Online Service*, BC Cycle (Reuters), Feb. 2, 1996, available in LEXIS, Compny Library, Allnws File.

(7) This access also gives rise to new responsibilities; a failure to consult Westlaw or

LEXIS, which results in the failure to find relevant case law, could be the basis of malpractice. *See* Duane A. Daiker, *Computer-Related Legal Malpractice: An Overview of the Practitioner's Potential Liability*, Fla. Bar J., Apr. 1995, at 12, 19-20.

(8) "One theme of this book is that we need to stop thinking in terms of *replacements*,

of making traditional institutions disappear, and instead observe the process of *displacement*, of changing patterns of orientation and operation." Katsh, *Law in a Digital World*, *supra* note 3, at 13 (emphasis in original).

(9) *Id.* at 83-88.

(10) *Id.* at 106. This position is a continuation of his view expressed in *The Electronic*

Media and the Transformation of Law. Katsh, *The Electronic Media and the Transformation of Law*, *supra* note <5>, at 3-16.

(11) Katsh, *Law in a Digital World*, *supra* note 3, at 106.

(12) *Id.* at 95-102.

(13) *Id.* at 126-128. *See* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic*

Relations Under Classical, Neoclassical, and Relational Contract Law, 72 Nw. U. L. Rev. 854 (1978). *See also* Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 Ann. Surv. Am. L. 139.

(14) Katsh, *Law in a Digital World*, *supra* note 3, at 128-130.

(15) Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269 (1986).

(16) *See, e.g.*, Charles Fried, *Contract as Promise* (1981).

(17) A helpful collection of the various theories appears in *A Contracts Anthology*. A

Contracts Anthology 54-128 (Peter Linzer ed., 2d ed. 1995). *See also* Patrick Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. Rev. 193 (1978); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 Wash. & Lee L. Rev. 697 (1990); Restatement (Second) of Contracts § 1 (1981) (defining a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty").

(18) Katsh, *Law in a Digital World*, *supra* note 3, at 118.

(19) *Id.* at 120-28.

(20)*Id.* at 129.

(21)*See, e.g.*, U.C.C. §§ 1-201 (3) (definition of "agreement" as "bargain in fact" of the parties), 1-201(12) (definition of "contract" as a legally enforceable agreement) (1994).

(22)Katsh, *Law in a Digital World*, *supra* note 3, at 132.

(23)One need only look to the training in declamations given to Roman lawyers to see

that even then lawyers were trained to deal with tough, if not irreconcilable, problems. *E.g.*, 1 The Elder Seneca, *Controversiae* I-VI 465-69 (M. Winterbottom trans., Loeb Classical Library 1964) (n.d.) (A patron who was on the losing side in the civil war and an outlaw took refuge with a freedman of his who still owed him services on account of his manumission. At great personal risk, the freedman took the patron in, but asked him to waive the services owed. The patron waived them, in writing. Afterwards, when the patron is restored to his estate, he demanded his services that were once waived. The freedman objected.)

(24)*See* John R. Searle, *The Rediscovery of the Mind* (1992) (especially chapter

3).

(25)*See* Geoffrey Chaucer, *The Canterbury Tales*, *reprinted in* *The Riverside*

Chaucer 3, 28 (Larry D. Benson ed., 3d ed. 1987) (Description of the Sergeant of the Lawe: "Therto he koude endite and make a thyng, Ther koude no wight pynche at his writyng;"). *See also* C.W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England* 240-42 (1986).

(26)Katsh, *Law in a Digital World*, *supra* note 3, at 83-88.

(27)Dick the Butcher's comment in *Henry VI* is the classic statement: "The first thing

we do, let's kill all the lawyers." William Shakespeare, *The Second Part of King Henry the Sixth* act 4, sc. 2. A more vehement condemnation is found in the New Testament: "And he [Jesus] said, 'Woe to you lawyers also! for you load men with burdens hard to bear, and you yourselves do not touch the burdens with one of your fingers.'" *Luke* 11:46.

(28)Katsh, *Law in a Digital World*, *supra* note 3, at 129.

(29)*Id.* at 174-75.

(30)Kronman, *supra* note 4, at 2.

(31)*Id.* at 3.

(32)Katsh, *Law in a Digital World*, *supra* note 3, at 175.

(33)*Id.* at 182.

(34)*Id.* at 189.

(35)Id.

(36)For some discussions of the nature of information, see generally Murray Gell-Mann, *The Quark and the Jaguar* 37-38 (1994); Pagels, *supra* note <2>, at 149-50.

(37)Of course there are lawyers who provide simple or predominantly simple

information. Title opinions in some states and blue sky advice in securities offerings may be examples of this kind of information.

(38)See Gay Jervey & Stuart Taylor, Jr., *From Statesman to Front Man: How Clark*

Clifford's Career Crashed, Am. Law.Nov. 1992, at 49, 51. Other examples exist, including Marty Lipton's eighteen-million-dollar fee in the Pennzoil/Getty matter and Moses Lasky's million-dollar fee for one brief in Telex's suit against IBM. Debra Whitefield, *Texaco and Pennzoil Shift to Print in War Over Getty*, L.A. Times, Apr. 23, 1986, § 4 (Business), at 1; *The Pervasive Influence of Lawyers*, U.S. News & World Report, Nov. 1, 1982, at 55.

(39)Kronman, *supra* note <4>, at 128-29.

(40)Katsh, *Law in a Digital World*, *supra* note 3, at 193-94. It is also possible that

Professor Katsh does not see such a crumbling away of the legal profession, at least so long as cognitive science or artificial intelligence stays in its current state: "Computers are pretty good at letting laypeople fill out forms and do paperwork [but] are not so good at replacing expert human judgment in complicated situations." *Come To My Windows*, Mass. Law. Wkly., May 1, 1995, at B2 (quoting Professor Katsh).

(41)This point can be seen from Dean Kronman's suggestions at the end of his book.

They include stressing practical wisdom in the law classroom and the consideration of smaller firms and more rural settings by law graduates. Kronman, *supra* note <4>, at 375-81.

(42)Some traditions die slowly. The final version of a legislative bill is the "engrossed"

version, a word which has its origins in a definitive, manually produced text. For a short history of the "engrossed" Constitution, see Daniel J. Boorstin, *Printing and the Constitution*, in Daniel J. Boorstin, *Cleopatra's Nose: Essays on the Unexpected* 63 (1994).

(43)See Robert W. Lucky, *What Technology Alone Cannot Do*, Sci. Am., Sept. 1995,

at 204, 205 ("[A] friend recently wondered aloud if, since technologists now regularly debate legal issues, lawyers have taken to debating technology. At my next meeting with lawyers, I asked if this were indeed the case. They looked at me blankly. 'Of course not,' someone finally said. In fact, lawyers are just as comfortable in cyberspace as are scientists. It is a social invention. The problems that we all debate pertain to universal access, rights to intellectual property, privacy, governmental jurisdiction and so forth. Technology was the enabler, but these other issues will determine the ultimate worth of our work.").