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## RoboCourt: How Artificial Intelligence Can Help Pro Se Litigants and Create a “Fairer” Judiciary

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# RoboCourt: How Artificial Intelligence Can Help Pro Se Litigants and Create a “Fairer” Judiciary

Justin Snyder\*

## INTRODUCTION

[I]t seems likely that artificial intelligence . . . will begin to alter judicial practices. . . . I look forward to a time when computers will create profiles of judges’ philosophies from their opinions and their public statements, and will update these profiles continuously as the judges issue additional opinions. The profiles will enable lawyers and judges to predict judicial behavior more accurately, and will assist judges in maintaining consistency with their previous decisions – when they want to.<sup>1</sup>

Every year, millions of Americans traverse the U.S. court system without a lawyer. Litigation has become too expensive, too cumbersome, and too unpredictable for many laypeople to hire lawyers.<sup>2</sup> Judges have tried to address this access-to-justice issue;<sup>3</sup> however, a judge’s position is meant to be one of impartiality. If a judge makes significant efforts toward helping a pro se litigant (PSL), the judge may appear as biased and the proceeding as unfair. Then how does the judicial system ensure fairness in its proceedings?<sup>4</sup> The solution: the judicial implementation of artificial intelligence (AI) to help PSLs. The decrease in American access to justice parallels an increase in the technological advancements within society.<sup>5</sup> The time has come and gone from when advanced AI was merely science fiction, and the processing power of AI has steadily progressed to being on par with (and sometimes exceeding) the mental-processing capabilities of humans.<sup>6</sup> AI, if used to help the average PSL, would increase fairness in judicial proceedings while ensuring that judges refrain from playing an active role in proceedings.

In this Article, Part I will provide background information for the different protections the United States provides for criminal pro se defendants as opposed to civil PSLs. Part II will detail access-to-justice problems facing PSLs and judges. Part III will describe different uses that technology and AI have already had within

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<sup>1</sup> Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1050 (2006).

<sup>2</sup> See *infra* Section II.A.

<sup>3</sup> See *infra* Section II.B.

<sup>4</sup> This assumes “fairness” is based on ensuring an equitable result stemming from the validity of a claim and not on the skill of the litigator or other external factors to the case. See Jay Tidmarsh, *Resolving Cases “on the Merits”*, 87 DENV. U. L. REV. 407, 436 (2010) (“[A] ‘fair outcome’ principle should be our primary guide as we think about procedural reform.”); ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* (1958).

<sup>5</sup> See *infra* Section II.A., Section III. B.

<sup>6</sup> See *infra* text accompanying note 99.

law. Lastly, Part IV will address the concerns raised in Part II by suggesting potential judiciary uses of AI to help PSLs.

## I. BACKGROUND: THE LACK OF A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS AND STANDARDS FOR PRO SE CIVIL LITIGANTS

The U.S. Constitution guarantees the right to an attorney, but only in criminal cases. The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”<sup>7</sup> The Supreme Court later elaborated that this protection requires that all criminal defendants subject to imprisonment should be guaranteed the right to counsel.<sup>8</sup> In the context of a pro se criminal case, the Court has said:

*The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of “effective assistance of counsel.”*<sup>9</sup>

Here, the denial of a pro se criminal defendant’s right to bring an ineffective assistance of counsel claim may seem “fair” because the defendant at least has the *guarantee* of receiving counsel they desired. This “fairness,” however, does not translate as cleanly to the civil process, where no such guarantee of counsel exists.<sup>10</sup>

The Constitution’s right-to-counsel guarantee does not extend to civil cases.<sup>11</sup> Would-be civil litigants are instead presented with the following choices when considering litigation: (a) paying for a lawyer, (b) proceeding pro se, or (c) not pursuing their claim whatsoever. As discussed later in Section II.A, many litigants do not seek counsel in a civil case because many laypeople cannot afford an attorney.<sup>12</sup> To address this, courts have tried to accommodate PSLs who wish to navigate the civil-litigation process. The Restatement (Third) of the Law Governing Lawyers describes these efforts:

Every jurisdiction recognizes the right of an individual to proceed “pro se” by providing his or her own representation in any matter, whether or not the person is a lawyer. . . . The right extends to self-preparation of legal documents and other kinds of out-of-court legal work as well

<sup>7</sup> U.S. CONST. amend. VI.

<sup>8</sup> *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

<sup>9</sup> *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975) (emphasis added).

<sup>10</sup> *See Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 32–33 (1981).

<sup>11</sup> *Id.* at 26–27 (“[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”); *see also* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). *But cf.* Helen B. Kim, Note, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1642 n.5 (1987) (“[S]everal commentators have argued for the application of the Court’s reasoning in *Powell* to indigent civil litigants.”).

<sup>12</sup> *See* discussion *infra* Section II.A.

as to in-court representation. In some jurisdictions, tribunals have inaugurated programs to assist persons without counsel in filing necessary papers, with appropriate cautions that court personnel assisting the person do not thereby undertake to provide legal assistance.<sup>13</sup>

Over time, judicial procedures have developed to provide PSLs more access to the courtroom,<sup>14</sup> but “[t]he right to be heard has little value . . . to those who lack the knowledge to exercise their right in a meaningful or skillful way.”<sup>15</sup> Practically, there is little chance that a PSL would know the proper procedures and rules of the court system. Another protection for civil litigants, a legal malpractice claim—the civil parallel of a criminal ineffective assistance of counsel claim—is only available as a protection to a civil litigant if they are able to afford counsel in the first place.<sup>16</sup> The legal system still requires civil PSLs to adhere to the procedural requirements that accompany the litigation process, even though those same litigants are not guaranteed a lawyer to ensure that those same procedural requirements are satisfied.<sup>17</sup> The following Part will detail exactly why the absence of any guaranteed protection for civil PSLs detracts from the element of fairness in legal proceedings.<sup>18</sup>

## II. TWO CONCERNS WITH FAIRNESS ARISING FROM A LACK OF A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS

Legal scholars have struggled with developing a solution that adequately addresses the existing civil access-to-justice issues. This Part identifies the following two concerns that spawn from the lack of a guarantee to counsel in civil cases: (1) the high number of civil PSLs, discussed in Section II.A, and (2) the interference of judges in proceedings involving PSLs, discussed in Section II.B.

### *A. The Practical Concern: The High Number of Litigants that Proceed Pro Se in Civil Proceedings*

As discussed in Part I, PSLs in civil suits are faced with either: (a) paying for an attorney, (b) proceeding pro se, or (c) not pursuing their claim. However, with choice (a), many people cannot realistically afford to take on the expenses involved

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<sup>13</sup> RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 4 cmt. d (AM. LAW. INST. 2017).

<sup>14</sup> See Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 676 (1988).

<sup>15</sup> Kim, *supra* note 11, at 1641.

<sup>16</sup> See, e.g., *McGrogan v. Till* 771 A.2d 1187, 1193 (N.J. 2001) (noting that “the existence of an attorney-client relationship creating a duty of care by the defendant attorney” is necessary for a legal malpractice claim).

<sup>17</sup> See *infra* note 43 and accompanying text.

<sup>18</sup> This Article does not make the argument that counsel in civil cases should be guaranteed to litigants, as this would practically create an unmeetable demand that the resources of the legal industry, as they currently exist, cannot satisfy. See generally Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (discussing the drawbacks of a right to counsel in civil cases).

with litigation.<sup>19</sup> State and federal studies suggest that roughly “80 to 90 percent of low- and moderate-income Americans with legal problems are unable to obtain or afford legal representation.”<sup>20</sup> “The economic problem, then, is not primarily a concern over the quality of the services . . . . It is an issue of reach, in that relatively few people can afford to secure the services on offer.”<sup>21</sup> Legal aid service agencies have faced resource issues as well, having to turn away many eligible clients because they cannot sufficiently accommodate everyone with existing legal needs.<sup>22</sup> These concerns have led many laypeople to file lawsuits without professional aid or abandon their potentially viable claims altogether.

Nongovernment lawyers and companies have stepped up to try and help alleviate this plight of uninformed civil PSLs. The Model Rules of Professional Conduct suggests that every lawyer should donate some of their time toward providing legal services to those in need.<sup>23</sup> Forms are now widely available on websites such as LegalZoom at a cost lower than that of hiring independent counsel.<sup>24</sup> PSLs may receive a government lawyer to handle their divorce if they fall below 125% of the poverty line or are seeking a divorce in an abusive relationship.<sup>25</sup> In addition, various legal-aid organizations have been created to address the issues that civil PSLs face.<sup>26</sup>

These initiatives are noble, but not necessarily comprehensive enough to solve the underlying access-to-justice issue. PSLs struggle to get adequate attention

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<sup>19</sup> Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1787–90 (2001); see also Lauren Sudeall & Darcy Meals, *Every Year, Millions Try to Navigate US Courts Without a Lawyer*, *CONVERSATION* (Sept. 21, 2017, 8:36 PM), <https://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159> (“In some states, as many as 80 to 90 percent of litigants are unrepresented, even though their opponent has a lawyer.”).

<sup>20</sup> Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, *ABA J.* (Jan. 1, 2015, 5:50 AM), [https://www.abajournal.com/magazine/article/washington\\_state\\_moves\\_around\\_upl\\_using\\_legal\\_technicians\\_to\\_help\\_close\\_the\\_justice\\_gap](https://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the_justice_gap).

<sup>21</sup> RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 34 (2015).

<sup>22</sup> See John C. Rothermich, Note, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 *FORDHAM L. REV.* 2687, 2688 (1999) (“[I]t is estimated that legal services organizations were forced to deny over half of their eligible clients any assistance due to inadequate resources.”).

<sup>23</sup> *Rule 6.1: Voluntary Pro Bono Publico Service*, AM. BAR ASS’N. (Apr. 17, 2019), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_6\\_1\\_voluntary\\_pro\\_bono\\_publico\\_service/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service/). The Model Rules suggests that lawyers devote at least fifty hours per year to no-cost legal services. *Id.* Similar requirements have been adopted by states that require a minimum number of pro bono hours before sitting to take that state’s bar examination. See Section 520.16(a) of the Rules of the Court, N.Y. STATE BD. OF L. EXAM’RS, <https://www.nybarexam.org/Rules/Rules.htm#520.16> (last visited Mar. 17, 2020) (requiring New York bar examination takers to complete at least fifty hours of pro bono work prior to taking the test).

<sup>24</sup> BENJAMIN H. BARTON & STEPHANOS BIBAS, *REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW* 46–47 (2017); see *Legal Forms*, LEGALZOOM, <https://www.legalzoom.com/forms> (last visited Mar. 17, 2020).

<sup>25</sup> *Id.* at 47.

<sup>26</sup> See, e.g., Evan G. Zuckerman, Note, *JusticeCorps: Helping Pro Se Litigants Bridge a Divide*, 49 *COLUM. J.L. & SOC. PROBS.* 551 (2016).

even when lawyers are willing to help. Estimates show that “there is one attorney for every 6,415 poor people.”<sup>27</sup> Another 2008 study shows that 97% of tenants that go to court against their landlords are unrepresented, 98% of domestic violence litigants are unrepresented, and 98% of parents in paternity and child-support cases are unrepresented.<sup>28</sup> Alongside these metrics, the rate of self-representation has accelerated especially over the past two decades, with a majority of American cases (civil and criminal) now including at least one PSL in their proceedings.<sup>29</sup> Although indigent litigant resources exist, such as the ones mentioned above, those resources cannot meet the demand related to the vast quantity of PSLs.<sup>30</sup>

Surely, there are many people whose claims are meritorious, but ultimately do not pursue their claims because they likely lack the capital to do so. Civil claimants have no constitutional guarantee of counsel to ensure that their claims are effectively litigated, and, even if they did, restraints on human resources within the legal field could not meet the need of every person who seeks to access the courtroom. What option, then, do these people have aside from taking on their cases themselves as PSLs? Some judges have shown sympathy to PSLs by guiding them through their case;<sup>31</sup> however, this act brings up an additional concern that judges may be unfairly championing one party over another.

### *B. The Ethical Concern: Judges Interfering with Proceedings*

Judges have the utmost duty to administer impartial justice to all who submit claims to their chambers.<sup>32</sup> The Model Code of Judicial Conduct provides: “A judge shall accord to *every person* who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”<sup>33</sup> But what about when that legal interest cannot be properly conveyed? The Model Code provides that “a judge [may] make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”<sup>34</sup> Courts have also recognized that some technical assistance by a judge may be necessary for PSLs to adequately present their case.<sup>35</sup> However, formally “giving legal advice is prohibited by multiple canons of judicial conduct.”<sup>36</sup> A judge vows to “uphold and apply the law, and . . . perform

<sup>27</sup> BARTON & BIBAS, *supra* note 24, at 51.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 52.

<sup>30</sup> See BARTON & BIBAS, *supra* note 24, at 57 (“Pro bono work is admirable, but cannot begin to meet the need.”).

<sup>31</sup> See discussion *infra* Section II.B

<sup>32</sup> See MODEL CODE OF JUD. CONDUCT R. 1.2 (AM. BAR ASS’N 2020).

<sup>33</sup> *Id.* r. 2.6(a) (emphasis added).

<sup>34</sup> *Id.* r. 2.2 cmt. 4.

<sup>35</sup> See, e.g., Tyree v. Evans, 728 A.2d 101, 105 (D.C. 1999) (“[A] trial judge may, without compromising requisite judicial impartiality, provide reasonable technical assistance to a pro se plaintiff in presenting her case.”).

<sup>36</sup> Robert Bacharach & Lyn Entzerth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 42 (2009); see also BARTON & BIBAS, *supra* note 24, at 53 (“Clerk’s offices are frequently told not to give any legal advice to pro se litigants.”).

all duties of [their] judicial office *fairly and impartially*.”<sup>37</sup> When does helping a PSL transform into a breach of the judge’s duty to oversee a case fairly?<sup>38</sup> Additionally, does the act of helping PSLs at all constitute a breach in the judge’s ethical obligations?<sup>39</sup> The answers to these questions are not exactly clear.

A judge’s ethical duties tend to collide with the procedural right of a PSL to be adequately heard. The United States Supreme Court has indicated that complaints drafted by PSLs are held “to less stringent standards than formal pleadings drafted by lawyers.”<sup>40</sup> Stemming from *pro se* procedural concerns, “great latitude is allowed to a litigant who, either by choice or necessity, represents himself or herself in legal proceedings provided that this does not infringe on the just rights of the adverse party.”<sup>41</sup> This latitude has an “open-ended quality to it”;<sup>42</sup> aside from general procedural concerns and desires to promote goodwill, there are no binding rules to guide PSL assistance from judges.<sup>43</sup> That being said, courts have noted that many claims brought by PSLs ultimately end up being frivolous.<sup>44</sup>

The United States Supreme Court has provided that a PSL is still able to benefit from standby counsel without foregoing their right of self-representation.<sup>45</sup> The Court has clarified that self-representation rights are “not infringed when standby counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes

<sup>37</sup> MODEL CODE OF JUD. CONDUCT R. 2.2 (AM. BAR ASS’N 2020) (emphasis added).

<sup>38</sup> See *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244 (3d. Cir. 2013) (“Judges must be impartial, and they put their impartiality at risk—or at least might *appear* to become partial to one side—when they provide trial assistance to a party.”).

<sup>39</sup> See *Pliler v. Ford*, 542 U.S. 225, 226 (2004) (“Requiring district courts to advise *pro se* litigants . . . would undermine district judges’ role as impartial decisionmakers.”); Mark Andrews, *Duties of the Judicial System to the Pro Se Litigant*, 30 ALASKA L. REV. 189, 194 (2013) (“[S]tep-by-step assistance to the [pro se] litigant . . . might force the judge to become the advocate for one side.”).

<sup>40</sup> *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

<sup>41</sup> 7A C.J.S. *Attorney & Client* § 247 (2021).

<sup>42</sup> *MacLeod v. Georgetown Univ. Med. Ctr.*, 736 A.2d 977, 983 (D.C. 1999).

<sup>43</sup> Michael Roundy, *The Proper Approach to Pro Se Litigants*, ABA (July 30, 2020), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/proper-approach-to-pro-se-litigants/> (“[T]he rules of procedure apply to all parties, including *pro se* litigants. While the courts ultimately adhere to this concept, many will exhibit great patience with *pro se* parties who fail to strictly adhere to the rules . . .”). In fact, law is generally concerned with preventing judges from assisting PSLs, not encouraging assistance. See Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice*, 40 FAM. CT. REV. 36, 43 (2002); see *infra* text accompanying note 65.

<sup>44</sup> See Joseph M. McLaughlin, Note, *An Extension of the Right of Access: The Pro Se Litigant’s Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1109 n.4 (1987) (citing *Green v. McKaskle*, 788 F.2d 1116, 1119–20 (5th Cir. 1986); *Urban v. United States*, 768 F.2d 1497, 1499–1500 (D.C. Cir. 1985); *In re Martin-Trigona*, 737 F.2d 1254, 1259 (2d Cir. 1984); *Johnson v. Baskerville*, 568 F. Supp. 853, 855 (E.D. Va. 1983)).

<sup>45</sup> *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Standby counsel is also sometimes referred to as “advisory counsel” in some jurisdictions. See, e.g., *State v. Jones*, No. A08-2101, 2009 WL 3818236, at \*1 (Minn. Ct. App. Nov. 17, 2009). Even though the name of the term is generally stylistic, there are some courts that interpret each as having different definitions. See Jona Goldschmidt, *Judging the Effectiveness of Standby Counsel: Are They Phone Psychics? Theatrical Understudies? Or Both?*, 24 S. CAL REV. L. & SOC. JUST. 133, 150–52 (2015).

to complete.”<sup>46</sup> “The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel.”<sup>47</sup>

The need for PSL assistance has been recognized throughout the circuits with varying approaches for dealing with PSLs. The PSL’s education and circumstances are generally factored into the PSL’s respective needs.<sup>48</sup> The Court of Appeals for the D.C. Circuit was the first circuit to acknowledge that strictly enforcing summary judgment requirements onto an unrepresented prisoner would be unfair.<sup>49</sup> The court reasoned that “fair notice” to PSLs of summary judgment requirements was needed to give PSLs a fighting chance in litigation.<sup>50</sup> Afterward, the circuits generally adopted one of three approaches in their dealings with PSLs.

The first, and least expansive approach, is for courts to treat PSLs in civil cases virtually the same as non-PSLs. This approach is followed by the First<sup>51</sup> and Sixth<sup>52</sup> Circuits, likely reflecting the Supreme Court’s opinion that additional assistance or leniency should be granted to PSLs after the pleading stage because it would infringe on a proceeding’s element of fairness.<sup>53</sup> A court offering leniency during the pleading stage effectively fulfills the bare minimum PSL assistance allowance laid out by the Supreme Court.<sup>54</sup> The second approach some circuits have adopted is to allow judges to assist PSLs beyond the pleading stage, but only if the party is a prisoner in a civil case. The Third<sup>55</sup> and Ninth<sup>56</sup> Circuits follow this approach, likely due to many prisoners physically not having convenient access to counsel or comprehensive legal information within the prisons.<sup>57</sup> The third, and most expansive, approach is allowing judicial assistance and leeway to all PSLs

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<sup>46</sup> *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984).

<sup>47</sup> *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

<sup>48</sup> *Compare* *Klinge v. Eikenberry*, 849 F.2d 409, 411–12 (9th Cir. 1988) (holding that pro se prisoners were entitled to notice of summary judgment requirements by judges), *with* *Weinhaus v. Cohen*, 773 F. App’x 314, 317 (7th Cir. 2019) (holding that pro se appellant with a formal legal education deserved sanctions after they ignored relevant case law in drafting their motions).

<sup>49</sup> *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968).

<sup>50</sup> *See id.*

<sup>51</sup> *See* *Ruiz Rivera v. Riley*, 209 F.3d 24, 28 n.2 (1st Cir. 2000).

<sup>52</sup> *See* *Brock v. Hendershott*, 840 F.2d 339, 342–43 (6th Cir. 1988).

<sup>53</sup> *See supra* notes 36–37 and accompanying text..

<sup>54</sup> *See supra* text accompanying note 40.

<sup>55</sup> *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244–45 (3d Cir. 2013).

<sup>56</sup> *Klinge v. Eikenberry*, 849 F.2d 409, 411–12 (9th Cir. 1988).

<sup>57</sup> Although many prisons have law libraries, courts have recognized that this does not make up for the inherent disadvantages of litigating from prison. *See id.* at 411 (“Appellees point somewhat *unrealistically* to the prison law libraries available to prisoners as part of the advantage to prisoners. . . . We decline appellees’ invitation to . . . avoid giving the required advice based on a determination that a prisoner has the requisite sophistication in legal matters.” (emphasis added)).

past the pleading stage.<sup>58</sup> This is the most widely adopted approach, followed by the Second,<sup>59</sup> Fourth,<sup>60</sup> Fifth,<sup>61</sup> Seventh,<sup>62</sup> Tenth,<sup>63</sup> and Eleventh<sup>64</sup> Circuits.

Even if a circuit is open to a greater degree of PSL judicial assistance, ultimately “district judges have no obligation to act as counsel or paralegal to *pro se* litigants.”<sup>65</sup> By helping a PSL, judges open themselves up to the potential criticism of showing favoritism for one of the parties.<sup>66</sup> This can happen even in the most pro-PSL court. “Providing litigants step-by-step advice and help, in addition to prompting concerns over neutrality, also strains judicial resources.”<sup>67</sup> To help PSLs become more informed (and also more independent in the proceedings) courts have developed various legal form templates<sup>68</sup> and informative handbooks for *pro se* litigation.<sup>69</sup> “While judges would no doubt prefer fully-represented litigants, the choice in most venues is a self-represented litigant who is well prepared or one who is not.”<sup>70</sup> Although the development of these resources may be a step toward creating “fairer” proceedings for PSLs, there is no clear showing that these resources have helped PSL efforts in any substantial way.<sup>71</sup>

If these efforts are not enough to equitably help the plight of PSLs without the direct assistance of the judge, then what would be? At what point does the judge turn from being a referee in the courtroom to a player in its proceedings?<sup>72</sup> In addition, what would make a judge “fair” in a proceeding involving a PSL? Is it when the judge treats both parties equally and “fairly,” ignoring each party’s respective knowledge and experience? Or is it when both parties are allowed to argue from “fair” positions by ensuring the less knowledgeable person has the

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<sup>58</sup> See, e.g., *Champion v. Artuz*, 76 F.3d 483, 486 (2nd Cir. 1996) (“[S]ummary judgment should not be entered by default against a *pro se* plaintiff who has not been given any notice that failure to respond will be deemed a default.”).

<sup>59</sup> See *id.*

<sup>60</sup> See *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975).

<sup>61</sup> See *Perez v. United States*, 312 F.3d 191, 194–95 (5th Cir. 2002).

<sup>62</sup> See *Timms v. Frank*, 953 F.2d 281, 283–84 (7th Cir. 1992).

<sup>63</sup> See *Jaxon v. Circle K Corp.* 773 F.2d 1138, 1140 (10th Cir. 1985).

<sup>64</sup> See *Griffith v. Wainwright*, 772 F.2d 822, 825 n.6 (11th Cir. 1985).

<sup>65</sup> *Pliler v. Ford*, 542 U.S. 225, 231 (2004).

<sup>66</sup> See *Bacharach & Entzeroth*, *supra* note 36; see also *Goldschmidt*, *supra* note 43, at 43 (“If a judge assists a *pro se*, he or she may be perceived as not being impartial. Therefore, judges must avoid assisting the *pro se* litigant.”).

<sup>67</sup> *Andrews*, *supra* note 39.

<sup>68</sup> See, e.g., *Civil Pro Se Forms*, U.S. CTS., <https://www.uscourts.gov/forms/civil-pro-se-forms> (last visited Jan. 9, 2022).

<sup>69</sup> See, e.g., FED. BAR ASS’N, REPRESENTING YOURSELF IN FEDERAL DISTRICT COURT: A HANDBOOK FOR PRO SE LITIGANTS (2019), <https://www.fedbar.org/wp-content/uploads/2019/12/Pro-Se-Handbook-APPROVED-v2019-2.pdf>.

<sup>70</sup> ABA Standing Comm. on the Delivery of Legal Servs., *An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants*, 45 FAM. L.Q. 64, 67 (2011).

<sup>71</sup> See *Laura K. Abel*, *Evidence-Based Access to Justice*, 13 U. PA. J. L. & SOC. CHANGE 295, 302 (2010).

<sup>72</sup> See *Jacobsen v. Filler*, 790 F.2d 1362, 1366 (9th Cir. 1986) (noting that providing advice to a PSL on what a motion means “would entail the district court’s becoming a player in the adversary process rather than remaining a referee.”).

possibility to win over the more knowledgeable party? Ideally, an affirmative answer to both questions would likely produce optimal “fairness.” Although the Constitution imposes minimum standards to ensure judicial proceedings are fundamentally fair, “[a] wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.”<sup>73</sup> To reach this point, judges cannot act alone—they will need to utilize the advancements in modern legal technology to ensure optimal “fairness.”<sup>74</sup>

### III. HOW TECHNOLOGY HAS ALREADY AFFECTED THE LEGAL INDUSTRY

The following Part will seek to address the fairness concerns raised in Part II. Section III.A will provide a background of how early technology revolutionized the practice of law. Section III.B will discuss how artificial intelligence (AI) has already affected the legal profession from a practitioner’s point of view. Section III.C will shift perspectives and show how AI has positively changed judiciaries globally and in select pockets of the United States.

#### A. *The Effect of Pre-AI Technology*

The problems discussed in Part II are not unique to modern times. The legal profession has progressed and evolved slowly for millennia, with an emphasis on the word “slowly.”<sup>75</sup> Many lawyers have developed their mode of operation around an established way of thinking and become resistant to how twenty-first century advancements have already begun to impact the profession.<sup>76</sup> A 2012 amendment to the American Bar Association’s Model Rules of Professional Conduct requires lawyers to “keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology.*”<sup>77</sup> The attorneys who swim while the rest sink are going to be those who innovate and adapt to new technologies.

The first major modern change to the legal industry from modern technology occurred when society gained widespread access to the internet. The addition of search engines, such as Google, allowed attorneys to access vast amounts of

<sup>73</sup> *Lassiter v. Dep’t of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 33 (1981).

<sup>74</sup> See *supra* note 4 discussion.

<sup>75</sup> See Gary A. Munneke, *Why Practice Management?*, 79 N.Y. STATE BAR J. 46, 46 (2007) (“[M]any practitioners . . . either ignore the changes that are transforming the practice of law or they react slowly and resentfully to the evolving professional landscape.”); SUSSKIND & SUSSKIND, *supra* note 21, at 34.

<sup>76</sup> William D. Henderson, *Innovation Diffusion in the Legal Industry*, 122 DICK. L. REV. 395, 454 (2018) (“[L]awyers and legal educators struggle to learn new work methods grounded in data, process, and technology. The gap is undoubtedly the most visible with artificial intelligence.”); see also William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 463 (2013) (discussing resistance by law professors to change).

<sup>77</sup> MODEL RULES OF PRO. CONDUCT R. 1.1 cmt. 8 (AM. BAR. ASS’N 2013) (emphasis added); see also Paul Lippe, *What We Know and Need to Know About Watson, Esq.*, 67 S.C. L. REV. 419, 419 (2016) (“Just as no serious lawyer could argue that they are entitled to practice in a world without electricity, the PC, or the Internet, so lawyers must be aware of and engaged with new technologies . . . as they emerge.”).

information from virtually anywhere.<sup>78</sup> Modern legal research was further transformed in the 1990s by the creation of legal search engines by companies such as Westlaw and LexisNexis.<sup>79</sup> No longer did someone need physical access to law reporters; through a handful of keystrokes, an attorney could access relevant case law and statutes quicker than anyone could by sifting through endless books at a library.

The internet has not only been helpful for practitioners but for PSLs and courts as well. As discussed previously,<sup>80</sup> there are websites such as LegalZoom that are dedicated to giving quick access to legal forms for purposes such as forming a business<sup>81</sup> or drafting a will.<sup>82</sup> The website Cybersettle has facilitated hundreds of thousands of dispute resolutions.<sup>83</sup> After Cybersettle, other online dispute resolution applications have developed that do not require the involvement of a lawyer.<sup>84</sup> The internet also has been a hot spot for courts to directly feed information about the judicial system to laypeople. Court systems in states such as Minnesota have created batches of informational videos that explain procedural requirements within the court system to PSLs.<sup>85</sup> Courts have also uploaded various legal forms on the internet for the general population's convenience.<sup>86</sup>

These foregoing technological advancements have made legal information more accessible to the public. In theory, if a PSL were to read and thoroughly understand all materials provided by the court, then perhaps a judge would not need to inform the PSLs about various procedural rules through the litigation process—this, obviously, is unrealistic and far from the reality. Although compiling relevant information and distributing it into the public sphere are steps in the right direction for ensuring “fairer” courts, clearly these steps have not produced results that have been able to meaningfully change many of the PSL statistical realities.<sup>87</sup>

### *B. The Effect of AI on Legal Practitioners*

Technology has the capacity to positively change the practice of law, not only through increased access to information, but also through the new emerging

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<sup>78</sup> BARTON & BIBAS, *supra* note 24, at 119.

<sup>79</sup> *Id.*

<sup>80</sup> *See supra* text accompanying note 24.

<sup>81</sup> *See, e.g., Business Formation*, LEGALZOOM, <https://www.legalzoom.com/business/business-formation/> (last visited Mar. 30, 2020).

<sup>82</sup> *See, e.g., Estate Planning*, LEGALZOOM, <https://www.legalzoom.com/personal/estate-planning/> (last visited Mar. 30, 2020).

<sup>83</sup> *See* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 156 (2012). For a description of how the Cybersettle settlement process works, *see id.* at 156 n.32.

<sup>84</sup> *See* Robert Ambrogi, *Is There a Future for Online Dispute Resolution for Lawyer?*, LAWSITES (Apr. 11, 2016), <https://www.lawsitesblog.com/2016/04/future-online-dispute-resolution.html>.

<sup>85</sup> *See* Minnesota Judicial Branch, *How to File a Motion in Family Court*, YOUTUBE (June 25, 2015), <https://www.youtube.com/watch?v=PI0nCxxh906I&t=2s>.

<sup>86</sup> *See supra* text accompanying notes 68–69.

<sup>87</sup> *See* discussion *supra* Section II.A.

benefits that AI can provide.<sup>88</sup> AI does not have a clear definition,<sup>89</sup> but “[a]t its simplest, AI is the development and use of computer programs that perform tasks that normally require human intelligence.”<sup>90</sup> The different categories and descriptions of AI vary depending on the author explaining them. Generally, AI is separated into three primary categories with increasing complexities: expert systems,<sup>91</sup> machine learning,<sup>92</sup> and deep learning.<sup>93</sup> AI has various useful functions: “AI systems can be *descriptive* as they tell you what happened; *diagnostic* as they tell you why something happened; *predictive* as they forecast what will (statistically) happen; and *prescriptive* in being capable of performing actual decision-making and implementation.”<sup>94</sup>

Physical lawyers are not as irreplaceable in a legal proceeding as we tend to think. Aside from the act of speaking in a courtroom, “[v]irtually every other aspect of a legal problem can be broken down into its component parts, reengineered, streamlined, and turned into a legal input or legal product that is better, cheaper, and delivered much faster.”<sup>95</sup> Early proponents of AI have suggested its use for various tasks, such as performing due diligence for Mergers and Acquisitions, selecting outside counsel, creating contracts, monitoring compliance, and reviewing legal applications.<sup>96</sup>

AI has seen particularly widespread use in finding relevant documents for discovery requests.<sup>97</sup> Traditional physical discovery and e-discovery can be very expensive and tedious.<sup>98</sup> With AI, someone can input a few key search terms and the program can find all relevant discovery documents in a fraction of the time the

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<sup>88</sup> See Rob Toews, *AI Will Transform the Field of Law*, FORBES (Dec. 19, 2019, 02:09 PM), <https://www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-law/#5066185d7f01>.

<sup>89</sup> See Karman Lucero, *Artificial Intelligence Regulation and China's Future*, 33 COLUM. J. ASIAN L. 94, 96–97 (2019).

<sup>90</sup> Gary E. Marchant, *Artificial Intelligence and the Future of Legal Practice*, 14 ABA SCITECH LAW. 20, 21 (2017).

<sup>91</sup> Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 114 (2019). Expert systems are detailed algorithms that rely on human programming for problem solving. *Id.*

<sup>92</sup> Matthew Ivey, *The Ethical Midfield in Artificial Intelligence: Practical Reflections for National Security Lawyers*, 33 GEO. J. LEGAL ETHICS 109, 114–15 (2020). Machine learning uses algorithms to analyze subsets of data and influence the program's decision making. *Id.*

<sup>93</sup> *Id.* at 115; see also Manheim & Kaplan, *supra* note 91, at 1115 (“This dynamic approach allows [deep learning] to find patterns in unstructured data, from which it models knowledge representation in a manner that resembles reasoning.”). Deep learning is an advanced form of machine learning that uses artificial neurons to mimic human brain thought patterns, including the ability to understand if its predictions are accurate or inaccurate. Ivey, *supra* note 92, at 115.

<sup>94</sup> Iria Giuffrida, *Liability for AI Decision-Making: Some Legal and Ethical Considerations*, 88 FORDHAM L. REV. 439, 440 (2019).

<sup>95</sup> Henderson, *supra* note 76, at 463.

<sup>96</sup> See *id.*, at 465–66.

<sup>97</sup> See *Dynamo Holdings Ltd. P'ship v. C.I.R.*, 143 T.C. 183, 192-94 (2014).

<sup>98</sup> See Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (“Of longstanding concern has been the cost of discovery and the relationship of that cost to the overall cost of litigation and the amount at stake in the case.”).

same task would take for a human.<sup>99</sup> Computer experts even claim that these programs are far cheaper and more accurate than humans.<sup>100</sup> The Southern District of New York was one of the first courts to look at whether a computer-assisted algorithm was a valid legal alternative to manual document review.<sup>101</sup> Although the court did not assert that computer-assisted document review is appropriate in every case, it did hold that the program was appropriate in the case at hand.<sup>102</sup> The court even suggested similar programs should be “seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.”<sup>103</sup>

The analytical capabilities of AI have been utilized to predict legal outcomes and provide AI users with the tools to make more informed decisions.<sup>104</sup> One of the first of these AI companies was Lex Machina, a legal tech company owned by LexisNexis.<sup>105</sup> Lex Machina analyzes large spans of publicly available information<sup>106</sup> to help litigants with “comparing courts, judges, or law firms, early case assessment, motion strategy, and patent portfolio evaluation.”<sup>107</sup> These legal analytics are performed through Lex Machina’s various software applications.<sup>108</sup> The applications use trends to predict various likely outcomes based around case-specific circumstances.<sup>109</sup> One of its most prominent features is its ability to help litigants draft tailored motions and arguments relative to a judge’s respective judgment history.<sup>110</sup>

After the creation of Lex Machina, various other companies and applications were created that used similar analytic software.<sup>111</sup> ROSS Intelligence, developed

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<sup>99</sup> See BARTON & BIBAS, *supra* note 24, at 132.

<sup>100</sup> *Id.*

<sup>101</sup> See *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN. STATE L. REV. 41, 92 (2018).

<sup>105</sup> *Id.* at 93. Before being acquired by LexisNexis, Lex Machina began as a public interest project at Stanford University. *Id.*

<sup>106</sup> See *How It Works*, LEX MACHINA, <https://lexmachina.com/what-we-do/how-it-works/> (last visited Mar. 28, 2020).

<sup>107</sup> *Quick Tools*, LEX MACHINA, <https://lexmachina.com/legal-analytics-apps/> (last visited Mar. 28, 2020).

<sup>108</sup> See *id.* At the time of writing, Lex Machina hosted nine different applications for various aspects of litigation and other legal decision-making: Damages Explorer, Parties Comparator, Courts and Judges Comparator, Law Firms Comparator, Attorney Team Analyzer, Early Case Assessor, Motion Kickstarter, Patent Portfolio Analyzer, and Product Liability Analyzer. *Id.*

<sup>109</sup> See Osbeck, *supra* note 105, at 94.

<sup>110</sup> See *id.* Previous technology projects have sought to help predict various judges’ voting patterns as well. See, e.g., Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1151–52 (2004). Even in 2004, a machine was able to predict actual Supreme Court outcomes in 75% of cases, while experts were only correct at a rate of 59.1%. *Id.* at 1171.

<sup>111</sup> See Osbeck, *supra* note 105, at 94–96.

from the IBM Watson system,<sup>112</sup> provides legal solutions to users by responding to questions written in ordinary, layperson language.<sup>113</sup> Another legal tool based on IBM Watson is Premonition,<sup>114</sup> which, like Lex Machina, can forecast likely success rates for motions and arguments respective to each judge and case.<sup>115</sup> Within its first twenty-one months of operation, the chatbot DoNotPay (also referred to as “the world’s first robot lawyer” by its creator) contested and won 160,000 parking tickets across New York and London.<sup>116</sup> These are some of the many different legal products that exist today that ultimately show how many functions of a lawsuit can be assisted or outright replaced by AI.<sup>117</sup>

### C. The Effect of AI on the Judiciary

AI has already been used to a small degree in judicial determinations. In *State v. Loomis*, a court was faced with determining whether a district court’s use of its Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)<sup>118</sup> risk assessment tool to help with sentencing violated a defendant’s due process rights.<sup>119</sup> COMPAS is a program used to project a defendant’s odds of crime recidivism by comparing the defendant’s criminal history to the history of similar offenders.<sup>120</sup> The defendant in *Loomis* had a “high risk of recidivism” according to the COMPAS reports, which was used as one of several “factors in ruling out probation” as an appropriate sentence for the defendant’s crime.<sup>121</sup> The defendant raised several arguments against the reports being used in the sentencing determination, a noteworthy one being that he was unable to review and challenge the information used in COMPAS’s algorithm.<sup>122</sup> The court ultimately permitted the use of the program with the reservation that COMPAS risk scores are not to be used as a determinative factor in setting the severity of the sentence, nor may they be used as a determinative factor in a decision regarding whether a defendant can be safely and effectively supervised while in the community.<sup>123</sup> The

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<sup>112</sup> See *id.*, at 95. IBM Watson is a program that even bested trivia veterans on Jeopardy!; IBM Watson was developed to understand and learn from questions akin to human reasoning. See Jennifer Emens-Butler, *President’s Column: Thinking About the Future*, 41VT. BAR J. 5, 6 (2016).

<sup>113</sup> See Osbeck, *supra* note 105, at 95.

<sup>114</sup> *Id.* at 94.

<sup>115</sup> See *Legal Analytics*, PREMONITION, [https://www.premonition.ai/legal\\_analytics/](https://www.premonition.ai/legal_analytics/) (last visited Mar. 30, 2020).

<sup>116</sup> Samuel Gibbs, *Chatbot Lawyer Overtakes 160,000 Parking Tickets in London and New York*, GUARDIAN (June 28, 2016, 6:07 AM), <https://www.theguardian.com/technology/2016/jun/28/chatbot-ai-lawyer-donotpay-parking-tickets-london-new-york>.

<sup>117</sup> Some scholars suggest that “in the near term, however, AI will probably only be used to augment human decision-making rather than acting truly autonomously.” Ivey, *supra* note 92, at 117.

<sup>118</sup> *State v. Loomis*, 881 N.W.2d 749, 753 n.10 (Wis. 2016).

<sup>119</sup> *Id.* at 753 (Wis. 2016).

<sup>120</sup> *Id.* at 754.

<sup>121</sup> *Id.* at 755.

<sup>122</sup> See *id.* at 761.

<sup>123</sup> See *id.* at 769.

*Loomis* decision has been a point of interest for legal scholars analyzing AI's increased prevalence in the law and potential role in the judiciary.<sup>124</sup>

AI has had an even larger impact in foreign judiciaries. In 2017, China released its plan to increase AI usage across the country.<sup>125</sup> AI has made its way into various sectors of Chinese society,<sup>126</sup> including the Chinese judiciary.<sup>127</sup> The city of Hangzhou has implemented its own “cyber-courts” (that have since expanded to other regions in China) where litigants can submit documents and have their case screened by an AI judge before the determination is sent to a human judge for final approval.<sup>128</sup> From March 2019 until December 2019, Chinese AI courts handled “three million legal cases or other judicial procedures.”<sup>129</sup> In addition, “robot guides are positioned in courts and prosecutors’ offices. The robot guides are capable of having simple conversations with litigants to help them file complaints and to provide procedural assistance.”<sup>130</sup> China is not the only country implementing AI judging—Estonia, for example, is also developing a “robot judge” designed to adjudicate small claims of \$8,000 or less.<sup>131</sup>

AI is beginning to instill its roots into the American court system.<sup>132</sup> For example, the Superior Court of Los Angeles County has implemented an AI system, Gina the Avatar, to help laypeople handle their traffic citations.<sup>133</sup> Gina is not a deep-learning AI system<sup>134</sup> but, instead, is “programmed to work down predefined paths.”<sup>135</sup> This shows a simple form of AI implementation, but it is only a start. The American judiciary has also adapted to the backdrop of the COVID-19 pandemic by

<sup>124</sup> See Han-Wei Liu, Ching-Fu Lin & Yu-Jie Chen, *Beyond State v. Loomis: Artificial Intelligence, Government Algorithmization and Accountability*, 27 INT'L J.L. & INFO. TECH. 122 (2019).

<sup>125</sup> For an English-translated version of the plan, see FOUND. FOR L. & INT'L AFFS., NOTICE OF THE STATE COUNCIL ISSUING THE NEW GENERATION OF ARTIFICIAL INTELLIGENCE DEVELOPMENT PLAN (Flora Sapio, Weiming Chen & Adrian Lo, trans., 2017), <https://flia.org/wp-content/uploads/2017/07/A-New-Generation-of-Artificial-Intelligence-Development-Plan-1.pdf>.

<sup>126</sup> See Fabian Westerheide, *China – The First Artificial Intelligence Superpower*, FORBES (Jan. 14, 2020, 2:55 AM), <https://www.forbes.com/sites/cognitiveworld/2020/01/14/china-artificial-intelligence-superpower/#27bd37432f05>.

<sup>127</sup> See Tom Fish, *AI Shock: China Unveils ‘Cyber Court’ Complete with AI Judges and Verdicts via Chat App*, EXPRESS (Dec. 6, 2019, 4:20 PM), <https://www.express.co.uk/news/science/1214019/ai-china-cyber-court-artificial-intelligence-judges-verdicts-chat-app>.

<sup>128</sup> *China’s Pioneering Cyber-Court System is the Way of the Future*, TELECOM REV. ASIA PAC. (Dec. 9, 2019), <https://www.telecomreviewasia.com/index.php/news/technology-news/1804-china-s-pioneering-cyber-court-system-is-the-way-of-the-future>.

<sup>129</sup> Fish, *supra* note 127.

<sup>130</sup> Jinting Deng, *Should the Common Law System Welcome Artificial Intelligence: A Case Study of China’s Same-Type Case Reference System*, 3 GEO. L. TECH. REV. 223, 227 (2019).

<sup>131</sup> Eric Niiler, *Can AI Be a Fair Judge in Court? Estonia Thinks So*, WIRED (Mar. 25, 2019, 7:00 AM), <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/>; David Cowan, *Estonia: A Robotically Transformative Nation*, ROBOTICS L.J. (July 26, 2019), <https://roboticslawjournal.com/global/estonia-a-robotically-transformative-nation-28728942>.

<sup>132</sup> See Stephanie Condon, *AI in the Court: Are Robot Judges Next?*, ZDNET (Jan. 22, 2020), <https://www.zdnet.com/article/ai-in-the-court-are-robot-judges-next/>.

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* notes 89–93 discussion.

<sup>135</sup> Condon, *supra* note 132.

implementing nontraditional means of remotely interacting with the courts through technology.<sup>136</sup> But, as is natural with adapting to new technologies, the COVID-19 technology transition was not necessarily seamless.<sup>137</sup> Some judiciary workers have looked at this “temporary” transition as a prelude to a larger shift within the philosophy of the judiciary toward technology.<sup>138</sup> Although likely only with base-level AI initially, the American judiciary seems to be moving in a direction that is much more likely to embrace AI and other technologies post-COVID-19 than it would have pre-COVID-19.<sup>139</sup> In fact, over the last several years various American state legislatures have proposed and enacted legislation pertaining to the ever-increasing use of AI.<sup>140</sup> Some bullish scholars even predict that American “[j]udges and their courts will become less necessary. . . . Some judges may remain in office to rule on algorithm cases not brought to a decision suitable to both sides, and in cases where entirely new issues are being presented.”<sup>141</sup>

These innovations, both inside and outside the judiciary, have transformed the legal industry.<sup>142</sup> AI and technology have already morphed extremely burdensome tasks into simple exercises and greatly increased levels of convenience for other matters.<sup>143</sup> Although these innovations have made some strides to help PSLs,<sup>144</sup> they have primarily targeted lowering costs for the larger and wealthier

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<sup>136</sup> *Courts Deliver Justice Virtually Amid Coronavirus Outbreak*, U.S. CTS. (Apr. 8, 2020), <https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak#:~:text=Federal%20circuit%2C%20district%2C%20and%20bankruptcy,sentencings%2C%20and%20other%20procedures%20remotely>.

<sup>137</sup> *See, e.g.*, Aaron Holmes, *Courts and Government Meetings Have Fallen into Chaos After Moving Hearings to Zoom and Getting Swarmed with Nudity and Offensive Remarks*, INSIDER (Apr. 18, 2020, 8:42 AM), <https://www.businessinsider.com/zoom-courts-governments-struggle-to-adapt-video-tools-hearings-public-2020-4>.

<sup>138</sup> *See Zack Quaintance, Will COVID-19 Cause Long-Term Tech Changes for Courts?*, GOV'T TECH. (May 29, 2020), <https://www.govtech.com/public-safety/Will-COVID-19-Cause-Long-Term-Tech-Changes-for-Courts.html> (“We’re seeing benefits that may be courtroom-related and non-courtroom-related. There’s a lot of activity that goes on before a case gets into a courtroom, and a lot of that has been handled virtually, and we’re finding it very efficient and very effective.”).

<sup>139</sup> *See id.*

<sup>140</sup> *See Legislation Related to Artificial Intelligence*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 15, 2021), <https://www.ncsl.org/research/telecommunications-and-information-technology/2020-legislation-related-to-artificial-intelligence.aspx> (collecting legislative records).

<sup>141</sup> Daniel Ben-Ari, Yael Frish, Adam Lazovski, Uriel Eldan & Dov Greenbaum, “*Danger, Will Robinson?*” *Artificial Intelligence in the Practice of Law: An Analysis and Proof of Concept Experiment*, 23 RICH. J.L. & TECH. 3, 57-59 (2017).

<sup>142</sup> The legal industry is not the only nontechnical field to experience this kind of change from AI; AI is beginning to fill important roles in various other fields that previously were solely reserved to humans. For example, “robo advisors” have been created to help financial consumers decide where to invest their money. *See Tom Baker & Benedict Dellaert, Regulating Robo Advice Across the Financial Services Industry*, 103 IOWA L. REV. 713, 714, 719 (2018). Also, during the second quarter of 2019, AI startup companies in the medical field raised \$864 million for future integration into the realm of health services. *See DRS. CO., THE ALGORITHM WILL SEE YOU NOW: HOW AI’S HEALTHCARE POTENTIAL OUTWEIGHS ITS RISK 1* (2020), [https://www.thedoctors.com/siteassets/pdfs/12043\\_ai\\_whitepaper\\_nomarks\\_f.pdf](https://www.thedoctors.com/siteassets/pdfs/12043_ai_whitepaper_nomarks_f.pdf).

<sup>143</sup> *See, e.g.*, Condon, *supra* note 132 (describing the use of AI to make handling traffic citations more convenient for laypeople).

<sup>144</sup> *See, e.g.*, *supra* text accompanying notes 104-109.

corporate sector of law.<sup>145</sup> However, the same innovations that legal practitioners have been employing in their practice could seamlessly carry over to the judicial branch with similarly bountiful effects. By implementing AI innovations into the judicial branch's handling of PSLs, AI could alleviate the stress of uninformed PSLs while preserving judicial fairness in proceedings.<sup>146</sup>

#### IV. IMPLEMENTING ARTIFICIAL INTELLIGENCE INTO THE JUDICIARY

Benjamin H. Barton and Stephanos Bibas compared the issues of PSLs to the plights eBay faced almost two decades ago.<sup>147</sup> In 2002, eBay experienced approximately forty million disputes with their shipments.<sup>148</sup> Instead of hiring enough manpower to tackle all of those disputes (which would only need to be increased as time went on), the company developed their own online dispute resolution (ODR) system.<sup>149</sup> The team designing the system initially analyzed common issues and solutions with claims<sup>150</sup> and eventually programmed algorithms that could suggest solutions based on information customers inputted.<sup>151</sup> The system went on to handle up to sixty million disputes per year, with only ten percent requiring any human interaction whatsoever.<sup>152</sup> Throughout this change, “[c]ustomers expressed high rates of satisfaction with the process,” even though they were interacting with an AI system instead of an actual human.<sup>153</sup>

eBay's customer service dilemma is a parallel allegory to the modern legal industry.<sup>154</sup> Similar innovations are necessary to solve the issues with PSLs and judicial fairness that were discussed in Part II. If court systems can integrate technology and AI to address their underlying systematic problems, perhaps society will see increased levels of fairness for PSLs.

The innovations by AI explained in Part III can address the high number of PSLs and judicial hesitancy towards helping PSLs, as discussed in Part II. AI, not being bound by human resource constraints, could also serve as a substitute for the lack of a right to counsel for civil litigants, as discussed in Part I. Section IV.A will discuss what publicly available AI would look like in the judiciary. Lastly, Section IV.B will address common objections that may be raised opposing the implementation of AI into the judiciary.

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<sup>145</sup> See Henderson, *supra* note 76, at 408 (“[O]rganizational [wealthy] clients account for three-fourths of the legal services market.”).

<sup>146</sup> See *infra* Part IV.

<sup>147</sup> See BARTON & BIBAS, *supra* note 24, at 110–11.

<sup>148</sup> See *id.* at 111.

<sup>149</sup> *Id.*

<sup>150</sup> See *id.* at 112.

<sup>151</sup> See *id.* at 113–14.

<sup>152</sup> *Id.* at 113.

<sup>153</sup> See *id.*

<sup>154</sup> See discussion *supra* Part III.

### A. How Pro Se AI in the Judiciary Would Look

The problems presented in Part II can be drastically remedied by the judicial implementation of AI. As a preliminary matter, the answer to the concerns raised in Part II is not as simple as adding more lawyers. Lawyers produce high costs, create delays, and add additional complexities to cases that may not even require much expertise.<sup>155</sup> Although lawyers have abilities that are desired at many points throughout the span of a lawsuit (advocacy in particular), a study shows that lawyers in noncomplex civil cases did not drastically outperform PSLs in achieving positive court outcomes.<sup>156</sup> Civil cases also have lower stakes than criminal cases.<sup>157</sup> A litigant may think that an expensive lawyer that is not reasonably affordable may be worth the cost in a criminal case where a guilty verdict could have exponential life-changing consequences. However, this same litigant may think that an expensive lawyer is not worth the cost in a civil case because the prospect of losing or gaining money damages is likely less important to someone than the prospect of being imprisoned in a criminal case—at the end of the day, a lower number in one’s bank account is less painful than forty years in jail. Even with lower stakes, the underlying concern in civil cases is the fact that many PSLs have no expendable money to obtain a lawyer. That being said, even though a lawyer is not required for a litigant’s success in a lawsuit, many may find comfort and increased success by pursuing their claim represented by counsel. However, a lawyer may not be needed with AI.

As discussed in Part III, AI has already revolutionized the way many attorneys practice today.<sup>158</sup> These resources have been helpful to practitioners but are generally inaccessible to PSLs outside of select pro bono initiatives.<sup>159</sup> “In preparation for litigation, intelligent search systems can now outperform junior lawyers and paralegals in reviewing large sets of documents and selecting the most relevant [documents for discovery]. . . .”<sup>160</sup> In addition, AI’s ability to analyze large data samples and discern complex patterns gives it a level of accuracy that “for many tasks, can surpass the abilities of human decisionmakers.”<sup>161</sup> Overall, AI has proven that it can perform several lawyer activities more quickly and more thoroughly than an actual lawyer.

Bringing all these concepts and uses of AI together, courts should ideally develop or contract out one central AI system that integrates the systems discussed in Section III.B, such as judicial predictions, assistance with discovery, and assistance with document drafting. In addition, the increased reliance on technology by the judiciary, as discussed in Section III.C, makes such a system’s

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<sup>155</sup> BARTON & BIBAS, *supra* note 24, at 100.

<sup>156</sup> *See id.* at 106.

<sup>157</sup> *See id.* at 104.

<sup>158</sup> *See supra* Part III.

<sup>159</sup> *See supra* text accompanying notes 105–111, 144–145.

<sup>160</sup> SUSSKIND & SUSSKIND, *supra* note 21, at 69.

<sup>161</sup> Cary Coglianese & David Lehr, *Transparency and Algorithmic Governance*, 71 ADMIN. L. REV. 1, 16 (2019).

implementation more likely. The AI software, in theory, would be available to PSLs in person at the courthouse and potentially over the internet if the software can remain secure. Practically speaking, most lower court cases are not grappling with nuanced legal questions that afford judges a great deal of discretion in determining what the law is.<sup>162</sup> The procedural hurdles, such as filing a motion, are what seem to ail PSLs the most. AI assistance with these issues alone would substantially alleviate judicial involvement in proceedings. In addition, the AI system could provide PSLs tips for drafting their motions based on past judicial determinations.<sup>163</sup> Such a system could also give litigants projections of their odds of succeeding in the litigation so PSLs can evaluate up front if they have viable claims before investing their time into litigation.<sup>164</sup> Such a system would also continue to develop based on other user data and be able to continually improve over time. These are all elements of existing AI software systems currently in use, as discussed previously, and making these features available to PSLs would significantly increase access to justice to the common person in civil proceedings.

### *B. Addressing Artificial Intelligence Concerns*

There are five concerns this Article addresses related to the implementation of AI into the judiciary. First, is this even legal?<sup>165</sup> Some states have declared that electronic legal service providers were committing the unauthorized practice of law.<sup>166</sup> The unauthorized practice of law has slightly different definitions depending on respective state law;<sup>167</sup> however, the general crime requires one to render legal services without being properly licensed in the jurisdiction in which they performed those services.<sup>168</sup> Although the question of whether AI is engaging in the unauthorized practice of law is still a relatively novel one, it seems as though courts are becoming increasingly receptive to alternative solutions to legal problems, even if those solutions do not involve an actual lawyer.<sup>169</sup> Regardless, if a state wishes to

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<sup>162</sup> See Charles Gardner Geyh, *Judicial Selection and the Search for Middle Ground*, 67 DEPAUL L. REV. 333, 347 (2018) (“[Judges] are foot soldiers constrained by the precedent of the U.S. Supreme Court itself.”).

<sup>163</sup> See *supra* note 95 discussion.

<sup>164</sup> See *supra* text accompanying note 100.

<sup>165</sup> See generally Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 HARV. J.L. & TECH. 353 (2016) (discussing the adaptations that the law is destined to make around AI).

<sup>166</sup> See, e.g., *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1069 (W.D. Mo. 2011).

<sup>167</sup> See generally Thomas E. Spahn, *Is Your Artificial Intelligence Guilty of the Unauthorized Practice of Law?*, 24 RICH. J.L. & TECH. 1, 2, 7–19 (2018) (comparing various definitions of “unauthorized practice of law”). Compare *Greenspan v. Third Fed. Sav. & Loan Ass’n*, 912 N.E.2d 567, 570 (Ohio 2009), with *Am. Abstract & Title Co. v. Rice*, 186 S.W.3d 705, 708 (Ark. 2004).

<sup>168</sup> See, e.g., *Greenspan*, 912 N.E.2d at 570.

<sup>169</sup> See Spahn, *supra* note 168, at 45 (“As this technological evolution has demonstrated, lawyers often fight rearward actions in attempts to prohibit laymen from using books, software, etc.--contending that such non-human aids constitute the illegal unauthorized practice of law by their creators. But lawyers ultimately lose each fight. It would be safe to presume that the same outcome will occur with artificial intelligence.”) (citations omitted).

adopt such an AI system into its judiciary, the state would likely have to make a preliminary determination that a system like this was legally allowed to function beforehand.

Second, would the monetary cost of creating an AI system for the judiciary be too high to practically create? This likely is the biggest hurdle to make a publicly available AI system a reality. AI is very expensive to develop from scratch;<sup>170</sup> however, this is a cost that would provide a significant value to society. The only alternatives are to (a) leave the current method of handling PSLs in the broken state it is in or (b) spend a drastically large amount of money to hire lawyers to represent civil PSLs. The upfront costs of implementing the AI systems would likely be expensive; however, there is already a tremendous amount of money that is contributed to legal aid on a yearly basis.<sup>171</sup> In addition, if the courts wish to contract with existing AI companies that were discussed earlier,<sup>172</sup> this would eliminate the high upfront infrastructure cost in exchange for a continual payment to these companies.

Third, will these AI systems develop biases that treat various PSLs differently and therefore create a new problem altogether? As discussed previously, there are existing AI systems that factor trends and data into sentencing decisions against parties,<sup>173</sup> and there are several publications that report how disparate impacts negatively shape the way AI perceives particular groups.<sup>174</sup> It is hard to imagine how this would translate to the civil context—perhaps AI that encourages settlement more for some demographics than others. However, potential bias seems to be less of an issue in a civil case where the AI would be advisory to the PSL and created for the benefit of PSLs, as opposed to the examples discussed earlier where the AI was antagonistic to the litigants.

Fourth, would the judiciary willingly adopt the AI system? The use of machine learning algorithms has tended to produce inherent skepticism among legal minds.<sup>175</sup> Judges have tended to believe AI decision making bears an innate risk of erroneous deprivation, stemming from the nuanced and opaque role that technology plays in decision making. For example, in *Houston Federation of Teachers, Local 2415 v. Houston Independent School District*, a Texas district court

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<sup>170</sup> See John Mortensen, *Why is AI so Expensive for Business?*, TECH-EVALUATE, <https://www.techevaluate.com/why-is-ai-so-expensive-for-business/> (last updated Aug. 1, 2021).

<sup>171</sup> See Adiel Kaplan, *More People than Ever Need Legal Aid Services. But the Pandemic Has Hit Legal Aid Funding Hard.*, NBC (Apr. 25, 2021, 6:00 AM), <https://www.nbcnews.com/business/personal-finance/more-people-ever-need-legal-aid-services-pandemic-has-hit-n1264989> (“More than \$2 billion went to legal aid in 2019, from nearly a dozen different kinds of public and private sources.”).

<sup>172</sup> See discussion *supra* Section III.B

<sup>173</sup> See *supra* text accompanying notes 118–123.

<sup>174</sup> See, e.g., Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (“The [artificial intelligence] formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants.”).

<sup>175</sup> See, e.g., Coglianese & Lehr, *supra* note 161, at 14 (“Machine-learning algorithms . . . discern patterns and make predictions in a way that cannot be intuitively understood or explained in the same way as conventional analysis can be.”).

determined that a school’s use of technology to help evaluate teacher performance, which in turn helped determine potential firings, violated the teachers’ due process rights under the Fourteenth Amendment.<sup>176</sup> The court reasoned that “making high stakes employment decisions based on secret algorithms [was] incompatible with minimum due process” under the Fourteenth Amendment.<sup>177</sup> In *K.W. v. Armstrong*, an Idaho district court determined that the use of a Medicaid budget software program using Individualized Budget Calculations (IBC) to calculate assistance for disabled people violated those peoples’ due process rights.<sup>178</sup> The tool was estimated to generate budgets that did not meet the needs of “between 10% and 15% of the participants.”<sup>179</sup> The court ruled that the use of the IBC violated the participants’ due process rights because its calculations were not necessarily reliable and that the IBC needed “substantial” improvements to be a legally viable tool.<sup>180</sup>

Although these cases present legal issues distinct from an AI giving legal advice, the holdings do suggest that courts have a general concern about potential inaccuracies AI may rely on when helping with or completely handling decision making.<sup>181</sup> If PSLs were offered AI legal services, it is not hard to imagine that the AI’s legal assistance would be heavily influential on any decisions the PSL makes throughout their case.

The Court recognizes that computer-assisted review is not a magic, Staples–Easy–Button, solution appropriate for all cases. The technology exists and should be used where appropriate, but it is not a case of machine replacing humans: *it is the process used and the interaction of man and machine that the courts needs [sic] to examine*.<sup>182</sup>

As courts become more knowledgeable and comfortable with AI, it seems likely that judges will sign on to its implementation, especially if it makes their jobs easier and removes their urge to intervene in PSL proceedings.

Lastly, will PSLs actually use such a service? There is a strong possibility that PSLs would be hesitant to use such a system because of the sheer mistrust that people have for AI to perform a job historically performed by humans.<sup>183</sup> Part of this

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<sup>176</sup> *Houston Fed’n of Tchrs. Local 2415 v. Hous. Indep. Sch. Dist.*, 251 F. Supp. 3d 1168, 1171–72, 1179–80 (S.D. Tex. 2017).

<sup>177</sup> *Id.* (“[A]n error as small as one hundredth of a point could spell the difference between a positive or negative EVAAS effectiveness rating, with serious consequences for the affected teacher.”) (citation omitted).

<sup>178</sup> *K.W. v. Armstrong*, 180 F. Supp. 3d 703, 708–09, 717 (D. Idaho 2016).

<sup>179</sup> *Id.* at 714. The calculations had substantial room for error as “just a few points can alter the budget by thousands of dollars.” *Id.* at 717.

<sup>180</sup> *Id.* at 718.

<sup>181</sup> See Ashley Deeks, *The Judicial Demand for Explainable Artificial Intelligence*, 119 COLUM. L. REV. 1829 (2019). But see *Da Silva Moore v. Publicas Groupe*, 287 F.R.D. 182, 191 (S.D.N.Y. 2012) (“While . . . computer-assisted review is not perfect, the Federal Rules of Civil Procedure do not require perfection.”).

<sup>182</sup> *Moore*, 287 F.R.D. at 189 (emphasis added).

<sup>183</sup> See, e.g., *Consumers Failing to Embrace AI Benefits, Says Research*, PEGA (June 4, 2019), <https://www.pegacom/about/news/press-releases/consumers-failing-embrace-ai-benefits-says-research> (“Our

mistrust derives from what scholars refer to as the “Black Box Problem,” which references humans’ inability to understand the processes that AI uses to reach decisions.<sup>184</sup> “Because the algorithms are not directly created by humans, the actual reasoning process used by them may be unknown and unknowable . . . . We know it was adaptive, but may not know the precise pathway taken to reach its current state.”<sup>185</sup> This initial apprehension is common with adoption of any new technologies, and it is inevitable that people will be more receptive to new technologies as time passes on.<sup>186</sup>

## CONCLUSION

Although we may be years away from having artificial intelligence as a substantial part of the American judiciary, the day of its deep integration—as Posner predicted<sup>187</sup>—does not seem too far away. Many courts, both foreign and domestic, are interacting with AI systems more every year. As courts become more comfortable with these systems, it seems natural that the American judiciary will implement its own AI system. This system should become available to PSLs in civil cases because these litigants have very few protections guaranteed by law otherwise. If AI were to be widely accessible for civil litigants, the availability would lead to a substantial growth in access to the courtroom among civil litigants while also alleviating judges from having to play a more active role in proceedings where a PSL is involved. “The use of AI in law will thus be an evolution, not a revolution.”<sup>188</sup>

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study found that only 25 percent of consumers would trust a decision made by an AI system over that of a person regarding their qualification for a bank loan.”).

<sup>184</sup> See Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L. & TECH. 889, 905 (2018).

<sup>185</sup> Manheim & Kaplan, *supra* note 91, at 153–54.

<sup>186</sup> See Guru Mirthinti, *Technology Adoption Curve: 5 Stages of Adoption*, WHATFIX (June 9, 2020), <https://whatfix.com/blog/technology-adoption-curve/>.

<sup>187</sup> See Posner, *supra* note 1, at 1050

<sup>188</sup> Marchant, *supra* note 90, at 21.