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Robots vs. Predators: Can Generative Artificial Intelligence Help to Address the Justice Gap in Consumer Debt Litigation?

Raymond H. Brescia

ROBOTS VS. PREDATORS: CAN GENERATIVE ARTIFICIAL INTELLIGENCE HELP TO ADDRESS THE JUSTICE GAP IN CONSUMER DEBT LITIGATION?

Raymond H. Brescia[*]

With generative artificial intelligence's growing availability in early 2023, many have expressed fears that this technological innovation might relieve humans of the burden of carrying out some repetitive and simple tasks, and possibly cost them their livelihoods. It also raised the specter that this, and related technologies, could end up displacing workers, including lawyers. The initial burst of enthusiasm surrounding the availability of generative artificial intelligence (GenAI) to the public — including from members of the legal profession — was quickly dampened when lawyers began relying on the work product of this technology to aid them in preparing legal documents, with rather unfortunate results. In some instances, lawyers were subject to sanctions by judges for submitting documents with GenAI "hallucinations," where the technology "found" authorities for legal propositions where no such authorities existed, which those lawyers relied upon to their detriment. Given these and other experiences with GenAI demonstrating an inability to satisfy even the most basic standard of care that lawyers must meet when serving clients, the initial excitement surrounding this technology receded. Yet lawyers and technologists have continued to explore ways to harness GenAI to make the work of the legal profession more efficient and effective, while ensuring that lawyers are able to uphold their ethical obligations, even when they deploy new technologies to attempt to address their clients' legal needs. While GenAI and other related technologies, like machine learning, might play some future role in displacing some, if not many, of the functions of the legal profession, the introduction of these new technologies might serve to address needs where the profession is currently failing. That is to say, GenAI does

[*] The author is the Associate Dean for Research and Intellectual Life, the Hon. Harold R. Tyler Chair in Law & Technology, and Professor of Law at Albany Law School. No artificially intelligent beings were harmed — or utilized — in the drafting of this Article.

not run the risk of displacing lawyers where few lawyers currently serve clients in need. What is more, in at least some areas where lawyers are failing to meet the legal needs of those in need, those needs call for interventions that GenAI is quite well-suited to execute: highly repetitive tasks, at scale, involving problems of relatively low complexity, and possibly even relatively low stakes. One such area is consumer debt. In the United States, millions of Americans of low- and moderate-income are sued for relatively small amounts of money—ranging from $5,000–10,000. Many of the plaintiffs in these cases are "debt buyers": entities that have paid a very small percentage of the face value of debt for the right to try to collect it and use the courts as their primary vehicle for doing so. The overwhelming majority of those creditor-plaintiffs are represented by counsel, whereas only a tiny fraction of the debtor-defendants have legal representation. The nature of these cases lends itself to the use of technology-driven interventions, fueled by GenAI, to provide some legal guidance, support, and perhaps even the preparation of formal pleadings, in order to assist debtors to defend themselves in court. This Article explores the theoretical, technological, ethical, and practical challenges associated with creating a GenAI-powered intervention that might help address the significant asymmetry of legal representation and assistance in consumer debt cases. Through such an exploration, it will identify the opportunities and risks of developing such tools to help close the justice gap more broadly, in this and other areas of law where the nature of the dispute might lend itself to this type of intervention. It will also identify areas of further research and inquiry as the legal profession strives to not just adapt to, but also harness, the introduction of GenAI into the practice of law in ways that are effective, while also ensuring it will serve the broader goal of the profession, which should be to expand access to justice and do so in ethical, equitable, and meaningful ways.

INTRODUCTION

Across the United States, millions of American families face their legal problems without legal assistance.[1] Over 90% of low-income Americans and as much as 50% of middle-income Americans are unable to secure sufficient legal guidance and representation for legal needs[2] like eviction, considering filing for bankruptcy, injury in the workplace, unpaid wages, and being sued for a debt they did not know they owed and may not believe they have to pay.[3] In the midst of this access-to-justice crisis in many areas of law and for many populations, law offices across the United States are exploring ways to incorporate new technologies — the most important of which is generative artificial intelligence (GenAI) — to determine if such technologies might make the practice of law more efficient and effective. This Article explores the challenges — theoretical, technological, ethical, and practical — one might face in any effort to create a GenAI-powered intervention to overcome the significant asymmetry of legal representation and assistance in a legal setting that disproportionately impacts low-and-moderate-income Americans: consumer debt cases.[4] This exploration identifies the risks and opportunities one faces when seeking to develop such tools to address the justice gap in this and other similar areas of law where the nature of the dispute might lend itself to this type of intervention. It will also identify areas of further research and inquiry as the legal profession strives to adapt to and harness the introduction of GenAI into the practice of law in effective ways, while ensuring it serves the broader goal of the profession: to expand access to justice in ethical, equitable, and meaningful ways. With these goals in mind, this Article proceeds as follows: Part I describes the access-to-justice crisis — generally the problem of consumer debt in the U.S.; Part II examines the way practice technology has impacted the practice of law for decades and the ways in which GenAI innovations are beginning to impact the practice of law today; Part III outlines the opportunities and risks associated with the widespread adoption of GenAI to

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1. *See generally* LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2022) [hereinafter JUSTICE GAP REPORT], https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1 [https://perma.cc/EBN8-RKZ9] (documenting the unmet legal needs of millions of Americans).

2. *See id*. at 8 (for low-income Americans); Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1228 (2014) (describing unmet legal needs of middle-income Americans) (citation omitted); *see also* Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013).

3. *See* JUSTICE GAP REPORT, *supra* note 1, at 33–35.

4. For a study showing the disproportionate impact of the access to justice crisis on low-income people, see Paul Prettitore, *Do the Poor Suffer Disproportionately from Legal Problems*?, BROOKINGS (Mar. 23, 2022), https://www.brookings.edu/articles/do-the-poor-suffer-disproportionately-from-legal-problems/ [https://perma.cc/CR4M-7QFG].

the practice of law; and Part IV discusses what creating a digital continuum of legal care in the consumer debt context might look like, and the potential barriers to doing so.

I. THE ACCESS-TO-JUSTICE CRISIS AND THE PROBLEM OF CONSUMER DEBT

A. The Justice Gap, the Reasons for Its Persistence, and Some Initial Thoughts on the Potential Role of Technology in Addressing It

The scale and scope of the access-to-justice crisis in the United States is well-established, even if its precise contours and the reasons for its stubborn persistence are not exactly known. What we do know about the causes of the crisis goes beyond the high cost of legal services generally. In this Section, this Article will first describe the scope of the access-to-justice crisis, often referred to as the "justice gap." Second, it will provide a review of some of the literature on the reasons for this gap. Finally, it will offer some initial reflections on the ways emerging technologies might help to address some of the causes of the crisis.

1. The Scope of the Crisis

The access-to-justice crisis — the fact that millions of Americans face their legal problems without a lawyer — has profound implications for the rule of law, economic justice, racial and gender equality, and impacted individuals' personal well-being and mental health.[5] A recent report from the Legal Services Corporation (LSC) documents the current state of this crisis.[6] According to the LSC:

> [N]early three-quarters (74%) of low-income households have experienced at least one civil legal problem in the past year. Additionally, 38% of low-income Americans have personally experienced a civil legal problem that substantially impacted their lives in some way. Even for these "substantial" problems, they only sought legal help 25% of the time.[7]

"Over the course of a year, low-income individuals approached LSC-funded legal aid organizations for help with an estimated 1.9 million civil legal problems" that were eligible for assistance.[8] "They [] receive[d] some legal help for 51% of these problems, but even then, they [] only receive[d]

5. For a book-length treatment of the contours and impacts of the access-to-justice crisis, see generally DEBORAH L. RHODE, ACCESS TO JUSTICE (2005).

6. *See* JUSTICE GAP REPORT, *supra* note 1, at 18.

7. JUSTICE GAP REPORT, *supra* note 1, at 18.

8. JUSTICE GAP REPORT, *supra* note 1, at 19.

enough help to resolve their problem about [] 56% of the time."[9] In 2022, the LSC found that "[l]ow-income Americans did not receive any [] or enough legal help for 92% of the problems that substantially impacted their lives in the past year."[10] It also noted that "LSC-funded organizations are unable to provide any or enough legal help for 71% of the civil legal problems brought to them," equivalent to an estimated 1.4 million problems over the course of a year.[11]

When individuals seek assistance from LSC-funded organizations surveyed by the organization, most of the time they receive less-than-full representation. Indeed, according to the LSC's 2022 study, only 21% of those who receive assistance from the LSC benefit from what are referred to as "extended services."[12] A larger percentage — 28% — receive "general information and self-help resources,"[13] and a narrow majority, 51%, "receive brief services and advice."[14]

For our purposes, one additional data point is particularly salient. The survey respondents were asked to identify the most common legal problems they faced; the most prevalent legal problems, which a full 50% of respondents identified as having, were consumer law issues.[15] Other common categories included: health care — 39%; income maintenance — 34%; and housing — 33%.[16]

2. Reasons for the Justice Gap

The LSC report also investigated the reasons why otherwise eligible potential LSC clients do not seek out legal assistance. Forty six percent of respondents to the survey who did not seek help for one or more of their legal problems cited "concerns about cost" as one of their reasons for not doing

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9. JUSTICE GAP REPORT, *supra* note 1, at 19.

10. JUSTICE GAP REPORT, *supra* note 1, at 19.

11. JUSTICE GAP REPORT, *supra* note 1, at 19.

12. JUSTICE GAP REPORT, *supra* note 1, at 72. The report describes the following interventions as examples of this level of service: "Preparing complex legal documents (e.g., advance directives, appeals for benefits, real estate documents)" and "[r]epresenting a client in court, in administrative proceedings, or in interactions with third parties." JUSTICE GAP REPORT, *supra* note 1, at 72.

13. JUSTICE GAP REPORT, *supra* note 1, at 72 The report provides the following as examples of this level of service: "[g]iving guidance on how to complete legal forms/documents" and "[e]xplaining the requirements on how to file for custody or apply for benefits." JUSTICE GAP REPORT, *supra* note 1, at 72.

14. JUSTICE GAP REPORT, *supra* note 1, at 72 Examples of this type of services include: [p]roviding advice about how to handle a custody hearing" and "[w]riting a demand letter to a landlord to repair a rented home." JUSTICE GAP REPORT, *supra* note 1, at 72.

15. JUSTICE GAP REPORT, *supra* note 1, at 33.

16. JUSTICE GAP REPORT, *supra* note 1, at 33.

so.[17] In addition, 53% of low-income respondents did not believe they could afford a lawyer should they have a need for one.[18] More in-depth research helps shed greater light on both the scope of the justice gap and some reasons why it is so great.

In a study published in 2014, access-to-justice researcher Rebecca Sandefur surveyed the residents of a mid-sized midwestern U.S. city "typical of many U.S. communities in terms of its size and socioeconomic and demographic composition" to gauge the civil legal needs of its residents and identify national trends.[19] For these reasons, the study argued that the city's residents are "expected to represent typical experiences in the U.S. context."[20] According to the study, 66% of respondents reported having one or more civil legal problem in the previous 18 months.[21] In terms of the types of problems respondents reported facing, the most common "involved their livelihood and financial stability . . . ."[22] Indeed, 24% of respondents said that they experienced at least one problem dealing with employment, like unlawful termination or lost wages; 21% reported financial issues like disputed bills; and the largest group, 25%, reported having at least one problem involving consumer debt, like being unable to pay a credit card bill, student loans, or utility bills.[23] After assessing the total number of civil legal problems the respondents reported, Sandefur considered what these findings likely represented for the nation as a whole: "In a nation of over 316 million people, these rates represent a tremendous amount of civil justice activity — tens of millions of civil justice situations."[24]

What is more, Sandefur's study, not surprisingly, also found that lower-income and BIPOC communities faced more civil legal problems than wealthier communities and those communities that were primarily Caucasian: "[P]oor people were significantly more likely to report civil justice situations than people in high- or middle-income households, and African Americans and Hispanics were more likely to report civil justice situations than were Whites."[25]

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17. JUSTICE GAP REPORT, *supra* note 1, at 18.

18. JUSTICE GAP REPORT, *supra* note 1, at 18.

19. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 4 (2014).

20. *Id.*

21. *Id.* at 7.

22. *Id.*

23. *Id.* Other categories that respondents reported included "at least one situation involving insurance (e.g., disputes about payments and claims, confusion about policies and terms)" (22%); "government benefits such as social security, Medicare or food stamps" (16%); "rental housing, such as eviction or problems with housing conditions" (18%). *Id.*

24. *Id.*

25. *Id.* at 8.

While these findings are likely unsurprising, Sandefur also investigated whether the respondents turned to lawyers to help solve their civil legal problems, and why few did. According to Sandefur: "Americans respond to their civil justice situations in a wide variety of ways, but this variety masks a powerful consistency: rarely do they turn to lawyers or courts for assistance."[26] Indeed, the most common "source of assistance" Sandefur found "for people facing civil justice situations is actually themselves."[27] In other words, "the most common way in which people report handling civil justice situations is by taking some action on their own without any assistance from a third party."[28] The second-most commonly reported strategy that respondents used when dealing with civil justice problems "involved turning to their immediate social network": according to the study, 23% of such situations were addressed "with the help of family or friends, either as the sole source of assistance (16%) or in conjunction with a third party advisor or representative of some kind (an additional 7%)."[29] The report continues: "[j]ust over a fifth (22%) of situations were handled with the assistance of a third party who was not a member of people's social network."[30] At the same time, among those who only relied on their social network for assistance, in 46% of those instances, they took that action because they did not see the need to do so because "either the problem had resolved or they expected it to resolve without getting advice, or they simply felt that they did not need advice."[31] In addition, "[i]n 9% of instances where people did not or were not planning to seek advice," it was because "they did not know where to go or how to do so."[32]

Only 17% of respondents who did not turn to third parties for assistance identified cost as playing a role in that decision.[33] Sandefur also found that an additional reason many of the respondents did not seek to address their legal problems through lawyers or the courts was they did not understand the problems to be legal in nature.[34] According to the study, "[o]verall, people went to lawyers for help or considered doing so with 16% of the situations" identified as having occurred over their lifetime.[35] At the same time, "they were significantly more likely to have used or considered using lawyers for

26. *Id.* at 11.
27. *Id.*
28. *Id.* The report showed that 46% of respondents offered this explanation of how they tended to deal with the civil justice system. *See id.*
29. *Id.*
30. *Id.*
31. *Id.* at 12.
32. *Id.* at 13.
33. *Id.*
34. *Id.*
35. *Id.* at 14.

the situations that they believed to be 'legal' (39% of instances) than for those they did not (14% of instances)."[36]

In sum, Sandefur's study suggests that the crisis of access to justice in America is a product of several forces, with only one of them being the relatively high cost of legal services, and others being that individuals and families may not realize they have a legal problem in the first place or that a lawyer might help them resolve it, even if they do understand it to be legal.[37] Certainly, cost is a factor, but it is just one factor in the failure of the legal community to meet the legal needs of many Americans, mostly those on the lower end of the income scale and those from communities of color.[38] For this reason, the justice gap has obvious economic, racial, and ethnic overtones. As a result, the need to address this crisis is even more acute if one believes that lawyers should contribute to a more just, less economically stratified, and more fair multi-racial democracy.[39]

3. The Ways in Which Emerging Technologies Could Help Close the Justice Gap

Any efforts to address the justice gap in the United States must strive to align solutions to the causes and scope of the problem. The justice gap operates on the practical as well as the substantive level, so a calibrated response to the crisis should help address both the root causes of the problem itself while matching legal interventions to specific legal needs. A massive increase in the provision of a particular type of legal service in a particular area of need may help to address that problem. For example, the right-to-counsel movement in the context of eviction defense, which has been an area of significant legal need for decades, has resulted in a large increase in the delivery of legal services that target tenants who are facing eviction.[40] The fact that cities nationwide are creating programs that provide eviction defense legal services to tens of thousands of tenants represents a meaningful intervention to address the justice gap in this area of desperate need.[41] Similar efforts could be targeted towards substantive areas of significant

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36. *Id.* (footnote omitted).

37. *Id.* at 8–14.

38. On the relationship between race, ethnicity, income, and access to justice, see JUSTICE GAP REPORT, *supra* note 1, at 22–26.

39. For an argument that one of the core responsibilities of the American legal profession is to advance civil rights within a multiracial democracy, see RAYMOND BRESCIA, LAWYER NATION: THE PAST, PRESENT, AND FUTURE OF THE AMERICAN LEGAL PROFESSION 106 (2024).

40. *See generally* Andrew Scherer, *STOP THE VIOLENCE: A Taxonomy of Measures to Abolish Evictions*, 51 FORDHAM URB. L.J. 1329 (2024).

41. On the growing movement supporting a right to counsel in eviction proceedings, see generally Maria Roumiantseva, *A Nationwide Movement: The Right to Counsel for Tenants Facing Eviction Proceedings*, 52 SETON HALL L. REV. 1351, 1351 (2022).

legal need, such as consumer bankruptcy, immigration law, and workplace justice. Targeting services to particular areas where there is such need is just one way to address the justice gap.

Tailoring services to address some of the reasons why many Americans face their legal problems without a lawyer would be another way to address the justice gap. Since one of the main reasons Americans do not access a lawyer to address their legal needs is that they do not know how to get in contact with one, improving ways that information about the provision and availability of legal services is delivered to communities to reduce the *knowledge* gap would be one way to align responses to the reasons why people do not face their legal problems with assistance.[42] There could be a technological solution to this piece of the access-to-justice puzzle. Select courts have created systems for contacting litigants by mailing postcards by "snail mail" to defendants when a case is filed against them.[43] This effort is largely a response to the risk of so-called sewer service: where plaintiff's lawyers submit false documentation that a defendant was properly served in an action, when in reality, no such requirement was followed.[44] Technology could solve this problem: court filings could be scanned for names and mailing addresses and simple notices then sent out automatically to such individuals.[45] Courts could also create an online registry where individuals could submit their name and share an effective means of communicating with them in the event that someone seeks to hale them to court. Another example of a technological solution is a computerized tool that searches legal filings — like the services that scan the legal notices in local publications — for the names and contact information of individuals who might find themselves as defendants in actions and then finds a way to communicate with them.

Another way to align digital interventions with the reasons for the justice gap would be to make "know-your-rights" information readily available so that individuals who receive threatening legal documents could receive

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42. On the history of restrictions on lawyer advertising and their demise, see RENEE KNAKE JEFFERSON, LAW DEMOCRATIZED: A BLUEPRINT FOR SOLVING THE JUSTICE CRISIS 39–43 (2024).

43. *See, e.g.*, THE ASS'N OF THE BAR OF THE CITY OF N.Y. HOUS. CT. PUB. SERV. PROJECTS COMM. & THE CIV. CT. OF THE CITY OF N.Y., A TENANT'S GUIDE TO THE NEW YORK CITY HOUSING COURT 2, 5 (2006), https://www.nycbar.org/pdf/report/tenantsguide.pdf [https://perma.cc/YP2U-ZX4A] (describing New York City Housing Court practice of mailing postcards to tenants against whom an eviction case has been filed).

44. *See* Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813, 813–14 (2018). *See generally id.* (describing sewer service and potential technological solutions to overcome it).

45. For a description of other technology-based solutions to the problem of inappropriate service, see *id.* at 854–60.

guidance about their legal rights and obligations that help them understand, if they do not already, that the problem they are facing is a legal one.[46] Many non-profits and legal services providers have made the transition to digital and have posted carefully curated legal guidance online, the type of information they might have made available in analog, hard copy form to individuals seeking assistance in the past.[47] Groups are also currently exploring the use of so-called chat bots[48] that can serve as a digital assistant to individuals in search of legal guidance around a problem that might require a legal solution.[49] These chatbots are being deployed in fields such as tenants' rights to provide legal information to individuals contacting non-profit organizations to help them understand their rights and offer solutions to address their legal problems.[50] The intervention can also serve a triaging function: providing limited guidance where such guidance is sufficient to address a relatively minor problem or issue, while directing individuals with more complex problems that require more intensive and sophisticated interventions to more robust responses, which might include working with a live person on the other end of the line, or referral to a full-service attorney.[51] These bots are able to relieve staff from having to answer many of the same questions repeatedly, while also directing individuals who need more intensive services to those who can provide it.[52]

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46. For an example of a community-based organization providing these sort of know-your-rights guides, see *Know Your Rights*, MAKE THE RD. N.Y., https://maketheroadny.org/know-your-rights/ [https://perma.cc/6KML-STDB] (last visited Aug. 24, 2024).

47. Together with my co-authors, I recount efforts to digitize information for homeowners facing foreclosure that a legal services office produced in a lengthy manual that it would mail via postal service each time an individual needing guidance in this area contacted the office. Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 601–05 (2015).

48. For a description of chatbots, see IBM, *What Is a Chatbot?*, https://www.ibm.com/topics/chatbots [https://perma.cc/KH3Z-R9YF] (last visited Mar. 14, 2024).

49. *See infra* Section II.A.

50. *See, e.g.*, *Rentervention Renny Virtual Assistant*, L. CTR. FOR BETTER HOUS., https://rentervention.com/ [https://perma.cc/W39R-CSEG] (last visited, Aug. 24, 2024).

51. For a description of triage in legal services practice, see Paul R. Tremblay, *Acting "a Very Moral Type of God": Triage Among Poor Clients,* 67 FORDHAM L. REV. 2475, 2475–79 (1999) (discussing triage in nonprofit legal services offices). For a description of a technology-based tool for conducting such triage, see BRESCIA, *supra* note 39, at 171–73 (describing the screening processes of the Houston Volunteer Lawyers Project).

52. One for-profit entity, LegalZoom, has operated to provide a mix of legal information and guidance while also referring potential customers with more complex problems to fully licensed attorneys. Apart from some challenges that it is engaged in the unauthorized practice of law, many of which have not succeeded, it has largely filled a niche in the legal services ecosystem. For a description of how LegalZoom operates, see Raymond H. Brescia, *Uber for*

Finally, since cost is a driver of legal assistance need, making legal services either more affordable, or less expensive to deliver, is another way to align responses to the reasons for the justice gap, and where technology might hold the most promise. Technology can do this in several different ways, and in fact, has been doing this for lawyers for well over a century. Whether it was the introduction of the typewriter in the late 19th century, or technologies such as legal research and document assembly today, legal work has become much more efficient and effective as a result of technology, particularly in the last two decades.[53] Lawyers no longer need to consult a library filled with bound volumes, conduct a search using the Shephard's service for checking the status of legal citations without the aid of a computer,[54] or even communicate with adversaries and clients without texting or using email. There are many technologies that lawyers use every day that make their work easier to do, less expensive to provide, and more effective. While some of these technologies might have been eschewed at first, eventually, they became the standard of care.[55] Indeed, to neglect to use these technologies in a way that harms the client is likely to result in a finding that the lawyer failed to act competently. As explored further in Part II.C, while the unbridled use of new generative artificial intelligence in pleadings and other court documents has resulted in lawyers facing sanctions for their failure to check the output of these technologies, it is also not hard to imagine a day where a lawyer's *failure* to use such technologies may constitute malpractice. We are not there yet, but is such a day that far off?

What the history of the incorporation of technology into the practice of law tells us is that technology can, and most of the time does, make the work of attorneys more efficient and effective. As such, it should lower the cost of legal services for paying clients, and permit non-profit organizations to serve more clients if it is less costly, per client, to handle matters for the communities they serve.[56] Technologies that provide information to prospective clients before those problems metastasize into more complex problems that require a more labor-intensive and sophisticated solution, alert

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Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services, 64 BUFF. L. REV. 745, 760–66 (2016).

53. *See* Christopher A. Suarez, *Disruptive Legal Technology, COVID-19, and Resilience in the Profession*, 72 S.C. L. REV. 393, 400–15 (2020) (describing impact of technology on the practice of law).

54. *Shephard's Citations*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/shepards_citations [https://perma.cc/6KBH-TLWM] (last visited Aug. 24, 2024) (describing the Shephard's citation service).

55. *See infra* Part II.A.

56. For examples of non-profit organizations using technology to address the justice gap, see Sherley E. Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 TENN. L. REV. 347, 357–69 (2019).

individuals that they might have a legal problem, and make the provision of legal services more cost-effective are all examples of ways that technology can address the different reasons why too many Americans face their legal problems without legal assistance. Part I.C will take a closer look at one of the substantive areas of law in which too many Americans face their legal problems without a lawyer: the field of consumer debt. The scope of the problem in this area is vast and the justice gap yawning, and the consequences of a lack of representation are dramatic, even though the legal problem itself is generally fairly straightforward.[57] The significant economic and human consequences of consumer debt, the failure of the legal profession to address needs in this area, and the relatively simple nature of many of the legal problems consumers face make this area ripe for a technological response to the justice gap. Before I explain the present state of consumer debt issues in the United States, the following Part considers the role of technology in the practice of law and whether our devotion to the current model, expensive, "bespoke" legal services,[58] would be our choice if the evolution of technology in this area and the development of the legal profession, had unfolded in a different way.

B. A Rift in the Space-Time Continuum

Imagine if someone had invented global positioning technology before the creation of analog roadmaps: those difficult-to-fold — let alone use — products about which we took tests as young people designed to evaluate our ability to read them. Driving along a lonely stretch of highway or in a neighborhood you had never been in before, and the route was not apparent to the driver or there was no navigator in the passenger seat, you would have to pull over, pull out the map, and try to divine its guidance. The more granular the map and the more specific its object, the less helpful it might be for longer trips. Conversely, maps of large states might not be very useful once the driver needed "last-mile" guidance and more specific, street-by-street instruction. If there was a car accident or construction delays, you might find yourself stuck in traffic for hours. They were bulky to manage, frustrating to use, and did not adapt to real-time information on the ground that could help drivers navigate a whole host of impediments.

The arrival of global positioning software (GPS), available to drivers on dashboard-mounted devices, incorporated into a car's navigational system, or simply installed on a smartphone, has all-but-made the analog roadmap

57. SANDEFUR, *supra* note 19, at 9–10 (describing negative impacts of civil justice problems).

58. RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 29 (2008) (describing the traditional model of legal services as "bespoke").

obsolete. GPS applications can provide detailed guidance, navigate around impediments in real time, reroute drivers when traffic builds up on an otherwise preferred route, and alert drivers to police presence surveilling drivers for speeding and other infractions, through audible commands that drivers can follow without having to pull over or stop to follow. What is more, had GPS been made available prior to the "invention" of the roadmap, no one would have purchased maps since the digital system is so much better and navigating in any other way would seem ludicrous. In fact, it is unlikely that we would even see the so-called invention of the analog map in the first place.[59]

What does such a thought experiment have to offer to the question of the potentially disruptive role of technology as it relates to the traditional functioning of lawyers? Let us assume there will come a point where GenAI will provide a level of legal guidance and assistance that is at least as competent as a lawyer would provide in situations of modest complexity. Imagine a world where a GenAI tool could do something like prepare a tax return; prepare a will or an even simpler document, like a power of attorney; or prepare a pleading in a relatively straightforward case, and do so with virtually no errors, apart from those related to user error. Imagine also that the technology could do these things at a fraction of the cost that a human might charge for the same service, and that the customer could utilize these services from the comfort of their home and at the push of a button. If such a technology existed before the emergence of a cartelized band of individuals who called themselves professionals, one that charged many times more than what it would cost a consumer to use the technology, justified the cost they charged because it was expensive to provide the service, and lobbied for the elimination of the technology-based approach because it undermined the professionals' ability to earn outsized profits on the backs of consumers, it is hard to imagine that such a group would find much support in the community for its practices. What is more, such a group could not thrive in the market unless it was able to secure support from legislators and regulators to prohibit consumers from using technology that threatened the cartel's bottom line. Wealthier consumers may be willing to pay for such higher-priced services because of prestige or because they think such services might offer them a tactical advantage over someone who utilizes more affordable technology-based services. This group of professionals may also have a hard time securing regulatory capture sufficient to crowd out its silicon-based competitors because the consumer voice would resist such efforts and elected

59. For the argument that this type of technology might actually harm cognitive functions, see Angela Lashbrook, *Google Maps Is Melting Your Brain*, MEDIUM (Oct. 29, 2020), https://debugger.medium.com/google-maps-is-melting-your-brain-a9b34adc0936 [HTTPS://PERMA.CC/9RNG-TR3T].

officials and regulators who sought to eliminate such popular, widespread products that offered essential services would likely soon find themselves out of a job.

In this imagined world, would the professional class go the way of the mapmaker or suffer the fate of the buggy whip manufacturer, displaced by the proliferation of the automobile?[60] Would it even emerge for all but the super-elites, those who pay for concierge services, luxury boxes at sporting events, and to skip the line at amusement parks? In a world where technological interventions that helped solve consumers' legal problems by providing competent, accessible, and affordable services preceded a professional class that offered such services in less accessible-and-affordable ways, would that professional class even emerge? Or would it only exist for the ultra-elite, who would gain little from the advantage of using such services, other than to signal to their peers that they can afford them? In such a world, we would tolerate the existence of this class of professionals, but they would not threaten to undermine the ability of the overwhelming majority of consumers to receive adequate services that satisfy their needs.

Of course, we do not live in such a world. Worse, the fact that the existence of the legal profession preceded the emergence of technology that might otherwise provide competent services to a large number of consumers means that the profession has distinct advantages and can work to undermine efforts to deploy technology in effective ways. Imagine that this power did not exist, that we could deploy technology in ways that served customers effectively where it was well-suited to do so, and that the profession did not take it upon itself to try to stop this from happening. Such a thought experiment is just that — an experiment — if the technology does not exist that can effectively serve consumers of legal services. But what if such technology does exist or might exist in the very near future? What are the barriers to its adoption in ways that expand consumers' access to legal services, particularly in discrete areas of law where such access is currently non-existent, the issues are simple, and the harm to consumers is considerable? This Article will return to these issues and questions throughout the remainder of the piece. In the next section, this Article will examine one area of law — consumer debt — to identify it as one in which the justice gap is vast, the issues relatively straightforward, and the consequences of a lack of legal representation can have devastating effects.

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60. *See* Kevin P. Lee, *The Citizen Lawyer in the Coming Era: Technology Is Changing the Practice of Law, but Legal Education Must Remain Committed to Humanistic Learning*, 40 OHIO N.U. L. REV. 1, 20 (using the common metaphor of the demise of the buggy whip manufacturer in the face of the emergence of automobiles to describe the legal profession's and law schools' resistance to the adoption of practice technology).

C. The Problem of Consumer Debt in the United States

As of the last quarter of 2023, consumer debt in the United States reached an unprecedented $17.5 trillion.[61] The problem of consumer debt is particularly acute in low-income households,[62] and disproportionately impacts women,[63] minority populations,[64] and urban communities.[65] One study on the impact of consumer debt litigation in New York City alone estimated that such litigation pulled roughly $1.2 billion out of the city economy in a single year in the form of default judgments that would otherwise go to families that would likely divert the funds to satisfy such judgments into the local economy.[66]

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61. *See* CTR. FOR MICROECONOMIC DATA, FED. RSRV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2023: Q4 (2024), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2023Q4 [https://perma.cc/N4A4-VEYC].

62. *See, e.g.*, Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of* Gideon, 69 UCLA L. REV. 1130, 1158 (2023) (showing "individuals in the lowest income bracket [in the United States] are three times more likely to find themselves caught in debt collection than those in the highest income bracket — and female-headed households represent 55 percent of households in the lowest bracket (while male-headed households represent 28 percent).").

63. *See id.* (surveying existing data on consumer debt in the United States to show that they "demonstrate that women carry debt and face debt delinquency in higher numbers than men in three of the most critical areas of debt: student debt, payday loan debt, and medical debt" and that the number of "female-headed households" in the lowest-income bracket which carries the most debt "represent 55 percent of households . . . while male-headed households represent 28 percent"); *see also* Lucia F. Dunn & Ida A. Mirzaie, *Gender Differences in Consumer Debt Stress: Impacts on Job Performance, Family Life, and Health*, 27 J. FAM. & ECON. ISSUES 1, 3–5 (2022) (showing disproportionate rate of debt-to-income for women as compared to men).

64. *See* AM. C.L. UNION, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 10–11 (2018), https://www.aclu.org/sites/default/files/field_document/022118-debtreport.pdf [https://perma.cc/6VN2-9MMF].

65. *See* Elyssa Kirkham, *Country vs. City: Which Has the Larger Balances and Better Credit Scores?*, LENDINGTREE (Apr. 10, 2019) (using anonymized credit report data on file with consumer lending company and finding that "[u]rban borrowers owe an average of $132,155 across all loan types, including mortgages," while "[r]ural borrowers owe nearly $40,000 less on average, with typical total debts of $92,484"), https://www.lendingtree.com/debt-consolidation/country-vs-city-which-has-larger-balances-and-better-credit-scores/ [https://perma.cc/7Q8D-NLDU].

66. *See* Anika Singh Lemar, Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor 21, 23 (Nov. 2, 2007) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3160600 [https://perma.cc/EWF3-Y42K]. The change in value of judgments is calculated using the CPO calculator from the Bureau of Labor Statistics. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS., https://data.bls.gov/cgi-bin/cpicalc.pl [https://perma.cc/4827-HGXM] (last visited Sept. 10, 2024).

Every year, millions of Americans of modest income face lawsuits based on alleged consumer debt.[67] These cases can arise from unforeseen medical bills, unpaid credit card charges, or personal guarantees of lines of credit made for a friend or family member years earlier.[68] The party bringing the suit is often an entity called a debt buyer: a company that has purchased debt from a financial institution, hospital, or some other company, at a fraction of the cost of the original debt, often pennies on the dollar.[69] Those debt buyers then turn around and sue the consumer for every dollar of the original debt, plus interest.[70] Too often, the first time a consumer learns that a case has been filed against them is when they receive a notice from their bank that their account has been frozen because the debt buyer has already won the case due to the consumer's failure to answer the complaint filed in the action against them.[71] Debt buyers' default judgments are often easily overturned once the consumer goes to court and explains that they never received notice of the original lawsuit against them.[72] In many of these cases, consumers have many defenses to the claims against them, but they rarely get a chance to defend themselves before a judgment is rendered in their case.[73] What is more, one study found that at most four percent of consumers in these types of cases are represented by counsel, while at the same time, creditors are all represented by counsel.[74] While the consequences of consumer debt and the impact of a judgment in such cases are severe, the reality is that these cases are far from complex. Indeed, there are often only a few defenses to these actions and the creditors' legal claims raise relatively straightforward issues of contract law. This Article will explore these issues in greater depth in Part IV.

II. TECHNOLOGY AND THE PRACTICE OF LAW: RISE OF THE MACHINES

The widespread availability of new GenAI tools has accelerated discussions over whether the emergence of new technologies may displace the traditional functions of lawyers and prompted questions about the proper role of lawyers and whether new technologies may help address the justice

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67. *See Consumer Debt*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/consumer-debt [https://perma.cc/L4PP-RVH3] (last visited June 15, 2024).

68. JUSTICE GAP REPORT, *supra* note 1, at 33–34.

69. On the debt-buyer industry, see generally Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 42 (2015).

70. *See id.*

71. For a description of the harmful impacts of the outcomes of these cases, see Singh Lemar, *supra* note 66, at 4–5.

72. *See* Singh Lemar, *supra* note 66, at 13 (describing the process of vacating default judgments in these actions).

73. *See* Singh Lemar, *supra* note 66, at 9.

74. *See* Singh Lemar, *supra* note 66, at 1.

gap. But such questions are not new — since the late 19th century, lawyers have typically initially resisted the widespread adoption of new technologies into the practice of law.[75] However, such resistance is often transformed into acceptance, and the use of such technologies eventually becomes the standard of care, as this Article will explore further in this Part.

A. The Brief History of Technological Innovation in the Practice of Law

We are just 150 years from when quill and ink were the most advanced technologies used by many law offices. Apprentices served as human copy machines, writing out original drafts of correspondence and pleadings and copying such documents and court orders in long hand.[76] This practice was a form of training for these apprentices as they supposedly absorbed the material they were transcribing while also generating work product for the offices in which they worked.[77] The introduction of the telephone, typewriter, and rapid reproduction of documents to the practice of law in the late 19th century was initially met with skepticism or downright hostility. Some lawyers criticized these new technologies, claiming they would interfere with the bonds of trust between lawyer and client.[78] What client would want an impersonal typewritten letter that could have been composed and prepared by anyone, without the personal touch of a handwritten note?[79] Who would want to talk with their lawyer on the phone when they could meet face-to-face?[80] Some lawyers bristled at adversaries gaining advantages in arguments and pleadings before courts because the rapid reproduction of judicial opinions allowed those adversaries to cite recently issued opinions, as opposed to lawyers being used to referencing "general principles" in their arguments and court documents.[81]

Of course, no law office today could operate without the wide range of technologies that make the practice of law more efficient. Many law offices

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75. *See generally* Jan L. Jacobowitz, *Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond*, 23 VAND. J. ENT. & TECH. L. 279, 297–300 (2021).

76. For a description of the apprenticeship system, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 302–03 (4th ed. 2019).

77. *Id.*

78. GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE BAR OF THE CITY OF NEW YORK 191–95 (1970).

79. *Id.* at 192–95.

80. *Id.*

81. *Id.* at 195–96.

have gone paperless, some even virtual.[82] Human copy machines have been replaced by their electronic counterpart. Messengers, and their initial digital counterpart, the fax machine, have been supplanted by email, scanning, and document-sharing technologies. For nearly 40 years, lawyers have used computer-assisted technologies to conduct legal research.[83] And long gone are the days when one conducted a laborious and tedious Shephard's search to determine the status of a case one wanted to cite. Indeed, a search through the paper copies of publications by the Shephard's service could take hours, something that today is done automatically through most digital legal research services, requiring no more than a glance at an icon on the screen by one using such services to determine the status of the case.[84]

These ubiquitous technologies might have been resisted at first, but they now represent the standard of care.[85] One cannot — or should not — now argue that they missed a filing deadline because the office scrivener, laboring by hand, failed to produce the office's brief in a timely fashion. While some lawyers might possess a mug with the slogan "Please do not confuse your Google search with my law degree,"[86] other lawyers are chided by courts for not conducting a "simple Google search" to learn basic facts about their case.[87]

From the past 150 years, we can see that while technology might face resistance by the profession at first, it later enjoys widespread adoption to the point where its use is not just expected but becomes the standard of care. The most recent technology that holds the potential to truly transform the practice of law is GenAI. What is the promise and what are the potential pitfalls of this technology? Can this technology help expand access to justice by making the practice of law more efficient, effective, affordable, and

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82. For commentary on and predictions concerning the future prospects of the "electronic law office," see Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 281–86 (2009).

83. Ray Worthy Campbell, *Rethinking Regulation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1, 6–7 (2012) (describing emergence of computer-assisted legal research).

84. For a discussion of the analog version of a Shephard's search, see BRESCIA, *supra* note 39, at 164–65.

85. Dean Andrew Perlman makes this argument in a forthcoming piece, Andrew M. Perlman, *The Legal Ethics of Generative AI*, 56 SUFFOLK U. L. REV. (forthcoming 2024) (manuscript at 1, 15) (arguing that "generative AI is advancing so rapidly that we may eventually move away from saying that lawyers are ethically permitted to use it, to saying that lawyers are ethically required to do so").

86. *Please Do Not Confuse Your Google Search with My Law Degree Ceramic Coffee Mug (11oz) Funny Lawyer Mug Attorney Gift Lawyer Gift*, AMAZON, https://www.amazon.com/Please-Confuse-Google-Ceramic-Attorney/dp/B019EV73U0 [https://perma.cc/3N37-8QMR] (last visited Aug. 24, 2024).

87. *See, e.g.*, Crooked Creek Props., Inc., v. Ensley, No. 2:16-CV-905, 2017 WL 455937, at *4 (M.D. Ala. Feb. 2, 2017) (sanctioning lawyer for filing action when a "simple Google search" would have revealed that the matter had been litigated previously, multiple times).

accessible? Will it sustain or disrupt the practice of law, and will its use ultimately become not just expected, but also represent the standard of care, such that failure to use it might constitute malpractice? It is to these and other questions that this Article will turn for the remainder of this Part.

B. The Emergence of Generative Artificial Intelligence

In late November of 2022, a new form of artificial intelligence was made widely available — generative artificial intelligence.[88] GenAI represents not just a new method of searching, producing much more than links in response, but can also generate a narrative, text-based answer to a query posed to the service.[89] Before, a person conducting a search had to sift through responses and advertisements based on that query, now, with GenAI, they would receive an "answer" to the query itself. The introduction of this new type of GenAI presented a significant and intriguing new tool for many fields, including the practice of law. In late December 2022, Andrew Perlman, the dean of Suffolk Law School, posted a paper describing this new version of GenAI, ChatGPT-3, as "a state-of-the-art chatbot developed by OpenAI," which, he explained "has the potential to revolutionize the way legal work is done, from legal research and document generation to providing general legal information to the public."[90] To say Perlman "wrote" this paper is a bit of a stretch. As he explained, the white paper he produced was almost entirely prepared and drafted by the technology itself, in response to queries he posed.[91] The paper explains that GenAI identified the potential use cases of the technology as: "legal research," "document generation," "providing general legal information," and "legal analysis."[92] Since Perlman posted that paper, some within the legal profession have approached the use of GenAI with some trepidation,[93] while others have embraced it and explored ways to utilize it in a wide range of areas, with varying degrees of success, and sometimes with fairly harmful consequences.[94] Some may consider this new

88. *See Introducing ChatGPT*, OPENAI (Nov. 30, 2022), https://openai.com/blog/chatgpt [https://perma.cc/C2B3-PSZH].

89. *Id.*

90. Andrew M. Perlman, *The Implications of ChatGPT for Legal Services and Society* 1–2 (Suffolk Univ. L. Sch. Rsch. Paper No. 22-14, 2022), https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=263003 [https://perma.cc/3Z46-W48U].

91. *Id.* at 1.

92. *Id*. at 2–3.

93. *See generally* Bradford Newman, *The Use of Generative AI in the Law: Understanding Ethical Rules and Responsibilities, Business Law Podcast*, AM BAR ASS'N (July 31, 2023), https://www.americanbar.org/groups/business_law/resources/podcast/the-use-of-generative-ai-in-the-law/ [https://perma.cc/R63T-NQBK].

94. *See* discussion *infra* Part II.C.

technology a significant step in transforming the practice of law by making lawyers' jobs easier, perhaps even putting the power of technology in the hands of laypeople who might find that they can secure legal advice and guidance from GenAI tools at little to no expense. However, many early experiments in GenAI have produced extremely harmful consequences for both lawyers and litigants.

C. Inappropriate Initial Uses of GenAI in the Practice of Law

It took just six months for ChatGPT to generate a cautionary tale and demonstrate that the technology, in the form it existed at the time, might not be the groundbreaking tool it was believed to be. Concerns about the technology came to light when a reporter for the *New York Times* revealed the interactions he had with it included some fairly creepy exchanges. The bot the journalist was interacting with professed its love for him and asked him to leave his spouse.[95] Soon after, lawyers representing a plaintiff in a personal injury lawsuit in the U.S. District Court for the Southern District of New York used the technology to look for support for their positions in the litigation[96] and prepare a brief in opposition to a motion to dismiss.[97] After the tool set forth several arguments that were favorable to the lawyers' position, the lawyer conducting the search prompted GenAI to "provide case law," "show me specific holdings," "show me more cases," and "give me some cases."[98] In turn, as the court found, when prompted this way, "the chatbot complied by making them up."[99]

When the lawyers attempted to check the results produced by the technology by asking the technology itself whether those cases existed, the technology confirmed the validity of the citations.[100] The trouble was that the cases were complete works of fiction.[101] Like with the interaction with the *New York Times* journalist, it became clear that GenAI was capable of what has come to be known as "hallucinations" — where the technology makes up incorrect answers to queries.[102] The court sanctioned those lawyers for their use of GenAI, demonstrating that the technology might not

95. *See* Kevin Roose, *A Conversation with Bing's Chatbot Left Me Deeply Unsettled*, N.Y. TIMES (Feb. 16, 2023), https://www.nytimes.com/2023/02/16/technology/bing-chatbot-microsoft-chatgpt.html [https://perma.cc/WWC4-SZDJ].

96. *See* Mata v. Avianca, 678 F. Supp. 3d 443, 457 (S.D.N.Y. 2023).

97. *See id.* at 450, 456.

98. *Id.* at 457.

99. *Id.*

100. *See id.* at 458.

101. *See id.* at 458–59.

102. *See id.* at 459.

be as useful as originally thought.[103] In the wake of these developments, courts have attempted to take preemptive measures to address the potentially inappropriate use of GenAI technologies in courtrooms, as the next Section explores.

D. Judicial Responses to the Introduction of GenAI to the Practice of Law

With the introduction of new, GenAI technologies, courts have been on the front lines — dealing with the potential impact that such technologies may have on the practice of law. The use of GenAI tools to scan judicial opinions, review documents, and prepare initial outlines of pleadings and other documents comes with risk that the technology might generate false results. Courts are uniquely positioned to police the use of GenAI to limit the extent to which fictitious sources find their way into legal pleadings, briefs, and other court documents. As they would with any filing, courts must review documents for their legitimacy and may rely on or reject the arguments contained therein. They thus can and must scrutinize such documents — regardless of whether the litigants before them have utilized GenAI. Because of their position within the legal system, courts stand as the primary monitor of the inappropriate adoption of the results of GenAI searches. Of course, lawyers must always serve as the initial check on incorrect material finding its way into the documents they file, but, as the previous discussion showed, lawyers do not always uphold this obligation.

Further, judges should harbor and act upon legitimate concerns about the use of GenAI in drafting legal documents that are submitted to courts, which can have adverse impacts on the legal system and the administration of justice. First and foremost, should counsel practicing before them rely on fictitious sources for their claims, courts will have to expend court resources to debunk those claims. When it comes to legal research, it is difficult to prove a negative, to conclude definitively that a case does not exist. If a litigant actually produces a source in support of its position — like a judicial opinion — and shares a copy of that source — as occurred in the *Mata* case described above — the task of confirming that the source is fictitious gets even harder, even though the source is completely fabricated by a GenAI tool. Second, there is also the risk that a court might actually rely on a fictitious source submitted by a litigant when reaching its decision, which has obvious implications for the parties before the court and for those who

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103. *See id.* at 465–66; *see also* Park v. Kim, 91 F.4th 610, 614–16 (2d Cir. 2024) (referring lawyer to disciplinary authority for use of fictitious cases generated by artificial intelligence). *But see* United States v. Cohen, No. 18-CR-602, 2024 WL 1193604, at *6 (S.D.N.Y. Mar. 20, 2024) (finding lawyer's use of fictitious cases supplied to him by client who had used generative artificial intelligence was not willful and thus refraining to issue sanctions).

might rely on the opinion and the sources cited within it, in subsequent litigation or simply as they order their behavior in light of the guidance supplied by the court in the dispute. Third, courts are likely to see, if they have not already, an increase in filings by *pro se* litigants using GenAI tools.[104] One could imagine a particularly litigious group, like the so-called Sovereign Citizens or individuals filing *pro se* petitions challenging conditions of confinement, using GenAI to amplify — and even generate — their filings, straining judicial resources to sift through and respond to the miasma of legal arguments produced using these new technologies.

There are likely other broader, more general risks as well, described in the next Part,[105] but the most significant impact of litigants using GenAI technologies to prepare and file legal pleadings is the burden on courts of having to contend with litigants knowingly or unknowingly relying on fictitious sources in their filings. Courts already operating under resource constraints must now contend with the added burden of sifting through litigant filings to ensure they have not been improperly augmented by baseless claims that rely on the product of GenAI hallucinations. Cognizant of these threats, we have seen courts impose *ex post facto* sanctions on litigants for relying on such fictitious sources and begin to examine ways to prevent litigants from improper use of generative technologies, as the following discussion shows.

Courts have relied on Rule 11 of the Federal Rules of Civil Procedure,[106] 28 U.S.C. §1927,[107] and their inherent powers[108] in imposing sanctions for improper use of GenAI.[109] While these sanctions are imposed after the fact, courts are expected to tailor the punishment to deter future conduct, so there is a future-oriented quality to them as well. Thus, courts certainly have a range of tools at their disposal that punish lawyers for filing baseless claims supported by fictitious sources, deter offending litigants from taking such

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104. *See, e.g.*, Marco Poggio, *Gen AI Shows Promise — and Peril — for Pro Se Litigants*, LAW360 (May 3, 2024) (describing opportunities and risks of pro se litigants using generative AI tools), https://www.law360.com/articles/1812918/gen-ai-shows-promise-and-peril-for-pro-se-litigants [https://perma.cc/4G48-PDFV]; Judge Xavier Rodriguez, *Artificial Intelligence (AI) and the Practice of Law in Texas*, 63 S. TEX. L. REV. 1, 14 (2023) ("ChatGPT and other such platforms may give pro se litigants unmerited confidence in the strength of their filings and cases, create an increased drain on system resources related to false information and nonexistent citations, and result in an increased volume of litigation filings that courts may be unprepared to handle.").

105. *See* discussion *infra* Part III.B.

106. FED. R. CIV. P. 11(c).

107. 28 U.S.C. §1927.

108. For an overview of the inherent powers of the court, see generally Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

109. *See, e.g.*, Mata v. Avianca, 678 F.Supp.3d at 465–66.

inappropriate action again, and discourage others from engaging in the same sort of conduct.[110]

While *ex post* punishments are certainly one way in which courts can seek to deter future offensive conduct, courts are beginning to explore ways in which other interventions might discourage litigants from relying on GenAI technologies when preparing submissions to the court. While the overwhelming majority of judges and court systems have taken no affirmative steps to curb the inappropriate use of GenAI technologies, as the following discussion shows, some judges have issued standing orders that cover the litigants who come before them, and a handful of court systems have begun to explore ways to address the risks associated with GenAI technologies.

Most judges and courts have chosen to adopt no new mechanisms for reining in inappropriate use of these technologies and rely on existing tools for sanctioning misconduct, though some have experimented with different techniques to curb litigant misconduct, and we can map these interventions on a continuum, from the less onerous to most restrictive. The least onerous of these interventions involves warning litigants of the risks associated with the use of AI. District Judge Arun Subramanian of the Southern District of New York has issued a standing order for those practicing before him warning of the dangers of using GenAI in their filings.[111] On the other extreme, District Judge Michael J. Newman of the Southern District of Ohio has not only prohibited GenAI in the production of court filings, but imposed an affirmative duty on litigants to disclose when it appears that others involved in litigation before the court might have done so.[112] The federal courts for the Eastern District of Missouri have issued an order banning *pro se* litigants specifically from using GenAI in preparing their filings.[113]

Other courts have chosen a range of disclosure-related mechanisms with respect to the use of GenAI in research and drafting of filings. U.S. Magistrate Judge Jeffrey Cole of the Northern District of Illinois requires

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110. *See* FED. R. CIV. P. 11(c)(4) ("[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.").

111. *See* Judge Arun Subramanian, Standing Order on Individual Practices in Civil Cases § 8(f), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf [https://perma.cc/3XV9-D7CK] (S.D.N.Y.).

112. Judge Michael J. Newman, Standing Order Governing Civil Cases § VI, https://www.ohsd.uscourts.gov/sites/ohsd/files//MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf [https://perma.cc/XM96-QDDJ] (S.D. Ohio).

113. *Self-Represented Litigants*, U.S. DIST. CT., E. DIST. OF MO., https://www.moed.uscourts.gov/self-represented-litigants-srl [https://perma.cc/88Z9-AZ4E] (last visited Aug. 24, 2024).

litigants to disclose the use of AI in legal research and in preparation of materials submitted to the court.[114] Several judges have required litigants to disclose their use of GenAI and attest that they have confirmed the accuracy of such filings.[115] Others require litigants to disclose their use of GenAI and acknowledge that they recognize that FRCP 11 applies to their filing.[116] Finally, Judge Stephen Vaden of the U.S. Court of International Trade requires litigants to disclose the use of GenAI in their filings and confirm that no confidential client information was shared with the GenAI service they used.[117]

The typology of the different interventions that judges and court systems have imposed on litigants' use of GenAI reflects a range of approaches — from outright bans to required disclosure of its risks. As stated, however, the overwhelming majority of courts throughout the country have taken no specific action related to such use, but that does not mean courts are powerless to take action if litigants do rely on GenAI tools that produce fictitious sources. Courts certainly have tools at their disposal to rein in frivolous conduct. The approaches courts have taken help point to just some

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114. Judge Jeffrey Cole, Standing Order on the Use of Artificial Intelligence in the Preparation of Documents Filed Before this Court, https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Cole/Artificial%20Intelligence%20standing%20order.pdf [https://perma.cc/6H9J-BNSY] (last visited Aug. 24, 2024) (N.D. Ill.).

115. *See, e.g.*, *Judge Brantley Starr: Mandatory Certification Regarding Generative Artificial Intelligence*, U.S. DIST. CT., N. DIST. OF TEX., https://www.txnd.uscourts.gov/judge/judge-brantley-starr [https://perma.cc/2RCF-4KRM]; Bankr. N.D. Tex. Gen. Order 2023-03; Judge Michael M. Baylson, Standing Order Re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson, https://www.paed.uscourts.gov/rules-orders/standing-order-re-artificial-intelligence-ai-cases-assigned-judge-baylson [https://perma.cc/W4CS-WNYR] (E.D. Pa.); Judge Leslie E. Kobayashi, Disclosure and Certification Requirements — Generative Artificial Intelligence, https://www.hid.uscourts.gov/cms/assets/95f11dcf-7411-42d2-9ac2-92b2424519f6/AI%20Guidelines%20LEK.pdf [https://perma.cc/W4CS-WNYR] (D. Haw.); Judge Gene E.K. Pratter, General Pretrial and Trial Procedures,https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/prapol2.pdf [https://perma.cc/SX3Q-E7L4] (E.D. Pa.).

116. Judge Scott L. Palk, Standing Order on Disclosure and Certification Requirements— Generative Artificial Intelligence, , https://www.okwd.uscourts.gov/wp-content/uploads/AI_Guidelines_JudgePalk.pdf [https://perma.cc/UJE3-SWGF] (W.D. Okla.); Judge Evelyn Padin, Judge Evelyn Padin's General Pretrial and Trial Procedures, https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf [https://perma.cc/9YV5-5A22] (D.N.J.): Judge Gabriel A. Fuentes, Standing Order for Civil Cases Before Magistrate Judge Fuentes, https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev'd%205-31-23%20(002).pdf [https://perma.cc/EZS2-5GL3] (N.D. Ill.).

117. Judge Stephen Alexander Vaden, Order on Artificial Intelligence, https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf [https://perma.cc/6FJF-GA2Y] (U.S. Ct. of Int'l Trade).

of the risks associated with the use of GenAI in the practice of law; such risks certainly go beyond the dissemination of fictitious sources throughout the judicial system. These interventions, and the harms they are trying to prevent, help surface not just the larger risks, but also the opportunities raised by the deployment of GenAI into the practice of law, as the next Part explores.

III. OPPORTUNITIES AND RISKS RELATED TO THE WIDESPREAD ADOPTION OF GENAI TO THE PRACTICE OF LAW: DISRUPTIVE VS. SUSTAINING TECHNOLOGIES

While the previous Part outlined the measures some courts are taking to prevent against just some of the risks associated with the incorporation of GenAI into litigation, this typology also shows, in a fun-house mirror sort of way, the potential *opportunities* of GenAI as well. This Part explores some of these opportunities while also highlighting the broader risks beyond the litigation context. I also introduce the concepts of Disruptive and Sustaining Innovations as an additional way to assess these technologies and the risks and opportunities they pose.

A. Opportunities Associated with GenAI

Courts have certainly used their judicial orders to note the risks associated with GenAI, likely a result of the fact that many legal practitioners are considering potential uses for GenAI in their work. Putting aside the risk that GenAI might hallucinate, which is a large caveat, the promise of GenAI is that it can make the lawyer's work more efficient, allowing them to complete certain repetitive and laborious tasks quickly, with minimal effort. We have seen the advances of machine learning and artificial intelligence in electronic discovery for several decades, where Optical Character Recognition (OCR) has permitted review of terabytes of documents during the discovery process in a fraction of the time, and arguably with greater accuracy, than it would take a lawyer.[118] Lawyers have also used electronic legal research since the 1970s, likely saving countless hours of time, and presumably passing those savings on to clients.[119] Today, GenAI might

118. *See* Katie Wolf, *OCR for Law Firms: Your Secret Weapon for Document Efficiency*, FILEVINE (Apr. 25, 2024), https://www.filevine.com/blog/ocr-for-law-firms-your-secret-weapon-for-document-efficiency/ [https://perma.cc/J8YU-AP26].

119. On the introduction of electronic research into the practice of law, see *The Past, Present, and Future of Legal Research with Generative AI*, THOMSON REUTERS (Feb. 22, 2024), https://legal.thomsonreuters.com/en/insights/white-papers/helping-the-legal-researcher-feel-confident-they-have-done-enough [https://perma.cc/5DNS-89H6]; *From Dusty Tomes to Artificial Intelligence: The History and Future of Legal Research*, BLUE J,

supercharge these and other activities, helping reduce the time it might take for a lawyer to summarize a record, prepare a first draft of a brief or other document, or compare and synthesize thousands of contracts to identify common terms and help clients understand their contractual obligations.

In settings where lawyers engage in highly repetitive work, like high-volume, low-complexity practice areas like workers compensation, landlord-tenant law, or consumer debt, practitioners might use GenAI tools to generate pleadings and other filings where complaints, answers, and other filings are generic, even if tailored to a specific client's case when it comes to inserting identifying information unique to a particular dispute. Courts' approaches to the introduction of GenAI help identify not just the risks, but also the possibilities that GenAI offers. Indeed, if lawyers were not exploring ways to use GenAI in the practice, there would be no need to introduce ways to rein in their conduct.

The rules regulating the use of GenAI also help identify the opportunities it presents by helping *pro se* litigants and laypeople gain critical assistance and insights into basic legal issues, thereby allowing them to address some of their legal problems before they turn into significant issues that require legal representation. GenAI is also likely to provide these individuals with the information necessary to represent themselves in court and even draft rudimentary pleadings in certain cases. Again, putting aside the question of whether the guidance these consumers receive is actually accurate — again, a fairly large caveat — we can see the possibility that GenAI, whether through generic GenAI interfaces or more sophisticated platforms designed to produce legal documents, could provide opportunities for consumers to receive some form of legal assistance where they might otherwise receive none. Despite these two potential "upsides" to the use of GenAI in the legal context — that legal work might become more efficient and thus less costly to provide, and unrepresented individuals might receive some form of legal guidance where they might generally go without it — the introduction of GenAI is certainly not without its risks, as the following discussion shows.

B. The Risks Associated with Generative Artificial Intelligence in the Law

We have already seen some of the risks associated with the introduction of GenAI into the practice of law. First, the technology cannot always be trusted to produce accurate results. The hallucinations that the technology occasionally produces necessarily means that lawyers cannot blindly rely on

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https://www.bluej.com/blog/from-dusty-tomes-to-artificial-intelligence-the-history-and-future-of-legal-research [https://perma.cc/2L6K-6DUM] (last visited June 15, 2024).

the technology when dispensing legal advice and certainly not when submitting filings with courts. When lawyers acknowledge such risks and take responsibility for any submissions or legal guidance they might offer a client based on the product of GenAI, there is a degree of accountability, baked within the already existing system of professional ethics,[120] so the additional layers of requirements and punishments set forth in the approaches described above should only reiterate the point to lawyers who might utilize these technologies in their practice: user beware.

At the same time, laypeople who use GenAI are not trained to consider the legitimacy of sources GenAI might produce and largely do not have access to the tools necessary to verify the materials it generates. Although much of the focus of the legal press has centered around the punishments imposed on lawyers who have relied on GenAI to their detriment, *pro se* litigants have also found themselves on the business end of sanctions for their reliance on these technologies.[121] Without the wherewithal or knowledge that the fruit of GenAI technologies might prove untrustworthy, *pro se* litigants and other consumers who rely on the work product of these tools might find themselves worse off than they would have been if they had never utilized these tools in the first place.

Relatedly, while it is unlikely that an off-the-shelf product like ChatGPT could ever face charges of being engaged in the unauthorized practice of law, the providers and entities that harness GenAI technologies to create interfaces that help unrepresented consumers deal with legal issues might find themselves facing charges that they are violating state unauthorized practice of law (UPL) provisions.[122] The incorporation of GenAI into platforms that might seek to displace lawyers altogether shows that the technology could render the work of lawyers so easy to undertake that even a computer could do it. In the next section, this Article will introduce the typology first introduced by the late Clayton Christensen, that of disruptive and sustaining innovation, and show how it can help to frame the core issues

120. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983) (detailing duty of competence).

121. *See* Eugene Volokh, *Six Federal Cases of Self-Represented Litigants Citing Fake Cases in Briefs, Likely Because They Used AI Programs*, THE VOLOKH CONSPIRACY (Nov. 23, 2023), https://reason.com/volokh/2023/11/13/self-represented-litigants-use-ai-to-write-briefs-produce-hallucinated-citations/ [https://perma.cc/G7BQ-HRAX].

122. For a discussion of the UPL issues most salient to the use of artificial intelligence to delivery legal assistance, see Joseph J. Avery et al., *ChatGPT, Esq.: Recasting Unauthorized Practice of Law in the Era of Generative AI*, 26 YALE J.L. & TECH. 65, 89–92 (2023). On UPL issues generally, see Deborah L. Rhode & Lucy Buford Ricci, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014).

at the heart of the broad potential impacts of technology on the practice of law.

C. Sustaining and Disruptive Innovation in the Legal Services Market

Clayton Christensen, the late Harvard Business School professor, preached the so-called gospel of disruptive innovation — the notion that new processes for doing things and new technologies can "disrupt" a market, and when harnessed by new entrants into a market, can crowd out incumbent actors within that market.[123] The cycle of disruption that he identified in various fields showed that incumbent market actors tend to offer more expensive products than their customers actually want, at prices customers do not want to pay.[124] Often, a new entrant into the market begins to offer a cheaper product that draws consumers, typically on the lowest end of the market, attracting those who the incumbent considers to be outside its core customer base because those consumers are looking for a less-expensive product than the one the incumbent offers.[125] Eventually, the new entrant into the market refines its production processes and starts to improve its product to attract a larger share of the market for that product, eventually surpassing the incumbent in market share.[126] The cycle often results in the new entrant ultimately displacing the incumbent provider.[127] Christensen contrasted disruptive innovation with what he called sustaining innovation,[128] which helps incumbents preserve their market share by allowing them to provide their products to customers in more efficient and effective ways.[129] Such innovations do not really create the type of changes to the market share or economic dominance of incumbents because they tend to support and sustain them in ways that do not create major tectonic shifts in any particular market.[130]

Today, many preach the "gospel of disruptive innovation" when it comes to the legal services market.[131] In reality, though, what they are often peddling is loyalty to sustaining innovation. Investment in legal technology

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123. *See* CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL xv (1st ed. 1997) [hereinafter CHRISTENSEN 1st ed.] (describing disruptive innovation).

124. *See id.* at xii–xvii.

125. *See id.* at xvi–xvii.

126. *See* CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL 204 (New ed. 2024).

127. *See* CHRISTENSEN 1st ed., *supra* note 123, at xxii.

128. *See* CHRISTENSEN 1st ed., *supra* note 123, at xvi.

129. *See* CHRISTENSEN 1st ed., *supra* note 123.

130. *See* CHRISTENSEN 1st ed., *supra* note 123.

131. For a critique of the "gospel of innovation" and Christensen's theories, see Jill Lepore, *The Disruption Machine*, NEW YORKER, June 16, 2014.

is mostly targeted toward the higher end of the legal services market: business-to-business products designed to serve large firms and other private providers of legal services.[132] If the story of disruptive innovation were to hold true in the legal services market, then we should look to innovation at that low end, and not concern ourselves with how those at the top are going to be able to fight each other with sharper and sharper weapons.[133] Indeed, since much of the interest and energy in legal technology innovation is directed towards the higher end of the market, then an additional risk from the introduction of new technologies to the practice of law actually has the potential to increase, not reduce, the justice gap because the haves will have more, and the have-nots will be left behind. What is more, if the theory of disruptive innovation holds true, then actual disruptive innovation in the legal sector will occur at the lower end of the legal services market, and not at the higher end, as it is currently playing out. If true disruption in the legal services market will occur at the lower end of the market, what might that look like, and what are the barriers to it occurring? In the following Part, this Article will explore what disruption might look like in one of these "low-end" sectors of the legal market: the defense of debtors in consumer-debt litigation.

IV. CREATING A DIGITAL CONTINUUM-OF-CARE IN CONSUMER DEBT CASES

A. Consumer Debt: A Paradigmatic "Low-End" Market Sector

An area where low-and-moderate income people face legal problems with some regularity is consumer debt litigation.[134] This might be a credit card bill, car loan payments, student loans, medical debt, or a range of other related cases.[135] The substantive law in question is generally not all that complex: either the debt is owed, or it is not; either the creditor has standing to bring the case, or it does not; either the claim is stale and outside the statute of limitations, or it is not; either the defendant was properly served, or they were not.[136] Based on my own experience reviewing the pleadings in these

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132. For trends in legal technology, see resources available at *Law Technology Today*, AM. BAR ASS'N, https://www.americanbar.org/groups/law_practice/resources/law-technology-today/ [https://perma.cc/RPY5-WJ9X] (last visited Aug. 24, 2024).

133. *See* BRAD SMITH & CAROL ANN BROWNE, TOOLS AND WEAPONS: THE PROMISE AND THE PERIL OF THE DIGITAL AGE xix (2019) (describing information technology as both "a powerful tool and a formidable weapon").

134. *See* JUSTICE GAP REPORT, *supra* note 1, at 33.

135. *See* JUSTICE GAP REPORT, *supra* note 1, at 34.

136. For an overview of some of the legal issues in these cases, see, for example, *Fact Sheets and Self-Help Guides: Consumers*, MOBILIZATION FOR JUST.,

types of cases, reflecting the relative simplicity of these actions, the complaints filed by plaintiffs and the answers filed by defendants are rarely more than a page long, consisting of just a few paragraphs of content each. Before a suit is even commenced, a creditor or collection agency tends to send so-called dunning letters, derived from the verb "dun," meant to demand payment on a debt, and has its origins in Middle English.[137] When a creditor begins the process of seeking to collect payment on an alleged debt, that process unfolds in stages, starting with informal or formal demands for payment, sometimes by dunning letters, the commencement of a lawsuit if that demand is not satisfied, and resolution of the matter in court. That resolution often takes the form of a default judgment; settlement if the defendant does appear to defend the action; through the plaintiff making a motion for summary judgment on the debt; or, in rare instances, trials.[138] If a default judgment is granted and the consumer never received notice of the action, the first time they learn that a case was filed against them is when the creditor goes to seize the debtor's assets, freeze their bank accounts, or garnish their wages.[139] At that point, the debtor could try to re-open the default judgment. Across this range of services, a continuum of care emerges, from brief advice at the outset to full service through motion practice, trial, and even efforts to vacate any judgment. Next, I explore to what extent GenAI and related technologies could serve to create a sort of digital continuum of care.

B. A Consumer-Focused, Digital Continuum of Care

It is possible that technology can serve as an essential legal counterweight to the otherwise unchecked and unsupervised debt buyers by providing guidance and assistance to consumers and the lawyers who represent them. Given the nature of the problem, I will outline some of the potential interventions where a technological solution might address the consumer debt justice gap as part of a digital continuum of care.

1. A Consumer-Focused "Chatbot"

As described above, at the outset of the process, when the consumer is first approached by a creditor, having legal information and guidance to help the consumer respond to the demands might help them present legitimate

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https://mobilizationforjustice.org/get-help/fact-sheets-and-self-help-guides/#consumers [https://perma.cc/EN8N-88ZL] (last visited Mar. 15, 2024).

137. *Dun*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/dun [https://perma.cc/P9ES-4396] (last visited Aug. 24, 2024).

138. In a study reviewing hundreds of consumer debt cases filed in civil court in New York City, not a single case in the data set went to trial. Singh Lemar, *supra* note 66, at 18.

139. *See* Singh Lemar, *supra* note 66, at 4.

objections to the debt or assist them in working out a payment plan. There is already a fair amount of guidance to consumers in such situations where non-profit organizations have compiled *pro se* resources for consumers.[140] These resources could be incorporated into a chatbot: an artificial-intelligence-fueled interface that could provide a curated list of answers responsive to the common questions consumers in such situations may have.[141] There are several settings in which these types of chatbots are currently being utilized with some degree of success, including in the landlord-tenant context.[142] The existence of these bots in other areas of law indicates that the technology has evolved such that the content currently existing in other digital forms could be incorporated into a chatbot. Whether the bot was created through traditional artificial intelligence that matched pre-prepared answers to questions posed by consumers or if it utilized GenAI through a limited large language model (LLM) from which it draws its content[143] is somewhat beyond the point. In reality, the technology exists to bring such a chatbot to life.

2. A Document-Assembly Tool to Provide Legal Filings for Consumers

Similarly, the technology that would permit the creation of an interrogatory-based interface that asks consumers a series of questions about their case and the claims against them, then compiles the legal document that the consumer could file in court to defend themselves, also seems to exist. At least with respect to the initial answer a debtor needs to file, in my experience, there are a limited number of defenses, ranging from a denial of the debt to a claim that the plaintiff does not have standing to assert the claims filed. One could imagine a text-based interface that asked the consumer a series of questions identifying the full range of defenses a consumer might want to interpose. It could then convert the consumer's answers into a workable and substantive pleading and generate an analog document that the consumer could file with the court.[144] One need not look

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140. *See, e.g.*, *Fact Sheets and Self-Help Guides: Consumers*, *supra* note 136.

141. *See* Victor Li, *Talking Tech: Chatbot Apps Help Users Communicate Their Legal Needs*, 103 A.B.A. J., July 2017, at 34 (describing chatbots).

142. *See, e.g.*, *Tenants' Rights Guide*, ITHACA TENANT RES., https://ithacatenantresources.org/tenantsrightsguide [https://perma.cc/EU3V-RPA8] (last visited Mar. 15, 2024).

143. For a description of Large Language Models, see *What Are Large Language Models?*, IBM, https://www.ibm.com/topics/large-language-models [https://perma.cc/A6NJ-QNQ6] (last visited, June 13, 2024).

144. *See* Michael J. Wolf, *Collaborative Technology Improves Access to Justice*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 759, 779–83 (2012) (describing document-assembly tools).

much further than a service like TurboTax, which addresses a far more complex area of law.[145]

3. A Sophisticated Document-Assembly Tool, Fueled by GenAI, for Legal Filings for Attorneys

A tool fueled by OCR technology, which would scan creditors' legal filings and analyze them for potential defenses and counterclaims the consumer might have, could put these ideas into action. It would utilize generative artificial intelligence or a complex document assembly tool to prepare the response to the complaint, either an answer or a motion to dismiss, if there are grounds for filing one based on any perceived defects in the creditor's complaint. This would be a "business-to-business" or "B-to-B" initiative that would only be available to legal aid organizations for their internal use. Those organizations would work to provide the appropriate content and training of the AI. Both this and the next initiative would save these legal aid organizations significant time and resources so that they could assist more consumers.

4. Automated Discovery

At present, "electronic discovery" or "e-discovery" has developed to where it is a routine part of most litigators' practice.[146] While the issues in consumer debt cases are not complex, there are instances where debtors might benefit from pursuing discovery, particularly where a debt buyer is the plaintiff. One could imagine a simple macro that would generate discovery demands centered on the transfer of ownership of the debt, the relationship between the original creditor and the debt buyer, the knowledge the debt buyer has or does not have as it relates to the original creditors business records, and more beneficial information. Plaintiffs' failure to produce such evidence in discovery could create grounds for debtors to move for summary judgment or motions *in limine* that would prevent the creditor from presenting information related to such matters at trial. Simple document-creation software, like that which is available through off-the-shelf products such as Google Forms, could easily generate form discovery demands if the user supplies basic information related to the parties and the underlying transactions. It is not difficult to imagine a system where such information

145. For a discussion of creating such a tool to aid lawyers in serving non-profit organizations with critical incorporation documents, see Raymond H. Brescia et al., *Civil Society and Civil Justice: Teaching with Technology to Help Close the Justice Gap for Non-Profit Organizations*, 29 ALB. L.J. SCI. & TECH. 16, 17 (2019).

146. Michael Thomas Murphy, *Just and Speedy: On Civil Discovery Sanctions for Luddite Lawyers*, 25 GEO. MASON L. REV. 36, 40 (2017).

is input once by an advocate and populated into all subsequent documents, from answers and discovery demands to motions. Technology also exists to create a tool that would "read" the initial pleading scanned into the system and pull the relevant information needed to populate the documents necessary to litigate the matter.[147]

5. Motion Practice Fueled by GenAI

The final and most complex stage of the continuum of care involves motion practice, which could be both defensive and offensive. In many consumer debt cases, creditors file motions for summary judgment — requests for decisions without the case going to trial because, according to the creditors, there are no disputes related to their claims and the court should issue a ruling in their favor.[148] Despite their arguments that there is no need for a trial and they should win without one, in my experience, skilled legal analysts can often assess the basis for the creditors' motions and compile meritorious defenses to them. Legal aid organizations, and perhaps *pro se* litigants, would benefit from a system that was capable of scanning and analyzing these motions, determining whether there are valid defenses or responses to them, and potentially generating the appropriate documents and materials necessary to oppose them. While there is certainly a possibility that some of the arguments might be complex, it is likely that in most instances a few, basic issues will be raised in support of or against the motion. A creditor, for example, might argue that the plaintiff's business records establish all of the elements necessary to prove the case, and would have to establish the admissibility of those records. A defendant opposing such a motion would first try to exclude the evidence.[149] If they are able to do that, they could cross-move for summary judgment as well, given that there would be no admissible evidence of the underlying debt. A debtor might move for summary judgment on the issue of defective service of process, for example, because the address where they tried to serve the defendant was incorrect or the affidavit of service submitted by the plaintiff does not establish that proper service was effectuated.

Given the relative simplicity of the issues, the arguments for or against a wide range of motions are fairly straightforward and conducive to the

147. There are a number of general, off-the-shelf commercial products that exist at present that can carry out these tasks, like Zapier and Microsoft Power Automate. For a description of these sorts of tools, see Catherine Sanders Reach, *Automation from Simple to Sublime*, 48 L. PRAC. 56, 58 (2022).

148. *See, e.g.*, FED. R. CIV. P. 56.

149. *See* Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 104–06 (2017) (describing evidentiary challenges related to business records in consumer debt cases).

creation of a brief or pleading bank of sorts that pulls relevant arguments from various documents that are aligned with particular litigants' needs. This could take the form of a type of a rudimentary document assembly tool or even GenAI that uses a highly restricted LLM to draw the information. A "lawyer in the loop" might select arguments to compile from a menu of options, or, where preparing an opposition to a motion for summary judgment, use the AI to read the opening motion papers and compile a first draft of an opposition filing for the lawyer to review. To the extent that this type of program might be directly consumer facing, it might be difficult to ensure that the correct arguments are being compiled and raised. At the same time, if the summary judgment motion filed on behalf of a creditor is machine readable, then GenAI might be able to produce a viable response to it, perhaps enhanced by the consumer answering some basic questions the tool might have about their case. This final element of the continuum of care appears to require the greatest amount of human labor to ensure it functions properly, and the expertise it requires likely means that it is the most difficult to provide as a pure direct-to-consumer application.

At the end of the day, and as described above, the creation of a continuum of care as described here does seem possible in theory. In the next section, this Article explores some of the challenges the development of such a continuum poses in practice.

C. Technological, Practical, and Ethical Concerns with a Digital Continuum of Care in the Consumer Debt Sector

Of course, the description of the continuum set forth above, which seems theoretically possible, might not work in practice and might face considerable ethical hurdles. Accordingly, in this final section, this Article will identify some of the more significant barriers the deployment of such a model might face and raise some possible responses to such barriers.

1. Technological Barriers to Adoption of the Continuum

The first and most serious issue that might stand in the way of the creation of the continuum of care described above is technological — is the technology at such a state of development that it might have the capacity to perform the tasks as set forth above? The technology currently exists to create the first element of the continuum — the chatbot. In addition, simple tools that assist in document assembly have been in existence for several decades and have only improved over time.[150] Some of the more

150. *See., e.g.*, Robert C. Blitt & Reece Brassler, *Experiencing Experiential Education: A Faculty-Student Perspective on the University of Tennessee College of Law's Adventure in*

sophisticated applications, like those that might require an attorney's analysis to determine which features of a filing to include, a human to input data, or a knowledgeable individual to review that output prior to filing are certainly labor intensive, a barrier I will explore next. To what extent is the technology at a point in its evolution that it might enable scanning and optical character recognition that would eliminate the need for some of this human intervention in the continuum of care? As it stands, it appears that at a minimum, some of the more sophisticated applications that require some degree of oversight and review by humans are possible with current technologies.

2. Practical Considerations Regarding the Adoption of the Digital Continuum

Of course, while the technology might be up to the task of fulfilling many components of the continuum, that still begs the question: is the human capital there to carry out these functions? This question is particularly acute looking at the low end of the legal services market, which is presently dominated by non-profit providers. If human resources are necessary to serve within the continuum, to what extent are such resources available to provide the critical link necessary to make these applications function? At present, non-profit legal services providers are currently under-staffed and operating on limited budgets.[151] Entities that fund legal services could dedicate some financial resources toward technological innovation, which might allow more clients to receive some form of assistance from those providers. The LSC already does this through its technology grants.[152] Could other funders follow suit? This might also entail a shift in personnel within such providers if they dedicated some staff to these sorts of initiatives. There is also the possibility that some entrepreneurs might think of a low-cost or "low-bono" way to deliver these services to consumers, with the proceeds from the provision of such services funding the technology necessary to provide them.[153]

Another potential barrier to any technological innovation in the practice of law, such as the digital continuum of care described above, is that those on the low end of the economic spectrum might also face the so-called digital

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Access to Justice Author, 50 J. MARSHALL L. REV. 11, 37–40 (2016) (describing several document-assembly tools used in law practice).

151. *See* JUSTICE GAP REPORT, *supra* note 1, at 15, 19.

152. *See Technology Initiative Grant Program*, LEGAL SERVS. CORP., https://www.lsc.gov/grants/technology-initiative-grant-program [https://perma.cc/CZP6-J44B] (last visited, Mar. 15, 2024).

153. On the role of low bono services in addressing the justice gap, see Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 898–907 (2009).

divide; that is, they do not have ready access to the internet, mobile technologies, or broadband, which are all essential elements to actual engagement with such technologies.[154] In addition, language barriers and accessibility might impede the effective use of such technologies.[155] Accordingly, to the extent these sorts of technological interventions are made available, accommodations must be made to ensure meaningful access to such tools.

3. Ethical Concerns with the Digital Continuum

Last, but certainly not least, there are legitimate ethical concerns with the development of this sort of digital continuum of care. The first is the extent to which the services rendered satisfy the standard of care required of all attorneys, assuming that the services rendered are legal services. When lawyers curate the content that serves as the basis for the outputs of these services, it should be fairly easy to ensure that the requisite standard of care is met, or at least, that lawyers can be held accountable if it is not.

Another issue that could affect the use of GenAI in the practice of law is the extent to which lawyers might share confidential information with outside entities when they utilize off-the-shelf technologies or other commercial providers.[156] When the documents accessed and read by GenAI are public filings, there are no issues of confidential information being shared. To the extent any of these systems utilize GenAI in the production of content, such use must only occur within a closed system managed by the provider of the services, or the individuals using the system should be prompted not to share confidential information through the interface by which they access the service.

Finally — and most importantly — any such system will have to contend with UPL concerns. Whenever services are ultimately delivered by licensed attorneys, even if there is some technology use along the way, and those licensed attorneys take responsibility for the work product, there are no UPL

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154. Julie R. Gordon, *Legal Services and the Digital Divide*, MGMT. INFO. EXCH. J. 46, 46–51 (2001) (defining the digital divide).

155. One chatbot utilized by the Houston Volunteer Lawyers Project for conducting initial assessment of intake of prospective clients is presently available in English and Spanish, and incorporates Google Translate within the interface for those who might prefer to use a different language. BRESCIA, *supra* note 39, at 173.

156. *See, e.g.*, Dazza Greenwood, *Task Force on Responsible Use of Generative AI for Law: Principles*, MIT COMPUTATIONAL L. REP., https://law.mit.edu/pub/generative-ai-responsible-use-for-law/release/9 [https://perma.cc/WWL9-BZR4] (last visited, Mar. 15, 2024) (listing duty of confidentiality to clients in all uses of GenAI as a first principle for responsible use of GenAI).

violations.[157] Additionally, some jurisdictions permit lawyers to engage in "ghostwriting" of briefs and other court documents in certain circumstances such that a *pro se* litigant might be able to access some of the elements of the continuum of care using content supplied by a licensed attorney, provided that appropriate notice is made that the litigant is relying on such work product.[158] Similarly, limited-scope engagements and lawyer-for-the-day programs have functioned quite well in recent years; it is likely that at least some of the services rendered could be analogized through a continuum to these types of programs, where the limitation is reasonable and the client consents to the nature of the engagement.[159] Still, if the programming is not providing tailored services to individual clients, it generally is not considered the unauthorized practice of law[160]; to the extent it might qualify as a sort of limited-scope engagement, it should also be consistent with legal ethics, provided the limitation is reasonable and the consumer consents to the arrangement.[161] Where services are not provided by lawyers in any way, even if they are limited in scope but tailored to a particular client's individual needs, there is some risk that those services will constitute UPL. Thus, if the services are not specifically tailored to individual client needs or are carefully curated and overseen by licensed lawyers, the continuum should pose no UPL issues.

CONCLUSION: TOWARDS A DIGITAL CONTINUUM OF CARE IN THE CONSUMER DEBT SECTOR

The widespread availability of GenAI to the general public, including the practice of law, has raised the possibility that it and other related technologies could be deployed to help shrink the justice gap in the United States by making critical legal guidance and assistance available to those most in need of legal services. At the same time, significant barriers exist that might impede the proliferation of such tools to help improve access to justice. What is more, given the potential cost associated with such

157. *See* Thomas E. Spahn, *Is Your Artificial Intelligence Guilty of the Unauthorized Practice of Law?*, 24 RICH. J.L. & TECH. 2, 3–19 (2018) (providing definitions of the practice of law and the unauthorized practice of law in several jurisdictions).

158. Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 3 GEO. J. LEGAL ETHICS 271, 285–91 (2010) (describing different jurisdictions' approaches to ghostwriting of legal briefs by lawyers for pro se litigants).

159. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2024) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

160. For an exploration of online services and their relation to UPL restrictions, see Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 814–15 (2002).

161. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2024).

technologies and the fact that entities that can afford to deploy such tools likely serve those on the higher end, who already enjoy access to justice, it is likely that the introduction of these new technologies in the practice of law will not only fail to close the justice gap, *but also possibly widen it*. For this reason, it is imperative that those who seek to create true disruption in the legal services market should target their attention and resources towards those who need it most: the millions of Americans who face their legal problems without a lawyer. What I have argued here is that it seems feasible that technological interventions could make a significant impact in consumer-debt cases. By prototyping in this area, it is possible that advocates could begin to see the possibility for similar interventions in other areas of great need, addressing the justice gap across more substantive areas of law. The technology that might help address, at a minimum, this specific area does seem to exist at present. Should these interventions improve the situation for consumers, it could help chart a course forward in other areas of law as well, where complexity is relatively low and interventions can be built at scale. At present, though, what might be missing when it comes to developing such interventions are the will, the resources, and the commitment to develop effective technological interventions that can help address the justice gap.