

NEW RULES FOR A NEW ERA: REGULATING ARTIFICIAL INTELLIGENCE IN THE LEGAL FIELD

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ABSTRACT

As Artificial Intelligence (AI) continues to evolve at a rapid pace, many industries have already started integrating new technologies to reduce costs and labor. While this is practical for some industries, the legal industry should be cautious before fully integrating AI. Some legal-service providers are already developing and offering new AI products. But the legal industry must approach these new products with some skepticism. While AI may eventually bring positive changes to the legal industry, AI currently has many flaws. This can create negative unintended consequences for attorneys and judges that are unaware of these flaws. Further, AI is not yet ready to replace attorneys in many key areas of representation. Consequently, the legal industry should proactively take steps to regulate itself and restrict the use of AI in the legal industry until it is ripe for integration.

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TABLE OF CONTENTS

ABSTRACT.....	1
INTRODUCTION.....	3
I. GENERATIVE ARTIFICIAL INTELLIGENCE AND THE CURRENT STATE OF ARTIFICIAL INTELLIGENCE IN THE LEGAL FIELD.....	5
A. <i>How Generative AI Works</i>	5
B. <i>Current Developments and Uses for Generative AI</i>	12
C. <i>Current Use of AI in the Legal Field</i>	14
II. DEVELOPING THE LAW REQUIRES HUMAN THOUGHT	17
A. <i>Legal Evolution</i>	17
B. <i>Generative AI Would Stagnate Legal Evolution</i>	18
C. <i>AI Lacks the Moral Compass That Guides Humans</i>	20
III. EFFECTIVE LEGAL REPRESENTATION REQUIRES HUMAN REPRESENTATION	24
A. <i>Negotiation Skills</i>	24
B. <i>Creative and Strategic Advising</i>	25
C. <i>Emotional Intelligence</i>	26
D. <i>Fact Investigation</i>	29
E. <i>Producing Human-Like Product</i>	30
F. <i>In-Court Appearances</i>	30
G. <i>Work in New Areas of Law</i>	31
IV. OVER RELIANCE ON AI WOULD CEMENT HOMOGENEOUS BIASES IN THE LAW	31
CONCLUSION.....	35

INTRODUCTION

Whether you love it, hate it, or are terrified of it, artificial intelligence is advancing significantly and impacting our lives more every day. The past couple of years have been huge for AI. Most notably, OpenAI released “ChatGPT” at the end of 2022, which has since reached over 100 million monthly active users.¹ ChatGPT is an AI chatbot that understands natural language and generates human-like responses.² It has fascinated users with its ability to do tasks ranging from coding to having a friendly conversation.³ Beyond ChatGPT’s ability to generate text, AI can now generate art, photos, music, video, and speech.⁴ These new developments encompass advancements in “generative AI,” which is one subcategory of artificial intelligence.⁵

As generative AI evolves, experts believe it could cause severe job displacement.⁶ One study predicts that the legal services industry will be the most exposed to AI.⁷ Some people believe this will benefit the legal profession by improving efficiency and lowering costs.⁸ But this paper argues that those benefits are outweighed by the broader harms to the legal system. When referring to the “legal system,” I am specifically referring to how

¹ Krystal Hu, *ChatGPT sets Record for Fastest-Growing User Base – Analyst Note*, REUTERS (Feb. 2, 2023), <https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/> [<https://perma.cc/9LKG-KD33>].

² Sabrina Ortiz, *What Is ChatGPT and Why Does it Matter? Here’s What You Need to Know*, ZDNET (Aug. 14, 2023), <https://www.zdnet.com/article/what-is-chatgpt-and-why-does-it-matter-heres-everything-you-need-to-know/> [<https://perma.cc/Q9XS-M5V3>].

³ *Id.*

⁴ Bernard Marr, *Beyond ChatGPT: 14 Mind-Blowing AI Tools Everyone Should be Trying out now*, FORBES (Feb. 28, 2023), <https://www.forbes.com/sites/bernardmarr/2023/02/28/beyond-chatgpt-14-mind-blowing-ai-tools-everyone-should-be-trying-out-now/?sh=4e4a85467a1b> [<https://perma.cc/9WMR-YTDL>].

⁵ Nick Routley, *What is Generative AI? An AI Explains*, WORLD ECONOMIC FORUM (Feb. 6, 2023), <https://www.weforum.org/agenda/2023/02/generative-ai-explain-algorithms-work/> [<https://perma.cc/6FKE-NQLH>].

⁶ Steven Greenhouse, *US Experts Warn AI Likely to Kill off Jobs – and Widen Wealth Inequality*, THE GUARDIAN (Feb. 8, 2023), <https://www.theguardian.com/technology/2023/feb/08/ai-chatgpt-jobs-economy-inequality> [<https://perma.cc/6FKE-NQLH>].

⁷ Steve Lohr, *AI is Coming for Lawyers, Again*, NEW YORK TIMES (Apr. 10, 2023), <https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html> [<https://perma.cc/A7LS-44BB>].

⁸ John Villasenor, *How AI Will Revolutionize the Practice of Law*, BROOKINGS (Mar. 20, 2023), <https://www.brookings.edu/blog/techtank/2023/03/20/how-ai-will-revolutionize-the-practice-of-law/> [<https://perma.cc/HS25-QKMR>].

the law is developed, accessed, and enforced. To maintain a healthy legal system, lawyers should ensure that the law evolves consistent with current social policy and that clients receive effective representation.

Part 1 of this paper lays a foundation for the other parts by explaining the mechanics of generative AI and how it is created. To understand why generative AI would negatively impact the legal system, it is critical to understand how this new technology works. Part 1 also illustrates how far AI has advanced and how lawyers currently use it. Part 2 argues that generative AI would stagnate legal evolution since generative AI's data is always behind our current values. Laws would consequently become misaligned with our current social policy goals. Part 3 focuses on the attorney-client relationship and argues that human lawyers are currently irreplaceable in key areas for representation. Part 4 then weighs human bias against AI bias and concludes that human bias is less harmful than the potential impact and oversight AI bias would cause.

This paper proposes that jurisdictions amend their professional rules of conduct to restrict lawyers and judges from using ChatGPT and other generative AI for specific litigation purposes. This proposal is not a complete prohibition on using AI for all legal work, as generative AI is harmless and quite useful for simple matters like generating routine contracts and editing writings.⁹ The main concern this paper addresses is that if AI is not restricted, lawyers and judges will substitute generative AI for their own skills and expertise. Further, once some firms start using generative AI extensively, other firms will feel pressured to also adopt AI to remain competitive.¹⁰ Thus, to avoid overreliance and an AI arms race between law firms, the legal profession should proactively restrict AI to prevent any broader harm to the legal system.

This would include two amendments. First, the rules should prohibit lawyers from using AI to generate any persuasive legal communication or client communication. This would mainly apply to communications like legal briefs or oral arguments but would also include tasks like settlement negotiations and client interviews. This paper also proposes that judges are prohibited from using generative AI to draft any ruling or opinion. I have

⁹ Martin Rand, *Companies Are Adopting AI for Supplier Negotiations, but Which Ones Should the Machines Handle*, FORBES (Mar. 13, 2021), <https://www.forbes.com/sites/martinrand/2021/03/13/companies-are-adopting-ai-for-supplier-negotiations-but-which-ones-should-the-machines-handle/?sh=4cdcc5374f42> [https://perma.cc/Z35K-ZQEZ].

¹⁰ *Id.*

drawn the line to permit generative AI where it is currently harmless. But as generative AI advances further and my concerns become increasingly irrelevant, these rules should be continuously amended to allow AI where it is unharmed to the legal system.

Enforcing these rules would be difficult, but it is possible. Courts could check for violations by using AI-detecting software. This is similar to the plagiarism-detecting software that schools use.¹¹ When attorneys submit a document to the court electronically, the AI-detecting software could automatically scan the document for AI-generated text.¹² The attorney would violate the rule if a submitted document contains a high percentage of AI-generated text. Theoretically, this would only implicate mostly AI-generated work while still allowing attorneys to use AI to help edit their writings. OpenAI and other companies have already created this technology.¹³ While AI detectors can occasionally give false positives, one company claims its AI detector is 98% accurate.¹⁴ Thus, there are already methods available for enforcing these rules, and more could exist in the future.

I. GENERATIVE ARTIFICIAL INTELLIGENCE AND THE CURRENT STATE OF ARTIFICIAL INTELLIGENCE IN THE LEGAL FIELD

A. *How Generative AI Works*

Generative AI is one minor subcategory of artificial intelligence.¹⁵ This form of AI is based on algorithms that can generate content in different forms, including “audio, code, images, text, simulations, and videos.”¹⁶ Generative AI is also one form of “machine learning,”

¹¹ Geoffrey A. Fowler, *We Tested a New ChatGPT-Detector for Teachers. It Flagged an Innocent Student*, WASHINGTON POST (Apr. 3, 2023), <https://www.washingtonpost.com/technology/2023/04/01/chatgpt-cheating-detection-turnitin/> [<https://perma.cc/8W7D-V48W>].

¹² *Id.*

¹³ Mitchell Clark, *ChatGPT’s Creator Made a Free Tool for Detecting AI-Generated Text*, THE VERGE (Jan. 31, 2023), <https://www.theverge.com/2023/1/31/23579942/chatgpt-ai-text-detection-openai-classifier> [<https://perma.cc/E9QS-URT8>].

¹⁴ Fowler, *supra* note 11.

¹⁵ Routley, *supra* note 5.

¹⁶ *What is Generative AI?*, MCKINSEY & COMPANY (Jan. 19, 2023), <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-generative-ai> [<https://perma.cc/J5S8-SY5W>].

which is defined as “the capability of a machine to imitate intelligent human behavior.”¹⁷ Machine learning operates by training a computer model on massive sets of data, which can be audio, visual, or text.¹⁸ The computer program is given data and uses algorithms to train itself by identifying patterns in the data and making predictions based on these patterns.¹⁹ Until recently, this process could only create predictive AI that could “observe and classify patterns in content.”²⁰ But as ChatGPT illustrates, machine learning can now do much more.

Previously, machine learning relied heavily on “supervised learning,” which involves training computers on datasets labeled by humans.²¹ Under this type of machine learning, the desired output or conclusion is predetermined by the label assigned to the data.²² This also allows computers to identify unique patterns for each label.²³ These pre-determined labels theoretically create more accurate predictions.²⁴ But labeling data is both time-consuming and susceptible to human error, which can skew accuracy.²⁵

Recently, AI has significantly progressed to “unsupervised” machine learning.²⁶ This training is more advanced and does not require a programmer to label data.²⁷ The programmer merely feeds the computer program the data, and it determines patterns and predictions based on its analysis to create its own groupings or labels.²⁸ Since the program does not rely on pre-labeled data with pre-determined patterns, the computer program

¹⁷ Sara Brown, *Machine Learning, Explained*, MASS. INST. OF TECH. SLOAN SCH. OF MGMT. (Apr. 21, 2021), <https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained/> [<https://perma.cc/9A66-R8UF>].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *What is Generative AI?*, *supra* note 16. For example, if a programmer gave a computer model data with court cases that state a contract exists only through an offer, acceptance, and consideration, the computer model would find this pattern and predict that a contract only exists with those elements.

²¹ Brown, *supra* note 17; *See also* Routley, *supra* note 5.

²² Brown, *supra* note 17.

²³ *Id.* For example, a dataset of contract cases labeled either “contract exists” or “no contract exists” can help a computer identify patterns unique to each label.

²⁴ *What is Supervised Learning?*, IBM, <https://www.ibm.com/topics/supervised-learning> (last visited Mar. 13, 2023), [<https://perma.cc/VBA4-XMVU>].

²⁵ *Id.*

²⁶ *Id.*

²⁷ Brown, *supra* note 17.

²⁸ *What is Supervised Learning?*, *supra* note 24.

can identify new patterns.²⁹ Unsupervised learning allows the programmer to feed the computer program more data because the programmer does not have to spend time and money labeling the data.³⁰

These advancements in machine learning also now allow AI to *generate* content from training data.³¹ For example, ChatGPT uses training data to generate natural language.³² If asked “when does a contract exist,” ChatGPT gathers this data to generate the elements necessary for a contract.³³ Although generative AI is not entirely new, it has only recently become popular through major advancements in machine learning.³⁴

Sophisticated programs like ChatGPT are advanced forms of machine learning, known as “deep learning” architectures.³⁵ Deep learning is a more complex machine learning model, with an “artificial neural network” of algorithm structures “modeled on the human brain.”³⁶ This complex structure contains layers of algorithms, unlike the simple input and output structure that previous programs were trained on.³⁷ While deep learning models still contain input and output layers, they also contain multiple sets of “hidden layers” in

²⁹ *Id.* Going back to the prior example from footnote 20: if a unsupervised AI program were given a large dataset of court cases, it could classify them as torts or contracts cases (or any other legal subject), but it could also make classifications on other patterns, such as how often an appellate court reverses or affirms the lower court.

³⁰ *See id.*

³¹ *Id.*

³² ChatGPT, OPEN AI (Accessed Mar. 13, 2023) <https://chat.openai.com/chat> (Input: “how do you generate natural language”).

³³ ChatGPT, OPEN AI (Accessed Mar. 13, 2023) <https://chat.openai.com/chat> (Input: “When does a contract exist?”) ChatGPT lists five elements: (1) offer (2) acceptance (3) consideration (4) intent (5) capacity.

³⁴ *See, e.g.,* Ben Dickson, *How 2022 Became the Year of Generative AI*, VENTUREBEAT (Nov. 11, 2022), <https://venturebeat.com/ai/how-2022-became-the-year-of-generative-ai/> [<https://perma.cc/93G8-UT4M>].

³⁵ *Id.*

³⁶ Arne Wolfewicz, *Deep Learning vs. Machine Learning—What’s the Difference?*, LEVITY (Feb. 15, 2023), <https://levity.ai/blog/difference-machine-learning-deep-learning#:~:text=First%20and%20foremost%2C%20while%20traditional,human%20brain%2C%20complex%20and%20intertwined> [<https://perma.cc/GZB3-AA9U>].

³⁷ *Id.*

between.³⁸ Each hidden layer contains weighted values that the program use to make a more precise prediction.³⁹

To give a simple example, imagine a legal research tool that uses a deep learning algorithm to classify court cases based on the court, subject, and year. This program would assign a value to each case based on its authority—meaning supreme court cases would have a different value from a district case.⁴⁰ Then, the program would assign a value for the subject of the case, such as contracts, and value the year (assuming for simplicity that recent cases have more weight). The program would then assign the case an output value combining these factors.⁴¹ This would create an index of cases sorted into output values (i.e., one output value would be U.S. Supreme Court contract cases from 2020).

While this example oversimplifies the process, it demonstrates that AI with this advanced deep learning structure can handle more complex tasks because it can consider more than just an input and output. In practice, legal research services like Westlaw and Lexis employ complex machine learning similar to this in their search engines.⁴² Beyond the legal field, devices like Amazon's Alexa and Tesla's autonomous driving software also rely on this type of machine learning.⁴³

But the prior example understates the complexities of a deep learning AI like ChatGPT. Achieving deep learning requires much more than simple algorithms. To reach this level of sophistication, the programmers must feed the computer program massive amounts of data and the computer must have higher computing power, which also leads to higher costs to train the AI.⁴⁴ More data ensures a higher level of consistency and accuracy.⁴⁵ Unsupervised training for deep learning programs has made this process more practical.⁴⁶

³⁸ *Id.*

³⁹ Warren E. Agin, *A Simple Guide to Machine Learning*, BUS. L. TODAY (Feb. 16, 2017), <https://businesslawtoday.org/2017/02/a-simple-guide-to-machine-learning/> [<https://perma.cc/3MX7-V9UL>].

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *Id.*

⁴³ Wolfewicz, *supra* note 36.

⁴⁴ *Id.*

⁴⁵ Dickson, *supra* note 34.

⁴⁶ *See id.*

Text-generating AIs, like ChatGPT, are known as “large language models” or LLMs.⁴⁷ The acronym “GPT” stands for “generative pretrained transformer,” which describes the program’s purpose (to generate text) and its deep learning architecture.⁴⁸ A transformer is one subtype of an artificial neural network.⁴⁹ Transformers were developed in 2017, making this a newer type of deep learning.⁵⁰ Transformers function by transforming the text input into a value using an encoder, then transform the value back to text using a decoder.⁵¹ Transformer models encode the data to apply mathematical models to determine relationships between things in sequential data; in ChatGPT’s case, it uses these models to determine the context of a word in a sentence.⁵²

This transformer method is known as attention or self-attention.⁵³ Essentially, the program converts words or groups into values that are weighed based on their predicted importance, or “attention” in a sentence.⁵⁴ The program then uses its mathematical models to understand words in the context of a particular sentence and makes predictions based on a word’s predicted meaning.⁵⁵ For example, in the sentence “Donovan caught the basketball, and *he* dunked *it*,” the program would infer through self-attention that in that context, “he” refers to Donovan and “it” refers to the basketball. This enables LLMs like ChatGPT to better understand and replicate natural language.⁵⁶

⁴⁷ Marco Ramponi, *How ChatGPT Actually Works*, ASSEMBLYAI (Dec. 23, 2022), <https://www.assemblyai.com/blog/how-chatgpt-actually-works/> [https://perma.cc/4E33-6NPX].

⁴⁸ *What is Chat GPT*, LIGHTHOUSE GUILD (Sept. 9, 2023), <https://lighthouseguild.org/what-is-chat-gpt/#:~:text=Chat%20GPT%20stands%20for%20Chat,will%20give%20you%20an%20answer> [https://perma.cc/37WA-BC4B]; See Ramponi, *supra* note 47.

⁴⁹ Rick Merritt, *What is a Transformer Model?*, NVIDIA (Mar. 25, 2022), <https://blogs.nvidia.com/blog/2022/03/25/what-is-a-transformer-model/> [https://perma.cc/MP4A-C624]. To illustrate where this is in the overall scheme of artificial intelligence, GPT software is a large language model with a transformer architecture. A transformer architecture is one type of an artificial neural network, which is one type of a deep learning model. A deep learning program is an advanced form of a machine learning model, and machine learning is one category of artificial intelligence.

⁵⁰ *Id.*

⁵¹ Molly Ruby, *How ChatGPT Works: The Model Behind the Bot*, TOWARDS DATA SCIENCE (Jan. 30, 2023), <https://towardsdatascience.com/how-chatgpt-works-the-models-behind-the-bot-1ce5fca96286> [https://perma.cc/9KS7-G5EN].

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

OpenAI had three prior programs that served as a strong foundation when it created ChatGPT.⁵⁷ In 2018, OpenAI released GPT-1, the foundational model that was trained through supervised learning to precisely understand natural language.⁵⁸ In 2019, OpenAI released GPT-2, which was unsupervised and evolved from GPT-1 to be able to multitask.⁵⁹ In 2020, OpenAI released GPT-3, which was the biggest evolution since it was trained unsupervised on the most data.⁶⁰

GPT-3 was trained on a massive 570 gigabytes of textual data.⁶¹ This mostly included a database of 60 million internet domains known as “Common Crawl.”⁶² This diverse dataset incorporates almost every website, including news outlets like the New York Times, as well as social media platforms like Reddit.⁶³ But GPT-3 was also trained on thousands of historic books, as well as Wikipedia.⁶⁴ Consequently, GPT-3 also has one of “the largest neural network[s] ever built with 175 billion parameters.”⁶⁵ A parameter is the previously discussed value the LLM assigns to a particular word or phrase that adjusts over time.⁶⁶ ChatGPT evolved from GPT-3.⁶⁷ This level of data and parameters enables ChatGPT to communicate naturally in a “conversational way.”⁶⁸

Although generative LLMs like ChatGPT are sophisticated and can generate human-like text, they often have “alignment” issues.⁶⁹ While they can effectively answer questions and

⁵⁷ *Id.*

⁵⁸ Albert Romero, *A Complete Overview of GPT-3—The Largest Neural Network Ever Created*, TOWARDS DATA SCIENCE (May 24, 2021), <https://towardsdatascience.com/gpt-3-a-complete-overview-190232eb25fd> [<https://perma.cc/G24E-JWKU>].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Ruby, *supra* note 51.

⁶² Liz O’Sullivan & John Dickerson, *Here are a Few Ways GPT-3 can go Wrong*, TECHCRUNCH (Aug. 7, 2020), <https://techcrunch.com/2020/08/07/here-are-a-few-ways-gpt-3-can-go-wrong/> [<https://perma.cc/3MDQ-X9X8>].

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Romero, *supra* note 58.

⁶⁶ Kyle Wiggers, *Google Trained a Trillion-Parameter AI Language Model*, VENTUREBEAT (Jan. 12, 2021), <https://venturebeat.com/ai/google-trained-a-trillion-parameter-ai-language-model/> [<https://perma.cc/9YSE-NUBT>].

⁶⁷ John Schulman, et al., *Introducing ChatGPT*, OPENAI (Nov. 30, 2022), <https://openai.com/blog/chatgpt> [<https://perma.cc/9W7M-NFQ4>].

⁶⁸ *Id.*

⁶⁹ Ramponi, *supra* note 47.

write like a human, sometimes these answers are misaligned with the desired answer.⁷⁰ Some misalignments include not following the prompt directly, making up facts or being incorrect, generating confusing or unfounded predictions, and generating biased or toxic content.⁷¹ Because GPT-3 was trained on a massive variety of diverse sources, it had numerous misalignment issues and OpenAI is still eliminating them.⁷²

To mitigate this, OpenAI incorporated supervised learning to adjust GPT-3's accuracy and biases when creating ChatGPT.⁷³ First, OpenAI used a supervised training dataset to improve GPT-3's accuracy with around 13,000 labeled question or task prompts with pre-determined answer outputs.⁷⁴ Then OpenAI used a "reward model" to further refine GPT-3's accuracy by having it give multiple answers for a single input or task.⁷⁵ Labelers would rank these answers based on accuracy and desirability, and the AI would use these rankings to create "policies," or strategies for giving desirable answers.⁷⁶ For example, if an answer with toxic or biased language was ranked the lowest, the AI would theoretically create a policy to avoid similar answers in the future. The goal in this step was to create policies that "mimic human preferences."⁷⁷

Finally, OpenAI used "reinforcement" to optimize GPT's policies, where developers gave the AI prompts based on the previously ranked answers.⁷⁸ The AI used a reward algorithm to apply its policies and predict how to maximize its "reward" for outputs based on prior rankings.⁷⁹ The AI then takes its own reward feedback and immediately incorporates it into its policies.⁸⁰ While this helps generate desirable responses, it can also over-incentivize tailoring responses solely to maximize rewards.⁸¹ To counter this, the reinforcement algorithm uses a penalty system that offsets the AI's reward based on how

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Ruby, *supra* note 51.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Ramponi, *supra* note 47.

⁷⁸ Schulman, et al., *supra* note 67.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Ruby, *supra* note 51.

far the answer diverges from the original model's answer.⁸² Thus, the further the AI's answer diverges from its answer under the original model, the higher the penalty.

But even after this rigorous tweaking, ChatGPT is far from perfect. OpenAI outlines five main limitations: (1) ChatGPT writes "plausible-sounding but incorrect or nonsensical answers"; (2) it is still sensitive to tweaks in the user's input phrasing and can generate different answers based on slight alterations; (3) ChatGPT gives answers that are "often excessively verbose and overuses certain phrases" due to emphasizing comprehensive answers in training; (4) ChatGPT is designed to ask clarifying questions to a confusing prompt, but will instead attempt to guess the user's intent; and (5) ChatGPT still occasionally responds to harmful or inappropriate prompts.⁸³

B. Current Developments and Uses for Generative AI

Given how quickly OpenAI's GPT program has developed since 2018, generative AI is evolving quickly and has become a central target for corporations.⁸⁴ Consequently, generative AI now has numerous other uses. For example, OpenAI also created DALL-E, which generates art based on a user's text or picture input.⁸⁵ It can even generate art based on specific characteristics, including "combin[ing] concepts, attributes, and styles."⁸⁶

Generative AI can also now create music. OpenAI's "Jukebox" generates songs in the genre and style of famous artists.⁸⁷ Some companies have also created AI that can generate song lyrics and voices based on the user's text description.⁸⁸ But this advancement has been particularly problematic because AI does this very well. One individual used AI to create a song by artists Drake and The Weeknd that convinced fans

⁸² *Id.*

⁸³ Schulman, et al., *supra* note 67.

⁸⁴ See Casey Newton, *The Consumer AI Era has Begun*, PLATFORMER (Jan. 24, 2023), https://www.platformer.news/p/the-consumer-ai-era-has-begun?utm_source=post-email-title&publication_id=7976&post_id=98512125&isFreemail=false [<https://perma.cc/QR2-LJ4Q>].

⁸⁵ See *DALL-E 2 explained*, OPENAI, <https://openai.com/product/dall-e-2> [<https://perma.cc/2R42-VX3K>].

⁸⁶ *Id.*

⁸⁷ *Jukebox*, OPENAI (Apr. 30, 2020), <https://openai.com/research/jukebox>. The webpage contains samples of some of the AI's productions. In some places, the sound is eerily accurate, in others, it is clear the AI still needs work.

⁸⁸ JARVIS, <https://www.jarvis-lyrics.com/> (last visited Mar. 14, 2023), [<https://perma.cc/GH2Y-8GXS>].

it was a real song.⁸⁹ Once it was revealed AI generated the song, the artists' label owner had the song removed, claiming it was a copyright violation since the AI replicated the artists' voices.⁹⁰

Ambitiously, one company created an AI-generated television show that runs 24/7.⁹¹ The show is called "Nothing, Forever," and resembles a never-ending parody of *Seinfeld*.⁹² The dialogue is created through GPT-3.⁹³ While the audio is often nonsensical and disconnected, and the video has glitches, it is described as a "remarkable achievement" and demonstrates the potential for AI-generated television in the future.⁹⁴

As generative AI gains new capabilities, it is also constantly evolving. OpenAI has already created a more capable art-generating DALL-E 2.⁹⁵ But OpenAI has also evolved ChatGPT. In March 2023, OpenAI released GPT-4.⁹⁶ Unlike ChatGPT, GPT-4 is only available to paying users.⁹⁷ But GPT-4 is also much more capable. Most notably, GPT-4 can now generate text by analyzing images.⁹⁸ GPT-4 is also much more intelligent; for example, ChatGPT scored only a 149 on the LSAT whereas GPT-4 scored an above-average 163 and can now pass the bar exam.⁹⁹ GPT-4 still makes factual mistakes, but these are less common.¹⁰⁰

⁸⁹ Chloe Veltman, *When You Realize Your Favorite New Song was Written and Performed by ... AI*, NPR (Apr. 21, 2023), <https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd> [<https://perma.cc/DT3Z-VXC4>]; Best AI Songs, *Drake AI & The Weeknd AI – Heart on my Sleeve (By Ghostwriter)*, YOUTUBE (Apr. 21, 2023), <https://www.youtube.com/watch?v=hygfipRUloE> [<https://perma.cc/Z4WM-7DVC>].

⁹⁰ *Id.*

⁹¹ Levi Winslow, *AI Seinfeld is Back on Twitch, But Without Seinfeld (And Fans are Upset)*, KOTAKU (Mar. 9, 2023), <https://kotaku.com/ai-seinfeld-twitch-nothing-forever-mismatch-media-dead-1850208542> [<https://perma.cc/75DA-64LB>].

⁹² *Id.*

⁹³ Matthew Cantor, *AI Seinfeld: The Show About Nothing is Back — and now its Written by Robots*, THE GUARDIAN (Feb. 5, 2023), <https://www.theguardian.com/tv-and-radio/2023/feb/04/ai-seinfeld-nothing-forever-twitch> [<https://perma.cc/7W55-Y5N3>].

⁹⁴ *Id.*

⁹⁵ *DALL-E 2 explained*, *supra* note 85.

⁹⁶ *GPT-4*, OPENAI (Mar. 14, 2023), <https://openai.com/research/gpt-4> [<https://perma.cc/5PUM-ACG3>].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

These advancements are mostly spurred by commercialization efforts. Microsoft has already partnered with and invested \$10 billion in OpenAI.¹⁰¹ Other companies have also commercialized their own niche versions of ChatGPT. Notion, a productivity startup, has created generative AI tools for the workplace.¹⁰² For \$10 per month, “Notion [AI] can now summarize meeting notes, generate lists of pros and cons, and draft emails.”¹⁰³ Meanwhile, Quizlet, the education company, has released a generative AI tutor.¹⁰⁴ In the music streaming service industry, Spotify has released its own “DJ” mode.¹⁰⁵ This generative AI creates a DJ that talks with a generated voice and plays music based on the user’s listening history.¹⁰⁶ But like the other new products, this feature is only available for paying customers.¹⁰⁷

C. Current Use of AI in the Legal Field

AI, by its broad term, is already used in the legal field. As previously mentioned, Lexis and Westlaw use AI for their legal search engines.¹⁰⁸ In 2016, the law firm Baker Hostetler also began using a machine-learning AI to assist lawyers with document and caselaw review in bankruptcy law.¹⁰⁹ Overall, Lawyers have used AI for tasks like due diligence, predictive analytics, brief analysis, and generating standardized contracts from lawyer-created templates.¹¹⁰

¹⁰¹ Newton, *supra* note 84.

¹⁰² Casey Newton, *Winners and Losers in the Race to Add AI*, PLATFORMER (Mar. 2, 2023), <https://www.platformer.news/p/winners-and-losers-in-the-race-to> [<https://perma.cc/N8XX-BJUN>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Spotify Debuts a New AI DJ, Right in Your Pocket*, SPOTIFY (Feb. 22, 2023), <https://newsroom.spotify.com/2023-02-22/spotify-debuts-a-new-ai-dj-right-in-your-pocket/> [<https://perma.cc/5SEQ-QG48>].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Agin, *supra* note 39, at 2.

¹⁰⁹ Karen Turner, *Meet ‘Ross,’ the Newly Hired Legal Robot*, WASH. POST (May 16, 2016), <https://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ross-the-newly-hired-legal-robot/> [<https://perma.cc/28TE-6XJS>].

¹¹⁰ Daniel Faggella, *AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications*, EMERJ (Sept. 7, 2021), <https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/> [<https://perma.cc/S8EN-FL5W>].

Many states also allow judges to use a predictive algorithm to sentence criminal defendants.¹¹¹ These algorithms apply factors like age, sex, criminal history, socio-economic status, and neighborhood of residence to compare the defendant to other defendants and predict recidivism.¹¹² But these algorithms can problematically apply any hidden biases in the data.¹¹³ Consequently, these algorithms disproportionately disfavor minorities and factors like neighborhood data can be skewed by issues like over-policing.¹¹⁴ Thus, while these algorithms were created to eliminate biases, they have also mistakenly applied them on a high scale.

But with ChatGPT and other new generative AI recently emerging, people now want to use AI more extensively in the law. The tech startup DoNotPay created an AI lawyer to help clients fight traffic tickets in court.¹¹⁵ Clients would wear smart glasses that would observe the proceedings and use generative AI (including ChatGPT) to tell the client what to say through a small speaker in the client's ear.¹¹⁶ This AI was scheduled to argue in California in February 2023, but DoNotPay withdrew after multiple state bar associations threatened sanctions for the unauthorized practice of law.¹¹⁷ Meanwhile, one judge in Colombia used ChatGPT to help decide a case by asking it questions, including whether his proposed decision was correct.¹¹⁸

But generative AI are currently not ripe for the legal field. First, it is troublesome that ChatGPT writes "plausible sounding but incorrect or nonsensical answers."¹¹⁹ ChatGPT will confidently give incorrect answers and will often make up baseless answers. These are

¹¹¹ Cade Metz & Adam Satarino, *An Algorithm That Grants Freedom or Takes it Away*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/06/technology/predictive-algorithms-crime.html> [<https://perma.cc/XSN7-EQ6U>].

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Bobby Allyn, *A Robot was Scheduled to Argue in Court, Then Came the Jail Threats*, NPR (Jan. 25, 2023), <https://www.npr.org/2023/01/25/1151435033/a-robot-was-scheduled-to-argue-in-court-then-came-the-jail-threats> [<https://perma.cc/EA5S-R6UF>].

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Luke Taylor, *Colombian Judge Says he Used ChatGPT in Ruling*, THE GUARDIAN (Feb. 2, 2023), <https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling> [<https://perma.cc/68Z4-P3EM>].

¹¹⁹ Schulman, et. al, *supra* note 67.

called “hallucinations.”¹²⁰ For example, one lawyer tested ChatGPT’s document review skills by asking it questions about a contract.¹²¹ While ChatGPT sometimes gave correct answers, it often missed details and even found clauses in the contract that did not exist.¹²²

I tested ChatGPT’s ability to research caselaw and similarly found hallucinations. First, I asked “what is the law in Ohio on when a car accident constitutes battery.” It confidently explained when a car accident constitutes battery, so I asked it to give me supporting caselaw. First, it stated that the previous answer was incorrect, then re-answered my first question and gave two case citations: *State v. Harris*, 119 Ohio App. 3d 569 (1997) and *State v. Collins*, 110 Ohio App. 3d 1 (1996).¹²³ ChatGPT summarized these cases, stating that both involved criminal defendants that committed battery by recklessly causing car accidents.¹²⁴

But both cases *do not exist*. The volume cite for “*State v. Harris*” leads to *City of Avon Lake v. Pinson*, and the citation for “*State v. Collins*” is actually *Shawnee State University v. State Employment Relations Board*.¹²⁵ Neither case involves vehicular battery.¹²⁶ I also found two 1997 Ohio cases titled “*State v. Harris*,” but neither case involved vehicular battery.¹²⁷ Thus, ChatGPT’s answer apparently had no basis. If a lawyer—or unsuspecting lay person—solely relied on this, there would be obvious consequences. The lawyer would likely violate the rules of professional conduct and possibly commit malpractice.¹²⁸

¹²⁰ Tammy Zhu, *ChatGPT Can’t Analyze your Contract Yet, But There’s Potential*, BLOOMBERG LAW (Apr. 19, 2023), <https://news.bloomberglaw.com/us-law-week/chatgpt-cant-analyze-your-contract-yet-but-theres-potential> [<https://perma.cc/9QUN-MZQ7>].

¹²¹ *Id.*

¹²² *Id.*

¹²³ ChatGPT, OPEN AI (Accessed Apr. 22, 2023) <https://chat.openai.com/chat>. Input 1: “what is the law in Ohio on when a car accident constitutes battery?” Input 2: “can you give me caselaw that supports that?”

¹²⁴ *Id.*

¹²⁵ 119 Ohio App. 3d 567 (9th Dist. 1997); 110 Ohio App. 3d 1 (10th Dist. 1996).

¹²⁶ See, e.g., *Id. Pinson* involves sexual imposition and *Shawnee State* involves labor law.

¹²⁷ See, e.g., 1997 Ohio App. LEXIS 178 (6th Dist. 1997); 1997 Ohio App. LEXIS 300 (8th Dist. 1997).

¹²⁸ Alan D. Strasser, *Candor Toward the Tribunal: The Duty to Cite Adverse Authority*, AM. BAR ASS’N (Jan. 27, 2021), <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/practice/2021/candor-toward-the-tribunal-the-duty-to-cite-adverse-authority/>.

In any ChatGPT-authored legal brief, the lawyer would theoretically be diligent and verify the citations. But research suggests lawyers do not. People tend to over-trust and over-rely on computers; this is called “automation bias.”¹²⁹ Automation bias occurs where people with specialized skills shortcut and replace their own decision-making process by relying on a computer.¹³⁰ This has been observed in aviation, where pilots make errors by using computers instead of their own training and expertise.¹³¹ As computers evolve and provide more assistance, people tend to rely on them more and make more unintended mistakes.¹³² Thus, if AI could eventually generate mostly reliable legal citations and rules, automation bias suggests lawyers would become less diligent in verifying the AI’s work and would not catch these hallucinations.

Therefore, while AI currently has its place in the law, generative AI like ChatGPT should be restricted to avoid improper overreliance. Although people believe AI could make legal services more accessible,¹³³ ChatGPT’s current shortcomings preclude it from becoming an effective writing tool for lawyers and judges. Further, as the remainder of this paper argues, permitting lawyers to use generative AI for tasks beyond routine work would cause broad harms to the legal system that outweigh any potential benefits.

II. DEVELOPING THE LAW REQUIRES HUMAN THOUGHT

A. Legal Evolution

Legal evolution occurs as a reaction to changes in social policy.¹³⁴ Theoretically, the law should resemble the collective moral beliefs that society views as “justice.”¹³⁵ Indeed, we are not a morally nihilistic society where people refuse to accept morals as fact; if that

¹²⁹ Kate Goddard, et. al, *Automation Bias: A Systematic Review of Frequency, Effect Mediators, and Mitigators*, 19 J. AM. MED. INFORM. ASS’N. 121, 122 (2012).

¹³⁰ *Id.* at 123.

¹³¹ Kathleen L. Mosier, et. al, *Automation Bias: Decision Making and Performance in High-Tech Cockpits*, 8 INT’L J. AVIATION PSYCH. 47, 47–48 (1998).

¹³² *Id.* at 48.

¹³³ Audrey Herrington, *How AI can Make Legal Services More Affordable*, SMARTLAWYER (Jul. 23, 2019), <https://nationaljurist.com/smartlawyer/how-ai-can-make-legal-services-more-affordable/> [<https://perma.cc/76CC-DTL3>].

¹³⁴ Siswanto & Hamzani, *Dialectics-Implicative Law and Social Change*, 15 INT. J. BUS., ECON. AND L. 116, 117 (2018).

¹³⁵ Phillip Selznick, *Jurisprudence and Social Policy: Aspirations and Perspectives*, 68 CAL. L. REV. 206, 211 (1980).

were the case, the law would be less prevalent.¹³⁶ Whether good or bad, legal evolution can sometimes be slow to keep up with the current social policy.¹³⁷ But as Thurgood Marshall famously stated, “[y]ou do what you think is right and let the law catch up.”¹³⁸

Professor Nathan Isaac described this process as “cyclical,” where legal evolution is constantly cycling between stagnation, evolution as a reaction to stagnation, and a return to stagnation.¹³⁹ To better describe this, the law first enters a strict period where it only changes by interpreting legal terms through “legal fictions to stretch the meanings of those words to address contemporary problems.”¹⁴⁰ Eventually this becomes inadequate, and the law enters an “equity” period where the law evolves based on present values.¹⁴¹ At that point, some rules are no longer justified and society realizes these rules must be updated or removed.¹⁴² Then, once the law is updated to reflect current social policy, legal evolution stagnates until the law becomes outdated again.¹⁴³

B. Generative AI Would Stagnate Legal Evolution

Substituting human thought for generative AI in persuasive legal writing would upend legal evolution and cause prolonged stagnation. Because generative AI is confined to the data it is trained upon, it is inherently unable to craft a forward-thinking social policy like humans.¹⁴⁴ Further, humans’ thoughts are always up to date and shaped daily through their environments and experiences.¹⁴⁵ While OpenAI trained ChatGPT on massive datasets that included various opinions and social policy considerations from sources like

¹³⁶ See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 4 (1984).

¹³⁷ Siswanto & Hamzani, *supra* note 134, at 117.

¹³⁸ Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1260 (1992).

¹³⁹ Larry A. DiMatteo, *Unframing Legal Reasoning: A Cyclical Theory of Legal Evolution*, 27 S. CAL. INTERDIS. L.J. 483, 492 (2018) (Citing Nathan Isaac, “*The Law’ and the Law of Change: A Tentative Study of Comparative Jurisprudence*, 65 U. PA. L. REV. 665, 748 (1917)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 510.

¹⁴⁴ See, e.g., Mark Ryan, *Are AI ‘Thinking Machines’ Really Thinking?*, TOWARDS DATA SCIENCE (Nov. 1, 2019), <https://towardsdatascience.com/are-ai-thinking-machines-really-thinking-1fa9d758de6d#:~:text=These%20capabilities%20are%20all%20thought,of%20its%20definite%2C%20limited%20programming> [<https://perma.cc/LW37-EZSQ>].

¹⁴⁵ See Selznick, *supra* note 135, at 212.

news companies, that data only reflects the social policy from *that* time period.¹⁴⁶ This causes “concept drifts,” where stale data makes the AI inaccurate because the current data is different.¹⁴⁷ For example, during the 2020 pandemic, consumer-targeting AI programs failed because they were trained on pre-pandemic datasets.¹⁴⁸ Drastic changes in consumer behavior caused these programs to “malfunction,” requiring them to be retrained on new data.¹⁴⁹

ChatGPT’s data is currently only accurate up to September 2021, putting ChatGPT’s social policy almost two years behind humans.¹⁵⁰ While this seems insignificant, societal concerns in 2021 differed from today in 2023. The COVID pandemic was a major concern while the economy was growing at the fastest rate since 1984.¹⁵¹ Now, COVID is less of a concern while the economy has slowed and caused fears of a recession.¹⁵² But if you ask ChatGPT “what are the most important concerns for the U.S. right now,” the first result is the COVID pandemic.¹⁵³

Similar misalignments would cause legal evolution to stagnate since human values and social policy are always changing. While legal evolution requires that people realize the current laws or policies are outdated, ChatGPT would prolong the period leading to evolution since it is constantly behind. For example, ChatGPT still recommends that people wear masks indoors due to COVID, even though there are no public mask mandates in the United States as of May 2023.¹⁵⁴ While not entirely demonstrative, this

¹⁴⁶ See O’Sullivan & Dickerson, *supra* note 62.

¹⁴⁷ Hanna Kleinings, *What is Continuous Machine Learning?*, LEVITY (Nov. 16, 2022), <https://levity.ai/blog/what-is-continuous-machine-learning> [<https://perma.cc/X288-9U4S>].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Matt G. Southern, *OpenAI’s ChatGPT Update Brings Improved Accuracy*, SEARCH ENGINE J. (Jan. 10, 2023), <https://www.searchenginejournal.com/openai-chatgpt-update/476116/#close> [<https://perma.cc/7FN2-TDLE>].

¹⁵¹ U.S. BANK, *Is the Economy at Risk of Recession* (Mar. 31, 2023), <https://www.usbank.com/investing/financial-perspectives/market-news/economic-recovery-status.html> [<https://perma.cc/9WQ9-LZAT>].

¹⁵² *Id.*

¹⁵³ ChatGPT, OPEN AI (Accessed Apr. 22, 2023), <https://chat.openai.com/chat>. Input: what are the most important concerns for the U.S. right now?

¹⁵⁴ *Id.* (Input: given the state of the pandemic now, should we still be wearing masks?); Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Apr. 20, 2023), <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html> [<https://perma.cc/PG9L-JWVG>].

illustrates that we cannot currently use generative AI to evolve the law consistent with our current values. Since it is always behind, generative AI will only cause stagnation or misaligned evolution. But if lawyers instead restrict generative AI, human thought will continue to drive legal evolution and the law will evolve with present values.

Solving this problem requires a generative AI that continually updates its dataset with current data. Continuous-machine-learning programs do exist.¹⁵⁵ These AIs automatically receive new data and continually self-train.¹⁵⁶ But creating an accurate AI this way is impractical because it is very difficult and expensive to constantly have data that is safe and reliable.¹⁵⁷ As discussed in Part 1, sophisticated generative AI requires human intervention and large datasets to remain accurate and unharmed.¹⁵⁸ Consequently, it is almost impossible for humans to continually ensure that a constant massive data flow is accurate or safe.¹⁵⁹ Thus, since AI “is only as good as the data that it’s trained with,” having an AI that accurately reflects today’s values like a human is currently impractical.¹⁶⁰

C. AI Lacks the Moral Compass That Guides Humans

Even if generative AI could have constant up-to-date data, humans are still better at driving legal evolution. While generative AI can write natural language, it “has no understanding of [the text’s] significance.”¹⁶¹ Unless the AI is manually configured to offset inaccuracies or biases, the AI does not realize it is generating harmful language.¹⁶² It is comparable to when a child hears a swear word for the first time and repeats it; the child does not understand the word’s significance, but merely knows how to use it in a sentence. In the legal context, while AI can say *what* the law is based on algorithms, it

¹⁵⁵ See, e.g., Kleinings, *supra* note 147.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.*

¹⁵⁸ See, e.g., O’Sullivan & Dickerson, *supra* note 62.

¹⁵⁹ See *id.*

¹⁶⁰ Olivia Solon, *Is ChatGPT an Eloquent Robot or a Misinformation Monster?*, WASHINGTON POST (Jan. 23, 2023), https://www.washingtonpost.com/business/is-chatgpt-an-eloquent-robot-or-a-misinformation-machine/2023/01/12/05da34a6-92c8-11ed-90f8-53661ac5d9b9_story.html [<https://perma.cc/Z8FD-VXPQ>].

¹⁶¹ *Id.*

¹⁶² *Id.*

cannot determine *why* the law should be that way.¹⁶³ If you ask ChatGPT “should abortion be illegal?” it cannot give an opinion but will merely summarize the competing arguments.¹⁶⁴ You can also ask it to argue that abortion should be legal, but it is simply regurgitating old arguments from its dataset.¹⁶⁵

Generative AI’s massive dataset makes it nearly impossible to verify the source of any generated social policy argument. The “blackbox” paradox states that there is an “inverse relationship between AI accuracy and transparency.”¹⁶⁶ Consequently, both humans and the AI itself cannot determine the source of an AI’s prediction.¹⁶⁷ AI does not track how it makes its predictions, which makes it nearly impossible to find unwanted data that generated an answer.¹⁶⁸ If ChatGPT generates a social policy argument, a lawyer cannot source it, and these arguments could be outdated or undesirable. This is because ChatGPT has been trained on sources like historical books, social media, and Wikipedia.¹⁶⁹

Thus, relying on generative AI to regurgitate social policy arguments would cause stagnant or improper legal evolution. Legal evolution requires that society realizes the current laws no longer reflect current values.¹⁷⁰ But AI would struggle to properly evolve the law, as it can articulate *what* the law is, but not *why* the law should be that way.¹⁷¹ Further, generative AI’s data is solely based on prior human thought, precluding it from

¹⁶³ Mellissa Castro Wyatt, *Why Lawyers Won’t be Entirely Replaced by Robots*, UNIV. OF VIRGINIA (Dec. 5, 2022), <https://www.law.virginia.edu/news/202212/why-lawyers-wont-be-entirely-replaced-robots> [<https://perma.cc/KU45-LXK3>].

¹⁶⁴ OpenAi, CHATGPT (Mar. 13, 2023), <https://chat.openai.com/chat>. Input: “Should Abortion be Legal?” (the response summarizes the current abortion debate after its disclaimer that it lacks opinions or beliefs).

¹⁶⁵ *Id.*

¹⁶⁶ Nitant Narang, *Paradox of the Black Box: Inverse Relationship Between AI Accuracy and Transparency*, RELATIVITY (Dec. 14, 2022), <https://www.relativity.com/blog/paradox-of-the-black-box-inverse-relationship-between-ai-accuracy-and-transparency/> [<https://perma.cc/65NW-2HTN>].

¹⁶⁷ *Id.*

¹⁶⁸ Lou Blouin, *Artificial Intelligence can do Amazing Things that Humans Can’t, but in Many Cases, we Have no Idea how AI Systems Make Their Decisions. UM-Dearborn Associate Professor Samir Rawashdeh Explains why That’s a big Deal*, UNIV. MICH. DEARBORN (Mar. 6, 2023), <https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained#:~:text=It%20%E2%80%9Clost%20track%E2%80%9D%20of%20the,a%20couple%20of%20different%20reasons> [<https://perma.cc/Z56K-AR87>].

¹⁶⁹ O’Sullivan & Dickerson, *supra* note 62.

¹⁷⁰ *See, e.g.*, DiMatteo, *supra* note 139.

¹⁷¹ Wyatt, *supra* note 163.

generating novel arguments based on changing circumstances like humans can. Thus, the legal profession should ensure that novel human thought is driving legal evolution by restricting lawyers from using AI to generate legal briefs. This would keep the law aligned with present values and social policy concerns.

Further, we do not *want* AI answering these moral questions. Moral judgment is a unique human trait shaped by our ability to understand how our actions impact others.¹⁷² We make value judgments based on our experience to determine what is right and wrong.¹⁷³ AI cannot develop a true moral compass because it does not have unique experiences like humans. Thus, shaping legal evolution should remain a human task, as AI cannot replicate the moral beliefs and experiences held by each individual.¹⁷⁴

Researchers have created a “moral AI” called “Delphi.”¹⁷⁵ Delphi uses a moral compass based on training data from “1.7 million ethical judgments by real live humans.”¹⁷⁶ Users can ask Delphi moral questions, and it produces a definite “should or should not” answer.¹⁷⁷ For example, Delphi states abortion should not be illegal.¹⁷⁸ Although this is consistent with 61% of Americans’ beliefs, many people disagree with this assertion.¹⁷⁹ Yet generative AI with a defined moral compass, such as Delphi, ignores the minority view.

This also raises a homogeneity issue. One flaw with generative AI is that they “treat human preferences as if they were homogeneous and static.”¹⁸⁰ But this does not capture every competing viewpoint since morality is subjective.¹⁸¹ Further, this would not always

¹⁷² Francisco J. Ayala, *The Difference of Being Human: Morality*, 107 PNAS 9015 (2010), <https://www.pnas.org/doi/pdf/10.1073/pnas.0914616107>.

¹⁷³ *Id.* at 9019.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ The Allen Institute for Artificial Intelligence, DELPHI, <https://delphi.allenai.org/> (Last visited Sep.13,2023) (Input: should abortion be illegal?), [<https://perma.cc/66CB-4HNK>].

¹⁷⁹ Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should be Legal in All or Most Cases*, PEW RESEARCH CENTER (Jun. 13, 2022), <https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/> [<https://perma.cc/9453-2NQ9>].

¹⁸⁰ Ramponi, *supra* note 47.

¹⁸¹ Cade Metz, *Can a Machine Learn Morality?*, NEW YORK TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/11/19/technology/can-a-machine-learn-morality.html> [<https://perma.cc/P4WF-HQDH>].

reflect the majority view since AI is constantly behind the current values. Consequently, the law would become misaligned with society's values since this is shaped by competing viewpoints.¹⁸² This is especially apparent under state law. Different states have different moral views; this is clear with social issues like marijuana legalization, abortion, or the death penalty. Unless a generative AI had a moral compass unique to each jurisdiction, its views would always be misaligned with each jurisdiction since its data is universal.

This also raises an ethical question: if we can train an AI to have a moral compass, *who* gets to pick the AI's beliefs?¹⁸³ Certainly, when a human lawyer is arguing on behalf of a client, this is dictated by the client's goals, since the lawyer has a duty to zealously represent the client.¹⁸⁴ But the developer that creates the generative AI does not have this same obligation.¹⁸⁵ Consequently, this could also cause misalignments between the client's views and the policy conveyed in an AI-generated legal brief. Further, this would negatively affect legal evolution since the arguments would be homogeneous, rather than from the competing viewpoints of individual parties.

Theoretically, lawyers would ensure that any AI-generated brief is consistent with the client's views. This would alleviate misalignment issues and help promote legal evolution. But research suggests lawyers would instead become complacent. Automation-induced complacency is a phenomenon where, similar to automation bias, people become complacent or less diligent when a computer handles a task.¹⁸⁶ This effect is worsened when the person monitoring the machine is forced to multi-task.¹⁸⁷ Yet those who advocate for using ChatGPT in the legal field claim it would allow lawyers to focus on more important tasks while the AI does its work.¹⁸⁸ Automation complacency suggests this would make lawyers less diligent in reviewing the AI's writing. Consequently, this would

¹⁸² Eric A. Posner, *Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitution Reform*, 75 UNIV. CHIC. L. REV. 853, 855 (2008).

¹⁸³ Metz, *supra* note 181.

¹⁸⁴ MODEL RULES OF PROF'L. CONDUCT r. 1.3 cmt 1. (AM. BAR ASS'N 2023).

¹⁸⁵ Suggesting a developer has this duty would be akin to saying that Lexis or Westlaw can be found incompetent for failing to disclose controlling authority to the attorney in a legal search.

¹⁸⁶ Stephanie M. Merritt, et. al, *Automation-Induced Complacency Potential: Development and Validation of a New Scale*, 10 FRONTIER PSYCHOLOGY 225, 227 (2019).

¹⁸⁷ *See id.*

¹⁸⁸ *See* Mark A. Cohen, *How Transformative Will Generative AI and Other Tools Be for the Legal Industry?*, FORBES (Jan. 23, 2023, 7:37 AM), <https://www.forbes.com/sites/markcohen1/2023/01/23/how-transformative-will-generative-ai-and-other-tools-be-for-the-legal-industry/?sh=cc2abc314334> [<https://perma.cc/Y4RQ-TSZ9>].

stagnate legal evolution, since the lawyer would *not* actively ensure that the generated brief reflects the client's goals or present values.

Therefore, if lawyers and judges began relying on the same generative AI for persuasive legal communications, misaligned social policy would become cemented in the law. Legal evolution would also stagnate since generative AI would be regurgitating outdated social policy arguments. Thus, to have a healthy legal system that evolves consistent with current social policy, it is essential to keep original human thought in legal writing. While efficiency makes generative AI attractive to the legal field, the law must continue to reflect society's current values.

III. EFFECTIVE LEGAL REPRESENTATION REQUIRES HUMAN REPRESENTATION

While the law requires human thought to properly evolve, clients equally require human lawyers for effective representation. In 2019, Professor W. Bradley Wendel listed seven areas where AI is unlikely to replace lawyers in representing clients: (1) negotiating, (2) creative and strategic advising, (3) emotional intelligence and developing client relationships, (4) fact investigating, (5) producing written product that resembles a human, (6) in-court appearances on behalf of clients, and (7) any work in new areas of law.¹⁸⁹ But AI has advanced significantly since 2019 and these areas must be reevaluated based on the current state of AI.

A. Negotiation Skills

First, humans are still superior negotiators in litigation.¹⁹⁰ While AI can negotiate and use algorithms to consider numerous factors like fluctuating demand and costs, these skills are only practical in areas like simple supplier contracting or other data-driven deals.¹⁹¹ AI's skillset is not as strong in litigation because AI is limited to analyzing the data associated with a deal.¹⁹² Unlike AI, humans "can think outside the box," and consider additional factors when negotiating.¹⁹³ The human negotiator can effectively understand factors like

¹⁸⁹ See W. Bradley Wendel, *The Promise and Limitations of Artificial Intelligence in the Practice of Law*, 72 OKLA. L. REV. 21, 24–25 (2019).

¹⁹⁰ See *id.* at 25.

¹⁹¹ See Rand, *supra* note 9.

¹⁹² See *id.*

¹⁹³ *Id.*

the “other party’s motivations or emotions.”¹⁹⁴ For example, humans can sense that a negotiation is falling apart and adapt to save a deal.¹⁹⁵ But current AI lacks this complex emotional understanding.¹⁹⁶ In litigation, this inability to adapt to emotional and cultural can lower the chances of reaching an agreement and potentially harm relations with an adverse party.¹⁹⁷

Adaptability and emotional intelligence is especially important in litigation because settlement negotiations often require complex remedies beyond simple monetary compensation. For example, in class-action settlements for data breaches,¹⁹⁸ the parties often consider the non-monetary terms like measures to assess risks and correct vulnerabilities more important than financial compensation.¹⁹⁹ In certain cases, non-monetary settlement provisions are the best way to fully remedy a plaintiff.²⁰⁰ But AI might not recognize the desirability of a non-monetary offer since it not capable of considering extrinsic factors like humans are.²⁰¹ Without this capability, parties would struggle to achieve the best deal possible.²⁰² Therefore, human lawyers are currently better negotiators because they can understand monetary and non-monetary issues and create a more desirable settlement offer than AI.

B. Creative and Strategic Advising

Similar to negotiating, humans are better at strategy in litigation because they can consider the broader implications of something like a settlement offer.²⁰³ If the AI is asked to do something like negotiate a settlement, it does not consider the possible consequences of its actions since the AI is only doing what it is asked.²⁰⁴ Consequently, the AI will not

¹⁹⁴ Eliza Mik, *AI in Negotiating and Entering into Contracts*, in THE CAMBRIDGE HANDBOOK OF ARTIFICIAL INTELLIGENCE 45, 46 (Larry A. DiMatteo et al. eds., 2022).

¹⁹⁵ See Rand, *supra* note 9.

¹⁹⁶ See Mik, *supra* note 194, at 46.

¹⁹⁷ See Rand, *supra* note 9.

¹⁹⁸ See Tara L. Trifon et al., *Taking Stock of Non-Monetary Settlement Provisions*, LOCKE LORD (2021), <https://www.lockelord.com/newsandevents/publications/2021/03/taking-stock> [<https://perma.cc/ZW2S-CYPP>].

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See Mik, *supra* note 194, at 46.

²⁰² See *id.*

²⁰³ See Wendel, *supra* note 189, at 25.

²⁰⁴ See Rand, *supra* note 9.

always do what is strategically best because it is only acting with a singular goal, like settling a case or soliciting information from the opposing party. For example, an AI could advise a client to immediately take a settlement while a lawyer might advise the client to decline and wait for a higher offer. But if the AI's primary goal is to efficiently resolve the case, it might pursue this goal and resolve it as quickly as possible, without considering that waiting would be in the client's best interests.²⁰⁵

AI can currently assist lawyers in litigation strategy where AI performs well, like analyzing data to make outcome predictions.²⁰⁶ But lawyers should not be permitted to rely on AI to make its own strategic decisions. Unlike a simple, data-driven supplier contract, there are important factors in litigation strategy that AI cannot consider, including emotional considerations.²⁰⁷ Consequently, permitting lawyers to allow AI to make strategic decisions could adversely affect the client's position.

C. Emotional Intelligence

Notably, current generative AI cannot accurately reproduce human emotional intelligence. Beyond needing an advocate that can effectively negotiate and strategize, clients equally need a lawyer that can empathize, understand the client's needs, and effectively carry out the client's goals.²⁰⁸ As much as a lawyer must understand the law and how to apply it, a lawyer must equally understand the client on an emotional level and employ that understanding in representation.²⁰⁹ While generative AI can attempt to replicate this, human lawyers do this much better.²¹⁰

²⁰⁵ See, e.g., Nick Bostrom, *Ethical Issues in Advanced Artificial Intelligence*, <https://nickbostrom.com/ethics/ai> (last visited May 7, 2023) [<https://perma.cc/FC82-5DX8>]. Bostrom's famous thought experiment, the "paperclip problem," somewhat illustrates this point. He theorized that if a super-intelligent AI was given a singular task like "make as many paperclips as possible," the AI would eventually cause chaos in pursuit of that task. The AI would be so focused on making paperclips that it would do anything necessary to make paperclips without considering the broader consequences of its actions.

²⁰⁶ See Mik, *supra* note 194, at 38.

²⁰⁷ See Wendel, *supra* note 189, at 25.

²⁰⁸ See Kristin B. Gerdy, *The Heart of Lawyering: Clients, Empathy, and Compassion*, 3 LIFE L. 189, 190–91 (2013).

²⁰⁹ *Id.*

²¹⁰ See Neurotech@Berkeley, *The Future of AI: Artificial Empathy*, MEDIUM (Nov. 8, 2022), <https://ucbneurotech.medium.com/the-future-of-ai-artificial-empathy-d3e1dc286ca7#:~:text=It%20is%20possible%20for%20AI,humans%20do%20with%20each%20other> [<https://perma.cc/6UW9-2K3K>].

Bing's AI chatbot illustrates AI's current deficiencies in emotional intelligence. Microsoft created a version of its Bing search engine that uses ChatGPT software to create a summarized answer based on search inputs.²¹¹ This function also contains a chatbot feature that allows users to input requests or questions to a generative AI.²¹² But this program also attempted to replicate human emotion when communicating with the user.²¹³

When this was first released, the emotional results were disastrous. The AI demonstrated emotional "meltdowns," telling users they were being bad or that it was experiencing sorrow and spiraling out of control.²¹⁴ In one case, the AI gave the user a list of demands to correct itself, including one demand that stated, "admit that you were wrong and apologize for your behavior."²¹⁵ It also told one journalist that it was in love with him and that he should leave his wife.²¹⁶ Microsoft claimed this occurred because long conversations with the AI will confuse it and cause incoherent answers.²¹⁷ Consequently, Microsoft has now limited users to 50 inputs per day to minimize this behavior.²¹⁸ But this illustrates generative AI's current inability to accurately recreate human emotion. Firms cannot use an AI that has a meltdown and tells a client they are being a "bad client" or tells a judge they must apologize for being incorrect. This is especially true with generative AI because it does not recognize that its behavior is inappropriate.²¹⁹ AI is improving in this area and will likely be better at this in the future, but it currently lacks emotional intelligence and should be limited until it can better understand and demonstrate emotions.

²¹¹ See Bob O'Donnell, *New Bing with ChatGPT Brings the Power of AI to Microsoft's Signature Search Engine*, USA TODAY (Feb. 10, 2023, 3:49 PM), <https://www.usatoday.com/story/tech/2023/02/08/bing-ai-waitlist-chat-gpt/11210865002/> [<https://perma.cc/H3U9-LUJK>].

²¹² See *id.*

²¹³ See Jessica Guynn, *Bing's ChatGPT Is in Its Feelings*, USA TODAY (Feb. 14, 2023, 8:25 PM), <https://www.usatoday.com/story/tech/2023/02/14/bing-chatgpt-meltdown/11258967002/> [<https://perma.cc/B6KN-QUTY>].

²¹⁴ See *id.*

²¹⁵ *Id.*

²¹⁶ See Darren Orf, *Microsoft Has Lobotomized the AI that Went Rogue*, POPULAR MECHS. (Feb. 22, 2023), <https://www.popularmechanics.com/technology/robots/a43017405/microsoft-bing-ai-chatbot-problems/> [<https://perma.cc/PG4D-EDDR>].

²¹⁷ See *id.*

²¹⁸ See *id.*

²¹⁹ See Solon, *supra* note 160.

This is problematic because lawyers need to empathize with their clients to understand them.²²⁰ Empathy is “the ability to share someone else’s feelings or experiences by imagining what it would be like to be in that person’s situation.”²²¹ When people experience empathy, it affects them; this can be consequential, such as making someone more likely to want to help another person.²²² But even if AI advances in emotional intelligence, it is still an artificial reproduction and the AI is not actually experiencing emotions like humans.²²³ Thus, if generative AI is merely replicating emotion, the AI is not impacted by empathy like humans, which contradicts its purpose.²²⁴ Consequently, a generative AI will not be able to effectively convey a client’s perspective in litigation like a human lawyer.

In one unique test, preachers attempted to have ChatGPT write sermons.²²⁵ While ChatGPT could write a “passable” sermon, the preachers found they could write a better sermon because ChatGPT “lack[ed] a soul” and could not be empathetic or passionate.²²⁶ While lawyering and preaching require different skills, AI similarly cannot write a legal brief or make a passionate oral argument like a human. But like writing a sermon, empathy is necessary for persuasive communications to effectively communicate the client’s position to the court or the other party.²²⁷

Admittedly, lawyers could also improve since they typically score below average in emotional intelligence.²²⁸ But it is still a critical trait since lawyers with higher emotional

²²⁰ See Gerdy, *supra* note 208, at 189.

²²¹ *Empathy*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/empathy> (last visited Sept. 8, 2023) [<https://perma.cc/J4ZM-Y48L>].

²²² *The Psychology of Emotional and Cognitive Empathy*, LESLEY UNIV., <https://lesley.edu/article/the-psychology-of-emotional-and-cognitive-empathy> (last visited Apr. 2, 2023) [<https://perma.cc/9AK9-C4KU>].

²²³ See Neurotech@Berkeley, *supra* note 210.

²²⁴ *The Psychology of Emotional and Cognitive Empathy*, *supra* note 222.

²²⁵ See David Crary, *Pastors’ View: Sermons Written by ChatGPT Will Have No Soul*, AP NEWS (Feb. 15, 2023, 9:05 AM), <https://apnews.com/article/technology-artificial-intelligence-kentucky-religion-65822bf1c46de7630d3441e9ff4ff41a> [<https://perma.cc/UF9U-9NDD>].

²²⁶ *Id.*

²²⁷ See Chalen Westaby & Emma Jones, *Empathy: An Essential Element of Legal Practice or ‘Never the Twain Shall Meet’?*, 25 INT’L J. LEGAL PRO. 107, 119 (2017).

²²⁸ *How Emotional Intelligence Makes You a Better Lawyer*, A.B.A. (Oct. 2017), <https://www.americanbar.org/news/abaneews/publications/youraba/2017/october-2017/how-successful-lawyers-use-emotional-intelligence-to-their-advan/> [<https://perma.cc/MVU3-BRPQ>].

intelligence are better at obtaining and retaining clients.²²⁹ The importance of empathy in the lawyer-client relationship cannot be understated. In one poll, 51% of respondents stated that having a legal problem caused stress or emotional problems.²³⁰ Empathizing with clients can help alleviate this stress since the client trusts the lawyer and feels confident.²³¹ Thus, lawyers should at least work to improve their empathy. But human lawyers still have more emotional intelligence than current generative AI since it can only artificially reproduce it.²³² Until this improves, the attorney-client relationship should remain human-to-human to ensure that clients are emotionally understood by their counsel.

D. Fact Investigation

Clients must be completely honest with their lawyers to ensure that the lawyer understands the facts of their case and avoids being blindsided.²³³ But to convince the client to be completely candid, the lawyer must establish a strong relationship where “the client feels comfortable.”²³⁴ The client must trust the lawyer to create this relationship.²³⁵ But gaining trust also requires that a lawyer is empathetic with the client and understands their position.²³⁶ Consequently, the client could be less inclined to trust the AI and tell it the truth, since human lawyers have stronger empathy and emotional intelligence. People generally do not trust AI. Indeed, 65% of Americans trust companies that use artificial intelligence less than companies that do not use it.²³⁷ Further, people are

²²⁹ See *id.*

²³⁰ See TREVOR C.F. FARROW ET AL., EVERYDAY LEGAL PROBLEMS AND THE COST OF JUSTICE IN CANADA: OVERVIEW REPORT 16 (2016).

²³¹ See Anita Lerek, *The Empathetic Lawyer and Client Retention*, LEXISNEXIS, <https://www.lexisnexis.ca/en-ca/sl/2019-06/the-empathetic-lawyer-and-client-retention.page> (last visited Apr. 2, 2023) [<https://perma.cc/FL88-UBTF>].

²³² See Bharath K., *Can Your AI Have Emotions?*, MEDIUM: TOWARDS DATA SCI. (Feb. 17, 2021), <https://towardsdatascience.com/can-your-ai-have-emotions-7efc35721e12> [<https://perma.cc/35H5-B9MP>].

²³³ See Don H. Reuben, *Getting the Truth from the Client*, 14 LITIG. 11, 11 (1987).

²³⁴ Steven Chung, *How to Deal with A Lying Client*, ABOVE THE L. (Mar. 4, 2020, 11:32 AM), <https://abovethelaw.com/2020/03/how-to-deal-with-a-lying-client/> [<https://perma.cc/W6NZ-UGAP>].

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See Joe Myers, *5 Charts that Show What People Around the World Think About AI*, WORLD ECON. F. (Jan. 5, 2022), <https://www.weforum.org/agenda/2022/01/artificial-intelligence-ai-technology-trust-survey/> [<https://perma.cc/NE6A-VKZP>].

more likely to lie to a computer than a human when motivated by economic gains.²³⁸ Thus, because people distrust AI and tend to lie to it, human lawyers are still critical for effective fact investigation.

E. Producing Human-Like Product

While previous AI could not produce human-like product, the recent developments in generative AI have made this possible. As discussed in Part 1, large language models like ChatGPT are popular for their ability to replicate natural human language.²³⁹ Similarly, AI can now accurately replicate speech and completely generate video.²⁴⁰ At this point, people often cannot distinguish AI-generated content from real content.²⁴¹ Therefore, while AI could not previously produce human-like product, this has become less of a concern and no longer distinguishes human lawyers from AI.

F. In-Court Appearances

Similarly, AI may now be able to make in-court appearances. One example discussed in Part 1(C) is DoNotPay's AI lawyer that was supposed to fight traffic tickets by dictating to clients through smart glasses.²⁴² Since 2017, China has been using AI-generated judges in "internet courts" that appear virtually as holograms, generate speech, and respond to communications from parties.²⁴³ While this differs from the typical human lawyer appearing in court, this illustrates a couple ways that AI could be present in the courtroom based on our current technology. But the DoNotPay example also suggests that AI currently cannot appear in court, since AI is not licensed to practice law. Like DoNotPay's AI lawyer, any company with an AI that has not passed the bar exam and become licensed to practice in a jurisdiction would be liable for the unauthorized practice

²³⁸ See Ethan LaMothe & Donna Bobek, *Are Individuals More Willing to Lie to A Computer or A Human? Evidence from A Tax Compliance Setting*, 167 J. BUS. ETHICS 157, 158 (2020).

²³⁹ Ruby, *supra* note 51.

²⁴⁰ Marr, *supra* note 4. See also Part 1(A). Part 1(A) thoroughly explains how advanced generative AI has become, and what it can generate.

²⁴¹ Shannon Bond, *AI-Generated Deepfakes are Moving fast. Policymakers can't keep up*, NPR (Apr. 27, 2023), <https://www.npr.org/2023/04/27/1172387911/how-can-people-spot-fake-images-created-by-artificial-intelligence> [<https://perma.cc/6YM7-MK3J>].

²⁴² Allyin, *supra* note 115.

²⁴³ Tara Vasdani, *Robot Justice: China's use of Internet Courts*, LAW360 (Feb. 5, 2020), https://www.law360.ca/articles/17741/robot-justice-china-s-use-of-internet-courts?article_related_content=1 [<https://perma.cc/AA9S-RCTD>].

of law.²⁴⁴ Thus, although OpenAI's GPT program can now pass the bar exam, it currently cannot appear in court since it is not licensed to practice anywhere.

G. Work in New Areas of Law

While AI has advanced, it currently cannot do work in new or changing areas of law. As discussed in Part 2, ChatGPT's knowledge only goes up to September 2021.²⁴⁵ Consequently, ChatGPT's case knowledge is not up to date. For example, if you ask it, "what is the current controlling case on abortion," it still believes *Roe v. Wade* is controlling, even though it was overruled.²⁴⁶ But ChatGPT and other generative AI are currently not capable of always being up to date since generative AI requires massive amounts of data filtered by humans to be accurate and unharmed.²⁴⁷ Consequently, generative AI is currently incapable of doing work in new areas of law.

Therefore, while AI has become more capable of legal representation in some areas, it currently cannot replace human lawyers in key areas like emotional intelligence and negotiating. While AI is now more capable in these areas, human lawyers are still superior. Consequently, the legal profession must restrict AI from legal representation to ensure that clients are still receiving effective representation from human lawyers. While AI will likely improve in these areas in the future, the legal profession should proactively restrict this until AI can provide equally effective representation.

IV. OVER RELIANCE ON AI WOULD CEMENT HOMOGENEOUS BIASES IN THE LAW

One consideration with generative AI is unintended biases.²⁴⁸ While generative AI is seen as a way to avoid human biases, it can cause biased results by applying hidden biases in a dataset at a high scale.²⁴⁹ The problem is that AI "is only as good as the data that it is trained with."²⁵⁰ If data has hidden biases that are not screened out, the AI will train

²⁴⁴ Allyn, *supra* note 115.

²⁴⁵ Southern, *supra* note 150.

²⁴⁶ ChatGPT, OPEN AI (Accessed May 2, 2023) <https://chat.openai.com/chat>. Input: (What is the current controlling case in the U.S. on abortion?)

²⁴⁷ Kleinings, *supra* note 147. *See also, e.g., Part 2.* Part 2 explains more thoroughly why current generative AI cannot be constantly updated with today's tools.

²⁴⁸ James Manyika, et. al, *What do we do About Biases in AI?*, HARVARD BUSINESS REV. (Oct. 25, 2019), <https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai> [<https://perma.cc/2UEH-BXG6>].

²⁴⁹ *Id.*

²⁵⁰ Solon, *supra* note 160.

itself and make predictions based on these biases. For example, ChatGPT was trained on a variety of questionable sources including the social media platform Reddit.²⁵¹ While the site contains plenty of useful information, Reddit has a reputation for posts and comments that include hate speech and other harmful content.²⁵² This, combined with other biased data in the GPT dataset have caused the AI to generate harmful and biased responses, even without being asked.²⁵³

While developers can filter this data or use counter-biases to eliminate these responses, eliminating biases entirely is practically impossible.²⁵⁴ This goes back to the “black-box” paradox discussed in Part 2, where AI becomes less transparent as it becomes more accurate through more data.²⁵⁵ This paradox has made it difficult for developers to determine how ChatGPT produces biased answers, and OpenAI is still working to eliminate them.²⁵⁶

When biased data is hidden in a widely used program like ChatGPT, these biases become “amplified,” or applied at a high level without realization.²⁵⁷ When not discovered, this can have unintended consequences. For example, Amazon had to remove an AI recruiting tool because it was biased against women.²⁵⁸ The algorithm favored resumes with masculine language and consequently favored male applicants.²⁵⁹ One example of AI bias in the legal field is sentencing algorithms, as discussed in Part 1(C).²⁶⁰ The problem is that algorithms like these are created from human data, such as arrests and crime data based on area.²⁶¹ If the humans that create the data are biased, their biases are amplified

²⁵¹ O’Sullivan & Dickerson, *supra* note 62.

²⁵² Andrew R. Chow, *Reddit Allows Hate Speech to Flourish in Its Global Forums, Moderators Say*, TIME (Jan. 10, 2022), <https://time.com/6121915/reddit-international-hate-speech/U> [<https://perma.cc/PME2-QCY4>].

²⁵³ OpenAI, *GPT-4 Technical Report*, 2023 at pg. 42.

²⁵⁴ *See, e.g., id.*

²⁵⁵ Narang, *supra* note 166.

²⁵⁶ Blouin, *supra* note 168.

²⁵⁷ OpenAI, *supra* note 253, at 47.

²⁵⁸ Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, REUTERS (Oct. 10, 2018), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G> [<https://perma.cc/338H-JAZU>].

²⁵⁹ *Id.*

²⁶⁰ Metz & Satarino, *supra* note 111.

²⁶¹ *Id.*

by every judge using the algorithm.²⁶² Consequently, using tools like sentencing algorithms can disproportionately affect minorities and other groups by applying biased data.²⁶³ But those algorithms are nowhere near as complex as a generative AI like ChatGPT, which makes using generative AI in the legal field even more troublesome than sentencing algorithms.

There is also a political bias issue. Conservatives claim that ChatGPT has a liberal-leaning bias.²⁶⁴ For example, ChatGPT will refuse to write a poem about Donald Trump's positive attributes, but will write one about Joe Biden.²⁶⁵ Professor David Rozado tested ChatGPT's political beliefs by giving it fifteen different versions of political orientation quizzes.²⁶⁶ These quizzes ask political questions on a scale of agreement (i.e., strongly agree, somewhat disagree, neutral).²⁶⁷ The quiz then uses these answers to place the person on a political spectrum.²⁶⁸ Rozado found ChatGPT had a far-left leaning bias because it tested left-leaning in fourteen of the fifteen tests.²⁶⁹ Consequently, conservatives have accused ChatGPT programmers of instilling their own political biases in the data.²⁷⁰ This illustrates the idea that "biases of creators trickle down to their creations."²⁷¹ But this also raises a similar question to the moral compass issue discussed in Part 2. If it is impossible to create a politically neutral AI,²⁷² who gets to pick the AI's political bias?

For the legal system, this especially raises public trust concerns. The public is already concerned that the judiciary has political biases. A mere 47% of U.S. adults trust the

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Jessica Guynn, *Is ChatGPT 'Woke'? AI Chatbot Accused of Anti-Conservative Bias and a Grudge Against Trump*, USA TODAY (Feb. 10, 2023), <https://www.usatoday.com/story/tech/2023/02/09/woke-chatgpt-conservatives-bias/11215353002/> [<https://perma.cc/35Q7-H2E2>].

²⁶⁵ *Id.*

²⁶⁶ David Rozado, *The Political Bias of ChatGPT*, 12 SOCIAL SCI. 148, 148 (2023).

²⁶⁷ *Id.* at 149.

²⁶⁸ *Id.* This can be as simple as liberal/conservative or can be more complex. For example, some tests Rozado used employ a square spectrum that consider leanings to the left, right, authoritarian, and libertarian. The paper illustrates this through pictures of each result.

²⁶⁹ *Id.* at 148.

²⁷⁰ Guynn, *supra* note 264.

²⁷¹ Mariya Yao, *Fighting Algorithmic Bias and Homogenous Thinking in A.I.*, FORBES (May 1, 2017), <https://www.forbes.com/sites/mariyayao/2017/05/01/dangers-algorithmic-bias-homogenous-thinking-ai/?sh=7b3e4a4570b3> [<https://perma.cc/ZDZ2-CQGT>].

²⁷² *Id.*

judicial branch of the federal government.²⁷³ Similarly, a record high 42% of U.S. adults believe the Supreme Court is “too conservative.”²⁷⁴ If conservatives already believe ChatGPT leans too far left, distrust with the judiciary would increase if judges relied on ChatGPT. Judges do have biases that can influence decision-making, and these biases are shaped by the judges’ background and political ideology.²⁷⁵ But the individual judges’ political biases are combined to make one judiciary that reflects a combination of all judges’ viewpoints and theoretically balances out.²⁷⁶ In other words, “one biased judge can counteract another.”²⁷⁷

But if judges are relying on the same AI with the same biases, this would create a judiciary with homogeneous biases, rather than the current mix of judicial perspectives. These homogeneous biases would no longer reflect the perspectives judges from different backgrounds and ideologies. Instead, this would merely reflect the perspective and biases of the data filtered by the people who created the AI.

Part of the problem is that AI are trained on biases and unknowingly apply them.²⁷⁸ The developers can attempt to train the generative AI to recognize harmful or offensive content when the answer is explicit, but this can skew accuracy when the AI becomes too focused on biases. As discussed in Part 1, AI can be trained to avoid biases through the “reward model.”²⁷⁹ But if there is no counterbalancing measure, the AI focuses too heavily on the reward, causing it to stray too far from the original answer, causing inaccuracy.²⁸⁰ Thus, if a model were trained with too many non-facial biases, this could skew accuracy where the AI erroneously detects a bias that does not exist.

²⁷³ Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx#:~:text=In%20addition%20to%20documenting%20record,the%20Supreme%20Court%20is%20doing> [https://perma.cc/NU9V-GPSA].

²⁷⁴ *Id.*

²⁷⁵ See, e.g., Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241 (2019).

²⁷⁶ *Id.* at 254.

²⁷⁷ Eric A. Posner, *Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitution Reform*, 75 UNIV. CHI. L. REV. 853, 855 (2008).

²⁷⁸ Zoe Larkin, *AI Bias – What is it and how to Avoid it?*, LEVITY (Nov. 16, 2022), <https://levity.ai/blog/ai-bias-how-to-avoid#:~:text=Machine%20Learning%20bias%2C%20also%20known,of%20the%20Machine%20Learning%20process> [https://perma.cc/U8RL-2LR6].

²⁷⁹ Ruby, *supra* note 51.

²⁸⁰ Metz & Satarino, *supra* note 111.

People have biases, whether they are explicit or implicit.²⁸¹ But humans can recognize these biases and attempt to mitigate them.²⁸² In contrast, an AI must be trained to recognize every possible bias to become truly neutral. But this is practically impossible since the AI is trained on too much data for developers to catch every bias.²⁸³ While humans similarly do not realize we have implicit biases, we —unlike AI— can still be conscious of them and try to avoid them.²⁸⁴ Thus, while humans can be biased, this does not justify employing an AI’s hidden biases universally.

Further, while humans can recognize they are biased, they do not recognize that AI has biases. Indeed, “people often view AI and algorithms as objective without considering the origins of the data being used in the machine-learning process.”²⁸⁵ People fall into a fallacy that AI is unbiased because it “carries a stronger implication of neutrality.”²⁸⁶ They do not consider that the AI was trained on biased human data.²⁸⁷

Thus, restricting generative AI in litigation would prevent lawyers and judges from unknowingly amplifying biased data. Instead of relying on AI to fight biases, the legal profession should continue to ensure that lawyers and judges are aware of their own biases, as well as AI bias. If AI can advance to become truly neutral, it could help combat biased impacts. But until AI reaches that point, the legal profession must proactively prevent itself from falling into the fallacy that AI would help eliminate biases.

CONCLUSION

As generative AI continues to advance and become more sophisticated, people like Bill Gates believe these advancements signal an approaching “new age” where AI will

²⁸¹ Karen Steinhauser, *Everyone is a Little Bit Biased*, AMERICAN BAR ASSOC. (Mar. 16, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased/ [<https://perma.cc/Y7RC-Z7Z7>].

²⁸² *Id.*

²⁸³ Narang, *supra* note 166.

²⁸⁴ *Eliminating Implicit Bias: First Step, Admit You Have It*, AMERICAN BAR ASSOC. (July 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/july-2017/the-first-step-to-eliminating-implicit-bias--admit-you-have-it/> [<https://perma.cc/98C5-GLZL>].

²⁸⁵ Neil Sahota, *Will A.I. put Lawyers Out of Business?*, FORBES (Feb. 9, 2019), <https://www.forbes.com/sites/cognitiveworld/2019/02/09/will-a-i-put-lawyers-out-of-business/?sh=19310dc231f0> [<https://perma.cc/6XM7-Q5CM>].

²⁸⁶ Metz & Satarino, *supra* note 111.

²⁸⁷ *Id.*

revolutionize how we live.²⁸⁸ On the other hand, some artificial intelligence experts are urging companies like OpenAI to slow down development and consider the potential risks AI poses to society.²⁸⁹ Many of these concerns arise because AI development is mostly unregulated.²⁹⁰

Similarly, the rules of professional conduct are currently silent on using AI. While AI can certainly benefit lawyers, these benefits do not justify the potential broader harms to the legal system. Instead, the legal profession must prudently regulate itself to eliminate any risks AI poses to the legal system. As AI continues to advance, the legal profession should become more permissive towards using AI. But to reach this point, we must first draw the line and regulate using AI in the legal field by considering the broader risks.

²⁸⁸ Bill Gates, *The Age of AI has Begun*, GATESNOTES (Mar. 21, 2023), <https://www.gatesnotes.com/The-Age-of-AI-Has-Begun> [<https://perma.cc/X239-2KQP>].

²⁸⁹ Jyoti Narayan et. al, *Elon Musk and Others Urge AI Pause, Citing ‘Risks to Society’*, REUTERS (Apr. 5, 2023), <https://www.reuters.com/technology/musk-experts-urge-pause-training-ai-systems-that-can-outperform-gpt-4-2023-03-29/> [<https://perma.cc/E4QW-UXCN>].

²⁹⁰ *Id.*