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Liberty, Justice, and Legal Automata

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INTRODUCTION

This article expands on the analysis begun by the author in a recent computer science journal piece called *Are we free to code the law?*[1] The focus there was whether interactive online services for legal self-helpers can be prohibited as the unauthorized practice of law. Put more generally, how should legal 'automata' be regulated? Do they serve justice? Are people at liberty to create and distribute them?

Few would contend nowadays that attempts to suppress books, pamphlets, or speeches on how the legal system works, and what forms one needs to interact with it, would pass constitutional muster in the United States. Is restricting the creation and distribution of software within the legitimate scope of state action? Is providing software that helps people meet their legal needs an activity that government can prohibit?

This article explores ways in which software-based legal assistance systems can be understood for purposes of public policy and First Amendment analysis.

I. AUTOMATION AND AUTHORIZATION

An automaton is a self-operating machine.[2] The term has historically been used in reference to physical devices like toys and robots (and particularly clueless humans). Complex mechanical devices have been a fascination since ancient times, and were fabricated with surprising sophistication well before the industrial revolution. In modern times, 'automata theory' emerged as the study of abstract machines as

* President, Capstone Practice Systems, Inc. and Legal Systematics, Inc. Research behind this article was partially underwritten by LegalZoom.com. I am grateful to Pamela Samuelson and Laurence Tribe for helpful suggestions and reactions.

1. Marc Lauritsen, *Are We Free to Code the Law?,* COMM. OF THE ASS'N. FOR COMPUTING MACHINERY (forthcoming 2013).

2. *Automaton*, WIKIPEDIA, http://en.wikipedia.org/wiki/Automaton (last visited Apr. 20, 2013).

mathematical objects and the problems they can solve.[3] Such automata can be understood as devices that "run" on a sequence of inputs and transition through a series of states that can represent answers to computational questions.

In this paper, 'automata' is used informally to describe software applications that yield answers to questions and other informational artifacts, such as documents. This is done to emphasize their key characteristic of being self-operating, which seems to have special legal significance.

Let's consider an exemplary class of such applications.

A. Online Documentation Systems

Individuals and organizations that need to prepare documents with legal significance turn to a variety of sources, including form books, courts, government agencies, physical form suppliers,[4] packaged software,[5] online form sites,[6] free online document repositories,[7] organizations such as the Association of Corporate Counsel,[8] notaries public, legal document assistants or technicians, conventional private law practices and corporate law departments, and virtual law practices, with secure client portals.[9]

An increasingly popular—and controversial—category of service providers are those that generate customer-specific documents over the Internet, using interactive software, without purporting to be engaged in the practice of law. These include

- commercial services, such as LegalZoom,[10] RocketLawyer,[11] SmartLegalForms,[12] and WhichDraft;[13]

3. AUTOMATA THEORY,.http://en.wikipedia.org/wiki/Automata_theory (last visited Apr. 1, 2013).

4. *See, e.g.*, BLUMBERG, http://www.blumberg.com (last visited Apr. 20, 2013).

5. *See, e.g.*, TURBOTAX, http://turbotax.intuit.com (last visited Apr. 20, 2013); *Will Maker*, NOLO LAW FOR ALL http://www.nolo.com/products/quicken-willmaker-plus-WQP.html (last visited Apr. 20, 2013); *WillWriter*, BRODERBUND http://www.broderbund.com/p-124-willwriter.aspx (last visited Apr. 20, 2013).

6. *See, e.g.*, US LEGAL FORMS, http://www.uslegalforms.com (last visited Apr. 20, 2013); SMARTLEGALFORMS, http://www.smartlegalforms.com (last visited Apr. 20, 2013); COMPLETECASE, http://completecase.com (last visited Apr. 20, 2013).

7. *See, e.g.*, DOCRACY, http://www.docracy.com/ (last visited Apr. 20, 2013).

8. *See Contract Advisor*, ASSOCIATION OF CORPORATE COUNSEL, http://contracts.acc.com/acc/forms.aspx (last visited Apr. 20, 2013).

9. *See* STEPHANIE KIMBRO, VIRTUAL LAW PRACTICE 1 (2010).

10. LEGAL ZOOM, http://www.legalzoom.com (last visited April 20, 2013).

11. ROCKET LAWYER, http://www.rocketlawyer.com (last visited Apr. 20, 2013).

12. SMARTLEGALFORMS, *supra* note 6

- nonprofit sites, such as I-CAN![14] and LawHelp Interactive;[15]
- governmental and court sites, such as self-help court resources in California,[16] New York,[17] and Utah;[18] and
- free services by law firms such as Goodwin Procter,[19] Orrick,[20] Perkins Coie,[21] and Wilson Sonsini.[22]

Most of these services make use of specialized document assembly software, a form of technology that has long been used by lawyers themselves.[23] In brief, that technology enables someone to program 'what words go where' under various sets of answers, gathered in interactive questionnaires that change as users work through them, with context-specific guidance. These applications can embody rule sets of arbitrary size and complexity, and generate highly tailored and precisely styled documents.

In addition to the above commercial, governmental, and nonprofit initiatives, courses are offered at a growing number of law schools—some under an 'Apps for Justice' rubric—in which students build useful

13. WHICH DRAFT, http://whichdraft.com (last visited Apr. 20, 2013).

14. *About I-CAN!*, LEGAL AID SOCIETY OF ORANGE COUNTY, https://secure.icandocs.org/donor2/icanlegal.asp (last visited Apr. 20, 2913). I-CAN! was created by the Legal Aid Society of Orange County, California. Its E-FILE, a free Internet-based tax assistance program for low-income workers, has returned more than $233 million to taxpayers nationwide. *See I-CAN! E-file*, LEGAL AID SOCIETY OF ORANGE COUNTY, https://secure.icandocs.org/donor2/icanefile.asp, (last visited Apr. 20, 2013).

15. *See* LAWHELP INTERACTIVE, https://lawhelpinteractive.org/ (last visited Apr. 20, 2013). Since 2005, LawHelp Interactive, an award-winning service of Pro Bono Net, has assembled over 1.3 million documents. *See InnovAction Awards*, COLLEGE OF LAW PRACTICE MANAGEMENT, http://collegeoflpm.org/innovaction-awards/award-winners/2010-innovaction-award-winners/ (last visited Apr. 20, 2013). Its contributors and operators arguably risk civil and criminal liability in certain states under certain interpretations of their unauthorized practice of law rules.

16. *Online Self Help Center*, CALIFORNIA COURTS, http://www.courts.ca.gov/selfhelp.htm (last visited Apr. 20, 2013).

17. NEW YORK COURT HELP, http://www.nycourts.gov/courthelp (last visited Apr. 20, 2013).

18. *Online Court Assistance Program*, UTAH STATE COURTS, http://www.utcourts.gov/ocap (last visited Apr. 20, 2013).

19. FOUNDERS WORKBENCH, http://www.foundersworkbench.com/ (last visited Apr. 20, 2013).

20. TERM SHEET CREATOR, ORRICK, https://tsc.orrick.com (last visited Apr. 20, 2013).

21. *startupPerColator*, PERKINS COIE, http://www.startuppercolator.com (last visited Apr. 20, 2013).

22. *WSGR Term Sheet Generator*, WSGR, http://www.wsgr.com/wsgr/display.aspx?sectionname=practice/termsheet.htm (last visited Apr. 20, 2013).

23. For an overview of document assembly and other specialized technologies used by lawyers, *see* MARC LAURITSEN, THE LAWYER'S GUIDE TO WORKING SMARTER WITH KNOWLEDGE TOOLS (2010).

software applications as part of their education, results of which can be made available to the public.[24]

B. The Legal Issues

The legal issues here fall into two groups, (1) those about the power of government to regulate automated legal assistance, and (2) those about the wisdom of doing so. In other words, (1) *can* government prohibit automated legal assistance; and, if so, (2) to what extent *should* it?

(1) Do Americans have a right to write, read, and run software that embodies ideas about how the law works? To what extent are people free to provide automated legal assistance? Is there a right to receive such assistance? To what extent can government enjoin or punish such provision or receipt? Is the distribution of software that helps people with their legal needs an activity that needs to be 'authorized'? By what authority?

How are legal self-help applications to be judged—as expressions deserving of protection, or behavior that is appropriately proscribed by the state? If I have the right to say/write something, and others have the right to hear/read it, do I, or they, also have the right to run it? Is an interactive application meaningfully distinguishable from a book? Does our right to say and write things extend to making things that say and write things? To make artifacts that in turn make artifacts?

(2) What is the right regulatory response? Is it good policy to forbid automated legal assistance? Should lawyers be given a monopoly over legal software as well as over personal legal services?

In general, what are the appropriate boundaries? What principled lines can we draw in this area?

24. *See e.g.*, *Justice and Technology Practicum*, CHI.-KENT COLL. OF LAW, http://www.kentlaw.iit.edu/courses/jd-courses/jd-elective-courses/justice-and-technology-practicum (last visited Apr. 20, 2013); *Lawyering in an Age of Smart Machines*, SUFFOLK UNIVERSITY LAW SCHOOL, http://www.law.suffolk.edu/academic/jd/course.cfm?CourseID=571 (last visited Apr. 20, 2013). Courses in which students build interactive legal applications have also been offered at Columbia, Georgetown, and New York Law School. *See also* Karen Sloan, *Legal education goes high-tech*, THE NAT'L L.J. (Jun. 4, 2012),' http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202556661527; *Neota Logic CEO in the Fastcase 50*, VIRTUAL-STRATEGY MAG. (Aug. 2, 2012), http://www.virtual-strategy.com/2012/08/02/neota-logic-ceo-fastcase-50.

C. Unauthorized Practice of Law

Most states have defined law practice, and its unauthorized variants, in statutes and case law. Most such definitions extend to the selection and preparation of documents. Unauthorized practice of law ("UPL") is a crime in some states. For instance, it is a class E felony in New York.[25]

Attorneys General, bar authorities, and private plaintiffs around the country have initiated proceedings against automated legal assistance providers. A few matters are mentioned here to illustrate.

In *Unauthorized Practice of Law Committee v. Parsons Technology Inc.*,[26] the Texas Unauthorized Practice of Law Committee sued two manufacturers of software that helped people prepare wills and other documents, and was granted summary judgment by the court. The case became moot when the Texas legislature crafted a statutory exception:

> In this chapter, the "practice of law" does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.[27]

In *In re Reynoso*,[28] an appellate panel of the Ninth Circuit upheld a bankruptcy court's finding that a provider of bankruptcy preparation software was engaged in UPL, and stressed the point that websites are put together by people.

Many state bar committees have opined on this subject. Provider disclaimers and explicit consumer consent have generally been found to be unavailing. For instance, in March 2010, the Pennsylvania Bar Association Unauthorized Practice of Law Committee issued Formal Opinion 2010-01.[29] Relying largely on a similar opinion from the Connecticut Unauthorized Practice of Law Committee,[30] it concluded:

25. N.Y. EDUC. LAW § 6512 (McKinney 2013).

26. 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

27. TEX. GOV'T CODE ANN. §. 81.101 (West 2005).

28. 477 F. 3d 1117 (9th Cir. 2007).

29. Pennsylvania Unauthorized Practice of Law Committee, Formal Op. 2010-01, PENNSYLVANIA BAR ASSOCIATION (Mar. 10, 2010), http://www.pabar.org/public/committees/unautpra/Opinions/2010-01LglDocumentPreparation.pdf.

30. Connecticut Unauthorized Practice of Law Committee, Informal Op. 2008-01, CONNECTICUT BAR ASSOCIATION (2008), http://www1.ctbar.org/sectionsandcommittees/committees/UPL/08-01.pdf.

> It is the opinion of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that the offering or providing [in Pennsylvania] of legal document preparation services as described herein (beyond the supply of preprinted forms selected by the consumer not the legal document preparation service), either online or at a site in Pennsylvania is the unauthorized practice of law and thus prohibited, unless such services are provided by a person who is duly licensed to practice law in Pennsylvania retained directly for the subject of the legal services.[31]

In short, in the opinion of authorities in at least some states, many of the services listed in section I.A. are violating the law.

D. Defining Law Practice

Of course not all forms of law-related information gathering and provision constitute the practice of law. That lawyers regularly perform an activity does not necessarily mean that it is something *only* lawyers can or should do. Is there 'intrinsically legal work', as opposed to 'non-legal work historically performed by lawyers'? Can interactions in which neither party thinks there is a lawyer-client relationship be considered 'practice'? Does it make sense to characterize behavior of a machine as law practice?

Some arguments boil down to the false syllogism that since lawyers apply rules to facts, any system or service that applies rules to facts constitutes the practice of law.

If automated services that deliver customized legal documentation are inescapably 'practice', and are only permissible within lawyer-client relationships, not only are they proscribed to non-lawyers, but they are rendered highly impracticable even for lawyers due to the obligations attendant upon such relationships. For example, even though confidentiality can be satisfactorily arranged in a wholly automated service, full conflict of interest checking may be problematic. A lawyer's duty to inquire about facts and issues may be impossible to fulfill if the lawyer is not even aware of the 'client' being served. While some of these problems may be overcome with carefully crafted limited service agreements, automated assistance applications framed as part of a lawyer/client relationship are only realistically practical in the context of hybrid, 'unbundled' scenarios, combined with at least a basic level of direct personal interaction.

31. Pennsylvania Unauthorized Practice of Law Committee, *supra* note 29.

If self-help systems cannot be made available outside of lawyer-client relationships, and are highly impractical within such relationships, they may not be available *anywhere*.

E. The Many Faces of Legal Help

To decide how self-help applications should be treated, it is useful to consider the wide range of means by which someone might be helped. Here is a hypothetical that touches on many of them.

Sue Hilfer, not a lawyer, knows a lot about divorce law because she went through a divorce herself. She has made it her life mission to help other people who cannot afford to hire a lawyer, or who choose not to. She has tried nearly every form of delivery that seems to help.

1. Sue started by giving public lectures about the divorce process at a local community college.
2. At first she just delivered remarks, without answering questions, but eventually began to take questions from the audience. Sometimes people would describe their situations and ask what they should do. Sometimes Sue would tell them (in public) what she recommended.
3. Sue developed a set of pamphlets that described the rules, processes, and forms involved. She handed these out at her lectures.
4. Sue turned some of the pamphlets into articles that were published in a regional newspaper.
5. The pamphlets and articles grew into a book, which Sue self-published in paperback form.
6. Sue initially gave away the books for free, but then started charging for them.
7. Supporters helped Sue produce an audio version of her book, first on tape and later on CD. At five dollars each, they sold well.
8. Sue then arranged for her book to be available for downloading to electronic book readers.
9. She created a website and put long excerpts online.
10. She created short videos about each stage of the divorce process and put them on YouTube.
11. Most editions of the book included tables, diagrams, flowcharts, decision trees, and annotated form samples, to help self-represented litigants apply book contents to their particular situations.
12. Sue's form samples were turned into fillable PDFs on her website, which visitors could download, fill out, print, and take to the courthouse.

13. With the help of a niece who was studying computer science, Sue then programmed an application that presented an interactive questionnaire to users, with scripted guidance about how to answer questions.
14. The application at first gave specific, but impersonal, guidance to users. For instance, it said things like "An unemployed person with custody of two children whose former spouse earns $630 a week should expect to receive an order for child support of about $350 per week."
15. Later the application was revised to be more personal, saying for instance "Since you are unemployed, and are caring for two children, and Joe earns $630 a week, . . ."
16. At first the application just described the documents the litigant needed to file, and how they should be filled out.
17. Later, the application generated filled out forms for the litigant to download and print.
18. Sue decided to incorporate her business, and began operating as Self Help Helper, under the slogan "Helping Those Who Help Themselves."
19. At one point Sue arranged for 'office hours' at her home, where litigants could receive guidance from her on how to use her book, forms, website, and other materials. She called these 'navigation services'.
20. Sue also offered to help people through text messaging and email.
21. Lately Sue has begun accompanying customers to court and helping them as questions arise, by talking with them in the hallway and passing notes in the courtroom. Each customer signs this acknowledgment: "I understand and accept that you are not a lawyer. Please help me anyway."
22. For a fun side project with a group of local seniors, Sue led a team that built a totally mechanical form-filling machine, using parts from an old typewriter, cash register, player piano, and pinball machine. Calling it Documat, they installed it in a laundry near the courthouse, next to the snack vending machines. Coin-operated, it helps litigants prepare complaints, motions, and financial statements. Sue periodically makes sure there are ample supplies of preprinted forms and ink.
23. This just in—after being accused of the unauthorized practice of law, Sue took the interactive application off her website. But she now makes the source code available for download as a text file, along with instructions for how users can compile it for use on their own computers.

At what points in this sequence did Sue cross the line into unauthorized practice? What features make a difference?

Whether the content of Sue's expression is 'information' or 'advice'?

- Whether it relates to specific kinds of circumstances?
- Whether it is printed or spoken?
- Whether it is public or private?
- Whether it is in real time or asynchronous?
- Whether Sue and her listener(s) are in the same physical location?
- Whether the service includes preparation of documents?
- Whether information is provided on paper or electronically?
- If electronic, whether online or not?
- Whether Sue is being paid?

As we will see, most such features have little bearing on the legality of Sue's actions.

II. SOCIAL POLICY

A. The Case for Prohibition

Policy arguments in favor of disallowing automated legal assistance systems generally involve protection of the public and protection of the legal profession.

1. Protecting the Public

Undoubtedly some people will be harmed by automated systems. Defective or incomplete legal assistance can cause significant damage, and it is reasonable to assume that such damage is more likely when no lawyer is involved.

Software applications lack common sense. They cannot hear what is not being said. They do not detect nuance or emotion. Moreover, as with people, they can operate on unspoken assumptions, create the illusion of expertise, and engender unwarranted trust.

Wendy Goffe and Rochelle Haller paint a vivid picture of the kinds of errors and lost opportunities that can arise in the estate planning area with do-it-yourself systems.[32] People may not know what they really want, or the implications of choices they make. Documents can end up with missing or contradictory information. Users may not be

32. Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27 (2011), *available at* http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/EPCMJ1108_Goffe_thumb.pdf.

properly informed of formalities required to validly execute documents. Defects of these sorts may not surface for years, and cause havoc for loved ones and beneficiaries.[33] Online systems typically do not keep track of a consumer's circumstances and issue an alert when the law changes in ways that might require updating an estate plan.[34]

2. Protecting the Legal Profession

We justify licensing in many contexts—taxicabs, restaurants, plumbers, electricians. Other purely informational professions are regulated, such as accounting, banking, insurance, and teaching. Why shouldn't lawyering be limited to lawyers?

Lawyers are bound by many restrictions on their behavior in exchange for a license to practice. Is it unfair or unwise to restrict what non-lawyers can do in relation to legal advice giving, counseling, or representation? Part of the societal bargain regarding any profession is a limited monopoly.

By not allowing unqualified people to advise citizens on their legal affairs, and seeing to it that such advice occurs within appropriately structured and protected relationships, we help ensure the smooth functioning of the legal system and the preservation of an independent legal profession that is so important to our democracy.

B. The Case for Toleration

Those who favor allowing automated legal assistance systems generally claim that they yield net benefits for both society and the legal profession. Many forms of assistance can have unfortunate consequences; mere 'information' can lead people astray. Well intentioned help can go wrong. But we tolerate ranges of quality in other subjects and media. Even heavily regulated drugs sometimes turn out to have unanticipated effects.

Given the vast amount of textual material already available to legal self-helpers—much of which is of uncertain quality and with few clues about currency and relevance to specific situations—interactive systems seem more likely to reduce harm than produce it. They require significant time and money to develop, which few invest recklessly.

33. *Id.* at 28.
34. *Id.* at 29.

Lawyers themselves of course are not infallible. Some are incompetent and some are downright unscrupulous. Much legal work can be scripted, and software will eventually make fewer mistakes in many contexts. Machines have already proven demonstrably better than people in certain law-related activities.[35]

Counterbalanced against the inevitable harms automated assistance will sometimes engender are many clear benefits: more informed citizens, better prepared litigants, cleaner and more complete documents.

There are also considerations of economic freedom. Business and social entrepreneurs are anxious to innovate in the legal field. Threats of unauthorized practice claims chill innovation. Even the Federal Trade Commission raised concerns about anti-competitive behavior when states were drafting overly aggressive definitions of the practice of law.[36] An open market is the best defense against poor quality. To paraphrase Louis Brandeis,[37] sunlight may be the best debugger.

C. Reaching a Balance

Do concerns about harms to consumers and the legal profession outweigh the benefits of citizens having access to legal knowledge in interactive programs? Are occasional harms sufficient reason to forgo the power of modern information technology to make a dent in the vast unmet need for legal assistance?

We do not regard occasional harm as sufficient reason to foreclose an entire category of economic or social activity. Therefore, laws and regulations should focus narrowly on possible abuses. Wholesale prohibition of automated legal assistance systems goes too far. We can deal with bad actors and protect people through enforcement of existing rules regarding false advertising, information torts, and the like.

A healthy and independent legal profession is a highly desirable social good. But activities that do not require the distinctive skills and values of lawyers should not be reserved exclusively to lawyers. A robust industry of legal knowledge tool providers—to lawyers and lay

35. *See* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011).

36. *See, e.g.*, *Comments on Draft Proposed Definition of the Practice of Law in Massachusetts*, DEPARTMENT OF JUSTICE (Dec. 16, 2004),
http://www.justice.gov/atr/public/comments/206843.pdf.

37. *See* FREUND, THE SUPREME COURT OF THE UNITED STATES 61 (1949).

people alike—is not inconsistent with that good. In the hands of lawyers, knowledge tools actually level the playing field.

Much effort is being spent to define the metes and bounds of law practice, when little will and few resources exist to police and enforce those boundaries. This situation poses the likelihood of selective enforcement, with unpopular providers unfairly targeted. Is it wise or politically sustainable for courts and law enforcement agencies to delegate to lawyers the question of what lawyers can exclusively do?

A free flow of automated systems seems to offer net advantages. Reasonable regulations should be established to minimize potential harms, but a robust and open market of interactively coded legal ideas is in the best long-term interest of both society and the profession. It is desirable to have lots of such programs competing for usage in a free market, and to incentivize legal knowledge codification and systemization.

Imagine if a trade union of human 'computers' in the 1940s[38] had successfully thwarted the development of electronic machines as the 'unauthorized practice of computing'. I guess we would at least not have to worry today about machines doing legal work.

D. Self Representation

Before leaving the policy discussion, we should consider the practical implications of prohibition for those who represent themselves.

Individuals have the right under the Sixth Amendment to represent themselves in criminal proceedings,[39] and most courts extend a similar right to civil matters. How meaningful is a right of self representation without materials and tools with which to represent oneself effectively? Surely, people have a right to use such resources as *are* legally available. Few suggest that people somehow engage in illegal behavior by using interactive software. But such access can be meaningless if the software is not available in the first place.

The fact that at least some people can effectively represent themselves in certain contexts has been confirmed by many studies.[40] We

38. *See* GEORGE DYSON, TURING'S CATHEDRAL: THE ORIGINS OF THE DIGITAL UNIVERSE (2012). George Dyson tells the fascinating story of the early days of electronic computing at Princeton's Institute for Advanced Studies and elsewhere, including the (non-obstructive) role of human 'computers'.

39. *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975).

40. *See, e.g.*, Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976); D. James Greiner & Cassandra

allow them to access books and forms. Should more convenient and effective ways of gaining knowledge be precluded? Online systems are the most effective way yet, short of direct assistance by a qualified human specialist.

If ignorance of the law is no excuse, what excuse is there for denying citizens tools that counteract ignorance?

III. FREEDOM

A. Free Speech

Even if there were a good policy case for regulating the creation and distribution of automated legal assistance systems, do such regulations pass muster under the First Amendment to the United States Constitution? These applications admittedly are novel artifacts not envisioned by our founders.

Although the text of the First Amendment prohibits only Congress from enacting laws that abridge freedom of speech, under the incorporation doctrine enunciated by the Supreme Court in *Gitlow v. New York*,[41] that prohibition extends to state legislatures by virtue of the due process clause of the Fourteenth Amendment.

First Amendment protections are of course not without exceptions. They do not authorize people, for instance, to violate intellectual property or reputational rights. We are not free to engage in libel, copyright infringement, or sedition. Obscenity is only partially protected.

None of these exceptions apply to the expressive activity involved in automated legal assistance systems.

Alleged misinformation or harmfulness is not viewed as justifying suppression of books, except in extreme circumstances. We have not viewed government as appropriately being in the business of judging the quality or content of speech. *New York Lawyers Ass'n v. Dacey*[42] held that distributing the book *How To Avoid Probate!* did not constitute the unauthorized practice of law where the book was sold to the public at large and there was no direct relationship of trust or confidence between the author and purchasers.

Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012).

41. Gitlow v. New York, 268 U.S. 652, 666 (1925).

42. 234 N.E.2d 459 (N.Y. 1967).

One may be inclined to suggest that some automated systems are a form of 'commercial speech', and thus deserve less protection. Commercial speech has generally been understood as the activity of beckoning business, not the substantive content of what is being offered. "The ''core notion' of commercial speech is that 'which does no more than propose a commercial transaction.'"[43] Selling a book does not render it any less deserving of First Amendment protection than one given away for free. Speech motivated by profit has expressive value even if it is being uttered in the marketplace.

The irrelevance of whether an individual is paid for his or her services has been recognized in the Unauthorized Practice of Law ("UPL") context. UPL rules are not there to protect attorneys from losing business to unlicensed individuals. Rather, the purpose is to protect the public from consequences resulting "from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law."[44]

While a strict scrutiny standard of review is required for overtly political speech, or that which is critical of government, restrictions on other forms of speech are generally assessed with a balance of interests approach. But that is not true when the content of speech is what is targeted.

Restrictions that apply to certain viewpoints but not others face the highest level of scrutiny, unless they fall into one of the court's special exceptions. An example of this is found in the United States Supreme Court's decision in *Legal Services Corp. v. Velazquez*[45] in 2001, where the Court held that government subsidies cannot be used to discriminate against a specific instance of viewpoint advocacy.

UPL rules applied in this context seem unequivocally content-based, since they do not extend to applications that provide similar functionality outside of the legal context. For instance, they do not foreclose applications that generate cooking recipes, weight loss reduction plans, or psychological profiles. They target systems that help people understand what their rights and obligations are, how to secure the former, and how to comply with the latter. Regulators seem more

43. Anderson v. Treadwell, 294 F.3d 453, 460 (2d Cir. 2002) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983)).

44. South Carolina v. McLauren, 563 S.E.2d 346, 351 (S.C. 2002).

45. 531 U.S. 533 (2001).

concerned with what is being expressed than how it is being communicated.[46]

An alternative way to avoid First Amendment issues is to conclude that programs are not "'speech"' at all, but a form of conduct, analogous to the work done by manual document preparers. This involves distinguishing between 'pure' speech and 'speech plus', which involves actions as well as words. Sometimes speech-like or speech-related action is not protected if *physically* dangerous. Does such a dangerousness rationale extend to *communicative* action?

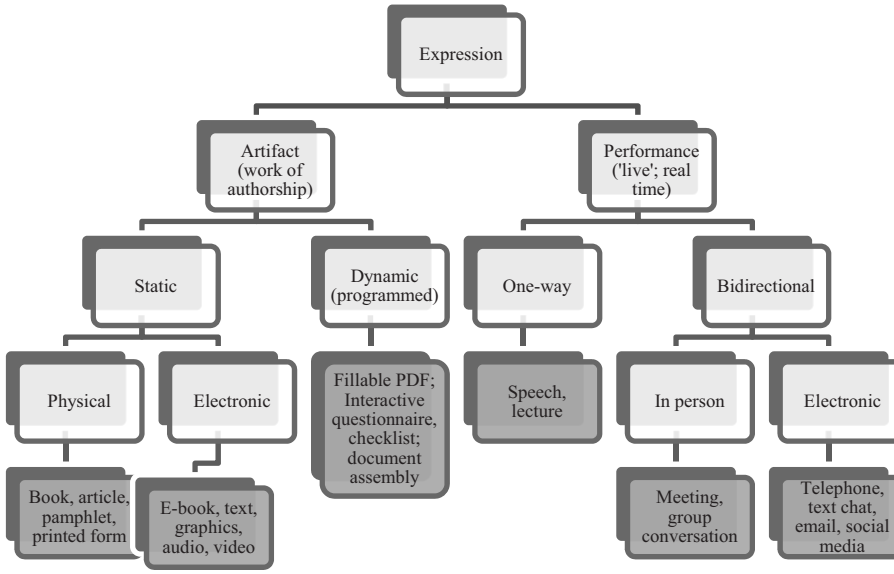
Several scholars have reached tentative conclusions for the unconstitutionality of repressing online legal services under the guise of unauthorized practice of law.[47] The following sections lay out an analytical framework that will support more definitive conclusions.

B. Typology of Expressions

Here is one way to organize the varieties of helpful expression described in section I.E. above. Light boxes are categories; dark ones contain examples.

46. Unauthorized Practice of Law Comm. v. Parsons Tech. Inc., 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999). Judge Sanders concluded that the UPL law was content-neutral, because it was not based on disagreement with specific content expressed in the software under consideration, but rather on fact that it was communicated other than by a licensed lawyer. This analysis was not reviewed on appeal because the case was vacated as moot in light of intervening legislation.

47. *See, e.g.*, Catherine Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811 (2002); Catherine Lanctot, *Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law,* 20 TEMP. POL. & CIV. RTS L. REV. 255; Taiwo Oriola, *The Use of Legal Software by Non-lawyers and the Perils of Unauthorised Practice of Law Charges in the United States,* 18 A.I. & L. 285 (2010).



Expressive conduct falls into two main categories: (1) creating artifacts (works of authorship) and (2) 'performing' (engaging in live, real-time communication with others). Artifacts in turn are either static (with fixed content in a fixed order) or dynamic (programmed to present different content in different orders depending on external triggers, such as a user's behavior in interaction with it.) Performances fall into two high-level categories, those in which communication is one-way (unidirectional), such as speeches, and those in which communication is bidirectional, such as one-on-one and many-to-many conversations.

Some features apply to multiple branches of this tree. For instance,

- Most of the modes of expression can be via either physical or electronic means. (For practical purposes, programmed content and social media interactions can be accomplished *only* electronically.)
- Electronically mediated expression can happen offline or online (i.e., via electronic networks such as the Internet and protocols such as the World Wide Web.)
- All of the artifacts can include charts, diagrams, tables, flowcharts, decision trees, and other graphical elements. (Such things can of course also be *used* in most forms of performative expression.)

- Some of the artifacts can include audio and video elements (which also can be used in performances.)
- All of the artifacts can include structural and navigational features, such as tables of contents, indices, and links. (In physical artifacts, the reader does the 'work'. In electronic ones, buttons and hyperlinks make navigation easier.) In many, there is arbitrary access to any part, e.g., by page turning, fast-forwarding, or scene selection.

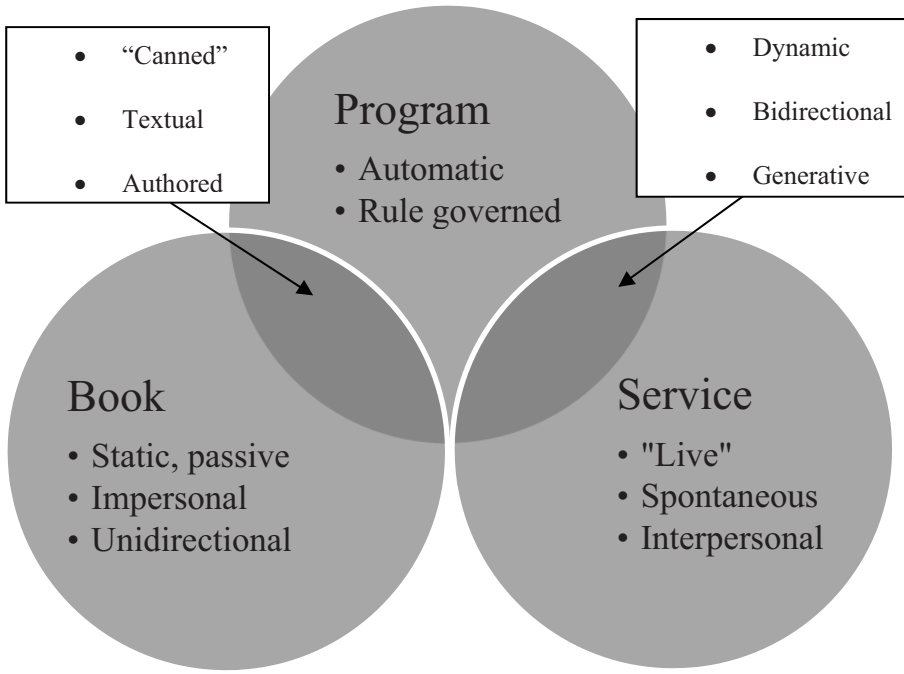
C. Are Automata More Like Books or Human Services?

The difficulty of reaching satisfactory conclusions about automated legal assistance arises in part from our instinctive assent to two propositions:

- People should not be allowed to do via a program what they are not allowed to do in person.
- People should not be disallowed to do via a program what they are allowed to do via books and other media.

To the extent that a software application is seen as a kind of personal conduct, it makes sense to apply the treatment one would apply to comparable functions being accomplished through an in-person service. To the extent that a software application is seen as a work of authorship, it makes sense to apply the treatment one would apply to the comparable content being delivered through a book. How can we resolve these competing instincts?

We might first acknowledge that software applications are a *tertium quid*, something similar to but distinct from both books and services. Like the wave/particle duality of light in modern physics, perhaps it makes sense to regard software as both a 'work' and a service. The shared and unshared characteristics of these three kinds of things are summarized in the following diagram.



Software programs share characteristics with both books and instances of service delivery. Like books, they are essentially textual works of authorship, fully written in advance of their use. The author is generally not present at the time of use. Like services, they can be dynamic, bidirectional, and generative (for instance, by producing case-specific answers and documents.) Unlike both, programs operate as machines, with automated behavior. They are rule governed and deterministic.

Any of these can be used for the transmission of knowledge, guidance, opinions, and expertise. The content delivered through any of these modes can be neutral or tilted in favor of a particular kind of party or point of view.

D. Automata as Texts

When in use, software applications typically involve no contemporaneous human involvement by their authors. Users interact with prewritten code. There is no human interacting with them as they do so.

Programs are special forms of words and numbers—textual objects that instruct machines how to behave. Any program by definition can be expressed textually. You can think of them, as hypertext pioneer Ted Nelson put it, as "literary machines."[48]

All of the outputs of an automated legal assistance system are also in the form of textual speech acts. Delivering a document that someone can download is not meaningfully different, except in terms of convenience, from presenting content that in effect says "Here are the words you need, in this order." These systems not only emit text, they are constituted of text.[49]

Interestingly, much of the fabric of legal work can also be conceived in textual terms. One early article on computer-based legal systems concluded as follows:

> It should not be too surprising if law ends up leading the parade in the work as text movement, and if legal technologists increasingly find themselves understanding the law's constitutive processes in documentary terms. Text (inevitably open—textured) and technique, after all, define the context within which the architects of legal technology must operate.[50] Today's commercial practice system tools — well evolved from the modest beginnings of document assembly yet only suggestive of what artificial intelligence ought to be able to deliver — provide a kind of Jacquard loom upon which to weave some of the fabric of lawyering. Perhaps these tools can inspire more intelligent systems in the same way that loom inspired computer pioneer Charles Babbage.[51]

While debate continues as to whether the First Amendment extends to 'symbolic' speech like flag burning,[52] there is little doubt it protects written texts. If I have the right to share the text of a program with others, and they would commit no offense by compiling and running it, why should I not have the right to run the program and give them access to it?

48. TED NELSON, LITERARY MACHINES (1981).

49. 17 U.S.C. § 101 (2012) (under copyright law software programs are considered "literary works").

50. [footnote in original text] **Text** and most of the other significant words in this sentence derive from the Indo-European root, **teks**, meaning "to weave or fabricate." *The Weavers* is the title of a play, written in 1892, that won the Nobel Prize for Gerhart Hauptmann, father of German naturalist theater. It depicts the doomed 1844 uprising of a community of starving Silesian weavers whose mode of production was rapidly being rendered obsolete by mechanization of the textile industry.

51. Marc Lauritsen, *Building Legal Practice Systems with Today's Commercial Authoring Tools*, 1 ARTIFICIAL INTELLIGENCE AND L. 87 (1992).

52. *See, e.g.*, Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057 (2008).

The question of whether First Amendment rights extend to computer code has arisen in cases involving the publication of decryption algorithms. For example, "computer source code," though unintelligible to many, is the preferred method of communication among computer programmers. Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.[53] Another court noted, "[c]ommunication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code."[54]

Many decisions like those cited in section I.C. treat automated document preparation systems as though they are no different than document preparation directly done by people. That ignores a fundamental distinction. Human services can be responsive to particular situations. Software services may anticipate a variety of 'use cases' and answer scenarios, but the human act of expression behind them is not in reaction to any particular situation. Programs are written before the contexts in which they are used. An action cannot be in reaction to something that happens after that action. An expression cannot be responsive to a communication that has not yet occurred. Its author cannot be charged with knowledge he or she cannot possibly have had.

E. Line Drawing

If we embrace automated legal assistance systems as forms of expression entitled to First Amendment protection, have we started down a slippery slope toward total deregulation of law practice? Can people 'say' anything about law anyway they want? Might we formulate bright-line rules that will spare endless debate and litigation?

There are some distinctions that seem to make little difference to the analysis:

- Whether information is provided online or offline.[55] (In other words, whether the software being used has been purchased as a package and run locally by the consumer, or accessed online as Software-as-a-Service.)

53. Junger v. Daley, 209 F.3d 481, 484-85 (6th Cir. 2000).

54. Universal City Studios v. Corley, 273 F.3d 429, 445 (2001).

55. Reno v. A.C.L.U., 521 U.S. 844, 868–69 (1997) (The Supreme Court unanimously extended the full protection of the First Amendment to the internet, striking down portions of the 1996 Communications Decency Act, which prohibited "indecent" online communication. The court's decision extended the same protections given to books, magazines, films, and spoken expression to materials published on the internet.).

- Whether the software is provided free, or for a fee, as discussed above.
- Whether the software is provided by a natural person or by a corporation. (Both have First Amendment rights, at least under current U.S. Supreme Court rulings.[56])
- Whether information and guidance is couched in the second or third person. (It is always possible to substitute an abstract description for "you"—e.g. "women who are 47 years old with earned income below $550 per week, presently living in Alabama.")
- Whether the content is cast in advisory terms ("should"), at least when it is pre-written or generated automatically based on pre-written rules.
- Whether the content is static or dynamic, again at least so long as any dynamism arises from pre-written code.
- Whether communications are synchronous or asynchronous. (Legal advice delivered via email is just as authorized or unauthorized as advice delivered face-to-face.)

But, there are other lines that we can draw.

1. Helping Someone Versus Representing Them

Since lawyering and the artifacts it produces are largely informational, are there any aspects of lawyering that computers cannot or should not do? The best candidates are those activities that involve interactions with third parties on behalf of a client, namely the many forms of advocacy and representation. Forbidding non-lawyers, directly or via automated systems, to so interact would not seem to unduly compromise free expression values.

2. Doing Things Lawyers Also Do Versus Saying You Are A Lawyer

Even most ardent opponents of lawyer 'tyranny' would agree that holding oneself out as a lawyer when one is not crosses the line of acceptable behavior. They wouldn't agree, though, that you should not be able to say that your services are "just as good" as those of a lawyer.

The UPL line involves consideration of both what you are doing and what you are *saying* you are doing. There is a significant difference between speech and speech about your speech (metaspeech), that is, between speech and the description or characterization of that speech. Allowing free expression of content in 'canned' modalities does not

56. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 900 (2010).

require allowing that expression to be characterized in untruthful or misleading terms.

3. Automated Versus Human Assistance

Our current technologies already permit richly interactive experiences for users of automated legal assistance systems. What happens when IBM's Watson and Apple's Siri get married? When our legal self-help applications feature photorealistic avatars with emotional intelligence and convincing facial expressions?[57] Will that cause us to reexamine the proper limits of authorized practice? Quantum computing and other techniques will continue to blur the line between what humans and machines can do.

If software of arbitrary scope and complexity must be allowed on free expression grounds, why shouldn't non-lawyer humans be allowed to provide similar assistance, with or without such tools? Aren't people even *freer* to engage in plain-old speech than to program?

Whether or not some forms of direct human assistance may deserve First Amendment protection, we can at least be reasonably confident that such a conclusion need not follow from a finding that automated systems are protected. Human helpers introduce the possibility of spontaneity and discretionary judgment, qualities unavailable from machines that are governed by finite rules. Machines cannot go 'off script'; people can.

A key distinction, I suggest, is whether or not information being provided to a consumer is actually in reaction to that consumer's individual circumstances, as opposed to merely being about circumstances like those the consumer describes. Since software is written in advance of its use, it cannot be the former. Its behavior is entirely predetermined. Anyone who gives the same answers to its questions will get the same results.[58]

This does not mean that human activity incidental to automated services necessarily taints such services. One needs to examine the

57. It is sobering to be reminded that even an early text-based 'chatbot' convinced many users that they were talking to a real psychoanalyst. *See* Joseph Weizenbaum, *ELIZA—a Computer Program for the Study of Natural Language Communication Between Man and Machine*, 9 COMMUNICATIONS OF THE ACM 36 (1966).

58. Again, as a preview of coming attractions, technological advances may blur this distinction. Some systems will eventually learn and evolve, perhaps in very engagement with a current user, in ways that make it seem that they are no longer fully 'pre-written' or pre-determined. And what if a program goes out and conducts research based on a communication from a user? It thus might access and use data that may not have been in the same state, or even available, for a different user at another time.

nature of that activity, including whether it involves substantive advice and whether the circumstances imply a trusted professional relationship. For example, a service representative might answer a customer's question about how to use a website, or a law student working at a court self-help center might help a litigant navigate an interactive application, without giving substantive advice.

IV. LIBERTY AND JUSTICE

Forbidding the distribution of self-help legal software is not only of dubious wisdom as social policy, it is also offensive to First Amendment values. It is hard to make a principled case for suppressing freedom of expression about how the law works.

Free expression, by definition, need not be 'authorized'. Honest attempts to transmit knowledge about how the law works should not be suppressed; at least when done in ways that do not impersonate trusted lawyer/client relationships. Free citizens should not be required to have a license in order to express their understanding of how the law works, or to sell or give away such expressions.

Coded law is not something—like hate speech at military funerals[59]—that we should have to tolerate out of concern for higher values. It is an affirmative good we should embrace. There should no more be limits about what we can code about and publish than what we can write about and publish. The state should not be in the business of regulating knowledge distribution. Its understandable right to regulate professions should not extend to censoring what knowledge people can communicate.

It is in the enlightened interest of lawyers, and the best interest of society in general, to enable programmatic expression of legal knowledge. We should be free to write code, run code, and let others run our code. If concerned citizens, law students, or entrepreneurs want to create tools that help people access and interact with the legal system, let them do it.

Fondly celebrated in our Pledge of Allegiance, justice and liberty will both be advanced by recognizing legal automata as works of creative expression that deserve encouragement and protection.

59. Snyder v. Phelps, 131 S.Ct. 1207, 1217 (2011).