

HOW MEDIATION CONTRIBUTES TO THE “JUSTICE GAP” AND POSSIBLE TECHNOLOGICAL FIXES

*Ellen Waldman**

INTRODUCTION

The justice gap—defined as “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs”—is large and growing.¹ According to recent reports, seven in ten low-income Americans experienced a significant civil legal problem, including problems with health care, housing conditions, disability access, veterans’ benefits, and domestic violence.² 25 percent of poor families surveyed reported facing more than six civil legal problems within the span of one year.³ The numbers are higher for resource-starved parents of young children, individuals with disabilities, and survivors of domestic violence and sexual assault.⁴

When faced with this barrage of legal trouble, poor people, in the main, do not seek out legal assistance.⁵ The decision to go it alone may flow from several factors. Disputants may not recognize the problem they are facing as strictly legal.⁶ They may not know how to access an attorney. And, even if

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1. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [https://perma.cc/Z5U6-43BJ].

2. *Id.* at 21.

3. *Id.*

4. *Id.* at 27.

5. Robert H. Frank, *How Rising Income Inequality Threatens Access to the Legal System*, DÆDALUS, Winter 2019, at 10, 11–12 (explaining that widening income disparities leave low-income individuals unable to access basic legal protection).

6. JULIE MACFARLANE, THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS FINAL REPORT 49 (2013), <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [https://perma.cc/3XP6-4RNW] (demonstrating that a common response among self-represented litigants as to why they chose to self-represent was that they knew their case better than anyone else and what it meant to them).

they can find an attorney, they may not be able to afford her.⁷ Demand for free or low-cost legal assistance vastly exceeds the supply.⁸

Unsurprisingly, our courts are flooded with self-represented litigants. Estimates drawn from samplings of state court records indicate that roughly 75 percent of all civil and domestic relations cases involve one self-represented litigant and 25 percent of all cases involve no lawyers at all.⁹ In Miami-Dade County, Florida, volunteer lawyers recorded that an estimated 80 percent of all domestic violence victims appeared in court unrepresented,¹⁰ while California tallies indicate that 67 percent of disputants in family court and 90 percent of defendants in unlawful detainer actions are self-represented.¹¹ Records pulled from Virginia's state circuit courts reveal that, in 42 percent of cases only the plaintiff is represented,¹² while in 14 percent neither party has an attorney.¹³ The same study revealed that in consumer debt and contract disputes, 65 percent of cases featured a self-represented defendant.¹⁴ In Virginia's Juvenile and Domestic Relations District Court, a staggering 87 percent of cases involve no attorneys, whereas in Virginia's general district courts, that number sits at 43 percent of all cases filed.¹⁵

Plunged into a system built for legal professionals, self-represented litigants fare poorly.¹⁶ Studies of pro se parties in family,¹⁷ small claims,¹⁸

7. *Id.* at 39 (stating that more than 90 percent of the sample in this study referred to financial reasons for representing themselves).

8. LEGAL SERVS. CORP., *supra* note 1, at 44.

9. *Id.* at 33.

10. Jessica Brown & Nancy Kinnally, *Everyone Counts: Taking a Snapshot of Self-Represented Litigants in Miami-Dade*, A.B.A. (Nov. 17, 2017), https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/20/fall-2017/pro-bono-everyone-counts/ [https://perma.cc/27B9-FSAV].

11. TASK FORCE ON SELF-REPRESENTED LITIGANTS, JUDICIAL COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 2 (2004), <https://www.courts.ca.gov/documents/selfreplitsrept.pdf> [https://perma.cc/4UQ4-AV2T].

12. JOHN E. WHITFIELD, NAT'L CTR. FOR STATE COURTS, VIRGINIA SELF-REPRESENTED LITIGANT STUDY: DESCRIPTIVE ANALYSIS OF CIVIL DATA IN CIRCUIT COURT 4 (2018), <http://brls.org/wp-content/uploads/2018/03/Summary-Report-on-the-Findings-of-the-Virginia-Self-Represented-Litigant-Study-rev.pdf> [https://perma.cc/8KHW-EYMK].

13. *Id.* at 5.

14. *Id.* at 5 tbl.4.

15. John E. Whitfield, *The Sobering Findings of the Virginia Self-Represented Litigants Study*, VA. LAW., June 2018, at 20, 21.

16. CHANLEY S. PAINTER, ARK. ACCESS TO JUSTICE COMM'N & CLINTON SCH. OF PUB. SERV., EXPLORING THE PROBLEM OF SELF-REPRESENTED LITIGANTS IN ARKANSAS CIVIL COURTS 25 (2011), <https://arkansasjustice.org/wp-content/uploads/2017/04/Capstone-Report-AAJC-Final-1.pdf> [https://perma.cc/4JNB-MN6H] (stating that 80 percent of the judges report that self-representation has a negative impact on case outcomes; one judge reported, "there have been times [self-represented litigants] prevailed, but very, very seldom").

17. LOGAN CORNETT ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 44 (2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [https://perma.cc/4A53-QDZH].

18. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 55 (2010).

and housing court¹⁹ indicate that a lack of representation leads to unfavorable outcomes relative to their represented adversaries. Without the assistance of counsel, parties have difficulty filling out court forms,²⁰ successfully accomplishing service, asserting appropriate claims and defenses, and mastering court etiquette and decorum.²¹ When disputants seek to “tell their stories” in court, they find themselves stifled and silenced by evidentiary rules and relevance requirements that are baroque and befuddling to them.²²

Mediation, it was thought, would improve this situation. It was thought that, if self-represented litigants could be spared the ordeal of navigating court rules, instead talking informally under the auspices of a neutral third-party, better results could be achieved with less trauma.²³ Dispute system designers, in pleading mediation’s cause, drew heavily from theories of procedural justice, de-emphasizing and rendering questions of substantive or distributive justice largely moot.²⁴ Focusing on those aspects of informal dispute resolution that are thought to enhance participants’ subjective experience—autonomy, emotional unburdening, and creative collaboration—ADR’s advocates proclaimed that an increase in mediation among self-represented litigants would represent an increase in “access to justice.”²⁵

19. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 426–29 (2001).

20. MACFARLANE, *supra* note 6, at 60 (“Virtually every [self-represented litigant] in the sample complained that they found the language in the court forms confusing, complex.”).

21. CORNETT ET AL., *supra* note 17, at 30 (“The interviews suggest many self-represented litigants struggle with understanding how to navigate the [legal] process”); Brook Sessions & Carolyn E. Howard, *Views from the Bench: Dealing with Self Represented Parties in Justice Court*, UTAH B.J., July/Aug. 2019, at 14, 14 (explaining that pro se litigants “often appear well prepared with documents in hand as supporting evidence but don’t understand that rules against hearsay and other rules of evidence may make such documents inadmissible”).

22. JOHN M. GREACEN, SERVICES FOR SELF-REPRESENTED LITIGANTS IN ARKANSAS: A REPORT TO THE ARKANSAS ACCESS TO JUSTICE COMMISSION 2, 24 (2013), <https://www.srln.org/system/files/attachments/Arkansas%20Final%20Report%207-26-13.pdf> [<https://perma.cc/T7KZ-T2HG>] (“The civil courts and the procedural rules that govern . . . [self-represented litigants] in Arkansas and elsewhere in the United States have been designed with the expectation that all parties are represented by lawyers. The procedures are complicated, the rules are strict and often unforgiving, and the jargon used is often incomprehensible to a person without legal training.”)

23. See, e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 15.

24. Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professor Carrie Menkel-Meadow*, 5 NEV. L.J. 347, 353 (2004/2005).

25. Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-violent and Empathetic Means of Human Problem Solving*, 8 UNBOUND 79, 89 (2012–2013) (“Giving parties greater control of how they confront those they are in conflict with and encouraging more possibilities of resolution, including reconciliation, as well as restitution, responsibility and accountability, for example, may itself lead to more peaceful, robust and enduring outcomes. These are the claims of process pluralism and ‘appropriate’ dispute resolution”).

There are two problems with this characterization. First, it is not clear that the way in which self-represented parties interact in court-connected mediation meets the requisites of procedural justice. For a process to be experienced as “just,” three criteria must be met. Parties must experience voice—the ability to express their views and tell their stories as they experience them.²⁶ They must feel heard and understood by a neutral third party.²⁷ And lastly, they must believe they are being treated with dignity and respect.²⁸ Unrepresented parties often come to mediation after they have filed a claim in court and then were “encouraged” to try mediation.²⁹ They lack knowledge of the legal framework in which their case is situated.³⁰ When they ask the mediator to assist them in understanding their legal rights and entitlements, they are told that such a function lies beyond the mediator’s role.³¹ Arguably, being asked to negotiate one’s claims without being provided the information necessary to evaluate the offers on the table constitutes neither respectful nor dignified treatment.

Second, if our goal is to enhance self-represented parties’ access to justice, then it is illegitimate to limit the inquiry to process. The question of whether increasing access to mediation necessarily entails increasing access to justice must include considerations of substance. Justice is not increased if the outcomes self-represented parties receive when they negotiate for themselves are systemically less favorable than those they would have obtained had they presented their case in a court of law. At a minimum, a process in which parties unknowingly bargain away rights that courts and legislatures have conferred in an effort to instantiate important social values cannot be characterized as just.

This Essay’s basic premise is that mediation, as it currently is presented to pro se parties in the lower courts, risks significant depredations of justice. This risk flows directly from the ethics rules that either discourage or outright forbid mediators from providing disputants with exactly the information they need to make informed judgments as they bargain over housing, time with children, and scarce financial resources.³² One solution might be to relax mediators’ ethical obligations when dealing with unrepresented parties to

26. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 16–17 (2001).

27. *Id.* at 19.

28. *Id.* at 18.

29. See Press Release, N.Y. State Unified Court Sys., Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases 2 (May 14, 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf [<https://perma.cc/4WKB-NBQW>] (announcing the New York State Unified Court System’s intention to develop uniform court rules that “authorize, endorse and provide a framework for courts to introduce and expand court-sponsored mediation programs, particularly early mediation via *automatic presumptive referrals* in identified types of civil disputes” (emphasis added)).

30. See generally, e.g., CORNETT ET AL., *supra* note 17, at 26–39.

31. Jane C. Murphy, *Objecting to Court Ordered Mediation*, MD. B.J., Sept./Oct. 2005, at 54, 55.

32. See *infra* Part I.D.

enable the provision of significant legal information. This solution is unlikely to take hold as many court-connected mediators in the lower courts are nonlawyer volunteers and law students who feel ill-equipped to deliver legal information in ways that are both scrupulously accurate and impartial.³³

A more promising option lies in embracing technological assets, both of the low-tech and high-tech varieties. Some courts have already begun to include impressive amounts of information on their websites, including content delivery in the form of “day-in-the-life” YouTube videos, interactive web-based apps that help with generating polite—but assertive—correspondence, and tools that assist litigants with populating court forms.³⁴ Moving beyond the upload of dense fact sheets, courts and associated nonprofits are beginning to use technology in increasingly inventive ways.

High-tech interventions such as algorithms could be even more transformative for self-represented litigants. What a self-represented litigant really wants to know in mediation is, what is likely to happen if I do not take the offer on the table? In other words, if my facts and governing law are placed before “my” judge, what is the likelihood that I’ll prevail and how much can I get? Self-represented litigants want the data that predictive legal forecasting is able to deliver. Artificial intelligence (AI) has already been harnessed in the legal arena to benefit wealthy corporations.³⁵ It is time to harness this burgeoning capacity for unrepresented litigants seeking to mediate their claims in court-connected processes.

This Essay flushes out this recommendation in four parts. Using housing court as the paradigmatic example, Part I sets out in concrete detail the challenge that unrepresented litigants often find themselves in once their case is sent to mediation. It describes deficits in the mediation process from the vantage point of procedural and substantive justice theories and identifies the ethics rules that prevent mediators themselves from curing those deficits. Part II reviews the panoply of technological solutions that have already been

33. See, e.g., Maureen E. Laflin, *Dreamers and Visionaries: The History of ADR in Idaho*, 46 IDAHO L. REV. 177, 207–09 (2009) (discussing development of small claims mediation programs in Idaho that rely on law student participation as mediators); Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC’Y REV. 323, 327 (1995) (reporting on a study of small claims mediation involving community volunteers, law students, and graduate students serving as mediators).

34. See *Mediation*, SUPERIOR CT. CAL. COUNTY SAN DIEGO, http://www.sdcourt.ca.gov/portal/page?_pageid=55,1555434&_dad=portal&_schema=PORTAL [https://perma.cc/5N87-C9N2] (last visited Apr. 12, 2020) (offering litigants an explanatory video regarding mediation options); *Name Change Form Builder*, CAL. CTS., <https://www.courts.ca.gov/35393.htm> [https://perma.cc/6S76-8MAS] (last visited Apr. 12, 2020) (offering a self-populating legal name change form); see also *Self-Helpers*, LAWHELP INTERACTIVE, <https://lawhelpinteractive.org/Home/SelfHelper> [https://perma.cc/Q39V-UG7F] (last visited Apr. 12, 2020) (offering a complete fifty-state guide to self-populating forms available in each state).

35. See, e.g., Bernard Marr, *The 10 Best Examples of How Companies Use Artificial Intelligence in Practice*, FORBES (Dec. 9, 2019, 12:26 AM), <https://www.forbes.com/sites/bernardmarr/2019/12/09/the-10-best-examples-of-how-companies-use-artificial-intelligence-in-practice/> [https://perma.cc/DN7E-FF3G] (describing how corporations like Apple, Alphabet, Microsoft, Facebook, and Amazon use AI).

offered to self-represented litigants seeking to navigate the unfamiliar terrain of the adversary system and suggests that AI should be further investigated as a possible mechanism for improving the experience of self-represented litigants in mediation. Part III briefly outlines concerns that AI critics have articulated regarding overreliance on algorithmic formulas. Part IV suggests practical safeguards and methods for implementation that may allay those concerns.

I. SELF-REPRESENTED PARTIES IN MEDIATION

A. Self-Represented Litigants in the “Lower Courts”—One Example³⁶

Jackie was starting a job in New York City in three weeks and still did not have an apartment. After an exhausting day spent touring apartments, she signed a lease with a corporate landlord, Broadway LLC Housing, settling on a one bedroom close to her new job with rent that was 32 percent of her income. The rent was more than she was hoping to pay, but the apartment was convenient and in a nice neighborhood.

Jackie moved in on January 1st. By February, she began to notice that she was not alone. She was sharing the apartment with at least two mice. She called her superintendent who placed some mouse traps in the kitchen and bathroom, but the mice seemed undeterred. For the next eight months, the mouse population grew. Jackie started to notice mouse droppings everywhere—on her bed, on the stove, behind the sofa. A few mice landed in the traps that were set, but many more seemed to be living comfortably in nooks and crannies that Jackie couldn’t locate. The superintendent got tired of Jackie’s weekly calls and texts but did not deny that there was a problem. Ten months into the lease, a professional extermination company came and identified some holes in the walls that led to a thriving mouse community in the bowels of the building. By this time, Jackie estimated that she was sharing her residence with at least twenty mice. Jackie spent the next two months alternately camping with friends or staying at a nearby cheap motel, during which time she stopped paying rent on her apartment. Twelve months into the lease, Broadway LLC agreed to relocate Jackie into an apartment in a nearby unit and Jackie signed a new lease.

Jackie is happy with her new apartment but is unhappy that Broadway LLC expects her to pay for the rental period in her old apartment when she was camping with friends and staying in a motel. Each month, she pays the lease for the new apartment but refuses to pay the two month’s rent on the old apartment. Each month, Broadway LLC states that Jackie is “behind on the rent” and adds interest charges to her account.

Jackie has sued Broadway LLC in small claims court seeking to have her balance “zeroed out.” She has always paid her rent on time and will continue

36. This “hypothetical” is based on a real case mediated by Cardozo law students in the New York City Small Claims Court. Identifying information has been changed or omitted in order to preserve client confidentiality.

to do so but does not believe it is fair to require her to pay rent for the time when the mouse infestation made it impossible for her to continue living in her apartment. She is not claiming any additional damages for the motel bills, the furniture that was ruined, or the extra expenses necessitated by not having a kitchen available. She simply wants the rent for the two months (\$4000) that she was living with friends or in a motel wiped off her balance sheet.

The court where she has filed her complaint has adopted “presumptive ADR,” which means that all parties will be strongly encouraged to mediate before taking their cases before a judge. The court clerk tells Jackie and the landlord’s attorney that the court docket is backlogged, and they will not be able to see the judge today or even the next two times they are told to return to court. “You may as well try mediation while you are waiting,” the clerk advises her and hands the court files to volunteer mediators who are waiting in the jury box. The mediators take the files and usher the parties toward the tiny side rooms, where everything that is said and done will be cloaked in confidentiality.

Jackie is calm and deliberate as she tells her story. She has at least twenty-five pictures of her apartment during the mouse infestation. Mouse droppings are everywhere; a few of the pictures show mice caught in traps. Jackie hands the pictures to the mediators who hand them to the landlord’s attorney. He rifles through them quickly. When it is his turn to speak, he says the following:

Jackie is one of those squeaky wheels who is never satisfied. We gave her a new apartment. Part of the deal was that she would pay the rent on the old apartment. Tenants can’t just move out when there is something they don’t like and expect not to pay rent. A constructive eviction only happens when tenants complain and the landlord doesn’t do anything. Here we did something. We moved her into a new place. And, you know, Jackie, landlords don’t like squeaky wheels. If you like your new place and want to stay there, you should just pay up and let this go.

Jackie turns to the mediator and says,

It doesn’t seem fair that I should have to pay for rent in my old apartment during the period I couldn’t live there. I like my new apartment, but why should I pay rent on my old apartment during the period when I was in a hotel or camped with friends. Does the law say I have to?

The mediator says apologetically, “I’m sorry, I can’t answer that question. I’m here as a neutral—not as your attorney.”

Jackie’s eyes fill with tears and she says, “I guess I just need to suck it up.”

B. Procedural Justice and Respectful and Courteous Treatment

One of mediation’s central selling points is that it embodies the principal features of procedural justice. But this assertion merits challenge when considering how self-represented litigants experience mediation. Certainly, parties are afforded voice and the opportunity to tell their stories to an unbiased third party. But, what of the requirement of respectful treatment?

Respectful treatment in the procedural justice literature includes respecting individuals' rights, including human and legal rights.³⁷ Studies examining the degree to which community members perceive police and judges as wielding authority legitimately highlight the importance of respecting individuals' rights as citizens.³⁸ Housing court litigants such as Jackie might legitimately feel that their rights as citizens are not being respected when a suit is filed seeking a judicial declaration regarding monies charged—and that suit is instead transformed into an informal discussion of what she will settle for—without any mention made of her rights as a tenant.

Efforts to revamp court websites to improve procedural justice values emphasize the importance of clarity, transparency, and the provision of important information.³⁹ Educational programs for court personnel geared toward increasing procedural justice stress the importance of explaining court processes and how decisions are made and the implications of those decisions on litigant rights.⁴⁰ How then, can "presumptive"—read: forced—mediation imposed without the addition of a support person, advisor, or source of legal information, be experienced as respectful, courteous, or fair?

C. Substantive or Distributive Justice Concerns

Self-represented litigants' lack of access to legal information has an impact on more than their subjective experience of the mediation process. It has an impact on outcomes as well. Jackie did not know her rights as a tenant, apart from an instinctive feeling that she should not have to pay rent during the period that a mouse infestation rendered her apartment uninhabitable. The landlord's attorney, during his presentation to Jackie and the mediators made two assertions: (1) constructive evictions do not occur unless the landlord

37. Hollander-Blumoff & Tyler, *supra* note 23, at 6 (explaining that procedural justice includes "both human rights (treatment with dignity) and legal rights (standing to bring a case to the authorities and have it treated seriously)").

38. See generally M. SOMJEN FRAZER, CTR. FOR COURT INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (2006), http://courtinnovation.org/uploads/documents/Procedural_Fairness.pdf [<https://perma.cc/8DRK-Y5AP>]; Jonathan Jackson & Tom R. Tyler, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78 (2013).

39. See CTR. FOR COURT INNOVATION & TEX. MUN. COURTS EDUC. CTR., BUILDING TRUST AND CONFIDENCE THROUGH MODEL COURT WEBSITES 5–6 (2019), https://www.courtinnovation.org/sites/default/files/media/documents/2019-08/building_trust_confidence_through_model_websites.pdf [<https://perma.cc/W6AG-TFAA>]; EMILY GOLD LAGRATTA & PHIL BOWEN, TO BE FAIR: PROCEDURAL JUSTICE IN THE COURTS (2014), <http://criminaljusticealliance.org/wp-content/uploads/2015/02/TobeFair.pdf> [<https://perma.cc/2WTK-8MR3>].

40. See *Pro Se Centers Help Even the Odds for Litigants Without Lawyers*, U.S. CTS. (Aug. 20, 2015), <https://www.uscourts.gov/news/2015/08/20/pro-se-centers-help-even-odds-litigants-without-lawyers> [<https://perma.cc/8PM5-SG8F>]; see also GREACEN, *supra* note 22, at 14–16, 22 (reporting on surveys indicating that Arkansas court staff misunderstand the degree of latitude they have to provide self-represented parties legal information and recommending circulation of best practices and training to educate staff in the latitude they have in answering self-represented parties' questions regarding their legal rights, options, and court procedures).

"does nothing" in response to the tenant's complaint; and (2) landlords resent tenants who drag them into court and if Jackie wanted to stay in her current apartment, she should stay off of her landlord's "radar screen." Despite the mediators' questioning in caucus regarding how a judge might respond to the tenant's pictures, the landlord's attorney steadfastly insisted that the tenant pay all back rent. Meanwhile, the tenant sat, slump-shouldered, contemplating what "getting on her landlord's bad side" would mean for the future.

Although it is impossible to say what would have happened had the tenant taken her cause directly to a judge, case law and recent legislative reforms were on her side. Long-standing precedent in New York holds that a constructive eviction occurs when conditions in a residence are dangerous to the life, health, and safety of a tenant regardless of a landlord's efforts to rectify those conditions.⁴¹ Courts invariably hold that a vermin infestation poses a threat to tenants' health and safety.⁴² Moreover, the recently enacted Housing Stability and Tenant Protection Act of 2019⁴³ (HSTPA) strengthens protections against retaliatory evictions, specifically prohibiting landlords from pushing out tenants because they have asserted a breach of the warranty of habitability or have otherwise taken action that they are legally entitled to pursue.⁴⁴ The legal protections Jackie enjoyed were, seemingly, outcome-determinative. But foundational ethical precepts stand in the way of mediators counseling Jackie regarding her legal rights. Ironically, a mediator's desire to be ethically scrupulous may lead self-represented litigants to experience mediation as both procedurally and substantively disadvantageous.

D. Ethical Barriers to the Provision of Legal Information

Most ethics codes do not flat out bar mediators from providing legal information. They prohibit mediators from providing legal advice and layer on sufficient cautionary gloss to encourage most mediators in lower courts to approach the discussion of legal norms warily and with trepidation.⁴⁵ This is especially true when parties are unrepresented.

41. See, e.g., *Bedke v. Chelsea Gardens Owners Corp.*, No. 601112/09, 2010 WL 1641147 (N.Y. Sup. Ct. Mar. 25, 2010); *U.S. Bronsville II*, *HDFC v. Nelson*, No. 72728/03, 2004 WL 1236913 (N.Y. Civ. Ct. June 1, 2004); see also *Mayers v. Kugelman*, 367 N.Y.S.2d 144 (Dist. Ct. 1975).

42. See, e.g., *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1294–95 (1979) ("[N]o one will dispute that health and safety are adversely affected by insect or rodent infestation . . .").

43. S. 6458, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (enacted); see N.Y. DEP'T OF STATE, GUIDANCE FOR REAL ESTATE PROFESSIONALS CONCERNING THE STATEWIDE HOUSING SECURITY & TENANT PROTECTION ACT OF 2019 AND THE HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019 (2020), <https://www.dos.ny.gov/licensing/pdfs/DOS-Guidance-Tenant-Protection-Act-Rev.1.31.20.pdf> [<https://perma.cc/D4KE-27SR>].

44. Luis Ferré-Sadurní, *How New Rent Laws in N.Y. Help All Tenants*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/nyregion/rent-laws-new-york.html> [<https://perma.cc/A3F2-FQNB>].

45. See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. ARBITRATION ASS'N 2005).

The Model Standards of Conduct for Mediators, the most well-known and widely followed set of standards in the field, begins with the bold statement that party self-determination, defined as making voluntary, uncoerced, and *informed* choices about both process and outcome, lies at the heart of the mediation process.⁴⁶ Almost immediately, however, the standards clarify that “mediator[s] cannot . . . ensure that each party has made [a] free and informed” decision.⁴⁷ As if to settle the quandary that has just been presented regarding a party who appears to be making decisions with insufficient knowledge regarding implications or alternatives, the standards emphasize that “a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.”⁴⁸

The yellow flashing signals surrounding the provision of information continue in later standards. Standard VI, devoted to explicating what quality mediation entails, warns that “[m]ixing the role of a mediator and the role of another profession is problematic.”⁴⁹ Mediators are further admonished that, while they may provide information that falls within their professional sphere of competence, they can only do so if it is consistent with other standards’ mandates.⁵⁰ Obligations to hew vigorously to an impartial stance and avoid undermining party autonomy generally impose significant constraints on mediator efforts to educate parties about background legal norms.⁵¹

The Supreme Court of Virginia’s Department of Dispute Resolution Service’s excellent report on the difference between delivering permissible legal information and impermissible legal advice in mediation only highlights the challenges facing the scrupulous mediator.⁵² Drawing on a variety of court rules, state statutes, and Virginia State Bar legal ethics opinions, the report defines legal advice in mediation as making “specific predictions about the resolution of legal issues or direct[ing] the decision-making of any party.”⁵³ The report concludes that mediators may communicate certain general information, so long as the information does not purport to have any predictive power and is articulated at a high level of generality.⁵⁴ So, mediators may hand out copies of child support statutes—so long as they do not explain their relevance to the parties’ situation. Mediators may ask reality-testing questions that raise legal issues, so long as they stick to questions and avoid any temptation to provide answers. Mediators may inform parties of their own personal experience with a particular court and a particular type of case, so long as the mediator makes

46. *Id.* standard I.A.

47. *Id.* standard I.A.2.

48. *Id.*

49. *Id.* standard VI.A.5.

50. *Id.* (“A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.”).

51. VIRGINIA RULES OF PROF’L CONDUCT r. 2.11 cmt.1 (VA. STATE BAR 2020).

52. *See id.*

53. SUPREME COURT OF VA., GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW ch. 2, § 4 (1999), http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf [<https://perma.cc/S69H-85KF>].

54. *Id.* ch. 3.

clear that this empirical data is limited and doesn't necessarily have any import for the parties' own unique circumstances.

Even where the mediator is careful to speak in generalities and qualifications, the report suggests that certainty in distinguishing between legal information and advice is elusive. The report notes:

While adhering to these Guidelines should provide some measure of protection against charges of [unauthorized practice of law] or unethical practice, mediators should note that what constitutes legal advice is highly contextual and may vary according to the nature and type of the statements made by the mediator, the manner in which law-related information is provided to the parties, the purposes for which it is provided, and the expectations of the disputing parties.⁵⁵

Given this uncertainty, who could blame mediators for choosing to steer away from providing any legal information to unrepresented parties at all?

In New York, the standards guiding community dispute resolution mediators, a group commonly serving at community centers and small claims and housing courts, state that party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or disagree.⁵⁶ One possible interpretation of this standard is that parties can decide if they want to make informed—or uninformed—choices as to whether to settle or not. The standard seems to advise mediators not to concern themselves with whether parties have the information they need to make informed decisions—the parties alone are to be the arbiters of whether their information base is sufficient to decide which options serve their long-term self-interest. The New York standards, mirroring the model standards, also warn mediators against assuming additional roles apart from that of the mediator.⁵⁷ In associated comments, the drafters clarify that they were specifically worried about mediators with legal knowledge edging into an advisory capacity and acknowledge the tension that exists between encouraging informed decision-making and avoiding problematic advice-giving.⁵⁸ The drafters urge mediators to strike a balance, without necessarily hinting at what that balance might entail.⁵⁹

55. *Id.* ch. 2, § 1.

56. STANDARDS OF CONDUCT FOR NEW YORK STATE CMTY. DISPUTE RESOLUTION CTR. MEDIATORS standard I (N.Y. STATE UNIFIED COURT SYS. 2009).

57. *Id.* standard VI cmt. 5.

58. *Id.* standard I cmt. 3 committee note; *id.* standard IV cmt. 5 committee note.

59. *Id.* standard I cmt. 3 committee note; *id.* standard IV cmt. 5 committee note (“The Committee recognizes that the mediator may have specialized knowledge, due to the mediator’s professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties’ decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties’ agreement). However, even if the mediator were correct and this knowledge would impact the parties’ agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator’s role is solely to help the parties make

While the cautionary stance that most ethics codes take toward mediator “activism” is sensible and salutary where disputants have other sources of information or advice, it creates significant problems for low-resource disputants who lack access to important legal information and advice. The next Part considers how technological advances may change the bleak landscape that such parties currently face in the mediation arena.

II. TECHNOLOGICAL ASSISTS

A. Low Tech

To date, the most commonly offered solution to the difficulties unrepresented parties face in mediation is the one most unlikely to be implemented; that is to increase funding to legal aid groups such that every litigant is afforded an attorney to guide him or her through court.⁶⁰ More modest and potentially executable proposals include unbundling services,⁶¹ providing a “lawyer for a day,” and the use of nonlawyer helpers or coaches to provide support and general information.⁶²

Moving from human to machine-based assistance, a consortium of legal service organizations, nonprofits, court-based programs, and tech-oriented nonprofits have developed a series of technological tools designed to assist self-represented litigants in navigating various court processes. At the most basic level, many courts’ websites include links to documents that explain elementary court procedure and include information on litigant rights. For example, New York City Housing Court provides links to documents relating

informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator’s specialized knowledge.”)

60. See, e.g., Bernice K. Leber, *And Justice for All*, N.Y. ST. B. ASS’N J., Oct. 2008, at 5, 5 (arguing that, even in the wake of an economic recession, increased funding to ensure unrepresented parties have access to attorneys, is necessary); see also Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 977–82 (2012) (discussing the scholarly movement calling for a civil *Gideon* right beginning in the 1960s and continuing to the present day).

61. Forrest S. Mosten, *Unbundled Services to Enhance Peacemaking for Divorcing Families*, 53 FAM. CT. REV. 439, 445 (2015) (describing unbundling and encouraging its use “to help the unrepresented gain legal access, acquire some relief for the courts in dealing with the flood of [self-represented litigants], and provide additional practice-building opportunities for lawyers”); see also Forrest S. Mosten, Julie Macfarlane & Elizabeth Potter Scully, *Educating the New Lawyer: Teaching Lawyers to Offer Unbundled and Other Client-Centric Services*, 122 DICK. L. REV. 801, 823–24 (2018) (discussing unbundling strategies as well as “legal coaching,” which can be performed by law students, so long as they refrain from providing legal advice).

62. See, e.g., Jona Goldschmidt, *Autonomy and “Gray-Area” Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J.L. & SOC. POL’Y 130, 173–75 (2011) (encouraging American courts to adopt practices prevalent in English and Canadian courts where nonlawyer agents or friends assist self-represented litigants in court processes); see also Fern Fisher, *Navigating the New York Courts with the Assistance of a Non-lawyer*, 122 DICK. L. REV. 825, 829–32 (2018) (describing three New York navigator programs designed to assist unrepresented parties with participation in court processes, where navigators are typically college students and community volunteers).

to illegal lock-outs, holdover proceedings,⁶³ and “how to prepare for a landlord-tenant trial.”⁶⁴ New York City Family Court includes links to information put together by the nonprofit “LIFT” (Legal Information for Families Today) that answers simple questions relating to custody, visitation, child support, and domestic violence.⁶⁵

LawHelp.org, one of several programs developed and maintained by ProBono.net, includes a network of twenty-six statewide legal information portals, built and maintained on the LawHelp platform, with the assistance of legal aid, pro bono, and court-based programs and libraries across the country.⁶⁶ Information guides include topics ranging from bankruptcy to wage theft to discrimination.⁶⁷ Some state websites include PowerPoint slides with pictures and YouTube videos to supplement the text-heavy nature of the information delivery.⁶⁸

A second technological innovation is a document assembly software that populates court forms based on self-represented litigants’ answers to interview questions. LawHelp Interactive, another program maintained by ProBono.net, allows users to identify the state, legal issue, and particular form needed, and then poses questions, the answers to which will be used to supply the content.⁶⁹ On LawHelp Interactive, a self-represented litigant could apply for food stamps and energy assistance in Pennsylvania, seek a modification of child-support in Montana, and obtain a protective order in Texas. Other document assembly software assists individuals in contacting their landlords to request repairs or explain why the rent will be late.⁷⁰ DoNotPay, marketed as “the world’s first robot lawyer,” assists unrepresented litigants in appealing parking tickets and suing individuals, airlines, wireless providers, or Uber in small claims court, as well as

63. *New York City Housing Court: Legal & Procedural Information*, N.Y. Cts., <https://nycourts.gov/courts/nyc/housing/procedural.shtml> [https://perma.cc/Q8YE-HGZ2] (last visited Apr. 12, 2020).

64. *New York City Housing Court: In General*, N.Y. Cts., <https://www.nycourts.gov/COURTS/nyc/housing/general.shtml> [https://perma.cc/L9E2-L269] (last visited Apr. 12, 2020).

65. *New York City Family Court: Looking Forward*, N.Y. Cts., <http://ww2.nycourts.gov/COURTS/nyc/family/vision.shtml> [https://perma.cc/W7D8-PAJD] (last visited Apr. 12, 2020); *see also* LIFT ONLINE, <https://www.liftonline.org/> [https://perma.cc/YBG4-TNRC] (last visited Apr. 12, 2020).

66. LAWHELP.ORG, <https://www.lawhelp.org> [https://perma.cc/K65C-D3WA] (last visited Apr. 12, 2020).

67. *See, e.g.*, LAWHELPNY.ORG, <https://www.lawhelppny.org> [https://perma.cc/J752-BXF8] (last visited Apr. 12, 2020) (providing information on New York law devoted to money and taxes, including bankruptcy, and workers’ rights, including harassment, discrimination, and paid sick leave).

68. *See, e.g.*, *Videos, Publications and Community Seminars*, N.Y. Cts., <https://www.nycourts.gov/COURTS/nyc/civil/videos.shtml> [https://perma.cc/D348-3S4H] (last visited Apr. 12, 2020); *see also* Representing Yourself, ST. CONN. JUD. BRANCH, <https://www.jud.ct.gov/faq/represent.html> [https://perma.cc/M3Q5-THVE] (last visited Apr. 4, 2020).

69. LAWHELP INTERACTIVE, <https://lawhelpinteractive.org/> [https://perma.cc/ZN9J-BRPX] (last visited Apr. 12, 2020).

70. *About*, HELLO LANDLORD, <https://hellolandlord.org/about/> [https://perma.cc/RYC3-L3H6] (last visited Apr. 12, 2020).

canceling entertainment subscriptions.⁷¹ In addition to populating court forms, DoNotPay also engages users in online interviews that are used to construct a script to be used when presenting information in small claims court.⁷² Access to Justice Author (“A2J Author”) is a cloud-based software tool that allows nontechnical authors such as law students, librarians, and legal services staff to create court documents from two separate components: a clear and accessible user interface called A2J Guided Interview and a template called an A2J Template.⁷³ Together these two tools allow laypeople to engage in their own document assembly projects.⁷⁴

While all these tools are useful in allowing unrepresented parties to successfully complete court forms and access general information, they do not provide the help unrepresented litigants really need once they enter the mediation room: information tailored to their particular circumstances. For this function, they need high-tech assists.

B. High Technology—AI and Predictive Forecasting

AI, specifically the use of machine learning to identify patterns and correlations in large data sets and predict outcomes based on interlocking variables,⁷⁵ is disrupting the legal industry in various ways. In a survey of 350 general counsel, outside counsel, and technology professionals at global companies around the world, 17 percent of respondents reported their belief that computers will be able to do *all* of their current work within two years.⁷⁶ An additional 34 percent report using AI as a legal tool in day-to-day matters.⁷⁷ Surveys of American lawyers reveal slower, but growing, uptake.

71. DoNOTPAY, <https://donotpay.com> [<https://perma.cc/2F8T-D8DX>] (last visited Apr. 12, 2020).

72. *Id.*

73. A2J AUTHOR, <https://www.a2jauthor.org/> [<https://perma.cc/UC3B-KP7T>] (last visited Apr. 12, 2020).

74. See, e.g., *Complete Your New York Divorce Online*, LEGALZOOM, <https://divorce.legalzoom.com/divorce/new-york/> [<https://perma.cc/R7NS-YFRE>] (last visited Apr. 12, 2020) (explaining that assembling the documents necessary to procure a New York divorce would cost \$499 using LegalZoom’s services); *Living Will Pricing*, LEGALZOOM, <https://www.legalzoom.com/personal/estate-planning/living-will-pricing.html> [<https://perma.cc/2CKU-CYAC>] (last visited Apr. 12, 2020) (explaining that creating a living will would cost \$39 for the “basic plan,” \$49 for the “comprehensive,” and \$179 for a “bundled service”); *Pricing*, ROCKET LAW., <https://www.rocketlawyer.com/plans-pricing.rl#/> [<https://perma.cc/S8H32-C3VQ>] (last visited Apr. 12, 2020) (demonstrating that Rocket Lawyer currently charges \$39.99 per document, with an additional \$49.99 charge per question posed online to an affiliated attorney).

75. Max N. Helveston, *Consumer Protection in the Age of Big Data*, 93 WASH. U. L. Rev. 859, 865–66 (2016) (stating that predictive analytics “refers to the use of ‘statistical and analytical techniques . . . to develop models that predict future events’” (quoting CHARLES NYCE, PREDICTIVE ANALYTICS WHITE PAPER 1 (2007), <https://www.the-digital-insurer.com/wp-content/uploads/2013/12/78-Predictive-Modeling-White-Paper.pdf> [<https://perma.cc/9MPX-CS2E>]).

76. *Beyond Science Fiction: Artificial Intelligence and the Legal Industry*, ANKURA (Jan. 29, 2019), <https://ankura.com/insights/beyond-science-fiction-artificial-intelligence-and-the-legal-industry/> [<https://perma.cc/44AJ-9SSH>].

77. *Id.*

Among firms of one hundred or more lawyers, 26 percent are most likely to currently be using AI-based technology, although the number drops considerably at smaller firms.⁷⁸

Although United States-based law firms and in-house departments may be slow to warm to futuristic legal tools, the tech companies generating these breakthrough modalities are clearly marketing their wares to Big Law and other massively profitable institutions.⁷⁹ On the supply side, competition has exploded between AI innovators for the attention and dollars of megafirms like Kirkland & Ellis, Latham & Watkins, Baker McKenzie, and DLA Piper.⁸⁰ For example, Premonition offers in-depth analytics on attorney performance to firms and companies seeking to systematize and optimize attorney hiring and retention decisions.⁸¹ Once engaged in a litigation matter, attorneys with a Premonition subscription can procure charts and reports on opposing counsel's win-loss rates and forge a litigation—or settlement—strategy accordingly.⁸² And, if a lawyer is charged with improving business development, Premonition's analysis of various companies' litigation records and damage payments highlights prospective clients who may be interested in switching counsel.⁸³

ROSS Intelligence, a startup founded by graduate students from the University of Toronto, claims that its natural language searches are both more efficient and effective at answering legal inquiries than more established competitors.⁸⁴ Its website is peppered with testimonials from lawyers who switched to ROSS and are now able to secure the most relevant and useful authority more quickly and for less money.⁸⁵ Unsurprisingly, Westlaw has unveiled its own multipronged, AI-powered platform, including the newly developed KeyCite Overruling Risk, which uses machine learning to signal when a case has been implicitly and only indirectly overruled, and WestSearch Plus, which uses a continuous predictive text editor to help users

78. *ABA Releases 2019 TECHREPORT and Legal Technology Survey Report on Legal Tech Trends*, A.B.A. (Oct. 23, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/10/aba-releases-2019-techreport-and-legal-technology-survey-report-/> [https://perma.cc/SP6P-XZN5].

79. See *Law Firms*, LEX MACHINA, <https://lexmachina.com/law-firms/> [https://perma.cc/L84X-8W82] (last visited Apr. 12, 2020) (advertising legal analytics services to law firms). “Lawyers have traditionally competed by combining two key skills: legal research and reasoning. But now there’s a third leg to the law practice stool. . . . With data driven insight [through Legal Analytics] Lex Machina enables law firms to pitch and land new clients and win lawsuits.” *Id.*

80. See generally Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, JOLT DIG. (Jan. 3, 2018), <https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession> [https://perma.cc/Q366-L7AD] (explaining the emergence of AI in the legal industry and how to implement AI in the legal profession).

81. *Legal Analytics*, PREMONITION, https://premonition.ai/legal_analytics/ [https://perma.cc/VZ29-GKVC] (last visited Apr. 12, 2020).

82. *Id.*

83. *Id.*

84. *About Us*, ROSS INTELLIGENCE, <https://rossintelligence.com/about.html> [https://perma.cc/88N7-WY8U] (last visited Apr. 12, 2020).

85. *Case Studies: Find Out How ROSS Has Helped Others*, ROSS INTELLIGENCE, <https://rossintelligence.com> [https://perma.cc/4DZ6-56JS] (last visited Apr. 12, 2020).

refine searches and more accurately retrieve responsive text from relevant document sets.⁸⁶ Judicata, a website currently searching California law but promising imminent expansion, offers the fruits of AI-driven search capability to California lawyers,⁸⁷ while vLex advertises itself as applying its search algorithms to “one of the largest collections of legal information in the world.”⁸⁸

Lex Machina’s website is typical in that it targets corporate counsel and experienced litigators looking for a competitive edge as its average customers.⁸⁹ The company markets its wares to the savvy business entity looking to protect assets, hire the best talent in a crowded field, and offer superior legal services at attractive prices.⁹⁰ Clients include well-known companies such as Microsoft, eBay, and Nike, as well as a range of well-known boutique and Big Law firms.⁹¹

What is noteworthy, although not surprising, is that the disruptive power of machine learning has been largely harnessed for the benefit of already well-resourced lawyers and the wealthy individuals and corporations they serve. The one exception to this rule, however, offers a vision of what AI devoted to the service of the disadvantaged would look like.⁹²

C. The Legal Navigator Project

Legal Navigator is a collaboration between Microsoft, the Legal Services Corporation, ProBono.net, and Pew Charitable Trusts, which seeks to connect individuals with a legal problem with the local, legal, and human resources that will help them.⁹³ Using a chatbot-like system, Legal Navigator allows users to pose questions in plain language, like “What should I do if I’m getting kicked out?”⁹⁴ The platform analyzes the inquiry as relating to eviction and then guides the user to resources, both print and

86. *Legal Research Products*, WESTLAW EDGE, <https://legal.thomsonreuters.com/en/products/westlaw> [<https://perma.cc/Y3C3-PZL9>] (last visited Apr. 12, 2020). Quick Check scans legal briefs and memos and uses artificial intelligence to identify helpful cases that have not been discussed or cited and weak cases that should be deleted from the argument. *Id.* Statute and Regulation Compare reveals how existing statutes or regulations differ from prior versions and are helpful when tracking and interpreting legislative intent. *Id.*

87. *Introducing Clerk*, JUDICATA, <https://www.judicata.com> [<https://perma.cc/BGH8-KGHA>] (last visited Apr. 12, 2020).

88. vLEX, <https://vlex.com> [<https://perma.cc/H6XU-EJDV>] (last visited Apr. 12, 2020).

89. *About Us*, LEX MACHINA, <https://lexmachina.com/about/> [<https://perma.cc/3VHN-A92H>] (last visited Apr. 12, 2020).

90. *Resource Library*, LEX MACHINA, <https://lexmachina.com/resources/> [<https://perma.cc/DHZ5-7LZZ>] (last visited Apr. 12, 2020).

91. *About Us*, *supra* note 89.

92. See *infra* Part II.C.

93. *Simplifying Legal Help: LSC Moves Forward with Legal Navigator Project*, LEGAL SERVICES CORP., <https://www.lsc.gov/simplifying-legal-help> [<https://perma.cc/C4W8-RZJB>] (last visited Apr. 12, 2020).

94. David A. Heiner, *Milestone Reached: AI at Heart of Legal Navigator Complete, Will Connect People With Legal Resources*, LEGAL SERVICES CORP., <https://www.lsc.gov/simplifying-legal-help> [<https://perma.cc/5UBJ-AT56>] (last visited Apr. 12, 2020).

local service providers, who can help.⁹⁵ Additionally, the program can provide results and action plans tailored to the user's circumstances.⁹⁶ Because Legal Navigator uses machine learning, the responses will become more precise, pointed, and relevant with each inquiry, as the system continually improves and updates its ability to read and retrieve text in context.⁹⁷

Currently, Legal Navigator is being piloted in Alaska and Hawaii with the strong involvement of those states' legal aid and self-help communities.⁹⁸ Before beginning work on the technical aspects of the project, staff hosted focus group meetings with court personnel, self-represented litigants, and legal services attorneys.⁹⁹ In these "Ideation Workshops," stakeholders discussed their needs and the type of information and assistance they would like to gain from the platform.¹⁰⁰ In developing the technical architecture, its builders focused on the following capacities: (1) technology that could identify user location and pull information from trusted sources; (2) natural language processing that could recognize nonlegal descriptions as well as slang and colloquialisms; (3) machine learning that would "get smarter" based on continued use and user feedback; and (4) inclusive design that would be fully accessible to individuals with disabilities.¹⁰¹ The project's scope is currently limited to problems relating to family, housing, and consumer issues, but its structure is designed to be scalable and "extensible," both geographically and topically.¹⁰²

Imagine if a tool similar to Legal Navigator could be made available to self-represented parties in mediation. Imagine if Jackie had a computer terminal available to her in the courthouse where her mediation was taking place.¹⁰³ When called upon to assess how the offer (or nonoffer) on the table compares to what she might expect to achieve in court, she might type a search into the computer: "Do I have to pay rent if I am sharing my apartment with twenty-five mice?" Legal Navigator (or perhaps this machine learning program could be called Legal Negotiator's Helper) would read this inquiry as involving a breach of the warranty of habitability and rodents and would return information regarding this court's receptivity to claims similar to

95. *Introducing the Initiative*, LEGAL SERVICES CORP., <https://www.lsc.gov/simplifying-legal-help> [<https://perma.cc/RGJ3-SHTG>] (last visited Apr. 12, 2020) ("The technology will utilize innovative machine learning/AI technology to assist people in identifying what resources and services are best-suited to help them resolve their legal problem.").

96. *Incubating Innovation in Alaska and Hawaii*, ECOURTS (Jan. 8, 2019), <https://ecourts.org/incubating-innovation-alaska-hawaii/> [<https://perma.cc/98C9-X9Y7>].

97. Heiner, *supra* note 94.

98. *'Legal Navigator' Recognized by Hawaii's and Alaska's Chief Justices for Potential to Narrow the Justice Gap*, LEGAL SERVICES CORP., <https://www.lsc.gov/simplifying-legal-help> [<https://perma.cc/UW8N-LYEB>] (last visited Apr. 12, 2020).

99. See *Ideation Workshops in Alaska & Hawaii*, SIMPLIFYING LEGAL HELP BLOG (Mar. 27, 2018), <https://simplifyinglegalhelp.org/2018/03/27/ideation-workshops/> [<https://perma.cc/C8N4-PT27>].

100. *Id.*; see also Heiner, *supra* note 94.

101. *Incubating Innovation in Alaska and Hawaii*, *supra* note 96.

102. *Simplifying Legal Help*, *supra* note 93.

103. See *supra* Part I.A.

Jackie's. It is likely that the program could only provide Jackie a report on probable success or failure—the decision whether to settle or proceed to court will still involve risk and, possibly, error. However, access to Legal Navigator (or a similar tool) would afford Jackie greater understanding regarding the nature of the risk she faces and allow her to make an educated choice about how she chooses to manage that risk.

III. POSSIBLE PROBLEMS

A. *Garbage In, Garbage Out*

This possible solution to unrepresented parties' dilemma in mediation is not without its problems. What data do the lower courts collect and how accurate and complete is it? Predictive forecasting can only be performed on data that is both comprehensive and scrupulously precise.¹⁰⁴ There is reason to believe that the chaotic, fast-paced environment that characterizes most family, housing, and small claims courts is not conducive to carefully collecting, recording, and preserving court filings and judgments. Indeed, one judge, commenting on the dubious practice of using New York City Housing Court data to compile blacklisting reports on tenants, observed, “[t]he problem is compounded by the fact that the information available” from the housing court “is sketchy in the best of cases and inaccurate and incomplete in the worst.”¹⁰⁵

According to Lex Machina, the first step in constructing its “unparalleled database of legal information” is to mine both federal and state court and U.S. Patent and Trademark Office sites every twenty-four hours for raw attorney and court records.¹⁰⁶ These records are then cleaned, coded, and tagged, whereupon consistent and structured information, such as parties, claims, findings, and outcomes, are extracted.¹⁰⁷ The intricacy and complexity of this process raises questions as to whether the raw data available in family, housing, and small claims courts is accurate and complete and what sort of “cleaning and coding process” would be required. To the degree that unrepresented parties are filing complaints and recording answers on messy handwritten forms, transcription difficulties are inevitable. Additionally, if judicial opinions are not captured and logged in an easily accessible,

104. See generally Alina Zhang, *Forecasting Fundamentals You Should Know Before Building Predictive Models*, TOWARDS DATA SCI. (Sept. 11, 2018), <https://towardsdatascience.com/forecasting-fundamentals-you-should-know-before-building-predictive-models-299a18c2093b> [https://perma.cc/W86A-UWGA] (explaining that the effectiveness of predictive forecasting models depends on the availability of appropriate data).

105. White v. First Am. Registry, Inc., No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *1 (S.D.N.Y. Mar. 7, 2007). See generally Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1360–61 (2007) (discussing *White*).

106. See *How It Works*, LEX MACHINA, <https://lexmachina.com/what-we-do/how-it-works/> [https://perma.cc/3XUG-TG3N] (last visited Apr. 12, 2020).

107. *Lex Machina: Legal Analytics for the Data-Driven Lawyer*, LEX MACHINA, <https://lexmachina.com/wp-content/uploads/Legal-Analytics-for-Data-Driven-Lawyer.pdf> [https://perma.cc/4C5D-ESDH] (last visited Apr. 12, 2020).

systematic way, then computer formulas based on a subset of actually rendered opinions will be imprecise and misleading. The information that AI provides is only as useful as the raw data on which it is based.

B. Bias In, Bias Out

A related problem stemming from the nature of algorithmic inputs is the degree to which those inputs reflect existing prejudice. The danger that algorithmic formulas will encode and perpetuate bias has been well-documented.¹⁰⁸ For example, one program adopted by Broward County, Florida estimated the risk of recidivism to African American offenders to be nearly double the actual rate, whereas white offenders' recidivism rates were significantly underestimated.¹⁰⁹ When factoring in future crimes including misdemeanors, the software functioned at barely better than a coin flip.¹¹⁰

Similar problems have surfaced in software adopted by state child welfare departments.¹¹¹ Designed to predict children's risk for parental mistreatment, these automated systems proved stunningly faulty. Rates of error ranged from 70 to nearly 95 percent when assessing false positives.¹¹² The Illinois Department of Children and Family Services ended its trial of one predictive forecasting tool because "it didn't seem to be predicting much."¹¹³

The inaccuracies in these programs are in part a function of the biases that are baked into the algorithms. As Erin Dalton, deputy director of Allegheny County, Pennsylvania's Department of Human Services, noted, "[a]ll of the data on which the algorithm is based is biased. Black children are, relatively speaking, over-surveilled in our systems, and white children are under-surveilled. Who we investigate is not a function of who abuses. It's a function of who gets reported."¹¹⁴ At each point in the construction of predictive forecasting software, designers make choices regarding which data is useful in assessing risk.¹¹⁵ In the child welfare arena, algorithms significantly rely on family interaction with public benefit systems, drug and mental health rehabilitation programs, as well as calls made to child welfare authorities, which may reflect ongoing risk or the harassing behavior of a

108. See Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [https://perma.cc/6HIR5-57UY].

109. *Id.*

110. *Id.*

111. Sarah Valentine, *Impoverished Algorithms: Misguided Governments, Flawed Technologies, and Social Control*, 46 FORDHAM URB. L.J. 364, 380 (2019).

112. *Id.* The Los Angeles County Office of Child Protection ceased its use of a predictive algorithm formula after an audit revealed a false positive rate of 95 percent. *Id.* A New Zealand program similar to the one adopted by Allegheny County, Pennsylvania was terminated after research revealed a nearly 70 percent error rate. *Id.*

113. *Id.*

114. Dan Hurley, *Can an Algorithm Tell When Kids Are in Danger?*, N.Y. TIMES MAG. (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/magazine/can-an-algorithm-tell-when-kids-are-in-danger.html> [https://perma.cc/V6QP-R8WK].

115. Valentine, *supra* note 111, at 380–82.

disgruntled landlord, neighbor, or boyfriend.¹¹⁶ The Allegheny child welfare system is linking poverty, and consequently race, with the risk of child abuse by using receipt of food stamps, Temporary Assistance for Needy Families grants, county medical assistance, and supplemental security income as predictors of abuse.¹¹⁷

The problems of bias in small claims or housing court algorithms are less serious. The difficulty is not that data inputs will systematically disadvantage targeted racial or ethnic groups but rather that inputs will present existing law as static and unchanging. Because disputants will be presented forecasts that capture past legal rules—but cannot anticipate future changes—those forecasts will amplify the power of prior rulings. And, to the degree that disputants choose to settle based on those forecasts, the algorithm will actually reify existing rules and slow the possibility of future change. Thus, regressive norms will prove stickier and harder to dislodge.

An example may help demonstrate the problem. In New York, there is support for the proposition that chronic rent delinquency can constitute a “nuisance,” justifying eviction and additional remedies, so long as the landlord can establish two factual predicates: (1) the landlord “was compelled to bring numerous nonpayment proceedings within a relatively short period” and (2) “aggravating circumstances,” including a showing that “the tenant’s nonpayment was willful, unjustified, without explanation or accompanied by an intent to harass the landlord.”¹¹⁸ There is also precedent holding that inability to pay due to financial exigency does not justify chronic late payment of rent¹¹⁹ and that eleven separate nonpayment proceedings brought within a thirteen-year span lays out a *prima facie* nuisance case sufficient to survive a motion to dismiss.¹²⁰ A chronically stressed tenant who suffered job loss, a medical emergency, or a legal setback and who has been hauled into court in a holdover proceeding might face a discouraging assessment of the odds of keeping her apartment. The data that a computer

116. *Id.* at 384.

117. *Id.* at 384–85.

118. See 127th St. Cluster, LP v. Brown, No. 250456/09, 2009 WL 1737625, at *1–2 (N.Y. Civ. Ct. June 10, 2009) (“[W]hile the [New York] Court of Appeals . . . has not decided whether chronic late payment or nonpayment of rent when combined with aggravating circumstances could support an eviction proceeding for ‘nuisance,’ the petitioner here has failed to allege any explicit facts showing the presence of aggravated circumstances.”); *see also* Greene v. Stone, 553 N.Y.S.2d 421, 422 (App. Div. 1990) (“Thus, in view of respondent’s alleged chronic late payment and nonpayment of rent, which petitioner claims necessitated repeated resort to legal process, including nonpayment and holdover actions, respondent’s possession of the subject premises may constitute a nuisance warranting eviction if not adequately explained by the tenant.”); Adam’s Tower Ltd. P’ship v. Richter, 717 N.Y.S.2d 825, 827 (App. Term 2000) (“A history of repeated nonpayment proceedings brought to collect chronically late rental payments supports an eviction proceeding on the ground that the tenant has violated a ‘substantial obligation’ of the tenancy. This proceeding was not brought upon the ground of nuisance, which requires a showing of ‘aggravating circumstances.’”).

119. See Sharp v. Norwood, 643 N.Y.S.2d 39, 46 (App. Div. 1996) (Sullivan, J., dissenting).

120. 3510 Realty Corp. v. Matos, No. 8901/19, 2019 WL 5302910, at *1–3 (N.Y. Civ. Ct. Oct. 10, 2019) (denying a tenant’s motion to dismiss the landlord’s nuisance cause of action predicated on the tenant’s alleged chronic rent delinquency).

algorithm spits out might lead her to settle—or rather capitulate—in mediation and agree to vacate the apartment as quickly as she is able.

Settling based on an algorithmic prediction removes this tenant's case from judicial consideration with two interrelated deleterious effects. First, it eliminates the possibility that this tenant presents her unique situation before a tribunal, with the possibility that the judge finds that her situation differs sufficiently from that of prior litigants as to justify a different, more favorable outcome.¹²¹ Second, when disputants with sympathetic situations are led to settle, this deprives courts of an opportunity to reconsider draconian precedent, tamping down the possibility of progressive change and leaving future litigants facing even gloomier algorithmic predictions.

Although settlements driven by computer formulas do not and cannot take into account progressive movement and the bending of the law's arc toward justice, it is also true that lawyerly intuition based on anecdote and speculation similarly ignores the possibility of progressive movement. The only difference between settling on the basis of a computer algorithm as opposed to the advice of a grizzled and experienced legal services lawyer is that an algorithm shows up cloaked in the armor of scientific inevitability while a human prediction can always be discounted as merely one person's opinion.

C. Transparency and Trust

Another possible objection that could be lodged against algorithms as a basis for action or inaction is their opacity.¹²² While due process norms suggest that tools designed to influence disputants' negotiating behavior should be transparent and open to examination, AI is inherently recondite.

Machine learning typically involves identifying a model that describes the relationship between "features"—descriptive characteristics of the "training data set"—and target features, which is the information that the computer will teach itself to recognize in a generalized data set.¹²³ Although machine learning begins with a source code, as the computer learns from its review of voluminous data and gets better at identifying patterns, it begins to write its own increasingly comprehensive and precise code.¹²⁴ Thus, with the most powerful algorithms, the models that the computer is ultimately using far surpass what the original human creators can explain or understand. As commentators acknowledge, this creates a "black box" phenomenon where

121. See, e.g., *Sharp*, 643 N.Y.S.2d at 40 (finding that where a tenant divorcée relied on husband's frequently dilatory alimony payment to meet rent and tenant's rent payment was late eleven times over the course of a thirty-three-year leasehold, such lateness did not constitute a nuisance and did not justify eviction).

122. Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1288 (2018).

123. *Id.* at 1286–87.

124. *Id.* at 1286–90.

the “inputs go in, an output emerges, but how the computer got from Point A to Point B is nearly always a mystery.”¹²⁵

Although many proceduralists contend that computer-based decision tools should be made as transparent as possible, there are some indications that too much disclosure can actually erode trust. A study conducted in a Stanford computer science course in which discrepancies in teaching assistant grading were corrected via algorithmic formula revealed that more detailed explanations of how the algorithm adjusted grade points did not necessarily generate more confidence in the ultimate grade assigned.¹²⁶ Instead, researchers discovered that, where student expectations were disappointed and where the algorithmically altered grades were lower than students expected, more detailed explanations resulted in lower satisfaction levels than when students received short, relatively abbreviated instructions regarding how the algorithm affected grading.¹²⁷ Researchers concluded that “users will not trust black box models, but they don’t need—or even want—extremely high levels of transparency.”¹²⁸ Very basic discussions of initial inputs and the relationships the source code seeks to discover should satisfy consumer needs and be sufficient to generate trust in the overall process.

IV. POSSIBLE SOLUTIONS: PROMOTING EASE OF USE AND ADDRESSING THE DIGITAL DIVIDE

Suggesting that unrepresented parties use AI to plug their knowledge gaps may seem to ignore the potential for computers to confuse, rather than clarify, litigants’ choices. Although computer literacy is accelerating, sophistication and aptitude is not universal. Digital divides still exist based on race, education, and, especially, age.¹²⁹ If courts were able to install computers with machine learning software, could unrepresented parties use them proficiently?

One possible mechanism for ensuring parties have the capacity to use the software is to pair parties with computer proficient “navigators” or “coaches.” In 2014, responding to the inequities facing unrepresented tenants in New York City Housing Court, the Committee on Non-lawyers and the Justice Gap established a pilot program where nonlawyers would help

125. *Id.* at 1315; Andrew Tutt, *An FDA for Algorithms*, 69 ADMIN. L. REV. 83, 101–02 (“An algorithm’s predictability is a measure of how difficult its outputs are to predict, while its explainability is a measure of how difficult its outputs are to explain. . . . Abstract learning algorithms run headlong into that difficulty. Even if we can fully describe what makes them work, the actual mechanisms by which they implement their solutions are likely to remain opaque: difficult to predict and sometimes difficult to explain. And as they become more complex and more autonomous, that difficulty will increase.”).

126. Kartik Hosanagar & Vivian Jair, *We Need Transparency in Algorithms, but Too Much Can Backfire*, HARV. BUS. REV. (July 25, 2018), <https://hbr.org/2018/07/we-need-transparency-in-algorithms-but-too-much-can-backfire> [https://perma.cc/UCT3-V9UB].

127. *Id.*

128. *Id.*

129. See SAIDA MAMEDOVA ET AL., U.S. DEP’T OF EDUC., NCES 2018-161, STATS IN BRIEF: A DESCRIPTION OF U.S. ADULTS WHO ARE NOT DIGITALLY LITERATE (2018), <https://nces.ed.gov/pubs2018/2018161.pdf> [https://perma.cc/3FG3-ET4D].

parties access and complete court forms, formulate defenses where applicable, assist with keeping paperwork in order, explain court etiquette and procedures, and provide moral support throughout the trial itself.¹³⁰ An evaluation of the program indicated that tenants who were linked with navigators were more likely to formulate defenses and have a judge credit those defenses.¹³¹ Researchers considering the plight of self-represented litigants in family courts have also hit upon the idea of a hybrid navigator or coach who could assist litigants in accessing the information they need to move effectively through the court process.¹³²

In a recent article, Julie Macfarlane, founder of the National Self-Represented Litigants Project and fellow contributor to this Symposium, detailed the various types of coaches who might assist self-represented parties in their efforts to stay the course in a labyrinthian legal system.¹³³ “Procedural coach[es]” would assist a client in understanding court rules and procedures and answering questions like where to file, how to submit evidence in advance of a hearing, and how to interpret court rules that are not pellucid or obvious.¹³⁴ A “hearings coach” could assist in explaining “the expectations that a neutral decisionmaker has of the parties,” including how to structure a presentation and even how to dress, while a “negotiation/settlement/mediation coach” could help design the mediation or negotiation process, assist in determining a party’s settlement goals (and situations to be avoided), and aid the parties in articulating and prioritizing their needs.¹³⁵ Each of these coaches, one assumes, would need to have some legal training to be useful in his or her designated role. A “computer coach,” however, would simply need to be familiar with the designated software and able to assist parties in identifying the right searches and pressing the right keys. Most college students, or even high school students, could be recruited for this function as part of a public service project or for pro bono credit.

CONCLUSION

Mediation has been presented as a solution to the justice gap, a means to increase access to justice for the poorest and most disadvantaged among us. But simply providing a forum where disagreements can be discussed is not enough. Real respect for self-determination and a true commitment to

130. Fisher, *supra* note 62, at 829–30.

131. REBECCA L. SANDEFUR & THOMAS CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 14 (2016), http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_report_final_with_final_links_december_2016.pdf [https://perma.cc/TPU3-ZNJ8]; see also Fisher, *supra* note 62, at 832–33.

132. See Natalie Knowlton, *From Talk to Action: How the IAALS Summit Recommendations Can Reshape Family Justice*, 55 FAM. CT. REV. 97, 99–100 (2017).

133. See Mosten, Macfarlane & Scully, *supra* note 61, at 809.

134. *Id.*

135. *Id.* at 810.

procedural justice requires that individuals be provided the information they need to make informed, deliberate decisions.

Ideally, each individual who wants legal advice would be able to access a lawyer to provide it.¹³⁶ Ideally, any mediation participant grappling with the question as to whether the offer on the table is respectable, given her likely chances in court, would obtain sufficient information to be able to make a decision with some confidence and certainty. It is unlikely that this ideal will arise through traditional means. Thus, we need to think of less traditional mechanisms. Predictive forecasting through machine learning offers a tantalizing solution. AI is already the darling of tech firms, Big Law, Fortune 500 companies, and other fixtures of the corporate firmament. We should now think about how we can harness the power AI holds for those who find themselves in court or in mediation with questions they cannot answer. If we really care about closing the justice gap, we should do no less.

136. It must be said that some critique this view as law- and lawyer-centric. See Rebecca L. Sandefur, *Access to What?*, DÆDALUS, Winter 2019, at 49, 50 (“The distinction between a justice problem and a legal need turns out to be crucial, for these two ideas reflect fundamentally different understandings of the problem to be solved. If the problem is people’s unmet legal needs, the solution is more legal services. If the problem is unresolved justice problems, a wider range of options opens up.”).