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Artificial Intelligence in the Criminal Justice System: The Ethical Implications of Lawyers Using AI

Taylor Brodsky

ARTIFICIAL INTELLIGENCE IN THE CRIMINAL JUSTICE SYSTEM: THE ETHICAL IMPLICATIONS OF LAWYERS USING AI

TAYLOR BRODSKY

I. INTRODUCTION

Artificial Intelligence (*hereinafter* "AI") is rapidly revolutionizing the way that human beings work, think, and collaborate with each other. In 2021, of the 9,130 patents received by IBM inventors, 2,300 of them were AI-related.[1] AI is shaping the future of every industry, from the healthcare industry to the financial industry, and even the legal industry.[2]

The first documented AI program was written in 1951 by Christopher Strachey, who taught the AI tool to complete a full game of checkers.[3] Consequently, computer scientists built on Strachey's work, and computer programs emerged that could perform algebra, solve puzzles, and more. Soon thereafter, project after project emerged from optimistic scientists around the world.[4] Before Strachey's entrance into the field of AI, the beginnings of the conversation began with Alan Turing (often referred to as the "father of computer science") in his work, "Computing Machinery and Intelligence" where he asked the question, "Can machines think?"[5] Turing hypothesized that, "in about fifty years' time it will be possible to program computers… to make them play the imitation game so well that an average interrogator will not have more than 70 percent chance of making the right identification after five minutes of questioning."[6]

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[1] *IBM Tops U.S. Patent List for 28th Consecutive Year with Innovations in Artificial Intelligence, Hybrid Cloud, Quantim Computing and Cyber-Security*, IBM (Jan, 12, 2021), https://newsroom.ibm.com/2021-01-12-IBM-Tops-U-S-Patent-List-for-28th-Consecutive-Year-with-Innovations-in-Artificial-Intelligence-Hybrid-Cloud-Quantum-Computing-and-Cyber-Security.

[2] Mike Thomas, *The Future of AI: How Artificial Intelligence Will Change the World*, BULLTIN (March 3, 2022), https://builtin.com/artificial-intelligence/artificial-intelligence-future.

[3] *Id.*

[4] American Bar Association. Section of Business Law, The Law of Artificial Intelligence and Smart Machines: Understanding A.I. and the Legal Impact (T. Claypoole ed., American Bar Association, Business Law Section) (2019).

[5] A.M. Turing, *Computing Machinery and Intelligence*, in 59- 236 MIND 433, 433 (OCT. 1950).

[6] *Id*. at 442.

The beginning stages of AI, those programs that could win a game of chess and solve algebraic equations, has transformed into the technology we see today in our everyday lives.[7] Examples of this include GPS programs like Google or Apple Maps, which can predict the optimal route of travel based on traffic patterns and barriers.[8] Using virtual filters on our faces or using face ID to unlock our phones are another example of AI that has become a routine part of our daily lives.[9] AI has also increasingly been used by businesses to improve customer service, boost efficiency, and improve decision-making.[10]

While there are discussions about the ethical use of Artificial Intelligence and its implications on different sectors, this analysis will focus on the ethical implications of utilizing AI in the legal field. The legal industry is on the cusp of a technological revolution that will change the way all attorneys practice law.[11] Many in-house lawyers are beginning to use AI for the purposes of e-discovery, due diligence reviews, contract preparation, and legal research, and trial lawyers are considering using AI to predict outcomes of cases and assist judges in sentencing procedures.[12]

Section II of this article will provide an overview of Artificial Intelligence, including what it is, how it works, and how it is influencing different sectors such as health care and finance.[13] Section III will discuss the ethical issues of using AI in the criminal justice system, including the potential for bias, threats of breaking attorney-client confidentiality, and depriving clients of

[7] Sterling Miller, *Benefits of Artificial Intelligence: What have you done for me lately?* THOMSON REUTERS https://legal.thomsonreuters.com/en/insights/articles/benefits-of-artificial-intelligence (last visited March 10, 2023).
[8] Sasha Reeves, *8 Helpful Everyday Examples of Artificial Intelligence*, IOTFORALL (Jan. 24, 2023), https://www.iotforall.com/8-helpful-everyday-examples-of-artificial-intelligence.
[9] *Id.*
[10] Adam Uzialko, *Artificial Intelligence is Already Here. How is it Impacting Business Every Day?* BUSINESS NEWS DAILY (Updated February 21, 2023), https://www.businessnewsdaily.com/9402-artificial-intelligence-business-trends.html.
[11] Miller, *supra* note 7.
[12] *Id.*
[13] *See infra* Section II.

transparency and due process.[14] Finally, Section IV will provide a brief discussion on possible solutions and sample language that can be utilized by ethics committees to create a system where the use of AI is safe and promotes equality and justice for all actors in the legal system.[15]

II. BACKGROUND

a. *What is Artificial Intelligence?*

In its simplest form, artificial intelligence refers to a tool that can be implemented into a system that is taught to perform human tasks.[16] It is a machine that can be programmed to think like and mimic human behavior.[17] The algorithms within AI learn from themselves and continue to learn from their own experience, similarly to that of the human brain.[18] Examples of this include asking a smart phone to set reminders for you throughout your day, or asking Siri what the weather is like outside.[19] As of 2017, 85% of Americans have used some form of AI device.[20]

AI is generally divided into three different categories: weak, strong, and super.[21] Weak Artificial Intelligence, also known as narrow AI, refers to a system that is designed to carry out a specific job.[22] This includes video games, chess games, and personal assistants like Amazon's Alexa and Apple's Siri that can answer specific question for you.[23] Strong Artificial Intelligence

[14] *See infra* Section III.
[15] *See infra* Section IV.
[16] Josh Kern, *AI in Law: Transforming Legal Practice*, CLIO, https://www.clio.com/blog/lawyer-ai/ (last visited March 10, 2023).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] § 50:1. *What is Artificial Intelligence*? 3 Health L. Prac. Guide § 50:1 (2022).
[21] Jake Frankenfield, *Artificial Intelligence: What it is and How it is Used*, INVESTOPEDIA (updated July 6, 2022), https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp.
[22] *Id.*
[23] *Id.*

is a theoretical form of AI that can mimic an intelligence equal to that of human beings.[24] It aims to create intelligent machines that are indistinguishable from the way that human beings think, act, and feel.[25] The trend toward strong AI is rapidly emerging.[26] AI has played an important role in fields such as cybersecurity, entertainment, content creation, behavioral recognition and prediction.[27] Finally, super AI refers to the theory that AI will surpass human intelligence and perform the task better than a human can. The concept is that AI will evolve so much so that it will learn to have its own emotions, beliefs, desires, and hypotheses.[28]

b. How is AI Used Today?[29]

1. *Health Care*

The issues that have emerged in other spheres often intersect with those emerging in the legal sphere. While the focus of this analysis is on the emerging use of Artificial Intelligence in the legal sphere and its ethical implications, it is important to note other areas in which AI has become a revolutionizing form of technology. In the health care industry, AI is currently being used to process and analyze patients' test results, gather data, and then use that data to diagnose people.[30] The Laboratory of Computer Science at Massachusetts General Hospital, DXplain, developed a "decision support system" that allows a healthcare provider to input symptoms of a patient and it will provide a list of possible diagnoses and treatments for that patient.[31] This kind of AI is known as "machine learning techniques" which gathers vast amounts of data, finds

[24] *Id.*
[25] *Id.* Examples of strong artificial intelligence systems are self-driving cars or computer systems found in hospital operating rooms. *Id.*
[26] *Id.*
[27] *Id.*
[28]
[29] *Id.*
[30] Sarah Kamensky, *Artificial Intelligence and Technology in Health Care: Overview and Possible Legal Implications*, 21 DEPAUL J. HEALTH CARE L. 1, 4 (2020).
[31] *Id.* 4.

patterns in that data, and forms conclusions based on those patterns.[32] This automated process aids in diagnosing and treating patients, which in turn speeds up the healthcare process and creates a more efficient way of treating patients and providing access to healthcare.[33]

The emerging use of AI in the healthcare industry is not without faults. AI in medicine must be safe and accurate enough to ensure that mistakes are not made.[34] Medical professionals must be aware of possible tort liability and medical malpractice claims, and legislatures must recognize that the current tort liability laws may not be sufficient to address an incorrect medical judgment made by AI.[35] Issues arise when a medical error is made due to a malfunction of the AI technology – do we apply a negligence standard or a products liability standard? – perhaps the use of AI is not as promising as we imagine.[36] Today, nearly 86% of health care providers' practices utilize AI in some form, but medical professionals face many hurtles if they are to begin to rely so heavily on the use of AI to diagnose and treat patients.[37]

2. *Artificial Intelligence in Insurance, Banking, and Finance*

Insurance companies rely on data to analyze an applicant's background to identify high and low risk applicants.[38] Utilizing AI, insurance companies can now sort through large volumes of data and identify key considerations that affect different insurance claims and policies.[39]

In the banking industry, banks are highly prone to fraud, and it is difficult for human employees to keep track of and flag suspicious transactions.[40] However, with the use of AI,

[32] *Id.*
[33] *Id.*
[34] *Id.* at 6.
[35] *Id.* at 7.
[36] *Id.* at 8.
[37] *Id.* at 17-18.
[38] *Top 50 Use Cases of Artificial Intelligence in Diverse Sectors,* ANALYTICS INSIGHT (May 27, 2021), https://www.analyticsinsight.net/top-50-use-cases-of-artificial-intelligence-in-diverse-sectors/.
[39] *Id.*
[40] *Id.*

banks can flag suspicious and fraudulent transactions by sorting through large volumes of data and recognizing trends and keeping track of those accounts that have already been flagged.[41] AI can also help in investments, using predictive technology to identify the best investment based on factors in the market and personal risk analysis.[42]

3. *Education*

Artificial Intelligence provides tremendous opportunities for providing access to education and enhancing the learning experience.[43] The use of AI in education has increased exponentially during the Covid-19 pandemic.[44] Now, AI can tailor lessons and specific learning strategies to each student, according to their capabilities, knowledge gaps, and efficiency to learn.[45] Students can learn according to their specific needs, and educators no longer need to be tasked with mundane and repetitive tasks like grading, checking assignments, and responding to questions, as all of these tasks may be delegated to an AI model.[46] Virtual assistants could increase accessibility to education.[47]

And yet, despite its seemingly endless benefits, the use of AI in education also poses many issues. Like the issue of bias infringing on the practice of law when AI is used, educators should be weary of AI containing inadvertent biases that could be taught to their students. A recent Consortium Report[48] warns school districts to be aware of the consequences of using AI to

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[41] *Id.*
[42] *Id.*
[43] Chris Chambers Goodman, Esq., *Just-Aied: An Essay on Just Applications of Artificial Intelligence in Education*, 123 W. VA. L. REV. 937, 938 (2021).
[44] *Id*. at 939.
[45] *Top 50 Use Cases of Artificial Intelligence in Diverse Sectors,* ANALYTICS INSIGHT (May 27, 2021), https://www.analyticsinsight.net/top-50-use-cases-of-artificial-intelligence-in-diverse-sectors/.
[46] *Id.*
[47] *Id.*
[48] *See* David Rauf, *Artificial Intelligence in K-12 Education: Unintended Consequences Lurk, Report Warns*, EDUC. WEEK (May 28, 2020) (noting that the Consortium for School Networking Report "highlights some of the most promising applications for artificial intelligen**ce** in the K-12 landscape, namely providing adaptive and personalized instruction that could give teachers the chance to create more constructive one-on-one learning opportunities").

teach its students, such that it could lead to infringements on privacy as well as perpetuate biases and inequities."[49] The Report also notes, "bias could manifest in how the platform teaches particular skills, corrects different answers, represents different individuals, and even attempts to interpret students' emotions."[50] AI's measurement of student achievement from other groups may be skewed if it is trained on the answers of high-achieving white and suburban students.[51]

c. AI in Law Enforcement and the Practice of Law

Law enforcement and detectives may reap the benefits of AI as well. Legal departments are investing in AI as a predictive measure for future crimes and are allocating resources to prevent crimes based on those predictions.[52] Law enforcement will no longer have to manually cross check IDs across different states, as facial recognition technology can be used to identify individuals beyond doubt.[53] Thus, law enforcement units can use facial recognition technology to locate wanted individuals, identify people who are captured in images with less of a risk of a false identification, and establish the identity of injured or unconscious victims of traffic accidents.[54] Beyond the use of facial recognition, AI can also reduce the amount of police paperwork, and make it easier to share information between departments and agencies.[55]

As more law enforcement agencies invest in the use of AI technology, the agencies must be weary of a growing trend- the data being used to teach software systems can be imbedded with bias and can reinforce inequality.[56] While AI can be useful in predicting future crime, and

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[49] *Id.*
[50] *Id.*
[51] Chris Chambers Goodman, Esq, *Just-Aied: An Essay on Just Applications of Artificial Intelligence in* Education, 123 W. VA. L. REV. 937, 952 (Spring 2021).
[52] Hope Reese, *What Happens When Police Use AI to Predict and Prevent Crime?* JSTOR DAILY (February 23, 2022), https://daily.jstor.org/what-happens-when-police-use-ai-to-predict-and-prevent-crime/.
[53] *How Will Artificial Intelligence Affect Policing and Law Enforcement?* ARTIFICIAL INTELLIGENCE + (updated March 27, 2023 at 10:52am) https://www.aiplusinfo.com/blog/artificial-intelligence-ai-and-policing/.
[54] *Id.*
[55] *Id.*
[56] Reese, *supra* note 52.

allow law enforcement to send more officers to a certain neighborhood where crime is more likely, this is also a faulty logic—if more police are dispatched to a specific neighborhood, it therefore follows that "more" crime will appear there.[57] Additionally, facial recognition systems have repeatedly demonstrated a bias against people of color.[58]

1. *Transactional Use of AI*

AI has and will continue to revolutionize the practice of law and maximize the way that lawyers allocate their time. Yet, with all new technology, there are pros and cons. Before identifying the issues that plague the industry as the use of AI becomes more prominent, it is useful to understand how legal departments and firms are using AI.

In house lawyers are utilizing AI for the purposes of e-discovery, which eliminates duplicate documents, connects strings of emails, and searches documents for key contexts, concepts, and tone that goes far beyond keyword searches.[59] Predictive coding is also being used to go through thousands of gigabytes of data in minutes, which minimizes the billable hours lawyers and firms charge their clients.[60]

In the corporate transactional field, AI can assist in automating the due diligence process and find specific legal issues and then generate reports about what is has found.[61] As far as contractual work, AI can be for creating contracts and for contract management.[62] AI tools now exist that create form contracts using a set of parameters inputted, and legal departments can decide how much they want to be involved in the creation process. Moreover, attorneys can enter in key aspects of a contract (i.e., terms, start dates, end dates, renewals) and AI can manage

[57] Reese, *supra* note 52.
[58] Reese, *supra* note 52.
[59] Sterling Miller, *Benefits of Artificial Intelligence: What Have You Done for Me Lately?* THOMSON REUTERS, https://legal.thomsonreuters.com/en/insights/articles/benefits-of-artificial-intelligence (last visited April 1, 2023).
[60] *Id.*
[61] *Id.*
[62] *Id.*

and notify parties of contract termination, renewal, and more.[63] Many legal departments and firms are relying on e-billing systems, where AI can analyze the work that was done and compare it to work done by other firms and the market generally, to enhance efficiency and budgeting.[64]

2. *AI in Research and Litigation*

The use of AI tools in legal research is well underway as well. AI can minimize labor-intensive research tasks and lower costs for clients.[65] All attorneys have experienced the mundane, time consuming task of legal research. However, AI now provides a promising and attractive new technology that will allow an attorney to ask a legal question in plain language and get an immediate answer back.[66] The answer will include caselaw, proper citations, secondary sources, and applicable laws.[67] In addition to saving time and money, this technology can streamline the legal research process and give attorneys, especially those that are inundated with heavy caseloads, like public defenders and prosecutors, the luxury of time to think about a problem, and provide the best possible legal judgment.[68]

The United States Court System's public records are filled with incredible amounts of data, including opinions and orders of courts, jury verdicts, and other valuable information.[69] AI now promises a way to search through all of this data, and predict an outcome of litigation.[70] Many in-house lawyers are posed with the same question by their clients: "what are my odds of winning?" and now, they may actually be able to give their client and an answer.[71]

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[63] *Id.*
[64] *Id.*
[65] Reese, *supra* note 52.
[66] Miller, *supra* note 7.
[67] Miller, *supra* note 7.
[68] Miller, *supra* note 7.
[69] Miller, *supra* note 7.
[70] Miller, *supra* note 7.
[71] Miller, *supra* note 7.

With these attractive promises looming, some institutions have conducted research and analyzed how these tools are being used in industries by human beings. An AI Now Institute Workshop, in collaboration with Center on Race, Inequality, and the Law Electronic Frontier Foundation conducted, "a deep examination of current United States courtroom litigation where algorithmic decision making has been central to the rights and liberties at issue in the case."[72] The researchers looked at cases where AI is being used for things like Medicaid and government benefits, public teacher evaluations, the role of social science and technical experts, criminal DNA analysis, and criminal risk assessments, and looked at how humans used the AI systems in each of these cases.[73] In each of these cases the researchers found that many of the AI systems were being misused by humans and that many of the systems were implemented without any meaningful training, support, oversight and, had little protections for recipients.[74] In examining these systems, most of the advocates raised concerned about embedded racial bias:

> For example, most assessment systems include several risk factors that function as proxies for race. One risk factor that is often used is "parental criminality" which, given the long and well-documented history of racial bias in law enforcement, including the over-policing of communities of color, can easily skew "high risk" ratings on the basis of a proxy for race. "Community disorganization is another influential risk factor if an individual lives in a neighborhood considered to be "violent" or near gang activity, which given the long and well-documented history of private and public housing discrimination, could skew "high risk" ratings on the basis of a proxy for race." [75]

The examination done here is just the beginning of the conversation that needs to be had if litigators and practicing attorneys are looking to implement AI systems throughout their practice. There must be ongoing assessments of these systems while they are being used to ensure that data is not being manipulated and used to hurt, rather than help, entire communities.[76]

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[72] LITIGATING ALGORITHMS: CHALLENGING GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS (2018).
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*.

3. *Judicial Use of AI- Bail, Sentencing, and Parole*

Data-driven systems like AI are already being used to assess recidivism in the court system and are also being used during the parole and sentencing phases of criminal matters to assist judges in the sentencing process.[77] In countries like Germany, and the United Kingdom, AI systems are used to predict and prevent crimes.[78] Similarly in China, there is a "206 System" which is an AI assistant used for criminal cases that helps aid judges in sorting through facts, authenticate evidence, and provide impartial judgment to avoid wrongful convictions.[79]

Risk- assessment tools have been developed in the United States to assist judges in reaching sentencing decisions. The Brennan Center for Justice summarized the use of risk assessment tools by judges throughout different states: "these tools use data to predict whether an individual has a sufficiently low likelihood of committing an additional crime to justify a shorter sentence or an alternative to incarceration."[80] Researchers have analyzed and assessed the accuracy of using AI as a predictive tool, and found that with well-trained and educated staff using the best instruments available, AI can predict re-offending with 70% accuracy.[81] The problem lies however, in the fact that not all courthouses can afford the best systems, or have the resource to train and continue to train users on developing systems.

4. *Access to Justice: Unbundled Legal Services and Ghost Writing*

One of the biggest areas where AI can potentially transform the legal system is in providing access to justice to indigent defendants. There is much hope that the use of AI will

[77] Dan Hunter, et al., *A Framework for the Efficient and Ethical Use of Artificial Intelligence in the Criminal Justice System*, 47 FLA. ST. U. L. REV. 749, 752 (2020).
[78] Prof. Dr. Muharrem KILIÇ, *Ethical-Juridical Inquiry Regarding the Effect of Artificial Intelligence Applications on Legal Profession and Legal Practices*, 14 J. Marshall L.J. 202, 205 (2021).
[79] *Id.* at 205.
[80] Hunter, *supra* note 77 at 777.
[81] Hunter, *supra* note 77 at 779.

provide access to justice for individuals throughout the country, by reducing the unnecessary work for lawyers and judges and allowing for more time to be spent on individual cases.

There are unmet legal needs of the poor and middle-class in New York State and throughout the country.[82] A legal right is essentially meaningless without access to the justice system and someone to zealously advocate for those legal rights. Legal services offices cannot meet the needs of the indigent, and most of the middle-class cannot afford a private attorney to assist them.[83]

One of the suggestions that legal professionals have had for decades is the idea of unbundling legal services and ghost writing, however, there has been much pushback to these ideas.[84] AI now opens the door to rectify the criticisms that the courts and legal professionals have had. Unbundled legal services is a practice where a lawyer and a client agree that the lawyer will provide some, but not all of the work that would be involved in a traditional case of legal representation.[85] This way, an indigent defendant who may not be able to afford the entire legal representation—the lawyer's retainer fee plus hours billed—may pay the lawyer on an as-needed basis for legal assistance that they may not be able to do on their own. For example, a client may need a lawyer for trial representation, but be able to do the court filings, discovery, and negotiations on their own.[86] The critics to unbundled legal services raise concerns about the ability of a lawyer to adequately represent their clients through piecemeal efforts.[87] "Unbundled legal services raise questions concerning the existence and adequacy of client autonomy,

[82] Press Release, New York State Unified Court System, Judge Juanita Bing Newton Appointed Deputy Chief of Administrative Judge for Justice Initiatives (June 29, 1999) (on file with authors).
[83] Justice Fern Fisher-Brandveen et al., *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URBAN L.J. 1107 (2002).
[84] *See generally id.* at 1111 (discussing the criticism to unbundling that raises malpractice and ethical concerns).
[85] *Id.* at 1108.
[86] *Id.*
[87] *Id.* at 1115-1119

confidentiality, competence, continuity of representation, communication with represented parties, and candor to the court."[88]

However, with the use of AI, lawyers may be more inclined to participate in unbundled lawyering. Imagine a scenario where an attorney steps into the case after motion practice has occurred and is only hired for the sole purpose of representing the client at trial. The attorney, through the use of an AI algorithm may be able to get a summary of everything that has happened before he has joined the case, including evidence presented, documents received or given during discovery, important legal issues that have arose, and more. Not only that, but perhaps that same lawyer could continuously ask the AI model specific legal questions throughout their limited representation to ensure that they know all the facts.

Ghostwriting is a type of unbundled lawyering where an attorney may draft complaints, motions, and prepare court documents for pro se litigants without ever actually entering an appearance.[89] It can range from drafting a single complaint to behind-the-scenes writing during an entire proceeding.[90] While ghost writing can be extremely beneficial for pro se litigants who have difficulty understanding legal jargon and drafting documents, opponents of ghostwriting say that it is unfair in light of the special leniency afforded to pro se litigants.[91] Opponents also recognize that it violates rules of professional conduct, such as the duty of candor to the court and the duty of fairness to an opposing party.[92] Attorneys also fear the possibility of a malpractice suit for making an error, and therefore refuse to engage in ghosting writing.[93] Here we too see the possibility of AI opening the doors for access to justice across the country.

[88] *Id.* at 1115.
[89] *Id.* at 1117.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

Is the ethical rule of candor to the court violated when an AI module drafts the motion papers or complaint in a proceeding? Especially if the specific AI module used is disclosed to the court? The American Bar Association Standing Committee on Ethics and Professional Responsibility has said that a lawyer's actions may or may not be appropriate when engaging in ghost writing depending on the level of the ghostwriter's participation.[94] "An undisclosed lawyer who renders extensive assistance to a pro se litigant is involved in the litigant's misrepresentation contrary to the Model Code of Professional Responsibility DR 1-102(A)(4), which provides that a lawyer shall not 'engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'"[95] Perhaps an AI model that is trained in document drafting and review could draft these papers for the pro se litigant and remove the issue of a lawyer's ethical obligations to provide candor to the court entirely out of the conversation in the near future.

The idea seems promising, and it provides hope for the future of access to justice advocates, but there are many other ethical issues that must be considered. The AI modules that we currently have may not be fully equipped to handle drafting an entirely accurate motion, and pro-se litigants may not be able to pick up on all of the inaccuracies. In addition, there are concerns about privacy, as far as the data being given to AI modules that is confidential, and the risk of third parties garnering that information.

Other questions regarding ethics include: to what extent should the creators of the software have to follow ethics rules? And how do courts sanction these AI modules or hold them accountable if a mistake is made?[96] With the advent of AI, the American Bar Association is quickly recognizing that it needs to create standards, and fast. The following section of this

[94] *Id.* at 1118.
[95] *Id.*; *see also* ABA Comm. On Ethics and Prof'l Responsibility, Informal Op. 1414 (1978).
[96] *Id.*

article therefore analyzes the ethical implications of the use of AI in legal proceedings, drafting, and representation, and how regulators can begin to promulgate rules to ensure the ethical use of AI in the legal system.

d. *The Intersection of Ethics and AI*

The Model Rules of Professional Conduct, adopted by 36 states, describes a lawyer's responsibilities as a legal professional.[97] The rules state that a lawyer is a representative of clients, "an officer of the legal system, and a public citizen having a special responsibility for the quality of justice."[98] In addition to this, a lawyer must provide their client with an informed understanding of their legal rights and obligations and explain their practical implications.[99] A lawyer should, "zealously assert the client's position under the rules of the adversary system," and seek an advantageous result for the client in negotiations.[100]

Much of these rules are implicated in the emerging use of AI in the legal profession as lawyer's must learn to balance this technology against the Model Rules.[101] The comments to Revised Model Rule 1.1 of the ABA Model Rules requires that a lawyer be competent, which includes, "maintaining the requisite knowledge and skill" and to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject."[102] As AI enters the legal sphere, lawyers must understand and recognize when utilizing AI could be beneficial to a client.[103]

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[97] MODEL RULES OF PROF'L CONDUCT PREAMBLE & SCOPE (2009).
[98] *Id.*
[99] *Id.*
[100] *See generally* Sharon D. Nelson & John W. Simek, *The ABA Tackles Artificial Intelligence and Ethics*, 46 NO. 1 ABALPRAC 26, 26 (January/February 2020)(addressing the ethical issues that the ABA addressed in 2019 regarding AI, and its impact on the legal system).
[101] *Id.*
[102] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009).
[103] Nelson, *supra* note 100 at 27.

First, the lawyer's duty to communicate becomes implicated with AI.[104] A lawyer who decides to utilize AI to assist in representation of a client must disclose this to a client and obtain their informed consent before relying on such technology.[105] Model Rule 1.5[106], which discusses fees and requires that all fees be reasonable, becomes implicated when a lawyer decides to use AI, if using it will lower or increase the cost of representation for the client.[107] A lawyer must also think about the duty of confidentiality, and how the use of AI may require confidential information be shared with third-party vendors.[108] In transmitting data to a third party, a lawyer must think about how reasonably protect a client's data, how that data is stored, and who will be able to access it.[109]

A lawyer also has a duty to ensure that they do not engage in discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law.[110] Thus, it is important for lawyers and judges to be aware of the explicit and implicit biases that are programmed into these AI systems.[111]

In 2016, Microsoft developed an AI model that was meant to respond to people on social media, but ended up developing certain personality elements in the process.[112] She learned from, and mimicked, the speech of the people that she interacted with, and as more internet users fed racist or homophobic remarks, her offensive comments grew exponentially.[113] Thus, a lawyer's

[104] Nelson, *supra* note 100 at 27; MODEL RULES OF PROF'L CONDUCT R. 1.4 (2009).
[105] Nelson, *supra* note 100 at 27.
[106] MODEL RULES OF PROF'L CONDUCT R. 1.5 (2009).
[107] Nelson, *supra* note 100 at 27.
[108] Nelson, *supra* note 100 at 27.
[109] Nelson, *supra* note 100 at 27.
[110] MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2009).
[111] *See* Nelson, *supra* note 100 at 27-28.
[112] *See* Nelson, *supra* note 100 at 27.
[113] *See* Nelson, *supra* note 100 at 27.

chatbot on a law firm's website encountering a similar situation could present serious ethical issues for attorneys.[114]

III. ISSUE

a. *Ethics in AI: Transparency, Bias, and Due Process*

On August 12, 2019, the ABA House of Delegates (*hereinafter* "ABA") passed Resolution 112, which states:

> "*RESOLVED,* That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence in the practice of law including: (1) bias, explain-ability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI."[115]

The resolution addresses the issues that are implicated when courts and lawyers either use AI, or don't, and what lawyer's and judges alike need to be aware of.[116] The issues of bias, transparency, and due process when utilizing AI are the key legal issues that will be discussed throughout this article.

While AI has transformed many industries and aspects of the legal system[117], the criminal justice sector is where many of the core concerns with AI lie.[118] This is because much of the criminal justice system is based on predicting human behavior, which is precisely what modern AI systems are best at doing.[119]

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[114] *See* Nelson, *supra* note 100 at 27.
[115] *Id.* at 26.
[116] *Id.*
[117] *See supra* Section [ ].
[118] Mirko Bagaric et. al., *The Solution to the Pervasive Bias and Discrimination in the Criminal Justice System: Transparent and Fair Artificial Intelligence*, 59 AM. CRIM. L. REV. 95, 101 (2022).
[119] *See* Ric Simmons, *Quantifying Criminal Procedure: How To Unlock The Potential Of Big Data In Our Criminal Justice System*, 2016 MICH. ST. L. REV. 947, 957 (2016).

1. Potential for Bias

Model Rule 8.4(g) of the Model Rules of Professional Conduct prohibits, in part, "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[120] Seven states have adopted a version of this Model Rule, and certain federal district courts have also adopted Rule 8.4(g) and entered formal discipline rulings for any violation of the rule.[121]

Rule 2.3 of the Model Code of Judicial Conduct against bias, prejudice, and harassment, states:

> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
>
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.[122]

However, despite several states adoption and enforcement of these rules, biases continue to plague the criminal justice system. Implicit biases that operate outside of a person's conscious awareness or control often influence behavior among prosecutors, defense attorneys, police officers, and judges.[123] Research shows that:

> [T]he influence of unconscious bias on judges is subtle. We know that judges harbor many of the same implicit associations as most adults. For example, in our study

[120] MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2009)
[121] Nellie Q. Barnard et al., *Efforts Toward Improved Diversity and Inclusion Through the Anti-Bias Rule*, FED. BAR ASS. (Dec. 15, 2021) https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/.
[122] MODEL RULES OF JUDICIAL CONDUCT R. 2.3 (2010).
[123] Bagaric, *supra* note 101 at 101.

> using the implicit association test, we found that 80 percent of white judges more strongly associated Black faces with negative words, and white faces with positive words. Black judges expressed a more complex pattern, with some judges showing the same white-good/Black-bad association as white judges, but an equal number showing the opposite preference. These results suggest that judges are no different than most adults in the United States.[124]

Thus, whether judges are supposed to be impartial or not, their deep-rooted implicit biases often affect their decisions and lead to higher percentages of black and brown people incarcerated for longer periods of time.[125] African Americans constitute only 13% of the U.S. population, and yet, they represent over 30% of those imprisoned, "with one in four Black men incarcerated at some point in their lives."[126] Moreover, "studies undertaken in the federal jurisdiction between 2005 and 2012 found that judges impose longer prison sentences on black men than on white offenders convicted with similar offenses."[127]

With these statistics in mind, one of the biggest ethical concerns related to the use of AI in the criminal justice system is the potential for bias. The reason being that the algorithms themselves are only as unbiased as the data that are inputted into the systems. Humans are the ones that are providing the data to the systems, and as the computer learns from humans, the bias becomes baked into the algorithm.[128] If the training data is biased, the AI system will be biased as well. This could lead to unfair outcomes, especially for marginalized groups who have been historically subjected to discrimination by the criminal justice system.

Although it is not uncommon for our government to attempt to introduce changes to the criminal justice system without a system or plan for implementing them, it is imperative to have

[124] Bernice B. Donald, Jeffrey Rachlinski & Andrew J. Wistrich, *Getting Explicit About Implicit Bias*, 104 JUDICATURE 75, 76 (2021).
[125] Bagaric, *supra* note 101 at 102.
[126] Bagaric, *supra* note 101 at 102.
[127] Bagaric, *supra* note 101 at 102; *see also* Simmons, *supra* note 102 at 980.
[128] James Cooper, Kashyap Kompella, *AI and Threats to the Criminal Justice System*, L.A. Law., October 2022, at 13.

a system in place to prevent these implicit biases from entering AI's systems if prosecutors and judges are going to rely on them for indicators of recidivism and sentencing measures. A system devoid of the correct training, continuous checks on the algorithms, and clear rules and regulations, could prove disastrous for all actors in the criminal justice system.

a. *Implicit Bias, Sentencing, and AI*

The use of risk-assessment tools has been utilized by players in the legal system for many years, however, with the onset of AI, risk assessments are being applied in the sentencing arena as well. Risk assessments are tools that collects data based on demographics, employment status, and criminal history, and use this data to project recidivism for an individual defender. Throughout history these tools have been most used for probation and parole, rather than sentencing. Advocates for the use of the new generation of risk assessment tools argue that an inclusion of more advanced and dynamic factors will increase the reliability and accuracy of risk assessment and therefore be reliable enough to use in sentencing.[129] Yet, many people are weary of the use of these tools being used to sentence individuals. Judge Michael Wolff said in 2008, "risk assessment instruments are far from perfect, which is why the severity of punishment should not be based on a risk assessment prediction."[130] However, the push for the use of risk-assessment tools to be utilized in sentencing is at an all-time high.[131]

Critics of the use of AI in risk-assessment also argue that it will act as a "statistic veil" for the profiling and aggressive policing and jailing of people of color.[132] With these issues becoming more prevalent in the criminal justice system, courts are starting to realize that they

[129] Claire Botnick, *Evidence-Based Practice and Sentencing in State Courts: A Critique of the Missouri System* 49 WASH. U. J. L. & POL'Y 159 (2015).
[130] Wolf
[131] Botnick, *supra* note 127 at 174.
[132] Botnick, *supra* note 127 at 175.

need to start considering the implications of using these tools and how to set standards for their use. Yet, caselaw is significantly lacking. To date, the only appellate opinion that has that been published about the use of risk assessment in sentencing is *Malenchick v. State*.[133] In *Malenchik,* the Indiana Supreme Court addressed the "proper use of assessment scores and other information obtained from use of assessment tools."[134] The court here concluded that it was in fact not discriminatory for judges to use risk assessment tools that took into account offenders' immutable characteristics on the basis that sentencing law mandates that pre-sentence investigative reports include "the convicted person's history of delinquency or criminality, social history, employment history, family situation, economic status, education, and personal habits."[135] The scores, however, should supplement and enhance the judge's evaluation, rather than completely replace it.[136]

There have already been calls to use AI systems in sentencing[137] and while there are numerous points of concern, there are a range of potential benefits to its use as well. With the right algorithm, free of implicit and explicit biases, AI makes it possible to ensure fairness and equality under the law by generating the same outcome for every defendant, regardless of race, national origin, employment history, and more. However, in order to achieve this outcome, it will take a deep understanding of the data, the algorithms, and the system itself by all actors to safeguard the people from the potential downfalls of its use.

[133] Malenchik v. State, 928 N.E.2d 564 (Ind. 2010).
[134] Malenchick, 928 N.E.2d at 573.
[135] Malenchick, 928 N.E.2d at 573.
[136] Malenchick, 928 N.E.2d at 573.
[137] *See, e.g.,* Mirko Bagaric & Gabrielle Wolf, *Sentencing by Computer: Enhancing Sentencing Transparency and Predictability and (Possibly) Bridging the Gap Between Sentencing Knowledge and Practice* 25 GEO. MASON L. REV. 653, 654 (2018).

2. *Transparency and Due Process*

One of the most significant ethical concerns related to the use of AI in the criminal justice system is the lack of transparency regarding how these systems work. Unlike human decision-makers, AI algorithms are not often transparent about where the information comes from, which makes it difficult for attorneys and judges to understand how the systems arrived at the conclusions that they did. Transparency is essential to due process. When a defendant is arrested, charged, and sentenced, they have a right to know why they are being charged, and to confront their accuser. If an AI system is used to make these decisions, it could deprive criminal defendants of their essential rights under the United States Constitution. Further, the lack of transparency can make it extremely difficult for individuals to appeal decisions made by AI systems, and to even discern if the system itself is being fair and unbiased.

This lack of transparency can lead to wrongful convictions and mistrust by the public of the criminal justice system.[138] There have already been several cases where AI has been used without transparency and led to bias predictions against black defendants. Two 2014 cases are illustrative of this issue. In 2014, an 18-year-old African American girl was arrested and charged with burglary and petty theft for stealing a small bike. Around the same time, a 41-year-old white male was arrested for shoplifting, he had been previously convicted of armed robbery, which he served five years in prison.[139] The young girl also had a record, but it was for misdemeanors that were committed when she was a juvenile.[140] When both defendants were

[138] Zach Gehin, *The Ethical Implications of AI in the Criminal Justice System* ZTMG (Dec. 16, 2022) https://ztmg.com/tech/ai/the-ethical-implications-of-ai-in-the-criminal-justice-system/#:~:text=Lack%20of%20transparency%20in%20AI%20decision%2Dmaking&text=This%20means%20that%20the%20public,of%20the%20criminal%20justice%20system..

[139] Julia Angwin et al., *Machine Bias* PROPUBLICA (May 23, 2016) https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

[140] *Id.*

being processed, a computer program used to predict the likelihood of them recommitting a crime actually rated the young girl at a higher risk for recommitting.[141]

Two years later, it was clear that the algorithm was wrong- the man, named Vernon Prater, was serving an eight year prison term, and the woman, named Brisha Borden, had not committed any more crimes.[142] Although the technology that was used in 2014 is likely outdated today, new generations of AI are still not accurate enough to rely on in court rooms across the nation. In 2014, the U.S. Attorney General at the time, Eric Holder, warned that the risk scores being used to predict recidivism for individuals could be injecting bias into the courts, and called for the U.S. Sentencing Commission to study the use of these programs.[143] Unfortunately, they never performed the study.

The lack of transparency in AI-decision making is a concern for civil rights groups, the public, and advocates for the fairness of the criminal justice system. The public has a right to know what information and data is being used in these algorithms, and how it operates.

3. *Confidentiality*

Finally, confidentiality is a critical aspect of the criminal justice system and a major concern with the onset of AI. Rule 1.6 of the Model Rules deals with the client-lawyer relationship and confidentiality. The rule states that the lawyer must not reveal information relating to the representation of the client without the client's informed consent. The rule, "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[144]

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[141] *Id.*
[142] *Id.*
[143] Sari Horwitz, *Eric Holder Warns of the Risk of Using Risk Assessment Data to Determine Sentencing* SAFE & JUST MICHIGAN (Aug. 1, 2014) https://www.safeandjustmi.org/2014/08/07/eric-holder-warns-of-the-risk-of-using-risk-assessment-data-to-determine-sentencing/.
[144] MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009)

The AI systems are designed to collect and store data. However, the information that is gathered may be highly confidential and related to the lawyer's relationship and representation of the client. Access to this information by unauthorized parties without the consent of the client could infringe on a client's rights and subject the attorney to discipline. Client confidentiality ensures that the client trusts their attorney and feels as though they can communicate freely, but if a client is fearful of this information being disclosed, they may not feel that they can be honest with their attorney.

Moreover, if AI is used to store and analyze these communications, it will provide access to this information by third parties. A breach of client confidentiality is not just an ethical concern for lawyers, it may also risk a waiver of the attorney-client privilege.[145] To uphold attorney-client privilege, the communication must be between the attorney and the client.[146] If the communication is used by the algorithm for further predictions, and the algorithm needs to disclose their sources in order to conform with transparency, then this could constitute as a waiver of attorney-client privilege.[147]

A new program that has captured the attention of the global community is Open AI's ChatGPT. While attorneys may think that relying on this form of AI to find answers to specific client issues, doing so is riddled with issues. To start, in ChatGPT's Terms of Use, there is no protection for confidential information.[148] All of the information that is provided in your discussions with the chatbot is excluded from their definition of "confidential" information, and

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[145] Foster J. Sayers et al., *ChatGPT and Ethics: Can Generative AI Break Privelege and Waive Confidentiality?* ALM (Jan. 26, 2023) https://www.law.com/legaltechnews/2023/01/26/chatgpt-and-ethics-can-generative-ai-break-privilege-and-waive-confidentiality/?slreturn=20230327215923.
[146] *Id.*
[147] *Id.*
[148] *Id.*

ChatGPT themselves expressly caution against sharing sensitive information in the conversations.[149] The use of AI tools to exercise legal expertise is certain to give rise to ethical concerns that must be addressed before the legal community can entirely embrace these systems and rely on them for legal research, questioning, gathering and analyzing data, and providing counsel to their clients.

IV. SOLUTION

The use of Artificial Intelligence in the criminal justice system is fast approaching, and yet there are little safeguards to prevent the impacts it will have on criminal defendants. There are many steps that ethics committees and the federal government need to take to ensure the safe and adequate use of AI in the legal community. The first step that should be taken is the introduction of federal legislation that will require third party AI companies to disclose exactly how they create the AI programs, what is being used to program the algorithms, and how and where the data is being stored. These disclosures need to be ongoing and should be open to legal actors as well as the public, to ensure that clients and pro se litigants are fully aware of any issues with the algorithms that may affect them.

AI companies need to be more secure with the information that they are storing before they can be used by legal professionals as well. Third party AI companies could create their own systems exclusively for legal use, but this would need to be accessible to pro-se litigants as well to ensure fairness and access to justice. Lawyers should be trained in the use of these tools, how to incorporate them into their representation of the client, how and when to disclose its use to the client, and when the use of these tools will be affecting the lawyer's fees and billed hours. We

[149] *Id.*

need more transparency with the emergency technology than ever before if we are to ensure that all clients and pro-se litigants have fair representation.

To ensure that lawyers are complying with the use of AI, a separate ethics committee dedicated and educated on the use of AI needs to create a separate code of conduct rules exclusively for the use of AI in the criminal justice system. Some of the points that should be incorporated are confidentiality and obtaining the clients consent to consult with AI tools, disclosure of the use of AI tools, the use of AI and how it affects the lawyer's fees and finally, one of the most important provisions, the continued promise by the lawyer to keep abreast of all changes in the algorithms, who is created the algorithms, when and how the data is stored, and who is making changes to the algorithm.

Some sample language that may be incorporated could be:

1.1 Professionals who use AI must ensure that any confidential information is stored and transmitted securely, and that the AI system is designed to maintain the confidentiality and integrity of this information.
2.1 Professionals must be transparent with their clients about the use of AI and the types of information that will be collected and analyzed.
3.1 Professionals must obtain informed consent in writing from clients before using AI to collect and analyze their personal information and must provide clear explanations of the purpose and potential risks of using AI.
4.1 Professionals must ensure that any data used by AI is accurate and reliable, and that any biases in the data or algorithms are identified and addressed.
5.1 Professionals should be completely educated and up to date with all technology used and should be able to explain and answer any questions the client has about the use of such technology during their representation.

It is a long road to travel before the use of AI in the criminal justice system is free from ethical issues and concerns for the impacts of its use on clients; but, it is important that ethical and legislative committees begin to think about the best way to proactively safeguard the legal system from these concerns and use this emerging technology in a way that improves, rather than diminishes the already faulty criminal justice system.

V. CONCLUSION

In the 21st century, it is easy for people and large companies to jump onto emerging technology, as we have grown so accustomed to its use, possibilities, and reliability. We have seen a rapid expansion of the use of these Artificial Intelligence tools in areas like healthcare, business and finance, customer service and human relations, and the legal industry, but we have seen little done to safeguard the public from the issues discussed in this article. While companies and firms continue to invest in this technology and incorporate these algorithms into everyday use, the discussion on the potential issues and problems must continue.

While AI has promised a future that allows access to justice, efficient legislation, and quicker access to legal research, legislators and ethics committees should be concerned with the major issues, such as bias imbedded in the algorithms, transparency to the client, attorney-client confidentiality, and finally due process and constitutional issues. The public should be aware of these issues, and there should be open discourse on how to mitigate these concerns. Not only should regulatory bodies proactively work to establish standards and methods for disclosure, they also must continuously monitor and regulate the use of AI to ensure that the benefits are being maximized and harms are being minimized. By addressing these concerns, we can ensure that the use of AI remains ethical and promotes justice and equality.