I. Introduction

The ability to represent yourself in a judicial proceeding, a process intended to determine what is just and true, is necessary to American society and participatory democracies at large. A right to self-advocacy is read through the Sixth Amendment; its primary association is with criminal litigants after denying a court-appointed attorney. Only associating self-represented litigants (“SRLs”) with

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1 See Court Role and Structure, U.S. Cts. (Nov. 12, 2022), archived at https://perma.cc/B37C-FVWA (discussing the role courts play in the United States); Citizen Participation, NAT’L DEMOCRATIC INST. (Nov. 18, 2022), archived at https://perma.cc/8633-GCK5 (stating that “[e]nsuring that government actually works for the public good requires informed, organized, active and peaceful citizen participation.”). See also Gal Dor & Menachem Hofnung, Litigation as Political Participation, 11 ISR. STUD. 131, 131 (2006) (addressing a growing trend seen in the Israeli High Court of Justice of using it to advocate or agitate for political change). “We will argue that the Court has become an avenue for: a) participation in decision-making processes, b) communication with official authorities, and c) protestation against these very same authorities.” Id.

2 See U.S. Const. amend. VI (stating the right to “Assistance of Counsel” for criminal defense); Faretta v. California, 422 U.S. 806 (1975) (holding that within a state criminal trial a defendant has a right to represent themselves); Kenneth J. Copyright © 2024 Journal of High Technology Law and Hayden McGuire. All Rights Reserved. ISSN 1536-7983.
the criminal system is taking a narrow view.\textsuperscript{3} Throughout many jurisdictions, the frequency of SRLs in civil disputes has increased tremendously over the years.\textsuperscript{4} Unfortunately, the outcomes for SRLs appear worse than those who have representation.\textsuperscript{5} Their rising frequency and disparate outcomes have led those most familiar with the situation to call the current situation a crisis.\textsuperscript{6}

\begin{itemize}
\item \textbf{Weinberger, \textit{A Constitutional Right to Self-Representation – Faretta v. California}, 25 DePaul L. Rev. 774, 782 (1976) (discussing the requirement of “knowingly and intelligently” waiving counsel in a critical lens). See e.g. Eric Levenson & Rebekah Riess, \textit{Waukesha parade attack defendant is representing himself. He’s repeatedly interrupted the trial with his defiant behavior}, CNN (Oct. 7, 2022), archived at https://perma.cc/H2E4-CEZH (discussing a recent criminal case in Wisconsin that received national attention due to the litigant representing themselves and being extremely difficult for the judge to manage).}
\item \textbf{Sandefur is a prominent voice in arguing for more data collection from state courts on opinions on the issue). See id. at 359-62. (outlining that “[s]uch studies showcase the profiles of self-represented litigants and also reflect a possible correlation in disparate case outcomes.”). Cerniglia is principally writing about the need for more data on issues related to pro se litigants, indicating what we have should raise alarm but there is not enough to understand the whole problem. Id. at 359-62.}
\item \textbf{Cerniglia, supra note 4, at 359 (discussing Rebecca Sandefur’s, a field expert, opinions on the issue). Sandefur is a prominent voice in arguing and asking for more data collection from state courts on the prevalence and challenges of SRLs, something that is currently seriously lacking for proper analysis. Id. at 358-60.}
\end{itemize}
For instance, SRLs are common in Massachusetts housing courts; the vast majority of tenants appear *pro se* while most landlords have an attorney.\(^7\) This difference in representation is emblematic of the preexisting power disparity that exists between tenants and landlords.\(^8\) In Massachusetts, using the courts to remove a tenant is formally and procedurally called a Summary Process.\(^9\) Like all judicial proceedings, a core principle of summary process evictions is judicial efficiency.\(^10\)

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7 See Massachusetts Trial Court Department of Research and Planning, *Housing Court Summary Process: Fee-Shifting, Dispositions, and Other Practices*, MASS.GOV [hereinafter *Housing Court Summary Process*] (May 2021), archived at https://perma.cc/P47F-XFBZ (noting that in 2019 tenants were represented by an attorney only 8.4% of the time, while landlords were represented at nearly ten times that rate). But see Jennifer A. Leitch, Having a Say: Democracy, Access to Justice and Self-Represented Litigants (Apr. 5, 2016) (Ph.D dissertation, Osgoode Hall Law Sch. of York Univ.) (discussing problems associated with the way access to justice for self-represented litigants is framed, and advocates for a democratic approach to be utilized). In accordance with Dr. Letich’s arguments, I use the word “problem” in jest. The chorus of voices discussing SRLs often frames self-representation as an intrinsic problem, while a right to counsel is obviously critical, I urge you to not take the stance that all SRLs need or want a lawyer.

8 See Anna Baish, Public Policy Blog: State law needed to correct the power imbalance between tenants and landlords, HOME LINE (Apr. 29, 2021), archived at https://perma.cc/M7TV-F2KQ (discussing how a lease’s terms often obligate a substantial amount of restrictions on tenants and their leverage to hold landlords accountable is fairly toothless); Oliver Balch, Landlords Are Powerful. Here’s A Way Renters Are Regaining Some Control., HUFFPOST (Nov. 9, 2018), archived at https://perma.cc/HA5Y-HF4K (discussing the wealth differences between landlords and their tenants). “[R]enters experience higher levels of material hardship and are less likely to have emergency savings than their home-owning peers. Landlords, on the other hand, are among the wealthiest demographic in the U.S.” Id. See generally Susan Etta Keller, Does the Roof Have to Cave In?: The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress, 9 CARDOZO L. REV. 1663 (1988) (outlining a variety of power imbalances between landlords and their tenants).

9 See Mass. Gen. Laws ch. 239, § 1 (2022) (introducing chapter 239 of Massachusetts General Law, the primary laws regulating summary process).

10 See Mass. Trial Ct. Unif. Summary Process Rule 1 (2022) (“These rules . . . shall be construed and applied to secure the just, speedy, and inexpensive determination of every summary process action.’’); Adjartey v. Cent. Div. of the Hous. Court Dep’t, 120 N.E.3d 297, 306 (Mass. 2019) (describing Rule 1 of the Uniform Summary Process Rules as “leav[ing] little room for error” and noting that getting notice of the complaint to removal can occur within just seven weeks). See e.g. Liz Neisloss, A no-fault eviction sends a Weymouth teacher to the brink of homelessness, GBH (July
cases involving SRLs and their housing is the potential to create rapid homelessness due to litigants not being aware of their rights; from when a landlord files to removing a tenant can take as little as seven weeks.\(^{11}\)

The reality is, nine out of ten tenants are self-represented, and they operate in a fast-acting system designed for the professional lawyer, not them.\(^{12}\) There have been a variety of efforts and programs developed to assist pro se tenants, one of note is Massachusetts

\[21, 2022, \text{archived at https://perma.cc/T9AT-FJTS (discussing a no-fault eviction of a preschool teacher).}\]

It was a ‘no fault’ eviction because the family — who had lived in the same three bedroom apartment in Weymouth for 14 years — had done nothing wrong . . . . [A]ccording to O’Connor, six days after getting the eviction notice, she received a text explaining that the apartment was being renovated and then the rent would go up by nearly 60%. She couldn’t afford the rent hike or, she soon discovered, the price of apartments across her city. The eviction notice gave her family just 30 days to find a new place to live.

\[Id.\]

\(^{11}\) See Mass. Trial Ct. Unif. Summary Process Rule 1 (2022) (identifying the goal of judicial efficiency); Adjartey v. Cent. Div. of the Hous. Court Dep’t, 120 N.E.3d 297, 306 (Mass. 2019) (“The challenges inherent in navigating a complex and fast-moving process are compounded for those individuals who face summary process eviction without the aid and expertise of an attorney.”). See also Summary Process Executions Issued, TABLEAU PUB. (Jan. 25, 2024), archived at https://perma.cc/ZJ8X-GE9V (displaying the rates of eviction for non-payment of rent for the year of 2022). The graphs displayed show that in October of 2022 there were over 500 executions granted, meaning a tenant or prior owner was moved out of their housing. See also Alexi Cohan, Increase in homelessness and need for rental assistance expected with end of CDC eviction moratorium, BOS. HERALD (July 24, 2021), archived at https://perma.cc/49A5-8SCE (discussing the anticipated wave of evictions causing a rise in homelessness once the CDC eviction moratorium ends).

\(^{12}\) See Housing Court Summary Process, supra note 7 (showing that only 8.4% of tenants are represented); Housing Court Department, Fiscal Year 2018 Statistics, MASS.GOV (2018), archived at https://perma.cc/E8AC-QGDM (showing tenants in summary process cases in 2018 were self-represented ninety-two percent of the time). See also Christine E. Cerniglia, The Civil Self-Representation Crisis: The Need for More Data and Less Complacency, 27 GEO. J. POVERTY L. POL’Y 355, 356-357 (2020) (illustrating a typical reality of a self-represented litigant when needing to engage with the civil system, analogizing it to a medical setting requiring patients to operate on themselves with just an instructional booklet). See generally Fatos Selita, Improving Access to Justice: Community-based Solutions, 6 ASIAN J. LEG. EDU. 83, 84 (2019) (describing various difficulties faced by the unrepresented from the “labyrinth” of legislations and case law, to the “unnecessary formalities and language obstacles . . . .”).
Defense for Eviction ("MADE"), developed by Greater Boston Legal Services.\textsuperscript{13} MADE is an internet-based tool that assists SRLs facing evictions with drafting responsive pleadings and helps them attempt to dismiss and delay complaints.\textsuperscript{14} Its goal is to turn a set of complex forms and procedures into questions written in plain language, removing legalese from the processes and providing basic next steps for tenants to follow.\textsuperscript{15}

A similar scenario was playing out with SRLs in New York’s small claims courts.\textsuperscript{16} There, litigants often defaulted due to an inability to respond adequately, stemming from a lack of information and advice.\textsuperscript{17} This was and continues to be, an access to justice crisis.\textsuperscript{18}


\textsuperscript{14} See MADE, supra note 13 ("This completely free guided interview is for Massachusetts tenants who are being evicted . . . It will help you make sure that you respond to your landlord's eviction case correctly.").

\textsuperscript{15} See Respond to an eviction against you, MASS.GOV (Jan. 5, 2023), archived at https://perma.cc/5KRT-JELV ("The best way to file your answer, and any other paperwork you may need, is to use Massachusetts Defense for Eviction (MADE): self-guided eviction help . . . . This guided interview was created by Greater Boston Legal Services, but can be used by anyone in Massachusetts who is being evicted."). The state itself is acknowledging that the best method for a self-represented litigant to respond to an eviction is by using the MADE tool. \textit{Id}.

\textsuperscript{16} See THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, 1 (2010) (highlighting that 2.3 million New Yorkers are navigating the civil system pro se and that ninety-nine percent of borrowers are pro se in consumer credit card cases annually).

\textsuperscript{17} See Upsolve, Inc. v. James, 604 F. Supp. 3d 97, 103 (S.D.N.Y. June 27, 2022) ("[E]veryone agrees that vast majority of New Yorkers default when faced with debt collection actions. Plaintiffs provide estimates of the default rate that range from over 70% to up to 90%."); \textit{Id.} ("By one estimate, [debt collection actions] comprise approximately a quarter of all lawsuits in the State’s court system."). This reality is despite New York’s efforts with the production of a one-page answer form with affirmative defenses listed. \textit{Id} at 104.

\textsuperscript{18} See Necessary Condition: Access to Justice, U.S. INST. OF PEACE (Oct. 15, 2022), archived at https://perma.cc/6M7G-6EDJ (defining access to justice as “the ability
To combat the growing number of defaults among SRLs, a non-profit called Upsolve designed a program where non-lawyers would assist self-represented litigants with responsive pleadings and provide them basic legal advice on their case.\(^{19}\) Typically, drafting documents and the provision of legal advice requires a license to practice law and is reserved for attorneys.\(^{20}\)

Due to concerns about potential violations of the unauthorized practice of law ("UPL") regulations in New York, Upsolve sought injunctive relief in *Upsolve Inc., et al. v. James.*\(^{21}\) Upsolve claimed that the conduct of their program was speech, and therefore had first amendment protections.\(^{22}\) The injunction was granted allowing of people to seek and obtain a remedy through formal or informal institutions of justice for grievances . . .

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\(^{19}\) See Quinten Steenhuis & David Colarusso, *Digital Curb Cuts: Towards an Inclusive Open Forms Ecosystem,* 54 Akron L. Rev. 773, 777 (2020) (identifying the access to justice gap as the “gap between the minority of individuals who receive adequate legal assistance and the majority who do not.”). See also Bob Glaves, *What Do We Mean When We Say Access To Justice?*, The Chi. Bar Found. (Sept. 20, 2018), archived at https://perma.cc/N7GS-ZSSW (creating an organizational definition of access to justice to address the ambiguity of the phrase). Some describe the definition of access to justice as “amorphous and inconsistent” leaving it without meaning. Id.

\(^{20}\) See Upsolve, 604 F. Supp. 3d at 103 (explaining that petitioners are moving due to the conflicts their activities may have with New York regulations on unauthorized practice of law by non-lawyers); N.Y. Jud. Law § 478 (LexisNexis 2022) (governing regulation on what constitutes the “practice of law” – designating the activity to those who are licensed and admitted to practice law in New York).

\(^{21}\) See Upsolve, 604 F. Supp. 3d at 103 (moving for injunctive relief of their prospective program to conduct forms assistance and provide basic legal advice to low-income New Yorkers in small claims disputes).

\(^{22}\) See id. at 111-12 (asserting UPL rules must give way to the right to Free Speech on the facts of the Plaintiff’s program.) “[T]he issue here is a narrow one: whether the First Amendment protects the precise legal advice that Plaintiffs seek to provide, in the precise setting in which they intend to provide it.” Id.
Upsolve to start its program without being stopped by UPL regulations, a monumental moment for pro se advocates.23

The rate of self-representation is rising in civil courts around the United States and the outcomes of appearing pro se are almost always worse than their represented counterparts. The programs in Massachusetts and New York supply examples of effective ways non-lawyers can use technology to give legal assistance in a specific way to mitigate the effects that a lack of representation has on litigants. By making our system more accessible to pro se litigants, we can create a procedural structure where individuals engage more directly and effectively with one of our core law-making systems, likely improving their systemic trust. National adoption of these types of programs likely face barriers to being implemented due to regulations on the practice of law in many jurisdictions. Efforts to empower SRLs must be encouraged by regulators by creating avenues for these types of tools and programs. Though, this push for an inclusive legal industry must be tempered against the risks of litigants receiving incomplete information and advice. With proper limits, those potentially disastrous outcomes could be mitigated and the litigant’s autonomy and access to the state’s dispute resolution mechanisms increased.

II. History

A. The Unauthorized Practice of Law and Free Speech

The unauthorized practice of law is a regulation that exists in all jurisdictions within the United States that restricts the ability of

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23 See id. at 103 (“The UPL rules cannot be applied to Plaintiff’s program because the First Amendment protects their legal advice as speech, and the UPL rules are not narrowly tailored to satisfy strict scrutiny in this context.”); Nora F. Engstrom, UPL, Upsolve, and the Community Provision of Legal Advice, STAN. L. SCH. BLOGS (May 27, 2022) archived at https://perma.cc/LQX6-EUCE (pointing to the Upsolve complaint as adding another “crack in the monopoly lawyers hold over legal help in America.”); Brief of Amici Curiae The NAACP and The NAACP New York State Conference in Support of Plaintiffs’ Motion for a Preliminary Injunction at 1, Upsolve v. James, 604 F. Supp. 3d. 97 (S.D.N.Y. June 27, 2022) (No. 1:22-cv-627) (“The outcome of this case will have profound civil rights implications for NAACP members and for the NAACP’s institutional interest in redressing injustice and inequality.”).
unlicensed persons to “practice law.” Because every jurisdiction defines and justifies what constitutes the “practice of law,” the definitions and scope can vary greatly. However, there are common touchstones, with the most prominent being the concern for consumer protection.

The value of consumer protection leads to rules that attempt to minimize litigants accidentally foreclosing legal remedies, and creating awareness of the impacts that enforcement of rights could


25 See Lopez, supra note 24 at 69 (describing lack of clarity and enforcement in UPL laws).

The lack of clear standards in defining or punishing UPL in state statutes coupled with the uneven enforcement of these statutes make it difficult for average citizens and professionals to know what unauthorized practice of law is or to predict what consequences, if any, will befall those who violate the UPL restrictions.

Id. Even the American law Institute (ALI) cannot provide a suggestion for defining UPL due to state justifications being “vague or conclusory.” Id. See also Denver Bar. Ass’n v. Pub. Util. Com. 391 P.2d 467, 471 (Colo. 1964) (stating that “[t]here is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give and all-inclusive definition.”).

26 See Franklin v. Chavis, 640 S.E.2d 873, 876 (S.C. 2007) (“The purpose of prohibiting the unauthorized practice of law is to protect the public from incompetence in the preparation of legal documents and prevent harm resulting from inaccurate legal advice.”); Restatement (Third) of the Law Governing Lawyers § 4 cmt. b (2000) (“The primary justification given for unauthorized practice limitations was that of consumer protection . . . against the significant risk of harm believed to be threatened by . . . incompetence. . . .”). But see Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 STAN. L. REV. 1, 4 (1981) [hereinafter Professional Monopoly] (pointing to the maintenance of the monopoly on legal assistance as a key factor in UPL regulation). In Professional Monopoly Rhode highlights in detail the problems that flow from the lack of self-reflection the legal industry and state bars conduct on the effects of definitions of the “practice of law”, while consistently pointing to “protecting the public” as a goal. Id. at 4-5, 9.
have on others.\textsuperscript{27} This goal is necessary, as legal services that are inadequately delivered can have devastating ripple effects on other aspects of a person’s life and liberty.\textsuperscript{28} The disastrous effects of this are particularly salient in immigration settings when litigants work with \textit{Notarios}: individuals who misrepresent themselves as able to provide legal advice on immigration law, who can inadvertently or maliciously create problems for litigants.\textsuperscript{29} Still, disasters happen when individuals receive inadequate advice from licensed attorneys.\textsuperscript{30}

When it comes to the provision of legal guidance, the rules governing the legal profession are not (just) there to protect the lawyer’s cartel and the monopoly on the provision of legal services. Important consumer protection purposes animate UPL prohibitions, the most important of which is that . . . those services are carried out by someone competent to provide them, and the provider of such services is accountable to the consumer when she fails to provide those services in a competent fashion.

\textit{Id.} at 49.

\textsuperscript{27} See Raymond H. Brescia et al., \textit{Civil Society and Civil Justice: Teaching with Technology to Help Close the Justice Gap for Non-Profit Organizations}, 29 ALB. L.J. SCI. & TECH.16, 49-50 (discussing the importance in honoring the value of consumer protection).

\textsuperscript{28} See Howard Fischer Capital Media Services, \textit{Court: Bad legal advice led to plea deal that resulted in deportation, new case needed}, TUCSON.COM (July 17, 2019), archived at https://perma.cc/7TY7-4RJ7 (highlighting a case where the attorney failed to effectively communicate to their client the impacts a plea deal in a criminal suit can have on residency status). “[T]he trial judge who heard his claim agreed that, had he been accurately advised, he would not have accepted the plea.” \textit{Id.} See also Alina Seltukh, \textit{Will Filing For Unemployment Hurt My Green Card? Legal Immigrants Are Afraid}, NPR (May 11, 2020), archived at https://perma.cc/7LCC-JG4N (discussing how those with legal working status worry about the ways filing unemployment could affect residency status).

\textsuperscript{29} See Massachusetts Law Reform Institute, \textit{Watch Out for Notario Fraud!}, MASSLEGALHELP (July 2022), archived at https://perma.cc/6H38-VZFH (addressing the difference between an attorney and a notario publico). “A notary public is not a lawyer. A notary public in America is not the same as a ‘notario publico’ in Spanish-speaking countries like Mexico. It is against the law for a notary public to give legal advice or provide legal services.” \textit{Id.} See also About Notario Fraud, A.B.A. (Jan. 31, 2022), archived at https://perma.cc/WG87-LYTH (describing common issues around notarios). “While a notary public in the United States is authorized only to witness the signature of forms, a notary public in many Latin American (and European) countries . . . is authorized to represent others before the government.” \textit{Id.}

\textsuperscript{30} See Nomaan Merchant, \textit{Bad immigration lawyers hard to find, harder to stop}, AP NEWS (Aug. 21, 2017), archived at https://perma.cc/SV7V-QQ4C (highlighting some of the effects that bad legal advice obtained by licensed attorneys can cause in
The robust protections provided to speech conflict with UPL laws. 31 Free expression and exchange of ideas are long respected and appreciated principles within American society. 32 Due to the extreme importance the United States places on the freedom of speech, strict scrutiny – the highest standard of judicial review – is applied to regulations that limit the content of speech. 33 Common justification courts use for maintaining the validity of UPL statutes is by interpreting practicing law as conduct, not speech, meaning it does not require a strict scrutiny analysis. 34

immigration court). “A person with a winnable case can be thrown into deportation by a missed deadline or a botched court filing, and attorneys quietly known by others to do bad legal work can practice for years without being stopped.” Id.

31 See Professional Monopoly, supra note 26, at 67 (discussing how “[u]nauthorized practice prohibitions plainly implicate first amendment values by restricting both the lay speaker’s ability to convey information and the public’s opportunities to receive it.”); Michele Cotton, Improving Access to Justice by Enforcing the Free Speech Clause, 83 Brook. L. Rev. 111, 112 (2017) (addressing the fact that there are commentators who are at odds with the first amendment). See also Upsolve, 604 F. Supp 3d at 111–12 (pointing to the likely success Upsolve had on their theory of legal advice protection through the Free Speech Clause, although the court believed the right to association did not provide that protection). But see People v. Shell 148 P.3d 162, 173 (Colo. 2006) (holding that “Colorado’s ban on the unauthorized practice of law does not implicate the First Amendment because it is directed at conduct, not speech.”).

32 See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . .”); Stephen J. Wermiel, The Ongoing Challenge to Define Free Speech, A.B.A. (Oct. 23, 2022), archived at https://perma.cc/UV85-MZYR (describing the “[c]ountless” people who have articulated the “critically important role that freedom of speech plays in promoting and maintaining democracy.”). See also David Schultz, State Constitutional Provisions on Expressive Rights, THE FIRST AMEND. ENCYCLOPEDIA (Sept. 2017), archived at https://perma.cc/5NS2-9UAD (discussing the dynamics of state and federal constitutions enumerated rights). All states have also incorporated Free Speech clauses into their founding constitutions and laws. Id.

33 See City of L.A. v. Alameda Books, 535 U.S. 425, 433–34 (2002) (determining how to evaluate a substantial government interest and addressing the presumption of invalidity with content-based speech restrictions). See also Cotton, supra note 31, at 139 (addressing the fact that The Supreme Court has never directly analyzed a UPL law under the Free Speech Clause). Cotton argues these laws would likely be found unconstitutional because they are content based and improperly tailored. Id.

34 See Cotton, supra note 31, at 114–17 (describing and challenging an example of UPL analysis from the Colorado Supreme Court). Cotton discussed how the Colorado court relied on precedent that does not apply to noncommercial speech. Id.
There is no jurisdictional cohesion on how to define what it means to “practice law.”\(^{35}\) You find fragments of what it means throughout case law and statutes in each state, but there is no uniformity.\(^{36}\) Both litigants and those with legal knowledge face difficulty in understanding when providing someone with legal information become the practice of law.\(^{37}\) The American Bar Association’s descriptions of what constitutes practicing law provide little assistance in drawing distinctions between what is permitted and what is not; the Model Rules of Professional Conduct even states “the practice of law is established by law and varies from one jurisdiction to another. Whatever definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”\(^{38}\)


35 See Lopez, supra note 24, at 69 (describing lack of consistency in UPL laws).


37 See Lopez, supra note 24, at 61-65 (describing the variety of jurisdictional interpretations of what it means to “practice law”, and the confusion it causes); Id. at 63 (claiming that “Texas is the exception and not the rule and most states offer little specific guidance as to the nature of conduct that is punishable as UPL.”). See also Professional Monopoly, supra note 26, at 46 (describing the “laundry list” of actions states consider the practice of law).

38 See Model Rules Prof’l Conduct r.5.5, Comment on Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law (2022) (defining the practice of law). See also John M. Greacen, “No Legal Advice From Court Personnel”: What Does That Mean?, 34 Judges’ J. 10, 10 (Winter 1995) (stating that “[t]he term ‘legal advice’ has no inherent meaning.”). See also SJC Rule 3:07 (2016) (discussing the requirements for a lawyer to practice law in Massachusetts).
Providing “legal information” is an activity some states allow individuals to do. This has resulted in attempts to create distinctions between information and advice, often geared toward court employees. The idea of information and advice can be thought of as existing on a spectrum, with information being devoid of specific context and advice being very fact specific, forming some subjective conclusions to the litigant. This difference that sounds simple in the abstract breaks down quickly when you consider scenarios court staff, the audience for those guides, will face. This led commentators to describe the distinction between information and advice as “hazy.”

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39 See Virtual Court Service Center, supra note 3 (explain that the VCSC can provide legal information but not legal advice); Greacen, supra note 38, at 11 (providing the example that the West Virginia Supreme Court allows magistrates to provide legal information, but not advice). See also Heather Hazelwood, Legal information versus legal advice: what’s the difference?, AMPERSAND L. (Oct. 28, 2022) (distinguishing information and advice by describing legal information as saying what the law is, while legal advice is saying how it will apply to facts).

40 See EDUC. SUBCOMMITTEE OF THE UTAH JUDICIAL COUNCIL, LEGAL INFO. VS. LEGAL ADVICE 2-22 (Apr. 2010) (expounding on the distinction between these two activities for twenty pages). See also ABA Center for Professional Responsibility, Some Advice on Legal Advice, ABA FOR L. STUDENTS (June 17, 2016), archived at https://perma.cc/2GU3-2NGU (advising law students to avoid giving legal advice by “talking informally with an individual who may have a legal problem, a safe course to follow is to talk in general terms about the area of law, without honing in on the specifics of the individual’s problems.”).

41 See ABA Center for Professional Responsibility, supra note 40 (advocating for speaking in general terms to avoid giving legal advice); EDUCATIONAL SUBCOMMITTEE OF THE UTAH JUDICIAL COUNCIL, supra note 33, at 5 (describing interpreting and applying laws to facts to be legal advice).

42 See EDUCATIONAL SUBCOMMITTEE OF THE UTAH JUDICIAL COUNCIL, supra note 40 at 5 (highlighting how the Utah Supreme Court amended the Supreme Court Rules of Professional Practice to allow court staff to recommend forms for litigants and assist in filling them out). This exception shows how routine this type of thing is, it should be no surprise to see court staff being asked what form to file by pro se litigants. Id.

43 See Greacen, supra note 38, at 12 (expressing dissatisfaction with attempts to distinguish legal information versus advice); Rebecca L. Sandefur, ACCESS TO JUSTICE CONVENING: Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms, 16 STAN. J.C.R. & C.L 283, 286 (2020) (citing that “the line between advice and information can blur . . .”).
B. Self-representation in the Massachusetts Housing Courts

Housing courts within Massachusetts were created to provide a forum exclusive to housing proceedings. They hold concurrent jurisdiction with District Courts on issues involving housing law, which are often landlord-tenant disputes, although it also includes foreclosure proceedings. Housing court is typically viewed as the more tenant-friendly forum due to the resources available, like the Lawyer for the Day Program, and the experience the judges have on housing issues.

The rate of inequality in representation between litigants in housing court is stark – with one report finding tenants are represented in less than nine percent of cases while landlords are represented in almost eighty percent. There have been efforts to get representation

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45 See Mass. Gen. L. Ch. 185C § 3 (2022) (regulating the jurisdictional aspects for “housing problems”). See also Housing Court Summary Process, supra note 7, at 5 (showing that 30,687 summary process cases were filed in 2018, and 30,289 in 2019).

46 See Nomer Caceres, Housing Court expansion: Better or worse for landlords?, MASSLANDLORDS.NET (July 26, 2016), archived at https://perma.cc/6QR7-WWDA (describing the perception by landlords that the housing courts are more tenant-friendly than district court). See also Boston Housing Court, CITY OF BOSTON (July 8, 2022), archived at https://perma.cc/V6WE-FEL7 (explaining that housing courts have the Lawyer for the Day Program assisting in mediation by trained specialists). See also Lawyer for the Day programs, MASS.GOV (Oct. 24, 2022), archived at https://perma.cc/F5VK-5YXX (addressing how the “Lawyer for the Day programs . . . provide basic legal advice, help you understand relevant laws and your rights, and assist you in filling out court forms . . . [and] can equip you to better represent yourself in court.”).

47 See Housing Court Summary Process, supra note 7, at 18 (showing that in summary process cases 76.7% of landlords were represented, while only 8.4% of tenants were represented). See also Adjartey v. Cent. Div. of the Hous. Court Dep’t, 120 N.E.3d 297, 307 (Mass. 2019) (describing how “[t]he Housing Court has recognized the challenges inherent in the fact that ‘a significant number of litigants appear in court pro se and are unfamiliar with the Uniform Rules of Summary Process.’”).
and information to more litigants by many organizations.\textsuperscript{48} However, due to the high caseload of just summary process complaints in the state, this is an insurmountable task, leading to a large number of defaults.\textsuperscript{49} Although many of the efforts are geared towards tenants

\textsuperscript{48} See e.g., \textit{Who We Serve, Greater Boston Legal Servs.} (Oct. 24, 2022), archived at https://perma.cc/Z4A4-SQDA (showing the 2021 case breakdown for services provided by Greater Boston Legal Services’ (GBLS), with only 30% relating to housing). \textit{See also Housing and Tenant Rights, De Novo} (Oct. 24, 2022), archived at https://perma.cc/58NX-AG27 (highlighting that “De Novo works to prevent homelessness and involuntary dislocation by helping low-income residents of Cambridge and Somerville secure safe and affordable housing.”). \textit{See also Housing Unit, NE. Legal Aid} (Oct. 24, 2022), archived at https://perma.cc/3LGF-MCS7 (discussing the resources that Northeast Legal Aid provides for individuals facing housing disputes). \textit{See also Housing Court Lawyer for the Day, Volunteer Laws. Project} (Oct. 24, 2022), archived at https://perma.cc/N7Z3-E7L8 (discussing the Lawyer for the Day program that the Volunteer Lawyers Project (VLP) runs). \textit{See also Learn about Court Service Centers, MA. Gov} (Oct. 24, 2022), archived at https://perma.cc/Z9RU-5CLU (showing that the Court Service Centers will assist SRLs with court documents in summary process cases). \textit{But see Will Sennott, New Bedford eviction actions mount as legal services languish, THE NEW BEDFORD LIGHT} (July 27, 2021), archived at https://perma.cc/JJ4S-XTXG (stating that the Southeast Housing Court faces 92% \textit{pro se} litigants and is the only housing court in the state without the Lawyer for the Day program).

\textsuperscript{49} See Housing Court Summary Process, supra note 7, at 5 (showing that 30,687 summary process cases were filed in 2018, and 30,289 in 2019). \textit{See also Timothy Scalona, The eviction crisis is upon us, the Legislature must act, THE BOSTON GLOBE} (Sept. 9, 2021), archived at https://perma.cc/89RZ-XMT5 (describing the realities of what moving through housing court is like, and the challenges of obtaining rental assistance).

Contrary to common depictions, an eviction or foreclosure is not a single event that forces people from their homes. The threat of displacement provokes a period of long-term stress, desperation, and trauma for individuals and families who seek help from inaccessible rental assistance programs and plead for mercy in Housing Court. Should they face their day in court, usually without representation, they leave with a court record, regardless of the outcome.

\textit{Id. See generally An Act Establishing A right to Counsel in Certain Eviction Cases H.R. 1537, 191st Cong.} (Ma. 2020) (pending Senate concurrence on February 2, 2020, if enacted, this bill would provide counsel to some indigent tenants facing eviction).
and promoting housing stability, landlords can also receive assistance when appearing *pro se*.  

Representing litigants directly is not the only way to provide assistance and improve their access to justice. For example, with the development of a tool like MADE, a self-represented tenant can effectively respond to a complaint for summary process with many forms critical to the process. MADE will even remind the litigant of important dates and provide information on legal services that may be available. Alternatively, a SRL may go to the staff at the Court Service Center to assist with the production of these same documents, in a virtual or in-person setting. However, this type of document

50 See *Landlord Advocacy, Volunteer Lawyers Project* (Oct. 24, 2022), archived at https://perma.cc/3V4X-ACDP (describing the landlord advocacy program, designed to assist low-income small landlords in Massachusetts). See also Peter Vickery, *Limited Assistance Representation (LAR) for Landlords, MASSLANDLORDS.NET* (June 10, 2021), archived at https://perma.cc/BJ2S-WM9H (discussing using LAR as a landlord, the use of an attorney for discrete tasks based on the understanding “100% of the scenarios with Limited Assistance Representation end with the attorney leaving before the case is complete.”).

51 See *Housing and Homelessness, MASSLEGALHELP* (Oct. 24, 2022), archived at https://perma.cc/Z6K4-E72R (providing robust information for SRLs facing housing disputes and issues, like obtaining public assistance, self-help forms, sample letters, common questions, and basic shelter rights—these examples scratch the surface of what is provided). See also MADE, supra note 13 (describing the MADE tool).

52 See *Saving Homes with MADE: Massachusetts Defense for Eviction, supra* note 13 (describing MADE as a self-guided interview for SRLs that is made up of basic questions and “helps tenants prepare seven key forms needed to defend against an eviction in court.”). MADE is built to be accessible by people who speak Spanish, those with disabilities, and with low literacy levels. *Id.*

53 See MADE, supra note 13 (describing that MADE “can send you reminders of important dates by text and email.”). At the bottom of the MADE home screen, on Greater Boston Legal Service’s website, is a link to lawyer referral services. *Id.*

54 See *Learn about Court Service Centers, supra* note 48 (announcing that Court Service Centers will provide forms of assistance to *pro se* tenants who have received
preparation and guidance would conflict with UPL laws in several states and the resources that make distinctions between advice and information.55

C. Access to Justice Within Representative Democracies

One important aspect of the American legal system is that its law-making power must co-exist with representative democracy.56 A principle in this governing model is, participation and consent from the governed are necessary for achieving government legitimacy.57 When

a notice to quit). See also Virtual Court Service Center, supra note 3 (providing the Virtual Court Service Center will provide one-on-one forms assistance with many housing motions). Specifically, it assists with, answer and discovery forms for evictions, and other types of housing motions like temporary restraining orders, motions to stay executions, and some motions to vacate defaults and dismissals. Id.

55 See Real Estate Bar Ass’n for Mass. v. Nat’l Real Estate Info. Servs., 946 N.E.2d 665, 678 (“Whether [preparing documents] constitute the practice of law depends to some degree on the type of document, whether legal rights and obligations are being established, whether the document involves providing legal advice or a legal opinion, and whether the document is tailored to address a client’s individual legal needs.”). See also Joseph Patrick O’Brien, PROTECTING THE PUBLIC FROM UNAUTHORIZED PRACTICE OF LAW, 35 PENN. LAW. 18, 23 (Aug. 2013) (“The [UPL] committee concluded that while the simple sale of preprinted forms selected by the consumer was not unauthorized practice, the legal document preparation services must be performed by an attorney licensed to practice law in that state.”). But see Lowell Bar Ass’n v. Loeb, 52 N.E.2d 27, 31 (Mass. 1943) (holding that “[t]he proposition cannot be maintained, that whenever, for compensation, one person gives to another advice that involves some element of law, or performs for another some service that requires some knowledge of law, or drafts for another some document that has legal effect, he is practising [sic] law.”).

56 See Letter from Alexander Hamilton to Gouverneur Morris (May 19, 1777) (National Archives) (describing the history and founding of American democracy). Identifying that when representatives are “really and not nominally” selected by the people stability and trust are built. Id. See also George Thomas, ‘America Is a Republic, Not a Democracy’ Is a Dangerous—And Wrong—Argument, THE ATLANTIC (Nov. 2, 2020), archived at https://perma.cc/SJ4R-7KZ2 (discussing that the phrase “pure” democracy, used by the founding fathers, is what we now call a direct democracy); The Federalist Papers, No. 14 (Nov. 30, 1787) (describing a democracy exclusively to be a direct democracy).

57 See Myung Jin, Citizen Participation, Trust, and Literacy on Government Legitimacy: The Case of Environmental Governance, 5 J. SOC. CHANGE, 11, 13 (2013) (discussing how scholars believe “citizen participation contributes to legitimating governmental affairs and the regime that makes them.”); Susan George,
a government is viewed by its people as legitimate it can be equated to
them trusting the system functions properly, while illegitimacy is
associated with distrust and dysfunction. Additionally, a view that
one’s government is illegitimate is seen to decrease a citizen’s
willingness to accept and complete requests or demands from that
government.

The legal system is not immune to these principles of
legitimacy. Researchers have observed that trust in court-appointed
attorneys in criminal proceedings is low, the source of that distrust is
originating from a systemic problem, not one with the specific public
defender. This is accompanied by the view that defendants are

Democracy in danger: the rise of illegitimate authority, TRANSNAT’L INST. (Aug. 30,
2013), archived at https://perma.cc/H32V-PV5C (discussing how the requirement of
consent for a legitimate government means there is a power to reject illegitimate
authority). “Legitimacy demands above all the consent of the governed.” Id.
58 See POLITIC. LEGITIMACY, STANFORD ENCYC. OF PHIL. 10 (Edward L. Zalta et al.
eds., 2010 ed. 2023) (describing multiple interpretations of political legitimacy).
“Accounts that emphasize political participation or political influence regard a
political decision as legitimate only if it has been made in a process that allows for
equal participation of all relevant persons.” Id. “Without citizens’ active
participation in the justification of a state’s laws, Rousseau maintains, there is no
legitimacy.” Id at 11. See generally Stefano Passini & Davide Morselli, Disobeying
an Illegitimate Request in a Democratic or Authoritarian System, 31 POL. PSYCH.
341, 343-44 (2010) (identifying that a belief an authority is legitimate increases an
individual’s likely hood to be obedient to it, and that democratic authorities benefit
from this).
59 See Passini, supra note 58, at 350 (“[T]he participants obeyed more when the
request was made by an authority with a perceived legitimacy, such as President
Kennedy (the democratic condition). Moreover . . . the effect was significant when
people considered the authority democratic.”).
60 See Jill Filipovic, It’s time to say it: the US supreme court has become an
illegitimate institution, THE GUARDIAN (June 25, 2022), archived at
https://perma.cc/SDT7-TKVT (describing the Supreme Court of the United States to
be a tool of authoritarian rule). “As of 24 June 2022, the US [S]upreme [C]ourt should officially be understood as an illegitimate institution – a tool of
minority rule over the majority, and as part of a far-right ideological and authoritarian
takeover that must be snuffed out if we want American democracy to survive.” Id.
See also Rebecca Love Kourlis, Public Trust and Confidence in the Legal System:
The Way Forward, IAALS (Sept. 13, 2019), archived at https://perma.cc/9WPL-67BY (discussing the growing distrust citizens have in the judiciary); Leitch, supra
note 7, at 47 (“The essence of democracy is that it engages ordinary people in
government and governance.”).
61 See MATTHEW CLAIR, BEING A DISADVANTAGED CRIMINAL DEFENDANT: MISTRUST AND RESISTANCE IN ATTORNEY-CLIENT INTERACTIONS, 100 SOC. FORCES
“passive consumers of legal sanctions,” further dimensioning the position and status the litigant has within the legal dispute.62

The results of self-representation observed during litigants’ cases are varied, with both negative and positive effects.63 Promoting the democratic ideal of involvement in the process can produce settings where SRLs feel more effectively heard, improving their trust in the system.64 This institutional trust is similar to concepts within

62 See Clair, supra note 61, at 2 (explaining that “[D]efendants, who are assumed to be passive consumers of legal sanctions.”). See also Marcus T. Boccaccini, Jennifer L. Boothby & Stanley L. Brodsky, Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development, 22 BEHAV. SCI. 197, 198 (2004) (discussing the increase in trust that occurs when client participation is increased while being represented by a public defender).

63 See Cases Without Counsel, supra note 3, at 37 (measuring that “94% of respondents indicated that failure to present necessary evidence was a common problem; 89% said that ineffective witness examination was an issue for self-represented litigants; 81% cited self-represented litigant failures to properly object to evidence as problematic; and 77% referenced ineffective arguments mounted by self-represented litigants.”); Nourit Zimerman & Tom R. Tyler, Between Access to Counsel and Access to Justice: A Psychological Perspective, 37 FORDHAM URB. L.J. 473, 499-500 (discussing the satisfaction that SRLs had with being in full control of their case).

64 See Michele N. Struffolino, Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation, 2 ST. MARY’S J.L. MAL PRAC. & ETHICS 166, 211-12 (2012) (“[P]ro se litigants' satisfaction with the legal system is tied to the feeling that they have been treated fairly.”). See also Procedural Justice, YALE L. SCH. [hereinafter Understanding Procedural Justice] (Dec. 3, 2022), archived at https://perma.cc/MQ63-3TYR (identifying the application of having a voice as a factor in evaluations of procedural justice).
procedural justice, which holds value in litigants feeling heard by the court system and its actors.65 A “democratic thesis” for access to justice is articulated by Jennifer Leitch.66 Leitch challenges foundational principles within the American model of litigation and the professionalization of the legal system.67 This theory is discussed in more detail in sub-section d of the facts section.68

III. Facts

A. Legal Advice and Representation

There is an ongoing push within the American legal community to attempt to bridge the gap in access to justice.69 This gap in access has a few referents but is used to describe how most legal

65 See Emily Gold & Melissa Bradley, The Case for Procedural Justice: Fairness as a Crime Prevention Tool, COMTY. POLICING DISPATCH (Oct. 26, 2022), archived at https://perma.cc/C6R3-FXYA (describing procedural justice as the process where individuals regard the justice system as more favorable when the process is fair, rather than outcome received); Understanding Procedural Justice, supra note 64 (discussing procedural justice as a means of building institutional trust). See also LOGAN CORNETT & NATALIE ANNE KNOWLTON, PUBLIC PERSPECTIVES ON TRUST & CONFIDENCE IN THE COURTS, INST. FOR ADVANCEMENT AM. LEGAL SYS. 1 (2020) (“To operate effectively, courts rely on, among other things, the trust and confidence of the public.”).

66 See Leitch, supra note 7, at 7 (analyzing “[t]he democratic approach to access to justice contemplates that individuals are provided with more and better opportunities to participate in a discourse about law and justice.”). Leitch is pushing the perspective that access to justice requires individuals to have “meaningful and direct participation by individuals as opposed to a predominant focus on representation by lawyers.” Id. at 12.

67 See id. at 27-28 (contrasting the practical thesis of access to justice pushing of more access to representation, with the democratic approach wanting more direct litigant participation).

68 See discussion infra §(3)(D) (addressing the democratic thesis of access to justice presented by Leitch).

needs go unmet in the United States; the “gap” is the difference between unmet and met needs.\textsuperscript{70} A common proposal made to bridge the aforementioned gap is to increase access to representation, but equating access to justice to being adequately represented is not considering the whole picture.\textsuperscript{71} In §3(C) I address this association of representation and justice using procedural justice, highlighting problems that representation alone is unlikely to correct.\textsuperscript{72} Further, in §3(D) I highlight a perspective on access to justice named the “democratic thesis,” which argues for creating more direct involvement from litigants when crafting judicially created law.\textsuperscript{73} The reality is, increasing representation alone cannot cure all of the problems associated with access to justice and our justice system.\textsuperscript{74}

\textsuperscript{70} See LEGAL SERVS. CORP., THE JUST. GAP: THE UNMET CIV. LEGAL NEEDS OF LOW-INCOME AMS. 7 (Apr. 2022) [hereinafter Just. Gap] (stating that “the justice gap as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”); Kathryn Graham, Increasing Access to Legal Services for the Middle Class, 33 GEO. J. LEGAL ETHICS 537, 537-38 (addressing the situation for the middle class litigants whose earning place them above the maximum incomes for legal aid, but cannot afford a private attorney).

Studies show that forty to sixty percent of middle class legal needs are unable to be met by existing legal services. The economic divide in the United States is such that people of high socioeconomic status can afford to hire private attorneys at their hourly market rates, and people of low socioeconomic status potentially qualify for legal aid programs.

\textit{Id.} at 537.

\textsuperscript{71} See Bridging the Gap, supra note 69, at 725 (describing how many Americans don’t view the need for justiciable solutions to their issues, or don’t believe there is one). The article identifies that individuals often believe they don’t need legal advice or that it wouldn’t help – indicating that simple access to an attorney would not solve the whole problem faced. \textit{Id.} at 726. See also Bryan Mixon, Most Common Areas of Law Practiced in America, AMAZE.LAW (Feb. 25, 2023), archived at https://perma.cc/8MRT-HXY9 (showing that commercial litigation is the most common practice area in the United States). See generally Lisa H. Nicholson, Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose, 82 FORDHAM L. REV. 2761, 2785 (2014) (insisting that now is the time for the ABA to mandate pro bono service). Nicholson supports UPL laws to protect consumers from erroneous legal advice, but she errs in grouping all opponents of them as desiring a “free market” of legal advice. \textit{Id.} at 2762.

\textsuperscript{72} See discussion, infra §3(C) (explaining procedural justice).

\textsuperscript{73} See discussion, infra §3(D) (explaining the democratic thesis).

\textsuperscript{74} See David Freeman Engstrom, Rethinking the Regulation of Legal Services: What States Are Doing to Move the Needle on Access to Justice, STAN. L. SCH. (May 18,
Even with a policy like Civil Gideon, a civil right to counsel, there are simply not enough lawyers, and increasing the total number of attorneys is not a practical or sustainable solution.75

Currently, UPL laws are designed in a way to maintain the monopoly lawyers have on the legal profession, relegating almost all power in navigating the courts to them.76 This has contributed to the
nation’s access to justice crisis as it relates to access to information and legal services. In *Stifled Justice*, Mathew Rotenberg directly critiques the status quo, “bar associations and legislatures defend themselves from new advances with strict unauthorized practice rules, rather than embrace them with innovative ways to deliver legal services.” There are a variety of efforts to improve access to our official dispute resolution mechanisms for SRLs, but in the United States, most legal needs still go unmet.

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77 See Laurel A. Rigertas, *The Legal Profession’s Monopoly: Failing to Protect Consumers*, 82 Fordham L. Rev. 2683, 2694-98 (2014) (discussing the impacts that the monopoly lawyers have on consumers of legal advice and representation).

The regulation of the legal profession is failing in its consumer protection role because the manner in which the quality of legal services is currently regulated causes insurmountable problems with access to legal services. Current regulations restrict activities that constitute the practice of law to licensed attorneys. This restriction is justified, in large part, based on the assumption that the public cannot make informed decisions about who is qualified to provide legal advice and, therefore, the government must make that determination. Even if this assumption is correct, restricting the practice of law to those who have completed a juris doctor has constrained the market options so that many consumers have no access to legal services at all.

Id. at 2683 (footnotes omitted).


79 See Just. Gap, supra note 70, at 7 of legal advice for low-income Americans. The LSC found that 53% of low-income Americans do not know how they would find an attorney or afford one if they could find one. *Id.* The author addresses the fact that even if litigants knew where to find attorneys, “LSC-funded organizations are unable to provide any or enough legal help for an estimated 1.4 million civil legal problems (or 71% of problems) that are brought to their doors in a year.” *Id.* at 3. See also Volunteer Lawyers Project, Clinics & Projects – Housing Court Lawyer for the Day, VLPNET.ORG (Nov. 12, 2022), archived at https://perma.cc/SEG5-KMEE (discussing the program run by the Volunteer Lawyers Project to provide attorneys to low-income tenants and landlords that are unrepresented in Housing Courts in Massachusetts). See also Limited License Legal Technicians, *Affordable Legal Services in Family Law by a Legal Technician*, WASH. BAR ASS’N (Aug. 11, 2022), archived at https://perma.cc/B87X-TKBQ (highlighting the Limited License Legal Technicians (LLLT) program in Washington State, where nonlawyers provide legal advice with specific practice areas). “[A] LLLT . . . advise[s] and assist[s] people going through divorce, child custody, and other family law matters in Washington.”
There are movements around the country to expand the group of people who can provide legal advice to include non-lawyers. 

A primary driver in the jurisdictions considering this approach is to further the access to justice mission. These initiatives to expand the group still face friction with how to interpret the practice of law in UPL regulations.

Still, the jurisdictions that attempt to improve access to justice in this manner seem hesitant to truly evaluate UPL laws, allowing the legacy of ambiguity and confusion to continue. For example, the Massachusetts UPL law’s most recent changes were in 2010, and only

Id. See also MADE, supra note 13 (linking to MADE, a “free guided interview” designed for tenants to use to complete answer and discovery forms when they face summary process). See also About Us, Court Forms Online, COURT FORMS ONLINE (Mar. 25, 2024), archived at https://perma.cc/2NJ6-SVEC (hosting a variety of “guided interviews” for self-represented litigants to use to make the forms filing process more approachable, removing complex language and legalese). See e.g., Domestic Violence, COURT FORMS ONLINE (Nov. 14, 2022), archived at https://perma.cc/Q3RB-7YPA (hosting many of the forms needed for getting court involvement when navigating domestic violence).


See Richard Zorza & David Udell, New Roles for Non-Lawyers to Increase Access to Justice, 41 FORDHAM URB. L. J. 1259, 1262-66 (2014) (discussing the motivation for access to justice in reasoning to expand nonlawyer’s permitted conduct in the practice of law). “[O]ne of the most intriguing developments in response to the crisis of access to justice . . . [is] the increasing interest at high levels of the legal system in considering new roles for non-lawer legal practitioners to provide a range of civil legal services.” Id. at 1262.

See id. at 1268 (discussing the “structure of regulatory prohibition – that lawyers may practice law, and everyone else may not, except in some instances when supervised by a lawyer – has been increasingly challenged.”). See also Derek A. Denckla, Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters, 67 FORDHAM L. REV. 2581 (1999) (addressing that simple document preparation is prohibited if it involves any “legal advice”). Denckla also highlights the reality that, “[t]he definition of what constitutes ‘the practice of law’ . . . is by no means uniform, even within the same jurisdiction.” Id.

See also Caroline Shipman, Unauthorized Practice of Law Claims Against LegalZoom – Who Do These Lawsuits Protect, and is the Rule Outdated?, 32 GEO. J. LEGAL ETHICS 939, 952-53 (2019) (discussing the position that the Model Rules addressing the unauthorized practice of law is “outdated and does not account for technological advancement.”). “[T]he Federal Trade Commission, along with the Antitrust Division of the U.S. Department of Justice, wrote a comment letter that in general supported the General Assembly’s effort to allow the use of technology for certain legal services.” Id. at 953.
included a name change of the statute, with no substantive changes or clarity provided. During this regulatory stagnation, there has also been unprecedented growth in both the supply and demand for tools and services designed for the self-represented.

A recent example of these laws being interpreted in the modern world changed the way we should be understanding legal advice when it is provided through automation.  

Lola v. Skadden addressed the issue of automation of document review in a law firm setting. Lola is relevant for two reasons: first, it reaffirms that states will determine what it means to “practice law” in their jurisdiction. Second, it articulates that under North Carolina’s definition, one of predictable ambiguity, “tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law.”

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85 See Cases Without Counsel, supra note 3, at 5 (stating “[t]he growing number of self-represented litigants in state family courts and the ongoing conversation about how best to serve them highlights a natural tension between the legal profession and the court community as to who bears responsibility for ushering litigants through the family justice system.”). See also Van Wormer & Nina Ingwer, Help at Your Fingertips: A Twenty First Century Response to the Pro Se Phenomenon, 60 VAND. L. REV. 983, 1011 (2007) (discussing the rise in pro se litigants and the rise in services designed to assist them). See also Stephan Landsman, The Growing Challenge of Pro Se Litigation, 13 LEWIS & CLARK L. REV. 439 (2019) (pointing to the growing pro se caseload).


87 See Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 620 Fed.Appx. 37, 45 (articulating the quoted language).
B. Technology, Unbundled Legal Services, and Access to Justice

There is rising popularity for the idea of categorizing the method legal services that are provided into the categories of “unbundled” and “bundled,” with bundled legal services currently being the standard. Bundled services are provided when a litigant has an attorney represent and advise them throughout the entire legal process. Whereas the unbundled model has the litigant hire an attorney for discrete tasks and questions – also known as limited scope representation. The unbundled model is particularly alluring when considering that the largest barrier for SRLs is the cost of legal advice and the unbundled model is often marketed on affordability.

The prospect of a system of unbundled services is not without challenge; critics highlight a variety of concerns and doubt its overall efficacy. One prominent objection is that most legal issues cascade
into others, making the notion of discrete tasks and limited scope representation not truly achievable. Opponents also express concern over the challenge of communicating what the scope of assistance is at the beginning of representation in an understandable way, which if done inadequately, could harm litigants in unanticipated ways.

Combining unbundled legal advice with technology provides a unique opportunity to consider how UPL laws interact with nonlawyers and could be informative of what it means to practice law more generally. The programs and tools developed to improve SRLs efficiency and chances of success are regularly built around acute


Ethical critiques have plagued unbundling from the outset. The abridgement of the attorney-client relationship, which is demanded by the provision of limited services, has been denounced as incompatible with the duties of competence, diligence, and zeal. And component parts of unbundled practice—notably, ghostwriting—have been attacked as a violation of the duty of candor to the tribunal and an exploitation of pro se leniency.

Id. at 465 (citations omitted).

95 See Lapin, supra note 94, at 4 (addressing the need for attorneys to obtain informed consent regarding any foreseeable collateral problems when providing limited scope representation). Lapin highlights that attorneys who take on limited scope representations still need to identify and inform clients of foreseeable issues outside that scope. Id. at 5. “Attorneys providing limited representation operate in uncharted waters with little confidence in being protected against malpractice and ethical complaints.” Id. at 8.

96 See Lapin, supra note 94, at 2 (addressing the difficulty of creating a fixed scope of representation is within a domestic relations case). “The circumstances in contested domestic relations matters often prove less than optimal. Determining what is reasonable under the circumstances is a difficult task.” Id.

issues—like assistance with a particular form or legal process. Still, these tools face scrutiny in some jurisdictions, leading advocates to argue that unauthorized practice statutes are barriers to their potential success.

Courtformsonline.org, produced by the Legal Innovation and Technology Lab at Suffolk University Law School, is an example of a service that provides forms assistance. This tool walks people through a form using simple language to help them produce the most useful and accurate document for their relevant legal issue. Their terms of use, prominently displayed and agreed to by any user, explicitly say that the provided assistance is not legal advice; however, this type of help would likely cross the line in some jurisdictions.

98 See MADE, supra note 13 (hosting the MADE tool, designed to walk a tenant through an answer and discovery in 25-90 minutes); Massachusetts Law Reform Institute, Housing, Apartments & Shelter, MASS LEGAL HELP (Nov. 16, 2022), archived at https://perma.cc/CN6W-GFS (providing tenants with a robust amount of information in plain English, along with self-help forms and instructions for completing housing court forms); The Document Assembly Line Project, COURT FORMS ONLINE (Nov. 16, 2022), archived at https://perma.cc/2NJ6-SVEC (explaining the goal of the project is to “rapidly create mobile-friendly accessible version of online court forms and self-help materials”). See e.g. Request for a Temporary Restraining Order, COURTFORMSONLINE (Nov. 17, 2022), archived at https://perma.cc/EB2Y-6J9S (providing a simple interview-like process to complete a Temporary Restraining Order (TRO) for housing court). TROs are a method for tenant to request a judge orders a landlord to stop doing things that are illegal or do things that the law requires them to—like perform repairs. Id.

99 See Rotenberg, supra note 78 at 740 (arguing that the regulations regarding the unauthorized practice of law are wholly insufficient to modern technology and stand as a barrier to effective provision of legal services). Rotenberg stands firmly in the position that current regulations are harmful to consumers, stating that, “restricting the delivery of legal services to bar members only is an outdated quality control instrument, creating an unnecessary and harmful scarcity of legal services.” Id.

100 See sources, supra note 98 (providing examples of the programs available on courtformsonline.org).

101 See The Document Assembly Line Project, supra note 98 (describing the goals of the project).

102 See Ask the court for a Temporary Restraining Order: CourtFormsOnline, COURTFORMSONLINE (Nov. 26, 2022), archived at https://perma.cc/4WGT-SA7N (displaying the disclaimers for the TRO form). “This site is not a lawyer. If you would like a lawyer, find your local legal aid provider.” See also Guided Interviews Terms of Use and Data Privacy Policy, COURTFORMSONLINE (Nov. 16, 2022), archived at https://perma.cc/W9DX-BM6X (stating that “[t]his website does not constitute legal advice. You should consult a lawyer for legal advice.”). See also Tex. Gov. Code § 81.101(a) (1999) (defining the practice of law in broad terms,
C. Procedural Justice

Access to justice is a core component of all initiatives working to assist pro se litigants. Often used as an umbrella term being defined in a variety of ways, most still include the assumption that the currently unmet legal needs can be met through the regulated channels of the judiciary. Accordingly, an aspect that needs to be addressed when evaluating access to justice needs is whether the people not using the judiciary can trust it to fairly resolve their problems. It is entirely possible that someone who might have an actionable claim does not pursue judicial remedy due to a belief it would be futile because of their systemic distrust and a concern they will be received with bias.

including “any service requiring the use of legal skill or knowledge . . . .”). Still “legal skill or knowledge” remain to be defined and are equally ambiguous as “the practice of law.” Id.

103 See Wills, supra note 69 (pointing out the justice gap and the barriers those without representation face).

Access to justice remains one of the fundamental principles of the rule of law . . . . Without legal assistance, individuals can struggle to navigate through the complexity of court procedures. An individual’s failure to understand court procedures, and the substantive law-related issues of their case can lead to the loss of a home, children, job, income, and liberty.

Id.

104 See Wills, supra note 69 (arguing that “[a]ccess to justice consists of the ‘ability of individuals to seek and obtain a remedy through formal or informal institutions of justice for grievances.’ ”). Wills continues, “legal representation continues to remain expensive for most. This lack of affordability limits an individual’s access to justice, and contributes to what some refer to as the justice gap.” Id.

105 See Cornett, supra note 65, at 6 (explaining that “[a]mong those who did not trust their local judges, most shared a perception that judges are biased.”). “A majority of participants expressed concerns about the fairness of the current civil process, many of which centered on perceptions of systemic racial or gender bias, differential treatment based on financial ability, and judicial biases.” Id. at 1.

106 See id. at 3 (discussing how trust inhibits people from using or complying with the court). “If the people who need and use the courts view them as inaccessible, biased, or inefficient, they may be less likely to seek the help of the courts—or worse yet, less likely to comply with [the] dictates of the court.” Id. See also Procedural Justice, CTR. FOR CT. INNOVATION (Nov. 18, 2022), archived at https://perma.cc/2T7Y-22H3 (discussing how “when court users perceive the justice system to be fair, they are more likely to comply with court orders and follow the law in the future – regardless of the outcome of their case.”); Anne Wallace & Jane Goodman-Delahunty, Measuring Trust and Confidence in Courts, 12 INT’L J. FOR
Procedural justice attempts to analyze perceptions of fairness of procedure or process, rather than just the result. This type of systematic review is key for truly achieving the goals that most initiatives pursuing access to justice hold.

Procedural justice identifies four factors when SRLs evaluate their own opinion of whether their interaction with some legal entity was procedurally just. “[First, w]hether they were treated with dignity and respect; [second, w]hether they were given voice; [third, w]hether the decision-maker was neutral and transparent; and [fourth, w]hether the decision-maker conveyed trustworthy motives.” Two factors that are core to an SRLs situation are whether they were given a voice and if they were treated with dignity and respect.

Ensuring a self-represented litigant has an effective voice in interactions with the judiciary can improve procedural justice and the

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107 See Understanding Procedural Justice, supra note 64 (addressing the pillars of procedural justice and the goal of perceived fairness); Procedural Justice, supra note 106 (highlighting what procedural justice is and some of its benefits).

108 See Understanding Procedural Justice, supra note 64 (stressing that “[f]or decades, our research has demonstrated that procedural justice is critical for building trust and increasing the legitimacy of law enforcement authorities within communities.”).

109 See Robert Longley, What is Procedural Justice?, THOUGHTCO (Apr. 27, 2022), archived at https://perma.cc/MTC7-UZ2V (identifying the four key values of procedural justice as “voice, respect, neutrality, and trustworthiness.”); Understanding Procedural Justice, supra note 64 (identifying the four factors that individuals use when considering if an encounter with a legal authority was procedurally just).

110 See Longley, supra note 109 (highlighting the four values of procedural justice, and how they support each other).

111 See Sarah Burton, What Self-Represented Litigants (Actually) Want, LAWNOW (June 30, 2015), archived at https://perma.cc/MP3D-MDA2 (identifying that many SRLs feel disrespected when dealing with judges and court staff). “[M]any SRLs reported being treated in a way that stretched beyond the bounds of civility and into basic rudeness and disrespect.” Id. See also Kourlis et al., supra note 3, at 2 (addressing the fact that the reason some litigants go self-represented is a desire to “have a voice in the process . . . ”).
outcomes from the perspective of litigants.\textsuperscript{112} For example, it is observed that when people are provided clear avenues to give their opinion, their self-esteem improves.\textsuperscript{113} Improving the overall communication between judges and litigants is an important aspect of creating an effective place for SRLS to voice opinions and feel heard.\textsuperscript{114}

If a system treats someone with respect and dignity, that person will view the system as more procedurally just making it more likely

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\textsuperscript{112} See Kelly Tait, Procedural Fairness: A Treat for the Brain, Case In Point 4 (2016) (discussing the value of the people’s voice in the justice system).

Since SRLs are often unsure when to speak and what is relevant, protecting their instrumental voice is of particular concern. Building in ways for SRLs to constructively participate (and being sure to clearly explain them) can help ensure that judges hear the information they need to make the best decision possible and that SRLs feel they’ve been heard by a trustworthy decision-maker.

\textit{Id.} See also Mark N. Van Osdel, Procedural Justice and Voice: Do Individual Differences Moderate the Voice Effect? 5-11 (1994) (M.A thesis, University of Nebraska at Omaha) (on file with University of Nebraska at Omaha) (drawing the distinction between instrumental—outcome inducing speech—and symbolic—used to display a group identity or belief set—speech). Osdel explains that the identification of group membership through symbolic speech is a can “explain reported cross-cultural differences in procedural justice . . .” \textit{Id.} at 10.

\textsuperscript{113} See David De Cremer & Alain Van Hiel, Procedural justice effects on self-esteem under certainty versus uncertainty emotions, 32 Motivation & Emotion 278, 278-79 (Apr. 8, 2008) (on file with OpenAcess) (conducting research on the effects of certainty on perceptions of procedural justice). De Cremer and Van Hiel find results consistent with their hypothesis “procedural justice has a positive influence on self-esteem . . . .” \textit{Id.} at 281. \textit{See also} Van Osdel, supra note 112, at 9-10 (discussing the defining role that group membership has on self-esteem and identity).

\textsuperscript{114} See Emily LaGratta & Tom Tyler, To Be Fair: Conversations About Procedural Justice 63 (Emily LaGratta, 2017) (interviewing Jody Huber, staff attorney for the Justice of the Peace Court in Delaware, about her projects in Delaware about procedural justice). Huber talks about her project of videotaping judges and having them watch them, where their behavior on the bench often gives off unintentional effects. \textit{Id.}

One judge said to [Jody Huber], “I’m such a studious note-taker, especially during a trial, but watching myself on video, it looks like I’m not paying attention at all. I never even look up. I’m not making eye contact. I’m so focused on taking my notes. I just never realized that.”

\textit{Id.} In another interview with Steve Leben, a judge in Kansas Court of Appeals, addressed communication saying, “It’s important there be good communication so that [the litigant] know what is going on and, when their opportunity for input is limited, why those limits exist.” \textit{Id.} at 88-89.
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they respond with respect.\textsuperscript{115} It has also been seen that in situations where there is a perception of respect, people will be less resistant and more amenable to the process.\textsuperscript{116} Judicial communication is truly critical to creating a respectful and fair environment for SRLs.\textsuperscript{117}

D. The Democratic Approach to Access to Justice

Jennifer Leitch highlighted a distinction between two “orientations” that are the most prevalent in the access to justice conversation.\textsuperscript{118} The first has the goal of improving access to the legal system through a professional advocate, known as the “practical

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\item \textsuperscript{115} See Leitch, supra note 7, at 248-49 (describing an interaction between an SRL and a judge where respect played a key role in perceptions of a fair outcome).
\item \textsuperscript{116} See Anne Wallace, Measuring Trust and Confidence in Courts, INT’L J. FOR CT. ADMIN. 11 (2021) (addressing the need of respect for improving procedural justice). “An assessment that a procedure is fair results in the individual feeling respected and valued, which, in turn, promotes co-operation and compliance with the law.” Id.
\item \textsuperscript{117} See Tait, supra note 112, at 2 (addressing the importance of judges being attentive to how their communication behaviors are perceived); LAGRATTA & TYLER, supra note 114, at 102-09 (interviewing Barbara Marcille, a trial court administrator in Oregon). Marcille asserted, “If you can help young people understand how the system works, help them participate in their cases, and make sure they’re clear on what has just happened and what the next steps are, then you have a higher chance of them following through on what is expected.” Id. at 103.
\item \textsuperscript{118} See Leitch supra note 7, at 6 (articulating the differences between the practical thesis and the democratic one).
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thesis.” The other, “the democratic thesis”, wants to “enhance citizens’ participation and ultimately their ability to engage with law-making and law-administering institutions and processes as well as concepts of justice as ends in themselves.”

The practical thesis is the dominant perspective in the conversation, but the democratic approach provides a lot of value and is highly compatible with other popular perspectives within the access to justice movement, namely procedural justice. The democratic thesis is valued by Leitch because when individuals are “provided with better opportunities to participate in a discourse about law and justice . . . they might contribute to the development of new legal vernacular that is relevant to and reflective of their lives.” When this value is compared to procedural justice they appear to align, with both resulting in the incorporation of the litigant’s voice in the courtroom and consequentially the future common law.

When evaluating access to justice initiatives it is important to consider the reality that the United States is a democracy and operates

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119 See id. at 28-30 (detailing the practical thesis of access to justice). This model is focused on increasing representation and access to “courts and tribunals” is an increase in access to justice. Id. at 28. “Notwithstanding whether the lawyer pursued the client’s interest as the client saw fit, the assumption was that representation by a lawyer allowed the individual to participate fully in the legal system.” Id.

120 See Leitch supra note 7, at 6 (highlighting the goal of the democratic thesis as including and encouraging meaningful participation from litigants, as means to make the process more democratic).

121 See id. at 28 (discussing the prevalence of the practical thesis and how to facilitate individual involvement in cases). “The adherence to a conceptualization of access to justice as access to formal legal institutions with the assistance of legal representation has also shaped the thinking about how access is achieved.” Id. at 29. But see Asbjorn Storgaard, Access to justice research: On the way to a broader perspective, 13 ONATI SOCIO-LEGAL SERIES 1209, 1220 (Dec. 9, 2022) (highlighting the lack of research done using the democratic thesis proposed by Leitch and proposing future research recommendations). “As indicated in the table above, studies adhering to the practical thesis have received more attention than studies adhering to the democratic thesis[.]” Id.

122 See Leitch, supra note 7, at 40 (highlighting distinctions between the practical and democratic thesis).

123 See Understanding Procedural Justice, supra note 64 (discussing what procedural justice is and the values it embraces).
with a common law model.\textsuperscript{124} Laws are typically seen as being made by the legislative branch, and it is believed that through their representatives the law will reflect the people’s will.\textsuperscript{125} However, judicially created law does not involve the same type of representation, yet the law created is equally powerful.\textsuperscript{126} The democratic thesis argues that like the legislative law-making process, the common law process should involve the voice of the governed to maintain legitimacy.\textsuperscript{127} Leitch presents this idea by plainly stating:

\begin{quote}
[A] pressing challenge in a society that claims to be democratic is to bring the work of the courts as much as possible in line with the demands and disciplines of democratic principles and practices. As such, if courts are engaged in the process of making laws and governing people’s lives, it is arguably vital that as many citizens as possible play meaningful and informed roles in that process.\textsuperscript{128}
\end{quote}

\textsuperscript{124} See \textit{The Common Law}, AMERICAN\textsc{bar} (Jan. 27, 2023), archived at https://perma.cc/R9UR-6QRY (stating that “[t]he common law embraces the body of customs, rules, and precedent—rather than statutes—memorialized in judicial opinions that constitute much of the law that governs our lives. It emphasizes the importance of the courts in stating and restating the law based upon precedent and experience.”).

\textsuperscript{125} See \textit{Good lawmaking a cornerstone of democracy and human rights protection, OSCE leaders say}, OSCE (Apr. 26, 2021), archived at https://perma.cc/8RJS-HXKH (addressing the need for democracies to use “inclusive lawmaking”). \textit{Id.} ODIHR Director Matteo Mecacci says, “That’s why good laws are always based on democratic principles and drafted following full consultation, while good lawmaking ensures that the voices of all the groups making up our diverse societies are heard.” \textit{Id.}

\textsuperscript{126} See \textit{The Common Law, supra} note 124, at 3-5 (describing the development and power of judicially created law – case law).

\textsuperscript{127} See Leitch, \textit{supra} note 7, at 86 (stating “[t]he promotion of greater participation and engagement by individuals in the legal institutions and processes that affect them also has the added effect of strengthening the legitimacy of the justice system as part of the greater democratic process.”). Leitch goes on to say that “meaningful participation in the development and administration of the laws that govern them . . .” will cause individuals to be better positioned to critique those laws in the pursuit of making them just. \textit{Id.} at 86-87.

\textsuperscript{128} See \textit{id.} at 69 (addressing challenge and importance of having courts be democratic and arguing democratic societies must create the ability for effective citizen participation in the creation of common law).
IV. Analysis

A. Modern Realities Need Modern Solutions

The current regulations regarding the practice of law are outdated.\textsuperscript{129} The control for what constitutes practicing law is found in a state’s code and it is consistently ambiguous—often operating with a \textit{know it when we see it} perspective.\textsuperscript{130} Considering the current reality that most self-represented litigants face and the rising frequency courts interface with SRLs, the rules regarding the practice of law must change for there to be any meaningful improvement for either of these groups’ experiences.\textsuperscript{131} These updated rules should provide clear space for the implementation of technology to create solutions for SRLs.\textsuperscript{132}

Rates of self-representation are rising, the justice gap is expanding, and technological innovation has been hindered, making clear that regulations on the practice of law need to be re-evaluated.\textsuperscript{133}

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  \item \textsuperscript{129} See Rotenberg, supra note 78, at 711-12 (pointing out the inadequacy of current practice of law definitions in the modern age). Rotenberg argues that these regulations have large consequences on the legal system. \textit{Id.} “Seen in this light, the vague and outmoded language of the unauthorized practice statutes, and their uneven application, is a more serious problem than ever before. It decreases confidence in the legal system . . . .” \textit{Id.}
  \item \textsuperscript{130} See id. at 718-19 (arguing that the confusion the consistently vague state-based regulations these regulations essentially use a “know it when I see it” test). Rotenberg asserts that due to the state of unauthorized practice statutes there is a negative impact on “widespread public use” of Internet legal providers (ILP). \textit{Id.}
  \item \textsuperscript{131} See The Justice Gap: Executive Summary, supra note 69, at 45 (discussing rates that low-income Americans seek legal help). “Low-income Americans sought legal help for 25% of the civil legal problems that substantially impacted them in the past year.” \textit{Id.} The Justice Gap report also found a low level of awareness that a lawyer could help with their civil legal problems, with 74\% not knowing if a lawyer could help or thinking they could not. \textit{Id.} at 49.
  \item \textsuperscript{132} See Rigertas, supra note 77, at 2698 (stating the need for updating the laws regarding the practice of law). “The future sustainability of the legal profession’s monopoly will require state supreme courts to be more proactive in assessing ways to increase access and to reexamine the boundaries of lawyers’ exclusive practice areas.” \textit{Id.}
  \item \textsuperscript{133} See The Justice Gap: Executive Summary, supra note 69, at 6 (showing that low-income Americans received insufficient legal help for 92\% of their legal problems). \textit{But see} Nicholson, supra note 71, at 2777 (arguing that the loosening of UPL
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This should be pursued in a manner that brings the unauthorized practice of law statutes into a position that promotes access to justice, specifically using the ideas of procedural justice and the democratic thesis. The laws and regulations should make clear space for tools like MADE and Upsolve. These services can improve outcomes for self-represented litigants, take the workload off of lawyers, and improve judicial efficiency.

By redefining the practice of law to enable self-representation, there could be improved participation in the process and success in the outcomes for the individuals seeking judicial relief that cannot obtain representation. Enabling litigants to have a meaningful voice in the courtroom, and the legal process more generally, is a key aspect when restrictions through creating non lawyers’ providers of legal advice is a bad idea).

Nicholson argues that creating “qualified layperson[s]” will produce a “two-tiered market for legal services[,]” providing attorneys for those that can afford it and a nonlawyer for those that cannot. This perspective seems to ignore the reality of the situation of current rates of attorney representation. See Graham, supra note 70, at 538 (“[T]he cost of legal services has escalated to the point where it is difficult even for those making 200-400 percent above the poverty line to afford representation.”).

The core goals of unauthorized practice laws are as valid as ever. Non-lawyers must not hold themselves out as lawyers or undertake activities they are unqualified to perform. But while the core goals remain valid, a changing society and legal practice may necessitate significant alterations to the structure and operation of these laws.

See Zorza & Udell, supra note 81, at 1287-88 (calling for modernization of UPL regulations).

The core goals of unauthorized practice laws are as valid as ever. Non-lawyers must not hold themselves out as lawyers or undertake activities they are unqualified to perform. But while the core goals remain valid, a changing society and legal practice may necessitate significant alterations to the structure and operation of these laws.

See Tex. Gov. Code § 81.101(a) (1999) (prohibiting “any service” that requires any level of “legal knowledge”). See generally MADE, supra note 13 (providing robust forms assistance with simplified language removing legalese). A tool like MADE could prove incompatible with the broad and ambiguous Texas statute. See Respond to an eviction against you, supra note 15 (highlighting the fact that even the state of Massachusetts website is advocating for the use of MADE, strengthening a claim that institutions benefit from similar tools).

See Leitch, supra note 7, at 48-78 (arguing that a “conceptualization of access to justice” that encourages “meaningful participation” is consistent with the realities of “self-represented litigants” in the “civil justice system.”). Highlighting the empowerment that self-represented litigants experienced often resulted in an increased sense of self-confidence, enhanced knowledge of legal processes and institutions, and, in certain instances, a willingness to engage further in other forums and capacities. Id. at 51.
promoting procedural justice.\textsuperscript{138} By having self-represented litigants engage more effectively and clearly with judges, we would likely see increases in perceptions of procedural justice, institutional legitimacy, and general trust in the judiciary.\textsuperscript{139} Additionally, when SRLs view the system they navigate as procedurally just, even outcomes that are best described as a “loss” in our adversarial system, can be a positive experience to litigants.\textsuperscript{140}

Looking to the current laws for guidance on how to define practicing law brings only confusion from the disjointed and inconsistent body.\textsuperscript{141} They must be clarified, and consider the realities

\textsuperscript{138} See Tait, supra note 112, at 4 (discussing the positive impacts from giving SRLs a voice and helping them understand the process on their ability to meaningfully participate). “Building in ways for SRLs to constructively participate . . . can help ensure that judges hear the information they need to make the best decision possible and that SRLs feel they’ve been heard by a trustworthy decision-maker.” Id. See generally Leitch, supra note 7 at 27 (discussing some impacts on the access to justice theory that the user-centric approach may have). Leitch says that when you have SRLs engage more with “the decision-making processes that affect them, individuals are able [to] participate in a discourse about justice and further develop certain practical skills, which facilitate additional participation.” Id. at 40.

\textsuperscript{139} See Tait, supra note 112, at 4 (“There is an overwhelming body of evidence supporting the positive consequences of providing a voice to people in the justice system. People want an opportunity to tell their story to a well-intentioned authority figure.”) (footnote omitted); Wallace & Goodman-Delahunt, supra note 106, at 15 (highlighting that “concrete engagement with an institution generally has the effect of increasing an individual’s level of trust in it.”). See also Leitch, supra note 7, at 50 (raising the question of legitimacy in judicially created law). “To the extent that, beyond the electoral process, individuals are disengaged and disaffected, there are serious questions about the legitimacy of resulting laws and regulations; there are also questions about the implementation and operation of those laws.” Id. See generally De Cremer & Van Hiel, supra note 113, at 285-86 (discussing their findings that discrete emotions impact perceptions of procedural justice).

\textsuperscript{140} See Tait, supra note 112, at 1 (explaining the positive effects of procedural justice).

People are hardwired for fairness, and the justice system is the social context they count on most to provide it . . . . Researchers from multiple disciplines are examining the complex nature of perceptions of fairness . . . . These investigations have confirmed that people care deeply about the processes by which decisions are made, even when the decisions are unfavorable to them.

\textsuperscript{141} See Zorza & Udell, supra note 81, at 1268-69 (assessing the rise in interest in expanding who can provide legal assistance and how technology plays a role). Zorza
of current technological ability and the presence of pro se litigants. The implication from *Lola v. Skadden*, that fully automated actions are incapable of being the practice of law, exemplifies the regulatory inadequacy – these laws did not consider automation resulting in frequent doubt.

Additionally, in *Upsolve v. James*, the Southern District of New York created substantial authority on that jurisdiction’s interpretations when performing UPL analysis. The court held that due to the benefit and limited scope of the program in question, the conduct could proceed unrestricted and without fear of litigation – relying heavily on free speech protections, a relatively unprecedented position. This ruling is at clear odds with the statutory schemes in many jurisdictions; for example, in Texas Government Code § 81.101(a), “practice of law” is defined as, “... preparation of a legal pleading or other document incident to... or in the management of [a legal] action.”

There are exceptions for “computer software” in and Udell provided a robust reflection and analysis on the current status of non-lawyer roles in legal disputes; they proposed a variety of methods for further inclusion of non-lawyers in the pursuit of access to justice. *Id. See also* LeBoff, *supra* note 80 (suggesting caution while highlighting proposed UPL regulation changes in California, Arizona, and Utah).

See Rotenberg, *supra* note 78, at 711-12 (addressing the need for modernization of unauthorized practice statutes); Zorza & Udell, *supra* note 79, at 1268 (stating plainly “the level of [legal] need far outstrips the resources available...”). See *Lopez, supra* note 24, at 71 (arguing that there needs to be at least a consensus on what constitutes practicing law so the public can be properly informed on who to trust). *See also* Lola, 620 Fed. Appx. at 39 (grappling with the question of whether automated document review constitutes the practice of law). *Lola* held that actions that can be fully performed by a machine could not be considered the practice of law.

*Id.*

See *Upsolve*, 604 F. Supp. 3d 97, 102 (S.D.N.Y. 2022), *appeal denied*, 2022 U.S. Dist. LEXIS 113515 (addressing the large conflict between dissemination of perspective and information, with statutes on the unauthorized practice of law).

See *Upsolve*, 604 F.Supp. 3d 97, 112 (S.D.N.Y.2022) (finding that providing exclusively “out-of-court verbal advice” is protected by the First Amendment and the UPL law cannot satisfy the requisite scrutiny to stop it). Although not invalidating the UPL statute in New York, the court does find that as applied the statute fails strict scrutiny due to its broadness. *Id.* at 120.

See *Upsolve*, 604 F.Supp. 3d 97, 102 (S.D.N.Y.2022) (explaining that the Plaintiff’s free speech protects override the UPL regulations). *Compare with* Texas Gov. Code § 81.101(a) (1999) (defining the practice of law in broad terms); Unauthorized Practice of Law, TEXASLAWHELP.ORG (Jan. 20, 2023), archived at https://perma.cc/254N-MHSW (highlighting the fact that you cannot correct a
some situations, which potentially creates support for an independent software solution, but any human assistance may breach the regulations. The services that occur in Upsolve’s program in New York are in clear conflict with this.

These cases show support for the position that regulations on the unauthorized practice of law are outdated. Lola considering automation in an employee’s workflow shows just how inadequate current regulations are. This inhibits access to justice and worsens the justice gap due to uncertainty in the changing scope of conduct exclusive to lawyers. The conflict between the use case of a non-lawyer personally assisting someone through a MADE interview, with Texas regulations, exemplifies the ways the development of similar programs can be inhibited.

B. Justice and Representation cannot be Synonymous

Many who stand with access to justice, but disagree with expanding who can practice law, often argue for expanding access to

misunderstanding of a friend while helping them on court forms). Engaging in the unauthorized practice of law in Texas brings with it criminal liability. Id. See Texas Gov. Code § 81.101(c) (1999) (supplying some exceptions to the unauthorized practice definition for “written materials, books, forms, computer software, or similar products . . .”).

See Upsolve, Inc. v. James, 604 F.Supp. 3d 97, 103 (identifying how “[p]laintiffs’ proposal faces one problem: by giving legal advice as non-lawyers, their activities would constitute the unauthorized practice of law (‘UPL’) under several New York statutes.”); MADE, supra note 13 (discussing the services MADE provides). The creation of a service that functions like MADE requires legal knowledge the user then supplies the facts, but if the result required legal advice is unclear under many of UPL statutes. Id. See Upsolve, 604 F.Supp. 3d 97, 120 (holding in favor of the plaintiffs’ request for injunctive relief). The court reasoned, “the balance of equities favors an injunction because Plaintiffs’ program would help alleviate an avalanche of unanswered debt collection cases, while mitigating the risk of consumer or ethical harm.” Id. at 103. See also Rotenberg, supra note 78, at 736 (describing the current unauthorized practice regulations as “outdated and stifling”).

See Lola, 620 Fed. Appx. at 39 (grappling with the question of whether automated document review constitutes the practice of law).

See Rotenberg, supra note 78, at 736–37 (asking for re-regulation, not elimination, of unauthorized practice laws).

See id., supra note 78 (addressing the need for states to adopt modernized regulations “that embraces the potential of the Internet to increase accessibility of legal services.”).
attorney representation. This is a popular perspective for state bars, pursued through initiatives creating pro bono requirements. As discussed above, a complete right to counsel does not cure all the ills of our access to justice crisis; appointed representation is not a magic cure to injustice and distrust in the judicial system.

Even assuming the possibility that the right to counsel cures systemic distrust, the logistics of a regime of complete representation is likely impossible to achieve. This is clear given the current amount of unmet legal problems and the number of licensed attorneys. The difficulties become more apparent when you consider the legal experience and knowledge that would need to be acquired for a number of these attorneys due to the area of need versus their current practice area.

153 See Nicholson, supra note 71, at 2764–65 (arguing that the solution to the access to justice crisis is to mandate pro bono hours for attorneys but continue to restrict the practice of law to bar members). But see Rethinking the Regulation of Legal Services, supra note 74 (Justice Deno Himonas stated, “[t]he most recent estimate that I’ve seen suggests that every lawyer . . . in the U.S. would have to donate upwards of half their year—in order to provide even an hour of legal counsel to each American for each civil justice need.”).

154 See Nicholson, supra note 71 at 2785 (calling for the mandate of pro bono hours). “[N]ow is the time to finally, and swiftly, adopt the mandatory pro bono service obligation for all licensed attorneys.” Id.

155 See also Zimerman & Tyler, supra note 63, at 497 (identifying the use of self-representation as a tool of empowerment). Although potentially a tool for empowerment, Zimerman and Tyler also found clear problems with self-representation. Id. at 500–01. “Presenting the claims in everyday language and structure, those narratives often lacked the required components of legally adequate claims[.]” Id. at 501.

156 See Rethinking the Regulation of Legal Services, supra note 74 (showing the inadequacy in the amount of lawyers that would be needed to provide even an hour of legal advice to those in need).

157 See DeMeola & Houlberg, supra note 93 (highlighting the necessity of expanding how legal services are provided, and by who). In their article, DeMeola and Houlberg outline a variety of different state actions in expanding who can provide legal services — reshaping the role of an attorney and how to understand what types of conduct should exclusively perform. Id.

158 See Nicholson, supra note 71, at 2784 (pointing to the large discrepancy between indigent litigants and legal assistance attorneys); Mixon, supra note 71 (showing the top eight practice areas for American attorneys). The list ranks Family Law in fifth, likely showing that would be an inadequate number of attorneys who could provide competent assistance in that area given its large demand in the indigent populations. Id.
In addition to the logistical impossibility, it is not clear that only expanding access to attorneys truly achieves justice; either through the appointment of counsel or obligations of pro bono work.\textsuperscript{159} Looking at the criminal system we see clear problems.\textsuperscript{160} Defendants appear to hold views of systemic injustice, harboring distrust for their counsel, the judge, and other attorneys.\textsuperscript{161} Even if the litigant’s subjective perspective is ignored, the system appears to not be working for the best comparator to this hypothetical ‘pro bono civil attorney’ – the overworked public defender.\textsuperscript{162}

\textsuperscript{159} See Rethinking the Regulation of Legal Services, supra note 74 (stating how it seems impossible to fill the justice gap with pro bono services). “[E]very lawyer in the U.S. would have to donate upwards of half their year – in order to provide even an hour of legal counsel to each American for each civil justice need.” Id. See also Hussemann & Siegel, supra note 61, at 501 (describing the distrust defendants hold towards their appointed public defenders).

\textsuperscript{160} See Hussemann & Siegel, supra note 61 at 495–96 (highlighting different failures of the criminal system, despite the right to counsel). Hussemann and Siegel found that defendants occasionally felt their cases where not “given individual consideration” leading them to doubt the fairness in the process, even if they liked the final result. Id. at 495. “Despite the finding that most defendants perceive the outcomes and procedures of their case as fair, over 70 percent of defendants did not feel like that [sic] they had adequately participated in their cases.” Id. at 505.

\textsuperscript{161} See id. at 473–75 (discussing the role that race and class has on views of criminal justice). “As a result [of the war on drugs and other crime policies in the 1980’s and 1990’s], the criminal justice system has not only become a primary source of civic education for the poor but has led to distrust and disillusionment with the ‘system.’” Id. at 474.

It's not fair because they work for the city. So, he started working with the prosecutors and seeing what they want to come up with, but he's not asking the client what's going on. It's not fair. It was all him, him and the prosecutor. The public defender is not fair; it's not justice because they do what they want to do. What them and the prosecutor want to do.

Id. at 502 (quoting a black defendant facing a felony charge).

\textsuperscript{162} See Hussemann & Siegel, supra note 61, at 521 (describing the public defenders' situation as being “overworked, underpaid, and have little time to give adequate attention to each case”).
C. A Modern Solution

With the combination of technology and nonlawyers, we now can safely provide effective legal assistance in revolutionary ways. But these potential solutions remain restricted by antiquated definitions and understandings of technology and justice. A comprehensive definition of access to justice remains elusive, but almost universally it will support the ideal that the judicial process should be fairly administered.

Services like MADE provide an avenue to increase access to the judicial process in a manner that can improve perceptions of fairness. They will create situations where pro se litigants are more prepared for hearings. Adequate preparation likely improves the chances of having an effective voice in court, coinciding with the goals of both the democratic thesis and procedural justice.

163 See id. (“Technology, allied professionals, . . . and other solutions show—and in some cases, have already shown—incredible promise when it comes to addressing unmet legal needs.”); Respond to an Eviction Against You, supra note 15 (providing tips to individuals facing eviction in Massachusetts, recommending MADE for producing forms). The fact that the state suggests MADE as the best option for responding tenants goes to show the impact systems like it can have on SRL experience. Id.

164 See Rigertas, supra note 77, at 2697 (“An industry that enjoys a monopoly has little incentive to innovate in ways that could reduce the cost of services.”). Rigertas highlights consumers increased use of services like LegalZoom as do-it-yourself legal solutions, calling the state supreme courts to incorporate this consumer choice into the formal rules. Id. at 2701.

165 See Glaves, supra note 18 (discussing the amorphous reality of the phrase access to justice). Glaves wrote as the Executive Director of the Chicago Bar Foundation expressing the mysterious definition of access to justice leading to it being “meaningless”. Id. He created a definition for use by the CBF, including “a fair and efficient court or process to resolve disputes”. Id.

166 See MADE, supra note 13 (providing a tool for completing critical court forms to respond to an eviction in plain language).

167 See Leitch, supra note 7, at 125 (describing the disadvantage faced by people unable to maintain representation). People who are working poor and middle-income individuals “are compelled to enter the legal system unaware and unprepared for the legal aspects of their case or about the legal processes in which they must engage.” Id.

168 See Landsman, supra note 85, at 449 (addressing the fact that pro se litigants are unprepared as a result of operating in a professionalized system as non-professionals). See also Leitch, supra note 7, at 6 (discussing the goal of the democratic thesis as increasing direct engagement); see also Tait, supra note 112, at
The ambiguously defined monopoly lawyers have on providing “legal advice” leaves litigants seeking assistance in peril, and those looking to create solutions frustrated. And still, appointed representation is not a magic cure for injustice and distrust in the judicial system. Relationships between public defenders and their clients within our criminal justice system exemplify some of the problems of appointed representation.

By redrafting regulations that allow programs like MADE or Upsolve to be deployed, states could provide clarity to what is allowed to be done using technology in the access to justice pursuit. Creating explicit protections for tools approved through a licensing process is an example of one approach a state could take. This would allow lots of control over risk and a clear line for each specific situation.

A program like this could function in a very similar way to how the

1-2 (insisting the importance that the procedure is perceived of as fair by the litigants when evaluating legal institutions).

169 See Rigertas, supra note 77, at 2683–85 (outlining the negative impact caused from the restrictive nature of the current unauthorized practice of law regulations on consumers).

170 See Clair, supra note 61, at 6 (discussing legal cynicism, and distrust of court appointed criminal defense attorneys). Claire details widespread mistrust among disadvantaged defendants, citing factors such as low pay, attorney abilities, high caseloads, cultural differences, and perceived discrimination. Id. at 11-12.

171 See id. at 2 (raising the gap in research from a criminal defendant’s perspective, often relegating them to be “passive consumers of legal sanctions.”). “Mistrust in the attorney-client relationship emerges from the combination of racialized and classed constraints . . . often leading defendants to withdraw from their lawyers and cultivate expertise on their own.” Id. at 13.

172 See Upsolve, Inc. v. James, 604 F. Supp. 3d 97, 103 (S.D.N.Y. June 27, 2022) (concluding that a “balance of equities favors an injunction” in order to mitigate consumer risk).

173 See Rethinking the Regulation of Legal Services, supra note 74 (describing initiative in Utah of licensing non-attorneys to provide legal advice). “One of the innovations we launched in Utah was licensing specially-trained non-lawyers to provide legal advice in the areas of family law, debt collection, and landlord/tenant. These are three areas where the justice gap is widest.” Id.

174 See Upsolve, 604 F. Supp. 3d at 104 (S.D.N.Y. June 27, 2022) (describing the details of Upsolve’s program as a non-lawyer helping a litigant complete a one-page court form as constituting legal advice). The court found that since their program mitigated “risk of consumer or ethical harm” sufficiently an injunction was warranted. Id. at 2.
judge in Upsolve evaluated the program and determined it was permissible.\textsuperscript{175}

V. Conclusion

The ambiguous and outdated regulations on the unauthorized practice of law must be re-crafted to come by the modern realities of technology and who the court users are. The laws presuppose the ability of individuals to obtain representation, which is a flawed operating principle. This legal system was built for professionals, but it now sees the number of pro se litigants rising uncontrollably.

Those that want an attorney often have a hard time locating and affording one, while others believe they can effectively appear pro se. This results in self-represented litigants being underprepared for filings, court events, and demands they interact with opposing counsel and judges in completely foreign ways. This is undeniably an access to justice crisis.

The need to reshape our understanding of what it means to practice law provides an opportunity to refocus the values behind it. The historic touchstone of consumer protection needs to be modified to include procedural justice concerns. When coupled with modern technology this has the potential to create large improvements in the litigant’s experience and the judiciary’s efficiency.

\textsuperscript{175} See id. at 28 (analyzing the results of implementation of the program).

By implementing the AJM program, more New Yorkers will respond to their lawsuits and begin that adversarial process, rather than default entirely. And answering those lawsuits with Plaintiffs’ help does not risk additional legal error once their clients are through the courthouse doors; at that point, those clients will either retain a licensed lawyer (perhaps using a pro bono organization) or go on to represent themselves pro se (as anticipated by the State’s do-it-yourself checkbox form).

\textit{Id.}