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Having a Say: Democracy, Access to Justice and Self-Represented Litigants

Jennifer Ann Leitch

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**Having A Say:
Democracy, Access to Justice and
Self-Represented Litigants**

Jennifer A. Leitch

A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE
STUDIES IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE
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Abstract

Having a Say: Democracy, Access to Justice and Self-Represented Litigants

'Access to Justice' is one of the most contested issues on the law-and-society agenda. There is a long-standing exchange over its meaning, objectives, and success. Beneath that engagement, there is a deeper and more basic debate about the overall ambitions for access to justice: – is the goal to improve people's access to the legal process and generate more positive outcomes (the practical thesis), or to enhance people's participation and ultimately their ability to affect justice as an end in itself (the democratic thesis)? This thesis adopts the latter approach.

The plight of self-represented litigants (SRLs) offers a revealing glimpse into the more systemic failings of the litigation process. This thesis builds on original qualitative work that explores SRLs' experiences and circumstances in their own voices. The challenges presented by their growing numbers bring into question the whole basis for understanding and advancing the debate on access to justice. Indeed, existing ways to understand access to justice are found to be seriously lacking. Instead, a fresh agenda of questions and answers recommend themselves to deal with the new realities of the existing legal process. The existence of SRLs does not simply create difficult challenges *within* the legal process, but presents a huge and subversive challenge *to* the legal process itself. Due to this disconnect between the theory and realities of litigation, any progress in improving access to justice demands a transformed approach to further study and policy analysis.

Responding to this new state of affairs is not easy or straightforward. But it must be done if the drive for better access to justice is to make significant and meaningful headway. Consequently, this thesis contributes to the theory and practice of access to justice by shifting the discourse about what access to justice should be and how it might be pursued. The democratic approach advocated seeks to encourage the meaningful participation by SRLs in the legal and political processes and institutions that impact their lives. In doing so, the hope is to challenge the existing litigation framework and ensure that democratic rhetoric matches reality in the pursuit of access to justice.

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CHAPTER ONE

INTRODUCTION

Access to Justice is both an ideal and an undertaking that serves to benefit all members of society. It is difficult to be against a plea for more and better access to more and better justice in and through the legal process. However, the concepts of both access' and 'justice' are highly contested.¹ Moreover, this contest calls into play a range of theoretical issues and practical challenges that further separate scholars, members of the public, the legal profession and policy makers. Indeed, it may be said that a person's stance on access to justice is reflective of certain of their assumptions, both stated and unstated, about law and society in the broadest sense. Thus, in this regard, a person's position on access to justice is further reflective of her commitments to some of the foundational assumptions and values about the adversarial system, individuals' relationship with law, and concepts of justice.

The sociologist of law, Roscoe Pound, noted, "our conception of the problem to which our discourse is addressed shapes both. What we are trying to do, why we are trying to do it, and how we are trying to do it, are not wholly separable, and each enters in to both definition and discourse."² This is particularly true of access to justice. Each new wave of the access to justice movement has not only identified particular problems to be solved, but also recommended a particular discourse through which to think about and recommend reforms and solutions. Historically, the lack of access was viewed as a problem within the legal system that needed to be corrected through institutional reform of that system. In surveying access to justice and its literature, David Trubek suggested that, in the course of addressing the problem, "the original terms of the debate were changed as successive waves of reform led to a reconsideration of the original ideas that

¹ While the concepts of both access and justice have historically been contested, there are certain themes and approaches that have influenced the direction of access to justice theory and resulting policy. These are examined in more detail in chapter 2 of this thesis.

² Roscoe Pound, "Natural Natural Law and Positive Natural Law" (1960) 5 Nat L F 70 at 70.

had defined the concern in the first place.”³ Thus, institutional changes were often associated with certain theoretical approaches that, in turn, worked to justify a particular course of action. This cyclical process resulted in the shaping of not only the initiatives undertaken to ameliorate a lack of access, but also the underlying justification for those initiatives. Roderick MacDonald has challenged this cyclical reform process in access to justice as continuing to “induce the presentation of ideas in a form prefigured for implementation within the system.”⁴ This has the effect of bringing both theory and the initiatives derived from that theory within the “existing, stabilized normative order” of the official legal institutions and processes.⁵ The result being that, while the objective might be the removal of barriers and the enhancement of access, the process undertaken to affect these objectives already contains certain assumptions and values about the system that are not easily displaced.

This is a thesis about access to justice as understood through the experiences of self-represented litigants. It includes qualitative work involving self-represented litigants and their experiences in the litigation process and, more specifically, their experiences making use of self-help legal services when engaged in the civil justice system. The methodological approach undertaken in this research project, which is also consistent with the theoretical framework in this thesis, seeks to examine the self-represented litigants’ situation, circumstances and views in their own voice. However, this thesis is not intended to be restricted in either content or ambition by that specific focus. The situation and circumstances of self-represented litigants provides a means to shine a more critical light on the whole enterprise of access to justice. The challenges and dilemmas presented by the growing number of self-represented litigants bring into question the whole basis for understanding and moving forward the debate on access to justice. The

³ David M Trubek, “Critical Moments in Access to Justice Theory: The Quest for the Empowered Self” in Allan C Hutchinson, ed, *Access to Civil Justice* (Toronto, Canada: Carswell – A Division of Thomson Canada Limited, 1990) at 110-111 [Trubek, “Critical Moments in Access to Justice Theory”].

⁴ Roderick A MacDonald, “Theses on Access to Justice” (1992) 7:2 CJLS 23 at 32 [MacDonald, “Theses on Access to Justice”].

⁵ *Ibid* at 32.

plight of self-represented litigants offers a revealing glimpse at some of the larger and more systemic failings of the litigation process. Until recently, these failings had been taken for granted within the adversarial model in light of the fact that the litigation process was generally working and workable for the insiders that designed and made use of it.

Looked at through the experiences of self-represented litigants, this thesis suggests that the existing ways to understand access to justice are seriously lacking. The perspective from which people approach access to justice has generated a series of questions and a series of answers that no longer correspond with the realities of the existing legal process. Moreover, these new realities raise new questions about whether the existing litigation process, together with its underlying operating assumptions, is worth saving in the present form. Due to this disconnect between the theory and realities of litigation, if there is to be any progress in improving and enhancing access to justice, there needs to be a very different approach taken so that the agenda for study and policy change are transformed. This is not an easy or straightforward matter, but is one that must be initiated and debated if the movement to achieve access to justice is to make significant and meaningful headway. Consequently, this thesis is intended to contribute to the conversation about the theory and practice of access to justice in a way that shifts the discourse about what access to justice should be and how it might be pursued in a new direction. By doing so, the hope is to challenge the existing litigation framework, particularly in terms of its failure to meet the new realities within the litigation process, and ensure that rhetoric matches reality in the pursuit of access to justice.

Toward a Democratic Approach

In his classic essay written in 1976, Abram Chayes explained how a paradigm shift was taking place in civil litigation.⁶ He chartered a move from a traditional private law model of litigation that was grounded in ideas of 19th century legal liberalism to a public law model of litigation that envisioned more flexible procedures and a broader role for the

⁶ Abram Chayes, “The Role of the Judge in Public Law Litigation” (1976) 89:7 Harv L Rev 1281 [Chayes, “The Role of the Judge in Public Law Litigation”].

adjudicator. In so doing, he identified some of the salient characteristics of the older model and demonstrated how they were being challenged and replaced by the new, more expansive and different ones. Not unlike Thomas Kuhn's notion of paradigm shifts in the scientific realm, Chayes' basic idea was that, within an established model, there were a whole set of basic assumptions and operating premises that offered a finite set of problems and answers to those problems.⁷ The existing traditional model represented both the wisdom on what the appropriate parameters of civil litigation were and defined the conditions, directions and limits of both academic research and possible institutional reform of the litigation process or institutions given those parameters. Thus, within the existing model, the participants and the researchers take certain first principles for granted and, in so doing, engage on the basis of those shared values and even make adjustments based on those same values.

For Chayes, the breakdown of the traditional model and the dawning of a new model raised serious questions not only about the efficacy of the older paradigm, but also about its legitimacy. Although his focus was primarily on the broader role of the judge within a public law model of litigation and a correspondingly expanded notion of procedure, his analysis opened up a whole new approach to thinking about the legal process. His overall assessment was very much to the point – “we are witnessing the emergence of a new model of civil litigation and, I believe, our traditional concept of adjudication and the assumptions on which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of the judge and the court within this model.”⁸

In the same way that Abram Chayes in 1976 charted a paradigm shift that was taking place in civil litigation,⁹ I want to insist that another paradigm shift is (or should be) taking place today. Whereas Chayes focused on the role of the judge in civil

⁷ Thomas S Kuhn, *The Structure of Scientific Revolutions*, (Chicago, USA: The University of Chicago Press, 1962) at 10; Chayes, “The Role of the Judge in Public Law Litigation”, *ibid* at 1285.

⁸ Chayes, “The Role of the Judge in Public Law Litigation”, *supra* note 6 at 1282.

⁹ Chayes, “The Role of the Judge in Public Law Litigation”, *supra* note 6.

litigation, I identify and analyze a similar transformation of size and significance that is beginning to occur in civil litigation when understood from the perspective of self-represented litigants. This shift gives rise to a corresponding imperative to develop a broader conceptualization of access to justice. Self-represented litigants now comprise a large portion of litigants. As I will try to show through exploring the experiences and perceptions of self-represented litigants as they grapple with and within the existing system of civil litigation, the signs of impending crisis and the resulting need to re-evaluate the existing adversarial model are plain to see. The existence of self-represented litigants does not simply create difficult challenges *within* the legal process, but present a huge and subversive challenge *to* the legal process itself.

In some legal settings, self-represented litigants comprise the overwhelming majority of litigants. This fact alone necessitates a serious re-appraisal of the structure and dynamics of the adversarial context. However, when this fact is combined with a sense of disempowerment and disengagement felt by those who represent themselves and/or those who, for a variety of reasons, do not litigate at all,¹⁰ the need for deep and systemic change in the system becomes apparent. The consequence otherwise is the continued disengagement and corresponding de-legitimization of legal processes and institutions. Moreover, this continued disengagement from legal processes and institutions is inconsistent with the equal application of the Rule of Law in the sense that not all members of society are in a position to invoke and/or otherwise benefit from the Rule of Law. As such, I maintain that Chayes' comments regarding the need for a new model of civil justice, that in this case takes account of the failure of the current model to include and engage self-represented litigants, are as pertinent now as they were then.

¹⁰ Due to the nature of the self-help centre and the fact that it offers assistance to a wide range of individuals addressing civil legal matters, one particular challenge faced by the staff and highlighted by several of the interviewees in this research project was the difficulty in addressing the needs of individuals with mental health issues. On a regular basis, there were often individuals waiting to speak to a volunteer lawyer who were suffering from apparent mental health issues as well as issues of homelessness and other poverty-related issues. In these instances, it appeared that the staff found it quite challenging when attempting to understand the nature of the individual's legal problem and how LawHelp Ontario ("LHO") might be able to assist them. Thus, an important question raised in respect of this research is that while the fact is that there are lots of self-represented litigants making use of self-help legal services to resolve their legal problems, this fact also begs the question of who is not accessing the self-help services and/or fall outside the scope of the services offered by LHO and as such, are unable to get assistance at all.

Accordingly, I want to suggest that this changing landscape presents important challenges to the legitimacy and continued operation of the prevailing process of civil litigation as viewed from the perspective of access to justice. While there is not yet any fixed or settled notion of what a new process or underlying paradigm might look like, there are signs that one might be beginning to take shape. At a minimum, my research suggests that, based upon the views from those trying to access the legal system (the self-represented litigants) and those witnessing and assisting these attempts (the volunteer lawyers), there are clear indications that, as the traditional model and its underlying assumptions start to falter, a fresh appraisal of the litigation process and its operating assumptions is required. How the legal system responds to these fundamental challenges will be a good indication of whether there is a genuine desire to make substantive and substantial changes that best promote and advance a broader conceptualization of access to justice.

The major contribution of this thesis to the access to justice literature is to recommend and defend a more thoroughly and pervasive democratic approach to access to justice. At present, much of the disagreement within the access to justice community of scholars, activists and policy-makers can be traced to an important and often ignored division over a fundamental operating premise not only within the access to justice debate, but also underneath it. Allegiance to one commitment or another has very significant implications for the whole approach of access to justice in both its theoretical and practical dimensions. In short, there is a foundational difference between those who assume a different position on the overall framework for understanding and taking steps to improve access to justice. There are two basic orientations that dominate the discussion:

- For some, the goal is to improve people's access to the legal process (through legal representation or an equivalent form of legal services that requires professional intervention) so as to increase their chances of achieving a more positive outcome in their individual legal matter (*the practical thesis*).

- For others, the goal is 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 democratic thesis*).

This basic division influences not only an appreciation of the central problems to be addressed, but also the range of possible solutions to be adopted. While the practical thesis has tended to underpin and dominate the access to justice debate to date, the primary ambition of this thesis is to deepen and expand upon the democratic thesis and its implications for future work and interventions in access to justice. The 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. In so doing, they might contribute to the development of a new legal vernacular that is relevant to and reflective of their lives. In this sense, individuals have an opportunity to reclaim official law. The further benefit in proceeding in this manner is that individuals begin to engage in a wide variety of decision-making processes as citizens and the resulting decisions are legitimized. This expansion of a theory of access to justice in accordance with the democratic thesis also takes account of my empirical data respecting self-represented litigants' experiences and the implications of their existence and experiences on an expanded conceptualization of access.

Furthermore, this expanded theory of access to justice has important implications for a transformed view of lawyering. The rise in the number of self-represented litigants puts pressure on the traditional understanding of what the role of the lawyer should be. By emphasizing the democratic approach to access to justice, there is an opportunity to re-appraise the way that both opposing counsel and lawyers (insofar as they assist self-represented litigants) think about and approach their duties, strategies and general participation in the legal process.¹¹

¹¹ Carrie Menkel-Meadow, "The Lawyer's role(s) in Deliberative Democracy" (2004) 5 Nev LJ 347.

The examination of a broader conceptualization of access to justice and the research undertaken in this project in respect of this broader conceptualization originates out of my experience as a litigator, and a volunteer lawyer at a self-help legal centre in downtown Toronto. In the course of acting as a volunteer lawyer, I provided legal information and advice to self-represented litigants representing themselves in the civil justice system. My encounters with self-represented litigants attempting to navigate the justice system on their own, together with my experience as a civil litigator, caused me to begin to question some of the accepted reasoning about access to justice, its objectives and the initiatives derived therefrom. In the traditional sense, the existence of self-represented litigants has been viewed as a problem for which the accepted solution has been to find ways to provide more and different legal services in order to ameliorate the presence of self-represented litigants in the legal system. However, this seemed to be an unsatisfactory approach from both a practical as well as a philosophical perspective. Self-represented litigants represent a new reality within the litigation process that this approach does not fully address. More significantly, this approach appeared to disregard certain essential factors about the role of law in individuals' lives in a modern democratic society and the importance of ensuring that individuals are able to participate in the construction and implementation of the laws that affect them. Consequently, I began to question whether the existing thinking about access was provisional, insubstantial and, thus, limited by its response to the perceived problem which was how to provide individuals with legal representation. In this sense, this approach failed to take account of individuals' agency and abilities, while being overly preoccupied with courtroom efficiency. As a result, I wanted to examine a different approach to access that could begin to re-frame the discussion about the nature of the issue, the underlying objectives and the potential responses in a deeper and more enriched manner.

Charting the Thesis

The goal of the second chapter in this thesis is to examine, from a historical perspective, the different waves of access to justice theory and the corresponding initiatives that have evolved out of developments in access to justice theory. Important to this examination is

the role of the dominant practical thesis of access to justice that has influenced access to justice theory and practice and how this approach conflates access to legal services with access to justice movements. Subsequently, I will introduce a broader conceptualization of access to justice as it is contemplated in the democratic thesis. This conceptualization originates from some of the most recent deliberations on access to justice theory by individuals such as Roderick MacDonald and Janice Gross Stein, among others, and is further informed by procedural justice scholars. This democratic thesis frames the empirical research undertaken in this project, both in terms of the research questions posed and the methodologies employed to address those questions.

In the first part of chapter three, I elaborate on the principles of participatory democracy as a theoretical foundation for a democratic thesis of access. This will include a brief discussion of the objectives, as well as benefits, associated with empowerment and meaningful citizen participation. Following this discussion, the chapter will analyze the role of law and legal institutions, including both their law-making and law-administering functions within a democracy. Included in this analysis is a discussion about the corresponding importance of adopting a participatory approach to both law-making and law-administering functions, particularly as it relates to the dual objectives of the democratization of law and the creation of a new legal vernacular, which is more consistent and relevant to individuals' lives. In light of the important role that law plays in individuals' lives, this chapter will further examine how access to justice might encourage direct meaningful participation in these important legal processes, particularly within the civil justice system. An access to justice project undertaken in Connecticut will be used to underscore the importance of fostering participation and the benefits potentially derived from a participatory approach to access to justice. Finally, this chapter will look at some of the previously recognized institutional challenges associated with the promotion of participation within the civil justice system.

In chapter four, I will examine the growth of self-representation within the civil justice system, and briefly touch upon causes and consequences of this phenomenon. In the course of examining the growth of self-representation, I intend to review some of the

particular barriers that previous research has suggested that self-represented litigants face when they attempt to engage in the civil justice system. As a result of the growing numbers of self-represented litigants entering the civil justice system and otherwise attempting to resolve their legal issues without professional legal representation, there has been a corresponding proliferation of access to justice initiatives that are aimed at improving individuals' access to justice. In the context of such initiatives, the focus of this discussion will be on the emergence of self-help legal services. Self-help legal services provide self-represented litigants with legal information and advice in order that they may better represent themselves. I will examine the development of self-help legal services in various jurisdictions as well as the potential benefits associated with this initiative in accordance with the democratic thesis. I will also canvass some of the critiques associated with self-help legal services both in terms of the particular challenges faced by self-represented litigants as well as certain broader critiques including a neoliberal critique of self-help services. With respect to the latter, the critical commentary questions whether self-help represents a form of empowerment or alternatively, a form of disempowerment.

Chapter five of this thesis will lay the methodological groundwork for the empirical work undertaken in this research project. I will begin by canvassing certain recent empirical quantitative work in access to justice and relate it to the broader challenges and ambitions of the practical and democratic theses. In so doing, I hope to outline the tension between quantitative and qualitative research methodologies in access to justice and the challenges associated with these different methodologies. This will include a discussion of the two research streams that have arisen in access to justice research namely, (1) the qualitative and related observational work; and (2) the more recent quantitative studies that seek to use randomized methods in an attempt to measure outcomes. With regards to the later approach, I will discuss critically and in more depth some of the concerns associated with a focus on legal outcomes and corresponding adoption of a randomized quantitative methodology. I will concentrate on the practical, theoretical and ethical issues raised by these studies. In turn, I will advocate for the continuing need for more in-depth qualitative research that examines the experiences,

views and perceptions of individuals engaged with the civil justice system. This is based on the belief that qualitative research, which takes account of the individual's experiences attempting to access justice, creates a space in which to think about and debate access and meaningful participation from the users' perspectives. This discussion will also serve as a foundation for a discussion of the methodology adopted in this project. My critical ambition is to relate the empirical debate back to the more fundamental discussion over the tension between the practical and democratic theses as a basis for access to justice theory and policy.

The focus of my empirical research is on those individuals who, having identified their problem or issue as legal in nature, take steps to address it without retaining legal representation. The self-represented litigants interviewed in this project were involved with cases in the civil courts in Ontario and had appeared in a variety of different levels of courts within the civil justice system.¹² While the participants in this study were representing themselves, all of the individuals had made use of self-help legal services in Toronto. This chapter will include a brief description of the self-help centre (Law Help Ontario) where the research was undertaken.

Based on the earlier discussions regarding the need for qualitative research, the second part of this fifth chapter will outline the actual ethnographic methodology adopted in this research project and include a description of the methods employed to obtain an understanding of self-represented litigants' experiences representing themselves. These methods include observation and in-depth interviews with self-represented litigants who made use of self-help legal services and the lawyers who volunteer at the self-help centre. As such, the last part of this chapter will include a discussion of both the rationale for adopting these particular methods as well as the process involved in conducting this particular type of research. I will conclude this chapter with a consideration of some of

¹² These cases involved a variety of civil matters including housing and tenancy, employment, debt, family relationships, motor vehicle and in some administrative context, immigration and the allocation of social benefits.

the methodological and ethical challenges that flow from these research methods, particularly as it relates to the in-depth interviews conducted.

In the sixth chapter, I will begin by introducing the participants in this research project and contextualizing the setting for the research through a brief discussion of some of the observations made at Law Help Ontario (“LHO”). Following this, I will frame the two overarching themes derived from the narratives provided by the participants in this study – empowerment and disempowerment. These contrasting themes are situated within the previously discussed literature on participatory democracy and citizen engagement. Next, I will discuss each of these themes in greater depth. In so doing, I will draw on those aspects of the participants’ experience as described in their interviews that animate these themes. Finally, I will canvass the impact that these contrasting themes have had on the participants’ conceptualization of access to justice and engagement more generally. Throughout the discussion in this chapter and in keeping with the democratic thesis, I hope to give expression to the participants’ experiences through their own voices, whenever possible.

In the concluding chapter, I intend to discuss two important aspects of a shift from the practical thesis to the democratic thesis of access to justice. In the first part, I will suggest that the adoption of the democratic thesis is consistent with democratic objectives and, more importantly, reflective of certain aspects of the self-represented litigants’ experiences gathered in this research project. Thus, as part of this discussion, I intend to propose that what is needed from a theory of access to justice is a commitment to enhancing more meaningful and direct participation by individuals as opposed to a predominant focus on representation by lawyers. Assuming that individuals wish to participate but struggle to do so, it will be necessary to make significant changes to the way access to justice is conceptualized and operationalized. Thus, to paraphrase Chayes, “the traditional conception of [access to justice] and the assumptions on which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the

workability or the legitimacy of civil litigation as a realization of [access to justice].”¹³ The result is a need for broader systemic changes as well as more immediate and practical changes that will encourage and support self-represented litigants. Therefore, the second part of this concluding chapter will introduce the idea that the litigation process must change to better address and redress the self-represented litigants’ disempowering experiences. This transformation, which is aimed at enhancing greater participation by self-represented litigants, signifies a broader paradigm shift in the litigation model and one that is both necessary and urgent, if we are to live up to our democratic ideals.

Conclusion

Recent thinking about access to justice has questioned the dominant role played by lawyers. As an alternative, it has begun to explore the role that ordinary citizens can and should play in the creation and operation of law that is more consistent with the participatory goals and principles of democracy. The recent rise in the number of self-represented litigants in the civil justice system has concretized the need to explore this question in a more immediate fashion. By employing the methods of ethnographic research and socio-legal critique, this thesis aims to examine a broader concept of access to justice that adopts, more centrally, a democratic perspective. The hope is that this approach will not only enhance the positive benefits associated with direct engagement by self-represented litigants, but also address the challenges and continued barriers that cause self-represented litigants to lose confidence in the civil justice system, feel disempowered and, therefore, unable or unwilling to participate. As part of the examination of a broader conceptualization, the concepts of empowerment and disempowerment will play a key role in both understanding the experiences of self-represented individuals and proposing innovations and changes that will empower individuals to participate in a more meaningful fashion. This applies not only in the context of the civil justice system, but also in a myriad of political and legal forums and processes. In so doing, the ambition will be to re-think access to justice generally so that

¹³ Chayes, “The Role of the Judge in Public Law Litigation”, *supra* note 6 at 1282.

it will better advance the practical efficacy of the legal process as well as its democratic agenda and corresponding legitimacy.

CHAPTER TWO

ACCESS TO JUSTICE

Access to justice is a truly contested concept. There is little agreement about what the term access to justice means among scholars and policy makers. Moreover, this continuing lack of agreement respecting the concept of access to justice could be traced to an “evolution in thinking about what access to justice in a liberal democracy entails.”¹ This has resulted in heated and divergent debates over its meaning, its objectives and its successes. That said, my approach is to take much more seriously than has been done to date the commitment to a democratic perspective on access to justice. Instead of pursuing or refining a practical thesis that commits to the goal of improving individuals’ access to the legal process through legal or professional representation in the hope of generating more positive outcomes, I will explore access to justice as a means of enhancing citizens’ participation that potentially improves citizens’ ability to engage with law-making and law-administering institutions and processes as well as concepts of justice as ends in themselves.

By way of laying the groundwork for this democratic approach, the goal of this chapter is to examine the different permutations of access to justice theory and the corresponding initiatives that have evolved out of access to justice theory.² The purpose

¹ Roderick A MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto, Canada: The Law Society of Upper Canada, 2005) at 19 [MacDonald, “Access to Justice in Canada Today”].

² In a discussion of the critical moments in the evolution of access to justice, David Trubek considers the relationship between legal theory, legal institutions and legal practices that are relevant in the context of thinking about how access to justice theory is constituted. Specifically, he states, “[t]he relationship between legal theory and legal institutions and practices is complex. Theory and practices are loosely related. Theory neither determines practice, nor practice theory. Theory is both normative and descriptive. It is a way of explaining what we do and why we do it. It can operate as justification: legal theory is often a rationalization (in the Freudian sense) of practices in light of broadly held normative understandings. Because theory must have a normative component, it also can be a source of critique. Thus theory can be transformative.” David Trubek, “Critical Moments in Access to Justice Theory: The Quest for the Empowered Self” in Allan C Hutchinson, ed, *Access to Civil Justice* (Toronto, Canada: Carswell - A Division of Thomson Canada Limited, 1990) at 110 [Trubek, “Critical Moments in Access to Justice Theory”].

in proceeding in this fashion is to trace the evolution of access to justice theory and, thus, better understand how different influences have shaped the current approaches to access to justice. An important aspect of this examination is the role played by legal professionals in both the construction of theories of access as well as the implementation of those theories through various policy initiatives. In the first part of this chapter, I will examine the ‘waves’ of access to justice movements that have evolved over time. In so doing, I will also examine the policy initiatives that have been developed in accordance with those theoretical waves. Next, I will investigate critically the dominant practical thesis of access to justice that has shaped much of the policy direction in access to justice. I look at the implications that this approach has for self-represented litigants attempting to access justice. In particular, I emphasize how this approach conflates access to legal services with access to justice; this is grounded in serious and legitimate concerns about the ability of individuals to represent themselves without professional legal assistance. Finally, I will discuss a broader conceptualization of access to justice as it is contemplated in the democratic thesis and that originates from some of the most recent deliberations on access to justice theory. This democratic thesis frames the empirical research undertaken in this project, both in terms of the research questions pursued and the methodologies employed to address those questions.

The Evolution of Access to Justice Theory and Policy

In North America, approaches to thinking about access to justice have been characterized as ‘waves’ that began subsequent to World War II.³ Much prior to this time in the late eighteen and early nineteen hundreds, access to justice was viewed essentially as a “right of access to judicial protection” which contemplated the formal rights an individual may have to either assert or defend a claim.⁴ This approach to access to justice was consistent

³ Marc Galanter, “Access to Justice in a World of Expanding Social Capability” (2010) 37:1 Fordham Urb LJ 115 [Galanter, “Access to Justice in a World of Expanding Social Capability”]; Mauro Cappelletti & Garth Bryant, (eds), *Access to Justice: A World Survey*, vol 1 (Milan, Italy: Sitjoff & Noordhoff-Alpehenaandenrijn, 1978); Albert Currie, “Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework”, Government of Canada. Available online at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf.

⁴ Mauro Cappelletti and Bryant Garth, eds, *A World Survey*, vol 1 (Milan, Italy: Tipografia MORI & C, 1978) at 6 [Cappelletti and Garth, *A World Survey*].

with ‘classic legal thought’ that pervaded certain thinking about law and procedure during the nineteenth century. In accordance with this approach, individuals as legal subjects were viewed as “fully-constituted, self-contained actors capable of autonomous choice” who were free to make choices within formally delineated spheres defined by regulation.⁵ Elements of this approach to procedure and dispute resolution still shape certain current thinking about the legal process and, thus, by extension, continue to impact how we think about the promotion of access to justice.⁶ In this sense, the development and reform of theoretical approaches to access to justice were intimately tied to theories and approaches to civil procedure.⁷ However, an individualist and formalistic approach to procedure and dispute resolution and, by extension, access to justice, fails to take account of both great inequalities that effectively prevent a majority of citizens from accessing the justice system and the value-laden role of procedure. Recent articulations of access to justice theory arose once it was acknowledged that it would be necessary for the state to take steps to actively protect and promote certain civil and social rights.⁸

The work of Mauro Cappelletti, Bryant Garth and others has been instrumental in developing the characterization of access to justice in waves.⁹ In the course of his work on access to justice, Cappelletti originally set out the development of access to justice theory and policy in three broad waves. Cappelletti’s description of waves of thinking in

⁵ David M Trubek, “The Handmaid’s Revenge: On Reading and Using the Newer Sociology of Civil Procedure” (1988) 51:4 Law & Contemporary Problems 111 at 112-114 [Trubek, “The Handmaid’s Revenge”].

⁶ For example, one of the underlying assumptions was that procedure would not impact the outcome of a dispute but rather serve as a framework in which disputes were subjected to pre-existing rules and resolved accordingly. In this sense, procedure was a scientific instrument that had no effect on the goals or values of the participants using the system. See Trubek, “The Handmaid’s Revenge”, *supra* note 5 at 114-115.

⁷ Trubek, “Critical Moments in Access to Justice Theory”, *supra* note 2 at 111.

⁸ Cappelletti & Garth, *A World Survey*, *supra* note 4 at 7.

⁹ In his article entitled “Access to Justice in a World of Expanding Social Capability”, Galanter attributed the phrase ‘access to justice’ (as it is currently understood) and the expansion of its meaning to developments made by Mauro Cappelletti during the Florence Access to Justice Project which ultimately embodied a series of publications about access to justice. The Florence Access to Justice project cultivated a concept of access that was expanded to include a focus on achieving justice in a variety of forums. See Galanter, “Access to Justice in a World of Expanding Social Capability”, *supra* note 3 at 116.

access were grounded in part in his work on the Florence Access to Justice Project (a partnership between the Italian government and the Ford Foundation in the United States) which aimed to “examine and seek solutions for the pressing problems of making justice more accessible.”¹⁰ The work on access to justice at this time was also grounded in various institutional changes that were occurring in the United States.¹¹ MacDonald expanded this characterization to provide for more recent elaborations on access to justice theory and situate the discussion in a uniquely Canadian context.¹² Different countries developed initiatives in varying manners and time frames. Generally speaking, as the notion of access evolved and expanded, access to a variety of different institutions and processes, both judicial and non-judicial, were contemplated. As noted, David Trubek argues that the theoretical framework of access of justice, which ultimately resulted in a broad range of institutional reforms across jurisdictions, can be linked back to efforts to change the theory of civil procedure.¹³ Viewed in this manner, the ‘waves of access to justice’ can be better understood as an interaction between theoretical claims and changes to institutional practices which in turn, led to new theoretical claims and so on.¹⁴

The first wave of access to justice saw the birth of poverty law and the development of ‘storefront’ legal clinics that were aimed at providing legal services to low-income individuals. In Canada, this mode of thinking led to the emergence of legal aid initiatives that included certificate programs, duty counsel and eventually legal clinics, some of which provided specialty legal services or addressed particular legal needs. Beginning around 1973, there was federal funding for legal assistance programs

¹⁰ K.-F. Koch, *Access to Justice, An Anthropological Perspective*, vol IV (Milan, Italy: Tipografia MORI & C, 1979), at v; see also Cappelletti and Garth, *A World Survey*, *supra* note 4 at 7 in which Cappelletti notes that the “task in this Report will be to trace the emergence and development of a new and comprehensive approach to access problems in contemporary societies.”

¹¹ Galanter, “Access to Justice in a World of Expanding Social Capability”, *supra* note 3 at 116.

¹² MacDonald, “Access to Justice in Canada Today”, *supra* note 1.

¹³ Trubek, “Critical Moments in Access to Justice Theory”, *supra* note 2 at 111.

¹⁴ Trubek, “Critical Moments in Access to Justice Theory”, *ibid* at 110.

that encouraged the growth of legal aid.¹⁵ At this time, there was also a focus on procedural rights in criminal law and the development of civil rights litigation.¹⁶ Notwithstanding the different iterations, the focus was on providing lawyers and legal services to those who would not otherwise be able to afford them.

In the second wave of access to justice through the 1970's, there was a recognition that issues within the institutional organization of the civil justice system impacted individuals' ability to access to justice. The judicial system's performance regarding the procedures used in both the criminal and civil context was scrutinized and consequently found to be slow, inefficient and inconsistent. As a result, non-judicial institutions and processes were established as a means of dealing with certain types of civil claims.¹⁷ In an effort to reduce costs and enhance timely access for those in need of specific types of remedies, this wave in thinking led to an expanded landscape of dispute resolution mechanisms. This included workers' compensation boards, human rights tribunals, and other quasi-regulatory bodies and schemes that operated outside of the purview of the traditional justice system. While the goal during this period might have been to provide additional means by which individuals could resolve their legal problems outside the traditional legal system in a timely and efficient manner, the development of these bodies and regulatory schemes did not necessarily dissuade individuals of the need for professional legal assistance. The quasi-judicial nature of these regulatory regimes meant that there were still many complex procedural requirements that necessitated the need for legal assistance. Moreover, in certain contexts, the failure to have legal representation potentially placed the individual at a significant disadvantage. Having said that, there was an acknowledgement of the need to develop alternative means of resolving individuals' legal problems. In keeping with this acknowledgement, this period also witnessed the emergence of alternative dispute resolution processes.

¹⁵ Ab Currie, "Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework" (Government of Canada). See http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf [Currie, "Riding the Third Wave"].

¹⁶ MacDonald, "Access to Justice in Canada Today", *supra* note 1 at 19.

¹⁷ *Ibid* at 20.

Galanter suggests that in the 1970's, ideas about access to justice were accompanied, as well as influenced, by the Alternative Dispute Resolution (ADR) movement and the dispute perspective. These fields were born of,

an expansion of accountability and remedy fostered by courts and legislatures in the years between the end of World War II and the mid-1970's. An enlargement of remedies, an expansion of standing, abolition of old immunities, and the promotion of civil rights provided ordinary people with new occasions for using the courts and a greater likelihood of success when they did.¹⁸

The dispute perspective in legal research examined how disputes were constructed and ultimately resolved (or not resolved) within a legal framework. This body of inquiry influenced Felstiner, Abel and Sarat's influential work on the naming, blaming and claiming process that occurs when individuals are confronted with an injury or problem. A key component of this mode of analysis was the development of the litigation pyramid that had, at its pinnacle, the small number of cases that actually proceed to the legal system for resolution. Galanter suggests that the realization that only a small number of disputes are resolved in the formal legal system had important implications for access to justice theory.¹⁹ In particular, it uncovered various barriers that prevented individuals from both identifying issues and resolving those issues. The dismantling of these barriers became important access to justice objectives. Moreover, the development of a litigation pyramid that highlighted the fact that only a limited number of disputes are resolved through formal legal processes also served to raise broader questions about the purposes and interests served by the justice system; these questions remain integral to the access to justice agenda. In this regard, it could be said that ADR provided a partial answer to the challenges raised by the dispute perspective, particularly as it relates to the legitimacy of the formal dispute resolution process. MacDonald contends that the emergence of ADR

¹⁸ Galanter, "Access to Justice in a World of Expanding Social Capability", *supra* note 3 at 117.

¹⁹ Galanter, "Access to Justice in a World of Expanding Social Capability", *ibid* at 118.

also served to spark public legal education programs and the use of plain language as means of demystifying law and thereby making it more accessible.²⁰

Interestingly, as ADR was embraced by corporations and courts for its cost-effectiveness and its potential for faster results as well as tailor-made solutions for the affected parties, there was a shift in thinking about ADR as a means of enhancing access to justice. In fact, in subsequent years, there have been critiques of ADR that challenge the notion that it enhances access to justice.²¹ In her discussion of ADR, Sally Engle Merry suggested that wealthy corporate parties and government were keen to make use of the ADR process (and thus chose to make use of ADR initiatives) because it offered a less time-consuming and inexpensive process, which they could abandon if it did not work. However, for the working poor, ADR was required or at a minimum, encouraged because “their problems were defined as undesirable or inappropriate for the courts.”²² The former group was likely able to make use of private lawyers if need required. However, the latter group were often either without representation in the court system or dependent on state assistance. In this regard, the argument was that certain groups were removed from the court system and relegated to a second-class system of justice.

²⁰ MacDonald, “Access to Justice in Canada Today”, *supra* note 1 at 22; however MacDonald was subsequently critical of attempts to make legal language more accessible because it either discounted non-official law as non-legal or attempted to convert non-official law rather than allowing for the construction of a legal language by citizens directly. See Roderick A MacDonald, “Theses on Access to Justice” (1992) 7:2 CJSLS 23 at 32 [MacDonald, “Theses on Access to Justice”].

²¹ For example, in her article entitled, “Processes of Constructing (No) Access to Justice (For Ordinary People),” Laura Nader expressed a skepticism regarding the development of alternative dispute resolution (ADR) mechanisms as a means of resolving disputes outside the courtroom. Specifically, she questioned whether instead of improving access to justice, ADR is an unregulated process motivated by a desire to unburden the courts and control the populace, neither goal of which served the justice interests of the ordinary person. See Laura Nader, “Processes of Constructing (No) Access to Justice (For Ordinary People)” (1990) 10 Windsor YB Access Just 496 at 511 [Nader, “Processes of Constructing (No) Access to Justice”]. In terms of another critique, MacDonald suggested that the popularity of ADR was, in part due to the adoption by the legal community of an alternative to the ‘prosecution of rights in court’ that maintains a legal framework but transfers to a “‘therapeutic’ terrain all those conflicts which threaten to reveal the partiality of the office of the judge and of the structure of professionally-defined rights.” See MacDonald, “Theses on Access to Justice”, *supra* note 20 at 30.

²² Sally Engle Merry, “Varieties of Mediation Performance: Replicating Differences in Access to Justice” in Allan C Hutchinson, ed, *Access to Civil Justice* (Toronto, Canada: Carswell – A Division of Thomson Canada Limited, 1990) at 261.

Following a period that explored alternative forums as well as modes of dispute resolution, the 1980's saw a third wave of access to justice reforms that was focused on issues of equality and the corresponding development of substantive measures that were aimed at ensuring equality in legal outcomes as well as procedures.²³ Most significantly, this was influenced in Canada by the inception of the *Canadian Charter of Rights and Freedoms*²⁴ (the "Charter") in 1982. This was particularly true in the criminal context whereby the scope of challenges to different aspects of criminal procedure was expanded and, as a result, new iterations of rights were articulated. In this respect, legal aid in Canada was also significantly impacted due to the increase in the number of cases being brought before the courts.²⁵ Notwithstanding the specific impact that the *Charter* had on access to justice in the criminal context, it also had a broader impact in the sense that it raised difficult questions about equality, the need to ensure equal access and what equal access entailed. MacDonald maintains that this also required an equality of outcomes. This aspect of the access agenda remains a live issue from both a theoretical as well as a practical perspective. Ongoing questions about inequality in society are directly linked to broader issues of marginalization and disengagement, both of which have profound effects on individuals' ability to access justice.

Through the 1990's, there was a growing recognition by legal scholars that access to justice would need to include access to non-traditional means of resolving disputes as well as provide better access to public legal education. This would enable citizens to understand their rights and responsibilities and potentially gain access to the law-making processes.²⁶ These initiatives were motivated by an acknowledgement that access needed to include access to law-making as well as law-administering institutions and forums. Underlying this acknowledgement was a more fundamental concern that law creation also needed to take account of issues of access to justice. In order to do so, it was

²³ MacDonald, "Access to Justice in Canada Today", *supra* note 1 at 20-21.

²⁴ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c.11 [the "Charter"].

²⁵ Currie, "Riding the Third Wave", *supra* note 15 at 2.

²⁶ MacDonald, "Access to Justice in Canada Today", *supra* note 1 at 22.

necessary that citizens engage in the law-making processes.²⁷ In the Canadian context, it was during this time that the government sought to “enhance citizen participation in Parliamentary committees and the rule-making hearings of administrative bodies in accordance with this expanded concept of access to justice.”²⁸ Expanding the sites at which it is recognized that access is both required and deeply inadequate represented an important shift in access to justice theory. Galanter has suggested that prior to this shift, “access to justice programs have focused on ‘unmet legal needs’” and thus, the programs have been principally concerned with removing barriers to the existing system.²⁹ Further underlying this focus was the assumption that access to courts will result in access to justice.³⁰ In accordance with this assumption, concepts of ‘justice’ are linked predominantly to court processes. However, this provides for a limited conceptualization of justice; it fails to take account of the “justice to which we seek access.”³¹ As society evolves and socio-political and legal conditions change, justice becomes a moving frontier that must be defined and re-defined by those directly impacted by either its fulfillment or, alternatively, its failures. In this regard, the ability to engage in discussions about justice and how it is implemented in society become crucially important. Thus, to the extent that law permeates significant aspects of individuals’ lives, the ability to engage in a discourse about justice at different law sites is a crucial component of access.

Finally, the fifth and most recent wave of access to justice theory has built on and responded to some of the themes that have emerged over the past 30 years. The most recent approaches to promoting access to justice contemplate an expanded notion of access that includes access to the “official and myriad of unofficial institutions where law

²⁷ See the discussion of Janice Gross Stein’s legal vernacular and the need for access to facilitate citizen discourse on concepts of justice in chapter 3 of this thesis.

²⁸ MacDonald, “Access to Justice in Canada Today”, *supra* note 1 at 22.

²⁹ Galanter, “Access to Justice in a World of Social Capability”, *supra* note 3 at 123.

³⁰ Janet E Mosher, “Lessons in Access to Justice: Racialized Youths and Ontario’s Safe Schools” (2008) 46 Osgoode Hall LJ 807 at 815 [Mosher, “Lessons in Access to Justice”].

³¹ Galanter, “Access to Justice in a World of Social Capability”, *supra* note 3 at 124.

is made and administered.”³² This approach to access includes the recognition that in order for people to be able to affect justice in their lives – a critical objective of promoting access – citizens must be able to participate in all of the institutions where law is made and administered. As such, the promotion of access to justice cannot be restricted to access to the formal court processes. More importantly, there is an acknowledgement that meaningful access to justice that enhances individuals’ ability to participate in a variety of legal institutions and processes is not limited to access to legal representation. Instead, MacDonald stated,

[i]n a liberal democracy, true access to justice requires that all people should have an equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied. This means providing equal opportunities for the excluded to gain full access to positions of authority within the legal system. Improving access to legal education, to the judiciary, to the public service and the police, to Parliament and to various law societies is now seen as the best way of changing the system to overcome the disempowerment, disrespect and disengagement felt by many citizens.³³

A New Wave?

Following from this broader conceptualization of access to justice, the question that now arises is whether access to justice is on the cusp of a new wave. This is shaped by existing as well as evolving themes in access and motivated by attempts to address the challenges stemming from a continued lack of access. I believe that there are several considerations that may affect the emergence of this latest shift in the access to justice movement. First of all, recent socio-legal research on access to justice, including ongoing research on the unresolved justiciable issues of vulnerable groups,³⁴ has highlighted the fact that there is a

³² MacDonald, “Access to Justice in Canada Today”, *supra* note 1 at 23.

³³ MacDonald, “Access to Justice in Canada Today”, *ibid* at 23.

³⁴ Pascoe Pleasance, Nigel J Balmer, Alexy Buck, Aoife Grady & Hazel Genn, “Multiple Justiciable Problems: Common Clusters and their Demographic Indicators” (2004) 1 J Empirical Legal Stud 301; Ab Currie, “A National Survey of the Civil Justice Problems of Low-and Moderate-Income Canadians: Incidence and Patterns” (2006) 13:3 Int’l J of the Legal Profession 217; Amanda Dodge, “Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations” (March 2013) Paper prepared for Envisioning Equal Justice for the Standing Committee on Access to Justice, Canadian Bar Association. Available online at http://www.cba.org/CBA/Access/PDF/Community_Voice_Paper.pdf.

link between a lack of access to justice and the continued social exclusion of certain individuals and groups within society. In his article on social exclusion and civil law, Pascoe Pleasance states, “the existence of a defining framework of civil law applicable to many problems of every day social life and social well-being, and the possibility for utilizing legal services and process to reach solutions to such justiciable problems, means that the infrastructure of civil justice today plays an important role in realizing social justice.”³⁵ His research on vulnerable groups underscored the fact that “the socially excluded often face multiple problems...[and] there is a clear overlap between those demographic characteristics associated with social exclusion and vulnerability, such as living in temporary accommodations or being on a low income, and the experience of justiciable problems.”³⁶ In the Canadian context, the Canadian Bar Association’s Report entitled “Envisioning Equal Justice” recently highlighted the significant role that access to justice has to play in alleviating social exclusion when it was stated that,

[t]he reality today is that not everyone has meaningful access to justice regardless of income. The justice system is aggregating, rather than mitigating inequality. The growth in income disparity and social exclusion is a leading public policy concern and has specific ramifications for justice policy. Providing suitable legal advice and assistance can play a crucial role in helping people move out of some of the worst experiences of social exclusion. Timely intervention in a life crisis can make all the difference.³⁷

Incorporating concerns of marginalization and social exclusion within the framework of access to justice objectives represents a further deepening of how access to justice is both conceptualized and reformed.³⁸

³⁵ Alexy Buck, Nigel Balmer & Pascoe Pleasance, “Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups” (2005) 39:3 *Social Policy and Administration* 302 at 305 quoting an earlier article by the same authors. [Buck, Balmer & Pleasance, “Social Exclusion and Civil Law”].

³⁶ Buck, Balmer & Pleasance, “Social Exclusion and Civil Law”, *ibid* at 318.

³⁷ Canadian Bar Association, “Reaching Equal Justice: An Invitation to Envision and Act”, *Report of the Action to Justice Committee of the CBA*, (August 2013). Available online at http://www.CBA.org/CBA/equaljustice/secure_pdf/Equal-Justice-Summary-Report-Eng.pdf at 12.

³⁸ See also Trevor Farrow’s discussion of a new conceptualization of access to justice that requires legal professionals, policy-makers and academics recognize “the complex, multidimensional realities of every-day social and legal problems.” This includes the need to expand the examination of a problem beyond its

In accordance with the acknowledgement that access to justice has a role to play in ameliorating social exclusion in society, there has also been a corresponding call to ensure that access to justice takes better account of the civil justice system users' perspectives and needs as opposed to the views and perspectives of those who work in the civil justice system. In other words, individuals attempting to make use of the justice system to resolve their legal issues need to be heard in terms of both designing and administering dispute resolution processes. Most recently, the Action Committee on Access to Justice in Civil and Family Matters' Final Report highlighted the need for a cultural shift in both how access to justice is conceptualized and how the corresponding reform is approached. Specifically, one of the objectives articulated in the report included,

...a need to change our primary focus. Too often, we focus inward on how the system operates from the point of view of those who work in it. For example, court processes — language, location, operating times, administrative systems, paper and filing requirements, etc. — typically make sense and work for lawyers, judges and court staff. They often do not make sense or do not work for litigants. The focus must be on the people who need to use the system. This focus must include all people, especially members of immigrant, aboriginal and rural populations and other vulnerable groups. Litigants, and particularly self-represented litigants, are not, as they are too often seen, an inconvenience; they are why the system exists. Until we involve those who use the system in the reform process, the system will not really work for those who use it.³⁹

This sentiment was also emphasized in the Canadian Bar Association's report on access

legal perspective. Farrow states that “[t]o the extent that we improve how we address everyday social issues (including legal issues) in order to provide those things that people need and want, then – in line with a more modern view of justice – we succeed in improving access to justice. And to do so, we need to start from the premise of what the public needs, not – at least as a starting point – what the legal system currently can offer.” See Trevor Farrow, “A New Wave of Access to Justice Reform in Canada” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer* (Vancouver, Canada: UBC Press, 2016) 164 at 167 [Farrow, “A New Wave of Access to Justice Reform”].

³⁹ Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil and Family Justice: A Roadmap for Change”, *Final Report* (October 2013) at 12. Available online at http://www.cfcj-fcjc.org/sites/default/files/doc/2013/Ac-Report_English_Final.pdf [Action Committee, *Final Report on Access to Civil and Family Justice*].

to justice.⁴⁰ It has been operationalized in research undertaken by Trevor Farrow who sought to ask members of the public what they thought about concepts such as ‘access’ and ‘justice.’ Farrow’s ethnographic research project was based on the belief that “[t]he public, which uses the system, needs to be at the centre of how we think about, understand, and reform the system” and this was consistent with a “growing body of public-centered access to justice literature and justice reform initiatives.”⁴¹

A user-centric approach to access to justice theory and related reform is further consistent with the present realities of the civil justice system. One of the present realities and most pressing issues facing the civil justice system is the increasing number of self-represented litigants who are obligated to represent themselves within a system that, to date, has not taken serious account of their particular needs or objectives. While there is no question that efforts have been made to simplify court processes and reform complex procedures, these measures have, more often than not, been shaped by those professionals who work within the system rather than those who use the system. This approach to reform has, in turn, underscored the continuing influence that legal representation and legal services more generally have on the development of concepts of access to justice and implementation of access initiatives. The continued weight afforded to legal representation as a means of improving access to justice is now running up against the practical reality of self-representation and the need to address this phenomenon. Moreover, this has begun to call existing practices and approaches to access into question. The presence of significant numbers of self-represented litigants has also begun to challenge certain underlying assumptions about the dispute process and, more particularly, the role of the key actors in the dispute process, including how lawyers and judges interact with self-represented litigants. When read together, all of these factors signal another potential shift in the access to justice movement and one that contains the possibility of fundamentally challenging certain accepted understandings of what access entails.

⁴⁰ Canadian Bar Association, “Reaching Equal Justice: An Invitation to Envision and Act”, *Report of the Action to Justice Committee of the CBA*, (August 2013). See <http://www.CBA.org/CBA/equaljustice/securepdf/Equal-Justice-Summary-Report-Eng.pdf>

⁴¹ Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957 at 961 & 966.

These broader concepts of access to justice theory form part of the framework for the present analysis of self-representation and the role of self-help legal initiatives in promoting access to justice. While this approach to access to justice represents a broader concept of what access should entail, there is still a tension between this broader concept as expressed by the democratic thesis, which contemplates participation in a variety of legal and political institutions that impact individuals' lives, and a concept of access as described by the practical thesis, which is focused on providing individuals with access to lawyers and legal services as a means of obtaining justice.

The Practical Thesis of Access to Justice

Despite very recent shifts in access to justice theory that have begun to take account of the role of citizen participation in various legal and political forums, the 'waves' of access theory and policy that have developed over the past 60 years have tended to assume that participation by individuals is best achieved through improved access to legal representation that, in turn, promoted access to institutionalized dispute resolution processes.⁴² It was further assumed that if, "we increase people's access to courts and tribunals by lowering wait times, making trials more efficient, and to the extent that we increase the availability of lawyers, perhaps by increasing the number of lawyers who can practice law in a given jurisdiction or decreasing what they charge, we increase access to justice."⁴³ The predominant paradigm about what access should include and how access achieves justice has largely focused on the belief that access to lawyers will assist individuals in getting a better outcome; a better outcome was typically defined as justice within the particular context of the individuals' cases. Notwithstanding whether the lawyer pursued the client's interests as the client saw fit, the assumption was that representation by a lawyer allowed the individual to participate fully in the legal system.⁴⁴ These assumptions have continued to influence the development of the 'waves' of access to justice over the past 60 years. In this regard, the continued focus on legal

⁴² Christine B Harrington, "The Politics of Participation and Non-Participation in Dispute Processes" (1984) 6 Law & Pol'y 203 at 205 [Harrington, "The Politics of Participation"].

⁴³ Farrow, "A New Wave of Access to Justice Reform", *supra* note 38 at 166.

⁴⁴ *Ibid* at 205.

representation calls the metaphor of the ‘wave’ into question.⁴⁵ Specifically, to the extent that a focus on legal representation—present in the earliest conceptualizations of access—has continued to influence thinking about access to justice and direct the reform initiatives, it cannot be said that each new development in access is like a wave. This is particularly true when it is considered that, once a wave has reached its peak, it recedes and is ultimately replaced by another one.⁴⁶ In the example of access to justice, this has not been the case. To the extent that there have been different iterations about the points of access, certain dominant views about how best to enhance access have continued to shape access policy.

Underlying this paradigm are certain assumptions about what people are believed to want from the legal system.⁴⁷ The first assumption is that individuals’ only desire is to win their case. A further assumption is that the formal justice system represents the complete landscape of access to justice and that access to the formal legal system (with the assistance of lawyers) can affect justice in people’s lives. This is perhaps more problematic than the first assumption because there is an underlying belief that “existing law is substantively just” and individuals, once unencumbered by procedural barriers to the formal legal system, will be in a position to obtain justice.⁴⁸ This belief fails to take account of the political nature of attempting to obtain justice and also serves to underplay the importance of obtaining access to the many other institutions (e.g., legislatures) where law is constituted and the possibilities of obtaining justice delineated. Instead, citizens are limited to participating in formal legal institutions by way of professional agents who re-construct their issues, problems and struggles within a legal framework that those

⁴⁵ Mosher, “Lessons in Access to Justice”, *supra* note 30 at 817.

⁴⁶ Mosher, “Lessons in Access to Justice”, *ibid* at 817.

⁴⁷ Susan Silbey & Sally Merry, “What Do Plaintiffs Want? Re-Examining the Concept of Dispute” (1984) 9:2 *The Justice System Journal* 151. Certain empirical research has questioned the validity of this assumption. In her research on the plaintiffs’ motivation for commencing medical malpractice claims, Tamara Relis suggests that plaintiffs’ objectives often include various non-economic and extra-legal aims such as an admission of fault, prevention of recurrences; answers and apologies. However, these objectives are ultimately transformed or reduced by the plaintiffs’ lawyers to pure economic claims consistent with what lawyers consider to be “legal system realities”. See Tamara Relis, “‘Its Not About the Money!’: A Theory of Misconceptions of Plaintiffs Litigation Aims” (2007) 68 *U Pitt L Rev* 701.

⁴⁸ MacDonald, “Theses on Access to Justice”, *supra* note 20 at 26-27.

same individuals had no part in constructing and little opportunity to reform. The result is a very limited ability of citizens to engage in discussions about and ultimately define concepts of justice that have direct bearing on their lives.

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. In particular, it assumes that the removal of certain types of barriers will improve individuals' ability to obtain access to justice. MacDonald categorized certain of these barriers as being 'material.' These include access to the physical institutions such as courts, administrative agencies and court offices, and are further focused on the delay, cost and complexity of legal processes and institutions. In addition, barriers to access are also characterized as 'subjective' in the sense that certain justice-seekers (i.e., non-white, female, and poor individuals) do not see themselves as able to access the formal legal institutions.⁴⁹ However, taking a step back from these categories of barriers, it is important to take note of the fact that the equation of access to justice with access to legal representation in formal legal institutions represents a particular barrier for individuals who self-represent. If it is assumed that access to legal representation provides for access to justice, then it may also be assumed that self-represented litigants (who proceed without legal representation) will be unable to access justice. Given the ever-increasing number of individuals who are compelled or, alternatively, choose to represent themselves, these assumptions about how access is achieved (i.e., the removal of barriers) represent a hollow account of access to justice and one that fails to take account of more deeply-rooted barriers to access.

The Crisis in Access to Justice

In recent years, there has been a dramatic increase in the number of individuals who either choose or are compelled to address a legal issue without the assistance of legal representation. This dramatic increase is reflective of even more troubling statistics that

⁴⁹ MacDonald, "Access to Justice in Canada Today", *supra* note 1 at 26-28.

reveal a serious lack of access to justice in Canada manifest in unmet legal needs.⁵⁰ Specifically, statistical data in Canada suggests that approximately 12 million people will experience at least one legal problem in a given three-year period.⁵¹ Underlying this statistic is the fact that many individuals do not identify or characterize their problem as ‘justiciable’ or seek assistance in addressing the problem, even if they are able to identify the issue as legal in nature.⁵² One of the consequences in this regard is that a significant portion of the population may be unaware of the rights they hold as citizens, unable to exercise their rights and/or recognize those same rights in other citizens; all of which is inconsistent with the principles underlying a democratic society. Research has further demonstrated that unresolved legal problems can lead to further and more complicated legal problems, as well as lead to other types of socio-economic problems.⁵³ Moreover, given the increasingly long “reach of law” into individuals’ daily lives and the significant socio-political role that legal institutions play in our society,⁵⁴ the inability of citizens to identify and address legal problems signifies a critical disengagement by significant portions of the population. Thus, the consequence of not addressing these problems can be profound.

In Canada, it is believed that approximately “50% of people try to solve their problems on their own with no or minimal legal or authoritative non-legal assistance.”⁵⁵ In certain legal contexts such as family law, the percentages are significantly higher.⁵⁶ In these circumstances, individuals do not retain a lawyer to address their legal matter on

⁵⁰ Action Committee, *Final Report on Access to Civil and Family Justice*, *supra* note 39 at 2.

⁵¹ Action Committee, *Final Report on Access to Civil and Family Justice*, *ibid* at 2.

⁵² William LF Felstiner, Richard L Abel & Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...”(1980-81) 15:3-4 *Law & Soc’y Rev* 631 [Felstiner, Abel & Sarat, “The Emergence and Transformation of Disputes”].

⁵³ Ab Currie, “A Lightning Rod for Discontent’: Justiciable Problems and Attitudes Towards the Law and the Justice System” in Alexy Buck, Pascoe Pleasance & Nigel J Balmer, eds, *Reaching Further – Innovation, Access and Quality in Legal Services* (Norwich, UK: TSO, 2009); Action Committee, *Final Report on Access to Civil and Family Justice*, *supra* note 39.

⁵⁴ Deborah Rhode, “Access to Justice: Connecting Principles to Practice” (2004) 17 *Geo J Legal Ethics* 369 at 374 [Rhode, “Access to Justice”].

⁵⁵ Action Committee, *Final Report on Access to Civil and Family Justice*, *supra* note 39 at 4.

⁵⁶ Action Committee, *Final Report on Access to Civil and Family Justice*, *supra* note 39 at 4.

their behalf. However, a certain percentage of self-represented individuals seek out various forms of legal advice or sources of legal information that will help them to address their problem and maneuver through the legal system.

Prior to examining the underlying reasons that individuals may have for addressing their legal problem without legal representation, there is a preliminary issue raised in the access to justice literature regarding the appropriate nomenclature respecting individuals who manage their own legal matter without legal counsel.⁵⁷ It has been suggested that the term ‘self-represented’ is preferable to ‘unrepresented.’ The latter connotes a lack of representation due to an insufficiency of financial resources, which, in turn, conveys negative images of the litigants that follow them through the civil justice system. In contrast, Rollie Thompson suggests that ‘unrepresented litigant’ is the more accurate term because unrepresented litigants “would like to have a lawyer but can’t afford or find one. The ‘self-represented’ might be able to afford a lawyer, but don’t want one or can’t keep one.”⁵⁸ According to these understandings, the ‘unrepresented litigants’ category would likely represent the overwhelming number of non-lawyers in the civil justice system. However, it is important to note that the term ‘self-represented’ is not without negative connotations and the assumptions that come with such connotations.⁵⁹ Julie MacFarlane offers a different interpretation of the relevant nomenclature on self-represented litigants. She states that the term ‘unrepresented’ suggests a level of intention and choice to appear without a lawyer that mischaracterizes the motives of the vast majority of the respondents in her study. MacFarlane further asserts that the decision to adopt the term “self-represented” as a generic term throughout her Report is reflective of the conclusions of the Lord Chancellor’s Civil Justice Council

⁵⁷ Trevor CW Farrow, Diana Lowe, Bradley Albrecht, Heather Manweiller & Martha E Simmons “Addressing the Needs of Self-Represented Litigants in the Canadian Justice System” A White Paper Prepared for the Association of Canadian Court Administrators (March 27, 2012). Available online at www.cfjc.fcjc.org/sites/default/files/docs/2012 (Farrow et al., “Addressing the Needs of Self-Represented Litigants”).

⁵⁸ DA Rollie Thompson, “The Judge as Counsel” (2005) 8 News and Views on Civil Justice Reform 3 at 3 [Thompson, “The Judge as Counsel”].

⁵⁹ Paula Hannaford-Agor & Nicole Mott, “Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations” (2003) 24 Justice System Journal 163 [Hannaford & Mott, “Research on Self-Represented Litigants”].

Working Group in the United Kingdom. This group rejected the use of the term “unrepresented” saying that it assumes that the “norm is representation by lawyers and this assumption can no longer be made.”⁶⁰ Moreover, in its report on self-represented litigants in England and Wales, the Civil Justice Council acknowledged that there were important considerations underlying the change in nomenclature from ‘litigant in person’ to self-represented litigant. The Report states that two general points about language lay behind this change. First, there is the importance of using language that those representing themselves will recognize; plain language as opposed to legal terminology. Second, there is an obligation to use language that both emphasizes that representation of a party does not only exist when there is a lawyer, as well as acknowledges that the terms employed do not imply a deficiency in the fact of self-representation.⁶¹ Finally, the Canadian Judicial Council’s Statement of Principles on self-represented litigants makes note that the term self-represented litigant is

used to describe persons who appear without representation. The use of the term is not meant to suggest inferences about the reasons the individual is without representation, nor the quality of their self-representation, and recognizes that some individuals prefer to represent themselves.⁶²

Data collected from several socio-legal research projects in the field of access to justice indicates that the main reason that individuals represent themselves relates to their inability to pay for legal representation.⁶³ While the self-representation phenomenon is

⁶⁰ Julie MacFarlane, “Identifying and Meeting the Needs of Self-Represented Litigants” *Final Report of the National Self-Represented Litigants Project* (May 2013) at 16. Available online at www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self_Represented_Project.pdf [MacFarlane, *Final Report of the National Self-Represented Litigants Project*].

⁶¹ Civil Justice Council, “Access to Justice for Litigants in Person (or self-represented litigants)” *A Report and Series of Recommendations to the Lord Chancellor and to the Lord Justice* (November 2011) See National Report on Civil Justice (November 2011) at 13. Available online at www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/litigants-in-person/ [Civil Justice Council, “Access to Justice for Litigants in Person”].

⁶² Canadian Judicial Council, “Statement of Principles on Self-Represented Litigants and Accused Persons” (September 2006) at 1. Available online at www.cjcccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf [Canadian Judicial Council, “Statement of Principles on Self-Represented Litigants and Accused Persons”].

⁶³ Nourit Zimmerman & Tom Tyler, “Between Access to Counsel and Access to Justice: A Psychological Perspective” (2010) 37 *Fordham Urb LJ* 473 [Zimmerman & Tyler, “Between Access to Counsel and Access to Justice”]. See also Farrow et al., “Addressing the Needs of Self-Represented Litigants”, *supra* note 57.

not entirely new, the scale and scope of self-representation has increased dramatically.⁶⁴ Data suggest that this trend will continue as legal fees are priced out of the reach of more individuals. The result is that individuals are compelled to represent themselves. The further consequence is a concept of self-representation that is at odds with the traditional practice of law and the legal institutions that were designed by and for lawyers and judges.⁶⁵ More specifically, a lack of knowledge, experience and skills about both the legal processes and institutions place self-represented litigants at a serious disadvantage when acting on their own. This, in turn, limits individuals' access to justice.⁶⁶ In the preamble to its statement of principles on self-represented litigants and accused persons, the Canadian Judicial Council acknowledges that self-represented litigants both face and present special challenges that necessitate efforts to ensure that "self-represented litigants are provided with fair access and equal treatment by the court."⁶⁷

As noted, various socio-legal studies have indicated that the most notable reason that individuals represent themselves relates to an inability to afford legal representation.⁶⁸ In this regard, the research reveals that a disproportionate percentage of self-represented litigants are either low or moderate-income individuals for whom the costs of legal services are out of reach. Recent empirical research in Canada has identified various characteristics of self-represented litigants which include individuals with a lack of social resources (such as low income, low education levels and/or low

⁶⁴ Farrow et al., "Addressing the Needs of Self-Represented Litigants", *supra* note 56 at 9 & 16. This report includes reference to specific survey data involving court workers and their experience with self-represented litigants in which one participant is quoted as saying "the number of SRLs is continually increasing. On an average week, last year you would have served 2-3 a week, and this year, it is more like 2 every day. The counter staff is not set up to handle this lengthy process." See Diana Lowe, Bradley Albrecht, Heather Manweiller & Trevor CW Farrow, "Available and Required Services for Self-Represented Litigants (SRLs) in Canada (A Canada-Wide Survey of Court Staff, including those working at front counters, information centres and law libraries)" (2011). Available online at www.cfjc-fcjc.org.

⁶⁵ Rhode, "Access to Justice", *supra* note 54 at 398.

⁶⁶ Sande L Buhai, "Access to Justice for Unrepresented Litigants: A Comparative Perspective" (2009) 42 *Loy LA L Rev* 979 at 984.

⁶⁷ Canadian Judicial Council, "Statement of Principles on Self-Represented Litigants and Accused Persons", *supra* note 62.

⁶⁸ Zimmerman & Tyler, "Between Access to Counsel and Access to Justice", *supra* note 62; MacFarlane, *Final Report of the National Self-Represented Litigants Project*, *supra* note 60.

literacy), individuals living with social barriers (such as mental or physical challenges, language or cultural barriers), individuals living in remote areas as well as individuals that are unable to find a lawyer or lose their lawyer in the course of a lengthy case.⁶⁹ Moreover, research by Balmer in England and Wales has suggested that inaction among certain groups (e.g. low and moderate income individuals) was also connected to the individual's level of awareness regarding legal rights: data indicated a link between greater awareness of legal rights and higher income levels.⁷⁰ Similar conclusions have been made as a result of research data collected in Canada.⁷¹ However, more recent research has suggested that increased levels of income do not necessarily mean that individuals are less likely to either suffer justiciable issues or represent themselves when faced with a legal problem.⁷² In their article on justiciable problems and the corresponding use of lawyers, Pascoe Pleasance and Nigel Balmer stated that, while the type of legal problem experienced may be different as between individuals of different income levels, research data collected from Canada, New Zealand, England and Wales among other jurisdictions demonstrated that low-income is most associated with problems of welfare and housing. In contrast, individuals with higher income are likely to experience problems as owner-occupiers, issues of employment or consumer problems.⁷³ Thus, while the type of problem faced may differ, the pervasiveness of law in "contemporary bureaucratic societies" means that a significant majority of individuals,

⁶⁹ Farrow et al., "Addressing the Needs of Self-Represented Litigants", *supra* note 56 at 16 which is further referencing Mary Stratton, *Alberta Self-Represented Mapping Project Final Report* (Edmonton, Canada: Canadian Forum on Civil Justice, 2007) at 12-16. See <http://cfcj-fcjc.org/docs/2007/mapping.en.pdf> and Mary Stratton, *Alberta Legal Services Mapping Project Final Report* (Toronto, Canada: Canadian Forum on Civil Justice, 2011). Available online at <http://cfcj-fcjc.org/publications/mapping.en.pdf>.

⁷⁰ Pascoe Pleasance & Nigel J Balmer, "Caught in the Middle: Justiciable Problems and the Use of Lawyers" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice*, (Toronto, Canada: University of Toronto Press, 2012) at 49 [Pleasance & Balmer, "Caught in the Middle" in Trebilcock, Duggan and Sossin, *Middle Income Access to Justice*].

⁷¹ Pleasance & Balmer, "Caught in the Middle" in Trebilcock, Duggan and Sossin, *Middle Income Access to Justice*, *ibid*.

⁷² In her article entitled "Access to Justice: Connecting Principles to Practice", Deborah Rhode suggests that recent research in the United States indicated that approximately "two thirds of the civil needs of moderate income consumers were not taken to lawyers or the legal system." See Rhode, "Access to Justice", *supra* note 53 at 397.

⁷³ Pleasance & Balmer, "Caught in the Middle" in Trebilcock, Duggan & Sossin, *Middle Income Access to Justice*, *supra* note 70 at 34-35.

including middle-income individuals, have justiciable issues that they cannot afford to retain a lawyer to address.⁷⁴ Even in the case of individuals who start out by hiring legal representatives, they may ultimately become self-represented as the retainer paid upfront to the lawyer runs out and the legal matter remains outstanding.

As a result of these factors, individuals may offer three responses: take no action to try and resolve their problem, thereby ‘lumping’ the problem;⁷⁵ attempt to take some action on their own; or try and find some limited assistance that includes other forms of legal services.⁷⁶ Moreover, while it is assumed that individuals falling within the middle-income category may be in a better position to secure some form of legal assistance other than legal representation, these alternative forms of legal services often provide a patchwork remedy at best. For example, individuals may be able to access self-help resources, information centres (e.g. the family law information centres), specialty legal clinics (e.g. the Family Legal Health Program at the Hospital for Sick Kids), as well as duty counsel in certain courts (e.g. the amicus curiae program at the Ontario Court of Appeal). However, these services tend to work independently of each other. Thus, individuals are unlikely to obtain complete or comprehensive assistance when attempting to resolve their legal issue. Compounding the patchwork nature of available services is the fact that certain of the legal services available have income limits and are not accessible to those in a middle-income bracket.⁷⁷ As a result of these circumstances, many low- as well as middle-income individuals are compelled to proceed alone and in so doing, navigate the justice system without legal assistance.

⁷⁴ Pleasance & Balmer, “Caught in the Middle” in Trebilcock, Duggan & Sossin, *Middle Income Access to Justice*, *supra* note 70 at 34-35.

⁷⁵ Felstiner, Abel & Sarat, “The Emergence and Transformation of Disputes”, *supra* note 52.

⁷⁶ Rhode, “Access to Justice”, *supra* note 54 at 373; *ibid* at 36.

⁷⁷ For example, in Ontario, the financial cut off for a legal aid certificate is approximately \$12,000.00 for a single individual and \$27,000.00 for a family of four. This is well below a middle-income bracket that can range from \$30,000.00-\$90,000.00 (subject to calculations of ‘disposable’ income). See the financial eligibility standards contained on the Legal Aid Ontario website at www.legalaid.on.ca/en/getting/eligibility.asp.

Notwithstanding that a significant number of individuals become self-represented out of financial need, it is also important to acknowledge that a certain percentage of individuals may choose to represent themselves for other reasons.⁷⁸ A recent study on legal needs in Ontario found that approximately one-third of low- and middle-income individuals surveyed indicated that they would prefer to settle their legal matter themselves with appropriate advice. This did not necessarily mean with the assistance of a legal representative.⁷⁹ This decision to self-represent can be based on a variety of considerations. For example, individuals may believe that the legal matter is simple enough to be handled without a lawyer's involvement. In this sense, the type and/or size of the legal matter will impact the individual's decision to seek legal representation.⁸⁰ In the American context, Deborah Rhode contends that the growth in self-representation has, in part, resulted from increased consumer consciousness coupled with cutbacks in government-subsidized legal assistance.⁸¹ This growth has, in turn, led to more interest in the concept of self-help strategies and the corresponding expansion of 'do-it-yourself' legal documents and online programs that individuals can access from a variety of different sources.

With respect to the latter, a recent development in dispute resolution theory and practice that reflects this shift toward self-help is the growth of online dispute resolution (ODR) processes.⁸² ODR processes contemplate the use of technology to create

⁷⁸ Herbert M Kritzer, "To Lawyer or Not to Lawyer: That is the Question" (2008) 5:4 J Empirical Legal Stud 875 [Kritzer, "To Lawyer or Not to Lawyer"].

⁷⁹ R Roy McMurty, Marion Boyd, John Camus & Lorne Sossin, "Listening to Ontarians" - Report of the Ontario Civil Legal Needs Project (May 2010) at 4. See www.lsuc.on.ca/media/may3110_oclnreport_final.pdf.

⁸⁰ Kritzer, "To Lawyer or Not to Lawyer", *supra* note 78 at 900.

⁸¹ Rhode, "Access to Justice", *supra* note 54 at 399; Jeff Giddings & M Robertson, "'Lay People, for God's sake! Surely I Should be Dealing with Lawyers?'" Toward an Assessment of Self-help Legal Services in Australia"(2002) 11:2 Griffith LR 436 at 438-439.

⁸² Darin Thompson, "The Growth of Online Dispute Resolution and Its Use on British Columbia" (March 2014), Paper presented at the Civil Litigation Conference, CLE BC. Outside of a corporate context, the Dutch legal aid pioneered the use of ODR in the fields of divorce and separation and landlord-tenant law. Through an internet platform, individuals in the Netherlands can "learn about their legal options while receiving rich support for an interest-based dialogue between the people involved." As well, the platform provides mediation, arbitration and a review of all agreements. The Rechtwijzer (Dutch legal aid) website suggests that ODR technology "empowers people in various domains where they used to be more

platforms and processes on the Internet through which individuals attempt to resolve their dispute. While these initiatives are still in their infancy, it is possible that ODR processes could provide an additional opportunity for self-represented litigants to participate directly in the resolution of their legal dispute. Its original use by entities such as Ebay and Amazon, was in the context of e-commerce whereby consumers could resolve disputes that arose in the course of transactions that occurred over the Internet. However, the ability to resolve disputes online through a combination of electronic submissions and real-time exchanges between disputants is consistent with conceptualizations of self-help that support individuals in resolving their disputes directly and without legal representation. Rather than simply automating traditional disputes processes, ODR seeks to “create new processes using technology.”⁸³ In this sense, ODR could incorporate processes that are reflective of self-represented litigants’ abilities and experiences (as opposed to those developed and administered by lawyers), and in so doing, provide self-help services that encourage individuals’ participation in these new processes. Moreover, the fact that individuals would be able to engage online rather than be physically present in a courtroom could also serve to alleviate certain challenges faced by self-represented litigants living in remote areas or otherwise encountering physical barriers to access.

Alternatively, individuals may decide to represent themselves because they have lost confidence in the ability of members of the legal profession to represent their interests.⁸⁴ A recent report of the Canadian Bar Association suggested for some individuals who might otherwise be in a position to afford legal representation, the decision not to hire a lawyer was based in part on the individual’s distrust of lawyers

dependent on experts.” See the Rechtwijzer website available online at <http://www.hiil.org/project/rechtwijzer>. The United Kingdom is also in the process of implementing an online dispute process that is modeled on the Dutch example. See Roger Smith, “Online Dispute Resolution: ten lessons in access to justice (2015). Available online at <http://www/judiciary.co.uk>.”

⁸³ *Ibid* at 1.1.2.

⁸⁴ Scott Barclay, “Decision to Self-Represent” (1996) 77 *Social Science Quarterly* 912 [Barclay, “Decision to Self-Represent”]; see also John M Greacen, “Self-Represented Litigants and Court and Legal Services Responses to Their Needs – What We Know” (2000). Paper prepared for the Center for Families, Children and the Courts, California Administrative Office of the Courts. Available online at www.courts.ca.gov/partners/documents/SRLwhatwknow.pdf. [Greacen, “Self-Represented Litigants and Court”]

and/or a confidence in her own ability to represent herself in the legal system.⁸⁵ In the American context, statistical data collected from various studies on self-represented litigants in the United States confirmed that, while financial concerns were the predominant reason for not hiring a lawyer, individuals also expressed concerns over delays caused by lawyers, as well as distrust in lawyers.⁸⁶

In another regard, empirical research has suggested that the decision to self-represent is for certain litigants a means of compelling the court to address the issues as defined by the litigant rather than the lawyer. In examining the decision to self-represent, Scott Barclay distinguished between what might be a ‘successful legal decision’ and a ‘sound legal decision’. If litigants are aware that their choice may result in losing the case, the decision to self-represent in order to ensure that the issues as they see them are before the court rather than how a lawyer may characterize the issue, may not be successful, but it can constitute a sound decision.⁸⁷ The idea that individuals would decide to represent themselves in order to ensure that their voice is heard has important implications for how access to justice is conceptualized and how the types of initiatives that are aimed at ensuring individuals are heard are developed and implemented.

Given these different accounts of why individuals might decide to represent themselves, the traditional focus on access to justice as being about how to increase access to lawyers may be quite different when looked at from the public’s standpoint. Instead, what might be needed is a greater emphasis on achieving justice rather than achieving more access to lawyers.⁸⁸ This shift in priorities is consistent with the most recent wave of access to justice theory and policy that is more focused on direct

⁸⁵ Nicholas Bala & Rachel Birnbaum, “The Rise of the Self-Representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants” (2013) 91 Canadian Bar Review 67.

⁸⁶ Greacen, “Self-Represented Litigants and Court”, *supra* note 84.

⁸⁷ Barclay, “Decision to Self-Represent”, *supra* note 84 at 921.

⁸⁸ Rhode, “Access to Justice”, *supra* note 54 at 399. It is important to note that Roderick MacDonald called for a shift in thinking about access, such that the goal is participation by individuals in the legal institutions and decision-making processes that affect them rather than the relinquishment of their voice to legal professionals.

engagement by individuals in the legal process that affects their lives. In this regard, there would be a corresponding shift away from strict reliance on traditional modes of legal representation and a move toward more varied means and forums for accessing justice. Individuals would have a better say and be heard and, in so doing, participate directly in the development of both a theory and practice of justice. Rhode further suggests that a focus on achieving justice, as opposed to a focus on increasing legal representation, further contemplates providing individuals with the means to address legal problems in ways that are “timely, fair and affordable.”⁸⁹ This may ultimately envisage individuals pursuing their own legal strategies.

In addition to addressing the reasons underlying individuals’ decision to represent themselves, two of the main themes in the literature on self-representation relate to the significant challenges that self-represented litigants face when representing themselves, as well as the impact that self-represented litigants have on the administration of the justice system. For a significant portion of self-represented litigants, the challenge lies in being able to represent themselves within a professionalized and complex justice system.⁹⁰ This challenge is rooted in certain assumptions about the reality of the existing adversarial system, the role of the professionals within the adversarial system, the right of opposing parties to a timely resolution of disputes, and the associated need for the justice system to run in an efficient and timely manner.⁹¹

The Democratic Thesis of Access to Justice

Given the growing numbers of self-represented litigants in the civil justice system and the challenges they face, it is necessary to revisit the efficacy of the existing waves of access to justice theory and the corresponding implications for access to justice policy. An important element of this examination is the need to take critical account of some of the

⁸⁹ Rhode, “Access to Justice”, *supra* note 54 at 399.

⁹⁰ Russell Engler, “Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel is Most Needed” (2010) 37:37 *Fordham Urb LJ* 2.

⁹¹ A more detailed description of these challenges is contained in chapter four and in the research findings discussed in chapter seven of this thesis.

underlying ideas about what constitutes access, why access is important, and for whom access is pursued. As I have sought to insist, one of the manifestations of this re-examination involves reference to the more basic debate about the underlying premises of access to justice—is the goal to provide individuals with legal representation so that they may assert legal rights and resolve legal problems in a favourable manner (the *practical thesis*) or is it to enhance their direct engagement with a variety of law-making institutions and processes such that they are able to participate in and ultimately affect concepts of justice relevant to their lives (the *democratic thesis*). My discussion about and research on access to justice is premised on the democratic thesis of access to justice. In accordance with this broader approach to access to justice, the means by which an individual participates span a continuum from self-representation through to representation with the assistance of lawyers whose ambition and expertise are directed toward encouraging clients to share in the decision-making processes that affect them. In the course of engaging in the decision-making processes that affect them, individuals are able participate in a discourse about justice and further develop certain practical skills, which facilitate additional participation. Unlike the practical thesis, which is more narrowly focused on achieving a specific outcome in a particular legal matter with the assistance of legal representation, the democratic thesis is more broadly focused on encouraging individuals’ engagement in law-making and law-administering institutions. Importantly, the result would be the “returning of official law to ordinary people.”⁹²

This broader conceptualization of access to justice is further premised on a belief that there are a significant number of individuals in society who are disengaged from law-making processes, whether these processes take place in the legal system or through the legislatures. Moreover, the present reality for many citizens living in highly bureaucratic societies is that law permeates a broad range of activities in their lives. However, they have little say in how laws that impact them are either constituted or administered. As a result of this continuing disengagement, many individuals are not provided with any

⁹² MacDonald, “Thesis on Access to Justice”, *supra* note 20 at 43.

opportunity to contribute to definitions of justice relevant to their lives.⁹³ If the political and legal institutions that govern individuals' lives are to remain legitimate and relevant, it is important that those ultimately affected by the decision-making processes in these institutions are able to participate in the relevant decision-making processes. Otherwise, there remains a continuing disconnect between citizens and the laws to which they are subject such that democracy is weakened and de-legitimized. For these reasons, it is important to democratize law and re-enlist individuals in defining both law and justice in their own language. This applies fully and squarely to access to justice.

Aside from the theoretical considerations, there is also a practical reality that underscores this broader conceptualization of access. Not only are there not enough legal professionals to address all of the legal issues that individuals' experience, but there are a wide variety of relationships and issues that individuals would likely prefer to mediate outside of formal legal frameworks. Finally, it is arguable that an attempt to provide legal representation of this nature without substantial reform of the existing system of dispute resolution would potentially cause the existing legal system to collapse in on itself both in terms of delay and volume of matters litigated.

I have emphasized that part of the explanation for a move toward a broader conceptualization of access to justice also lies in the corresponding shift away from reliance on the traditional dispute resolution process as the exclusive means by which individuals are able to obtain justice. This shift is derived, in part, from the earlier waves of access that influenced the development of ADR. MacDonald characterized this as a movement to de-judicialize and de-institutionalize justice. Merry and Harrington suggest that some of the early motivations underlying the development of alternative dispute resolution included ideas about community building, participation and empowering individuals to handle conflict at a local level. All of these benefits are thought to assist in

⁹³ In his article "Theses on Access to Justice", MacDonald critiqued Quebec's Task Force on Access to Justice for its failure to formally recognize the importance of promoting legal information and knowledge such that it enables "citizens to participate more effectively in the legal process by lobbying legislatures, city councils, or administrative agencies". See MacDonald, "Theses on Access to Justice", *supra* note 20 at 40.

disabusing citizens of the assumption that justice was imposed on the citizenry by the state.⁹⁴

While subject to certain criticisms, alternative dispute resolution processes potentially provide individuals with an opportunity to have a more ‘direct say’ in the process as opposed to being passive bystanders in the context of the traditional court system. Carrie Menkel-Meadow suggests that this can facilitate greater democratic participation in the sense that, “some forms of facilitated settlement, including mediation, mini-trials, and some settlement conferences, involve greater, rather than lesser, participation from the actual disputants, ‘control’ of the dispute by the parties involved may make some forms of dispute resolution more responsive to the parties, rather than professionals’ interests.”⁹⁵ This is, again, contrasted with the passive role traditionally played by non-lawyers in the legal system. On this basis, alternative dispute resolution processes provide a means by which individuals may have the opportunity to participate directly in the resolution of their own dispute and, in the course of doing so, become more accepting of the resolution.⁹⁶ In her article on the level and scope of participation in mediation and court processes respectively, Christine Harrington also suggests that the flexible and accommodative nature of mediation allows account to be taken of individual histories and circumstances, which in turn, allows for participatory problem-solving by the parties.⁹⁷ While such processes may not provide for individuals’ participation in the articulation of public norms of justice, Menkel-Meadow offers an alternative and

⁹⁴ Lauren B Edelman & Mia Cahill, “How Law Matters in Disputing and Dispute Processing (Or, the Contingency of Legal Matters in Information Dispute Processes)” in Bryant G Garth & Austin Sarat, eds, *How Does Law Matter* (Illinois, USA: Northwestern University Press, 1998) at 20. Carrie Menkel Meadow, “Whose Dispute is it Anyway? A Philosophical and Democratic Defence of Settlement (in some cases)” (1995) 83 Geo LJ 2663 [Menkel-Meadow, “Whose Dispute is it Anyway?”].

⁹⁵ See also Menkel-Meadow, “Whose Dispute is it Anyway?” *ibid* at 2689.

⁹⁶ Research by Lissak and Sheppard in the context of fairness criteria in alternative dispute processes determined that while various participants in the study focused on issues such as “getting at the facts” and ensuring there is a fair process were important criteria “the relative importance of criteria is somewhat dependant upon what is in dispute and who is doing the rating.” See Robin I Lissak & Blair H Sheppard, “Beyond Fairness: The Criterion Problem in Research on Dispute Intervention” (1983) 13:2 Journal of Applied Science 45 at 58.

⁹⁷ Christine B Harrington, “The Politics of Participation and Non-Participation in Dispute Resolution Processes” (1984) 6:2 Law and Pol’y 203 at 209 [Harrington, “The Politics of Participation”].

democratic interpretation of the settlement derived in an alternative dispute resolution in which, “[s]ettlement (and its sometimes rejection of law) could just as easily be seen as a democratic expression of individual justice where rules made for the aggregate would either be unjust, or simply irrelevant to the achievement of justice in individual cases.”⁹⁸ Again, this is contrasted with the formal adjudicatory process whereby ostensibly neutral general principles are imposed on the parties in the form of a judgment rendered by the adjudicator.⁹⁹ In light of these considerations, one of the key lessons that may be learned from the ADR movement and subsequently applied in the context of a broader conceptualization of access is the centering of the individual (rather than the professional) in the decision-making and problems-solving process. In this way, such processes are consistent with the democratic thesis of access.

For the purposes of my research project, an examination of the tension between the broader ‘democratic’ concept of access and a concept that has focused on ‘practical’ legal outcomes facilitated by legal professionals is situated within a study of the role of legal self-help in assisting self-represented litigants. This context provides a useful site at which to examine the objectives and merits of the different concepts of access from the perspective of the self-represented litigant. In so doing, it may be possible to evaluate critically the legitimacy of a broader conceptualization that takes account of self-represented litigants’ ability and willingness to engage in legal and political processes. This critical evaluation is made possible, in part, by the fact that there are valid practical concerns associated with self-represented parties’ ability to participate meaningfully in a judicial system that is designed by and for lawyers and judges. Arguably, the legal process as it has been developed and administered historically has not been conducive to participation by non-lawyers.¹⁰⁰ “Is the

However, if the benefits derived from the adoption of a broader conceptualization of access are worth pursuing (and it is my view that such goals are not only worthwhile, but

⁹⁸ Menkel-Meadow, “Whose Dispute is it Anyway?”, *supra* note 94 at 2676.

⁹⁹ Harrington, “The Politics of Participation”, *supra* note 97 at 209.

¹⁰⁰ Carrie Menkel-Meadow, “Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve” (2004) 57 *Current Legal Problems* 82.

necessary for a more robust democratic society), then it is imperative that the existing system be critically examined with a view to adopting a broader concept of access. Thus, to the extent that access to justice initiatives promote direct engagement by citizens in the decisions that affect them (an example of which is self-help), it is important that existing court systems and procedures, as well as the key players in that system, be assessed from the perspective of civil justice system's users. The ultimate ambition is to reshape and support a process that better facilitates participation.¹⁰¹

Conclusion

The historical evolution of access to justice as both a theoretical approach and policy initiative has been shaped by a variety of concerns that include individuals' ability to assert legal rights and the fair administration of justice. One of the predominant forces in this evolutionary process has been the role of the legal representative, both in terms of shaping the conceptualization of access and in facilitating or controlling individuals' access to justice. However, more recent thinking about access has questioned the dominant role played by lawyers: it has begun to explore the role that the ordinary citizen can and should play in the creation and operation of law that is more consistent with principles of democracy. The recent rise in the numbers of self-represented litigants in the civil justice system has concretized the need to explore this question in a more urgent fashion. As a result, my project aims to examine a broader concept of access to justice within the particular context of self-represented litigants' experiences participating in the civil justice system. However, prior to engaging in that examination, it will be important to explore the more general objectives and merits of a participatory approach to democracy that might inform a broader conceptualization of access. This exploration will also need to take account of the particular challenges that the civil justice system poses in respect of direct citizen engagement. Consequently, the next chapter will examine the concept of participatory democracy and the role of law in a democracy.

¹⁰¹ The implications of non-participation are profound. Low- and moderate-income individuals are disproportionately among those individuals without access to the legal and political institutions and thus, are unable to influence the laws and policies that affect their daily lives. The problems associated with disengagement and disempowerment are intertwined in the sense that individuals without access cannot impact the laws and policies that affect them and are often disproportionately influenced by the law's application in a variety of intrusive ways.

CHAPTER 3

DEMOCRACY AND LAW

The modern era is one in which private law and public law regulate a broad range of everyday activities of life. Many aspects of citizens' lives and the problems that they experience in a modern bureaucratic society incorporate a legal dimension.¹ Elements of personal injury, consumer relations, and debt as well as almost all areas of economic and social interaction are regulated by the law. In a common law system, decisions about familial relationships, housing and employment, social benefits and immigration matters made in the traditional legal institutions such as the civil law courts, as well as various regulatory and administrative regimes, are just some of the types of decisions that can affect individuals' daily lives in significant ways.² In this sense, courts and tribunals "create a body of law that directly governs and indirectly guides, through both the full light and the shadow of the common law, much of what we do in our daily lives, including both individuals and corporate actions."³ Moreover, in many instances the matters encompassed by these areas of law can affect the "cohesiveness and inclusiveness of the bonds that tie people together as both members of a community and as citizens more generally."⁴ Notwithstanding the pervasiveness of civil law in our society and the impact of its creation and administration on our lives, the reality is that citizens are too often bystanders in such matters; they are either represented by lawyers, and/or required to resolve civil law problems themselves without the assistance of legal representation.

¹ Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidences and Patterns" (April 2005). Available online at <http://cfcj-fcjc/docs/2006/currie.en.pdf> [Currie, "A National Survey of Civil Justice Problems"]. As noted in chapter two, there are the legal issues for which many individuals do not obtain formal legal assistance and many of these problems may be such that they do not even characterize the issue as a legal problem or are unaware or unable to address as a legal problem and thus end up 'lumping'. See William F Felstiner, Richard L Abel & Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming and Claiming..." (1981) 15:3/4 *Law & Soc'y Rev* 631 [Felstiner, Abel & Sarat, "The Emergence and Transformation of Disputes"].

² Mark Rix & Scott Burrows, "The Foundations of Legal Citizenship: Community Law, Access to Justice and the Community Legal Sector" (2005) 30:3 *Alt LJ* 126 [Rix & Burrows, "The Foundations of Legal Citizenship"].

³ Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto, Canada: University of Toronto Press, 2014) at 251 [Farrow, *Civil Justice, Privatization, and Democracy*].

⁴ Rix & Burrows, "The Foundations of Legal Citizenship", *supra* note 2 at 126.

In effect, the history of court processes and the development of law within these court processes has involved a stylized conversation between elite judges and lawyers: ordinary citizens were typically excluded and, even if included, had little familiarity or dexterity with its routines. The development of the regulatory state has, in certain ways, provided avenues for individual members of society to engage more directly with the laws and regulations that impact their lives. However, not unlike the traditional court processes settings, many tribunal settings are attempting to address the fact that these forums are either replete with legal representatives and/or encountering an increased presence of unrepresented individuals. The consequence of this is to raise questions about the fairness and workability of the regulatory procedures.⁵

The essence of democracy is that it engages ordinary people in government and governance.⁶ It contemplates a “regime of popular self-government which not only allows for, but relies upon participation by citizens in the formulation and enactment of laws that govern their lives.”⁷ In its strong incarnation, democracy encompasses “politics in the participatory mode where conflict is resolved in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent, private individuals into free citizens and private interests into public goods.”⁸ In furthering a concept of strong democracy, the question that arises is how best to increase the scope and nature of individuals’ participation in the institutions, processes and decision-making that impacts their lives.

⁵ Robert Thomas, “From ‘Adversarial’ v ‘Inquisitorial’ to ‘Active, Enabling and Investigative’: Developments in the UK Administrative Tribunals” in Laverne Jacobs & Sasha Baglay, eds, *The Nature of Inquisitorial Processes in Administrative Regimes*, (Surrey, UK: Ashgate Publishing Limited, 2013) Thomas, “From ‘Adversarial’ v ‘Inquisitorial’”]; See also Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49 Osgoode Hall LJ 71 [Rehaag, “The Role of Counsel in Canada’s Refugee Determination System”].

⁶ Christian Welzel & Ronald Inglehart, “The Role of Ordinary People in Democratization” (2008) 19:1 *Journal of Democracy* 126 at 128.

⁷ Hutchinson, *The Province of Jurisprudence Democratized*, (Oxford, UK: Oxford University Press, 2008) at 137 [Hutchinson, *The Province of Jurisprudence*].

⁸ Benjamin R Barber, *Strong Democracy – Participatory Democracy for a New Age*, (Berkeley, USA: University of California Press, 1984) at 132 [Barber, *Strong Democracy*].

In the first part of this chapter, I examine the fundamental principles of participatory democracy, including a brief discussion of the objectives, as well as benefits, associated with meaningful citizen participation. Following this discussion, the next section of this chapter will analyze the role of law and legal institutions, including both their law-making and law-administering functions, within a democracy and the corresponding significance of adopting a participatory approach to both functions. In light of the important role that law plays within a democracy, this chapter will then explore how access to justice might further democratic participation in these important legal processes, particularly within the civil justice system. At this stage, an access to justice project in Connecticut will be used as a means of examining the ways in which participation may be fostered and the benefits potentially derived from a participatory approach to access to justice theory. These benefits include the democratization of law and the creation of a new legal vernacular that is more consistent with and relevant to individuals' lives. Finally, this chapter will outline some of the challenges associated with the promotion of more and better participation within the civil justice system.

Democracy and Participation

Democracy in a participatory mode is not simply about conducting free elections in which every citizen is provided with the opportunity to vote. Rather, it involves a “diffuse and urgent hope that the people themselves can become moral and political actors in the civic fabric of our society.”⁹ Subject to casting votes in regularly scheduled elections, citizens in a representative system of democracy do not directly participate in the creation of the laws and policies that govern them. As a result, they become the “passive constituents of representatives, who, far from reconstituting the citizens' aims and interests, usurp their civic function and deflect their civic energies.”¹⁰

⁹ Lani Guinier, “Supreme Democracy: *Bush v Gore* Redux” (2002) 34 Loy U Chicago LJ 23 at 27 quoting from Catherine Eschle, *Global Democracy, Social Movements and Feminism* (Boulder, USA: Westview Press, 2001) at 17 [Guinier, “Supreme Democracy”].

¹⁰ Barber, *Strong Democracy*, *supra* note 8 at 147.

By contrast, participation requires that citizens regularly and frequently engage in debate, deliberation and decision-making respecting the development of policy and deployment of power that impacts their collective lives. Drawing on Habermas' theories, Finlayson suggests that political systems work well when the decision-making processes are porous to the input of civil society and there are channels through which members of civil society can provide public opinion that influences and impacts policy.¹¹ From a theoretical standpoint, there is a presumption that communication, dialogue and deliberation by citizens and decision-makers together can produce better and more legitimate outcomes.¹²

The assumption is not that citizens, as opposed to elected officials, will resolve all of the complicated issues that face modern democratic societies. Rather, it is that citizens will participate through dialogue and deliberation. In so doing, they develop public ends that reflect the concerns and needs of the citizenry, including collective normative concepts, such as justice and equality, and the promotion of positive social change.¹³ While it is not assumed that individuals will always agree about the definition of public norms or public ends and about how such norms may be adopted and implemented within the fabric of society, it is assumed that the ability to participate in the discussion and delineation of such norms encourages and strengthens individual empowerment. This is due to the fact that as individuals contribute to the dialogue, are heard and their views and concerns are reflected in the resulting articulation of public ends, they experience a sense of connectedness and engagement that is further empowering on an individual scale. Moreover, the development of public ends and the expression of collective normative values is consistent with a community that is engaged in acts of collective self-

¹¹ James Gordon Finlayson, *Habermas - A Very Short Introduction* (Oxford, UK: Oxford University Press, 2005).

¹² Carrie Menkel-Meadow, "The Lawyer's Role(s) in Deliberative Democracy" (2005) 5 Nev L Rev 347 [Menkel-Meadow, "The Lawyer's Role(s) in Deliberative Democracy"].

¹³ Barber, *Strong Democracy*, *supra* note 8 at 154-155. Participation in this mode contemplates a broad spectrum of activities and goals that range from the development of policy and law-making to information exchange and deliberation of public issues.

government as opposed to representative government or, alternatively, a political system that is focused almost exclusively on individual needs.

In light of the objectives associated with political participation (i.e., the encouragement of individual empowerment, development of community and a greater citizen engagement in a wide variety of decision-making processes), the question that arises is whether these objectives are achievable within a representative democracy. Typically, in a representative democracy, the elected politicians are entrusted to determine what is in the public's interest. As such, there is often assumed to be little or no further need for citizen engagement once the electoral process is complete.¹⁴ From a practical standpoint, this approach can be particularly significant in respect of policies that require that citizens play an active role in the administration of specific policy initiatives, such as disease control and environmental protection.¹⁵ 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. However, an even more substantive critique of large-scale representative democracies calls into question the validity of a political system in which the "masses are relegated to voting for representatives, joining interest groups (few of which have adopted internal participatory procedures), and providing the elites with new recruits."¹⁶ Acknowledging the difficulties associated with direct democracy in a large and pluralistic society, Susan Lawrence questions the validity of modern democratic theory that has abandoned an

¹⁴ Jocelyne Bourgon, "Why Should Governments Engage Citizens in Service Delivery and Policy-making?" in *Focus on Citizens: Public Engagement for Better Policy and Services* (2009) 199 at 201. Available online at www.oecd.org/gov/publicengagement [Bourgon, *Why Should Governments Engage Citizens?*]; In her critique of the US Supreme Court's decision in *Bush v Gore*, Lani Guinier suggests that voting is a poor means of fostering political participation. Moreover, she challenges the Court's conceptualization of democracy as being the act of holding elections that "function as a test to narrow the electorate to those who are qualified, i.e., those who successfully maneuver through complex machinery, the untrained poll workers, and the inconvenient polling hours to actually cast a vote." See Guinier, "Supreme Democracy", *supra* note 9 at 26.

¹⁵ This is contrasted with a neo-liberal critique that is discussed further in the context of certain critiques of the legal self-help initiative.

¹⁶ Susan E Lawrence, "Justice, Democracy, Litigation, and Political Participation" (1991) 72:3 *Social Science Quarterly* 464 at 466 [Lawrence, "Justice, Democracy, Litigation"].

educative/community-building function in favour of this reliance on political elites and limited citizen engagement in the political decision-making processes. In this regard, there is a critical distinction between individuals merely “having a vote” in a representative democracy and individuals also “having a say” in the matters that affect them pursuant to the principles of participatory democracy.¹⁷

Drawing on the work of classic democratic theorists, such as Rousseau and Mill, Carole Pateman articulated certain principles of participatory democracy. She ultimately concluded that a theory of participatory democracy is built on a central assertion that individuals and institutions cannot be considered in isolation from one another.¹⁸ In further reflecting on classic conceptualizations of participatory democracy, Susan Lawrence has, more recently, suggested that a mutual dependence of each citizen on others creates a sense of belonging to a community that, in turn, serves as a mechanism for community-building and self-government.¹⁹

Thus, not only are individuals and institutions inter-related, but so too are those individuals within a community. Theories of empowerment characterize this inter-relatedness as two sides of the same coin; personal empowerment occurs at a level of consciousness that requires internal strengths, while political empowerment necessitates organizational conditions that enable the individual to exercise her new abilities as an empowered citizen.²⁰ Thus, participation requires that an individual obtain certain training or skills and also be in a position to access the appropriate forum or institutional setting in which to exercise those skills.

¹⁷ Bourgon, “Why Should Governments Engage Citizens?”, *supra* note 14 at 201.

¹⁸ Carol Pateman, *Participation and Democratic Theory* (London, UK: Cambridge University Press, 1970) at 42 [Pateman, *Participation and Democratic Theory*].

¹⁹ Lawrence, “Justice, Democracy, Litigation”, *supra* note 16 at 465.

²⁰ Elisheva Sadan, *Empowerment and Community Practice: Theory and Practice of People-Focused Social Solutions* (Tel Aviv: Hakibbutz Hameuchad Publishers, 1997) at 76. Available online at www.mpow.org [Sadan, *Empowerment and Community Practice*].

Empowerment as an Antecedent to Participation

Individual empowerment plays a crucial role in a participatory democracy. It works both in terms of an individual's ability to initiate participation as well as engage in ever greater and more frequent types of participation. In particular, individual empowerment is a necessary prerequisite for open debate and the exchange of ideas; both of these are integral to meaningful participation. Elisheva Sadan contends that individual empowerment results in the enhanced ability to participate, an ability to cope with frustrations, and a desire to influence decision-making processes.²¹ This sense of individual empowerment begins on a personal level with the advent of self-confidence and self-efficacy; this is associated with enhanced skills, abilities, access to resources, and knowledge. Moreover, Sadan contends that because an individual's self-perception is based on their experiences and achievements in their lives, there is a positive relationship between the "development of self-confidence and reinforcement of personal ability."²² The accumulation of these attributes contributes to the further ability and willingness to engage in the social world. This does not mean that empowered individuals will automatically obtain more political power. Rather, by being empowered, individuals can become enabled-participants in a variety of political and democratic forums and decision-making processes.²³ As such, personal empowerment becomes a necessary precondition for meaningful participation in a variety of different contexts.

In answering the question of how greater citizen participation might evolve, Pateman suggests that there is a need for the social training of citizens in the ways of democracy in order to ensure that citizens are able to maximize their participation within

²¹ Sadan, *Empowerment and Community Practice*, *supra* note 20 at 75.

²² Sadan, *Empowerment and Community Practice*, *supra* note 20 at 84.

²³ Sadan, *Empowerment and Community Practice*, *supra* note 20 at 77. A recent report of the United Nations on legal empowerment of the poor characterized legal empowerment as "the process by which the poor become protected and are enabled to use the law to advance their rights and their interests, vis-à-vis the state and the market." This conceptualization focuses on legal empowerment as a means to affect social change, namely the reduction of poverty. In this regard, legal empowerment travels from the bottom up such that change starts at an individual level, whereby empowerment encourages the exercise of certain behaviours and skills that provide an environment for change. See Commission on Legal Empowerment of the Poor, *Report of the Commission on Legal Empowerment of the Poor*, vol 1, United Nations Development Program (2008) at 26 [United Nations, *Report of the Commission on Legal Empowerment of the Poor*].

a democracy. She envisions this training as occurring in many different spheres of society and involving ever-greater acts of participation. The benefit of participating in different social and political spheres is that the individual develops “attitudes and psychological qualities” that, in turn, foster further participation.²⁴ Thus, one of the significant functions and effects of democratic participation is educative. Participation serves as a “learning process that educates citizens with the skills needed to sustain democracy”, including the skills necessary to both engage in political processes and be effective in those same processes. As individuals participate in making decisions and solving problems, they learn in an experiential manner and this leads to further changes in behaviour, confidence and leadership.

From a participatory perspective, each encounter by a citizen provides an opportunity for that individual to gain self-confidence and knowledge of the community around them. This inculcates the capacity to negotiate and deliberate which spills over from one area of life to another. This ‘spill-over’ has a cumulative effect on the individual’s ability and potential willingness to engage in different forums.²⁵ Of course, this characterization presupposes that participation is both meaningful and productive.²⁶ Individuals also gain practice asserting democratic skills, which potentially provide them with the confidence to participate in ever more complex spheres of decision-making. As this happens, participation becomes self-sustaining because individuals voluntarily continue to use the skills and information obtained to engage further in debate and deliberation about the laws and policies that affect them.²⁷ Democracy is then strengthened by the fact that input from citizens and the resulting decision-making is derived from wide and frequent participation. This, in turn, further empowers individuals

²⁴ Pateman, *Participation and Democratic Theory*, supra note 18 at 43.

²⁵ Barber, *Strong Democracy*, supra note 8 at 384.

²⁶ A discussion of the meaningfulness of individual engagement is contained in the later section of this chapter.

²⁷ Pateman, *Participation and Democratic Theory*, supra note 18 at 43. In his discussion of strong democracy, Benjamin Barber distinguished between individuals lacking interest in politics versus a lack of interest in political decision-making. He argued that a myriad of surveys reflected individuals’ interest in the latter. Barber, *Strong Democracy*, supra note 8 at 266.

and allows them to expand the nature and scope of their participation.²⁸ As individuals participate positively and meaningfully in decision-making processes that impact their lives, the argument is that they will be more willing to engage further in dialogue and deliberation and in more diverse contexts. Thus, there are educative benefits associated with learning from participation in public spheres that potentially carry forward for the individual as well as broader community. In the context of self-represented litigants compelled to engage directly with the decision-making processes in the civil justice system, one of the questions becomes whether individuals' experiences are educative in the positive sense of providing them with participatory skills, information, knowledge and confidence such that they are able to further participate in other decision-making processes. Another more fundamental question that arises is whether self-represented litigants' experiences participating in the civil justice system will ultimately encourage or discourage further and broader participation in other contexts.

A key component of this process involves the individual as a citizen in the political sense. In this regard, citizenship is learned through "education, socialization, exposure to politics, public life and day-to-day experiences."²⁹ Benjamin Barber distinguishes between masses (as in 'government of the masses') and citizens. While masses do not govern themselves, citizens self-govern through participatory processes and evolve as they engage in deliberation and decision-making processes.³⁰ Within a theory of participatory democracy, citizenship requires more than voting from the individual members of society; it requires that individuals actively engage in creating and implementing the political and legal rules and processes that shape their lives and the lives of their communities. This concept of participation necessarily entails direct deliberation, direct action and direct contribution.

²⁸ NC Saxena, "What is Meant by People's Participation" in Andrea Cornwall, ed, *The Participation Reader* (London, UK: Zed Books, 2011) at 32.

²⁹ Lisa Veneklasen, Valerie Miller, Debbie Budlender & Cindy Clark, eds, *A New Weave of Power, People & Politics – The Action Guide for Advocacy and Citizen Participation* (Warwickshire, UK: Practical Action Publishing Ltd., 2011) at 31.

³⁰ Barber, *Strong Democracy*, *supra* note 8 at 145-150.

In this sense, ‘strong democracy’ is defined as a means of resolving conflict through a participatory process that engages citizens in a political community.³¹ Barber’s definition of a strong democracy contemplates a public element to citizenship that obliges individuals to think and act in common. However, the kind of participation contemplated in a strong democracy exists on a small scale, as well as a national political scale, in terms of issue, forum and/or geography. In fact, the small-scale focus of much participation offers a sense of connectedness because people are more likely to be comfortable engaging in dialogue and reaching sustainable solutions on a local level, as opposed to being thrust in to large national forums where the issues and policy choices can be quite complex.³²

In this regard, the local realm can arguably become one of the important sites at which to learn and develop collective action by cultivating “face-to-face settings and manageably sized groups in which people talk, listen and think, and act together.”³³ The argument made by Jaime Lee regarding the potential for the new governance model to support marginalized voices is based, in part, on the belief that even rare opportunities for incremental change assist in alleviating deeply entrenched marginalization. For instance, small, localized, examples of engaged decision-making can support “learning by doing” which is then potentially applied in different contexts.³⁴ Again, in the context of the self-represented litigant’s experiences in the civil justice system, the question becomes whether their participation in the dispute processes in the civil justice system represents an example of localized engaged decision-making that has the potential to offer an

³¹ Barber, *Strong Democracy*, *supra* note 8 at 151. A good example of the transformation from private individuals to public citizens through the assistance of a volunteer lawyer is Laura Nader’s research on a community lawyer project in Connecticut. See Laura Nader, “Processes for Constructing (No) Access to Justice (For Ordinary People)” (1990) 10 Windsor YB Access J 496 [Nader, “Processes for Constructing (No) Access to Justice”]. The community lawyer project is discussed in greater detail later in this chapter.

³² Orly Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” (2004) 89 Minn L Rev 342 at 383.

³³ Asciano Piomelli, “The Democratic Roots of Collaborative Lawyering” (2006) Clinical L Rev 541 at 610 [Piomelli, “The Democratic Roots of Collaborative Lawyering”].

³⁴ Jaime Alison Lee, “Can You Hear Me Now?: Making Participatory Governance Work for the Poor” (2013) 7 Harv L & Pol’y Rev 405 at 440 [Lee, “Can You Hear Me Now?”]. The New Governance Model contemplates the participation of a broad array of stakeholders in a decentralized problem-solving process and includes the notion of ‘learning by doing.’

opportunity to learn by doing. The assumption being that, to the extent that individuals are able to participate in a 'face-to-face setting' (i.e. civil justice forums) and are provided an opportunity to engage with and learn important participatory skills as a result of having engaged in these settings, they will be better prepared and perhaps more willing to expand the scope of their participation. Such would be consistent with principles of participatory democracy.

Ever-greater citizen participation encourages the development of a community to the extent that individuals begin to think publicly as citizens, establish connections to other citizens, and, in feeling connected, are prompted to consider the "welfare of the community as a whole."³⁵ This process influences the setting of collective goals because all of the members of the community are given the opportunity to deliberate over the construction and development of those goals. In this sense, community has,

a meaning of life that is more egalitarian, participatory and intimate than life in society at large, which demands the objectification of man and anonymous obedience to authority and law. The 'community' as an image is a kind of antithesis of the bureaucratic, hierarchical, formal, and judiciary society. The concept is to a certain extent abstract, but at the same time concrete, because it operates in the geographical, the ethnic, and the functional sense.³⁶

Thus, the development of a community and the enhancement of meaningful participation become mutually constitutive. Participation in a community encourages individual empowerment because it contemplates self-efficacy, the making of group decisions, the solving of common problems and the mobilizing of local resources for common causes.³⁷

Furthermore, the concept of community-building is related to the potential for individual self-transformation that is often associated with participation. By participating in various decision-making processes, individuals are also able to fulfill certain "innate

³⁵ Jocelyne Bourgnon, "Responsive, Responsible and Respected Government: Towards a New Public Administration Theory" (2007) 73:1 International Review of Administrative Sciences 7 at 16.

³⁶ Sadan, *Empowerment and Community Practice*, *supra* note 20 at 90.

³⁷ Sadan, *Empowerment and Community Practice*, *ibid* at 90.

and basic developmental needs for agency and for living up to one's potential" which reinforces the individual's sense of autonomy.³⁸ However, by engaging in deliberation and dialogue, this autonomy is balanced against individuals taking account of other world-views and becoming attentive to the interests of others. Again, a key manifestation of empowerment is the notion that individuals move from the private to the public. This means that the person becomes engaged in a political sphere that expands beyond self-interest and takes account of both the socio-political influences around them and the individuals' ability to affect outcomes in respect of these conditions. A recent report of the United Nation on the topic of legal empowerment suggested, "democracy and legal empowerment are kindred spirits, and are better synchronised than sequenced. In the absence of empowerment, societies lose the benefits that come from the free flow of information, open debate, and new ideas."³⁹

Acknowledging that it is not possible to have both significant inequality and meaningful participation,⁴⁰ a prospective benefit of participatory democracy is the potential to create measures and forums that re-engage those members of society that are presently disenfranchised and/or disempowered. By developing avenues through which all citizens are given the opportunity to be heard and affect decision-making, individuals are also given the opportunity to re-engage as equal members of a community: they begin to think and act in common. This could, in turn, work to negate the concept of the 'other' associated with exclusion and inequality. At the same time, it fosters inclusivity. While this represents a promising and positive consequence of meaningful participation, it is also important to take account of the ways in which inequality, social exclusion and the marginalization of certain individuals and groups in society preclude their ability to

³⁸ Audrey G McFarlane, "When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development" (2000) 66 Brook L Rev 861 at 909. [McFarlane, "When Inclusion Leads to Exclusion"].

³⁹ United Nations, *The Report of the Commission of Legal Empowerment of the Poor*, *supra* note 23 at 4.

⁴⁰ For instance, according to Joshua Cohen, a Habermasian discourse requires equal 'participatory rights' of all individuals such that each individual is able to "propose issues for the agenda, propose solutions to the issues on the agenda, offer reasons in support of or in criticism of proposed solutions...[and] an equal voice in the decision." See Joshua Cohen, "Reflections on Habermas on Democracy" (1999) 12:4 Ratio Juris 385.

engage at all. In this sense, it is important to stress that ‘meaningful engagement’ seeks actively to ensure that the voices and needs of historically-excluded groups are heard. In the particular context of engagement in the civil justice system, Patricia Hughes suggests that this requires the need to ensure that the solutions implemented are not generic but rather that,

[i]deally, responding to the challenges facing individuals who cannot afford lawyers challenges us to apply the lessons offered by the rich scholarship exploring the complete dynamics in the relationship between dominant and marginalized groups or communities or even the simpler understanding of the relationship of marginalized groups to the legal system. It requires us to apply what we know about why particular groups and individuals are exclude from access to justice. Without doing so, we cannot expect to provide adequate solutions that will promote access to justice.⁴¹

Meaningful Participation

Notwithstanding the benefits associated with greater citizen engagement, there are challenges to the pivotal notion of ‘meaningful participation’. First and foremost, there is an assumption that any or all participation is good participation. Sherry Arnstein challenges this idea. She maintains that participation must result in the real possibility of redistributing power and resources to those without resources or power if it is to be meaningful and legitimate. This presupposes that the participation will be effective and of consequence. Even more fundamentally, it assumes that there will be a willingness and agreement among those who maintain power to share power and decision-making authority.⁴² Failing that, participation is an empty process used by those with power to justify a course of action that only certain members decide on and from which only certain members of society are likely to benefit.⁴³

⁴¹ Patricia Hughes, “Advancing Access to Justice Through Generic Solutions: The Risk of Perpetuating Exclusion” (2013) 31 Windsor YB Access Just 1 at 22 [Hughes, “Advancing Access to Justice Through Generic Solutions”].

⁴² Lee, “Can You Hear Me Now?”, *supra* note 34.

⁴³ Sherry Arnstein, “A Ladder of Citizen Participation” (July 1969) AIP Journal 216 at 216 [Arnstein, “A Ladder of Citizen Participation”].

Given this requirement, if participatory democracy is to be effective and beneficial, it must account for the “economic and social determinants” that impact individuals in society and affect their ability to participate in a meaningful way.⁴⁴ Lucie White suggests that, in many instances, the lack of power held by an individual or a particular group in society will do more than prevent them from being heard. Even more fundamentally, it will structure consciousness; preventing individuals from attempting to engage in the discussion at all.⁴⁵ This makes any notion of participation worthless. For Gramatikov, individuals’ belief in their ability to solve legal problems (a key component of legal empowerment) will differ depending on a variety of factors. However, an important factor is the distribution of power in the relationship.⁴⁶

Gramatikov’s conceptualization of legal empowerment incorporates the belief that empowered individuals are those who see their position in a relationship as being as important as the other party and, therefore, perceive that they are afforded relatively equal power in resolving the relevant dispute. As Sadan noted in a more general context, “people have testified that in their empowerment process, they did not necessarily acquire more social influence or political power but they did become able participants in the political process and in local decision-making.”⁴⁷ Thus, empowered individuals are those who have developed confidence in the sense that they believe that they have the ability to solve their problems and the corresponding means by which they can attempt to resolve them.⁴⁸ These beliefs are then manifest in individuals exercising certain abilities and taking certain actions. The downside of this characterization of the empowerment

⁴⁴ Barber, *Strong Democracy*, *supra* note 8 at 146; Roderick A. MacDonald, “Access to Justice and Law Reform#2” (2001) 19 Windsor YB Access Just 317 at 320 [MacDonald, “Access to Justice and Law Reform”]. Pateman also relies on the Rousseauian requirement that participation contemplate economic equality and independence among citizens. Pateman, *Participation and Democratic Theory*, *supra* note 18 at 22.

⁴⁵ Lucie E White, “To Learn and Teach: Lessons from Driefontein on Lawyering and Power (1988) Wis L Rev 699 [White, “To Learn and Teach: Lessons from Driefontein”].

⁴⁶ Martin Gramatikov & Robert B Porter, “Yes I Can: Subjective Legal Empowerment” (2011) 18:2 Geo J on Poverty L & Pol’y 169 at 169 [Gramatikov & Porter, “Yes I Can: Subjective Legal Empowerment”].

⁴⁷ Sadan, *Empowerment and Community Practice*, *supra* note 20 at 78.

⁴⁸ Sadan, *Empowerment and Community Practice*, *ibid* at 76.

necessary for participation is reflected in Gramatikov's research results on legal empowerment. His research results suggested that, when there were significant power imbalances among individuals and/or groups, the result was a "disbelief in perceived personal capabilities for using the law to solve problems."⁴⁹

As such, when significant power imbalances exist, it is unlikely that those with less power will adopt the belief that they have either the abilities or the means by which to act. The further result of this is continued disengagement and a corresponding sense of disempowerment. Thus, individuals who are subordinated in the sense that they have internalized the isolation and/or the belief that it is either their fault or immutable position in society are unable to articulate who is responsible for their situation and will further distrust the existing legal and political systems. Indeed, in these circumstances, it may be impracticable to suggest that there can be meaningful participation without a profound change in the actual distribution of power to these individuals.⁵⁰

The link between distributions of power and the ability to participate is seen in one example that took place during apartheid-era South Africa. In that example, the black town members of Driefontein were threatened with forcible removal orders pursuant to which the white South African government would relocate the individuals to resettlement camps. These camps were located in impoverished rural areas that lacked even basic resources. Because the government action was sanctioned by South African law, the black community had "few clear cut legal rights" and few protections against the removal.⁵¹ Notwithstanding what appeared to be limited legal options, the community was able to resist the removal order. In so doing, it was necessary for the members of the black community to challenge the existing structures of apartheid domination and create their own source of power in the government's vulnerabilities. Historically, the majority of the community would have placed all of the power in the hands of the white apartheid government. However, by beginning to talk about the legality and the morality of the

⁴⁹ Gramatikov and Porter, "Yes I Can: Subjective Legal Empowerment", *supra* note 46 at 196.

⁵⁰ White, "To Learn and Teach: Lessons from Driefontein", *supra* note 45 at 758-760.

⁵¹ White, "To Learn and Teach: Lessons from Driefontein", *ibid* at 720.

removal order, as well as the validity (or invalidity) of the South African law from a justice perspective, the community members recognized, through their own conversations about these issues that they ‘had the collective power to reason about justice.’⁵²

This type of conversation can be likened to other political dialogue that becomes an “embodiment of the procedural and substantive goals that a democratic society can aspire to achieve; it improves and strengthens itself through constant practice and usage.”⁵³ To the town members of Driefontein, the ability to engage in discussions about what was happening to them, what they felt about what was happening, and what might be done about the situation allowed them to define their circumstances on their own terms and then begin to think about transforming it in a political manner. The conversation further fostered confidence in the collective perspective that the proposed action by the South African government was unjust.⁵⁴ This confidence and corresponding consciousness around issues of justice, in turn, motivated the community to mobilize and develop strategies and courses of action that were outside traditional legal approaches and grounded in different sources of power. Once there was an acknowledgement of existing power relations, there was an opportunity to think about how to shift the power held by the community based in part on its mobilization. As a result, the community was able to ultimately stave off the relocation with the assistance of a volunteer lawyer and a community worker.

However, following the transition from apartheid to democracy, the challenges associated with facilitating participation and addressing asymmetries of power were still present in South Africa. An analysis of three participatory forums that were established following apartheid raised questions about the viability of deliberative policy-making

⁵² White, “To Learn and Teach: Lessons from Driefontein”, *supra* note 45.

⁵³ Allan C Hutchinson, “Talking the Good Life: From Liberal Chatter to Democratic Conversation” in Allan C Hutchinson & Leslie J M Green, eds, *Law and Community – The End of Individualism*, (Toronto, Canada: The Carswell Co. Ltd., 1988) at 171 [Hutchinson, “Talking the Good Life: From Liberal Chatter to Democratic Conversation”].

⁵⁴ White, “To Learn and Teach: Lessons from Driefontein”, *supra* note 45 at 727-728.

through discourse between groups in formal institutions of policy-making.⁵⁵ In the context of the three participatory organizations examined, it was held that the entrenched power of the ruling ANC government meant that, despite a commitment to the idea of participation, the government was not necessarily motivated to relinquish its own control over policy direction and thereby engage in meaningful participation with various civic groups. As a result, the researchers maintain that without a re-distribution of power and a corresponding genuine interest in societal participation, citizens may be wise to continue to make use of power in the informal public sphere (through protest and pressure) that can then be expended in more institutional settings.⁵⁶

Harris and Gabel contend that alienation is best described as the “inability of people to achieve genuine power and freedom.” This alienation is most often associated with a hierarchical society. This hierarchy ultimately diminishes the community and,

...forces people into a lifelong series of isolating roles and routines within which they are unable to fully recognize one another in an empowering and mutually confirming way. By contrast, the development of community through dialogue, deliberation and the articulation of common objectives further engagement and continued participation. Absent the development of community, people come to experience one another as powerless and passive in relation to the hierarchies within which they live and work.⁵⁷

⁵⁵ Lucio Baccaro and Konstantinos Papadakis, “The Downside of Participatory-Deliberative Public Administration” (2009) 7 Socio-Economic Review 245 at 264 [Baccaro & Papadakis, “The Downside of Participatory-Deliberative Public Administration”]. In their article, the authors examine the efficacy of the three participatory forums on the basis of two contrasting theories of participatory democracy – participatory-deliberative public administration which suggests that members of society engage with government in resolving issues of public-policy and in so doing, reach better and more efficient solutions and Habermas’ theory of deliberative politics, and more specifically, the role of moral discourse in the informal public sphere, which remains skeptical of citizens’ ability to impact official sources of power through participation.

⁵⁶ Baccaro and Papadakis, “The Downside of Participatory-Deliberative Public Administration”, *ibid* at 267.

⁵⁷ Peter Gabel & Paul Harris, “Building Power and Breaking Images: Critical Legal Theory and the Practice of Law” (1982-1982) 11 Rev L Soc Change 369 at 371 [Gabel & Harris, “Building Power and Breaking Images”].

The result is that individuals begin to self-identify as powerless, passive and alienated within the social order. Without engaging in a dialogue about these common objectives, the justice of the South African government's actions and their options, these individuals would have likely remained powerless.

The consequence of not providing legitimate means and opportunities by which power can be re-distributed is that the participation remains 'cosmetic' in nature; this potentially leads to alienation and the deeper marginalization of certain stakeholders.⁵⁸ This deeper sense of marginalization results from the entrenchment of existing beliefs that only certain voices will be heard and only certain viewpoints are actually considered in the decision-making process. The likely outcome in this scenario is not only the continued exclusion of certain individuals and groups from the dialogue, deliberation and decision-making processes, but also the further belief that only certain individuals or groups are worthy of being heard. This, in turn, perpetuates continued disengagement by those who have been excluded historically. Without the capacity to be heard and impact the decision-making process, this necessarily implies that power is not shared among the relevant stakeholders. As such, participation may prove to be a faux-engagement.

The meaningfulness of citizens' engagement within various democratic contexts will, in part, be judged by the actual impact that citizens have on the decision-making process. This is not to assume that the individual will always be able to change the outcome. Rather, the individual will be able to 'have a say' and that there will be opportunity for their voice to be reflected in the decision-making process that ensues. For this to occur, there must be dialogue that "demands more than the existence of speech somewhere by someone; it demands a realistic opportunity to have that speech heard and, preferably responded to by others."⁵⁹ Thus, an important component of this dialogue is individuals' belief that they were heard which is validated, in part, through the nature of

⁵⁸ Lee, "Can You Hear Me Now?", *supra* note 34 at 406.

⁵⁹ Hutchinson, "Talking the Good Life: From Liberal Chatter to Democratic Conversation", *supra* note 53 at 172.

the response provided, notwithstanding the final outcome achieved.⁶⁰ Susan Lawrence argues that the legal system can provide this opportunity to individuals in the context of their private law case because individuals are required to make legal and factual arguments, have these arguments responded to, and in turn, respond to those counter positions – a process that does not occur directly in other political settings.⁶¹

Thus, within a participatory context, engaging in dialogue and deliberation is different from engaging in traditional political debate. Unlike political debate, which seeks to expose weaknesses and score points for the debater, the former approach seeks to ensure that there is a considered exchange of different views and perspectives prior to making informed decisions.⁶² A focus on listening as much as speaking fosters citizens' belief that their views and perspectives are not only being heard, but also being considered. In order to have such an impact, citizens as well as the decision-makers must be in a position to communicate and, in so doing, engage in conversation; this again involves more than simply speaking. Specifically, it involves “receiving as well as expressing, hearing as well as speaking, and empathizing as well as uttering.”⁶³

Such communication plays an important role not only in terms of decision-making, but also in terms of ensuring that all individuals, including those previously silenced or unable to access the conversation, are able to engage in dialogue and deliberation before decisions are made. This component of meaningful participation presupposes a second important educational pre-requisite—that individuals are provided with access to adequate information about the issues, processes and policies prior to being expected to deliberate about those same issues, processes and policies. Without

⁶⁰ The need to be heard underlies certain legal approaches to questions of procedural fairness. One such approach suggests that the ‘ideal procedural value’ must involve a “fair hearing of contrary claims” in which competing claims are heard. See Menkel-Meadow, “The Lawyer’s Role(s) in Deliberative Democracy”, *supra* note 12 at 113. However, as will be discussed later in this paper, this particular procedural value loses significance when it is examined in the context of self-represented litigants.

⁶¹ Lawrence, “Justice, Democracy, Litigation”, *supra* note 16.

⁶² Lisa Blomgren Bingham, “Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice” (2009) 2 J Disp Resol 269 at 278.

⁶³ Barber, *Strong Democracy*, *supra* note 8 at 173.

adequate and reliable information, certain individuals and/or groups remain disadvantaged and thus, unlikely or unable to participate.

However, there are certain practical realities involved in promoting meaningful dialogue that must also be addressed. While the majority of individuals may “possess the intuitive capacity to reason practically and therefore participate in political decision-making, it is naïve to assume communicative skills are distributed equally in society.”⁶⁴ Moreover, even if it is assumed that all individuals are capable of participating, many individuals are busy with their own lives; they have neither the time nor the inclination to participate in various political processes.⁶⁵ In such circumstances, there is a concern that participatory democracy will fail to achieve the critical mass of committed political citizens that is necessary to meet the ambitions of participatory democracy. In addressing these concerns, there are a couple of different considerations. First, it should be noted again that, while not all citizens are prepared to participate in every decision-making process, what is important is that individuals understand that they can participate if they so choose; they must be provided with both the requisite opportunities to participate as well as the support necessary to do so when they do so. Moreover, the political and democratic institutions must be designed to encourage participation. The forums and contexts in which citizens participate are expanded and made accessible to citizens. Accepting the reality that not all citizens will participate in all decision-making processes, Benjamin Barber stated that, “if all of the people can participate some of the time in some of the responsibilities of governing, then strong democracy will have realized its aspiration.”⁶⁶

⁶⁴ Lorne Sossin, “Redistributing Democracy: An Inquiry in Authority, Discretion and the Possibility of Engagement in the Welfare State” (1994) 26 Ottawa L Rev 1 at 12-13.

⁶⁵ One justification for such a critique was raised by Ilya Somin who commented that from a fatalistic position, even altruistic individuals assumed to be working for the public good do not waste the time needed to gain the political knowledge necessary to participate because they know their vote has so little impact – in effect, voters know they do not have any chance of effecting outcomes. While attempting to demonstrate the inefficacy of a participatory mode, this argument seems to highlight the failings of a representative democracy and reinforce the notion that the existing system has perpetuated perceptions of alienation and disengagement. See Ilya Somin, “Deliberative Democracy and Political Ignorance” (2010) 22:2-3 Critical Review 253.

⁶⁶ Barber, *Strong Democracy*, *supra* note 8 at 267.

Furthermore, the failure of individuals to exercise willingly their power to participate may have less to do with their ability to do so and more to do with the fact that the present political system excludes all, except certain specialists who become vocal interest groups and experts. All of these individuals engage in the day-to-day political activity on behalf of citizens through a representative democracy. In so doing, they perpetuate a language and process that is removed from and unfamiliar to ordinary citizens.⁶⁷ By contrast, the purpose of promoting a participatory mode of democracy is to create a community in which citizens engage in dialogue and deliberation that will “oblige and empower people to wrest control of responsible decision-making from the technical experts, like lawyers and bureaucrats.”⁶⁸ Secondly, while individuals may be frustrated with politicians and political processes as they presently exist in a representative democracy, it does not mean that they do not want or are not interested in having a voice and role in the policies, rules and decisions that affect their daily lives and the lives of their communities. Experience would suggest that, to the extent that participation begets further and expanded participation (and individuals are provided with the opportunity to participate), the assumption is that individuals want more participation and engagement, not less, so long as it is meaningful. However, as noted fostering meaningful participation requires a re-distribution of power such that those who have been excluded historically are able to engage and those who have held power are prepared to relinquish it or at a minimum, share it. A redistribution of power may not alone be sufficient to foster meaningful participation. But, at a minimum, it may constitute an important criterion for meaningful participation. Such a redistribution of power must also take account of existing and inadequate socio-economic infrastructure, differences in knowledge bases and difficulties faced by certain groups who have been impacted by historical alienation, exclusion and distrust.⁶⁹ These considerations involve a gamble that those who have historically been disengaged and disempowered will be or

⁶⁷ Barber, *Strong Democracy*, *supra* note 8 at 152.

⁶⁸ Allan C Hutchinson, “Talking the Good Life: From Liberal Chatter to Democratic Conversation”, *supra* note 53 at 168.

⁶⁹ McFarlane, “When Inclusion leads to Exclusion”, *supra* note 38 at 925.

become in a better position to place themselves in the conversation and ultimately the decision-making processes.

Given these challenges, if participation is to be effective, it is important that participation be fostered in a variety of forums and institutions that contemplate individuals participating on local as well as national levels. By offering a variety of forums and avenues for participation, individuals are able to gain the experience, skills, self-confidence and knowledge that encourage further participation. However, this also means that participation will not look or operate the same in all areas of political, social and economic life.⁷⁰ The very nature and structure of a particular participatory process may be influenced by theoretical frameworks of deliberative democracy and discourse theory as well as questions of operationalization and differing participatory objectives.⁷¹ Moreover, it cannot be assumed that all individuals will participate in all forums or decision-making processes and in respect of all issues. Rather, the goal is that individuals are able to participate as they choose. This is particularly so in situations where the policies being decided affect citizens' lives and/or where "significant power is being deployed" against them.⁷²

Therefore, if participation is to be meaningful, it is important that the requisite political and legal institutions provide for and encourage engagement at a variety of different stages, at different levels, and in different ways. To accomplish this, there is also a need for corresponding systematic institutional reform within the various political and legal institutions. However, because many of the barriers to participation are context-specific, the reforms must be examined within the particular forum in which greater participation is sought. If participation is to be sustaining and meaningful, these reforms cannot be piecemeal, but must be system-wide and complementary.⁷³

⁷⁰ Allan C Hutchinson, *The Companies We Keep – Corporate Governance for a Democratic Society* (Toronto, Canada: Irwin Law Inc., 2005) at 71.

⁷¹ Menkel-Meadow, "The Lawyer's Role(s) in a Deliberative Democracy", *supra* note 12 at 11-112.

⁷² Barber, *Strong Democracy*, *supra* note 8 at 151.

⁷³ Barber, *Strong Democracy*, *ibid* at 265.

The Role of Law in a Democracy

As a “robust, retrospectively looking public dispute resolution system, as well as a predictable, accessible and just prospectively looking common law based-regulatory regime,”⁷⁴ courts are an integral part of democracies that profess to be bound by the Rule of Law. Consequently, it is acknowledged that law-making by courts is a historical as well as institutional fact of common law jurisdictions.⁷⁵ As such, any serious account of participatory democracy must examine the role of courts in developing law and preserving democracy.

More specifically, the civil justice system represents a significant component of a democratic society.⁷⁶ Courts resolve the private disputes of parties that come before them, as well as the public disputes that arise in the constitutional context and beyond. In so doing, courts and the judges who sit in these courts perform a distinctly political process within a democracy – namely rule-making and rule-administering whether it be in a private, public, or constitutional context. In a paper that Chief Justice McLachlin delivered on the legal profession, she stated that,

[c]ourts are seen as ways of compensating for the weaknesses of electoral decision-making and contributing to deliberative democracy by providing a forum where citizens can test laws for conformity to the fundamental values upon which the society is premised...[these values]...are fundamental to deliberative democracy, the goal of which is decisions that best represent the interests of the community as [a] whole. Independent courts thus emerge as an essential condition of democracy.⁷⁷

⁷⁴ Farrow, *Civil Justice, Privatization, and Democracy*, supra note 3 at 26; Barber, *Strong Democracy*, *ibid* at 252.

⁷⁵ See the discussion in chapter two of Farrow, *Civil Justice, Privatization, and Democracy*, *ibid*.

⁷⁶ Carrie Menkel-Meadow commented that total access to courts that run well and are inclusive ensures access to a leading democratic institution. See Carrie Menkel-Meadow & Bryant G Garth, “Civil Procedure and the Courts” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford, UK: Oxford University Press, 2010) [Menkel-Meadow, “Civil Procedure and the Courts”].

⁷⁷ Rt. Hon Beverly McLachlin, PC, “Judges in a Multicultural Society” (paper presented at Chief Justice of Ontario’s Advisory Committee on Professionalism on the Legal Profession, “Inaugural Colloquium on the Legal Profession,” 20 October 2003, Faculty of Law, University of Western Ontario) at 3-5-3-6, available online at http://www.lsuc.on.ca/media/mclachlin_judges_multicultural_society.pdf.

In recognizing the importance of active participation in the decisions that affect individual citizens, Susan Lawrence also suggests that “through litigation, citizens can participate in decisions about how the law will be applied to them and, sometimes about how the law should be.”⁷⁸ While Lawrence acknowledges that litigants are not necessarily the final decision-makers (as that function is reserved for the adjudicator assuming the matter proceeds to trial in the civil justice system), the argument is that concepts of participation do not require that the individual be the final decision-maker in order to gain benefits typically associated with a participatory approach. What is more important is individuals’ “participation in the dialogue preceding the final decision that provides the educative benefits to the litigant.”⁷⁹

Notwithstanding the important role that adjudication plays in constructing and enforcing law, there is continuing debate and discussion about both the legitimacy and effectiveness of the courts’ law-making function from a democratic perspective.⁸⁰ More specifically, there is a criticism that the courts should adhere to a practice of judicial restraint in decision-making in recognition of the supremacy of the elected bodies’ law-making powers in a democracy. Pursuant to this critique, engagement by the courts in law-making processes tends towards being illegitimate and undemocratic. Antithetical to this criticism is a further critique that not only challenges the ability of the existing court system to affect positive social change, but also claims that, through its law-making function, courts maintain existing power relationships in society.⁸¹

⁷⁸ Lawrence, “Justice, Democracy, Litigation”, *supra* note 16; see also David Luban, “Settlements and the Erosion of the Public Realm” (1995) 83 Geo LJ 2619.

⁷⁹ Lawrence, “Justice, Democracy, Litigation”, *ibid* at 467.

⁸⁰ Gabel & Harris, “Building Power and Breaking Images”, *supra* note 57 at 370.

⁸¹ White, “To Learn and Teach: Lessons from Drefontein”, *supra* note 45. In this regard, Gabel & Harris suggest that the legal system is an important public arena in which the State attempts to legitimate the existing social order – a social order from which many individuals are alienated and disengaged. A later section of this thesis will engage in a further critical examination of the role of the civil justice system in a democratic society. See Gabel & Harris, “Building Power and Breaking Images”, *ibid*.

Despite the critiques proffered in respect of the role that courts do or should play in a liberal democracy, 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.⁸² One of the questions that arises in this regard is whether this role is best played by legal representatives who act on behalf of citizens (as has historically been the case within the civil justice system) or whether citizens should play a more direct role in the development of the laws that govern them and the articulation of prospective concepts of justice that reflect the society in which they live. The challenges associated with this fundamental question have become particularly relevant given the fact that a significant number of individuals are compelled to enter this process overwhelmed and underprepared; this strongly suggests a crucial failing in democratic governance. This troubling state of affairs is particularly acute in the case of self-represented litigants and, as a result, has important implications for access to justice theory and policy.

Given the important role that law and the legal system plays in a democracy, there are further challenging questions about whether the work undertaken by lawyers and judges within the framework of the civil justice system is compatible with the commitments of a truly democratic society. In a democratic society, the civil justice system is engaged in the adjudication of legal rights and the delineation of legal duties

⁸² In her article on the lawyer's role in promoting deliberative democracy, Carrie Menkel-Meadow suggests that the value of participation, which is articulated by the fact that "legitimate laws are authored by the citizens who are subject to them", must be a central tenet of any discussion on modern political decision-making. See Menkel-Meadow, "The Lawyer's Role(s) in Deliberative Democracy", *supra* note 12; Gabel & Harris, "Building Power and Breaking Images", *supra* note 57 at 406-409. Gabel and Harris challenge the liberal ideology in which it is assumed that the legal order is "created and maintained through politically legitimate institutions like the courtroom where competing political claims to justice may be heard and evaluated by democratically elected government officials." Within this construct, while the client does not typically speak for herself, it is assumed that the individual will be treated justly through the "neutral and autonomous application of the law to their claims of right as those claims are evaluated through a democratically constituted proceeding." Adherence to this ideology contributes to a failure to acknowledge the political nature of individuals' issues and a corresponding disengagement from process that are cloaked in law and legal process but remain inherently political.

and responsibilities by an independent appointed judiciary. Courts, through the creation and application of law, construct the ways in which individuals' real life problems and disputes are situated within a particular legal framework and then subjected to a range of possible solutions that are established within that same legal framework.⁸³ Lawyers contribute to this process by transforming individuals' disputes and reframing clients' experiences and claims into legal causes of action that are only recognizable to lawyers and judges. In many instances, this may be contrary to or inconsistent with the clients' wishes:⁸⁴ this contributes to a sense of disengagement by clients who feel unable to participate in the resolution of their legal problem. This reframing of disputes and claims within a legal framework understood only by lawyers and judges has the added effect of reinforcing the idea that law is impermeable to the input of the ordinary citizen.

In the course of this transformative process, the lawyers and judges who participate (almost exclusively) in the justice system also engage in critical political discussions. They shape not only the claims brought forward, and the content of the laws, but also the underlying values and norms adopted by and reflected in society.⁸⁵

⁸³ In their qualitative research on how ordinary people both think about and interact with the law, Patricia Ewing and Susan Silbey commented that many of their interviewees experience the imposition of law in their life as a "disturbing force". In this regard they state "[n]ormal appearances are shattered when our motives, relationships, obligations, and privileges are explicitly redefined within 'legal' constructs and categories...[t]he tragic, but sadly commonplace, aspects of life become strangely transfigured through law: harsh words between feuding co-workers become harassment, or the brutal violence committed by a husband against his wife is euphemistically labeled a domestic dispute. In short, when we confront our own lives transposed within the legal domain we often find ourselves subject to a mighty power that can render the familiar strange, the intimate public, the violent, passive, the mundane extraordinary, and the awesome mundane." See Patricia Ewing and Susan B Silbey, *The Common Place of Law* (Chicago, USA: The University of Chicago Press, 1998) at 15-16 [Ewing & Silbey, *The Common Place of Law*].

⁸⁴ Tamara Relis, "'Its not about the Money!': A Theory of Misconceptions of Plaintiffs' Litigation Aims" (2007) 68:3 Pitts LR 701 at 704 [Relis, "Its not about the Money!"].

⁸⁵ In his analysis of comparative federalism, Gerald Baier refers to the concept of the "attitudinalists" which arises in the context of a political science interpretation of judicial power. An attitudinal approach begins with the assumption that judges are making "conscious, political decisions in the way that they interpret the constitution or any other law." Moreover, the behaviour and attitudinal characteristics of the judges are an integral indicator of judicial decisions. See Gerald Baier, *Courts and Federalism – Judicial Doctrine in the United States, Australia and Canada*, (Vancouver, Canada: UBC Press, 2006). More generally, in his critique of private settlements and the corresponding need for public adjudication, David Luban states, "legal rules and precedents are valuable not only as sources of certainty but also as a reasoned elaboration and visible expression of public values." See David Luban, "Settlement and the Erosion of the Public Realm" (1995) 83 Geo LJ 2619 at 2626.

One manifestation of this norm-creation occurs in the context of precedential judgments whereby judges are not only resolving private parties' disputes, but also engaging in the regulation of future behaviour and the future outcome for similarly situated parties in similarly situated cases or negotiated settlements.⁸⁶

In his work on the transformation of the traditional litigation model to a newer public law model of litigation in 1976, Chayes examined the expanded role of the judge in the newer litigation model. In so doing, Chayes commented that this expanded judicial role within public law litigation contemplates a judicial process that operates as “an effective mechanism for registering and responding to grievances generated by the operation of public programs in a regulatory state.”⁸⁷ But, perhaps more significantly and more directly relevant to the political nature of the litigation process, Chayes suggests that the process of fact-finding within public law litigation,

begins to look like the traditional description of legislation: Attention is drawn to a ‘mischief’, existing or threatened, and the activity of the parties and the court is directed to the development of on-going measures designated to cure that mischief. Indeed, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, pro tanto, a legislative act...⁸⁸

The civil justice system articulates citizens' legal rights and duties and, in some instances, the system will protect citizens' rights vis-à-vis the state. However, the judicial process is criticized as being inconsistent with democratic principles because while it may be “for the people,” it is certainly not “by the people.”⁸⁹ One of the

⁸⁶ Farrow, *Civil Justice, Privatization and Democracy*, *supra* note 3.

⁸⁷ Abram Chayes, “The Role of the Judge in Public Law Litigation” (1976) 89 Harv L Rev 1281 at 1308 [Chayes, “The Role of the Judge in Public Law Litigation”].

⁸⁸ Chayes, “The Role of the Judge in Public Law Litigation”, *ibid* at 1297.

⁸⁹ Some maintain that because the law favours maintaining the status quo and the courts apply the law, the legal process in the judicial system forms an “integral part of the general apparatus which holds the existing governmental arrangements in place and places a series of obstacles in the way of those who struggle to bring about political change.” Hutchinson, *The Province of Jurisprudence*, *supra* note 7 at 167. See also

objections being that decision-making in the courts, and even more particularly so in the context of constitutional review, is antithetical to the concept of majority-rule, a cornerstone of democratic systems.⁹⁰ In speaking about the United States Supreme Court, John Hart Ely stated, “[t]he Court may be purseless and swordless, but its ability importantly to influence the way the nation functions has proved great, and seems to be growing all the time.”⁹¹ Within the United States, the debate continues over the extent of the political nature of the legal process and the corresponding appropriateness of unelected judges defining public policy that unavoidably includes the delineation of societal norms and values.⁹²

In the outset of the Charter-era in Canada, Patrick Monahan predicted that the *Canadian Charter of Rights and Freedoms*⁹³ was likely to have a significant impact on public policy outcomes. As such, both the political nature of the Supreme Court’s role and the underlying political theory guiding the Supreme Court in cases of constitutional review needed to be openly acknowledged and articulated.⁹⁴ In acknowledging the political nature of the decision-making process, the Supreme Court would “identify the background political ideals which give shape and substance to the *Charter* as a whole...[and that] constructing such a background political theory is a normative exercise, as well as a descriptive one.”⁹⁵ By engaging in this exercise, Monahan contended that the Court would be better equipped to make “excruciatingly difficult

Allan C Hutchinson, “A ‘Hard Core’ Case Against Judicial Review”, (2009) 121:7 Harvard Law Review Forum 1.

⁹⁰ Lawrence, “Justice, Democracy, Litigation”, *supra* note 16 at 468; see also Patrick Monahan, *The Charter, Federalism and The Supreme Court of Canada*, (Toronto, Canada: The Carswell Co. Ltd., 1987) at 7 [Monahan, *The Charter*].

⁹¹ John Hart Ely, *Democracy and Distrust-A Theory of Judicial Review* (Cambridge, USA: Harvard University Press, 1980) [Ely, *Democracy and Distrust*].

⁹² Ely, *Democracy and Distrust*, *ibid* at 43-44; the significance as well as correctness of acknowledging and accepting that judges (particularly in a constitutional setting) impose certain norms and values on the legislative branches through their decision-making function is called into question by Ely who challenges the appropriateness of this approach.

⁹³ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11 [the “*Charter*”]

⁹⁴ Monahan, *The Charter*, *supra* note 90 at 10.

⁹⁵ Monahan, *The Charter*, *ibid* at 12.

moral and political choices demanded by the *Charter*.⁹⁶ The assumption underlying this exercise was the fact that the process relied on by the Supreme Court was political, impacted public policy, and, therefore, involved important normative discussions about the values that were fundamental to the citizenry affected. The focus of this discussion has been on the political nature of public law, including its impact on the development of public policy. However, it is important to not overlook the significance of private law and in particular, the court's role in resolving disputes between private individuals. This broad sphere of law also engages critical political discussions that generate norms and regulate various aspects of our day-to-day lives.

Despite the pervasiveness of civil law in our society and the impact of its creation and administration on our lives, the reality is that citizens are too often spectators in such matters; they are either represented by lawyers and/or required to resolve their legal problems themselves without the assistance of legal representation. In effect, the history of court processes and the development of law within these court processes has involved a stylized conversation between the elite ranks of judges, and lawyers and clients including wealthy individuals and corporate parties financially secure enough to initiate and continue litigation. Ordinary citizens played little or no role.⁹⁷ Notwithstanding the increase of self-represented parties and attempts to make the institutional processes user-friendly, the legal language deployed in the civil justice system continues to be the specialist vernacular of lawyers. Even with procedural reform, it is very difficult for ordinary citizens to participate in the process without legal representation. Despite this difficulty, growing numbers of individuals are compelled to proceed without legal representation.⁹⁸ As a result, many self-represented litigants express anxiety, frustration,

⁹⁶ Monahan, *The Charter*, *ibid* at 12.

⁹⁷ However, the democratic process involving majority rule might also be characterized in this manner; the election by the citizenry of political elites who will then enact enlightened public policy on behalf of the electorate but with little or no further input from the citizens. See Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law & Soc'y Rev* 95 [Galanter, "Why the 'Haves' Come Out Ahead"].

⁹⁸ Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto, Canada: University of Toronto Press, 2012) [Trebilcock, Duggan & Sossin, *Middle Income Access to Justice*]

powerlessness and, ultimately, disengagement when they appear in court without legal assistance.⁹⁹ To the extent that the political nature of the adjudication process and the important role that it plays in a democracy is acknowledged, the fact that a significant portion of individuals are unable to access the adjudication process is inconsistent with the applicability of the Rule of Law as well as principles of democracy. In the recent Supreme Court of Canada decision regarding the constitutionality of hearing fees in British Columbia, Chief Justice McLachlin linked explicitly the importance of access to justice to the Rule of Law in a democracy. In this regard, she reiterated the comments made by Newbury JA in an earlier decision when she stated that,

[i]n the context of legislation, which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.¹⁰⁰

This Supreme Court of Canada decision offers encouragement to the challenge to improve access to justice. The Supreme Court of Canada's rhetoric about access to justice as a basic constitutional principle (based on section 96 of the *Constitution*) that flows from the Rule of Law goes some of the way towards recognizing the importance of access to justice in a democracy. However, it does not go far enough; the thrust of the Supreme Court's decision recommends a much fuller and more substantive effort to ensure meaningful access to justice given the democratic significance associated with individuals being able to raise issues or make claims particularly in relation to government policy and/or action in Court. If the Supreme Court's words are taken seriously, it will mean that more constructive and affirmative action will need to be taken

⁹⁹ Julie MacFarlane, "Identifying and Meeting the Needs of Self-Represented Litigants", *Final Report of the National Self-Represented Litigants Project* (May 2013). Available online at: www.lsuc.onca/uploadedfiles/For_The_Public?About_The_Law_Society/_Decisions/2014/Self_Represented_Project.pdf. [MacFarlane, *Final Report of the National Self-Represented Litigant Project*].

¹⁰⁰ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 4 quoting from *Christie v British Columbia (Attorney General)*, 2005 BCCA 631.

to ensure that the courts are truly open to all citizens, even and especially those that cannot afford lawyers in order that those citizens may actively and meaningfully participate in law-making and law-administering processes integral to a democracy. This citizen participation is crucial to legitimizing the democratic process and individuals' ability to play a role in the democratic process.

The resulting disengagement of ordinary citizens also has serious and lasting consequences for the justice system as well as for the democratic process more generally. To the extent that individuals are unable to participate in the political and legal decision-making processes that affect their lives, they remain disempowered and alienated. The recent United Nations Report on Legal Empowerment noted that, with legal disempowerment, one of the core principles of democracy is undermined because "legitimate power is derived from the freely expressed will of the people."¹⁰¹ Thus, to the extent that individuals are unable to participate, the democratic objective is compromised.

The problems associated with disempowerment and disengagement are exacerbated for those living in poverty or otherwise marginalized communities. Deborah Rhode has suggested "the poor experience more legal difficulties than the average [person]" and are less likely to be in a position to address their problems without assistance.¹⁰² In this regard, empirical research has demonstrated that there is a strong link between unresolved legal problems and social exclusion.¹⁰³ Social exclusion is both a cause and effect of individuals experiencing justiciable problems. More often than not, these individuals experience a combination of problems that include among other things, unemployment, poor skills, low income, lack of housing, high rates of crime and

¹⁰¹ United Nations, *The Report of the Commission of Legal Empowerment of the Poor*, *supra* note 23 at 17.

¹⁰² Deborah L Rhode, *Access to Justice* (New York, USA: Oxford University Press, 2004) at 103 [Rhode, *Access to Justice*].

¹⁰³ Melina Buckley, "Moving Forward on Legal Aid: Research on Needs and Innovative Approaches" (June 2010) at 40. Available online at <http://site.ebrary.com/liboculyork/Doc?id=104257958ppg=1> [Buckley, "Moving Forward on Legal Aid"].

breakdown of the family.¹⁰⁴ Alone or in combination, these problems perpetuate social exclusion, disempowerment and alienation, thereby making it difficult for individuals to resolve issues on their own and almost impossible for them to affect justice in their lives.¹⁰⁵ This disempowerment and corresponding inability to access legal processes in order to address issues or problems reinforces and perpetuates individuals' disengagement: this de-legitimizes the authority of the legal system, the Rule of Law, as well as broader principles of democracy. In this regard, Roderick MacDonald stated that,

the interests disfavoured by the substantive law today are the very same interests that are systematically under-represented in the civil justice system. There is no separating the social forces that produce inaccessible civil justice from the social forces that produce substantially disempowering rules of law. These social forces are in fact, the same.¹⁰⁶

Thus, in light of the cyclical nature of disengagement and marginalization that is both potentially created, as well as reinforced, by a lack of access to justice, these consequences can be particularly severe for individuals who are already disenfranchised. Moreover, the failure to take account of disadvantaged groups or individuals when conceptualizing and/or implementing access to justice initiatives runs the risk of further creating an “underclass of people that are still excluded from the legal system”¹⁰⁷ with no ability to make use of the access to justice reforms offered.¹⁰⁸ One of the ways in which to protect against this negative consequence involves the active engagement of all citizens in discussion and deliberation that ultimately contributes to the creation of a ‘new legal vernacular.’¹⁰⁹ Through meaningful participation that is inclusive of the diverse

¹⁰⁴ Currie, “A National Survey of the Civil Justice Problems”, *supra* note 1.

¹⁰⁵ Roderick MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambition” in Julia Bass, W A Bogart, & Frederick H Zemans, eds, *Access to Justice for a New Century Forward* (Toronto, Canada: The Law Society of Upper Canada, 2005) 19 at 100 [MacDonald, “Access to Justice in Canada Today”].

¹⁰⁶ *Ibid* at 101.

¹⁰⁷ Hughes, “Advancing Access to Justice Through Generic Solutions” *supra* note 41 at 7

¹⁰⁸ Hughes, “Advancing Access to Justice Through Generic Solutions” *supra* note 41 at 7.

¹⁰⁹ Janice Gross Stein & Adam Cook, “Speaking the Language of Justice: A New Legal Vernacular” in Julia Bass, W A Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto, Canada: The Law Society of Upper Canada, 2005) 163 at 170-171 [Gross Stein & Cook, “Speaking the Language of Justice”].

groups and interests in society and reflective of the “complex dynamics between dominant and marginalized groups”, the development of a ‘new legal vernacular’ could assist in developing a community’s legal knowledge as well as normative concepts of justice that are applicable to all members. This would foster citizens’ further ability to understand, engage in and ultimately shape legal institutions and processes.

In considering participation within the specific context of the judicial system, there is a particular need to address the disconnect between the traditional legal framework that focuses on an adversarial process undertaken by more or less evenly matched legal professionals and the modern realities that include significant numbers of self-represented litigants who are at serious disadvantage when engaging the traditional legal system. Unlike professional lawyers, self-represented litigants suffer from a lack of knowledge and familiarity with the formalized processes and procedures, as well as the presence of hostile players (i.e., lawyers, judges and clerks). Given the modern reality facing many self-represented litigants, the question that will be examined in the next section is whether, in the particular context of the civil justice system, access to justice might take account of participatory principles so that self-represented litigants are able to participate in the legal system in a meaningful manner.

In accordance with a broader conceptualization of access to justice that encourages citizen engagement, it is necessary to examine access to justice through the lens of participatory democracy and the democratic benefits and objectives associated with increased citizen participation. In this way, access to justice theory and the policy initiatives that flow from that theory may take account of the potential objectives and benefits associated with participatory democracy. In so doing, it might be better able to improve citizens’ meaningful access to justice.

Democratic Participation and Access to Justice

In the most recent waves of access to justice, I have noted that there is a shift toward a focus on citizen participation. MacDonald stated that “access to justice means most of all that people are able to find justice in their everyday encounters with public officials; it is

about transparency, accountability, integrity and ethics in the delivery of public services.”¹¹⁰ This characterization of access to justice as a ‘public service’ leads to questions about how it might be possible to provide opportunities for ordinary citizens to engage fully in the judicial, legislative and administrative processes in which law is made and administered.¹¹¹ While the practices and procedures followed in the civil justice system may be very different from the procedures adopted by city council when holding public meetings, the theory is that, by participating in one forum, individuals will gain confidence and skills respecting how political and democratic institutions are administered and how they might subsequently engage in decision-making processes; this is consistent with a robust democratic system. Moreover, individuals’ engagement in decision-making processes fulfills important needs related to empowerment, ‘voice’, self-government and community-building; all of these are important aspects of a healthy democratic society. It is in this way that Pateman suggests that participation becomes self-sustaining.¹¹²

By contrast, the failure to promote participation leads to continued disengagement by citizens that is inconsistent with democratic principles. Among other concerns, there is a corresponding loss of legitimacy in the legal institutions where law is made and applied.¹¹³ From a pragmatic standpoint, an approach to access to justice that is informed by principles of participatory democracy and focused on promoting participation by those engaged with the civil justice system is also consistent with the evolving modern realities of self-representation in that same justice system. The question that arises in this regard is pertinent—whether access to justice initiatives can empower individuals to participate meaningfully in the legal decisions and processes that affect their lives and, by extension, the democratic process?

¹¹⁰ MacDonald, “Access to Justice and Law Reform#2”, *supra* note 44 at 319.

¹¹¹ *Ibid* at 319.

¹¹² Pateman, *Participation and Democratic Theory*, *supra* note 18 at 24.

¹¹³ Gross Stein & Cook, “Speaking the Language of Justice”, *supra* note 107.

In answer to this pertinent question and based on the dual role of the courts in “rule-of-law-based democrac[ies],” there is a strong argument that access to justice theory should take account of direct citizen involvement in these adjudicatory law-making processes. Again, this position is bolstered by Susan Lawrence’s arguments about the potential democratic nature of participation in the civil justice system. Because courts are passive institutions in which judges only engage in decision-making in respect of the cases brought before them, “litigation is an important form of self-government in that it allows the individual to invoke the power of the state on his own behalf.”¹¹⁴ The parties, particularly plaintiffs, must bring a case forward for consideration and, in so doing, raise the issues upon which the adjudicator will hear and rule. As a result, in deciding whether to bring forward a case, individuals have the potential to affect participation in terms of issues that impact their lives. The assumption underlying this argument is that the barriers to engagement have been removed such that all of those individuals who wish to raise an issue in a legal context are able to do so. Thus, taking account of both criticisms of the adversarial process and the practical reality of courts’ law-making function, the focus of this part of the chapter is not to suggest that litigation (and the justice system more generally) is the only forum in which participation should be fostered. Rather, as a political process, litigation plays an important role in constructing and administering law in democratic societies. As such, in accordance with democratic principles, litigation is legitimized by meaningful citizen engagement.

However, prior to undertaking this analysis and offering some tentative suggestions for how participation might inform and direct access to justice policy, it is necessary to examine access to justice theory and initiatives from the perspective of meaningful citizen participation consistent with the principles of participatory democracy. This will include an examination of an approach to access to justice that is consistent with the democratic thesis: this approach takes particular account of the need for a new legal vernacular and a corresponding dialogue on concepts of justice. This relationship between access to justice and the principles of participatory democracy is

¹¹⁴ Lawrence, “Justice, Democracy, Litigation”, *supra* note 16 at 467.

further examined within the context of a specific access program undertaken in Connecticut to enhance access to justice through participation. Notwithstanding this encouraging example from Connecticut, the inherent weaknesses in the structure and operation of the civil justice system raise serious questions about whether, for self-represented litigants, meaningful participation is a legitimate or viable foundation for developing access to justice initiatives.

Consistent with a concept of ‘strong democracy’, meaningful participation allows citizens to move away from reliance on experts and toward wider and more frequent direct participation in a variety of legal and political forums. This engagement increases the likelihood that decisions ultimately reached are reflective of the citizens’ own understanding of law and views about justice.¹¹⁵ Access to justice as a goal that both promotes and provides for meaningful engagement by its citizens further allows individuals to participate directly in defining their own conceptualizations of justice. In this regard, access to justice that encourages meaningful participation provides an opportunity for citizens to contribute to the development of social, political and economic forms of justice in society consistent with democratic values and principles. Of course, this theoretical framework entails a commitment to the democratic thesis and a broad involvement by all citizens.

In examining whether access to justice policy might benefit from the infusion of participatory principles, it is important to review some of the objectives associated with the promotion of participation in order to determine whether such goals are consistent with or achievable in the context of access to justice initiatives. As my discussion of participatory democracy more generally shows, one of the objectives associated with the promotion of participation is wide and frequent citizen involvement in the decision-making that affects their lives and their communities. Another of the objectives associated with greater citizen participation is the collective acceptance of the decisions

¹¹⁵ Hutchinson, *The Province of Jurisprudence*, *supra* note 7 at 199. This implies that the conceptualizations of justice that result from this wide and frequent participation reflect some consensus among the citizenry rather than the views of particular individuals better equipped than others to articulate their views.

made in the course of participation. To the extent that individuals are able to provide opinions and deliberate on the issues that affect them, it is maintained that they will be more willing to abide by the decisions that are ultimately made.

This does not mean that every decision will be reached through consensus nor does it mean that all participating individuals will be satisfied with the result obtained in every situation but it does mean that citizens are provided with the opportunity to deliberate, to take action and, in some instances, revisit issues previously decided upon when changes in society dictate.¹¹⁶ While the opportunity to be heard may seem like small or cold consolation for the party that loses its case, safeguarding the right to be heard contributes to the overall legitimacy of the justice system and citizens' confidence in the fairness of a legal process.¹¹⁷ This is particularly relevant in the context of decisions affecting self-represented litigants who are typically compelled to engage the civil justice system on their own.

A participatory approach to access to justice suggests a move away from an exclusive focus on improving access through the provision of traditional legal services or legal representation (the practical thesis). In this context, the provision of traditional legal representation that is focused on meeting "unmet legal needs" is criticized as representing "tokens of power achievement".¹¹⁸ Instead, there would need to be a move toward "redefining the traditional roles played by both the citizens and the legal profession"¹¹⁹ so that individuals are able to gain direct access to various democratic institutions and processes. This applies not simply to where law is administered, but also where law is constituted. This approach also takes account of the social and political

¹¹⁶ Barber, *Strong Democracy*, *supra* note 8.

¹¹⁷ Nourit Zimmerman & Tom R Tyler, "Between Access to Counsel and Access to Justice: A Psychological Perspective" (2010) 37 *Fordham Urb LJ* 473 [Zimmerman & Tyler, "Between Access to Counsel and Access to Justice"]; Tom R Tyler, "What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 *Law & Soc'y Rev* 103 [Tyler, "What is Procedural Justice"].

¹¹⁸ Paul R Tremblay, "Acting 'A Moral Type of God': Triage Among Poor Clients" (1999) 67 *Fordham L Rev* 2475 at 2477 [Tremblay, "Acting 'A Moral Type of God'"].

¹¹⁹ Gross Stein, "Speaking the Language of Justice", *supra* note 109 at 170.

nature of law so that the evaluation of access to justice initiatives is based on how the initiative provides individuals with opportunities to engage meaningfully with the democratic process on their terms.

One of the more potentially specific and positive effects of individuals' direct engagement with the legal institutions is the potential for the 'democratization of law'. This entails a shift away from the professionalization of law that has necessitated the need for full representation and a tentative move toward self-representation and direct engagement.¹²⁰ By contributing through legal processes directly, there is also an opportunity for individuals to develop and incorporate their own distinctive concepts of justice. In developing these ideas, individuals will contribute to and be more likely to accept a legal system that is legitimate and transparent; these objectives are both consistent with democratic values and principles. By contrast, the failure to facilitate participation (as a consequence of a lack of access) results in disengagement by citizens from conversations about justice and from the legal system more specifically.¹²¹ Further consequences associated with this disengagement include the loss of citizens' voluntary adherence to the legal system and a corresponding lack of legitimacy in the legal system.

Given both the potential benefits as well as potential detriments, numerous scholars, including Janice Gross Stein, Lucie White, Marc Galanter and Roderick MacDonald, recommend that the goal of improved access must include direct engagement by all citizens in the legal and political processes that affect them: this is different from more reliance on legal professionals. While this approach does not rule out assistance by lawyers or even full representation by lawyers (and in fact, recognizes the important role that lawyers could play given their training and knowledge base),¹²² it does contemplate a more engaged and balanced relationship between lawyer and client. Pursuant to such a relationship, the lawyer would take better account of the importance of ensuring that individuals are able to participate in the decision-making processes that

¹²⁰ Zimmerman & Tyler, "Between Access to Counsel and Access to Justice", *supra* note 115 at 503-504.

¹²¹ Gross Stein, "Speaking the Language of Justice", *supra* note 109 at 170-171.

¹²² Menkel-Meadow, "The Lawyer's Role(s) in a Deliberative Democracy", *supra* note 12.

affect them. With the aid of certain relevant information, advice and skills, citizens would be able to engage in the construction of a new language of law – a language that is more reflective of the meaning and vocabulary of the citizens it governs. This, in turn, provides an opportunity to further fosters citizens’ ability to both understand and participate in the legal system.¹²³ The failure to cultivate an ordinary language of law and justice disempowers individuals because the use of an “official language,” by necessity, demands official interpreters. Therefore, it serves to exclude ordinary citizens from discussions about justice; a discussion that citizens are capable of having in ordinary language.¹²⁴ In this regard, MacDonald stated,

the imposition of legal language on lay expressions of normativity has the effect of subjecting implicit, variegated pluralist law to explicit, homogeneous, monist law. It thus produces a demand for professional characterization and interpretation, a monopoly of coercive remedy, and a hierarchy of standards of justice.¹²⁵

By contrast, citizens’ direct engagement in legal processes and institutions is reflective of the “living law of everyday human activity”.¹²⁶ From a practical standpoint, the de-mystification of law means that law is made less technical and more relevant to the ordinary citizens that it purports to regulate.¹²⁷ This de-mystification contributes to and encourages the development of the “new legal vernacular” through which citizens further “participate in redefining, reforming and shaping the law and its institutions.”¹²⁸ As a

¹²³ Gross Stein & Cook, “Speaking the Language of Justice”, *supra* note 109 at 170.

¹²⁴ MacDonald, “Theses on Access to Justice” (1992) 7:2 CJLS 23 at 31 & 43 [MacDonald, “Theses on Access to Justice”].

¹²⁵ MacDonald, “Theses on Access to Justice”, *ibid* at 31.

¹²⁶ Ellen Berrey, Steve G Hoffman & Laura B Nielsen, “Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation” (2012) 46:1 Law & Soc’y Rev 1 at 6 [Berrey, Hoffman & Nielsen, “Situated Justice”]; MacDonald, “Access to Justice in Canada Today”, *supra* note 106 at 319.

¹²⁷ Interestingly, there has been a recent trend in superior courts in downtown Toronto respecting the nature of draft orders prepared by judges following motions. Specifically, certain judges have begun to move away from the traditional legal language and format used in draft orders and instead engage plain language in order to ensure that the directions are understandable to those subject to the order.

¹²⁸ Gross Stein & Cook, “Speaking the Language of Justice”, *supra* note 109 at 170.

result, citizens' engagement with and shaping of the legal system becomes self-perpetuating and ultimately contributes to common ideas about justice.

Underlying this development of a “new legal vernacular” are assumptions that litigants' understanding of law, legal processes, experiences in law and expectations of fairness affect their legal engagement.¹²⁹ All of these may be either encouraged or thwarted by the efforts undertaken in promoting access to justice. Individuals' experiences, perceptions and expectations of law can be determinative of whether they in fact ‘turn’ to law and/or continue to engage with law-making and law-administering processes that form the basis of the modern political authority.¹³⁰ Stuart Hampshire suggests, “[r]espect for a process can, as a matter of habit, coexist with detestation of the outcome of the process, and this is particularly in democracies.”¹³¹ The procedures for conflict resolution may be challenged and subject to reform in order to ensure fairness, but their existence is necessitated as a way of resolving political and moral conflict.¹³²

In the particular context of the civil justice system, considerable socio-legal research has suggested that when evaluating the fairness of a legal process, individuals are more likely to express satisfaction with the legal process if they feel that they were able to speak and be heard by the decision-maker.¹³³ In many instances, the litigants' positive evaluation of the process is less tied to a particular outcome in the proceeding,

¹²⁹ Berrey, Hoffman & Nielsen, “Situated Justice”, *supra* note 126 at 7.

¹³⁰ Mathieu Deflem, *Sociology of Law* (Cambridge, UK: Cambridge University Press, 2008) at 37.

¹³¹ Stuart Hampshire, *Justice is Conflict* (Princeton, USA: Princeton University Press, 2000) at 46 [Hampshire, *Justice is Conflict*].

¹³² Hampshire, *Justice is Conflict*, *ibid* at 26.

¹³³ Zimmerman & Tyler, “Between Access to Counsel and Access to Justice”, *supra* note 115; Tyler, “What is Procedural Justice”, *supra* note 115; Paula Hannaford & Nicole Mott, “Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations” (2003) 24 *Just Sys J* 163 at 179 [Hannaford & Mott, “Research on Self-Represented Litigation”]; William M O’Barr & John M Conley, “Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives” (1985) 19 *Law & Soc’y Rev* 661. A more detailed discussion of the procedural fairness research is undertaken in chapter 5 of this thesis.

but more tied to ‘having a voice’.¹³⁴ Thus, by ensuring that the parties are able to express their viewpoint and be heard in a meaningful manner, the parties may begin to feel that the justice system operates fairly, notwithstanding the particular result obtained.¹³⁵ Individuals are also more likely to accept the decision made if they believe that the procedure through which the decision was derived involved a fair process; a process in which they were able to participate.¹³⁶ Nowhere is this more significant than in the case of self-represented litigants who do not have an advocate speaking on their behalf; they are speaking directly within the adjudicative process.¹³⁷ For self-represented litigants, it could be argued that having a voice and being heard potentially has an immediate and direct impact on their perceptions about the legitimacy of the particular process as well as their potential willingness to participate in other contexts or forums.

The promotion of greater participation and engagement by individuals in the legal institutions and processes that affect them also has the added affect of strengthening the legitimacy of the justice system as part of the greater democratic process. Direct participation in the judicial system’s law-making processes has the potential to corroborate the democratic aspects of this law-making process. Drawing on themes of legal consciousness and democratic dialogue, it is through individuals’ engagement with law and legal practices that “ordinary people give flesh and meaning to what is otherwise an abstract but binding form.”¹³⁸ In his discussion of legal consciousness, Barclay suggests that individuals’ everyday interaction with law and decisions about law,

offers the potential for new interpretation, new legal claims, the introduction of legality into realms of social life that it had never before occupied, or the

¹³⁴ The research referenced in footnote 133 makes reference to the distinction between process and outcome when evaluating the procedural fairness of a procedure.

¹³⁵ Tyler, “What is Procedural Justice”, *supra* note 117.

¹³⁶ Hannaford & Mott, “Research on Self-Represented Litigation”, *supra* note 133 at 179.

¹³⁷ The researcher Tom Tyler has suggested that while is expanding research on the criteria used by individuals to evaluate the fairness of a legal procedure, there is a dearth of research regarding the specific context of self-represented litigants’ evaluation of the fairness of a process in which they were involved. See Zimmerman & Tyler, “Between Access to Counsel and Access to Justice”, *supra* note 117 at 505.

¹³⁸ Anna-Maria Marshall & Scott Barclay, “In Their Own Words: How Ordinary People Construct the Legal World” (2000) *Law & Soc Inquiry* 617 at 618 [Marshall & Barclay, “In Their Own Words”].

re-shaping of common understanding of that social life. Thus, even as legality constrains the range of accepted options for individual action, people nevertheless have opportunities to redefine and challenge these constraints.¹³⁹

Moreover, through meaningful participation in the development and administration of the laws that govern them, individuals will be in a better position to infuse those laws with their own conceptualizations of justice, freedom and equality. The impact of these changes potentially extends beyond the individual's particular circumstances.¹⁴⁰

Lucie White has suggested that the practice of law has cultural meaning and, as such, can and should include a dialogue about social justice.¹⁴¹ Thus, to the extent that individuals are able to move away from the traditional roles played by clients and lawyers within the legal system and engage directly in this conversation, they have the opportunity to participate in the development of norms of justice and equality that are reflective of their collective lives and experiences. This is consistent with a broad concept of 'ethico-political' justice envisioned by Agnes Heller. She argues that justice includes the "perspective, principles and procedures for evaluating institutional norms and rules."¹⁴² In this regard, like Janice Gross Stein, Heller's concept of justice is not limited to a concept of justice that is based on distributive principles, but rather includes the key component of citizenship. This enables individuals to deliberate about problems in the community and attempt to confront those problems in a collective manner that is "without dominance and with mutual tolerance of difference."¹⁴³ Thus, according to Heller, the 'good citizen' is one that is "committed to value discourse as the just procedure;" the resulting norms and values are accordingly validated through consensus

¹³⁹ Marshall & Barclay, "In their Own Words", *ibid* at 618.

¹⁴⁰ MacDonald, "Access to Justice in Canada Today", *supra* note 106 at 319.

¹⁴¹ White, "To Learn and Teach: Lessons from Drefontein", *supra* note 45 at 758.

¹⁴² Austin Sarat & Thomas R Kearns, eds, *Justice and Injustice in Law and Legal Theory* (Ann Arbor, USA: University of Michigan Press, 1996) at 5 [Sarat & Kearns, *Justice and Injustice in Law*]; see also Agnes Heller, *Beyond Justice* (Oxford, UK: Basil Blackwell, 1989) at 260-270 [Heller, *Beyond Justice*].

¹⁴³ Sarat & Kearns, *Justice and Injustice in Law*, *ibid* at 5.

such that just procedures provide a framework for the possible good lives for all citizens.¹⁴⁴

In a similar vein, Benjamin Barber suggests that terms such as ‘justice’ are not to be understood as abstract terms, but rather as political values that cannot be apprehended or practiced except in the setting of citizenship.¹⁴⁵ Moreover, the concepts of democracy and justice are contingent and interdependent: justice is not sustainable when delivered as a command and democracy is weak when it is restricted to counting votes as a means of obtaining a political outcome.¹⁴⁶ Through democratic dialogue, concepts such as justice become the subject of debate, challenge, valuation and transformation in accordance with the needs and circumstance of the particular political communities.¹⁴⁷ This is not to suggest that the concepts are only relative and relevant to the immediate will of citizens. Rather, it is that these terms are truly reflective of a citizenship that has, through meaningful dialogue and deliberation, encapsulated certain ideas and perspectives. In this regard, ‘voice’ becomes an important prerequisite for a discourse on justice. Concepts of justice or injustice can be developed and assessed from the perspective of the participant (or aspiring participant) in a society that is more or less attuned and committed to giving full and effective ‘voice’ to its members.¹⁴⁸ Sarat’s conceptualization of justice contemplates, as a pre-condition, participation that includes a “situated exploration of a legal order’s particular self-understanding and arrangements.”¹⁴⁹ Lawrence contends that the reality is that “courtrooms are only one of the few remaining forums where justice is debated daily.”¹⁵⁰ Thus, in a modern democracy, a significant portion of this dialogue and deliberation about concepts such as justice occurs in the civil justice system. Consequently, meaningful participation by

¹⁴⁴ Heller, *Beyond Justice*, *supra* note 142 at 269 & 273.

¹⁴⁵ Barber, *Strong Democracy*, *supra* note 8.

¹⁴⁶ Guinier, “Supreme Democracy”, *supra* note 9 at 66.

¹⁴⁷ Barber, *Strong Democracy*, *supra* note 8 at 156.

¹⁴⁸ Sarat & Kearns, *Justice and Injustice in Law*, *supra* note 142 at 12.

¹⁴⁹ Sarat & Kearns, *Justice and Injustice in Law*, *supra* note 142 at 12.

¹⁵⁰ Lawrence, “Justice, Democracy, Litigation”, *supra* note 16 at 470.

individuals in the civil justice system may provide an opportunity for deliberation on concepts of justice. As a result, the gap between institutions and citizens may be better bridged and even abridged.

This abridgement is accomplished in part by creating an “enabling environment” in which the opportunities for participation are expanded. As such, in the context of the civil justice system where barriers have resulted in the continued exclusion of ordinary citizens, creating an environment that expands and encourages opportunities for citizens to participate is an important consideration.¹⁵¹ This continued exclusion, in turn, leads to important debates and discussions within the access to justice literature regarding the best means to address and surmount these barriers.¹⁵²

A Case Study from Connecticut on Participation and Access to Justice

By way of confirmation, anthropological research conducted in respect of a participatory democracy project highlights the importance of a participating citizenry. It establishes a link between participation and community-building and the corresponding benefits associated with ‘democratic participation’ as a means for individuals to access justice in society.¹⁵³ This community lawyer project was undertaken in Winsted, Connecticut. A lawyer was hired to assist members of the town in building civic education and participation at the local level. Local government did not hire the lawyer: she was funded through a private charitable organization. The lawyer’s task was to provide individuals in the community with the “means by which they could translate personal concerns about the community into community action.”¹⁵⁴ Unlike a traditional lawyer-client relationship, the lawyer in this case study did not assume responsibility for the community members’ legal issue but rather provided advice and information that allowed

¹⁵¹ Barber, *Strong Democracy*, *supra* note 8 at 204.

¹⁵² See for example, Ronald W Staudt & Paula L Hannaford, “Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers” (2002) 52 *Syracuse L Rev* 1017; Bonnie Rose Hough, “Evaluation of Innovations Designed to Increase Access to Justice for Self-Represented Litigants”. Available online at www.courtinfo.ca.gov/programs/equalaccess/evaluation; Richard Zorza’s Access to Justice Blog. Available online at comment-reply@wordpress.com.

¹⁵³ Nader, “Processes for Constructing (No) Access to Justice”, *supra* note 31 at 505-508.

¹⁵⁴ *Ibid* at 505.

the citizen to take action. By providing individuals with information on the relevant law and procedures of local government, advising them on the use of media and lobbying, attending public meetings to ensure that officials followed procedures, and compiling information regarding emerging issues in the community, the lawyer was able to assist citizens “participate and become involved in the process of governing themselves.”¹⁵⁵ In describing her role in the community, the lawyer stated that “citizens without adequate information cannot exercise their rights and do not know what to expect from their government because they do not know what to demand” or presumably how to make demands.¹⁵⁶ This lack of information was seen as directly impairing the citizens’ capacity to engage in public dialogue. In turn, this further undermined both the ability of citizens to participate in the decision-making process and the accountability of the governing officials.

The nexus between a lack of information about rights and processes and an individual’s incapacity to engage in the democratic process at any level is relevant in the context of access to justice. Even more so, it is pertinent to self-represented litigants’ direct participation in the civil justice system. The community lawyer project provides a concrete example where the dissemination of legal information and related skills was thought to have a direct impact on citizens’ ability to participate and ultimately self-govern. In light of the fact that certain access to justice initiatives such as self-help are directed at providing self-represented litigants with legal knowledge so that they may navigate the civil justice system more effectively, it might be asserted that such initiatives, like the community lawyer project, promote opportunities for greater citizen participation; they provide much needed information and advice about particular legal processes. Thus, to the extent that access to justice theory is informed by principles of participatory democracy and direct citizen engagement, a central question that is how access to justice initiatives might be developed to further enhance meaningful participation. Related to this question are also questions about how such initiatives might

¹⁵⁵ Nader, “Processes for Constructing (No) Access to Justice”, *supra* note 31 at 505-508.

¹⁵⁶ Nader, “Processes for Constructing (No) Access to Justice”, *supra* note 31 at 506.

be reconciled with new approaches to lawyering that take better account of the need to foster decision-making by individuals in their own legal matters. The challenge in substantiating these initiatives is to account for the myriad of issues that arise when individuals are engaged in legal matters in a direct manner.

The Possibility of Meaningful Participation in the Civil Justice System

In examining the possibilities for meaningful participation, it is important to canvass some of the questions that are raised in respect of the viability of meaningful participation in the civil justice system whereby individuals are able to have an impact on the decision-making process. In addition to various informational, procedural and operational barriers that specifically impede participation by non-lawyers,¹⁵⁷ there are also substantive questions about the nature of the adversarial system and whose interests the civil justice system is in a position to serve.

These questions are particularly pertinent for any individual attempting to assert a social justice agenda within the traditional court system. Gary Bellows suggests that “[i]f a major goal of the unorganized poor is to redistribute power, it is debatable whether the judicial process is a very effective means toward that end.”¹⁵⁸ Gabel and Harris further contend that the legal system and, more particularly, the court system and the lawyers that act within it serve to legitimate the existing power structures in society. Thus, notwithstanding the significant and growing number of self-represented litigants engaged in the civil justice system, the existing legal system and the organization of the legal profession are criticized as being primarily designed to resolve the private disputes of corporations and wealthy individuals able to afford legal representation.¹⁵⁹ The civil justice system is, as it were, part of the problem, not the solution to a democratic deficit.

¹⁵⁷ These barriers are discussed in greater detail in chapters seven and eight.

¹⁵⁸ Anthony V Alfieri, “The Antinomies of Poverty Law and A Theory of Dialogic Empowerment” (1987-88) 16 NYU Rev L & Soc Change 659 at 689 [Alfieri, “The Antinomies of Poverty Law”] quoting Gary Bellows, “The New Public Interest Lawyers” (1970) 70 Yale LJ 1069.

¹⁵⁹ Stephen Wexler, “Practicing Law for Poor People” (1970) 70 Yale LJ 1049 [Wexler, “Practicing Law for Poor People”].

This criticism underscores the need to take account of the existing distribution of power and the potential for re-distribution of power when assessing whether meaningful participation is possible. In responding to the question of whether Canada has adequate access to justice, Chief Justice McLachlin answered in the negative: “Among those hardest hit are the middle class and the poor. We have wonderful justice for the corporations and for the wealthy.”¹⁶⁰ In this regard, courts are characterized as “venues that simply distribute power to power.”¹⁶¹ This skepticism is further reflected in the claim that “the legal process is strongly aligned with the interests of the established order which is better able to access its formidable authority and institutional resources in order to resist change and/or to divert those transformative efforts into debilitating and decelerating channels.”¹⁶² Thus, to the extent that the justice system only serves certain groups’ needs and certain existing power structures, increased participation by excluded groups may fall victim to claims of empty or cosmetic participation. This is due to the fact that there is no legitimate opportunity for the excluded groups to affect the redistribution of power and thereby affect decisions and change the legal vernacular.

Because the civil justice system is built on the resolution of individual cases,¹⁶³ there is also continued skepticism over whether it is possible for individuals who are already disempowered or disengaged from society to have any meaningful impact on the existing social and political systems through litigation. In the specific context of poverty law, Alfieri suggests that the direct service tradition of providing civil legal assistance to the poor has been marred by the “dominant tendencies prescribing the routine treatment of poor clients as isolated and passive individuals without common attributes or bonds.”¹⁶⁴ The result is a failure to address legal disputes in a contextual manner thereby

¹⁶⁰ Michael McKiernan, “Lawyers Integral in Making Justice Accessible: Chief Justice Beverly McLachlin”, *Law Times*, 21 February 2011, <http://www.lawtimesnews.com/201102218262/HeadlineNews/Lawyers-integral-in-making-justice-accessible-McLachlin>.

¹⁶¹ Farrow, *Civil Justice, Privatization, and Democracy*, *supra* note 3 at 28.

¹⁶² Hutchinson, *The Province of Jurisprudence Democratized*, *supra* note 7 at 156.

¹⁶³ This is notwithstanding the emergence of class actions in specific legal contexts.

¹⁶⁴ Alfieri, “The Antinomies of Poverty Law”, *supra* note 158.

inhibiting attempts at client politicization, consciousness-raising and potential mobilization.¹⁶⁵

By contrast, what is really required is collective political action and the opportunity to engage in “dialogue regarding the economic, political and social forces engendering and surrounding legal conflict.”¹⁶⁶ This is unlikely to occur in the context of the civil justice system. Moreover, the corresponding failure to contextualize individual cases within larger discussions of class and power reinforces “dependence, isolation, passivity and fragmentation in poor communities.”¹⁶⁷ The very fact that individuals’ claims are isolated, in the sense of being independent and singular, suggests that the system has a limited ability or willingness to affect broader social and political systems. The isolation associated with individual cases combined with the fact that, typically, there are limited legal resources available to assist these individuals means that claims may be framed in standard legal patterns that are easier for the trained lawyer to resolve and ‘move on’ to the next client in need. Proceeding in this manner does not encourage active client involvement and the client empowerment that comes with being engaged in the decision-making process, particularly when it is remembered that the resources available to these individuals and the legal professionals who assist them are very limited.

This concern about the negative impact of isolation is magnified when the individual attempting to engage is a self-represented litigant. Thus, even if individuals are able to articulate a claim in the civil justice system, the overall impact of such a case may be minimal if it is assumed that the implications of the case are limited to the facts of the particular case. To the extent that this portrayal is reflective of how the judicial system operates, the provision of information or skills that allow an individual to assert a claim and articulate a position in the civil justice system may fall victim to Arnstein’s criticism about empty participation reflected in an inability to redistribute power and

¹⁶⁵ Alfieri, “The Antinomies of Poverty Law”, *supra* note 158 at 684.

¹⁶⁶ Alfieri, “The Antinomies of Poverty Law”, *ibid* at 684.

¹⁶⁷ Alfieri, “The Antinomies of Poverty Law”, *ibid* at 683-685

resources and a reinforcement of perceptions of disengagement and powerlessness.¹⁶⁸ Existing power and income inequalities may also reinforce the idea that courts, and the adversarial system more generally, are likely to work in favour of those parties that already enjoy power advantages in the greater society.¹⁶⁹

However in an effort to end this discussion on a positive note, Trevor Farrow suggests that there are “many disputes for which the court system, guided by fair procedures administered under the watchful eye of the public, is more appropriate for redressing power imbalances and resulting injustices that can have far-reaching implications for disputants as well as the wider community.”¹⁷⁰ Thus, although substantive concepts of justice and fairness will presumably vary over time and across communities, fair and just procedures that ensure that individuals are able to engage in the resolution of conflicts and to dialogue about substantive concepts of justice represent a “fundamental kind of fairness.”¹⁷¹ In this regard, a key means of providing for both fair procedures as well as fair institutions is a reinvigorated adherence to the maxim, ‘hear the other side’. This prescription allows for the “fair weighing and balancing of contrary arguments” and for taking account of the distribution of power. Otherwise, this might prevent certain parties from having a say and being heard. Both of these are necessary precursors to not only conflict resolution, but also meaningful justice discourse. Thus, recognizing the role that procedural processes play in both promoting and protecting meaningful access within the formal court system, the imperative question arises—how can and should the design and enforcement of these procedural processes take account of who is attempting to access the processes and their abilities in so doing?

¹⁶⁸ Arnstein, “A Ladder of Citizen Participation”, *supra* note 43 at 216.

¹⁶⁹ Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 *Law & Soc’y Rev* 95.

¹⁷⁰ Farrow, *Civil Justice, Privatization, and Democracy*, *supra* note 97 at 28-29.

¹⁷¹ Hampshire, *Justice is Conflict*, *supra* note 131 at 4.

Conclusion

This chapter has examined the principles of participatory democracy in so far as they inform and enrich a concept of access to justice that promotes meaningful participation by citizens in a variety of political and legal decision-making processes and institutions (the democratic thesis). In light of the benefits associated with nurturing meaningful participation, empowerment and engagement are worthy objectives for a broader conceptualization of access to justice. Moreover, the fulfillment of these objectives is consistent with the important role that law and legal institutions play in individuals' lives and in a democracy more generally. However, while these may be worthwhile goals, there are serious questions about the possibility of cultivating meaningful participation within the civil justice system. This is particularly so given the existing structure of the legal system, the manner in which the adversarial system is operationalized, and the role that the legal system insiders play in administering the system.

In light of these challenges, the next chapter will examine the particular context of self-represented litigants. They are uniquely situated within this discussion due to the fact that they are attempting to participate directly and without the assistance of lawyers. Instead, they are seeking to participate with the assistance of self-help legal services. The question that arises in this regard is whether self-help legal services are construed as a form of empowerment (and therefore, consistent with a broader conceptualization of access) or are a form of abandonment that contributes to the self-represented litigants' disempowerment and disengagement.

CHAPTER FOUR

SELF-REPRESENTED LITIGANTS AND SELF-HELP SERVICES

The crisis in access to justice in Canada has both driven and resulted in a variety of policy initiatives that aim to address the problem.¹ Many of these initiatives have been directed at assisting the growing number of self-represented litigants who continue to enter the civil justice system.² In statistical terms, a recent report in Ontario suggests that approximately 40% of civil law litigants represent themselves and this percentage increases dramatically in certain legal fields, such as family law, where as high as 60-70% of litigants in family court are self-represented.³ Moreover, it is known that, as retainers run out and clients are unable to pay their mounting legal bills, the percentage of self-represented litigants also increases.⁴ As a consequence of being unable to afford legal fees, individuals are unable to resolve legal problems at earlier stages and their problems can become worse.⁵ Moreover, low- and moderate-income individuals have

¹ In her foreword to the Action Committee on Access to Justice in Civil and Family Matters' Final Report, Chief Justice McLachlin comments "as Canadians celebrated the new millennium, it became clear that we were increasingly failing in our responsibility to provide a justice system that was accessible, responsive and citizen-focused. Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights." See Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil and Family Justice – A RoadMap to Change" Final Report (October 2013). [Http://www.cfcj.fjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf](http://www.cfcj.fjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf) [Action Committee, Final Report on Access to Civil and Family Justice].

² Trevor CW Farrow, Diana Lowe, QC, Bradley Albrecht & Martha E Simmons, "Addressing the Needs of Self-Represented Litigants in the Canadian Justice System", A White Paper Prepared for the Association of Canadian Court Administrators (March 27, 2012). Available online at www.cfcj.fjc.org [Farrow et al., "Addressing the Needs of Self-Represented Litigants"].

³ Julie MacFarlane, "Identifying and Meeting the Needs of Self-Represented Litigants", *Final Report of the National Self-Represented Litigants Project* (May 2013) at 86. Available online at www.lsuc.onca/uploadedfiles/For_The_Public?About_The_Law_Society/_Decisions/2014/Self_Represented_Project.pdf [MacFarlane, *Final Report of the National Self-Represented Litigants Project*]. In the American context, the President of the American Bar Association recently commented that approximately "80% of litigants remain unrepresented in all civil matters." See Victor Li, "William Hubbard Speaks about the Importance of Technology in Expanding Access to Justice" (March 17, 2016) ABA Journal. Available online at: www.abajournal.com/news/article/william_hubbard_speaks_about_the_importance_of_technology_in_expanding_access.

⁴ Ontario Bar Association, "Getting it Right", Report of the Ontario Bar Association Justice Stakeholders Summit (June 2007). Available online at www.OBA.org/en/pdf/Justice%20Summit.sml.pdf.

⁵ Action Committee, *Final Report on Access to Civil and Family Justice*, *supra* note 1.

historically been among those likely to be self-represented. However, while these individuals are disproportionately self-represented, the latest empirical research in Canada indicates that 50% of the self-represented litigants surveyed had a university degree and approximately 40% of those interviewed had an income of over \$50,000.00 per year.⁶ In seeking to better understand who resolves their legal problems through self-help, Ab Currie stated that,

[i]n statistical terms, the relationship between the action taken to resolve problems and most socio-economic characteristics is statistically significant but extremely weak. There appears to be a slight tendency for self-helpers to be older, to have higher incomes, to be somewhat better educated and to be single or married or a couple with no children. Respondents who are self-helpers were less likely to report that they have a physical or mental health problem.⁷

This data appears to be reflective of a shift in the demographic make-up of self-represented litigants. As self-representation expands to include members of the traditional middle class, more people are attempting to resolve their legal problems without professional assistance.⁸ In the American context, this phenomenon was observed by Sande Buhai who, citing a 1994 American Bar Association report, noted that there was, “an increasing number of middle-income individuals choosing to resolve their legal issues without the help of a lawyer.”⁹ However, as discussed in chapter two of this thesis, the assessment of who is representing themselves needs to take account of the

⁶ MacFarlane, *Final Report of the National Self-Represented Litigants Project*, *supra* note 3 at 8.

⁷ Ab Currie, “Self-Helpers Need Help Too” (Draft 2010) at 8. Available online at <http://www.lawforlife.org.uk/data/files/self-helpers-need-help-too-ab-currie-2010-283.pdf/> [Currie, “Self-Helpers Need Help Too”].

⁸ There are different ways to define the middle class; if you define it by income earned, it would encompass families that earn between \$32,000.00 and \$95,000.00 per year (approximately 40% of Canadians meet this criteria. However, it may also be defined in terms of the amount of discretionary income that a family has to spend on non-essential items or to save. Research done by Statistics Canada in 1991 suggested that this only constituted 25% of the population. Please see Tasmin McMahan, “Who Belongs to the Middle Class in Canada?” (MacLean’s, February 26, 2014) Available online at: <http://www.macleans.ca/economy/who-belongs-to-canadas-middle-class/>.

⁹ Sande L Buhai, “Access to Justice for Unrepresented Litigants: A Comparative Perspective” (2009) 42 Loy LA L Rev 979 at 983 [Buhai, “Access to Justice for Unrepresented Litigants”]; see also Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans: Major Findings from the Comprehensive Legal Needs Study (1994)* available online at <http://www.abanet.org/legalservices/downloads/SC/aid/legalneedsstudy.pdf>.

reasons that an individual represents him- or herself and the fact that different groups of individuals are typically addressing different kinds of legal problems.¹⁰ In light of all of these dimensions, a shift in demographics has important implications for how we think about access to justice and how we develop initiatives that are aimed at assisting self-represented litigants achieve justice. To the extent that a broader spectrum of individuals (including for example, those who are university-educated and not otherwise dealing with issues of marginalization and exclusion) are self-represented, it becomes important to examine how access to justice policy might better support their attempts to do so. As part of the development of strategies and initiatives that support self-represented litigants, it will be necessary to ensure that self-represented litigants are able to engage with the legal processes and institutions essential to the resolution of their legal matter. The promotion of self-represented litigants' direct engagement with various legal processes and institutions is consistent with the democratic thesis that seeks to engage citizens directly in the decision-making processes that affect them.

As noted in chapter three, the development and administration of law has historically been the exclusive domain of specialists, namely members of a trained legal profession and a judiciary derived from the legal profession.¹¹ In contrast, self-represented litigants who do not rely on an intermediary (i.e., a lawyer or paralegal) have an opportunity to influence directly the legal decision-making that is relevant to their particular legal problem consistent with the 'politics of amateurs' rather than the 'politics of specialists.' This opportunity to be heard and potentially influence the decision-making process not only impacts the individual's perceptions about the fairness and justness of the particular process but also potentially creates a history and context for further participation.¹² To the extent those individuals believe that they were provided

¹⁰ Please see chapter two of this thesis.

¹¹ Participatory democracy has been described as the 'politics of amateurs' whereas representative democracy involves the 'politics of specialists.' See Benjamin R Barber, *Strong Democracy - Participatory Politics for a New Age* (Berkeley, USA: University of California Press, 1984) at 152 [Barber, *Strong Democracy*].

¹² Lucie E White, "Mobilization on the Margins of Litigation: Making Space for Clients to Speak" (1987) 16 NYU Rev L & Soc Change 535 [White, "Mobilization on the Margins"]. In her article, White suggests that the objectives associated with mobilizing poor people to affect welfare change should take account of

with an opportunity to ‘have a say’, they may be more inclined to believe that they are entitled to a say. Consequently, they may begin to exercise a right to have a say in other forums or contexts.

In this chapter, I intend to review briefly some of the particular barriers that it is assumed self-represented litigants face when they attempt to engage in the civil justice system without traditional legal representation. These include operational, attitudinal, and structural barriers within the operation of the civil justice system. Ultimately, the concrete nature and presence of these various barriers will be examined in greater detail in chapter 7 in the context of a discussion about self-represented litigants’ experiences in this research project. However, prior to doing so and in the course of examining the viability of meaningful participation by self-represented litigants and the role of self-help legal services in furthering meaningful participation, it is necessary to flag some of the potential challenges faced by these individuals.

Due to the fact that the numbers of self-represented litigants are increasing, there has been a corresponding proliferation of access to justice initiatives that are aimed at improving the individual’s access to justice. One such initiative targeting self-represented litigants directly is self-help legal services. The objective of self-help legal services is to provide self-represented litigants with legal information and advice in order that they may better represent themselves. In accordance with the democratic thesis, this initiative potentially offers an opportunity for self-represented litigants to enhance the meaningfulness of their participation. Thus, in this chapter, I will examine the development of self-help legal services in various jurisdictions as well as the potential benefits associated with this initiative from a democratic perspective. Finally, I will canvass some of the critiques associated with self-help legal services. This will include an examination of certain broader concerns about whether self-help represents a form of empowerment or a form of disempowerment and whether there is a corresponding abdication of responsibility by policy-makers, government and the legal profession.

the fact that the benefits associated with engaging poor clients may be quite modest and less comprehensive however that does not diminish the potential impact on future action by those individuals.

Operational Barriers to Access

Operational barriers inherent in civil justice procedures make it difficult for non-lawyers to enter and navigate through the system. Examples of this include courthouses that remain relatively inaccessible in terms of hours of operation and location (i.e., outside of highly populated areas) and court staff that are not typically in a position to provide extra assistance to self-represented parties who are unfamiliar with the court processes or forms.¹³ Moreover, assistance by court staff has historically been viewed as involving the provision of legal advice, which only lawyers are regulated to provide in all Canadian jurisdictions by virtue of their regulatory bodies. The adherence to procedures, which are generally unknown to non-lawyers and difficult to understand without legal intervention, compound the problems for self-represented litigants. This is further complicated by the fact that individual courts may invoke different local practices and procedures that are typically only familiar to the lawyers who regularly attend in that particular court. In light of these concerns, there have been calls to understand better the legal needs of self-represented litigants, particularly poor and disadvantaged self-represented litigants, when attending in court.¹⁴ The response has been a variety of studies that have examined the accessibility of courts, including the processes and procedures undertaken by individual courts and the staff that operate within these courts.¹⁵

As a result of this field of research and the burgeoning number of self-represented litigants, there have been some efforts to re-design court processes in order to ensure that the civil justice system is more user-friendly for non-lawyers.¹⁶ This has precipitated a move toward streamlined, as well as less formal, procedures and forms.¹⁷ In Ontario,

¹³ Farrow et al., “Addressing the Needs of Self-Represented Litigants”, *supra* note 2.

¹⁴ Hazel Genn, “Tribunals and Informal Justice” (1993) 56 Mod L Rev 393 at 397 [Genn, “Tribunals and Informal Justice”].

¹⁵ For example, see Ronald W Staudt & Paula L Hannaford, “Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers” (2002) 52 Syracuse L Rev 1017 [Staudt & Hannaford, “Access to Justice for the Self-Represented Litigant”]; Bonnie Rose Hough, “Evaluation of Innovations Designed to Increase Access to Justice for Self-Represented Litigants”. Available online at www.courtinfo.ca.gov/programs/equalaccess/evaluation.

¹⁶ Farrow et al., “Addressing the Needs of Self-Represented Litigants”, *supra* note 2.

¹⁷ Genn, “Tribunals and Informal Justice”, *supra* note 14 at 397.

examples of this include simplified procedures and higher monetary limits in small claims courts where there are a significant numbers of self-represented individuals appearing; the inclusion of more duty counsel who facilitate self-represented litigants' interaction in the civil justice system; and the simplification of court forms which incorporate plain language such that non-lawyers can complete the forms without legal assistance and then file the forms electronically.¹⁸ These initiatives represent some of the operational reforms that have been undertaken to accommodate self-represented litigants. It is acknowledged that these types of operational changes are necessary in order to remove some of the more tangible barriers to access. However, it is also important to note that there are ongoing challenges associated with undertaking procedural reform.

There is first and foremost a criticism that the procedural reform undertaken is not sufficient; it is piecemeal at best and not likely to improve significantly access to justice on a broad scale. Moreover, significant procedural changes that might better serve self-represented litigants' needs are often met with concerns about the litigation process that are grounded in a continued adherence to a traditional model of litigation that is created and administered by lawyers.¹⁹

Recognizing the need to undertake procedural reform that is consistent with access to justice, Supreme Court Justice Karakatsanis recently stated that the “balance between procedure and access struck by our justice system must come to reflect a modern reality and recognize that new models of adjudication can be fair and just.”²⁰ At issue in that case was the scope of a motion court judge's decision-making powers in summary judgment procedures. Speaking for the Court, Justice Karakatsanis concluded that procedure must be interpreted with a view to promoting the timely and efficient

¹⁸ For example, see *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 4.01(3) – electronic filing; OR 439/08 – increase in Small Claims Court limit to \$25,000.00. Moreover, LawHelp Ontario (LHO) now provides volunteer legal representation in Ontario Superior Court, Ontario Court of Appeal and Chambers as well as Divisional Court.

¹⁹ A discussion of certain assumptions regarding the traditional adversarial model and the litigation process employed is contained in chapter eight.

²⁰ *Hryniak v Maudlin*, 2014 SCC 7 at para 2 [“*Hryniak*”].

resolution of legal matters consistent with enhanced concepts of access to justice.²¹ By expanding the scope and the flexibility of certain procedural steps, such as summary judgment motions, the argument is that the civil justice system would better serve those who may not otherwise be able to afford to pursue a long and protracted trial process. While it is important that this decision acknowledged the need to infuse the development and implementation of procedural rules with concerns about access to justice, it is also important to examine critically the implications of certain procedural changes on those most affected by a lack of access to justice – self-represented litigants. Thus, the question that arises in the context of this case is whether expanded summary procedures (that potentially include the use of oral evidence whereby individuals have an opportunity to ‘tell their story’ early in a proceeding) assist a self-represented litigant or whether early in the proceeding, complex procedural steps are particularly onerous for self-represented individuals who are likely struggling to understand the relevant procedural and substantive law. This question led the National Self-Represented Litigant Project to conduct a survey of summary judgment applications and judgments in reported decisions.²² Comparing the number of reported decisions in 2004 with 2015, the survey suggested that there has been an increase in the use of summary judgment motions against self-represented litigants. The survey further indicated that in Ontario, 88% of the cases where a represented party brought a summary judgment application against a self-represented litigant, the represented parties were successful in obtaining judgment against the self-represented litigant. This led the researchers to conclude,

[w]hile SJPs offer an opportunity to deal efficiently with cases that are without merit, it is equally important to consider their unintended consequences. This is especially critical at a time of great change due to the influx of large numbers of SRLs. SRLs who face the end of their claim as a result of a summary judgment often feel that they have been denied access to justice and unfairly treated by our legal system. SJP cases

²¹ *Hryniak, ibid.*

²² Julie MacFarlane, Katrina Trask & Erin Chesney, “The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?” (November 2014) Available online at <http://representingyourselfcanada.files.wordpress.com/2015/11/nsrlp-the-use-of-summary-judgment-procedures-against-srls1.pdf> [MacFarlane, Trask & Chesney, “The Use of Summary Judgment Procedures Against Self-Represented Litigants”].

illustrate the dilemma of how to fairly and appropriately hold a SRL to account when their case is unlikely to succeed (the premise of SJPs).²³

To the extent that the latter is the case, it would seem that procedural reforms aimed at providing expedient resolutions actually work to disadvantage self-represented litigants who are attempting to get up to speed. At the same time, these procedural reforms provide a potentially unfair advantage to the opposing counsel who are already familiar with that particular procedural step. The lesson in this regard is while action may be taken to simplify and potentially streamline procedures, it is important that the action undertaken takes account of the particular needs and capabilities of those seeking access. More significantly, this also means taking account of the perspectives of those individuals or groups that have not historically participated in conversations about procedural reform.

There is an even more fundamental challenge associated with designing informal alternatives to the courts that are simpler and presumably more accessible than traditional court processes, but still maintain a commitment to fair and just proceedings in accordance with the Rule of Law.²⁴ Specifically, empirical research conducted in the United Kingdom suggests that, while there has been a general shift away from the formal processes of the civil justice system to less procedurally formal tribunal processes as a means of addressing the growing number of self-represented parties, the result has been that “in the absence of the conventional protections of formality, such as representation, and the rules of evidence, the cases of those appearing before informal tribunals and courts may not be properly ventilated, and the law may not be accurately applied, and ultimately justice may not be done.”²⁵ In light of this concern, the challenges involved in addressing operational and information-based barriers as well as procedural barriers to participation in the civil justice system remain daunting.

²³ MacFarlane, Trask & Chesney, “The Use of Summary Judgment Procedures Against Self-Represented Litigants”, *ibid* at 13.

²⁴ Genn, “Tribunals and Informal Justice”, *supra* note 14 at 398.

²⁵ Genn, “Tribunals and Informal Justice”, *supra* note 14 at 398.

In this sense, it is important that attempts to simplify court processes and procedure take account of the larger adversarial context in which the procedure operates, as well as the role played by the insiders (i.e., lawyers and adjudicators) who have and continue to dominate the litigation process. Even if the requisite procedures are simplified and self-represented litigants receive constructive assistance and, as a result, are prepared and willing to engage in the legal system, the legal system is not necessarily equipped to deal with them. Again, from a procedural standpoint, many of the existing legal institutions, processes and rules that non-lawyers are obligated to engage with remain difficult to navigate without ‘insider’ knowledge. In this regard, the procedures can be anachronistic and appear counter-intuitive for individuals not trained as legal professionals. Moreover, despite attempts to simplify various legal processes, many of the procedural aspects of these processes remain overly complicated. Challenges involving the procedural aspects of the adversarial process can be made worse by the fact that, in many instance, lawyers may be prepared to spend significant amounts of time arguing over procedural entitlements.

Interestingly, the move to simplify various legal processes by making the system less formal and presumably more accessible for non-lawyers has also resulted in a criticism regarding the negative and misleading impact that informal processes may have on self-represented litigants.²⁶ Small claims courts (with low monetary limits) are common venues in which the formal court rules have been relaxed and/or re-drafted with a view to making the process more accommodating of self-represented litigants, unfamiliar with legal process. However, research in small claims courts by O’Barr and Conley suggests that, “although the freedom to speak without the assistance of representation and without being constrained by formal rules of evidence was welcomed by many litigants, this may be a mechanism by which informal procedures substitute expressive satisfaction for the enforcement of rights.”²⁷ In other words, self-represented

²⁶ Genn, “Tribunals and Informal Justice”, *supra* note 14 at 403-404.

²⁷ Genn, “Tribunals and Informal Justice”, *ibid* at 403-404 quoting W M O’Barr & J M Conley, “Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives” (1985) 19 Law & Soc’y Rev 661 [O’Barr & Conley, “Litigant Satisfaction”].

litigants may find it easier to engage in a less technical and more relaxed process from a procedural perspective, but this does not necessarily mean that the self-represented litigants are affecting the results they wanted or expected. In fact, the informality of the procedural process may mislead individuals to believe that the decision-making and application of substantive law carried out by the adjudicator will involve the same informality as is present in the procedures governing the hearing more generally. In this sense, there can be a disconnect between the informal rules that govern the hearing process and the more traditional and formal process that governs the adjudicator's decision-making process. In these instances, self-represented litigants are led to believe that they are able to present their case in their own way and in their own voice, but are ultimately confronted with a formal application of evidence and law in the course of the decision. In the recent context of small claims court process, there has been another layer added to this critique. The concern is that, as the monetary limits in small claims courts increase, so too does the presence of lawyers. Thus, while the procedures are drafted in a less formal manner, the existence of lawyers gives rise to proceedings that are influenced and formalized by lawyers' traditional training and operation in the civil justice system.

In addition to the traditional civil courts, there are a variety of administrative tribunals that address a variety of legal issues including landlord/tenant, social services, employment, workers' compensation and human rights issues. The theory being that administrative tribunals "can be more responsive to the real situations people face."²⁸ However, like recent trends in small claims court, the Access to Legal Services Working Group – tasked with the goal of encouraging innovation and action in the delivery of legal services – notes that citizens are increasingly appearing in tribunals with legal representation.²⁹ Notwithstanding the fact that many of these administrative tribunals and regulatory processes contemplate citizen participation without lawyers, it is noted that the 'proliferation' and complexity of certain of these regulatory bodies and processes have

²⁸ Alison MacPhail, *Report of the Access to Legal Services Working Group* (May 2012) Action Committee on Access to Justice in Civil and Family Matters at 3. Available online at www.cfjc.fcjc.org/sites/default/files/doc/2012 [MacPhail, *Report of the Access to Legal Services Working Group*].

²⁹ MacPhail, *Report of the Access to Legal Services Working Group*, *ibid* at 3.

not necessarily encouraged engagement by ordinary citizens.³⁰ In other words, procedural reform and related attempts to simplify legal processes in tribunals has not always resulted in better processes for self-represented individuals.³¹ In many respects, the process remains complex both in terms of procedure and in the application of the relevant regulatory framework. Alternatively, Hazel Genn argues that there is a possibility that informal procedures and simplified steps in various tribunals may present traps for unwary self-represented parties who are lulled in to a false sense of comfort about the process.³² Moreover, similar to the critique of small claims courts, while the processes within the tribunal setting may be informal and thereby provide increased opportunity for direct participation, the statutory regime within which the tribunal operates may remain legally complex and heavily reliant on traditional legal principles and stylized modes of interpretation. Some of the concerns underlying this critique are responded to, in part, by more recent calls for active adjudication in administrative settings. The call for active adjudication is grounded in questions about “whether the judicial model of adjudication is the most appropriate way to adjudicate administrative matters” given the increasing numbers of self-represented litigants.³³ As such, more than developing simplified procedures, active adjudication calls on adjudicators to actively shape or direct the hearing process for the parties. In one sense, active adjudication “attempts to eliminate or at least mitigate some of what has traditionally made lawyers indispensable to the proper functioning of the hearing” and “create a process that is fair an accessible to all parties.”³⁴

³⁰ See also Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Analysis” (2011) 49 Osgoode Hall LJ 71 at 82. In her Report on Access to Legal Services, Melina Buckley suggests and it is interesting to note that in a “diametrically opposed trend”, administrative tribunals have seen an influx of legal representation in processes that were originally designed to be ‘counsel-free’ and courts have seen an dramatic increase in the number of self-represented parties. See also Genn, “Tribunals and Informal Justice”, *supra* note 14.

³¹ Genn, “Tribunals and Informal Justice”, *supra* note 14. Michelle Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law” (2015) 38:1 Dalhousie LJ 119 at 122 [Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”].

³² Genn, “Tribunals and Informal Justice”, *ibid*.

³³ Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”, *supra* note 31 at 126 & 129. Chapter eight of this thesis contains a broader discussion of active adjudication.

³⁴ Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”, *ibid* at 131.

Another critique offered in respect of a move toward informal processes as a means of providing access to individuals who cannot afford legal representation, suggests that a shift toward less formal hearings represents a “downgrading of the problems of the poor and a relegation of their disputes to second-class forms of justice.”³⁵ In other words, the type and/or scope of problems relegated to adjudicatory processes, like small claims courts, may be low in terms of monetary value, but no less significant to those involved than matters that remain in the more formal superior court. This is also true of the characterization of the legal issues raised and adjudicated upon by self-represented litigants against represented parties. While this critique might raise legitimate concerns about the motivations underlying certain procedural reforms, it remains important to balance this critique against the benefits associated with developing processes that promote access to justice for non-lawyers and providing procedures that are proportional to the claims in dispute. Again, the recent pronouncement by Justice Karakatsanis highlights this need for proportionality when designing and implementing procedures to resolve disputes in the civil justice system. In this regard, she stated that “[i]ncreasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures that are tailored to the needs of the particular case.”³⁶

Attitudinal Barriers Imposed by Insiders

Coupled with a concern that direct participation by certain self-represented litigants may be, at best, shallow (given complex procedural requirements and/or reliance on simplified process), there is an added concern that the existing legal process and its institutions are neither designed for, nor accommodating of, participation by self-represented litigants. Attitudinal barriers prevalent among the key players in the civil justice system are also

³⁵ Genn, “Tribunals and Informal Justice” *supra* note 14 at 397.

³⁶ *Hryniak*, *supra* note 20 at para 2.

thought to negatively impact self-represented litigants' attempts to access the civil justice system. Members of the legal profession, along with some members of the judiciary, have historically viewed self-represented litigants as not only vexatious or frivolous litigants, but also the cause of much delay in the judicial system.³⁷ One author has rejected the call to better accommodate self-represented litigants. He characterizes pro se litigants (self-represented litigants in the American legal system) as having "disrupted the efficiency of the courtrooms, causing courtroom delays and overburdening judges, attorneys, and court staff."³⁸ Perhaps even more significantly, self-represented litigants were characterized as "'pests' or 'nuts' who are an 'increasing problem' clogging our courts."³⁹ The consequence of these attitudes by both lawyers and members of the judiciary is that self-represented litigants often feel uncomfortable or intimidated in speaking to judges or with opposing counsel; they believe that judges and lawyers are either impatient with the self-represented litigant or attempt to take advantage of the self-represented litigants' lack of knowledge and experience.⁴⁰ The particular experiences of the self-represented litigants interviewed in this research project (discussed in chapter 7 in greater detail) corroborate these sentiments. Thus, in terms of the attitudinal barriers faced by self-represented litigants, there are significant questions about the existing ethical, as well as legal, guidelines and responsibilities that direct lawyers' and judges conduct when dealing with self-represented litigants.

In this regard, the basis for some of these attitudinal barriers may be grounded in the manner in which lawyers perceive their role within the adversarial model; this is a role that is now being challenged by a new reality of the litigation process. However, notwithstanding the new reality of more non-lawyers within the civil justice system, there

³⁷ Deborah Rhode, "Access to Justice: Connecting Principles to Practice" (2004) 17 Geo J Legal Ethics 369 at 402-403 [Rhode, "Access to Justice"].

³⁸ Drew A Swank, "In Defence of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation" (2004) 54 Am U L Rev 1537 at 1547 [Swank, "The Need to Curb Extreme Forms of Pro Se Assistance"].

³⁹ Swank, "The Need to Curb Extreme Forms of Pro Se Assistance", *ibid* at 1548.

⁴⁰ The interviews conducted with self-represented litigants and lawyers as part of this research project reflect this concern. MacFarlane, *The Final Report of the National Self-Represented Litigants Project*, *supra* note 3 at 91-92.

has not been a corresponding formal recognition by the profession of how lawyers might need to treat self-represented parties differently.⁴¹ It is not surprising that this failure to delineate any specific responsibilities or expectations of lawyers underscores the anxiety and frustration that many self-represented litigants feel when representing themselves. Again, the failure to outline particular ethical responsibilities when dealing with self-represented litigants is even further complicated by the ‘zealous advocate’ mindset that continues to permeate the way that lawyers practice law.⁴² Arguably, a lawyer’s singular commitment to ‘winning’ the client’s case may rationalize aggressive behaviour that opposing lawyers might be able to handle but does not take account of the self-represented opponent who is not likely operating on an equal playing field.

On occasion, lawyers and their governing professional bodies have also been criticized for their resistance to the development of programs that would assist individuals to represent themselves better when faced with a legal problem.⁴³ The legal profession, in its practicing and regulating guises, has characterized this resistance as

⁴¹ It should be noted that there are informal guidelines provided on the Law Society of Upper Canada’s website in the context of Practice Management Topics – Dealing with Self-Represented Litigants. These guidelines make reference to certain professional rules of conduct that require lawyers be reasonable in providing or withholding consents and courteous and civil in the lawyers’ dealings with other opposing parties. Available online at www.lsuc.on.ca/with.aspx?id=2147499412.

⁴² Trevor CW Farrow, “Sustainable Professionalism” (2008) 46:1 Osgoode Hall LJ 51 [Farrow, “Sustainable Professionalism”].

⁴³ Rhode, “Access to Justice”, *supra* note 37 at 81. It is worth noting that the Law Society of Upper Canada (“LSUC”), the legal profession’s regulatory body in Ontario, was resistant to relaxing the need for conflict of interest searches in the self-help setting notwithstanding that such a course of action would allow volunteer lawyers to meet with more individuals during the course of a day as they did not need to wait for the results of conflict searches. Although the LSUC’s conflict requirements were eventually relaxed for lawyers volunteering at the self-help centre, the process by which the LSUC was persuaded to change its position took a significant amount of time and drew on the already limited resources of the pro bono organizations that were required to make submissions to the LSUC. See Rule 3.4-16.3 of the Rules of Professional Conduct, which contemplates a relaxed conflict search process in the case of short-term limited legal services to pro bono clients. The Rules of Professional Conduct state “short-term limited legal services” means pro bono summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario’s Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.” See also Paul Paton’s discussion in his article, regarding his criticism of the Law Society of Upper Canada’s position on the regulation of paralegals. Paul Paton, “Between a Rock and a Hard Place: The Future of Self-Regulation – Canada Between the United States and English/Australian Experience” (2008) *The Professional Lawyer*. Available online at papers.ssrn.com/sol3/papers.cfm?abstract_id=1226802.

protecting litigants from the risks associated with receiving incorrect or misleading advice. However, a different explanation for the legal profession's resistance is linked to the profession's concerns about unrestricted competition. As a result of non-lawyers being better equipped to handle legal matters, the need for traditional legal representation might be reduced. This explanation reflects a perceived threat to the legal profession's longstanding monopoly on the provision of legal services.⁴⁴ Changing these existing attitudes to include an approach that contemplates greater accommodation of self-represented parties runs contrary to many of the legal profession's entrenched ideas about how the adversarial system works and what the lawyer's role is within that adversarial system.

Although based on different concerns, members of the judiciary do not escape some of these attitudinal criticisms. Again, earlier research data collected from self-represented litigants suggests that judges can appear unsympathetic and even antagonistic toward self-represented litigants who do not appear to understand the nature of the proceedings or the legal processes in their courtroom.⁴⁵ In fairness to many judges who are confronted with significant numbers of self-represented litigants on a daily basis, they may be unsure of how to balance the self-represented litigants' needs in the courtroom with their own obligation to remain impartial as part of their traditional role in the adversary system.⁴⁶ Moreover, Deborah Rhode suggests that, in certain courts and

⁴⁴ Rhode, "Access to Justice", *supra* note 37 at 81.

⁴⁵ In one recent and extreme example, an American judge ordered that the sheriff attending in court give the self-represented accused a shock through the accused's security ankle bracelet because the judge felt that the individual was wasting the court's time by raising superfluous arguments. The judge was immediately removed from the bench by the state bar. See Richard Zorza, "Judge Orders Self-Represented Litigant to be Given Electric Shock" (September 9, 2014). See <http://accesstojustice.net/2014/09/09/judge-orders-self-represented-litigant-given-electric-shock/>.

⁴⁶ Rhode, "Access to Justice", *supra* note 37 at 403. Some commentators note that many judges are unclear about how to help self-represented litigants within the adversarial system without appearing biased. For instance, Jona Goldschmidt observes that, in contrast to the operating premises of the traditional adversarial system, "in cases involving an SRL and a represented party, judges are faced with the difficulty of providing impartial justice on an uneven playing field. The SRL, who often represents herself out of necessity due to insufficient funds, must navigate a confusing legal process without the same familiarity or expertise about the rules of game that will allow her to present her issues effectively and substantiate her case. If judges remain passive and merely rule on procedural violations, SRLs have a substantial disadvantage and the truth-finding function of the hearing is severely curtailed." See Jona Goldschmidt,

particularly in a portion of the cases involving self-represented litigants, the nature of the cases are “symptomatic of broader social and personal problems: mental health disabilities, substance abuse, and inadequate employment of financial management skills, coupled with local shortages in jobs, housing, and health services.”⁴⁷ As a result, trial judges lack the time and resources to deal adequately with all of the issues that have potentially affected the self-represented litigant’s life.⁴⁸ Regardless of the underlying motivations, the results are the same—self-represented litigants are often made to feel excluded or outsiders in the civil justice system by those who operate inside the system.

While it may be the fact that many cases are delayed due to self-represented litigants’ inexperience with the legal procedures or the substantive law, the challenge is to find ways to make the judicial system more hospitable to self-represented litigants without compromising the integrity of the justice system. Notwithstanding recent developments aimed at ameliorating self-represented litigants’ participation and in light of the persistent operational and attitudinal barriers, the continued exclusion and disengagement of non-lawyers raises serious questions about whether even well informed self-represented litigants will be in a position to participate fully and effectively.

Underlying these observations about ongoing barriers to access is the recognition of a need for continuing and comprehensive change to the civil justice system. This change would need to include the measures necessary to ensure that self-represented individuals are able to engage in the civil justice system in a meaningful manner. Presumably, the implementation of such measures would need to take account of existing operational and structural barriers that continue to impede self-represented litigants from participating. In so doing, new procedures and processes might be developed that take account of non-lawyers’ needs and abilities. As noted by Benjamin Barber, changes aimed at encouraging meaningful participation cannot be implemented in a piecemeal

“Lawyers’ Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants” (2012) 30 Windsor YB Access Just 139 at 171.

⁴⁷ Rhode, “Access to Justice”, *supra* note 37 at 403.

⁴⁸ Rhode, “Access to Justice”, *supra* note 37 at 403-404.

fashion.⁴⁹ These types of changes must also balance the requirement that the legal processes be fair and consistent with concepts of procedural justice, the Rule of Law and, at the same time, take account of the practical realities of administering a legal system that includes a significant number of self-represented parties who are unfamiliar with those very legal processes. In this regard, the growing presence of self-represented litigants necessitates the need to consider whether and to what extent the existing adversarial process may be maintained and/or how new processes might be shaped by an inquisitorial or active adjudicative approach to dispute resolution in the civil justice system.

Legal Self-Help and Citizen Participation

Notwithstanding the criticisms that are leveled at the structure and administration of the civil justice system in terms of individuals' direct participation, the principles and objectives of participatory democracy imbue and recommend a broader concept of access to justice. The question becomes how to develop access to justice initiatives that are consistent with this broader conceptualization. More specifically, to what extent, can or should an access to justice initiative like self-help legal services play a role in facilitating meaningful participation? The criticisms raised in respect of the civil justice system would tend to suggest that meaningful participation by non-lawyers is minimal and a very challenging endeavor for any self-represented litigant. However, being aware of the educative function of participation and learning from the case of the Connecticut community lawyer, it is possible to see how an initiative such as self-help might expand and multiply the opportunities for citizen empowerment and meaningful participation.

The purpose of civil law self-help centres is to provide self-represented litigants with the information and skills necessary for them to pursue and resolve their own legal issues without legal representation.⁵⁰ The provision of legal information, skills and tools

⁴⁹ See discussion of Barber, *Strong Democracy*, *supra* note 11 and in chapter three of this thesis.

⁵⁰ There are several self-help legal centres in Canada as well as hundreds in the United States that provide a variety of legal services and information to self-represented individuals, typically on a 'first come, first serve' basis. The development of these centres has been linked to a corresponding decrease in legal aid support and increase in the numbers of individuals who are unable to secure legal representation. See

arguably allows the individual to engage with the civil justice system in a more, if not perfectly meaningful manner. By obtaining information and advice that helps to demystify the substantive law as well as the governing procedures, individuals might be in a better position to convey their position to opposing parties as well as members of the judiciary.⁵¹

For instance, part of Ab Currie's research on the viability of self-help as a means of problem-solving sought input on what people who 'took care of it on their own' would have done in retrospect. Respondents with problems that had been resolved at the time of the interview who had chosen the self-help option were asked if they thought that the outcome would have been better if they had obtained some other form of assistance.⁵² When asked what type of assistance this might include, Currie confirmed that of the respondents questioned, "[t]he most frequent first response was additional or better information, 30.4%."⁵³ Moreover, through direct participation in the legal process, individuals are afforded an opportunity to raise and frame the legal problem in a manner that is relevant to their lives; they can potentially engage in a dialogue that includes the formulation and expression of arguments and opposing positions. To the extent that this results in the construction of decisions that are more consistent with the organization of ordinary citizens' lives and reflective of their own conceptualizations of law and justice, it can be concluded that self-help has a role to play in advancing individuals' meaningful participation.

This view is reinforced by the notion that, in other non-law contexts, self-help programs provide an opportunity to foster consciousness-raising and the development of certain social skills including the ability to problem-solve; these promote empowerment

Merran Lawler, Jeff Gidding & Michael Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Resources to Citizens in Need" (2012) 30 Windsor YB Access Just 185 at 188 [Lawler, Gidding & Robertson, "Opportunities and Limitations in the Provision of Self-Help Resources"].

⁵¹ Of course, in accordance with Arnstein's comments about power this requires that the key players in the system relinquish some of their power over both the processes and the language used in the justice system.

⁵² Currie, "Self-Helpers Need Help Too", *supra* note 7.

⁵³ Currie, "Self-Helpers Need Help Too", *ibid* at 10.

and provide for the opportunity to engage in a meaningful manner. In fact, Elisheva Sadan suggests that,

participation in a self-help group is considered to be an ideal (though not exclusive) means of encouraging individual empowerment, for such a group produces empowerment beyond the individual as well: people receive emotional and social support in the course of a change process in which they provide concrete help to others and acquire new skills, including the development of ability for future public action.⁵⁴

While Sadan contemplates the development of individual empowerment through self-help in a non-law context, there are some similarities with legal self-help. Namely, in helping oneself, there are certain social skills, abilities and knowledge acquired that are necessary and relevant for further action.

One of the challenges in this regard is to ensure that, while civil law self-help centres provide individuals with the legal tools necessary to engage in deliberation and decision-making about civil law, the provision of legal advice and information does not result in a continued dependency on lawyers by non-lawyers.⁵⁵ In other words, civil law self-help centres must provide individuals with the information necessary to engage in the civil justice system and, at the same time, assist the individuals in disabusing themselves of the need to rely on the language of experts; they cease to be passive bystanders whom decisions are made about and for.

The purpose in providing individuals with the information they require to participate is not to eliminate all assistance by lawyers. Rather, it is to democratize the language and substance of law such that individuals are able to participate directly in its development, meaning and administration. This presupposes that to the extent that self-help legal services centres provide legal information, skills and tools, individuals will be able to make use of the information and engage with and ultimately influence the

⁵⁴ Elisheva Sadan, *Empowerment and Community Planning: Theory and Practice of People-Focused Social Solutions* (Tel Aviv: Hakibbutz Hameuchad Publishers, 1997) at 81-82 [Sadan, *Empowerment and Community Planning*].

⁵⁵ Marc Galanter, "Justice in Many Rooms: Courts, Private Orderings and Indigenous Law" (1981) 19 J Legal Pluralism 1 at 18 [Galanter, "Justice in Many Rooms"].

development of the civil law. However, given the existing legal framework with all of its traditional notions of adversarial and professionalized participation, the question that remains is whether this might be practically achievable.⁵⁶

Research on self-help initiatives in Australia as well as California reflects the growing significance of these initiatives across different jurisdictions.⁵⁷ The data collected from these endeavours suggest that there are still more questions about who might be best helped by self-help services and how these services might be delivered to ensure that the information and advice provided corresponds with individuals' needs and the overall objectives of the initiative.⁵⁸ A variety of the studies on self-help have examined why self-represented parties chose self-help and whether the initiatives are efficient in assisting individuals to resolve their legal issues. However, many of the studies did not take account of broader objectives that might be achieved in the context of this type of assistance. These studies have not examined how the provisions of self-help

⁵⁶ Interestingly, this approach has been observed in one unique and successful setting where participation by members of a tribal community in the local justice system has resulted in the development of a system of laws that are directly related to the community members' needs and concerns. Over four hundred years ago, the Zapotec Indians of Mexico were granted a right by the Spanish to administer their own local courts. The local court hears cases involving family, land, and debt, among other matters traditionally classified as "civil" law matters. Democratically-elected individuals in the community administer the court system. Plaintiffs play an active role in the proceedings in which there are no lawyers and, unlike in North American judicial systems, there are no "typical" plaintiffs. In other words, the plaintiffs are male, female and derive from all socio-economic levels in the community. The result has been the development of a body of laws that are directly linked to and arguably reflective of the users' needs rather than abstract concepts and principles derived from the legal reasoning of judges and arguments of lawyers. The results obtained through litigation generally reflect the communities' desire to find a remedy for the dispute rather than uphold an abstract principle of law. However, notwithstanding the obvious limitations of this particular justice system, it provides a useful point of discussion regarding a correlation between an approach to access to justice that encourages direct citizen participation and "participating citizenry". By having meaningful access to justice that both contemplates and provides for direct involvement in the dispute resolution system, the citizens in the Zapotec community actively participate in the definition of justice, and the administration of justice and in so doing, they are able to participate in the process of self-governing. Laura Nader, "Processes of Constructing (No) Access to Justice (For Ordinary Citizens)" (1990) 10 Windsor YB Access J 496 [Nader, "Processes for Constructing (No) Access to Justice"].

⁵⁷ Jeff Giddings & Michael Robertson, "'Lay People, For God's Sake! Surely I Should be Dealing with Lawyers?' Toward an Assessment of Self-Help Legal Services in Australia" (2002) 11:2 Griffith LR 436 [Giddings & Robertson, "Toward an Assessment of Self-Help Legal Services in Australia"]; Lawler, Giddings & Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Resources", *supra* note 50; Jessica K Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" (2010) 18 Geo J on Poverty L & Pol'y 453 [Steinberg, "In Pursuit of Justice"].

⁵⁸ Lawler, Giddings & Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Services", *ibid* at 210.

information and advice might impact self-represented litigants' views about their ability to engage with the civil justice system in a meaningful manner, regardless of the outcome achieved. Moreover, earlier research on legal self-help has not looked at self-represented litigants' inclination to participate further or in other forums or contexts. Consequently, in accordance with a broader conceptualization of access that seeks to incorporate citizen participation in the development of the law more generally, self-help provides a compelling site at which to examine self-represented litigants' perceptions about their engagement in civil law processes and institutions, as well as their inclination to participate in other political and legal process that affect their lives and communities.

Self-Help Legal Services Defined

The increasing number of self-represented litigants in the civil justice system has given rise to a variety of access initiatives that are aimed at assisting self-represented individuals address their legal issue and, hopefully, improving their access to justice.⁵⁹ One such initiative has been the creation of legal self-help programs. To a varying degree, research in the United States, Australia and the United Kingdom indicates that this type of program has evolved in response to the growing number of self-represented parties who are obliged to represent themselves when engaged in civil law matters, but who have little legal knowledge or experience about law, legal processes, or the administration of the civil justice system. The growth of self-help services has also resulted generally from a corresponding reduction in legal aid budgets in these jurisdictions.⁶⁰ A useful working definition of self-help legal services includes, “services that allows or encourages a legal consumer to take personal responsibility for some or all

⁵⁹ John M Greacen, “Self-Represented Litigants and Court and Legal Response to Their Needs – What we Know” (2000) at 1. Available online at www.courts.ca.gov/partners//documents/SRLwhatweknow.pdf.

⁶⁰ Lawler, Giddings & Robertson, “Opportunities and Limitations in the Provision of Self-Help Legal Resources”, *supra* note 50 at 188; however it is worth noting an exception to the general fact that legal aid budgets have been reduced in several jurisdictions. In Ontario, throughout 2015, Legal Aid Ontario (LAO) received additional funding that allowed it to expand its access initiatives to vulnerable groups such as first nations clients and people with mental illness. The additional funding has also allowed LAO to increase the level of financial eligibility by 6% over three years thereby increasing the number of individuals that meet the financial eligibility requirements for assistance. Finally, LAO has been able to commit additional funding to expand its clinic law services that are offered throughout the province. See http://www.legalaid.on.ca/en/info/legaleligibility_qanda.asp#q02.

of the activities necessary to complete a legal transaction.”⁶¹ An added understanding is that the legal services offered would be free to the legal consumer. Thus, the term self-help legal resources may be more broadly characterized as “encompassing all those resources, support mechanisms, structures and services which are designed to assist people to work through their own legal problems either independently or substantially independently of formal and comprehensive legal assistance.”⁶² Practically speaking, self-help initiatives may include telephone hotlines, online assistance with court forms and processes, self-help centres and duty counsel. In Ontario, there is a continuum of services that offers information, advice and assistance to individuals representing themselves in the justice system. In addition to self-help centres that are discussed below in greater detail, this spectrum of services includes the provision of information and advice respecting a particular area of law. For example, legal advice and information are provided by the Family Law Information Centres (FLICs) located throughout Ontario. Specifically, FLICs provide information and advice about various aspects of family law as well as referrals to other legal and non-legal resources.⁶³ In other contexts, information about individuals’ legal rights is available in pamphlet form, and through online services and community legal clinics. Community Legal Education Ontario (CLEO), established in 1974, “provide[s] practical legal rights education and information to help people understand and exercise their rights.”⁶⁴

There are also a variety of duty counsel projects that provide legal assistance to individuals appearing in different courts without representation. The assistance provided may include support with court forms and document preparation, advice regarding substantive law and/or representation in court. The scope of assistance may vary depending on the court context in which the duty counsel operates. Notwithstanding the

⁶¹ Giddings & Robertson, “Toward an Assessment of Self-Help Legal Services in Australia”, *supra* note 57 at 436-437.

⁶² Lawler, Giddings & Robertson, “Opportunities and Limitations in the Provision of Self-Help Legal Resources”, *supra* note 50 at 189.

⁶³ Information about the Family Law Information Centres is contained on the Attorney General’s website. See <http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.php>.

⁶⁴ See the Community Legal Education Ontario website. See <http://www.cleo.on.ca/en/about-cleo>.

scope of the legal advice or information provided, the underlying assumption is that the self-represented party (and not the legal representative providing the assistance) retains control over their own legal problem. While it is not suggested that these services represent the complete terrain of self-help initiatives, it is important to be acquainted with the scope of services available to self-represented litigants when exploring the role of self-help within a broader conceptualization of access to justice. In this sense, one of the common denominators respecting these initiatives is the provision of legal advice and information that allows individuals to better understand their legal rights and responsibilities. However, it is also worth noting that these services are somewhat narrow in terms of the scope of the particular program's engagement with self-represented litigants. In this regard, individuals who attend at self-help legal centres are offered a broader range of assistance, which extends beyond the provision of legal information. It is self-represented litigants engagement with a self-help legal centre (discussed below in greater detail) that forms the basis of this research project.

While the self-help model of legal services may vary across different jurisdictions and take on different forms,⁶⁵ self-help legal centres generally make use of a combination of paid staff and volunteer lawyers acting on a pro bono basis. The lawyers who volunteer at these centres typically meet with self-represented litigants and provide summary legal advice and information respecting their legal issue or problem. Normally, the lawyer does not assume carriage of the matter on behalf of the self-represented individual. It is assumed that the individual will maintain responsibility for his or her own file as it moves through the civil justice system or is otherwise resolved. This includes responsibility for the necessary procedural steps, the strategies adopted, and the materials prepared in support of the matter.

⁶⁵ In some jurisdictions, such as California, which have extensive self-help services for self-represented litigants, self-help is expressly defined as providing "neutral, non-confidential information to all court-users" but this does not include advice and does not provide for an ongoing solicitor-client relationship. See Richard Zorza, "An Overview of Self-Represented Litigation Innovation, its Impact, and an Approach for the Future: An Invitation to Dialogue" (2009) 43:3 Fam LQ 519; see also Russell Engler, "And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks" (1999) 67 Fordham L Rev 1987 at 1904 [Engler, "And Justice for All"].

This approach to assistance is contrasted with unbundled legal services whereby the client seeks a lawyer's assistance on a limited basis, typically to provide certain advice or to complete a specific task on the file; the lawyer does not assume responsibility for the entirety of the file in the traditional sense.⁶⁶ To the extent that the individual receives unbundled legal services, the services are still performed by the lawyer as opposed to self-help centres where the lawyer may explain a particular step or advise on how a task is to be completed. However, it remains the client's responsibility to act.

Self-Help Initiatives in Other Jurisdictions

In the United States, one of the first legal self-help centres provided information and resources to self-represented litigants; it originated in Arizona in the early 1990's.⁶⁷ One recent survey by the American Bar Association suggests that court-based, self-help centres in the United States (of which there are about 500) assist approximately 3.7 million people annually.⁶⁸ However, while the number of self-help programs operating throughout the United States has increased dramatically, research in a number of state jurisdictions suggests that, "most self-help programs serve only a fraction of the self-represented litigants in their jurisdiction."⁶⁹

⁶⁶ Samreen Beg & Lorne Sossin, "Should Legal Service be Unbundled?" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto, Canada: University of Toronto Press, 2012) 193 at 195 [Beg & Sossin, "Should Legal Services be Unbundled?" in Trebilcock, Duggan & Sossin, *Middle Income Access to Justice*].

⁶⁷ American Bar Association, Standing Committee on the Delivery of Legal Services, "The Self-Help Center Census: A National Survey" (August 2014) at 1. Available online at www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_self_help_center_census@authcheckdam.pdf [ABA, "The Self-Help Center Census"]. It is worth noting that in the American context, there is a distinction between providing legal advice and legal information in a self-help setting – the focus being on the provision of legal information rather than advice. See also Russell Engler, "Non-Lawyer Forms of Assistance to Middle-Income Earners" in Trebilcock, Duggan & Sossin, *Middle Income Access to Justice*, *ibid* at 157. See also John M Greacen, "Self-Represented Litigants and Court and Legal Services Responses to Their Needs – What We Know" (2000). See www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf.

⁶⁸ ABA, "The Self-Help Center Census", *ibid*.

⁶⁹ *Ibid* at 2.

Since its inception, this initiative has evolved in a myriad of ways – providing services at self-help centres over the telephone or in-person (typically located in or near court houses); assistance with court appearances; and assistance with the preparation and review of documents. More recent developments include offering assistance and resources for individuals appealing a judicial decision. Until very recently, appeals and appellate related work have ‘fallen between the cracks’ in terms of assistance for self-represented litigants.⁷⁰

Self-help resources in Australia can be traced back to 1995. At that time, non-profit community legal centres began to develop self-help resources in order to “bridge the gap between legal services provided by the Legal Aid Commissions and those provided by the private profession.”⁷¹ For-profit organizations had been offering information packages and telephone support in certain legal contexts (e.g., how to proceed in probate court) since 1982.⁷² Recent research in Australia indicates that “there is indeed a growing and significant category of legal services that contain a self-help dimension” and this trend is likely to continue and expand.⁷³ In fact, it is assumed that,

⁷⁰ Meehan Rasch, “A New Public-Interest Appellate Model: Public Counsel’s Court-Based Self-Help Clinic and Pro Bono ‘Triage’ for Indigent Pro Se Civil Litigants on Appeal” (2010) 11:2 J App Pr & Pro 461. Ontario now offers assistance to self-represented litigants seeking to appeal a decision and further offers individuals the ability to obtain an opinion regarding the validity or likely success on a motion for leave to the Supreme Court of Canada.

⁷¹ Merran Lawler, Jeff Giddings & Michael Robertson, “‘Maybe a Solicitor Needs to Know that Sort of Thing But I Don’t’: User Perspectives on the Utility of Legal Self-Help Resources” in Alexy Buck, Pascoe Pleasance & Nigel J Balmer, eds, *Reaching Further-Innovation, Access and Quality in Legal Services* (Norwich, UK: TSO, 2009) at 39 [Lawler, Giddings & Robertson, “Maybe a Solicitor Needs to Know that Sort of Thing But I Don’t”].

⁷² Lawler, Giddings & Robertson, “Maybe a Solicitor Needs to Know that Sort of Thing But I Don’t”, *ibid* at 37.

⁷³ Lawler, Giddings & Robertson, “Opportunities and Limitations in the Provision of Self-Help Legal Resources”, *supra* note 50; Giddings & Robertson, “Toward an Assessment of Self-Help Legal Services in Australia”, *supra* note 57 at 437-439. In their article, Giddings and Robertson suggest that through the 1990’s there was shift in the delivery of legal services influenced by the ‘ideology of the marketplace’ pursuant to which “legal practice became a business” and the role of the citizen, as a ‘legal subject’ was recast as a ‘legal service consumer’. In accordance with the ideology, concerns about competition and efficiency became paramount. The authors continue to suggest that this ideology also permeated the discourse on access to justice where it was assumed that enhanced competition and efficiency would increase access to law and this combined with increased access to information technology and a retraction of traditional legal services by publicly funded legal aid services led to the focus on “self-directed legal services”.

as a policy initiative, self-help legal services will continue to increase in keeping with the growing needs of self-represented parties that are reflected in a burgeoning demographic.

The United Kingdom has also witnessed an increase in the number of self-help legal services. This has been the result, in part, of cuts to government legal aid spending and a corresponding reduction in the scope of legal services available to individuals; this includes reductions in the field of social welfare cases.⁷⁴ The findings of a report on Access to Justice for Litigants in Person (or Self-Represented Litigants) prepared in 2011 by the Civil Justice Council highlighted some of the agencies that function in the United Kingdom to provide advice to self-represented litigants.⁷⁵ One of the largest and most common is the Citizens Advice Bureau (CAB). This organization is not strictly limited to legal advice, but rather provides advice on a myriad of topics ranging from “debt and employment to housing and immigration plus everything in between.”⁷⁶

Currently, there are approximately 3,300 CAB locations in designated advice centres, hospitals, courts and prisons across England and Wales. Within certain of these centres, pro bono lawyers work to provide legal assistance to self-represented parties. For example, the Royal Courts of Justice Advice Bureau has paid, as well as pro bono, lawyers who provide legal advice and information services to self-represented litigants appearing before the Court of Appeal, High Courts, County Courts, family courts and bankruptcy courts. The lawyers provide both procedural and substantive advice. In addition to offering advice to individuals in person, there is also access to information and advice through telephone hotlines and email services. In total, the CAB, through a

⁷⁴ Civil Justice Council, “Access to Justice for Litigants in Person (or Self-Represented Litigants)” *A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011) at 18-19. Available online at www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf [CJC, “Access to Justice for Litigants in Person”].

⁷⁵ CJC, “Access to Justice for Litigants in Person”, *ibid* at 49.

⁷⁶ “Key Facts about the Citizens Advice Service”, available online at: <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works>.

network of agencies, make use of over 22,000 volunteers who provide advice on a variety of topics and assist individuals in resolving “legal, money and other problems.”⁷⁷

The Civil Justice Council’s report also highlighted the fact that there are a variety of advice services that provide information about different legal contexts and on how to navigate the civil legal system. In so doing, these services are able to provide self-represented litigants with advice on the merits of a legal matter and the requisite legal processes. However, one of the critiques of these advice services relates to the inconsistency in services provided throughout.⁷⁸ In examining the needs of self-represented litigants, the Civil Justice Council emphasized the important role that advice centres play, particularly in the context of early advice on the merits and as a source from which self-represented litigants can draw information when first facing a legal issue. Interestingly, the Report makes note of the fact that the provision of early advice and information can help to ensure that individuals with meritorious claims are afforded an opportunity to pursue their claim; this is an important and potentially overlooked consideration in terms of the objectives often associated with self-help. Ensuring that people are able to pursue their claims is consistent with individuals’ direct participation in law-making and law-administering processes. In this regard, the provision of advice and information is not viewed simply as a means of assisting self-represented litigants administer their specific cases or ensure a more efficient legal process. Rather, it also characterizes the provision of advice as a means by which citizens can be supported when attempting to raise political and/or legal issues or concerns (not unlike the example of the volunteer lawyer in Connecticut) in a meaningful and hopefully constructive manner. This is not to suggest that self-help advice will promote certain types of cases or that all claims brought forward are necessarily meritorious. Instead, the provision of advice and information serves to support individuals in their decision to bring a claim forward. In

⁷⁷ *Ibid.*

⁷⁸ CJC, “Access to Justice for Litigants in Person”, *supra* note 74 at 49.

certain instances, this has the added benefit of potentially contributing to the development of a body of law in a particular field.⁷⁹

The fact that self-help legal services continue to expand both in terms of scope and prevalence across these various jurisdictions reinforces the need to examine certain challenges and questions about this initiative. These include what further or expanded role self-help services might play in a broader theory of access to justice that encourages direct and meaningful participation and how self-help might be expanded going forward. Part of this later analysis would also need to take account of the practical considerations associated with developing an expanded self-help regime. These include challenges associated with implementing more services, as well as funding issues.

The Self-Help Initiative in Canada

In Canada, the establishment of civil law self-help legal services has been both more recent and more limited in scale than other jurisdictions. In certain jurisdictions, many of these services were originally offered in the context of family law (for example, Family Law Information Centres) where self-represented litigants are more widespread. Family Law Information Centres located in several provinces were among the first centres to open in the late 1990's.⁸⁰ The first civil law (non-family) self-help legal centre in Toronto, Ontario (LawHelp Ontario) opened in 2007. LawHelp Ontario (LHO) is located on the main floor of the civil courthouse in downtown Toronto. The majority of these centres tend to be located either in or near courthouses and act as an immediate source of legal information and advice for self-represented litigants appearing in those courts. At present, there are varying forms of self-help legal services in the majority of the

⁷⁹ In the Canadian context, this sentiment was recently highlighted by Supreme Court Justice Karakastanis, in her discussion of the importance of proportionate legal procedure in promoting access to justice. As a justification for proportionate procedure, Justice Karakastanis stated that “[w]ithout public adjudication of civil cases, the development of the common law is stunted.” See *Hryniak v Maudlin*, 2014 SCC 7 at para 1.

⁸⁰ See Legal Services Inventory on the Canadian Forum for Civil Justice website. Available online at <http://www.cfcj-fcjc.org/legal-services-inventory>.

provinces.⁸¹ In certain circumstances, the services may be provided via telephone hotlines staffed by lawyers or online. In other instances, centres are established in which volunteer lawyers attend, meet with clients and provide legal advice. The volunteer lawyer may, on occasion, act as duty counsel on behalf of a self-represented party who is scheduled to appear in court. The report prepared on LHO one year after opening described the underlying philosophy of the LHO project as, “striv[ing] to address self-represented litigants procedural and substantive barriers to justice so they can better navigate the justice system. Specifically, LHO provides a continuum of legal services based on a triage system that assesses litigant need and allocates resources based on those needs.”⁸² My research project focuses on the type of legal services provided at LHO and the experiences of the self-represented litigants who make use of the services at LHO.

Objectives and Benefits Associated with Self-Help

The development of the self-help legal services model has been driven both by the practical realities surrounding the increasing number of self-represented individuals in need of advice and information and by certain broader educative objectives. The practical reality driving the expansion of the self-help initiative is that there are a significant number of self-represented litigants currently attempting to navigate the legal system with little or no information about the relevant processes; online research is their only tool. Moreover, it is likely that these numbers will continue to increase. While there are a myriad of causes associated with this increase in self-representation, the fact that legal services are being priced out of the reach of not just low-income individuals but also the middle class is significant. In fact, there is an argument to be made that the poorest of individuals are, in limited circumstances, able to access some forms of assistance. The poorest clients may be able to access legal aid to obtain assistance with

⁸¹ Please see the Legal Services Inventory of the Canadian Forum on Civil Justice, which lists various programs across Canada. Examples of the various programs include: (i) Alberta and Nova Scotia have family law information centres similar to Ontario; (ii) Prince Edward and Alberta offer advice over the telephone ; and (iii) British Columbia has several Justice Access Centre Self-Help and Information Services (formerly BC Supreme Court Self-Help Information Centres). Available online at: <http://www.cfcj-fcjc.org/legal-services-inventory>.

⁸² See An Evaluation of LawHelp Ontario as a Model for Assisting Self-Represented Litigants in the Ontario Superior Court of Justice at 393 University Avenue in Toronto (November 2009). Available from the author upon request.

criminal matters and extremely limited civil law matters. However, generally speaking, this group of individuals has virtually no assistance with a wide range of civil litigation cases: these cases form the subject matter of my study.⁸³

Notwithstanding any limited assistance provided (typically in the criminal context), the working poor and middle-income individuals are left to fend for themselves. In examining the link between access to the civil justice system and issues of social exclusion, Pleasance highlighted the importance of access to legal advice in the sense that “legal advocacy and legal advice for the poor and excluded is an effective engine for social inclusion and fighting poverty through insuring and expanding rights to critical benefits and services, and giving a voice to grievances and empowering people and communities.”⁸⁴ Moreover, as discussed earlier, even for those initially able to afford legal services, the duration and potentially complicated nature of many civil legal matters results in legal representation becoming more expensive than many individuals can afford. Thus, while a person may initially be able to pay a retainer and hire a lawyer, individuals are unable to pay the mounting fees as the retainer runs out and the legal matter remains unresolved and the lawyer withdraws from the file. A majority of these individuals are unable to provide another retainer to a new lawyer. As such, they 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. The consequence is that a lack of legal knowledge places these individuals at a serious disadvantage in a complex legal system that employs a highly professionalized language and body of rules.

As a result of these ongoing challenges, there is an argument that self-help legal services can be beneficial to the extent that they offer practical legal information and

⁸³ As previously noted, Legal Aid Ontario has recently announced increases in its budget that will allow it to offer services to more individuals as well as individuals at a higher income level however it is not expected that this will address the myriad of civil law legal issues experienced by individuals in Ontario who cannot afford a lawyer. Please see discussion in chapter two of this thesis.

⁸⁴ Alexy Buck, Nigel Balmer & Pascoe Pleasance, “Social Exclusion and Civil Law: Experiences of Civil Justice Problems among Vulnerable Groups” (2005) 39:3 *Social Policy & Administration* 302 at 304 [Buck, Balmer & Pleasance, “Social Exclusion and Civil Law”] quoting J Stein, “The Future of Social Justice in Britain: A New Mission for the Community Legal Service” (2001) *Centre for Analysis of Social Exclusion*, London School of Economics 48.

advice to a broad range of individuals who might choose or otherwise be compelled to proceed on their own without any legal assistance.⁸⁵ One of the rationales underlying this assumption is that, in certain instances, “many clients need only limited representation to resolve legal problems fairly.”⁸⁶ This is accompanied by the adage that some information is essentially better than no information. From a practical perspective, Gary Bellows suggested that,

[e]ven a cursory glance at the numbers makes the ideal of *enough* lawyers for poor people a chimera. On the other hand, there are literally thousands of poor people whose lives would be made somewhat easier and less vulnerable if they had a clearer sense of what were legally protected grievances, more knowledge of ways of pursuing them, higher expectations about what was possible to achieve through asserting claims in the existing system, and the availability of responsive forums and competent representation if they needed them.⁸⁷

To the extent that the practical reality is that laypersons are engaging the legal system with little or no information about the legal processes or substantive law governing their rights and responsibilities, any information provided at a self-help centre could provide them with some assistance. This assistance potentially helps them to navigate the legal system in a more meaningful manner. Moreover, there is also an argument that perceptions about the fairness of a process are linked to how well an individual understands the process and is provided assistance when attempting to access that process. Based on survey data collected from over 6,000 individuals, Ab Currie concluded that “[r]egardless of the type of assistance received, people are more likely to

⁸⁵ Empirical research undertaken with respect to self-represented litigants and access to justice initiatives like self-help has focused on whether and to what degree the initiative assists the individual in obtaining a specific legal outcome.

⁸⁶ Michael Millemann, Nathalie Gilfrich and Richard Granat, “Rethinking the Full Service Legal Representation Model: A Maryland Experiment” (1997) *Clearinghouse Review* 1178 at 1179 [Millemann, Gilfrich & Granat, “Rethinking the Full Service Legal Representation Model”].

⁸⁷ Gary Bellows, “Legal Services to the Poor: An American Report” in Mauro Cappelletti & Bryant Garth, eds, *Access to Justice in the Welfare State: An Introduction* (European University Institute) as quoted in Currie, “Self-Helpers Need Help Too”, *supra* note 7 at 10.

have positive perceptions about the fairness of the justice system if the assistance they received was perceived as helpful.”⁸⁸

Finally, given the number of self-represented litigants in the civil justice system, the self-help format provides an opportunity to disseminate basic information and advice to significantly more individuals than could be reached in a traditional lawyer-client relationship; this improves the overall reach of access to justice in society. As a result of having received assistance from a self-help centre, more individuals will be better informed when addressing their particular legal matter. This, in turn, enhances access to justice and promotes the administration of justice.⁸⁹ This also may assist individuals if and when they are compelled to deal with legal issues in the future by providing them with, at a minimum, some understanding of legal process and legal rights.

While it may be assumed that self-help services reach a wider spectrum of individuals, proponents of self-help programs do not suggest that self-help is the only means by which to enhance self-represented parties’ access to justice. Rather, self-help should, combined with other initiatives, form a spectrum of services that individuals can access to address their differing legal needs and capacities. In acknowledging the different capacities and needs of self-represented litigants, John Greacen has stated,

[s]elf-represented litigants and their cases present an endless variety of situations, ranging from highly educated and capable persons seeking to obtain the simplest forms of court relief (such as a change of name) to persons with limited education, limited English capability, and other handicaps (ranging from hearing and sight impairment to mental illness) seeking to obtain relief in the most complex sorts of legal proceedings...some litigants can obtain all the assistance they need to vindicate their legal rights from court-provided forms and information. Others need limited legal advice

⁸⁸ Ab Currie, “‘A Lightning Rod for Discontent’: Justiciable Problems and Attitudes Towards the Law and the Justice System” in Alexy Buck, Pascoe Pleasance & Nigel J Balmer, eds, *Reaching Further Innovation, Access and Quality in Legal Services* (Norwich, UK: TSO, 2009) at 109.

⁸⁹ One caution in this regard pertains to the criticism that initiatives such as self-help have less to do with improving the self-represented litigants’ experiences in the civil justice system and more to do with ensuring that the judicial system is efficient and less subject to the delays and challenges that come with having lay persons participate in the system.

to enable them to represent themselves. Others need full legal representation because of the complexity of the factual or legal issues involved in their case or because of their lack of the basic skills needed to present them to a court.⁹⁰

Empirical research conducted in respect of family law pro se initiatives in Maryland highlighted the importance of recognizing that many self-represented individuals have varying levels of need and ability that influence the impact of self-help in a particular case.⁹¹ Based on the data collected from interviews with clients who made use of the family law pro se program, it was also concluded that self-help programs should form part of a larger continuum of legal services made available to self-represented parties: the continuum “should include several different legal services levels, incrementally more intensive, between the information-only and full service poles.”⁹²

In light of the recognition that certain litigants run a higher risk that their interests will be compromised if they are compelled to represent themselves in the civil justice system, it has been suggested that programs directed toward self-represented litigants including both self-help legal services and a civil right to representation (as contemplated by Russell Engler) should form part of the same access to justice strategy; different types of legal service would be available in different contexts depending on the needs of particular litigants.⁹³ This approach to access is predicated on the belief that there are certain factors that affect whether particular litigants are able to make use of self-help services and represent themselves. These factors include the vulnerability of the litigant and the seriousness of the right at stake. The consideration of some of these factors led the Supreme Court of Canada to recognize a right to state-funded legal representation in cases where the state was applying to remove a child from parental custody. In determining that an individual, in those circumstances, would have a right to legal assistance, Chief Justice Lamer stated,

⁹⁰ John M Greacen, “Resources to Assist Self-Represented Litigants: A Fifty-State Review of ‘The State of the Art’” (June 2011) Paper prepared for the Michigan State Bar. Available online at <https://GreacenReportNationalEdition.pdf>.

⁹¹ Milleman, Gilfrich & Granat, “Rethinking the Full-Service Legal Representational Model”, *supra* note 86.

⁹² Milleman, Gilfrich & Granat, “Rethinking the Full-Service Legal Representational Model”, *ibid* at 1178.

⁹³ Milleman, Gilfrich & Granat, “Rethinking the Full-Service Legal Representational Model”, *ibid*.

Section 7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children. For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. While a parent need not always be represented by counsel in order to ensure a fair custody hearing, in some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel. A consideration of these factors leads to the conclusion that, in the circumstances of this case, the appellant's right to a fair hearing required that she be represented by counsel.⁹⁴

Several facts—self-represented parties' differing abilities, the importance of certain civil law issues to individuals' lives, and the potential imbalance created when they are expected to engage in a professionalized legal system without representation—raise challenging questions about the efficacy and scope of self-help initiatives.

In addition to the practical realities that have driven the growth of self-help legal services, there is also an educational consideration that has influenced the development of these services. Underscoring this consideration is the recognition that access to justice initiatives can serve to ameliorate individuals' lack of information and corresponding sense of confusion about law and legal processes. The purpose is to “simplify and demystify the law and the system, including its language.”⁹⁵ Research conducted in Australia on different self-help resources noted that the information packages prepared by legal aid and community legal centres sought to “convey both propositional knowledge (by way of information about the substantive law) and procedural knowledge (by way of information about the process-oriented steps).”⁹⁶ The objective in preparing materials that encompass both substantive as well as the procedural information is to provide community legal education about a variety of legal processes and legal institutions.

⁹⁴ *New Brunswick (Ministry of Health and Community Services v G. (J.))*, [1999] 3 SCR 46.

⁹⁵ CJC, “Access to Justice for Litigants in Person”, *supra* note 74 at 10.

⁹⁶ Lawler, Giddings & Robertson, “Opportunities and Limitations in the Provision of Self-Help Legal Resources”, *supra* note 50 at 220.

Arguably, in receiving procedural as well as substantive legal information, individuals are better informed about their rights and responsibilities. They are potentially better equipped to identify and avoid legal problems or address legal problems when they arise; this potentially avoids or minimalizes similar problems in the future.

The Australian researcher Jeff Giddings has suggested that this educative component is based on an underlying belief that promoting community legal education through the use of self-help resources will empower citizens by enhancing “increased public awareness about law and legal process generally.”⁹⁷ In this context, legal education through self-help seeks to achieve the broader goals of community development, engagement by those educated, consciousness-raising and, ultimately, the “imparting of legal knowledge that assists people to participate more actively in and ‘own’ a legal system.”⁹⁸

Practically speaking, in many instances, it can be difficult for self-represented litigants without legal information to even “know which agency to approach with what problems, or how to organize their information and evidence for presentation.”⁹⁹ As such, it has become increasingly important that information provided through initiatives such as self-help legal services expand beyond technical information. This might include the skills and tools necessary to engage in a variety of forums and institutional settings, as well as more generalized information about why certain steps are undertaken and how the various steps fit together. Similar to the services provided by the community lawyer in Connecticut, the information made available to self-represented parties must ensure that individuals are better able to understand their rights and responsibilities and identify the appropriate forum and process for addressing them. By providing individuals with information about the legal and political options and forums available to them in a

⁹⁷ Lawler, Giddings & Robertson, “Opportunities and Limitations in the Provision of Self-Help Legal Resources”, *ibid* at 220.

⁹⁸ Rosemary Hunter, Cate Banks & Jeff Giddings, “Australian Innovation in Legal Aid Services: Lessons from an Evaluation Study” in Alexy Buck, Pascoe Pleasance & Nigel J Balmer, eds, *Reaching Further Innovation, Access and Quality of Legal Services*, (Norwich, UK: The Stationery Office, 2009) at 26.

⁹⁹ Nader, “Processes of Constructing (No) Access to Justice”, *supra* note 56 at 508.

broader educative sense, legal self-help offers an opportunity for individuals to gain legal knowledge; they also receive the practical means to access the different political and democratic institutions that impact their lives.

In this regard, Genn has suggested that ‘unpreparedness’ is one of the single most significant determinants of any individual’s ability to participate in the decision-making process.¹⁰⁰ This is a problem that is experienced disproportionately by self-represented parties. Consequently, in attempting to address this dilemma, self-help can assist individuals gain skills and tools that allow them to engage; this includes how to gather and organize information that they may need to submit in a particular institutional setting and present such information to an adjudicator. The inclusion of the practical skills and tools that are necessary for participation also potentially encourages opportunities for citizen participation outside of the specific context of the civil justice system. This will provide an opportunity for further engagement with a variety of government processes, forums and different decision-making capacities.

Criticisms of the Self-Help Model

Despite the growth of self-help programs and the potential benefits associated with them, there are several criticisms connected with a reliance on self-help centres as a means of promoting access to justice. One of these critiques is grounded in the concern that self-help initiatives fail to take account of the professionalization of law that often necessitates the need for full representation.¹⁰¹ In this context, self-representation is viewed as a barrier to accessing justice rather than as a means to access justice. Flowing from this concern is a further critique about whether self-help is legitimately capable of assisting individuals to participate; such programs might provide a false sense of security to self-represented parties who are compelled to represent themselves in a legal system

¹⁰⁰ Genn, “Tribunals and Informal Justice”, *supra* note 14 at 404.

¹⁰¹ Nourit Zimmerman & Tom R Tyler, “Between Access to Counsel and Access to Justice: A Psychological Perspective” (2010) 37 *Fordham Urb LJ* 473 [Zimmerman & Tyler, “Between Access to Counsel and Access to Justice”].

that has historically been unequipped to deal with them and in some circumstances, is hostile to their presence. Finally, there are broader political questions about the motivations that drive the development of self-help programs. These questions suggest that, rather than being a form of empowerment, self-help represents a form of abandonment by both government and the legal profession. This abandonment is then rationalized through the use of terms such as ‘empowerment’ that contemplate individuals assuming responsibility for the decision-making that impacts their lives and for the action necessary to implement the decisions. Several of these critiques merit greater attention.

One of the most compelling criticisms of self-help programs involves questions about the ability of individuals to represent themselves in the existing legal system. Recent research on the outcomes that self-represented litigants were able to achieve when representing themselves in busy housing courts in New York challenges the assumption that lay persons are able to successfully manage their own legal case. Specifically, Carroll Seron, Martin Frankel and Gregg Van Ryzin suggest that unrepresented tenants face “swift eviction...with minimal judicial involvement.”¹⁰² The data collected further suggests that, once the tenant had legal representation, they were up to 19% more likely to stave off eviction by the landlord. Rebecca Sandefur’s meta-analysis of various empirical research projects also concluded that, in a variety of different legal contexts when individuals are represented by lawyers, they are, on average, more likely to win than individuals who are not represented.¹⁰³ The implication of this research becomes more problematic when account is taken of the broad range of individuals who are

¹⁰² Russell Engler, “Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel is Most Needed” (2011). See http://papers.ssrn.com/so13/papers.cfm?abstract_id=1641269 at 4 [Engler, “Connecting Self-Representation to Civil Gideon”]; Carroll Seron, Martin Frankel & Gregg Van Ryzin, “The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of Randomized Experiments” (2001) 35 Law & Soc’y Rev 419; Rebecca L Sandefur, “The Impact of Counsel: An Analysis of Empirical Evidence” (2010) 9:1 Seattle Journal of Social Justice 51 [Sandefur, “The Impact of Counsel”].

¹⁰³ Sandefur, “The Impact of Counsel”, *ibid* at 52; it is worth noting that certain of this research data has subsequently been challenged by Jim Greiner and his fellow researchers who dispute the actual impact that counsel has in certain legal contexts. A more detailed discussion of this assertion is contained in chapter five of this thesis.

compelled to represent themselves. Russell Engler suggests that a significant number of self-represented litigants are vulnerable and, for a variety of different reasons, also lack power. This lack of power places them at a disadvantage in most legal forums. He continues that the, “greater the power lined up against a litigant and the more vulnerable the litigant, the greater the likelihood litigants will forfeit important rights, absent representation.”¹⁰⁴

In light of the data respecting the impact of counsel, a critique of self-help initiatives maintains that there are some litigants and some cases where it is imperative that the individual receive full legal assistance. As noted in the Supreme Court of Canada case of *New Brunswick v G.(J.)*, the loss of custody of one’s child to the state was one such circumstance. In these types of cases, the provision of advice and information in a self-help setting is not sufficient to ensure that the individual will be able to participate in a meaningful manner. Given concerns about vulnerability and the unequal distribution of power between parties, critics of self-help initiatives suggest that such initiatives are not only unhelpful, but may even be harmful for certain individuals in certain cases. At a minimum, these concerns call for a nuanced assessment of who is in a position to be assisted (and able to make use of the assistance) and what is at stake in the particular case. From a research and policy perspective, the challenge is to identify those individuals who may require full representation because of their particular vulnerability, the type of case involved, and the kind of forums in which full representation is required.

Taking account of the need to distinguish between these situations, the consequent question is how such traditional legal representation might be reconciled within a broader conceptualization of access that contemplates meaningful and direct participation by the individual litigant where possible. In this regard, Engler is not suggesting that self-help is ineffective (and, therefore, not worth pursuing). Rather, he is proposing that, “programs providing assistance short of full representation need to understand where their assistance is most meaningful, and where a referral to programs providing counsel is a better use of

¹⁰⁴ Engler, “Connecting Self-Representation to Civil Gideon” *supra* note 102 at 13.

resources.”¹⁰⁵ This analysis would need to take account of factors such as the particular circumstances of the parties, the case in question, the type of forum, the complexity of legal issues, and the outcome at stake. Having taken account of these various factors, it would be possible to better understand who might be served by self-help and who requires a different form of assistance in order to ensure that they have meaningful access.

Equally significant is the fact that the legal language spoken by members of the legal profession and judges remains inaccessible to non-lawyers attempting to engage with members of the profession and/or the judiciary. Rather than demystifying law, self-help services may be criticized for contributing to the continued mystification of legal processes and legal institutions because self-represented litigants are trained to act as quasi-lawyers. In short, they are encouraged to speak the language of lawyers without the benefit of the training and experience that actual lawyers receive. As a result, self-represented litigants are expected to complete tasks as if they were lawyers. This is without having experience in doing so or a clear understanding of why they are required to perform the tasks in question. By proceeding in this manner, the advice and training that self-represented litigants receive also overlooks and devalues the non-legal skills and abilities of the litigants.¹⁰⁶ Instead, it attempts to train the individual to participate in the traditional legal system in a pseudo-legal capacity.

The result is a disconnect between the limited training provided to the individual and the expectations that they both place on themselves and are placed on them by judges, opposing counsel and court staff. This is particularly problematic when self-represented litigants adopt some of the legal terminology through self-help assistance and then make use of that same terminology in court or in dealing with opposing counsel. At this point, the adjudicator and/or opposing counsel may make certain assumptions about

¹⁰⁵ Engler, “Connecting Self-Representation to Civil Gideon”, *supra* note 102 at 13.

¹⁰⁶ Elizabeth McCulloch, “Let Me Show You How: Pro Se Divorce Courses and Client Power” (1996) 48 Fla L Rev 481 at 508 [McCulloch, “Let Me Show You How”].

the scope of the self-represented litigant's knowledge and experience: this could affect the way in which they interact with the self-represented litigant and further inhibit the way in which the self-represented litigants are able to present their case.

Self-Help as a Form of Disempowerment

Elizabeth McCulloch further challenges the idea that self-help 'empowers' individuals. Following research on pro se divorce courses in Florida in which individuals learn how to complete their own divorce without legal representation, she concluded that self-help was not a form of empowerment, but rather worked as a form of disempowerment. First of all, the self-help services were offered as an alternative for those individuals who could not afford traditional legal representation. As such, the decision to attend the course did not represent a decision that the self-represented party necessarily had a choice in making or would have made if their financial circumstances were different. Arguably, this is true of many self-represented litigants who make use of self-help legal services.¹⁰⁷ The reality is that, if they were able to afford legal representation, they would likely retain a lawyer to represent their interests.¹⁰⁸ McCulloch further observed that, in some instances, self-represented litigants developed unrealistic expectations about the outcomes that they would be able to achieve on their own. It is debatable whether the completion of the divorce course ensured that the individuals felt they were in a position to assert their rights in court or as against opposing counsel. Moreover, after completing the pro se divorce course, individuals are expected to 'go it alone' in a legal system that is unprepared to deal with them and, in some instances, hostile to their presence.¹⁰⁹ McCulloch asserts that this can ultimately lead to feelings of isolation and frustration rather than empowerment and engagement. In this example, it is conceivable that

¹⁰⁷ Julie MacFarlane's research with self-represented litigants suggests that a majority of those interviewed were compelled to represent themselves because they were otherwise unable to afford legal services. See MacFarlane, *Final Report of The National Self-Represented Litigant Project*, *supra* note 3. Moreover, the majority of the participants in this research project also indicated that if given the choice, they would have retained formal legal representation.

¹⁰⁸ For a contrary viewpoint, please see Scott Barclay whose research with self-represented litigants involved in appellate proceedings suggest that a significant portion of the individuals willingly and voluntarily pursued appeals of their legal matters. Scott Barclay, "Decision to Self-Represent" (1996) 77 *Social Science Quarterly* 912 [Barclay, "Decision to Self-Represent"].

¹⁰⁹ McCulloch, "Let Me Show You How", *supra* note 106 at 508.

individuals who experience isolation and frustration in attempting to participate are not likely to engage willingly in other processes or forums on their own.

In their research on the efficacy of self-help initiatives in Australia, Merran Lawler, Jeff Giddings and Michael Robertson compared the motivations of self-help users (i.e., self-represented individuals) in seeking self-help resources with those of the self-help program designers responsible for developing various self-help initiatives (through both for profit and not-for profit organizations). While they acknowledge that empowerment, promotion of participation, and community legal education were important objectives in the design of certain self-help legal resources, this did not always correspond with the objectives of those seeking to make use of self-help programs. They concluded that self-help users, while “emotionally invested in the outcome of their legal issue,” also “measured the utility of legal self-help resources by whether those resources allow them to quickly, easily and directly enter and exit the legal system.”¹¹⁰ The individuals were less concerned with empowerment and education and more concerned with negotiating a resolution of their legal matter in the most efficient manner. This sentiment was particularly evident in the context of legal matters such as probate where individuals highlighted the importance of having the information necessary to navigate the probate process as quickly as possible. Another example in which this was evident was in the field of family law. In particular, in matters involving custody, individuals are, in every respect, concerned with the particular outcome of their case. Again, the self-help users’ evaluation of the utility of a self-help service was based on achieving a particular result: this contrasted with the self-help providers’ objectives of community legal education and individual empowerment.¹¹¹ As a result of the discrepancy between the two groups’ objectives, there were certain instances where the users expressed frustration with the materials or services provided; they suggested that the self-help initiative in question did not meet their needs. While this may not represent a criticism of self-help legal services, the Australian research does highlight the importance of clearly

¹¹⁰ Lawler, Giddings & Robertson, “Opportunities and Limitations in the Provision of Self-Help Resources”, *supra* note 50 at 210.

¹¹¹ *Ibid* at 218.

outlining the objectives and goals of self-help services when designing and implementing these initiatives.

A Neo-liberal Critique of Self-Help Initiatives

From a theoretical perspective, the development of the self-help model can also be examined through a neo-liberal lens. The argument that self-help represents an abdication of responsibility by government and the legal profession stands in sharp contrast to self-help advocates' claims of empowerment and engagement. In this regard, Jeff Giddings has suggested that "as legal jurisdictions across the western world grapple with the problem of stretching limited legal aid budgets even further, there has been an increasing pressure upon individuals with legal problems to 'help themselves' through the use of legal self-help resources."¹¹² This problem is compounded by the fact that legal services continue to be priced out of the reach of more and more individuals. Consequently, the high price of legal fees and the corresponding reduction in legal aid budgets by governments in Australia, United Kingdom, Canada and the United States has resulted in individuals having no or little choice other than to represent themselves.¹¹³ To the extent that these non-lawyers have begun to enter the legal system in significant numbers, there are corresponding concerns about delay and additional costs as a result of the self-represented litigants not being familiar with the legal rules or processes. This potentially poses significant challenges for opposing counsel who must engage with self-represented litigants who are unfamiliar with the substantive and/or procedural rules. Consequently, self-help programs are developed not to empower individuals and enhance their participation. Rather, they are intended to address the delays and inefficiencies caused by individuals' inexperience and lack of knowledge. In other words, self-help might be viewed as simply an attempt to ensure that the administration of the legal system runs relatively smoothly.

¹¹² Lawler, Giddings & Robertson, "Maybe a Solicitor Needs to Know that Sort of Thing but I Don't", *supra* note 60.

¹¹³ Again, in the Canadian context, it is reminded that Legal Aid Ontario in Ontario has recently witnessed increases in its budget that potentially allow Legal Aid Ontario to provide services to more individuals.

Viewed through a neo-liberal lens, there are questions about whether self-help programs represent the effect of steps taken to dismantle social welfare programs. This positions self-reliance as a cover for inadequate safety nets for the citizens.¹¹⁴ Critical of a neo-liberal focus on privatization and the corresponding dismantling of social welfare programs, Henry Giroux stated,

[t]he incessant call for self-reliance that now dominate public discourse betray a hollowed-out and refigured state that neither provides for adequate safety nets for its populace, especially those who are young, poor or marginalized, nor gives any indication that it will serve the interests of its citizens in spite of constitutional guarantees.¹¹⁵

Given this critique, one of the specific questions that arises in the context of self-help assistance is whether the current focus on the shared concepts of individualism, self-reliance and limited state involvement in individuals' lives (all of which form part of a neo-liberal political philosophy) underlies the motivation for the development of self-help programs in which it is assumed that the individual will take responsibility for his or her own legal matter with minimum state assistance.

As a political paradigm, neo-liberalism gained significant standing in the 1980's.¹¹⁶ From an ideological perspective, the concept represents an economic doctrine that puts the "production and exchange of material goods at the heart of the human experience" and envisions a "consumerist, free-market world."¹¹⁷ Underlying this ideology is a strong adherence to the twin concepts of individual freedom and reduction in state functions that support and assist the individual. Steger and Roy maintain that a

¹¹⁴ Henry A Giroux, *The Terror of Neoliberalism: Authoritarianism and the Eclipse of Democracy* (Colorado, USA: Paradigm Publishers, 2004) at 106 [Giroux, *The Terror of Neoliberalism*]. In a paper delivered in in May 2003, Erhard Berner and Benedict Phillips suggested that, "the shift towards self-help can be seen as a masking defence against calls for redistribution". See Erhard Berner & Benedict Phillips, "Left to Their Own Devices? Community Self-Help Between Alternative Development and Neoliberalism", Paper presented at N-Aerus Annual Seminar: Beyond the Neo-Liberal Consensus on Urban Development: Other Voices from Europe and the South (May 15-17, 2003).

¹¹⁵ Giroux, *The Terror of Neoliberalism*, *ibid* at 106.

¹¹⁶ Manfred B Steger & Ravi K Roy, *Neoliberalism A Very Short Introduction* (Oxford, UK: Oxford University Press, 2010) at 11 [Steger & Roy, *Neoliberalism*].

¹¹⁷ *Ibid* at 11-12.

neo-liberal ideology includes an unwavering commitment to the free-market and the accompanying belief that the free-market (with little or no interference from government) will inevitably lead to a better and more productive society for all individuals. These ideological principles, in turn, influence the modes of governance. Specifically, a neo-liberal approach to governance is shaped by entrepreneurialism, competitiveness, self-interest, and the devolution of central state power.¹¹⁸ Active democracy is pushed to the political margins and confined to market participation.

The neo-liberal approach of governance is articulated in government policies that promote the privatization of government enterprises, de-regulation, and reductions in government funding. This is particularly so for social services and welfare programs.¹¹⁹ In this regard, governments view their role as being responsible to the free market and actors in “slimmed down state enterprises.”¹²⁰

In his discussion of the role of Community Legal Centres in promoting legal citizenship in Australia, Mark Rix suggests that the contracting out and outsourcing by

¹¹⁸ Steger & Roy, *Neoliberalism*, *ibid* at 12.

¹¹⁹ In the Canadian context, between 1867 and the 1970's, it is generally held that social welfare programs expanded to encompass various universal programs including health care, old age pension, and unemployment insurance among others. In Canada, “the welfare state developed as a response to demonstrated needs and articulated demands, particularly from unions, from professional organizations, and from community groups but also from the business community. And it was about values as well as about practices. Especially in the period following the Second World War, government reports, academic research, and social commentaries emphasized the Canadian commitment to social responsibility and to sharing the risks of ill health, disability, poverty, age, and unemployment. These values were clearly evident in the introduction of federal programs and regulations designed to share risks and responsibilities among both people and provinces.” However in recent years, there has been a consistent move by Canadian governments to reduce spending and therefore responsibility for many of the social programs that have been a mainstay of the Canadian political system since the late 1960's. This move is justified on the basis that growing deficits must be controlled, globalization and the rationalization that various social programs rather than alleviating inequality have perpetuated same. As a result, “social programs deflecting the old values are being downsized and transformed. A wide variety of programs, based on a range of criteria are being collapsed and 'rationalized' into an integrated project that determines access on the basis of individually demonstrated need. Increasingly, social security and social services are being 'targeted' or privatized. Privatization in this sense refers not only to the transfer of responsibility from the public to the private sector, but also from the collectivity to the individual and from the state to the home. At the same time, regulations that protected individuals and equity-seeking groups are being eliminated.” Pat Armstrong, “The Welfare State as History” in R Blake, P Bryden & F Strain, eds, *The Welfare State in Canada: Past, Present and Future* (Concord, Canada: Irwin Books Ltd., 1997).

¹²⁰ Steger & Roy, *Neoliberalism*, *supra* note 116 at 12-13.

government of its responsibilities to its citizens has transformed both the state and its citizenry. In this regard, he states that,

[t]he contracting out of public services does not simply mark a change in the way that governments deliver services to citizens, as important as this is. In drastically transforming the relationship between governments and citizens, contracting out has also brought about the emergence of a new mode of citizenship...[the] contract state has divested itself of many of the roles and functions that were once regarded as core responsibilities of the welfare state, so has 'citizenship' been similarly hollowed out. In other words, citizenship has come to denote a much narrower range of far more limited citizen rights than the term denoted during the era of the welfare state. The term 'consumer citizenship' refers to this narrowing and hollowing out of the meaning and significance of citizenship.¹²¹

The reduction of support for social welfare programs results in the relinquishment by government of its responsibility for citizens' well-being¹²² and a corresponding transference of that responsibility to the individuals themselves; as Rix notes this creates a 'consumer citizenship.' At a minimum, from a democratic standpoint, the recasting of citizens as consumers and the market as a framework for engagement and participation means, "people begin to think of themselves as consumers in all they do, even when they are not in an overtly economic situation. While people are economic consumers some of the time, they are political citizens all of the time."¹²³ Moreover, as 'consumer citizens,' individuals are left to self-mobilize in order to obtain the services that they require in their daily lives. Citizens are "compelled to pay for or 'earn' the benefits and services that are supplied by private or community sector organizations contracted to government, and in attempting to seek redress for any shortcomings or problems in service delivery, they essentially play the role of active and responsible consumers."¹²⁴ Individuals become responsible for achieving their own well-being. As a result, the recasting of

¹²¹ Mark Rix & Scott Burrows, "The Foundations of Legal Citizenship-Community Law, Access to Justice and the Community Legal Sector" (2005) 30:3 Alt LJ 126 at 129 [Rix & Burrows, "The Foundations of Legal Citizenship-Community Law"].

¹²² David Harvey, *A Brief History of Neoliberalism* (Oxford, UK: Oxford University Press, 2005).

¹²³ Allan C Hutchinson, "Beyond the law-and-economics approach - from dismal to democratic" in Aristides N Hatzis & Nicholas Mercuro, eds *Law and Economics-Philosophical Issues and Fundamental Questions* (London, UK: Routledge-Taylor Francis Group, 2015) 89 at 98.

¹²⁴ Rix & Burrows, "The Foundations of Legal Citizenship-Community Law", *supra* note 121 at 129.

citizens as consumers results in the narrowing of rights that individuals are afforded and otherwise make use of as citizens of a welfare state. This recasting also has the effect of isolating citizens as individual consumers with the net result being “an atomized society of disengaged individuals who feel demoralized and socially powerless.”¹²⁵ All this has a detrimental effect on the democratic impulse.

This “atomized society of disengaged individuals” is further consistent with concepts of social exclusion that contemplate certain individuals being geographically resident in a society, but unable to participate in the “normal activities of citizens in society.”¹²⁶ Key components of the activities from which individuals are excluded include the ability to exercise decision-making power and the ability to be part of a larger community from which the individual draws support and a sense of connectedness. Individuals who are socially excluded suffer from economic disadvantage and are less likely to secure social rights that include employment, housing, health care and education.¹²⁷ In this sense, there are economic as well as social aspects of the deprivation that give rise to social exclusion.¹²⁸ Thus, in recognizing and addressing social exclusion, it is important to identify and remedy the various mechanisms by which individuals are disengaged from the mainstream society. From a political perspective, Bhalla and LaPeyre have noted that, “[t]he political dimension of exclusion involves the notion that the State, which grants basic rights and civil liberties, is not a neutral agency but a vehicle of the dominant classes in a society. It may, therefore, discriminate between insiders and outsiders and may exclude some social groups and include others.”¹²⁹ This is relevant to

¹²⁵ Noam Chomsky, *Profit over People - Neoliberalism and Global Order* (New York, USA: Seven Stories Press, 1999) at 10 [Chomsky, *Profit over People*].

¹²⁶ Tania Burchardt, Julian Le Grand & David Piachaud, “Social Exclusion in Britain 1991-1995” (1999) 33:3 *Social Policy and Administration* 227 at 230.

¹²⁷ Liz Richardson & Julian LeGrand, “Outsiders and Insiders’ Expertise: The Response of Residents of Deprived Neighbourhoods to an Academic Definition of Social Exclusion” (2002) 36:5 *Social Policy and Administration* 496 [Richardson & LeGrand, “Outsiders and Insiders’ Expertise”].

¹²⁸ Ajit Bhalla & Frederic LaPeyre, “Social Exclusion: Towards an Analytical and Operational Framework” in Institute of Social Sciences, *Development & Change* (Oxford, UK: Blackwell Publishers Ltd, 1997) at 418 [Bhalla & LaPeyre, “Social Exclusion: Toward an Analytical and Operational Framework”]; Richardson & LeGrand, “Outsiders and Insiders’ Expertise”, *ibid* at 5.

¹²⁹ Bhalla & LaPeyre, “Social Exclusion: Toward an Analytical and Operational Framework”, *ibid* at 8.

the democratic thesis. Individuals who are socially excluded remain unable to participate in or impact the decision-making that takes place in a variety of legal institutions and processes. This lack of an access to justice results in individuals being unable to realize certain social rights and thus, remaining marginalized in society. In his discussion of the barriers that prevent individuals from accessing justice, McDonald further notes that, “a lack of access to justice results not just from factors tied to the subjective perceptions of those who are excluded. It also flows from social marginalization visited upon them by the societal mainstream.”¹³⁰

The individualistic nature of a ‘consumer citizenship’ and the corresponding requirement that all citizens, regardless of ability or resources, effectively take responsibility for fulfilling their own needs results in the potential for social exclusion of certain members of society. This is not ameliorated by the provision of choice in the types and terms of services if individuals are unable to access or make use of the services offered. From a critical neo-liberal perspective, these ‘responsibilized’ citizens are not empowered by the opportunity to control their own lives and well-being. Instead, the individuals end up isolated, vulnerable to exploitation, socially powerless to make substantive changes in their lives and, thus, ultimately disengaged. This is largely because such an individualistic approach does not take account of the social, economic and political inequality prevalent in society. Together these inequalities work to prevent segments of the population from engaging in society in a meaningful manner. Robert W McChesney suggests that the consequence is that “the social inequality generated by neoliberal policies undermines any effort to realize the legal equality necessary to make democracy credible.”¹³¹

In the context of self-help legal services, this neo-liberal critique challenges the legitimacy of the underlying theoretical motivations of this initiative—that self-help represents a form of individual empowerment that ultimately encourages greater

¹³⁰ Roderick A MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward*, (Toronto, Canada: The Law Society of Upper Canada, 2005) 1 at 29.

¹³¹ Forward by Robert W McChesney in Chomsky, *Profit over People*, *supra* note 125 at 10.

participation and engagement. Rather, by placing the onus on the individual to seek out self-help in order to address their own legal matter in a legal system that is unfamiliar and unwelcoming, self-help represents an abdication of the state's responsibility to provide the resources to ensure that members of society are in a position to engage as active political citizens. The consequence is that individuals are unable to engage in a meaningful manner and are left isolated and disenfranchised.

Given this critique, it is important to examine critically the motivations as well as the efficacy of self-help in terms of facilitating a broader conceptualization of access to justice that seeks to expand citizens' meaningful participation. In undertaking this critical examination, self-represented litigants' experiences with self-help and their views on participation in the civil justice system offer important insight into whether self-help might promote meaningful participation. Alternatively, it might lead to isolation and disengagement and thereby fall victim to this particular critique of neo-liberalism.

Conclusion

This chapter has sought to examine the particular circumstances of an expanding self-represented litigant population in the civil justice system. This included a discussion of some of the barriers facing self-represented litigants as they attempt to engage in the civil justice system. As a means of addressing the problems faced by the growing number of self-represented litigants who are navigating the legal system without procedural or substantive legal advice, various jurisdictions have developed self-help legal services. Self-help centres provide advice and information to self-represented litigants on a volunteer basis. From a democratic perspective, self-help services offer the potential for assistance and support that empower and enable individuals to participate in a more meaningful and direct manner. However, this initiative is vulnerable to certain criticisms about the motivations behind the development of self-help services and whether it is limited in terms of the legal issues at stake and the particular vulnerability of certain individuals or groups. The latter concern is that certain individuals may not be in a position to benefit from the assistance offered. Notwithstanding the validity of the criticisms that are raised in respect of this initiative, I maintain that self-help remains a

useful site at which to examine self-represented litigants' experiences and perceptions about participating in the civil justice system, as well as access more generally. As such, a self-help legal centre in downtown Toronto was utilized as the basis for the empirical research conducted in this project. The following chapter will examine the rationale for the particular methodological approach adopted and the specific methodologies employed in conducting the research at the Toronto self-help legal centre.

CHAPTER FIVE
EMPIRICAL RESEARCH METHODOLOGIES IN ACCESS TO JUSTICE
RESEARCH

As noted at the outset, access to justice remains one of the most debated issues on the law-and-society agenda. Of late, attention has turned to efforts to measure the impact and efficacy of different initiatives aimed at improving individuals' access to justice.¹ Along with a broader turn toward empirical studies in law, there have been renewed efforts within the access to justice field to develop a more compelling and convincing methodology by which to assess and evaluate these different initiatives. A tension has arisen between quantitative and qualitative approaches; this is typically framed within the context of how initiatives are evaluated for the purposes of research. However, beneath that seemingly technical project, there is a deeper and more basic policy debate about the overall ambitions for access to justice – namely whether access to justice policy and initiatives ought to be informed by a continued commitment to the practical thesis or whether a new approach to access as articulated in the democratic thesis should be adopted?²

One specific area in which these debates arise is that of civil law self-help centres. The efforts to gauge the success of this initiative have encompassed both empirical and

¹ In their article on empirical studies on access to justice, Catharine R Albiston and Rebecca Sandefur note that a “new crop of evaluation studies have joined a broader body of contemporary research investigating the delivery of legal services.” This new crop of studies has tended to focus on the implications of legal representation and legal services. However, Albiston and Sandefur have called for an expanded research agenda that “steps back from lawyers and legal institutions to explore not only whether existing policies are effective, but also how current definitions and understandings of access to justice may blind policy makers to more radical, but potentially more effective, solutions.” See, for example, Catharine R Albiston & Rebecca L Sandefur, “Expanding the Empirical Study of Access to Justice” (2013) *Wis L Rev* 101 at 103 [Albiston & Sandefur, “Expanding the Empirical Study of Access to Justice”].

² In her article entitled “Processes of Constructing (No) Access to Justice (For Ordinary People)”, Laura Nader questions whether the gap caused by much legal advice and assistance to the few and too little for the many undermines the legitimacy of the institutions of democratic self-government. See Laura Nader, “Processes of Constructing (No) Access to Justice (For Ordinary People)” (1990) 10 *Windsor YB Access Just* 496 at 508 [Nader, “Processes of Constructing (No) Access”].

conceptual analysis.³ As such, the work devoted to assessing the validity and viability of self-help law centres provides an important site at which to discuss access to justice theory and objectives. Moreover, there are significant policy implications to be drawn and considered from such work.

The purpose of this chapter is to canvass certain recent empirical quantitative work and relate it to the broader challenges and ambitions of the practical and democratic theses in terms of a policy agenda for access to justice. In so doing, I hope to outline the tension between quantitative and qualitative research methodologies and the challenges associated with these different methodologies as a foundation for discussing the methodology adopted in this project. Next, I will introduce the two research streams that have arisen in access to justice research namely, (1) the qualitative and related observational work; and (2) the more recent quantitative studies that seek to use randomized methods in an attempt to measure outcomes. In the following section, I will discuss critically and in more depth some of the concerns associated with a focus on legal outcomes and corresponding adoption of a randomized quantitative methodology. I will concentrate on the practical, theoretical and ethical issues raised by these studies.

As part of laying the groundwork for my methodological choices, I will advocate for more in-depth qualitative research that examines the experiences, views and perceptions of individuals engaged with the civil justice system. This is based on the belief that qualitative research, which takes account of the individual's experiences attempting to access justice, creates a space in which to think and debate meaningful participation. Indeed, I contend that this form of qualitative research is consistent with an expanded concept of access to justice that contemplates policies and initiatives that encourage democratic participation and citizen engagement. In so doing, my hope is not only to expand discussion of the broader objectives respecting access to justice, but also to learn from some of the criticisms that have been leveled against earlier qualitative and

³ Michael Millemann, Nathalie Gilfich & Richard Granat, "Rethinking the Full-Service Legal Representation Model: A Maryland Experiment" (1997) *Clearinghouse* 1178 [Millemann, Gilfich & Granat, "Rethinking the Full-Service Legal Representation Model"]; Gary Blasi, "How Much Access? How Much Justice?" (2004) 73 *Fordham L Rev* 865.

observational studies in access to justice. Accordingly, throughout the first part of this chapter, my critical ambition is to relate the empirical debate back to the more fundamental discussion over the tension between the practical and democratic theses as a basis for access to justice theory and policy.

The Democratic Thesis and Qualitative Research

Working within a theoretical framework that contemplates more direct participation by individuals in the legal and political processes that impact their lives, qualitative research seeks to examine how self-represented litigants' views and perceptions are formed by their particular interactions with the legal system.⁴ In this regard, qualitative research, including in-depth interviews, case studies and observation, can be used to gather data regarding individuals' "lived experience" with law. It also offers an opportunity to elicit the meaning that they assign to these experiences and the implications for their further engagement with law.

In a litigation context, individuals' ability to tell their stories, as well as present evidence to the adjudicator, are both important criteria by which the litigants assess the fairness of the legal proceeding in which they are involved. The significance of these criteria is supported by research that has been conducted in field of procedural justice. More specifically, it looks to the importance of process-versus-outcomes to a litigant when assessing the overall fairness of a legal process.⁵ In seeking out the self-

⁴ Ellen Berrey, Steve G Hoffman & Laura B Nielsen, "Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation" (2012) 46:1 Law & Soc'y Rev 1 at 6 [Berrey, Hoffman & Nielsen, "Situated Justice"].

⁵ Specifically, the social psychology research that has been conducted in the field of procedural justice examines how individuals weigh the quality of the procedures afforded them in different legal contexts and ultimately assess the fairness of a given process. See Martin Gramatikov, Maurits Barendrecht & Jin Ho Verdenschot, "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" (2011) 3 Hague Journal on the Rule of Law 349 at 361. In the context of procedural fairness, the values associated with evaluating the procedural fairness of a process are informed by principles of natural justice such as a right to be heard, the right to be judged impartially, and the making of a determination on the 'evidence' presented. See Grant Huscroft, "From Natural Justice to Fairness: Thresholds, Content and the Role of Judicial Review" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto, Canada: Emond Montgomery Publications, 2013) at 148-151 [Flood & Sossin, *Administrative Law in Context*] and Laverne Jacobs, "Caught Between Judicial Paradigms and the Administrative State's Pastiche: 'Tribunal' Independence, Impartiality, and Bias" in Flood & Sossin, *Administrative Law in Context*, *ibid* at 233-235.

represented litigants' experiences, it is also important to take account of some of the themes raised in the research on legal consciousness. In particular, it examines how a litigants' legal consciousness both informs and is altered by their particular legal experiences.⁶

Previous research in access to justice has examined in what circumstances individuals consider law as a viable option to resolve their problems and when they in fact 'turn' to law.⁷ Having 'turned to law' to resolve their problems (with assistance of a service such as self-help), there is a further need to examine whether they believe they are subsequently better able to engage with legal processes and institutions in the future. In other words, having participated directly in a legal process, it is important to understand how individuals' experiences in the civil justice system and resulting perceptions about their ability to participate might impact their views about future participation more generally. Underlying this approach to access to justice research is the democratic thesis: this thesis values enhanced and meaningful participation by all citizens within a variety of legal and political forums.

An approach to research that is focused on individuals' experiences, perceptions and potential for engagement can be contrasted with the more recent quantitative, randomized and results-based approach. This methodology seeks to generate data by attempting to measure the impact of legal representation and/or other comparable legal services within a particular legal context using measurable legal outcomes in individual

⁶ Laura Beth Nielsen, "Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment" (2000) 34:4 Law & Soc'y Rev 1056 at 1059 [Nielsen, "Situating Legal Consciousness"].

⁷ See for example, research conducted by researchers such as Austin Sarat, Lucie White, Susan Silbey, Patricia Ewing, Laura Beth Nielson and Sally Engle Merry (and most recently Michael Trebilcock, Anthony Duggan and Lorne Sossin in the Canadian context). See Patricia Ewick & Susan B Silbey, *The Common Place of Law* (Chicago, USA: The University of Chicago Press, 1998) [Ewick & Silbey, *The Common Place of Law*]; Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans*, (Chicago, USA: The University of Chicago Press, 1990) [Merry, *Getting Justice and Getting Even*]; Lucie E White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G" (1990) 38:1 Buff L Rev 1; Austin Sarat & William LF Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (New York, USA: Oxford University Press, 1995); Nielsen, "Situating Legal Consciousness", *ibid.*

cases. In terms of access to justice initiatives, research that measures the impact of a specific legal service on the legal outcome achieved arguably helps to define when full legal representation is needed to achieve a particular outcome and when something less than full legal representation can be provided to self-represented litigants.⁸ In this regard, quantitative data may be used to rationalize budgetary cutbacks of initiatives that are not ‘proven’ to generate certain outcomes or that offer a basis for suggesting that a lesser service has a certain statistical probability of achieving the same results. However, caution must be exercised: research should not be driven by questions that fit “policy-makers’ definition of a problem and their policy goals for addressing that problem.”⁹

In light of this focus on quantitative data, the call for ‘hard data’ as a basis for developing and maintaining access to justice initiatives becomes louder. This has worked to effect a corresponding downgrading of the value of qualitative research. Specifically, the focus on self-represented litigants’ experiences and perceptions about their engagement with the civil justice system is relegated to the status of ‘customer satisfaction surveys’; “there are no counterfactuals” to the individual’s belief that the service provided a benefit.¹⁰ While this research project does not negate the need for full legal representation in certain situations and the associated need for research that assists in delineating those situations, there are practical, theoretical and ethical concerns that arise in shifting the focus from qualitative research to randomized outcome-based quantitative research. Accordingly, I will argue that qualitative research that concentrates on the self-represented litigants’ experiences, views and perceptions must be an integral part of a broader conceptualization of access to justice that seeks to promote the democratic virtues of participation and engagement and is further consistent with giving ‘voice’ in a democratic context.

⁸ Subsequently to conducting research on self-help services, Michael Millemann and others discussed the benefits associated with adopting a spectrum of legal services. Millemann, Gilfich & Granat, “Rethinking the Full-Service Legal Representation Model”, *supra* note 3.

⁹ Albiston & Sandefur, “Expanding the Empirical Study of Access to Justice”, *supra* note 1 at 104.

¹⁰ Pascoe Pleasance, “Trials and Tribulations: Conducting Randomized Experiments in a Socio-Legal Setting” (2008) *JL & Soc’y* 8 at 9 [Pleasance, “Trials and Tribulations”].

Empirical Research on Access to Justice

A significant portion of the recent research conducted in the field of access to justice has focused on the impact of legal representation (or lack thereof) on case outcomes.¹¹ This is consistent with the practical thesis and a corresponding focus on traditional legal representation as a means of improving access to justice. Within this research stream, outcomes have generally been defined as a positive result in the particular case type (e.g., a greater monetary award or the avoidance of an eviction) or other defined ‘win’ in a purely legal context. More recently, this approach to research has expanded to other forms of legal services that run a spectrum from legal clinics and duty counsel programs to initiatives that distribute legal pamphlets or provide online assistance. Historically, research in this area involved observational studies that purported to study the impact of legal services in a variety of different settings.¹² Typically, these projects included a combination of observations about various adversarial processes, interviews with stakeholders (including lawyers, judges, court clerks and self-represented litigants), surveys, case studies, reviews of court records, and a meta-analysis of other outcome-based studies.¹³

¹¹ Herbert M Kritzer, “To Lawyer or Not to Lawyer: Is that the Question?” (2008) 5:4 J Empirical Legal Stud 875 [Kritzer, “To Lawyer or Not to Lawyer”].

¹² D James Greiner & Cassandra Wolos Pattanyak, “Randomized Evaluation in Legal Assistance: What Difference does Representation Make (Offer and Actual Use) Make?” (2011) at 49-56. Available at http://papers.ssrn.com/sol3papers.cfm?abstract_id=1708664. This article was subsequently published as “Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?” (2012) 121:8 Yale LJ 2032 [Greiner & Pattanyak, “Randomized Evaluation in Legal Assistance”]. In the article, the authors provide an exhaustive review of the various studies that have been conducted to date.

¹³ For an example of meta-analysis, see Rebecca L Sandefur, “The Impact of Counsel: An Analysis of Empirical Evidence” (2010) 9:1 Seattle Journal for Social Justice 51 as well as research by researcher such as Jessica Steinberg, Michael Milleman and Jeff Gidding regarding examples of other methods of inquiry. See Jeff Giddings & Michael Robertson, “‘Lay People, For God’s Sake! Surely I Should Be Dealing with Lawyers?’ Toward an assessment of Self-Help Legal Services in Australia” (2002) 11:2 Griffith LR 436; Milleman, Gilfrich & Granat, “Rethinking the Full-Service Legal Representation Model”, supra note 3; Jessica K Steinberg, “In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services” (2010-2011) 18 Geo J on Poverty L & Pol’y 453 [Steinberg, “In Pursuit of Justice”]; Julie MacFarlane, “Identifying and Meeting the Needs of Self-Represented Litigants”, Final Report of the National Self-Represented Litigants Project (May 2013) at 86. Available online at www.lsuc.onca/uploadedfiles/For_The_Public?About_The_Law_Society/_Decisions/2014/Self_Represented_Project.pdf [MacFarlane, Final Report of the National Self-Represented Litigant Project]; Trevor CW Farrow, Diana Lowe QC, Bradley Albrecht, Heather Manweiller & Martha E Simmons, “Addressing the Needs of Self-Represented

For the purposes of this discussion, research regarding outcomes can be divided into two broad categories: (1) research that examines the outcomes achieved by self-represented litigants who do not have counsel compared with those individuals who have counsel; and (2) research that examines a spectrum of legal services whereby individuals receive some legal assistance that falls short of full representation, such as unbundled legal services. Further examples of legal services that fall into the second category include self-help centres, duty counsel, hotlines and legal education programs. Both of these broad categories reflect a focus on evaluating the instrumental impact of legal services and the efficacy of a particular access to justice initiative in affecting positive legal outcomes for the clients. In certain respects, both categories are aimed at assessing the effectiveness of a service in a particular legal setting. Importantly, the ‘effectiveness’ of a program is measured in terms of the objective legal outcome achieved in the case.

In contrast to this approach, there are legal researchers working in the field of access to justice who have adopted more qualitative methods (including ethnographic methods). These are borrowed from the social sciences as a means of examining individuals’ experiences within the civil justice system, their legal consciousness, and their perceptions about law more generally.¹⁴ Typically, the objective in this type of research is to collect narratives and/or information from individuals in order to “discover the different ways in which people use and think about law” and what that means for access to justice going forward.¹⁵ This work seeks to examine the way in which individuals characterize, address and respond to civil justice problems without traditional legal representation and what impact this has on the individual. One of the validating

Litigants in the Canadian Justice System”, A White Paper prepared for the Association of Canadian Court Administrators (March 27, 2012). Available online at www.cfcj.fccj.org [Farrow et al., “Addressing the Needs of Self-Represented Litigants”].

¹⁴ See for example, Hazel Genn, *The Paths to Justice – What People Do and Think about Going to Law* (Oxford, UK: Hart Publishing, 1999); Merry, *Getting to Justice and Getting Even*, supra note 7; Patricia Ewing & Susan Silbey, *The Common Place of Law*, supra note 7; William O’Barr & John M Conley, “Litigant Satisfaction versus Legal Adequacy in Small Claim Court Narratives” (1985) 19 *Law & Soc’y Rev* 661; and Ingrid Eagly, “Community Education: Creating a New Version of Legal Services Practice” (1997-98) 4 *Clinical L Rev* 433 [Eagly, “Community Education”].

¹⁵ Ewick & Silbey, *The Common Place of Law*, *ibid* at xi.

bases for conducting research in this manner is to engage in a broader discussion about not only what role law plays in citizens' lives, but also what role it should play. In this regard, an in-depth analysis of individuals' particular experiences provides an opportunity to engage in a much broader theoretical discussion.¹⁶ In keeping with the democratic thesis, this approach also seeks to directly engage individuals in a discussion about how they participate in legal processes and legal institutions.

The research that engages the views and perceptions of self-represented litigants through methods such as observation and in-depth interviews has recently come under attack. The main thrust of the attack is that the solicitation of clients' viewpoints does not provide evidence of the efficacy of a particular legal service; it fails to correlate the service provided with the self-represented litigant's ability to affect a particular result. Furthermore, it is argued that this methodological approach does not address whether the client is in a position to make use of the assistance provided in order to obtain a successful outcome. In this regard, it is further argued that, although surveys and interviews reflect the client's level of 'customer satisfaction' with a particular service, they offer only limited insight into the effectiveness of an initiative in relation to specified goals.¹⁷ This critique is bolstered when the legal service being studied is something less than full legal representation. In these particular circumstances, there is an added concern that surveying clients who might otherwise not receive any legal assistance provides a distorted picture of the efficacy of the particular initiative: the interviewees are likely to be disproportionately positive about any assistance that they receive. This criticism applies notwithstanding the actual outcome obtained or the objective quality of the service provided. Finally, there is a concern that the self-represented litigant (as a layperson with little or no experience with lawyers, legal processes or legal institutions) is not in the best position to assess critically the services provided.

¹⁶ Lucio Baccaro & Konstantinos Papadakis, "The Downside of Participatory-Deliberative Public Administration" (2009) 7 Socio-Economic Review 245 at 256.

¹⁷ Laura K Abel, "Evidence-Based Access to Justice" (2009-2010) 13 U Pa J L & Soc Change 295 at 297-303 [Abel, "Evidence-Based Access to Justice"].

What is important to note about these criticisms is their underlying insistence that a focus on case outcomes (i.e., the legal result reached in a particular case) is necessary to establish an accurate measure of the quality and/or efficacy of a particular access to justice initiative. In this regard, some scholars further contend that research on access to justice should attempt to provide “definitive evidence” and/or a “quantification of the benefit of advice or representation” about a particular access to justice initiative.¹⁸

However, the resulting focus on case outcomes as a measure of the effectiveness of an access to justice initiative raises deeper challenges. These include questions about what the broader objectives of access to justice theory are and how such objectives should be articulated in access to justice policy and initiatives. Moreover, broader theoretical considerations about what access to justice seeks to provide access to, as well as practical and ethical issues concerning case outcome research (as a means of obtaining the ‘quantification of benefits’) suggest that there are valid reasons for guarding against a shift that is too heavily focused on case outcome research. Instead, it is important to continue to incorporate a variety of methodologies that, at a minimum, encourage ongoing discussion about how access to justice should be conceptualized so that they are optimally consistent with and support a broad conceptualization of access to justice goals, particularly as it pertains to advancing democratic values and interests.

Outcome-Based Studies

It is important to critically examine outcome-based research in regard to a dialogue about methodologies. Specifically, this examination should take account of certain issues that are raised about outcome-based research in a socio-legal setting; this includes how outcomes are conceptualized and delineated, as well the potential problems with doing so. Following this critical discussion, it is necessary to look at some of the problems that are more specifically generated in the context of randomized outcome-based research. Generally speaking, an outcome-based approach to research raises several important

¹⁸ Abel, “Evidence-Based Access to Justice”, *ibid* at 303, Pascoe Pleasance, “Trial and Tribulations: Conducting Randomized Experiments in a Socio-Legal Setting”, *supra* note 10 at 11.

normative questions about the nature of access to justice and about what is being sought as the end-goal—whether this should be access to law as opposed to access to justice; and whether ‘justice’ may be characterized as something different from a successful outcome in a particular legal context. Related to these difficult normative inquiries is the primary question of how successful outcomes are or should be defined for the purposes of empirical research. However, even more fundamentally, it must be asked, given the challenges associated with measuring outcomes, whether a focus on outcomes should be the main driver of decisions about the overall direction of access to justice or whether it should be a piece of a larger puzzle. This question ties in directly with the tension between the practical and democratic theses.

Outcome-based research is used because it can assist researchers in evaluating the efficacy of a particular legal service, assuming that outcomes are conceptualized in a particular way (which, in itself raises difficult questions).¹⁹ Moreover, policy-makers will likely use the data resulting from this type of research when they are called upon to make difficult decisions regarding resource allocation and the development of programs that seek to improve individuals’ access to justice. With respect to forms of assistance that offer something less than full legal representation, there is also an argument that it is important, from the user’s perspective, that individuals seeking assistance are able to make use of the assistance in a meaningful way. In this regard, research regarding the link between the effectiveness of a program and the outcome achieved is important to the individuals making use of the assistance.

However, there are a couple of problems associated with such an emphasis on the measurement of legal outcomes. First, in some legal contexts, it may be important to distinguish between successful representation and successful outcomes. The former raises difficult questions about the quality of the services provided; this is something that

¹⁹ Abel, “Evidence-Based Access to Justice”, *supra* note 10; Greiner & Pattanyak, “Randomized Evaluation of Legal Assistance”, *supra* note 12.

the legal profession is often reluctant to consider.²⁰ For example, in the limited representation or self-help setting, the legal services provided to the self-represented litigants are typically *pro bono* and, as a result, vary greatly between the individual's interactions with different lawyers. As such, it would be difficult to account for differences in the quality of the legal service provided and the impact this might have on self-represented litigants' ability to achieve a successful outcome. From a professional, as well as research perspective, there is a problematic assumption that, to the extent that a self-represented litigant has failed to obtain a positive result, it is the fault of the self-represented litigant or the program design (among other factors), but is not related to the quality of the advice or information provided by the legal professional.

Second, defining what constitutes a 'successful outcome' may be less than straightforward. For example, providing legal advice that an individual not proceed with a particular claim (i.e., it has no basis in law) may result in a successful outcome if the individual follows the advice and decides not to pursue the legal issue. Moreover, from a legal standpoint, if the client was provided with good advice or information and was in a position to act on the advice provided in accordance with both procedural and substantive rules but still obtained a negative judgment, it may not be an 'unsuccessful outcome.'²¹ With respect to judicial outcomes in an adversarial system, there are invariably 'winners' and 'losers': these do not necessarily correlate with the nature of the assistance provided to the litigants. A final dimension relates to the use of settlements and how a settlement might constitute a successful outcome. This is particularly relevant given the number of cases that settle prior to formal adjudication. In this case, should the measure of the

²⁰ In their article entitled "Peer Review in Canada: Results from a Promising Experiment", Fred Zemans and James Stribopoulos call for an increased research focus on the quality of legal services provided in the context of improving access to justice in order to ensure that those in need of access to representation receive quality representation. Fred Zemans & James Stribopoulos, "Peer Review in Canada: Results from a Promising Experiment" (2008) 46 Osgoode Hall LJ 697 at 698-699. Interestingly, in this research project, several of the self-represented litigants interviewed made reference to the fact that in meeting with different volunteer lawyers at LHO, they received different advice that they attributed in part to the seniority and experience of the particular volunteer lawyer.

²¹ Lucie E White, "Specially Tailored Legal Services for Low-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation" (1998-1999) 67 Fordham L Rev 2560 at 2561 [White, "Specially Tailored Legal Services for Low-Income Persons"].

success depend on an objective analysis of the terms of the settlement when it is conceivable that none of the parties may characterize the settlement as a success?

In defining the parameters of a successful outcome, researchers may canvass legal professionals who practice within the particular field. However, this may be easier to do in certain legal contexts where there is a discernible solution to the legal matter. For example, in a study conducted on the impact of counsel in refugee determination hearings at the Canadian Immigration and Refugee Board, the researcher undertook to study the effect of counsel on outcomes achieved in refugee determination hearings.²² In this particular legal context, it may be slightly easier to define a successful outcome, namely whether the Immigration and Refugee Board granted the individual refugee status. However, it is interesting to note that, even within this study, it was acknowledged that one of the challenges associated with conducting the research was the difficulty in accounting for the multiple variables (other than presence of counsel) that may impact the granting of refugee status.²³ Moreover, there is an added consideration that all successful claims are ‘good decisions’ in the sense of being deserving and winnable.

The delineation of a successful outcome for the purpose of measuring the impact of a particular variable becomes even more problematic when there is more than one possible solution and/or it is less clear what constitutes the best solution in the particular circumstances. A good example of this is family law where competing interests and non-legal considerations may make it difficult to define a successful outcome for research purposes. Added to this uncertainty are some of the additional problems pertaining to research in poverty law where establishing what constitutes ‘success’ when dealing with members of a seriously disadvantaged population is further complicated. For instance, unlike other members of society, disadvantaged groups tend not to suffer ‘discrete’ legal problems, which, once resolved, allow them to continue with their everyday life.²⁴ In

²² Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Analysis” (2011) 49 Osgoode Hall LJ 71 at 82.

²³ *Ibid* at 84.

²⁴ Stephen Wexler, “Practicing Law for Poor People” (1970) 79 Yale LJ 1049.

these circumstances, the legal issue may be bound up with other socio-economic problems that require redress if the individual is to derive some meaningful benefit from the legal assistance.²⁵ Finally, research on laypersons' experiences in court suggest that individuals may often have "hidden agendas" – these include the "unappreciated factors that cause people to resort to the legal system and the undisclosed objectives that they pursue within the system."²⁶ While a hidden agenda may remain undisclosed by the individual (a party that seeks the court's "official" recognition of the seriousness of their problem), a hidden agenda may indirectly impact the outcome that is ultimately achieved and/or the individual's reaction to that outcome. Moreover, in certain cases, a more successful outcome may entail redress of socio-economic conditions rather than a legal 'win'.²⁷ In all of these instances, if the measurement of a 'successful' outcome is to be meaningful and reflective of an actual improvement in the individual's life rather than a legal construct, the question becomes how are these other factors accounted for in the research?

In most studies, the definition of a successful outcome typically involves a consideration of the legal results achievable in a particular case. However, this analysis also fails to take account of the broader historical, political and social factors that may provide advantage to certain parties (i.e., the "haves") and result in disadvantage to other parties (i.e., the "have-nots") in terms of resources, the application of legal rules and the structure of the various legal institutions.²⁸ The result of these varying advantages and disadvantages (many of which may not easily be accounted for in quantitative research design) is potentially different outcomes achieved within a particular type of case.

²⁵ Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidences and Patterns" (April 2005) Available online at http://cfcj-fcjc.org/docs/2006_currie.en.pdf.

²⁶ John M Conley & William O M Barr, "Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure" (1988) 51:4 Law & Contemp Probs 181 at 182.

²⁷ This relates to the critique regarding the effectiveness of addressing issues of inequality, marginalization and disempowerment through the legal process. A more detailed discussion of this is contained in chapter three.

²⁸ Marc Galanter, "Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change" (1974-75) 9 Law & Soc'y Rev 95 at 97.

In addition to defining the parameters of a successful outcome across various legal fields and contexts, there are further challenging questions about how outcomes should be conceptualized. For example, in measuring the legal outcome achieved in a particular case, certain broader goals associated with political, social and economic concepts of justice may also be overlooked.²⁹ In this regard, empirical studies have historically shied away from the study of ‘justice’ due to its contested normative and political nature.³⁰ For instance, Laura Nader’s review of a privately-funded community lawyer project in small town Connecticut demonstrated that the benefits derived from legal assistance provided by a community-based lawyer to citizens wishing to raise issues affecting the entire community included a collective improvement in civic education among citizens and greater participation by those same citizens in political and administrative decisions made by the local government.³¹ Both of these ongoing and long-term democratic benefits would likely be overlooked in studies that focus exclusively on measuring the specific outcome achieved by an individual party with the assistance of the community lawyer.

The failure to take account of broader forms of social and political justice when evaluating outcomes is also further complicated when examining access to justice initiatives that do not involve direct representation by counsel. In studying the impact of a community legal education program in Chicago, it was concluded that, unlike analyzing certain zero-sum litigation, it is more challenging to evaluate the results of an initiative such as a legal education program. This was particularly true in light of the fact that community legal education programs (like the one studied in that research project) tend to reach populations not otherwise served by traditional legal services. As a result, the benefits may be diffused among the community. However, by gathering the stories of those individuals involved with the education initiative, qualitative research was able to

²⁹ Laura Nader, “Processes of Constructing (No) Access”, *supra* note 2 at 506-508; Eagly, “Community Education”, *supra* note 14.

³⁰ Austin Sarat, Mariane Constable, David Engel, Valerie Hans & Susan Lawrence, *Crossing Boundaries: Traditions and Transformations in Law & Society Research* (Evanston, USA: Northwestern Press, 1998).

³¹ Nader, “Processes of Constructing (No) Access to Justice”, *supra* note 2 at 505-509. See also the discussion in chapter three.

ascertain the impact of the program on the individuals that participated and the corresponding benefits derived from the program.³² Specifically, through the dissemination of certain legal knowledge, the program provided information about legal procedures and processes that subsequently enabled individuals to participate in strategic decisions about their own case, to develop problem-solving skills, and to improve leadership skills and consciousness-raising among community members about their rights and responsibilities.³³ All of these benefits represent important access to justice objectives consistent with a democratic thesis that may be overlooked or underestimated in a conceptualization that focuses on the particular legal outcome that an individual was able to achieve.

By contrast, empirical research that focuses on the specific legal outcomes achievable in a particular legal context may fail to take account of some of the broader political and social benefits to be gained by members of a community. With respect to these broader political and social benefits, it is also likely that outcome-based randomized studies would struggle to measure the long-term impact of providing certain legal services to a particular group over time. Even if such quantitative research were practically feasible, the prospect of conducting this type of longitudinal quantitative research would be extremely challenging. Moreover, the effort to gather the sample populations large enough to perform this kind of analysis would be logistically challenging, if not impossible, without the expenditure of significant financial and human resources. Both of these are not typically available in access to justice research.

From a practical perspective, measuring the impact of a particular legal service on the outcome in a legal case can also be difficult given the number of variables (i.e., the disposition of a particular adjudicator, the approach of opposing counsel, and the individual abilities/resources of the self-represented litigant and the merit of the case) that potentially affect the outcome in even the most straightforward of circumstances.

³² Eagly, “Community Education”, *supra* note 14 at 472.

³³ Eagly, “Community Education”, *supra* note 14 at 474 & 479.

Interestingly, even within randomized research settings, it is not always possible to isolate the requisite variables in the control and treated groups or hold constant the socio-legal setting in which the research is being conducted. Indeed, it is worth noting that, in Greiner and Pattanyak's study at Harvard, some members of the control group found legal assistance through other sources and some members of the treated group declined the offer of assistance from the clinic. The ability to isolate the appropriate variable becomes even more difficult when examining legal services other than full representation, such as 'unbundled' services. As a result of this difficulty, some of the research conducted on programs that offer limited forms of legal assistance or unbundled legal services has failed to demonstrate discernible benefits to the client and/or has demonstrated mixed results.³⁴ These contradictory findings have also driven concerns about the appropriateness of using outcome measurement as a means of evaluating an access to justice initiative without randomizing the study. This is, in part, because it is difficult to isolate or control for the particular variable being measured in certain adjudicatory contexts.

One example in which the research on limited legal services produced mixed results was a study by Jessica Steinberg. It was conducted in California on the unbundled legal services offered to individuals in housing eviction cases.³⁵ The study was designed to examine the impact of discrete legal services offered to poor litigants facing eviction in county court proceedings.³⁶ The study was observational and, while not randomized, a percentage of the litigants observed received assistance drafting court documents and a

³⁴ Steinberg, "In Pursuit of Justice", *supra* note 13; W Vaughan Stapleton & Lee E Teitelbaum, "In Defence of Youth: A Study of the Role of Counsel in American Juvenile Courts" (1972); Carroll Seron, Gregg Van Ryzin & Martin Frankel, "The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment" (2001) 35:2 Law & Soc'y Rev 419 [Carroll, Van Ryzin & Frankel, "The Impact of Legal Counsel on Outcomes for Poor Tenants"].

³⁵ Steinberg, "In Pursuit of Justice", *supra* note 13; Ross Dolloff, "Let's Talk about Values, not Systems" (2003) Mgmt Info. Exch J; Robert Bickel "Limited Legal Services: Is it Worth it?"(2006) 39 Colum J L & Soc Probs 331; Empirical Research Group, UCLA School of Law, Evaluation of Van Nuys Legal Self-Help Centre (Final Report) (August 30, 2001).

³⁶ Interestingly, the author of the study suggests that the study suffered from "methodological limitations as it was unable to measure the impact of unbundled legal services independent of the merit of the cases or the personal attributes of the clients who sought assistance." Steinberg, "In Pursuit of Justice", *supra* note 13 at 458.

further percentage of those litigants observed also received assistance at pre-trial conferences. These cases were compared against a group of litigants who had full representation and against those without any assistance. In examining both the procedural and substantive outcomes achieved in each case, the research concluded that, while the self-represented litigants who received unbundled legal services were successful from a procedural justice standpoint, the impact on substantive outcomes was limited. It was noted, “recipients of unbundled aid fared no better than their unassisted counterparts on either possession or monetary outcomes...nor did outcomes improve with increased unbundled legal aid.”³⁷ The study noted that, in terms of the procedural justice benefits, the litigants who received unbundled services were better equipped than the litigants who received no assistance to avoid default judgment and to raise valid and legally cognizable defences.³⁸ However, notwithstanding the potential benefits associated with providing individuals with unbundled assistance that allows them to defend against default judgment on a procedural basis, it was concluded that the provision of unbundled legal services in default proceedings did not ensure better overall substantive outcomes. This is true even if the litigant was successful in avoiding default judgment.³⁹

In light of the findings and notwithstanding that there was no generalizable correlation between the provision of unbundled legal services and better substantive outcomes, Steinberg did highlight certain other benefits associated with the provision of unbundled legal services. Regardless of the actual outcomes achieved, the data suggested that the self-represented litigants who received unbundled services were better informed about their rights and potentially better able to address matters in the future.⁴⁰ This may be particularly relevant in light of the specific legal context and the group of individuals involved, namely low-income individuals dealing with housing evictions. In this instance, the dissemination of pertinent legal information represented an important

³⁷ Steinberg, “In Pursuit of Justice”, *supra* note 13 at 482.

³⁸ Steinberg, “In Pursuit of Justice”, *ibid* at 491.

³⁹ Steinberg, “In Pursuit of Justice”, *ibid* at 494.

⁴⁰ Steinberg, “In Pursuit of Justice”, *ibid* at 494.

practical result that should not be overlooked when developing and implementing access to justice initiatives. The self-represented litigants who received unbundled legal services gained knowledge about their legal rights and responsibilities and were, in theory, in a better position to use that information in the future, as well as potentially distribute the information gained to other individuals within their community.

Randomized Outcome-Based Research

While randomized testing has typically not been the standard practice in legal representation research, it is closely linked to a focus on legal outcomes. Historically, many studies have sought evidence about the efficacy of a particular service through methods such as observation, surveys, interviews with various stakeholders and case-file reviews. However, these methods have not generally involved randomization. The underlying motivation in much of this research has been to understand better the impact that legal representation (and/or some form of legal services) has on an individual's case.⁴¹ Yet, due to the number of factors that potentially influence any given outcome, there are challenges involved in making generalizations about the impact of a particular access to justice initiative on outcomes achieved. Moreover, it is suggested that many of the studies that compare the outcomes of cases in which there was legal representation with outcomes where there was no representation are fatally flawed from a methodological perspective.⁴² Flowing from this critique, it is maintained that, "the use of comparisons and control groups are the best empirical method for isolating the effectiveness of a particular intervention while excluding other explanations for the intervention's claimed effects."⁴³ Together with a focus on evaluations that examine the "sort of difference a service makes,"⁴⁴ these critical observations have led to a shift in methodological alignment in access to justice research. This is supported by a belief that

⁴¹ Greiner & Pattanyak, "Randomized Evaluation in Legal Assistance", *supra* note 12 at 2139.

⁴² Greiner & Pattanyak, "Randomized Evaluation in Legal Assistance", *ibid* at 2126.

⁴³ Abel, "Evidence-Based Access to Justice", *supra* note 17 at 299.

⁴⁴ Liz Curran, "A Literature Review: Examining the literature on how to measure the 'successful outcomes': quality, effectiveness and efficiency of Legal Assistance Services" (February 2012) at 12. See www.ag.gov.au/LegalSystem/Legalaidprograms/Documents/literature/20review20of/20legal/20assistance/20by/20Dr/20Liz/20Curran.pdf [Curran, "A Literature Review: Examining the Literature on How to Measure Successful Outcomes"].

‘hard data’ can assist in making difficult policy decisions about access to justice initiatives and that ‘hard data’ is obtained through randomized studies. That said, while containing useful cautions, these criticisms regarding the absence of hard data should not have the effect of excluding or marginalizing other forms of research.

In the context of assessing access to justice, randomized studies create two similar groups (a treated group and a control group). The claim is that it is possible to compare the impact of legal services on outcomes achieved when the service is offered or provided to a treated group and not offered and/or provided to a control group of clients. By managing for a collection of variables that may potentially impact the outcome of the case in both treated and control groups, researchers making use of randomized studies insist that it is possible to measure the impact that a particular legal service has on the outcome achieved in a specific legal setting.

While there are a small number of studies that have pursued randomized research, I will concentrate on one recent and prominent example from Harvard Law School: it can serve as a focal point for a critical discussion about research methodologies in access to justice research.⁴⁵ In conducting this study, one of Greiner and Pattanyak’s arguments was that earlier observational studies “suffer from methodological problems so severe as to render their conclusions untrustworthy.”⁴⁶ They suggest that these earlier studies may provide “rich descriptive” information about self-represented litigants, but that it is not possible to “draw inferences on causation regarding the effects of offers or actual use of representation” from the descriptive information collected due to various methodological shortcomings in the structure of the various studies.⁴⁷ Greiner and Pattanyak contend that there are three main methodological problems in the earlier observational studies: a failure to define the intervention that is being examined; a failure to account for selection

⁴⁵ Greiner & Pattanyak, “Randomized Evaluation in Legal Assistance”, *supra* note 12.

⁴⁶ *Ibid* at 2126.

⁴⁷ Greiner & Pattanyak, “Randomized Evaluation in Legal Assistance”, *ibid* at 2126-27.

effects; and a failure to adhere to standard principles of statistics that account for uncertainties within the study.⁴⁸

These criticisms of earlier access to justice research projects arose in the context of a research project that Greiner and Pattanyak undertook at Harvard Law School. They conducted a randomized study in the field of access to justice.⁴⁹ In their study, the researchers sought to measure the impact of an offer of representation from law students working at the Harvard Law Aid Bureau (HLAB): this is a student-run, faculty-supervised legal clinic connected with the clinical law program at Harvard Law School. Potential clients consisted of claimants who were seeking to appeal a denial of certain unemployment insurance benefits. Upon contacting the clinic for assistance, the claimants were subjected to the usual intake interview respecting their case and their consent to participate in the evaluation was obtained.⁵⁰ Following this process and assuming that the individual qualified for assistance at the clinic, the individual's information was sent to the researchers; they randomized the case and instructed HLAB whether to offer the individual assistance. Within the treated and control groups, the researchers attempted to account for gender, education, race, as well as the length of time the legal matter had been continuing. The treated group was offered assistance from the clinic, but the control group was not offered assistance. However, it is important to note that the relevant variable that the research sought to isolate was the impact of an offer of representation from the Harvard Legal Aid Bureau. The research did not randomize the participants on the basis of actual representation provided or withheld.

⁴⁸ Greiner & Pattanyak, "Randomized Evaluation in Legal Assistance", *ibid* at 2184.

⁴⁹ In focusing on the studies conducted at Harvard Law School, I am starting from the position that the methodology and results achieved are statistically valid. It seems appropriate here to caution that I do not have any formal or sustained background in statistics and, therefore, do not purport to pass judgment on the technical or scientific aspects of their methodology.

⁵⁰ Upon attending at the clinic, the potential clients were verbally advised that HLAB was conducting an evaluation of the service and were also read a script about the study before being asked to confirm whether they verbally consented to participate in the study. See Greiner & Pattanyak, "Randomized Evaluation in Legal Assistance", *ibid* at 2143-2144.

Accordingly, the study did not purport to evaluate the quality of the legal services provided. In fact, the researchers expressly made certain assumptions about the quality of the legal services. Instead, the research project was limited to examining whether an offer of legal assistance (and subsequent use of representation) had a positive impact on the ultimate outcome obtained by the claimant; this was measured by the value of the pecuniary award made to the claimant.⁵¹ The researchers reasoned that offers of representation are “what a service provider actually does to attempt to improve a potential client’s situation” and, as such, it is worthwhile to measure its effects.⁵² The measurement of an offer of legal assistance also allows the researchers to focus on the service provider’s delivery system and operation. Finally, the researchers concluded that they could not randomize actual use of representation from an ethical standpoint.

Once subjects were divided into treated or control groups, the official records about the outcome achieved in the individual cases included in the study were scrutinized. It was theorized that the claimants who had been offered legal assistance in the form of legal representation (and ultimately accepted the offer of assistance) would achieve better results (i.e., greater monetary awards) than those individuals not offered assistance. Ultimately, the results from the randomized study suggested that an offer of assistance from the HLAB had “no statistically significant effect on the probability that a claimant would prevail.”⁵³ The researchers also concluded that the offer of representation delayed the adjudicatory process.

One of the noteworthy aspects of this research is that Greiner and Pattanyak’s conclusions appear to run contrary to many of the earlier observational studies: these studies suggested that legal representation (as opposed to not having representation)

⁵¹ Greiner & Pattanyak, “Randomized Evaluation of Legal Assistance”, *supra* note -12 at 2127-2129.

⁵² Greiner & Pattanyak, “Randomized Evaluation of Legal Assistance”, *ibid* at 2127-2129.

⁵³ Greiner & Pattanyak, “Randomized Evaluation in Legal Assistance”, *ibid* at 2124; there are other studies that reflect a similar conclusion regarding unbundled legal services and limited representation. See Jessica Steinberg, “In Pursuit of Justice”, *supra* note 13.

typically has a positive impact on case outcomes.⁵⁴ The discrepancy between the data collected in their randomized study and the data derived from the earlier studies caused Greiner and Pattanayak to re-examine the earlier studies. In so doing, they made some observations regarding the ‘rigour’ of the methodologies employed in the earlier studies. Based on their review, they concluded that the “only way to produce credible quantitative results on the effect of legal representation is with randomized trials.”⁵⁵

In addition to reviewing earlier studies on the impact of representation on legal outcomes, the Harvard researchers engaged in an analysis of how the particular circumstances of their study might explain the lack of a statistically significant result. These explanations sought to contextualize the specific legal setting in which the research was conducted so as to provide insight into possible explanations for the data results recorded. The explanations took account of the particular nature of the legal issue in dispute (i.e., unemployment benefits) as well as the type of procedure and process faced by the claimants in the study (specifically, face-tracked processes in which the adjudicators were accustomed to hearing from self-represented parties).

A Discussion of Randomized Outcome-Based Research

From a policy perspective, it is argued that determining which individuals, issues and/or legal settings necessitate the assistance of counsel (or some other equally appropriate form of legal service) is important when distributing limited legal resources to individuals

⁵⁴ This also appears contrary to an earlier study conducted in respect of the New York City Housing Court. See Seron, Van Ryzin & Frankel, “The Impact of Legal Counsel on Outcomes for Poor Tenants”, *supra* note 34.

⁵⁵ Greiner & Pattanyak, “Randomized Evaluation of Legal Assistance”, *supra* note 12 at 2144; a similar conclusion was reached by Jessica Steinberg following her non-randomized analysis of unbundled legal services offered to poor litigants involved in eviction cases in California. Jessica K Steinberg, “In Pursuit of Justice”, *supra* note 13. Interestingly, a recent research project that Greiner and other researchers have undertaken includes the use of questionnaires to “obtain qualitative information about the study participants” in a study about different initiatives aimed at assisting consumers in financial crisis. In conducting long term surveys of consumers who had been in significant debt, the authors of the study state “[t]he surveys will assess elements of overall well-being that might conceivably be affected by counseling and representational interventions, such as self-reported stress levels, perceptions of the court system, and likelihood of compliance with any court-imposed remedies.” See Dalie Jimenez, D James Greiner, Lois R Lupica and Rebecca L Sandefur, “Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach” (2013) 20:3 Geo J on Poverty L & Pol’y 449 [Jimenez, Greiner, Lupica & Sandefur, “Improving the Lives of Individuals in Financial Distress”].

who would otherwise proceed without counsel.⁵⁶ Moreover, to the extent that assumptions are made about the perceived benefits of initiatives such as self-help or unbundled legal services and that these assumptions form the basis of a justification for reduced funding for full representation, research data could be useful in challenging these assumptions. However, it is also equally important that the search for ‘scientific’ or ‘hard’ data that drives randomized outcome-based research and contributes to the justification of certain policy initiatives does not occupy the whole field and, perhaps more importantly, does not presuppose the answers sought. The utility of quantitative work need not diminish the corresponding need for qualitative research that incorporates a deeper contextualized understanding of the experiences of those engaged with the justice system; this understanding extends beyond the specific outcome achieved.

Interestingly, in a more recent research project involving debt collection, Greiner indicated that the research project designed was innovative in the sense that it utilizes “a combination of subjective and objective metrics to measure the financial well-being of consumers.” The newer research project in question includes both an analysis of the outcomes achieved in debt collection court cases and also seeks qualitative information about the study participants. In this regard, the researchers seek to adopt a “holistic approach to research that takes account of the users’ perspective.”⁵⁷ This more contextualized understanding of individuals’ experiences is entirely consistent with a broader theory of access to justice that seeks to engage individuals in a conversation about justice, participation and their corresponding ability to affect justice. Moreover, this approach is less an either/or issue and more about how quantitative and qualitative methods can complement each other.

⁵⁶ See the Boston Bar Association Task Force on Expanding the Civil Right to Counsel in Massachusetts in which it is acknowledged that different civil proceedings will require different levels of intervention by counsel and that, where appropriate, lesser forms of assistance may be provided. See “Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts”, Boston Bar Association Task Force on Expanding the Civil Right to Trial, (September 2008). Available online at: http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

⁵⁷ Jimenez, Greiner, Lupica & Sandefur, “Improving the Lives of Individuals in Financial Distress”, *supra* note 55.

While proponents of randomized studies maintain that randomization is better suited to the task of drawing causal connections between the outcome and the type of representation being studied, there is still debate as to how this can best be achieved. Moreover, within randomized studies, it can be very difficult to isolate the variable being studied (i.e., the legal service) from some of the other aspects of the legal matter that may influence the resolution of the matter. As is the case with other social science research that involves participants and fieldwork, it is not possible to replicate a purely experimental setting in which the researcher can isolate and causally measure the impact of a particular variable.⁵⁸ Again, this is particularly complicated when examining non-traditional legal services used by low-income clients and/or disadvantaged or vulnerable individuals. The unpredictability and often demanding nature of addressing the needs of disadvantaged groups raises unique challenges when attempting to isolate the cause and effect of a legal service on the outcome achieved. Finally, Pascoe Pleasance noted a practical consideration in his discussion of the length of randomized control trials generally. He noted that the “relatively long duration of control trials does not fit easily into the political context in which many trials may run.”⁵⁹

In addition to various practical challenges associated with outcome-based research, there are important ethical challenges respecting the withholding of legal services to otherwise deserving clients. In the Harvard study, Greiner and Pattanayak distinguished the treated and control group by offering legal representation to the treated group and not offering assistance to the control group. Thus, the variable that was controlled for was the offer of legal assistance rather than the withholding of actual legal services. The decision to proceed in this manner was defended, in part, on the basis that the clinic was not in a position to offer assistance to all those seeking it.⁶⁰ As such, offers

⁵⁸ For example, in her review of access to justice research and methodologies, Liz Curran insists that randomized studies are problematic when attempting to evaluate legal services due to the “complex and diverse nature of the legal assistance service, the clients they serve and the setting they are.” Curran, “A Literature Review: Examining the literature on how to measure successful outcomes”, *supra* note 44 at 15.

⁵⁹ Pascoe Pleasance, “Trials and Tribulations”, *supra* note 10 at 13.

⁶⁰ Greiner & Pattanayak, “Randomized Evaluation of Legal Assistance”, *supra* note 12. In the poverty law context, Paul R Tremblay makes note of the ‘scarcity’ of legal services that inevitably forces poverty lawyers to confront the reality that there are more poor clients than resources, time or money to serve these

of assistance to certain clients (but not all clients) would happen in any event. Thus, a certain percentage of individuals otherwise entitled to assistance would be turned away from HLAB. While this is likely true, it raises difficult questions about whether there is a difference between allowing the legal clinic's capacity to dictate who will receive its services (and/or adhering to an established policy regarding how this issue will be addressed when there are limited resources available⁶¹) and randomly assigning assistance to anonymous clients in order to 'test' the impact of assistance on the outcome achieved by the client.⁶²

This rationalization about randomizing offers of assistance can be contrasted with the discussion about the ethical challenges associated with triage in legal clinics. While it is acknowledged that frontline lawyers in legal clinics will need to make difficult decisions about who they can and cannot assist, the factors that will impact these decisions must be carefully considered and be consistent with the overall goals and objectives of the clinic, the needs of the individuals seeking assistance, and the broader socio-political setting in which the legal clinic is operated.⁶³ In fact, randomized decisions about assistance are contrary to articulated triage policies (as well as the policy objectives pursued by legal aid more generally); these contemplate the weighing of

clients. However, he proceeds to suggest that the rationale for decisions about who to assist must be clearly articulated rather than a matter of happenstance. See Paul R Tremblay, "Acting 'A Very Moral Type of God': Triage among Poor Clients" (1999) 67 Fordham L Rev 2475 [Tremblay, "Acting 'A Very Moral Type of God'"].

⁶¹ Tremblay, "Acting 'A Very Moral Type of God'", *ibid*.

⁶² Although practically speaking many clinics are quite resourceful at finding ways to assist individuals even when beyond capacity. Interestingly, in the medical context, when testing the impact of a new drug, it is not acceptable to withhold existing treatments that address the medical condition in question in order to isolate and measure the impact of the new drug. Moreover, in the medical field where randomized controlled studies are prevalent, there are still continuing ethical debates about the implications of randomization. These debates are rooted in the conflict between a physician's obligation to the patient they are examining – namely that there not be any arbitrariness in the care they provide and the clinical research setting where randomization does include arbitrary delivery of treatment; necessary to measure the efficacy of a potentially life-saving treatment. While the medical situation is not identical to the legal context (particularly the civil law context), randomization raises important ethical questions respecting the 'withholding' of services to those in need that are not easily addressed. See David Wendler "The Ethics of Clinical Research" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2012). Available online at http://plato.stanford.edu/archives/fall_2012/entries/clinical-research/ [Wendler, "The Ethics of Clinical Research"].

⁶³ Tremblay, "Acting 'A Very Moral Type of God'", *supra* note 60 at 2477.

certain factors such as the significance/impact of the case, the nature of the client's needs and the availability of resources to address the particular legal issue.

Randomized research also raises additional ethical challenges in the specific context of poverty law because the research (where the supply of services is controlled by a researcher) is conducted in a setting in which individuals are particularly vulnerable and most in need of assistance.⁶⁴ Coupled with this is the concern that the research is driven by a focus on the expenditure of limited resources rather than a determination of what certain groups need and what will directly improve their particular ability to affect justice.⁶⁵ Moreover, recent statistics suggest that there is a growing lack of access to justice and legal processes among middle-income individuals.⁶⁶ In certain respects, the legal challenges faced by middle-income individuals will be different from low-income individuals and/or disadvantaged groups. This shift in demographics raises further questions about the validity of importing the research data gained from a poverty context into other social contexts.

These reservations about a focus on outcomes and randomized research as a means of measuring outcomes suggest the need for a more comprehensive agenda on the appropriate focus of access to justice research. In particular, these reservations raise larger and more compelling questions around how a particular methodological approach supports and informs a theory of access to justice going forward. The dialogue about methodologies in access to justice research also reflects a wider contestation about the practical and democratic theses of access to justice. The practical thesis limits its focus to ways in which to improve self-represented parties' chances of obtaining a positive

⁶⁴ Again, in the medical context, randomized clinical research raises ethical concerns about exploitation – specifically whether the research exposes subjects to risks in order to collect data for potential benefit of future subjects; see Wendler “The Ethics of Clinical Research”, *supra* note 62. In a poverty law context, the question that arises is whether researchers are further exploiting a group of individuals that are already marginalized.

⁶⁵ Albiston & Sandefur, “Expanding the Empirical Study of Access to Justice”, *supra* note 1.

⁶⁶ Jamie Baxter, Michael Trebilcock & Albert Yoon, “The Ontario Civil Legal Needs Project: A Comparative Analysis of 2009 Survey Data” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle-Income Access to Justice* (Toronto, Canada: University of Toronto Press, 2012) at 55.

outcome in their legal matters. On the other hand, the democratic thesis incorporates a broader approach to access to justice that seeks to enhance citizens' empowerment and participation in the broader legal processes and political decisions that impact their lives and, in so doing, expand concepts of 'justice.'⁶⁷ In this regard, the objectives of the democratic thesis of access to justice extend beyond outcomes in a particular case. Given this wider contestation about the appropriate thesis going forward, the question is whether the provision of legal services should be the end goal of access to justice or whether there are broader principles and goals that should frame both research and the development of policy initiatives in access to justice? I now turn to addressing some of these questions. I will offer some tentative answers before outlining the specific research methodology implemented in this project.

The Importance of Qualitative Research

The present focus on outcome-based research draws upon an access to justice theory that is concerned with improving access to justice by providing individuals with various kinds of legal services such that they may address and resolve their legal issues. While outcome-based studies maintain that 'hard data' will allow policy-makers and professionals to improve access by providing for the better and more efficient delivery of legal services, there remains a deeper question about whether this should be the ultimate or even dominant goal. I contend that the research that supports a traditional route to access through expanded legal services and simplified court processes does not go far enough in terms of a theoretical framework.⁶⁸ As Rebecca Sandefur concluded,

the typical ways of conceptualizing people's experiences with civil justice problems focus too narrowly on law...[;] Stepping back to look at the whole canvas of public experience with civil justice problems reveals that we need not merely provide additional access to law, but also more creativity in thinking about access to justice.⁶⁹

⁶⁷ Roderick A MacDonald, "Access to Justice and Law Reform #2", (2001) 19 Windsor YB Access Just 317 at 319.

⁶⁸ Sandefur, "The Impact of Counsel", *supra* note 13 at 52.

⁶⁹ *Ibid* at 52.

Consequently, within a comprehensive theory of access to justice, it will be important to focus on enhancing the ways by which individuals can give meaning to the concepts of law and justice in their lives and in the life of their communities. In order to do so, it is important that individuals are provided with direct access to a variety of forums in which they can engage in discussions about law and how law might foster a discourse on justice. This should include access to traditional legal institutions as well as non-legal institutions and processes. In order to achieve a comprehensive approach to access, it is essential that researchers engage with those individuals attempting to access the various legal processes and institutions. The goal in this regard is to ensure that the approaches to access that are adopted reflect the needs and expectations of those individuals that are being encouraged to participate. Research that seeks to understand citizens' experiences, perspectives and perceptions is also consistent with the democratic principle that individuals should have a voice in the development and administration of the institutions that affect them. In this sense, this approach to research is consistent with the democratic thesis discussed earlier and the underlying commitment to participatory democracy.

Previous research has demonstrated that only a small percentage of individuals' civil legal needs are understood by them to be legal problems and addressed in formal legal settings.⁷⁰ Furthermore, the practical reality is that neither the state nor the legal profession is in a position to provide and/or fund the level of legal representation needed to address every individual's legal issues. This is true from both a financial and practical standpoint.⁷¹ Notwithstanding that providing legal services to all who need it is impracticable, there is also a segment of the population who do not want to relinquish their legal problem to a legal professional. One example of this was demonstrated by Barclay's research in which appellants chose to represent themselves at the appellate

⁷⁰ For example, see Hazel Genn, *The Paths to Justice – What People Think about Going to Law* (Oxford, UK: Hart Publishing Inc., 1999) [Genn, *The Paths to Justice*].

⁷¹ In the American context, Gillian Hadfield has indicated that it would cost approximately 50 billion dollars annually to secure one hour of legal help (at small firm/sole practitioner rates) for all American households that have an unmet dispute-related need; see USC News, available online at <http://news.usc.edu/57034/usc-professor-reflects-on-the-high-costs-of-law>.

level because self-representation allowed them to have more control over the legal process in which they are participating regardless of the increased potential for a negative outcome.⁷² In representing themselves, the appellants felt they could ensure that the issues are presented in the order and style that they chose.⁷³ All of these considerations need to be attended to when theorizing about what access to justice should hope to achieve and when conducting research on access to justice.

These practical realities pose challenging questions for the development of a comprehensive access to justice theory. Most importantly, they ask whether access to justice would be better served by moving away from a focus on the provision of an ‘equal’ but ‘elite’ level of legal services for all citizens.⁷⁴ In the Canadian context, an ‘equal’ but ‘elite’ level of legal services contemplates a continued commitment to providing a lawyer to as many individuals who would like a private lawyer. This focus on ‘equal but elite’ legal services has had a twofold effect: (1) it has prioritized programs that are directed at providing legal services to those who cannot otherwise afford the services; and (2) it has driven the outcome-based research that is aimed at measuring the effectiveness of those programs, as well as the corresponding allocation of resources necessary to support those services.⁷⁵ However, with respect to the effect that this policy has on designing and conducting research, Albiston and Sandefur emphasize the need to resist the “pull of the policy audience.”⁷⁶ This contemplates research questions and resulting projects being designed to fit policy-makers’ definition of a problem and the goals thought necessary to address the problem. This is to be contrasted with research projects that attempt to understand the problem from the perspective of those impacted. In this regard, access to justice theory should,

⁷² Scott Barclay, “Decision to Self-Represent” (1996) 77 *Social Science Quarterly* 912 [Barclay, “Decision to Self-Represent”].

⁷³ Barclay, “Decision to Self-Represent”, *ibid*.

⁷⁴ Lucie E White, “Specifically Tailored Legal Services for Low-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation?” (1998-1999) 67 *Fordham L Rev* 2573 at 2578 [White, “Specially Tailored Legal Services”].

⁷⁵ *Ibid* at 2578.

⁷⁶ Albiston & Sandefur, “Expanding the Empirical Study of Access to Justice”, *supra* note 1 at 104.

in the context of the present levels of wealth inequality...endorse the idea that the social needs of disenfranchised groups should be addressed *sui generis*, in ways that reflect their own experiences of need, their embedded historical and cultural realities, the societal power landscapes from their perspectives, their capacities, and their normative aspirations.⁷⁷

A shift in the objectives of access to justice theory away from a focus on lawyers requires a corresponding shift in access to justice research objectives: the research data collected should reflect the experiences and perspectives of the individuals and groups currently attempting to access to justice. This approach to research would seek to identify the actual needs and expectations of those individuals.⁷⁸

A useful analogy is to a similar debate in the field of health care delivery where a ‘universal standard of health services’ is challenged as a bad idea from both a short-term and long-term perspective.⁷⁹ From a short-term perspective, a ‘universal standard of care’ does not allow for a contextualized approach that takes account of different groups’ different needs at different times. From a long-term perspective, the focus on standardized services that are framed around elite practices and institutions actually perpetuates the separation of institutional practices that maintain social stratification rather than move society toward a goal of institutional equality.⁸⁰ In the context of legal service delivery, prioritizing the value of an adversarial legal system that contemplates an ideal of equality of legal services becomes problematic when the result is a failure to deliver an elite and uniform quality and level of services to all citizens. This is made more problematic in the context of an adversarial system that contains certain assumptions and expectations about the expertise and experience of the various

⁷⁷ White, “Specifically Tailored Legal Services”, *supra* note 74 at 2578.

⁷⁸ See recent research conducted on self-help programs in Australia by Merran Lawler, Jeff Gidding and Michael Robertson in which the researchers, through interviews, observation and case studies sought to gain insight into the “particular experiences and perspectives of self-help themselves instead of focusing on explorations of the potential impact of legal self-help on the smooth administration of justice.” See Merran Lawler, Jeff Giddings & Michael Robertson, “Opportunities and Limitations in the Provision of Self-Help Legal Resources to Citizens in Need” (2012) 30 Windsor YB Access Just 185 at 187 [Lawler, Giddings & Robertson, “Opportunities and Limitations in the Provision of Self-Help Legal Resources”].

⁷⁹ White, “Specially Tailored Legal Services”, *supra* note 74 at 2578-2579.

⁸⁰ White, “Specially Tailored Legal Services”, *ibid* at 2578-2579.

participants.⁸¹ In this regard, there is a disconnect between expectations about how the system operates and the ability of certain participants to navigate through the system.

In the legal context, the more traditional route travelled (i.e., providing access to legal services) can be contrasted with the broader concept of access to justice that I have been advocating.⁸² In the context of a broader conceptualization, it is worth re-iterating Roderick MacDonald's comments regarding a broader approach to the conceptualization of access to justice that suggest that,

[i]n a liberal democracy, true access to justice requires that all people should have an equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied.....Improving access to legal education, to the judiciary, to the public service and the police, to Parliament and to various law societies is now seen as the best way of changing the system to overcome the disempowerment, disrespect and disengagement felt by many citizens.⁸³

This broader conceptualization seeks to promote direct citizen participation in both law-making and law-administering institutions and processes.⁸⁴ In this regard, the goal in encouraging participation is not to assume individuals will assume control of all of the political processes occurring in a large-scale democratic society. Nor is the goal to affect radical court reform. Rather, the goals are more modest, but more immediate and relevant to individual citizens' lives – to foster direct and meaningful participation when and where individuals so choose. This approach seeks to encourage engagement on local as well as national levels and in a variety of forms and forums.

⁸¹ White, "Specially Tailored Legal Services", *ibid* at 2579.

⁸² A broader conceptualization of access to justice is discussed in chapters two and three of this thesis.

⁸³ Roderick MacDonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward*, (Toronto, Canada: The Law Society of Upper Canada, 2005) 19 at 23 [MacDonald, "Access to Justice in Canada Today"].

⁸⁴ Janice Gross Stein & Adam Cook, "Speaking the Language of Justice: A New Legal Vernacular" in Julia Bass, W A Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto, Canada: The Law Society of Upper Canada, 2005) 163 [Gross Stein & Cook, "Speaking the Language of Justice"].

In order to advance a democratic approach to access, it is necessary to undertake research that seeks out the perspectives and views of the individuals seeking to participate. Thus, the research undertaken in conjunction with this theoretical approach should ensure that the individuals ultimately impacted by the adoption of a democratic approach are provided an opportunity to provide their input. In other words, if the underlying theoretical approach to access is driven by democratic principles and goals, then it is important that the research undertaken in conjunction with that theoretical approach should also be based on those same democratic principles. This ensures that the initiatives developed to promote meaningful participation are reflective of individuals' actual needs and expectations. Therefore, before it is possible to choose between potential solutions aimed at enhancing access, it is vital that the "people bearing the greatest weight of the current failure of our institutions...(the public)...be consulted about what they want when they face civil justice problems."⁸⁵ While this sentiment was originally expressed in the context of outcome-based research, it is pertinent in terms of any research that seeks to improve individuals' access to justice.

Research on Legal Consciousness

Adopting a qualitative approach to access to justice research that collects data about individuals' experiences is useful in highlighting "how people's sense of fairness is formed through their particular experiences within the legal system and in relation to the litigants' embeddedness in the institutional context."⁸⁶ One of the assumptions underlying legal consciousness is that individuals manoeuvre through legal structures based on their legal consciousness. However, individuals' legal consciousness may, in

⁸⁵ Sandefur, "The Impact of Counsel", *supra* note 13 at 85; See also Lawler, Gidding & Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Resources", *supra* note 78 in which it was noted that the lack of data on the particular experiences and perspectives of self-helpers in Australia necessitated the need for qualitative research that sought to understand the role of self-help from the users' perspective. It was further noted that much of the earlier research had focused on how self-help as an initiative impacted the larger system of justice.

⁸⁶ Berrey, Hoffman & Nielsen, "Situated Justice", *supra* note 4 at 6 suggests that a qualitative approach that take account of how individuals evaluate the fairness of their experience can also take account of certain structural constraints (i.e., the role of professionals, the types of opportunities that law provides, and the social and financial resources available).

turn, be shaped by the legal structures and processes that they encounter.⁸⁷ As such, in seeking to understand self-represented litigants' experiences in the civil justice system and how those experiences both shape and are shaped by their engagement in the judicial system, it is helpful to draw specifically on the work of a group of scholars, including Patricia Ewick, Susan B Silbey, Austin Sarat, LB Nielsen and Lucie E White.⁸⁸ To varying degrees, they seek to understand individuals' experiences with law from the individuals' perspective as well as how those same individuals construct meaning about law and the legal processes they experienced.⁸⁹

Susan Silbey suggests that, "legal consciousness as a theoretical concept and topic of empirical research developed within law and society in the 1980's and 1990's to address issues of legal hegemony, particularly how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action."⁹⁰ While subject to different iterations, the study of legal consciousness explores the ways in which knowledge about and/or experience with law (and legal institutions) affects one's understanding of law and the meaning one gives to law.⁹¹ It reflects the continual

⁸⁷ *Ibid* at 6.

⁸⁸ Ewick & Silbey, *The Common Place of Law*, *supra* note 7; Laura Beth Nielsen, "Attitudes of Ordinary Citizens about Law and Street Harassment" (2000) 43:4 *Law & Soc'y Rev* 1056 [Nielsen, "Attitudes of Ordinary Citizens about Law"]; Austin Sarat, "... 'The Law is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor" (1990) 2 *Yale JL & Human* 343 [Sarat, "... 'The Law is Over'"]; Lucie E White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G." (1990) 38(1) *Buff L Rev* 1 [White, "Subordination, Rhetorical Survival Skills and Sunday Shoes"].

⁸⁹ Bryant G Garth & Austin Sarat, eds, *How Does Law Matter? Fundamental Issues in Law & Society Research* (Evanston, USA: Northwestern University Press, 1998) [Garth & Sarat, *How Does Law Matter?*].

⁹⁰ Susan S Silbey, "After Legal Consciousness" (2005) 1 *Annual Review of Law and Social Science* 323 at 323 [Silbey, "After Legal Consciousness"]. Silbey suggests that legal consciousness was originally driven by the question that if "law failed to meet its public aspirations, how did it retain support among the people and how did it continue to achieve the sense of consistency, accessibility, fairness and legitimacy?" This required understand not only who used law and how they used law but also who did not use law and why. These questions led to research by individuals such as Sally Merry who sought to understand "the ways that law is used and understood by ordinary citizens". Silbey, "After Legal Consciousness", *supra* note 90 at 326 quoting Sally Merry "Concepts of Law and Justice among Working Class Americans" (1985) 9 *Legal Studies Forum* 59.

⁹¹ Ewick & Silbey, "Conformity, Contestation, and Resistance: An Account of Legal Consciousness" (1992) 26 *New Eng L Rev* 731 at 734 [Ewick & Silbey, "Conformity, Contestation and Resistance"]; Nielsen, *Attitudes of Ordinary Citizens about Law*, *supra* note 88 at 1059.

interplay of law, everyday life and individual experiences.⁹² Legal consciousness research examines the role law plays in constructing meaning, affecting actions and shaping the various aspects of individuals' social lives.⁹³ Thus, central to conceptualizations of legal consciousness is the individual's specific understanding of law.⁹⁴

However, legal consciousness research also seeks to examine how the meaning one gives to the concept of law or justice further "translates into actions and decisions."⁹⁵ In this regard, legal consciousness is not merely a 'state of mind,' but is also procedural in the sense that it seeks to reveal what people do as well as what they say.⁹⁶ Thus, in order to better understand the meaning that individuals prescribe to law and how their actions might subsequently be shaped by this meaning requires that researchers engage with those who are the 'recipients of law' rather than those who produce law.⁹⁷ In this regard, examining individuals' own accounts of their participation (or non-participation) in legal processes or institutions, how they interpret and give meaning to this participation, and how this participation subsequently affects their understanding of law become important elements of legal consciousness research.

Ewick and Silbey defined legal consciousness in terms of how individuals make sense of law and legal institutions and also how they, "give meaning to their law-related experiences and actions such that consciousness is understood to be formed within and changed by social actions."⁹⁸ In this regard, self-represented litigants' understanding of

⁹² David M Engel & Frank W Munger, "Rights, Remembrance and the Reconciliation of Difference" (1996) 30 Law & Soc'y Rev 7 at 14.

⁹³ Nielsen, "Attitudes of Ordinary Citizens about Law", *supra* note 88 at 1059.

⁹⁴ Ewick & Silbey, "Conformity, Contestation, and Resistance", *supra* note 91 at 734.

⁹⁵ Nielsen, "Attitudes of Ordinary Citizens about Law", *supra* note 88 at 1059.

⁹⁶ Garth & Sarat, *How Does Law Matter?*, *supra* note 89.

⁹⁷ Austin Sarat, "... 'The Law is All Over'", *supra* note 88 at 375 citing David M Trubek, "Where the Action is: Critical Legal Studies and Empiricism" (1984) 36:1 Stan L Rev 575.

⁹⁸ Elizabeth A Hoffman, "Legal Consciousness and Dispute Resolution: Different Disputing Behaviour at Two Similar Taxicab Companies" (2003) Law & Soc Inquiry 691 at 732 [Hoffman, "Legal Consciousness and Dispute Resolution"].

law and views about their ability to participate in legal institutions may be constituted and sometimes re-constituted by their experiences within those particular institutional settings or processes. Arguably, this, in turn, influences the meaning that they give law and their relationship to law going forward. Moreover, individuals' actual experiences and the meaning they attribute to them are juxtaposed with conventional norms and pre-existing assumptions about the role of law in society.

For example, Lucie E White's account of a client's attempt to reverse an administrative tribunal's decision reducing her welfare benefits and the barriers that she faced in attempting to do so provided a context in which to examine such a juxtaposition. In that research project, the individual's actual 'lived experience' was contrasted with concepts of procedural justice that contemplated "meaningful participation by all citizens in the governmental decisions that affect their lives."⁹⁹ In telling the woman's story, White sought to present the case as a means to examine the 'disjuncture' between the ideal of procedural justice and the stratified conditions in society in which certain marginalized individuals attempt to make use of those procedural rituals.¹⁰⁰ In the particular facts of that case, White argued that, as a result of substantive inequality, there are serious social, economic and operational barriers that work to prevent women, like Mrs. G, from engaging in the decision-making process in a meaningful manner. While these barriers overwhelmingly discourage meaningful participation by certain marginalized groups, White maintains that Mrs. G was, at certain points during the administrative process, able to assert an "equal power to take part in the *making* of language, the making of shared categories, norms, and institutions, as she spoke through that language about her needs about Sunday shoes."¹⁰¹ By speaking about something that was important to her life, namely the shoes needed for church on Sunday, Mrs. G asserted herself into the process on her terms. However, White ultimately concludes that,

⁹⁹ White, "Subordination, Rhetorical Survival Skills and Sunday Shoes", *supra* note 7 at 3.

¹⁰⁰ White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes", *ibid* at 3-4.

¹⁰¹ White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes", *ibid* at 50.

Mrs. G's unruly participation at her hearing was itself political action. Yet it was an act that did little to change the harsh landscape which constricts Mrs. G. from more sustained and more effective political participation. Substantial change in that landscape will come only as such fragile moments of dignity are supported and validated by the law.¹⁰²

This process requires an examination of individuals' actual 'lived experiences' in various legal processes. This examination provides an important context in which to explore ideas of empowerment and participation within the existing adversarial system. In so doing, attempts can then be made to elucidate a better account of theory and practice.

The development of legal consciousness as a line of inquiry into the meaning attributed by actors to the role of law in constructing and communicating certain social transactions led researchers to draw on anthropology and qualitative sociology.¹⁰³ A qualitative methodology aims to "describe accurately another's experience so as to elicit what the research participant believes or understands, and to provide quotes as evidence, rather than to judge through one's own lens what that person must think or feel."¹⁰⁴ Thus, through the use of methods such as in-depth qualitative interviews in which the participants are able to recount their story, researchers are provided an opportunity to gain an understanding of both the individuals' experiences and the meaning that individuals prescribe to those experiences as it pertains to certain concepts.

Critiques of Legal Consciousness Research

In light of the fact that different researchers have adopted different working definitions of legal consciousness, research respecting individuals' legal consciousness is open to the critique that it is too interpretive and too subjective to be of value; it has the hallmarks of art, not science. Additionally, there is an argument that "legal consciousness is contingent, and may change according to the area of social life about which the

¹⁰² White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes", *ibid* at 52.

¹⁰³ Silbey, "After Legal Consciousness", *supra* note 90 at 327.

¹⁰⁴ Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford, UK: Oxford University Press, 2010) at 926 at 931 [Webley, "Qualitative Approaches to Empirical Legal Research"].

researcher asks, with reference to the social location of the subject, and the subject's knowledge about the law and legal norms."¹⁰⁵ Moreover, given the subjectivity of the research, the findings are not generalizable; every individual's perception is uniquely their own and, therefore, any person's particular legal consciousness is likely to be very different across gender, race, and socio-economic groups. Again, Lucie White's case study involving Mrs. G. provides a useful example of the way in which certain characteristics or status in society may affect an individual's conceptualization of law and their interaction with it. Finally, there is a criticism that the researcher's own definition and understanding of law may ultimately influence how the researcher hears and/or interprets an interviewee's experience of law. While these are legitimate concerns about legal consciousness research, they must be balanced against the importance associated with ensuring that the experiences, perceptions and views of those who are attempting to access to justice are included in discussions about enhancing access.

Taking account of the views of those attempting to access justice is, in part, in response to the historical fact that the perspectives of the legal profession both informed and framed the discussion of the issues respecting access. However, there are serious questions whether the profession's approach to these issues coincides with the self-represented litigants' actual experiences in the civil justice system. More recently, reports by both the CBA and the Action Committee on Access to Justice in Civil and Family Matters have stressed the importance of including justice system users in the discussion about reform. The Australian research that examined whether legal service providers develop self-help resources from an "entirely law-centric perspective" and, therefore, maintain the legal profession's position as gatekeepers of the legal system lends weight to this concern.¹⁰⁶ Given the existence of this type of research data, it is important that account be taken of potential differences between the objectives of those

¹⁰⁵ Nielsen, "Attitudes of Ordinary Citizens about Law", *supra* note 88.

¹⁰⁶ *Ibid* at 186.

developing access to justice initiatives and the experiences of individuals making use of those same initiatives.¹⁰⁷

The research project undertaken as part of this thesis is interested in examining elements of the participants' legal consciousness, particularly in terms of how their views on access, justice and engagement were affected by their experience as a self-represented litigant. However, the purpose of the research is not to map the legal consciousness of self-represented litigants. Instead, the research seeks to describe the participants' experience with certain legal processes and institutions and in so doing, draw out the meaning that the participants attribute to notions of access, justice and empowerment based on those experiences. This research project draws on earlier research on legal consciousness in order to develop a methodological approach that assists the research in better understanding individuals' experiences interacting with the civil justice system and the meaning individuals' prescribe to those experiences. The theoretical gambit is that both the experience and the meaning attributed to the particular experience will influence the individual's future engagement with law and legal processes and their general willingness to participate in decision-making processes.

Research on Procedural Fairness

Research in the field of procedural fairness has concentrated on the subjective experiences of litigants as a means of understanding how individuals evaluate the fairness of a legal process and legal institution. This research approach is set against the randomized outcome-based research, which focuses on evaluating the objective outcomes achieved. By contrast, procedural fairness research has demonstrated that individuals in adversarial settings distinguish process from outcome when evaluating the 'fairness' of both: they are more likely to accept an unfavourable outcome if they believe that the process used to arrive at the outcome was fundamentally fair.¹⁰⁸ In this regard, as briefly

¹⁰⁷ Lawler, Giddings & Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Resources", *supra* note 78.

¹⁰⁸ Hazel Genn, "Tribunals and Informal Justice" (1993) 56 Mod L Rev 393 at 14; EA Lind & T Tyler, *The Social Psychology of Procedural Justice*, (New York, USA: Plenum Press, 1988); EA Lind, R Lissak & D Conlon, "Decision Control and Process Control: Effects on Procedural Fairness Judgments" (1983) 13:4

discussed earlier, issues of procedure and the individuals' ability to engage in the process play a central role in how they react to their experiences in court.¹⁰⁹ For example, individuals' ability to tell their story as well as present evidence to the adjudicator both become important criteria against which individuals assess the fairness of the particular proceeding.¹¹⁰ This does not mean that the outcome is irrelevant, but only that there are other elements of the adjudicatory process that significantly affect an individual's overall perception of fairness and their willingness to accept the legitimacy of that process and the outcome achieved.

Thibault and Walker were some of the first researchers to conduct research in the field of procedural justice in 1975.¹¹¹ They hypothesized that "litigants' satisfaction with dispute resolution decisions would be independently influenced by their judgment about the fairness of the dispute resolution process."¹¹² They sought to examine individuals' perceptions about the justness of court procedures by recording individuals' reactions to different legal processes. Based on the results obtained, Thibault and Walker ultimately concluded that, "the just procedure for resolving the types of conflict that result in litigation is a procedure that entrusts much control over the process to the disputants

Journal of Applied Social Psychology 338; R Lissak & B Sheppard, "Beyond Fairness: The Criterion Problem in Research on Dispute Intervention" (1983) 13:2 Journal of Applied Social Psychology 45.

¹⁰⁹ Nourit Zimmerman & Tom R Tyler, "Between Access to Counsel and Access to Justice: A Psychological Perspective" (2010) 37 Fordham Urb LJ 473 at 483-485 [Zimmerman & Tyler, "Between Access to Counsel and Access to Justice"].

¹¹⁰ In their discussion about legal consciousness, Ewick and Silbey link the ideal of an "attitudinal" concept of legal consciousness with concepts of fairness and due process, such that attitudes about law are directly related to one's assessment of the fairness of a process. In this regard, the authors suggest that there is a "deep, broad-based normative consensus" that individuals may be skeptical about the fairness of a particular legal process or institution but at the same time, maintain a commitment to the creation of an ideal that assumes equal and fair treatment. This idea is discussed further in chapter 6 in the context of the participants' views on participation within the civil justice system. See Ewick and Silbey, *The Common Place of Law*, *supra* note 7 at 36.

¹¹¹ J Thibault & L Walker, *Procedural Justice: A Psychological Analysis* (New York, USA: John Wiley & Sons, 1975) (Thibault & Walker, *Procedural Justice*). The authors note that prior to the 1970's there was a limited amount of procedural justice research, which tended to focus on particular aspects of the legal process. As a result, the consensus was that there was little social science research on the topic of procedure.

¹¹² Tom R Tyler, "What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22:1 Law & Soc'y 103 at 103.

themselves and relatively little control to the decision-maker.”¹¹³ This conclusion is particularly relevant to self-represented litigants in light of the fact that their participation is not mediated by legal representation. In this regard, two specific questions arise: how the provision of services (such as those offered to self-represented litigants at self-help centres) influences the self-represented litigants’ ability to engage with those adjudicatory processes; and what the ramifications of that engagement are for the individual’s evaluation of their experience.

In recent years, this field of study has been extended to encompass the relative importance of different fairness criteria used by individuals when assessing the ‘justness’ of an experience; recent research has also examined the inter-relationship between the different criteria in various legal settings. One of the conclusions drawn from more recent research involves the importance that litigants place on their opportunity to be heard in the litigation process.¹¹⁴ Research has demonstrated that ‘having a voice’ in the process is considered “central to people’s subjective reactions to that experience”¹¹⁵ because it allows them to tell ‘their side of the story.’ It also reassures the litigants that the decision-makers are listening to and considering their stories when making decisions.¹¹⁶ Flowing from this conclusion is the question of whether litigants, in valuing direct interaction with the decision-maker, will demand more direct participation in their own legal process. Again, this question has important ramifications for the particular context of self-represented litigants attempting to access justice.

Overall, the procedural fairness research conducted has sought to identify those aspects of adjudicatory processes that affect individual litigants’ experience in litigation processes as well as their perceptions about their experience. Drawing on some of the criteria that individuals use in assessing the fairness of a particular process can assist in

¹¹³ Thibault & Walker, *Procedural Justice*, *supra* note 111 at 2.

¹¹⁴ The use of the term “to be represented” is not in this particular context, restricted to representation by legal counsel.

¹¹⁵ Zimmerman & Tyler, “Between Access to Counsel and Access to Justice”, *supra* note 109 at 503-504.

¹¹⁶ Zimmerman & Tyler, “Between Access to Counsel and Access to Justice”, *supra* note 109 at 503.

evaluating individuals' overall experience and the meaning they attribute to that experience. Specifically, criteria such as whether individuals were able to tell their side of the story and whether they believe that the resulting decision was based on the facts presented can be helpful in attempting to understand self-represented litigants experiences with the litigation process.

Critique of Procedural Fairness Research

Procedural fairness research has not been without its critical commentary. One aspect of this has been directed primarily at the early studies that attempted to identify and rank the importance of certain procedural criteria within clinical settings that did not represent the real life experiences of individuals in adversarial litigation processes.¹¹⁷ An early example of this is Folger's study regarding the importance of voice, particularly as it relates to an individual's ability to alter experienced inequity. The research in question was conducted using male students in grade six in a simulated work setting.¹¹⁸ While the clinical setting of this research, as well as other similar research, does raise concerns about the validity of generalizing the findings to the civil justice system, it is important to note that there is more recent research that has substantiated the process criteria in adversarial settings.¹¹⁹ More particularly, this encompasses the small claims court setting where individuals experience participation in the process and place value on their experiences.¹²⁰

In a recent critical discussion of the evolution of both procedural justice research and legal consciousness research, Susan Silbey questioned certain of the conclusions drawn in various procedural justice research projects.¹²¹ She stated that, "it turns out that

¹¹⁷ Berrey, Hoffman & Nielsen, "Situated Justice", *supra* note 4 at 6.

¹¹⁸ Robert Folger, "Distributive and Procedural Justice: Combined Impact of 'Voice' and Improvement on Experienced Inequity" (1977) 35:2 Journal of Personality and Social Psychology 108

¹¹⁹ William O'Barr & John M Conley, "Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives" (1985) 19 Law & Soc'y Rev 661 [O'Barr & Conley, "Litigant Satisfaction Versus Legal Adequacy"].

¹²⁰ O'Barr & Conley, "Litigant Satisfaction Versus Legal Adequacy", *ibid*.

¹²¹ Silbey, "After Legal Consciousness", *supra* note 90 at 337.

these studies often begin with a model of fairness as it is defined by existing legal processes and doctrine (i.e., the opportunity to be heard, to have professional representation, and to have access to appeal and review). These studies then measure popular agreement or disagreement with those norms. Commitments to alternative conceptions of fairness, such as loyalty, compensatory treatment or substantive equality are not measured.”¹²² Instead, procedural justice research projects are premised on a particular model of fairness defined in terms of the existing adversarial model of legal process and framed by values of legal liberalism. The result is a failure to engage in a discussion with the participants about the possibility of alternative models and a further failure to examine questions of underlying inequality and power distribution that ultimately influence individuals interaction with legal processes and the law more generally.

Taking account of the potential limitations that an exclusive focus on either procedural fairness and/or legal consciousness research might have, these themes can be used to inform a broad qualitative approach to research in access to justice that seeks to include both contextual and diverse perspectives. Such an approach would focus on an in-depth analysis of a limited number of cases rather than search for a causal explanation of the link between certain variables. In this sense, qualitative research methods “reveal particularity and diversity and are good at enabling greater sense to be made of a situation that might not be evident with a more superficial study.”¹²³

In light of this, it is prudent to recommend that a combination of different methodologies would assist qualitative research on access to justice. For example, qualitative research methods might likely include, along with in-depth interviews, observations of self-represented litigants who have received different forms of assistance and proceeded to represent themselves. Sally Merry’s research regarding legal

¹²² Silbey, “After Legal Consciousness”, *supra* note 90 at 337.

¹²³ Curran, “A Literature Review: Examining the Literature on How to Measure Successful Outcomes”, *supra* note 44 at 15.

consciousness provides an example of this type of research.¹²⁴ In speaking to subjects, listening to them talk in mediation and in different court settings and observing how they handled their particular legal matter, she was able to gain a varied and fuller perspective from her subjects. In eliciting this fuller and more enriched perspective from the participants, she was able to draw certain inferences about the construction of individuals' legal consciousness. The triangulation of research methods such as in-depth interviews and observational techniques allows for a richer and more nuanced account of the individuals' experience.

Critiques of Qualitative Research Methods

However, in choosing to adopt qualitative methods, it is important to take account of some of the criticisms that have been leveled against earlier qualitative-focused studies more generally.¹²⁵ One of the most significant criticisms leveled at the qualitative and observational access to justice research is that it purports to draw causal connections that are not justified by the qualitative methods employed. Based on this criticism, therefore, it is important that the objectives of qualitative research are clearly and modestly outlined; they must be consistent with the type of data that will be collected.

Furthermore, the sample selection process, as well as sample size, adopted in qualitative research cannot be assumed to be representational of a group or a phenomenon. Thus, in conducting qualitative studies, it will be important to acknowledge that the data gathered from such studies may be representative only “in the sense of capturing a range or variation in a phenomenon,” and not in the sense of “allowing for the estimation of the distribution of the phenomenon in the population as a whole.”¹²⁶ The collection of qualitative data should contribute to a conversation about what access to justice means to those directly affected by attempts to improve access. In

¹²⁴ Merry, *Getting Justice and Getting Even*, *supra* note 7.

¹²⁵ For instance, David Fetterman suggest that a “rigorous effort” contributes to the knowledge base in a particular field while a poorly designed or executed study only adds “noise to the system.” See David M Fetterman, *Ethnography – Step by Step*, 3rd ed (California, USA: Sage Publications Inc., 2010) at 145 [Fetterman, *Ethnography*].

¹²⁶ Webley, “Qualitative Approaches to Empirical Legal Studies”, *supra* note 104 at 943.

this context, in-depth knowledge about an individual's particular experience and the meaning they attribute to that experience can provide more assistance than fleeting and impersonal knowledge from a larger sample.¹²⁷

The Basis for Research regarding Self-Help and Participation

In light of the foregoing discussions about the importance of qualitative research and participatory democracy, my research project sought to examine how self-represented litigants experienced the legal process in which they were directly involved and the meanings they attributed to that experience. The goal of the research project was to gather accounts from self-represented litigants who made use of the resources offered at a civil law self-help centre and proceeded to manage their own legal matter. In so doing, they attempted to participate in the civil justice system without the assistance of legal representation.

Situating this qualitative research about self-represented litigants' experiences within the context of a self-help legal centre provided an opportunity to explore access to justice from a broader participatory perspective. The participants' experiences in attempting to participate in the litigation process provided the context for a discussion about the potential relationship between access to justice and meaningful participation. Engaging in this discussion would, in turn, provide an opportunity to deepen the discourse on access to justice to include the possibility of meaningful participation as both an objective of and strategy for improving access going forward. This discussion would be in keeping with the democratic thesis of this project. This is contrasted with the historic focus in access theory and policy that has concentrated on the provision of lawyers and legal services (the practical thesis).

Thus, without proceeding with a fully formed theory of access to justice to be tested, this research sought to examine the relationship between the self-represented litigants' experiences (as relayed by the self-represented litigants themselves) and their

¹²⁷ John Gerring, *Case Study Research: Principles and Practices* (New York, USA: Cambridge University Press, 2007) at 4-5.

views and perceptions about being able to participate in the civil justice system. The objective in proceeding this way was to examine how a theory in progress—the democratic thesis—might be further grounded in the participants’ experiences and might also be modified by those same experiences. Drawing on some of the themes explored in the earlier research on procedural fairness and legal consciousness, this research sought to explore how the individual’s perceptions about his or her ability to participate and affect justice in their daily lives were shaped and/or re-shaped by their experiences with self-help legal assistance and their engagement in the civil justice system. Specifically, through observation and open-ended in-depth interviews with the participants, this project sought to gain insight into the participants’ perspectives and examine how these individuals’ “lived experiences” influenced their views on participation and about their ability to access justice.¹²⁸

In addition to conducting interviews with self-represented litigants, I also conducted interviews with lawyers who regularly volunteer at the self-help legal centre. The aim in conducting these interviews was to survey the nature of the legal assistance that these volunteer lawyers offered clients. Moreover, it was historically taken for granted that the legal profession’s views on access both informed the discussion about the objectives of access to justice and directed the resulting initiatives. However, the project showed that there are serious questions about whether these views are reflective of self-represented litigants’ experiences and/or their views about what access to justice should entail. Research in Australia highlighted the discrepancy between what self-help providers believed was needed in terms of resources and what self-represented parties actually wanted when trying to resolve their legal matter.¹²⁹ Taking account of these earlier research findings, the objective in conducting interviews with volunteer lawyers at the self-help legal centre was to gain an ‘insider’s perspective’ on access to justice: this would then be compared and contrasted with the self-help user’s actual ‘lived

¹²⁸ Webley, “Qualitative Approaches to Empirical Legal Research”, *supra* note 104 at 931.

¹²⁹ Lawler, Giddings & Robertson, “Opportunities and Limitations in the Provision of Self-Help Legal Resources”, *supra* note 78 at 210.

experiences.¹³⁰ The purpose in proceeding in this manner was not to critique the nature or efficacy of the legal services provided at the self-help legal centre. Rather, it was to explore how differing perspectives and expectations about accessing justice might be reconciled within a broader conceptualization of access to justice.

As a means of defining the scope of this research, it is helpful to outline what the research did not aim to do. This research project did not seek to suggest that the data collected is representative of all self-represented litigants' experiences with self-help. Nor did it purport to make generalizations about the effectiveness of self-help legal services (as discussed in the context of Greiner's research at Harvard). Moreover, it did not purport to test a fully formed theory of access to justice against data collected at the self-help legal centre nor measure the presence or absence of certain variables. Rather, this project was exploratory and open-ended in the sense that the self-represented litigants' narratives ultimately informed the discussion about a new theoretical conceptualization of access, albeit one that contemplates enhanced and meaningful engagement by citizens in the "decisions that affect their lives."¹³¹ The goal in this regard was to examine the possibility of a shift away from a strict reliance on legal professionals and a move toward more direct participation by citizens.¹³² Thus, this project's ambition was to both contextualize (through narratives of self-represented litigants who have attempted to access justice), as well as deepen, the conversation about the possibility of a broad conceptualization of access.

This thesis has maintained that the adherence to a particular and traditional paradigm about what access should entail and how access might be promoted has shaped the response to the access to justice crisis. According to this paradigm, access to legal representation will assist individuals in obtaining a better outcome or securing a legal

¹³⁰ For a fuller discussion of this rationale for interviewing the volunteer lawyers, please see the discussion in chapter six of this thesis.

¹³¹ White "Subordination, Rhetorical Survival Skills and Sunday Shoes", *supra* note 7 at 3-4.

¹³² Nielsen, "Attitudes of Ordinary Citizens about Law", *supra* note 88 at 1058.

victory that better represents justice.¹³³ To the extent that this research project sought to take account of how self-represented litigants were impacted by their experiences participating in the civil justice system, it is acknowledged that the project sought to examine the potential benefits as well as harms that result from individuals' direct participation in the civil justice system. In this respect, it is noted that such an examination contemplates the exploration of outcomes in the sense of skill development and the acquisition of knowledge that results from individuals having received assistance from self-help services and from their direct participation in civil justice forums. However, it is important to note that this research project approached the examination of these broader ideas of outcomes in an exploratory and non-randomized manner such that the discovery of any such benefits and/or harms would be derived from the insights provided by the individuals.

Consequently, one of the questions raised in this research was whether self-help legal advice serves as a temporary and/or fragmented measure that provides an opportunity for limited engagement or whether self-help can and/or should encourage meaningful participation consistent with the democratic thesis. From an ethnographic viewpoint, direct individual engagement in the civil justice system with the assistance of self-help legal services provides an institutional standpoint that "organizes the direction of the sociological gaze and provides a framework of relevance."¹³⁴ In this context, the 'guiding perspective' was that of the self-represented litigant who makes use of self-help and how their experiences might inform a critical discussion about the role of self-help legal assistance within a broader and more democratic conceptualization of access. Through the collection of self-help users' narratives, I sought to explore the participants' thoughts about both the positive, as well as negative, aspects of their attempts to participate in the civil justice system, the goals they achieved (or did not achieve), and

¹³³ Sally Engle Merry & Susan Silbey, "What do Plaintiffs Want? Re-examining the Concept of Dispute" (1984) 9:2 Justice System Journal 151.

¹³⁴ Dorothy E Smith, *Institutional Ethnography – A Sociology for People* (Oxford, UK: AltaMira Press, 2005) at 32.

how their experiences might impact their willingness to participate further in the civil justice system or other legal and political forums.

This focus on self-represented litigants' particular experiences is linked to the belief that individuals' experiences will shape their perceptions or views about a particular topic. Underlying this belief is the claim that individuals act on their perceptions and those actions have real-world consequences. As such, the subjective reality experienced by an individual is no less real than the putative objectively-grounded and measured reality offered by quantitative researchers.¹³⁵ This viewpoint is further supported by the conclusion that individuals evaluate their legal experiences (and, in so doing, form attitudes about law and legal institutions) more in terms of process and form of interaction than outcomes achieved.¹³⁶ Thus, the process in which individuals are engaged can be as important as the outcome in shaping their views and perceptions.

In the particular context of the civil justice system, the concept of how an individual evaluates the 'fairness of a legal process' (which has unique implications for self-represented parties) is not neutral or universal in nature. Rather, it is directly linked to the individual's particular experience.¹³⁷ One of the major factors that an individual uses in assessing the fairness of a legal process is the individual's actual ability to participate in the process.¹³⁸ And as it was noted earlier, 'having a voice' and 'being heard' in the process are considered to be "central to people's subjective reactions to that experience" because both aspects allow them to tell their side of the story.¹³⁹ It also reassures the litigant that the decision-makers are listening to and considering their stories when making decisions. This reassurance that they were heard is consistent with principles of procedural justice, which serve to strengthen the legitimacy of the

¹³⁵ Fetterman, *Ethnography*, *supra* note 125 at 5.

¹³⁶ Ewick & Silbey, "Conformity, Contestation and Resistance", *supra* note 91 at 735.

¹³⁷ Berrey, Hoffman & Nielsen, "Situated Justice", *supra* note 4 at 6.

¹³⁸ Tyler, "What is Procedural Justice?", *supra* note 109; White, "Subordination, Rhetorical Survival Skills and Sunday Shoes", *supra* note 7 at 4.

¹³⁹ Zimmerman & Tyler, "Between Access to Counsel and Access to Justice", *supra* note 109 at 503-504.

institutional process and, ultimately, the Rule of Law. Thus, in the context of this research, interviews with the self-represented litigants sought to determine whether the participants felt that they were heard and listened to as part of their general engagement with the litigation process.

Flowing from these research findings is the further question that is relevant to this project - whether litigants, in placing value on direct interaction with the decision-maker, will seek more direct participation. In this regard, self-help seeks to provide individuals with the tools, skills and information necessary to be heard directly in the civil justice system. Thus, given the focus on direct participation in the context of the democratic thesis, self-represented litigants' self-evaluation of whether they were heard also assists in understanding the impact of self-help on the self-represented litigants' attempts to participate and their views on such attempts. Moreover, to the extent that individuals' ability to participate is linked to their ultimate perceptions about the fairness of the particular legal process, it may also be assumed that this could affect their views about further participation in other legal or political contexts. Thus, again drawing on data and methodologies used in the fields of procedural justice and legal consciousness, qualitative research becomes an important tool by which to examine how individuals' experiences with certain legal institutions and processes shape their ability and/or willingness to participate in law and/or other political processes.¹⁴⁰ This also has implications for the development and implementation of the policy and initiatives that promote a broader conceptualization of access to justice.

¹⁴⁰ Merry, *Getting Justice and Getting Even*, *supra* note 7 at 5 & 9; Eagly, "Community Education", *supra* note 14. Sally Merry's research respecting self-represented litigants' court experiences in Boston provides a good example of this type of qualitative research in access to justice. Her research examined patterns of court use by working class individuals who 'went to court' (and/or mediation) to resolve their problems. Part of the scope of the research examined the individuals' legal consciousness, which Merry defined as "the way people understand and use law". Merry maintained that consciousness is formed and re-formed through individuals' experiences including their experiences within certain social/legal structures. Merry observed that individuals' legal consciousness changed as they went through court processes and that as a result, there were contradictions between what they expected beforehand and what happened to them in court.

In her book entitled *Getting Justice and Getting Even*, one of the questions that Sally Merry Engle sought to examine was why individuals would continue to return to court processes “to seek redress despite the efforts of court personnel to persuade them that their problems do not belong in court.”¹⁴¹ In seeking an answer to this question, she examined the individuals’ particular experiences with court processes and how those experiences shaped their views about what the court could offer them (even if in a symbolic sense). Drawing on this type of inquiry, my research project sought to ask how individuals’ experiences as self-represented parties impacted their perceptions about their ability to bring about justice in their lives and further participate in decisions that impact their lives. As a corollary, I also sought to examine the role self-help played in shaping these perceptions.

Conclusion

In conclusion, if access to justice research and policy-making is to make important headway, it will require further and better attention to its underlying conceptual and methodological foundations. While being critical of the quantitative turn in recent empirical research, it does not mean that such work has no role to play in access to justice research. On the contrary, a more catholic and less narrow approach to empirical work is demanded if access to justice research is to fulfill its potential. This is one that will value both quantitative and qualitative research. The work of Greiner and others has much to offer and recommend, but it must be part of a more encompassing research agenda that takes account of an equally encompassing theoretical framework. Such a program will examine not only the impact of various legal and policy initiatives on outcomes achieved in individual cases, but also the effect of such interventions on people’s capacity to participate more fully in a variety of legal and political process. It is only by aligning and reconciling the continued importance of qualitative research within a broader conceptualization of access that it will be possible to advance the practical efficacy of the legal process as well as its democratic legitimacy. Based on the discussion in this

¹⁴¹ Merry, *Getting Justice and Getting Even*, *supra* note 7 at 170.

chapter, the particular methodologies adopted in this research project are discussed in the following chapter.

CHAPTER SIX
AN ETHNOGRAPHIC APPROACH TO RESEARCH
IN ACCESS TO JUSTICE

Having examined critically an exclusively quantitative and outcome-based approach to research in access to justice and in so doing, made an argument for the continued importance and potential value of qualitative research, this chapter will include a discussion of the particular methods used in this research project. More specifically, this will include a discussion of certain ethnographic methods. My research project incorporates observations at the self-help legal centre in downtown Toronto and qualitative interviews with self-represented litigants and volunteer lawyers who attend at the self-help centre. Consequently, this chapter will begin with a broader discussion of the objectives and underlying ambition for the research project, namely to examine self-represented litigants' experiences navigating the civil justice system. Following this broader discussion, I intend to outline the mechanics of the research project, including the methods used, the rationale for adopting these methods, and the process involved in conducting this type of research. Finally, I will conclude this chapter with a discussion of some methodological and ethical considerations that flow from the adoption of these research methods, particularly as it relates to the in-depth interviews with self-represented litigants.

An Ethnographic Approach

This study is grounded in an ethnographic methodology.¹ The ethnographical research project is interested in obtaining the insider's perspective through fieldwork. This typically engages various social science methods such as participant observation and in-

¹ While the approach may be grounded in an ethnographic approach, it is not held to be traditional fieldwork in the sense that the researcher is immersed in a social setting for extended periods of time. Rather, the goal is to draw on aspects of an ethnographic approach, namely gathering detailed information about how interviewees interpret an aspect of their social world as opposed to quantitative data that seeks to measure the occurrence or frequency of an event. Michael Agar, *The Professional Stranger*, 2nd ed (San Diego, USA: Academic Press, 1996) at 129 [Agar, *The Professional Stranger*].

depth interviews.² In this regard, ethnography seeks to understand social and cultural phenomenon through interaction with individuals who experience a phenomenon directly. In the particular context of socio-legal research, methods such as observation and interviews are useful tools when attempting to understand the “complex ways in which law, decision-making, and legal regulation are embedded in wider social processes.”³ From an ethnographic perspective, the focus of this research was (through both observation and interviews) to gather a description of the self-represented litigants’ experiences that reflected the “richness, depth and variety” of these experiences as told by the individual.⁴ In this regard “qualitative data, with its emphasis on people’s lived experiences, is fundamentally well-suited for locating the meanings people place on the events, processes and structures of their lives and for connecting these meanings to the social world around them.”⁵

Engaging in in-depth interviews with participants allows the researcher to not only view a social phenomenon from the participants’ own perspective, but also to explore the meaning attributed to the phenomenon by the individuals involved.⁶ As a result, ethnographic studies typically do not stem from a fully articulated theory (that the researcher seeks to either prove or disprove) but rather draw upon different theoretical approaches that guide the research framework and assist in defining the nature of the information sought.⁷ In describing institutional ethnography, the sociologist Dorothy E Smith suggested that the individual’s experience can define the ethnographer’s further

² David M Fetterman, *Ethnography Step by Step*, 3rd ed (California, USA: Sage Publications Inc., 2010) at 3 & 5 [Fetterman, *Ethnography*].

³ June Star & Mark Goodale, eds, *Practicing Ethnography in Law* (New York, USA: Palgrave MacMillan, 2002) at 2 [Star & Goodale, *Practicing Ethnography in Law*].

⁴ Agar, *The Professional Stranger*, *supra* note 1 at 63.

⁵ Matthew B Miles, A Michael Huberman & Johnny Salanda, eds, *Qualitative Data Analysis*, 3rd ed (California, USA: Sage Publications Inc., 2014) at 11.

⁶ Lisa Webley, “Qualitative Approaches to Empirical Legal Research” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford, UK: Oxford University Press, 2010) at 926, 934 [Webley, “Qualitative Approaches to Empirical Legal Research”].

⁷ Fetterman, *Ethnography*, *supra* note 2 at 7.

research steps. In this regard, both the experiences and the perspective of the individual organize the direction of the ethnographer's investigation.⁸

In the present study, I drew on different aspects of certain socio-legal fields of study including procedural fairness and legal consciousness. This helped to build a conceptual framework in which it would then be possible to gather data about the self-represented litigants' experiences and the meaning they attributed to those experiences. However, rather than attempting to construct a new theory of access to justice that was based on the stories collected from self-represented litigants, this research sought to contextualize and deepen the discussion about meaningful participation in accordance with the democratic thesis. Presenting the participants' experiences in a qualitative and narrative form provided an opportunity to reflect on and analyze the experiences from the viewpoint of this broader conceptualization of access.

When analyzing the participants' experiences in accordance with the democratic thesis, it was important to remain aware of the benefits and challenges associated with meaningful participation. Specifically, the relevant benefits included educative enhancement, improved confidence, and the ability and/or willingness to participate in other forums and contexts. This analysis also required being aware of the potential challenges or pitfalls associated with cosmetic participation, particularly as it relates to participation in contexts where the distribution of power inhibits meaningful engagement in the decision-making process.

In this regard, the theoretical development of the democratic thesis was influenced by the narrative data collected in this project. The collection of data was, in turn, influenced by a method, which "collect[s] and analyze[s] data in such a way so as to generate theory from data sources using a constant comparative method."⁹ In proceeding in this manner, it was important to examine and re-examine the data collected in terms of

⁸ Dorothy E Smith, *Institutional Ethnography – A Sociology for People* (Oxford, UK: AltaMira Press, 2005) at 31.

⁹ Webley, "Qualitative Approaches to Empirical Legal Research", *supra* note 6 at 931.

the theoretical underpinnings of the research project. This meant that the sample selection and data collection were done together and in accordance with the development of emerging theoretical considerations derived from the original conceptualization.¹⁰ While this approach to research draws on certain aspects of a grounded theory method (i.e., an open-ended and concurrent approach to data collection and analysis),¹¹ the method used in this project went beyond grounded theory and also drew on aspects of other qualitative methods.

Specifically, the methods employed in this study involved participant observation whereby I attended at the self-help centre. I observed the operation of the centre, as well as the interaction between various self-represented litigants, staff and lawyers who volunteer legal services at the centre. This period of observation both overlapped with and was followed by qualitative interviews with self-represented litigants who attended at the self-help centre to seek legal assistance with a legal issue. By observing the processes at the self-help centre, as well as the litigants' interactions at the centre, and then subsequently interviewing the clients about their experiences, I sought to gain a more expansive understanding of the self-represented litigants' experience with self-help and with their attempts to negotiate the resolution of their legal matter. One of the goals in proceeding by way of both passive observation of interactions between individuals and lawyers and in-depth interviews with self-represented litigants was to obtain nuanced and detailed accounts of individuals using self-help to attempt to access justice.

Notwithstanding the two methods employed, the main thrust of the research focused on in-depth qualitative interviews with both a limited number of self-represented litigants who had made use of the services at the self-help centre and the lawyers who

¹⁰ Benjamin F Crabtree & William L Miller, eds, *Doing Qualitative Research*, 2nd ed (California, USA: Sage Publications Inc., 1999) at 41 [Crabtree & Miller, *Doing Qualitative Research*].

¹¹ In her discussion of the core aspects of grounded theory, Kathy Charmaz states “[f]undamental tenets of the grounded theory method include: (1) minimizing preconceived ideas about the research problem and the data, (2) using simultaneous data collection and analysis to inform each other, (3) remaining open to varied explanations and/ or understandings of the data, and (4) focusing data analysis to construct middle-range theories. See Kathy Charmatz, “Grounded Theory as an Emergent Method” in SN Hesse Bilber & P Leavy, eds, *Handbook of Emergent Methods* (New York, USA: Guildford Press, 2008) 155.

volunteered there.¹² The intention was that the interview process would be “intensive, fine-grained, qualitative, and unapologetically interpretive.”¹³ The objective in proceeding in this manner was to collect a “thick description” of the individuals’ experiences rather than data that proves or disproves a pre-determined hypothesis or represents fleeting knowledge about a large number of examples”.¹⁴ In this regard, the ethnographic approach adopted focused on “intensive discussions with a very few people”, not on the collection of survey data that reflects the presence or absence of ...a few predefined variables in a large population.”¹⁵

The particular form of the interview was narrative. But it was interspersed with broadly constructed prompts that assisted in ensuring that the interview covered certain broad topics.¹⁶ As it pertains to narrative interviews, “it is in the telling and hearing of stories that people disclose, arrange, and make sense of their own experience as well as that of others.”¹⁷ Thus, the collection and examination of the self-represented litigants’ narratives sought to explore the meaning that self-represented litigants gave to their participation in the civil justice system. Furthermore, undertaking interviews in this manner also allowed for the possibility that individuals would not only offer their own account of their experiences, but also provide insight into the views that they generated as a result of these experiences including how those views might impact future actions.

¹² A copy of the guides that I used during the interviews with the self-represented litigants and the volunteer lawyers interviewed are attached as appendix A to this thesis. In keeping with a flexible approach to the interviews, the guides were used as a form of prompts during the course of the interview in order to ensure that certain broad topics were discussed rather than as a form of survey.

¹³ Draft paper by Cynthia Williams entitled “The Social Reform of Banking” (November 2013) at 7 [Williams, “The Social Reform of Banking”]; Clifford Geertz, *The Interpretation of Culture* (New York, USA: Basic Books, 1973) at 23 [Geertz, *The Interpretation of Culture*].

¹⁴ Williams, “The Social Reform of Banking”, *ibid* at 7; Geertz, *The Interpretation of Culture*, *ibid*; John Gerring, *Case Study Research - Principles and Practice* (New York, USA: Cambridge University Press, 2007 [Gerring, *Case Study Research*]).

¹⁵ Gerring, *Case Study Research*, *ibid* at 134.

¹⁶ In this case, it was possible to draw on some of the factors studied in the field of procedural fairness research to prompt participants to discuss the nature of their participation and in reflecting on their participation in certain legal processes, how they evaluated that participation.

¹⁷ Crabtree & Miller, *Doing Qualitative Research*, *supra* note 10 at 221.

As an example, in an examination of homelessness and bureaucratic decision-making on housing needs in England, the researchers theorized about the “interaction perspective”; namely how the homeless participants’ legal consciousness was situated within the interaction between the individual seeking housing and the welfare bureaucrat, both preceding and culminating in the refusal of help from the bureaucrat.¹⁸ The decisions made regarding the homeless participants’ entitlement to housing and the manner in which the decisions were communicated to the individuals by the bureaucrats were thought to influence and inform the recipients’ ideas about the nature of the legal process and the value associated with deciding to challenge the decision.¹⁹ It is this dimension of the ethnographic methodology that draws upon theories of legal consciousness and more specifically, in the context of this research how individuals’ perceptions about engagement may be formed or re-formed by their particular experiences in the legal system and how this formation and/or reformation proceeds their future actions.

The Use of Multi-Methods in this Research Project

In qualitative research projects, data is typically collected through three broad categories of methods that can be used separately or in combination; these are observation, interviews and document analysis.²⁰ Most notably, in the law and society tradition, empirical socio-legal research often engages a variety of methods to study law in a larger social context because it provides a more “nuanced understanding of law, legal institutions, and legal processes than can be provided by any one methodology alone due to the complex nature of the social world in which they operate.”²¹ Thus, combining different methods in accordance with a triangulation process provides an opportunity to

¹⁸ Dave Cowan, “Legal Consciousness: Some Observations” (2004) 67:6 MLR 928 [Cowan, “Legal Consciousness”]

¹⁹ Cowan, “Legal Consciousness”, *ibid* at 939.

²⁰ Lisa Webley, “Qualitative Approaches to Empirical Legal Research”, *supra* note 6 at 928; Herbert M Kritzer, “Stories from the Field: Collecting Data Outside Over There” in Starr & Goodale, *Practicing Ethnography in Law*, *supra* note 3 at 143 [Kritzer, Stories from the Field”].

²¹ Laura Beth Nielsen, “The Need for Multi-Method Approaches in Empirical Legal Research” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (United Kingdom: Oxford University Press, 2010) at 955 [Nielsen, “The Need for Multi-Method Approaches”].

secure a more detailed and descriptive account of an individual's experience that might not otherwise be possible if only one method were employed. Moreover, the use of multiple methods is consistent with a holistic approach to ethnographic research that seeks to examine a social group or phenomenon from a variety of angles, with the understanding being that this will ultimately contribute to a more complete picture of the subject matter being studied.²²

For example, it is suggested that in-depth qualitative interviews can “provide insight into processes and subjectivities, but often at the expense of representativeness,²³ bias or social desirability”²⁴ whereas observation alone does not allow for the expression of the inner views, thoughts or perceptions of the interviewed.²⁵ In this context, the inner views, thoughts and perceptions of the participants are important when examining the meaning participants give to a particular experience: observation alone would not be sufficient. Combining the observational and interview methods allows the researcher to address some of the weaknesses of both methods, thereby ensuring more comprehensive data collection.

In conducting observational research at the outset of the study, the researcher can, by engaging in a more passive role, gather data, which is then complemented by an interview process that imposes added structure on the data collection process but allows for the deeper probing of a particular issue with a participant.²⁶ In an ethnographic context, the data collected during the initial observation period can inform the interview process based on what was actually observed rather than what might be expected by the interviewer or recounted by a participant: each of the methods can inform and guide the development of the other. In this research project, observation and in-depth qualitative interviews were both used to collect detailed data about self-represented litigants’

²² Fetterman, *Ethnography*, *supra* note 2 at 19.

²³ Nielsen, “The Need for Multi-Method Approaches”, *supra* note 21 at 953.

²⁴ Kritzer, “Stories from the Field”, *supra* note 20 at 154.

²⁵ Kritzer, “Stories from the Field”, *ibid* at 155.

²⁶ Kritzer, “Stories from the Field”, *ibid* at 154-155.

experiences with self-help legal services and their participation in the civil justice system. With respect to the organization of this project, it was anticipated that the different methods would overlap during certain points in the project such that one stage of the research project may not be complete prior to the commencement of the next stage of research.

Following a period of observation, in-depth qualitative interviews were conducted with self-represented individuals who sought legal assistance from the self-help law centre. The main focus of the interview was to have individuals describe, in their own words, the nature of their legal matter, the steps they took in addressing their legal issue (including the types of assistance provided at the self-help centre) and their experiences in court and/or dealing with opposing parties and/or lawyers. A portion of these qualitative interviews also focused on the collection of demographical data about the self-represented litigant. This data include gender, employment status, educational background and age. One of the objectives in collecting demographic data was to situate the individuals' narrative within a particular social context and at the same time, attempt to ensure that there was a diverse collection of perspectives represented in the data.²⁷

Interviews were also conducted with pro bono lawyers who volunteer at the same self-help centre. Generally speaking, most but not all of the lawyers interviewed had been observed engaging with clients during the earlier observation stage of the research project. Proceeding in this manner helped to situate their views about access, self-represented litigants and self-help within a particular setting and take account of those views in the context of their specific interaction with self-represented litigants. Conducting interviews with the lawyers who volunteer at the clinic also provided an opportunity to compare and contrast the legal profession's 'insider' views on access and the ability to maneuver through the civil justice system with the views of those individuals who have direct experiences of attempting to access justice as self-

²⁷ The author acknowledges that it was not be possible to include participants from every cultural/racial/religious/socio-economic background within a limited interview process but does wish to highlight the fact that one of the goals in approaching the research in this manner was to interview individuals from a variety of different background in order to collect diverse narratives.

represented litigants.²⁸ In a system that was designed by and for lawyers and judges, it is not surprising that the legal profession's perspective has been very influential in this discussion: the layperson's (including self-represented litigants) perspective has only recently been included in the discussion.²⁹

LawHelp Ontario as a Site of Research

LawHelp Ontario (LHO) opened its doors in 2007. Drawing on self-help models developed in other jurisdictions – notably the United States, England and Australia – LHO sought to offer a variety of legal services to self-represented litigants engaged in a variety of civil law matters (excluding family law). These services included assistance with the preparation of legal documents, provision of summary advice about the procedural as well as substantive issues of law, assistance with preparation for court appearances, examinations and mediations, and a limited duty counsel role in certain circumstances. In accordance with other self-help service models, it was assumed that, while clients did not retain the volunteer lawyer assisting them, they could re-attend as often as necessary to obtain further advice and information about their legal matter. In many instances, where an individual has a case that involves various legal steps, the individual may re-attend at LHO several times to obtain assistance at different stages of the litigation. In even more particular instances, individuals may attend on certain days or times in order to try and ensure that they speak to the same volunteer lawyer.³⁰

²⁸ Carrie Menkel-Meadow and Bryant G Garth, "Civil Procedure and Courts" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford, UK: Oxford University Press, 2010) at 700 [Menkel-Meadow & Garth, "Civil Procedure and Courts"]. In her critique of recent access to justice research, Carrie Menkel-Meadows suggests that it is important that we question who is doing access to justice research as well as the purposes for which the research is used. Specifically, she questions the move away from research that tests theories that originate in social science disciplines such as research on 'voice' and democratic participation in favour of a move toward research that seeks to address "the problems that respond to the needs of the courts." This shift suggests a focus on efficiency from the perspective of the lawyers and judges rather than a focus on what individuals need in terms of accessing justice. See Menkel-Meadow & Garth, "Civil Procedure and Courts" at 700.

²⁹ One of the motivations for including the perspectives of the laypersons has been the call for this perspective from scholars such as Rebecca Sandefur. Catherine R Albiston & Rebecca L Sandefur, "Expanding the Empirical Study of Access to Justice" (2013) *Wis L Rev* 101 [Albiston & Sandefur, "Expanding the Empirical Study of Access to Justice"].

³⁰ During my time at LHO observing the working of the centre, attending client-lawyer meetings and/or meeting with interview participants, it was apparent that several 'repeat' clients would attend on a specific

Otherwise, individuals may meet with a different lawyer each time they re-attend at the centre.

The volunteer lawyers who participate in the program come from a variety of legal settings that range from large corporate firms to sole practitioners. On average, a lawyer will volunteer at the centre one half or full day a month and, in the course of the day, meet with approximately 4-7 individuals. Typically, the lawyer will meet with the client for approximately 45 minutes. However, prior to the volunteer lawyer meeting with the self-represented individual, a member of LHO's staff³¹ and/or one of the volunteer law students will attempt to ascertain the nature of the clients' matter and the scope of their questions for the lawyer.³² This is, in part, to ensure that the clients' issues falls within the scope of the assistance that LHO provides. The assessment of the clients' needs is undertaken through a triage process that begins when the individual first arrives at LHO. Upon arrival, individuals are asked to complete an intake form about the nature of their legal problem. LHO operates as a walk-in centre and, therefore, individuals receive assistance on a first-come, first-served basis. Once one of the volunteer students and/or staff members has confirmed that the individual's legal issue falls within the centre's remit the individual will wait to speak with one of the two volunteer lawyers who are available to meet with clients on any given day. While there are limits to the amount of time that a volunteer lawyer can spend with any one client, clients may wait a significant amount of time to speak to a lawyer if the centre is particularly busy.

day of the week in the hopes of meeting with one particular lawyer who volunteered at the same time each week.

³¹ It is important to note that several of the senior staff are trained as paralegals and/or foreign lawyers and thus, competent to engage in a legal discussion with the clients about the nature of their issue as well as the nature of the information that the lawyer will likely wish to review in order to provide advice and information.

³² LHO has an agreement with the University of Toronto Law School whereby students from the law school can volunteer at LHO once a week. The scope of the student's responsibilities include client assistance when the client is working on the computers, assistance in ascertaining the general nature of the client's needs and assuring that the client has all of the requisite documentation that they may require prior to speaking with a volunteer lawyer.

In addition to meeting with a lawyer to discuss a legal issue, clients can also attend at LHO to do work their own case on computers at the centre. Typically, clients may use the computers to prepare various court documents that are accessible online in a template format that includes prompts that allow the individual to input specific information about their case. In these instances, one of the volunteer law students will often provide technical assistance to the client regarding the formatting of the document. However, any substantive advice about the nature of the contents of the document must be reviewed by one of the volunteer lawyers. The objective in furnishing this workspace is to provide self-represented litigants, who might not otherwise have access to computers, with the resources they need to prepare legal materials. In so doing, they can draw on support from the staff and volunteer lawyers as needed.

While LHO maintains financial eligibility criteria that sets maximum income levels above which the individual is not eligible for assistance,³³ demographic information on the education levels of individuals seeking assistance indicates that approximately 30% have a university degree and at least 44% have a high school education as well some university or college-level courses.³⁴ This shift from predominantly poverty clients to include low-income and middle-income individuals reflects the changing demographic of self-represented individuals.³⁵ In terms of the age, the majority of the individuals attending the centre were between the ages of 35 and 64 (70%).

³³ In the case of a single person, the income limit is \$36,000.00 and this rises to \$73,992.00 for four people. However, individuals on social assistance are automatically accepted at LHO.

³⁴ LawHelp Ontario Pilot Year Project Year One Report (2009) at 13-14. Available upon request as it is no longer available online but on file with the author.

³⁵ The demographic information collected in respect of the small sample group used in this research project is consistent with these more general statistics reported in LawHelp Ontario's Pilot Year Report. While being sensitive to issues arising in respect of sample bias more generally, it was found that the majority of the individuals interviewed in this project had completed high school and had some post-secondary training.

Noting Engler’s concerns about the efficacy of self-help resources,³⁶ a significant portion of the earlier research on self-help initiatives was concerned with how and who self-help might assist, particularly as it relates to vulnerable groups in society. The shift in the make-up of self-represented litigant populations at LHO suggests that these concerns must now be examined within the context of this shift. As the self-represented population expands to include a broader range of individuals, it will be helpful to examine these individuals’ perceptions about being self-represented litigants, how they view self-help in the context of access to justice, and how they make use of self-help. Recent self-help research conducted in Australia touched on the implications of this shift in demographics when researchers examined the factors that were likely to affect how individuals handled their own legal issue.³⁷ That research explored whether there were certain personal characteristics that were likely to influence the way in which self-represented individuals handled their legal problem. Data collected from qualitative interviews with self-represented individuals highlighted three broad categories of factors, including certain personal attributes that were likely to contribute to the individuals’ effectiveness and potential success in addressing their legal matter. The researchers determined “[t]he results of this study also tend to confirm our original hypothesis, which is that legal self-help presents both opportunities as well as limitations and challenges for users - all within a complex mix of both positive and negative variables, represented in the three main sets of factors that have aided this study: environmental factors, legal complexity and the personal characteristics of the users themselves.”³⁸ In an effort to situate the self-help initiative within a broader conceptualization of access to justice that seeks to promote engagement and participation as part of the democratic thesis, it is important to take account of who is making use of this initiative, their objectives in doing

³⁶ Russell Engler, “Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel is Most Needed” (2010) 37:37 Fordham Urb LJ 2 [Engler, “Connecting Self-Representation to Civil Gideon”].

³⁷ Michael Robertson & Jeff Giddings, “Self-Advocates in Civil Legal Disputes: How Personal and Other Factors Influence the Handling of their Cases” (2014) 38 Melbourne UL Rev 119 at 124. In their research, Robertson and Giddings note that the majority of the interviewees in their study were between the ages of 18-50 years of age and had completed mid-level to late level secondary education [Robertson & Giddings, “Self-Advocates in Civil Legal Disputes”]. It is worth noting that this research project analyzed interviews of 17 individuals who had made use of self-help services.

³⁸ Robertson & Giddings, “Self-Advocates in Civil Legal Disputes”, *ibid* at 150.

so and what these accounts mean for self-help and access to justice policy more generally.

Observation at LawHelp Ontario

During the observation stage of the research, I attended LHO in Toronto and passively participated (with the prior consent of both the client and the volunteer lawyer) in client meetings between self-represented litigants and the volunteer lawyers. I also spent time at the self-help centre generally observing the interaction among staff and clients. My focus included both the process by which clients attended at the centre and applied for assistance as well as the resulting triage process undertaken by the centre's staff and volunteers in assessing the clients' needs and priorities.

During the course of the observation phase, I visited LHO approximately 15 times over an 8-month period. During a typical visit, I would stay for the day.³⁹ I observed the staff's interaction with clients, I spoke directly to clients about their willingness to participate in an interview process and, on occasion, I discussed their experience on an informal basis as they waited to meet with a lawyer, and I attended meetings between lawyers and clients. I tried to attend on different days of the week due to the fact that certain times and days of the week could be busier than others. The details of my observations along with the impressions and thoughts that arose as a result of the observation were recorded during the course of each daily visit in notebooks that I kept with me throughout the day. Each visit constituted a separate entry in my notebook. I discuss and analyze those observations in the next chapter.

Observing the setting and the processes at the self-help centre provided an opportunity to engage in an open-ended process of inquiry that was not restricted to specific research goals or expectations that the research may hold.⁴⁰ During research

³⁹ On average, I would arrive at LHO as it was opening at 9:30 and stay for the day. The centre closed at 4:30. The centre was also closed between 12:00 and 1:00 each day and during lunch, the staff, volunteer lawyers (on occasion) as well as law students conducting volunteer work would gather for lunch together.

⁴⁰ Crabtree & Miller, *Doing Qualitative Research*, *supra* note 10 at 48.

conducted on the practice habits of family law lawyers, Herbert Kritzer determined that the observation period (in which he followed lawyers through a typical day in practice), provided more “nuanced images” of the realities of their practice than the more straightforward data resulting from interviews with lawyers about their practice.⁴¹ He concluded that, during the observation period, he was confronted with events that differed from his initial expectations about how lawyers conduct themselves in practice.⁴² As a passive observer, Kritzer proceeded to record these events as he witnessed them. Based on the variations in the data collected through observation and interviews, Kritzer ultimately concluded that there were contradictions between what the researcher observed the lawyer doing on a daily basis when addressing clients’ needs and how these activities were characterized by the lawyer during the interview process based on the questions posed by the researcher.

In light of these types of findings, the purposes of the observational period in this project were multifold. First, it was important to get an understanding of how the staff and clients interact at the centre, as well as the processes employed by the self-help centre’s staff to assist self-represented parties who seek legal advice and information. One of the more specific goals in this regard was to become more familiar with the procedures in place at the self-help centre and with the nature and scope of legal matters raised by self-represented parties at the self-help centre. The observations made during this period include a description of the routine operations at the centre. This helped to contextualize the research setting in which the interviewees were selected and the interviews were conducted.⁴³ It also provided an opportunity to gain insight into the nature of self-represented litigants’ engagement with the centre; this begins when they first enter the centre and ask to speak to a lawyer.

⁴¹ Kritzer, “Stories from the Field”, *supra* note 20 at 153.

⁴² Kritzer, “Stories from the Field”, *ibid* at 153.

⁴³ Chava Frankfort-Nachmias & David Nachmias, eds, *Research Methods in the Social Sciences*, 7th ed (New York, USA: Worth Publishers, 2008) at 257 [Nachmias & Nachmias, *Research Methods in the Social Sciences*]

Again, this type of viewpoint was useful in contextualizing the interviewees' experiences and perceptions about the centre; some aspects of this were subsequently discussed by the participants during their interviews.⁴⁴ For example, the physical location, including the size and often overcrowded nature of the reception area, was an aspect of the individuals' experiences that was highlighted by several interview participants. In another example, during the observation period, it was apparent from several of the self-represented individuals' first interaction with the centre's staff that there was often a difference between the language used by the self-represented litigants to describe their problem and the language used by the staff and volunteer law students to define the nature of the self-represented litigants' legal issue. As a result, the self-represented litigants' first interaction typically required both the centre's staff and the individual to engage in a form of mutual translation whereby the client attempted to describe the nature of the issue and the staff member attempted to determine whether it was a legal problem that the volunteer lawyers might be able to address.

The observational period also provided an opportunity to meet with and establish a level of comfort with certain of the self-represented litigants; some subsequently participated in the interviews.⁴⁵ Specifically, during this period of observation, I had various opportunities to make contact with self-represented litigants while they waited to speak with a lawyer. This initial contact was often done with the assistance of staff from the self-help centre who were familiar with many of the returning clients. Often, I would introduce myself (and clarify my relationship to the centre), explain the nature of my research project, discuss the prior consent that they would need to provide for me to observe a meeting or contact them for a potential interview, and collect contact information from individuals who were amenable to being interviewed at a later date.

⁴⁴ Nachmias & Nachmias, *Research Methods in the Social Sciences*, *ibid* at 191; Crabtree & Miller, *Doing Qualitative Research*, *supra* note 10 at 48.

⁴⁵ It is important to note that during the observational stage of the research, repeated efforts were undertaken to assure potential interviewees that their willingness to participate in either the observation or interview stage of the research project did not impact the legal services that they were entitled to receive from the self-help centre.

The Use of In-Depth Qualitative Interviews

The number of in-depth face-to-face qualitative interviews conducted with self-represented litigants was limited to 12.⁴⁶ Because it was not the intention of this research to make findings that were generalizable to the entire population of self-represented litigants or draw analytical truths from the qualitative work conducted, the sample is not a statistically representative group nor does it contain a significant number of participants.⁴⁷ I use the experiences of this particular group of self-represented litigants (as framed and expressed by them directly) to identify common experiences within a diverse group of participants; they are not offered or utilized as a rock-solid foundation on which to base my constructive suggestions or proposals. I simply claim that an in-depth snapshot of the experiences and views of some self-represented litigants can offer useful, authentic and rebuttable insights into the process and practice of civil litigation. With this objective in mind, the goal was to collect rich and varied sources of information from the participants about their experiences as self-represented litigants within the more broadly construed institutional setting of the civil justice system.⁴⁸ From this perspective, the sampling method was purposeful. One of the main criteria shared by all interviewees was that they had all sought assistance from the self-help centre in the course of representing themselves in a civil law matter and were proceeding to act without

⁴⁶ In their discussion of sampling size, Crabtree and Miller suggest while there is not “hard and fast rules” regarding sampling to the point of redundancy or theoretical saturation, their experience has 5-8 data sources suffice for a homogeneous sample and 12-20 or more are commonly needed when looking for disconfirming evidence or trying to achieve maximum variation. Crabtree & Miller, *Doing Qualitative Research*, *supra* note 10 at 42.

⁴⁷ It is noted that while the research does not aim to generalize about self-represented litigants or the effectiveness of self-help centres, the author Lisa Webley notes that qualitative in-depth interviews can be representative in the sense that the research does seek to capture a “range or variation in a phenomenon.” The difference is that in identifying a phenomenon, the research does not purport to estimate how such a phenomenon is distributed in the population as a whole. See Webley, “Qualitative Approaches to Empirical Legal Research”, *supra* note 6 at 943. Moreover, in defending against the critique that qualitative ethnographic research methods are limited in their application, Dorothy Smith contends that the critique ignores “the contemporary realities of how the local is penetrated with the extra-or translocal relations that are generalized across particular settings.” Smith continues to suggest that institutional ethnography “addresses explicitly the character of institutions in contemporary society: that they are themselves forms of social organization that generalize and universalize across multiple local settings. While they may and do articulate differently in the particularities of local settings, their generalized and generalizing character is going to appear in any ethnography -indeed, it has to be there and should be there explicitly, even in an investigation that begins with the experience of one individual.” See Dorothy E Smith, *Institutional Ethnography-A Sociology for People* (Oxford, UK: AltaMira Press, 2005) at 42.

⁴⁸ Webley, “Qualitative Approaches to Empirical Legal Research, *ibid* at 934.

traditional legal representation. Given the practical realities involved in contacting interviewees outside the self-help centre and scheduling interviews, it was assumed that the interviewees' legal matters would be at various stages of resolution. The range of these stages extended from initial service of an originating process through discovery to the implementation of costs, settlement documentation and potential routes of appeal.

The intention was to gather a sample that generated data about a range of different experiences. It was presumed that this would provide for a fuller discussion about how these individuals' experiences might inform the conceptualization of a broader theory of access to justice. For this reason, it was important to select as diverse group of self-represented litigants as possible in an effort to obtain a broad range of perspectives. Thus, drawing on a purposive snowball approach to research sampling, this study engaged in a process of sampling that sought to ensure a broad spectrum of narratives.⁴⁹ In order to do so, the sampling of participants evolved as I spent time at the self-help centre, observed the interactions between staff, clients and lawyers, met with self-represented litigants, and carried on interviews with self-represented litigants. Moreover, throughout the interview process, there was a rolling review of the data collected in the interviews.⁵⁰ For example, when it became apparent that there had been more women interviewed than men, a conscious effort was made to engage male clients in the interview process. The same was true of age groups; the experiences of younger clients were solicited when earlier interviews involved individuals between the age of 45 and 65. While this attempt to gather diverse perspectives was not always successful, there were some opportunities to engage different perspectives and broaden the discussion of experiences. The ethnographer Michael Agar has characterized this approach to ethnographic sampling as theoretical sampling. In theoretical sampling, "the ethnographer chooses in a self-conscious way the next people to interview to obtain data

⁴⁹ Crabtree & Miller, *Doing Qualitative Research*, *supra* note 10 at 40-41.

⁵⁰ During the interview process, I sought to ensure that a variety of perspectives were included. In some instances, this presented particular challenges. For example, I wanted to ensure that there were both plaintiff and defendants represented equally however in certain cases, it was necessary to sacrifice this balance in order to account for a diverse group of individuals.

for comparison with the group she has already talked with.”⁵¹ One of the benefits of proceeding in this fashion is that the researcher can determine whether they begin to hear similar accounts or experiences.”⁵² While it is assumed that, with in-depth interviews in which the participant is recounting their personal experiences, the interviewer is likely to hear different narratives, it is possible that certain themes may begin to take shape. In these instances, the researcher may decide to complete the interview process or seek out a new sampling group in order to explore the themes as they arise or seek out entirely new themes.

The majority of the participants were recruited through collaboration with the self-help centre’s staff who would identify potential research participants from the intake form that the individuals completed upon arrival at the centre or was based on the staff’s knowledge of the participants and their cases from previous visits. It was at this point that the staff member would assure the individual that the research being undertaken was independent of the centre’s services. As such, their decision about whether to participate in the study would have no impact on the services they could access at the centre. While there are some potential challenges associated with this approach in terms of sampling bias,⁵³ this approach was more likely to provide a varied sample of individuals. More importantly, this approach sought to ensure that certain vulnerable individuals did not feel exploited or pressured into participating in the research. This was based on the fact that members of the staff were familiar with the particular individual either through previous visits or through the intake process; they were able to assess whether a particular individual would be amenable to being approached. On other occasions, I would first participate as an observer in a participant’s meeting with the volunteer lawyer and,

⁵¹ Agar, *The Professional Stranger*, *supra* note 1 at 172.

⁵² Agar, *The Professional Stranger*, *ibid* at 172.

⁵³ While there were practical reasons for proceeding in this manner, it is important to acknowledge the potential challenges when selecting participants in this way, namely that the self-help centre staff may have their own potential biases and/or reasons for suggesting certain clients. In order to address this concern, prior to commencing the research I met with staff and volunteers to discuss the nature of my research. Moreover, throughout the course of the research project, I was actively engaged in asking questions about potential participants before they were approached by staff. This included a brief discussion of their past involvement with the centre.

subsequent to the meeting, inquire whether the individual would be prepared to meet with me for an interview.

In addition, I was also able to make initial contact with potential interviewees while they were in the self-help centre reception waiting to speak with a volunteer lawyer. In these cases, I would introduce myself, describe the nature of my research and then ask whether they would be interested in being interviewed for the study. If these individuals were amenable to being interviewed, I would obtain their contact information so that I could set up a time to meet. Typically, this contact was made through email, although on occasion I was also able to contact individuals by phone.

The aim during the interview stage was to conduct in-depth interviews that ‘generated narratives’ which focused on a specific experience, namely the self-represented litigants’ participation in the civil justice system.⁵⁴ Open-ended questions and prompts (drawn in part from the literature on procedural justice research) were used to help elicit a detailed description of the litigants’ experience representing themselves. It was hoped that this discussion would also draw out the participant’s views on certain topics including their ability and willingness to participate in this as well as other legal or political processes. The content of the questions and prompts sought to encourage the individuals to talk about the participatory aspects of their experience. Specifically, the participants were encouraged to talk about engaging in court processes, completing steps in the legal process, and interacting with lawyers and judges. The individuals were also asked about how they felt about those experiences, whether they would characterize the various experiences as positive and negative, and why. The goal was to see how having participated directly, the individuals characterized their experience and what about that experience led them to characterize it in that particular manner.

The interviews proceeded as more of a conversation in which the participants were encouraged to not only relate the details of their legal case and the steps they had or would undertake, but also their views about subjects such as participation, justice and

⁵⁴ Crabtree & Miller, *Doing Qualitative Research*, *supra* note 10 at 93.

access generally. During the course of the conversation, the participants were also asked about the self-help resources that they used, what they found helpful and/or unhelpful about the services, and what skills or tools they may have developed as a result of accessing this resource. Again, the purpose in asking these types of broad questions was not to evaluate the efficacy of the self-help resource, but rather to explore how the self-represented litigants felt about participating directly and what skills or tools may have impacted their experience or been obtained as a result of their experience. The purpose in using open-ended questions was to also try and encourage the interviewees to reflect on their experience in their own voice. Toward the end of the interview, there were also a series of survey-type questions that followed the more open-ended questions and prompts. The survey questions were aimed at obtaining certain demographic information about the participants including age, educational background, socio-economic status as well as information about what, if any, legal services the participants used in addition to self-help. This information helped to situate the interviewees within a myriad of contexts.

On a practical level, there were certain challenges associated with scheduling interviews once the participants left the centre. These challenges were related to the fact that a significant portion of the interviewees fell within certain lower income levels, existed on subsidized income, travelled great distances to attend at the centre and/or worked jobs that did not provide much flexibility.⁵⁵ Moreover, several of the individuals did not have a fixed address, changed addresses often, and/or had limited access to phone or email; this made it difficult to contact them outside of the centre. As a result, it was necessary that the sampling methods remained flexible. In terms of physically scheduling the interviews, individuals were interviewed in neighbourhood coffee shops, public libraries or even public parks. Other participants were interviewed at LHO either prior to their meeting with a volunteer lawyer or directly following the meeting.

⁵⁵ In order to qualify for assistance from the self-help centre, the self-represented litigants must not have an income of more than \$36,000.00 for a single person. See also <http://www.cfcj.org/a2jblog/access-to-justice-to-clients-methodological-challenges-in-civil-justice-research/>.

Methodological Considerations

The examination of the self-represented litigants' experiences and the relationship between those experiences and the litigants' legal consciousness raised several methodological issues. First and foremost, it was important that, in establishing the self-represented litigants' views on access to justice and participation, I did not impute views to the participant that would potentially bias the responses and/or distort the views of the participant.⁵⁶ Moreover, it was important to be aware of potential selection biases associated with soliciting interviews from individuals who were making use of the self-help services. Keeping in mind the research regarding justiciable issues conducted by individuals such as Ab Currie and Hazel Genn and the inclination of many individuals to 'lump' their legal problem, the concern in this regard was that those who attend at the self-help centre to seek assistance already have or are disposed to have, certain views and attitudes about engagement and access to justice that would likely be reinforced by the assistance they receive at the centre. Drawing on examples from an earlier research project—in studying the legal consciousness of employees from two separate taxi cab companies that had different grievance cultures—steps were taken to approach potential interviewees rather than post a notice seeking participants. The reason being that there was a concern about the potential for self-selection and the bias that might be associated with self-selection. In the context of legal consciousness research, this was relevant because the assertiveness or extroversion of the volunteer interviewees might skew the discussion about legal consciousness, which included a discussion of how the individual addressed problems at work.⁵⁷

In my research project, there was also a concern that, because the centre's staff would on occasion first approach potential participants regarding their willingness to participate in an interview, the staff would be inclined to select certain interviewees on the basis that the participants were likely to be positive about self-help and the services

⁵⁶ Laura Beth Nielsen, "Attitudes of Ordinary Citizens about Law and Street Harassment" (2000) 43:4 Law & Soc'y Rev 1056 at 1061 [Nielsen, "Attitudes of Ordinary Citizens about Law"].

⁵⁷ Elizabeth A Hoffman, "Legal Consciousness & Dispute Resolution: Different Behaviour at Two Similar Taxi Cab Companies" (2008) 28:3 Law & Soc Inquiry 691 at 700 [Hoffman, "Legal Consciousness & Dispute Resolution"].

received at LHO. While this is a different kind of self-selection bias, the potential for selective sampling by the centre's staff raised concerns about the ability to obtain a diverse range of perspectives and required that I engage in an ongoing discussion with staff about potential interviewees.⁵⁸ Taking account of these concerns in my discussions with staff, it was important to stress that this research sought a group of participants whose experiences as self-represented litigants were likely to expand and deepen existing understandings rather than disprove a pre-constructed theory generalizable to the larger self-represented populations.⁵⁹ It was also important to stress that the purpose of this research project was not to complete a quality assessment of the self-help services provided at LHO, thereby hopefully alleviating certain of the staff's concerns.

In addition to conducting interviews with self-represented litigants who sought assistance from the self-help centre, the study included interviews with six volunteer lawyers who provide legal services at the self-help centre on a pro bono basis. The questions posed of the lawyers were less about constructing a narrative of their experiences and more about exploring an 'insider's' perspective' on access, justice and engagement. For example, some of the questions focused on the lawyers' views about the role of self-help, what they thought that it provides individuals, what they thought might further assist self-represented litigants, and their views on self-representation more generally. During this segment of the research project, I also sought to understand why the lawyers volunteered at the self-help centre and what they thought they were contributing in terms of promoting access to justice. The purpose of conducting these interviews was to compare some of the lawyers' views on what they thought they were providing and the associated benefits of these services with the self-represented litigants' actual experiences. The assumption was that these potentially divergent views would ultimately highlight how different stakeholders might frame the objectives differently and

⁵⁸ In an attempt to address the concern regarding staff selection, prior to conducting the research I met with LHO's staff and provided them with a broad outline of the nature of my research and in the course of so doing, stressed that this research project was not focused on examining the efficacy of the self-help services provided at LHO nor was it focused on conducting a quality assessment of the services offered but rather was focused on the individuals' engagement with the civil justice system; a component of which included self-help legal services.

⁵⁹ Crabtree & Miller, *Doing Qualitative Research*, *supra* note 10 at 35.

what this meant for a more comprehensive access to justice theory. A discussion of the data collected from all of these interviews is also discussed in the context of the research findings in the next chapter.

All of the interviews except one were recorded.⁶⁰ Once the interviews were completed, the contents of the interviews were transcribed, reviewed and summarized in table form. Due to the small sample of interviews conducted and the narrative nature of the interviews, it was not necessary to code the data collected. Instead, it was felt that the information could be managed through the use of summaries as well as tables that condensed key elements of the data from each interview and highlighted various themes that arose across different interviews.⁶¹ In this regard, the decision was made to present the data respecting the individuals' views and perceptions "interpretatively and qualitatively, as instances and opportunities for analysis and reflection" in terms of the broader concepts discussed in this thesis.⁶² Conducting fieldwork and then processing the field notes made during in-depth interviews can be a process that is "inevitably framed by our implicit concepts."⁶³ Therefore, in examining the resulting text of summaries and tables, which by nature include an element of subjectivity, it was again important to guard against imposing my own meanings to the data. In order to do so, it was important to review periodically the original transcripts of the recorded interviews in order to ensure that the themes being developed were consistent with the actual accounts provided by the participants. This rolling review of the transcripts was also undertaken during the course of writing the discussion of the results that is contained in chapter seven. Because the interviews also represent an interpretation of what was experienced,

⁶⁰ One of the earlier interviews was unscheduled and therefore took place in a cafeteria at the courthouse as soon as the individual had finished his meeting at LHO. It became apparent early in the interview that the noise in the cafeteria was interfering with the audio recording. As a result, I took detailed notes of the interview instead, including specific quotes from the participant.

⁶¹ Miles, Huberman & Saldana, *Qualitative Data Analysis*, *supra* note 5; Merran Lawler, Jeff Giddings, & M Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Resources to Citizens in Need" (2012) 30 Windsor YB Access Just 185 at 192.

⁶² Jonathan Yovel, "Language and Power in a Place of Contingencies: Law and the Polyphony of Self-Representation" (2013) 5 Studies in Language and Society 27 at 39.

⁶³ Miles, Huberman & Saldana, *Qualitative Data Analysis*, *supra* note 5 at 11.

it remained important to be aware of this issue when transcribing and interpreting the information provided: this would ensure that the narrative remained in the participants' voices. As such, to the extent that the certain data was discussed, it was important that reference to certain ideas or themes remain in the actual voice of the participants; direct quotes were used wherever possible.

Ethical Considerations

Prior to sitting in on client-lawyer meetings at the centre and conducting interviews with clients of the centre, it was necessary to acquire the written consent of the participants to engage in both the observational stage as well as interview stage of the project. At the observation stage, it was also important that the individuals (and the lawyer) consent separately to having a third party (researcher) attend the meeting. As part of the informed consent process and before deciding whether to participate in either stage of the research, the potential participants were advised of the nature of the research and its objectives; details were given about the methods that would be used to collect the data.

As previously noted, there was a particular ethical concern that potential participants, who were seeking assistance from the self-help centre, would feel pressure to consent to participate in the study in order to receive or continue to receive assistance from the centre. In light of this concern, the individuals were assured (both verbally and in writing) that their willingness to participate in either the observation or the interview stage of the study was in no way tied to the legal services that they would be entitled to receive from the centre. Copies of the relevant consent forms are attached as appendix B to this thesis.

In addition, given the sensitive nature of the information that the participants were being asked to discuss in their interview or were observed discussing with the volunteer lawyer, the participants were advised of the continuing confidentiality associated with their participation in the study. It was felt that this was particularly important in light of the fact that the participants were discussing legal matters for which they had sought legal advice from the self-help centre. Specifically, the participants were assured that while

the researcher was not acting in a legal capacity, their meetings and interviews would remain confidential. Moreover, in an effort to protect the privacy of the participants and in light of the fact that actual names were not necessary for the purposes of analyzing and reporting on the data collected, it was decided that the names of the individuals and details about their legal problem including court files or dates of court proceedings would be removed from the main data file. Alternatively, pseudonyms would be used and access to the data file would be limited to the researcher conducting the interviews.⁶⁴ It was believed that removing identifiers such as names, addresses or reference to specific legal proceedings (ie. titles of proceedings/court file numbers or names of parties) would assist in protecting the confidentiality and privacy of the participant.

Aside from the ethical issues associated with conducting interviews in a legal context, this group of interviewees raised additional ethical concerns. Earlier access to justice research established that the majority of self-represented litigants are either low or moderate-income individuals for whom the cost of legal services is out of reach.⁶⁵ Many of the individuals seeking legal advice from the self-help centre do so because they cannot afford to retain a lawyer. Furthermore, a significant percentage of self-represented litigants who seek pro bono legal assistance may also face additional socio-economic challenges associated with poverty, disempowerment and social exclusion.⁶⁶ As a result, it was important to respect the fact that many of these individuals may feel

⁶⁴ In the recent decision of *Parent c R*, 2014 QCCS 132, the Quebec Superior Court examined the issue of researcher-participant privilege. While the court ultimately determined that this privilege must be assessed on a case-by-case basis, it did make certain important statements about the importance of academic social science research and the corresponding importance to protect the confidentiality of participants who participate in research projects where they are asked to divulge sensitive and personal information. Of particular importance to the court in establishing a privilege over confidential interviews, was the reliance placed by the interviewee on the promised confidentiality and the steps taken by the interviewer to protect the confidentiality during and after the research project. See also Nachmias & Nachmias, *Research Methods in the Social Sciences*, *supra* note 43 at 79-80.

⁶⁵ Research in this area has been conducted by researchers such as Tom R Tyler, Jona Goldschmidt, Ab Currie and Rebecca Sandefur. However, it is important to note that recent research undertaken in Ontario has also suggested the self-represented demographic is expanding to include members of the middle class who cannot afford the cost of private legal services. See Sande L Buhai, "Access to Justice for Unrepresented Litigants: A Comparative Perspective" (2009) 42 Loy LA L Rev 979 at 983.

⁶⁶ Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns" (April 2005) at 2. Available online at <http://www.cfcj-fcjc.org/sites/default/files/docs/2006/currie-en.pdf>.

vulnerable in a variety of different ways. This awareness requires that the research protocols utilized be sensitive to these potential vulnerabilities. Also, the methods employed may affect not only the nature of the data collected, but also the participants themselves.⁶⁷ This required adopting a diligent and reflective approach during the course of the research project. This specifically included examining regularly how the research process might be affecting a particular interviewee during the course of their interview and allowing the interviewee to direct the flow of the conversation as much as possible by, for example, respecting the interviewees' direction to move away from a topic when they so indicated. By so doing, I endeavored to ensure that the research process was not "exploitative or oppressive for the participants."⁶⁸

There are also are ethical questions that arise in the context of gathering and analyzing interview data that results from unstructured qualitative interviews. One qualitative researcher has characterized the ethical concern that arises in this context as questions of "what will be left in and what will be left out of the 'findings'", as well as "who will interpret and disseminate the findings."⁶⁹ Unlike methods of data collection such as surveys whereby both the question and the potential range of answers are limited, narrative interviews raise concerns about interpretation given the breadth of the discussion that occurs between the interviewee and interviewer. Narrative interviews are characterized as involving a conversation between the interviewer and the participant narrator. Thus, the story takes shape based on the interaction between the interviewer and the participant: this is typically in the form of broad questions and prompts and the responses that result from these prompts. As such, the process is a "reciprocally interpretive process" through which the interviewer and participant develop the meaning

⁶⁷ In his book on ethnography, David Fetterman has also suggested that experienced interviewers will begin sensitive interviews with non-threatening questions embedded in a conversation before proceeding to more personal and sensitive questions. In proceeding in this manner, the interviewer is sensitive to timing and the participant's level of comfort with the progression of the interview. Fetterman, *Ethnography*, *supra* note 2 at 41.

⁶⁸ *Ibid* at 126.

⁶⁹ Carl F Auerbach & Louise B Silverstein, *Qualitative Data* (New York, USA: New York University Press, 2003) at 130.

of the story together.⁷⁰ In light of this process, the concern is that the researcher's own perspectives, cultural biases and pre-existing assumptions may influence not only the interviewee's response, but also the scope and discussion of the narratives ultimately constructed.

In addressing the ethical concerns that arise in the context of narrative interviews, it was incumbent upon me, when conducting the research, to remain aware of my own perspective and how this perspective might influence the course of the discussion or the interpretation of the interviewees' responses. In so doing, I sought to remain alert to the possibility that my own experiences would be inserted into the interview process and subsequently responded to or reinterpreted by the participant. In this particular study, it was important to take account of how my perspective on the process of litigation or previous experience participating in the civil justice system or volunteering at LHO might overshadow or run up against the self-represented litigant's experience in the same civil justice system.

In undertaking this research, it was important to acknowledge that, prior to conducting this research, I had been a civil litigation lawyer who previously provided volunteer legal services at the self-help centre on a regular basis. While I had not volunteered at the centre in the three years prior to conducting this research, it was important that I identify the cultural norms, beliefs and views that might potentially influence the interview process as well as the collection and interpretation of the data. As such, it was important in understanding the individual's particular legal experience and their reflections on their experience that I remain aware throughout of my own 'insider' status. In this regard, I sought to remain focused on an attempt to understand their experience through their own eyes untainted by my perspective. This resulted in different challenges at different stages of the project. For example, during the observation stage between the lawyer and client, I did not place myself in the position of the volunteer lawyer providing advice and/or attempting to solicit information from the client regarding

⁷⁰ Crabtree & Miller, *Doing Qualitative Research*, *supra* note 10 at 225.

their specific legal matter. During the interview stage, I tried not to engage in a legal vernacular that the participants would expect of lawyers or those trained in the law. Rather, I sought to allow the participants' description of their legal issues and experiences to be articulated in the participants' own language and reflective of their understanding of that process. These challenges remained throughout the course of the research project: I addressed them through efforts to reflect on the language I adopted as well as the nature of the questions and prompts used during the interview process.

Conclusion

In keeping with a broader conceptualization of access, the research design for this particular project incorporated ethnographic and qualitative methodologies as a means of obtaining insight in to self-represented litigants' experiences with the assistance of self-help legal services. The data collected from these interviews and from my time observing the operation of the self-help centre are discussed in detail in the next chapter.

CHAPTER SEVEN

RESEARCH FINDINGS

The narrative form is a powerful research tool for accessing and assessing individuals' experiences in the world. In contrast to other intellectual and statistical approaches, it can capture and portray aspects of human lives that more measured approaches to academic inquiry ignore or marginalize: it can add dimensions of depth and detail that elude other traditional forms of investigation. Furthermore, narratives can work on both a macro and micro level. Although some narratives may be particularistic in that they represent individuals' distinct stories, they can also reflect broader and more shared messages about the reality of those individuals' lives in the greater social environment.¹ Consequently, in a project that claims to incorporate and value the experiences of laypersons, the narratives of self-represented litigants can offer insight into a qualitative dimension of behaviour that is often missing from quantitative studies. The narratives generated in this research project and analyzed in this chapter may not be entirely illustrative of the experience of all self-represented litigants. However, they can reflect and bring to light certain generalized messages about the reality of what it means to represent oneself in the civil justice system.

In this chapter, I will begin by introducing the participants in this research project and contextualize the setting for the research through a brief discussion of some of the observations made at Law Help Ontario ("LHO"). Following this, I will frame the two overarching themes derived from the participants' interviews; the contrasting themes of empowerment and disempowerment are situated in the previously discussed literature on the objectives and benefits derived from a participatory approach to democracy and citizen engagement. Next, I will discuss each of these themes in greater depth and in so doing, draw on those aspects of the participants' interviews which reflect these contrasting themes. Finally, I will canvass the impact that these contrasting themes have

¹ Benjamin F Crabtree & William L Miller, eds, *Doing Qualitative Research*, 2nd ed (California, USA: Sage Publications Inc., 1999) at 224 [Crabtree & Miller, *Doing Qualitative Research*].

had on the participants' conceptualization of access to justice and engagement, more generally. Throughout, the discussion in this chapter I hope to speak in the participants' voice whenever possible and in keeping with the democratic thesis.

Findings based on Interviews with Self-Represented Litigants

I conducted 12 in-depth interviews with self-represented litigants who sought assistance from the self-help legal centre. All of the participants interviewed had visited LHO on more than one occasion and were in the process of managing their own legal case in the civil justice system. The majority of the individuals had visited the self-help centre between three and seven separate times.² I interviewed six men and six women. The participants ranged in age from 20 to 71 with the majority of the participants falling between the ages of 30 and 50. In terms of level of education, one of the interviewees had a grade nine education and one had recently completed high school. The remainder had graduated from high school. Those who had graduated from high school had also completed post-secondary level courses or degrees in the fields of accountancy, journalism, political science, education, chemistry, computer programming, nursing and the fine arts as well. There was also one individual with master's level courses in occupational health. Several of the participants had been involved in previous legal matters in which the individuals had both represented themselves or been represented by legal counsel.

The interview lasted approximately 60-90 minutes on average: the longest interview lasted just over two hours. The chart below outlines certain demographic data about each self-represented litigant.

² As noted in the methodology chapter, one of the challenges in securing interviews was gathering a sample of individuals who attended at LHO more than once and were in the process of handling their legal problems with assistance from the centre. In many instances, individuals may attend the centre once, obtain information but not return for a second visit. As a result, it is not possible to determine whether they are handling their legal issue without counsel, have retained counsel or may be 'lumping' the problem having determined it is not something that they can address.

Name ³	Interview Date	Interview Location	Gender	Age	Education/Employment
QC	11/13/14	LHO	M	71	Chartered Accountant
BS	11/25/14	LHO	M	60-70	Chemical engineering Degree
EP	12/15/14	LHO	F	50	Unemployed
SE	12/23/14	LHO	F	44	BA in political science/Degree in journalism/self-employed
KC	04/28/15	Coffee shop	F	50	Fine Arts Degree/ Registered Nurse/ Self-employed
BN	04/30/15	Toronto Reference Library	M	30-40	Unemployed /recipient of ODSP
LM	05/21/15	LHO	M	48	4/6 years of Certified General Account/unemployed
SX	05/25/15	LHO	F	21	High School Diploma/unemployed
QH	06/03/17	Public park	M	30	BA in Political Science
KU	06/12/15	Public Library	F	44	Degree in Political Science & Education
MD	07/16/15	Coffee shop	F	60	Grade 9/ Previous small business owner/ Unemployed
XE	07/27/15	LHO	M	50-60	Trained in Computer IT/recipient of ODSP

³ The names of all of the interview participants have been changed in order to protect their privacy and confidentiality. All other demographic information about the participants remains unaltered.

I also conducted six interviews with lawyers who volunteered their legal services at the centre. Of the six lawyers, I was able to observe three of these individuals in meetings with clients. In one instance, I was also able to interview the self-represented individual who had received assistance during an observed meeting. These participants included three partners and three associates with different levels of experience. The most junior associate had been called to the bar in 2013 and the most senior partner had been called to the bar in 2004. There were both male and female partners. The lawyers worked for different types of firms; these included a partnership of two lawyers, a small boutique family law firm, a mid-size corporate commercial firm and three large Bay Street firms. On average, the lawyers volunteered between 2-5 times a year with one exception; one lawyer who volunteered a half a day once a week had been doing so for several years. This particular volunteer had developed a following of clients who would regularly attend when he volunteered to speak about their file and seek advice. Several of the self-represented litigants interviewed made reference to his assistance in the course of their interviews. The chart below outlines certain demographic data about the volunteer lawyers interviewed.

Name	Interview Date	Interview Location	Year of Call/Gender	Type of Practice	Type of Firm
EN	03/03/15	LHO	2005/M	Commercial litigation	Partnership of 2
DA	04/01/15	Law Firm	2013/F	Commercial litigation	Medium size full service firm
DE	04/03/2015	Law Firm	2012/F	Family Law	Boutique family law firm
ST	04/29/15	Law Firm	2006/M	Insurance Defence	Bay street firm
SB	07/09/15	Law Firm	2004/M	Commercial Litigation	Bay Street Firm

NQ	07/21/15	Law Firm	2005/F	Commercial Litigation	Bay Street Firm
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My research was focused on the experiences and views of the individuals who were representing themselves. As such, this discussion will concentrate on those interviews. Having said that, the interviews conducted with volunteer lawyers will be incorporated in the discussion in so far as the data collected from those interviews informs and, in some cases, contrasts with the self-represented litigants' narratives. The objective in proceeding in this manner is to highlight the different perspectives on access to justice that exist between the self-represented litigants as 'users' of the civil justice system and the lawyers as 'insiders'. Also, I intend to utilize these different perspectives to challenge further existing assumptions about access to justice in theory and practice.

Observations at LawHelp Ontario

Over the course of 10 months (between October 2014 and July 2015), I observed day-to-day operations at the self-help centre as well as specific meetings between volunteer lawyers and clients: some of these clients and lawyers I interviewed about their experiences. During this period, I observed the interaction between the staff and the clients upon the client's arrival at the centre, the interaction between many of the clients while waiting in the reception area, and the staff's (both volunteer and paid) internal operations as they sought to manage the flow of clients arriving daily at the centre.⁴ In many instances, the staff was familiar with returning clients and, thus attuned to the stage of the individual's legal matter and the nature of the assistance they required at that specific time. In the case of new clients, the staff presented the first opportunity for the client to explain their issue and outline what type of advice or information they required. Aside from completing intake forms, the process by which the staff assisted clients in

⁴ The self-help legal centre, LHO is described in greater detail in chapters four and six. The centre maintains a paid staff as well as a rotating roster of volunteer lawyers who provide procedural as well substantive legal advice and information to clients in 40 minutes meetings. The centre has financial eligibility requirements that are vetted by the staff when clients first attend at the centre. The clients are welcome to re-attend as often as necessary however their ability to speak with a volunteer lawyer is on a first-come-first-served basis.

articulating their legal issue and the assistance they require is informal and ad hoc. Typically, this involves discussions with the client, clarification of facts, review of documents, and importantly, an assessment of the immediacy of the legal issue. In some instances, the staff might ultimately conclude that the centre is unable to assist them with their particular problem as it is beyond the purview of the services provided at the centre. On many occasions, it appeared that the staff struggled with making this determination and with advising the client, as it meant that the client was turned away from the centre. On occasion, the client might express anger and frustration at being turned away and, more significantly, at not knowing where to turn next.

On many days, there were more clients than time available with the volunteering lawyers. This meant that a certain number of individuals would sit in the small reception area for an extended period waiting to speak to a lawyer; some would not have the opportunity to meet with a lawyer and, therefore, needed to return to the centre on a different day. One interviewee, who was a mother of two young children, commented, “if you arrive at 10:00 and there’s already 5 people ahead of you, you won’t get to be seen in the morning. So then you have to wait and have lunch and then come back in the afternoon. So that can be tough, because I’m always trying to juggle my schedule as a mom.”⁵ Many of the clients were observed sitting quietly. However, several of the interviewees commented on these long waits and the conversation that takes place between clients in the reception area: information and experiences about their respective cases was shared. One of the interviewees, MD, in describing her time waiting, said, “you get to know also by talking to each other, you get to know what other people are going through.”⁶ In another example, the same interviewee described a conversation she had with a fellow client while waiting to meet with a lawyer; his advice to her was to proceed with her motion because “its not the lawyer’s motion, it’s your motion.”⁷

⁵ Interview of KU dated June 12, 2015 at 7.

⁶ Interview of MD dated July 16, 2015 at 9.

⁷ Interview of MD dated July 16, 2015 at 9.

During the period between October and December 2014, I also participated in meetings between clients and volunteer lawyers at LHO. During the course of the meeting, I took notes as appropriate and generally observed the interaction between the self-represented litigant and the volunteer lawyers. In many instances, the volunteer lawyer and the client would spend a good portion of the allotted time (approximately 30-40 minutes) bringing the lawyer up to speed on the status of the client's matter, the stage of the proceeding, and how the lawyer might assist the client. The clients were often seeking to understand what steps were required or permitted and what was likely to be the outcome of those steps in the litigation. The challenge for the lawyer was to explain the process in practical terms and in non-legal language. In certain instances, it appeared as though the lawyer was struggling to explain a particular procedure in non-legal terminology or to provide the underlying rationale for a particular procedure. In one example, a client was told that they would need to prepare both a notice of motion and an affidavit in respect of a motion they wished to bring. The lawyer explained that the notice of motion advises the court of the basis for the motion and grounds on which it is brought. The lawyer then proceeded to explain that the affidavit provides the court with the moving party's story that forms the basis for the motion. From the client's perspective, these two documents appeared to be performing the same function. As such, he was unclear as to why both were required. The lawyer ultimately responded – "that is just how we do it."

In other regards, the volunteer lawyer often provided a sympathetic ear to clients who were struggling with their file. During the course of my observations at LHO, one of the lawyers made specific reference to this aspect of her role at the centre. She indicated that she would allow clients to spend a considerable amount of time providing the background of their case; this included the various non-legal aspects of how the case had affected them. The lawyer believed it was important that someone was listening to them. Interestingly, several of the participants interviewed also made reference to the emotional support they received from both the staff and the volunteer lawyers at LHO.⁸

⁸ Interview of QH dated June 3, 2015 at 13.

In certain instances, the particular volunteer lawyer would take an almost brusque approach, cutting the client off and posing questions about the immediate issue to be resolved. The latter approach was observed with one lawyer in particular who had been volunteering at LHO for a long period of time. He justified this approach on the basis of time management – namely, that there were always more clients than could be served. It is also worth noting that the lawyer in question was very popular among the clients, some of whom would specifically show up on the day he volunteered in order to speak with him.

Self-Represented Litigants, Empowerment and Disempowerment

With respect to the construction of an individual's legal consciousness, Ewick and Silbey have suggested that,

to the extent that consciousness is forged in and around situated events and interactions, (a dispute with a neighbour, a criminal case, a plumber who seemed to work few hours but charged for many), a person may express through words or actions, a multifaceted and possibly contradictory consciousness.⁹

While Ewick and Silbey's characterization of legal consciousness included three broad categories of consciousness that were relevant to their study about the different ways in which ordinary individuals use and think about law, the idea that individuals may construct a multi-faceted and contradictory sense of legal consciousness resonates with the data collected in this research project. In fact, the interviews with self-represented litigants (bolstered by the observations of the volunteer lawyers) highlighted certain themes that, at first glance, appear antithetical. However, on further examination, these themes support the development of a participatory approach to access and, at the same time, serve to highlight the challenges associated with doing so within the traditional adversarial model.

⁹ Patricia Ewick & Susan Silbey, *The Common Place of Law* (Chicago, USA: The University of Chicago Press, 1998) at 50 [Ewick & Silbey, *The Common Place of Law*].

In her examination of individuals' court experiences and corresponding legal consciousness, Sally Merry noted that, "consciousness develops through individual experience. But this experience takes place inside structures, which define people's lives. Further, it changes with contradictory experience...[t]he legal consciousness I observed changed as plaintiffs went to court and observed contradictions between what happened to them and what they expected."¹⁰ In the course of each research interview, the individuals discussed a variety of different issues, concerns and viewpoints about the nature of their legal issue, their attempts at self-representation in the civil justice system, as well as their experience dealing with opposing counsel, judges and even the volunteer lawyers at the self-help centre. While each interviewee had a very different (and in many respects personal) story to tell, when reviewed together, the totality of the interviews reflected two overarching and conflicting themes. This discussion seeks to animate these conflicting themes through the particular views and perspectives as expressed by the participant interviewees in their own voices.

For the purposes of a discussion about the development of access to justice both in terms of a theoretical framework and a policy initiative, these overarching themes are broadly categorized as *empowerment* and *disempowerment*. Individual empowerment is both a necessary precondition to meaningful participation and constituted by meaningful participation.¹¹ In this sense, the meaningfulness of the individual's engagement will be judged in part by the effect that the individual perceives to have on the decision-making process, including their ability to 'have a say' and 'be heard.' An essential requirement of both 'having a say' and 'being heard' is educative in the sense of developing the skills necessary to engage in the dialogue and being informed about the issues at stake. Roderick MacDonald maintained that, in order for education to be empowering, it must

¹⁰ Sally Engle Merry, *Getting Justice and Getting Even – Legal Consciousness among Working Class Americans* (Chicago, USA: The University of Chicago Press, 1990) at 5 [Merry, *Getting Justice and Getting Even*].

¹¹ For a more detailed discussion of the relationship between individual empowerment and meaningful participation, see the discussion in chapter three of this thesis.

be broad in scope and comprehensive rather than instructional.¹² By contrast, the “inability to communicate is itself a manifestation of social exclusion as well as a cause.”¹³ This was one of the findings made by researchers in the course of their interviews with members of disadvantaged communities in England.¹⁴ Members of tenant advocacy groups operating in disadvantaged neighbourhoods were asked about their thoughts on the concept of social exclusion; this included what it meant to them, how it affected them, and what caused certain individuals to be socially excluded. As part of their responses, several of the participants in that study listed,

communication skills and ability to learn as a key activity in its own right. These skills link to people’s ability or opportunity to participate across all four dimensions, e.g. by engaging politically, interacting socially, working, caring or volunteering, and consuming. For the residents [interviewed], communication skills are a generic set of skills that is a determining factor in opportunities to participate across a range of dimensions.¹⁵

In the democratic context, disempowerment results from both the continued exclusion of certain individuals and groups from the dialogue, deliberation and decision-making processes and a corresponding entrenchment of the belief that only certain individuals are worthy of being heard.¹⁶

Consistent with the benefits derived from greater citizen participation, many of the interviewees expressed feelings of personal empowerment relating to certain aspects of their experience as self-represented litigants. However, these feelings of empowerment were often juxtaposed or overshadowed by corresponding feelings of disempowerment that manifest in the individuals’ engagement in different aspects of the civil justice process. These aspects are broadly defined as engagement with adjudicators,

¹² Roderick MacDonald, “Theses on Access to Justice” (1992) 7:2 CJLS 23 at 44 [MacDonald, “Theses on Access to Justice”].

¹³ Liz Richardson & Julian LeGrand, “‘Outsiders’ and ‘Insiders’ Expertise: The Response of Residents of Deprived Neighbourhoods to an Academic Definition of Social Exclusion” (2002) 36:5 Social Policy and Administration 496 at 506 [Richardson & LeGrand, “‘Outsiders’ and ‘Insiders’ Experiences”].

¹⁴ Richardson & LeGrand, “‘Outsiders’ and ‘Insiders’ Experiences”, *ibid*.

¹⁵ Richardson & LeGrand, “‘Outsiders’ and ‘Insiders’ Experiences”, *ibid* at 505.

¹⁶ See the discussion of participatory democracy in chapter three of this thesis.

interactions with opposing counsel, and understanding and implementing legal procedures. Interestingly, the volunteer lawyers interviewed in this project tended to corroborate the self-represented litigants' experiences, particularly as it related to themes of disempowerment.

In one particularly stark example, several of the interviewees expressed concern about being taken advantage of (or even tricked) by opposing counsel.¹⁷ In several cases, this anxiety resulted in the individuals' unwillingness to discuss legal issues with the opposing lawyer either in person or on the phone. Instead, they choose to communicate only in writing. The participants' concern in this regard was corroborated by several of the volunteer lawyers who recounted experiences in which they believed that opposing counsel improperly withheld consent to reasonable requests made by self-represented litigants and/or responded to self-represented litigants in an overly aggressive or patronizing fashion.

Self-Representation as an Empowering Experience

The benefits associated with meaningful participation include the potential for increased self-confidence, a broader understanding of legal and political processes and institutions and the corresponding possibility of ever greater engagement on the individual's own behalf as well as others.¹⁸ More specifically, the development of certain skills, the formation of political consciousness, and even the ability to cope with frustrations are reflective of empowerment. These qualities broaden individuals' social understanding, connect them to others in the same situation, and give them faith in social change as well as a desire to affect change.¹⁹ All of the skills associated with empowerment further foster an ability to participate in political processes and local decision-making.²⁰ In the

¹⁷ This discussion is examined below in greater detail of this chapter.

¹⁸ See chapter three of this thesis regarding a discussion of engagement and the benefits associated with participatory democracy.

¹⁹ Elisheva Sadan, *Empowerment and Community Planning: Theory and Practice of People-Focused Social Solutions* (Tel Aviv: Hakibbutz Hameuchad Publishers, 1997) at 80 [Sadan, *Empowerment and Community Planning*].

²⁰ Sadan, *Empowerment and Community Planning*, *ibid* at 77.

case of the self-represented litigants interviewed, several of the participants demonstrated varying aspects of empowerment. These included an increased sense of self-confidence, a corresponding recognition that they could affect results and respond to challenges in the future, and a sense of empathy and concern for other individuals in similar circumstances.

Specifically, several of the participants in this study acknowledged that they were more self-confident in their abilities as a result of preparing for and participating in various legal processes. Several of the participants characterized this self-confidence in terms of their ability to accomplish certain legal tasks that would have been viewed previously as formidable. Enhanced self-confidence was also characterized in terms of personal growth and a corresponding recognition that individuals could represent themselves when faced with new and/or different challenges in the future. Moreover, an important aspect of this development was individuals' recognition that when placed in these challenging circumstances, they could learn new skills and processes and respond accordingly. For many of the participants interviewed, this was contrasted with a corresponding acknowledgement that there would be a wide variety of individuals who would not be in a position to represent themselves; the challenges facing certain individuals would be too daunting.²¹

For EP, who was involved in litigation over a failed real estate transaction and, at the time of the interview, was preparing for the presentation of her case in court, the process of representing herself made her realize that it is possible to go in to court and tell your story without the experience or education of a lawyer.²² In terms of the impact of this process on her personally, EP suggested that it has had a “good effect in the sense that it is ‘empowering’. You feel like you can do things. You can defend yourself, you can go through the procedure, you can learn and make an attempt to defend yourself

²¹ The later discussion in this chapter includes a more detailed discussion of the challenges facing certain self-represented litigants. See also Russell Engler, “Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about when Counsel is Most Needed” (2010) 37:37 Fordham Urb LJ 2 [Engler, “Connecting Self-Representation to Civil Gideon”] in which Engler makes reference to certain groups of individuals who may, for different reasons, not be in a position to effectively represent themselves.

²² Interview of EP dated December 15, 2014.

without legal representation.”²³ Having received assistance from volunteer lawyers at LHO, EP also indicated that,

coming here [LHO] for help, they explained the process, it’s less intimidating and there’s some things you probably can do yourself, really. And I mean this is pretty straightforward so I don’t feel terribly lacking in confidence because I know he’s lying, basically. So I just hope the judge sees that. So they help a lot there.²⁴

EP’s assertion of confidence is contrasted with a later conversation in which she describes her previous encounters with a legal professional. In the past, EP had been unable to stand up for herself and was fearful. Due to various personal challenges in her life, she was also deferential to the lawyer from whom she sought advice. As a result, she believed she allowed decisions to be made for her. This included decisions with which she did not agree. In particular, she disagreed with her lawyer’s decision that certain personal facts would not be raised with the court in order to protect her from potential embarrassment, notwithstanding the possibility that the inclusion of the information would better explain EP’s actions. In this regard, she said, “I was too meek. If someone said ‘no’ I just shrugged it off, and I will not do that now.”²⁵ In this regard, she believed that the experience of representing herself had changed how she would approach similar challenges in the future. This was due in part to a realization that “you have to fight for yourself, even with the lawyer you have to explain and say ‘listen, at least we can try’.”

In hindsight, EP believed that these facts were relevant, important to her position, and, ultimately, not embarrassing for her. An important aspect of having taken over responsibility for her own case was the acknowledgement that, in the past, she had not advocated on her own behalf vis-à-vis her legal counsel. Going forward, she had learned the importance of speaking up and engaging with the decisions being made that affected her representation and impacted her life. For EP, this meant that she would be prepared tell a lawyer what steps they might take and ask more questions about events that might

²³ Interview of EP dated December 15, 2014 at 8.

²⁴ Interview of EP dated December 15, 2014 at 2.

²⁵ Interview of EP dated December 15, 2014 at 12.

affect her life. In this regard, direct engagement resulted in EP learning to assert her own interests and challenge the assertions of those experts who might advise her to proceed differently.

A similar sentiment was expressed by XE. A former IT specialist, he had been served with a subrogated insurance claim in respect of a fire in his home that allegedly caused damage to the adjoining residence. At the time of his interview, he had prepared and served a statement of defence. When questioned about how the process of representing himself might impact him, he commented that,

part of why I'm doing it is to gain some experience in self-litigation, because I never know when a situation like this might come up. And again my circumstances might be different. Maybe I've moved on, my health has improved and I have a job and I can afford a lawyer. But I think at least I will be able to say to that lawyer, 'can we handle it this way?' Participate in my defence.²⁶

As with EP and XE, the self-represented litigant's increased self-confidence was reflected in how the individual believed that they would deal with similar problems in the future. KU is a 44 year old mother of two who was involved in a dispute with a former commercial landlord. KU's case involves a lease as well as claims of defamation on behalf of KU and her black husband. The case has been continuing for some time. Originally, KU had retained a lawyer to pursue their claim, but this legal relationship had ended. She said "we had a good lawyer who was very competent and did his best but I think he just felt okay I'm losing steam, I am not going to get anything out of this and this is going to be a long battle. For many reasons, he kind of gave up on us and decided to walk the other way. So we had nobody to represent us, so it was a long lengthy process."²⁷ It was at this point that KU began to represent herself.

At the time of the interview, KU had been involved in a variety of legal procedures, including the preparation and arguing of motions as well as participation in the discovery

²⁶ Interview of XE dated July 27, 2015 at 11.

²⁷ Interview of KU dated June 12, 2015 at 1-2.

process. In the interview, KU felt very strongly about her case and the principles involved, namely that her former landlord had been racist in his handling of her own and her husband's commercial lease. KU was confident about her case and about her ability to speak in court. With respect to her court appearances in particular, she indicated that, "I was fine with it because I felt quite fiery, in most situations I felt like I'm ready to go. I want to get this over with it but at the same time, yes I have something to say."²⁸ In learning about the legal system and participating in various legal processes, she felt less intimidated and more emboldened in the sense that she believes, "[p]ersonally, I've learned so much. The growth has been tremendous I can't summarize it just with our time together, and it's changed me completely. I cannot go back to being the naïve person I was before."²⁹ With respect to the impact of self-help on her experience, KU stated,

[o]kay so very *empowering* for sure. I felt like we had a chance to be a voice for our own corporation. And more definitely all the legal terminology, I feel a little more comfortable with now, so comfort level is up there. And I don't feel intimidated anymore being before the Master – the first time I had to go in the whole building I thought I was, yes I would lose it because it just felt so intimidating. So now it's like that's not an issue at all. Anything else happens in the future, friends mention a legal issue I'll say it's not a problem. Go to Law Help, get some information – so just feeling empowered that you can get access to information and not feeling isolated. That's very important.³⁰

It is worth noting that the term 'empowering' was initially raised by the participant and not referenced in interviewing KU. Even more significantly, when asked if she would represent herself again, KU indicated that she would. This was despite the recent loss of a motion and a very stressful discovery experience in which she felt that the emotional side of the legal issues overwhelmed her and her husband's performance in that process. This sentiment was reinforced by one of the volunteer lawyers (EN) when he suggested that the assistance provided to self-represented litigants,

²⁸ Interview of KU dated June 12, 2015 at 5.

²⁹ Interview of KU dated June 12, 2015 at 9.

³⁰ Interview of KU dated June 12, 2015 at 6.

besides just the instrumental assistance where they learn something and they can do their case a little better, it really provides almost all of them invariably with a huge reduction in their own stress. They know that there's somewhere they can go, they can talk about their case and they suddenly feel a little bit more empowered with the case. It doesn't feel as overwhelming.³¹

This opinion was also reflected by MD who was engaged in a claim against a trustee under the *Bankruptcy and Insolvency Act*. MD alleged that the trustee acted improperly in providing her with negligent advice and was moving to initiate a claim against the trustee. In discussing the assistance provided by LHO, MD contended that had she previously known about the services provided at the centre, she would have taken steps against a former employer over allegations of harassment and she would have been prepared to proceed on her own without counsel. For MD, there was a strong sense that with the right information (like the type provided at LHO) individuals could win their own cases. In discussing the nature of the assistance provided at LHO, MD said "I feel very positive, I'm very happy, I wish I'd known about it years ago because I had an issue with my company and the union and I wish I'd known because I would have sued my company then".³²

QH, a university student with severe social anxiety, indicated that he was proud of his ability to prepare court documents in a very short time frame and to make arguments in court. This was particularly so in light of the fact that the opposing counsel was a very senior lawyer. In this regard, QH stated,

I did take some positives from the experience as well. I felt more confident in my own ability to stand up for myself and take on social and socially based professional challenges. Despite the fact that on the social aspects of it I wasn't able to prevail, in terms of actually compiling my case I was actually quite proud of myself. Anyway it needs to be kept in mind that this boutique penthouse litigator [opposing counsel] took about nine months or whatever to get her case together and I was scrambling, didn't know what I was doing and I think I put together something pretty reasonable

³¹ Interview of EN dated March 3, 2015 at 2.

³² Interview of MD dated July 16, 2015 at 10.

considering. So I guess it provided some – not that I necessarily needed a major boost, like I’m so good in my writing - but it was nice to look at it as a final thing and be like that wasn’t bad. It wasn’t the greatest, looking at it I was like oh I could have worded that better...But ultimately looking at it I was like for what it was it was pretty good.³³

QH had been involved in a dispute with a family member over the division of a real estate property that was jointly owned. With the assistance of LHO, QH prepared responding application materials and appeared before two judges on two separate occasions to make substantive legal arguments about the application in issue. While ultimately not successful in his own application, QH felt that, as a result of the experience representing himself, he was less likely to “get pushed around in the future” and more able to assert himself. This was particularly meaningful for QH whose struggle with severe social anxieties had often affected his life in significant and negative ways. In his interview, QH acknowledged that “in terms of problem solving and actually having to express it orally and/or in person, that is something that I got better with.”³⁴ Thus, the ability to stand in front of a courtroom full of lawyers and clients and make submissions on behalf of his application had important implications for his self-confidence. This was so much so that, when asked in the interview whether he would represent himself again, he indicated that, depending on the complexity of the matter and his financial means, he would consider doing so.³⁵

Certain of the interviewees also expressed confidence based on the skills they developed. This resulted from learning about the various steps relevant to their legal process, understanding how the steps fit together, and completing those steps by themselves. For one participant, BN, developing the skills to defend himself was a challenging, but important process. In describing the confidence that he derived from the experience, BN said,

³³ Interview of QH dated June 3, 2015 at 13.

³⁴ Interview of QH dated June 3, 2015 at 15.

³⁵ Interview of QH dated June 3, 2015.

[s]o about the experience, I went in not empowered and I feel, I don't want to say 100% but I feel more empowered. The fact that I know how to do this stuff and I'm learning a process. Like I kind of look at it that way so I don't just see the negative. I'm listen – these are skills that are not really pleasant but there are skills you are learning, you're learning how to represent yourself. As difficult and challenging as it is it's like this is stuff that you wouldn't have looked into.³⁶

BN was involved in a complicated employment case that originated as a human rights complaint and subsequently involved allegations of breach of contract by the employer. Initially, BN received assistance from a lawyer in resolving the human rights complaint. However, he was left to his own devices regarding the employment litigation with his former employer. At the time of his interview, BN was preparing to bring a motion to set aside a default judgment obtained by the opposing lawyer. A previous and unrelated legal experience had left him feeling rushed, overwhelmed and panicked when representing himself. However, as a result of learning about the legal process and developing certain skills to represent himself better, BN indicated that he now felt that he had rights, could prepare a response and defend himself.³⁷ In contrast to his previous experience, BN believed that with the information he received from LHO, he is,

a little bit more chilled out I would say because I know that – like when I receive a document I know I have rights. I can prepare a response. I can defend myself. The other time I felt panicked because I didn't really know what to do. Now I know that ok he sent this but I'm going to send something back. It's not like he is going to get me. Before it was like he's going to get me.³⁸

This assertion of confidence was manifested in a belief that he would be able to address new issues as they arose. It was reinforced by BN's acknowledgement that, like the volunteer lawyers at LHO who typically reach for their copy of the rules of procedure when faced with a procedural question, BN could use the same book to search the rules

³⁶ Interview of BN dated April 30, 2015 at 5.

³⁷ Interview of BN dated April 30, 2015.

³⁸ Interview of BN dated April 30, 2015 at 6.

for the appropriate procedural answer. In seeking advice from the volunteer lawyers at LHO, BN observed,

I think the one thing that I would like to see is every time I am in this situation [seeking advice at LHO], the lawyer just opens up a book and pulls out the rules. Fair enough. And I'm like I could do that, but what book is this? Can I do this at home? Not fully but can I help out the process by knowing what I should be looking up and also the steps of procedure.³⁹

In a related manner, XE expressed satisfaction in being able to research and ultimately prepare his statement of defence on his own. While he clarified that preparing his defence was not “enjoyable”, he also acknowledged, “there was some satisfaction in the end product, just in the way I was able to find sample statements of defence and pull out certain key phrases that helped me in my own defence. And this is something – I guess that’s all part of being a self-helper.”⁴⁰

Accordingly, an important component of empowerment is education. This is not only about individuals being educated through the process of participation, but also about education being a pre-requisite for empowerment and meaningful participation. If individuals are to deliberate on and participate in decision-making processes, they must receive adequate information about the interests at stake, the issues, the processes, and the relevant policies. Moreover, ensuring that individuals are educated so that they are able to engage in a meaningful manner furthers a sense of empowerment in those individuals. To the extent that education about legal processes and institutions facilitates participation and direct engagement, it can also contribute to the ‘democratization of law.’⁴¹ This democratization of law involves a shift in power from the elite professionals who exhibit control over the meaning and administration of law to individuals who, in learning about various legal processes, are able to begin to participate in the design and operation of those same processes. In so doing, individuals have the opportunity to develop and incorporate their own concepts of justice into the laws and institutions that

³⁹ Interview of BN dated April 30, 2015 at 7.

⁴⁰ Interview of XE dated July 27, 2015 at 7.

⁴¹ See chapter three regarding a discussion of the democratization of law.

affect them. In the context of this research project, information provided to the self-represented litigants at LHO assisted the individuals in better understanding the relevant processes, reducing the intimidation and resulting anxiety surrounding legal proceedings, and providing an opportunity for individuals to make informed decisions about the pursuing their case.

In reflecting on the effect of education through self-help, EP indicated that, by understanding the step-by-step process involved in furthering her legal position, she was able to,

talk about legal documents, I'm more knowledgeable and I feel more comfortable so that makes the procedure go better. And sometimes I even know already before I get here I have to do this and this. So it's an education. My writing skills I think are stronger. And I think it's basically just being more familiar with the legal system. That is tremendously helpful.⁴²

BS, who was addressing credit issues resulting from an unresolved mortgage that was discharged, visited LHO because he,

wanted them to first of all introduce him to the legal system because I have no background in it. I am a university graduate – a Canadian university graduate but in science. I have no idea of the legal system. So being the good educated person I am I wanted to do some basic homework and find out about how I could go about helping myself to access; to support myself or to represent myself within the legal system.⁴³

Notwithstanding that there was an acknowledgement that learning about the legal process and institutions made the system less intimidating and assisted the self-represented litigants in preparing for and participating in their legal case, several of the interviewees were also mindful of the inherent value associated with having a better understanding of the legal system and how it works. When KU first approached a lawyer about pursuing a claim on behalf of herself and her husband, she acknowledged that she

⁴² Interview of EP dated December 15, 2014 at 7.

⁴³ Interview of BS dated November 25, 2014 at 2.

had little information or knowledge about the legal system. When asked in the interview about what skills that she might have acquired as a result of her experience, she stated,

I would just say that a general overall knowledge of the legal system and the steps before trial, I had no idea, really, it's ridiculous. I had a lack of knowledge when we first approached the lawyers...but when it actually happens to you I guess the personal reflection of knowing there's many steps to seeking justice I didn't know, so that's really been an education for me.⁴⁴

For QC, a retired chartered accountant who was involved in litigation with former employees over issues of payroll and intellectual property, it was evident that he believed that he has “learned about the importance of form.” He said he now grasped the importance of not simply anticipating what the court requires, but also appreciating why and how one might go about providing the appropriate evidence. At the time of his interview, QC was preparing appeal proceedings and looking forward to the challenge of presenting his case at the appellate level. Notwithstanding a previous appearance before the Federal Court of Appeal in which the court ruled against him, QC characterized his experience in court (particularly at the appellate level) as a “superb education.”⁴⁵

Understanding the process to which their cases were subjected was a recurring theme that arose in the discussions with the self-represented litigants. One of the participants described the legal procedures involved in resolving her civil action as “stepping stones, a building process...its like you're in a building process to get from one point to another to achieve your end goal. So it's about what's your end goal.”⁴⁶ For some of the self-represented litigants, this understanding of process encompassed not only the need to decipher the formal steps that the individuals were required to take, but also the significance of those steps in the litigation process. When the process was

⁴⁴ Interview of KU dated June 12, 2015 at 8.

⁴⁵ Interview of QC dated November 13, 2014.

⁴⁶ Interview of KC dated April 28, 2015 at 20.

understood better, it had the potential to legitimize the process. EP suggested that “once you kind of learn some of the procedures, you kind of gain a respect for it.”⁴⁷

In his interview, BN was very clear regarding the legal information and advice provided to him – “I would like the instructions and I’d like to know why.”⁴⁸ For BN, this reflected his need to not only understand what might be requested by the opposite side, but also how he might begin to make decisions about how to respond as new issues and challenges arose in the context of his case. MD also expressed a similar viewpoint. She highlighted the importance of not simply understanding the technical steps, but grasping how the steps fit together and why certain steps were necessary. In the context of understanding a cross-examination process and the action that proceeded the cross-examination, MD stated that, “I just feel going back to Law Ontario, when I asked her one question it’s just not one question, it’s got to be the whole.”⁴⁹

For XE, the quest to learn the procedural steps involved in his legal matter had a slightly different iteration. After having served his statement of defence, XE wanted to understand how, in practice, his matter might proceed and what his role was to be as a defendant. XE was confident in the sense that he had “a little bit of an aptitude for this type of work and I have the time, but I don’t know the procedure.”⁵⁰ XE wanted to understand not only the technical requirements, but also “who really is now responsible to push the matter along? Is it entirely their responsibility that is the plaintiffs? Because basically I’ve been shown the flow chart for a simplified procedure and this is the challenge for me to understand what the procedure is.”⁵¹ For XE, this meant understanding how the litigation process progressed and what his role was within that process.

⁴⁷ Interview of EP dated December 15, 2014 at 10.

⁴⁸ Interview of BN dated April 30, 2015 at 7.

⁴⁹ Interview of MD dated June 16, 2015 at 11.

⁵⁰ Interview of XE dated July 27, 2015 at 3.

⁵¹ Interview of XE dated July 27, 2015 at 3.

However, there is a second educational component that is evident in the steps undertaken by the individual self-represented litigants to educate themselves about the legal system and their particular legal issues apart from the information and advice provided at LHO. One participant had been engaged in litigation with a bank over their cheque-cashing policy that he claimed ran contrary to the *Bills of Exchange Act*. In the course of his legal case, he had been to Small Claims Court, Superior Court, the Ontario Court of Appeal, and the Divisional Court. Having educated himself about the substantive aspects of his case, he was also well versed in the procedures relevant to his case, the organization of the courts, as well as the contents of the *Bills of Exchange Act* and the relevant interpretive case law. In the course of our discussion regarding his extensive knowledge of both the procedural and substantive law relevant to his case, LM indicated that,

when this all started I think I read something like 2,000 Can LII cases, every case with the word cheque in it. So at that point that was 2005, Can LII was still fairly new at it. I think there's 15,000 cases with the word cheque in it. So I read the first 2,000 back in 2005, so that gave me my basis for the legal determinations and decisions going back 300 years. That's where some of these laws come from, like Canada's Bills of Exchange Act is actually a word for word copy of Ireland's Bills of Exchange Act from 1800 something or other."⁵²

For another self-represented litigant who was trained as a journalist, SE, managing her own employment case and attempting to determine whether she could bring a motion for summary judgment necessitated her finding the relevant information on her own. She indicated that, in attempting to find an answer, "I read the *Rules of Civil Procedure*, I've read them all."⁵³ In these examples, the self-represented litigants exhibited both a willingness and a determination to inform themselves about the nature of their case from both a procedural and a substantive law perspective. In fact, the self-represented litigants' endeavours to understand and engage with the different elements of their

⁵² Interview of LM dated May 21, 2015 at 7.

⁵³ Interview of SE dated December 23, 2014 at 6.

particular case underscored one of the volunteer lawyer's impressions of the individuals that he encountered at LHO. In this regard, he stated,

now I actually leave there [LHO] feeling quite impressed by the clients that I see and their ability to maneuver their way through the system with the help of us. Because I've been doing it for 9 years now and I still half the time don't have a clue what I'm doing. So to imagine someone trying to manoeuver their way through that system without any legal education and without any resources like I've had to rely on, except for the volunteers they see 3 or 4 times at the project, it's laudable. I think it's amazing frankly that they're able to do as good a job as they do. Some of the affidavits they come in with, some of the pleadings they come in with, I'm just blown away. Really, really good.⁵⁴

(i) Self-Represented Litigants and Judges

Throughout the course of their legal proceedings, several of the self-represented litigants had appeared before Masters and/or Judges. As a result of appearing in a variety of court settings, the participants were in a position to reflect on the different roles and attitudes adopted by the various adjudicators: they were able to provide their views on how these particular experiences influenced their perceptions of the adjudicator, his or her role within the civil justice system, and their own beliefs about their ability to engage with the adjudicatory process and affect justice in their case.

Based on their various court appearances, the self-represented litigants had a myriad of different experiences when participating in court proceedings. A review of the narrative data collected reflects both the participants' positive and negative experiences in court. For certain of the self-represented litigants interviewed, their experience appearing before an adjudicator (whether it be a Master or a Judge) was positive in the sense that they felt that they were provided with an opportunity to engage with the court. In those instances, it was useful for the interviewee to reflect in greater detail on those aspects of the experience that were positive.

⁵⁴ Interview of ST dated April 20, 2015.

KU had recently lost a motion on the production of documents previously agreed to during an examination for discovery. During the motion, she had made submissions on behalf of herself and her husband and had taken the position that certain documents need not be disclosed due to a lack of relevancy. The Master hearing the motion ruled against her. However, when speaking about the hearing, KU said, “It was fair. We lost very well”. In referring to the Master, KU further suggested that they (her and her husband) “were lucky to have somebody who was fair and he was kind of guiding us in the sense of what questions you want to ask next.”⁵⁵ For KU, being a fair adjudicator meant that he was,

a very empathetic listener. Maybe being older as well he didn’t speed through things. He made sure that we were one of the last people, we didn’t have an audience to listen to us. I thought maybe that’s just coincidence or maybe he was thinking of our situation knowing that we didn’t have representation. I felt he was an empathetic listener. He was just curious about the case itself.⁵⁶

KU felt that the adjudicator did not dismiss her nor did he make her feel that she was unprepared. In all, KU felt that the Master has given her time to speak.

Despite an earlier experience that left EP “scared because I don’t want anyone to yell at me”, she also had a more encouraging exchange with a judge in the context of the current case. EP described this adjudicator as “very nice and when she wrote her short form, she explained it to me so I’d understand because I am not a lawyer, and she was wonderful. Very nice.”⁵⁷ In elaborating on what made this particular judge ‘fair,’ EP suggested that,

she wasn’t condescending, and she wasn’t dismissive and rolling her eyes like ‘oh my gosh we’re going to have to slow down the procedure and she’s not going to know what she’s doing.’ She was very open-minded. It looked to me, the way she spoke to me was respectful and she wanted me to understand everything that we were doing, all the steps, so that I would

⁵⁵ Interview of KU dated June 12, 2015 at 4.

⁵⁶ Interview of KU dated June 12, 2015 at 4.

⁵⁷ Interview of EP dated December 15, 2014 at 4.

understand what was happening and to present my case. So I was very appreciative of that. And it was encouraging...And it strengthened my resolve and helped me.⁵⁸

In the course of her case, KC had participated in several court appearances including two summary judgment motions as well as a motion to amend the pleadings. While she ultimately lost a motion for summary judgment, she had felt confident about her earlier interactions with the bench. With respect to one appearance in particular, KC said “Now Master *** was special, she said ‘I have read absolutely everything.’ I loved it. She’s good. She’s very decent. She made that very clear. And I had this much [KC uses her hand to describe the depth of her motion materials] and they had less than half an inch thick [opposing counsel’s motion materials] and she actually said to the bank lawyer, ‘is this all you have?’”⁵⁹ In referring to the same adjudicator, KC acknowledged that, while sympathetic, the Master’s “hands were tied.”⁶⁰

Notwithstanding how the Master might have been restricted in reaching her decision, KC remained positive about the manner in which the Master prepared her endorsement. In this regard, KC noted that she (the Master) had “worded her endorsement to move everything from the counterclaim up into the amended statement of claim of defence. So when costs awards would be rendered it may buffer the final result. So she actually was very helpful to me, I feel, in that way. That’s all she could do. So that’s how her endorsement went.”⁶¹ Interestingly, for KC, her assessment of a subsequent judge was also based, in part, on how he handled the delivery of his endorsement. With respect to this subsequent judge, KC stated,

Judge *** heard me, because he wrote a six-part endorsement. And he stepped up to the plate and read aloud my statements in court...[Interviewer: How did you feel about that when he did that?]....I thought it was awesome

⁵⁸ Interview of EP dated December 15, 2014 at 15.

⁵⁹ Interview of KC dated April 28, 2015 at 23.

⁶⁰ Interestingly, several of the participants interviewed made reference to the fact that the adjudicator’s hands ‘were tied.’ Thus, despite being either sympathetic or amenable to the self-represented litigants’ position, the adjudicator was unable to find in the self-represented litigants’ favour.

⁶¹ Interview of KC dated April 28, 2015 at 8.

that he would be so openly supportive. He clearly saw there was a concern. But again his hands were tied. There's a lawsuit on the table but he very, very carefully worded that endorsement. And I honestly and sincerely went in to mediation with an open heart hoping we could do something. But the resistance has been no compromise from the other side.⁶²

MD's experience in court before a Master was also a positive experience. In describing her first court appearance, MD said of the Master,

she was really great. It was quite an experience. And I actually went in to court a couple of times before my date so I could see how it worked. That's something very suggestive to people that they should go in and see what court is like...[Interviewer: When you say she was great what about her was great?]....If I didn't know something or if I repeated something she said 'I understand', 'I've already read it' and she was very nice. She wasn't like some of those on TV. There was one on TV that calls people stupid. I'm like really, they're not stupid, they're just not informed properly and you shouldn't be calling them stupid.⁶³

(ii) Self-Represented Litigants and Future Engagement

Finally, an important consequence of meaningful participation within the context of participatory democracy focuses on the 'spill-over' effect from one area of life to another. The cumulative effect being that individuals become willing to participate in other forums and contexts. In the course of the interviews, several of the self-represented litigants made a connection between their participation in the immediate legal context in which they were involved and a willingness to engage in other contexts in the future. More specifically, in two instances, this was reflected in the participants' acknowledgement that there could be a role for them in speaking on behalf of those who cannot. For BN this meant,

maybe I become an advocate, maybe I help other people. Because one thing I've learned is that, it was a really difficult time for me, the past 3 years...I was able to pull myself together but there's lots of people – like I figure I'm a pretty tenacious type of person and I really work hard. But there's lots of people that I know that there's no way they could have pulled this off. So it

⁶² Interview of KC dated April 28, 2015 at 12.

⁶³ Interview of MD dated July 16, 2015 at 5.

makes me worry about the people - like I can do this but there's people that can't do this. And if they're left with the same options that worries me.⁶⁴

Perhaps more significantly, in reflecting on whether his experience has led to him being otherwise politically engaged, LM acknowledged that subsequent to commencing his action,

it's led to the – because of this and as a result of the Sammy [Yatim] shooting on the street car - that led to me being down here for a protest of that and it ended out in front of the Police Headquarters on the day they were having their board meeting. So I've been to all the board meetings since and have made presentations.⁶⁵

For KU this had a slightly different meaning in the sense that her claim against the landlord and her experience litigating the claim over several years reinforced in her a commitment to furthering justice and standing up for herself as well as others facing injustice. In this respect, when reflecting on the concept of injustice in the context of her own litigation experience, she noted,

my point in all of this was that I've always been an advocate for justice whatever form it's in so it just reinforced personally for me that wherever there's an injustice I will be there...so I guess injustice in the sense that there are some things that are clearly and blatantly people being exploited or things being done that shouldn't be. So whenever personally if I can get involved to most of my capacity I would like to continue to be that kind of person. So in this case it touches us very personally but there are many other issues and many other people fighting for their land and their rights and whether it's here in Canada or elsewhere. So injustice is for me, I'd say summarizing it is checking on the champion of the underdog who doesn't have a voice. And it maybe sounds a bit clichéd but that really is the case unless you've been in those shoes. It's a horrible feeling because you really don't know, you really realized there's so much bigger massive forces that you feel you can't fight against. And this individual [the defendant in JT's action] who is one representative of this company who is masked behind the company, he owns so much property that it means nothing to him. He could easily have, in my case, walked away and it just became a whole personal vendetta, ridiculous, which is not worth getting into now. But I really hope

⁶⁴ Interview of BN dated April 30, 2015 at 5.

⁶⁵ Interview of LM dated May 21, 2015 at 16.

in this case that I've shook him up and wakened him and at least have to pay all these legal fees which can be very, very high. He's paying for it, he's losing something. And whenever I get the opportunity, when people ask me I say well yes we're still in court. What? It's still going on. I can't believe it. Yes and we're not done with this.⁶⁶

The potential for positive spill-over was also emphasized by one of the volunteer lawyers who described the long-term impact of self-help as being,

like learning how to ride a bike. Every court or tribunal or whatever it is has a fairly similar process, very specific rules here and there, the rules of ethics might change here and there. But for the most part, it's the same process. One side presents their case, the other side presents their case and there's a lead up to that in terms of the exchange of information and all that. So I see this self-help process as someone learning how to ride a bike. And once you've learned how to ride the bike you can get on a different bike and you have to adjust maybe the handle bars or the seat or it's a little higher off the ground so it take a little bit of getting used to. But you still know how to ride a bike. And I think that it does have the power to give self-represented individuals information, knowledge and skills that they can take into their lives into the future, to future disputes and navigate their way through those disputes more efficiently and effectively.⁶⁷

Self-Representation as a Disempowering Experience

Ewick and Silbey's conceptualization of legal consciousness included three different characterizations of individuals' relationships with law; standing before the law, engaging with the law, and struggling against the law.⁶⁸ Of the three characterizations, the description of individuals' relationship 'before the law' had particular resonance with this research project: self-represented litigants are essentially before the law in the sense that they are compelled to engage directly with the formal dispute resolution structures of the civil justice system. In describing individuals' experiences before the law, Ewick and Silbey depict law as a "formally ordered, rational, and hierarchical system of known rules and procedures" which is often regarded as "somewhere else, a place very different from everyday life;" an individual takes certain problems "somewhere else" that is elevated in

⁶⁶ Interview of KU dated June 12, 2015 at 10.

⁶⁷ Interview of ST dated April 29, 2015 at 8.

⁶⁸ Ewick & Silbey, *The Common Place of Law*, *supra* note 9 at 47.

terms of significance.⁶⁹ When viewed in this way, individuals who come ‘before the law’ expect that their everyday problems will be transformed and resolved in a manner that is consistent with their conception of an objective and impartial legal system of rules and procedures. Merry suggested that the “promises of equal treatment in court, for example, are contradicted by the experience of the court’s unequal attention to interpersonal problems.”⁷⁰

The reality is that this is not always the case. In this regard, individuals may “believe in the appropriateness and justness provided through formal legal procedures, although not always in the fairness of the outcomes. Sometimes, however, finding themselves before the law, people express frustration, even anger, about what they perceive as their own powerlessness.”⁷¹ Thus, disempowerment is reflected in ‘cosmetic’ experiences of engagement in which individuals become aware of the fact that their participation is not bringing about the desired result or even affecting the course of the process.

For the self-represented litigants interviewed, the sense of empowerment that they gained as a result of handling their own legal problem was often juxtaposed with feelings of powerlessness. This ensued from their engagement with the formal civil justice structures and with the actors working within the civil justice system, namely the lawyers and judges. In her interview, EP aptly characterized her concern as “I worry more about the Master or the Judge, I have to be honest. Because you don’t know what decision they’re going to make and they’re all powerful. You get that feeling and they could go either way, so that worries me.”⁷² This sense of powerlessness was also expressed in the self-represented litigants’ attempts to both understand and implement a legal process that was overly complex and often operated differently than prescribed in the rule book. For the self-represented litigants interviewed, appearing ‘before the law’ caused a bifurcation

⁶⁹ Ewick & Silbey, *The Common Place of Law*, *supra* note 9 at 47.

⁷⁰ Merry, *Getting Justice and Getting Even*, *supra* note 10 at 5.

⁷¹ Ewick & Silbey, *The Common Place of Law*, *supra* note 9 at 47.

⁷² Interview of EP dated December 15, 2014 at 5-6.

of what they expected to have happen in terms of the fair resolution of their legal problem and how they were actually treated within the legal system.

This division was manifest in how the self-represented litigants approached the concept of access to justice, often in contrast to what they experienced in court. When asked about what access to justice would look like in the context of their individual cases, very few of them characterized access to justice as being about winning their case. Instead, the focus was on presenting the facts and having a decision based on those facts. For KC, justice included, “open, full transparency. No judgment should be made unless all evidence is in front of a judge. And if there’s any evidence missing a judgment shouldn’t be allowed. It’s not okay, that’s how I define it.”⁷³ EP suggested that justice means that they look at all the evidence regardless of whether it’s a lawyer presenting the evidence and questioning witnesses. The bottom line should be the evidence presented, “regardless of the fact that maybe you don’t have the experience of the lawyer but you’re still presenting the facts, what happened...If you don’t have an opportunity to present your evidence then you won’t feel that justice has been served.”⁷⁴

XE articulated a similar view when asked about justice in the context of his case. He stated,

I think what I’ve been told several times in this office is that the judge will always be interested in the facts and I think that’s what justice is. It’s getting down to the facts and what really happened and was there negligence or wasn’t there negligence and determining what the costs are. It’s all about the facts, I think that’s what justice is.⁷⁵

LM expressed a similar view regarding the objective of pursuing a matter in the civil justice system. He suggested that,

⁷³ Interview of KC dated April 28, 2015 at 16.

⁷⁴ Interview of EP dated December 15, 2014 at 14-15.

⁷⁵ Interview of XE dated July 27, 2015 at 16.

for me, this is all about, let me get before a judge and argue the case on its merit. Now that happened with Justice --- where we spent 2 hours or an hour and 45 minutes of arguing this stuff which is probably more than all the other hearings combined, give or take, or it's certainly 2 or 3 times longer than any other hearing and 10 times longer than some. So having that proper hearing is what it all comes down to and everything else before that or leading to that is just something that distracts you and it's a road block or step to getting where you want to be. It's all about having a hearing of your case and having somebody who has the authority to judge matters – saying you're crazy or yes you have some rights or yes your rights were violated...That's all anybody is really looking for and everything else tends to be about roadblocks to preventing that, and I can understand why those roadblocks are there.⁷⁶

Whether articulated as 'facts' or 'evidence', it would appear that 'telling the judge one's story' was a significant objective for the participants, which was grounded in their particular conceptualizations of both access and justice. From the participants' accounts, it seems that, while the procedure may be understood and, in some instances, legitimized by the self-represented litigants, it is also the formality of the procedures that ultimately interfered with individuals' ability to tell their story before the adjudicator.

For the self-represented litigants interviewed, their conceptualizations of what being 'before the law' should entail was often contrasted with their actual experience when navigating the civil justice system. While the self-represented litigants interviewed took steps (with the assistance of self-help legal services) to engage in the resolution of their own legal problems, they often ran up against 'insiders' within the adversarial system that resulted in negative experiences for them. These insiders were unprepared or unwilling to engage with them; the civil justice system is ill-equipped to facilitate their direct engagement. The consequence was a sense of disempowerment. For one participant in particular, this sense of powerlessness ultimately influenced her perception of the justice system as a whole. When asked about her views on the civil justice system, SE expressed a loss of faith that was premised on her,

⁷⁶ Interview of LM dated May 21, 2015 at 13.

experience with Masters and the Judges, with the exception of Master ---, who don't seem to give a [shit]. I don't care. It's like they're all playing croquet together or something. It's like the lawyers are corrupt, they're playing the system, the Judges and the Masters know it, but they don't stop it. Why? I don't know. Because they are afraid of being overturned on appeal?⁷⁷

For SE in particular, the disconnect between her view of the justice system before engaging as a self-represented litigant and her view of the system subsequent to representing herself was attributable, in part, to the perception of her own powerlessness vis-a-vis the actors who inhabit the system (i.e., the lawyers, judges and court staff).

This sense of powerlessness was reflected in the participants' belief that the legal processes involved a different language that the self-represented litigants did not understand and could not speak. This inability left the self-represented litigants unable to communicate and, as a result, feeling excluded from the process.⁷⁸ The nature of this disadvantage was typified by QC, who described his frustration with the opposing counsel and judge's repeated use of the term 'nunc' during a court proceeding; this term held no meaning for QC at the time of hearing, although it was later explained to him that nunc was the abbreviated form of 'nunc pro tunc'.⁷⁹ For BS, the need to speak like a lawyer had direct implications for the resolution of his case. He reported that if "one is not aware of it - [the legal vernacular] - you are lost. You will be treated as such."⁸⁰

SE described the impact of not knowing the language in a more profound way when she stated that this "whole legal system is like I've fallen through some rabbit hole. I don't know this world. I don't even understand much of the language. I've been living here for three years so now I know some of the language. It's kind of like moving to a

⁷⁷ Interview of SE dated December 23, 2014 at 18.

⁷⁸ Richardson & LeGrand, "Outsiders and Insiders' Expertise", *supra* note 13 at 505-506.

⁷⁹ The legal term 'nunc pro tunc' means 'now for then'. Generally speaking, a court ruling 'nunc pro tunc' will apply retroactively to correct an earlier ruling. At https://en.wikipedia.org/wiki/Nunc_pro_tunc.

⁸⁰ Interview of BS dated November 25, 2014 at 6.

new place.”⁸¹ For SE, attempting to manage her own file and navigate the civil justice system as a lay person was akin to landing in a foreign country where you do not speak the language, are unfamiliar with the food, and do not know where to find clothing or lodging.⁸²

(i) Self-Represented Litigants and Judges

Several of the participants had positive experiences with adjudicators, as discussed earlier. However, other participants characterized their court appearance as negative. The discussion of these experiences also provided an opportunity for participants to reflect on the critical aspects of their experience and what this meant for them as self-represented litigants. In examining the self-represented litigants’ experiences in court, it is possible to contrast what the individuals may expect or value in a court proceeding with the deleterious effects that a negative experience may have on those expectations and their corresponding sense of empowerment/disempowerment. This also affected the participants’ perceptions about the legitimacy of the justice system.

Certain of the participants interviewed described discomfiting interactions with adjudicators that often left them feeling embarrassed and ineffectual in representing themselves. The self-represented litigants’ anxiety respecting these encounters tended to focus on the fact that, as non-lawyers, they did not know the process and procedures. Yet, in many instances, they are expected to engage in a fashion similar to legal professionals who attend regularly in these courts. As a result, they felt that they made mistakes, worried about making mistakes or felt dismissed by the adjudicator. When appearing before a judge in civil court, QC recounted an incident in which the judge advised him that, “we will make no exceptions for you because you are a self-represented litigant.”⁸³ This blunt articulation of the court’s attitude toward self-represented litigants underscores the apprehension that they feel as ‘outsiders’ in the civil justice system.

⁸¹ Interview of SE dated December 23, 2014 at 7.

⁸² Interview of SE dated December 23, 2014.

⁸³ Interview of QC dated November 13, 2014.

While EP has appeared in several different courts without representation, an earlier procedural appearance in a matter unrelated to her current case left her nervous about appearing without a lawyer. In that matter, she had raised an issue with the court that had been overlooked and, as a result, was subject to a reprimand by the Master. In re-telling her account of the appearance, EP stated,

I told the other lawyer, the defendant's lawyer there's one more thing-I can't remember what it is now, it's over a year. But one thing we had to bring up to the Master and he forgot to tell, and she was really trying to get the little cases, little matters out of the way to clear her docket. And he didn't tell her, and then she screamed at me when I brought it up...[Interviewer: What did she say?]....She was furious. She said 'I told you I want – this was supposed to be just do one thing', and it wasn't my fault because I told him. And the whole room froze and looked. It was horrible, horrible. It was really bad. And then he [the defendant's lawyer] told me, he said, I think I forgot. He's a nasty little lawyer anyway, he's not really nice, he's very aggressive, very pit-bull like, and he apologized. But when we went back in he apologized [to the court], she didn't apologize to me so I didn't think that was right, because she just screamed at me and it wasn't right.⁸⁴

In his interview, QH recounted two separate court appearances related to his real estate litigation. His experiences in respect of these two appearances were very different. In reflecting back on these appearances, QH highlighted some of the particular challenges he thought he faced as a self-represented individual in court. In this regard, he said,

as a self-rep it's kind of you're really on the hot seat. Aside from that, again the procedural things, knowing when to speak, what to call who, how to refer to what, what to be careful of, what sort of rights you have, when you should speak, when you shouldn't speak. I guess another point that was kind of an issue was just in terms of the vestments. The attorney of course has their robes as does the justice. So dressing as a civilian, even if you're not wrong, it kind of feels like you're being prosecuted in a way. Do you know what I mean?...We're the only one not wearing a robe.⁸⁵

⁸⁴ Interview of EP dated December 15, 2014 at 4.

⁸⁵ Interview of QH dated June 3, 2015 at 8.

QH's views of court were significantly impacted by one court appearance in particular. Regarding this hearing, QH said his adjudicator "reminded him of Judge Judy in a way. She was very like I'm going to hurt you and put you down." In describing her approach to him in court, QH further elaborated,

[s]he wouldn't let me speak, she would constantly cut me off, tell me that she didn't want to hear it. She apparently had come to her decision generally prior, it would appear to me. Like when I got there she seemed like she was furious with me, like she wanted to hurt me...Anyway it was one of those things – how do I put it? I guess during the second hearing I was concerned about being held in contempt because again she didn't want to hear about, 'I don't want to hear the merits'. Okay so I didn't want to speak out of turn and because of that I didn't really think that I was given an opportunity to really defend myself. I think if I'd been an experienced attorney I would have simply known how much to push back, or to feel like your honour, my client is entitled to this...where as for me, that's her courtroom, she's kind of running the show and she just seems to be on a bit of a, I was like I don't understand why you're doing that. So it was confusing.⁸⁶

LM had appeared in a variety of judicial settings and had experienced a range of adjudicators. In one particular experience in small claims court, LM felt that the deputy judge dismissed his case without any significant input from him. In describing the hearing, LM said,

in that case, for whatever reason I guess the Attorney General's office didn't file the right paperwork in order to have the hearing actually on the docket. So it ended up being an add-on to the full day's docket. The judge said at the beginning of the hearing – 'I haven't read any of the materials' but he asked the Crown if they wanted to proceed anyway. And then asked me to explain the entire case in one sentence and then made his ruling that - 'I wouldn't have a problem paying the \$5.00 to the bank so neither should you'. Case dismissed. That was it.⁸⁷

In the course of his interview, LM returned to this appearance when discussing the challenges faced by individuals who go to court to defend themselves and are judged by

⁸⁶ Interview of QH dated June 3, 2015 at 9.

⁸⁷ Interview of LM dated May 21, 2015 at 6.

individuals who are disconnected from the realities of the litigants' lives. Specifically, he stated,

I guess it comes down to the people aren't being judged by their peers, they're being judged by, as with Deputy Judge *** where he said 'well I wouldn't have a problem paying \$5.00 to them'. And my thought in response is 'well yeah a guy that makes \$300,000 a year on a government salary doesn't care about \$5 and the guys he hangs out with at the country club are going to be the guys that receive that \$5 and buy him a beer.'⁸⁸

This view was echoed by another participant who worried that the socio-economic gap between judges and self-represented litigants made it difficult for judges to appreciate the perspective of the self-represented litigants. This made it difficult for self-represented litigants to advance their case. In other words, the judges, accustomed to having a particularized conversation with the lawyers that appear before them, were not in a position to engage with non-lawyers. While partially attributing the judges' mindset to human nature, SE said, "If you're a judge and your friends are all judges and you're hanging out with lawyers, you go to the National Club...Yeah, so I think they know intellectually that there's a world outside but do they really feel it? Do they feel the pain of people who really cannot?"⁸⁹

The frustration exhibited by the self-represented litigants regarding their experiences with judges also resonated with the volunteer lawyers interviewed. In discussing the importance to self-represented litigants of being 'heard' by the adjudicator, the volunteer lawyer, SB stated,

[s]o I understand that it's frustrating to hear the guy mutter and move his papers and talk about irrelevant stuff. But I think the value of moving it to the bottom of the list, saying 'okay listen I'm going to hear you out.' I know that is frustrating, but 'I'm going to hear you out.'...You have an hour, you booked an hour, you tell me everything you want to tell me for the next hour and I'm going to write my notes. And I also think judges could be just a little more sympathetic. I don't know why there isn't a little more

⁸⁸ Interview of LM dated May 21, 2015 at 14.

⁸⁹ Interview of SE dated December 23, 2014 at 20-21.

empathy. Like ‘I’m really sorry for the problems that you have encountered but unfortunately you have no cause of action, you’re outside the limitation period, I’m going to strike your claim.’ I think that would go a long way to reducing the frustration.⁹⁰

This view is consistent with some of the findings from Tom Tyler’s and other researchers’ examining individuals’ views on procedural fairness. More specifically, it points to the link between being heard and a legitimate legal process.⁹¹ For the self-represented litigants, the ability not only to present evidence, but also to receive an indication from the adjudicator that their story was heard significantly affected the individuals’ sense of whether they were treated fairly. More importantly, it influenced whether they believed that they would be willing or able to engage in the legal process in a meaningful manner.

To the extent that the self-represented litigants felt that they were listened to and taken seriously by the adjudicator, they had positive experiences in court. These positive experiences were, in several instances, unconnected to the ultimate outcome in the hearing. In fact, in suggesting that the adjudicator’s ‘hands were tied,’ it would appear that the self-represented litigants were prepared to accept the decision of the adjudicator when the adjudicator took the time to listen to the self-represented litigants’ position, explained the process, and elucidated the basis of their judgment. Moreover, in acknowledging receipt and review of both the written materials and oral submissions of the self-represented litigants, the adjudicator also appeared to legitimize the efforts made by the self-represented litigants to engage in the process. In this sense, the self-represented litigant was not treated as an ‘outsider’ but rather an active participant in the process. By contrast, a negative experience with a judge had the effect of reinforcing the self-represented litigant’s self-perception of an ‘outsider’. The formal procedures followed in court, as well as the informal practices known only to the participating

⁹⁰ Interview of SB dated July 9, 2015 at 7-8.

⁹¹ Tom R Tyler, “What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures” (1988) 22 Law 7 Soc’y Rev 103; J Thibault & L Walker, *Procedural Justice: A Psychological Analysis* (New York, USA: John Wiley & Sons, 1975); E Allan Lind, Robin I Lisak & Donald E Conlon, “Decision Control and Process Control Effects on Procedural Fairness Judgments (1983) 13:2 Journal of Applied Social Psychology.

counsel—the language used by lawyers and judges, and even the robes worn by the lawyers and judges—all serve to highlight the perceived gulf between ‘insiders’ (judges and lawyers) and ‘outsiders’ (self-represented litigants).

The perception of this gap is further reinforced by the self-represented litigants’ view that lawyers and judges are part of the same elite profession and inhabit a similar socio-economic sphere; many of the self-represented litigants are not part of that sphere. Given these views, the attitudes and approaches adopted by certain adjudicators toward self-represented litigants often served to widen this perceived gap. In these instances, the adjudicators did not provide an opportunity for the individual to speak, did not appear to take account of what the individual was saying, and/or scolded the individual for speaking out of turn or making a mistake. The result was a sense of powerlessness and a corresponding belief that only certain voices are likely to be heard within the civil justice system. Both of these factors contribute to an overall sense of disempowerment, which is inconsistent with the principles underlying a democratic approach to access to justice.

(ii) Self-Represented Litigants and Opposing Counsel

One of the recurring themes that arose in the context of the interviews with self-represented litigants involved the participants’ experiences with and attitudes toward opposing counsel. Not all of the self-represented litigants interviewed had a negative experience interacting with opposing lawyers; some of the participants characterized the lawyers’ actions as ‘just doing his job’. However, many of the self-represented litigants expressed concerns about feeling tricked by lawyers and/or that the lawyers were unwilling to cooperate with the self-represented litigants in ways that they might not otherwise do if dealing with a lawyer. The result was that the self-represented litigants felt intimidated and often powerless when dealing with opposing counsel.

Moreover, it was felt that this behaviour was perpetuated or, at a minimum, overlooked by Masters, Judges and even the Law Society of Upper Canada. By virtue of the organization of the adversarial system or through the maintenance of an elite legal profession to which both lawyers and judges belong, it was believed that the profession

ultimately protected its own. In the course of her case, SE made a complaint to the Law Society of Upper Canada about the opposing lawyer's behaviour. The Law Society told her that there was no basis for her complaint and that, if she wished to pursue the matter, she did have recourse through the courts; this suggestion seemed absurd to the self-represented litigant. Indeed, it caused SE to call into question whether lawyers should be judged by an impartial person and, "[n]ot someone that you golf with but maybe someone whose a bit more impartial...They all go to the same country clubs."⁹² As it pertains to self-represented litigants who are up against trained lawyers, SE challenged the notion that self-regulation is meant to "protect us from government tyranny. I think the government needs to protect us from lawyer tyranny."⁹³

SE's comments regarding her belief that the Law Society is effectively unreceptive to self-represented individuals is also reflective of the broader concern that judges and lawyers are 'insiders' and self-represented litigants remain 'outsiders' within the civil justice system. This division between insiders and outsiders is also manifest in self-represented litigants' observations of the interaction between lawyers and judges in courtroom settings. While the participants expressed concerns about not being provided with an opportunity to articulate their position, there was also a corresponding anxiety about the ease with which lawyers and judges conversed to the exclusion of the self-represented litigant. For LM, lawyers were characterized as 'insiders' who knew how the legal system operated and were comfortable functioning within it. This position creates a significant advantage for lawyers in the sense that,

it's still a case of a system by and for lawyers and where lawyers get preferential treatment by the nature of them providing the information to the decision-maker in a nice easy format, that's what they're looking for that you just get a natural advantage by serving the people [judges] what they like and what they're wanting.⁹⁴

⁹² Interview of SE dated December 23, 2014 at 17; while it is not contended that this perception reflects all members of the legal profession, it does speak to the concern about 'insiders' and 'outsiders' in the legal system and how such a distinction serves to undermine the legitimacy of the civil justice system.

⁹³ Interview of SE dated December 23, 2014 at 17.

⁹⁴ Interview of LM dated May 21, 2015 at 13.

In the course of discussions with the self-represented litigants, this was, again, often characterized as a problem with legal language. The stylized conversation between lawyers and judges in court has a significant impact on self-represented litigants participation in the proceeding. From their perspective, it would appear that the lawyers and the judges are engaged in a conversation to which the self-represented litigants are not privy (e.g., QC's frustrating example of the use of the legal term 'nunc'). However, this also raises more significant issues about whether self-represented litigants are able to contribute to the conversation in a meaningful manner or will be able to respond effectively to submissions made by an opposing lawyer.

BN typified this concern when, talking about an upcoming court proceeding, he said that the opposing lawyer could,

say certain things to the judge and just have something, and I don't know how to argue it. I have no idea how to argue anything on Monday. I'm going to be like okay. There's certain things that will be said and he [the opposing lawyer] could say something that could basically shut me down, and I have no idea, that's kind of frightening...I'm sure that the judge would - I'm talking about as far as lingo that might be over my head and him possibly being able to assert something that I don't even notice to argue. But hopefully the adjudicator would explain.⁹⁵

In describing her experience dealing with opposing counsel, KC described a feeling of intimidation based on the fear of,

being up against experts in the law who are very crafty. How to work and manipulate the law to the benefit of the case they may be dealing with. I think crafty is a fair word to use, it's what I've been dealing with. And it's always like trying to be one step ahead of them or figure out where they're at, or where they're going. It's been troubling. To me in a fair and just system there should be no craftiness.⁹⁶

⁹⁵ Interview of BN dated April 30, 2015 at 8-9.

⁹⁶ Interview of KC dated April 28, 2015 at 23.

This concern is further complicated by the discrepancy between the rules as read by the self-represented litigants and the application and interpretation of those same rules by lawyers. In some instances, the self-represented litigants expressed an additional fear that lawyers may purposefully manipulate the rules in order to mislead self-represented litigants. SE articulated this concern when she said that, “the rules are there for a reason so that people don’t abuse the system which is the ultimate irony because people are using it [the rules] to abuse the system. You know what I mean?”⁹⁷

Similarly, BN’s concern was that the opposing counsel would assert positions or make demands of BN that he could not defend as valid or legitimate. In the context of opposing counsel’s demands for a cross-examination in advance of a motion, BN stated,

I would like to have those navigational instructions [the rules of procedure], even if it’s just in writing them down, just to be able to reference them over the weekend so I might know, because I didn’t know whether he could just say he wants to cross-examine. I could go ‘I didn’t get the email.’ He’s been doing that with me with the examination [judgment-debtor examination]. I tried to say I’m going to be setting aside a motion and he’s like – he didn’t respond, so I showed up at that anyway [judgment-debtor examination]. So it’s like just little things like that. I don’t know when people are playing tricks. That’s the one thing that I don’t have that knowledge base.⁹⁸

When asked further about his distinction between someone acting within the purview of the rules and someone who is playing tricks, BN responded,

before when I was getting the Notice of Examination and I look at some of the documents, my gut feeling tells me that probably the process was not 100% on the up and up as far as what they did. That’s my gut feeling from reading it. Like I’d see judgments with different dates on them and crossed out. But I don’t know for sure.⁹⁹

⁹⁷ Interview of SE dated December 23, 2014 at 13.

⁹⁸ Interview of BN dated April 30, 2015 at 7.

⁹⁹ Interview of BN dated April 30, 2015 at 8.

SE's concern was that once she filed a motion, she would be inundated with emails and faxes from the opposing counsel who was going to,

try to baffle me with bull*#&#@, and I'll be 'is it true?' Can I do this, can I not do this? Is what's he's saying true? So I'll have to come here [LHO] and say 'is it true?', can he do that?...And then when I get these ridiculous emails from the other side threatening and saying 'I'm going to do this and I'm going to do that', I'm going to come in and say 'can he do this? Is what he's saying true or is it just more scare tactics.'¹⁰⁰

In BS's interview, this manifested in a concern that the opposing lawyers would take steps against him that he was unversed in and unable to address. In this regard, he stated "the speed at which I can go is not the speed at which the law firm would like me to go and they may get frustrated with me and throw the book at me but I do not know what is in the book."¹⁰¹ The concern, as articulated by KC, BN, SE and BS, is that they may be overwhelmed or manipulated by opposing lawyers who have all the legal knowledge. More significantly, the participants felt that the lawyers are prepared to use it against the self-represented litigants. These feelings of intimidation based on a disparity in levels of legal knowledge were compounded by an anxiety that lawyers would use loopholes or tricks to confuse and trip-up self-represented litigants in ways that they may not against other lawyers.

For SE, the problem was further complicated by the fact that, when lawyers adopt overly aggressive positions with self-represented litigants, there was little or no recourse available to the self-represented litigants because,

this is just someone whose playing the system, like he knows all the loopholes, he knows the games he can play, he knows that he will do whatever he wants and not be held to account because I can't afford to hold him to account. This is the thing I think I said when I met you a few weeks ago. I made an analogy to a hockey game. When there's a hockey game there's a ref, and there seems to be no ref here. So it's like he can do

¹⁰⁰ Interview of SE dated December 23, 2014 at 23-24.

¹⁰¹ Interview of BS on November 25, 2014 reflects BS' reluctance to speak to opposing counsel on the phone and concern that he could not communicate with the lawyer until he was confident of the law and how he would articulate his position.

whatever he wants, slashing, hooking, smash me into the boards face first and then I can go to the ref but that's the court...[Interviewer: "Its two weeks after the game is over"]...It's not just that, it could be months after the game's over and guess what, I'll end up having to pay.¹⁰²

QH's distrust of opposing counsel manifested in what he felt was the adoption of unreasonable positions that were only resolved once a lawyer from LHO became involved on QH's behalf. Specifically, after the opposing counsel refused to consent to a first adjournment of the matter in order to allow QH time to prepare responding materials, QH reported that "DE [the volunteer lawyer at LHO who was assisting QH] was able to apparently get her [the opposing lawyer] to be a bit more reasonable, whereas it was difficult for me to get her to just give anything...when DE called she was just like 'you and I both know how this will go, so don't push anymore. He's going to get his adjournment and you're well aware of it.'"¹⁰³ Interestingly, I observed this particular exchange: the volunteer lawyer (DE) made several attempts to call and was ultimately successful in reaching the opposing lawyer to secure a reasonable adjournment for QH.

In her interview, KC also referenced a refusal by opposing counsel to cooperate with her as a self-represented litigant. Early in the proceeding, she requested a change of venue from the opposing lawyers based on the fact that the action against her had been initiated outside the downtown. She said that, "distance driving is painful for me. I have right leg injuries and back and neck injuries. And I also have an old car. So I sent a letter, when I eventually got onboard with Pro Bono asking them to transfer it to Toronto and there was a refusal and resistance."¹⁰⁴ This was despite the fact that KC lived downtown, the bank branch at issue was located downtown, and the opposing firm maintained offices downtown near KC.

¹⁰² Interview of SE dated December 23, 2014 at 8-9.

¹⁰³ Interview of QH dated June 3, 2015 at 4.

¹⁰⁴ Interview of KC dated April 28, 2015 at 4.

The concerns regarding opposing counsels' approach to self-represented litigants were bolstered by certain of the volunteer lawyers' experiences at LHO. In describing her role at LHO, the volunteer lawyer DE said,

a lot of time it's calling the opposing lawyer because the bank has a lawyer and the condo corporation has a lawyer, and just saying we need an adjournment. Because they won't give it to the self-rep but they'll give it to someone who says they're a lawyer. I have experienced that a lot...I've done that a lot, called the other lawyer and just said, 'are you going to be reasonable?'¹⁰⁵

The apprehension expressed by both the self-represented litigants and the volunteer lawyers was also reflected in the advice that the volunteer lawyers would provide the self-represented clients about their interaction with opposing lawyers. Specifically, in one meeting that I observed in October 2014, the advice provided to the self-represented litigant by the volunteer lawyer, DE, was "speak to the other side's lawyer in writing or email – not on the phone."¹⁰⁶

The volunteer lawyer, ST, recounted similar experiences at LHO whereby on behalf of a self-represented litigant, he would typically "pick up the phone and talk to a lawyer and say 'what are you doing here? This person is self-representing here at the project, you're treating them like – I don't want to say – a lack of civility but it approaches that at times. And realistically this is what is going to happen so why don't you give them the extra two weeks or whatever is it that they need and stop being so difficult.'"¹⁰⁷ In elaborating further on the difficulties faced by self-represented individuals when dealing with opposing counsel, ST continued,

I think the biggest problem, and I see it in my files all the time, is I defend cases that self-reps bring, and I see a lot of lawyers spending a lot of time using procedural strategy to try and defeat a claim...And I think that's a bit

¹⁰⁵ Interview of DE dated April 3, 2015 at 2-3.

¹⁰⁶ I observed meetings between the volunteer lawyer, DE and QH and between DE and another client on the afternoon of October 14, 2014 in which both clients were advised to communicate with the opposing counsel in writing to avoid being bullied or potentially out-manuevered by the opposing lawyer.

¹⁰⁷ Interview of ST dated April 29, 2015 at 3.

unfair, because I know that a motion to strike a claim that you receive from a self-rep is a great procedural strategy to see if they'll go away and to get a costs award etc, etc, etc. But I know that's not going to make the claim go away. So unless it's a very clear case and I really have no idea what I'm pleading to, a motion to strike isn't something that I tend to recommend to my clients. Whereas co-defendants on the same case are scheduling motions to strike.¹⁰⁸ And I'm going to sit back and let that process happen because I know that in the end it might just scare them into amending their claim and continue. So I would say that one of the biggest challenges for them is lawyers and high paid law firms who are simply trying to put procedural blocks in front of them. Once they actually get their case before the court and have their case heard, I think for the most part the court will do its best to see justice. But there's a lot of cases that I've seen where that isn't getting there. And I don't for a minute want to suggest that I'm not guilty of the same things. I have done them.¹⁰⁹

Like certain of the self-represented litigants' experiences with adjudicators, the issues raised about their experiences with opposing counsel are characterized by their self-perception as 'outsiders' and lawyers as 'insiders'. In this regard, lawyers are insiders in terms of the knowledge they hold and the way in which they are able to use that knowledge in an adversarial setting against the self-represented individual. Moreover, the anxiety experienced by the self-represented litigants when they were compelled to interact with opposing lawyers was exacerbated in situations where lawyers adopted overly aggressive or difficult positions toward the self-represented party and/or they took positions that they would not likely have taken with trained lawyers. The resulting imbalance of power between the self-represented litigant and the lawyer serves to undermine the individuals' belief in their ability to engage meaningfully. This also heightens the self-represented litigants' sense of distrust regarding actions taken by the lawyer. Taken together, these further undermine the legitimacy of the legal process that from the self-represented litigant's perspective, is subject to manipulation by lawyers.

¹⁰⁸ It is important to consider ST's characterization of the use of summary judgment motions by lawyers in the context of the recent SCC decision, *Hryniak v Maudlin*, which advocated the use of such motions early in the proceedings as a means of improving access to justice. See chapters three and four of this thesis.

¹⁰⁹ Interview of ST dated April 29, 2015 at 5-6.

(iii) Self-Represented Litigants and Legal Process

It is arguable that open, transparent and fair procedures help to legitimize the legal processes and the outcomes achieved in those processes. However, for the participants in this project, the legal rules and procedures presented certain challenges that ultimately affected their perceptions of both their ability to proceed without legal representation and the equal applicability of the law.¹¹⁰ Roderick MacDonald suggested that substantive, linguistic, structural and procedural complexities produce a second effect on individuals by generating additional barriers through the feelings they engender in individuals.¹¹¹ While the self-represented litigants sought out information and advice from LHO and often made further attempts on their own to understand both the substantive and procedural aspects of their particular case, many discussed their struggle to comply with and apply the various procedural requirements. Specifically, fulfilling the formal written requirements of certain court documents proved to be quite challenging for the self-represented parties. Finally, the time-consuming and drawn out nature of litigation, as well as the emotional aspects of managing one's own case, contributed to the participants feelings of disempowerment.

While there may be various challenges associated with understanding the relevant rules of procedure, a recurring theme that arose in the context of the interviews involved the self-represented litigants' efforts to understand when and how the rules of procedure are applied. The *Rules of Civil Procedure* set out timeframes for the completion of certain steps in litigation and provide a framework for what is to happen when those timeframes are not met. However, a further complication arises when other informal customs are adopted by the insiders. A volunteer lawyer, EN, reiterated this sentiment in a slightly more innocuous fashion when, describing his role at LHO, he said there is a "big difference between the rules as written and the rules in practice, and helping them

¹¹⁰ Martha Minow and Robert Post, "Trust in the Legal System must be Regained" (December 9, 2014), *The Boston Globe*. Available online at <https://www.bostonglobe.com/opinion/2014/12/09/after-michael-brown-eric-garner-trust-legal-system-must-regained/ySfGQ3UrhSuWF1hVH0z2K/story.html>.

¹¹¹ Roderick MacDonald, "Theses on Access to Justice", *supra* note 12 at 34.

[the self-represented litigants] to understand that difference so as to be as efficient as possible with their claims. That's number one."¹¹² SB expanded on the volunteer lawyer's role in demystifying the rules when he said:

the rules are drafted in such a manner that I can see why the self-reps come in....like this guy in Court recently. It says here if he doesn't deliver an affidavit of documents I can move to strike his claim. And I'm like 'yeah that's what the rule says.' Why wouldn't you as a community of people, never mind like a first year lawyer probably does that, just assume that if the rules say that then that is the rule. And I think the rules are drafted in a manner that have so much discretion, and again now much better, but it leads self-reps to the point where they don't have the annotated rules, they don't know what to read about the case law. Even the annotated rules don't give you much help. And the rules are read in such a manner that you think you have all these rights and then they – I think get frustrated when the court says 'well no, I'm never going to dismiss the claim.' That's not reasonable and they don't understand. So I think there is a real disconnect between their image of the legal system and how it operates and what the rules of the game are, and then actually how the rules are applied.¹¹³

While XE ultimately concluded that learning about the legal process and undertaking steps on his own was a positive aspect of his self-representation, he also underscored the difficulty faced by a non-lawyer in understanding the practical application of the rules. Notwithstanding having reviewed a flow chart outlining the procedural steps, XE questioned the applicability of the rules in light of the fact that the flow chart indicated an affidavit of documents was required within 10 days. He complained that, "nobody called me about any exchange of documents. So have I basically missed that deadline? Another date coming up on that flow chart is you have 60 days to discuss a settlement with the other party. So again I don't know who calls who. And if I don't get a call have I missed that date?"¹¹⁴ Thus, while non-lawyers may be in a position to find the requisite rule (typically online via the Ministry of the Attorney General's website or the CanLii website) and interpret the application of the rule in the context of their particular case, ultimately the rule is often applied differently in practice

¹¹² Interview of EN dated March 3, 2014 at 2.

¹¹³ Interview of SB dated July 9, 2015 at 4.

¹¹⁴ Interview of XE dated July 27, 2015 at 3.

among lawyers. During the course of SE's interview, she exemplified the challenge facing self-represented litigants when they attempt to exercise judgment and make strategic decisions about the progression of their case in accordance with the prescribed rules. SE indicated that,

I served my defence on Friday and filed it on Friday. So I'm going to move for summary judgment. I know I'm allowed – like according to my research I can move for summary judgment right after I file my defence, but then I'm like 'well the pleadings are still open so I don't know if I'm going to hear from them again, if they're going to change their claim against me.' So that's what I have to ask these guys. Do I have to wait or can I file a summary motion.¹¹⁵

This discrepancy between what the technical legal rule might require or prohibit and what the 'practice' of law might be among lawyers was a source of significant frustration for self-represented litigants. Interestingly, during the observation stage of this research project, volunteer lawyers were often heard to be advising clients that the step they were seeking to take was not typically undertaken in practice in the manner that they were proposing. For example, several clients were advised against noting an opposing party in default immediately following the expiration of the time limit for filing a statement of defence because it was not the practice among most lawyers to do so and any default judgment obtained would likely be set aside by a judge.

For other participants, a key theme underlining the discussion of their case and their resolve to move their case forward was a concern that they would be 'tripped up' by the 'technicalities' of law. XE underscored the stress involved in this regard when he said that, "If my objective is to win the case, which it is, then that is very stressful, to think that a technicality like that would invalidate my claim. That would be stressful because I've come that far."¹¹⁶ MD also highlighted a concern about technicalities associated with the application of procedural rules when she expressed the view, "[w]e don't want to be kicked out of court because of a technicality. That's the thing right here.

¹¹⁵ Interview of SE dated December 23, 2014 at 2.

¹¹⁶ Interview of XE dated July 27, 2015.

I don't know the technicalities. If I don't get all those files [documents requested in a cross-examination] is there going to be trouble.”¹¹⁷ In terms of understanding the procedural requirements, MD further described,

the stress of not knowing where the next step is, and no one explaining even if I do ask, they're still like you've got to do this and this and then they leave one thing out. That's very stressful. This has been a very stressful three years, and just because I don't have a doctor's note stating that I've gone through a psychiatrist, you've got to understand that it is stressful because you don't know. It's like taking an exam...because I think just knowing that – ‘hey, if I don't do this I'm going to get thrown out of court or I'm going to have to do an appeal.’ I think that's my anxiety, because I even asked one of the lawyers and she said ‘this is a mess but I know there is going to be this, this and this.’¹¹⁸

In addition to struggling to decipher how the procedural rules might be applied in a particular case, the participants highlighted another challenge specific to non-lawyers when completing steps in litigation. This involved the preparation of written materials for court, such as statements of claim, statements of defence and affidavits. The participants were sensitive to the fact that adjudicators and lawyers prepared court materials in a particular language and format and that, if the self-represented litigants were to engage with the process, they would need to prepare their materials in a similar style.

LM acknowledged that there was a certain logic in having the parties lay out their evidence in advance of the hearing. However, the preparation of a formal affidavit was a particularly intimidating event for him. In this regard, he stated,

[b]ut at the same time there's too much information as you can imagine with this. If I try and put it all in writing and then provide all the background and all the details I end up with 100 pages or something like that. As it is, I've got a 7 or 8 page affidavit that he's telling me that's way too much information, so I try and summarize this for my motion. So for a layman to

¹¹⁷ Interview of MD dated July 16, 2015 at 10.

¹¹⁸ Interview of MD dated July 16, 2015 at 16.

try and provide all the information while simultaneously not providing too much information is pretty much impossible.¹¹⁹

LM further elaborated that while the process might be understandable in terms of the rules of procedure, those same rules do not assist in the preparation of court materials. Specifically, he suggested that “the documents in terms of how to prepare whether it’s a plaintiff’s claim or an affidavit or anything like that, there really isn’t anything to tell you how to do it and what it should look like.”¹²⁰

QH experienced a similar difficulty when attempting to prepare his responding materials. He said,

I had to get 8 years of memories written down in a few – well what was actually considered a few pages for me, but again I can tend to go on a little. So again, that was another challenge for me was ensuring that it was to the point. Again LHO was helpful in providing I guess resources for ‘this is what it needs to look like, you have to have this page first, then this page needs to come after, this needs to be filed here, these are their hours. It needs to have a Table of Contents that looks like this’ ... Yeah and also in terms of the affidavit. It’s not entirely clear what you have to write. There are a number of issues of that nature that I faced that were – again, if I had formal legal training or experience I would have simply known how to do that or what to do, and again it takes a lot more I guess – it’s actually really time-consuming.¹²¹

For KC, there was a concern that “I don’t know how to minimize it. That’s one of the deficits of a self-rep - is what do you leave out and still be heard? You can be too complete but at the end of the day if it’s all there and they dismiss it you can say but I put it all in there.” KC’s anxiety over whether she had provided sufficient information to the court was corroborated by comments made to her by a judge. In a motion regarding her pleadings, KC was required to delete certain phrases that she had included in an amended statement of defence,

¹¹⁹ Interview of LM dated May 21, 2015 at 7.

¹²⁰ Interview of LM dated May 21, 2015 at 11-12.

¹²¹ Interview of QH dated June 3, 2015 at 5-6.

through Pro Bono I was told the five step process of how you present misconduct and I put together a 17 page report and the judge said I didn't plead it properly. Which I find as a self-represented person, like you're talking about access to justice, why should anyone whose self-represented have to plead anything, let alone properly. We don't know how, we're not lawyers. So that troubled me because I don't know what pleading properly is.¹²²

In striving to tell their stories within the structured format of an affidavit or a pleading, several of the participants acknowledged that part of this struggle related to the fact that, for the self-represented litigant, a legal proceeding can be a highly emotional experience. While a lawyer may feel vested in the case that she is advocating, there is still a distance between the subject matter of the litigation and the lawyer's personal life.¹²³ However, for the self-represented litigants, the subject matter of the litigation involves the personal aspects of their life. KU became acutely aware of this challenge in the course of an examination for discovery in which,

sitting in front of somebody whose done you so much harm and caused your family so much grief, we thought we'd be cool as cucumbers but it wasn't the case. It was more for my husband to keep it together. He wasn't crying or anything like that, there were no outward really display of emotion but you could tell he was off balance and couldn't respond as quickly and in the right manner...Self-representing, I wish we would have done a better job, I felt like we were ill-equipped for the discoveries, especially my husband because he had to face the property manager who he was buddies with, so when you have an emotional relationship, we didn't answer those questions as well as we could have and I think we gave away too much information.¹²⁴

QH articulated a similar sentiment when he said that, "when you're representing yourself, it's something that's really personal. It's not something that you can kind of deal with at arm's length. And of course, it's very emotional. And if the issue is

¹²² Interview of KC dated April 28, 2015 at 7.

¹²³ In defining the attributes of the "dominant model" of legal professionalism, Trevor Farrow suggests that key elements of this model require that the lawyer remain "personally neutral vis-à-vis the result of the client's cause; and to leave the ultimate ethical, personal, economic and social bases for the decision to proceed in the hands of the client." See Trevor CW Farrow, "Sustainable Professionalism" (2008) 46 Osgoode Hall LJ 51 at 63.

¹²⁴ Interview of KU dated June 12, 2015 at 5.

complex, which our issue was, you actually have a lot more of the information than your lawyer would have.”¹²⁵

The fact that the self-represented litigant is not only attempting to argue a particular position, but also experiencing the legal issue in the course of his or her daily life means that the adherence to neutral and detached advocacy is neither possible nor realistic. In this sense, there is a disconnect between the ways in which trained lawyers might choose to present a case and how the judiciary expects to see a case presented and the way in which self-represented litigants might present their case. This disconnect becomes apparent to the self-represented litigant upon their engagement with the civil court process. While acknowledging the emotional side of litigation, QH also recognized that, “its [the court] kind of an environment where it’s best not to be emotional.”¹²⁶ In watching court proceedings and preparing to present her own case, EP observed that, “I want to go in there really organized, calm and rational rather than emotional, because I’m a really emotional person anyway.”¹²⁷

The difficulties that resulted from the emotional aspects of representing oneself were further compounded by the time-consuming nature of preparing your own case. Most experienced litigators would acknowledge that the litigation process can take a significant amount of time as a legal matter moves through the judicial system. However, for self-represented litigants, the process of litigation can consume an exponential amount of time by comparison. Unlike the professional lawyer retained on behalf of a client to handle their case for them, many self-represented litigants must manage their legal case while otherwise employed and/or meeting a variety of personal responsibilities. QH recognized early in his litigation that self-represented litigants require significant amounts of time to research how to take certain steps; this fact worked to the opposing counsel’s advantage. KC acknowledged that “for the size of the matter I’m dealing with I feel that amount of time I’ve consumed at Pro Bono is disproportionate....for self-reps there’s a

¹²⁵ Interview of QH dated June 3, 2015 at 4.

¹²⁶ Interview of QH dated June 3, 2015 at 4.

¹²⁷ Interview of EP dated December 15, 2014 at 8.

disproportionate amount of time required for maybe things that could be dealt with faster in another way.”¹²⁸ SE suggested that one of the reasons that she would not represent herself in the future was because, “[a]ll things being equal because it's a time suck. Like right now I am on a deadline to get a manuscript in for my book and I'm spending hours and hours dealing with the lawsuit. So it's sucking up my time.”¹²⁹ KU highlighted the time-consuming nature of litigation for self-represented litigants both in terms of the time spent at LHO waiting to speak to someone, as well as the drawn-out nature of litigation generally. Respecting the latter, she said,

I think so much time is spent with the paperwork and I think people can lose steam. Really if we weren't a strong couple a lot of people said 'I think you guys would be divorced by now or crack up because the strain on your marriage and your finances is tremendous.' So luckily we have a strong base and we've made it through. But I would say if there's a way to speed things up quicker for people who are self-representing in particular that would help. Because if they don't have a support network, emotional support network or financial, you just give up. You just say it's too hard, it's too difficult.¹³⁰

Self-Represented Litigants and Access to Justice

Having examined different aspects of the corresponding themes of empowerment and disempowerment, the question that remains is how these apparently conflicting experiences ultimately influence the participants' beliefs about access to justice. More significantly, it is important to show how these experiences affect the perception of their ability to bring about justice in their lives. Mindful that the self-represented litigants interviewed had been engaged with the civil justice system first hand, it is worth noting that all but three of the self-represented litigants indicated that, if they were to be involved in another legal matter, they would likely prefer to retain a lawyer. This assertion is, in turn, contrasted with these litigants' conceptualization of access to justice that tended to focus on whether one was able to present one's case and be heard by those with the authority to make a decision. Arguably, the apparent discrepancy between the

¹²⁸ Interview of KC dated April 28, 2015 at 20.

¹²⁹ Interview of SE dated December 23, 2014 at 13.

¹³⁰ Interview of KU dated June 12, 2014 at 8.

participants' admission that they would likely hire a lawyer in the future (notwithstanding what they had learned or gained personally from the present experience) and their characterization of access to justice may be reconciled and resolved in terms of how lawyers interact with their clients and the extent to which clients are engaged in the decision-making processes on their cases. Alternatively, this discrepancy may also be explained in terms of how their beliefs about what the civil justice system should do does not correspond with how it actually operates for them. While this does not mean that the entire civil justice system is unworkable from the perspective of the self-represented litigants, it does require that policy-makers, the judiciary and the legal profession evaluate critically how the system is operationalized by 'insiders' and how those 'insiders' must begin to disabuse themselves of the control that this status has afforded them. Such an ambition is consistent with a democratic approach to access.¹³¹

While the participants believed that the services provided at LHO generally assisted them in accessing the civil justice system, one participant, BN, distinguished between access to services and access to justice. In this regard, he stated,

I don't think I have access to justice because I'm going to Law Help Ontario because I don't know whether I will get justice. So access to legal support but I don't know if I have access to justice. Time will tell...Yeah. Access to Justice, I know it's a catch phrase, but for the way I see it, I don't feel like having these services is really access to justice. I think that it's just access to – you're doing it yourself you're just getting training. I don't know, am I wrong?...[interviewer: so some people define it [access] as getting lawyers and that will get me justice. Some people say it's about being able to just be heard, and, if I get heard, then I've got access]...BN: I was actually going to say that—to be heard.¹³²

As noted, when EP was questioned about what she thought justice would look like in her case and what that term meant to her more generally, she responded,

¹³¹ This critical evaluation is developed further in the final chapter of this thesis that examines certain recommendations that are based on the insights provided by the participants interviewed in this research project.

¹³² Interview of BN dated April 30, 2105 at 11.

What it should mean is they look at all the evidence regardless of whether it's a lawyer presenting the evidence and questioning witnesses. The bottom line should be the evidence presented...Regardless of it and regardless of the fact that maybe you don't have the experience of the lawyer but you're still presenting the facts, what happened...[Interviewer: So is the justice piece being heard by the court or is the justice piece the decision that comes out of that, for you?]....EP: I think it's both. If you don't have an opportunity to present your evidence then you don't feel that justice has been served, and if you don't have a good outcome you probably think would it have made a difference if I hired a lawyer, did I not do the work, did I not present properly? Was there a bias because I wasn't represented? There are a lot of questions that'll come up. I haven't got there yet.¹³³

LM felt strongly that access to justice should mean, “[h]aving somebody with the authority to do something about a situation, hear the facts and render a decision. That I’d say is the...That’s the whole point of the system and that’s what the system is all about denying from happening.”¹³⁴

However, LM’s positive experience with one particular judge with whom he was provided an opportunity to discuss the details of his case still left him skeptical about whether he would be in a position to affect justice. For him, access was about being heard. This was evident in his previously noted comments about the interaction he had with one judge in particular. In this regard, he said,

[y]ou at least feel like you had a proper hearing which makes it a little easier to stomach not having gotten justice...But that’s where even having an opportunity to argue something before somebody that is actually listening, which is a challenge to begin with, where even having that opportunity it can still end up not giving you the justice you’re seeking because you didn't get that ability to give a full argument because of personal limitations of any person.¹³⁵

Thus, a key component of achieving justice included the prerequisite that individuals are heard in a meaningful manner. However, there remain significant barriers, both

¹³³ Interview of EP dated December 15, 2014 at 14-15.

¹³⁴ Interview of LM dated May 21, 2015 at 17-18.

¹³⁵ *Ibid* at 18.

personally and structurally, that prevent individuals from being heard. From LM's perspective, the challenges faced by non-lawyers who must engage with members of the bench in a highly stressful setting in a civil courtroom meant that self-represented litigants were unlikely to access justice. As well, the difficulty of completing the often multi-staged procedural requirements of civil litigation added to the stress.

For XE, the concept of justice and access to it was about "getting down to the facts, and what really happened and was there negligence or wasn't there negligence and determining what the costs are. It's all about the facts, I think that's what justice is."¹³⁶ This view was shared by KC and MD. For KC, justice involves "[o]pen, full transparency. No judgment should be made unless all evidence is in front of a judge. And if there's any evidence missing a judgment shouldn't be allowed. It's not okay. That's how I define it."¹³⁷ For MD, being able to go into court the same as a lawyer and feel comfortable making an argument was an important aspect of access to justice. In the context of her particular case, she believed that, with the assistance of LHO, she was "positive" that she would be able to get justice in her case.

Law as a Level Playing Field

The research that Trevor Farrow conducted on individuals' understanding of their ability to access justice highlighted "[a] strong and troubling theme...that money and class are key factors when it comes to meaningful accessibility of justice" and that "justice appears, at least to many, as only available to the rich."¹³⁸ Several of the participants in this study echoed this concern. Specifically, there was reference made to the need for access to justice, as an initiative, to 'level the playing field' for non-lawyers. In so doing, this ensures that individuals, regardless of means, are able to engage in the legal system. BS suggested that, without services such as LHO, the average citizen is not on a level playing field in the legal system. He stated,

¹³⁶ Interview of XE dated July 27, 2015 at 16.

¹³⁷ Interview of KC dated April 28, 2015 at 16.

¹³⁸ Trevor C W Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 972-973.

it is definitely for the average person like myself and I consider myself an average citizen, there is a lot of anxiety because you realize that you are in a playing field and you do not have access to it and you are kind of at the mercy of the system and you need to have the proper access...a service like LHO to level the playing field for all citizens.¹³⁹

QH likened the provision of services that assist individuals access justice to the provision of health care services, in the sense that,

it is an extremely important thing for a democratic society to have. Because in a sense again from a political perspective, it is one of our three branches of power, it's our third branch of government. And it can pose a bit of a democratic issues in terms of if certain people have greater access to government, it kind of has the same argument as 'is it fair that lobbyist can have greater access whereas normal people can't have a say in the executive or parliament.' So there's an access issue.¹⁴⁰

SE held a much stronger position in this regard. She maintained that,

there is no justice in the justice system unless you can pay for it. That's the bottom line. If you can't afford to pay a lawyer \$400-\$600 an hour, and let's face it, who can?...I just mean you have to afford to represent yourself, you have to have good representation, you have to pay and it's prohibitively expensive. So if you can't afford that you have no access to justice.¹⁴¹

Conclusion

The self-represented litigants interviewed in this research project raised important and distinctive issues about their experience in the civil justice system. It might be said that, by seeking assistance from self-help legal services at LHO, they were already prepared to engage in the legal system on their own behalf. Their subsequent experiences highlighted a variety of challenges as well as successes. From a confidence and educational standpoint, there was an overall sense of encouragement about their individual ability to learn, engage and grow. However, in some instances, this was undermined by their interaction with those who inhabit the civil justice system, namely the lawyers and

¹³⁹ Interview of BS dated November 25, 2014 at 12.

¹⁴⁰ Interview of QH dated June 3, 2015 at 17.

¹⁴¹ Interview of SE dated December 23, 2014 at 19.

judges. Often, participants exhibited a sense of powerlessness when dealing with the system's insiders that left them disenchanted not only about the operationalization of the legal system, but also about their own ability to affect a result in their case and the ability of like individuals to do the same.

The central question that follows from a review of these themes is how the self-represented litigants' particular challenges and successes might inform a theoretical conceptualization of access to justice and the policy initiatives derived therefrom. As part of this undertaking, it is important to take account of both the empowering and educative aspects of the participants' experiences and their disempowering aspects. In doing so, it is hoped that an approach to access that seeks to enhance the positive benefits associated with direct engagement by self-presented litigants can also address the challenges that cause self-represented litigants to lose confidence in the civil justice system and ultimately disengage. Developing such an approach would be consistent with the democratic thesis that seeks to encourage citizens' wide and frequent participation in the legal and political decisions that affect them. A key component of this analysis must include a critical examination of how the existing adversarial system is operating in light of the presence of self-represented individuals and how those who currently participate in and administer the adversarial system might better address self-represented litigants' concerns. Consequently, the final chapter in this thesis will examine some of the ways in which access to justice theory and the corresponding access policy and programs might be approached in order to advance the practical efficacy of the legal process as well as its democratic legitimacy.

CHAPTER EIGHT

ANALYSIS AND RECOMMENDATIONS

Access to justice policy and approaches have had various iterations. However, much of the debate about conceptualizations of access to justice, as well as the resulting policies, have been influenced by a central focus—legal representation. This predominant view has influenced much of the theory of access to justice, as well as a myriad of the initiatives developed to improve access. However, the purpose of this thesis has been to offer an alternative conceptualization of access that shifts away from a reliance on legal representation as the predominant approach to promoting access. This alternative conceptualization seeks to deepen the way access to justice is conceptualized and operationalized.¹ This conceptualization is informed by the principles of participatory democracy and is justified on the basis of law’s critical role in a democratic society. A participatory approach to access attempts to ensure that individuals are able to engage meaningfully in the legal and political processes that impact their lives. Through engagement in these political and legal processes, individuals will also be in a position to affect the achievement of justice in their lives. Moreover, encouraging meaningful participation has important consequences for the administration of justice, the continued legitimacy of the justice system and the laws created and administered within that justice system.

A conceptualization of access to justice that encourages meaningful participation is consistent with the realities of self-represented litigants in the civil justice system. More significantly, this conceptualization is supported by the self-represented litigants’ narratives in this study. While there were many reasons for them to feel disempowered about their experience, the self-represented litigants also experienced and revealed important moments of empowerment, which is relevant to the development of meaningful

¹ In the case of access to justice, there may be a general acceptance of the idea that enhancing access to justice is a worthwhile goal but little agreement regarding how that goal is defined or how it is to be achieved.

participation. In the context of this research study, this sense of empowerment was often associated with 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. Thus, to the extent that empowerment is valued with a view to fostering meaningful participation by citizens in a myriad of capacities and forums, the democratic thesis represents a potentially transformative endeavor.

Consistent with the democratic thesis, a participatory approach to access to justice offers different roads to change than those associated with the predominant model of access as defined by the practical thesis.² This is not to say that these two theoretical approaches are mutually exclusive, such that adoption of one approach negates the implementation of initiatives that are grounded in the alternative approach. Rather, that it is necessary to ensure that the choice of a particular initiative is guided by the broader objectives of access to justice theory. In this way, the initiative will contribute to the overall goal; the promotion of opportunities for individual empowerment and participation.

In light of the participants' stories in this research project, particularly relating to their disempowering experiences, it is apparent that there are significant changes required within the litigation process. Some of these changes are immediate and practical in the sense that the participants, specifically lawyers and judges, be more inclusive of self-represented litigants. Moreover, the process should be made more accessible through better support for individuals attempting to represent themselves. However, there are other changes that require a deeper examination of the structure and operationalization of

² In his article entitled "Theses on Access to Justice", MacDonald was critical of 'reforms' undertaken to ameliorate the lack of access as "the very notion of 're'-form induces the presentation of ideas in a form prefigured for implementation within the system, but thereafter out of the interpretive control of those who propose them. The appointment of task forces, working groups and commissions of inquiry composed of those who have a commitment to official structures and institutions is a guarantee of recommendations written in the official discourse...The Policy Audience demands output which can be evaluated within existing structures." Keeping this critique in mind, it is not only important how we think about access to justice initiatives but also how we frame proposed changes to ensure that those changes are not caught within an official discourse that fails to take account of those who we wish to include in the discourse and who might previously have been excluded. See Roderick A MacDonald, "Theses on Access to Justice" (1992) 7:2 CJLS 23 at 32 [MacDonald, "Theses on Access to Justice"].

the litigation process so that self-represented litigants are viewed not as a problem to be addressed, but rather become an important and integral part of the legal process in a democratic society.

Thus, while this crucial insight does not mean that the entire civil justice system is unworkable from the perspective of the self-represented litigant, it does require that scholars, policy-makers, the judiciary and legal professionals critically evaluate how the system is currently operationalized. This necessarily entails a re-appraisal of the role of the 'insiders' who act within the adversarial system, as well as the process implemented by those same 'insiders'. The failure to take account of these critical components and make the requisite changes will likely result in continued cosmetic participation experienced by many self-represented litigants and a corresponding mystification of the legal system.³ By contrast, undertaking comprehensive change in terms of both practice and the underlying assumptions about the litigation process signals a transformation of the existing adversarial system consistent with the democratic thesis of access to justice.

In this chapter, therefore, I intend to discuss two important aspects of the shift from the practical thesis to the democratic thesis of access to justice. In the first part, I will suggest that the adoption of the democratic thesis is sustained and encouraged by the self-represented litigants' experiences in this research project. As part of this discussion, I propose that what is needed from an access to justice perspective is a commitment to enhancing more meaningful participation by individuals, as opposed to a predominant focus on representation by lawyers and a corresponding continued reliance on professionals. In so doing, I will briefly canvass several aspects of the participants' empowering experiences as a basis for adopting a participatory approach. However, assuming that individuals wish to participate, but struggle to do so, it will be necessary to make significant changes to the way the litigation process is conceptualized and

³ In his critique of the Task Force on Access to Justice (a task force that he chaired), MacDonald suggested that ultimately the recommendations reflected the fact that "all destabilizing proposals gradually became transformed from queries about the legitimacy of the existing institutional order to tacit re-endorsements of that order: over two years, ADR, case management, legal aid, preparing legal insurance, public legal information, and legal education in the law faculties, for example, each came to be discussed only terms of the dominant model. See MacDonald, "Theses on Access to Justice", *supra* note 2 at 44.

operationalized. This includes broader systemic changes, as well as more immediate and practical changes that will encourage and support self-represented litigants. Therefore, the second part of this concluding chapter will address certain changes that might begin to transform the self-represented litigants' disempowering experiences. These changes are aimed at enhancing greater participation by self-represented litigants. This, in turn, signifies a broader paradigm shift in the litigation model and one that is both necessary and urgent if we are to live up to our democratic ideals. In the course of this chapter, I intend to unite the theoretical and the empirical research in a series of policy initiatives.

A New Approach to Access to Justice

The democratic thesis of access to justice contemplates that individuals are provided with opportunities to participate in law-making and law-administering processes. This encourages citizens' discourse on concepts of law and justice. This discourse contributes to the development of a new legal vernacular that is relevant to and reflective of individuals' lives. In this sense, individuals have an opportunity to reclaim official law. The benefit of facilitating meaningful participation more generally is that it also assists individuals to develop the confidence, skills, and tools that enable them to participate further. In this regard, Pateman maintained that the social training of citizens in the ways of democracy ensures that citizens are able to maximize their participation within a democracy. The associated benefit in proceeding in this manner is that individuals begin to engage in a wide variety of decision-making processes and the resulting decisions are legitimized. Moreover, the promotion of meaningful participation, if taken seriously, necessarily encourages wider and more frequent engagement by individuals and/or groups that have historically been disengaged or excluded from legal and political institutions. Within the context of the democratic thesis of access to justice, the means by which individuals are able to participate will incorporate both self-representation and assistance from lawyers who are focused on encouraging individuals to share in the decision-making processes that affect their lives.⁴

⁴ In terms of a comprehensive approach to access to justice, the provision of legal representation is not characterized as an either/or but rather forms part of an overall approach that contemplates assisting individuals seek justice in their lives and participate directly where possible. Thus, the underlying premise is that access initiatives would facilitate direct participation in a variety of different fashions.

While individuals may be frustrated by their attempts to participate, it does not mean that they do not want to or are not interested in having a voice and a role in the policies, rules and decisions that affect their daily lives and those of their communities. Experience suggests that, to the extent that participation begets further and expanded participation, individuals want more participation and meaningful engagement, not less. Thus, the frustration expressed by the participants in this research may have more to do with the reality of their participatory experiences within a complex and professionalized legal system than with a disinterest in being part of the process or any particular outcome.

This state of affairs is borne out by the procedural fairness research discussed in chapter five and further reflected in the discussions with self-represented litigants in this research project. Also, research in the field of procedural fairness has indicated that, “people want voice in legal proceedings and react to the extent that they do or do not receive it.”⁵ In this sense, ‘voice’ is defined as “having some form of participation in decision-making by expressing one’s own opinion.”⁶ There are positive benefits associated with individuals’ belief that they had a ‘voice’ in the particular proceeding; these include being more likely to trust the decision-maker, feeling that they were treated with respect, increased self-esteem, and an enhanced belief about what they may be entitled to as a worthwhile person.⁷ All of these are important elements of empowerment and participation.

In the specific context of this research project, the participants’ views about their court experiences were significantly influenced by whether they believed that the

⁵ Nourit Zimmerman & Tom R Tyler, “Between Access to Counsel and Access to Justice: A Psychological Perspective” (2010) 37 Fordham Urb LJ 473 at 486 [Zimmerman & Tyler, “Between Access to Counsel and Access to Justice”].

⁶ Robert Folger, “Distributive and Procedural Justice: Combined Impact of ‘Voice’ and Improvements on Experienced Inequality” (1977) 35 J Personality & Social Psychology 108 at 109 [Folger, “Distributive and Procedural Justice”].

⁷ Folger, “Distributive and Procedural Justice”, *ibid* at 117.

adjudicator provided them with an opportunity to speak and be heard.⁸ In fact, in several instances, the adjudicators' reaction to the self-represented litigants' attempts to participate in the proceeding significantly affected the individuals' general perception of the fairness of the process. For instance, QH's perceptions about the fairness of the legal process were impacted greatly by his interaction with a judge who he said,

wouldn't let me speak, she would constantly cut me off, tell me that she didn't want to hear it. She had apparently come to her decision generally prior, it would appear to me. Like when I got there she seemed like she was furious with me, like she wanted to hurt me. And it was kind of confusing.⁹

For QH, the judge's dismissal of his attempts to engage in the conversation resulted in him concluding that the judge had already made her decision and there was nothing for him to contribute. Rather than encouraging participation, this type of exchange is more likely to reinforce certain negative perceptions about who is able or allowed to speak and who is not. Unlike lawyers who regularly attend in court and who may appreciate that a particular judge does not need to hear from them because she either understands or does not dispute their submissions, self-represented litigants have no such contextual reference. Therefore, they are likely to assume that their voice is not relevant or worthwhile. Not surprisingly, such an experience has the potential to reinforce feelings of disempowerment and disengagement.

In this research, the implications of being provided with an opportunity to be heard and thereby participate in a meaningful manner extended beyond the participants' evaluation of the fairness of the specific proceeding. For the individuals interviewed, being heard and being able to participate in the decision-making process further affected their perceptions about access generally and, more specifically, their ability to access justice. For EP, achieving justice was about an adjudicator listening to the evidence regardless of who was presenting it. For BN, access to justice was not about access to

⁸ See the discussion in chapter seven of this thesis regarding the self-represented litigants' experiences interacting with adjudicators.

⁹ Interview of QH dated June 3, 2015 at 9.

legal services or assistance such as the type provided at LHO, but rather about using the tools and skills provided at LHO in order to be heard.

Implicit in these descriptions of access is the emphasis placed on direct engagement and the opportunity to both speak and be heard. Moreover, while it may be that many of the interviewees were obligated to proceed by virtue of being defendants in a civil action, it is also worth noting that all of the self-represented litigants had made repeated visits to LHO in order to obtain additional legal information and advice about how best to proceed. This readiness to engage was reflected in the self-represented litigants' efforts to learn more about the legal rules, processes and institutions relevant to their case; this, in itself, suggests a commitment to participate. While almost all of the participants also indicated that, if given a choice, they would prefer to hire a lawyer, this assertion was often qualified in a variety of ways. For example, certain of the self-represented litigants acknowledged that, even if they did hire a lawyer in the future, they would want to participate in the decisions made within the solicitor-client relationship rather than allow the lawyer to unilaterally manage their case. As XE indicated, this meant that, in the future, "at least I will be able to say to that lawyer, can we handle it this way? Participate in my defence."¹⁰ The admission that self-represented litigants would likely hire a lawyer was also a reflection of their acknowledgement that the litigation process presented a variety of challenges that were both disproportionately time-consuming and financially taxing; lawyers were better equipped to handle the situation.

Benefits Associated with Meaningful Participation

As a result of handling their own case, there were important consequences for the participants.¹¹ Specifically, several of the participants expressed increased confidence as a result of addressing their legal problem without a lawyer (KU and MD), standing up and making submissions in court (LM, EP and QH), and preparing complicated court documents such as affidavits and various pleadings (QH and XE). This increased

¹⁰ Interview of XE dated July 27, 2015 at 11.

¹¹ This was discussed in chapter seven of this thesis.

confidence extended beyond the particular task at hand. It encompassed a more general sense of confidence associated with recognition of an ability to address problems as they arose in the future and stand up for oneself as well as others. Increased personal confidence is an important component of empowerment, which is necessary, for meaningful participation.¹²

While meaningful participation both includes and requires an educative prerequisite, there is also an educative benefit to be gained through engagement.¹³ In order to engage in decision-making processes in a meaningful manner, individuals must be educated in a range and use of democratic as well as legal tools and skills. It is also necessary that individuals be provided with the relevant information required for participation. This includes obtaining both the skills necessary to engage and be effective in that engagement, as well as information about the relevant rules, policies and issues, that form the subject matter of the decision-making process. One modest site at which this may begin to occur is self-help legal services where individuals are provided with technical information, as well as training in skills that assist them to participate more effectively. However, by participating in decision-making and problem-solving, individuals acquire educative benefits; they learn in an experiential manner that leads to changes in behaviour, confidence and leadership. Moreover, individuals gain knowledge about those processes that potentially carries over to other decision-making processes. For certain of the participants in this research project, there was a definite recognition that they had learned important skills and/or obtained knowledge that was not only necessary for their participation in the civil justice system, but was also likely to carry over to other aspects of their lives. The volunteer lawyer, ST, had compared the development of these skills to learning to ride a bicycle in the sense that once you learn to

¹² See discussion regarding the link between increased confidence and empowerment in chapter three of this thesis.

¹³ Carol Pateman, *Participation and Democratic Theory* (London, UK: Cambridge University Press, 1970) [Pateman, *Participation and Democratic Theory*]. Pateman's discussion of participation is discussed in greater detail in chapter three of this thesis.

do so, you can ride a variety of different types of bikes with minor adjustments.¹⁴ As noted, BN articulated this when suggesting,

I went in not empowered and I feel, I don't want to say 100% but I feel more empowered. The fact that I now know how to do this stuff and I'm learning a process. Like I kind of look at it that way so I don't just see the negative. I'm listen – these are skills that are not really pleasant but there are skills you are learning, you're learning how to represent yourself. As difficult and challenging as it is it's like this is stuff that you wouldn't have looked into.¹⁵

For other self-represented litigant participants in this study, such as KU, developing a different knowledge base about the structure and operation of the legal system was an important benefit of attending at LHO and proceeding without a lawyer. More importantly, this was knowledge that she did not have prior to representing herself, but which she subsequently placed a significant value on when she noted,

I would just say a general overall knowledge about the legal system and the steps before trial, I had no idea, it's ridiculous. I had a lack of knowledge when we first approached the lawyer...Yeah again, I'd really like to reinforce that I've grown as a person but it expanded my knowledge. So yes maybe when I read an article or I hear about something I would be more engaged and be more interested, 'okay what's the legal side of it.'¹⁶

Given the scope and impact that a wide variety of legal decisions are likely to have on the daily lives of individuals, the development of a better understanding of how these decisions are made is important. Individuals may understand and begin to think critically about the process by which the decisions are made. This is arguably a worthwhile and promising means by which individuals may participate.

In the context of this research project, a crucial aspect of the interviewees' education and training involved the role played by LHO in providing information, advice, as well as support, to the self-represented litigants. All of the self-represented litigants

¹⁴ Interview of ST dated April 29, 2015.

¹⁵ Interview of BN dated April 30, 2015 at 5.

¹⁶ Interview of KU dated June 12, 2015 at 8-9.

interviewed had made use of the self-help legal services at LHO on more than one occasion. Several of the interviewees had visited LHO between five and ten times. While the interviewees raised certain concerns about the services provided at LHO,¹⁷ the consensus was that the information and advice provided by the volunteer lawyers and the staff assisted them in representing themselves in a more effective manner. In this regard, when asked about the role played by LHO, QH stated,

[p]rocedural was something that was quite difficult, I suppose for a layman to just know right off the bat. I guess reminding of deadlines. They were quite helpful in terms of assisting in my initial I guess application for adjournment for the first hearing, which was ultimately successful. Aside from that they were able to identify at least one hole in the case and it was something that I was able to pick up myself as well...Yeah actually I'm glad you brought that up, it's a point that I wasn't able to go over with my going back and forth here. But I guess a large part of it was the emotional support...The only real support I actually had, aside from my aunt did lend me some money for costs, I had to pay her back after of course. But from an emotional standpoint or from a who can I talk to about this, it was really kind of heartening that some people, even if they don't even know you at all, that they care enough to do that. So that was nice.¹⁸

It was apparent from conversations with the interviewees that LHO provided them with more than technical information about legal rules. It also provided explanations about how the various litigation steps fit together, why certain action was taken, and how the self-represented litigant may want to think about the next steps that would best help them achieve their particular goals.¹⁹ KC valued the discussions that she had with the

¹⁷ The most common concern raised by the interviewees related to the fact that a self-represented litigant may meet several different lawyers at LHO and this resulted in both an inefficiency in service delivery which was particularly problematic in light of the fact that clients were limited to approximately 40 minute meetings with the volunteer lawyer and the potential for inconsistent advice; particularly as it related to litigation strategy.

¹⁸ Interview of QH dated June 3, 2015 at 3 & 13.

¹⁹ The participants interest in understanding the process in this research appears to contradict the findings of Gidding research regarding the objectives of self-help users in Australia as several of the participants in this research project expressed an interesting in not only receiving technical advice but also receiving more general information about the litigation process in order to better understand why certain steps were taken and anticipate future steps. See Jeff Giddings & Michael Robertson, "Law People, For God's Sake!, Surely I Should be Dealing with Lawyers?" Toward an Assessment of Self-Help Legal Services in Australia" (2002) 11:2 Griffith LR 436 [Giddings & Robertson, "Toward an Assessment of Self-Help Legal Services"].

volunteer lawyer at LHO. This was not simply in terms of understanding the legal procedure, but also in terms of the advice she received regarding the strengths and weaknesses of her case and the corresponding strategy for dealing with them. In this regard, speaking of meetings with a particular lawyer, she noted,

[h]e's (a volunteer lawyer at LHO also interviewed in this study) very good. We came to what I felt like was a bit of a conflict of interest because he was a bit harsh with me but I like that too. You don't always want to hear everything that's good. And he said when you talk you sound like you're a bit all over the place. He said 'you have to be focused or a judge gets upset with that.' And that's not bad advice....Of course, --- helped me in the sense that he played the devil's advocate if you will. And he gave me a few examples of how he had won in court, just keeping it simple. Keep it simple, factual.²⁰

In terms of the benefits associated with participation, both empowerment and engagement are considered to contribute to a sense of community-building. This is in part due to individuals moving from an exclusively private sphere to a public sphere. In the process, they begin to take account of more than their own self-interest; they begin to consider the "welfare of the community as a whole."²¹ In this context, community-building contemplates a shift away from the 'private' toward the creation of public norms, as well as the positive spill-over associated with participation that begets further participation in other public spheres. Modest illustrations of the shift from private interests to public concerns were observed in this research. The overwhelming majority of the self-represented litigants interviewed in this research project were both cognizant of and sympathetic to the challenges that particular categories of individuals might face when attempting to access justice as a self-represented litigant. Specifically, the interviewees noted that, notwithstanding the challenges that they faced in representing themselves, there were likely certain individuals (i.e., new immigrants, those who did not speak English, and/or individuals who suffered from mental health issues) who would be

²⁰ Interview of KC dated April 28, 2105 at 14 & 19.

²¹ Jocelyne Bourgnon, "Responsive, Responsible and Respected Government: Towards a New Public Administration Theory" (2007) 73:1 International Review of Administrative Sciences 7 at 16.

disproportionately impeded when attempting to represent themselves. From his experiences in various court settings, LM noted,

[y]ou've got to figure from looking at the array of people that come in and out through here (LHO) and the upstairs and anywhere else in the courtrooms, certainly the majority of the people in the court are at the bottom end of the scale whether it's monetarily or intelligence or resources or however you want to look at it. So right from the start its either people that are almost disadvantaged in society as a whole, either trying to defend their rights or trying to defend themselves against being attacked by somebody else whose perhaps abusing the system or has abused them in some way and may now justify themselves.²²

In this regard, BN also noted a concern that, “there's a lot of people that I know that there's no way they could have pulled this off. So it makes me worry about the people – like I can do this but there's people who can't do this. And if they're left with the same options, that worries me.”²³

What is also interesting about these illustrations was the corresponding acknowledgement by certain of the interviewees that what was needed, in addition to the service provided at LHO, were informal forums that self-represented litigants could join. There, self-represented litigants might share their experiences and provide practical advise and support to other self-represented litigants engaged in legal processes. In particular, SE suggested that what would be beneficial as a self-represented litigant would be “to have a database of former self-represented litigants would could talk about their experiences. And just say ‘hey just so you know what you're in for, you might learn from experience. I would do that. When this is all said and done.’”²⁴ SE further elaborated on the rationale associated with such a forum for self-represented litigants when she suggested that, “it would be like an emotional support because I kind of feel like I'm out there on my own. I feel like I'm in this jungle with a machete just hacking

²² Interview of LM dated May 21, 2015 at 14.

²³ Interview of BN dated April 30, 2015 at 5.

²⁴ Interview of SE dated December 23, 2014 at 8.

my way through. Am I heading in the right direction here, what's going on.”²⁵ In this sense, there was an acknowledgement that, having been through this experience, the individuals would be in a position to help, guide or, at least, support other self-represented litigants.

These examples of the empowering aspects of the interviewees' experiences, together with the positive individual benefits associated with their engagement, support an argument for the promotion of meaningful participation as a basis for thinking about access to justice theory and policy. At this point, some might suggest that the effort to advance democracy by way of civil litigation is misguided in the sense that the courts were not designed or are not best suited for making up the democratic deficit in society. While this stance might have some credence in an ideal democratic context, the present circumstances are far from ideal. In other words, my proposal to think about civil litigation is not intended as a replacement for direct and meaningful participation in the political process; that would be and is an ideal situation. Rather, litigation can act as a support to that broader ambition.

There are two main reasons why my proposal is defensible and worthy of serious consideration. First, the work and approach of courts are already located within a democratic framework. The judicial development of constitutional law, administrative law, and even the common law generally are grounded in and justified in terms of democratic justice: judges shape the formal and substantive dimensions in line with demands and deficiencies of a democratic process of governance.²⁶ Secondly, the rise in self-represented litigants presents both a crisis in and opening for the advancement of democratic participation. As the experience and reflections of self-represented litigants themselves reveal, litigation is a means through which otherwise excluded persons can

²⁵ Interview of SE dated December 23, 2014 at 23.

²⁶ See discussion in Trevor Farrow's book regarding the role and the work of the courts in a democratic society. Specifically, Farrow quotes former Supreme Court Justice Lebel who aptly stated "courts play a key role in a democracy". Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto, Canada: University of Toronto Press, 2014) at 18-30 [Farrow, *Civil Justice, Privatization, and Democracy*] citing Lebel J in *Named Person v Vancouver Sun*, [2007] 3 SCR 252 at para 85.

not only resolve particular disputes, but also have some say in the workings of government and the law. By promoting access that contemplates individuals being heard in a meaningful fashion, the legal system and the democratic process more generally is legitimized. Consequently, whatever the ideal role of courts, their contemporary status and *raison d'être* is intimately tied to the democratic project and therefore it is imperative that more marginalized citizens be brought into an otherwise elite forum of decision-making. The pressing question becomes whether the existing litigation process could ultimately be designed to advance a more democratic approach to access to justice that takes account of meaningful and direct participation by self-represented litigants.

A New Paradigm For Self-Represented Litigants

In 1976, Abram Chayes charted a paradigm shift that was taking place in civil litigation.²⁷ Like him, I want to insist that another paradigm shift is (or should be) taking place today. Whereas Chayes focused on the role of the judge in civil litigation, I identify and analyze a similar transformation of size and significance that is beginning to occur in civil litigation when understood from the perspective of the self-represented litigants who now comprise a large portion of the litigants in the justice system.²⁸ This shift gives rise to a corresponding imperative to develop a broader conceptualization of access to justice based on the democratic thesis. As I have tried to show through exploring the experiences and perceptions of certain self-represented litigants as they grapple with and within the existing legal system, the signs of impending crisis and the resulting need to re-evaluate the existing adversarial model are evident. The existence of self-represented litigants does not simply create difficult challenges within the legal process, but also presents a huge and subversive challenge to certain of the foundational assumptions about the legal process.

²⁷ Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281 [Chayes, "The Role of the Judge in Public Law Litigation"].

²⁸ Chayes, "The Role of the Judge in Public Law Litigation", *ibid.* In his discussion of the need to re-define the role of the judge in cases involving self-represented litigants, Rollie Thompson stated that, "It's time to admit that the traditional adversary system cannot accommodate more unrepresented litigants. And it's time to address this in a systematic way, by way of practice directions and rule changes." See Rollie Thompson, "The Judge as Counsel" (2005) 8 News and Views on Civil Justice Reform 3 at 5 [Thompson, "The Judge as Counsel"].

The fact alone that self-represented litigants are the overwhelming majority of litigants in some legal settings warrants a serious re-appraisal of the structure and dynamics of the adversarial context. When this is combined with a sense of disempowerment and disengagement by those who do self-represent and/or those who do not litigate at all,²⁹ the need for deep and systemic change in the system becomes apparent. As such, I maintain that Chayes' comments are as pertinent now as they were then: "we are witnessing the emergence of a new model of civil litigation and, I believe, our traditional conception of adjudication and the assumptions on which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of the judge and court within this model."³⁰

Accordingly, I want to recommend that this changing landscape presents important challenges to the legitimacy of the prevailing paradigm of civil litigation. While there is not yet any fixed or settled notion of what a new paradigm would look like, there are signs that one is needed. What is clear is that there are indications that, as the traditional model and its underlying assumptions start to fray and unravel, a re-appraisal of the litigation process and its operating assumptions are required. Reform of the legal process and the role of those that operate within the civil justice system is required. This should be in conjunction with a commitment to meaningful participation. How the legal process responds will be a good indication of whether there is a genuine desire to make substantial changes that best promote and advance a broader conceptualization of access to justice that encourage citizens' direct participation.

²⁹ Due to the nature of the self-help centre and the fact that it offers assistance to a wide range of individuals addressing civil legal matters, one particular challenge faced by the staff and highlighted by several of the interviewees in this project was the difficulty in addressing the needs of individuals with mental health issues. On a regular basis, there were often individuals waiting to speak to a volunteer lawyer who were suffering from apparent mental health issues as well as issues of homelessness and substance abuse. In these instances, it appeared that the staff found it quite challenging when attempting to understand the nature of the individual's legal problem and how LHO might be able to assist them. Thus, an important question raised in respect of this research is that while the fact is that there are lots of self-represented litigants making use of self-help legal services to resolve their legal problems, this fact also begs the question of who is not accessing the self-help services and/or fall outside the scope of services offered by LHO and as such, unable to get assistance if at all.

³⁰ Chayes, "The Role of the Judge in Public Law Litigation", *supra* note 27 at 1282.

Looked at from the perspective of access to justice and meaningful participation consistent with the democratic thesis, some of the defining features of the existing model of litigation include:

- a complex legal system that necessitates individuals hiring lawyers in order to resolve their disputes in court;
- a legal profession that maintains almost exclusive control over the creation and application of the procedural, as well as substantive, aspects of litigation;
- an assumption that lawyers work with and against other lawyers that are, within certain parameters, evenly matched and generally have the same knowledge and skills;
- an assumption that adjudicators remain neutral, largely passive umpires in the disputes between legal professionals;³¹ and
- an assumption that ultimately the parties are primarily responsible for how their case goes forward including how it will be presented by their lawyers for the adjudicator's consideration.³²

Taken together, these features are foundational aspects of the adversarial system of litigation. However, they are all, to a greater or lesser extent, no longer defensible features of a system in which a significant number of the individuals entering the legal system are not represented by legal professionals and do not themselves have the same legal training as the legal professionals already acting within the adversarial system.

The Presence of Self-Represented Litigants

As noted in chapter four, approximately 40% of litigants in the civil justice (non-family) system are unrepresented by lawyers: this percentage is significantly higher in family courts. The very adversarial structure of the justice system and the assumptions that

³¹ While in 1976, Chayes argued that there was a shift in paradigm regarding the litigation model from a traditional private law model (originating in the 19th century) to a newer public law model, I believe that many of those traditional assumptions about litigation and the role played by the various actors in the legal system remain deeply ingrained in the adversarial system.

³² Neil Brooks, "The Judge and the Adversary System" in A Linden, ed, *The Canadian Judiciary* (Toronto, Canada: Osgoode Hall Law School, 1976) 90 at 90.

underlie this structure - that each party has a trained legal representative who will advocate on the party's behalf and from which a just result will be derived³³ - starts to break down when only one party has an advocate who is familiar with the substantive law and legal procedures. Moreover, the data from this project, as well as data collected in other research projects on self-represented litigants, suggests that many self-represented litigants are frustrated and dissatisfied with their experiences in the civil justice system.³⁴ The consequence is that individuals remain disengaged from the law-making processes that impact their lives. This continued disengagement by a significant portion of individuals further diminishes the legitimacy of the justice system and is inconsistent with democratic principles. However, before discussing those aspects of the adversarial system that might be changed in order to provide self-represented litigants with an opportunity to participate in a more meaningful manner, it is important to examine certain features of the existing system in light of some of the particular challenges generated and faced by self-represented litigants. In doing so, it will then be possible to engage in a discussion about those features that require change. While the proposed changes may appear piecemeal, it is in keeping with Chayes' analysis that an accumulation of individual changes signals a transformation in the system that ultimately leads to a new model of litigation.

³³ In describing the failings of the English adversary system, Jack Jacob stated, “[f]or the proper functioning of the adversary system, a basic assumption is that the opposite parties command equal resources and can engage lawyers having equal skill, expertise and competence, but in practice this assumption is not fulfilled in a much larger volume and variety of cases than is generally imagined; and indeed, the adversary system accentuates the inequality in terms of resources and legal advice and representation between the parties....The true casualties are the litigants themselves, who are frustrated in their search for justice....Lastly, it may be said that, in the interplay between the court and the parties and their lawyers, the adversary system envelops the machinery of civil justice with a kind of mystique, even mysticism, which alienates people and inhibits them from resorting to the courts for the resolution or determination of their disputes.” See Sir Jack I H Jacob, *The Fabric of English Civil Justice* (London, UK: Stevens, 1987) at 5-19.

³⁴ In addition to the discussion of the interviewees disempowering experiences in Chapter 7 of this thesis, please see Julie MacFarlane, “Identifying and Meeting the Needs of Self-Represented Litigants”, *Final Report of the National Self-Represented Litigants Project* (May 2013) at 86. Available online at: www.lsuc.onca/uploadedfiles/For_The_Public?About_The_Law_Society/_Decisions/2014/Self_Represented_Project.pdf [MacFarlane, *Final Report of the National Self-Represented Litigant Project*] and Action Committee on Access to Justice in Civil and Family Law, “Access to Justice in Civil and Family Justice: A Roadmap to Change”, *Final Report* (October 2013). Available online at www.cfcj.fccj.org.

The evolving demographic of self-represented litigants suggests that poverty is not the sole indicator of self-representation. Perhaps, more significantly, the increasing numbers of self-represented litigants give rise to some fundamental questions not only about the practical realities associated with the presence of self-represented litigants in the legal system, but also about the legitimacy of the current legal system as a means of resolving disputes and promoting justice. In this regard, Sande Buhai noted that, “[t]he rise of pro se litigants has been seen as a ‘sign of system breakdown,’ the implication being that the system needs more or less expensive-lawyers. We should consider the possibility, however, that a system that only works when every party is represented by competent and equal counsel is not a system worth saving.”³⁵ One of the consequences of the existing organization of the adversarial system is that, because the quality of legal services continues to have a significant impact on proceedings and legal services are distributed through a market to which only a few can gain entry, justice is effectively being bought and sold. Russell Pearce argues that the result is unequal justice under the law.³⁶ Thus, to the extent that there is an unequal application of justice, it is necessary to re-examine the efficacy of the existing adversarial system given the increased presence of self-represented litigants within the system.

In my study, the majority of the self-represented litigants interviewed had varying levels of post-secondary education.³⁷ They were employed, owned their own businesses or were the recipients of certain temporary government assistance programs.³⁸ As noted in chapter four, Scott Barclay’s research on litigants that pursue appeals without legal

³⁵ Sande L Buhai, “Access to Justice for Unrepresented Litigants: A Comparative Perspective” (2009) 42 Loy LA L Rev 979 at 983-984 [Buhai, “Access to Justice for Unrepresented Litigants”].

³⁶ Russell Pearce, “Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help” (2004) 73 Fordham L Rev 969 at 970 [Pearce, “Redressing Inequality in the Market for Justice”]; see also Lloyd L Weinreb, “The Adversary Process is Not an End in Itself” (2002) 2 The Journal of the Institute for the Study of Legal Ethics 59 at 62 [Weinreb, “The Adversary Process is Not an End in Itself”].

³⁷ All except two of the interviewees had post-secondary education and certain of the interviewees had more than one post-secondary degree.

³⁸ Two of the interviewees were retired but had been gainfully employed - one has owned his own chartered accountant business and the other had been a project manager. There was also one young adult who had recently completed her high school diploma and had been employed in transit. Finally, two other individuals were on temporary disability insurance from their employment.

representation also suggests that, while many individuals may prefer to have a lawyer handle their case, there are also a portion of people who choose to represent themselves on appeal.³⁹ The purpose in doing so may vary from individual to individual. However, a loss of faith in lawyers or a desire to ensure that their case is presented as they see it are examples of the reasons provided by the self-represented appellate litigants. There are also a number of self-represented litigants who may choose to represent themselves because they believe that the subject matter of the legal problem is small or discrete and, therefore, manageable. Alternatively, they might wish to present their story to the court in their own words. Ultimately, these reasons represent a new reality that affects the traditional dynamic of how litigation might unfold when the parties engaging in the legal process are not lawyers.

(i) The Role of Lawyers

One of the fundamental assumptions about the litigation process and the legal system more generally is that, due to the complexities of the legal system and the professionalization of law, individuals require lawyers in order to successfully navigate their way through the system. The empirical research completed by Sandefur, Seron, Engler and others reinforces this basic assumption; individuals who are represented by lawyers tend to achieve better legal results. Underlying this assumption is a further premise that, in accordance with the client's wishes, the lawyer will take responsibility for individuals' legal problems without further engaging or, at least, only minimally engaging the individual in the process. However, the assumption that individuals rely on lawyers to navigate the legal system and resolve their legal problem is inconsistent with the new reality of self-represented litigants.⁴⁰ The data suggests that not only is there an

³⁹ Scott Barclay, "The Decision to Self-Represent" (1996) 77 *Social Science Quarterly* 912 [Barclay, "The Decision to Self-Represent"].

⁴⁰ See for example the various research undertaken by the Canadian Forum on Civil Justice and MacFarlane, *Final Report of the National Self-Represented Litigants Project*. Available online respectively at www.cfcj-fcjc.org and www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self_Represented_Project.pdf.

increasing number of self-represented litigants in the legal system, but also that this trend does not show signs of diminishing.⁴¹

As part of the existing adversarial framework, it is further assumed that lawyers, as professionals, are exclusively skilled and knowledgeable about the process and substance of law (which they both develop and administer). Thus, they claim to be entitled to maintain exclusive control over the litigation process. In this regard, Zimmerman and Tyler note, “as lawyers develop a greater role in the system, the legal process becomes more professionalized and complex, and, when the procedural design assumes representation, the ability of individuals to actually proceed successfully without an attorney, or to directly participate when they do have a attorney, diminishes.”⁴² Given this professionalization of law and the corresponding complexity of the legal process, it is assumed that lawyers are the only individuals properly equipped to handle and resolve legal matters. This is further perpetuated by the mystification of legal practice whereby both lawyers and non-lawyers assume that there is a way of engaging in the practice of law that is only known to and operationalized by lawyers, trained first in law schools and then in legal practice through work with other lawyers.⁴³

However, these assumptions must be balanced against certain other assumptions that underlie our legal system. For instance, the by-laws of the *Law Society Act* contemplate non-lawyers representing a friend, neighbour or family member in court so long as certain conditions are met. These conditions include not acting in more than three matters per year and not receiving compensation or benefit for representing the individual.⁴⁴ There is also an assumption that individuals have the right to appear in court in person and the *Rules of Civil Procedure* presuppose that individuals are entitled

⁴¹ Practically speaking, without a significant reduction in legal fees, the trend would suggest that more not less individuals are likely represent themselves.

⁴² Zimmerman & Tyler, “Between Access to Counsel and Access to Justice”, *supra* note 5 at 477.

⁴³ Frederick Schauer, “Introduction: Is there Legal Reasoning?” in Frederick Schauer, *Thinking like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, USA: Harvard University Press, 2009) at 1.

⁴⁴ *Law Society Act*, RSO 1990, c L.8, s 30(4) & (5), by-law 4.

to appear without representation. More fundamentally, the recent Supreme Court of Canada decision regarding hearing fees acknowledged that ensuring individuals have access to courts is important for the development of law, as well as a means of holding the state to account – all of which is crucial to the preservation of the Rule of Law.⁴⁵ Certain of these presumptions are also grounded in classic liberal concepts of personal autonomy and liberty.⁴⁶ However, to the extent that a fundamental right to be heard appears to run contrary to other assumptions about how one might be heard effectively—namely the need to use lawyers—it will be important to reconcile this contradiction. This is particularly true given the practical realities that suggest that lawyers will not be available for all those who require assistance.

Several of the interviewees in this study grappled with this mystification of law and legal practice when seeking to take procedural steps in their matter. When they attended at LHO to obtain advice regarding how they might successfully complete a particular step in the litigation, it was not uncommon for a volunteer lawyer to tell them that, despite the wording of the particular procedural rule, it was not the generally accepted practice among lawyers to proceed in that fashion.⁴⁷ In these instances, self-represented litigants were often dissuaded from proceeding with the particular procedural step. In the course of being dissuaded, they were left with the impression that engaging in the practice of law was something that is known exclusively to lawyers and, by extension, unknowable by non-lawyers.

The specialized knowledge and training of lawyers which is supposed to make them uniquely positioned to engage in the practice of law also underlies another fundamental assumption about the current litigation model – namely, that lawyers work

⁴⁵ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 39-40.

⁴⁶ David M Trubek, “Critical Moments in Access to Justice Theory: The Quest for the Empowered Self” in Allan C Hutchinson, ed, *Access to Civil Justice* (Toronto, Canada: Carswell, 1990) at 107.

⁴⁷ During the observation period of this research project, I observed several instances where self-represented litigants sought advice about taking a particular step - such as noting a defendant in default due to the fact that they had not served a statement of defence and were told by the volunteer lawyer with whom they were speaking that lawyers did not typically note parties in default.

with and against other lawyers who are equally trained and well-matched. In accordance with the traditional dominant model of litigation, it is assumed that evenly-matched legal representatives will act as zealous advocates for their client.⁴⁸ This assumption underscores the functioning of the adversarial system as well as the validity of the outcomes reached in that system. However, the validity of this assumption is called in to question by the fact that it assumes most lawyers are evenly matched⁴⁹ or, even more fundamentally, that a zealous approach to advocacy results in the best or most just legal outcomes.⁵⁰ As Sande Buhai has noted, “the adversarial system expects parties to be selfish in their arguments, creates incentives to hide evidence, and rewards parties whose attorneys are the most skilled and well-funded.”⁵¹ All of this seriously undermines the legitimacy of the results reached.

Finally, the recent influx of self-represented litigants into the litigation process now more urgently calls this assumption into question. Contrary to certain of the assumptions underpinning a zealous advocacy approach to litigation, one party is likely to have a distinct advantage over the other. In fact, to the extent that trained lawyers are regularly appearing against self-represented litigants, the notion of zealous advocacy within the adversarial system (already suffering from questions of legitimacy) becomes distinctly problematic and potentially unfair when one side (the legally represented party)

⁴⁸ The adherence to a dominant model of legal professionalism that includes a continued commitment to zealous advocacy on behalf of a client is discussed by Trevor Farrow, “Sustainable Professionalism” (2008) 46 *Osgoode Hall LJ* 51 at 63-64 [Farrow, “Sustainable Professionalism”].

⁴⁹ Roger Cramton suggests that more often than note, lawyers “resources and abilities are not equally matched and equal justice under the law becomes an illusion.” See Roger C Cramton, “Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable” (2002) 70 *Fordham L Rev* 1599 at 1608 [Cramton, “Furthering Justice by Improving the Adversarial System”].

⁵⁰ See Farrow, “Sustainable Professionalism”, *supra* note 48; Robert K Vischer, “Legal Advice as Moral Perspective” (2006) 19 *Geo J Legal Ethics* 1; Carrie Menkel-Meadow, “The Lawyer as Problem-Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering” (1999) 72 *Temp L Rev* 785 [Carrie Menkel-Meadow, “The Lawyer as Problem-Solver”]. Moreover, in his discussion about the adversarial system Lloyd Weinreb argues that because the adversaries in trial (and other adjudicatory proceedings) are lawyers, “everything and everyone who might inhibit the contest between them is relegated to the sidelines” and thus, lawyers in a courtroom, are like gladiators that “roam about posturing in their fashion, attracting all the attention to themselves, winning or losing.” This, in turn, raises difficult questions about the validity of the adversarial system as a means of both discovering the truth and resolving disputes. See Weinreb, “The Adversary Process is Not an End in Itself”, *supra* note 36 at 61-62.

⁵¹ Buhai, “Access to Justice for Unrepresented Litigants”, *supra* note 35 at 982.

has a disproportionate advantage in experience, skills and knowledge of the applicable legal rules and procedures.

(ii) The Role of The Judge

Finally, within the adversarial model, judges are thought to function as neutral umpires who generally ensure that evenly matched legal representatives work within certain parameters defined by principles of procedural justice. As opposed to an inquisitorial legal system in which the judge actively manages the legal process by conducting investigations, determining issues and controlling the presentation of evidence, the adversarial model places these responsibilities squarely on the parties' shoulders with respect to the presentation of evidence, issues and law.⁵² With the adversarial model, the assumption is that, by not taking an active role in the administration or presentation of the case in court, the adjudicator will remain unbiased, unpartisan and therefore impartial.⁵³ In defence of the adversarial system, many members of the legal profession maintain that judicial impartiality is a necessary precursor in order to be able to arrive at the truth or 'justice'. Related to this assumption is the further belief that impartiality is demonstrated through the adoption of a passive and neutral stance. In accordance with this assumption, judges do not undertake their own investigations or participate actively in the search for the truth in the cases presented before them.

This view is subject to significant debate and, on occasion, may be challenged on the basis that, "empirical research has cast doubt on the premise that judges really are unbiased, suggesting that what is really at stake is only the appearance of impartiality."⁵⁴ It has been noted that an impartial decision-maker is "one who is able to make judgments

⁵² Pearce, "Redressing Inequality in the Market for Justice", *supra* note 36 at 972.

⁵³ While in the American context, Sande Buhai's comments regarding the role of the judge in the adversarial system has significant implications for self-represented litigants. She stated, "[p]erhaps because they are trained primarily as lawyers and not as judges, American judges tend to view their role as that of a neutral and impartial referee, consistent with the sporting theory of justice. They perceive their main job to be procedural-to ensure that the adversary system, quintessentially a contest between lawyers, operates efficiently and effectively." See Buhai, "Access to Justice for Unrepresented Litigants", *supra* note 35 at 994-995.

⁵⁴ Buhai, "Access to Justice for Unrepresented Litigants", *ibid* at 982.

with an open mind – that is, one who comes to the decision-making table without his or her ‘mind already made up’ or without connections that improperly influence the decision-making process.”⁵⁵ Within the inquisitorial model, judges may participate more actively in the presentation of the parties’ cases, but they are still expected to be impartial and unbiased: their decisions are supposed to be based on fact and law, not extraneous issues.⁵⁶ The participant, SE, provided an interesting insight into a self-represented litigants’ perception of the judge’s role when she noted,

I think that they’re beholding to the laws and the rules. So even if they can see what this lawyer is doing, even if you have an ethical judge, a judge who is interested in justice, he can see what’s going on but he’s kind of shackled in a way because he can see the other lawyer is abusing the system, but he’s abusing it in a way that’s legal so to speak.⁵⁷

One of the problems with the assumption that passivity is commensurate with impartiality is that it is based on a concept of the adversarial system that, in turn, makes certain assumptions about the players within the system. It assumes that cases involve a contest between lawyers who are equally well-versed and equally well-resourced in the requisite procedural and substantive law and that they are equally prepared for the legal contest.⁵⁸ These assumptions mean that, in an effort to remain passive (and thereby impartial) judges may fail to take account of self-represented litigants’ lack of legal knowledge and experience. When “judges remain passive in the face of litigant confusion,”⁵⁹ many litigants are left feeling like outsiders who are unable to participate because they are unfamiliar with the professional legal language spoken by lawyers and

⁵⁵ Laverne Jacobs, “Caught Between Judicial Paradigms and the Administrative State’s Pastiche: ‘Tribunal’ Independence, Impartiality, and Bias” in Colleen M Flood and Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto, Canada: Emond Montgomery Publications, 2013) 233 at 234 [Jacobs, “Caught Between Judicial Paradigms”].

⁵⁶ Buhai, “Access to Justice for Unrepresented Litigants”, *supra* note 35 at 982.

⁵⁷ Interview of SE dated December 23, 2104 at 19.

⁵⁸ Michelle Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law” (2015) 38:1 Dalhousie LJ 119 at 124 [Flaherty, Self-Represented Litigants, “Active Adjudication and the Perception of Bias”].

⁵⁹ Richard Zorza, “An Overview of Self-Represented Litigation, Innovation, its Impact, and an Approach for the Future: An Invitation to Dialogue” (2009) 43:3 Family LQ 519 at 524 [Zorza, “An Overview of Self-Represented Litigation”].

judges; they are also equally unfamiliar with many of the procedures that take place in the courtroom.⁶⁰ Given this disparity between lawyers and self-represented litigants in terms of training and experience, the validity and fairness of this judicial attitude is seriously called into question. While these views are very problematic in their own right, there are even more significant issues raised about the fairness and justness of a legal system in which significant numbers of litigants do not understand the process, receive no assistance when attempting to engage with the system and, as such, are left unable or unwilling to express themselves. Effectively, this is no participation at all.

By contrast, in a recent example, Judge Posner undertook his own research relating to a case he was reviewing. This was considered to call his role as a neutral decision-maker into question.⁶¹ Specifically, Judge Posner had searched certain medical websites regarding information about a prescription drug that an unrepresented inmate claimed was being unfairly administered by the prison in which he was incarcerated. The prison administration had counsel as well as expert witnesses. Posner's fellow judges, while concurring in the result, found that Posner, in conducting research online and outside the evidence presented by the parties, had turned the court into an advocate for one side. However, Judge Posner queried whether "the unreliability of the unalloyed adversary process in a case of such dramatic inequality of resources and capabilities of the parties as this case is to be an unalterable bar to justice?"⁶² He felt that the inmate was ill-equipped to challenge the expert medical evidence presented by the administration. As such, Judge Posner believed, "it is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence."⁶³

⁶⁰ MacFarlane, *Final Report of The National Self-Represented Litigants Project*, *supra* note 34 at 95.

⁶¹ Debra Cassens Weiss, "Dissenter Blasts Posner's Internet Research in Inmate's Suit over Acid Reflux Treatment (August 20, 2015), ABA Journal, Available online at: http://www.abajournal.com/news/article/posners_internet_research_in_inmates_gerd_suit_leads_to_sparri_g_in_7th_cir [Weiss, "Dissenter Blasts Posner's Internet Research"].

⁶² Weiss, "Dissenter Blasts Posner's Internet Research", *ibid.*

⁶³ Weiss, "Dissenter Blasts Posner's Internet Research", *ibid.*

The criticisms directed at Judge Posner in respect of his positive step to ensure that the self-represented litigant's case was properly presented is grounded in what Goldschmidt characterized as a "current reluctance of the judiciary to assist self-represented litigants." This is rooted in assumptions about the traditionally passive role of the adversarial trial judge and reflected in American case law that generally refuses to recognize a duty of judicial assistance.⁶⁴ Notwithstanding these considerations, Goldschmidt suggests that the new reality respecting the significant numbers of self-represented litigants in the civil justice system is forcing the judiciary to grapple with the question, "how far can a judge go in guiding and assisting a self-represented litigant in such a way as to avoid the possibly harsh or unjust consequences resulting from their lack of familiarity with the judicial process?"⁶⁵ In the Canadian context, there is an acknowledgement of the need for adjudicators to provide judicial assistance in the course of a hearing. This duty has been articulated in several decisions.⁶⁶ In a decision of the Ontario Superior Court, MacDonald J dismissed a motion for a mistrial that was based on her having assisted a self-represented party to raise issues during the self-represented litigant's examination and cross-examination. In her reasons, the trial judge stated,

[t]rial fairness requires ensuring that an unrepresented person is not denied a trial on the merits by her lack of knowledge of either the trial process or procedural or substantive law, or by the stress of appearing in court, or by a combination of those factors. Litigants have the right to appear in court without counsel and the right to a fair hearing regardless of whether they are legally represented. Since it is the trial judge who is required to give effect to those rights, doing so cannot amount to abandonment of the role of the trial judge and assumption of a counsel-like role.⁶⁷

MacDonald J's concern about trial fairness caused her to acknowledge that while the adversarial system in "its purest form" provides a potential advantage to the represented

⁶⁴ Jona Goldschmidt, "Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Context" (2006). Available online at www.americanbar.org/content/dam/aba/migrated/judiciaethics/resources/Judicial_Assistance.autocheckdam.pdf, at 2 [Goldschmidt, "Judicial Assistance to Self-Represented Litigants"].

⁶⁵ Goldschmidt, "Judicial Assistance to Self-Represented Litigants", *ibid* at 2.

⁶⁶ For example, see *Barrett v Layton*, [2003] OJ No 5572 (Sup Ct); *Manitoba (Director of Child and Family Services) v A (J)* 2004 MBCA 184 (CanLII).

⁶⁷ *Barrett v Layton*, [2003] OJ No 5572.

party who is opposing a self-represented party, such an advantage must be tempered by a commitment to fair trials; it must be deemed fair by “reasonable and informed observers of the trial process.”⁶⁸ While tempered by a concern for impartiality and not assuming a ‘counsel-like’ role, this approach to adjudication was upheld in a later decision of the Manitoba Court of Appeal. In her discussion of active adjudication, Michelle Flaherty recognizes the importance of judicial impartiality as a “key component of procedural fairness.”⁶⁹ However, she also challenges traditional notions of impartiality that require judicial passivity in light of the presence of self-represented litigants and the recognition that without judicial assistance, self-represented litigants are not likely to get a fair hearing. In light of this concern, Flaherty advocates for the adoption of “substantive impartiality.”⁷⁰ Substantive impartiality is contextual in the sense that adjudicators do not treat all litigants the same but rather treat litigants fairly, particularly as is needed to ensure that self-represented litigants are able to navigate their hearing in a meaningful manner.⁷¹ As such, the question that must be posed is how the judiciary can better facilitate self-represented litigants’ opportunities to be heard in a meaningful manner? The starting point for addressing this question must include a recognition that the opportunity to be heard cannot be interpreted in the traditional sense whereby two parties are deemed cognizant of the rules and relevant procedures, are legally represented, and appear before a neutral adjudicator.

The fact that a great majority of civil courts suffer from long delays and civil cases can involve drawn out procedural steps raises further concerns about the appropriateness of the judiciary’s traditional passivity in civil law matters. Taking account of these structural criticisms, it may be that the judge’s role as neutral umpire fails to ensure that litigants act in accordance with concepts of procedural fairness, both in and outside the courtroom. In other words, in many instances, the concern is that

⁶⁸ *Barrett v Layton, ibid.*

⁶⁹ Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”, *supra* note 58 at 137.

⁷⁰ Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”, *ibid* at 139.

⁷¹ Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”, *ibid* at 139.

lawyers and litigants may act in certain ways outside of the court setting that are rarely captured and/or regulated by the judge. This is due in part to the fact that certain procedural steps, such as motions, must be initiated by the parties based on their understanding of the procedural rights and responsibilities, these steps can take a long time to implement, and add additional costs to an already costly process. Again, this situation disproportionately affects self-represented litigants who may be unfamiliar with the rules or their rights and are thereby disadvantaged when dealing with opposing counsel.

This incongruity was highlighted by one of the participants in this research project when she drew an analogy between the role of the judge and a referee in a hockey game. As noted in chapter seven, SE challenged the efficacy of the judge's ability to regulate the parties and their lawyer's conduct given the role played by the adjudicator and the nature of the process by which a litigant is able to challenge an opposing party's conduct. Specifically, she stated:

[w]hen there's a hockey game there's a ref and there seems to be no ref here. So its like he [opposing counsel] can do whatever he wants, slashing, hooking, smash me into the boards face first and then I can go to the ref but that's the court...it could be months after the game's over and guess what, I'll end up having to pay.⁷²

Added to this is the further concern that judges, having trained as lawyers, "tend to reflect the entrenched attitudes, interests and constant influence of the organized bar."⁷³ To the extent that the bar maintains a commitment to zealous advocacy and the conduct that flows from an adherence to that approach, self-represented litigants are likely to remain disadvantaged.

⁷² Interview of SE dated December 23, 2014 at 9.

⁷³ Cramton, "Furthering Justice by Improving the Adversarial System", *supra* note 49 at 1605.

Proposed Areas of Change

These foundational assumptions about the litigation process and the particular challenges faced by self-represented litigants demand a transformation in the prevailing approach to the model of litigation and the legal process more generally. At a minimum, they necessitate a re-evaluation of the traditional model. Some of the required changes are relatively practical and easy to incorporate, but there are others that require more fundamental shifts in how the litigation process is conceptualized. In both cases, it is important to remember that the primary objective is the engagement of self-represented litigants in the civil justice system such that they are able to participate in a meaningful manner. In the final section of this chapter, I will propose certain changes (and areas that require transformation) that are based, in part, on the research data collected in this project and informed by the democratic thesis of access to justice. It is only if the litigation process generally and our thinking about how it might be transformed that real progress can be made in achieving a true measure of access to justice that is consistent with the democratic thesis.

(i) Access to Legal Advice and Information

The participants in this research project all made repeated use of the self-help legal services at LHO in downtown Toronto.⁷⁴ As their legal matters progressed, they returned to LHO to receive additional information and advice about preparing for the next step in the litigation as well as responding to action taken by opposing parties. For KC, who had been to the centre several times during the course of her legal matter,

It was very time-consuming but I've been lucky in that the calibre of lawyers who volunteer their time at Pro Bono is exceptional. Some are more versed than others. But my experience has been that they're always been very generous with eliminating conflicts of interest and in one sense its consumed far too much time. But on another sense if you believe in the greater good in the universe that things do take time. Each time I've gone there've been people who've strategically helped me get to where I am now. Its been like a stepping stone. A building process, stepping stone. Which is what any case is, is it not?⁷⁵

⁷⁴ A description of LHO is contained in chapter six of this thesis.

⁷⁵ Interview of KC dated April 28, 2015 at 20.

This educative service provided the individuals with information, advice, skills and tools that assisted them in managing their own case. The self-represented litigants were able to speak directly with volunteer lawyers who could advise them on substantive legal and procedural matters. As well, the volunteer lawyers were able to assist them in making strategic decisions about the progress of their case.

The critique that self-help legal services represents a shifting of responsibility to citizens to advocate on their own behalf within a complex and professionalized legal system raises legitimate concerns about the reliance on this initiative. It is suggested that this initiative can engender a sense of disempowerment.⁷⁶ This is particularly true if it is assumed that the legal system in which individuals are compelled to participate remains inhospitable to them. However, this critique must be weighed against two counterbalancing factors: the practical realities of the existing legal system, (i.e., the growing number of self-represented litigants in need of legal advice and information); and the aspirational goals of the democratic thesis of access (i.e., promotion of meaningful participation and the demystification of law) that occurs when law is ‘taken back by ordinary citizens.’ Self-help can encourage non-lawyers to engage in conversations about law and legal process and do so in their own voices. By so doing, they will begin to shape a new legal vernacular – a new language of law that is reflective of and constituted by the very citizens it is meant to govern. Thus, taking account of these considerations and recognizing the ongoing limitations of the civil justice system as it relates to self-represented litigants, I maintain that self-help legal services have an important role to play in the promotion of participation and the corresponding demystification of law. The

⁷⁶ See discussion of the neoliberal critique of self-help contained in chapter four of this thesis. In addition to the neo-liberal critique of self-help, there is a further consideration that requiring individuals to spend significant amounts of time addressing their legal problems is unrealistic when it is assumed that these individuals may already be fully occupied and perhaps overwhelmed within their day-to-day lives. Erhard Berner and Benedict Phillips raise this critique in the context of self-help in poor communities when they state, “It would be a mistake to assume that those poor in income are rich in spare time: ‘[i]n many of the lowest-income households all men and women work such long hours that they are unable to commit themselves to projects that involve a lot of self-help.’” See Erhard Berner & Benedict Phillips, “Left to Their Own Devices? Community Self-Help Between Alternative Development and Neoliberalism”, Paper presented at N-Aerus Seminar: Beyond the Neoliberalism Consensus on Urban Development: Other Voices from Europe and the South (May 15-17, 2003).

question that arises in this regard is how both the practical realities facing self-represented litigants and the goals of a democratic approach to access might shape the form and content of self-help legal services.⁷⁷

During my time observing meetings at the centre, I saw several lawyers explaining not only the process of litigation, but also the underlying reasons for a particular legal procedure in plain language. This often facilitated a meaningful conversation between the lawyers and the self-represented litigants about their legal issues before ultimately making decisions about how to proceed. In many instances, the volunteer lawyers also advised clients to speak in plain language when telling their stories to the court. In this regard, the volunteer lawyers engaged in discussions with the self-represented individual in a way that a review of the particular rule or legal principle in a text book or online service could not. Thus, these services represent an essential component of a self-represented litigant's attempt to participate and they are relevant to the legal profession's responsibility to further access to justice.⁷⁸

The approach adopted by LHO and the lawyers who volunteer there (i.e., to provide substantive and technical advice as well as an underlying explanation for why certain steps are required) is an important element of self-help services. It offers the opportunity to assist individuals in better understanding how the legal system operates and how they may participate in it. Moreover, by offering assistance that improves individuals' ability to articulate positions either in writing or orally in a court setting,

⁷⁷ For example, empirical research conducted in respect of self-representation in Alberta recommended the establishment of self-help services - but qualified the nature of the self-help services that should be offered. Specifically, the report stated: “[a]n SHC must be easily accessible, welcoming and non-intimidating, have hours that work for clients, provide outreach to those who cannot come to the centre, and be adequately resourced to meet client demand with quality service.” See Mary Stratton, *Alberta Self-Represented Litigant Mapping Project Final Report* (Edmonton, Canada: Canadian Forum for Civil Justice, 2007) at 46-47. Available online at www.cfcj.fjc.org/docs/2007/mapping-en.pdf. See also Trevor CW Farrow, Diana Lowe, Bradley Albrecht and Martha E Simmons, “Addressing the Needs of Self-Represented Litigants in the Canadian Justice System” A White Paper Prepared for the Association of Canadian Court Administrators (March 2012). Available online at www.cfcj.fjc.org.

⁷⁸ Moreover, in addition to being consistent with lawyer's duties to promote the public interest, involving lawyers in local pro bono programs and clinics is beneficial because it “involves lawyers as long term partners in communities' efforts to gain control of their destiny.” See Ruth Bader Ginsburg, “In the Pursuit of the Public Good” (2001) 7 Wash U J of L & Pol'y 1 at 13.

self-help legal services can potentially serve to build self-confidence and the assist individuals develop the skills needed to participate more generally. In this regard, unlike more limited self-help programs in the United States, the scope of self-help services should not be limited to legal information; it should be expanded to provide for the development of skills and education necessary to support and encourage participation. Finally, the example of the community lawyer project in Connecticut might also provide a basis for an expanded notion of self-help services whereby the self-help centres would include advice and information and training on topics that extended beyond litigation.⁷⁹

In light of the potential benefits associated with providing self-help, efforts should be made to ensure that the services are more widely available for self-represented litigants to avail themselves. The existing self-help centres are located in civil courthouses in Ontario. It would appear that the choice of these locations was made on the basis that the services are accessible to self-represented litigants who attend at that court or have matters in that court. However, it was noted by both staff and self-help users at LHO that clients will often travel from other areas in the province in order to get assistance from LHO as there are currently only two such centres in Ontario.⁸⁰ Locating the self-help centres in courthouses has worked to ensure that the judges and court staff working in those same courthouses are aware of the services and able individuals to direct litigants to the service for assistance.⁸¹ In light of the contribution that these services make in assisting and supporting self-represented litigants to participate in their own case, the scope and availability of self-help legal services should be expanded. There should be more centres like LHO, preferably in the every civil courthouse in Ontario. Moreover, from a logistical standpoint, the centres should be open to the public

⁷⁹ For a more detailed discussion of the community lawyer project, see chapter three of this thesis.

⁸⁰ Currently, there is a self-help centre in downtown Toronto (University Avenue) and another located at the civil courthouse in downtown Ottawa (Elgin Street). There is also a self-help centre at the Small Claims court in Toronto (Sheppard Avenue). This does not suggest that every courthouse requires a fully staffed self-help centre but rather that there are sufficient resources to address the needs of litigants throughout the province.

⁸¹ Staff reported that judges at the courthouse at 393 University Avenue will, on occasion, hold a matter down in order to allow a self-represented litigant to leave the courtroom, go downstairs and speak with a lawyer at LHO before proceeding.

beyond a regular nine-to-five schedule so that the centres may accommodate those individuals who work consistent with the shifting demographic of self-represented litigants.⁸²

(ii) The Role of Lawyers

While there are a significant number of self-represented litigants entering the civil justice system and managing their own files, the reality is that a great number of them are litigating against trained lawyers.⁸³ By virtue of their traditional role within the adversarial system and as required by the Rules of Professional Conduct in Ontario, a significant number of lawyers continue to be motivated by a commitment to zealous advocacy. Carrie Menkel-Meadow has suggested that, “the lawyer’s ‘habitat’ remains primarily one of partisan protectionism, looking out for the client’s interests.”⁸⁴ This continued commitment to zealous advocacy within the adversarial system is contrasted with the view held by members of the legal profession regarding the difficulty associated with advocating against self-represented litigants.⁸⁵ Thus, in many cases, there is likely to be a serious imbalance of power whereby one party, represented by a legal professional, holds the relevant knowledge, skills and experience. The self-represented litigants’ experiences suggest that they are aware of the fact that they do not have the same information or skills as the opposing lawyers. As a result, they feel intimidated or bullied by opposing counsel and vulnerable to being taken advantage of by lawyers. Russell Engler has also noted that,

attorney misconduct permeates the interaction between counsel and an

⁸² This was a common complaint from the self-represented litigants interviewed, namely the difficulty in attending at LHO during work hours. Interestingly, as there are more and more middle-class self-represented litigants who are employed full-time, this may become a more immediate issue for self-help centres to address.

⁸³ Thompson and Engler have noted that, in the civil context, proceedings involving both represented parties and unrepresented parties present the greatest challenges in terms of developing court processes that are fair and take proper account of the unique needs of the self-represented litigant. See Thompson, “The Judge as Counsel”, *supra* note 28 at 6.

⁸⁴ Menkel-Meadow, “The Lawyer as Problem-Solver”, *supra* note 50 at 790.

⁸⁵ For example, one lawyer recently commented “lawyers don't like dealing with angry self-represented litigants. That is what articling students are for.” See Linda Perlis, “The Death of a Divorce Lawyer” (December 2, 2015) *The Globe and Mail*, *Globe Life and Arts*, Facts and Arguments, L6.

unrepresented adversary. Lawyers routinely engage in impermissible advice-giving, often including a misleading presentation of the law or facts, and over-reaching. Lawyers present legal and factual issues in a strategically favorable light, selectively control the flow of information, and manipulate their un-represented adversary by misusing argument, appeals, threats, and promises. Whatever assistance an unrepresented litigant has received may be undercut by the litigant's encounter with the opposing lawyer.⁸⁶

The resulting imbalance and the views that this fosters call into question the fairness and legitimacy of the adversarial process. Roger Cramton has noted that the role lawyers play is further complicated by the fact that, even if lawyers attempt to express personal values that extend beyond the minimum requirements of their ethical codes or traditional adversarial role, “[e]veryday practice, however, pushes the conscientious lawyer to engage in conduct that is unfair and unjust.”⁸⁷ Moreover, as officers of the court who are obligated to ensure that the administration of justice is not brought into disrepute, there is an argument that lawyers should not be permitted to act in ways that unfairly restrict or impede individuals from being heard; this is particularly so when similar action would not be taken against an opposing lawyer.⁸⁸ As such, the question arises as to the extent to which lawyers can or should continue to act as zealous advocates (in the traditional sense of that notion) for their clients when acting against self-represented litigants?

From an ethical standpoint, the application of general principles regarding the conduct of lawyers as advocates contained in the professional rules of conduct places little responsibility on lawyers when acting against self-represented litigants.⁸⁹ For

⁸⁶ Russell Engler, “And Justice for All – Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators and Clerks” (1999) 67 *Fordham L Rev* 1987 at 1908 [Engler, “And Justice for All”].

⁸⁷ Cramton, “Furthering Justice by Improving the Adversarial System”, *supra* note 49 at 1605.

⁸⁸ The commentary respecting Rule 5.1-1, the lawyer as advocate states “[t]he lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done.” See The Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 5.1-1, commentary 1.

⁸⁹ For the purposes of this discussion, I have focused on the rules of conduct that govern lawyers in Ontario as these rules are directly relevant to the empirical research I undertook at LHO in downtown Toronto. While not directly referencing self-represented litigants, the commentary on Rule 5.1-1 does contemplate the responsibilities incumbent on a lawyer when opposing interests are not represented, either because it is related to a matter for which notice is not required or alternatively, involves a situation which the “full

example, Rule 5.1-1 of the Rules of Professional Conduct of the Law Society of Upper Canada outlines the scope of the lawyer's duties when representing a client. The commentary on this Rule further colours the role of the lawyer in an adversarial context.⁹⁰ Rule 7.2-9 of the Rules of Professional Conduct in Ontario deals expressly with a lawyer's duties to unrepresented litigants and is quite limited in its scope; it comprises only two subsections with next to no commentary. The main focus of the professional conduct rules addressing self-represented litigants is on the lawyer's obligation to ensure that a self-represented litigant does not mistakenly believe that he or she can rely on any advice given by the lawyer or that the lawyer has taken account of her interests.⁹¹ There are no other positive duties imposed on lawyers in respect of self-represented litigants. Moreover, in reviewing the rules pertaining to lawyers' responsibility to other parties, it is interesting to note that the scope of lawyers' responsibility to represented parties as well as different corporate entities and governments is quite extensive, particularly when contrasted with the rules that outline lawyers' duties to self-represented parties.

Moreover, these limited provisions are overshadowed by a continued focus on and adherence to a principle of zealous advocacy that permeates lawyers' professional

proof and argument inherent in the adversarial system cannot be achieved.” In these instances, the lawyer must take particular care to be accurate, candid, and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.” See The Law Society of Upper Canada, *The Rules of Professional Conduct*, Rule 5.1-1, commentary 6.

⁹⁰ The first part of the commentary in Rule 5.1-1 characterizes the nature of the advocate's role and duties in an adversarial system:

[1] Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected; and

[3] The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

⁹¹ The Law Society of Upper Canada, *The Rules of Professional Conduct*, Rule 7.2-9. Available online at <https://www.lsuc.on.ca/uploadedFiles/RulesofProfessionalConduct.pdf>.

identity. At a minimum, this is insufficient from an ethical standpoint as it signals a focus on how lawyers should act when interacting with other lawyers and/or represented parties while, at the same time, downplaying the need to identify distinct ethical concerns that may arise in the context of acting against unrepresented parties. This state of affairs is compounded by the risk that particular conduct by a lawyer, (e.g., unreasonably withholding consent, misconstruing a position or the application of a relevant rule) is likely to be noted as “sharp practice” by opposing counsel who are familiar with the rules to which they are also subject, but not be appreciated by a self-represented litigant. Finally, the failure to articulate specific ethical obligations vis-à-vis self-represented litigants also sends an implicit message that this is not something with which lawyers (and the system at large) need to be concerned.

Lawyers are subject to certain ethical requirements when acting as advocates for their clients. In certain contexts, this can include competing requirements. These become more problematic when the opposing party is a self-represented litigant. For instance, the commentary contained in rule 5.1 acknowledges that lawyers are “openly and necessarily partisan” while representing a client: they are, therefore, under no obligation to assist an adversary. However, this acknowledgement is contrasted with the lawyers’ duty not to take advantage of other’s party’s slips or mistakes (e.g., so-called sharp practices). In an adversarial system where it is assumed that lawyers are relatively evenly matched, these conflicting interests may not cause significant issues or, if an issue arises, it is likely that the conduct may be caught by opposing counsel who is equally well-versed in the professional rules of conduct. However, when the inexperience and lack of professional training of many self-represented litigants is taken into account, these types of contradictory duties have greater significance.

The absence of more comprehensive ethical guidelines regarding self-represented litigants, as well as the contradictory nature of the existing rules, is in need of correction. Given the influx of self-represented litigants in the civil justice system, it may become necessary to address expressly the treatment of self-represented litigants by opposing

counsel within the rules of professional conduct framework.⁹² There is an assumption that lawyers act as ‘neutral mechanics’ that, without judging the morality of their clients’ actions, undertake to act on their behalf within the confines of the law. However, this approach of neutral partisanship is often used to justify behaviour that is not necessary for the lawyer to do their job (i.e. adopting unreasonable positions that delay or obfuscate the process). While lawyers have an unwavering duty to their clients and a duty that is partisan, there must be limits placed on the behaviour undertaken in the name of that duty. Acknowledging the need for such limits, there is a further need for a critical evaluation of the lawyer’s role and the lawyer’s corresponding ethical duties when dealing with self-represented litigants. This would provide lawyers with ethical guidelines and tools to resolve these issues in the context of self-represented litigants. The failure to do so means that self-represented litigants are potentially subject to conduct by lawyers that, while not clearly in violation of their ethical duties in the traditional sense, pushes the envelope regarding ‘norms of practice’; these might not otherwise be pushed if both sides were represented.

In addition to various ethical considerations, a zealous approach to advocacy that does not take account of the particular position of the self-represented litigants also serves to undermine the democratic thesis more generally. It discounts the deleterious affects that a negative interaction can have on the self-represented litigants’ perception of their ability to participate and willingness to engage in other forums and processes. As such, it is imperative that account be taken of the inequality in power between many self-represented litigants and counsel. This accounting also necessitates a serious commitment from lawyers to promote and protect ‘the right to be heard’ in accordance with principles of procedural justice and their ethical responsibilities: this includes the

⁹² It is beyond the scope of this thesis to draft appropriate rules of professional conduct regarding self-represented litigant. Nevertheless, it is important to recognize that such rules will likely, in cases involving self-represented parties, need to take account of certain practices that potentially result in unfair advantages to the represented party. Also, any rules will need to address the broader framework of the legal profession’s responsibility to balance not only its duty to its clients, but also its duty to the administration of justice.

obligation to “promote the parties’ right to a fair hearing.”⁹³ Perhaps more fundamentally, these calls for change challenge the appropriateness of the current role of the lawyer in the adversarial system and demand substantive reform of the adversarial system.⁹⁴

In accordance with the democratic thesis, a shift in the role of the lawyer in the adversarial system has implications beyond that of opposing counsel’s behaviour in a litigation context. At this stage, it is important to distinguish between a differentiated role for lawyers and a rejection of the role for lawyers in society. In both the criminal and civil justice context, there are examples of the acknowledgement of the importance of legal representation. From a constitutional perspective, the courts have also recognized, in both criminal and child welfare contexts, a right to state-funded counsel in narrow circumstances where necessary to ensure meaningful participation in the adjudicative process.⁹⁵ Provincial legal aid organizations such as Legal Aid Ontario list criteria and/or factors that delineate certain types of cases in which legal representation is either important or necessary.⁹⁶ Moreover, lawyers play a significant part in the development of the common law through the cases that are brought before the courts and the arguments made in the course of those cases. All of this underscores the important function that lawyers play in society. Therefore, without undermining lawyers’ roles, it is important to re-evaluate the traditional role and function of legal representation in the

⁹³ Under the *Rules of Civil Procedure*, there is a recognition that the right to a fair hearing should not be undermined by the failure to comply with a requirement under the rules. Both this recognition as well as the lawyer’s duties as officers of the court take on special significance in the case where lawyers are acting against self-represented litigants who are more likely to contravene inadvertently the rules. *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 1.04 and 2.01.

⁹⁴ Allan C Hutchinson, *Fighting Fair: Legal Ethics for An Adversarial Age* (New York, USA: Cambridge University Press, 2015).

⁹⁵ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11 [the “Charter”]; *New Brunswick (Ministry of Health and Community Services v G. (J.))*, [1999] 3 SCR 46 regarding the right of a parent to obtain legal assistance when faced with the prospect of losing custody of a child to the state. Please see discussion in chapter three.

⁹⁶ For example, in Ontario, if you are charged with a crime and facing jail, are experiencing domestic violence, applying to enter the country or in danger of being kicked out of the country, or are dealing with mental health issues, then you are potentially eligible for legal aid. Information drawn from the Legal Aid Ontario website. Available online at www.legalaid.on.ca/en/getting/typesofhelp.asp.

context of the democratic thesis. In other words, what would lawyering look like if approached from a more democratic perspective?

Within most democratic societies, lawyers are uniquely positioned to know the rules and processes that individuals need to understand in order to participate meaningfully.⁹⁷ In contrast to traditional ideas about lawyering and consistent with a broader conceptualization of access to justice, democratic or rebellious lawyers engage in non-hierarchical partnerships with clients: lawyers encourage client participation in the legal decisions and strategies that affect their cases as well as the implementation of those decisions.⁹⁸ Underlying this approach to lawyering is the democratic principle that “no single person should have sole responsibility for making and implementing [such] decisions.”⁹⁹ Lawyers and clients deliberate together to both frame the issue and then implement the decided-upon strategies in addressing the issue. While this approach is not limited to the direct interests or needs of opposing self-represented litigants seeking assistance, such an approach does have the potential to and is consistent with encouraging more meaningful engagement of clients in the legal system more generally. In this regard, a further potential benefit of this approach is a better understanding and awareness by individuals of the impact of their decisions. Taken further, a democratic approach to lawyering challenges traditional notions of a binary adversarial system that is focused on wins and loses in a particular case; it asks lawyers to take a step back and

⁹⁷ While this is most often contemplated in the context of lawyers engaged with clients advocating social change, a democratic approach to access and by extension lawyering is not limited to cases engaging issues of social justice. In their article entitled “Building Power and Breaking Images: Critical Legal Theory and the Practice of Law”, Peter Gabel and Paul Harris argue that even in “non-political cases” (cases involving divorce, personal injury or unemployment - many of which will make up the bulk of many lawyers’ practice), it is important that lawyers de-professionalize the lawyer-client relationship such that when confronted with the client’s problem, the lawyer acts as an “ordinary person with special experience - to emphatically comprehend these needs and help the client to articulate them in the most effective and meaningful way possible”, taking account of the political nature of the conflict rather than characterizing it as an abstract legal concept. See Peter Gabel & Paul Harris, “Building Power and Breaking Images: Critical Legal Theory and the Practice of Law” (1982-83) XI Review of Law and Social Change 369 at 408. See also Carrie Menkel-Meadow, “The Lawyer’s role(s) in Deliberative Democracy” (2004) 5 Nev LJ 347 at 368 [Menkel-Meadow, “The Lawyer’s Role(s) in Deliberative Democracy”].

⁹⁸ Asciano Piomelli, “The Democratic Roots of Collaborative Lawyering” [2006] 12 Clinical L Rev 541 [Piomelli, “The Democratic Roots of Collaborative Lawyering”].

⁹⁹ Piomelli, “The Democratic Roots of Collaborative Lawyering”, *ibid* at 600, see also Gerald Lopez, “Living and Lawyering Rebelliously” (2005) 73:5 Fordham L Rev 2041.

fulfill their public interest duties to promote access to social justice. Moreover, it is worth noting that a portion of the participants interviewed in this study had retained lawyers in the past and/or had indicated that they would retain a lawyer in the future. To the extent that this is reflective of self-represented litigants more generally, it will become more important to re-evaluate the relationship between lawyers and clients.

One of the continuing challenges for democratic lawyers as legal experts is to resist the temptation to take over the process when it becomes difficult or “place pressure on subordinated groups to formulate their interests in forms that the law can process.”¹⁰⁰ To do so would entail a retreat to a more formal approach to lawyering that contemplates a division between the “active elites” who govern with little involvement from the “passive masses.”¹⁰¹ This approach is more consistent with principles of representative democracy than participatory democracy. Pursuant to such an approach, lawyers continue to act on behalf of others’ interests in a traditionally adversarial process; the individuals are not involved in the process or the decision-making that ensues. This approach was rejected by certain of the self-represented litigants interviewed in this project.

In terms of participatory processes, this traditional view has also been challenged by scholars, such as Carrie Menkel-Meadow. She is interested in “exploring how those with legal training can harness what they already know” and learn new skills. In so doing, they will become not only “architects of process,” but “architects of participatory democracy.”¹⁰² Menkel-Meadow further suggests that in this respect the lawyer has an important role to play not only in both creating new processes and institutions but also engaging with those processes and institutions such as to “provide more participatory and legitimate outcomes and more humane processes.”¹⁰³ Moreover, by engaging with

¹⁰⁰ Lucie E White, “To Learn and Teach: Lessons from Drefontein on Lawyering and Power” (1988) *Wis L Rev* 699 at 757.

¹⁰¹ Piomelli, “The Democratic Roots of Collaborative Lawyering”, *supra* note 98 at 602.

¹⁰² Menkel-Meadow, “The Lawyer’s Role(s) in Deliberative Democracy”, *supra* note 97 at 369.

¹⁰³ *Ibid* at 369.

lawyers, learning about various legal processes, and devising solutions to address their issues and concerns, clients become empowered to devise their own solutions. In so doing, they relinquish their reliance on experts and have a direct ‘say’ in the legal decision-making that affects their lives.¹⁰⁴ It is worth noting that, in the course of observing volunteer lawyers and client at LHO, I noticed the volunteer lawyers moved away from a traditional legal role in which they assume responsibility for the client’s legal issue. Instead, they adopted more of a teaching role through which they undertook to explain not only the procedure that the self-represented litigant was required to complete, but also the reason for the particular procedure and how it fit within the broader legal process. Additionally, in defining their role at LHO, several of the volunteer lawyers suggested that their duties included a responsibility to encourage the self-represented litigants’ confidence and by extension, engagement.

(iii) Changes to the Litigation Process

The continuing need for procedural clarification and change remains an important component of self-represented litigants’ ability to participate in the civil justice system. Several of the participants interviewed in this research project have suggested that one of the most significant challenges that they faced involved discerning when it was necessary or prudent to take certain procedural steps. An illustration of this involves the enforcement of deadlines in accordance with the *Rules of Civil Procedure* and the measures available to a party when a deadline is not met (i.e., noting a delinquent party in default). While there may be informal norms of practice that dictate when a lawyer is likely to pursue certain measures, those norms are typically not known to the self-represented litigant. As a result, self-represented litigants are often left questioning when they may adopt a particular course of action or may be subject to certain action by opposing counsel.

In his call for more systematic reform, Thompson specifically addressed the need for the procedural rules to change in order to better accommodate non-lawyers in the civil

¹⁰⁴ Ingrid Eagly, “Community Education: Creating a New Vision of Legal Services Practice” (1997-1998) 4 *Clinical L Rev* 433 at 445 [Eagly, “Community Education”].

justice system. Currently, the rules are premised on an assumption that parties appearing in court are represented and, generally speaking, that lawyers understand both the interpretation and application of the rules. However, Thompson suggests that what is needed is a new set of rules (or at a minimum, two sets of rules) that take direct account of self-represented parties and are designed from their perspective.¹⁰⁵ In other words, these rules would not be drafted for lawyers. Rather, they would be written for the myriad of non-lawyers now attempting to resolve disputes in the civil justice system. At certain stages of the litigation process, such a set of rules and procedures may adopt a more active approach to judicial procedure that is focused on assisting the self-represented litigant present their case. At the same time, this would need to ensure the continued protection of certain principles of procedural justice.

Another challenge raised by the participants related to the drafting of pleadings and affidavits; these remain technical and bogged down in formal legal terminology.¹⁰⁶ The self-represented litigants expressed difficulty in being able to conform their pleadings to the technical legal requirements. When XE was preparing his statement of defence, this meant,

I had to somehow figure out how to respond in a very professional way and to handle it as a lawyer would handle it. That's a steep learning curve. So what I found was I did find some sample statements of claim which used the types of phrases like to the extent that this relates to me, so, and so and to the extent that it relates to the other person I have no knowledge or insufficient knowledge. So I was able to find that language in these other statements of claim. If I hadn't found that I would have been out in the cold, I wouldn't have known what to do. Another point in the statement of claim where a lawyer here (LHO) assisted me was when I tried to explain that the owners of the adjoining property were negligent because they were aware of the problem of negative airflow on to their property. But I didn't

¹⁰⁵ Thompson, "The Judge as Counsel", *supra* note 28 at 6.

¹⁰⁶ Chayes suggests that the goal of a "liberalization of pleadings" by reform of the historically strict forms of action led to the creation of the 'cause of action' rules. While these were less convoluted and technical than the forms of action, they still remained complicated and grounded in legal theory. Thus, the need for even more flexible and informal approaches to pleading ultimately led to the further shift to a concentration on the factual context. However I argue that the outcome of this shift is no longer sufficient given the presence of self-represented litigants. See Chayes, "The Role of the Judge in Public Law Litigation", *supra* note 27.

know how to express that in such a way so as to show that this was not my primary defence. My primary defence was that it was accidental and I just didn't know how to word that properly. My lawyer (at LHO) helped me to do that to use the expression 'in the alternative', which I wouldn't have known. That's just almost entirely legalese because it's not day-to-day, in the alternative is not day-to-day language.¹⁰⁷

Thus, there is a continuing need for plainer language in legal documents that are used in court proceedings. Also, more flexibility in the way in which self-represented litigants are permitted to articulate their positions would be helpful.¹⁰⁸ This commitment to the use of plain language and a further move away from a legal language is consistent with the adoption of a new legal vernacular whereby individuals are engaged in the creation and use of a language that reflects their lives. However, in undertaking to adopt plain non-legal language, it is important to take account of Roderick MacDonald's criticism that "all attempts to make legal language accessible are bundled up in attempts either to cast non-official law as non-legal or to incorporate non-official law into the existing and stabilizing normative order in a way that reduces citizens' input into its formulation and makes true justice inaccessible."¹⁰⁹

In discussions with both self-represented litigants and volunteer lawyers, the notion of more extensive case management was often raised as a means of assisting self-represented litigants in a very practical way. One of the greatest challenges for self-represented litigants is getting into court, becoming familiar with the procedures of court, and being able to stand up and make submissions before judges and opposing counsel. In fact, several of the self-represented litigants interviewed characterized the process of

¹⁰⁷ Interview of XE dated July 27, 2015.

¹⁰⁸ It is important to note that some of these changes are occurring on an ad hoc basis. For example, due to the number of self-represented litigants attending in civil court in downtown Toronto, a number of judges have waived the requirement that their endorsements be drafted as formal orders that are subsequently registered with the court office. The preparation of a formal order with its technical requirements has been a cause of significant challenge for many self-represented litigants because, if the form did not meet certain formal criteria, it was often rejected by the court office; this delayed the effect of the endorsement unnecessarily.

¹⁰⁹ MacDonald, "Theses on Access to Justice", *supra* note 2 at 32.

going to court as ‘foreign’ and ‘intimidating.’¹¹⁰ These concerns included navigating physically the courthouse, signing in to court, addressing the bench in the proper manner, and knowing when and when not to speak. Consequently, providing for designated courtroom and/or judges who case-managed self-represented litigants’ matters would ensure a level of consistency and familiarity that might ease the anxiety of the self-represented litigants and reduce confusion over formalities. Another notion of a modified procedure for self-represented litigants involves more case management at the pre-trial stage where judges or properly trained court officers could “supervise the pre-trial process, assisting parties with filing forms, disclosure, identification of issues, preparation of the case for trial, and case management before trial.”¹¹¹

While case-management offers the potential to assist self-represented litigants in better preparing and presenting their case, it is also important to note the limitations associated with case-management. Several of these problems were highlighted by Chief Justice Warren Winkler in his 2008 report.¹¹² Specifically, the initial implementation of intensive case-management in all civil cases gave rise to a series of problems. These included ineffectual mediations scheduled too early in the process, increased backlogs regarding trial dates within the civil justice system, reduced judicial resources for motions and trials (due to the fact that judges were consumed with case conferences and trial scheduling matters), and longer dates for the smaller number of matters that actually proceeded to trial.¹¹³ While the premise underlying the implementation of comprehensive case-management was to compel lawyers to pick up and move files forward earlier with the assistance of active judicial intervention, the result was to burden further the civil justice system and tax already limited judicial resources. Upon review of these implications, the conclusion reached was to develop a modified form of case-

¹¹⁰ See interviews of SE and QH dated December 23, 2014 and June 3, 2015, respectively.

¹¹¹ Thompson, “The Judge as Counsel”, *supra* note 28 at 6.

¹¹² The Honourable Chief Justice Warren K Winkler, Evaluation of Civil Case Management in the Toronto Region – A Report on the Implementation of the Toronto Practice Directive and Rule 78 (February 2008). Available online at www.ontariocourts.ca/coa/en/ps/reports/rule78.pdf [Winkler, “Evaluation of Civil Case Management”].

¹¹³ Winkler, “Evaluation of Civil Case Management”, *ibid* at 14-16.

management that did not contemplate case-management in every case and removed certain additional procedural steps that disproportionately consumed judicial resources. Notwithstanding the challenges associated with case-management, it is still contended that modified forms of these programs could work to ensure that the self-represented litigants are able to concentrate on making their submissions in the most meaningful manner. Modified approaches to case-management might also contemplate involvement by actors other than judges and/or prioritized case-management in certain types of cases.

Moreover, self-represented litigants liked the idea of reappearing before the same judge. By proceeding in this way, the judge could also become familiar with the facts of their case and be in a position to guide them through the various procedural steps that are part of litigation. Returning to the same judge or master also meant that there was a greater likelihood that the judge could better regulate opposing counsel's behavior toward the self-represented litigant both in and out of court. Assumedly, if the opposing lawyers knew that they would be back before the same judge at a later date and that that judge actively managed the procedural aspects of the file, it would be more difficult to engage in unethical or overly aggressive conduct toward the self-represented parties. In addition, the regular engagement by a judge familiar with the case could assist in ensuring that the self-represented litigant is not unduly delaying the process or raising extraneous issues. The continued engagement by one judge, albeit done properly, is also likely to reassure self-represented litigants that their case is being heard and addressed.

(iv) The Role of the Judge

One of the assumptions underlying the existing adversarial model of litigation is that judges will act as neutral umpires that facilitate evenly matched legal professionals being able to present their respective cases.¹¹⁴ Given the complexity of many legal procedures, not to mention the relevant substantive law, the preparation and presentation of a case typically necessitates expert legal advice and specialized information. Notwithstanding

¹¹⁴ While discussed in the criminal context, Lloyd Weinreb notes that, in many litigation contexts, a system is neither exclusively adversarial or exclusively inquisitorial. As such, it is important to choose a procedure that best serves the purposes and goals of the particular process. See Weinreb, "The Adversary Process is Not an End in Itself", *supra* note 36 at 59.

this complexity, it is assumed that the judge remains a ‘neutral and impartial referee’.¹¹⁵ If it is also assumed that the parties are in the control of the process, their ability to ‘lawyer the case’ effectively becomes an important determinant of how the case will be decided. Without active intervention or, at a minimum, some assistance from the adjudicator, there is an inherent disadvantage to those who attempt to participate, but are unfamiliar with the processes, particularly as it relates to the preparation of one’s case. In this sense,

[w]here the law, the rules of procedure, and the legal processes are unintelligible or unfamiliar to one or more of the litigants, cases stop being a dialogue between informed and experienced participants within a framework designed to test evidence and facilitate truth seeking. Instead, cases turn into a frustrating exercise in imposing legal norms on parties who do not grasp their significance, and who see them as arbitrary, unfair, or simply unintelligible.¹¹⁶

The practical realities associated with the increase in self-represented litigants render traditional assumptions about judges and passive adjudication fundamentally untenable.¹¹⁷

The adversarial system has traditionally operated on the assumption that parties require lawyers in order to successfully maneuver through the civil justice system: the same is not always assumed within the administrative law context, particularly as it relates to appearances before certain tribunals. In the context of procedural fairness, there has been much debate about the extent to which tribunals should follow the

¹¹⁵ Sande L Buhai, “Access to Justice for Unrepresented Litigants”, *supra* note 35 at 994; a fact that was noted by Judge Posner in the earlier example provided regarding the unrepresented inmate.

¹¹⁶ Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”, *supra* note 58 at 121.

¹¹⁷ Citing an increase in the number of self-represented litigants and the fact that there are some legal contexts that are not well served by an adversarial context, Lord Chief Justice Thomas in the United Kingdom recently suggested that “[a]n inquisitorial system might be an improvement for litigants in person and secure a fair trial for all whilst doing so within limited and reducing resources.” Recognizing the significance of his comments within the context of the traditional adversarial system, Lord Chief Justice Thomas further commented that, “research would have to consider whether an inquisitorial procedure would require more judges or a ‘cadre of junior judges.’” See Owen Bowcott, “Inquisitorial System may be better for family and civil cases, says Top Judge”, *The Guardian* (4 March 2014). Available online at www.the-guardian.com.

procedural processes of the common law court systems.¹¹⁸ However, given that many administrative tribunals contemplate individuals appearing without counsel, perhaps it is time to reverse the process and examine the operationalization of tribunals in terms of civil court reform. In calling on judges to adopt a more active role within the courtroom to ensure that self-represented litigants are provided with an opportunity to participate in a fair process, Russell Engler has suggested that,

[t]he precedents from small claims courts and administrative agencies serve as an important reminder that impartiality does not require judges to be passive. Like other judges, small claims judges must remain impartial. ALJs [Administrative Law Judges] in Social Security, welfare, and unemployment benefits' cases must also remain impartial. Judges may therefore be active in assisting unrepresented litigants without compromising their impartiality.¹¹⁹

This sentiment was more recently echoed by Thompson who also advocated the need for superior court judges to adopt a more active role at trial similar to administrative agencies.¹²⁰ Questions about the nature of the adjudicator's role within tribunal proceedings have traditionally been examined within the context of the dichotomy between the adversarial-inquisitorial models of judicial procedure.¹²¹ However, Robert Thomas suggests that a better way to approach questions about the role of the adjudicator would be to examine the “degree of intervention – ranging from a passive, reactive stance

¹¹⁸ Colleen Flood & Jennifer Dolling, “An introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto, Canada: Emond Montgomery Publications, 2013) at 27 [Flood & Sossin, *Administrative Law in Context*]. See also discussion by Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias” in which Michelle Flaherty comments on the fact that, “[o]ver the years, we [administrative justice system] has fallen very easily into a pattern of using the judicial model of adjudication as the basis for our understanding of a fair hearing. As we have seen, however, this judicial model of adjudication is not effective in contexts where representation is the exception rather than the norm.” Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”, *supra* note 58 at 126.

¹¹⁹ Russell Engler, “And Justice for All”, *supra* note 86 at 2018.

¹²⁰ Thompson, “The Judge as Counsel”, *supra* note 28 at 5.

¹²¹ Robert Thomas, “From ‘Adversarial v Inquisitorial’ to ‘Active, Enabling and Investigative’: Developments in UK Administrative Tribunals” in Laverne Jacobs & Sasha Baglay, *The Nature of Inquisitorial Processes in Administrative Regimes* (Surrey, UK: Ashgate Publishing Limited, 2013) 51 at 51-52 [Thomas, “From Adversarial to Inquisitorial”].

to a more proactive or intrusive one of the adjudicator.”¹²² Flaherty characterizes the nature of adjudicative behaviour as spreading across a spectrum that contemplates permissible judicial assistance or involvement at one end and clearly impermissible behaviour at the other end. Between these two points, it is contemplated that there would be a range of judicial direction and assistance necessary to ensure that the parties are able to “meaningfully present their case” without giving rise to a claim of partiality on the adjudicator’s behalf.¹²³ These approaches are particularly relevant in addressing the needs of self-represented litigants.

The development of an “enabling approach” would require that a particular tribunal provide self-represented litigants with “every possible assistance to enable her to participate and to compensate her for her lack of skills or knowledge.”¹²⁴ One of the benefits of this approach is that it allows a specific tribunal to adopt its own processes; this would include varying degrees of judicial activism depending on a variety of factors, one of which would be the presence of self-represented litigants and the need to ensure that self-represented parties are provided with a fair hearing. Thomas notes that there are challenges associated with increased judicial activism.¹²⁵ However, the move away from a strict adherence to either an adversarial or inquisitorial model and the corresponding move toward an enabling approach does provide an opportunity to address better self-represented litigants’ needs in a more realistic fashion. As such, the adoption of an enabling approach within the administrative law setting could provide important lessons for the reform of judicial procedure within the civil justice system.

In light of very serious concerns about the fairness of the legal processes in which self-represented litigants are compelled to engage, many have called for judges to take a

¹²² Thomas, “From Adversarial to Inquisitorial”, *ibid* at 52.

¹²³ Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias”, *supra* note 58 at 138.

¹²⁴ Thomas, “From Adversarial to Inquisitorial”, *supra* note 121 at 53.

¹²⁵ Specifically, Thomas notes an overly active approach places too much power and trust in the adjudicators. There are concerns about pre-judgment and the need to ensure that adjudicators are properly trained to intervene. Additionally, there are practical challenges associated with ensuring that adjudicators have the resources necessary to intervene and manage cases more actively. See Thomas, “From Adversarial to Inquisitorial”, *ibid* at 61.

more active role in ensuring that self-represented litigants are provided with a fair opportunity to present their case.¹²⁶ In particular, Russell Engler has suggested that judges should “assist the unrepresented litigant in developing a full, factual record, and to help the litigant with matters of procedure and substantive law.”¹²⁷ Also, Brent Cotter has questioned whether in order to provide better justice for self-represented litigants, it will be necessary to consider less conventional judicial approaches that can better ensure meaningful access for self-represented parties.¹²⁸ Thompson has suggested there are certain immediate and necessary steps for judges to take. These include providing legal information to self-represented litigants (notwithstanding the judge’s role as a neutral umpire), moving the legal matter through the various procedural steps by providing information along the way, ensuring that procedural rulings move matters forward, effectively ‘telling’ the self-represented litigant what to do, and, finally, relaxing the procedural rules so that self-represented litigants can engage with the substantive issues sooner.¹²⁹

In the particular context of this research project, the self-represented litigants interviewed had very definite views on what they perceived as a fair adjudicative process and what left them feeling disempowered or excluded from the process. As such, their experiences in court and the interpretation they impute to those experiences provide a useful basis of discussion about judicial reform. For self-represented litigants who had positive experiences presenting their cases to judges and masters, there were certain similar characteristics shared by the participants. First of all, on a very practical level, the adjudicators took account of the self-represented litigant in the courtroom. For example, the judge might move the matter to the bottom of the list of matters to be heard that day. At first glance, this might appear to be unfair to the self-represented litigants. However, it was noted that, by moving the matter to the end of the day, it was likely that the

¹²⁶ For example, see Buhai, “Access to Justice for Unrepresented Litigants”, *supra* note 35; Zorza, “An Overview of Self-Represented Litigation”, *supra* note 59.

¹²⁷ Engler, “And Justice for All”, *supra* note 86 at 2029.

¹²⁸ Brent Cotter, “Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada” (2012) 63 UNB LJ 54 at 63.

¹²⁹ Thompson, “The Judge as Counsel”, *supra* note 28 at 5.

courtroom would be less full and, therefore, it would be a less intimidating experience for the individual getting up to speak. Secondly, in these instances, the adjudicator took time to explain the process to the self-represented litigant; this included how the hearing would unfold, who would speak first, when there would be an opportunity to respond, etc. This initiative has a dual effect of easing the self-represented litigants' anxiety over legal formalities and providing them with a roadmap for the process. This is particularly important when it is remembered that many of these steps are not always outlined in the *Rules of Procedure*; they are part of the informal court processes that lawyers learn through experience. In her discussion about active adjudication, Michelle Flaherty outlined several steps she would take in human rights tribunal hearings in order to help alleviate self-represented litigants' confusion and frustration about the process of adjudication. Specifically, she would begin the hearing by outlining the legal issues (and provide an opportunity for the parties to comment on the articulation of the issues), explain the conduct of the hearing (again providing an opportunity for questions and comments from the parties), engage in a discussion of the issue in a chronological fashion, and allow each witness to give evidence on each issue with the adjudicator posing questions throughout.¹³⁰ While the administrative context of a human rights tribunal contemplates the adoption of alternative processes, Flaherty's example does highlight the fact that changes to certain procedures may assist in ensuring that self-represented litigants both understand the process and are able to participate in a meaningful manner consistent with concepts of substantive impartiality.

This method of informing the self-represented litigant about the process also extended to the delivery of an endorsement or a judgment in which the reasons for judgment were written and explained to the self-represented litigants in plain language.¹³¹ In addition to taking time to explain both the process and the resulting decision reached,

¹³⁰ Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias", *supra* note 58 at 127.

¹³¹ Folger has suggested that when an individual does not have information about how decisions are made or receive ambiguous information about the decision-making process, the individual may rely on the outcome as evidence of the fairness of the process. See Robert Folger, "Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity" (1977) 35:2 *Journal of Personality and Social Psychology* 108 [Folger, "Distributive and Procedural Justice"].

the adjudicators also took additional steps to engage the self-represented litigants in their submissions by asking questions, allowing the individual time to respond without feeling that they were imposing on the court, and signaling to the self-represented litigants that they had read the self-represented litigants' materials and made efforts to understand their position. While many of these steps do not fundamentally change the judges' role within the adversarial process, they do require judges to adopt a more active role that assists self-represented litigants appearing before them.

In the American context, Richard Zorza has proposed certain best practices that should be adopted by judges when adjudicating matters involving self-represented litigants. These proposals were based on research undertaken in family courts in the United States in which court staff and the judges made a commitment to developing and implementing 'access-friendly' policies aimed at assisting self-represented litigants. The researchers determined (through post-court interviews with the judges and litigants) that, in adopting certain policies, there was better and more effective communication between the parties and the members of the judiciary. As a result of their studies, the researchers were able to develop 'best court practices'¹³² in respect of cases involving self-represented litigants. These best practices were subsequently used in training/educational sessions with other judges.

Zorza maintained that the adoption of these best practices was part of a need to re-conceptualize how judges engage with self-represented litigants in their courtrooms. This reconceptualization encourages judges to engage actively with self-represented litigants. The researchers characterized the best practices as 'engaged neutrality,' a concept that assumes that judges can be "deeply engaged with the case without threatening, in any way, the neutrality of the court or running afoul of ethics prohibitions."¹³³ Consequently,

¹³² These best practices for judges include: framing the subject matter of the litigation; explaining the process to be followed; breaking the hearing into topics; moving back and forth between the parties, paraphrasing; articulating and elucidating the decision; and explaining the next steps. See Zorza, "An Overview of Self-Represented Litigation", *supra* note 59 at 524.

¹³³ Richard Zorza, "An Overview of Self-Represented Litigation", *supra* note 59 at 524. It is also worth noting that the Model Code of Judicial Conduct prepared by the American Bar Association contemplates in

additional family courts undertook to revise existing procedures and practices based on integrating self-represented litigants' needs and competencies in order to ensure that self-represented litigants were in a position to participate in a meaningful manner. Not unsurprisingly, many of the examples of best practices proposed by Zorza are consistent with the self-represented litigants' experiences in this research project. For example, as part of actively engaging with self-represented litigants, the best practices developed and adopted by judges in Zorza's study called on judges to reorganize court procedures in cases involving self-represented litigants, take steps to explain the procedures, assist parties in framing the issues, and ultimately explaining the law and the decision reached.¹³⁴

While many of these actions appear modest in effort, the effect on the self-represented litigants' perceptions about their ability to participate and be heard can be significant. Interestingly, in many of the positive incidents recounted by the self-represented litigants in this research, the individuals were either unsuccessful or only partially successful in persuading the court of their position. However, their assessment of the fairness of the proceeding was more encouraging and accepting. Thus, while it may be frustrating from the judge's perspective to have an individual appearing who is unfamiliar with the process and possibly uncomfortable speaking, there is an important benefit to be obtained by judges who say to self-represented litigants, "You have an hour. You booked an hour, you tell me everything you want to tell me for the next hour and I am going to write my notes."¹³⁵

In this vein, the Canadian Judicial Council has taken a positive step toward a judicial approach that contemplates 'engaged neutrality' when faced with self-represented litigants. While advisory in nature, the Judicial Council's statement of

its commentary to Rule 2.2: Impartiality and Fairness that under subsection (4) It is not a violation of this Rule for a Judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

¹³⁴ Richard Zorza, "An Overview of Self-Represented Litigation", *supra* note 59 at 524.

¹³⁵ Interview of SB dated July 9, 2015 at 7-8.

principles on self-represented litigants does highlight the important role that judges must play in ensuring that self-represented litigants are provided with an opportunity to participate. Specifically, the Judicial Council states that “[j]udges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.”¹³⁶ In the course of fulfilling this commitment, the Judicial Council suggests judges may, when hearing cases involving self-represented litigants, take added steps to explain the process, provide information about the law and evidentiary requirements, modify the order in which evidence is presented, and question witnesses. All of these steps contemplate a role for the judiciary that goes beyond the traditional role of a neutral arbiter of cases. It requires that adjudicators actively ensure that individuals are able to participate in a meaningful manner despite not being trained legal professionals. Arguably, such an approach is consistent with certain principles underlying procedural and democratic justice that seek to afford individuals a chance to participate in the decision-making process. More specifically, these include disclosure of the information on which a decision is made, an opportunity to engage in the process, an opportunity to provide evidence, and an articulation of the reasons for the decision.¹³⁷

By contrast, present practices can have serious negative effects on the self-represented litigant’s perceptions about the process and access more generally: failing to allow a self-represented litigant to speak (or otherwise advising that it was not necessary to hear from the individual); speaking in legal terms to opposing counsel without taking the time to explain the terms to a self-represented litigant who is likely unfamiliar with the term; failing to account for discrepancies in form that do not affect principles of procedural fairness, and/or yelling at the self-represented litigant.

¹³⁶ See Canadian Justice Council, “Statement of Principles on Self-Represented Litigants and Accused Persons.” Available online at http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_Principles_Statement_2006_en.pdf.

¹³⁷ Flood & Sossin, *Administrative Law in Context*, *supra* note 118 at 27.

There is also an argument that, to the extent that members of the judiciary act in a certain fashion, it will have a ‘trickle-down’ effect on lawyers who appear before those judges. As judges begin to address self-represented litigants in different ways, there might be a corresponding expectation on behalf of those judges that the opposing lawyers will also begin to engage in a different fashion. In this regard, judges have a crucial role to play in setting the tone regarding conduct toward self-represented litigants as well as managing self-represented litigants’ expectations. These efforts by adjudicators underscore more crucial questions about the role of the judge in the litigation process as it pertains to self-represented litigants. While this thesis does not advocate a shift from an adversarial model to an inquisitorial model of dispute resolution, the research does raise serious and foundational questions about the extent to which judge should intervene to ensure that self-represented litigants are able to participate meaningfully. At the same time, attention will need to be paid to ensuring a corresponding commitment to impartial and fair decision-making in accordance with principles of procedural justice.

Related to these fundamental questions about the role of the judge are operational concerns that a more interventionist approach by the judiciary will cause additional delay and strain on the civil justice system. However, Carrie Menkel-Meadow has cautioned that, in performing research about the function of courts and, more importantly how courts and process ought to function, care must be taken to ensure whose needs are represented.¹³⁸ In this case, concerns about over-burdened courts, timely resolution of disputes, and a need for increased efficiency must be weighed against the views and perceptions of the self-represented litigants attempting to engage in the civil justice. Also, account must be taken of the harms associated with continued disengagement by large segments of the population. Thus, one of the important aspects of future research must involve the role of the adjudicator and, more generally, the role of the civil justice system. To the extent that the objective (for which solutions are sought) is to provide individuals with an opportunity to be heard in a fair and transparent process that resolves

¹³⁸ Carrie Menkel-Meadow & Bryant G Garth, “Civil Procedure and Courts” in Peter Cane and Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research*, (Oxford, UK: Oxford University Press, 2010) at 699.

disputes in a manner that maintains the legitimacy of the legal system, it is necessary to revisit the role of judges as it relates to self-represented litigants.

(v) The Need for More Qualitative Research

The need to weigh competing interests when articulating a research agenda raises a final, but important recommendation regarding the work to be done going forward. This work involves the need for more qualitative research that engages self-represented litigants in a dialogue about their experiences participating in the civil justice system. This initiative has the potential to demonstrate what will be needed in order to ensure that they are better able to participate in a more meaningful manner. However, in undertaking this research, it is important, as noted by Albiston and Sandefur, to resist,

the pull of the policy audience: ...[l]imiting our efforts to evaluation research risks allowing the policy agenda to define the research questions before the problem and potential responses are fully understood. It does little to identify the mechanisms through which civil legal services might address troubling inequalities or change society. If we truly wish to address a crisis in access to justice, we need a broader understanding of both what access to justice means and what the current lack of access entails.¹³⁹

This broader understanding of access requires the infusion of self-representatives' perspectives in identifying not only the nature of access, but also the impact that a lack of access has on citizens. Such an approach to access to justice research is consistent with a broader conceptualization of access that encourages individuals to speak in their own voice and become engaged in the decision-making and problem-solving processes as part of a democratic sensibility. Only then is it possible to explore potential policy approaches that encourage and support engagement, taking account of the practical realities of what individuals' require and what can be provided.

As the data collected in this research project disclose, there is a significant disconnect between some of the views and perceptions held by self-represented litigants

¹³⁹ Catherine R Albiston & Rebecca L Sandefur, "Expanding the Empirical Study of Access to Justice" (2013) *Wis L Rev* 101 at 104-105.

regarding members of the judiciary and their expectations regarding the adversarial process and the role of the judge within the adversarial process. Thus, there is also a particular need for additional qualitative research that engages members of the judiciary and the bar in discussions about the role they do or should play in respect of self-represented litigants. This should also incorporate how the relationship between all of these parties might be better reconciled going forward. It is my belief that, in light of the critical role played by judges, particularly as it relates to the potential for self-represented litigants' meaningful participation, this research is urgent if the civil justice system is to meet its democratic potential and maintain its legitimacy.

Conclusion

To date, the access to justice movement has had numerous successes, but they remain relatively limited in those it has reached and piecemeal in effect. Driven by a range of different rationales, the reforms introduced have shared a similar and limiting institutional assumption – they have been hostage to a very lawyer-based conception of the problem to be solved. In this thesis, I have sought to suggest a different way of approaching access to justice and, as a result of the research completed, have recommended a different approach to remedying some of the ongoing challenges in the access to justice movement. Focussing on the increase in and situation of self-represented litigants, I have proposed a democratic paradigm for appreciating the challenge of access to justice and working toward a more responsive collection of interventions that engage a variety of stakeholders. Such a perspective is optimistic in the promise it holds for transforming not only the specific plight of self-represented litigants, but also the broader problems of access to justice. As part of this endeavour, there will be a need for more and better qualitative as well as quantitative research if that promise is to be fulfilled. This thesis offers itself as an important first step on that exciting journey.

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APPENDIX A

Interviews with pro bono volunteers at LHO

Demographics

- Year of Call?
- Type of practice – field / firm?
- How did you first hear about LHO?
- How long have you volunteered?

Experience at LHO with self-help legal services

- why did you decide to volunteer at LHO - what did or do you hope to accomplish?
- how do you view your role at the centre?
- what role do you think that self-help provides for individuals?
- challenges for you in volunteering at LHO? What is the most difficult part?
- what do you find most rewarding?

Thoughts on Self-Help and SRL's

- what is your general thoughts/perceptions about SRL's that you see come in to LHO?
- in talking with SRL's - what is your sense of what they wish to accomplish in coming to somewhere like LHO?
- In other words, what is your understanding of their expectations in terms of seeking help?
- do you think you are able to assist them in this regard?
- biggest challenge facing SRL's? In representing themselves?
- what do you think about SRL's ability to participate in these civil legal processes?

- what do you see (if any) long term affects or benefits of self-help?
- In your opinion - what do you think SRLs need? [Now putting aside lawyers – assuming this is not economically or practically feasible – what do they need?]
- What do you think would improve SRL’s ability to participate directly?
- reflecting back on your experience at LHO are there any cases that stood out for you - either positively or negatively?

Thoughts on Access More Generally

- generally speaking – what do you think about when you think about improving access to justice?
- what about more specifically in terms of access for SRLs?

Interview Outline

1. Are you involved with a case now or in the past year?
 - can you describe the nature of the case?
 - What kind of legal matter?
 - What side were you on?
 - Is it settled or ongoing? If ongoing, what stage is it at?
 - Have you been to court?

2. Before this case, have you been involved in other legal cases?
 - do you have any formal training in law?
 - Have you sought legal advice in the past? Or retained a lawyer?
 - Alternatively, have you been a self-represented litigant before?

3. Initial reasoning for engaging in self-help? (Factors involved in decision to engage S-H?)
 - Putting aside the outcome you wished to achieve, could you reflect on what you hoped to achieve using self-help? What you expected?
 - Also - aside from wishing to get a positive outcome in your case, what other factors were important in deciding to pursue your matter on your own?
(Potential Prompts: ie - time, control over the matter/the principle of the matter/emotional reasons)

4. What type of services did you get at Self-Help? (Experience in conducting your own file)
 - did those services help you with your case? If so, how?
 - What other resources if any did the client make use of when dealing with their legal matter?
 - In hindsight - can you think of something that would have also helped?
 - What specific tasks have you undertaken in your case?
 - How did you feel about doing those tasks?
(Potential prompt: Did S-H prepare you for those tasks?)
 - Did you feel like you knew what to do?

- How do you value your legal experience - do you think it was fair/even-handed? If so, why/ If not, why not?
- How do you feel about interacting with lawyers?
- How do you feel about interacting with Judges?
- Do you feel that you were able to make yourself heard?
- Did you feel that you were listened to?

5. What skills, if any, did you gain from the assistance at Self-Help?

- Thinking about what you learned about the legal process and the skills needed to participate in that process, can you think of any ways you might use that information/knowledge and skills in the future? This could be legal or non-legal?
- Can you reflect on the impacts (other than purely 'legal' – ie a particular outcome) that this experience may have had on you?
- What did you learn about this process? about legal proceedings?

6. Use of self-help in the future?

- if you had had a choice about using a lawyer would you have done so?
- What about in the future? (given this experience)
- How would your answer change if you knew that you would get the same result even with a lawyer?

7. What does the term access mean to you?

- what does the term “justice” mean
- What would 'justice' look like in their particular circumstances?
- Given the above question, does the client feel that he or she was able to obtain justice? If not, why not?
- Having been through this - what does it mean to get justice in a case?

APPENDIX B

Informed Consent Form

Study Name: The Role of Civil Law Self-Help Centres in Promoting Access to Justice

Researchers: Jennifer Leitch
PhD Candidate, Osgoode Hall Law School
[email address]

Purpose of the Research: To examine the role that self-help law centres play in a broader conceptualization of access to justice that which contemplates direct and meaningful citizen engagement and participation in civil society.

What You Will Be Asked to Do in the Research: In order to help with this research, you will be asked whether you are prepared to have a researcher observe a meeting between yourself and a volunteer lawyer at LawHelp Ontario. During the course of the meeting, the researcher will not participate in the meeting but simply observe the process and the discussion between you and the volunteer lawyer regarding your legal matter. Following this meeting, you may be contacted regarding your willingness to participate in an one-on-one interview with the researcher. This interview should take no more than one hour.

Risks and Discomforts: I do not foresee any risks or discomfort from your participation in the research.

Voluntary Participation: Your participation in the study is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not influence the nature of your relationship with LawHelp Ontario or York University either now, or in the future.

Withdrawal from the Study: You can stop participating in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researcher, LawHelp Ontario or York University, or any other group associated with this project. In the event you withdraw from the study, all associated data collected will be immediately destroyed wherever possible.

Confidentiality: All information you supply during the research (including all information discussed during the course of your meeting) will be held in strict confidence and unless you specifically indicate your consent, your name will not appear in any report or publication of the research. If individual information is used, it will not be identifiable in any way. The data will be comprised of transcripts of the audio recorded interviews

and handwritten notes taken following or during meeting or interviews. While these will have identifying information for the convenience of the study, such identifying information will be kept strictly confidential. Your data will be safely stored in a locked facility and/or on a password-protected computer device and only research staff will have access to this information. Data will be stored for two years at which time it will be destroyed. Confidentiality will be provided to the fullest extent possible by law.

Questions About the Research? If you have questions about the research in general or about your role in the study, please feel free to contact me or my Graduate Supervisor – Professor Janet Mosher by e-mail [email address]. This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University’s Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, please contact the Sr. Manager & Policy Advisor for the Office of Research Ethics, 5th Floor, York Research Tower, York University (telephone ***-***-**** or e-mail address)

Legal Rights and Signatures:

I _____, consent to participate in the research project entitled The Role of Civil Law Self-Help Centres in Promoting Access to Justice conducted by Jennifer Leitch. I have understood the nature of this project and wish to participate. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Signature _____
Participant

Date _____

Signature _____
Jennifer Leitch
Principal Investigator

Date _____

Informed Consent Form - Interview

Study Name: The Role of Civil Law Self-Help Centres in Promoting Access to Justice

Researchers: Jennifer Leitch

PhD Candidate, Osgoode Hall Law School

[email address]

Purpose of the Research: To examine the role that self-help law centres play in a broader conceptualization of access to justice that which contemplates direct and meaningful citizen engagement and participation in civil society.

What You Will Be Asked to Do in the Research: In order to help with this research, you will be asked whether you are prepared to participate in an one-on-one interview with the researcher. This interview should take no more than one hour. The focus on this interview is on your experience as a self-represented litigant who has made use of the legal services at LawHelp Ontario.

Risks and Discomforts: I do not foresee any risks or discomfort from your participation in the research.

Voluntary Participation: Your participation in the study is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not influence the nature of your relationship with LawHelp Ontario or York University either now, or in the future.

Withdrawal from the Study: You can stop participating in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researcher, LawHelp Ontario or York University, or any other group associated with this project. In the event you withdraw from the study, all associated data collected will be immediately destroyed wherever possible.

Confidentiality: All information you supply during the research (including all information discussed during the course of your meeting) will be held in strict confidence and unless you specifically indicate your consent, your name will not appear in any report or publication of the research. If individual information is used, it will not be identifiable in any way. The data will be comprised of transcripts of the audio recorded interviews and handwritten notes taken following or during meeting or interviews. While these will have identifying information for the convenience of the study, such identifying information will be kept strictly confidential. Your data will be safely stored in a locked facility and/or on a password-protected computer device and only research staff will have access to this information. Data will be stored for two years at which time it will be destroyed. Confidentiality will be provided to the fullest extent possible by law.

Questions About the Research? If you have questions about the research in general or about your role in the study, please feel free to contact me or my Graduate Supervisor – Professor Janet Mosher by e-mail [email address]. This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University’s Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, please contact the Sr. Manager & Policy Advisor for the Office of Research Ethics, 5th Floor, York Research Tower, York University (telephone ***-***-**** or e-mail address)

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Signature _____
Participant

Date _____

Signature _____
Jennifer Leitch
Principal Investigator

Date _____

Informed Consent

Study Name: The Role of Civil Law Self-Help Centres in Promoting Access to Justice

Researcher: Jennifer Leitch
PhD Candidate, Osgoode Hall Law School
[email address]

Purpose of the Research: To examine the role that self-help law centres play in a broader conceptualization of access to justice that contemplates direct and meaningful citizen engagement and participation in civil society.

Dear _____,

I am writing to ask if it would be possible for me to interview you about your experiences providing legal assistance to self-represented litigants. My understanding is that you volunteer your time and legal services at LawHelp Ontario and in so doing, assist self-represented litigants with their civil law legal matters.

I am a graduate student at York University here in Toronto. I am completing a research project on self-represented individuals' experiences in the civil justice system in Toronto, Ontario, which includes their experiences with securing self-help and the ways in which self-help impacts an individual's access to justice. For the purposes of my research access to justice is defined quite broadly to include meaningful participation in various aspects of life in a democratic society.

As part of my research, I am hoping to spend some time at LawHelp Ontario observing the process and procedures as well as sitting in on meetings between volunteer lawyers and self-represented parties that attend at the centre. My goal in conducting this research is to familiarize myself with the way in which the centre runs (and thus be able to contextualize the experiences of the self-represented litigants) and potentially gain a better understanding of how self-represented litigants make use of self-help services. Additionally, as noted, I would like to conduct a brief interview about your experience providing volunteer legal services as well as your thoughts and views about self-help and access to justice.

Our meeting would be in the nature of a conversation, initiated with open-ended questions on the research topics outlined above, as opposed to a formal interview or survey. I expect it to take about 45 minutes to one hour. In addition to ensuring that the content of our conversation is protected in accordance with the research ethics requirements of York University as noted below, I further confirm that your interview will remain anonymous and any identifiable information respecting any particular legal matter discussed including the court file number, the names of the parties, any reference to specific court dates or appearances or specific details about the case will be removed from the research file such that any reference to a specific legal case would not be

identifiable to an outside reader. I confirm that this will be in keeping with a continued expectation of confidentiality, akin to what you would provide in a legal context as part of the legal services that you provide at LawHelp.

My goal is to gain an understanding of your personal experience with a self-help program and self-represented litigants as well as your views and thoughts about non-lawyers' ability to participate in the civil justice system. With your permission, I may use quotations from our meeting in any published material that I may later produce. If that is the case and I do wish to use a quotation, I will send you the quote before it is included so that you may have the opportunity to correct any misunderstanding that I may have. I will use a tape recorder during this interview, but only as a supplement to my own note-taking. The data from this interview will be securely stored on the hard drive of a password protected computer and in the locked office of the researcher. After the two-year period, it will be stored in the researcher's secure archives in a locked storage space.

The research will result in a thesis that I will submit as a requirement for my Doctoral degree at York University. Doctoral theses are not widely circulated, but they are available to the public. I may also decide to publish portions of the research in academic journals.

York University has a research ethics policy. It indicates that, of course, you are under no obligation to meet with me or to answer any particular question that I might pose. You may stop the conversation at any point. The notes from our meeting will be kept on file with me for two years. They will be treated as confidential and kept in a secure location. This research and the methods involved in conducting this research (including the conversations that are part of it) have been reviewed and approved by a university research ethics committee for compliance with research ethics protocols. Should you have any questions about this study, you may contact me at [email address] [or my Graduate Supervisor – Janet Mosher by email \[email address\]](#). If you have any questions or want further information about the ethics related to this study, please feel free to contact the Manager, Office of the Research Ethics, York University, 5th Floor, York Research Tower, phone ***-***-****.

I will contact you within the next two weeks to see if a convenient time for meeting can be arranged.

Regards,

Jennifer Leitch

Legal Rights and Signatures:

I, _____, consent to participate in the research project entitled The Role of Civil Law Self-Help Centres in Promoting Access to Justice conducted by Jennifer Leitch. I have understood the nature of this project and wish to participate. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Signature _____

Date _____

Participant

Signature _____

Date _____

Jennifer
Researcher

Leitch