

LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

**FIFTEEN STORIES:** **LITIGANTS**  
**IN PERSON IN THE CIVIL JUSTICE SYSTEM**

**KATHRYN LEADER**

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## DECLARATION

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## ABSTRACT

Litigants in Person [LiPs] have a poor reputation in legal scholarship. Routinely labelled ‘pests’, ‘nuts’, ‘weirdos’, and worse, LiPs are often posited as a problem for the courts. This perception has only been aggravated by the passage of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act in April 2013 which ended legal aid for the majority of litigants in non-criminal cases. And yet, despite these pejorative attitudes, we know surprisingly little about LiPs. Historically marginalised in scholarship, LiPs are rarely spoken about, and almost never spoken to. This thesis sets out in part to redress this by putting their experiences at the centre of this research. Drawing on fifteen oral history life stories with LiPs, this thesis asks: what is going to law like for them? In addition to adding LiP experiences to the record, though, this thesis also sets out to consider what LiP experiences can tell us about access to justice. This thesis contends that LiPs face far more challenging difficulties than has heretofore been recognised in research. Moreover, this thesis argues that these difficulties are, counter to popular perception, not problems inherent to LiPs, but are instead indicative of systemic inadequacies in the civil justice system itself, a system which theoretically provides access for LiPs but which excludes them in all meaningful ways. Ultimately, I argue that until reform addresses the systematic inequality embedded in the civil justice system, LiPs are doomed to fail.

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It is curious that lay litigants have been regarded ... as problems, almost as nuisances for the court system. This has meant that the focus has generally been upon the difficulties that litigants in person pose for the courts rather than the other way around.<sup>1</sup>

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<sup>1</sup> John Baldwin, Monitoring the Rise in the Small Claims Limit: *Litigants' Experience of Different Forms of Adjudication* (LCD Research Series 1/97, December 1997).

## INTRODUCTION

This thesis begins with a simple question: why do litigants in person [LiPs] have such a terrible reputation? Routinely labelled pests, nuts, weirdos and worse, LiPs are frequently spoken about, or written about, in highly pejorative terms.<sup>2</sup> These terms are so pejorative, in fact, that no other group involved in legal proceedings is talked about in equally negative terms, including serial criminal defendants, who attract less vitriol. This is perhaps unsurprising: the figure of the criminal defendant as the “poor accused” and the obligation of the legal professional to robustly represent this individual is fundamental to our conception of justice, and to our notion of a fair trial. LiPs, however, don’t fit into this idealised vision of justice. Mostly appearing in proceedings of very little financial or legal consequence, claiming or defending comparatively “mundane” issues, LiPs have no place in legal mythologizing. The fact that LiPs cut rather unromantic figures may be one reason why they attract comparatively little sympathy.<sup>3</sup>

As this thesis contends, however, the problem isn’t simply that the LiP doesn’t belong in legal mythology. The problem is that the LiP doesn’t belong *anywhere*. Even when we aren’t imagining ideal legal proceedings—even when we are simply thinking about any kind of legal encounter—we probably aren’t picturing LiPs. This is because normal legal practice means being legally represented. Our civil justice system reflects this: it is not a system, as the Civil Justice Council noted in 2012, ‘designed with self-represented litigants in mind’.<sup>4</sup> LiPs are an aberration from what is perceived of as “normal”. The normalisation of representation, and the consequent aberrance of *not* having legal representation, means that there is no clear place for LiPs in the civil justice system.<sup>5</sup> This thesis therefore seeks to understand *how* LiPs came to be perceived as aberrant from legal proceedings, and what consequences flow for LiPs *from* this positioning. As I will show, this aberrance works as a kind of double marginalisation: LiPs are

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<sup>2</sup> See, for example, Tania Sourdin and Nerida Wallace, “The Dilemmas Posed by Self-Represented Litigants – The Dark Side,” *Access to Justice*, Paper 32 (2012). More examples are provided in Chapter Two.

<sup>3</sup> It is worth pointing out that while LiPs are generally unromantic to the legal profession, there is a romanticism on the part of the public more widely, in the idea of the “little guy” going up against a larger foe, such as in the ‘McLibel’ case. See *McDonald’s Corporation v Steel & Morris* [1997] EWHC QB 366.

<sup>4</sup> Civil Justice Council, *Access to Justice for Litigants in Person* (London: CJC, November 2011), 11.

<sup>5</sup> It is important, of course, to distinguish between different kinds of civil proceedings. However, as I will go on to argue, while some proceedings, such as small claims, are *more* accessible for LiPs than others, they still always pose more risks and difficulties for LiPs than they do for represented parties.



both structurally marginalised, through their lack of place in the civil justice system, as well as marginalised through their positioning as aberrant in their behaviour or character.

In this respect, then, LiPs—although there are more of them than we might think—are analogous to a minority. That is, while LiPs may not be knowingly and actively discriminated against, the barriers they face are systemic and institutional. In addition, they have been largely ignored or overlooked by legal scholarship. In fact, although LiPs are often talked about pejoratively, the bigger problem has been that historically, LiPs haven't been talked about, or thought about, much at all. They have also hardly ever been spoken *to*. LiPs rarely feature in legal scholarship about civil justice. Indeed, with some notable, and important, exceptions, very little scholarship has focused directly on the LiP at all, leading to their effective invisibility in the records.<sup>6</sup> This thesis is therefore in part a means of correction, joining a small body of scholarship that seeks to understand what it is like to pursue or defend a claim without legal representation.<sup>7</sup>

However, although LiPs have been historically marginalised in legal scholarship, it is important to acknowledge that recent changes to legal aid have resulted in a considerable increase in interest in LiPs. I began this thesis in April 2013, the month that the Legal Aid, Sentencing and Punishment of Offenders [LASPO] Act came into force. This Act effectively cut off access to legal aid for the overwhelming majority of litigants in non-criminal cases.<sup>8</sup> In the wake of the passage of this bill, the LiP came to the fore as a pressing issue for the legal profession and for legal scholarship. This was primarily because it was expected that these cuts in legal aid would lead to a significant rise in LiPs in civil and family proceedings.<sup>9</sup> Scholars and practitioners were therefore wrestling with the projected impact LiPs would have on the courts. In addition, discussions about LiPs occurred in tandem with debates and protests about the future of legal aid practitioners after LASPO. There has consequently been

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<sup>6</sup> This body of scholarship includes the influential work of Hazel Genn, John Baldwin, Richard Moorhead and Mark Sefton, Julie McFarlane, Liz Trinder and Rosemary Hunter.

<sup>7</sup> See in particular, Hazel Genn and Yvette Genn, *The Effectiveness of Representation at Tribunals*, Report to the Lord Chancellor (LCD, London 1989); Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented Litigants in First Instance Proceedings*, Department of Constitutional Affairs Research Series 2/05 (DCA: United Kingdom, 2005); John Baldwin, "Litigants Experience of Adjudication in the Civil Courts," *Civil Justice Quarterly* 18 (1999): 12-40; Paul Lewis, "Litigants in Person and their Difficulties in Adducing Evidence: A Study of a Small Claims in an English County Court," *International Journal of Evidence and Proof* 11, no.1 (2007): 24-48; Robert Lee and Tatiana Tkacukova, *A Study of Litigants in Person in Birmingham Civil Justice Centre* (CEPLER: Birmingham, 2017).

<sup>8</sup> For a summary of these early changes, see Bar Council, "Bar Council response to the Transforming Legal Aid: Next Steps Consultation," *Consultation Paper*, October 2013.

<sup>9</sup> See Judith Marsh, "A View from the Personal Support Unit," *The Rise of the Litigant in Person: Three Perspectives on The Increasing Numbers of People Who Represent Themselves in Court* (London: Inner Temple, 2013), 48.

a marked increase in scholarly interest in LiPs since I began this PhD, and this has only continued to grow over the last few years.<sup>10</sup>

But while the passage of LASPO was important, and while research into LiPs is growing, this thesis parts company from recent scholarship in two ways. Firstly, I argue that while the passage of LASPO may have aggravated the situation, legal aid changes by no means created the difficulties that LiPs face. As I will show, these difficulties have been with us for a very long time and they go far deeper than the result of legal aid restrictions. They are, instead, the result of an institutional inequality. Secondly, this thesis contends that this inequality has a far deeper impact on LiPs than has been hitherto realised. Ultimately, while much post-LASPO writing focuses on the impact LiPs will have on the courts, this thesis argues we should spend more time considering the very real impact the courts have on the LiP.<sup>11</sup>

This thesis takes its conceptual framework from the idea of exploring different ‘ways of seeing’ when it comes to LiPs.<sup>12</sup> Firstly, this thesis seeks to understand how LiPs are seen *by* the legal profession, and secondly through using oral history techniques in the form of life stories interviews, this thesis seeks to understand how LiPs see the law, the people who work within the law, and themselves.<sup>13</sup> As this thesis will demonstrate, what emerges from this analysis is a disjuncture between discourses; LiPs have radically different ways of seeing to legal professionals, and the result of this is that these groups largely talk across one another. The failure of understanding one another’s ways of seeing is central to explaining many of the difficulties that arise in practice and communication. Guided by these ideas, then, this thesis pursues an original analysis of LiP experience in the civil justice system, seeking to answer four key research questions. Firstly, how and why did LiPs come to acquire the negative reputation that they have? Secondly, how can we better gain access to LiP experiences, and to their ways of seeing? Thirdly, what can these experiences tell us about the institutional barriers to access that LiPs face? And finally: what can we do about these barriers? The pursuit and elaboration of these four questions is the story of this thesis.

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<sup>10</sup> This includes most recently Lee and Tkacukova, *A Study of Litigants in Person*; Trinder et al, “Litigants in Person in Private Family Law Cases,” *Ministry of Justice Analytical Series* 2014; the research project under Professor Grainne McKeever at Ulster University (<http://www.nuffieldfoundation.org/impact-litigants-person-northern-ireland-court-system>).

<sup>11</sup> As pointed out by John Baldwin, in the epigraph that opens this thesis, as well as Justice Woolf and others.

<sup>12</sup> I have borrowed the term ‘ways of seeing’ from John Berger’s pioneering work of images and visual arts, where he explores how the way in which we see is affected by what we know and believe. See John Berger, *Ways of Seeing* (London: Penguin, 1972).

<sup>13</sup> I will explain life stories interviews in more detail later in the chapter as well as in depth in Chapter Four which outlines my methodology.

## WHAT IS A LITIGANT IN PERSON?

The first point of departure is to clarify who exactly is a LiP. This is by no means straightforward. In addition to issues with an historical lack of data on LiPs (Hazel Genn memorably described it as a “black hole”),<sup>14</sup> demographic research that has been done shows a considerable diversity in gender, age, ethnicity and education.<sup>15</sup> As John Baldwin pointed out, therefore, ‘the average litigant or the typical court user does not exist, and any attempt to generalise about them is hazardous and probably in most circumstances misleading’.<sup>16</sup> In addition to this, inconsistencies as to the definition of the term LiP create considerable confusion amongst those attempting to discuss legal aid changes, propose reforms or even to intervene in any way in the conversation. Peter Gibson, LJ defined a LiP as:

A party to litigation who represents himself by appearing in court himself. If someone other than himself represents him, then notwithstanding that that other person is his agent, that party is not a litigant in person.<sup>17</sup>

But while this may seem simple enough, this definition in fact fails to capture a large proportion of individuals without representation. Lord Gibson emphasises that being a LiP involves attending court, but this excludes individuals who may lack legal representation, be involved in legal proceedings, and never set foot inside a courtroom. These people are also LiPs.<sup>18</sup> In the post-Woolf reforms world, with an emphasis on mediation and on avoidance of court, only including those appearing in courtrooms considerably truncates our understanding of who acts as a LiP.<sup>19</sup> A more comprehensive definition, then, is the one issued by the *Equal Treatment Bench Book*: ‘The term [litigant in person] encompasses those preparing a case for trial or hearing, those conducting their own case at a trial or hearing and those wishing to enforce a judgment or to appeal’.<sup>20</sup>

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<sup>14</sup> Hazel Genn, Conference Paper given at Australasian Judicial Institute of Administration, *Assisting Unrepresented Litigants*, Sydney, 15-17 April 2014. Richard Moorhead also describes the lack of information on LiPs as a “black hole” in his 3 June 2013 blog at: <https://lawyerwatch.wordpress.com/2013/06/03/response-to-legal-aid-consultation/> (accessed 14 July 2017). See also Genn, *Judging Civil Justice: The 2008 Hamlyn Lectures* (Cambridge: Cambridge University Press, 2009), 133.

<sup>15</sup> Kim Williams, *Litigants in Person: A Literature Review* (Ministry of Justice: London, 2011).

<sup>16</sup> Baldwin, “Litigants Experience,” 20.

<sup>17</sup> Gibson, LJ, [1996] 2 All ER 334 at 341, [1996] 1 WLR 518 at 525.

<sup>18</sup> And this conversation leaves aside the question of using the term ‘LiP’ over the arguably more comprehensible term ‘self-represented litigant [SRL]’ which is gaining currency in other jurisdictions, such as Australia and Canada. This latter term was considered, and rejected, by Lord Dyson in 2013. See: <https://www.judiciary.gov.uk/publications/mor-guidance-terminology-lips/> (accessed 14 July 2017).

<sup>19</sup> Lord Woolf, *The Woolf Report: Access to Justice* (London: Ministry of Justice, 1996).

<sup>20</sup> Judicial College, *Equal Treatment Bench Book* (London: Judicial College, 2013), 1.

However, this still leaves the question of McKenzie Friends to consider. McKenzie Friends are individuals who assist LiPs but who do not formally represent them.<sup>21</sup> Practice guidance issued in 2010 emphasises that McKenzie Friends can provide ‘moral support’, ‘take notes’, help with ‘case papers’ and ‘quietly give advice’ but may not ‘act as the litigant’s agent’, emphasising that McKenzie Friends have no right of audience and are not formal agents.<sup>22</sup> Gibson suggests that anyone represented by an ‘agent’, whether or not they are a legal representative, is not a LiP, which implies that individuals with McKenzie friends are still considered LiPs. However, considering that in ‘exceptional circumstances’ McKenzie Friends *can* be granted rights of audience, and considering that McKenzie Friends can provide significant assistance for litigants, definitions of LiP that do not consider McKenzie Friends also arguably fail to capture another important variety in LiP experience.<sup>23</sup>

Terminological confusion also arises from the assumption, as Moorhead and Sefton point out, that LiPs are claimants who bring proceedings.<sup>24</sup> As I will demonstrate in the next chapter, the association of LiP with claimant is linked to pejorative assumptions predicated on the belief that LiPs are litigious and actively pursue proceedings (usually unnecessarily).<sup>25</sup> But LiPs act as both claimants and defendants. If anything, as Moorhead and Sefton point out, the majority of LiPs are defendants. Indeed, they go on to point out that ‘passive defendants’, whom they define as named defendants in litigation who never actively take part in proceedings, let alone appear in court, formed 56 per cent of their sample.<sup>26</sup> Definitions of LiPs, therefore, that are based on appearing in a courtroom or active participation limit, rather than assist our understanding.

Finally, the term LiP is linked to the literature that posits LiPs as being individuals who deliberately “go it alone”. However, as past research demonstrates, and as this research

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<sup>21</sup> See Lord Chief Justice of England and Wales, *Reforming the Courts’ Approach to McKenzie Friends: A Consultation* (Stationery Office: London, November 2016). See also Leanne Smith, Emma Hitchings and Mark Sefton, *A Study of Fee-Charging McKenzie Friends and Their Work in Private Family Law Cases* (Bar Council: Bristol and Cardiff University, 2017).

<sup>22</sup> Courts and Tribunals Judiciary, *Practice Guidance: McKenzie Friends (Civil and Family Courts)* (Courts and Tribunal Judiciary: London, 2010), 1.

<sup>23</sup> McKenzie Friends can be granted ‘rights of audience’ on application by the litigant if the judge feels there are exceptional circumstances. Examples of circumstances given in the practice guidance includes litigant health problems, a lack of financial resources, or the possibility that a litigant is sufficiently inarticulate to require considerable amounts of prompting, which would delay proceedings. See Courts and Tribunals Judiciary, *McKenzie Friends*, 3-4.

<sup>24</sup> Moorhead and Sefton, *Unrepresented Litigants*, 245.

<sup>25</sup> Of course, calling someone litigious is not in and of itself pejorative; however, in this context the link is made between ‘frivolous’ litigation and wasting the courts’ time; two claims frequently made against LiPs, as I will outline in the next chapter.

<sup>26</sup> *Ibid*, 27.

supports, this is almost never the case.<sup>27</sup> Most LiPs have intermittent, and considerably varying, degrees of representation and advice.<sup>28</sup> The impact of this kind of advice and representation has a meaningful influence on how and why individuals become LiPs and as such, it is important to acknowledge this variety. Cumulatively then, many of the assumptions we make about LiPs often turn out to be wrong, and many of the ways in which we attempt to define LiPs fails to capture the true breadth of individuals who *are* LiPs. For the purposes of this dissertation then, I define LiPs as broadly as possible: individuals who are either claimants or defendants, who do not have sustained legal representation throughout the life of their legal proceedings.

In addition to the diversity of individuals who may constitute LiPs, this complexity is only added to by the fact that LiPs act in multiple kinds of proceedings in the United Kingdom. This is reflective of the U.K.'s position of having no restrictions of access in any court or tribunal for those without representation.<sup>29</sup> This breadth necessitates some limitations on the scope of this study. This research focuses on a group of LiPs who have lodged matters in the County Courts. The reason I have chosen this specific court is firstly, because County Courts are theoretically designed to facilitate access for LiPs.<sup>30</sup> Consequently, the experiences LiPs have with these proceedings help test whether the current procedures in place to help LiPs are represented in the experiences LiPs have or whether (as I will argue) there remain significant barriers to access.

Secondly, my focus on the County Court forms a point of difference from much post-LASPO research which has focused on LiPs in private family law proceedings.<sup>31</sup> As stated earlier, my thesis contends that LiP difficulties date back farther than the 2013 legal aid changes and consequently such changes are not my focus. When I state that I am looking at County Court proceedings, however, I do not mean that my research is limited to this court alone. One of the significant findings from this research is that almost all the LiPs interviewed had been involved in other court proceedings as well; so, while the County Courts form a baseline of

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<sup>27</sup> See Julie McFarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, Treasurer's Advisory Group on Access to Justice [TAG] Working Group Report, 86.

<sup>28</sup> Hazel Genn, *Paths to Justice* (Hart Publishing: Oxford, 1999), 83-98.

<sup>29</sup> Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (Oxford: Oxford University Press, 2015).

<sup>30</sup> This is comparatively speaking however; as even the *Handbook for Litigants in Person*, written by six judges for LiPs in civil proceedings, prefaces the guide with a warning that no court is designed for a LiP. See HHJ Edward Bailey et al., *A Handbook for Litigants in Person* (London: Courts and Tribunals Judiciary, 2012).

<sup>31</sup> See for example, Trinder et al, "LiPs in Private Family Law Cases"; Jess Mant and Julie Wallbank, "The Post-LASPO Landscape: Challenges for Family Law," *Journal of Social Welfare and Family Law* 39, no. 2(2017): 149-151; Liz Trinder and Rosemary Hunter, "Access to Justice? Litigants in Person Before and After LASPO," *Family Law* 45, no.5 (2015): 535-41; Jess Mant, "Neoliberalism, Family Law and Access to Justice," *Journal of Social Welfare and Family Law* 39, no. 2 (2017): 246-258.

shared experience, the interviews in this study take us to many different kind of courts, including tribunals, higher civil courts and criminal proceedings.

In addition, although I have so far talked about different kinds of *courts* LiPs are involved in, I am not focusing only on what happens in the courtroom. This would give a misleading weight to these kinds of appearances when the reality of legal proceedings is that attending hearings is a minor part of the process. Most litigation involves far more time being spent “behind the scenes” in negotiations, discussions, settlements and mediation.<sup>32</sup> In addition, research into LiPs has repeatedly shown the important effect differing kinds of advice and preparation they receive can have, if and when they do appear before a court or a tribunal because ‘representation...is the culmination of a series of preparatory stages in the redress of grievances or challenging of decisions which begins with early advice’.<sup>33</sup> Consequently this thesis pays equal attention to LiP experiences before, during and after appearing in court, and includes those LiPs who may never step into a courtroom.

#### DISCOURSE, SPECIALISM AND THE LEGAL PROFESSION

A key focus in this thesis is the attempt to elaborate on different discourses, or “ways of seeing” communicated by both LiPs and by legal professionals and the gaps between the two (loosely definable as “lay” and “law”). In Moorhead and Sefton’s 2005 study into unrepresented litigants, for example, they observe that: ‘With unrepresented litigants, judges and court staff pointed out there was a much stronger possibility of cases being entirely misconceived, or being expressed solely in social, non-legal terms’.<sup>34</sup> What Moorhead and Sefton draw attention to is a collision between what they term ‘social’ (non-legal) understanding and legal understanding. This conflict is one of the primary problems LiPs face when representing themselves as what they perceive to mean by “common sense”, “justice”, “relevance” or “fairness” may bear little resemblance to legally understood meanings of these terms. What is common sense to legal practitioners and what is common sense to a LiP will be fundamentally different and is likely to come into conflict.<sup>35</sup> This thesis will contend that this kind of knowledge gap is a crucial means by which LiPs are excluded from meaningful participation in legal process.

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<sup>32</sup> Genn describes this as the ‘centrality of out of court settlement’ to the civil justice system in *Paths to Justice*, 2.

<sup>33</sup> Genn and Genn, *Representation at Tribunals*, 126.

<sup>34</sup> Moorhead & Sefton, *Unrepresented Litigants*, 154.

<sup>35</sup> Of course, such conflicts or gaps in perception also exist between *all* litigants and legal professionals, not just LiPs; however, what distinguishes LiPs here is that they do not have a representative to translate their experiences for them.

In analysing these different ways of seeing, I use the term discourse in the sense that Michel Foucault meant; not as a formalistic analysis of language, but rather as an interrogation into the specific conditions under which a way of seeing is constructed and deployed, and the effect that this has.<sup>36</sup> As Foucault points out:

we must grasp the statement in the exact specificity of its occurrence; determine its conditions of existence, fix at least its limits, establish its correlations with other statements that may be connected with it, and show what other forms of statement it excludes.<sup>37</sup>

In this respect, to analyse discourses, and in particular to think about the discourse of legal practitioners and LiPs is to fundamentally consider the network of power relations within which such discourses take place:

To reveal in all its purity the space in which discursive events are deployed is not to undertake to re-establish it in an isolation that nothing could overcome; it is not to close it upon itself; it is to leave oneself free to describe the interplay of relations within it and outside it. <sup>38</sup>

Importantly, this kind of discourse is not limited to language, but also encompasses embodied behaviours, procedure and habituated practice, all of which play an important role in constituting ways of disadvantaging and excluding LiPs.

However, in approaching describing the relationship between “lay” and “law,” specifically in terms of inequality of power, I am conscious of not oversimplifying how complex each of these subject positions are. So, while I believe that certain themes of practice and certain behaviour may be *generally* apparent in the behaviour of legal practitioners, I want to emphasise that I am not claiming that *all* legal practitioners think or behave in a uniform way, which of course they do not. It is at this point that I find the sociological theory of Pierre Bourdieu valuable in making this complexity clear. Bourdieu follows Foucault in seeing discourse as constituting and defining power relations, but is particularly interested in how individuals absorb and reproduce such discourses, or what he terms ‘field specific knowledge’, arguing that this is largely through unconscious habits and practice, or what he terms *habitus*.<sup>39</sup>

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<sup>36</sup> Michel Foucault, *The Archaeology of Knowledge and The Discourse on Language* (New York: Pantheon Books, 1972), 27.

<sup>37</sup> *Ibid*, 28.

<sup>38</sup> *Ibid*, 29.

<sup>39</sup> Bourdieu’s ‘field theory’ emerges from his analysis of different ‘fields’ of cultural production where he investigates how field-specific concepts develop and how individuals working within these fields seek to

For Bourdieu, *habitus* is a dynamic, conceptual idea that seeks to describe an individual's predispositions and belief systems, based on what individuals learn to value from early childhood onwards. This acquisition of values comes through the drive of all humans to seek recognition and validation from others.<sup>40</sup> This drive continues into our professional lives, and any individual working within a field, such as the legal field, will naturally seek recognition within that field: we are all in pursuit of what Bourdieu termed symbolic capital, whether that be prestige, advancement, or explicit financial gain.<sup>41</sup> To be successful within a field, individuals (or what Bourdieu termed 'agents') will internalise and naturalise the logics of that particular field or, more informally, they will learn the "rules of the game," in their effort to get on. But, importantly, in the process of learning the rules of the game, Bourdieu argues that these individuals end up misrecognising the 'social conditions under which it [the juridical field] is manifested' as being "natural". This is something apparent in all fields:

The tendency to conceive of the shared vision of a specific historical community as the universal experience of a transcendental subject can be observed in every field of cultural production. Such fields appear as sites in which universal reason actualises itself, owing nothing to the social conditions under which it is manifested.<sup>42</sup>

So, like Foucault, Bourdieu is arguing that discourses or practices that emerge within specialist fields present themselves as timeless or 'eternal', but in so doing disguise the specific historical conditions, and power relations, under which they are constituted to the point that even those working within these fields may not necessarily recognise the inequality on which such practices are founded.

For Bourdieu, misrecognition is essential for establishing the relative autonomy of any specialist field. So, the gap between lay and law for Bourdieu is reproduced through agents unconsciously learning and playing out the "rules of the game" in that field. But this gap isn't accidental; instead the gap is the border between laypersons and law that emphasises the necessary skills *possessed by the legal profession alone*. As Bourdieu comments:

The institution of a "judicial space" implies the establishment of a borderline between actors. It divides those qualified to participate in the game and those who, though they may

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establish a specialised identity. See Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature* (Columbia University Press: New York, 1993), 162-164.

<sup>40</sup> Pierre Bourdieu, *Pascalian Meditations* (Stanford: Stanford University Press, 1997), 166.

<sup>41</sup> Ibid, 166.

<sup>42</sup> Pierre Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field," *Hastings Law Journal* (1987): 819.



find themselves in the middle of it, are in fact excluded by their inability to accomplish the conversion of mental space—and particularly of linguistic stance—which is presumed by entry into this social space.<sup>43</sup>

Bourdieu's theory is critical for this research as it helps explain how a LiP's failure to achieve the requisite skills demanded of them in the courtroom (and elsewhere) is a necessary and deliberate consequence of entry into juridical space. LiPs cannot accomplish the 'conversions' required of language and behaviour because *they are not meant to*. A LiP's failure is a means of maintaining the specialist legal profession: it sustains dependence on legal representation to navigate legal process.

Critically, however, legal practitioners will not necessarily be fully cognisant of the difficulties for LiPs because they have naturalised what is in fact a very specifically legally produced form of understanding and knowledge:

an essential tautology...requires that within the field, conflicts can only be resolved juridically—that is, according to the rules and conventions of the field itself. For this reason such entry completely redefines ordinary experience and the whole situation at stake in any litigation. As is true of any "field," the constitution of the juridical field is a principle of constitution of reality itself.<sup>44</sup>

This is evidenced by Moorhead and Sefton, who noted in 2005 that:

There was some evidence of a broader, and understandable, confusion of law with social or moral notions of 'justice'. Unrepresented litigants frequently sought to introduce evidence of facts relevant to their own perceptions of fairness but irrelevant to the legal adjudication of their dispute.<sup>45</sup>

I argue, following Bourdieu, that what Moorhead and Sefton term 'confusion' is better understood as a conflict of concepts produced by the gap between lay and law: this gap is productive because it allows the legal field to redefine 'ordinary' concepts into a hierarchy of meaning that privileges legal understanding and undermines 'social' meaning. As Bourdieu expresses it: 'The professionals create the need for their own services by redefining problems

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<sup>43</sup> Ibid, 828.

<sup>44</sup> Bourdieu, "The Force of Law," 831.

<sup>45</sup> Moorhead and Sefton, *Unrepresented Litigants*, 256.

expressed in ordinary language as *legal* problems, translating them into the language of the law'.<sup>46</sup>

As Bourdieu notes, legal language tends to emphasise the neutral and the objective that transcends historically contingent and “ordinary” understandings. This leads to a fundamental difference between “common sense” as internally defined within the legal field, and what people from *outside* this field might see as common sense.<sup>47</sup> By drawing on Bourdieu’s terminology, then, I am not arguing that legal professionals necessarily deliberately seek to undermine or aggravate LiPs; rather I argue that training and repeated practice leads those who work within the legal field to embody and reproduce certain kinds of knowledges that disadvantage LiPs. Legal practitioners will frequently (although not always) misrecognise their skills as normal and this, as this thesis will demonstrate, leads to all sorts of difficulties.

In addition to Foucault’s work on discourse, and Bourdieu’s field-theory, another important theoretical building block for this research is the work of Magali Sarfatt Larson, whose 1977 work *The Rise of Professionalism: A Sociological Analysis*, outlines what Larson terms the ‘professional project’. For Larson, the professional project is:

the process by which producers of special services sought to constitute and control a market for their expertise. Because marketable expertise is a crucial element in the structure of modern inequality, professionalization appears also as a collective assertion of special social status and a collective process of upward social mobility[...]. professionalization is thus an attempt to translate one order of scarce resources—special knowledge and skills—into another—social and economic rewards.<sup>48</sup>

Larson’s work also emphasises the gap between lay and law, arguing that this gap is a deliberate consequence of this professional project. Like Bourdieu, Larson too does not claim that such a project is necessarily a conscious undertaking. As she notes, when she uses the term project:

it does not mean that the goals and strategies pursued by a given group are entirely clear or deliberate for all the members, nor even for the most determined and articulate among them. Applied to the historical results of a given course of action, the term “project”

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<sup>46</sup> Bourdieu, “The Force of Law,” 833-834.

<sup>47</sup> Ibid, 820.

<sup>48</sup> Magali Sarfatt Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press 1977), xvii.

emphasises the coherence and consistence that can be discovered ex post facto in a variety of apparently unconnected acts.<sup>49</sup>

However, what distinguishes Larson's work from Bourdieu, and makes her work of value to this thesis, is her attention to how the dual goals of the professional project—consisting of both monopolisation of the market and the attainment of social status—develop.

Laying out the historical development of professions, Larson traces the way in which professions emerge in the 19<sup>th</sup> century in a political and economic context marked by the emergence of new markets and the movement of rural populations towards urban centres. As she notes, 'the modern model of profession emerges as a necessary response of professional producers to new opportunities for earning an income'.<sup>50</sup> Larson argues that critical to the development of a profession is attention to standardisation of practice, the development of a 'cognitive commonality,' and the move to eliminating any competition from unregulated actors. All of these tendencies, Larson argues, are oriented towards the ultimate goal, which is the social distancing of these professionals from non-professionals, and the consequent status that arises from this distinction.<sup>51</sup> I draw on Larson's work to argue that much of the difficulties that LiPs experience is a by-product of this professional project. Seen through the lens of the professional project, LiPs are not simply laypersons. Instead they are also individuals who aren't appropriately educated, regulated, licenced or trained to be taking on legal work, but who are arguably taking the place of a professional. This analysis opens up another possibility as to why LiPs are talked about pejoratively. This is not only because they are deemed insufficiently competent, but because their growing presence constitutes a threat towards the monopoly of the legal profession.

In addition to the literature that seeks to understand and approach talking about legal practitioners and "the law", this thesis also draws on socio-legal scholarship to talk about "the lay". For this, the work of Patricia Ewick and Susan S. Silbey in *The Common Place of Law* is of particular value.<sup>52</sup> Ewick and Silbey's work concentrates on what the law means to those outside of the legal profession and how ordinary people understand their connection with the law. As such, their work focuses on conceptions of law as conceived outside of a legal framework and consequently provides insight into lay meanings of terms such as 'justice', or 'fairness' that I draw on to consider how LiPs and legal professionals may experience conflicts in understanding. In addition, Hazel Genn's landmark *Paths to Justice* is an important reference

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<sup>49</sup> Ibid, 6.

<sup>50</sup> Ibid, 9-10.

<sup>51</sup> Ibid, 77.

<sup>52</sup> Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago and London: University of Chicago Press, 1998).

point in this research as well. Genn's work outlines 'justiciable problems' and what people do about them. Genn's work seeks to understand what people think about going to law and how they experience the process of litigation, including their motives for going to law in the first place. Genn's emphasis on litigant perceptions and experiences, and on the impact of going to law, has been of considerable influence in developing my own questions for interview.

However, while such socio-legal scholarship is of great value in exploring the lay, I argue that to understand LiPs it is also essential to think about them outside of the frames and categories legal research tends to place on them. In this respect, this thesis contends it is useful to draw on disciplines outside *of* law to try and understand these individuals who are outsiders *to* the law. Because of this, this thesis draws on materials and practices from oral history as well as anthropological and ethnographic theory; in particular the work of Luisa Passerini, Clifford Geertz and Kristen Hastrup. While Passerini is located in the discipline of oral history, and Geertz and Hastrup are anthropologists, all three scholars concentrate on how to develop research methods orientated towards getting as close as possible to understanding another's way of seeing, as well as pay close attention to the ethics involved in such a project.

For Passerini, approaching another person's way of seeing involves understanding the 'subjectivity' of the research subject: getting at not just what individuals say they did but which also gets at 'the dimensions of memory, ideology and subconscious desires.'<sup>53</sup> Geertz, too, argues that a researcher needs to approach understanding 'from the native's point of view'.<sup>54</sup> Like Passerini, he argues this is not just about finding out what individuals say they did, but also 'to figure out what the devil they think they are up to'.<sup>55</sup> Both scholars therefore employ methods that attempt to understand what research subjects may not articulate directly because they may take it for granted about their own world. Geertz and Passerini are therefore influential in shaping the kinds of questions I ask interviewees, as I will go on to outline in more detail in Chapter Four.

Kirsten Hastrup shares the desire Passerini and Geertz have for approaching a 'native' understanding of research subjects. However, in addition Hastrup is interested in the ethics of ethnography. Hastrup argues that it is essential that sufficient importance is given to how a researcher translates or analyses data because this raises critical ethical questions about how a person can speak for another.<sup>56</sup> This is of pertinence in the context of the power imbalance that

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<sup>53</sup> Luisa Passerini, "Work, Ideology and Consensus under Italian Fascism," *History Workshop Journal* 8 (1979): 84.

<sup>54</sup> Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (London: Basic Books, 1983), 56-58.

<sup>55</sup> *Ibid.*, 56-58.

<sup>56</sup> Kristin Hastrup and Peter Hervik, eds., *Social Experience and Anthropological Experience*, (London: Routledge, 1994).

exists between researcher and research subject. So, while this project does not constitute an ethnography, Hastrup's work on the ethics of writing and translation is invaluable in informing how I approach data analysis in this project.<sup>57</sup>

Finally, however, while this research is predicated on exploring the distinction between lay and law, what this thesis ends up doing is disrupting these categories. As I have argued above, reducing "the law" to a uniform position, rather than a site of contestation and disagreement, is misleading and counterproductive. Similarly, I will go on to argue that calling LiPs laypersons can also be unhelpful. Many LiPs in this study have repeat experiences as claimants and defendants, with some ending up being engaged in multiple kinds of legal proceedings over decades.<sup>58</sup> As such, these LiPs are involved in their own kind of repeat practice, and evolve techniques and skills that mirror the acquisition of specialist skills. So, while LiPs do not acquire *legal* skills (and indeed, how they fail to do so is critical to this research), the attempt by LiPs to acquire what they *perceive* to be legal skills and knowledge means they end up being not quite laypersons either. I instead argue that LiPs might best be understood as occupying a space somewhere in-between layperson and specialist. While their expertise does not constitute legal expertise, it is a form of specialism, if a peculiar one, and it is an integral part of how LiPs understand themselves.

## THESIS STRUCTURE

I begin this thesis by exploring how LiPs are understood or, as I argue, *misunderstood* in legal scholarship and what potential issues may flow from these misconceptions. Starting with the passage of LASPO, I analyse the literature emerging at this moment of crisis, arguing that two distinct discourses become apparent. Firstly, there is an alarmist discourse that emphasises the coming "flood" of LiPs and the potentially disastrous impact this will have on the courts. As I will demonstrate, this discourse essentially conceptualises LiPs as a problem for the courts, and in doing so draws on a rich history of scholarship that depicts LiPs as at best, nuisances, and at worst, pathological. The other discourse that emerges is one that argues that legal aid changes will lead to disadvantageous outcomes for LiPs, as a concomitant result of the loss of the assistance of legal professionals. This way of talking about LiPs does not position LiPs as inherently difficult, in fact it is far more well-meaning; however I will argue both discourses, through confining themselves to a 'legal lens', limit the ways in which

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<sup>57</sup> I will return to these scholars and outline their theories and how they underpin this project in more detail in Chapter Three.

<sup>58</sup> In considering repeat experiences, this work also engages with Marc Galanter's work on 'One Shotters' and 'Repeat Players' in more detail in Chapters Five and Six. Galanter, "How the Haves Come Out Ahead: Speculation on the Limits of Legal Change," *Law and Society Review* 9.1(1974): 98-99.

we see LiPs. I conclude by arguing that our inability to see LiPs outside of the frames we impose on them significantly limits our understanding.

Having considered how LiPs are largely viewed in a negative way by legal practitioners and scholars, the third chapter of this thesis seeks to understand how we came to acquire these attitudes: have we always felt this way about those who represent themselves? And if not, when and how did this start to happen? I pursue this inquiry through the critical investigation of the term 'LiP' itself, studying the moment when the term LiP first appears, and the context in which this takes place. I argue, drawing on Larson, that the term 'LiP' emerges as a by-product of the broader development of the Law's 'professional project' over the course of the 19<sup>th</sup> century, starting with the founding of the new County Courts and ending when these new courts become fused with the higher courts. As I will show, in this period self-represented parties become caught up in wider developments occurring within the profession: the ongoing conflict between the 'higher' and 'lower' branches of the profession, the emphasis on increasing standardisation, and concerted attempts to stamp out unregulated practitioners. As the professional project develops, courts become less and less accessible for laypersons. Ultimately this chapter argues, then, that being a LiP is not simply self-representation; it is self-representation that only occurs *in a standardised and formalised environment*. As I conclude, when the term LiP first appears in the literature, then, it does not indicate a greater participation of laypersons in the legal system; it instead symbolises their aberrance from what has become normal practice: legal representation.

In the fourth chapter, I start from the premise established in the previous three chapters: that the term 'LiP' is inherently framed as pejorative in legal discourse. In this chapter, then, I draw on new ways of approaching and understanding LiP experiences through outlining the methodology of this research project. This consists of fifteen life story interviews. These life stories are a form of oral history that involves biographical interviewing of long duration. As such the interviews with each LiP range from a minimum of three hours to a maximum of ten hours per interview, with an average length of between five and six hours per interviewee. I outline here how and why I came to take this unusual approach to studying LiPs and why I believe this method offers insights that add to and complement our existing research on LiPs. To make this argument, I outline the utility and implications of using oral history and qualitative research more broadly, arguing that qualitative analysis can offer a valuable insight into the subjective and lived experience of LiPs. Finally, I detail my specific methods; who I interviewed, how I found my interviewees and the process of interviewing and translating such interviews into data for this project.

The second half of the thesis constitutes the findings of this empirical research and uses the data gathered to explore how and why LiPs experience difficulties in pursuing and defending claims. I start in the fifth chapter by looking broadly at the effect going to law has for LiPs. As I outline, the experience is far more damaging than has heretofore been articulated. The findings in this chapter refute assumptions that LiPs frivolously or unnecessarily pursue legal proceedings, with the interviewees in this study emphasising that they only used the law as a last resort. This chapter also emphasises the sheer cost—financial, emotional and physical—that legal proceedings have on them. While we tend to spend a lot of time considering the impact of LiPs on the courts, I argue we do not spend nearly long enough considering the significant impact the courts have on LiPs.

The sixth chapter concentrates on the questions of language and embodied behaviour: how do LiPs understand their role and how they are meant to behave, particularly in legal environments? This chapter draws on sociological theory to tease out the complex and inconsistent performative demands being made of LiPs and considers how lack of access to internal specialist legal knowledge impedes LiPs' ability to fully comprehend what is happening, or to effectively participate in proceedings. As I ultimately argue, while LiP failure is usually attributed to their lack of knowledge or their incompetence, this research reveals that the odds are stacked against them. The incoherence and inconsistency of expectations placed on LiPs, coupled with the systemic barriers to accessing necessary knowledge and assistance, is what causes LiPs to perform badly, rather than it being the result of personal failing. There is simply no way for LiPs to do well.

The final chapter of this thesis then considers the multitude of ways in which LiPs are traumatised by going to law, and turns to how these experiences shape LiP beliefs *about* law. In particular, this chapter focuses on the small proportion of individuals in this study who express conspiracist theories about legal proceedings and considers how their experiences of going to law affects their overall perception of the legitimacy of legal proceedings as well as the degree to which they trust legal professionals. Starting out by exploring some of these beliefs, I then consider how and why certain conspiracy theories emerge in the context of acting as LiPs. Drawing on conspiracy theory literature, I argue that conspiracies are always historically and contextually specific. Rather than understanding them as the product of individual pathology, these theories are better understood as shaped by the litigation environment in which LiPs find themselves. As I outline, this environment is one in which their experiences of 'justice' do not match their expectations. Drawing on the work of Tom Tyler on trust and legitimacy, I consider the impact this dissonance between expectation and

experience may have on LiPs.<sup>59</sup> I then consider the degree to which ‘procedural justice’, as outlined by Tyler and Zimmerman, or rather its absence, may contribute significantly to the distrust LiPs experience.<sup>60</sup> Ultimately I go on to argue that while the conspiracy theories held by LiPs are eccentric and mistaken and at times, offensive, they are a refracted and warped narrative of the multiple exclusions LiPs experience in attempting to go to law. Lord Woolf stated:

Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court system and its procedures, which are still too often inaccessible and incomprehensible to ordinary people.<sup>61</sup>

In the end, I argue that if LiPs are “crazy”, perhaps it’s at least partially because going to law has made them so.

I conclude by considering where these findings leave us in terms of reform: what changes are being suggested to accommodate LiPs? And what are potential impediments to reform? This thesis will argue that most reform does not go nearly far enough in recognizing how entrenched the disadvantages are for LiPs and that, consequently, until this is recognised, LiPs will continue to fail. Ultimately, however, I end on a more positive note, arguing that while systemic changes are needed, there are also potential correctives towards the dominant paradigms of thinking and this may, at the very least, allow for more meaningful participation for LiPs in the civil justice system. As such, while the future for LiPs seems gloomy, perhaps they need not forever be doomed to fail.

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<sup>59</sup> Tom Tyler, *Why People Obey the Law* (Yale University Press: New Haven, 1990); See also E Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press: New York and London, 1988); for his research on criminal process and trust see: Tom R. Tyler and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation: New York, 2002);

<sup>60</sup> Nourit Zimmerman and Tom Tyler, “Between Access to Counsel and Access to Justice: A Psychological Perspective,” *Fordham Urban Law Journal* 37.1(2009): 23.

<sup>61</sup> Lord Woolf, *The Woolf Report*, Chapter 17, para. 2.



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CRISIS!

THE COMING FLOOD OF LITIGANTS IN PERSON

Shut the flood-gates: the litigants are coming!<sup>62</sup>

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<sup>62</sup> Elizabeth Lee, "Shut the Flood-Gates: The Litigants are Coming!," in *Alternative Law Journal* 38, no.3 (2013): 193.

## INTRODUCTION

'Shut the Flood-Gates: The Litigants are Coming!' cries the headline of a 2014 article in the *Alternative Law Journal*. The alarmist tone of the article is generated by the possible changes to administrative law in Australia that would lead to more LiPs.<sup>63</sup> While this article may be Australian, this dramatic tone is only too familiar in the UK since the coming of the Legal Aid, Sentencing and Punishment of Offenders Act [LASPO] in April 2013 and the resultant £350m in cuts to civil legal aid. Throughout this time, LiPs have gone through a strange and rapid transition from being occasionally lambasted, but largely ignored, to suddenly becoming the harbingers of the potential downfall of the civil justice system. While this may seem an overly sensationalist analysis, it does not overstate just how alarmist the tone of much of this output has been with an emphasis on LiPs coming in floods, tides, and surges to overwhelm the courts.<sup>64</sup> This is based on the presumption that LASPO's effect will be a dramatic rise in LiP numbers and a permanent decline in the availability and provision of legal representation for civil litigants.<sup>65</sup>

There is no doubt that the passage of LASPO has engendered a crisis for the legal profession and that LiPs are caught up in this. But what this chapter seeks to show is how much this outpouring about LASPO demonstrates two things: firstly, how little we know about LiPs and secondly, how damaging our misunderstandings about LiPs can be. This chapter, then, explores legal misconceptions of LiPs and the potential ramifications of these misunderstandings through the lens of the LASPO crisis, arguing that failure to adequately understand LiPs and their experiences serves to entrench their inequality. As I will show, the response of the legal profession to LASPO does not constitute a single crisis, but can instead

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<sup>63</sup> Or Self Represented Litigants [SRLs], as they are known in Australia. Australia has been facing similar questions when it comes to coping with unrepresented parties.

<sup>64</sup> See for example John Hyde, "Judges call for urgent overhaul to cope with surge of LIPs," *The Law Society Gazette*, 5 July 2013; Eduardo Reyes, "Litigants in Person Numbers Soar," *The Law Society Gazette*, 13 October 2011. These articles will be explored later in the chapter.

<sup>65</sup> See Judiciary of England and Wales, *Judicial Working Group on Litigants in Person Report* (London: July 2013), s 2.3. See also Chris Bevan, "Self-Represented Litigants: the Overlooked and Unintended Consequence of Legal Aid Reform," *Journal of Social Welfare & Family Law* (2012): 43-55; Graham Cookson, *Unintended Consequences: The Cost of the Government's Legal Aid Reforms: A Report for the Law Society of England & Wales* (Department of Management, School of Social Science and Public Policy, November 2011); Mavis MacLean and John Eekelaar, "Legal Representation in Family Matters and the Reform of Legal Aid: A Research Note on Current Practice," *Child and Family Law Quarterly*, 24, no. 2 (2012): 223-233; Civil Justice Council, *Access to Justice for Litigants in Person*.

be usefully divided into a tale of three crises—that reveal different ways of seeing the LiP. Writ broadly, the first crisis depicts a future of “crazy” LiPs clogging up tribunals and the second crisis fears a future where the lack of legal aid leads to an increasing normalisation of not having representation, threatening the future of the legal profession as a specialty. For those who fear the former, the response has been an outpouring of concern about all the inherent problems LiPs bring with them; for the latter, there was, and continues to be, strong lobbying on behalf of legal aid practitioners, including highly public marches and strikes, drawing attention to the crisis of the loss of legal representation.<sup>66</sup> Either way this crisis is posited, however, a future of more LiPs poses a threat.

I start this chapter by exploring the first perceived crisis: that a rise in LiPs will flood the courts. In this section I look at some recent writing, as well as draw on some historical and familiar characterisations of LiPs. This material tends to deride not only LiPs’ performance but also questions their behaviour, personality and, at times, their sanity. This leads to the first serious misconception to which I wish to draw attention; the underlying tendency to conflate all LiPs with high-risk, querulous or vexatious litigants. Writing about LiPs frequently posits the difficulties they may encounter as due to personal deficiency or even as symptomatic of a behavioural disorder. This reflects a failure of many legal researchers to date to sufficiently interrogate the complexity of context and importance of the environment in which LiPs act.

The second crisis positions LiPs as pawns in a larger fight for the retention of legal representation, with LiPs expected to automatically lose out because of legal aid changes. This discourse emphasises that the lack of good quality legal representation results in LiPs struggling, due to a lack of substantive legal knowledge and an inability to discern what is relevant to a claim or defence. These latter claims are ones that are largely echoed by past research into LiPs.<sup>67</sup> However, while this discourse is far more well-meaning than the previous one, and while I do not dispute the valuable assistance legal representation can afford, I argue that this position tends to conflate LiP difficulties with the cause of advocating legal representation for civil litigants. This paints a picture where LiPs should *always* have legal representation, rather than considering how individuals may be able to improve outcomes without being legally represented.

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<sup>66</sup> This includes groups such as the *Judicial Working Group*, the Civil Justice Council report, *Access to Justice* and the Nuffield Foundation, *Developing the Evidence Base on Family Justice: Mediation and Litigants in Person* (London: Ministry of Justice, 22 February 2012).

<sup>67</sup> See Paul Lewis, “Litigants in Person and their Difficulties in Adducing Evidence.” In this study Lewis notes multiple ‘failures’ such as failure to call witnesses and failure to understand the rules of evidence. This is similar to John Baldwin’s findings in *Monitoring the Rise of the Small Claims Limit*.

I conclude by considering the way in which both crises limit how well we can see LiPs. ‘LiP’ is a legally constituted subject and, like other legally constituted subjects, a LiP becomes a LiP in legal space, much like a barrister becomes a barrister through putting on their wig and gown. Yet LiP experiences are inherently more complex than discourses that reduce them to either a problem, or an object of pity. Legal discourse in this way constructs and simultaneously limits our understanding of LiPs. We are unable to grasp the very subjects we seek to research outside of the frames we impose on them. These frames often tell us more about ourselves than the subjects we are theoretically seeking to understand. Ultimately, in the final section of the chapter I argue that the ways in which LiPs are talked about not only limit understanding, but obscure what I argue to be a much the third, deeper, crisis: the systematic exclusion and inequality experienced by LiPs in civil litigation.

#### CRISIS NO. 1: THE RISING TIDES

In October 2011, The *Law Society Gazette* published an article entitled: “Litigants in Persons numbers soar”. In it, author Eduardo Reyes discloses a ‘dramatic increase’ in LiPs, based on data from the Personal Support Unit at the Royal Courts of Justice showing they received a 19 per cent increase in applications to assist LiPs appearing in the Principal Registry of the Family Division in the 8 months running up to August 2011 across the country.<sup>68</sup> Reyes’ article predates the coming into force in April 2013 of the LASPO Act. The article goes on to argue that the increase in LiPs would only be aggravated when the act came into force: ‘Many solicitors’, Reyes says, feel this will ‘trigger a huge rise’ and this rise will lead to ‘strain’ and ‘burden’ on the court system.<sup>69</sup>

Reyes’ alarmist tone is not anomalous, nor incidental. Numerous articles and letters have appeared in the *Law Society Gazette* and elsewhere since 2011 discussing the expected rise of LiPs in the face of legal aid changes, many of whom tend to reproduce to a greater or lesser extent this tone. In January 2012 for example, Grania Langton Down wrote of an expected ‘huge increase’ in LiPs, resulting in ‘dire warnings’ from the judiciary due to the potential risk of ‘chaos’.<sup>70</sup> In July 2013, John Hyde’s article referred to an oncoming ‘surge of LIPs’.<sup>71</sup> A

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<sup>68</sup> Reyes, “Litigants in Person Numbers Soar.” The Personal Support Unit provides non-legal assistance and support for self-represented litigants. PSU members will assist litigants in non-legal tasks, including typing up information, providing forms and templates, and signposting them to legal assistance. In addition, PSU volunteers will also accompany litigants into the court if the litigant chooses this. While the PSU volunteer cannot speak for the litigant, or provide any legal assistance, they are there to provide moral support and to take notes, and to ensure the litigant understands what transpired during the proceedings and what they may need to do next.

<sup>69</sup> *Ibid.*

<sup>70</sup> Grania Langton-Down, “Litigants in person could struggle to secure access to justice,” *Law Society Gazette*, 19 January 2012.

published letter from an occasional contributor in July 2013 was entitled: “Legal Aid: Children Suffer” and claimed that: ‘Litigants in person are the scourge of the courts – ask any judge’.<sup>72</sup> Similarly, Catherine Baksi’s October 2013 article was memorably titled: “Litigant in Person Punches Wife During Hearing”.<sup>73</sup> This refers to an incident in a Family Court proceeding in Essex where the father, a LiP, crossed the floor to the witness box and repeatedly hit his wife. A Ministry of Justice spokesperson, when asked about this event, pointed out that regardless of legal aid changes, about half the parties in family court proceedings were usually LiPs, and went on to observe that lawyers representing a party would not usually ‘play a role in court security matters, and we have no evidence to suggest any increase in this type of incident since April’. Nevertheless, the article’s author argues that this incident highlights ‘security concerns as more people appear in court without a lawyer’.<sup>74</sup>

While Baksi’s reference to the direct physical threat of the LiP might seem extreme, Langdon-Down’s article in fact treads similar ground, citing District Judge Nick Crichton on the security threat posed by LiPs:

We are getting more and more people coming to court in private law cases without the benefit of sensible, structured legal advice, wanting to spill blood on the court carpet. Angry with each other, they shout across the court, they refuse to listen when you try to calm them down and it is very difficult to find a solution that they will go away and work with.<sup>75</sup>

These articles demonstrate two linked, overarching beliefs: firstly, because of legal aid changes, the numbers of LiPs will rise. Secondly: more LiPs are not a good thing. In these articles LiPs are presented as difficult to manage, disruptive and potentially violent.

Alarmist ideas relating to LiPs have a long and rich history both in the UK and abroad. Pejorative characterisations of LiPs abound in 20<sup>th</sup> and 21<sup>st</sup> century scholarly literature. Litigants in person (or their overseas equivalent such as *pro se* in the U.S. and self-represented litigant [SRL] in Australia) have been described, variously, as ‘mavericks’<sup>76</sup>, obsessive and difficult<sup>77</sup>, ‘cranks’ and ‘pests’<sup>78</sup>, ignorant<sup>79</sup>, naïve<sup>80</sup>, disruptive<sup>81</sup>, crafty<sup>82</sup>, time wasters<sup>83</sup>,

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<sup>71</sup> John Hyde, “Judges call for urgent overhaul to cope with surge of LiPs,” *The Law Society Gazette*, 5 July 2013.

<sup>72</sup> John Greenwood, “Letters: Legal Aid: Children Suffer,” *Law Society Gazette*, 22 July 2013.

<sup>73</sup> Catherine Baksi, “Litigant in Person Punches Wife During Hearing,” *Law Society Gazette*, 21 October 2013.

<sup>74</sup> *Ibid.*

<sup>75</sup> District Judge Nick Crichton quoted in Langdon-Down, “Litigants in Person Could Struggle.”

<sup>76</sup> Simon Smith, *Maverick Litigants: A History of Vexatious Litigants in Australia 1930-2008* (Maverick Publications: Melbourne, 2009).

<sup>77</sup> Tania Sourdin and Nerida Wallace, “The Dark Side.”

delusional<sup>84</sup>, ‘injustice collectors’<sup>85</sup> and, importantly, ‘nuts’.<sup>86</sup> The *New York Law Society Journal* memorably dubbed them as ‘a society of losers’.<sup>87</sup> Negative characterisations of LiPs are never just abusive epithets, of course. They are always revealing in terms of what they tell us about how LiPs are understood, or indeed *misunderstood*, by many people in the legal profession and others. There is an historical tendency in the literature to assume all LiPs are potentially high-risk, querulous or vexatious litigants. This manifests in using terminology that frequently identifies an arguably systemic issue, but then blames the LiP for this.

For example, there is the issue of delay and disruption. At first glance, accusing a LiP of delay does not necessarily seem a personal attack. There is indeed some evidence that LiPs take longer to pursue claims, although this is not conclusive.<sup>88</sup> However, the term ‘time waster’ suggests a deliberate decision on the LiP’s part to draw out proceedings. Similarly, there is also evidence that LiPs’ presence in courts and tribunals disrupts normal procedures: however, while this is factually accurate, calling LiPs ‘disruptive’ implies that they somehow *bring* chaos with them.<sup>89</sup> Finally, LiPs are indeed uneducated in legal language, procedure and behaviour and in this respect describing them as ‘ignorant’ is hardly incorrect. But the term ‘ignorant’ suggests again that this is an inherent or wilful defect of the LiP. My point here is not to dispute that LiPs’ presence in legal proceedings can cause problems, but rather that LiPs tend to be blamed for any issues as indicative of their own shortcomings. Yet I believe that the delay in proceedings caused by LiPs, indeed the trouble they may cause in general, are more indicative of a system which on the one hand upholds LiPs’ right to self-litigate and yet on the other fails to mould proceedings to their needs and perspectives. As Moorhead and Sefton’s 2005 study concludes:

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<sup>78</sup> Monica Taylor, “Querulent Behaviour, Vexatious Litigants and the Vexatious Proceedings Act 2005 (Qld),” conference paper delivered at the Australasian Institute of Judicial Administration, *Assisting Unrepresented Litigants – A Challenge for Courts and Tribunals Conference*, Sydney, 15-17 April 2014.

<sup>79</sup> *People v. Sharp*, 7 Cal. 3d 448 (1972); California Secretary of State, *Proposed Amendments to Constitution Primary Election*, June 6 1972: 8; Judicial College, *Equal Treatment Bench Book*.

<sup>80</sup> I.P. Robbins and Susan Herman, “Pro Se Litigation - Litigating Without Counsel: Faretta or For Worse,” *Brook Law Review* 42, no.4 (1975): 637; Mark K. Ridley, “The Right to Defend Pro Se: Faretta v California and Beyond,” *Alabama Law Review* 40, no.2 (1975): 425.

<sup>81</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>82</sup> Benjamin R. Dryden, “Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age [comments],” *University of Pennsylvania Journal of Constitutional Law*, 10, no.4 (May 2008): 854.

<sup>83</sup> California Statute 1971, ch. 1800, § 6, at 3898, quoted in *People v Sharp supra* n 66: 463.

<sup>84</sup> Ellesha LeCluyse, “The Spectrum of Competency: Determining a Standard of Competence for Pro Se Representation,” *Case Western Reserve Law Review* 65, no. 4 (2015): 1239-1268.

<sup>85</sup> Monica Taylor, “Querulent Behaviour.” See also Didi Herman, “Hopeless Cases: Race, Racism and the Vexatious Litigant,” *International Journal of Law in Context* 8, no. 1 (September 2012): 27-46.

<sup>86</sup> Drew A. Swank, “The Pro Se Phenomenon,” *BYU Journal of Public Law* 19, no.2 (2005): 373, 384.

<sup>87</sup> Editorial, *New York Law Journal*, Nov. 23, 1971, 1: col 7.

<sup>88</sup> CJC, *Access to Justice for Litigants in Person*, viii; Moorhead and Sefton, *Unrepresented Litigants*, ii; Genn and Genn, *Representation at Tribunals*, 245.

<sup>89</sup> See California Secretary of State, *Proposed Amendments to Constitution*, Primary Election, June 6 1972, 8.

The struggles they [LiPs] have comprehending law and procedure; and the importance of ensuring that substantive justice is done in our courts suggests that unrepresented litigants need help far more than they need approbation.<sup>90</sup>

Turning to the other negative epithets described above, these are even more immediately recognisable as attacks based on a perception that LiPs are high risk or vexatious litigants. The terms ‘maverick’ and ‘injustice collector’ for instance, conjures up the archetypal vexatious litigant who goes it alone, ignoring legal advice, despite there being little evidence of such individuals.<sup>91</sup> Similarly, the idea that LiPs are ‘nuisances’ or ‘pests’ emphasises not only their disruptive qualities but also the idea that they repeatedly pursue frivolous issues. Finally, these negative epithets routinely—and importantly—emphasise a link between behavioural disorders, mental health and LiPs.<sup>92</sup> These are the LiPs described as ‘delusional’ or ‘nuts’. In her article “Hopeless Cases”, Didi Herman notes that vexatious litigants are:

characterised as falling into one of two groups: those with histories of mental health problems who launch multiple legal actions against diverse targets; and those whose initial legal action, for example (one that recurs often) a complaint of discrimination under the Race Relations Act (RRA; now incorporated into the Equality Act 2010), was resolved against them, and who then attempt to carry on with aspects of that complaint in various ways.<sup>93</sup>

I argue this tendency to blame LiPs for their shortcomings results from a strong belief on the part of the legal profession that LiPs *ought* to have legal representation. A LiP’s decision to act in person (presupposing this decision was voluntary, which as I will outline is usually not the case) in itself indicates a potential alarm bell. Tania Sourdin and Nerida Wallace claim, in their 2014 study into querulous and vexatious litigants, the ‘perception that these litigants [LiPs] pose a problem for courts is widespread’.<sup>94</sup> I would reconfigure this, however, to argue that the perception that LiPs *are* a problem is widespread. This slippage between the two—from the LiP causing problems to being *a* problem—is primarily attributable to legal distrust of anyone who would voluntarily forego representation.

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<sup>90</sup> Moorhead and Sefton, *Unrepresented Litigants*, 265.

<sup>91</sup> In *Paths to Justice*, Genn notes that only 35% of her sample were ‘self-helpers’ who obtained no advice in dealing with their problem however even they were likely to have sought advice previously (81%). It is also interesting to note the 5% who do not obtain any advice; as Genn notes, such individuals tend to have lower educational and income levels. One could speculate that such individuals may also be indicative of the ‘passive defendants’ Moorhead and Sefton identify in their 2005 research. See Genn, *Paths to Justice*, 72.

<sup>92</sup> And the conflation of these issues is explored further in the final chapter of this thesis which looks at LiPs who hold conspiracist explanations for what happens to them during litigation.

<sup>93</sup> Didi Herman, “Hopeless Cases,” 28.

<sup>94</sup> Sourdin and Wallace, “The Dark Side,” 14.

In Hazel Genn's landmark *Paths to Justice*, she critiques previous studies of legal need for focusing too much on 'the kinds of *people* who use legal services, rather than on the kinds of problems which are taken to lawyers'.<sup>95</sup> She goes on to say that this serves to homogenise legal problems: if one focuses on the people outside of the specific legal claim, one has no means of differentiating success or failure on the basis of legal merit. My argument pursues a related tack. Focusing on who a LiP *is* internalises shortcomings within the LiP him or herself. This is seen in the situation above where the difficulties that arise from the presence of LiPs are ascribed to behavioural or personality issues. The conflation of LiPs with high risk and vexatious litigants leads to a number of serious misconceptions.

In the first instance, vexatious litigants form a tiny minority of LiPs. The Civil Justice Council note that 'although a small minority of self-represented litigants behave in a way that leaves an adverse impression, the overwhelming majority of self-represented litigants are legitimate users of the system'.<sup>96</sup> Yet they continue to occupy a disproportionate amount of attention.<sup>97</sup> This tends to make the problem with vexatious litigants seem much bigger than it is. However, associating LiPs with vexatious litigants is also arguably fundamentally flawed. In law, definitions of vexatiousness hinge largely on the substance of the claim: they are *vexatious proceedings*. Lord Bingham in *Attorney General v Barker* elaborates:

The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.<sup>98</sup>

While vexatious litigation 'involves an abuse of the process of the court' this can only arise if 'the substance of the proceedings themselves can be characterised as vexatious'. In other words, a distinction is made in law between a vexatious claim and vexatious conduct. If a claim is sound, the manner in which it is pursued may not be characterised as vexatious. Lord Parker noted in *Re Langton*:

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<sup>95</sup> Genn, *Paths to Justice*, 1.

<sup>96</sup> Civil Justice Council, *Access to Justice*, paragraph 31.

<sup>97</sup> This is arguably because dealing with this minority absorbs a disproportionate amount of time and resources.

<sup>98</sup> Bingham LJ, *Attorney General v Barker* [2000] 1 FLR 759: 764, para 19.



Despite the fact that it may be said that the manner in which that action was conducted was vexatious, it must be remembered that the respondent acted in person, and, not only that, but that the action itself could not be said to be a vexatious action; it was one which the respondent was fully entitled to litigate and did litigate and accordingly, so far as these proceedings are concerned, I ignore that action except as a matter of history.<sup>99</sup>

It therefore makes a material difference if the respondent is acting in person. Lord Parker clearly comments here that although the ‘manner’ in which proceedings were conducted was ‘vexatious’, the action itself was not vexatious: rather, the LiP was ‘fully entitled to litigate’, and consequently cannot be considered to be a vexatious litigant. This distinction can be clearly seen where LiPs are most common, places such as the family court.<sup>100</sup> As Lord Gill noted in his review of the Scottish civil courts:

Respondents representing those who practice in the field of family law pointed out that because of the high level of emotion involved in family law cases, it would be difficult to categorise a litigant in a family action as “vexatious”.<sup>101</sup>

The important point to draw from this distinction is that although LiPs are often conflated with vexatious litigants, they may in fact be less likely to pursue ‘frivolous’ claims, a finding that is supported by this research.<sup>102</sup>

Seeing the LiP as “a problem” also leads to another issue: overlooking the importance of the context in which the LiP operates. LiPs appear in many different kinds of courts and tribunals, which have differing procedures. On top of this, LiPs may face both represented and unrepresented respondents. Who are they standing against? Does the fact that there is a LiP affect the behaviour of other participants in these circumstances? MacLean and Eeklaar’s 2014 study into the Family Court found that out of fifty hearings, there were twenty where one party was not represented. Of these cases only ten qualified as an ‘active’ litigant in person in Moorhead’s terms. In two of the twenty cases where a party was not represented, the legal professional who was involved was ‘of such a junior nature’ that ‘the judge commented to the researcher on the inequality of arms’. They went on to observe that in a further eight cases of the twenty, one party did not attend at all and their failure to do so meant the judge could not

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<sup>99</sup> Lord Parker LCJ, *Re Langton* [1966] 1 WLR 1575: 1758.

<sup>100</sup> Moorhead and Sefton’s study found 48% of cases in the family court had at least unrepresented litigant. See *Unrepresented Litigants*, 25.

<sup>101</sup> The Right Honourable Lord Gill, *Report of the Scottish Civil Courts Review* (Scotland: RR Donnelly, 2009), 240.

<sup>102</sup> Didi Herman takes this idea even further by questioning whether it is even possible to make a distinction between frivolous and non-frivolous claims when it comes to litigants in person. Herman, “Hopeless Cases,” 31.

proceed. MacLean and Eekelaar consequently argue the need for the term ‘absent LiPs’.<sup>103</sup> The sheer complexity of the landscape: whether a LiP is active, passive, a claimant or a defendant; whether he or she faces a barrister, group, corporation, LiP, whether he or she is in a County Court, a social security tribunal, an immigration tribunal, the High Court, and so on, could be usefully considered when attempting to understand LiPs’ experiences: this complexity is elided when we see the LiP as *a* problem.

Finally, another key assumption made by those who see LiPs as a problem is that LiPs deliberately forego legal representation. This results, firstly, from a misunderstanding on the part of some in the legal profession about the accessibility *to* representation in the first place. As many lawyers who work in the area of legal aid already know, Lord Otton’s 1995 report found, many years prior to legal aid changes, those who act as LiPs may not do so out of choice, but rather through a failure to obtain legal aid or afford representation. LiPs will fail to obtain the representation or advice sought or desired due to financial difficulties, problems of time or access.<sup>104</sup> A simple example is a LiP who tries and fails to access a Citizens Advice Bureau due to increasingly limited opening hours and closures of branches of the service.<sup>105</sup> Another is a LiP who becomes a LiP at some point during the life of their claim because of withdrawal of legal aid.<sup>106</sup> Cookson’s 2011 research stated that:

[a]pproximately 11% of people denied legal aid will not seek alternative advice. Following this choice, people will either give up on their social justice problem or attempt to tackle it on their own. The proportion of people who, at present, ‘give up’ and ‘tackle their problem alone’ after failing to obtain advice can be used as an estimate of the same strategies for those who are denied legal aid and do not seek alternative advice. This proportion varies by area of law with 65% of people who failed to obtain family law advice tackling their problem alone compared to 83% in social welfare law. This difference may reflect the greater complexity of family law and the higher proportion of cases which end up in court.<sup>107</sup>

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<sup>103</sup> MacLean and Eekelaar, “Legal Representation in Family Matters,” 227.

<sup>104</sup> George Applebey, “Justice Without Lawyers: Litigants in Person in the English Civil Courts,” *Holdsworth Law Review* 18, no.1 (1997): 109-136.

<sup>105</sup> See J Plotnikoff and R Wilson, *Otton Project*; Genn, *Paths to Justice*, 76-77; Genn and Genn *Representation at Tribunals*, 60-62.

<sup>106</sup> Although withdrawal of legal aid is in fact relatively rare according to Moorhead and Sefton. It is more likely that those who are intermittently represented due to issues with legal aid will be unrepresented at the beginning because of the length of time it takes to process. Moorhead and Sefton, *Unrepresented Litigants*, 30.

<sup>107</sup> Cookson, *Unintended Consequences*, 63.

There is a danger in perceiving legal aid changes as being responsible for cutting off access to representation. Difficulties with obtaining legal representation are longstanding; the passage of LASPO may aggravate the situation, but it did not create it.<sup>108</sup>

Ultimately for those who see LiPs as a problem, the influx of LiPs poses a significant threat. But even this fear of an influx is attributable to failures to adequately understand LiPs: in this case, the lack of accurate data regarding LiP numbers. One of the most striking features in the articles cited above is the repetition of a diluvian analogy. LiPs are going to ‘flood’ tribunals, and come in a wave or a surge, or even a ‘tsunami’. Alternatively, LiPs are going to ‘clog up’ the courtrooms suggestive that they are going to cause disruption to an otherwise smooth running process. One family law barrister refers in a blog to the ‘hordes of plastic bag wielding LiPs’.<sup>109</sup> This results in a kind of siege mentality where due to lack of knowledge as to rising numbers, alarmist ideas about LiPs are more likely to be aired.

But as I have previously outlined, what we know about LiPs has always been relatively limited.<sup>110</sup> This is indicative of their marginal status in litigation. As Cameron and Kelly note, there has been a lack of ‘any systematic effort’ in common law jurisdictions to understand who LiPs are, what their legal problems are, what LiPs can do about these problems, and why LiPs might choose to represent themselves.<sup>111</sup> While there are a number of important studies done on tribunals and small claims courts by researchers such as Hazel and Yvette Genn, Paul Lewis and John Baldwin,<sup>112</sup> data on LiPs has only just begun to be collected by the MOJ since 2014 and even now, it is not collected by the courts in any systematic fashion.<sup>113</sup> Consequently, much of the research attempting to quantify and qualify who the LiP is relies on filling in the gaps and assuming that someone is a LiP if there is no obvious evidence of representation.<sup>114</sup>

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<sup>108</sup> See also the recent research of Marie Burton into the effect of introducing telephone advice, rather than interpersonal contact, for legal aid. Marie Burton, “Calling for Justice: Comparing Telephone and Face-to-Face Advice in Social Welfare Legal Aid,” PhD Diss., Law Department, London School of Economics and Political Science, 2016.

<sup>109</sup> Lucy Reed, “Pink Tape” Blog available at: <http://pinktape.co.uk/2013/05/page/2/> (accessed 2 April 2017).

<sup>110</sup> Moorhead & Sefton analyzed court records for evidence of litigants in person. They themselves acknowledged that some of the data relied on a degree of guess work, primarily inferring lack of representation if there was no explicit mention of representation in the case file or court records. *Unrepresented Litigants*, 9-11.

<sup>111</sup> C. Cameron and E. Kelly, “Litigants in Person in Civil Proceedings: Part II Solicitors’ Perspectives,” *Hong Kong Law Journal*, 33, no.3 (2003): 313.

<sup>112</sup> John Baldwin, “Litigants Experience of Adjudication in the Civil Courts”; Paul Lewis, “A Study of a Small Claims in an English County Court.”

<sup>113</sup> As of mid-2014, the MOJ publishes LiP figures. However, these figures are based on the ‘representation’ box being left blank in the court forms. This is the same method Moorhead and Sefton used in their 2005 research, and they themselves elaborate on the limitations of this approach,

<sup>114</sup> Moorhead & Sefton, *Unrepresented Litigants*, 13-14.

What we do know from the *Civil Justice Quarterly Statistics*, subject to the limitations outlined above, is the percentage of representation in different types of cases in the civil courts. So, for example, the latest statistics (June-September 2017) show 97% representation in both sides when it comes to unspecified money claims (such as compensation claims), and radically less in other areas. Specified money claims, for example, had at least one LiP in 61% of cases. It was overwhelmingly the claimant represented in this one-sided scenario, with defendants much more likely to be unrepresented, in keeping with Moorhead and Sefton's 2005 findings of 'passive defendants'. Only a quarter of specified money claims were unrepresented on both sides. This means the likelihood of a LiP facing represented parties is much higher than them facing another LiP.<sup>115</sup> But this is clearly an incomplete picture.

In 2011, a Ministry of Justice literature review in the area concluded that:

Only a minority [of studies] provide robust evidence for our research questions. Few controlled for case complexity. As a result, this review should be treated as presenting evidence on the potential issues and impacts of litigants in person, rather than conclusive evidence of this.<sup>116</sup>

This is still the case in 2017. This means, in the context of legal aid changes one of the most basic questions we need to answer—is there a rise in LiPs?—can best be answered by “Probably”. To know definitively would require knowing how many LiPs there were before and how many there are now. But we don't know either. The discourse that constructs LiPs as a problem, then, may fear LiPs, but it doesn't know much about them.

## CRISIS NO. 2: THE END OF LAWYERS?

The post-LASPO environment has also resulted in alterations of historical attitudes to the LiP. Indeed, it must be pointed out at this stage that it would be disingenuous on my part to claim that negative writings are representative of all writing on LiPs. Of course, this is not the case. While negative characterisations of LiPs persist, so there is simultaneously a growing discussion as to how to include LiPs more meaningfully into legal processes by sympathetic legal practitioners and researchers.<sup>117</sup> Cameron and Kelly note in their 2002 series of articles into LiPs in common law jurisdictions that:

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<sup>115</sup> See MOJ, *Civil Justice Statistics Quarterly: June-September 2017* (National Statistics: London, 2017), 5.

<sup>116</sup> Williams, *LiPs: A Literature Review*, 3.

<sup>117</sup> See, for example Trinder et al, *LiPs in Private Family Law Cases*, McFarlane. “The National Self Represented Litigants Project”; Mavis MacLean and John Eekelaar, “Legal Representation in Family

The trend in the literature has moved from equating litigants in person with “vexatious litigants” to considering litigants in person from the perspective of the problems they create for other stakeholders in the system (other parties and their legal advisors, judges and court administration officials) to the more recent approach of accepting them as a fact of life and identifying strategies to make it easier for them to represent themselves.<sup>118</sup>

I would argue, however, that the current state of affairs is less of a trajectory from the first attitude (all LiPs are potentially high risk or vexatious litigants) past the second (LiPs cause problems for other users) to the last (LiPs are a fact of life and we must accommodate them) than a messy confluence of all three. The increased acknowledgement of the need for reform to assist LiPs exists simultaneously with the tendency to focus on LiPs *as* a problem. This is why the *Law Society Gazette* articles relating to legal aid changes that opened this chapter are so valuable for research: they offer a window into this very confusion. This confusion is arguably because, as this second way of seeing so clearly demonstrates, the future of the legal profession is indelibly tied to the rise of LiPs. As Zoe Saunder’s article “How Can Lawyers Learn to Love LiPs?” notes:

The Government’s evisceration of Legal Aid leaves those of us involved in the court system feeling a bit like the inhabitants of an island about to be hit by a tsunami, watching the sea recede further and further away, powerless to do anything but wonder how big the wave will be and how much damage it will cause. The tsunami will come in the form of litigants in person who would previously have had recourse to public funding for advice and representation but will no longer have that resource and will have to represent themselves.<sup>119</sup>

The one certain effect legal aid cuts have on the profession is a reduction in legal representation in a broader range of civil proceedings.<sup>120</sup> Any fear of rising numbers of LiPs cannot therefore be separated from this perceived professional threat. This threat is not just about displacing legal professionals, but also a threat to procedures in their current form, as reform will potentially entail changes in how the courts operate as well. The second LASPO “crisis”, therefore, is one where LiPs are remodelled from being problems to being, crudely, objects of concern because, in a post-LASPO environment not having representation will become the norm. In this particular crisis, the concern about LiPs is that they are likely to do

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Matters.” And of course, there have been many pre-LASPO sympathetic scholars, such as Hazel Genn, John Baldwin, Rosemary Hunter, Richard Moorhead and others.

<sup>118</sup> Cameron and Kelly, “Litigants in Person in Civil Proceedings: part II,” 341.

<sup>119</sup> Zoe Saunders, “How can Lawyers Learn to Love Litigants in Person?,” *The Lawyer*, 11 April 2013.

<sup>120</sup> Cookson, *Unintended Consequences*, 39.

badly, but this is ultimately secondary to a concern about the broad-reaching changes that will occur to the legal profession and the effect on the courts of more LiPs.

In 2014, The Bar Council produced a paper, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Laspo): One Year On*. In this paper they asserted that:

Although it is too early to determine the longer-term impact of the Government's transforming legal aid agenda (of which LASPO forms a central part), this early research suggests that much of what we feared has come to pass, including: A significant increase in litigants in person, especially in the family courts; increased delays in court and additional burdens on already-stretched court resources; Increased and likely unsustainable pressure on frontline providers offering free legal support, advice or representation; A growing reluctance of solicitors and barristers to take on complex, low-value litigation, denying many access to legal advice and representation, and a growing number of barristers actively considering the viability of a long-term career at the Bar.<sup>121</sup>

As we can see from the above, although LiPs do get a look in in this report, and although LiPs are posited as representing an access to justice issue, their presence is emphasised more in the context of the impact they will have on the courts. Of more pressing concern here is the long-term impact of such changes on the legal profession itself. This is of course unsurprising in a document produced by the Bar Council, however, it serves to underline that such a post-LASPO discourse prioritises the needs of the legal profession over those of the LiP, however much access to justice is raised as an issue. In this way of seeing, when LiPs are raised as a topic, this is usually to emphasise, as above, that more LiPs will have a detrimental impact on the court process. LiPs are not necessarily "problems" in and of themselves, but they will cause problems in the court and will fare badly without professional assistance. For example, in *Unintended Consequences*, Cookson notes that:

In certain key respects a rise in litigants in person will have noticeable, material unintended consequences to Government: poorer outcomes for litigants, greater burden on HMCTS, greater legal costs for legal aid-represented litigants and for government-run organisations such as the NHS.<sup>122</sup>

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<sup>121</sup> Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Laspo): One Year On* (Bar Council: London, 2014), 2.

<sup>122</sup> Cookson, *Unintended Consequences*, 38.

This question of a LiP *burden* is echoed by other recent LiP studies that note that LiPs are less likely to settle<sup>123</sup>, more likely to have their case thrown out<sup>124</sup>, more likely to take up more court time than represented parties,<sup>125</sup> and more likely to cost more money to the courts.<sup>126</sup> Unlike the previous assertions relating LiPs to high risk and vexatious litigants that are, at times, highly problematic, the assumption that not having legal representation is a problem is in fact better founded. Research, such as Genn & Genn’s tribunal study in 1989 and Moorhead and Sefton’s 2005 work have found consistent evidence that someone with good legal representation is more likely to succeed than a LiP.<sup>127</sup> This is not entirely straightforward, as it has also been demonstrated that poor quality legal representation may be significantly *worse* than no representation at all.<sup>128</sup> However, there is widespread belief, that is at the very least to some extent supported by research, that legal representation improves outcomes. Lord Pannick memorably articulated this in a House of Lords debate on the bill: ‘Do-it-yourself litigation—because that is what it is—will be as effective as a do-it-yourself medical operation’.<sup>129</sup>

Lord Pannick’s analogy of LiPs as DIY-ers offers an intriguing opening into the question of why LiPs are more likely to lose: they are not qualified. Lawyers are able to discern what is relevant to a proceeding; they also know the form in which to present information in courts and tribunals.<sup>130</sup> Crucially, they also know how to behave appropriately in the subtler ways: how to address different people in the courtroom, and so on. As study after study notes, it is a LiPs ignorance—of substantive law, legal procedure and appropriate behaviour, their inability to discern what is relevant to their claim or defence—that means they lose.<sup>131</sup> The unavoidable implication of this discourse, therefore, is that what a LiP really needs is to either get a lawyer,

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<sup>123</sup> Rosemary Hunter, “Adversarial mythologies: policy assumptions and research evidence in family law,” *Journal of Law and Society* 30, no 1(2003); J Dewar, BW Smith and C. Banks, *Litigants in Person in the Family Court of Australia* (Research Report No. 20. Family Court) (Family Court: Canberra, 2000).

<sup>124</sup> Advice Services Alliance, *Proposal for the Reform of Legal Aid in England and Wales: Ministry of Justice*, Consultation Paper CP12/10 (Advice Services Alliance response: London, 2011).

<sup>125</sup> Williams, *LiPs: A Literature Review*, 6. As this report acknowledges, when *both* parties are unrepresented, the proceedings may be shorter, but when one side is unrepresented, the case can take longer. However, these findings are also subject to the type of court or tribunal and the kind of legal claim, so it is difficult to make any generalist statement.

<sup>126</sup> See Cookson, *Unintended Consequences*, 40.

<sup>127</sup> Genn & Genn, *Representation at Tribunals*, 108. It is important to note that Genn and Genn refer to ‘good representation’, so this doesn’t exclude the possibility that *bad* representation can lead to worse outcomes, or at least no material difference. See D. James Greiner & Cassandra Wolos Pattanayak, “Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?,” *Yale Law Journal* 121, no. 8 (2012): 2118-2215.

<sup>128</sup> Ibid; see also Moorhead, Sherr & Paterson, “Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales,” *Law and Society Review* 37, no.4 (2003).

<sup>129</sup> Lord Pannick, *House Of Lords Debate* 29 January 2014: Column 1271. Available online at: <http://legalaidchanges.files.wordpress.com/2014/02/lords-debate-pannick-motion-to-regret-prison-legal-aid-29-jan-2014.pdf> (accessed 2 June 2017).

<sup>130</sup> See Genn and Genn, *Representation at Tribunals*, 244, 246-7.

<sup>131</sup> See Moorhead and Sefton, *Unrepresented Litigants*; Plotnikoff & Woolfson, *The Otton Project*.

or to *be* one.<sup>132</sup> This is certainly the case being forwarded by critics of legal aid changes. As the Bar Council noted in 2016:

The growth in the number of people who are attempting to handle often complex legal problems on their own is a particular cause for concern. The rise in court fees and the significant cuts to legal aid have put many litigants in the difficult position where they feel unable to access justice through the Courts, or through solicitors or barristers with the appropriate expertise to help them.<sup>133</sup>

This argument—that LiPs should have lawyers—is highly persuasive in the context of legal aid cuts post-LASPO which undoubtedly disproportionately affect vulnerable litigants. Amnesty’s 2016 report notes that the recent cuts are likely to primarily affect litigants in family cases, immigration tribunals, housing and other areas where such individuals are likely to be disadvantaged already in terms of socioeconomic background, mental health or for a host of other complex reasons.<sup>134</sup> This is supported by other recent research undertaken by Trinder *et al* in 2014, amongst others.<sup>135</sup> However, while I do not dispute or seek to take away from the very real effect such changes can have on vulnerable litigants, nor do I wish to minimise the inherent difficulties of being a LiP (this whole thesis is an extrapolation of this idea) this discourse is limited in terms of how helpful it can be for understanding LiPs. This is because in this way of thinking, LiPs become an exemplar of why one needs legal representation. And it is very difficult to separate this argument—that LiPs need legal representation—from the interest of legal professionals in maintaining dependency on legal representation.<sup>136</sup>

So how does this position—that holds that LiPs are fundamentally unable to navigate legal procedure in any useful way—sit with the right of a LiP to self-represent? This right, articulated in *Bremer v South India Shipping* by Lord Diplock states that:

Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their

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<sup>132</sup> It is notable, for example, that Genn and Genn were highly critical of the idea of the tribunals that were more “friendly” to LiPs. Genn and Genn, *Representation at Tribunals*, 248.

<sup>133</sup> Bar Council statement, “Bar Council Responds to Latest LSB Report on Legal Services Market,” 4 July 2016.

<sup>134</sup> See Amnesty International, *Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice* (Amnesty: London, 2016).

<sup>135</sup> Trinder *et al*, *Private Family Law Cases*; Rosemary Hunter, “Exploring the ‘LASPO Gap,’” *Family Law* 44 (2014); Meyler and Woodhouse, “Changing the Immigration Rules and Withdrawing the ‘Currency’ of Legal Aid: The Impact of LASPO 2012 on Migrants and their Families,” *Journal of Social Welfare and Family Law* 35, no.1 (2013): 55-78; Jess Mant, “Neoliberalism.”

<sup>136</sup> This inseparability also poses a problem when it comes to assessing the efficacy of legal representation. Does it automatically improve outcomes? See Herbert M, Kritzer, *Legal Advocacy: Lawyers and Non Lawyers at Work* (University of Michigan Press: Michigan, 1998).



respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.<sup>137</sup>

LiPs have a constitutional right of access to the courts to pursue claims, what Rabeea Assy calls ‘a long-standing common law tradition which treats self-representation as a fundamental right’.<sup>138</sup>

Those that advocate for legal representation, then, do not give much consideration towards how to *be* a LiP in the first place; presumably, given the opportunity, legal practitioners would not want LiPs to have unlimited access without representation. In this respect such a ‘right’ becomes something like a category error. The most energetic proponent of this position is Rabeea Assy who argues in his book *Injustice in Person*, that the ‘right’ to self-representation needs revisiting.

It entails overcoming the intuitive appeal of an entitlement to self-representation and the compelling force of tradition. And in the absence of previous theoretical work, possible rationales for the right must be expounded and then critically evaluated.<sup>139</sup>

For Assy, the concept of a ‘right’ to self-representation is misplaced because LiPs are unable to do justice for themselves.<sup>140</sup> As such, they are better served by having mandatory representation. However, while Assy’s position is more extreme, it is symptomatic of this kind of discourse. In Assy’s argument, his primary interest is that court proceedings are in keeping with the ‘overriding objective’ of civil justice.<sup>141</sup> Such an objective is outlined explicitly in Rule 1.1 of the *Civil Procedure Rules*, which states, amongst other points that this is about:

- (b) saving expense;
- (c) dealing with the case in ways which are proportionate –
  - (i) to the amount of money involved;
  - (ii) to the importance of the case;
  - (iii) to the complexity of the issues<sup>142</sup>

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<sup>137</sup> Lord Diplock in *Bremer v South India Shipping* [1981] A.C. 909.

<sup>138</sup> Assy, *Injustice in Person*, 2.

<sup>139</sup> *Ibid*, 2.

<sup>140</sup> For a good critique of Assy’s work, see Bridgett Toy-Cronin, “A Defence of the Right to Litigate in Person,” *Oxford Journal of Legal Studies* 37, no.1 (2017): 238-254.

<sup>141</sup> Assy, *Injustice in Person*, 24.

<sup>142</sup> Civil Procedure Rules 1.1.

But this overriding objective is one in which LiPs are, as this thesis will outline, more likely to be side-lined. The emphasis on saving money, and on prioritising cases based on their financial value or importance (*legal*, rather than any other interpretation of importance) tells us that what LiPs themselves value are of potentially less consequence to the civil justice system. While this is not what the objectives in and of themselves dictate, the political context in which they operate—one in which there have been successive policy changes in favour of greater efficiency of proceedings and reduction in matters coming to court—is one in which what LiPs might find worth litigating over becomes increasingly difficult to represent.

It is important to note here that while the general push towards out of court settlements, and the greater use of mediation is certainly a way of reducing the caseload in the courts and avoiding unnecessary delays, it would be unfair to not also mention that of course, for many litigants mediation can be a preferable and less expensive alternative to court-based litigation. As such, alternative forms of dispute resolution can play a valuable role in settling disagreements and resolving problems. But there remain two key concerns here. Firstly, there is a drift towards an increasing use of mediation: for example, a recent recommendation by Lord Justice Briggs for a new online court envisions a world in which individuals would only be able to litigate as a last resort, having exhausted other alternatives first.<sup>143</sup> The concern here is that any further push towards mediation risks pushing cases towards mediation that are simply not suitable and this nuance may be lost in the drive to keep caseloads down.<sup>144</sup>

The second concern relates to the public interest in private disputes. By restricting litigants' ability to access courts, and instead pushing them towards out-of-court settlement, such disputes and their resolutions will no longer contribute to the development of precedent. Linda Mulcahy in her article "The Collective Interest in Private Dispute Resolution" emphasises that bargaining out of court is facilitated by, and dependent on precedent.<sup>145</sup> The move towards narrowing, or entirely closing off, access to the courts for certain cases has, for Mulcahy, become:

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<sup>143</sup> Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales: London, 2016).

<sup>144</sup> For example, the online dispute court in British Columbia, the Civil Resolution Tribunal [CRT], is based on "forced" mediation, whereby once two parties enter into discussions with a mediator, it is only that mediator that will determine whether the matter can be settled, or will require adjudication. In other words, parties cannot withdraw. While the Briggs report does not explicitly advocate for this, the CRT is an important model for the online court that is proposed. See: <https://civilresolutionbc.ca>

<sup>145</sup> Linda Mulcahy, "The Collective Interest in Private Dispute Resolution," *Oxford Journal of Legal Studies* 12, no.33 (2012): 59-80.

[so] strong that it is time to turn to consider the equally important question of how we identify those cases that must get to trial if both the needs to individuals and the collective need of developing doctrine are to be served.<sup>146</sup>

And so here we face a dilemma; it is obviously in the private interests of some individuals to not litigate, but there is also a public interest dimension to consider, and balancing these two is extremely challenging. Hazel Genn, noting the centrality of out of court settlement, comments that: ‘whether this is a matter for congratulation or concern depends to some extent on your perspective and your fundamental beliefs about the social function of civil justice and the development of common law’.<sup>147</sup> Indeed, it is beyond the scope of this research to be able to offer any contribution here, other than to echo Mulcahy’s concern when she notes that one doesn’t have to be an ‘adjudication romanticist’ to note that ‘markets are in dire need of precedent if they are to function efficiently.’<sup>148</sup> In thinking specifically about LiPs, I would also argue that there is a clear conflict between the right to self-represent and the policy context that interprets and develops these objectives in the civil justice system.<sup>149</sup>

Natalie Byrom notes that:

The cuts to legal aid have changed the manner in which services are provided to the public in a number of important ways. The reforms have reduced the absolute number of providers available; they have affected the geographical distribution of legal aid funded civil law advice across England and Wales, creating “advice deserts”; and they have altered the nature of the service provided by moving the focus away from early intervention and complex casework, onto one-off pieces of advice provided once a situation has already escalated.<sup>150</sup>

Byrom goes on to say that legal-aid funded providers, including law firms, have reduced by about fifty percent since the introduction of LASPO. For Byrom, these changes engender a challenge to traditional concepts of “lawyering”, and she argues that a new vision of lawyering ‘that encompasses ideals of social justice and public service’ is necessary to gain public support for the push towards providing legal aid.<sup>151</sup> She argues this is necessary because too often, debates about legal aid are framed ‘in terms of its impact on the legal system and abstract legal

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<sup>146</sup> Mulcahy, “Collective Interest,” 61.

<sup>147</sup> Genn, *Judging Civil Justice*, 37.

<sup>148</sup> Mulcahy, “Collective Interest,” 79.

<sup>149</sup> This conflict is something I explore in the second chapter when I look at how and why LiPs became LiPs and gained right of access to the higher courts.

<sup>150</sup> Natalie Byrom, “Cuts and the Lawyering Identity Crisis” in A Flynn and J Hodgson, eds, *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury Publishing: London, 2017), 223.

<sup>151</sup> *Ibid*, 234

concepts and terminology, which fails to resonate outside rarefied circles of lawyers and legal academics'.<sup>152</sup> I argue that the prioritising of the effect LiPs will have on the legal system over ideas of access to justice for litigants is evidenced throughout these writings. As such, this post-LASPO discourse can be of only limited value in understanding LiPs and what they want, even if advocated by the most sympathetic of practitioners.

This second discourse of crisis, then, inherently reinforces two problematic ideas when it comes to LiPs: firstly, it reinforces the idea that LASPO is the crisis point: while it may be so for the legal profession, the difficulties LiPs have experienced *before* these changes show us this is by no means the case. As such this second 'crisis' of legal aid changes is inseparable from what is at stake for the legal profession. Secondly, the underlying implicit necessity of legal representation as the solution for all LiPs does not clearly sit with the right of self-representation.<sup>153</sup> On the one hand, there is a right of access to all courts for LiPs. But on the other, built into civil justice is an emphasis on the need for representation. So why do we have LiPs in the first place? This conflict means that this way of seeing can only get us so far in terms of how to improve LiP experiences. The answer seems to be: get a lawyer.<sup>154</sup>

### CRISIS NO. 3: A SYSTEMIC ISSUE

Both discourses above depict the LiP in certain ways, with the first emphasising how much LiPs are a problem and the second emphasising that LiPs would be better off with representation. In the first place, what both discourses demonstrate is that the category of 'LiP' is a problem. The term LiP is a legal concept—and yet LiPs exist outside of this. At the moment, any understanding by the legal field of what a LiP is and how they behave is being observed from a legal perspective. This means we have difficulty understanding LiP experiences outside of the frames we impose on them and it also makes it difficult (if not impossible) to consider what the law and legal process might mean to those outside of it.<sup>155</sup>

For example, LASPO changes have led to fears of rising numbers of LiPs in the courts. But what if we reconsider this from outside the perspective of the legal profession? As we have

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<sup>152</sup> Ibid, 234.

<sup>153</sup> Again, it is important to note that not all practitioners advocate for full representation; some argue for representation in higher courts, others just for more legal advice.

<sup>154</sup> In addition, as Chapter Six explores in more detail, the information and advice given to LiPs by organisations such as the Bar Council is often highly inconsistent.

<sup>155</sup> There has been some research that has specifically focused on what litigants might want outside of, or prior to, entering into a legal environment, considering what might become justiciable. This includes Hazel Genn, *Paths to Justice*; Patricia Ewick and Susan S. Silbey, *The Common Place of Law*; Felstiner, Abel and Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." *Law & Society Review* 15, no. 3/4 (1980-1981): 631-654.

seen, from the perspective of many legal practitioners, there is a tendency here to think that legal aid changes mean that most individuals who would have had access to representation will now go ahead without it. But even if more LiPs do come, they may not look as many in the profession imagine. We know from Moorhead and Sefton, and others, that the majority of LiPs are not active vexatious claimants, but rather passive defendants. These are people who do not participate in their own defence, let alone attend their own hearings. If there is a going to be a rapid growth in LiPs, I believe there is a significant risk that these LiPs will be these passive defendants: those either unable or unwilling to participate in their own proceedings or, indeed, to defend themselves. So what if the real risk isn't rising numbers? Long before LASPO, access to legal aid was problematic, obtaining good quality legal representation was difficult and legal proceedings were expensive.<sup>156</sup> This is still the case, and LASPO has only magnified it. Lia Moses of LawWorks suggests this in her blog for the *Law Society Gazette*, asking:

How will anyone who is not articulate, well-educated and familiar with the court system cope with the procedures in place – will they manage to pay the fees, get the forms in the proper order and get past the court office?<sup>157</sup>

In this context, the true worry is not that more people will come acting as LiPs; it is that they may not come at all.<sup>158</sup>

Most importantly, though, I argue these two crises serve to both point to, and simultaneously obscure, the true crisis: LiPs are perpetually positioned as aliens to legal proceedings. As we have seen, LiPs are usually talked about in legal discourses through the perceived threat they pose to legal proceedings. But the only way, of course, that LiPs' entry into legal process can be considered a threat is because they are presumed to be fundamentally *outside* of it. As Richard Moorhead noted, LiPs 'disturb the normal conventions of a courtroom': it is this aberration from normality that can so easily be conflated with the litigant in person him or herself being "abnormal".<sup>159</sup> This means that even those who advocate to improve conditions for LiPs continue to perpetuate this presumption.

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<sup>156</sup> See Richard Moorhead and Pascoe Pleasence, eds., *After Universalism: Re-engineering Access to Justice* (Oxford: Blackwell Publishing, 2003).

<sup>157</sup> See Lia Moses, "Helping out Litigants in Person," *Law Society Gazette*, 15 July 2013.

<sup>158</sup> Cookson suggest this, noting that individuals may be more likely to 'give up' in the context of lack of legal aid. *Unintended Consequences*, 37.

<sup>159</sup> Richard Moorhead, "The Passive Arbitrator: Litigants in Person and the Challenge to Neutrality," *Social and Legal Studies* 16, no.3 (2007): 405.

## CONCLUSION:

LiPs tend to be talked about in highly pejorative terms, and this is longstanding. This pejorative attitude arises largely from the impact that such individuals are believed to have on others in the court process, due to their lack of specialised knowledge, language or skill. LiPs don't understand their case, they don't understand how to behave and their disruptive behaviour impacts negatively on other court users. In short, LiPs cause *problems*. But the extent of these perceived problems seems to have led to a conflation where LiPs don't merely cause problems, but they themselves are considered to *be* a problem. As such, criticism of LiPs often presents their faults as somehow linked to their character or psychology. While there are also sympathetic scholars and practitioners who seek to improve experiences for LiPs, this writing still shares certain assumptions about LiPs: that they bring problems with them that affect others, and that they disturb the operation of a courtroom. As noted above, this means that both groups of writers tend to see LiPs as outsiders to what is 'normal'.

It is this outsider status that has let to us not knowing much about LiPs, because we have tended to neglect them in scholarship until relatively recently.<sup>160</sup> When we do talk about them, we are often dismissive or pejorative, and even the most sympathetic commentators position LiPs as objects of pity.<sup>161</sup> And as this thesis will go on to argue, while LiPs possess theoretical access to legal proceedings, in practice this right is largely rhetorical. LiPs do not have fair, easy, or equal access to the courts, and this is not the result of LASPO. The solution to *this* crisis, however, isn't about giving people lawyers or working out how to prevent "difficult" people from coming to court. Instead, we need to change the way we approach understanding those who act as LiPs, finding methods that attempt to, as sociolegal research calls for, 'reach beyond' the limitations of internal legal discourses.<sup>162</sup> While LiPs are positioned as alien to legal process they will continue to be afterthoughts, problems, or objects of pity. This cannot be sufficient in a civil justice system where, as Bridgette Toy-Cronin notes: 'the contribution that the right of self-representation makes' is linked to 'the continuing legitimacy of the legal system'.<sup>163</sup>

It is clear, then, that the term "LiP" poses more problems than it solves. More than just a confusing concept, the term is linked to a limited understanding of self-represented parties, and exists in a civil justice system that inadequately accommodates such individuals. But how

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<sup>160</sup> As noted above, there are few examples of LiP research prior to the 1980s, and most scholarship comes from the late 1990s, 2000s and later. This is interesting in a situation where self-representation, as I will demonstrate in the next chapter, has been going on for hundreds of years.

<sup>161</sup> See, for example, Marilyn Stowe, "Government Encourages Litigants in Person," *Solicitors Journal*, 8 August 2011.

<sup>162</sup> See David Cowan, Linda Mulcahy, Sally Wheeler, "Introduction," in *Law and Society* (Routledge: London, 2014), 4.

<sup>163</sup> Toy-Cronin, "A Defence," 250.

did this situation come to be? *Why* do we look down on LiPs? Have self-representing parties always been looked on as aliens to legal process, or is there another story to be told? Why is there a right of self-representation in the courts when the practice of civil justice seem to fundamentally preclude LiPs? These are the questions pursued in the next chapter.

## FROM THE BEAR-GARDENS TO THE COUNTY COURT:

## CREATING THE LIP

This [section of the *County Court Chronicle*] will be dedicated to the Suitor, whether by Attorney or in person. Firmly convinced that the ultimate interests of the Attorney and the Client are *the same*; that law may be too cheap as well as too dear; that bad law is worse than no law; and that there is substantial truth in the proverbial description of the man who is “his own lawyer”.<sup>164</sup>

This [case] seems an exemplification of a hackneyed observation that a man who is his own lawyer has not a Solomon for his client.<sup>165</sup>

TRIAL LASTS TWELVE DAYS: And Litigant Speaks for Nine of Them.<sup>166</sup>

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<sup>164</sup> County Court Chronicle [CCC], 1 June 1847, 10.

<sup>165</sup> CCC, 1 September 1866, 134.

<sup>166</sup> *Western Times*, 4 November 1927, 16.



## INTRODUCTION

This chapter seeks to understand how we came to acquire the dominant beliefs and attitudes we have about LiPs. Why is there such a pejorative attitude towards them? As I outlined in the previous chapter, LiPs are considered widely by legal professionals to be vexatious, time wasting, disturbed, incompetent or a combination of all of the above. This has significant consequences for LiPs when they try to pursue or defend claims. But how did we get here? Were people who represented themselves always considered so negatively? Or is this the result of historical changes: if so, when and how? As I will show, pursuing these questions is a distinct task to that of undertaking a broader history of self-representation. The term LiP is a relatively modern one and taking this term as synonymous with self-representation fails to consider how important the moment of historical transformation is from a general idea of self-representation to the creation of the LiP as a specific role. To understand *how* LiPs came to be understood as they are today demands a critical investigation of the creation of the term itself.

This chapter then, is a study of a particular historical moment: when the term LiP first appears, and the context in which this takes place. I argue that this moment is a by-product of broader changes taking place in both the legal profession and in legal adjudication, culminating in the sweeping *Judicature Acts* which create the modern superior courts. It begins with the founding of the new County Courts in 1847 and ends with the appearance of LiP as a term in case law, and in general parlance, by the 1880s. As I will show, in a remarkably short period of time from their creation, these new County Courts, theoretically designed to provide greater access to justice for poorer litigants, become increasingly dominated by legal professionals, who bring in their wake greater and greater formality of procedure and content, which makes it harder and harder for individuals to act without lawyers.<sup>167</sup>

Blaming ‘formality’ and the ‘legal profession’, however, for creating the LiP is an oversimplification. Instead I will argue in this chapter that what happens during this period can best be understood as emblematic of Larson’s ‘professional project’ in action. Drawing on Larson’s framework I will show that the new County Courts become a battleground for attorneys to claim their place in a legal profession that up until this point actively discriminates between the ‘higher’ calling of the Bar and the ‘lower’ rungs of the rank and file

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<sup>167</sup> Of course, this was never the only motive for establishing the County Courts, as I will outline later in the chapter.

practitioners.<sup>168</sup> As I will outline, this battle is a battle for *distinction* that takes place through the marking out legal representatives from laypersons, the normalisation of legal expertise and the cracking down on unqualified representatives. It is the introduction of these kinds of distinction into the County Courts that creates the LiP. What I will show, then, is that the LiP role is not simply that of self-representation, it is self-representation that occurs, and *only* occurs, in the context of the latter stages of the professional project. Perversely, this also means that the creation of the term LiP does not indicate the facilitation of lay participation in legal forums; it instead marks the moment when they are displaced.

#### A NOTE ON SOURCES AND SCOPE

It is important to start this chapter by saying explicitly that this is not a history, either of the County Courts, or of 19<sup>th</sup> century changes in legal adjudication.<sup>169</sup> These topics, while indirectly implicated in this research, are not only well beyond the scope of this project but they are also beyond my capacity as someone who is not an historian and who lacks the requisite skill and training to tackle such a task. Instead, what I attempt to do in this chapter is narrower: I try to understand what is happening for self-represented parties at the time the County Courts are founded and in the following decades, seeking to shed light on how the term LiP came about and how such individuals came to be so looked down upon.

However, such a task does necessitate having a general understanding of the pre-existing landscape of self-representation prior to the founding of the County Courts, knowledge of the County Courts themselves, and understanding of developments in the legal profession at that time. I therefore draw on, and am indebted to, several legal historians whose work is essential in constructing my argument: in particular, Patrick Polden's *History of the County Courts of*

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<sup>168</sup> The 'rank-and-file' practitioners are the attorneys and solicitors, with attorneys practising in courts of common law and solicitors practicing in Chancery. This division ends in 1874 with the *Judicature Acts* when all attorneys become solicitors. In this chapter, I am mainly focusing on the attorney as it is the attorneys who play the major role in the new County Courts. Solicitors are present as well, but it is the attorneys who are explicitly referred to in contemporary legislation about legal representatives at this period. Significantly, as the *County Courts Chronicle* notes, the attorney's function in the County Court becomes more and more that of an advocate. See CCC, 1 October 1847, 18.

<sup>169</sup> The nineteenth century is of course a time of extraordinary and far-reaching changes in the law courts: such developments touch on this research but remain tangential enough that dealing with them directly would take this research too far from the key questions. However, a contemporary account of these changes can be found in Robert William Andrews, *The Supreme Court of Judicature Acts, and the Appellate Jurisdiction ACT 1876: With Rules of Court and Forms to May, 1880. Annotated So As to Form a Manual of Practice. Adapted Chiefly to the Chancery and Common Law Divisions* (BiblioBazaar, London 2015 [1880]). For a more contemporary account of some of the changes taking place during this time, see Michael Lobban, "Preparing for Fusion: Reforming the 19<sup>th</sup> Century Court of Chancery, II," *Law and History Review* 22, no. 3(2004): 565-599.

England, H.W. Arthur's *Without the Law* and Paul Brand's *The Origins of the English Legal Profession*.<sup>170</sup> It is perhaps an irony that to write about people without lawyers, one must spend most of one's time talking about legal professionals. But as this thesis will continue to revisit, self-representation only exists as a concept in relation to legal representation, and so they remain indelibly linked.

In addition to the legal historical literature that provides a background to this analysis, this chapter draws on two primary sources for information about the County Courts: firstly, the House of Commons [HC] and House of Lords [HL] debates that took place around the establishment of these courts, and which took place over a nearly thirty-year period from 1821 until 1849. My research into the HC and HL debates was based on the online searching of the database of hansards using "County Courts" as the key search term.<sup>171</sup> I read any debate explicitly mentioning the County Courts as a means of understanding the grounds on which the legislation establishing the new courts was introduced.

Secondly, and most importantly, this chapter draws on the *County Court Chronicle*, a publication that was founded with the introduction of the new County Courts in 1847 and which continued until 1920. The *County Court Chronicle* provides early court reports, editorials, discussions of relevant legislative and procedural reforms, and letters to the editor from both litigants and lawyers: as such it offers an unmatched insight into debates taking place around the time. The alteration in the *Chronicle's* style and focus is a useful method of charting the shifts in process relating to the LiP that I seek to identify in this chapter. As I will show, within a short space of time, the *Chronicle* goes from being a journalistic, almost gossipy, account of cases, many of which have unrepresented parties, to becoming a distinctly different publication in keeping with the development of the professional project.

It is important to note here, though, that although the *County Court Chronicle* is an invaluable resource, I am aware that there is a danger in relying too heavily on it for evidence of what happened in the County Courts. This is because, of course, the reporting itself is always partial and selective. Even in the first year of its publication, where the amount of cases reported was significantly more than the amount reported ten or twenty years later, this was only ever a fragment of the proceedings actually taking place. I will argue, instead, that what we *can* do is consider the reporting in the *Chronicle* as indicative of what was important to the authors

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<sup>170</sup> Paul Brand, *The Origins of the English Legal Profession* (Oxford: Blackwell Publishers, 1992).

<sup>171</sup> Other search terms included 'small debts' and 'small debts act' as this the working title for some of the earlier proposals that preceded the *County Courts Act*.

(legal professionals) and their audience (largely legal professionals).<sup>172</sup> As I will show, the diminishment of cases reported involving self-represented parties in later editions of the *County Court Chronicle* does not necessarily indicate that they disappear (and, in fact, we know from isolated comments that they do not), but it does tell us that they are marginalised from what is perceived to be the “real work” of the Courts: that of legal professionals arguing matters of legal interest.<sup>173</sup>

My analysis of the *County Court Chronicle* is based on searching the database *Newspaperarchive.com* which provides access (via a fee) to editions of the *Chronicle* from the year 1846 onwards.<sup>174</sup> However, while online editions are available until 1904, and the publication itself continued for sixteen years after this online database ends, I chose to not continue to read further than the 1890s as by this time, the term LiP had been well established and was appearing in multiple contemporary newspapers. I began my *Chronicle* research by reading all the 1847 editions page by page to identify where information about self-represented parties could be found. Having identified the relevant sections of the publication for self-represented parties (this included, for example, ‘The Suitor’, which is dedicated to discussing developments for litigants, as well as the weekly County Court Reports and the Letters pages), I then used these as reference points when reading through later editions of the *Chronicle*. Although there is a key-word search function in the *NewspaperArchive* database, the term ‘litigant in person’ does not exist until the 1880s (and never appears in the *Chronicle*). Therefore, this tool was limited in its utility which necessitated continuing to read through each edition to ensure no new section or term had emerged. So, while I did attempt to make my searching as efficient as possible, the material in this chapter from the *Chronicle* is based on looking through every edition of the publication from 1849 to 1890.

#### BEFORE 1847: SELF-REPRESENTATION IN CIVIL PROCEEDINGS

The presence of self-represented parties in civil proceedings is a longstanding feature of English legal history.<sup>175</sup> As Paul Brand notes, ‘England before the middle of the twelfth century was a country without professional lawyers largely because there was little for them

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<sup>172</sup> While I have been unable to find any explicit circulation figures, the publishers were also those involved in the publication of legal circulars and we can therefore speculate that the *CCC* was for a fairly select, mainly legal, audience.

<sup>173</sup> Patrick Polden, *A History of the County Courts: 1846-1971* (Cambridge: Cambridge University Press, 1999).

<sup>174</sup> See *Newspaperarchive.com*

<sup>175</sup> For the parallel story of criminal proceedings, see John Langbein, *Origins of Adversarial Criminal Trial* (Oxford: Oxford University Press, 2003).

to be expert about'.<sup>176</sup> Prior to the emergence of the legal profession, litigants brought their suits in person. The introduction of specialised King's Justices and tribunals created the initial need for specialists. It is the emergence of the legal profession to meet this demand that in turn generates greater legal complexity, and then the need for greater expertise to navigate this complexity, which results in the development of more formality requiring further expertise, and so on in a symbiotic, ever developing relationship that results in a complex legal system and a profession that represents it. This accumulation of complexity inevitably displaces individuals from being able to self-represent because they lack the expertise with which to do so.<sup>177</sup> This is of course, in short, a version of Larson's professional project, whereby legal professionals establish a monopoly within an emerging market.<sup>178</sup> In England, this happens extraordinarily quickly.<sup>179</sup> By the time we reach the establishment of Superior Courts under Henry II, less than fifty years from the mid-12<sup>th</sup> century, we have courts where:

[a]lmost all litigants were "outsiders", both in the sense of having no social or family links to the judges and in the sense of their being ignorant of the law and custom followed in and constantly being reshaped by the court, which created demand for individuals who could act as intermediaries between litigants and the court.<sup>180</sup>

From the 13<sup>th</sup> century onwards, the Westminster courts used a writ system that required legal experts to draft documents establishing the suit as relevant to one of the recognised causes for action.<sup>181</sup> There were also professional pleaders who presented the case in court. The superior courts were therefore dominated by legal representatives from a very early point, as they relied on expertise in substantive issues and pleading.<sup>182</sup> Once representatives were involved, this significantly raised the costs of appearance, thus excluding individuals who could not afford to hire representatives. As Margaret Hastings points out:

the wonder is, considering the obstructions, the many delays, the tedious procedure, even where no extraordinary hurdles had to be surmounted, and the considerable expense of writs, attorney's fees, and so forth, that anyone ever had the courage to go to law in a mediaeval court except for large debts, extensive lands, or chattels of great value. Either

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<sup>176</sup> Brand, *Origins*, 5.

<sup>177</sup> *Ibid.*, 3.

<sup>178</sup> Larson, *Professionalism*, xvi.

<sup>179</sup> By Superior Courts, I am referring to the King's Bench, Exchequer, Chancery, and Court of Common Pleas all of which developed from the *curia regis* into specialist institutions between the 11<sup>th</sup> and 14<sup>th</sup> century.

<sup>180</sup> Brand, *Origins*, 69.

<sup>181</sup> *Ibid.*, 34.

<sup>182</sup> Penny Tucker, "London's Courts of Law in the Fifteenth Century: The Litigant's Perspective," in Christopher Brooks and Michael Lobban, eds, *Communities and Courts in Britain: 1150-1900* (London: A&C Black, 1997), 29.

attorneys were persuasive salesmen of the law, or men were willing to pay much to gratify litigious proclivities.<sup>183</sup>

It was simply not a practical option to pursue matters in these courts unless one had a considerable amount to spend, and to lose. Hastings' comment also draws our attention to an important point: that it is misleading to suggest that legal representation ends *any* individual's ability to self-represent. Clearly, even before lawyers, this ability was already largely limited to the wealthy and the landed, and thus did not include the vast majority of the population who lacked such resources and therefore were unlikely to have any encounters with these courts.<sup>184</sup>

It is apparent, then, that the courts at Westminster were inaccessible to laypersons from an early stage. But these were not the only courts in pre-19<sup>th</sup> century England. Self-representation continued to flourish in other courts and tribunals such as the Anglo-Saxon derived hundred courts and the manorial courts, alongside a host of specialised tribunals that existed throughout England and Wales well into the 19<sup>th</sup> century.<sup>185</sup> Early plea rolls from the Eyres (developed from hundred courts but employing itinerant King's Justices) show us an abundance of self-represented individuals.<sup>186</sup> Several factors help explain why self-representation continued in these courts: firstly, many of these courts and tribunals remained primarily oral with individuals able to attend and give their complaint on the day. This means that disputes were resolved quickly, and also meant that with no elaborate writ system, literacy was not necessary.<sup>187</sup> Secondly, there was no need for legal expertise as adjudication was not necessarily bound by precedent, and there were no superior courts to which these courts had to answer.<sup>188</sup> There was therefore no obvious need for legal representation because there was still nothing to be expert about. Procedures were consequently cheaper and simpler. Finally, these courts were held locally, making them not only more physically accessible to those who could not travel to London, but also tribunals that could dispense a kind of communal justice that the Westminster courts could not.

This is obviously a rather truncated and simplified overview of diverse and complex tribunals. But I provide this narrative to draw out two important points for this chapter. Firstly, it is

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<sup>183</sup> Hastings, *Court of Common Pleas*, 169.

<sup>184</sup> Brand, *Origins*, 9.

<sup>185</sup> For an overview of this multi-court landscape, see H.W. Arthurs, *Without the Law*, Chapter One.

<sup>186</sup> See *Plea Rolls for Staffordshire: 1251-55*, Staffordshire Historical Collections, vol. 4 (1883), pp. 121-133; F.W. Maitland, ed. *Select Pleas of the Crown: Volume 1 - A.D. 1200-1225* (London: Bernard Quaritch, 1881).

<sup>187</sup> Some tribunals required an initial written plaint, but the clerks at the courts themselves could draft this on the oral application of the plaintiff.

<sup>188</sup> This is not the case for the Eyres, which did employ common law and travelling King's Justices established under the Assizes of Clarendon in 1166.

obviously inaccurate to claim that self-representation becomes impossible only in the 19<sup>th</sup> century. Self-representation arguably always required facilitation by certain factors to be effective: proceedings that are oral and that therefore do not necessitate literacy, and forms of adjudication that don't rely on knowledge of legal doctrine that would necessitate legal expertise. It is when litigants lose access to these kinds of proceedings that self-representation becomes more difficult. Secondly, understanding that England is a landscape of multiple different courts and tribunals in the mid-19<sup>th</sup> century also helps to understand the impact of the *County Court Act 1846*. This is because this act does not simply create a new court for litigants, it replaces another one: The Courts of Request.

## THE COUNTY COURTS AND THE COURTS OF REQUEST

The *County Courts Act 1846* came into force in 1847. This bill, which was debated, drafted and redrafted over a nearly thirty-year period<sup>189</sup>, did not create County Courts, which in fact already existed, but was rather intended to reform them in order to provide an accessible and inexpensive forum for pursuing small debts.<sup>190</sup> The superior courts were, as noted above, accessible only to the wealthy, required legal representation, and were routinely criticized for their 'dilatatory' proceedings, with suits taking many months. Joseph Parkes, writing about his own experience of the Warwick Assizes of 1827, says:

I brought an action for £25. It was defended; six witnesses, besides the respective attorneys and parties, attended five days: I obtained a verdict: my costs to the defendant were £66, and probably his own costs due to his attorney would be an additional sum of £50; thus the original debt in dispute was more than quadrupled, besides the time and personal inconvenience lost to all parties.<sup>191</sup>

In addition, since 1278 the Statute of Gloucester had limited any proceedings in the superior courts to actions involving a value of more than 40s. The fact that a suit's importance was

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<sup>189</sup> The protracted debates surrounding the founding of these new Courts are long and complicated, with the initial instigator being Viscount Althorp in 1821. Sir Robert Peel took up the mantle in the 1820s and was succeeded (and exceeded in zeal) by Lord Brougham. For a more detailed overview of the debates taking place in the run up to the *County Courts Act*, see Chapter One of Polden, *History of the County Court*, 5-37.

<sup>190</sup> The Courts were intended primarily for small debt claims, but also meant to encompass any other forms of minor dispute resolution. The Statute itself was often referred to in parliament as the Small Debts Act. The initial 'Small Debts Committee' that first suggested new County Courts was operating in the early 1820s and reporting back to the House of Commons by 1824. See House of Commons Debate [hereafter HC Deb] vol. 10 cc 303-4, 23 February 1824.

<sup>191</sup> Joseph Parkes, *The State of the Court of Requests and the Public Office of Birmingham, with Considerations on the Increase and Prosecution of Crime in the County of Warwick, Etc* (Birmingham: Beilby, Knott and Beilby, 1828), 5.

formally determined by how much financially was at stake, barring it from the superior courts, was harshly criticised by Jeremy Bentham, among others:

No wrong that I know of can be a trivial one which to him to whom it is done is a serious one; serious to such a degree as to make it worth his while to demand redress at the hands of justice [...]. What to one man may be trivial, to another may be of high importance. In pecuniary cases, the smaller the sum in dispute the less reserve is used in branding the conduct of parties with the charge of litigation, of which, in such cases, the reproach is apt to fall principally, if not exclusively, to the plaintiffs share.<sup>192</sup>

As Bentham, and other contemporary commentators, including Sir Robert Peel, Viscount Althorp and Lord Falconer, argued, the arbitrary corollary between financial value and merit misrepresented what the value of the suit may be for the individual bringing it.<sup>193</sup> Poorer litigants may wager more of their net income or assets than a comparatively wealthy individual even if the total sum in question is significantly less.

This statute meant, however, that any suits of lesser value had to be pursued in the lower courts. And the existing County Courts were considered by many to be just as bad as the superior courts. These courts shared the charges of delay and expense levelled at the superior courts, but in addition were also regularly accused of corruption and criticised for their infrequency.<sup>194</sup> John Smith, in an early House of Commons debate on County Court reform:

[p]resented a petition from the inhabitants of Brighton, complaining of the serious evils which arose from the abuses of the practice of the County Courts. The petitioners alleged, that these courts frequently granted seizures for sums treble the amount of the original debt, and this enormous increase was generally caused by the costs, which swallowed up every-thing else. ... among others he mentioned the case of a poor woman, who was sued for a debt of 14s., and an execution being taken out against her for that sum, and for 15s. costs upon it, her goods were seized for a sum considerably exceeding the amount of both debt and costs; her bed, her pillows, and several other articles of furniture were taken from her, and in this case, as in others of a similar kind, nothing was returned.<sup>195</sup>

Politicians and jurists, then, proposed the County Court legislation ostensibly as a means of extending justice to poorer litigants, and as an explicit reaction to the inaccessibility of the

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<sup>192</sup> Jeremy Bentham, *A Protest Against Law Taxes* (London: J Debrett, 1795), 34-36.

<sup>193</sup> See Sir Robert Peel, HC Deb 20 June 1827, vol 17 cc 1350-61. See also Mr Brougham, HC Deb 29 April 1830, vol 24 cc 243-89.

<sup>194</sup> Arthurs, *Without the Law*, 16.

<sup>195</sup> John Smith, HC Deb 09 April 1827, vol. 17 cc 297-9.



current courts.<sup>196</sup> However, although there were certainly altruistic motives involved, the legislation was arguably less about giving access to justice for poorer litigants than allowing tradesmen to pursue poorer individuals for debts.<sup>197</sup> Most importantly, the implication of comments made by figures such as Lord Falconer is that the Act was needed to provide courts where there were no courts before, or only the bad old County Courts.<sup>198</sup> But this assumption ignores the Courts of Request.

Courts of Request (sometimes called Courts of Conscience) were courts where cases were decided locally according to ‘equity and good conscience.’ As Shaunnagh Dorset points out this means that such courts were:

neither a court of common law nor equity and decisions were to be made according to the more discretionary norms of “real justice and good conscience”, although such courts could apply common law or equitable principles, or a modified version of them [...] such courts were designed to allow matters to be determined in a manner that was shorn of the need for technicalities, difficult pleading or even lawyers, and they were often run by laypersons.<sup>199</sup>

Each Court of Request was a separate entity created by local municipal statute.<sup>200</sup> The cases in question in these courts were usually very small and as Dorset notes, the procedures were relatively simple, and parties could testify in person.<sup>201</sup> The Courts of Requests were clearly also hugely popular. By 1847, these courts existed in over four hundred locations and dealt with several hundred thousand suits annually.<sup>202</sup> This was where the majority of small debts claims were made, alongside a host of other kinds of minor disputes. As H.W. Arthurs puts it: ‘It is hardly an overstatement to say that, for most Englishmen of the period, the local Court of Request dispensed the only form of civil justice they would ever know’.<sup>203</sup> Far from there

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<sup>196</sup> Ibid.

<sup>197</sup> See Paul Johnson, “Creditors, Debtors and the Law in Victorian England,” *LSE Working Papers in Economic History* 31, no. 96 (1996): 1-32.

<sup>198</sup> Indeed, this is precisely the case made in one of the earliest pamphlets directly discussing ‘accessibility of justice’ published in 1830. See Editorial, “Mr Brougham and Local Judicatories,” *Westminster Review* 13 (1830).

<sup>199</sup> Dorset is writing about 19<sup>th</sup> century New Zealand practices, but these replicate English proceedings and her latter comment about the simplicity of proceedings is directly discussing English practice. See Dorset, “Destitute of the Knowledge of God: Maori Testimony before the New Zealand Courts in the Early Crown Colony Period,” in Diane Kirkby, ed., *Past Law, Present Histories* (Canberra: ANU E-Press, 2012), 46-47.

<sup>200</sup> Dorset, “Destitute,” 47; Polden, *History of the County Courts*, 47.

<sup>201</sup> Ibid. See also Arthurs, *Without the Law*, 26. Testifying in person is distinct to self-representation, referring to a party in the case giving a sworn account of what happened to a court.

<sup>202</sup> Ibid, 17.

<sup>203</sup> Ibid, 26.

being no forum for litigants pursuing small claims, then, there were in fact courts already operating that were arguably rather successful.<sup>204</sup>

So why, then, do the drafters of the *County Court Act* argue that the new County Court is needed? One explanation is that The Courts of Request were no place for those who considered themselves members of the legal profession. As a *Chronicle* correspondent would note later: ‘Courts of request were bear gardens in noise and confusion, and their character was at the lowest ebb’.<sup>205</sup> While there seems to be some evidence of attorneys involved in the Courts of Request, such individuals were looked down on as debasing the reputation of the profession in general.<sup>206</sup> The judges in the Courts of Request themselves required no legal training, although by the 1830s they did have to be landowners. Courts of Request do occasionally appear in the House of Commons debates about the new County Courts, but they are not depicted in a flattering light. Lord Brougham expresses a typical attitude here:

It happens that tradesmen, who know nothing of law, and who may not have much occupation in their own business, preside in these Courts of Request, and administer justice as well as might be expected. I say it is better to have these courts and these judges than to have none.<sup>207</sup>

So, while the Courts of Request were considered to serve a purpose while there was no better alternative, they were generally considered beneath the dignity of the profession and thus replaceable.<sup>208</sup>

But another, more persuasive explanation for why the Court of Request is replaced can be found through examining the criticism in closer detail. Such criticism demonstrates that for many in the legal profession, the Courts of Request weren’t just undignified, they weren’t *courts* at all. The language of the criticism evidences this: these courts were, as above, described as ‘bear gardens’.<sup>209</sup> Other commentators refer to them as ‘but tribunals’.<sup>210</sup> Such language is more than a character assessment: it is a policing of boundaries, symptomatic of what John Griffiths identified as ‘legal centralism’. Griffiths defines legal centralism as the idea that: ‘law is and should be the law of the state, uniform for all persons, exclusive of all other

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<sup>204</sup> See Polden, *History of the County Court*, 11.

<sup>205</sup> CCC, 1 July 1847, 34.

<sup>206</sup> Ibid.

<sup>207</sup> Lord Brougham, HC Deb 29 April 1830, vol 24 cc 243-89.

<sup>208</sup> A barnstorming address by the Lord Chancellor in 1830 outlines the reasons to ‘absorb’ the courts of conscience or requests and create the new County Courts. It is far too long to include here, but can be found in HL Deb 02 December 1830, vol 1 cc707-40.

<sup>209</sup> CCC, 1 July 1847, 34.

<sup>210</sup> Ibid.

law, and administered by a single set of state institutions'.<sup>211</sup> Courts and tribunals operating outside of the auspices of this central administration are therefore not real courts. But legal centralism is a claim, not a fact. As Marc Galanter comments in his article on indigenous law and legal pluralism:

Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. People experience justice (and injustice) not only (or usually) in forums sponsored by the state but at the primary institutional location of their activity—home, neighborhood, workplace, business deal and so on (including a variety of specialised remedial settings embedded in these locations).<sup>212</sup>

Following Griffiths and Galanter, the *County Court Act* can be read as an ideological claim to a specific kind of justice: a justice that can only be found via the guiding hand of the legal profession. The statute's preamble explicitly states that: 'it is expedient that the Provisions of such Acts should be amended, and that One Rule and Manner of proceeding for the Recovery of Small Debts and Demands should prevail throughout *England*'.<sup>213</sup> As such the *County Courts Act* is more than simple reform: it is part of a wider thrust of legal centralisation taking place throughout the 19<sup>th</sup> century, dismantling unregulated courts and transforming them into new areas of practice for the profession.<sup>214</sup>

The *County Courts Act*, then is drafted to provide *proper* courts for poorer litigants. These new courts will be overseen, and ideally frequented, by legal professionals.<sup>215</sup> As Patrick Polden states: 'from the point of view of the profession [. . .] it was imperative that the county courts should be established on a basis that would give lawyers access to a lucrative new area of practice'.<sup>216</sup> Here we see the mix of altruism and self-interest that largely characterises these developments. So while it would be overstating it to say that the new County Court was established purely in the pursuit of a professional monopoly, it would be naïve in the extreme to believe that this was not also a factor in its development.<sup>217</sup> In keeping with Bourdieu's sociological theory, instead, we can see these two motives are entirely blended: it is not the case that the legal profession want a monopoly of the new courts purely out of self-interest: instead, they genuinely believe that their presence will serve the ends of justice. This attitude

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<sup>211</sup> John Griffiths, "What is Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 3.

<sup>212</sup> Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law," *Journal of Legal Pluralism and Unofficial Law* 13, no. 19(1981): 10.

<sup>213</sup> Preamble, *County Courts Act* 1846.

<sup>214</sup> See H.W. Arthurs, "Without the Law: Courts of Local and Special Jurisdiction in Nineteenth Century England," *Journal of Legal History* 5 (1984): 143-144.

<sup>215</sup> Larson, *Professionalism*, 9-10.

<sup>216</sup> Polden, *History of the County Court*, 43.

<sup>217</sup> *Ibid*, 43.

is common in the *Chronicle*, and is exemplified in this *County Court Chronicle* editorial in the year the bill passed:

There is undoubtedly an inclination at present to stand aloof from the County Courts – to look upon the practices as *low*, and to leave it to the lowest grade of practitioners. Because the old County Courts and the old Courts of Requests were deemed beneath the notice of the most respectable class of the Profession, there is an unwillingness to look upon the new Courts as being at all superior to those they have displaced. But this is a grievous mistake, and if persisted in will be seriously injurious both to the Courts and to the Profession.<sup>218</sup>

The implicit argument here is that the presence of legal professionals is necessary in these new courts, because their presence will *transform* the proceedings from ‘bear-gardens’ into real courts.

#### AN OCCUPATIONAL HIERARCHY

It is necessary at this juncture to note that it is far too simplistic to keep referring to the ‘legal profession’ as a monolithic group, particularly if we want to understand what happens in the County Courts and how it affects self-represented parties. This is because the legal profession, like any other profession, has its own occupational hierarchy. More than that, the status of the law as one of the ‘older professions’, means that its professional structures were developed far earlier than many other professions.<sup>219</sup> While it is important not to get lost in these complex histories, for the purposes of this research, it is essential to note the gap between the elite members of the profession who practiced at the Bar and were admitted to the Inns of Court, and those who occupied a lower status in the profession: the rank-and-file attorneys and solicitors. While such divisions persist in different forms today, these divisions historically cut far deeper. They were, for a start, indicative of a distinct class difference: those admitted to the Bar came from loftier backgrounds, compared with attorneys and solicitors who were from humbler origins.<sup>220</sup> Of course this is often the case today, but in the pre-19<sup>th</sup> century, this division denoted the difference between practitioners at the Bar who were considered ‘gentleman’, and those who were seen *by* the Bar as merely working for money. As Daniel Duman argues, at the point that the Bar established its autonomy, practitioners worked as barristers to attain social privileges that would enable them to pursue leisure; work was not

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<sup>218</sup> CCC, 1 July 1847, 33.

<sup>219</sup> Law is considered one of the ‘old professions’, along with medicine and the Church.

<sup>220</sup> Again, of course, this is arguably still the case for the Bar, whose members are disproportionately drawn from Oxbridge and public schools. See Michael Blackwell, “‘Old Boys Networks’, Family Connections and the Legal Profession,” *Public Law* 3 (2012): 426.

valued in and of itself.<sup>221</sup> The fact that barristers were given an ‘honorarium’ rather than charging a fee indicated the origins of the Bar’s professionalism in a landscape of aristocratic patronage.<sup>222</sup>

This was of course not the case for attorneys who lacked these social privileges and who were dependent on a steady income to survive. But the late 18<sup>th</sup> and early 19<sup>th</sup> century was a time of radical changes. Industrialisation led to significant population changes, as people moved from the countryside to the towns. Such growing town populations led to radical economic and class changes too, as new markets opened up in these urban centres, and the class structure of the whole country changed with it, from one structured on landowners and peasants, to one centred around the market.<sup>223</sup> The consequences for the legal profession of these changes are significant. As Daniel Duman notes: ‘The aristocratic concept of the gentleman was no longer appropriate to the professions in an industrial age’.<sup>224</sup> While up until this point, the Bar had thrived on a pre-nineteenth century guild-like exclusivity, by this time, as T.H. Marshall notes:

Leisure is no longer in the same sense the mark of the aristocracy, and commerce is no longer a disreputable occupation . . . The professional had to change his ground. He had to admit that his occupation was laborious, like the tradesman's—and even to glory in the fact—but to assert that it was labour of a superior kind. The idea of service became more important than the idea of freedom.<sup>225</sup>

In the legal profession, this changing of ground happened at both the higher and the lower ends: the Bar re-oriented itself from aristocratic patronage to subscribing to a model of service.<sup>226</sup> But in the meantime, large sections of the ‘lower-rungs’, increasingly made up of the new, socially-mobile middle class, were also eager to improve their own prospects by emphasising their professionalism.

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<sup>221</sup> Daniel Duman, “The Creation and Diffusion of a Professional Ideology in Nineteenth Century England,” *The Sociological Review* 27, no.1 (February 1979): 115.

<sup>222</sup> Daniel Duman, “Pathway to Professionalism: The English Bar in the Eighteenth and Nineteenth Century,” *Journal of Social History* 13, no. 4 (July 1980): 622. Maimon Schwarzchild, “The English Legal Professions: An Indeterminate Sentence,” *Federal Sentencing Reporter* 10, no. 5 (March-April 1998):

<sup>223</sup> Marx and Engels identified this as central to the development of the ‘cash nexus’. The term, taken from Thomas Carlyle, underlines the shift from an agrarian society of goods valued for their inherent use, to a capitalist society where market determines value, and thus labour becomes alienated and commodified. See Marx and Engels, *The Communist Manifesto* (Simon and Schuster: London and New York, 2013), 61.

<sup>224</sup> Duman, “Creation and Diffusion,” 119.

<sup>225</sup> T. H. Marshall, “The Recent History of Professionalism in Relation to Social Structures and Social Policy,” *The Canadian Journal of Economics and Political Science* V (August 1939): 325-340.

<sup>226</sup> Although never quite shedding its aristocratic associations. For a fuller account, see Duman, “Pathway to Professionalism,” 615-628.

Larson argues that the distinction insisted on by professions is:

a means of conferring status by establishing social distance between the professionals and the other groups: the as-yet socially unacceptable self-made men of the industrial bourgeoisie, in societies which maintained pre-industrial criteria of stratification.<sup>227</sup>

I would argue that what is significant in this history of the legal profession is that the Bar maintained its 'pre-industrial criteria of stratification' well into the 19<sup>th</sup> century, and with this the anxiety to disassociate the Bar from attorneys.<sup>228</sup> This means that the division between upper and lower rungs of the legal profession was not simply a social one, but was actively policed. Attorneys were strongly discouraged from joining the Inns of Court and could only join the Bar if they 'abandoned their practice in the lower branch for at least two years before being called'.<sup>229</sup> In short, this means that at the time of the founding of the County Courts many areas of practice in the superior courts were simply inaccessible to the lower rungs of the profession because they did not have rights of audience, with the Bar enjoying a total monopoly on superior court advocacy. The fact that the entire judiciary was drawn from the Bar only ensured that the legal profession as a whole was largely dictated to by the interests of this elite group.

In this context, then, the new County Court becomes critically important because it offers a new site of practice to attorneys and through them, a means of establishing themselves and becoming recognised advocates.<sup>230</sup> Such a move could potentially both distinguish them from lay practitioners as well as allow them to access areas of practice previously the exclusive reserve of barristers, thus improving their prospects and strengthening their position in the legal profession. This echoes Larson's argument of the 'double' nature of the professional project:

the double nature of the professional project intertwines market and status orientations, and both tend towards monopoly—monopoly of opportunities for income in a market of service, on the one hand, and monopoly of status in an emerging occupational hierarchy, on the other.<sup>231</sup>

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<sup>227</sup> Larson, *Professionalism*, 77.

<sup>228</sup> *Ibid*, 77.

<sup>229</sup> *Ibid*, 11.

<sup>230</sup> As Paul Johnson notes, although there was never an acknowledged 'County Court Bar', it was attorneys (and later, solicitors,) who gained a near monopoly on representation in the new County Courts.

<sup>231</sup> *Ibid*, 79.

The new County Courts were therefore not only a new forum for poorer litigants to pursue debt claims. They were also not only a new area for legal professionals to expand into. They were in addition to both, an opportunity for attorneys to stake a claim to be taken seriously in the courts. And as I will argue in the next section of the chapter, it is when attorneys begin staking their claim that the LiP begins to emerge.

## THE EARLY YEARS OF THE COUNTY COURT

In June 1847, the first edition of the *County Court Chronicle* was published, advertising itself on its masthead as a monthly publication by the editor and contributors of the *Law Times*. At this point, the courts themselves had been in operation for less than two months. The front cover is dedicated to notices of the next County Court sessions on each circuit, followed by seven pages of law reports from across the country. The bulk of the rest of the publication is devoted to specific subsections on particular roles. The mission statement the *Chronicle* outlines for itself is: ‘to provide for all who are engaged in the County Courts, whether as Judges, Clerks, Bailiffs, Practitioners or Suitors, a medium for mutual information and intercommunication on the matters relating to the administration of justice by a tribunal which is of incalculable importance’.<sup>232</sup>

The tone of the first edition is journalistic and experimental. The *Chronicle* itself acknowledges the provisionality of its current layout and arrangements, and the court reports themselves frequently give descriptive accounts of the circumstances of the courts in addition to specific cases. For example: ‘Narbeth, May 20. There were thirty-six cases entered. The courtroom, which is much too small, was crowded to excess with upwards of 100 persons being obliged to wait in the street outside’.<sup>233</sup> In the reports themselves, self-representation is clearly common, with up to half the cases in the first half a dozen issues involving at least one individual appearing in person, if not on both sides. It is difficult to make any estimates of the proportion of self-representation in general because the reports are only a fraction of the cases that were heard. But it is reasonable to assume that an even higher proportion than that which appears in the law reports self-represented in actuality. This is because there is an explicit agenda on the part of the *Chronicle* to report cases of *legal* interest. For example, in Berwick, on May 29: ‘At the first Court there were twenty-five cases entered, while at the last there were upwards of sixty. The only case interesting to that of the Profession was:’ followed by an account of a dispute between an agent and a represented defendant.<sup>234</sup>

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<sup>232</sup> CCC, 1 June 1847, 11.

<sup>233</sup> Ibid, 3.

<sup>234</sup> Ibid, 4. This is echoed by the account from 27 April session at Whitby: Ibid, 6.

For a case to be of legal interest the concept must be understood in legal terminology: this is more likely to arise in cases with represented parties. Consequently, matters of unrepresented parties are more likely to go unreported. However, although the *Chronicle* is staffed by members of the profession, with their concomitant clear interest in drawing out relevant legal issues, the publication commits itself to the interests of self-represented parties as well as that of the profession. The *County Court Chronicle* dedicates a section to the “Suitor”: in other words, to the litigant, who was more likely than not to be self-representing. This section is filled with information that is intended to assist such individuals. As the editor explicitly states in the epigraph opening this chapter, a Suitor in person, and an attorney representing a client, are of equal dignity and status.<sup>235</sup> At this point, then, we may safely observe that self-representation is seen by the authors of the publication as relatively normal.

So, although I have made much of the radical transformation resulting from the *County Courts Act*, it really began as an attempt to combine the introduction of more professional practices—and with it an opportunity for attorneys to become recognised advocates—without completely dismantling what came before, thus retaining enough of the old Courts of Request to ensure the new court’s popularity. This hybridity can be seen in several ways. Firstly, and crucially, the *County Courts Act* clearly outlines the right of trained attorneys to represent litigants, and restricts the ability of other third parties to act as representatives.<sup>236</sup> The *Chronicle* notes in 1847 the measures taken towards this:

[o]ne of the most serious evils to which the suitors resorting to inferior tribunals have been exposed – that of being duped into the employment of sham practitioners – has already received a very decided check from the Judges presiding at Southwark and in Bloomsbury.<sup>237</sup>

This crackdown on unregulated individuals is one Larson argues is characteristic of the professional project, and it receives regular coverage in the *Chronicle* over the years.<sup>238</sup> At the same time, however, a fees cap is in place stopping legal representatives from claiming costs from the court in any proceedings less than 5*l*.<sup>239</sup> This means, in practical terms, that the County Courts both worked towards greater regulation of the profession by weeding out third

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<sup>235</sup> CCC, 1 June 1847, 10.

<sup>236</sup> This includes those who were not legal professionals but who still acted for others, including family members or work colleagues, in a paid or unpaid capacity. There is clearly an interesting link to be made here between the desire of the legal profession to stamp out non-legal representation and ensure their monopoly on representation, and the later relationship between the courts and McKenzie Friends.

<sup>237</sup> CCC, 1 July 1847, 28.

<sup>238</sup> See for example CCC, 2 August 1847; CCC, 1 May 1849, 119; CCC, 1 January 1869, 313; CCC, 1 July 1858, 161.

<sup>239</sup> *County Court Act 1846*, s91.



parties, but also restricted access to legal representation in practice as the majority of disputes fell below this threshold. This is in keeping with the intention stated by the initial proposers of the new County Courts that they would be as accessible and simple as possible.<sup>240</sup>

Secondly, there is a clear attempt to link the County Courts to the superior courts in an effort to legitimate them and attract more legal professionals: the *Chronicle*, for example, advises that the judges keep an eye to the ‘dignity’, ‘decorum’ and ‘tone’ of the superior courts. The following extract is typical of these kinds of editorials:

The new courts, for all practical purpose, dispense very nearly the same law as the superior courts, and have jurisdiction over almost as many subjects. True, the amount is limited; but that does not affect the real importance of the Courts; for the same legal questions, the same philosophy of evidence, the same care in the judgment, the same skill in the advocacy are required, whether the sum in dispute be 20l or 50l. It is the nature of the action and not the amount of demand that determines its legal importance.<sup>241</sup>

This is reflective of the concerted desire to get these County Courts more in line with the ‘dignity’ of superior proceedings, thus making them an appropriate forum for respectable professionals. But on the other hand, there was still no appeal avenue *to* the superior courts for the vast majority of cases, as the Newcastle County Court judge points out:

I am not bound by the specific rules of practice of the superior courts, nor by those of the County Court, part of whose jurisdiction has been turned over to this court....by the 78th section, I am to do justice between the parties by applying in such cases the general principles of practice in the superior courts, according to my discretion. It is very difficult to apply the practice of the superior courts to this court, because we have no pleadings here: but the principles of their practice I may apply.<sup>242</sup>

The attempt to achieve this new hybrid court, where professional standards could be introduced, while informality and simplicity could be retained, runs into difficulties very quickly. We can see this in the cases reported in the *Chronicle* in the 1840s. For example, in *Philip v Edwards*, the plaintiff in person fails to make out his case and applies for an adjournment: this is granted but only on condition he pays the defendant’s costs for attendance that day. But in Newcastle, an illiterate man who fails to bring his daughter to assist him in his

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<sup>240</sup> See Sir Robert Peel, HC Deb 20 June 1827, vol 17 cc1350-61.

<sup>241</sup> CCC, 1 July 1847, 34-35.

<sup>242</sup> CCC, 1 June 1847, 1. According to the *County Courts Act*, only sums over the value of 5lb could be taken to an appeal court, and only at the discretion of the judge. *County Court Act* 1846 c. 95, s XC.

plaint is also allowed to adjourn without paying defendant costs.<sup>243</sup> In Warwickshire, the judge states that he will not allow anyone to speak for the plaintiff except a member of the plaintiff's family, but in *Philips v Edwards*, the brother of the party asking for adjournment is not allowed as the judge refuses to recognise him.<sup>244</sup> Similarly, in *Lloyd v Jones* the judge will not recognise the plaintiff's wife.<sup>245</sup>

Contradictions are also apparent in the question of legal representation. Many judges expressly argue that they want to encourage the presence of attorneys in the new County Courts:

My great desire is to encourage the attendance of professional men in the courts on this circuit, for I am convinced that their assistance greatly conduces to the proper administration of justice in any court, whatever its rank, in which that assistance is rendered.<sup>246</sup>

This is in keeping with the argument that a greater presence of professionals will legitimate these new courts. But other judges argue that legal representation is unnecessary stressing that lawyers are a 'luxury, not a necessity'.<sup>247</sup> In *Jennings v Shepherd*, 'His Honour said he should be glad to allow costs where there was any necessity for an attorney's attendance; but in ordinary cases he should not, nor would he lay down any rule, but judge each case *per se*'.<sup>248</sup>

This lack of consistency is apparent in the court environment itself, which greatly exercises the *Chronicle* and its readers from the beginning. Consider, for example, this memorable account of Brentford County Court in 1847, which, while an extreme example, echoes other contributions around this issue:

The Court is held at a public-house, in a room capable of accommodating a hundred or a hundred and fifty persons; the judge, clerk, high bailiff, &c being all seated together at a common tavern table, none of them being distinguished by any badge of office [...] there must have been not less than five hundred people present, at the lowest calculation. These were distributed in the court (as many as it would most inconveniently hold), and the rest all over the house nearly, the greater part being on the staircase, and a great many, both there and in the court, intoxicated and withall noisy. The disgraceful confusion which these

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<sup>243</sup> CCC, 1 June 1847, 1.

<sup>244</sup> Ibid, 2.

<sup>245</sup> Ibid, 2.

<sup>246</sup> This is echoed by the judge in *Martin v Marshall* (August 1847).

<sup>247</sup> CCC, 1 July 1847, 5.

<sup>248</sup> Ibid.

state of things produced is perfectly indescribable; not to be witnessed, I hope and believe, in any other court of law in the kingdom.<sup>249</sup>

The choice of venue, a public house, draws attention to the lack of dedicated court buildings at this point in time.<sup>250</sup> There are clearly also no dress regulations: not only are the judges and professionals holding no ‘badge’ of office, but it later transpires that they are not dressed in any way distinguishable from anyone else. They sit at a large table that is again indistinguishable from other facilities in the public house. In the opinion of the writer:

It was the whole work, and hard work, too, of the poor wicket keeper or sub bailiff to prevent regular pitched battles, to say nothing of “words of violence” to check which his continued entreaty was- “Silence, ladies! silence! You really must be quiet, ladies; and go out if you want to talk”. But little the “ladies” reckoned, or the gentlemen either, for they still cut their jokes and vented their wrath, as the humour was upon them, in the most boisterous manner.<sup>251</sup>

The gloriously mixed metaphors employed by the distressed attorney above (taking in sporting events and warfare and, later, theatres and bear gardens) emphasises that what he sees taking place in the tavern is not what he recognises as proper court practice. This is clearly due to the absence of uniformity and distinction which leads to a lack of respect by the audience and other participants (who, outrageously, feel that they had the right to speak: even *women!*). The writer largely attributes this failure to the judge: it is the judge’s responsibility to create an appropriate atmosphere through preserving distinction of rank in dress and seating arrangements and upholding stricter control of the court.

This concern about the judge’s role in setting the tone is shared by other commentators of the time.<sup>252</sup> Polden notes:

Even in country towns, however, the extent to which dignity and decorum prevailed depended largely on the personality of the judge. Some judges felt it would be enhanced by adopting the trappings of the superior courts, put on robes themselves and encouraged advocates to do likewise. James Espinasse went further than most, dressing up in silk gown and wig and being preceded into court by his officers bearing wands; this was felt to be

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<sup>249</sup> CCC, 1 September 1847, 77.

<sup>250</sup> See Clare Graham, *Ordering Law: The Architectural and Social History of the English Law Court to 1914* (London: Routledge, 2003).

<sup>251</sup> CCC, 1 September 1847, 77.

<sup>252</sup> CCC, 1 May 1853, 14.

affecting the majesty of the law a little too much, but when Amos held court muffled up in his greatcoat he was considered to be lowering the dignity of the court.<sup>253</sup>

Polden goes on to tell the story of Justice Edward Parry who, as a young lawyer, found himself before a County Court Judge. As Parry relates in his memoirs, while he had been told about this judge's dislike of lawyers who wore robes, he hadn't been told about the other "rules", 'such as not standing between the judge and the fire.'<sup>254</sup>

But while these accounts are an entertaining demonstration of the lack of standardisation of practice in these new courts, what they *also* reveal is how much social anxiety is felt by these attorneys and how much they want to have their dignity and status upheld through operating in appropriate environments. Larson notes that:

beyond the local sphere in which reputations were established there were few recognized guarantees of competence and probity. Without these visible signs, respectable common practitioners found themselves helpless against the competition of the unscrupulous and the inept, who proliferated in unregulated markets.<sup>255</sup>

I argue, following Larson, that it is the 'common practitioners' battle for 'visible signs' that the *Chronicle* wages in the early years of the County Court. Attorneys fight to ensure that greater regulation, distinction and guarantees of competency are established in these new courts so that they can both shore up their role as advocates, as well as secure their status within the legal profession. As Polden notes:

[...] all the judges, whether modest or flamboyant, had to make decisions about procedure and evidence which were of importance to suitors and to the lawyers of the district, and such decisions were more significant for the administration of justice than any points of law that came before them.<sup>256</sup>

And this, arguably, explains why attorneys are so upset by proceedings such as that taking place at Brentford. It also explains why an unusual amount of time is spent in the *Chronicle* discussing things such as the regulation of dress. One upset writer complains in August 1847 of a professional wearing a 'ginger-beer blouse' commenting that it was 'wholly out of place and, under the circumstances, disgraceful.'<sup>257</sup> While this might come across at first glance as rather snobbish, in fact emphasises the importance of *distinction* in legitimating courts and

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<sup>253</sup> Polden, *History of the County Court*, 49.

<sup>254</sup> Ibid, 49.

<sup>255</sup> Larson, *Professionalism*, 12.

<sup>256</sup> Polden, *History of the County Court*, 43.

<sup>257</sup> CCC, 2 August 1847, 59.

the practitioners operating within them. Attorneys are trying to work out *what a proper court is* in the shadow of the 19<sup>th</sup> century superior courts. It is the growth of these markers of distinction that starts to undermine self-representation, as we begin to see from the 1850s onwards.

## THE DISAPPEARANCE OF THE SELF REPRESENTED PARTY

To the Editor of the CCC

Sir – I have before now expressed my opinion at some length on the CCs. Perhaps you will allow me however to summarise my reasons for thinking any further extension of jurisdiction in these courts most undesirable. 1. The fact of the many *small yet defended* and virulently contested cases between an uneducated plaintiff and an obstinate defendant. Everyone who has practised in the rural districts knows the result: Dreadful waste of time, impeded business, and ruffling of judicial equanimity.<sup>258</sup>

The 1850s, 1860s and 1870s in the County Courts was a time of increasing standardisation of practice and creeping formality that manifests in several different areas. By this period, there are codes of rules, judges are only appointed from candidates with seven years of experience at the Bar and there are qualified registrars.<sup>259</sup> Successive alterations to the statute also raises the ceiling on the amount that can be disputed.<sup>260</sup> The fees cap for attorneys is also continuously raised (although lawyers' fees being included in the awarding of costs always remained subject to the discretion of the judge).<sup>261</sup> This latter move was undoubtedly partially in response to the *Chronicle's* repeated advocacy of this. Both changes mean that by the 1860s and 1870s financial recompense was reasonable enough not to exclude attorneys from wanting to participate in the County Courts and therefore more and more begin appearing. At the same time, regulations are tightened to ensure that only appropriately credentialed individuals can act as representatives, with an emphasis placed on weeding out the 'sham attorneys' as part of a broader standardisation of procedure.<sup>262</sup>

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<sup>258</sup> CCC, 1 December 1870, 285.

<sup>259</sup> Johnson, "Small Debts," 11.

<sup>260</sup> This begins at amounts below £20 (or higher amounts if the parties agree that the amount awarded will not exceed £20) in 1847. It is then raised to £50 in 1850 and £100 in 1903.

<sup>261</sup> Section 91 of the original act determines the ceiling of pay awardable to an attorney in the County Courts. By 1850 a separate section of the Act (s 6) deals specifically with fees to be paid to attorneys and barristers, with provision stating that it should not exceed 2 pounds 10 shillings and that court costs are to be allocated at the discretion of the judge. This is revisited in 1852, 1856, and 1875 with continual incremental rises in fees before the 1882 reform essentially moving the question of fees into the court costs, thus facilitating an expansion of professional presence.

<sup>262</sup> Larson, *Professionalism*, 14.

On top of these developments, the calls for a greater connection to superior courts resulted in the eventual fusing of the County Courts to the appeal circuit in the 1870s.<sup>263</sup> This was part of wider, sweeping changes to the courts through the *Judicature Acts* of the 1870s.<sup>264</sup> This fusion certainly does not result in universal acclaim, with many writers in the *Chronicle* noting their concern. As one correspondent expresses it, such fusion would be ‘subjecting a sphere to the rule of the square’.<sup>265</sup> As he goes on: ‘we have often to protest against the public’s allowing itself to be guided upon questions of law reform by the profession, whose habits or interests are bound up with the abuses’.<sup>266</sup> However, this development also reflects the County Court’s success. By the 1870s it is adjudicating on almost all civil matters, having been granted jurisdiction on bankruptcy, admiralty matters and other areas previously only dealt with by the higher courts. This means that ‘common practitioners’ now have access to areas of practice that had once been completely out of their reach.

These changes are reflected in the *Chronicle*, which even by the mid-1850s is a noticeably different publication. By late 1849 the *Chronicle* is reporting relevant superior court decisions.<sup>267</sup> While it is only logical that superior court decisions are reported on once there is a system of horizontal precedent, the decision to include Superior Court decisions *before* there are official appeal courts underlines the *Chronicle*’s strong desire to emphasise that the County Courts are of equal respectability and scrupulousness to the superior courts. These changes also mean that the County Court reports are given much less prominence than originally, with the bulk of reporting now being superior court decisions. This remains the case throughout the rest of the *Chronicle*’s publication history. Already by June of 1849, there are eighteen pages of superior court decisions before reaching the County Court decisions (covering less than six pages).

Ten years later, in June 1859, the *Chronicle* contains only three pages of County Court reports out of sixteen pages in total of court reports. By June 1869, County Courts accounts are no longer listed under the reports: the report section is dedicated to superior courts only and they are grouped together by subject matter (contract, equity and so on).<sup>268</sup> There are four County Court reports, each of which reports a single case, represented on both sides, with extended discussion on a point of law for between half a page to two pages. This format continues throughout the 1880s, with it being difficult to find any County Court reports in the

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<sup>263</sup> CCC, 6 May 1850, 138.

<sup>264</sup> CCC, 1 July 1875, 163.

<sup>265</sup> CCC, 6 May 1850, 138.

<sup>266</sup> *Ibid*, 138.

<sup>267</sup> CCC, 1 December 1849, 328.

<sup>268</sup> This formula continues into the 1870s onwards, giving for example a table of contents where the subheading under ‘contract’ might be: ‘Liverpool county court; a novel question of ownership liability’ CCC, 1 October 1870, 237.

publication let alone a self-represented party. By 1889 the *Chronicle* is described as: ‘a report of cases required in the County Court and argued and determined in the Superior Courts’.<sup>269</sup>

Throughout this period, we also see repeated advocacy by the *Chronicle* to formalise court procedure even further. The following extract comes from the *Chronicle* in 1870 and is representative of many such calls at the time:

[a]s to pleadings in the CC, a plaintiff is permitted to state his case in the form of a statement which to all intents and purposes is as much like a declaration with the head and tail off as can be. I ask why should not a defendant be obliged to set out in writing a statement of his defence, and deliver it to the plaintiff or his attorney within a limited time before the hearing, and that in default the plaintiff be at liberty to sign judgement if the cause exceed a certain criteria?<sup>270</sup>

The idea that litigants should submit written outlines of their defence is not new, in fact the initial proposal came in 1849, two years into the new County Courts.<sup>271</sup> But what they *do* point to is the degree to which the presence of legal professionals in the court is normalizing the need for legal skills. The argument outlined above is an argument recognisable today: that it is a simple matter to submit a written statement in Plain English. But as we already know, such a requirement is far from a simple task for a self-represented litigant who may not be literate or who, even if they are literate, may lack the legal expertise with which to identify the specific issue at stake. And here we see the slippery slope: as more attorneys frequent the County Court, legal skills become seen as increasingly essential. This shift happens without necessarily recognizing how much this will exclude self-represented parties from being able to act effectively.<sup>272</sup>

#### A CHANGE IN ATTITUDE

The changes taking place in the County Courts result in a sea-change in attitude towards self-representation in the *Chronicle* over this time. In 1852, the *Chronicle* emphasises that ‘every man has a common law right to appear and conduct his own case in any Court in the kingdom’.<sup>273</sup> But The Suitor section has disappeared by August 1849, indicating a presumption

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<sup>269</sup> CCC, 1 July 1889.

<sup>270</sup> CCC, 1 December 1870, 270; See also CCC, 1 November 1870, 247.

<sup>271</sup> CCC, 1 February 1849.

<sup>272</sup> This is not always the case. In 1849 the *Chronicle* praises the County Court’s ongoing use of ‘plain English’ instead of formal pleading. CCC, 1 February 1849, 44.

<sup>273</sup> CCC, 1 June 1847, 10.

of the normality of legal representation even at this early point. From 1852-1862 the section reporting County Court decisions is renamed “County Court Curiosities”. This section covers ‘amusing’ incidents, frequently ones that occur at the expense of self-represented litigants. These are given titles such as ‘a funny bargain’ and ‘undergraduate extravagance at Cambridge’.<sup>274</sup> A good example of the tone of this section is reported in the memorable case of: ‘Who “robbed” the dead pig? *Damage to a pig, 6s*’.<sup>275</sup> In this case, the parties are both self-represented and the dispute is over whether or not the defendant disembowelled (‘robbed’) a pig to the value of 6s of innards against the instructions of the plaintiff. Citing the exchanges verbatim, the report becomes a kind of mini-play complete with laughter from the court, and dramatic escalation, culminating in the plaintiff flopping the pig corpse out onto the courtroom table: ‘(continued laughter, while plaintiff tumbled the two lumps of pork about the court-table with extraordinary agility, to the great amusement of the spectators)’.<sup>276</sup>

Most significantly, in September 1866 the *Chronicle*, reporting an incident involving a self-represented party, comments: ‘This seems an exemplification of a hackneyed observation that a man who is his own lawyer has not a Solomon for his client’.<sup>277</sup> By this time, then, we have a complete reversal of the original 1849 stance of the *Chronicle* seen in the opening epigraph of this chapter. As we saw then, there was a commitment to the role of self-representation in the County Courts and an implicit presumption of its normality. But less than twenty years later, the idea that an individual would go to the County Court without a lawyer is already seen as indicative of a lack of judgment.

This belief in self-represented parties’ lack of judgment is made explicit by one writer in the *Chronicle* in 1859 advocating the abolition of trial by jury. He begins by arguing that the adoption of ‘fixed and refined’ rules of law to determine dispute resolution renders lay juries outmoded.<sup>278</sup> The author then outlines what exactly legal training gives:

The faculty of hearing without being deluded by sophistry and eloquence, of catching and connecting as it flies the broken and disjointed evidence of numerous and contradictory witnesses; of selecting what is material and rejecting what is irrelevant, of sifting the wheat from the chaff, the substantial from the seeming, and extracting the kernel of truth from the misshapen husk of errors in which it is enveloped. The Greeks fabled that the Goddess of Wisdom sprang fully armed and grown from the head of Zeus. The English seriously

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<sup>274</sup> CCC, 1 February 1860, 14.

<sup>275</sup> Ibid, 12-13.

<sup>276</sup> Ibid.

<sup>277</sup> CCC, 1 September 1866, 134.

<sup>278</sup> CCC, 1 August 1859, 108.



believe that judicial wisdom springs forth mature from every tradesman's head. This is a fit article of faith for a nation of shopkeepers.<sup>279</sup>

This argument—that those without lawyers lacked the ability to effectively pursue or defend a claim—is common in the *Chronicle* from the 1850s onwards.<sup>280</sup> The irony here is that while the argument for the necessity of legal skills is initially targeted at weeding out 'sham' attorneys, it eventually undermines self-represented parties too. Once the proposition that only properly educated, credentialed and regulated professionals can provide representation, the discourse quickly widens to suggest that only such qualified individuals have any business at all being in court.

It is important to emphasise here that these changes do not stop individuals from self-representing, and in fact we have ample evidence that they continue to do so. As Paul Johnson points out: 'There was no obvious sign of this growing legal formalism crowding out the layman's direct access to the due process of law'.<sup>281</sup> But the self-represented party is either rendered invisible, or looked on with amusement, by the 1870s.<sup>282</sup> At this point, self-represented parties cease to be valued informants. Because they lack the specialism to understand the nature of their dispute in legal terms, the information they contribute becomes largely irrelevant and counterproductive. In addition, the emphasis on regulation and standardisation has resulted in a transformation of the courts to emphasise the distinction of the legal profession, evidenced through dress, spatial division, language and expertise. Thus, two factors exist by this time that persist even now: a derogatory attitude towards self-represented parties, and a tendency to render self-represented parties invisible in official legal accounts.

## WHOOPS! WE LET THE LITIGANTS IN

### AMUSING INCIDENT AT THE LAW COURTS

In a Divisional Court of Queen's Bench on Wednesday, Miss Carroll, a lady well known in the courts as a litigant, appeared in person before Mr Justice Denman and Mr Justice Vaughan Williams. She said she had an "ex parte" application to make

– *Mr Justice Denman*: What is your name?

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<sup>279</sup> Ibid. CCC, 1 June 1859, 66.

<sup>280</sup> CCC, 1 June 1847, 5;

<sup>281</sup> Johnson, "Creditors, Debtors," 17. It is interesting to note the absence of up to half of defendants; this seems consistent with Moorhead and Sefton's findings in 2005 that 56% of LiPs were 'passive defendants' who did not participate in their own proceedings or show up to court.

<sup>282</sup> For example, the self-represented party is an: 'eccentric and talkative little man'. CCC, 1 October 1870, 14.

- *The Applicant*: Octavia Carroll; otherwise, “the lady without a name” (Laughter.). My application is this: - I have obtained two orders to enable me to call witnesses, but the committee of the Incorporated Law Society keep the orders and will not give them up to me.
- *Mr Justice Denman*: But we can’t do anything unless we have the order before us. We have nothing to go upon.
- *The Applicant*: My Lord, give unto Caesar that which is Caesar’s. (Laughter.)
- *Mr Justice Denman*: There is nothing before us.
- *The Applicant*: My Lord, England expects that every man this day will do his duty (laughter).
- *Mr Justice Denman*: I can’t help that (Laughter). We have no duty to do now. Sit down.
- Miss Carroll then made a profound bow and left the court.<sup>283</sup>

The above sketching out of the development of the County Court seeks to demonstrate the degree to which self-representation becomes derided in tandem with broader developments in the 19<sup>th</sup> century professional project, specifically as a result of attorneys staking a claim in the new courts in pursuit of advancing their own respectability. But what does this mean for the creation of the term litigant in person? The term itself never appears in the *County Court Chronicles*.<sup>284</sup> But it does begin to appear in other publications in the 1880s. By the time it appears, it almost invariably refers to the pathological or vexatious litigant:

Mrs Thompson, the well-known litigant in person at the London Law Courts, was charged at Marlborough Street Police Court with being drunk in Piccadilly. The defendant emphatically denied the offence, but the constable’s view as to her condition was confirmed by medical evidence and a small fine was imposed by Mr Hannay.<sup>285</sup>

In 1884, the *London Evening Standard* is talking of woman who is ‘well-known’ as a ‘lady litigant in person’.<sup>286</sup> In 1890, *The Morpeth Herald* too refers to a lady ‘litigant in person’.<sup>287</sup> While the proceedings relating to Mrs Thompson, referred to above are, obviously, criminal, it suggests the kind of individual that was indicative of those who self-represented. Mrs Thompson, serially litigious, incompetent, and untrustworthy, is already recognisable as the

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<sup>283</sup> *Grantham Journal*, Saturday 15 August 1891, 7.

<sup>284</sup> CCC, 1 September 1866, 194.

<sup>285</sup> *Falkirk Herald*, Wednesday 20 October 1897.

<sup>286</sup> *The Standard (London Evening)*, Wednesday 5 November 1884, 3.

<sup>287</sup> In this article, the editorial is sympathetic towards her relative competence, but still notes the great difficulty the judge faces understanding her, her struggle to ‘comprehend’ the circumstances, and the unequal battle between her and her represented opponent. They also note the challenges faced by her ‘extremely poor English’. *Morpeth Herald*, 21 June 1890.

standard LiP we see today.<sup>288</sup> By the time the term appears, it is also clear that successful LiPs are exceptional.<sup>289</sup>

But what exactly does the term mean? The term's first appearance in case law, in 1896, simply notes that: 'in case law, every litigant in person has an absolute right of audience'.<sup>290</sup> But what this chapter has sought to demonstrate is that a "litigant in person" is much more than this. It is a concept that only makes sense where legal representation is the norm. More than this, the term only exists in the context where self-represented parties have lost their less formal forums to resolve disputes. The term LiP references the context of a formalised legal process indicative of the latter stages of the professional project: where unregulated practitioners have been largely stamped out, and where there is strict attention placed on distinction of legal practitioners from the lay: through dress, language and expertise. The appearance of the term, then, does not signify the LiP's incorporation into legal process; instead it marks their *distance* from what is legally appropriate. LiPs are created in the moment where they are no longer competent: they are established as a phenomenon by virtue of their failure to mimic legal professionals. The LiP's incompetence, then, is not a failure of their role, it *is* their role. Their inability to perform successfully (although there are exceptions, these are only considered as exceptions) reinforces the need for legal professionals.<sup>291</sup>

Tellingly, while self-represented parties are frequently mocked in the *Chronicle*, criticism of LiPs is overwhelmingly found in the higher courts (perhaps telling us why the term never appears in the *Chronicles*).<sup>292</sup> For example, in 1892 the *Gloucester Herald* runs an interview with a County Court Judge. The judge notes the difficulties caused by litigants in person in the superior courts, compared with the relatively trouble-free experience of them in the lower courts. And this leads to the most compelling reason *why* LiPs are talked about the way they are: because the fusing of the County Courts to the appeal circuit gave self-representing parties access to the Superior Courts. This means that parts of the legal profession that had no association with the County Courts—specifically the Bar and the superior court judiciary—met self-represented litigants for what is likely to be the first time in their professional lives. The decision to integrate the County Courts with the superior courts seems to have been taken without realising that not only would standardised practice filter downwards but that

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<sup>288</sup> *Yorkshire Evening Post*, 27 September 1922, 5.

<sup>289</sup> See: *Pall Mall Gazette*, Thursday 18 January 1894; *The Star*, Guernsey, 06 May 1890; *Dundee Evening Telegraph*, 30 July 1913.

<sup>290</sup> *The Queen v Justices of London* [1896] 1 Q.B. 659, 662. This case is significant in underlining LiPs' rights of access into the higher courts; earlier newspapers reported cases where LiPs were denied a hearing. See, for example, the *Edinburgh Evening News*, 10 August 1892. While this is a Scottish case it is notable that the LiP prevented from being heard protests that there is no evidence of such a rule banning self-represented litigants.

<sup>291</sup> See Letter from "Parochial Critics" in CCC, 1 November 1870, 262.

<sup>292</sup> *Aberdeen Evening Express*, Tuesday 9 August 1892.

self-represented parties would also filter upwards: and by the time they got there, they were LiPs.

## CONCLUSION

In this chapter I have argued that the LiP—and attitudes towards the LiP—are inseparable: the LiP is a role of failure, created as a by-product of the professional project in action, seen through developments in the new County Courts, which include increasing standardisation and distinction. But while this explains *why* there is such a negative attitude towards LiPs: they are productively anomalous—their presence emphasises the competence of the profession—this has never prevented individuals from self-representing. LiPs are still there, even if they aren't written about. The very irritation in which they are held by legal professionals tells us of their continued presence. The problem, of course, is that when legal records only record matters of 'legal interest', most actions involving LiPs fly beneath the radar, which is why we do not find it easy to find material about them and it is why we have so much trouble understanding their perspectives; because we have no real means of capturing them.

It is clear then, that the term 'LiP' in many ways limits our ability to understand what it is like for such individuals pursuing or defending a claim. To get at this missing experience, we need to take a different approach, and find ways of obtaining information about things that happen in the margins: things that aren't usually written down. In the next chapter, then, I turn to explaining how I have attempted to do this, through explaining the empirical arm of this project, starting from the premise that to understand what it is *like* to be a LiP, we have to go, in H.W. Arthurs' words, 'without the law'.

## METHODOLOGY AND METHODS

It isn't an inquisition; it's an exploration, usually an exploration into the past [...] So I think the gentlest question is the best one, and the gentlest is, 'And what happened then?' <sup>293</sup>

[t]he unique and precious element which oral sources force upon the historian and which no other sources possess in equal measure is the speaker's subjectivity. If the approach to research is broad and articulated enough, a cross section of the subjectivity of a group or class may emerge. Oral sources tell us not just what people did, but what they wanted to do, what they believed they were doing, and what they now think they did. <sup>294</sup>

Amongst the gravest of the inadequacies of oral history, I would suggest, is the tendency to transform the writing of history into a form of populism — that is, to replace certain of the essential tenets of scholarship with facile democratisation, and an open mind with demagoguery. Such an approach runs the risk of constructing oral history as merely an alternative ghetto. <sup>295</sup>

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<sup>293</sup> Studs Terkel quoted in William Grimes, "Studs Terkel, Listener to Americans, Dies at 96," *New York Times*, 31 October 2008.

<sup>294</sup> Alessandro Portelli, "What Makes Oral History Different?", *The Death of Luigi Trastulli and Other Stories: Form and Meaning in Oral History* (Albany: State University of New York Press, 1991): 35.

<sup>295</sup> Luisa Passerini, "Work, Ideology and Consensus under Italian Fascism," *History Workshop Journal* 8, no.1(1979): 84.

## INTRODUCTION

It is easy enough, as the first three chapters have demonstrated, to make a case for why drawing on legal scholarship can cause difficulties when it comes to understanding how LiPs experience going to law. This does not mean, however, it is easy to know how to go “without the law” in order to understand them better. Nevertheless, this is what this chapter seeks to do, by outlining the methodological decisions I made when putting together this study. This involves considering how disciplinary methods from outside of law can be put to use in the pursuit of understanding LiPs and their experiences in the civil justice system. Ultimately, the backbone of this dissertation is fifteen oral history life-story interviews with litigants in person. This chapter is consequently an account of how I came to use this approach and why I argue this is a valid, and valuable contribution to our understanding of LiPs. The chapter might then perhaps be more simply titled: why oral history? Or, to be more accurate, why use oral history when examining the LiP? For while there are many general answers as to what makes oral history, in Alessandro Portelli’s words, ‘precious’, this chapter must necessarily be concerned with what makes oral history a better choice than any other scholarly methodology for *this* research. This involves critically examining oral history as a discipline, as well as considering oral history’s potential shortcomings and how these pitfalls have been managed in the context of this research project.

More than just an elaboration of oral history, however, or an explanation of my methods, what this chapter seeks to do is account for how and why I have chosen to focus exclusively on LiP experiences. For while I canvas practitioner and scholarly arguments from the literature, I do not *talk* to anyone but LiPs, asking: what is the experience of going to law like for them? I begin by outlining my research questions, before explaining why these questions lead to my choice of a qualitative piece of research. I contextualise this decision within the field of previous LiP research undertaken before turning to outlining specifically my disciplinary choices, arguing why oral history can open up a way of seeing that may enable us to understand more about what it is like to be a LiP. Finally, I turn to my specific methods, discussing my interviewing process, use of data and approach to analysis. This latter section includes an account of how and why many of my hypotheses, questions, and interviewing techniques were frequently upset, undermined, contested, and fraught in ways that were largely unanticipated, but which turned out to be crucial in mapping out what I sought to understand: how LiPs see the law, how LiPs see the people who work in the law and, most importantly, how they see themselves.

## RESEARCH QUESTIONS

As this thesis has already outlined, understanding what going to law is like for LiPs is of critical importance, particularly in the wake of the passage of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act. However, at a time when it is more important than ever that we know as much as possible about LiPs, we find ourselves instead in a situation where we do not know enough. But know enough about what exactly? As previously outlined in this thesis, while a number of important studies have been done into LiPs, it remains an under-researched area. Those studies that do directly look at LiP experiences tend to do so as part of a wider project that involves multiple informants, including legal professionals.<sup>296</sup> This limits the amount of time spent talking to LiPs, with the majority of studies involving some use of face-to-face interviews, but far more frequently, telephone interviews or, most common of all, questionnaires.<sup>297</sup>

In addition, when I argued previously that LiPs were in some ways analogous to a minority, I did not just mean that they are historically overlooked as objects of legal study. I also meant that when they are studied, these studies tend to reproduce the institutional and systemic assumptions the legal profession already have regarding LiPs. For example, what much previous legal research into LiPs tends to share is a greater concern about the impact LiPs have on legal process than the impact that legal proceedings have on LiPs.<sup>298</sup> While this is perhaps hardly surprising as much of this research is intended to be used to shape policy and practice guidance, it is a significant limitation in studying LiPs. Despite the considerable growth in interest into LiPs since the passage of LASPO, current studies have continued this mixed-method trend of talking to LiPs in concert with legal professionals.<sup>299</sup>

I argue that these approaches risk a repetition of the privileging of legal over lay knowledge that marginalises LiPs in the first place. Ultimately, this means that although we have acquired more information about LiPs than we previously had, LiPs continue to not be seen outside of the frames imposed on them, even by well-meaning legal scholars and practitioners

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<sup>296</sup> See, for example, Trinder et al, "LiPs in Private Family Law Cases"; Moorhead and Sefton, *Unrepresented Litigants*.

<sup>297</sup> Moorhead and Sefton, *Unrepresented Litigants*, Genn & Genn, *Representation in Tribunals*; Lee and Tkacucova, *A Study of LiPs*.

<sup>298</sup> An important exception to this is the work into private family law, particularly the work of Rosemary Hunter and Elizabeth Trinder, both of whom concentrate in some detail on the effect of going to law without representation on LiPs.

<sup>299</sup> See for example, McKeever *et al*, "The Impact of LiPs on the Northern Ireland Court Service", currently underway at Ulster University; Bridgette Toy-Cronin, "Keeping up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person," PhD Diss., Otago University, 2015.

who are genuinely trying to improve LiPs' lot. It is these kinds of limitations that this thesis attempts to go beyond. This project therefore takes as its guiding principle that to better understand LiPs one must, in Richard Moorhead's words, 'engage directly with the litigant's social world'.<sup>300</sup>

There are therefore two important research gaps I have identified that directly generate this study: firstly, there is a lack of in-depth interviewing with individuals who have acted as LiPs to get at what going to law is like for them in more detail, including understanding their experiences before and after encountering legal professionals or going to court, with research to date primarily being about how LiPs' behaviour in court can be interpreted within existing legal frameworks. Secondly, almost all of the LiP studies conducted to this point are ultimately interested in the impact LiPs have on the courts and only secondarily, if at all, interested in the impact the courts might have on the LiP. This project therefore seeks to address both these gaps by understanding what going to law is like for LiPs, through attempting to gain an in-depth first-hand account of individual LiP experiences; such accounts covering not only when these individuals come to court, but also before, during and after. In addition, through these experiences, this project focuses on the impact going to law has on LiPs, and what this unilateral, and situated perspective can tell us about how LiPs themselves account for and describe the difficulties they face.

## A QUALITATIVE APPROACH

This thesis aims to understand the situated experiences of LiPs, and to gain access to their stories of going to law. As such, this emphasis on subjective experience clearly lends itself to a qualitative methodology. While quantitative analysis can, and has, provided vital information about LiPs, what I am trying to do is understand individual LiP experiences, which is something quantitative analysis cannot achieve. My research is not intended to 'reveal how things are', nor is it purporting to be a representative study of the area: indeed, I am also somewhat sceptical of any such project simply because any form of categorisation tends to sacrifice nuance. Quantitative methods are also not appropriate, I would argue, to go beyond internal legal discourse. As I have argued earlier, categorisation of LiPs is problematic in itself because the categories they tend to be put into are, again, *legal* categories, e.g. what kind of claim is it? Once again we face the same problem of legal research tending to reinforce previously assumed categories.

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<sup>300</sup> Moorhead, "The Passive Arbiter," 417.



While qualitative methodology is by no means uniformly agreed on, a broad explanation of a qualitative approach could be that such an approach prioritises the importance of understanding lived experience.<sup>301</sup> In addition, qualitative approaches are interested in the subjective, placing value on perspectival narratives given by individuals that can provide greater depth and contextual information, and through this, reveal insights not available to quantitative or statistical methods.<sup>302</sup> This approach tends to focus on smaller sample numbers, and to make greater use of in-depth methods—such as long-form interviewing, as is employed in this study.

In addition, qualitative research is often argued to be more suitable for approaching groups traditionally marginalised in scholarship, which again suggests a certain suitability for research into LiPs. It is important to emphasise at the outset however, that firstly, the distinction between qualitative and quantitative approaches is by no means clear-cut.<sup>303</sup> Secondly, and importantly for this piece of work, I do not wish to suggest that qualitative approaches escape the criticisms directed at qualitative research methods and how they are imbricated by discourses of power. As Denzin and Lincoln note, qualitative research, like any other form of scientific method, is bound up in conflicting and power-laden discourses and history of colonialism and imperialism and carries its own history in traditional anthropology and ethnography, of reinforcing the privileged researcher studying the ‘Other’. Nonetheless, Denzin and Lincoln suggest one can explain qualitative research generically in the following way:

Qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that make the world visible. These practices transform the world. They turn the world into a series of representations, including field notes, interviews, conversations, photographs, recordings and memos to the self. At this level, qualitative research involves an interpretive, naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them.<sup>304</sup>

As such, while qualitative research by no means escapes the difficulties inherent to any kind of scientific method, the emphasis placed on attempting to understand phenomena on its own terms and in its ‘natural settings’ make it conducive as a methodology for approaching LiPs ‘without the law’.

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<sup>301</sup> Norman K Denzin and Yvonna S Lincoln, “Introduction” in *Handbook of Qualitative Research* (London: SAGE Publications, 1999).

<sup>302</sup> Ute Flick, *An Introduction to Qualitative Research* (London: SAGE Publications, 2000).

<sup>303</sup> Isadore Newman and Caroline Benz, *Qualitative-Quantitative Research Methodology: Exploring the Interactive Continuum* (Carbondale and Edwardsville: Southern Illinois University Press, 1998).

<sup>304</sup> Denzin and Lincoln, “Introduction,” 6.

## WHY ORAL HISTORY?

This study uses ‘life-stories’ interviews, a form of oral history interviewing, of fifteen LiPs to account for their experiences. Oral history describes the process of interviewing people about their past, and ‘life stories’ are a long form of oral history that is in the form of a biographical narrative.<sup>305</sup> The purpose of this narrative varies, but narratives generated through the practice of oral history are often used to evoke accounts by informants marginalised by more traditional historical scholarship which tends to privilege written sources over oral ones. This is of course not exclusively the case, however those whose narratives are more effectively told by oral transmission may be those who have less access to the kind of privilege that facilitates literacy or record-making and the link between the marginalised and oral history as a methodology remains strong within the discipline.

Oral history is also distinct as a form of historiographic practice in the primacy of the interview as the method of gathering data. This is where oral history can be distinguished from autobiography because, as Michael Frisch points out, oral history depends on the interrelationship of interviewer and interviewee: it constitutes a ‘shared authority’.<sup>306</sup> The level of control of the interviewer in producing the interview, and the dialogic nature of the exchange is of importance to oral history. Oral history interviewing, then, relies on the importance of what interviewees *say*, and is also predicated on the relationship between interviewer and interviewee.

However, the term oral history also refers to the data produced *by* oral history interviewing and there is thus a blurring between process and product. As Lynn Abrams points out, oral history is ‘both a research methodology (a means of conducting an investigation) and the result *of* the research process’.<sup>307</sup> This kind of terminological conflation can lead to a number of difficulties in clearly distinguishing between the methodology of the specific project (how the investigation was conducted), and the process by which the data is analysed by the researcher. This is because the term ‘oral history’ describes two radically different methods in terms of ethics and approach. For example, whereas the process of making oral history interviews is a ‘shared authority’, the subsequent analysis belongs entirely to the researcher. I try and make this distinction clear in emphasising that while the interviews are a form of oral history, the

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<sup>305</sup> Charlotte Linde, “What is a Life Story?” in *Life Stories: The Creation of Coherence* (New York and Oxford: Oxford University Press, 1993), 20-50.

<sup>306</sup> Michael Frisch, *A Shared Authority: Essays on the Craft and Meaning of Oral and Public History* (Albany: State University of New York Press, 1990).

<sup>307</sup> Lynn Abrams, *Oral History Theory* (London and New York: Routledge, 2010), 2.

use I make of the data is a form of transcription that needs to be separately accounted for, as I outline later in this chapter.

There are three key reasons why I believe oral history is particularly suited to accessing LiP experiences. The most obvious starting point is the oral historian's ability to reach those largely disregarded by traditional historiography. As scholars such as Luisa Passerini, Ronald Grere, and Alessandro Portelli have claimed, oral history can give voice to the marginalised,<sup>308</sup> and oral history can unsettle traditional power relationships in the authorship of history.<sup>309</sup> Due to its perceived distinction from traditional forms of scholarly history, oral history is arguably also not subject to hierarchical prejudices that may exclude particular people or groups of people from scrutiny, due to factors such as gender, race, sexual orientation or socio-economic background.<sup>310</sup> In this respect, oral history is a natural fit when considering the experiences of the LiP, a marginalised figure in legal scholarship. They are, in Michael Frisch's words, 'a significant, much neglected, and previously unknowable corner of the attic'.<sup>311</sup>

The second powerful argument in favour of oral history as a methodology for examining LiPs is that it allows interviewees to tell their own story. When pioneering American oral historian Studs Terkel died in 2008, *The New York Times* obituary drew specific attention to the "rich detail" of his oral history work. Terkel, they said, had revealed 'great historic moments sounded by an American chorus in the native vernacular'.<sup>312</sup> The ability to access the vernacular—the common language—is one of the most frequently advanced arguments for oral history as a scholarly practice.<sup>313</sup> As noted earlier in this thesis, LiPs' experience in going to law often involves the collision of their vernaculars with legal language, resulting in them being unable to tell their own story. Using oral history as a methodology is a means, therefore, of engaging with LiPs' experiences on their own terms, and provides a way in to study the significance of the gaps between legal discourse and LiP understanding—a major aim of this thesis.

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<sup>308</sup> Abrams, *Oral History Theory*, 154.

<sup>309</sup> Passerini, "Work, Ideology," 85-86.

<sup>310</sup> For example, see M.P. Erdmans, "The Problems of Articulating Beingness in Women's Oral Histories" in *Oral History: The Challenges of Dialogue*, M. Kurkowska-Budzan, and Zamorski, K., eds., (Amsterdam: John Benjamins Publishing, 2009), 88; L. Niethammer. "Oral History as a Channel of Communication Between Workers and Historians" in P. Thompson, ed., *Our Common History: The Transformation of Daily Life* (London: Pluto Press, 1982); Stella Dadzie and B. Bryan, *Heart of the Race: Black Women's Lives in Britain* (London: Virago Press, 1985).

<sup>311</sup> Frisch., "Oral History and *Hard Times*: A Review Essay" in *A Shared Authority*, 9.

<sup>312</sup> Terkel quoted in Grimes, "Studs Terkel Dies at 96."

<sup>313</sup> *Ibid.* See also I Franklin, "Folkways and Airwaves: Oral History, Community and Vernacular Radio," PhD Diss, Bournemouth University, 2009.

In addition, in law, key to the adjudication of any form of dispute is the need to establish what happened. Narrative is consequently central to legal proceedings. In a court setting, a narrative is usually elicited through questioning by legal professionals in the form of examination in chief and cross examination.<sup>314</sup> In our adversarial system, two competing narratives will emerge and one will be chosen by the fact-finder as the most persuasive.<sup>315</sup> As has been observed by many legal scholars, a legal narrative involves the translation of a witness's experience into a particular discursive form.<sup>316</sup> To be persuasive, legal narratives must be coherent, chronological and usually interpret events in legal language.<sup>317</sup> However, as scholars such as forensic linguist John Gibbons have noted, the construction of this narrative involves the translation of someone's (usually a layperson's) experience into this form. This can significantly alter the story as it might have been told in other environments. As he explains:

The packaging of complex and multifaceted reality into a linear narrative carries obvious dangers of distorting the secondary reality. However, the need to make the secondary reality "graspable" for a varied audience usually outweighs these concerns.<sup>318</sup>

The emphasis on communicating a narrative in a legally recognised form is of the greatest importance in legal proceedings. However, this can lead to the distortion of someone's experience where the story that emerges no longer resembles the reality a witness might recognise. While this imposition of control is most obvious in situations such as cross-examination, it persists in all aspects of legal narrative construction both in and outside the courtroom and is part of the broader social process of translating external events into field-specific knowledge.<sup>319</sup> This necessarily involves privileging legal interpretation, something Clifford Geertz refers to as the 'skeletonization of fact'.<sup>320</sup> Accepting that this process is legally necessary, Geertz argues that 'it grows increasingly tenuous as empirical complexity [...] grows'. As he points out:

The realization that legal facts are made not born, are socially constructed, as an anthropologist would put it, by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the

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<sup>314</sup> Max Perry and George Hampel, *Hampel on Advocacy: A Practical Guide to Basics* (Melbourne: Leo Cussen Institute, 2002), 35; Chester Porter, *The Gentle Art of Persuasion* (Sydney: Random House, 2005),

<sup>315</sup> Ibid. See also Perry and Hampel, *Hampel on Advocacy*, 21.

<sup>316</sup> A.M. Büllow-Møller, "Trial Evidence: Overt and Covert Communication in Court", *International Journal of Applied Linguistics* 1, no.1 (1991): 38-60.

<sup>317</sup> Ibid.

<sup>318</sup> John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (Oxford: Blackwell Publishing, 2003).

<sup>319</sup> See Bourdieu, "The Force of Law."

<sup>320</sup> Geertz, *Local Knowledge*, 172.

scholarships of law school education raises serious questions for a theory of administration of justice that views it as consisting, to quote a representative example, 'of a series of matchings of fact-configurations and norms' in which either a 'fact-situation can be matched with one of several norms' or 'a particular norm can be . . . invoked by a choice of competing versions of what happened.' If the 'fact-configuration' are not merely things found lying about in the world and carried bodily into court, show-and-tell style, but close-edited diagrams of reality the matching process itself produces, the whole thing looks a bit like sleight-of-hand.<sup>321</sup>

While this translatory experience is commonplace, it is far from benign. Rather it is a good example of what Bourdieu termed symbolic violence. LiPs—like other laypersons—are not 'qualified to participate in the game' and their experiences are largely excluded, distorted, truncated and altered.<sup>322</sup> This practice has become so habituated as to be frequently misrecognised as normal. This is most apparent in legal advocacy materials through the use of terms such as 'persuasion' and 'storytelling'.<sup>323</sup>

Geertz famously commented: '[W]hatever it is the law is after it is not the whole story'.<sup>324</sup> We might also follow this statement to say that in any legal proceedings, some stories are told, but many stories are not.<sup>325</sup> In other words, the legal narrative that emerges privileges some versions of the truth and silences others. This can be from the shaping of a layperson's narrative into something alien to that teller, or due to the lack of opportunity at all for a layperson to tell their story. In addition, the legal conception of a single narrative contradicts the lived experience of most individuals who experience overlapping, complex and multi-faceted problems. As Pascoe Pleasence, Nigel Balmer and others have pointed out: people do not only have one problem and, as Hazel Genn, observed, if a person does have a problem, 'they [are] likely to experience it on more than one occasion'.<sup>326</sup> Oral history interviewing, then, can be a means of correcting these normalised presumptions. This project gives LiPs the

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<sup>321</sup> Ibid.

<sup>322</sup> Bourdieu, *Pascalian Meditations*, 171.

<sup>323</sup> E.g. Chester Porter, *The Gentle Art of Persuasion*.

<sup>324</sup> Geertz, *Local Knowledge*, 171.

<sup>325</sup> It is of course not only laypersons who experience this elision of their story. See Rosemary Hunter, McGlynn, C., and Rackley E., (eds), *Feminist Judgments* (Oxford: Hart Publishing 2010) which provides 'missing' female judgments.

<sup>326</sup> The work of the Legal Services Research Centre Surveys are relevant here. Set up in 1996, the LSRC conducted research and surveys, following Genn's work, into the landscape of 'justiciable' problems until it was abolished by LASPO in 2013. Archived reports can be found in the National Archives, here: <http://webarchive.nationalarchives.gov.uk/20130402192653tf/http://www.justice.gov.uk/publication/s/research-and-analysis/lsrc>. See also: Pascoe Pleasence, ed., *Causes of Action: Civil Law and Social Justice* (London: The Stationery Office, 2006); Nigel Balmer et al., "Worried Sick: The Experience of Debt Problems and Their Relationship with Health, Illness and Disability," *Social Policy and Science* 5, no. 1 (2005): 39-51; Genn, *Paths to Justice*, 30. Moorhead and Pleasence, eds., *After Universalism*.

opportunity to give their own account of events.<sup>327</sup> Put simply, LiPs can relate *what happened then*, something they are usually unable to do freely in legal proceedings.

I do not wish to imply that this narration is unfettered.<sup>328</sup> The shape of the narrative that emerged was of course influenced by my line of questioning and research interests and the framing of the interview in terms of my project also had an effect. There is always a degree of power and control involved in such a process, and this project was no exception.<sup>329</sup> But the narratives I have co-produced in this research *disrupt* what we understand as legal narrative, by providing an alternative framework, and environment, for stories to emerge. As Studs Terkel noted, unlike legal proceedings, oral history interviews are not an inquisition: ‘it’s an exploration, usually an exploration into the past [...] So I think the gentlest question is the best one, and the gentlest is, ‘And what happened then?’<sup>330</sup>

The third and final reason for choosing oral history for this research is the deliberate emphasis oral history places on the virtues of subjectivity and reflexivity. In her ground-breaking article on oral history and Italian fascism, Luisa Passerini argues that it is insufficient for oral history to merely shine a light into neglected areas. Instead, she argues a more radical approach is needed to outline the specific merits of oral history. As she observes: ‘We cannot afford to lose sight of the peculiar specificity of oral material, and we have to develop conceptual approaches—and indeed insist upon that type of analysis—which can succeed in drawing out their full implications’.<sup>331</sup> Whereas in the past, scholars aimed to provide a neutral account of a separate object of study, oral history scholarship, in concert with other disciplines using qualitative research methods, broadly argues that the traditional division between subjectivity and objectivity is limiting and that subjectivity can allow for powerful scholarly insight.<sup>332</sup>

For Passerini, what can emerge from oral history accounts is more than adding to the record, or hearing from the marginalised—something more than oral history’s ‘reconstructive agenda’.<sup>333</sup> Instead, oral history is about subjectivity in its fullest sense—as a manifestation of culture and belief. This turn in oral history scholarship is an explicit rejection of pejorative and limited understandings of subjectivity that rely on a dichotomy of objective and subjective. The kind of subjectivity Passerini envisages presupposes that neutrality and objectivity are not only unrealistic goals but also unwanted ones. This is not only a means of answering back

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<sup>327</sup> Pierre Bourdieu, “Outline of a Sociological Theory of Art Perception,” *International Social Science Journal* XX, no. 4 (1968): 597-598.

<sup>328</sup> Portelli, “What Makes Oral History Different,” 39.

<sup>329</sup> Robert Cover, “Violence and the Word,” *Yale Law Journal* 95, no.8 (July 1986): 1601-1630.

<sup>330</sup> Studs Terkel quoted in Grimes, “Studs Terkel Dies at 96.”

<sup>331</sup> Passerini, “Work, Ideology,” 84.

<sup>332</sup> Pierre Bourdieu, *The Logic of Practice* (Cambridge: Polity Press, 1990), 25.

<sup>333</sup> Abrams, *Oral History Theory*, 5.

critics of oral history that allege inherent bias, it is also a broader epistemological claim to a different kind of knowledge that qualitative research methods such as oral history are positioned to accrue.<sup>334</sup>

Looking across disciplines, subjectivity arguably shares much in common with the anthropologically derived term *sensibility*. Clifford Geertz, in his seminal essay “Art as a Cultural System” argues the inseparability of what we might consider ‘aesthetic production’ from the rest of everyday understanding and existence.<sup>335</sup> Geertz claims that ‘to study an art form is to explore a sensibility, that such a sensibility is essentially a collective formation, and that the foundations of such a formation are as wide as social existence and as deep’.<sup>336</sup> In other words, sensibility is something ‘the whole of life participates in forming, one in which the meanings of things are scars that men leave on them’.<sup>337</sup> Fields of cultural production such as the arts or law are therefore emanations of this, but inseparable from it: they are an ‘expression of culture’, as Passerini termed it. Accounts of LiPs through their very specificity and subjectivity may be a way in to understand their sensibility. But how might we practically go about this?

Social historian Robert Darnton argues in *The Great Cat Massacre and Other Episodes in French Cultural History* that key to understanding accounts of the past is to focus on moments of cognitive dissonance for the scholar in the historical account.<sup>338</sup> His famous example of a cat massacre—where an 18<sup>th</sup> century French population delighted in the telling of an event that would (arguably) horrify Darnton’s contemporaries—serves to illustrate his point that it is the moments of greatest *lack* of understanding on the part of the researcher that can potentially provide the most powerful insight into the past as they are a means by which he or she can gain entry into an alien sensibility. While Darnton was talking specifically about studying the past, this method can still usefully be applied when undertaking a ‘history of the present’.<sup>339</sup> In this project, this means not attempting to reconstruct information supplied by LiPs into something recognisable within pre-existing legal frames, but rather in deliberately focusing on the strangeness itself as an entry point into how LiPs construct their *own* understanding of law and legal proceedings. To reiterate Portelli’s points; ‘Oral sources tell us not just what people did, but what they wanted to do, what they believed they were doing, and what they

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<sup>334</sup> Ibid, 7.

<sup>335</sup> Clifford Geertz, “Art as a Cultural System,” in *Local Knowledge*, 97-98.

<sup>336</sup> Ibid, 171.

<sup>337</sup> Ibid, 171.

<sup>338</sup> Robert Darnton, *The Great Cat Massacre and Other Episodes in French Cultural History* (New York: Vintage Books, 1985).

<sup>339</sup> David Garland, “What is a ‘History of the Present?’ On Foucault’s Genealogies and their Critical Preconditions,” *Punishment and Society* 16, no.4 (2014): 365-384.

now *think* they did'.<sup>340</sup> To reconfigure it into discourse previously referred to in this thesis, what can emerge from LiP interviewing in this project is a means, as Richard Moorhead advocated, of 'engaging directly with the litigant's social world'.<sup>341</sup> Oral history, as a form of qualitative research, facilitates this engagement. <sup>342</sup>

However, while this chapter argues for the virtues of oral history for this project, there are a number of critical issues that need to be managed. Firstly, there is as much a danger in valorising oral history as there is in valorising the written word only. Studs Terkel himself considered his work "guerrilla journalism" and this again frames oral history as an alternative methodology: a way to sidestep the inequities of dominant historiography. But this kind of positioning carries its own scholarly risks, not least of which is creating a 'straw man' out of other forms of historiography. As Luisa Passerini observes in the epigraph opening this chapter, this kind of 'facile democratisation' can lead to an 'alternate ghetto'.<sup>343</sup> I am not claiming that oral history is essentially alternative, nor am I resorting to vague ideas about equality and empowerment for the interviewee. Claims about empowerment risk underestimating the degree of control that still exists on the part of the researcher that needs to be accounted for, specifically relating to how that record is used in further research, something I address later in the chapter.

More broadly, though, there is a tendency to valorise oral sources as inherently 'alternative' that simply does not stand up to scrutiny. Oral history methods are perfectly serviceable to reproduce and construct conservative frameworks for understanding history, just as one could with any form of historical method. This is evidenced by its popularity in eliciting accounts of areas of cultural production from elite players. Also, as Portelli points out, the "down-up" method may be common in oral history practice but it is not unique to it.<sup>344</sup> Nor is oral history's embrace of the quotidian aspects of life anything original.<sup>345</sup> Emphasis on oral history's status as alternative in and of itself is relatively meaningless: a way to the alternative ghetto outlined by Passerini in the epigraph opening this chapter. <sup>346</sup>

Secondly, a noticeable component of oral history scholarship is an emphasis on how unique oral history is as a method, with repeated references to its.<sup>347</sup> While I do not wish to

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<sup>340</sup> Portelli, "What Makes Oral History Different," 35.

<sup>341</sup> Moorhead, "The Passive Arbiter," 417.

<sup>342</sup> Frisch, *A Shared Authority*, 76.

<sup>343</sup> Passerini, "Work, Ideology", 84.

<sup>344</sup> Portelli, "What Makes Oral History Different," 34.

<sup>345</sup> *Ibid*, 34.

<sup>346</sup> Passerini, "Work, Ideology," 84.

<sup>347</sup> E.g. Portelli, "What Makes Oral History Different."; Abrams, "The Peculiarities of Oral History" in *Oral History Theory*, 18-32.



undermine the value of oral history in accessing subjective experience, I would question its insistence on its own uniqueness. Rather, I would argue that oral history shares with other forms of qualitative research methods certain advantages in terms of mining phenomenological experience and being interested in approaching subjective and lived experience, but not necessarily a *better* account than methods rooted in anthropological and ethnographic theory.

Thirdly, a recurring critique of oral history methods concerns the argument that memory is an inherently fallible source. As memory is subjective and fragmented it cannot be independently verified. Therefore, any account of *what happened* will not only be partial but can be confused, factually inaccurate, and misleading. There is no disputing that memory can be fallible. Scholars from across a range of disciplines from law<sup>348</sup> to neuroscience<sup>349</sup> to trauma studies<sup>350</sup> will tell us that memory does not simply store accounts of events that are then retrievable whole and intact at some period later. But this claim does not actually interrogate how memory is used in oral history projects. As Ronald Grele points out, memory is not necessarily supposing that we are drawing on a repository of facts.<sup>351</sup> Instead, it is used to illustrate an abundance of other things: a manifestation of culture, or belief, evidence of *habitus*, a way in to an alien sensibility.<sup>352</sup> This is because oral historians are asking different kinds of questions. Michael Frisch, in his essay review of Studs Terkels' *Hard Times*, asks:

What happens to experience on the way to becoming memory? What happens to experience on the way to becoming history? As an era of intense collective experience recedes into the past, what is the relationship of memory to historical generalization? These questions, so basic to thinking about how culture and individuality interact over time, are the sort of questions which oral history is peculiarly, perhaps uniquely, able to penetrate.<sup>353</sup>

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<sup>348</sup> See ALRC, *Seen and Not Heard: Priority for Children in the Legal Process, Report No. 84* (September 1997).

<sup>349</sup> For example, see the work of Eleanor Maguire whose research into neurological injuries has pointed to the broader ways in which we continually reinvent, construct and reinterpret memories through the act of recall. See Eleanor Maguire et al, "Imagining Fictitious and Future Experiences: Evidence from Developmental Amnesia." *Neuropsychologia* 48, no. 11(2010): 3187-3192.

<sup>350</sup> D Brown et al, *Memory, Trauma Treatment, and the Law*. (New York: W.W. Norton, 1998); D Brown et al, "Recovered Memories: The Current Weight of the Evidence in Science and in the Courts," *Journal of Psychiatry & Law* 27 (1999): 5-156; L. Nadel and W.B. Jacobs, "Traumatic Memory is Special," *Current Directions in Psychological Science*, 7.5 (1998): 154-157.

<sup>351</sup> Ronald Grele, "Oral History as Evidence" in Thomas L Charlton et al, eds., *History of Oral History: Foundations and Methodology* (Plymouth: AltaMira Press, 2007), 33-91.

<sup>352</sup> See Perks and Thompson, *Oral History Handbook*, 298.

<sup>353</sup> Frisch, "A Shared Authority," 75.

For Frisch, it is how oral history accounts *differ* from the record that is of value, as will be the case in this project. This is *not* despite their subjectivity, but because of it. As Passerini observes, ‘subjective reality also has its own history, and a multi-faceted relationship with institutional power’.<sup>354</sup>

Ultimately, in responding to these critiques I argue that generalist criticisms of oral history are largely misplaced. Methodology relates to the specific practices of gathering knowledge and these are always necessarily contextual and particular. We need to start by asking *what is the material being used for?* I will therefore conclude my chapter with a detailed account of my methods. This section will address explicitly who I talked to, what questions I asked and how I went about asking them. Ultimately, my aim in the concluding section is to explain how I avoided the ghetto while still making an argument for the ‘gentlest question’.

## RESEARCH METHODS

The first step in approaching conducting this empirical study was to consider what kinds of questions to ask potential interviewees. To a large extent, the basic structure of these questions is shaped by my choice of a ‘life stories’ approach and use of oral history as a methodology.<sup>355</sup> In addition, the interviews are also intended to be housed as a permanent archive at the British Library; as such, this lent weight to the need to make the interviews both roughly chronological as well as comprehensible.<sup>356</sup> The format of these interviews was therefore essentially biographical, where interviewees’ experiences as LiPs only formed one part of the account they gave. This was a deliberate strategy that in the first place encouraged interviewees to account for their experiences in law in a new and separate context that does not presuppose that this is the sole focus of the conversation. This is a quite straightforward, though effective, way of getting “outside of the law” where interviewees are more than ‘LiPs’. This lack of legalising of context also allows interviewees to give lesser or greater weight to their experiences as LiPs as is in accordance with “what they thought they were doing”.

This means that while the questionnaire I developed for interviews encompassed multiple detailed questions about LiPs’ litigation experience, it also spent equal, or more time, concentrating on interviewees’ childhood, background, professional experience, personal lives, and beliefs. Interviewees were asked questions such as ‘What is your happiest memory of

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<sup>354</sup> Passerini, “Work, Ideology,” 86.

<sup>355</sup> As the Oral History Society site notes, while any oral history interview is unique, there are common questions that will arise in all of them, relating to the interviewees’ parents, where they were born, and so on. See <http://www.ohs.org.uk/advice/getting-started/2/> (accessed 29 August 2017).

<sup>356</sup> See <https://www.bl.uk/collection-guides/oral-history>

school?’ and ‘What was your personality like as a child?’ Such questions serve multiple purposes: in the first place, it allows a development of a biographical narrative led by the interviewee. But secondarily, such questioning helps develop an intimacy between interviewee and interviewer. By asking questions about memories, desires, and emotions, these questions sought to encourage interviewees to be franker in later questioning that was more directly pertinent to my research questions and that covered topics that were potentially emotional or stressful for participants.<sup>357</sup>

However, while the establishment of closeness was a key aim of such questions, they did also serve a more direct purpose. Other questions that occur early in the script involved topics such as bullying, encounters with authority figures, and beliefs and attitudes towards the law, the police, politics and justice. Interviewees were asked to reflect on earlier experiences long before they acted as LiPs. This allowed the interviewees to attempt to chart the origins or development of beliefs about law, what the law can or should do, and what expectations an individual might have about his or her relationship to the law and the legal world. These questions were a means to begin to trace out interviewees’ ‘horizon of expectations’ about law prior to their encounter with it as a LiP.<sup>358</sup>

In this respect, life stories are a means of attempting to account for what Bourdieu terms *habitus*, and the questionnaire aimed to facilitate this.<sup>359</sup> Such questions, while sometimes entirely anodyne in the reflections they evinced, were revealing in allowing LiPs to account for their personalities and how they came to be LiPs. For example, some interviewees emphasised their early obsession from childhood of “justice” or “fighting for what was right”. Others emphasised their distrust of authority figures, and many commented on the lack of access to the legal profession. While some interviewees had no desire to be legally trained, other interviewees commented that access to the legal profession was something beyond their social and financial means, and that such a profession was reserved for those of different backgrounds to them. While such findings may not definitively demonstrate anything conclusive about LiPs in general, they can be suggestive of a sensibility in which LiPs may

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<sup>357</sup> This issue is further dealt with when I talk explicitly about ethics and this project later in the chapter.

<sup>358</sup> The term ‘horizon of expectation’ comes from Hans Robert Jauss in the field of Reception Studies, where he argues it describes the historically specific cultural conventions and codes that readers bring to a text. See Jauss, *Towards an Aesthetic of Reception* (Minnesota: University of Minnesota Press, 1982).

<sup>359</sup> There is obviously a caveat that is needed here: *habitus* refers to the preconscious and isn’t necessarily something accessible by conscious reflection. My argument is that interviewees reflecting on what is entirely normal to them can potentially trigger insight for the researcher into what constitutes this ‘normality’.

already feel resentful towards or excluded by legal professionals when it comes to the time when they are involved in litigation.<sup>360</sup>

Ultimately, the script I developed (attached in Appendix A) contained 134 questions, ranging over the entire extent of an individual's biography. Beyond the breadth of questions asked, the other emphasis in the questions posed was that of asking deliberately open, and open-ended questions, again in keeping with an oral history methodology. These questions were shaped by the notion of the 'gentlest question', as Studs Terkel put it: with an emphasis being placed on questions being a tool to facilitate an interviewee to speak freely, not to merely respond with a 'Yes' or a 'No'. As such, when asking such questions, I frequently adapted their form to make them more open if necessary, and encouraged the interviewee to conclude their train of thought. So, while the questionnaire served as a template, it was not a rigorously read-out script, but instead was part of a semi-structured interviewing process. Galletta describes semi-structured interviews as a method to 'address specific dimensions of your research question while also leaving space for study participants to offer new meanings to the topic of study'.<sup>361</sup> In the interviews, while I returned to the script for guidance and to keep a coherent and largely chronological structure to the interviews, I let interviewees continue to speak until they had finished their train of thought, and also moved topics with them if they wanted to discuss something else, free to, as Bernard expresses it, 'follow new leads'.<sup>362</sup>

This flexibility of questioning was also informed by 'grounded theory', which emphasises the dynamic nature of empirical research and lays importance on developing theory from data as well as data from theory.<sup>363</sup> Strauss and Corbin describe grounded theory as 'a general methodology for developing theory that is grounded in data systematically gathered and analyzed'.<sup>364</sup> They go on to note that grounded theory is essentially 'constantly comparative' whereby a researcher refines and develops new hypothesis throughout the collection and analysis of data. As Savenye and Robinson put it:

A grounded theory perspective leads the researcher to begin a study without completely preconceived notions about what the research questions should be, assuming that the

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<sup>360</sup> This is a theme I pick up on again in the final chapter of this dissertation that looks at the dependence on conspiracy theories for some interviewees.

<sup>361</sup> Anna Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication* (New York: New York University Press, 2013), 2.

<sup>362</sup> H.R. Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (Lanham: Rowman Altamira, 2011), 157.

<sup>363</sup> A.L. Strauss, *Qualitative Analysis for Social Scientists* (Cambridge: Cambridge University Press, 1987).

<sup>364</sup> A.L. Strauss and J.M. Corbin, "Grounded Theory Methodology: An Overview" in Denzin and Y.S. Lincoln, eds., *Handbook of Qualitative Research*, 273.

theory on which the study is based will be tested and refined as the research is conducted.<sup>365</sup>

As such, grounded theory is about keeping an open mind and this reaches across the whole course of methodological decision making. In this way, how I constructed the project, how I found interviewees, how I questioned interviewees and how I conducted analysis were informed by this ‘grounded’ approach. So, while I began with certain key research ideas, and shaped the questionnaire based on this framework, the attempt to find interviewees resulted in an alteration in how I structured my project. In addition, and throughout interviewing, as themes emerged from my questioning, these became emphasised in subsequent interviews. After interviewing I would reflect on the gathered data and as patterns emerged, this enabled me to shift direction in questioning. This approach also echoes Darnton’s earlier argument about alien sensibility; while I asked certain questions with some ideas in my mind of what the key findings may turn out to be, in many ways the interviewees upset these assumptions; by concentrating on the *strangeness* that emerged, I was able to access a situated and unusual perspective on LiPs which changed the nature of my approach.<sup>366</sup>

A particularly good example of the influence of grounded theory is the final chapter in this thesis, which details conspiracist theories and which was entirely unanticipated when sketching out what I thought my findings chapters would look like at the beginning of the empirical project. I undertook this study with the clear belief that LiPs were largely pejoratively treated and misrepresented as “weirdos” by many in the legal field. My contention was that this was largely predicated on misunderstanding and prejudice. However, I found the situation was much messier than this, with a number of my interviewees expressing clear conspiracist attitudes. As such, this finding made me want to understand these ideas better, and I therefore allocated more time to asking questions about these kinds of ideas in my later interviews, and this section of the thesis has become extremely important in developing my analysis.

## FINDING INTERVIEWEES

Having developed a rough questionnaire which, as outlined above, was a template that was freely adapted and significantly altered throughout the interviewing project, the next task was

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<sup>365</sup> Wilhelmina Savenye and R.S. Robinson, “Qualitative Research Issues and Methods: An Introduction for Educational Technologists” in D. H. Jonassen, ed., *Handbook of Research on Educational Communications and Technology* (New Jersey: Lawrence Erlbaum, 2004).

<sup>366</sup> Darnton, *The Great Cat Massacre*.

to find individuals to interview. This turned out to be significantly more challenging than I anticipated. An initial idea was to approach the County Courts individually to discuss accessing LiPs this way. While I knew there would be issues of confidentiality to potentially overcome, it seemed a sensible way to get started. I therefore began by emailing the County Courts in London one by one, trying to find a manager, or dedicated LiP liaison to speak to. Of the ten courts in London I emailed, I heard back from two, with the other eight never returning my emails. Of the two who did contact me, both stated that they had no individual who was nominated to assist with LiPs or specially trained to do so, and that there was no one for me to talk to.<sup>367</sup>

I then thought that while I may not be able to meet interviewees through LiP contacts at the County Courts, I may be able to develop materials to advertise the project and place them in the County Courts. I therefore developed a poster and information leaflet (see Appendix A) for which I consulted with, and received guidance from, Lizzie Iron, Head of Service at the Personal Support Unit. I contacted the County Courts to see if placing posters in the court buildings would be possible. I was then contacted by a member of HMCTS Performance, Analysis and Reporting Team who told me that to put posters up anywhere in a County Court building required making an application under the Data Access Panel. This turned out to be a complex process which would take a minimum of 7-8 weeks.<sup>368</sup> In the first instance, such an application required a long application form, my CV, the questionnaire and all other project information, and a separate letter of ethical approval from the London School of Economics to accompany the submission. While these requirements were not difficult to supply, I also needed to demonstrate that I had a sponsor within HMCTS which would involve a separate, lengthy negotiation with no guarantee I would be successful. I did ask whether such a process was necessary as I was not requesting permission to access any data, or to talk to court staff. However, the HMCTS staffer confirmed that this process would still be required to put up posters in the court buildings. In addition, the staffer noted that he felt there would be likely minimal to zero uptake in response anyway. I consequently decided against applying for this as my project did not have scholarship that met the criteria of the Panel, and because such a course of action would be very time consuming and difficult in return for what would quite likely be a not particularly successful outcome.<sup>369</sup>

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<sup>367</sup> A follow up email to the Wandsworth County Court led to a suggestion that I contact the Personal Support Unit based at Wandsworth, or at the Royal Courts of Justice.

<sup>368</sup> See: <https://www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers>

<sup>369</sup> I am not alone in finding the Data Access Panel criteria demanding. The 2017 study by Professor Bob Lee and Tatjana Tkacukova spends several pages talking about the challenges of meeting DAP criteria, despite their project being sponsored by the Birmingham Law Society. Their submission alone took seven weeks to prepare, and it took over a year for them to obtain permission. See Lee and Tkacukova, *A Study of LiPs*, 3-4.

I therefore abandoned this idea and thought that perhaps I would advertise via the PSU and requested to put up posters in the PSU branches around the country. However, the PSU at the RCJ decided against letting me put up posters in their branch feeling it would be inappropriate; other PSU branches either did not respond, or were unwilling to put up posters, with only one PSU being willing to place leaflets in their room, but not posters. I similarly tried to gain access to CABs for placement but was again told that this would not be possible. Finally, I considered placing the posters on Community Information Boards locally, but decided against this, firstly because I considered it very unlikely that anyone would make contact and secondly, because it would limit the geographical scope very radically as I would only be able to place them nearby in London. In the end, I printed over 200 posters, and I never used any of them, abandoning this method of finding interviewees.<sup>370</sup>

I next thought that perhaps I would contact potential interviewees directly, either through meeting them while training as a volunteer at the PSU, or through attending hearings at the County Courts themselves, approaching LiPs afterwards. However, while these seemed the most direct means of accessing LiPs I ultimately decided against both approaches for primarily ethical reasons. I could not reconcile volunteering at the PSU where my role was to assist LiPs with their needs, with attempting to co-opt such individuals for my own usage.<sup>371</sup> It seemed an ethical conflict of interest to approach individuals this way and it seemed to expressly go against what the PSU itself would expect as appropriate behaviour on the part of volunteers. I also decided against contacting LiPs at the courts directly because it seemed unethical to confront individuals, however gently, when they were under such considerable stress and preoccupation.<sup>372</sup> I felt such an approach would be intrusive and clumsy and risk alienating such LiPs. In addition, both such means of approaches would also only capture interviewees who had managed to access the PSU, and interviewees who actually went to court. Both would therefore narrow the potential pool of LiPs that this study deliberately seeks to try and keep broad. On top of this, such a direct approach would also narrow geographically the pool of interviewees, with me only being able to contact those in London, and therefore not making contact with LiPs outside of this; this was again expressly against my desire in this project to not limit my interviewees to Londoners, and so I abandoned these ideas too.

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<sup>370</sup> The posters did find a later life, and use, online as materials on the Facebook page, Twitter and website to help advertise the project.

<sup>371</sup> While I undertook training as a PSU volunteer at both the Family Court and the Royal Courts of Justice, I was unable to complete my training and become a registered volunteer. I spent a total of four days only in such a capacity, so I would not presume to argue that this added to my research project in any way. However, even in such a short stint it was an eye-opening experience; I accompanied one individual as a PSU volunteer to the Court of Protection, another to the County Courts, and assisted several in the offices.

<sup>372</sup> Lee and Tkacukova did use a form of this approach, however, they collaborated with the Birmingham PSU to ensure that their presence was clearly signposted and contextualised. See Lee and Tkacukova, *A Study of LiPs*, 4-6.

Ultimately, my experiences of failure in reaching interviewees directly and locally made me realise that in fact the most effective, and appropriate, method of finding interviewees was going to be online through the internet and social media. Using purposive sampling, this approach would allow me access to LiPs all over the country, it would also ensure that I could contact such individuals in a less confrontational manner, and that their participation would be explicitly voluntary.<sup>373</sup> As such it seemed like a far preferable option to the ones previously canvassed. I therefore set up a website, a Facebook account and a Twitter feed called *Litigant Stories*, calling for interviews for the study and explaining the project.<sup>374</sup> The website contained information about the study, about me, and about the kinds of questions to expect, and interviewees were able to inform themselves of project details before deciding whether or not to participate. I also exchanged multiple emails with potential interviewees frankly explaining what the interviewing process would be like.

Through these online methods, I managed, over the course of the project to speak to fifteen LiPs. Four interviewees were sourced through Twitter where they contacted me after seeing my call for interviewees (kindly retweeted by LiP organisations, such as the Bar Pro Bono Unit, and relevant academics, such as Richard Moorhead). Three others I found through Facebook. This was done by visiting the Facebook sites of the County Courts and noting who had 'checked in' to these places. I then contacted these individuals one by one to find out whether they had been LiPs. In total I messaged fourteen individuals through this means, with only five responding. Of those five, three became interviewees, but the other two withdrew. Through Facebook I also contacted the Citizens Advice Bureau pages for areas that had local County Courts, which included Birmingham, Bolton and Croydon. While these sites shared my Facebook page, this did not generate any additional interviewees. In addition, I joined a number of private Facebook groups after explaining my project to the group moderator. Through this, I became a member of several groups including 'McKenzie Friends of Children', 'McKenzie Friends & Self Representing in Court' and 'Self-Representation in Court.' However, I was unable to find interviewees in any of these forums.

Two interviewees were sourced via their webpages: one I found directly as it was explicitly about LiPs and I made contact with him. Another came to my attention in a newspaper article and I then found his website and contacted him and he agreed to be interviewed. Another interviewee was recommended to me by a colleague. Finally, the remaining five interviewees were obtained through 'snowballing' whereby interviewees passed on the details of other

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<sup>373</sup> Nick Emmet, *Sampling and Choosing Cases in Qualitative Research: A Realist Approach* (SAGE Publications: London, 2013).

<sup>374</sup> See [www.litigantstories.com](http://www.litigantstories.com).



potential interviewees after gaining their trust in my project.<sup>375</sup> While I was able to source several interviewees this way, my success rate was not very high, as I approached fifteen individuals, with less than half being willing to participate. I am, however, very grateful to those interviewees who enthusiastically assisted me in finding participants, which was extremely helpful.<sup>376</sup>

Because of this mixed method of sampling, and the emphasis on online sourcing, the interviewees in this study come from a variety of places, from Southampton to Yorkshire to Bristol to Grantham and beyond, with only four out of fifteen being based in London. In addition, I was able to capture a wide variety of legal categories, with the interviewees going to the County Courts in relation to issues including housing and possession proceedings, family matters (prior to 2014), small claims, non-money claims, negligence claims, bankruptcy claims and more. The interviewees also consisted of both claimants and defendants, and they had a mixed background in terms of obtaining advice and representation, with some using the PSU and the CAB, and others not, and some being legally represented for parts, and others not. Some also faced represented opposition and others faced other LiPs. In addition, some were still in the midst of litigation, others had completed litigation and others still were contemplating further litigation. As such, this method of sampling enabled me to gain access to the breadth of those acting as LiPs, including those who went to court regularly and some who had spent very little, if any, time in a courtroom.

However, there are a number of limitations to address within this sample. Firstly, there is its small size. Logistically, of course, there were challenges to doing more than this. Firstly, these are very long interviews involving multiple sessions for most participants and as such involved considerable amounts of travel and accommodation that was self-funded and very expensive. The shortest interview was just under three hours in length in one session, and the longest interview was between nine and ten hours over two sessions, with the average length of the interviews being around five to six hours in duration, over two to three sessions, although up to four in some cases.<sup>377</sup> Travel time was at times up to eight hours in each direction to reach further-flung interviewees, and involved overnight stays in half of all

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<sup>375</sup> As Rowland Atkinson and John Flint point out, 'snowballing', whereby one research subject will provide access to another research subject, is of value when trying to access hard-to-reach populations, making it particularly effectively in reaching LiPs. See Rowland and Flint, "Accessing Hidden and Hard to Reach Populations: Snowballing Sampling Techniques," *Social Research Update* 33 (2001).

<sup>376</sup> Lee and Tkacukova also spend some time in their most recent report discussing the difficulties of accessing LiPs to interview. They were assisted by the Birmingham PSU who allowed them access to their offices and distributed their questionnaires. Even with this facilitation, they note that of 193 questionnaires completed, only 60 were initially willing to be interviewed. This dropped to a total of 25, with many refusing, or hanging up, having initially agreed. These interviews were done over the phone, not face-to-face. See Lee and Tkacukova, *A Study of LiPs*, 5-6.

<sup>377</sup> It is important to note of course, that this only denotes recording times. This does not include the time spent before the interview recording began, any breaks and the time afterwards.

interviews. All of these factors set a constraint on how much interviewing I could do, in addition of course to the restrictive timeline of a PhD. This number of interviews, then, has been reached by firstly considering the scope of the project. Due to the intensive nature of the interviews and their length, more than this would be unfeasible within time constraints.

Beyond logistical considerations, though, the small sample is also in keeping with an oral history methodology. As this chapter has elaborated, oral history interviewing is about depth, sensibility and a situated perspective. The rich detail evinced through these interviews evidences the validity of such a method and of a small sample. A criticism frequently levelled at qualitative research is the generalisability of the findings. However, as Jennifer Mason notes: 'qualitative research should ...produce explanations which are generalisable in some way, or which have a wider resonance'.<sup>378</sup> And this is also the claim of this thesis: that this research not only shines a light into the specific nature of individual experiences but also considers how these insights can assist our understanding of LiPs more generally.

The difficulty arises, then, as to how one can do so in the context of a small group of interviewees. For Pertti Alasuutari, the term generalisable carries overtones of quantitative research. As he states:

generalization is...a word...that should be reserved for surveys only. What can be analyzed instead is how the researcher demonstrates that the analysis relates to things beyond the material at hand.... *extrapolation* better captures the typical procedure in qualitative research.<sup>379</sup>

Therefore, this thesis can be seen as keeping both Alasuutari and Mason's guidance in mind. I am not claiming to capture a representative sample, but instead arguing throughout that the findings in this thesis can be 'extrapolated' to consider wider resonances.<sup>380</sup> In taking this approach, I argue that although the sample number is small, this is sufficient to demonstrate the unexpected variety and complexity of the LiP experience compared to what has previously been discussed. Moorhead and Sefton's 2005 study notes the variety of LiP experiences including the phenomenon of passive defendants as well as active claimants, the differences for LiPs in facing represented and unrepresented opponents and so on.<sup>381</sup> My sample of interviewees reflects this variety in greater detail than previously analysed. It also goes further in providing new information as to the degree to which LiPs have had previous contact

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<sup>378</sup> Jennifer Mason, *Qualitative Researching* (London: SAGE Publications, 1996), 6.

<sup>379</sup> Pertti Alasuutari, *Researching Culture: Qualitative Method and Cultural Studies* (London: Sage, 1995), 156-57.

<sup>380</sup> See also Alan Bryman, *Quantity and Quality in Social Research* (London: Routledge, 1988), 90.

<sup>381</sup> Moorhead and Sefton, *Unrepresented Litigants*.

with the courts, or who then go on to pursue further claims: a complexity heretofore unexplored. Finally, my analysis considers the impact of legal proceedings in greater detail than previously undertaken. Consequently, although the sample number is small, as Howard Becker puts it:

[i]t may not take many interviews to show that something people have not thought about as taking a variety of forms in fact does take such a variety of forms. I can interview three physicians and demonstrate that there are three kinds of medical careers in a given community. I won't be able to say what proportion of the town's doctors have each kind of career and shouldn't try to hint at that. But my analysis may not require that kind of conclusion.<sup>382</sup>

And this is the note I want to emphasise: my analysis does not require the kind of conclusion that speaks definitively of what LiPs are like. The claim I am making in this thesis is that the in-depth nature of these interviews means that the findings therein can be extrapolated to consider some theoretical issues pertinent to the experience of LiPs in a wider sense. Through adopting a qualitative methodology, this research aims to complement, and add to, the existing picture of LiPs. By sitting alongside previous quantitative and mixed-methods research, this work can help bring out the individual voices behind the larger statistical picture.

Another limitation of this study is the lack of women participants; only five of the fifteen interviewees are female. Ultimately, the reason why I did not conduct more than fifteen interviews (I had initially aimed at a maximum of twenty) is because I wanted to interview five more women, and I was unable to persuade any more to participate. While a number of men were available for interview I decided not to do this, as it would skew the sample even further away from being sufficiently representative of women. As to *why* it was difficult to find women participants, this merits further examination. There is some suggestion in the literature that many defendant LiPs, at least, are male, but there is no real evidence of a clear gender gap.<sup>383</sup> However, to begin with, it is notable that ultimately my success rate in obtaining interviewees was overall quite low; of the approaches made online, the majority of individuals either did not respond, or eventually decided against undertaking being interviewed. This is because firstly, it demanded a considerable amount of unpaid time on the interviewees' part, and secondly, it involved identifying with the role of LiP and being willing to have an interview recorded and archived in a publicly accessible manner. This was undoubtedly a constraint set on who could participate. It was certainly the case that far more women withdrew from participating after

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<sup>382</sup> Howard Becker quoted in Sarah Elsie Baker and Rosalind Edwards, "How Many Qualitative Interviews is Enough: Expert Voices and Early Career Reflections on Sampling and Cases in Qualitative research". *National Centre for Research Methods Research Paper*, Unpublished, 2012.

<sup>383</sup> Williams, *LiPs: A Literature Review*, 4.

being initially willing to communicate, suggestive that perhaps the nature of this project was more likely to attract males than females, or that the constraints inherent to the project were more likely to be a problem to the particular women I contacted.

Similarly, only two participants were from a BAME background, both being Black British men from London. Once again, this interview did attempt to gain interviews with several other BAME LiPs, but they declined to participate or did not get in touch leaving this small sample undoubtedly predominantly white and male. The whiteness and maleness of this sample, while regrettable in some ways, is of interest, however, in certain other ways. There has been some suggestion that these are the groups most likely to *be* LiPs; certainly, they seemed to be the most ready individuals to self-identify *as* LiPs and the ones most keen to tell their story and have it publicised.<sup>384</sup> This perhaps reflects the normative position they operate in society in general; when things do not go their way, they are perhaps more likely to ascribe it to injustice that merits public attention. As mentioned before, while I do not want to go beyond the claims that these experiences merit, I certainly think that these experiences are suggestive of the kinds of people who may consider the courts 'theirs'.

It is notable, for example, that one BAME interviewee, Charles, commented that he was reluctant to attend court when he was pursuing a claim against a builder; in this case, the only way to get recompense was for the court to decide that the builder's house was one of his assets (the house was in the name of his wife), however, as he expressed it:

To be honest, I don't even want the judge to see me because I, I, I'm actually conscious of the fact that if he thinks it's a black man trying to take somebody's house away he might, he might rule against me. I might be completely wrong but I just don't want him to see me at all so I never go to court once, unless it is necessary.

There is of course ample evidence of the lack of diversity amongst the judiciary, particularly in regards to BAME individuals, as well as women.<sup>385</sup> This is also the case, although less so, for the lay magistracy as well as at the Bar, although less markedly amongst solicitors.<sup>386</sup> Senior legal professionals, particularly barristers and judges, remain predominantly white and male and while this study can hardly draw conclusions in the context of such a small sample, it is

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<sup>384</sup> Ibid, 14; Trinder et al, *LiPs in Private Family Law Cases*, 12.

<sup>385</sup> JUSTICE, *Increasing Judicial Diversity* (JUSTICE: London, 2017); LSE Commission on Gender, Inequality and Power, *Confronting Gender Inequality* (London: LSE Gender Institute, 2015): 36-47; Bar Standards Board, *Diversity at the Bar*, December 2016; Rosemary Hunter, "More than Just a Different Face? Judicial Diversity and Decision Making," *Current Legal Problems* 68, no. 1(2015): 119-141.

<sup>386</sup> See Ministry of Justice, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (MOJ: London, 2017); Coretta Phillips and Benjamin Bowling, "Ethnicities, Race, Crime and Criminal Justice" in Alison Lieblich et al., eds., *Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2017), 190-212.

important to be aware of how important this lack of diversity may indeed be when it comes to how accessible the courts might be to those who are not white, or male, or who may not speak English as a first language.<sup>387</sup>

The final limitation I think it is important to acknowledge to this sample is the degree to which such a long interview, where individuals self-identify as LiPs, means that it is far more likely that those who have *repeated* experiences as LiPs are likely to participate. As I outlined in the beginning of this thesis, while LiPs include ‘one-shotters’ and ‘repeat players’, this sample is dominated by individuals who have had repeated experience as LiPs, in some cases over the course of more than fifteen or twenty years. This means that the sample is less able to capture the experiences of one-time LiPs (although two of the sample *are* examples of this) and instead disproportionately focuses on the repeat players. However, as oral history interviewing tells us, and as Darnton’s theory proposes, what this skewing has done is provide unparalleled insight into the complex experiences of repeat LiPs. So much research emphasises LiPs as being involved in a single claim, but the experience is utterly different for those who find themselves being involved in multiple claims. This means that this thesis can examine in detail how and why individuals may become serial litigants, and what this experience can tell us about the LiP landscape.<sup>388</sup>

## ETHICS AND INFORMED CONSENT

This project was developed in line with the Oral History Society’s ethical guidelines as well as the LSE Research Ethics Policy, and it obtained ethical approval from the LSE Research Ethics Committee.<sup>389</sup> The project outline was submitted for analysis and I then responded to Committee feedback, before receiving approval to continue. As outlined above, in considering how to approach interviewees, I was concerned not to do so in a confrontational or unethical way and so I chose to source them online, explaining the project, and signposting the potential interviewees to the website for the project. I then provided all potential interviewees with a

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<sup>387</sup> See Alpa Parmar, “Intersectionality, British Criminology and Race: Are We There Yet?,” *Theoretical Criminology* 21, no.1(2017); N Chakraborti and Coretta Phillips, “Minority Groups and the Penal Landscape: Challenges for Research and Policy,” in Anita Dockley and Ian Loader, eds., *The Penal Landscape: the Howard League Guide to Criminal Justice in England and Wales* (Oxford: Routledge, 2016), 115-166.

<sup>388</sup> This is another example of the influence of grounded theory on this research; the repeat LiP phenomenon was one I in no way anticipated going into this project, but which significantly shaped my subsequent questioning and analysis.

<sup>389</sup> Oral History Society, “Is Your Oral History Legal and Ethical” available at: <http://www.ohs.org.uk/advice/ethical-and-legal/> (accessed 29 August 2017); LSE Research Ethics Policy, available at: <https://info.lse.ac.uk/staff/services/Policies-and-procedures/Assets/Documents/resEthPolPro.pdf> (accessed 29 August 2017).

Project Information Sheet in clear, accessible English (also downloadable from the webpage) that explicitly outlined the intention to lodge interviews in an archive at the British Library as well as explained how the interviews would be analysed in my subsequent research and used in publication.

I then made it clear to those potential participants who were interested at this stage that when I met with them I would provide them with further details as to the interviews, issues regarding consent, privacy and how the material is to be used. If the individual agreed to participate, we organised a time and date for me to come to them to conduct the interview. Once I had met the interviewee, I provided them with a secondary information sheet that outlined further information regarding consent and privacy and the use of the material. This two-step process prior to interviewing meant that before the interview took place, the interviewee orally agreed that I could use their (anonymised) interview in my research and publications. They also provisionally agreed to the archiving of their interview at the British Library. Once the interview was over, I again explained that I would use the findings anonymously in my research and only then did the interviewee sign the Recording Agreement for archiving their interview at the British Library. At this juncture, interviewees were given the opportunity to choose to ‘embargo’ for a period of up to thirty years any portion of the interview they did not wish to be made public.<sup>390</sup>

Participant privacy is protected in this thesis through the anonymisation of participants. While the participants agreed to be identified in the public archive, I chose to keep them anonymised here as this seemed the more ethical and appropriate way of presenting the research data, particularly as publications would see these findings circulated within the academic and, potentially, professional community which, although it is unlikely, could affect LiPs still pursuing or defending claims. This also means that where interviewees were involved in published proceedings, I have chosen *not* to reference these materials so as not to compromise their anonymity. While this is regrettable, because of the potentially valuable insight such a comparison could offer, it would compromise the anonymity this study is predicated on.

## THE INTERVIEWING PROCESS

The interviewing process took place between January and June 2016. Each interview lasted roughly between three and ten hours in length and usually took place at the interviewee’s

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<sup>390</sup> This offer was taken up by two interviewees, but the majority did not feel the need to request that any section be embargoed.

home. This method of interviewing was done with the intention of eliciting greater depth of information and fostering trust between researcher and interviewee. Most obviously, this encounter enables the interview to happen away from places with explicitly legal connotations. Whereas much of a LiP's experiences with law may take place in official, semi-formal, and neutral environments, these interviews happened in places chosen by the interviewee to put them at their ease. Twelve interviews were done at the interviewees' home, and I travelled to them to do the recording. Three took place elsewhere; one in my hotel room, and two at the PhD Academy at the LSE which provided a small, private side-room. While the hotel room interview seems to have been conducted there because the interviewee did not feel comfortable inviting me into her home, it is interesting that the latter two interviews not done at home were directly related to the interviewees' experiences as LiPs: one was in the midst of resisting possession proceedings and feared bailiffs (as well as having all parts of her flat filled with legal papers) and the second had been rendered homeless through litigation and did not have a place to go.<sup>391</sup>

While participant details are anonymised here, for safety reasons my supervisors were privy to the details of my interviewees and I contacted them with details of who I was meeting and where I was going prior to meeting an interviewee, and contacted them again to let them know that I had left safely. While I never experienced any sense of danger, there were several moments that were of some concern. One participant had no fixed address and wanted me to meet him at a train station in rural Somerset, at which point he would drive me to another undisclosed location. I turned down this offer explaining in a way that sought not to offend him by telling him that I needed to follow university guidance which forbade not being able to say where I was going (which is not entirely true), and he accepted this explanation. Eventually, he attended the LSE where I conducted his interview over three sessions in the Law Department and the PhD Academy. As mentioned above, another interviewee I went to meet would not allow me access to her home, and so we had to conduct the interview in my hotel room. This was unexpected, and of some concern, but this was assuaged by the interviewee being female, and her being accompanied by another individual, her McKenzie Friend, who stayed throughout the interview. While the circumstances remained far from ideal, I wanted very much to talk to this LiP and considered this not to be a sufficient reason to not conduct the interview. Unfortunately, because of the personal nature of the interview, as well as the demands of sound recording, conducting an interview in a public space was not feasible.

It is important to emphasise, however, that the majority of these encounters were welcoming. Interviewees made me lunch, we had many tea breaks, I would learn about their lives and

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<sup>391</sup> This refers to Marie, Oliver and Talia, respectively.

families, sometimes meet some of these family members and would be welcomed into their homes. This approach to interviewing means that I have become emotionally involved in, and affected by, participant experiences. This was a direct result of the intensity of this kind of research process. A good example of this is the interview I conducted with Neil. While most interviews were conducted over multiple sessions, Neil had less availability and lived further away, and so we conducted the interview over the course of an entire day. The intensity of that experience made Neil quite emotional, and by the end of the day he described the experience as akin to ‘therapy’. I do not make this point to somehow suggest how useful my interviews were to the interviewees. But I introduce this to say how much the experience of conducting these interviews affected me, and the difference this makes in how I approach analysing this data. Through this experience, I became heavily invested in the LiPs’ stories and experiences. I argue that this investment, however, has not compromised this research, but rather facilitated it. The intimacy the nature of this project evoked has developed in me a strong desire to fairly and accurately do justice to LiPs’ experiences. In addition, my own personal responses to these interviewees, and the unexpected degree to which I have *felt* in this project, has underlined the importance of being reflexive in how I approach this data rather than pretending to an unattainable objectivity: I have consequently hopefully trod a careful path between acknowledging my own discomfort, prejudices or concerns as they arose, without falling into the self-important trap of making myself the ‘hero’ of the story.

In this project, therefore, I do not pretend that I am not in the room, or that my presence had no effect, but instead I consider, as above, the difficulties this may pose for interviewees as well as the ways in which it may be advantageous. While the intrusion and dominance of a researcher can be problematic, the visibility of the researcher can, as oral history scholars assert, also be an asset. Alessandro Portelli comments that:

Communications always work both ways. The interviewees are always, though perhaps unobtrusively, studying the interviewers who ‘study’ them. Historians might as well recognize this fact and make the best of its advantages, rather than try to eliminate it for the sake of an impossible (and perhaps undesirable) neutrality.<sup>392</sup>

It is also important to acknowledge that I am not simply a ‘researcher’ but carry my own markers of identity, being both white and female. While I do not feel that this posed any explicit problems in this interviewing, I have no doubt that it changed the nature of the interviewing. One interviewee, for example, who was an older male, treated me in quite a ‘daughterly’ way, taking an interest in my life outside of research and wanting to know about my family. There is also, for example, some evidence that perhaps women find it easier to be

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<sup>392</sup> Portelli, “What Makes Oral History Different,” 39.



interviewed by other women in certain circumstances and so it is possible that when talking to one interviewee about traumatic issues to do with the adoption of her daughter, it was facilitated by our shared gender.<sup>393</sup> In terms of my whiteness, interviewing those of a BAME background undoubtedly means I have no shared understanding or appreciation of the discrimination faced by those who are not white, nor of the lived experience of being black, and this is an undoubted limitation in the research.

In addition, an obvious and important example of the implications of my presence, as well as the need for reflexivity as a researcher, is the anti-Semitism expressed by three or four interviewees, such as Anna:

because of the Jewish influence that um I needed a decent Jewish judge to stand up for what is right because you know, because I'm aware there's, that there is some thoroughly decent Jewish people who have got great family values but I'm also aware from personal experience and what my mother has told me that there are others who will do anything for money, um, and so I thought, this is an opportunity for him to stand up for the decent ones, yeah?<sup>394</sup>

Being not only white and female, but also from a Jewish background, this put me in an immediately awkward position. The purpose of these interviews is to get LiP perspectives, and not to challenge their narratives. As such, it seemed wrong to interrupt them. I also felt that doing so would immediately break any purported intimacy that was enabling the interview to work. I had not identified myself as Jewish, and clearly these interviewees did not think that I was; undoubtedly, they would not have spoken as they did if they had known.<sup>395</sup> However, I think there is no doubt that these comments of theirs affected me; on listening back to the transcripts I think it made me less sympathetic (if not consciously), more likely to be sceptical of their accounts, and more likely to move the interview on more rapidly as I felt uncomfortable in their home. I was also more likely to ask these interviewees questions to elicit them being more explicit about this prejudice although this happened on a subconscious level as I only noticed this behaviour on listening back to the interviews. As such, it changed the interview in subtle ways. This is a more explicit example that simply draws attention to what must always be acknowledged; that an interviewer's presence affects the interview.

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<sup>393</sup> J. Finch, "It's Great to Have Someone to Talk to: Ethics and Politics of Interviewing Women", in *Social Research: Philosophy, Politics and Practice* (London: SAGE Publications, 1993). For a contrasting perspective, see: C.K. Riessman, "When Gender is Not Enough: Women Interviewing Women," *Gender and Society* 1, no. 2 (1987): 172-207.

<sup>394</sup> This is by no means as bad as it got, but I do not want to give further airing to the nastier comments, such as allegations of 'what the Jews did in World War Two'.

<sup>395</sup> Two of my interviewees were Jewish themselves. While I did not identify myself as Jewish to one of these interviewees, the other interviewee continually asked me personal questions throughout the interviewing (and outside of it) so I had told him that I was Jewish.

However, I want to emphasise that while such reactions on my part weren't controllable consciously at the time of interview, I have tried to be open-minded, sympathetic and careful with all interviewee accounts and this partly involves acknowledging, as above, my own limitations as a novice interviewer.

#### APPROACHING ANALYSIS

While the challenges of interviewing were considerable, there is a final, difficult problem to consider: that of translation. Debates between written and oral sources overlook one important fact about oral history: it comprises both. No oral history research stays oral: at some point it has to be *written down*. As Lynn Abrams points out, oral history is 'both a research methodology and the result of the research process; in other words, it is both the act of recording and the record that is produced'.<sup>396</sup> How this process takes place is the most central question in oral history scholarship. This is unsurprising when we consider that the act of translation means oral history's defining disciplinary feature, its essential orality, is lost. Portelli comments:

Traits, which cannot be contained within segments are the site (not exclusive, but very important) of essential narrative functions: they reveal the narrators' emotions, their participation in the story, and the way the story affected them. This often involves attitudes which speakers may not be able (or willing) to express otherwise, or elements, which are not fully within their control. By abolishing these traits, we flatten the emotional content of speech down to the supposed equanimity-and objectivity of the written document.<sup>397</sup>

Any movement from an oral record to a written transcription means performative dimensions of live speech are 'flattened'. Interestingly, as Passerini notes, this is a parallel to legal processes where court proceedings are audio recorded but the records we tend to rely on are the written transcripts alone. As Lynn Abrams puts it, there is a 'verisimilitude' at best between recording and transcription.<sup>398</sup> Much of the scholarship in oral history is therefore concerned with dealing with this loss. Oral history scholarship concentrates on minimizing the inherent impoverishment of translation. This manifests in practical steps to be taken to improve the verisimilitude between the interview and the subsequent transcription. This can be done, for example, through including written references to speech styles, additional notes,

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<sup>396</sup> Abrams, *Oral History Theory*, 2.

<sup>397</sup> Portelli, "What Makes Oral History Different?," 35.

<sup>398</sup> Abrams, *Oral History Theory*, 13.

and attempts to render some of the mood or emotion into the written document. This is valuable in the context of this project whereby the audio recordings will be a richer document than written transcript. Attending to means by which emotion or context can be incorporated into the written transcript can significantly ‘thicken’ the description that can emerge from an interview. As such, in documenting comments made by interviewees I have tried to reproduce as exactly as possible ellipses, pronunciation and wording to retain a degree of this richness.

However, the tendency in oral history scholarship to see translation primarily as a practical step in a journey of producing a record elides the crucial distinction between the record of an interview and the *other* written record that is the subsequent production of knowledge by an academic based on this record. While both are in written form, they are two distinct phenomena. The failure to see this is I think in some ways attributable to language slippage. Having an umbrella term—oral history—that covers only the interview and the record (as Abrams has it) elides the emerging written research. The emphasis on the interview record also reinforces the origins of oral history as a practical method, rather than as a developed coherent theory. However, I believe another significant issue is oral history’s disciplinary isolation: scholars within oral history rarely looks to other fields to consider if there are comparable methods or understandings that could usefully be drawn on. In this case, I believe that oral history scholarship would be significantly enriched by drawing on anthropological and ethnographic theory to fully elucidate the ethics and challenges of translation from interview into analysis. I will outline this in the following section by drawing on the anthropological process from fieldwork to ethnography. Just to be clear: this interviewing project does not constitute ethnography, even if the empirical act of interviewing is a form of fieldwork. But the framework of this fieldwork-ethnography process pays better attention to the complexity of the project of translation as well as to the production of academic knowledge, something under-addressed in oral history scholarship. It is to this framework I will now turn.

In Clifford Geertz’s article “Thick Description: Towards an Interpretive Theory of Culture” he argues that in order to understand a science, ‘you should look in the first instance not at its theories and findings, and certainly not at what its apologists say about it, you should look at what the practitioners of it do’.<sup>399</sup> In anthropology, or anyway social anthropology, what practitioners do is ethnography. And it is in understanding what ethnography is, or rather *what doing ethnography is*, that a start can be made towards grasping what anthropological analysis amounts to as a form of knowledge. This, it must be immediately said, is not a matter of methods. From one point of view, that of the textbook, doing ethnography is establishing

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<sup>399</sup> Clifford Geertz, “Thick Description: Towards an Interpretive Theory of Culture,” *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973), 2.

rapport, selecting informants, transcribing texts, taking genealogies, mapping fields, keeping a diary, and so on. But it is not these things, techniques, and received procedures, that define the enterprise. What defines it is the kind of intellectual effort it is: an elaborate venture in, to borrow a notion of Gilbert Ryle, 'thick description'.<sup>400</sup>

In other words, although fieldwork and ethnography encompass practical methods, these do not define the work: it is the intellectual and conceptual framework: how you see it and *what you make of it*. The thick description that a scholar aims to evoke in research, then, is not just about the verisimilitude of the audio interview to the record even though this is a significant part of it. In other words, oral history's emphasis on finding ways to include emotion, emphases, pauses and so on into transcription is an essential part of building up a thick description, but it is not the thick description in and of itself. For the purposes of this project, then, while it is essential to pay attention to how the interviews are conducted, my aim as a researcher is not to produce the best possible interview, but to produce an analysis based on this. This involves moving beyond practical methods and into interrogating how I use the record that has been created. As Peter Hervik adds: 'anthropological knowledge is not about representing native voices or about evoking lived experience by narrative constructions but about generalizing the particular in a separate discourse'.<sup>401</sup>

The first thing that shifting my orientation towards this separate discourse does in this project is undermine the claims oral history scholarship makes about shared authorship. LiPs are co-authors of my interviews, but not of my research findings, when they become informants.<sup>402</sup> This is *not* an equal partnership, and this goes under-acknowledged in oral history scholarship, arguably demonstrable of the 'facile democratisation' of which Passerini warned us. One of the first things to consider is how much this situation potentially parallels legal narrative: except, instead of legal professionals telling LiPs stories, I am now doing it. Of course, paying reflexive attention throughout to allow a freer narrative to emerge from LiPs as well as the emphasis on being as accurate as possible will assist in addressing this. But the ethics of speaking for others remains complex and fraught.<sup>403</sup>

There are further challenges in the ethics of speaking for others. Pierre Bourdieu remarks that 'it is because subjects do not, strictly speaking, know what they are doing that what they do

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<sup>400</sup> Ibid, 2-3.

<sup>401</sup> Hervik in Hastrup and Hervik, *Social Experience and Anthropological Experience*, 97.

<sup>402</sup> Clifford Geertz, "From the Native's Point of View": On the Nature of Anthropological Sciences," *Bulletin of the American Academy of Arts and Sciences* 28, no. 1 (1974): 26-45.

<sup>403</sup> Gilles Deleuze and Michele Foucault, "Intellectuals and power: A conversation between Michel Foucault and Gilles Deleuze" in Donald Bouchard, ed., *Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault* (Cornell: Cornell Paperbacks, 1980).

has more meaning than they know'.<sup>404</sup> This statement captures the unconscious performance of habitus that is of such value when seeking to understand other people's experiences. But this is not just applicable to research informants but to the researcher herself. Knowledge production, its methods and discourse, is a form of scholarly habitus and it is something Bourdieu argues is overlooked in critical anthropological writing, including the work of Geertz. Bourdieu critiques thick description by arguing that it is insufficiently reflexive. His somewhat cumbersome term, 'scholastic epistemocentrism', refers to the fact that academic discourse is a form of knowledge production we too readily overlook as researchers:

it is customarily ignored that the description of descriptions or of spontaneous theories itself presupposes a scholastic break with the recorded activity that has to be put into the theory; and that apparently humble and submissive forms of scientific work, such as 'thick description', imply and impose on reality a pre-constructed mode of construction which is none other than the scholastic view of the world. [...] imputing to its object what belongs in fact to the way of looking at it, it projects into practice an unexamined social relation which is none other than the scholastic relation to the world.<sup>405</sup>

This critique speaks powerfully to the degree to which our ways of seeing limit and influence the project we create, the record we create and the research that we write. The emergent writing is defined and limited at every stage by being performed by someone (me) who has habituated the 'scholastic relation to the world'.

This critique can seem dispiriting in that it appears to close down the possibilities of any research undertaking. However, I think it can be seen better as a gauntlet thrown: a challenge to be as robustly reflexive in decision-makings as is possible, while acknowledging all the necessary caveats. It is hardly reasonable to spend a thesis arguing for the damage done by habituation of legal discourse if I fail to acknowledge my own habituation of academic discourse. As Bourdieu notes, one must 'return to the world of everyday existence, but armed with a scientific thought that is sufficiently aware of itself and its limits to be capable of thinking practice without destroying its object'.<sup>406</sup> While speaking for others cannot ever be 'solved', where the focus of the research lies can also help us move beyond being bogged down in scholastic epistemocentrism. Kirstin Hastrup, pointing out that 'anthropology and autobiography merge in the process of knowledge production', goes on to note that:

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<sup>404</sup> Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge Studies in Social and Cultural Anthropology, 1977), 79.

<sup>405</sup> Bourdieu, *Pascalian Meditations*, 53.

<sup>406</sup> *Ibid*, 50.

While acknowledging the indubitable significance of autobiography and the situatedness of the anthropologist, the starting-point is not the self, but the field into which the ethnographer invests her powers of imagination. Through this investment, the ethnographer arrives at an understanding not only of “culture” and “society”, but more importantly of the processes by which cultures and societies are reproduced and transformed<sup>407</sup>

Hastrup reminds us that the focus of the researcher needs to remain on the purpose of the project itself. While ethnographers must acknowledge their situated and partial perspective, their responsibility lies in being able to ethically and faithfully produce an account *based* on the interview records that sufficiently allows for complexity. In this project, I must be reflexive about my own academic discourse but not lose sight of the fact that the purpose of this project is to understand another sensibility, even if that understanding will always be limited. Kirstin Hastrup beautifully articulates this in her call for an ‘ethics of inarticulacy’. Hastrup notes that ‘experience is always emergent, never performed, while anthropological models often display a degree of finality’.<sup>408</sup> It is therefore important to avoid conclusions or finality. It is my responsibility as a researcher to draw attention to what isn’t said, what cannot be said, and what should not be inferred. It is about striking a balance. As Clifford Geertz pointed out: ‘it is not necessary to know everything in order to understand something’.<sup>409</sup>

However, in developing my ‘coding framework’, it is important to note that this process was messier than the term ‘coding framework’ suggests. As Herbert Kritzer notes:

Experienced social scientists know that textbook descriptions of the research process are at best a sanitized description of the messy reality of what happens when researcher meets data.<sup>410</sup>

As someone who is not an experienced social scientist, when this researcher met my data, I found it very difficult to know how best to go about my analysis. I had strong theoretical frameworks to guide me, knowing, as I have outlined above, that I wanted to foreground LiP experiences, to faithfully and sensitively reproduce what happened in the way they understood it, but also knowing the limitations of such goals, as well as the need to be reflexive. However, these frameworks are not the same thing as knowing exactly what to do with the material in a practical sense. As Kritzer notes: ‘research is not a simple journey to the shopping mall of

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<sup>407</sup> Hastrup in Hervik and Hastrup, *Social Experience and Anthropological Experience*, 2.

<sup>408</sup> Ibid, 9.

<sup>409</sup> Geertz, “The Interpretation of Cultures,” 20.

<sup>410</sup> Herbert M. Kritzer, “‘Data, Data, Data, Drowning in Data’: Crafting the Hollow Core,” *Law and Social Enquiry* 21, no. 3 (July 1996): 761.

research results'.<sup>411</sup> As such, the actual process of coding and analysing data was done largely intuitively. While in retrospect I can see clearly how a coding framework emerged from this process, the experience of *doing* this felt far less systematic. I found it enormously helpful to find the scholarly work of Halliday and Schmidt who outline the 'Methodological Anxiety Syndrome' or 'MAS' experienced by many novice socio-legal scholars conducting empirical research.

Halliday and Schmidt note that:

Law and Society research typically proceeds on a similar basis: beginning with a naive design, but informed and evolving through experiences in the field and engagement with the data. However, we have not done so well at naming and accepting the importance of "naive fieldwork" in the research process. In this understanding, then, being methodologically thoughtful – possessing the capacity to move from the naive understanding of one's project to the more sophisticated, and to discover the questions, theoretical potential, and epistemological problems latent in one's engagement with the world as one sees it – is ultimately much more important than being methodologically trained.<sup>412</sup>

In outlining how I conducted my analysis, then, I do not try and claim a smooth and natural process. But I hope I can demonstrate that how I analysed this data was methodologically thoughtful, if at all times underpinned by MAS.

#### DOING ANALYSIS

Coding describes the process of interacting with data and developing a framework for analysis. Denzin and Lincoln note that in grounded theory, coding is essentially an interactive process, where the researcher goes back and forth continually between data and the developing analysis.<sup>413</sup> They describe the process as follows:

First, we compare data with data as we develop codes; next, we compare data with codes; after that, we compare codes and raise significant codes to tentative categories: then, we compare data and codes with these categories: subsequently, we treat our major category(ies) as a concept (s), and last, we compare concept with concept.<sup>414</sup>

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<sup>411</sup> Ibid, 764.

<sup>412</sup> Simon Halliday and Patrick Schmidt, eds., *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge: Cambridge University Press, 2009), 4.

<sup>413</sup> Denzin and Lincoln, "Codes and Coding," 361.

<sup>414</sup> Ibid, 361.

Strauss and Corbin's framework supports this interpretation. They break down the coding process into three phases: open, axial and selective, with open codes being the first stage of analysis of data, and axial coding being the moment when codes become categories. Finally, selective coding is analogous to the raising of categories to concepts.<sup>415</sup> Such a framework is a helpful method to separate out the stages of my analysis which, if more intuitive and messier than these categories suggest, echoes these stages.

My analysis began during the interviews themselves. While I was careful not to do too much note-taking so as to be distracting to the interviewee, I made notes of the time-stamps when there was any moment that was particularly relevant to my research questions. I also recorded timestamps of the different sections of the interview to help me remember the structure of the interviews, given that the interviews themselves were of considerable duration. I made my first set of post-interview notes immediately after completing an interview (usually in my car, or as soon as I returned to my home or my hotel). These notes captured any themes, ideas, experiences or language that seemed important to that interviewee or which struck me as strange in Darnton's sense, as well as anything that explicitly and obviously addressed the overall research questions of this study. At this time, I would sometimes replay certain sections of these interviews drawing on the time-stamps I had made to catch something I had half-remembered afterwards that I wasn't sure about. I then typed up these (usually) handwritten notes, resulting in a few pages of rough notes for each interview. These notes became the earliest kind of 'open codes' that started to organise what I thought may turn out to be key ideas emerging from the research. These encompassed such ideas as conspiracy, language difficulties, distrust of lawyers, vulnerability, complexity, and 'justice obsession'.<sup>416</sup>

The next step of data translation occurred when I had completed all of the interviews. At this point, from June to December 2016, I listened through to each interview from start to finish systematically, accompanied by a blank word document, transcription software and a foot-pedal that enabled me to both make notes as I went along as well as, where I wanted to, transcribe sections of the interview. My main goals in this systematic review of interviews were firstly to make notes of timestamps where particular topics or subjects were covered, i.e. noting when the section on 'childhood', 'schooling', 'first LiP experience' occurred to assist me with finding this section of the interview in the future. While I had done some of this work in the interviews themselves, my handwritten notes were usually incomplete. Secondly, I again went through the process of making notes on important themes, experiences or ideas that

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<sup>415</sup> Strauss and Corbin, "Grounded Theory Research: Procedures, Canons and Evaluative Criteria," *Qualitative Sociology* 13, no.1 (1990): 3-19.

<sup>416</sup> Strauss and Corbin, "Grounded Theory Research," 13-14.



came out of the interview. This systematic interview was done *without* referring to my rough notes, to avoid overly influencing what I was looking for and to enable me to listen out for different ideas or new themes I may not have noted at the time but which, having done other interviews, might have become more important. In addition, I began to delve deeper into each of these emerging 'open codes', searching to understand the contexts, 'conditions' and 'consequences' of these moments.<sup>417</sup> I then compared these notes with my original notes to see if there were clear themes emerging.

The process of reviewing each interview obviously also changed from the first to the last interview as the second time I reviewed an interview, I had an earlier set of themes and ideas to compare it to. This meant that as I continued to review the data, I began to note trends and ideas that cut across multiple interviews, that connected with the initial notes I had made of key emergent themes in each interview. This enabled me to develop the major narratives that span this thesis that seemed to present something that was quite central to the LiP experience. I therefore then used this emerging narrative framework as a guide to return to parts of each interview.

Denzin and Lincoln note:

[a]s coding progresses, particular categories and themes emerge as more salient, as central to integrating a number of key concepts, and/or as being of interest to particular topic under study. The data are then more thoroughly and systematically reviewed with fewer specific concepts or categories in mind to determine where and how these are illustrated in the data.<sup>418</sup>

This was the experience I had in the systematic review of the interviews, as it enabled me to start to get a strong, largely intuitive, sense of the stories that were coalescing around common themes or experiences. I then used this to mine the interviews further trying to capture how and why these themes differed from interviewee to interviewee. Part of this 'going deeper' process was about understanding each interviewee's specific story of a common theme, and part of it was also about accessing the specific sensibility of the individual. While this, of course, is a near impossible task, one way I attempted this was to use their voices as much as possible. It was at this point that I transcribed sections or quotations from interviewees, concentrating on reproducing as exactly as possible the way in which the interviewees expressed themselves. This process, retrospectively reviewed, is in line with the 'axial coding' stage that Strauss and Corbin identify.

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<sup>417</sup> Ibid, 13-14.

<sup>418</sup> Denzin and Lincoln, "Codes and Coding," *The SAGE Handbook of Qualitative Research*, 87.

At this point, with detailed notes and ideas on a series of concepts, I was largely writing up small sections, returning to my notes on the data, and making choices as to the key themes that best communicated the narratives emerging across interviews. It is through this process that I decided on the major themes and sub-themes, akin to Strauss and Corbin's 'selective coding'.<sup>419</sup> However, it was of importance to me to ensure that I was not simply picking out data that supported the narratives I identified or those that supported my initial research hypotheses. As such, I tried to avoid this by continually reviewing the interview notes I had made throughout the writing process, to ensure I sufficiently paid attention to those findings, experiences and thoughts that did *not* support some of the themes emerging, or which complicated any pat findings of consensus amongst LiPs. The themes I did not cover in this thesis were sometimes ones I had less 'robust' evidence for but for others, such as the question of advice, it was a case of having to be realistic about how much I could talk about in one thesis, and I put these aside with the intention of referring to them in further writing.<sup>420</sup> This process led me to four key categories, or themes, that I wanted to focus on: conspiracy, impact, complexity, as well as 'acting as a LiP.' These themes do not describe all that came out of these interviews, and I have attempted to include stories of difference in this thesis, and to avoid making any claims of representativeness that would gloss over the reality of the individual, lived experiences of the interviewees. This has hopefully enabled me to be 'methodologically thoughtful' and careful about the claims I make from this data about LiP experiences.

## CONCLUSION

I cannot in the end, of course, claim that I am doing full justice to the interviews or interviewees. Such an enormous and rich amount of data forestalls that claim. However, these interviews have been framed to allow LiPs to speak for themselves as much as is practicable; to narrate their experiences, and draw attention to what they believe is important. I have tried to be respectful in drawing attention to these emphases made by LiPs and led to where they wish to go, while still obviously fulfilling the academic demands of this thesis. This means the layout of the second half of his thesis echoes LiP preoccupations, *not* legal categories, and not necessarily my own preoccupations either.

While I may have had some sense of what findings I expected, and while to some degree these findings have been echoed in this data, so much of this process has thrown up unexpected, confusing and complicated ideas and themes that I frankly did not remotely anticipate. The

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<sup>419</sup> Strauss and Corbin, "Grounded Theory Research," 14.

<sup>420</sup> *Ibid*, 14.

second half of this thesis therefore reflects this, with a mix of the anticipated (going to law is difficult) and the totally unexpected (conspiracies). I begin these stories with Chapter Five, which looks explicitly at *impact*: what does it feel like to be a LiP and what impact does going to court have? As I will show, if instead of focusing on the LiP's impact on the courts, we focus on the courts' impact on the LiP, a far more troubling and difficult landscape begins to emerge.

## BEING A LIP:

## VULNERABILITY, COMPLEXITY AND HIGH STAKES

Kate: What impact do you think this has had, going to court has had, on your life? Financially, personally?

Neil: [...]. You can't really put a cost on it monetary wise, well you can, I suppose, it can be a quantum worked out with all the Ogden tables and all the loss of earnings and interest and what have you. Uh, it has cost, from loss of earnings, say, I'd say £20000 a year. It's uh, not nearly, twenty, twenty-eight years now, so earnings, it's cost me lots of money.

You can add, you probably, it's not a great deal because, uh, there's probably, probably £10,000 worth of paper and ink and printer ink and what have you. And the, the models [medical models Neil has had made] there's a couple of grands' worth of models, postage. Telephones. But that's, that's not, the important thing, the one thing that they've taken from me, and I'm looking up there, that's J--'s grandson, you know that photo, little one, not my son, not my grandson...I'll never have that. There's a grandma, there's a great grandma there, there's a grandma and there's a little grandson and there's all sorts...

Where would you, where would you, you know like, how long have you been, I'm not trying to find out how old you are but what's your...what's your destination in life? Where would you like to be in thirty years' time? Successful, safe, secure? Healthy? Family around you? You know, being able to help your family...well think about, in thirty years' time, that's where you are, right, and then rewind yourself thirty years to now, and think something happens now that prevented you from getting where you wanna be, that wasn't your fault, that was somebody else's mistake and then that person, with the aid of a, with the aid of solicitors just lied through their back teeth to stop you from...you might never have gotten to where you were, but you shouldn't, you shouldn't be out of pocket...

Basically we're talking money aren't we, the ability to earn money, your economic loss, you know, yeah, I'm going to be paying for the rest of my life. But I'm dealing with that. The one thing that I hate is, [beginning to cry] little things. Social life has gone. And that's, that's all to do with money, you know. Being abro-, in my life I've been abroad, well, three times. Three times in fifty-four years. I've never been abroad with mates, I've never been able to afford... [crying]. God. I've never been able to afford to take me mum out for... a decent meal...you know, oh, sorry [crying]. God. It's weird.... [long pause]. I haven't been the brother I would have liked to have been, the son, the uncle, the grandson. Father. The grandfather, great grandfather. Because. Not because I was discharged from hospital by mistake, but because a group of supposedly ethical, intelligent, powerful people decided that they could get away with not dealing with their mistakes and responsibility and...just being unaccountable.<sup>421</sup>

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<sup>421</sup> Neil lives in Northern England and has been in chronic pain and unable to work since he was severely beaten by a group of organised football hooligans. He was sent home from hospital having been told his collarbone had not been fractured and, according to Neil, having not had it x-rayed. He suffered significant pain, was unable to work and his doctor subsequently told him on examination that he *had* broken his collarbone (although this has been subject to ongoing debate amongst medical professionals). For Neil, the hospital's failure meant that he did not receive the treatment he needed to be able to heal sufficiently to return to his livelihood as a foorer. This was the basis for the medical negligence claim he brought in the County Courts which lasted, in one form or another, for nearly thirty years.

## INTRODUCTION

One of the most important findings of this thesis is that LiP's lives—and cases—are significantly more complex and challenging than expected. With this finding comes the related one that the impact of being a LiP goes far deeper than I anticipated. The individuals who talked to me in this study, like Neil cited in the above extract, told me of long, multifaceted cases involving multiple courts that left them financially exhausted and emotionally drained. Some said the experience of pursuing a claim led to them losing their families and some lost their homes. Many felt the experience had a negative impact on their mental health, with the spectrum covering minor anxiety, depression, severe depression and those who had been, at times, suicidal. So, while LiPs are not the “nuts” they are often made out to be, their stories demonstrate significant, genuine vulnerability.

So, what to make of this finding? I am not a psychologist and am not qualified to make any judgments on any potential pathologies of interviewees, nor would such speculation be within the ethical boundaries of this thesis. But most importantly, I argue that we are too quick to pathologise LiPs—whether diagnosing them as litigious, or obsessive, or deluded. The result of this labelling is that we internalise problems within an individual, at the expense of considering the context in which these individuals are acting. The emotional and psychological stress LiPs experience is at least partly, and perhaps even largely, related to the *sheer cost* of pursuing or defending a claim. In other words, a LiP's vulnerability—the vulnerability I am talking about, anyway—is not one embedded in an individual's psychology but is fundamentally connected to the legal proceedings in which he or she is acting.

This chapter argues, then, that deeper engagement with LiPs telling their own stories reveals that what we might call the “outside” narrative of LiPs involved in multiple proceedings—that LiPs pursue a hopeless claim, come to court, lose their case and this makes them angry and drives them to more and more fruitless litigation—is reductive, for two important reasons. Firstly, this outside narrative seems to imply that LiPs understand what is happening. And mostly, they don't. Secondly, the outside narrative also implies that the legal system works efficiently and fairly and quite often, it doesn't. This means that LiPs may bring a worthy claim but still lose. They may defend an action well, and still lose. There may be a defence available to the LiP they don't know about. What is certain about these situations, however, is that these individuals will feel that something fundamentally unjust has occurred in a context of considerable importance to them.

What emerges from this research, then, and what I explore in this chapter and the following two chapters, is not what I expected it to be. To employ a double negative: my research does not demonstrate that LiPs do not behave in the ways ascribed to them. In other words, my research findings demonstrate what could be called “Yes, *but*”. Some LiPs *are* involved in multiple proceedings, some *do* suffer from mental health problems, all *are* confused and unsure of legal proceedings. But from *their* perspective, the situation looks very different. It is this perspective that is lacking from much research into LiPs and that I want to try and communicate.

I begin by demonstrating the sheer diversity of experience that can be seen between just three interviewees in this study, and the problems this raises for generalising about LiPs and their experiences. I then go on to explore how each interviewee’s story demonstrates significant complexity, across cases, courts and time, and the challenges this poses about narratives of LiPs that are oriented around ‘single issues’. Finally, I consider the issue of litigiousness by considering the stakes, arguing that far from voluntarily or enthusiastically pursuing litigation, each LiP in this study felt they had ‘no choice’. As I will argue, seeing things from a LiP’s perspective, partial and emotive as it can be, can tell us something of the relationship between high stakes, impact and multiple proceedings for LiPs. And through this, we can learn something of considerable importance: how we treat vulnerable people in the courts and how we show respect for their stories.

## DIVERSITY

Charles’ first contact with the County Courts was sometime in the early 1980s.<sup>422</sup> Charles went to collect his son for the day from his estranged partner and she wouldn’t let him in. Instead she called the police. Charles became extremely fearful and upset as he was working at that time in communications for the police and, as he put it, ‘I thought I could lose my job if I got in trouble with the police so for her to do that sort of thing, you know, it was really beyond belief. When the policeman arrived, Charles was in tears, trying to explain to the policeman what had happened and also telling him how he could not understand how she could have called the police. Charles decided then, he says, to walk away, to ‘walk out of his [son’s] life’ and he got in his car. But then the policeman knocked on his window, and talked to him. The policeman said to him ‘don’t do that, don’t just walk away’ before telling Charles of how he had regretted losing a relationship with his own child. At that point, Charles says, ‘I decided that I had to fight to make sure that I could get access to him’. This led to his first

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<sup>422</sup> Charles was unsure of the exact year but speculates that it was the mid-1980s.

appearance as a LiP in the County Court and being awarded joint custody of his son. Although his former partner had representation, through legal aid, and he did not, he described himself as ‘very confident’ going in:

...[1]ike I said, all I’m asking, all I was asking for is, um the opportunity to see my son on a regular basis so I couldn’t see, the, the judge had no reason why he would deny me that. He had no reason to deny me that access.

Eleanor’s first experience in County Court, on the other hand, was as a defendant in 2008. Owing her own business, Eleanor was sued by a subcontractor who claimed they had not been paid for work done for Eleanor’s business. Eleanor attended a £30 fixed-fee interview at a solicitor’s firm she had found online in her local area, who ‘walked me through what I needed to put into the defence to send back to the court so that’s what I did’. Following this, and some further communication from the claimant, she attended the County Court. She describes attending the hearing:

Well I mean I remember sort of sitting outside S— County Court, the, you know the court offices, hearing rooms or whatever they’re called, um, feeling, you know, my stomach sort of turning somersaults and stuff like that because...no matter how well prepared you are it’s still fairly scary, ‘cause you, the trouble is with court is you have a, you can go in there with the strongest case in the world and still lose...over a technicality.

Both Eleanor’s and Charles’s experiences differ again from the experience of Talia who first attended County Court in 2007 when she took her freeholder to court for failing to properly insure her property according to the terms of her lease. The freeholder did not turn up, and Talia was successful in evidencing her case. Talia then took the order the same day to the freeholder’s place of work but he did not comply with the order, or acknowledge it in any way, sending her back to court less than six months later. By the time of her initial County Court appearance, Talia had already gone through legal processes before, having attended the then Leasehold Valuation Tribunal [LVT].<sup>423</sup> Having had solicitors at the first hearing of this tribunal, she dispensed with them for the appeal, and was thereafter a LiP in almost all of her subsequent legal actions, including the ones at the County Court:

Um...it was, it was after the[LVT] decision being appealed [that Talia dispensed with the solicitor], I think, well it must have been. Um...without referring to my files, I wanted our solicitor to write a witness statement, I thought that would help, and he said okay, I’ll do it for £200 and then like a week before he was supposed to give it to us, he said Oh, I haven’t

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<sup>423</sup> Now the First-Tier Tribunal (Property Chamber).



quite finished, I'd like another £200 and I really, uh [laughter], I don't think, think he just expected me to just...and I said 'that's it, okay we won't use it, forget it' [laughter].

These are just three examples of first experiences of LiPs in the County Court, but I use them here to signify upfront the considerable diversity of experience inherent even at the most surface level examination of LiPs. Charles's first experience relates to family matters, Eleanor's to small claims and Talia's to housing possession. Both Charles and Talia are claimants, while Eleanor is a defendant. In addition, Charles does his own research and seeks no external advice and is confident acting as a LiP. Eleanor on the other hand, seeks solicitor advice prior to attending the hearing and is extremely anxious about the outcome. Talia also does her own research, but unlike Charles, who doesn't think he needs a lawyer, and Eleanor who can't afford a lawyer, Talia actively doesn't want a solicitor, considering them individuals who drag out proceedings for their own financial gain.<sup>424</sup>

What these three examples suggest is that there are far more points of divergence in LiP experience than there are convergences. At first glance, this disparity is hardly a surprising finding given the inherent complexity of civil justice. As Hazel Genn notes:

[O]ne of the problems in understanding civil justice is its complexity in terms of range of subject matter and configurations of parties and that this diversity inhibits conceptualization and theoretical development – so many different types of parties, so many different types of dispute.<sup>425</sup>

Other researchers, such as Moorhead and Sefton, as well as John Baldwin, have also argued that the category of LiP captures a wide range of individuals.<sup>426</sup> However, accounts of LiP failures often do not consider the variety of circumstances in which LiPs act, as perhaps they would when thinking about represented actors in civil disputes. In addition, what is also of importance is how substantial these differences are, and the concomitant difficulties this inherent diversity poses, both in terms of practical reform as well as in raising questions about the term LiP itself.

Firstly, an obvious example of how this diversity is a practical problem arises when considering how to provide useful guidance for LiPs. In a context where reliable free legal

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<sup>424</sup> This is a view shared by *many* interviewees, including Charles later in his legal proceedings experience. The lack of trust LiPs have towards legal representatives is explored in detail in Chapter Six where I draw on the work of Tom Tyler on trust and legitimacy, in particular *Why People Obey the Law*.

<sup>425</sup> Genn, *Judging Civil Justice*, 11.

<sup>426</sup> Moorhead and Sefton, *Unrepresented Litigants*; Hazel Genn, *Paths to Justice*; John Baldwin, "Litigants Experience of Adjudication," 20.

advice has been drastically reduced, how can one, for example, provide written assistance or online information for LiPs when the category itself, even in the County Courts alone, is so broad? While they may attend the same kind of court, LiPs will differ regarding any advice they sought or received, any research they undertook, whether they had representation at any point, how much legal or courtroom experience they may have had, the nature of the dispute itself, and whether their opponent is represented or unrepresented.<sup>427</sup> The LiP may also face an individual, or a corporation, or a local authority (all of whom are represented in this sample). Alongside this difference in types of proceedings and legal claim, there are of course differences in age, sex, ethnicity, education, and language to contend with.<sup>428</sup> These differences clearly raise immense difficulties in being able to provide applicable, sufficiently tailored or specific advice. This is also occurring in a context where the limited sources of face-to-face advice, such as the Citizens Advice Bureaux [CAB], are increasingly inaccessible. As Neil comments:

I found the Citizens Advice Bureau was basically impossible to get in to...uh...and to find one in the locality or to get an appointment to see somebody ...well I can't say they're useless because I never actually got there to use them. Um, there are various people like litigants in person help thing on the, uh, like on Twitter and they've got their own website, ah I'm sure you've seen those haven't you, litigant in person help. They may, they may be effective, uh, but I've never seen any evidence of it.

Secondly, this diversity of individuals and circumstances also draws attention to problems with the term 'LiP' itself. The term includes those such as Eleanor who seek legal advice, but are not formally represented, people like Charles who conduct research through legal forums online, but don't instruct a solicitor, and those like Talia who intermittently employ solicitors before dispensing with them.<sup>429</sup> It also includes anyone of any background and experience including, potentially, solicitors and barristers who may choose to act for themselves. In this research sample, it includes both Tim who has qualified as a solicitor but does not practice as one, and Marie who is raised in care and leaves school at 16. As the broad spread of interviewees demonstrate, these individuals have little in common other than a label.

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<sup>427</sup> Or they may not: many LiPs will resolve the dispute (or give up) before it reaches the court at all.

<sup>428</sup> In this group of individuals, as outlined in the previous chapter, thirteen interviewees were white, and two were black British, ten were men and five were women and they ranged in age from 28 to mid-80s. All spoke English as a first language.

<sup>429</sup> The category of LiP also includes those who are accompanied by McKenzie friends, paid or unpaid. In this sample, Marie has been using a McKenzie friend for several years and they have become so jointly committed to her case, and used to working together, that they undertake work on her case together, including, notably, this interview. When I went to interview Marie, her McKenzie friend accompanied her at her request. So, while Marie was the one answering questions, her McKenzie friend sat beside her throughout the proceedings, clearly functioning as a source of support and assisting her with her recollections and the timeline of the proceedings.

This use of labelling is problematic, though. It is unclear where the role of LiP starts and stops. Is being a LiP a role that is adopted temporarily and then doffed? Or is it more than that? When does one start, and stop, to be a LiP? This was something of interest in this study because it raises the question of whether these individuals *recognise themselves* in such a label. For many interviewees, this was a label they did not feel any affinity for. For example, as Tim put it:

Not, I don't, I wouldn't necessarily say that I saw myself...obviously I was, but it didn't sort of occur to me that I was a litigant in person. Um, again part of that is probably for me, that when I was studying [law] that was kind of a, a wild fantasy that someone had that they would actually, you know you could represent yourself absolutely, I think we probably covered it in about five minutes in a lecture once, you know people do, depending on the case, they're either idiots or they're geniuses and that was it basically, but it's a rarity.

Tim went on to note that LiPs are 'kind of looked down on slightly. More than slightly, um but that's largely by the lawyers who would rather be getting paid a lot of money to uh, to to, to do the case themselves'.<sup>430</sup> This was echoed by Charles:

I think they look down at us sort of, I think they wa-, they think of us as people wasting their time, wasting the courts time...it's not something that they want. They'd prefer if it didn't exist because, because I mean if you look at the documentation from my barrister for instance and compare it to my documentation, there, there's no comparison [*in quality*].

As both interviewees point out, the label itself has become cluttered with largely negative associations do not treat the term LiP as a temporary role, instead they tend to talk of LiPs as a specific type of person.<sup>431</sup> So although the term 'litigant in person' technically describes a specific and discrete temporal moment in an individual's life, it is spoken about by many in the legal profession, and *felt* by those who act as LiPs, as something approaching an all-encompassing *identity*: but this is an identity that for many interviewees is troubling because of all the negative connotations it brings.

Alongside these problematic issues of terminology and identity, however, the current working definition of LiP also implies that individuals' experiences prior to entry into judicial space are not relevant. By denoting individuals as LiPs only during a discrete period of time, we fracture

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<sup>430</sup> For Tim, 'idiots and geniuses' is the most apt way to describe how LiPs are perceived by the legal profession.

<sup>431</sup> For example, see Swank, "The Pro Se Phenomenon," 373-386.

the longer narrative that for any individual is relevant to how they come to act as a LiP and that will shape how they inhabit and perform that role.<sup>432</sup> This context of course includes background, education, family, income and so on. It also, crucially, involves any prior experience with legal proceedings. Returning to our three cases, for example, at the time of Talia attending the County Court, she had previously appeared at the Lease Valuation Tribunal and its subsequent appeal, as a LiP in the latter. Talia then went on to further disputes with her freeholder as well as her mortgage lender that spanned a period of ten years and were still ongoing at the time of writing this. She has acted as a LiP throughout this entire period.

Charles, on the other hand, when he first attended these County Courts, had never been in court before. However, this was not to be his only court experience. Charles went on to appear on two subsequent occasions relating to custody in the County Courts over the next ten years. He also, in the mid-1990s, started civil litigation against his conveyancing solicitor that took him to the High Court. Throughout this period, and the subsequent appeals, he was intermittently represented, and at one point, he sued the solicitor he employed to bring the case for negligence. Charles also became involved in a dispute with a contractor. This action started in 2010 and was ongoing at the time of his interview, by which time Charles was employing a direct access barrister. Finally, Eleanor was also a first-timer in the County Courts when she was sued in 2008. But after this experience in the County Court, Eleanor went on to act as a claimant in two further civil proceedings, one she won and one she lost. She conducted the majority of these proceedings as a LiP, and did so from prison, where she served a seven-year sentence, spending three and a half years in prison before being released in 2014.

Looking at the above then, beyond all the diversity inherent in being a LiP, one area of convergence in this study was that almost all of the LiPs who spoke to me had had multiple encounters with legal proceedings and legal professionals. The question that arises from these unexpected findings are therefore *how* and *why*: how do these individuals come to be multiple litigants? And why do they keep returning to law? Is it simply that these are 'litigious' people? Or are there other reasons? And how can these findings of complexity tell us something about the wider experience of LiPs in the civil courts? That is what I explore in the next section of the chapter.

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<sup>432</sup> Indeed, as I go on to note in this chapter, the inability of a LiP to restrict their arguments to one area leads to difficulty.

## COMPLEXITY

Kate: Do you have any other memories of making a complaint?

Charles: I'm sure there are lots but I can't actually remember at the moment [laughter]. I'm always trying to, always complaining about something to be honest [laughter].

Kate: Why do you think that is?

Charles: No, I, 'cause over the years, once you get, um, once you start complaining, because when you see people have deliberately taken the pee, you can't just, just let it go, you can't just turn your back on it so you tend to try and fight for your rights.

Kate: So in your experience you usually have to be persistent?

Charles: I think you have, because people just deliberately take the mickey because they know that a lot of people won't bother and a lot of people don't know their rights so they just take the mickey.

A striking finding of this study was how many individuals were involved in multiple proceedings. In this sample, thirteen out of fifteen interviewees had been involved in more than one case. Of the two who had *not* been involved in multiple cases, one, Trevor, was in the process of preparing to start a second case that arose directly from the circumstances of the first case. This means only one interviewee, Tim, had a single, discrete experience of attending County Court, receiving a judgment (against him) and then ceasing proceedings.<sup>433</sup> Of the thirteen who had gone to court multiple times, their litigation spanned from between two to three years (Eleanor) to over thirty years (Oliver). Neil, for example, as outlined in the opening epigraph of this chapter, has been pursuing some kind of remedy since the early 1990s. This has taken him to the County Courts as well as the Appeal Courts and directly to the High Court. Peter has been to the County Courts, the Family Courts, and the Queen's Bench on multiple occasions over the last five years. Paul has been in proceedings in the

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<sup>433</sup> As already noted, this finding raises questions about the assumptions made by the County Court that each LiP will be attending court for the first time, and that this will be their only experience with this kind of legal proceedings. I will explore this in the following chapter when I will consider the degree to which 'practice' aids LiPs in performing effectively.

County Court, the High Court, multiple Employment Tribunals and, most recently, the Immigration Tribunal. Marie, now 29, has been involved in legal proceedings almost non-stop since the age of 21. At one point, in 2012, she was involved in five different proceedings occurring simultaneously: ‘Basically we had cases in the County Court, we had cases in the Family District of the High Court, we had cases in erm, European Court of Human Rights, we basically had cases in every level of court going’.

This complexity cannot, of course, be separated from the methodology of this project. Ultimately, advertising for this project involved interviewees identifying themselves as LiPs, as well as having the available, unpaid time to complete what was a very long interview. There is little doubt that both factors mean my sample is more likely to contain individuals who have been involved in more complex situations, as perhaps the average ‘one-shotter’ LiP doesn’t consider their story to be sufficiently of interest to a researcher, or does not identify with the label of LiP.<sup>434</sup> However, while this may certainly be a factor in these findings, and we cannot make any assumptions as to how representative this complexity is across *all* LiPs, this finding reminds us that the assumption that County Court cases are simple and discrete belies the *potential* complexity of any individual’s legal history.

So *how* do LiPs come to be involved in multiple actions? In Chapter One, I argued that there was a tendency on the part of the legal profession to conflate all LiPs with high-risk and vexatious litigants. This was at least partially because of the perception that LiPs are more likely to be involved in more than one case. By performing this conflation, the legal profession provides its own explanation as to why individuals pursue multiple cases. As Didi Herman notes, vexatious litigants are:

characterized as falling into one of two groups: those with histories of mental health problems who launch multiple legal actions against diverse targets; and those whose initial legal action, for example (one that recurs often) a complaint of discrimination under the Race Relations Act (RRA; now incorporated into the Equality Act 2010), was resolved against them, and who then attempt to carry on with aspects of that complaint in various ways.<sup>435</sup>

A minority of interviewees in this sample clearly met the latter definition: that is, their multiple actions seemed to spring from obsessively continuing a complaint they felt was wrongly decided to the point that they had become actively conspiracist in their attitudes

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<sup>434</sup> Galanter, “Why the ‘Haves’ Come out Ahead.”

<sup>435</sup> Didi Herman, “Hopeless Cases,” 28.

towards the legal profession.<sup>436</sup> But the majority of the interviewees didn't seem to fit the description. And yet they pursued multiple complaints. So how had this come about? For some interviewees, their multiple different actions were unrelated.<sup>437</sup> But for others, the picture is more complicated: in the stories the interviewees narrated, it often *was* about pursuing other actions relating to an initial injury or wrong. And yet, to characterise these individuals as on the spectrum of vexatious is arguably to insufficiently consider the circumstances under which this took place. For example, for one interviewee, the impetus towards starting another complaint was due to bureaucratic errors, where to not continue a 'related' complaint would be to not be able to seek restitution for something that was clearly unfair. This is the case of Trevor.<sup>438</sup>

Trevor was sued by a contractor for withholding some of the money promised to complete a job.<sup>439</sup> Sending away his forms to the central Northampton Claims Processing, Trevor then heard nothing for several weeks before receiving a letter from the court telling him they had lost some of his paperwork, and asking him to re-send it. He then did so. A further few weeks passed before the court again contacted him, claiming it had not received his resubmitted paperwork. He then re-sent it a second time, this time ('luckily for me' as he puts it) using recorded delivery. He was then sent a letter explaining that the case had been allocated to the County Court.<sup>440</sup> He heard nothing after this until he received a letter telling him that because he failed to submit his defence, the judge had found against him ('thrown my case out'). Luckily for Trevor, he had a sister who was a qualified lawyer who helped him to have the judgment set aside.<sup>441</sup> Unfortunately, in the meantime the initial judgment resulted in bailiffs being sent to Trevor's door. He had to pay them to leave and the loss of money from this, as

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<sup>436</sup> This includes interviewees Anna, Frederick, Russell and Georgina. However even these stories do not necessarily imply that their original complaint had no merit, or that any of their subsequent legal actions were baseless.

<sup>437</sup> Eleanor is relevant here. There is no relation between her first case a defendant and her subsequent two civil actions. When Eleanor went to prison, her mother was elderly and unwell but still at home. A decline in her mother's health led to her being moved into care. This meant that Eleanor's property, including her two cats, no longer had a place. Both of Eleanor's subsequent actions relate to trying to recover her lost property when she was in prison. Similarly, Charles's family proceedings in the old County Courts, are totally separate proceedings from his civil claims. Paul, too, is currently involved with the Immigration Tribunal which relates to his wife's right to remain in the UK, and is unconnected with his previous multiple experiences at the Employment Tribunal.

<sup>438</sup> This also again chimes with the reality of the multiple interlocking problems individuals experience. See Pleasence, *Causes of Action*; Balmer et al., "Worried Sick."

<sup>439</sup> Trevor never disputed this, but had deliberately withheld some of the money because the contractor had done a substandard job, some of which he had to then employ another contractor to redo. When he received a summons from the small claim court relating to this, he felt confident that he was justified in his actions.

<sup>440</sup> Trevor had also ticked the box signalling his willingness to mediate, but he never heard further about this.

<sup>441</sup> Eventually Trevor and the contractor came before a judge and decided amongst themselves an amount they both agreed on.

well as what he called the blatant overcharging of the bailiffs (even though they were also not meant to be there) has led to him preparing to go back to court.

Trevor's case demonstrates that simple administrative errors can potentially lead to a LiP losing a case. While his case is the only example in this study of poor bureaucratic practice that, in Trevor's version at least, leads *directly* to a negative outcome, numerous other individuals in this study talked of similar problems including not receiving materials from the courts, the courts failing to send them judgments, missing or incomplete casefiles and other errata that posed serious problems for them, resulting in delays, and additional time and anxiety.<sup>442</sup> Marie, for example, relates the experience of a missing casefile in this extract:

I mean it's like um, we nearly ended up with a boycotted he-, first hearing on the contact case because they put the j-, they put the application in front of uh, the judge that had actually been the QC in the previous court contact case, you know what I mean? It's simple mistakes made by the court like that can cause so much, like messing around and everything. The court, the courts are so lacksidaisical about things at times. Then you, then you ring up and try and speak to um, a clerk about something and they're like, they don't even know what's going on and then it's like you turn up in court and there's uh, no court bundles, we actually ah, turn up in court and there's actually erm, bundles missing. We had to lend, lend the judge our bundle until erm, the missing bundle which is found at another, was actually found at, um, at the criminal cour-, the criminal court, it was actually found at the criminal court and they had to send a taxi to go [laugh], go and get the files. You know what I mean? It's simple stuff like that make it so much hard work.

Trevor's case, as well as the similar experiences of Paul, Talia, and others, illustrate that administrative issues can quite easily lead to mistakes and, potentially, unfair outcomes. This is clearly a relevant concern for LiPs, in a context of increased "efficiency" measures such as central processing in Northampton, and increasingly limited telephonic and face-to-face contact in the courtrooms themselves due to a diminution of court staff.<sup>443</sup> Interviewees in this study noted the difficulty they had simply trying to speak to somebody at the courtrooms: the central telephone line wouldn't pick up, or would transfer to voicemail. Similarly, emails received an automated response and there was no way of being able to reach someone who could assist them in what to do next.<sup>444</sup> Most enquiries led to them being redirected to the

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<sup>442</sup> Both Paul and Talia also had considerable problems with the courts not providing information to them on their respective cases.

<sup>443</sup> The repetition of the same complaints of poor administration indicate this is a key issue for LiPs, and not one generally dwelt on in LiP studies that usually focus on LiPs' inability to successfully navigate advice or follow instructions. See Williams, *LiPs – A Literature Review*, 1.

<sup>444</sup> The issue of IT services hovers over this thesis and is regrettably beyond the scope of what is coverable. However, it is important to note here that The *Woolf Report* spent some time arguing that



HMCTS website only which contains very limited information to assist LiPs.<sup>445</sup> However, what is also important to consider is the impact this may have for the majority of LiPs who may be unaware of what “normal” proceedings are like.

Trevor repeatedly stressed during his interview that it was only because he had privileged access to someone legally qualified that he was able to know what to do to redress the situation (although he still ended up £1000 out of pocket). Most people who act as LiPs will not have such privileged access and were, he stressed, at considerable risk, particularly those who were more vulnerable:

It's [central processing], it's like half-arsed, to use that, it's not, there, there should be loads of, there should be loads of places that you can go and access information and someone within the court system that you can speak to that's there to help you because you are not legally trained. But there isn't anything like that, you have to find it for yourself and that to me is silly 'cause it's law you're talking, it's, it's, it's still a legal thing, it's still something that can be, can, you know, can have ramifications, you know, and yet it's just left for you to do. And I, you know, that might be alright for some people who are, you know, quite intelligent and fairly, you know, together, but if you're a drug addict or, or somebody not that, you know, academically bright, or can't read very well, or, or all those sorts of things then it's not going to be that easy for you is it?

For those individuals, it would be exceedingly difficult to firstly, be able to identify what had gone wrong and secondly, be able to rectify the situation.<sup>446</sup> This returns us again to a feeling of lack of accessibility to courtroom staff who could help.<sup>447</sup> As Marie puts it, LiPs are considerably disadvantaged compared with legal professionals:

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improved IT systems would be essential in increasing access to justice but this never really took place with the courts still paper-bound. I will return to the question of IT systems in the following chapters, as well as in the Conclusion of this thesis where I will consider the prospect of an online court, something suggested by the *Briggs Report* in 2016. See Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (London: Judiciary of England and Wales, 2016).

<sup>445</sup> It is worth reflecting here on Pat Carlen's characterisation of courts as 'theatres of the absurd'. See Pat Carlen, "The Staging of Magistrate's Justice," *British Journal of Criminology* 16, no. 1 (1976): 48-55. Jacobson, Hunter and Kirby, and Paul Rock also call attention to the 'chaotic' nature of legal proceedings, with Jacobson describing them as 'structured mayhem'. See *Structured Mayhem: Personal Experiences of the Crown Court* (Criminal Justice Alliance: London, 2015); Rock, *The Social World of an English Crown Court* (Oxford University Press: Oxford, 1993).

<sup>446</sup> The concern that such individuals might 'give up' is noted by Genn and Genn in *Representation in Tribunals*, as well as Cookson in *Unintended Consequences*.

<sup>447</sup> This belief is supported by findings from the HMCTS survey into court staff done by the Trade Union Congress, cited more extensively in the next chapter, which demonstrates a reduced, deskilled and demoralised court staff. See TUC, *Speak Up For Justice*, available online at: [https://www.tuc.org.uk/sites/default/files/Justice\\_Denied\\_Report.pdf](https://www.tuc.org.uk/sites/default/files/Justice_Denied_Report.pdf) (accessed 3 November 2016).

I've had a hell of a lot of issues filing applications and erm, applications going missing and it seems to happen more if you're a litigant in person than it does for solicitors, like solicitors have internal emails and you're given a lot more information if you're a solicitor, you're given you know, more precedence whereas if you're a litigant in person you've got to go through the direct channels, you can't have communications through the court a-, except via a generic email, uh, generic phone, phone number, erm, and uh, solicitors have direct access to the judges you know what I mean? They can email a judge, they can send paperwork directly to the judge, litigant, again litigants in person don't have that power, they don't have, are not, are never, very rarely given that opportunity. I mean, I have once or twice which was pretty lucky to be honest with you but a gen-, as a general rule litigant in person have to go round the houses to get where they're going whereas solicitors are given all the shortcuts.

As Trevor sees it:

It seems to me that the, the court system is full of error, 'cause, you know, you hear of it all the time, stuff going missing, and getting lost and not having it, people turning up and this not happening and also, it seems from the outside, *super* inefficient. It seems. Now there's probably loads of reason why it is like that, you know, but on, on bigger cases I can imagine, you know, there is a lot of bits and they need to come together on a particular day and you only need one of those bits not to be there that you can't proceed with.

For Trevor, court processes are by 'nature' inefficient, and efficiency measures can only undermine any fairness. This situation of administrative error then is clearly either far more likely to happen to litigants in person in the first place, or far more likely to be more difficult to rectify than it would be for legal professionals. This is assuming, of course, that the LiP is even able to recognise what has gone wrong. If the LiP does attempt to rectify these problems, however, these administrative failures certainly present a persuasive reason for an individual to pursue a further complaint related to their initial proceedings without it being symptomatic of inherent litigiousness. Here, for Trevor, the transformation from 'one-shotter' to 'repeat player' has little to do with psychology and far more to do with the inefficiency of the legal context in which he was operating, as well as relating to the considerable disadvantage LiPs operate under compared with legal professionals.

Summarising the above, then, it is clear that multiple proceedings can be unrelated, or can be due to court system failures. Any on-the-surface assumption that conflates LiPs involved in multiple proceedings with vexatious litigants purely on this basis can therefore be problematic. If, for example, an assumption is made that *because* LiPs have been involved in

multiple proceedings, they are more likely to be vexatious this becomes a kind of circularity of logic and can detract from the serious hearing of a LiPs claim. However, it would be disingenuous to represent the majority of LiPs' multiple proceedings as down to bureaucratic failure. Although it is a frequent occurrence along the way, such failure does *not* explain the bulk of the interviewees' complex legal proceedings in this sample. Here the picture is much murkier. For the majority of interviewees involved in complex proceedings who spoke to me, these people were pursuing, at times obsessively, claims that proliferated around an initial 'wrong'. This clearly echoes the outline of a typical 'vexatious litigant' that Hermann summarises in her article. But even for *these* individuals, as I will argue in the next section of the chapter, to conflate complexity and vexatiousness is to mistake the gravity of the injury that prompted their initial contact with law. It is also, importantly, to potentially misunderstand what these individuals are trying to achieve by going to law in the first place.

## HIGH STAKES

*So um, I go to court.<sup>448</sup> I leave Sarah [Peter's wife] at home with James [Peter's son]. In court they're [the local authority] getting thrashed, they're getting thrashed in court. The judge is doing it in his nut with them, he's gone ballistic with them because they're saying: 'The judge before, she's corrupt!'. I just can't, I was just totally in turmoil, I couldn't believe, I was just, ha, couldn't believe what was going on, they were like absolutely desperate. 'Yeah the judge's corrupt' and I always remember it, the judge he turned around and he said, 'so you're telling me that the judge, the previous judge, is corrupt and they've made the wrong decision?'. 'Yeah, yeah that's right!'. He said 'right, I've never heard nothing like this in my whole career'. He said 'I'm going to adjourn now' and he said 'I want you to seriously consider what you've just been saying' and this is to the local authority. So we adjourn. This is about 11 o'clock in the morning...then five, maybe five minutes later, I stayed in the courtroom, and um, five minutes later, um, my wife's solicitor comes in. Guy. Nice bloke. He, he said, 'uh, I just, I just phoned up Sarah to give her an update'. He said, 'you'd better go home'. I said, 'well why?' 'Oh she don't sound well'. 'Oh...what do you mean?' 'Well she don't sound well, you'd better go home. Wait until the judge comes in, ask him to leave' and so I did, and I go off home, going, uh, what's going on?*

*So gets to my, drives home, gets to two streets away down that way, E----. There's a great big police van across the road, I think, what the, what's this? So, they've stopped, 'who are you?' so I told them, so*

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<sup>448</sup> This is Peter talking and the case he attends court for is trying to stop the local authority from taking his son into care.

*pull up over there and he said 'just wait', and he radioed through and all I could see all the way down the road and our house is at the bottom, is police vehicles. I think what the hell is happening? So, I uh, wait, and this car comes out, green car, with two police officers in it. And they, they say 'oh can you sit, sit in the uh, sit in the back and have a chat'. They said, 'uh, there's been an incident'. I said, 'what, well what incident?' And they said 'oh your wife, uh, she's took a overdose'. Oh my -, ...I said, 'well wh-, wh-, what about James, where, where's my son? Where's our son?' 'Oh, um, well there's been an incident', and they wouldn't, and I said 'well, wh-, what is it? Oh. I said 'well where are they?' 'Well, your wife's gone to SOOOO Hospital'. I said, 'but where's my son?' 'Oh well, he's gone to Frenchay [hospital]'. I said, 'well why?' and then they said, 'oh there's been an incident. He's been stabbed'.*

*And that was it I just [exhaling noise], I just like burst into tear- oh my god. And um, off we go. They race me in the car over to F---- hospital A&E and um, I'm sat in the, they said 'wait here', so I'm sat in the car waiting, they rush into A&E. They come out and they say 'right come on in, we're going to the family room'. So go in the family room, I'm just in like, uh, total, state and um, I get in there and I, I just, a [exhalation], terrible. And um, they say 'social services are outside, we told them to get', oh he said 'we've told them to leave' and they wanted to come in to see me! Like, and I said, 'well what's going on?' Then the surgeon comes in, and uh he says 'oh we're operating on, on your son'. They've had operating, lifesaving, touch and go. I, I find out she, she, what happened, she, she tried to kill herself and our son. She stabbed him eight times. She, she tried to kill him. And uh, yeah they had three surgeons working on him, and obviously, thankfully they saved his life.*

Peter has been in and out of court since 2010, trying to regain custody of his son.<sup>449</sup> At the time of the events outlined above, the local authority was already trying to remove Peter's son from his and his wife's care because of concerns about Peter's wife's mental health and stability. After the stabbing, Peter lost custody despite, as he has always argued, there not being any evidence against *him* being an inadequate parent.<sup>450</sup> For him, going to court is, and has always been, a means of trying to be reunited with his son. At the time of writing this, his son has been in foster care for over seven years and he had had no success in the courts. Peter's case is clearly an extreme and unusual situation, yet it illustrates the point that the clear majority of the LiPs I spoke to only pursued claims that were of considerable significance: indeed, for some, like Peter, the stakes could not be higher. This is also the case

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<sup>449</sup> This has mostly been, prior to 2014, the family section of the County Court and, post 2014, the Family Court, although also at times the higher courts as well.

<sup>450</sup> Peter's wife was convicted of attempted manslaughter and is currently detained indefinitely under the *Mental Health Act*. He has not had contact with her since 2010. Peter's son's foster home is less than two blocks from where Peter currently lives and they have regular supervised contact that will soon shift to unsupervised contact. As Peter puts it, what is most likely to happen is that as his son grows older, he will then have his own say about where he wants to live and Peter is optimistic this will result in him coming home.

for Neil, cited in the opening epigraph of this chapter. For him the alleged failure of the hospital staff, and the subsequent inability to obtain some form of restitution, led to him losing his livelihood, and through this, his means of being able to afford to have his own family. Marie's story, too, fits this narrative. At the age of 20, Marie had her baby taken from her care. After assessment in a Mother and Baby Unit, the child was fostered and then, ultimately, adopted. Marie has been fighting in the courts since then, in one way or another, to get her child back.<sup>451</sup>

The above cases might perhaps seem a more extreme example compared with a more 'typical' LiP experience. Yet of course, there *is* no typical LiP experience. And this study suggests any idea we may have of discrete and straightforward dispute resolution may itself be less normal than the experience of the contrary which, as above, is messy, confusing and complicated. Many other LiP experiences in this study also indicate, if not quite as extreme an example, a similar proportional level of personal significance to the individual in question. This is well illustrated by the case of Eleanor. When Eleanor was in prison, her mother's health deteriorated leading to her mother ultimately going into a care home, and eventually passing away. When Eleanor's mother went into care, Eleanor's possessions and her cats, which had all been at her mother's house, went into storage and her cats went into a cattery. Somehow, throughout the course of her imprisonment, the cattery bills went unpaid and an employee at the cattery took it upon herself to take the cats home. Eleanor then went to the County Courts as a LiP to reclaim possession of her cats. On the surface, this may not seem as significant as fighting for the custody of a child but, from Eleanor's perspective, fighting for return of her cats was as important as any fight in her life could be. As she expressed it:

It was fairly antagonistic because it's basically sort of "how dare you walk off with my property and my family", because basically those two are my family and it's like, it's the same as me turning up, you know, deciding I like, I've taken a fancy to your kids and taking them home with me. You wouldn't like that so, you know, it's the same thing.

For Eleanor, her two cats *were* her family, and the case in County Court was essentially, therefore, a custody dispute. As she said:

It had become a point of honour by that point, just because I'd been in prison doesn't mean you get to help yourself to whatever you fancy of mine with no consequences which was basically the attitude she'd [the employee who had taken Eleanor's cats home from the cattery] had taken.

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<sup>451</sup> Similarly, Talia is fighting possession proceedings on her home. As of September 2017, she had been evicted and was continuing to fight to regain access to her property which was being sold.

As well as being about keeping together the only family Eleanor had at this point, for Eleanor it was also about retaining a sense of identity. Alongside the case to get her cats back, Eleanor also fought as a LiP in the County Court, to get access to her possessions which had been stored in a place she could not access.<sup>452</sup> Essentially, the loss of her possessions and of her cats would mean that Eleanor had no connection whatsoever to her previous existence when released from prison. As it turned out, she managed to win back her cats, but not her possessions, and so when she returned to the community her cats were all she had.<sup>453</sup>

These stories remind us that for many LiPs, they are in court, and only in court, to address issues of great importance to them.<sup>454</sup> This is because they would not be there if they did not have to be. As Eleanor says: ‘people don’t go to court on a whim, they usually go to court as a last resort in a civil matter and, in criminal court, they get no choice and the implications of judgement can have huge consequences for people’.<sup>455</sup> Eleanor emphasises what was expressed uniformly in this study: that is, that going to law is a last resort. The LiPs in this sample routinely expressed that they felt that they only went down a legal path when they felt they had no other choice. As Tim said ‘I tend not to, as I saw, I tend not to complain unless there is something fairly significant to, to complain about’. Charles similarly remarked, when discussing going to court over what he argued was misappropriation of the funds from his property sale: ‘I tried to avoid litigation because, um, he’s [his opposition] um, he’s a barrister, and um I don’t know, I don’t want to, I didn’t want to get involved in that because of the cost, so, um, eventually I had no choice’. This belief that they largely had no choice was echoed by Marie, Talia, Peter, Oliver, Russell, Frederick and others. As Talia put it, it was to be done only in the context of something of utmost significance: ‘It’s, it’s something that, if you have to do it you have to do it, you, you, um, sometimes the choice is between, between being a litigant in person and losing your, your home or your rights to, um, well any of your rights’.

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<sup>452</sup> As Eleanor tells it, the solicitors [for her mother’s estate] involved in this storage refused to move it to a nearer facility that Eleanor could access on day release from prison. Because of this Eleanor was not physically able to go there to retrieve her things and organise to have them moved. However, she was also not allowed to send a proxy. This meant eventually her possessions were disposed of.

<sup>453</sup> The sheer significance of the cats to Eleanor’s sense of personhood is evident not just in this narrative but in the interviewing process itself which took place at Eleanor’s home. Eleanor’s cats were present, interview breaks were made around the cats’ feeding times and fittingly, the cats can be heard throughout on the interview tape.

<sup>454</sup> This of course demonstrates the huge amount of emotion involved in these cases versus a civil justice system that does its best, as Paul Rock notes, to keep emotions at bay. See Rock, “Witnesses and Spaces in a Crown Court,” *The British Journal of Criminology*, 31, no. 3(1991): 266-279.

<sup>455</sup> Eleanor Extract, 20.02.16, 04:03:16 – 04:03:31.

From the above, therefore, it is clear that many LiPs will only go to law when the stakes are sufficiently high and they feel there is no other choice.<sup>456</sup> There are, however, two things important to note here. Firstly, of course, LiPs feeling that they had no choice is not the same thing as them actually *having* no choice, and I would not want to mistake one for the other. Secondly, of course, what is of utmost significance to these LiPs may not be accorded the same significance in a wider context. While Peter and Marie fighting for their children might be recognisably significant, for example, Eleanor’s case would seem less so. But what is important is that it tells us about the significant investment and *belief* each LiP has in the case they are pursuing or defending, and the seriousness with which they take the decision to pursue or defend a legal matter.

This serves as a reminder of a point frequently returned to in this thesis: that LiP perceptions of significance frequently differ from legal perceptions of significance. Underestimating the importance of an issue to a LiP can lead to failure to see *why* a LiP might pursue what someone else might consider ‘Pretty Boring Stuff’.<sup>457</sup> The gap between these different ways of seeing can lead to a situation where the courts risk trivialising or undermining a LiP’s cause especially where this might result from failure to recognise the relative weight or value a LiP may accord to it.<sup>458</sup> LiPs therefore run the risk of being dismissed as vexatious or time-wasting, and can even be financially punished for carrying on, even if the case is of the utmost significance (to them).<sup>459</sup> This situation, to me, echoes what Jeremy Bentham was criticizing two hundred years ago:

No wrong that I know of can be a trivial one which to him to whom it is done is a serious one; serious to such a degree as to make it worth his while to demand redress at the hands of justice [...]. What to one man may be trivial, to another may be of high importance.<sup>460</sup>

Returning, then, to Herman’s definition of the vexatious litigant, we now run into some problems. Clearly, as I stated above, some LiPs may consider their case to be significant, but that will not prevent the proceedings from being vexatious. This is seen in those who verge on the conspiracist and who have pursued multiple, increasingly less plausible, claims and who blame their failure on corruption.<sup>461</sup> Others, like Eleanor, are obviously *not* on the vexatious spectrum at all, despite attending court on multiple occasions, but they risk being perceived as

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<sup>456</sup> This is surely at least partially related to the cost of pursuing proceedings, both financial and emotional, both of which I will consider at the end of this chapter.

<sup>457</sup> Dave Cowan and Emma Hitchings, “Pretty Boring Stuff.”

<sup>458</sup> This is of course not the case for the Family Court or Court of Protection.

<sup>459</sup> In the next chapter I look at examples where a LiP continuing a dispute can be financially penalised for this.

<sup>460</sup> Bentham, *A Protest Against Law Taxes*.

<sup>461</sup> And I will consider some of these cases in Chapter Seven.

potentially vexatious because the ‘merit’ of their case is untranslatable in the civil justice system.<sup>462</sup> And for people like Peter, Talia, Neil, Marie and others, the situation is even more confusing. As far as Peter is concerned, for example, anything he can do to attempt to win back his son, or extend contact with him, is worth the cost and time. This can mean trying in any way he can to have another hearing with a judge. This will always *relate to* the ultimate issue of the loss of custody of his son, but the case itself may be clearly of less merit.

For example, once Peter had a care order made against him, he immediately appealed the decision as a LiP. This was despite not understanding how the appeal process worked. This resulted in the grounds that he put forward being insufficient. As he says, when he got to the appeal, the judge explained what the problem was:

[h]e explained the appeal is about, did the judge, the lower court do something wrong. And this is the thing, see. And um, so I ended up going back to court again there. Uh, March the 28th. Um. And then again...what have I got, yeah April 2012, yeah, I must have went three times then...yeah, went three times, yeah, but it ended up he couldn’t do nothing. So the care order stayed in place obviously, um, and I couldn’t do nothing.

At this point, Peter’s appeal was technically without merit. And yet this is clearly because he didn’t understand how an appeal worked and how narrow the terms of a successful appeal had to be. He himself says ‘I must have went three times then’ and is unable to clearly articulate on what legal grounds he felt justified in doing so. From Peter’s perspective, then, it seems that an appeal is another chance to explain that he should have custody of his son, and to argue that the previous case was decided incorrectly. This is something that may be characteristic of vexatious proceedings, but is far more understandable if we consider it in the context of the “longer narrative”.<sup>463</sup> And therefore, the more chances Peter has of doing this, then the more chances he has of overturning the initial decision against him.

Peter’s story, and similar versions of it, is what I heard repeatedly throughout these interviews: individuals who have a central injustice or wrong for which they are trying to seek some kind of remedy. While this fits into what Herman described: the individuals initiate or defend a complaint that ‘was resolved against them, and who then attempt to carry on with aspects of that complaint in various ways’, this description does not sufficiently come to grips with *why* they might be doing so. This *why* seems to be both about seeking a sense of justice

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<sup>462</sup> While Eleanor has gone to court twice, she has been successful once, with the judge clearly finding merit in her argument and in returning her cats to her. Her previous experiences with court proceedings do not interfere with this assessment; none of them bear any relation to obsessive pursuit of any particular target, nor do they evidence any desire to compulsively pursue legal proceedings.

<sup>463</sup> The legal problem here of course is on re-raising issues of fact that have already been adjudicated by the court.



and ‘rightness’ but underlying it, there seems to be a hope amongst LiPs that going before a judge *one more time* might finally lead to that judge overturning the original wrong. This is an impossible wish, but one that arguably drives many. So, while Marie might now be pursuing a case against the local authority for their failures to *her* while she grew up in care, underlying it is the belief that these systemic failures materially contributed to the circumstances in which she lost her child. As such, if she were to succeed in this action, then greater scrutiny might be paid to all situations where those raised in care lost custody of their own child. And there is then a perceivable window of possibility that this could result in something changing; perhaps an inquiry, perhaps a scandal, something *else* that could undo what has been done.<sup>464</sup>

Similarly, for Peter, once he had exhausted the appeal process, he kept returning to court looking for other things to help him somehow subvert the care order decision. For example, he discovered that before the permanent care order was made, the interim care orders [ICO] were incomplete: that is, there was a 17-day gap that was not accounted for in the ICOs issued. For Peter this was a chance to prove that his son had been detained “illegally”. It is not difficult to see how this is a ‘hopeless case’. However, it is also easy to see that from Peter’s perspective it is about dismantling the initial wrong decision somehow, *anyhow*, and a technicality will do. Peter was hopeful that if this had been found to be so, then retrospectively the ICO would have been voided and that therefore the permanent care order could not have taken place.<sup>465</sup> That this is a hopeless belief is apparent to individuals with more knowledge of the legal system, but from his perspective, any action to gain access to his son was, and is, worth a try.

I argued earlier that the definition of a LiP as an individual involved in a discrete proceeding essentially fractures the longer individual narratives that are essential and relevant to a LiP’s understanding of how they came to be acting for themselves in any situation. This can create the appearance of vexatiousness in individuals who are pursuing something that, from their perspective, is both significant and quite straightforward. For LiPs, their *case* is about the longer story: restitution for a wrong, the return of their child, the security of their home. In this respect, it would seem that those who are *most* likely to pursue what could be considered vexatious proceedings are those who are pursuing claims of the *greatest* significance; as far from ‘time-wasters’, from their perspective at least, as is humanly possible.

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<sup>464</sup> Didi Herman, “Hopeless Cases,” 28. This belief also has echoes of Nobles and Schiff’s construction of perceptions of ‘miscarriages of justice’ where lay and law conceptions of ‘justice’ fundamentally talked across one another; here we literally have individuals talking across one another in the court. See Richard Nobles and David Schiff, *Understanding Miscarriages of Justice* (Oxford: Oxford University Press, 2001).

<sup>465</sup> It is interesting to reflect here that this echoes Ewick and Silbey’s claim about ‘narrative’ in how everyday laypersons understand law. See *The Common Place of Law*, 29.

This fracturing of LiP narrative leads to the potential proliferation of ‘hopeless cases’. However, it can also arguably lead to another, related problem which is the diminishment of the ability of a LiP to effectively represent him or herself in court, regardless of the inherent merit of any proceeding. This issue became apparent in this study. It was notable how many interviewees struggled to be able to tell their story coherently during their interview. This was often because, as above, the complaint or “big issue” took the form of multiple different levels of proceedings. For example, Charles went from talking about the case where he took his conveyancing solicitor to court over misappropriated funds put into an investment property (the court termed this a partnership dispute although Charles vehemently rejected this label), to talking about his negligence claim against his solicitor heard in the High Court. The sheer difficulty of holding all of this information in one’s head was evidenced in the confusing language deployed: ‘I think this.....this one was actually after my experiences with the, um, with, it sort of goes back now to this case and then that one came up after that’. This was repeated again and again by others when tasking them with outlining what each case was about and what happened during.<sup>466</sup> The process of asking each interviewee to describe cases one by one causes considerable difficulty; I would argue that this is because from a LiP’s perspective it is the wrong, or the harm, that is the central organizing feature, and the cases feature secondarily in amongst this. As Ewick and Silbey note, ‘one is never only the law because any legal matter is also a matter about something else...everyday life occurs as interactions among friends, among colleagues, among family members, between consumers and merchants. These relationships are the raw materials out of which disputes and legal cases emerge’.<sup>467</sup> This means the experience of interviewing was frequently about catching individuals in the middle of an experience that for them made no sense without a wider context.

If these LiPs are struggling to explain their stories to me in the context of an interview, this probably reflects a similar struggle that occurs when they are in the court. It seems likely that LiPs will similarly be unable to separate out incidents, nor to be able to stick only to the relevant matter of a hearing because the complex nature of their claims means that it is not necessarily clear to them how they can be separable in the first place. This must be a disadvantage to a LiP and add fuel to the perception that they are unable to stick to the point.<sup>468</sup> It also adds fuel to the perception of LiPs as obsessional, returning again and again to what for them is the most important factors, and for the court is frequently irrelevant.

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<sup>466</sup> This includes Georgina, Talia, Anna and others. Of course, memory and time elapsed since then are factors in this, but even taking this into consideration, the marked confusion between one case and another is suggestive of a real problem for LiPs involved in multiple cases.

<sup>467</sup> Ewick and Silbey, *The Common Place of Law*, 284.

<sup>468</sup> The introduction of irrelevant material is highlighted by Moorhead in “The Passive Arbitrator.” See 409-419; see also *Jones v Longley and Others* [2016] EWHC 1309 (Ch)

Yet what this section has demonstrated is that from the perspective of the LiP, multiple cases are not pursued on a whim, and are only undertaken out of sheer necessity. This problematises the assumption that LiPs pursuing multiple proceedings are necessarily vexatious. While some of the proceedings themselves may be spurious, they do not stem from a frivolous impetus. Until we better understand this gap between perception and reality, and until we recognise the disjuncture between, on the one hand, LiPs having right of access to the civil courts for dispute resolution and on the other hand, the significant barriers they face, the complexity of LiP experience is likely to be dismissed as anomalous or, at worst, indicative of LiP mischief. The reality for these LiPs, though, is that going to court is far from fun; instead it has a real, detrimental impact on their lives in a variety of ways.

## VULNERABILITY

It is perhaps unsurprising that the LiPs most involved in multiple legal proceedings were impacted by them the most deeply, but what is notable is that even those only involved in relatively minor or short proceedings spent some time in these interviews emphasising how difficult they found the experience.<sup>469</sup> While it is of course important to emphasise that much of the impact and strain of legal proceedings is clearly inseparable from the actual hurt or wrong that prompts said proceedings in the first place (to blame all of Peter's negative experience on legal proceedings, for example, would of course be to overlook the extremely painful and difficult situation he found himself in) even taking this into consideration, clearly being a LiP is extremely hard and stressful work.

I stated in the opening of this chapter that I did not want to talk about vulnerabilities in terms of pre-existing mental health issues. As I said before, I am not in a position to make any kind of evaluation on that front. Instead, I want to concentrate in this section on how the LiPs themselves felt their encounters with law affected them. We can begin this with returning to the beginning, the case of Neil. In his interview, Neil described the proceedings costing him a considerable amount of money, both the loss of earnings he would have had, as well as considerable costs towards representing himself. But in addition to these material costs, he talks about the formidable personal costs that have come in the wake of these proceedings. Neil's quest for some kind of restitution has led to his social isolation and his inability to have a family.

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<sup>469</sup> Trevor, for example, as mentioned earlier in the chapter, was involved in only one case, but bureaucratic errors led to bailiffs arriving on his doorstep and him losing over £1000.

For Talia the sheer anxiety she feels on an ongoing basis, and the sheer *work* involved in staying on top of the paperwork has led to her rarely leaving her house except to attend court and walk her dog. As Talia put it:

It's been very difficult. It's been by turns terrifying, I, sometimes, you know, I mean when you're in court, you're, you're being held up by adrenalin but at other times when an order or a letter arrives from them with some new insanity, it feels as if you've been hit, been hit by a baseball bat and sometimes its felt, literally felt as if my heart would stop, I was so anxious.

Talia states quite clearly that she doesn't have the time, or the energy, to pursue anything else outside of this claim:

It has completely shot up my social life, um, partly because being too tired but it's also the emotional thing as well. There was a, were a few months where I didn't, I, I became conscious that I had no conversation but, but this litigation, this litigation and the litigation against my freeholder. I, I, I don't know how long this is going to go on, and I'm going to have to try to revive my social life because I can't do without my social life.

This is echoed in Oliver's case. For Oliver, pursuing proceedings against the police led to his sectioning under the Mental Health Act as well as the loss of his wife and family and, eventually, his home:

Me being sectioned under the mental health act, that took away two-three years of my life, lost my wife and family, my health, wealth and professional qualifications, all in the middle of these proceedings. So I'm working all summer to put that as mitigation circumstances that, that the £1 million or £1.5 million claim [against him] which is currently resting on the table should be struck out.

Currently Oliver travels to stay at friends' houses but frequently sleeps in his car and is homeless.<sup>470</sup> Anna, too, has been rendered homeless on a number of occasions throughout pursuing legal proceedings. At the point of writing this in September 2017, Talia has been evicted and is homeless. Both Oliver and Anna are also unable to work as a direct consequence of legal proceedings. In Oliver's case, his professional licences in the two areas in which he could earn money were taken away as a result of his ongoing litigation and issues with the

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<sup>470</sup> Charles too, had a partner leave him because of the ongoing litigation.

police. In Anna's case, she simply has no time to run her own business when she is also conducting complex litigation on her own.

Peter, too, lost his job, as a direct consequence of legal proceedings. As he explains it:

And um, tha-, the important part of that is actually through this pro-, these proceedings, um, I lost my job. My company was extremely supportive of me, they never wanted me to leave, they, they, really really, was impressed with my ability to work as a training manager. Um. And it came to the stage where I needed to go back to work but the only way I could do that was, um, to make a proposal, which I did, I made a proposal, not in this hearing but the one going back in the early stages. I put a proposal in, um, to change contact which would allow me to see my son on a weekend or the evenings, even at a contact centre if needs be. Um, but it would have freed me up to go back to work and I would have to go back, my, my, I, my work involved Monday to Friday and they even agreed about if I could ease my way back in just a few days at a time and then get back into the rhythm of things because of all the trauma. The local authority, um, in a court session, my barrister was on the phone to my boss, and her words actually to the judge was, and I'm in the witness box.... Um 'this man is going to lose his job if the local authority don't agree with this proposal' and it was a reasonable proposal. It weren't nothing, you know, Uh, they turned around and said no. That was in March 2012. In August 2012 I lost my job. And they made, basically put, it's either you see your son or you have your job [ironic laugh]. I mean, sorry but, just crazy.

This has resulted in Peter being unemployed and becoming, at times, significantly depressed.

The emotional impact of conducting multiple proceedings is echoed by Marie, who elaborates on the cost of both losing her baby and attempting to get her back:

Well at the moment, um, I'm under Mental Health Services, I've been in and out of hospital on the mental health side, erm, for the last 18 month, I've been in and out, in and out, in and out, 'cause different things trigger different feelings and erm, and like I suffered severe depression, I've been suicidal, I've been, you know what I mean, I've been through the works really over the last 18 month, um, I mean if you asked me like two, two and a half, three years ago if I'd be under Mental Health Services, been suicidal, not been able to cope with everyday things, I would have laughed in your face, I was a strong person, or so I thought I was, erm and now I'm just like I say, I'm a shell. I'm a shell of what I used to be. I can't cope with normal everyday things. I struggle daily to, to actually find the will to move forward with things and try and find a way forward with things. Erm, I've had to

completely change my coping strategies, I've had to completely change, my whole life's changed, but mentally and physically I'm still stuck at the day I lost my daughter because I can't, I can't, I can't bring myself forward, I can't [...] my whole life, on that side of things, relationship side of things is non-existent and has been since the, the day I lost my daughter. Erm, and like I said, my mental health has deteriorated. I used to be, you know what I mean, I used to be upbeat, I used to be able to cope with things, I used to try and look on the positive side of things but now everything is just black. Everything is just dark. It's always negative and it's very hard to try and pull yourself through each day. And it's hard to convince yourself that it's better off that you are, you are are alive, it's better off that you are here for your child when you've got the feeling that they've not been told they're adopted.

Clearly, the emotional and material costs of going to court are extensive. What is also evident from these examples of cost, above, is that they do not purely represent the cost of the traumatic event that led them to court. For Marie, the emotional impact of the loss of her child and the stress and cost of the proceedings are inseparable, as is the case for most of the LiPs I spoke to. And this cost is significant for all LiPs, before even considering the financial cost which, when roughly estimated by the LiPs themselves runs into at least a thousand pounds, minimum, to upwards of hundreds of thousands of pounds.<sup>471</sup> There is no doubt, for some LiPs that mental health issues pre-existed, or were triggered or exacerbated by the sheer emotional turmoil of the situation they found themselves in. But even if this was the case, this vulnerability is at least exacerbated by the experience of going through legal proceedings.

For others, loss of income, jobs and relationships were a direct result of going to law. This is clearly a result of repeated proceedings, something that may be characterised as 'obsessional'. As discussed earlier, this is due to the emotional significance of the event that may trigger the need to pursue restitution at all costs. But it is crucial not to forget that this obsessive pursuit also occurs in a context where LiPs are not fully able to comprehend the proceedings and, crucially, are unable to articulate or have their longer narrative heard: a narrative that for them is central to the reason they are there in the first place.

Going to court has a dramatically disproportionate impact on a LiP compared with a legal professional. The sheer costs of paperwork, the collision between regular working hours and court opening times, the delays and lack of notice, the poor communication by the courts and other technical aspects aggravate a situation that is already of considerable emotional stress and this can lead to situations where simply being involved in important proceedings can lead to an individual such as Peter losing a job. This can only exacerbate the likelihood of the case

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<sup>471</sup> Marie estimates about £15,000.

becoming obsessional: because ultimately, the sheer impact of going to law can lead to the point where pursuing his or her case is all the LiP has left. As Peter expresses it:

He [the judge] said 'you've been bamboozled by the court system'. I thought yeah, that speaks volumes. Because at no time did they ever, and I've said it before, in no time did they ever consider me, as a person, like what I've gone through or...shocking really.

## CONCLUSION

This chapter has argued that the experience of being a LiP is a harder, more complex and more confusing experience than previously considered. The LiPs in this study are often involved in multiple proceedings and for some these proceedings have been going on for many years. Their experiences are consequently complicated by the sheer complexity of the cases involved as well as the emotional significance of the central issue at stake for each individual LiP. Far from pursuing litigation frivolously, then, the LiPs in this study are very clear that they did not take the decision to pursue or defend a claim lightly: for some LiPs, doing so was the only way to try and save their home, to keep their child or to preserve their sense of identity. And the impact of going to law has been dramatic, with people losing family, losing jobs and losing their homes.

But what I have also sought to demonstrate is that the difficulties LiPs experience are not simply because of wilful, vexatious obsessions on the part of delusional individuals. Instead, it is also about the considerable constraints of continuing to fight for something the LiP believes is right in a context where doing so is made disproportionately difficult. In this respect, this chapter has suggested that the civil justice system, while theoretically existing to adjudicate disputes, may in fact exacerbate grievances for LiPs, rather than redressing them. But while I have discussed the impact *of* these difficulties, what exactly are these difficulties themselves? How are LiPs being bamboozled? What are the challenges LiPs face when going to law themselves? How and why is being a LiP a disproportionately more difficult situation to being represented? These are the questions I pursue in the following chapter.

## HOW TO BE GOOD

You get people turning up and looking like idiots, when in actual fact they're not, they just haven't been given the, there's no guidance for them to find anywhere.

Tim

And I said...they've just tried to bully me, and I picked up, I'd got a cassette recording, a cassette in my briefcase, and I picked it up and I said "if it please", I remember I felt, I felt like Rumpole of the Bailey, "if it pleases My Lord, I will have transcripts made of these telephone conversations and we'll see who said what". Then uh, Mr. Justice Eady said to Bennett, "Shall we listen to these tape recording, Mr. Bennett?" Bennett turns 'round to his solicitors sat behind him and they're like: "no no no no no! [whispered], shaking [their heads], "no, no, no, no!" "That won't be necessary My Lord, we withdraw our application for costs". But you know the thing is, if I'd actually put [...] if I'd, if I'd actually, if we'd put this tape in, I'd got the right box but the wrong tape...and uh, I'd got one of me mates, I got the tape in, and if we'd have plugged it in and played it we would have heard a friend of mine called Butty, he's a black guy, it would have, we would have heard Butty's Special Reggae Dub Mix.

Neil



## INTRODUCTION

Why is going to law so difficult for LiPs? In the previous chapter I argued that it was disproportionately *more* difficult for a LiP to go to law than for a legally trained professional. This is not a controversial conclusion to come to; many researchers in the area have argued this to be the case.<sup>472</sup> But why? A number of reasons have been suggested. Some writers argue that it is because legal training is a necessary prerequisite for successfully participating in any kind of legal proceedings.<sup>473</sup> Others claim it is because it is easier pursuing or defending claims when one has knowledge and experience of the context and environment in which one will be acting.<sup>474</sup> Another suggestion is that the difficulty arises because LiPs are too emotionally attached to their ‘stories’ to be able to represent themselves coherently and successfully engage in proceedings.<sup>475</sup> But which is it? All of these reasons, or some of them? Or different reasons altogether? In this chapter I seek to address these questions by considering where LiPs *themselves* believe the difficulties to lie, and through examining how these difficulties are manifested in their experiences. I do this by exploring three key areas of potential difficulty that emerge through this study.

Firstly, I look at the gap between legally specialised knowledge and lay understandings of law. As I have outlined in earlier chapters, this gap has been argued by many, including scholars such as Pierre Bourdieu and Larson, to be a deliberate and necessary separation which functions at least in part to perpetuate dependence on the legal profession. The gap manifests in practice in the collision between two ‘world views’: what is common sense to a layperson and what is common sense to a professional. In legal proceedings, any knowledge outside of field-specific knowledge is either diminished in value or inadmissible unless it can be translated effectively into legal discourse.<sup>476</sup> This means experiences such as those the LiPs narrated in the last chapter must be translated into specialist language to be accepted. This gap also means that the language used by legal professionals is often alien to an outsider and difficult, if not impossible, for LiPs to comprehend. As I will show, in the interviews for this study, LiPs were frequently unable to accomplish the effective translation of their experiences into appropriate discourse which resulted in them feeling unable to communicate what they

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<sup>472</sup> See Moorhead and Sefton, *Unrepresented Litigants*; Genn and Genn, *Representation in Tribunals*; McFarlane, *The Self-Represented Project*; Baldwin, “Experiences of Adjudication”; Trinder et al, *LiPs in Private Family Law Cases*.

<sup>473</sup> Lewis, “Litigants in Person”; Baldwin, *Monitoring the Rise*, 74-75.

<sup>474</sup> Nicholas Crichton, DJ, quoted in Grania Langton-Down, “Litigants in Person Could Struggle.”

<sup>475</sup> Sourdin and Wallace, “The Dark Side.”

<sup>476</sup> The role of expert witness is a moderate exception to this, where there is a degree of recognition of expertise, but this is still controlled by rules of evidence and they can be questioned and have their explanations accepted, or not, by a judge.

believed to be important, leading to frustration that they were not being listened to.<sup>477</sup> In addition, LiPs routinely found themselves unable to understand the language deployed by legal professionals both inside and outside of the courtroom. This was to the extent that LiPs were unable to understand the proceedings of which they themselves were at the centre. In a number of cases, LiPs felt that this lack of understanding had an active impact on the outcome.<sup>478</sup> The collision between two ways of seeing, then, poses considerable barriers of access for LiPs.

Secondly, there is the equally large difficulty concerning role play. I have earlier in this thesis argued that inconsistencies exist when it comes to articulating exactly what it is that a LiP is meant to do. In this chapter I will return to this in more detail. What behavioural expectations are there for LiPs? How can a LiP perform well, or perform badly? As I will show, LiPs are frequently given contradictory information. They are told, for example, to tell their stories “simply”. Yet they are also expected to be able to conduct closed questioning, or be able to, on the spot, explain what area of law their proceedings deals with.<sup>479</sup> These inconsistencies of performative demands lead to the majority of LiPs in this study feeling that they do not have a coherent script to which they can adhere. Should they act naturally? Should they mimic the behaviour and language of lawyers? What would a good LiP look like? Many interviewees were told at different stages of proceedings to do both of these things, sometimes at the same time, leading to LiPs feeling they are being punished for failing to adequately perform in impossible circumstances. The significant, and unclear, performative demands placed on LiPs are therefore also a clear source of disadvantage.

The first two difficulties identified so far, that of an unclearly conceptualised role for LiPs, as well as the difficulties LiPs have translating experiences and understanding legal discourse, can both be seen as manifestations of the gap between “lay” and “law” described above; ways in which the law as a specialised profession functions through reification and exclusion, and reinforces its own autonomy. But the final section of this chapter considers a third and different potential source of difficulty for LiPs, one which cannot be explained through this kind of sociological analysis: the impact of the “gatekeeper”. By the term gatekeeper I refer to individuals who are *not* legal professionals, but who are individuals who are key intermediaries between LiPs and legal professionals. These include court staff within HMCTs, and others in related administrative and managerial roles. Surprisingly little attention has been paid to these people when considering the experiences of LiPs. And yet it is overwhelmingly these

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<sup>477</sup> As I have already argued, of course, LiPs’ inability to translate is of course a deliberate mechanism to enforce the specialism of the legal profession.

<sup>478</sup> The two most obvious examples of this are Trevor and Marie.

<sup>479</sup> This is precisely what happened to Tim, as I will explore later in the chapter.

individuals who are the first to have contact with LiPs and on whom LiPs are reliant throughout.

The LiPs in this study frequently cite problems of access relating to such gatekeepers. Interviewees feel that these individuals pose a considerable barrier to them when pursuing or defending their claim. The difficulties that inhere in these kinds of encounters cannot be explained away by arguments relating to the gap between lay and law. It is important to be clear that this thesis does not attempt to critique the behaviour of individuals not involved in this study. In addition, many of the difficulties in these encounters may be, at the very least, partially attributable to the behaviour of the LiPs themselves. However, these gatekeeper difficulties are also, arguably, indicators of a wider contemporary strategy imposed by policy makers on the courts, and beyond, of deflecting individuals from being able to pursue or defend complaints through limiting accountability and access. The decrease in face-to-face contact, the increased centralisation of procedures and use of privatised, outsourced or legally untrained intermediaries is a significant development that once again, as I will demonstrate, disproportionately impacts LiPs compared with legal professionals.<sup>480</sup> This chapter therefore concludes by considering what implications these kinds of previously unexamined difficulties have for the experiences of LiPs into the future.

#### RED HERRINGS

No disrespect to your colleagues or solicitor friends and stuff [laughing]...All college, no knowledge? Where's the common sense element? I mean, there's no, there's very little common sense in law. You know it doesn't, it just doesn't make sense, does it? A lot of law.

Neil

In 2012, when Marie still had a solicitor representing her, she attended the final hearing regarding the custody of her daughter. Ultimately, this hearing resulted in Marie's child being permanently adopted. From Marie's perspective, the issue of relevance for this hearing was ensuring that the presiding judge in the case understood that she was in the process of getting an Independent Social Worker (ISW) assessment. Potentially, if the ISW was positive, Marie believed it could have changed the custody outcome. An ISW assessment date had been agreed but the date was *after* this final hearing and Marie could not get it moved sooner. Consequently, she wanted her solicitor to explain this to the judge so that they could delay the

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<sup>480</sup> There is of course an impact on the legal profession too; increased outsourcing and changes in the Legal Services Act 2007 point to a potential for 'de-skilling' in the provision of some legal services, which have now been opened up to non-legal competition.

final hearing until the ISW had been done. Instead, this is how Marie recalls what happened when the judge asked her solicitor about the ISW.

Marie: My solicitor said it was a red herring. Now, at that point in time I had no idea what that meant, but when I found out what it meant I was absolutely *livid* because basically that comment had allowed the final hearing to carry on.

Kate: So you were present during this final hearing?

Marie: Yeah but like I said I didn't know nothing, uh, I didn't even understand the terminology of red herring.

Kate: And so you didn't have anyone else with you? They weren't allowed to...

Marie: No.

Kate: So did your solicitor raise the ISW?

Marie: No as I, he turned around and said it was a red herring, like the appeal and everything about it was a red herring and I was, when I found out what it actually meant I was absolutely *livid*.

Kate: And when did you find that out?

Marie: Um, yeah, when the appeal happened, 'cause we actually got our transcripts.

For Marie the language used by her own solicitor was incomprehensible. As she herself says, it was only much later, during the appeal (by which time she was a LiP), that she obtained a transcript and, in consultation with her McKenzie friend, finally understood what the expression “red herring” meant, and what the consequences of her solicitor’s statement had been.<sup>481</sup>

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<sup>481</sup> I want to emphasise here that the impact of this happening is of course still based on Marie’s perceptions and we cannot be certain what effect the ISW may have had if it *had* been explicitly discussed in court on that day. We can be certain, however, that it had a material effect on Marie’s perceptions of fairness in the justice system and was a major factor in her becoming a LiP. This latter outcome—how loss of trust in legal professionals can lead to becoming LiPs—is explored in detail in the following, final chapter drawing in particular on the work of Professor Tom Tyler’s work, *Why People Obey the Law*, on trust and legitimacy as well as the role of procedural justice, as outlined by Tyler and Zimmerman, “Between Access to Counsel and Access to Justice”.

I begin this chapter with Marie's experience because what happened to her is not unusual in the context of this study, or in the context of other research into the challenges posed to laypersons by certain kinds of language, but it *is* difficult to capture if we assume 'legal language' refers only to legal vocabulary.<sup>482</sup> As stated in the introduction, it is a generally accepted fact that legal terminology is inaccessible to an outsider and needs to be explained.<sup>483</sup> There is no doubt that a certain amount of progress has been made in this direction. Plain language is advocated by researchers, and guides for LiPs explaining key terms, can now be accessed online and sometimes at courthouses themselves.<sup>484</sup> But in this study, the language that functioned to exclude or confuse LiPs was not limited to specialist legal terms, or Latin or anything else that we might expect to constitute 'legalese'. Instead, the kind of expressions and constructions that confused LiPs frequently encompassed language that was unusual or deceptive.<sup>485</sup> The degree to which such language may be a product of the legal world, even though it is *not* specifically 'legal language' is something that clearly needs to be considered.

To approach how we might do this, it is helpful to draw on the work of Pierre Bourdieu. As outlined earlier, the smallness of the interviewee sample means that I cannot claim that my interviewees are representative of all LiPs, and I hesitate to make any assumptions about demographics on the basis of this sample. But it *does* seem quite likely that many LiPs, including those in this study, are formally educated to a lesser degree than the legal professionals they encounter in a courtroom.<sup>486</sup> Pierre Bourdieu recognises the importance of this when he argues in his sociological theory that all semi-autonomous fields, such as the field of law, operate within and are relatively closer or further away from, the field of power. Individuals who work within a field are therefore also part of a broader operation of social power. Those who work in positions of authority or influence within a field are likely to exhibit traits that reinforce their social status and class in all of their encounters, and this will be most obviously manifested in encounters with those of lesser authority. This idea is emphasised in Bourdieu's *Distinction*, where he argues that aesthetic choices are determined early on by one's *habitus* and the earliest social influences individuals have through their parents, the kind of people they go to school with and their education.<sup>487</sup> It is clearly also

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<sup>482</sup> Criminal Justice Alliance in *Structured Mayhem*, 23. Similarly see The Law Society, *Litigants in Person: Guidelines for Lawyers* (The Law Society: London, 2015), 6.

<sup>483</sup> Christopher Williams argues that the key features of 'legal vocabulary' are a usage of archaic or rarely used term, a preponderance of foreign vocabulary, particularly French or Latin, and 'obsessive repetition' of terms to avoid obscurity. In addition, this is complemented by long, 'convoluted' sentences and impersonal language. See "Legal English and Plain Language: An Introduction," in *ESP Across Cultures* (Global Print: Italy, 2004): 113-117.

<sup>484</sup> For example, the Bar Council's *Guide to Representing Yourself in Court* (April 2013).

<sup>485</sup> By deceptive, I mean language that has a double meaning: one within the legal field and one without it. I will return to this idea later in the chapter.

<sup>486</sup> This was the conclusion reached by the Williams, *LiPs: A Literature Review*. See also Charlie Ball, "Most People in the UK Do Not Go to University – and Maybe Never will," *The Guardian*, 4 June 2013.

<sup>487</sup> Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (Routledge: London, 1979).

evident in language. As Bourdieu emphasise, language is a function of social power. As he expresses it, when critiquing the neutral or scientific study of linguistics:

one must not forget that the relations of communication par excellence – linguistic exchanges – are also relations of symbolic power in which the power relations between speakers or their respective groups are actualised.<sup>488</sup>

The idea I want to take from this is that when talking about ‘legal language’, we need to go beyond narrow definitions that only encompass technical language. LiPs are not only confused by this kind of language, instead they are also potentially excluded from fully comprehending proceedings by the use of unusual, formal or complex language that goes unexplained to them because it is not recognised to *be* legal language. By failing to see such linguistic constructions, like Marie’s red herrings, as part of a broader pattern of social power, we limit the significance of legal language difficulties by saying they only evidence difficulties with a particular kind of transaction in a specific time and place. Laypersons don’t understand because they don’t have law degrees.<sup>489</sup> But instead, by encompassing a broader understanding of legal language we can see these transactions more broadly as an unequal relationship of power that denotes social class and educational differences, and is common to many such encounters.

The importance of considering the unequal distribution of power in the relationships between LiPs and legal professionals is supported by the work of Larson. The ‘professional project’ is about the collective pursuit of social mobility for professions that will result in ‘the desired social position to their occupants’.<sup>490</sup> Specialisms, such as lawyering, are predicated on the development of increasing autonomy based on markers of distinction, and through this distinction enjoying the exercise of financial and social power. As she notes: ‘The upgrading of an occupation into a profession, or the upgrading of a profession in terms of respectability and social credit, implies the articulation of principles of inclusion and exclusion’.<sup>491</sup> This pursuit of such a ‘project’ is one where acquiring specialist skills is only one small piece of a much more complex process that is rooted in processes of exclusion: class and educational differences. As Larson points out: ‘professions are not exclusively occupational categories: whatever else they are, professions are situated in the middle and upper middle levels of the stratification system. Both objectively and subjectively, professions are outside and above the working class, as occupations and as social strata’.<sup>492</sup>

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<sup>488</sup> Pierre Bourdieu, *Language and Symbolic Power*, (Polity Press: London, 1991), 37.

<sup>489</sup> Although, of course, some of them do, including Tim in this study as well as Oliver.

<sup>490</sup> Larson, *Professionalism*, 67.

<sup>491</sup> *Ibid*, 74.

<sup>492</sup> *Ibid*, xvi.

A number of interviewees in this study were clear, for example, when asked whether they had considered the law as a profession, that it was out of reach as it was too expensive and/or not for people like them. Charles expresses it thus: ‘no, I mean law was for rich people [laughter]. We don’t...contemplated that. You had to have the right accent, and um, lots of money’. Peter echoes this, stating: ‘from my own personal point of view um, I would, if I had the money and it is all about money because if I had the money I, I would study law’. Neil similarly notes that given his time again, he would study law although he had no interest in law at school at the time. However, even if he had, as he outlines, it wasn’t an option for him as he needed to earn money immediately to support himself. As he says:

All the lads, all the girls and the fellas that went to university, it took them another five or six years before they were earning the same amount of money as I was earning, you know, and they were off at university somewhere and their family were having to pay for them and we didn’t have that sort of money either.

Marie was caught by this difficulty because of the language her solicitor used. While ‘red herring’ may be a common enough expression that other LiPs are not caught by it, we should not underestimate the degree to which these kinds of language usages may trip up many more LiPs, because legal professionals may be *more likely* than LiPs to use this kind of language in the first place, whether formal or idiomatic, or with references to aesthetic traditions that are tied to specific social origins and contexts.<sup>493</sup> For us it means that we cannot ignore the disadvantage that Marie, and other LiPs, may experience, by not sharing the same social or educational background as other individuals in the courtroom.<sup>494</sup>

Part of the difficulty with this kind of language of exclusion is that it tends to go unnoticed both by those deploying it as well as by those encountering it, which is why *habitus* as a concept is so useful. Individuals in this study talked of a general lack of comprehension, and many commented on the accent and tone in which legal professionals spoke, denoting a kind of educational privilege or representing class, but could not give linguistic specifics, arguably because all of these factors worked together to generate an impenetrable complexity.<sup>495</sup> This means while one can only speculate on the impact complex or formal language constructions

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<sup>493</sup> For one interviewee it was also a gendered experience. Talia, who comes from a comparatively privileged background, attending a public boarding school in the UK, made clear that her parents only expected her brother to pursue a career (he became a lawyer). She was expected to marry and consequently her education was of secondary importance. This has become a source of regret and anger for her and is explored in the next chapter.

<sup>494</sup> This was not the case for all the interviewees however, with some coming from a relatively privileged background, such as Oliver and Talia.

<sup>495</sup> This includes Neil, and Eleanor who complains in her interview of her barrister’s misogyny and pomposity, emphasizing that ‘I kept being referred to by the barrister as a “silly little woman”. [laughter]’.

can have, in this case we at least know it meant that Marie was unable to understand how the decision was reached in the most important hearing she ever attended.<sup>496</sup> It also seems likely that this is not an unusual experience for a LiP. Clearly facilitating access for LiPs also requires addressing ourselves to language differences as expressions of power, not just as evidence that laypersons lack a narrow, specialised knowledge.

However, what Marie's experience also draws attention to is what appears to be troubling behaviour on the part of her legal representative. Clark D. Cunningham, in his 1992 article on lawyers as translators, notes that he uses the metaphor of translation because:

[t]he metaphor suggests that the meaning of the client's story will 'inevitably' be transformed through the lawyer's representation; no sentence can be perfectly translated from one language to another. Yet if one feels a sense of loss in speaking through a translator, there can also be something gained. By speaking through a translator, one can be heard and understood in places where otherwise one is mute. The translator does not silence the speaker but rather seeks to enhance the speaker's voice by adding her own. The good translator does not alter the speaker's meaning without the speaker's consent, and may even collaborate with the speaker to produce a statement in the foreign language that is more meaningful than the speaker's original utterance. Thus, translation offers both an image of the constraints upon a lawyer's ability to represent fully his client's story and a model for recognizing and managing the inevitable changes in meaning in a way that may empower rather than subjugate the client.<sup>497</sup>

But, as Cunningham points out: 'lawyers routinely silence and subordinate their clients while purporting to tell "their" stories'.<sup>498</sup> Clearly, while the solicitor may not have deliberately or consciously employed the term "red herring" to evade Marie's understanding, this solicitor, by Marie's account of this event, is not attempting to translate Marie's needs, or to communicate for or with her. At the very least, the relationship between Marie and her representative suggests a lack of 'translation'.<sup>499</sup> Indeed, he seems to be doing the opposite by cutting her out of the communication taking place in court.<sup>500</sup>

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<sup>496</sup> This hearing, and the behaviour of her solicitor, had clear consequences when it came to Marie's trust in the legal profession. The impact of solicitor behaviour on shaping litigants in persons' decisions to forego representation will be explored in the next chapter drawing in particular on the work of Tyler and Zimmerman, "Between Access to Counsel and Access to Justice."

<sup>497</sup> Clark D. Cunningham, "The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse," *Cornell Law Review* 77, no. 6(1992): 1299.

<sup>498</sup> *Ibid.*, 1300.

<sup>499</sup> Another way of thinking about this failure of translation is to consider that lawyers, as Sarat, Abel and Felstiner argue, see each case as a unit of analysis; Marie's separate application done without this representative is arguably something that falls outside the boundaries of this case.

<sup>500</sup> See Genn and Genn, *Representation at Tribunals*, 237.



It is of course important to stress here that the concept of 'lawyering' is a complex one, and how people 'do' lawyering is matter of historical and contextual specificity, so overly generalised claims should be avoided. Sarat and Felstiner draw attention to the complicated power dynamics existing between lawyer and client. Their 1995 work emphasises the 'dynamic' nature of the power relationship whereby, at different points in time, both lawyer and client feel a relative 'powerlessness', and that the relationship between lawyer and client is much more tightly negotiated than had been previously suggested.<sup>501</sup> In addition, more recent scholarship has consistently advocated for a *more* client-driven focus, with a greater sense of equality in the relationship between the two.<sup>502</sup> As well, there has been an emphasis in some critical scholarship of the ethical imperatives of communicating a client's story.<sup>503</sup> This vision of lawyering is, however, usually limited to the extent that there remains an expectation that lawyers are meant to perform some kind of translation and to be relatively autonomous in taking steps that are in the best interest of their client.<sup>504</sup>

In the context of this study, therefore, it is important to be cautious about any claims made as to how lawyers behave generally. All we can know from Marie's tale is Marie's perspective on one incident. But the story remains troubling, at the very least because it indicates a rather paternalistic narrative of lawyer behaviour.<sup>505</sup> A more critical reading suggests that, while exclusion on the basis of language and behaviour largely takes place on a preconscious level, there may well be individuals within the legal profession who might deliberately and consciously exploit this exclusion; in this scenario, by ignoring what his client was saying and failing to translate this to the judge.<sup>506</sup> Larson points out, 'although the project and its means are collective: it is through the upgrading of an occupation—with the attempts to control the individual members which this involves—that prestige is to be attached to the profession roles, and by extension, to their occupants, making the project 'ultimately individualistic'.<sup>507</sup> While conscious exclusion may not be applicable to the majority of legal practitioners, Marie's experience suggests that Larson's 'professional project' is an important way to consider the minority of lawyers who may well deliberately emphasise and perpetuate distinction through exclusion. As Larson observes:

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<sup>501</sup> Austin Sarat and William L.F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press: Oxford, 1995).

<sup>502</sup> See, for example, Julie McFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press: Vancouver and Toronto, 2008), xiii.

<sup>503</sup> Anthony V. Alfieri, "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative," *Yale Law Journal* 100 (1991): 2107-2147.

<sup>504</sup> Richard Moorhead et al., "What Clients Know: Client Perspectives and Legal Competence," *International Journal of the Legal Profession* 5 (2003): 5-35.

<sup>505</sup> R. Wasserstrom, "Lawyers as Professionals: Some Moral Issues," *Human Rights* 5(1975): 1-24.

<sup>506</sup> This is of significance to LiPs not only when they are periodically represented, but when they, as LiPs, face represented opposition.

<sup>507</sup> Larson, *Professionalism*, 67.

[t]he service orientation is...undoubtedly, part of the ideology and one of the prescriptive norms which organised professions explicitly avow. Yet the implicit assumption that the behaviour of individual professionals is more ethical, as a norm, than that of individuals in lesser occupations has seldom, if ever, been tested by empirical evidence.<sup>508</sup>

Another problem with language and communication that emerged from this study was about what might best be termed “deceptive” language. This can be seen in the case of Trevor. While awaiting the outcome of the small claim he was defending against the contractor who had initiated proceedings in the County Court against him, Trevor received a letter in the post from the court. As he explains it: ‘what it said was, um, Judgment, blah blah blah, Action: None, so I thought, with the first one, I thought well okay so there’s, he’s found a judgment but he’s, I don’t have to do anything because it says none.[...]’ His sister, a qualified solicitor, and a friend of hers, also legally trained, then explained the meaning of the letter to Trevor. As he goes on:

Once they [his sister and friend] read it they understood what it meant, but I as a layman don’t understand legal terminology, I don’t, but they write it all legalese so you’re there reading it, trying to interpret something that you haven’t got a clue what it actually means. When it says action: none, you think that means no action to be taken...that’s what you would ex-...so I don’t have to do anything, but no, that wasn’t what it meant, I can’t remember what it meant actually, but it meant something else, something to do with the judgment it meant that that was no-...um, so and those, and they use all that, you know, like, and they use legal terminology but yet it’s supposed to be litigant in person. How are you supposed to know legal technol-, terminology if you’re just a normal person who doesn’t operate within the law, operate in the law world if you know what I mean? You don’t, you won’t know what those things mean so you won’t understand what they’re trying to tell you or get you to do.<sup>509</sup>

Trevor’s experience is a commonplace one for LiPs, where the language employed by legal professionals is difficult to understand. However, as Trevor himself suggests in the above extract, the problem here is not the use of long, or complicated terms that would be easily recognisable as a form of such jargon, it is instead words that are misleading because they have both a legal and non-legal meaning, such as ‘action’, ‘judgment’ and ‘none’. Richard

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<sup>508</sup> Ibid, ix.

<sup>509</sup> Trevor Extract, 14.01.16, 02:07:59 – 02:09:06.

Moorhead and Sefton draw attention to this issue in their 2005 study where they note the ‘risk’ of LiPs expressing themselves ‘solely in social, non-legal terms’.<sup>510</sup>

The collision between what Moorhead and Sefton termed the ‘social’ and the legal can be seen even more clearly in the experiences of both Charles and Paul who both took their solicitor to court for negligence. This is how Charles recalls what happened during the hearing:

Well, the verdict didn’t take long at all, it was like just about half an hour, he, he, [the judge], like, he prepares a document and he reads through it and then says, um, you know, Mr C, basically judgment goes to Mr C but, um, then he goes, he tells you, he goes and to tell you, what um, what the, what you’ve actually achieved in terms of the, the, the the judgement what judgment would actually be, um, the, the money that you would gain, I don’t even know what the right expression is, what the compensation would be for your losses. But then he says, like £5, and I actually sued them for another case as well and it was £5 for each case, I won on both counts, but um, and then he basically said because I didn’t, um, I couldn’t prove my, my losses, which was nonsense. Because I’d showed him, demonstrated with documents what my losses were because that got, it was in my statement of claim.

As can be seen above, in Charles’s mind, he won this case (‘judgment goes to Mr C’). As he says, ‘like I said, I did very well because I won the case’. Consequently, the tiny amount of damages awarded to him was a source of significant confusion. This confusion was compounded when the judge went on to order him to pay the other side’s costs. As he remembers:

I did actually win the case, but when you win a case on negligence the judge, what he did was, um, he just gave me, I can’t remember the exact word they call it, um, punitive damages and just gave me £5 as compensation, knowing that the, the solicitors would have made an offer and because they had offered me £15,000 which I couldn’t take because I’d already lost over £100,000 because of all the, all, the, in terms of cost and the time, I couldn’t take £15,000 so, and so because he, my, my judgment was less than what was actually offered to me it means automatically I have to pay the solicitors’ costs which was £90,000.

Clearly, in the passage above Charles has confused ‘punitive’ and ‘nominal’ damages. However, the major source of confusion is what “winning” means. From Charles’s account of what happened, it seems clear that the judge accepted his argument on at least one of his points,

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<sup>510</sup> Moorhead & Sefton, *Unrepresented Litigants*, 154.

resulting in the awarding of nominal damages. However, from the judge's perspective, this was not a victory, but rather a failure to prove the rest of his case, hence being awarded *only* nominal damages. In addition, Charles clearly fell afoul of the Civil Procedure Rules pertaining to Part 36 on offers to settle. Essentially, because the solicitors offered Charles a substantial settlement, £15,000, and because Charles failed to obtain a judgment 'more advantageous than a defendant's part 36 offer', he was ordered to pay the other side's costs.<sup>511</sup>

The collision, then, between 'social' and 'legal' meanings here means that a LiP can't even be sure if he or she is successful or not. Charles clearly believes he has succeeded because the judge has *told* him he was succeeded, or 'won' on at least one or more grounds. However, the fact that the other side was awarded costs tells us he has not. For Charles to know that, though, he would need to understand *Blackstone's Civil Practice* 66.10, which states that:

A claimant who has claimed substantial damages, but has only recovered nominal damages, will normally be ordered to pay the defendant's costs (*Texaco Ltd v Arco Technology Inc* (1989) *The Times* 13 October 1989; *Mappouras v Waldrons Solicitors* [2002] EWCA Civ 842, LTL 30/4/2002 [...]) Where a claimant recovers more than nominal damages but only a small proportion of the amount claimed, costs should follow the event unless this conflicts with some other established principle [...].<sup>512</sup>

As above, generally speaking, costs orders to a defendant where only nominal damages are awarded to the claimant, are commonplace, although not automatic. As a 2013 case, *Clack v Wrigley's Solicitors LLP*, establishes, the judge has a 'wide discretion' to decide the issue of costs. In determining costs, though, it is about *who is the successful party*:

There is no doubt that the starting point in all cases is that the party who, looked at practically and realistically, is *the successful party* [my italics] will be awarded the costs of the action, but equally it is clear that there is a wide discretion to depart from this in appropriate circumstances. The authorities, both pre-and post-CPR, establish that a defendant who is held liable only for nominal damages will ordinarily be regarded as the successful party (unless the claimant had a legitimate reason for seeking to establish liability only), and that in such a case (a) the claimant will not ordinarily be awarded any costs but (b) the defendant will not necessarily recover all his costs, especially if and to the extent that (i) they have not been incurred in relation to an issue which should have been

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<sup>511</sup> Civil Procedure Rules 36.11 – 36.21.

<sup>512</sup> See *Blackstones Civil Proceedings* 66.10.

conceded and (ii) they would not have been incurred anyhow in resolving issues on which the defendant has succeeded.<sup>513</sup>

In the eyes of the judge, then, Charles is *not* the successful party. However, the circumstances surrounding how this process takes place do not seem to have been clearly explained to him. Charles is aware that his decision not to settle was what caused this costs decision, but for him, this is still baffling because he ‘won’.<sup>514</sup> The fact that one can ‘win’ but still lose, by virtue of only succeeding in being awarded nominal damages, is clearly, and unsurprisingly, a site of confusion for LiPs.

Paul narrates a similar story, also a case where he took his solicitors to court for negligence:

I had to present the case and he [the judge] later complimented me saying I had presented the case very, very effectively, uh very politely and uh, you know, I, uh, handled it really well. So he ruled in my favour, he said that the solicitors had been negligent. So I won at that stage and he awarded me costs, and a very tiny amount...they award certain people huge damages and they, wrong-, seemingly, wrongly, they, they award other people tiny amounts! [laughter]. They’re almost insignificant! Pennies! In relation to them. So, um, I was then needing to get these solicitors to comply with the court order and they were not. And I was having to do my, uh, costing to show what I’d, you know, my genuine costs, and they were difficult. So I then went back to court saying look, they’re not complying with the court order. And the district judge awarded *them* costs for attending that hearing. And their costs were more than my costs and damages.

Here we see an account closely paralleling Charles where Paul succeeds only to the extent of nominal damages, although in his account, it seems that he was awarded costs, or was at least certainly not ordered to pay the other side’s costs. While there are no particulars of the case to refer to in order to be certain as to what exactly happened at the second hearing, it seems likely that at this point the judge intervened, presumably because in the eyes of the courts Paul was not the ‘successful party’ in this situation and therefore his taking the solicitors *back* to court may have been perceived as a vexatious action. As Paul summarises it, however: ‘I won, but then I lost because the district judge, the subsequent district judge awarded costs against me’.

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<sup>513</sup> *Clack v Wrigleys Solicitors LLP* 2013 All ER (D) 83 (Apr), Strauss N, QC sitting as Deputy Judge, at 18.

<sup>514</sup> Charles is also baffled because the offer made by the other side was, in his mind, not reasonable (Charles was asking for more than £100k in damages). The question of settlement, and litigants in person being punished for failing to settle, is explored in the subsequent chapter. For the purposes of this chapter, though, ‘reasonable’ can certainly be seen as an example of the same word having both a social and a legal meaning.

Common to both individuals in these accounts is a bewilderment as to what has taken place in the courtroom. For them, the judge has said they were right, and awarded them compensation (albeit a small amount), and then they have been, as they see it, punished despite succeeding. This is clearly because the concept of ‘winning’ inside and outside a legal context differs.

However, in Moorhead and Sefton’s account, although they concede the situation is ‘understandable’, LiPs are held somewhat responsible for their own confusion; because they do not know how to distinguish between what is socially just and what is ‘legally’ just.<sup>515</sup> But of course, why should they? To fully comprehend the situation described above seems to require either an intimate knowledge of the *Civil Procedure Rules* or, at the very least, a judge able to explain what has occurred in a way that each LiP can understand. We cannot, of course, be sure of what was explained to either or both LiPs. It is perfectly possible the situation *was* explained by the judge and that Charles and Paul stated that they understood, even though they did not. It is also possible the judge did not fully explain the reason for his or her actions. What we can be fairly certain about, however, is that there was a fundamental miscommunication arising from what is a clear example of legal language and procedure being at loggerheads with a ‘common sense’ understanding of the matter to a layperson.<sup>516</sup> It is also unsurprising that LiPs may experience these kinds of decisions as unjust (in the ‘social’ meaning of the word). If a LiP pursues a case to court, despite all the difficulties detailed in the last chapter, so that a judge can adjudicate on the matter, only to be told that even though they’ve won, they are somehow at fault, we cannot be surprised that LiPs may be angered or upset by the experience. As suggested in the previous chapter, what happens here is that LiPs may be financially punished for pursuing a claim of importance to them.<sup>517</sup>

Moving beyond what happened in these two cases and returning to the broader argument, then, how can we make sense of these kinds of confusions and their impact on LiPs? As I

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<sup>515</sup> This question of course touches on a complex and much discussed issue in legal philosophy: to what degree should what is legal be also ‘just’? There are two paths to think about this question that are relevant here: firstly, there is the fact that the civil justice system has transformed from a court based system where what is just is what judges pronounce to be just, to one of ‘structured negotiation’ where settlement is the overriding objective. This transformation impacts on LiPs who, as I will show in this chapter, do not understand these changes and expect to be heard by a judge. For more on this, see Simon Roberts, “Listing Concentrates the Mind’: the English Civil Court as an Arena for Structured Negotiation,” *Oxford Journal of Legal Studies* 29, no. 3(2009): 457-479. The second path is the gap between popular justice and ‘legal justice’; the work of Nobles and Schiff in *Miscarriages of Justice*, is again relevant here, pointing to the wide gap between the two conceptions.

<sup>516</sup> We can also be certain that there was another serious outcome: the result of these transactions for both Charles and Paul was to substantially erode trust in the judges presiding over their cases. The way in which LiPs choose to make sense of encounters with law that are not effectively explained to them, and how some may resort to conspiracy, is the subject of the next chapter.

<sup>517</sup> This policy is also in keeping with the courts increasingly being used to punish those who do not settle, regardless of the relative merit of their case. See Roberts, “Listing Concentrates the Mind,” 457.

argued above, Moorhead's account ultimately seems to imply that this collision is natural and unfortunate. However, this kind of argument fails to take into account the disparity of power levels between parties that serves to reinforce and perpetuate a LiP's relatively lowly status. It also doesn't fully engage with how confusing and unfair the situation is for the layperson. It is therefore instead, perhaps, more useful to think in terms of sociological theory when pondering LiP disadvantages regarding language and procedure, particularly Bourdieu's theory of *habitus*. Following Bourdieu's argument, then, in these situations it is not the case that the judges or solicitors are deliberately trying to exclude or confuse Charles, Trevor, Paul or Marie. Instead, because of both the specialised knowledge legal agents have acquired and naturalised, as well as their broader pattern of class, education and social values, what seems obvious to these individuals is not what is obvious to a LiP. Instead these two forms of common sense will be fundamentally different and inevitably come into conflict.

So far, I have spent some time in this chapter talking about language. However, the conceptual gap between lay and law can be seen in other areas besides legal language. Bourdieu argues

The institution of a "judicial space" implies the establishment of a borderline between actors. It divides those qualified to participate in the game and those who, though they may find themselves in the middle of it, are in fact excluded by their inability to accomplish the conversion of mental space—and particularly of linguistic stance—which is presumed by entry into this social space.<sup>518</sup>

The language Bourdieu employs in this extract is highly suggestive, drawing attention as he does to a 'borderline between *actors*'. Often accounts of the gap between the lay and the law tend to focus exclusively on language. Clearly, as above, the role language plays is very important, however it is easy to overlook the equally important role of embodied behaviour. How does performance affect LiPs? This is what I explore in the next section of the chapter.

#### ACTING UP

Kate: Did you do research [on how to behave in court]?

Neil: No, what I, what I did, I don't know whether it's on there, it's probably upstairs, I, I'd got a book, I'd got a book out of the library, I bought a book from Waterstones or something, advo-, yeah, called advocacy at the Bar.

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<sup>518</sup> Bourdieu, "The Force of Law," 828.

*Advocacy at the Bar* and I read a bit of that. I went down to court and quite, quite funny I just, I wanted to see how the barristers, where they sat in court, and how they addressed the court, and what they did. So I remember, a particularly funny case, there were about six defendants in this one case and each one had got their own barrister and they were all bobbing up and down, they were all sat on the same row all with the wigs and the black thing on, they looked like pistons in a car, bobbing up, bobbing, when one sat down, the other one...in no particular order, it was sort of random bobbing up and down. I found it quite, quite funny. I don't think I learned a lot apart from you've got to call a judge in the High Court My Lord. ...yeah I just blagged it, blagged it all the way through.

How should LiPs behave in court? Since the passage of LASPO in April 2013 and the concomitant rise of unrepresented litigants ending up in courtrooms, there has been considerable effort by legal practitioners and other legal service providers to provide guidance and advice on this score. The Bar Council released a document for litigants in person in April 2013, a *Guide to Representing Yourself in Court*, and there are other similar documents and sources, such as AdviceNow's website which has a page called 'Going to court or tribunal without the help of a lawyer' and which links to the Royal Courts of Justice Advice Bureau guides.<sup>519</sup> These guides, produced by the Citizens Advice Bureau, similar to the document produced by the Bar Council, envisage specific scenes and times where a litigant in person might find themselves in court and attempt to explain what they should do and how they should behave. One of the first things both of these guides emphasise is that a LiP needs to disregard anything he or she may have seen on television. As the RCJ CAB guide puts it:

Forget everything you see on the telly. Most court hearings in TV programmes are about crime – and that is not what we are talking about here and anyway they focus on the drama of the story rather than reality!<sup>520</sup>

This is echoed by the Bar Council, whose guide states:

Keep it simple Throughout the Hearing, use simple, non-legal language as much as you can. Speak in short sentences. You might be tempted to speak like lawyers speak on television. Resist this temptation. Lawyers do not really speak like that. Some bad lawyers do, but judges hate it. Judges just want you to say what you mean in plain English.<sup>521</sup>

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<sup>519</sup> CAB, *Going to Court*, 1.

<sup>520</sup> Ibid.

<sup>521</sup> Bar Council, *Guide for LiPs*, 23.



Clearly, the emphasis here is to persuade LiPs that they should not behave as they have seen on television programmes, because these shows tend to be from the US and depict criminal proceedings, and will lead LiPs astray. The repetition of this advice in both guides suggests that this is a genuine problem and this is arguably supported by the fact that many of the interviewees in this study had a far more intimate knowledge of the law from television than they did from reality.<sup>522</sup> But what this also indicates is that many of these LiPs will not have attended a courtroom before and will have no prior knowledge of what it will be like. So they will be quite likely to have *only* ever seen courtrooms on television. This means that, when considering how they should behave, not only do LiPs lack any experience of the proceedings in which they will be acting, but they are also entering unfamiliar, and frequently intimidating environments. As Marie describes, attending a local magistrate's court for a civil hearing:

The courtroom? It felt like I'd committed a crime. It really really did, walking in, never been in front of the judge, never been in a courtroom or anything. It was horrendous. It was so, the courtroom itself looked like, well look like they do on TV and that and, and its just like, you know when you see them on TV and you think oh right, whatever, but when you're actually in there it's so intimidating. And like I say, you feel like you committed a crime or something.

Marie's extract suggests that the very fact that a LiP might base his or her knowledge of courtrooms on television may make them *more* intimidating, as they are more likely to associate courts with criminality, punishment or imprisonment. In this respect, many LiPs may already face a behavioural 'handicap': intimidation and fear.<sup>523</sup>

Putting aside the question of intimidation for now, we might begin this section by asking generally, how can one behave well in a courtroom? For a LiP, an obvious place to start might be to watch and imitate the behaviour of legal professionals. This approach is implied in the above guides, when LiPs are told that when they speak plainly, they are following the strategy of how lawyers 'really' speak, and that this is a desirable phenomenon. This is also what Neil does in the above extract; he attends a courtroom and observes the behaviour of legal

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<sup>522</sup> Trevor, and Charles, acknowledge this openly.

<sup>523</sup> The experience of intimidation is of course one that is well-recognised and discussed in criminal proceedings. Many scholars argue that architecture, procedure, placement of the defendant and other forms of 'segregation' are deliberately employed to intimidate defendants and witnesses before the overwhelming authority of the 'law'. See A.E. Bottoms and D. McClean (1976) *Defendants in the Criminal Process* (London: Routledge and K Paul, 1976); Paul Rock, "Witnesses and Spaces in a Crown Court"; Linda Mulcahy, *Legal Architecture. Justice, Due Process and the Place of Law* (Routledge: London and New York, 2011). However, less material has been written on the experiences of civil claimants and defendants in this regard. See "The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California, *Stanford Law Review* 21(1969).

professionals. But Neil clearly finds the experience largely comic. In this respect, this does not seem to be a helpful technique for him. More than this, though, Neil's reception to the behaviour and dress of barristers serves to remind us that there is a significant gap between what he, and other laypersons would consider 'normal' behaviour in a courtroom and what legal professionals themselves might consider 'normal behaviour.' Neil clearly finds the behaviour of the barristers bizarre, rather than instructive; referring to the 'random bobbing up and down' of barristers, he cannot make any sense of it and cannot use it as a basis for his own behaviour.<sup>524</sup>

So how does this gap between two different normalities of behaviour, between that of the LiP and the legal professional, come about? This is arguably because the performance of legal is another example of field specific knowledge which they learn through repeated experience. No junior barrister or trainee solicitor enters the courtroom fully embodying the expected behaviour and traits of their role; it is something they learn through rehearsal and repetition. This practice enables these individuals to habituate and naturalise their experiences, including overcoming their initial intimidation, and establishing familiarity with other participants they may share a courtroom with on more than one occasion. Through example of their senior colleagues, or mistakes, or failures on their part, these individuals will learn how to behave appropriately. But the boundaries of what is 'appropriate' or inappropriate behaviour in a courtroom is not a matter of "common sense" (or rather it *is* a matter of "common sense" in the sense that "common sense" itself is a field specific construct), which is why it is very different from what Neil would recognise as normal.

A legal professional who performs well in a courtroom, then, is an individual who gives the appearance of acting in a way that seems professional, skilful, or persuasive to his or her fellow legal practitioners. But this kind of assessment of skill—what is good—can only exist in comparison to its opposite: what is bad. Poor performance in the case of legal professionals might therefore be any behaviour that seemed histrionic, clumsy or overtly theatrical. But while the latter is sometimes characterised as 'acting up' or performing, whereas the former is considered to be behaving 'normally', a better way of interpreting this behaviour would be to understand it as the juncture, for legal professionals, between 'good acting' and 'bad acting'. Bad acting, on the part of a legal professional, is any overtly 'theatrical' behaviour that deviates from what is appropriate. Good acting, on the other hand, is misrecognised as 'natural', but is what I call *legal naturalism*: a style of performance habituated by legal

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<sup>524</sup> For an overview of the role of dress in legal process see A Hunt, "Governance of the Consuming Passions" (MacMillan Press Limited: Hampshire, 1996); Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (University of California Press: Berkeley, 1995); Rob McQueen, "Of Wigs and Gowns: A Short History of Legal and Judicial Dress in Australia", in Rob McQueen and W. Pue, eds., *Misplaced Traditions: British Lawyers, Colonial Peoples* (Federation Press: Annandale and Leichhardt, 1999).

professionals that mobilises years of learning how to behave, move or speak, in a way where it seems to be relatively effortless. Key to the concept of legal naturalism is the role of the habituated and the preconscious. As Bourdieu would argue, this acquisition and refinement of *habitus* is not explicitly recognised, and consequently legal professionals will see their own competency as ‘natural’.<sup>525</sup>

However, when a professional attains such skill, this is only possible through a forgetting of how this transformation took place:

[i]gnoring the social and cultural conditions underlying such an experience, and at the same time treating as a birthright the virtuosity acquired through long familiarization or through the exercises of a methodical training [...] for the acquisition of art competence in the sense of mastery of all the means for the specific appropriation of works of art is a self-seeking silence because it is what makes it possible to legitimise a social privilege by pretending that it is a gift of nature.<sup>526</sup>

Performative competence in a court of law, then, could be argued to be a ‘social privilege’ masquerading as a ‘gift of nature’. The point to take from this analysis is that legal naturalism is of course therefore not obvious to a LiP; it isn’t even obvious to legal professionals themselves. Because lawyers and judges have habituated these courtroom performance skills themselves, they are likely to underestimate how difficult—or impossible—it is for an outsider to master.<sup>527</sup> In this respect, purporting that performative skills can be ‘put on’ by LiPs by following a guidebook conceals the inequality that divides the world of legal professionals from that of laypersons. The reality is that LiPs are clearly not going to be able to learn how to behave like legal professionals without the concomitant experience.

This is of course recognised to a degree by those who work in the legal world: indeed, guides are quite clear that LiPs are not expected to be lawyers. For example, consider the following extract from the Bar Council guide.

Sometimes, the other side will make arguments about what the law is. Before the Hearing, you might have tried to understand the law as well as you can. If you feel that you understand it and have a point to make, make it clearly and simply. However, you are not

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<sup>525</sup> For example, Geoffrey Robertson argues in *The Justice Game* that advocacy skills are ‘instinctive’. See also Justice Edward Parry, *Seven Lamps of Advocacy*, 72.

<sup>526</sup> Bourdieu, *The Field of Cultural Production*, 234.

<sup>527</sup> This is to varying degrees; there will always be more nervous, or less able, individuals and I don’t mean to imply that there is a blanket competency that descends on all practitioners through rehearsal. See Paul Moore, “Longing to Belong: Trained Actors’ Attempts to Enter the Profession,” PhD Diss., University of Sydney, 2006, 43.

expected to be a lawyer. The judge will try hard to think about the arguments that you would be making if you were a lawyer. The lawyers for the other side should talk to the judge about any law that is damaging to their case (and supports your arguments). In that way, the judge and the other lawyers will be aware that you are not a qualified lawyer and will make allowances for that.<sup>528</sup>

The above extract clearly sets out to emphasise that LiPs are not expected to behave exactly like lawyers and that allowances will be made for them by other court users. This is echoed in the CAB guide which states: ‘You don’t have to speak in legal language or long words– use plain English’.<sup>529</sup> But the problem here is that what is ‘simple’ or ‘clear’ in a courtroom is simply not the same as what is simple and clear outside of a courtroom so while LiPs are being asked to behave normally, this normality is based on field specific logics that will disadvantage them. LiPs cannot speak simply and clearly without having to translate their experiences into legally accepted ones: this may not be a case of using legal words, but it is a case of being expected to be coherent in specifically legal way.<sup>530</sup> So actually LiPs *are* being implicitly expected to behave like skilled professionals because legal professionals *don’t realise this is what they are asking of them*. Speaking ‘simply’ masks considerable translation and effort that is disproportionately far more difficult for a LiP.

Beyond the problems with LiPs being told to act ‘naturally’, there is also more explicit inconsistency in what they are expected to do. Both the Citizens Advice Bureau guide and the Bar Council guide on going to court provide advice on how to conduct closed questioning and cross examination, indicating that these skillsets are expected of LiPs as well. So here we reach a significant difficulty: firstly, that LiPs are told to speak plainly and naturally, as good advocates do, without recognising that this behaviour is not actually natural. Secondly, that they are simultaneously expected to be able to master, or at least effectively imitate, technical questioning skills. As Marie describes it:

but the thing is, you’ve got to learn about, it’s not just about learning what’s in the courtroom, it’s about learning how to deal with court staff because sometimes you can face nightmares filing applications, it’s about learning how to put applications together, how to file it, um, how to do fee remission forms and what evidence you need, uh, putting together bundles, putting together um, arguments, uh, putting together questions, if you, even for a final hearing you got questions to do, it’s about linking the evidence to the questions, being able to point out certain areas where you, within the evidence where you can pull them up

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<sup>528</sup> Bar Council, *Guide for LiPs*, 23.

<sup>529</sup> CAB, *Going to Court*.

<sup>530</sup> Williams, “Legal English and Plain Language,” 113.

and say what's this about? What- Yeah, but you said this and then you've said this, which contradicts, you know what I mean? It's not, it's not just as straightforward as walking into court and saying 'hiya judge'. There's so much more to it and it's a very, very hard thing to actually achieve.

There is clearly a kind of confusion of role occurring. LiPs are meant to speak plainly and clearly, to *not* be lawyers or pretend to be lawyers, but are still expected to master lawyerly skills: as Marie puts it, you can't just walk into a courtroom and say 'hiya judge'.

Compounding this role confusion is the inconsistency of how this role may be being applied for each LiP at any time. The Bar Council says that while one might have tried as a LiP to familiarise oneself with the law, it doesn't matter if a LiP does not, because the judge will assist or explain the law to them.<sup>531</sup> But this does not seem to be what happened when Tim first came to court. As Tim describes it, when filling in his County Court claim form, there was no point in this form, or in the limited guidance relating to it, that asked him to frame the claim in explicitly legal terms; indeed, following the logic above, there is no reason why there would be, as the courts say they do not expect LiPs to be legal experts. Tim therefore filled in the facts as best as possible. He describes what happens when he attended the first hearing:

And it's the first, the first question we got asked when we were in there, which I'm surprised hadn't been asked before, was on what grounds of law we were actually bringing the claim in the first place. Now I'd never been asked the question previously....Uh, um, and you know we were fairly unprepared in that respect. Um, thankfully thinking relatively quickly on our feet, um, it was, it was breach of verbal contract really.

Tim emphasises that he was only able to answer this question successfully because he just happened to have a law degree and had had previous experience going to court as a trainee on behalf of his employees. This previous training and education clearly materially assisted him. As he says: 'I was able to go back to my old law school folder, pick it up and work out exactly what made a good witness statement and we'd also looked at, um, counties, magistrates, criminal and the larger civil courts and the different statements that were expected for each'. He emphasises that he was lucky, but that this was clearly a serious problem for a LiP, particularly in a County Court, where he or she may not be expecting it:

Certainly, for the County Courts, or certainly for the small claims, it sells itself on being for the layperson. I guarantee a person walking into that room and gets asked the question we were asked with regards to what area of law we were bringing this on, at no point was

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<sup>531</sup> See: The Law Society, *Litigants in Person: Guidelines for Lawyers*, 5.

there ever any question over we bring this as an area of law. Um. You know, there was no, not even a hint in any of the paperwork, or any of the discussion or anything else that we would have to prepare a legal case for this kind of claim. Um, which I think would be very difficult for a layperson in that respect. To, to, you know what area of law are you doing it on? I dunno. It's kind of why I'm here, I was hoping, you know, hoping someone could tell me. You know, that would be my perceived response.

While we cannot be sure how the judge would have responded if Tim could not answer the question (perhaps the judge may have supplied the answer for him), Tim's experience clearly suggests not having sufficient knowledge of legal grounds can be a point of issue, even in a context where LiPs are told they do not need to have a legal education.

So, if LiPs *are* expected to acquire some legal expertise (and this does seem to be the case, either relating to technical skills such as questioning, or knowledge of the subject matter) then how do they go about it? Something that emerged very strongly from these interviewees is how disproportionately more difficult it was to obtain information for a LiP because legal knowledge is largely inaccessible to laypersons. As Eleanor puts it:

The average Joe in the street, even if they want to educate themselves and to find out more and to...you know, be the best litigant in person they can, it's stacked against them, because you simply do not have, you're not allowed access to the information because it's jealously guarded by the law firms and everybody else so you, you can't get access to it. Possibly the only way to do it would be to find a tame law student, and realistically, kind of hanging around on street corners asking everybody if they're a law student is not really my idea of a good way to spend my, you know, my free time.

As many interviewees described it, simply getting the basic legal information required was often difficult and required sympathetic assistance, or slightly devious methods. Neil resorted to sneaking into a law library:

Uh, the law library up at uh S--- university. [...] I don't know how I found it...to...to be honest I didn't ask because I really shouldn't have been in the law library, I sort of blagged my way in. Sort of waited while somebody swiped their card and then nipped in with them.

Other interviewees noted that accessing legal knowledge was becoming increasingly *more* difficult in the wake of digitalisation and austerity measures. Paul for example, used to access the *All England Law Reports* in his local library. However, more recently the library has been shut. As he says:

Um, no, well you see if you do on-, if you try and do online research, very often there's a, you have to pay a fee to, to access them. It may be online, but it's not accessible. It's not free, it's not like in the library you could go to the AELR, look at the index and find it you know, and pay for copies.

One of the more successful interviewees in accessing legal knowledge was Neil, and this was through relying on fairly unorthodox methods. As he says: 'In 1996, I was spending a lot of time in the pub, but that's where you could catch a barrister'. He explains:

I used to go in a pub in S---- in the town centre where barristers, it was just, just uh, a place called Paradise Square in S----, and there's all barristers chambers around there, down near the courts, so I made a point of going into a pub that I knew all these barristers, well a lot of barristers used to go in and I used to get, a bit of, you know, legal information off them, 'glass of red wine, Mr Barber?' 'Ah thank you Neil' [Neil imitates a comically posh accent]; What do you think of this then?<sup>532</sup>

Clearly then, LiPs are in a bit of a bind. They are meant to behave naturally, like legal professionals, but legal professionals do not behave naturally. LiPs should also not actually mimic legal professionals. However, LiPs are meant to be able to conduct questioning like lawyers do. They are also expected to have some legal knowledge even though this is far less accessible to them than it is to legal professionals. From the LiP perspective, then, it is very difficult to see how they should confidently prepare for their role and easy to see how they might get it wrong. This is, of course, what frequently happens. As Charles describes:

What I did was I, I did a lot of research at the library, at the law library actually at the Royal Courts of Justice, used all their books apart from I'd bought a lot of books of my own about representing yourself in court and that sort of stuff [...]

He goes on to note:

Um, that [questioning] was quite daunting, and I think the judge had to kind of assist me with that because, um, I, I, what I did was, because I had read all the books I was trying to [laughter] do it the way it said in the book, you know, um, use certain terms that they

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<sup>532</sup> This was clearly quite a useful strategy. As he says later in the same train of thought, 'I became aware, after talking to the barristers in the pub, of the limitation act, the 1980 limitation act that says you've got, uh, three years to bring a, to issue a writ with regard to personal injury cases'.

would use in the books or, or what, or what you see on TV where in fact it doesn't actually happen that way [laughter].

By following the advice Charles found in legal texts, he found himself at times behaving inappropriately, or resorting to what he had seen on TV, and was again reliant on a judge to assist him.<sup>533</sup> Charles's experience is not unique. Many interviewees similarly attempted to acquire legal expertise, only to find themselves being told they had misunderstood, were using the information incorrectly, and that they should not be attempting to navigate this kind of information. The result of this is, as above, that a number of LiPs feel that they are actively prevented from acquiring legal expertise. There are also a number of LiPs who feel that when they attempted to present their hard-won legal expertise, their information was not accepted through processes of conscious or unconscious discrimination. This, too, was a significant factor in undermining trust, and led a small proportion of LiPs to attribute conspiracist explanations to their different treatment.<sup>534</sup>

What is more likely to be the reason for LiP failures, however, is not a conspiracist judge so much as that their performance was deemed to be a kind of 'bad acting'; that LiPs had mistaken what legal expertise or behaviour was and that this is what was held against them. But what is important to note here, in the light of these findings, is that we cannot be surprised that LiPs make mistakes because their role is so inadequately defined. This poor conception of role means that *even repeated practice* will not assist LiPs. This is at odds with Marc Galanter's influential article, "Why the Haves Come Out Ahead" where he argues that laypersons in court proceedings are disadvantaged compared with legal professionals unless they are what he calls 'repeat players' or RPs.<sup>535</sup> In Galanter's thesis, individuals who are repeat players (such as defendants who have been on trial on multiple occasions will be able to acquire certain skills and knowledge that will assist him or her that is not available to 'one-shotters' (OS). However, what emerged from this study is that while it is certainly the case that some LiPs report *feeling* more confident in attending court through repeated practice, and there is a degree to which some may get better at conducting questioning, or knowing where to stand, for example, many instead seem to end up repeating what might best be understood as *bad acting*.

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<sup>533</sup> Charles is not alone in having had difficulties applying something he had read in practice. This problematic acquisition of legal expertise—where LiPs read up on a matter, or a point of law, or a technique, and then find difficulties in deploying it successfully, is of key importance when exploring issues of trust between LiPs and the legal profession. This is the subject of the next chapter.

<sup>534</sup> These conspiracist ideas and the circumstances under which they come about will be explored in the following chapter.

<sup>535</sup> Galanter, "Why the Haves Come Out Ahead."



Essentially, a LiP cannot really know what to do when they attend courtroom because a series of inconsistent expectations are placed upon them, failure at any of which can result in their being penalised, and because these performative accomplishments are misrecognised as easily acquired when they are not. Repeat player LiPs, then, often do badly with greater experience. This is because in their pursuit of attempting to acquire legal skills, which is not available to them, they instead rely on a form of mimicry. This takes the form of attempting to memorise and cite legal rules, particularly the CPR, or to adopt “formal” modes of address that may be incorrect. Most tellingly, such mimicry leads to a lot of paperwork. Watching the reliance of legal professionals on bundles leads LiPs to develop their own extensive bundles of paper, but this is mistaking what the file is and does. Thomas Scheffer argues that the case file brings together the ‘organised memory’ of the case. As he puts it: ‘The circulation of case-information relies on the file’s completeness. Everything that enters the file is supposed to remain in it. As a result, it swells with each file-work session. The file as archive does not forget.’<sup>536</sup> As Scheffer argues, however, the file constitutes a locus of specialised knowledge and activity: knowing how to use the file, access the file, and so on, relies on a specific legal skill set. LiPs, who do not understand how a bundle is used, only see the materiality of the file: an ever-growing bundle of paper and they therefore accumulate this, mistaking the ‘materiality’ of the paper for the ‘materiality’ of what it is to be a legal professional.<sup>537</sup>

This means that each repeat LiP will develop a peculiar ‘LiP’ skillset which appears on the surface to have traces of legal professional, but is in fact a product of inaccessibility of knowledge, inconsistency of performative demands and lack of understanding of the embodied skills of legal professionals. While all LiPs will not behave alike, it is likely such individuals will generate a lot of paperwork, cite legal rules extensively and struggle to understand why this way of behaving is ineffective. It is therefore a role of failure. However, I would argue that this is simply because there is arguably no clearly defined way to be a good LiP. Indeed, this study seems to suggest that for LiPs, what is appropriate or inappropriate for a LiP is instead largely a discretionary matter for the judge. Take Neil’s epigraph at the opening of this chapter. Neil describes positive experiences because he and the judge clearly got along rather well. He is clearly not behaving “normally” in the sense that, as he himself puts it, he is acting like *Rumpole of the Bailey*. But the judge is willing to listen to him and indulge him, and finds him sufficiently personable or interesting.<sup>538</sup> This seems, in fact, to be Neil’s technique

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<sup>536</sup> Thomas Scheffer, “Materialities of Legal Proceedings,” *International Journal for the Semiotics of Law*, 17(2004): 32-33.

<sup>537</sup> And this leads to the ‘plastic-bag wielding’ image of LiPs. Neil himself relates carrying his large bundle of papers in a hessian bag marked “Fit as a Butcher’s Dog” on the side.

<sup>538</sup> As Neil tells it, after these proceedings where he threatens to put on the reggae, Justice Eady’s clerk approached him after court to tell him that this was one of the most entertaining days at work Justice Eady had ever had and the clerk gave him the courtroom notice as a memento.

throughout his court proceedings; to deliberately distinguish himself from legal practitioners to signify his difference and his (social meaning of the word) normality:

He [the opposing solicitor] got up and did his little bow, and it was in the district registry. It was in, just like an office really, with a great big desk and we were sat on these little desks up here, and uh, district, oh, mister, Judge H---, he said 'very nice meeting you Mr -'. And I walked around the table and I said 'very nice meeting you as well sir, thank you very much', I reached over to shake his hand and as he is shaking my hand, he says to me, I would be very interested to see how this progresses' so I said oh, well, do you want me to keep you informed? He said 'I'd appreciate that yes. Thank you Mr Heathcote'. And this uh solicitor for the hospital or whatever he was [...] he's saying 'You can't do that! I said 'What?'. He said 'Shake the judge's hand'. I said 'I just have done'. But yes, but 'You can't do that'. It's like, 'I've done it, you know, you were there, you saw me'. 'Yes, but you can't do it'. Maybe you can't do it, but I'm doing it out of respect. You can't do it because you're scared of him.

But the success of this strategy is dependent on a judge deciding that this form of behaviour is charming rather than offensive, or inappropriate. And different judges will behave in different ways. Take this piece of advice from the RCJ Advice Guide again:

People often think that the Judge will run the hearing; that the Judge will ask the other party questions, give them a hard time or unpick the evidence to get at the truth. This is not what happens. If it is your claim, you have to take the lead. Judges vary in how they start a trial. The Judge may invite you to speak, or not. They may just expect you to stand up and start. If you are not sure what to do, just stand up and say something like, 'Would you like me to start now?'<sup>539</sup>

So where does this leave LiPs? While it is a positive indicator that judges are encouraged to intervene and assist LiPs, it is troubling that LiPs are so dependent upon them for a positive reception.<sup>540</sup> Finally, to return to where we started, this very short analysis of the disadvantages for LiPs in role play doesn't even consider the question of intimidation, or high stakes, and how they may impact on a LiPs ability to perform. As Talia puts it: 'I'm one of those people who is much better on paper than on my two feet, especially when I'm petrified and someone is trying to take away my home'. There is no doubt, then, that the inadequately conceptualised role of the LiP is a significant source of disadvantage for LiPs and that it is

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<sup>539</sup> CAB, *Going to Court*, 6.

<sup>540</sup> It is also burdensome for the judge, as Genn and Genn point out, noting that in tribunals, lack of legal representation means the judge's task is significantly more difficult. See *Representation at Tribunals*.

currently insufficiently addressed by those involved in legal proceedings and those attempting to assist LiPs.

## THE GATEKEEPERS

Throughout its history many defendants, if not most, never actually attended the court, or at least got no further than the court office, but their perceptions of the legal system in its civil garb will certainly have been influenced, and perhaps shaped or reshaped, by that experience<sup>541</sup>

In the above two sections of the chapter, I have spent some time elaborating on the significant disadvantages for LiPs that arise from the conceptual gap between lay and law and how it is played out in the skills gaps between layperson LiPs and legal professionals. However, in the final section of the chapter, I want to briefly consider something quite different: the disadvantage that can result for LiPs from individuals or processes that mediate between them and the courts. As I outlined in the introduction, these “gatekeepers” involve individuals who work at the courts, or at central processing organisations, and other various individuals involved in administrative or managerial roles. The key distinguisher for these ‘gatekeepers’ is that they are *not* legal professionals, however they can have a significant impact on LiPs because LiPs are frequently dependent on their goodwill or assistance to progress their claim or defence.<sup>542</sup>

To begin with, it has long been recognised that the systems of communications in courts are generally poor. In the Lord Chief Justice’s Report of 2015, Lord Thomas noted that:

Although in common with many other European states the number of court buildings has been reduced through closure, the failure to invest has meant that many of the courtrooms have not been modernised and lack modern means of communication to provide for better access to justice.

He went on to point out that:

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<sup>541</sup> Patrick Polden, *History of the County Court*, 1.

<sup>542</sup> Before going any further, I want to emphasise again that this argument is not about questioning gatekeeper behaviour, but rather an analysis of the current gatekeeper role as representative of shifts in policies due to austerity measures imposed on the courts.

Outdated IT systems severely impede the delivery of justice. For example, the reforms to civil justice which were intended to implement the report of Lord Woolf were introduced in April 1999 only on the promise of modern IT; none was ever provided.<sup>543</sup>

Many of the proposed changes that Lord Woolf outlined on streamlining access to justice were dependent on the development and adoption of more sophisticated IT systems to support individuals navigating legal proceedings.<sup>544</sup> This was particularly directed at assisting LiPs. As Applebey points out, the idea was that ‘Litigants in person would be assisted by access to video instruction films, computer access points and information kiosks, as envisaged by Lord Woolf in his report’.<sup>545</sup> But this was never achieved and the courts remain woefully behind over twenty years after Lord Woolf’s recommendations.

The point I want to make here is that poor IT and communication issues disproportionately affect LiPs. We saw in the previous chapter the experience of Trevor in having his claim lost twice by the Northampton Central Claims Processing Centre. Such an event is far from surprising in a context where a single, outsourced service is meant to process *all* claims. But the point is that the effect it had was considerably more severe for Trevor because he is a LiP. Because Trevor is not a lawyer, he did not recognise the potential consequences nor was he able to intervene until after harm had been done and the bailiffs had been to his door. This is in tandem with Marie’s point outlined in the last chapter; that problems and errors can be dealt with more directly by legal professionals because they can bypass the administrative processes and go directly to their colleagues, through personal contacts or emails, whereas LiPs must go ‘round the houses’.

The second crucial issue to consider is what is currently happening in HMCTS. Simply going ‘round the houses’ for LiPs involves attempting to access what is an enormously oversubscribed service. The courts post-LASPO are facing considerable challenges. The MOJ has cut £157m from its budget over the period of 2010/11 to 2015/6. Achieving these savings has involved cutting 22% of staff overall. In addition, there are targets of an additional 15%

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<sup>543</sup> Judiciary of England and Wales, *The Lord Chief Justice’s Report* (Judicial Office: London, 2015). Available online at [https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj\\_report\\_2015-final.pdf](https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf) (accessed 3 November 2016).

<sup>544</sup> For an interesting overview of the developments of technology in *criminal* proceedings, the work of Emma Rowden explores how inconsistent availability of technology, variation in quality and lack of sufficient thought into consequences can lead to unfair outcomes for defendants. See Emma Rowden, ‘Virtual Courts and Putting ‘Summary’ back into ‘Summary Justice’: Merely Brief, or Unjust?’ in *Architecture and Justice: Judicial Meanings in the Public Realm* (Ashgate: London, 2013).

<sup>545</sup> George Applebey, ‘Justice without lawyers? Litigants in person in the English civil courts,’ *Holdsworth Law Review* 109 (1997): 123.

saving and a projected halving of the administrative budget by 2020.<sup>546</sup> This is coupled with the closure of 142 courts so far, with another 86 scheduled to shut.<sup>547</sup> These austerity measures have led to a dramatic decline in service quality. This is something explicitly drawn attention to by court staff themselves in the Trade Union Congress's latest publication, *Justice Denied: Impacts of the Government's Reform of Legal Aid and Courts on Access to Justice* published in October 2016, which drew on interviews with 141 staff members from HMCTS.<sup>548</sup> The report found that: 'the majority of respondents (90 per cent) viewed budget cuts to court services and the Crown Prosecution Service as being detrimental to the effective delivery of justice and this in turn was seen as diminishing access to justice'.<sup>549</sup> In addition the report noted that:

More than half of those surveyed (57 per cent) feel that their workloads have increased since 2010, and in many cases this was attributed to cuts to staffing combined with an increase in the volume in their work areas[...]. Changes to staffing and workloads over the last two to three years have resulted in, for example: the loss of experienced and permanent staff and an increase in the use of agency and temporary workers or staff on fixed-term contracts; an increase in stress, pressure and unpaid work; and an increase in errors, with quality of work affected.<sup>550</sup>

A single email address serves as a communication point for all matters relating to each County Court; the LiPs are therefore reliant on someone responding to them in good time, which frequently doesn't happen, due to a combination of poor IT systems and understaffing.<sup>551</sup> In addition, staffing cuts have had an impact on how able LiPs are to get any assistance. Trevor commented, when in the midst of attempting to get the court decision stayed:

I, I felt sorry for the lady in um, B---- because, you know, it's literally just one lady behind a window. There's, there was obviously more people at one stage, because there was lots of windows but there was only this one person and it is, it was all a bit, she can't give you any information or doesn't know anything [...].

Trevor is sympathetic towards this individual but his extract also notes that this is a new development; there used to be more windows, and more people to help you and budget cuts have led to fewer staff. In addition, the woman who is at the window is not equipped to

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<sup>546</sup> M Fouzder, "There was no money: MOJ called in consultants to help control spending," *Law Society Gazette*, 19 October 2016.

<sup>547</sup> This figure includes all HMCTS, and is not restricted to only civil courts. See Ministry of Justice, *Proposal on the Provision of Court and Tribunal Estate in England and Wales*, July 2015. The consultation ran from July to October 2015, 5.

<sup>548</sup> Trade Union Congress [TUC], *Justice Denied* (London: TUC, 2016).

<sup>549</sup> TUC, *Justice Denied*, 5.

<sup>550</sup> *Ibid.*, 5.

<sup>551</sup> *Ibid.*, 6.

respond to the questions. For Trevor, obtaining help or assistance to clarify what to do next is the prime requirement of being a LiP:

Who can you speak to? Is there someone? Do they provide some sort of back up, even if it's just a, even if it's just a website, you know, is there a website you can go to that you can, you know, ask a question and get some sort of answer.....you know, I mean I know you can be, the problem with that could be is that it gets completely jammed and everyone is asking legal questions to a, you know, a young eighteen year old who is just there for his Saturday job [laughs].

What is interesting here is that Trevor clearly assumes that the individuals who are assisting LiPs are not people who will have the requisite experience or expertise, instead they are increasingly likely to be 'eighteen year olds' on a 'Saturday job'.<sup>552</sup> The implication is that increasing responsibility in the context of rising numbers of LiPs is being put on the shoulders of those who are not insufficiently trained and inadequately compensated. Many individuals who work at the court therefore *cannot* help a LiP, either because they don't know how, or because it is beyond their job description.<sup>553</sup>

While many of the measures imposed on the courts have an austerity rationale, that of saving money in the face of enormous budget cuts, the results are an increasing inaccessibility of services and assistance for LiPs. It is hard to reconcile this with the concept of 'access to justice', something Lord Thomas himself draws attention to when criticizing the rise in court fees and LiPs.<sup>554</sup> The point I want to make here is that while these measures might be posited as unfair or unfortunate, there is arguably an ideological shift being undertaken through such policy initiatives. The reduction of face-to-face assistance, the move to central processing of claims and the closure of windows, the rise in court fees and many other related measures also all serve to minimise or deflect any accountability government policy may have towards impeding access to justice for LiPs. If a LiP does not receive an answer to an email, there is no one to whom he or she can appeal or complain. If the single staff member at the window has too long a queue, then a LiP may not be able to get an answer in time to respond to a claim. If the court fees rise substantially in tandem with a cutting of legal aid, many LiPs will not make it to court at all. But all of these patterns of experience and decision making cannot be directly attributed to any individual or institution's specific failing; instead they will be attributed, if at all, to the failure of the LiP to sufficiently 'work' with the system. The systems being put in place that cause difficulties for LiPs aren't perhaps simply unfortunate; they are an indirect but

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<sup>552</sup> This is supported by staffing changes at HMCTS. Ibid, 16.

<sup>553</sup> Ibid, 19, 27.

<sup>554</sup> Judicial Office, *Lord Chief Justice's Report*.

arguably useful means of reducing certain kinds of court users while also reducing any accountability for lack of access to justice.<sup>555</sup>

Trevor outlines the collision between austerity and fairness explicitly reflecting on his own experience:

Because what I mean is, if a thing is, by its nature going to be inefficient, if you, if what the law is about is getting to the truth, if that's what it's about, it's about giving people the hon-, the honest, as close to the truth as you can get about stuff, um, then it's gonna take, you've got to give that thing time, it can't be done quickly. If you're trying to make it quickly at some, somewhere down the line someone's going to lose out, something's gonna get missed because you're doing it quickly and if it can't be done quickly, then it can't be done quickly. There's no point in trying to make something into something that it's not, that's my point. Is that, if that's the case, that there is efficiency is going to have to be, you can either be efficient or you can be correct, then which, it depends which way you're going to go, whether you want to be correct or you want to be efficient, and then if you want to be correct then obviously you're going to have to put the money in to make sure that you can be correct, you can't, you can't have both, I don't think, I'm not an expert. It seems to me you're trying to save money in something that, where actually, you can't really save a lot of money. All you can do is make things less fair, less right, and then you save money but then you don't get the right result. So, that's what I think about the court system from my experience.

To follow Trevor's line of thinking then, cost cutting measures clearly result in disproportionately unfair experiences and encounters for LiPs. But beyond this, we can argue what is increasingly being put into place through government policy initiatives is a court system where saving money is the key motivator; and, most importantly, that the implementation of this savings policy is done through decreasing human contact, or recourse to assistance, even if this was not the primary or conscious aim. By achieving savings through outsourcing, or decreasing of workplace skills, one can also neuter the possibility of any complaints that may arise: the courts remain theoretically open, but are increasingly impenetrable, expensive and inconsistent. It is no wonder, then, that LiPs find navigating legal proceedings so challenging. Firstly, LiPs are excluded from procedures through a lack of understanding of legal language and behaviour, secondly, their own role is not conceptualised clearly and finally, crucially, LiPs are operating in a system that was never designed for them and that, increasingly, favours privatisation and outsourcing that serves to disadvantage them further but for which there is very limited accountability when things go wrong.

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<sup>555</sup> Fouzder, "There was no money."

## CONCLUSION

In summary, then, the question I asked at the beginning of the chapter perhaps needs to be changed. Instead of asking why is it harder for LiPs to go to law, perhaps we should be asking, how is it even possible for LiPs to go to law successfully? And if it isn't possible, is it their fault? To begin with, as this chapter has illustrated, LiPs face significant difficulties in communication and comprehension. They frequently feel not listened to. But such gaps in communication and comprehension speak to the preservation of the necessary gap between the law as a professional field and the layperson. Such a gap is not accidental. In addition, no matter how hard they try, LiPs are unable to improve, with success being an exception, not the rule. But as I have argued here, this is because there is no such thing as a good LiP: to be a LiP is, by its very definition, to fail. There is simply no way for LiPs to do well. In addition, the current policies in place, such as a lack of legal aid, rising court fees, and minimal assistance, clearly serve to discourage LiPs presence as much as possible through indirect means, if not actively direct ones.

It seems, perhaps, that LiPs are simply not wanted. Or, to rephrase this in a more nuanced way, LiPs are not significant enough players to warrant further assistance or attention in a belt-tightening environment. However, it should come as no surprise that LiPs themselves *feel* unwanted. And it is this idea that leads to the concerns of the final chapter: that of conspiracy. In this chapter I will examine how the cumulative, largely negative experiences LiPs have can come to affect their beliefs about lawyers, about the legal system, and about justice. As I will show, this erosion of trust in the legal system leads some LiPs to entertain conspiracist theories. But while the conspiracist conclusions LiPs may reach may be ill-conceived or disproportionate (and, at times, offensive), I argue that to dismiss these individuals as simple cranks overlooks two essential tenets of conspiracy theories that pertain to LiP experiences in the civil justice system: firstly, Bad Things certainly happen to good LiPs and secondly, 'even paranoids have real enemies'.<sup>556</sup>

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<sup>556</sup> Of course by 'enemy' I am not setting up a simplistic analysis of the courts actively persecuting LiPs, however, as I hope to show in the following chapter, the combined lack of assistance for LiPs and the generally hostile attitude of legal practitioners to LiPs amounts to what can be considered at the very least a limited tolerance towards LiPs moving towards active animosity. Ronald Inglehart, "Extremist Political Positions and Perceptions of Conspiracy: Even Paranoids have Real Enemies" in *Changing Conceptions of Conspiracy*, Graumann, C.F. and Moscovici, S, eds. (London: Springer-Verlag, 1987), 231.



## CONSPIRACY!:

## OR, WHEN BAD THINGS HAPPEN TO GOOD LIPS.

It was very, very, very distressing because, um, they had, um, they had a barrister supplied by, um, the Solicitor's Indemnity Fund and, um, even though I think I held my own very well, well obviously I did because I won the case, so I-I did very, very well considering that I was, I was a complete amateur but um, I think because of, um, the masons and all that sort of stuff, masonic lodges and all these people knowing each other, it would be very embarrassing for a solicitor to um, the thing is if I had won, it would have been in the press, and it would have been very embarrassing for them and they didn't want that so that's how they cover up to keep litigants in person down to make sure that, um, you don't rock the boat.

Charles

Yeah there's the odd case where, um, suddenly somebody is selected, probably a freemason, to win a landmark case, yeah? Erm, like that actress who got um, similar to an MRSA claim, um, can't remember what her name was but she got *huge* compensation for something very similar to me, um, uh what was it she had, what was her name, uh, quite a famous actress but anyway she had something similar to me, but oh! It's all over the newspapers. Is it Leslie Ash? Leslie Ash, I think so. All over the papers. I thought oh yeah, she's probably a freemason. They've selected her to give her some compensation. Uh, lots of publicity to try and persuade the general public that the courts are giving people compensation whereas in reality the only people that get compensation is a very small, selected few.

Anna

I know it sounds like I'm a conspiracy theorist but I can assure you I am not.

Georgina

## INTRODUCTION

How do some LiPs come to be conspiracists? The majority of LiPs, of course, probably don't become conspiracy minded.<sup>557</sup> There is also no evidence that LiPs are any more likely than anyone else in legal proceedings to *be* conspiracists, only, perhaps, that it tends to be more obvious when they are.<sup>558</sup> But there is no doubt that in this study, as has been identified before, there continue to be individuals who have conspiracist explanations for difficulties or failures they experience throughout their legal proceedings (and, sometimes, elsewhere).<sup>559</sup> But while it is known that some LiPs hold eccentric beliefs, there has been little attempt to understand how and why LiPs may come to acquire, or articulate these beliefs.<sup>560</sup> This is presumably at least partly because it is easier to dismiss such individuals as “cranks” or “nutters”. Alternatively, because such individuals form so small a percentage of LiPs, too much attention placed on them risks misrepresenting other LiPs.<sup>561</sup> Regardless of which objection one subscribes to, though, both tend to share the presumption that such cases involve pathological individuals who happen to be involved in legal proceedings; in other words, the fact that they are LiPs is less, or not at all, relevant. In this chapter, I take a different approach by seeking to understand how conspiracist beliefs may be connected *to* experiences of becoming, and acting, as LiPs. In other words, I argue that conspiracist behaviours and beliefs are affected, reproduced and even created *by* contact with legal proceedings.

Up until this point, this thesis has argued that legal proceedings can have a significant and negative impact on LiPs. What this chapter seeks to trace is the degree to which these kinds of negative encounters with legal proceedings affect LiP beliefs about the law, lawyers and the courts. I argue here that LiPs uniformly *feel* unwanted by the courts. But this is not because they are fundamentally needy or pathological individuals. It is because they experience differential treatment. While this treatment is symptomatic of structural inequality, and not

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<sup>557</sup> It is important to note that in this chapter I am making a distinction between conspiracist minded LiPs and vexatious litigants. At the moment, the only attention paid to more obsessive LiPs in research tends to absorb them all into the ‘vexatious’ category. This may be because other studies have not been able to identify conspiracist individuals prior to, or separately from, their declaration *as* vexatious litigants.

<sup>558</sup> As I will demonstrate, LiPs in this study who did entertain conspiracist ideas often freely expressed them in the courtroom itself. The possibility remains that represented individuals who may hold similar beliefs were prevented from doing the same by their legal representative.

<sup>559</sup> Fewer still will become declared vexatious litigants or have civil restraint orders taken out against them, and people who are declared vexatious litigants may not themselves be conspiracists.

<sup>560</sup> The important exception to this is the work of Didi Herman whose article on “Hopeless Cases” considers how and why declared vexatious litigants keep obsessively pursuing ideas of justice. Similar research has been undertaken by Monica Taylor in Australia as well. However, both pieces of work focus on vexatious litigants only, whereas this research looks at a broader group of LiPs.

<sup>561</sup> This is an argument I myself have already advanced in the beginning of this thesis.

necessarily of overt or conscious discrimination, what LiPs themselves perceive is that they are deliberately and systematically excluded from access to justice *by the actions of the legal profession*. Negative encounters with the law lead many LiPs to become critics of a legal system they feel fails to adequately perform and leads beyond this, for some, to the development or elaboration of conspiracist ideas to explain the failures they experience.

I begin this chapter by introducing the conspiracy theories that were brought up by interviewees in this study. I then draw on conspiracy theory literature to understand these ideas, arguing that conspiracies are better understood not as the product of individual pathology, but are rather rooted in social and collective experience. Applying these ideas to the situation of the LiP, I then look at how and why conspiracist beliefs arise and the context in which this takes place for these individuals. I go on to argue that while the malign authority conspiracists may invoke to explain their experiences is fictive, what leads to these beliefs—a perception of deliberately unfair treatment—is rooted in genuine and systematic experiences of exclusion, and these exclusions happen to *all* LiPs to differing extents in the civil justice system. Legal professionals have colonised the legal system, and thus LiPs are always treated as exceptions to the norm. There is no specific role for LiPs and so LiPs lack guidance as to how to do well. Legal information is largely inaccessible to laypersons. LiPs aren't recognised, or treated, as equal participants in legal proceedings. Most importantly, what LiPs may want or value is rendered almost impossible to translate into the policy and practice of the civil justice system in which they seek to pursue or defend their claim. So, then, is it any wonder that LiPs feel paranoid? As I conclude, if some LiPs are “crazy”, we ought to consider the possibility that going to law has made them this way.

## CONSPIRACY!

Talia, fighting a possession claim on her property, has long suspected that in order to win their case against her, her freeholder and the bank who hold her mortgage are in league together, and have resorted to ‘faking’ court documentation. As she expresses it:

The claims production centre, they have to ensure that you cannot substitute, um, a genuine template with a fake template. Because I work in IT I know how easy that is...most people wouldn't occur to them that that's what they'd done. And when I, when I looked at this order I'd been served I didn't notice straightaway that it was fake and then I had a closer look and then I realised that the note to defence to the defendant was the wrong one and was of a different form and then I started looking harder and noticed there

was no copyright notice and then I knew I was on to something and I went on the web and tried to find a genuine N31 and I could only find one. One, on the web. It's not on the um, it's not one of the forms that you can download on the ...court service website. I just found one that had been produced by Sweet & Maxwell some years ago and left on the web....if I hadn't found that, I couldn't have done what I've done so far which is prove to the, um, chief executive's office of the Court Service what had happened and...when the police get back to me I'll be able to prove to them that this is what has happened.

For Talia, her belief that court documents are being "faked" is attributable to the lengths her opposition will go to to try and win. As she notes:

All I could do was defend my interests and my, really vigorously, defend my position and let the cards fall as they would after that but I could never have foresawn, foreseen the fake court forms, I mean there just seems to be no e-....there seems to be no limit to what this claimant can do to subvert all stages of the, um, legal process.

Talia's belief that the court documents are fake has led her to refuse to accept the legitimacy of other documents she received in the belief that they are also fake. Talia's belief that there are counterfeited court documents in circulation, deliberately employed to trick LiPs, is shared by other interviewees, some of whom believe something even more elaborate and sinister. For example, Georgina not only believes documents issued by the courts are fake, she believes the courts themselves are 'fake'. As she expresses it:

I believe we've got a situation where we've got shadow banks contracting with shadow courts who are contracting, you know, with privately hired judges. Shadow means privately hired, paid for, commercial courts, administrative courts, they're not using due process, they're ignoring the law, they're even ignoring their own CPR rules and it's a dire state of affairs. They're not fit for purpose, it's a rigged game, there's no level playing field and, and woe betide anybody who goes in there.

For Georgina, there is a parallel system of 'shadow courts' in operation that is entirely self-serving; ignoring the rules and exploiting the less powerful.

For Russell, the picture is slightly different. Russell also believes that courts produce fake documents. Unlike Georgina, though, he does not refer to fake courts.<sup>562</sup> Instead, for Russell, the courts are real enough, but the decisions in these courts are made on the basis of

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<sup>562</sup> Which does not necessarily mean that Russell isn't a believer in a 'shadow conspiracy', however he was not explicit in saying so.

influential, shadowy figures having their objectives rubberstamped by those they are in league with; namely, it's a masonic conspiracy. For Russell the courts are riddled with Freemason influence. Russell describes how this influence might manifest in court:

[a] freemason, if he is in difficulties, say in a court, and you see it in a court, they go up like that, I just don't know what to do your Honour, so he's saying (finger signals) I'm a widow's son, see that's a fraud, you see, passing themselves off as something they're not. Yeah, they do all sorts of other tricks like you know, turn their head away and that means it stinks, this case stinks. Um, various things they can do.

Russell believes that fundamental to this masonic conspiracy is the idea that masons help one another, over the interests of anyone else. This belief means that there does not need to be a prior plot to undermine a specific LiP; a mason need only 'signal' to communicate his desired outcome and other masons will accommodate him, thus disadvantaging others in the courtroom. This suggests a very wide-reaching, and elaborate, conspiracy of all masons against other non-masons, in keeping with general conspiracist beliefs about Freemasons.<sup>563</sup> Georgina also believes in this wide ranging masonic conspiracy, noting it is one of the 'cults' infiltrating the justice system:

there's a lot of Machivalean [sic] cults like Freemasonry for example, I know that a lot of the things they do, they swear allegiance to each other, um, uh, even above their own families and to me that's highly dangerous, I know an awful lot of the bad things that are happening are in, through, you know they're in the same lodge, for example members of the police force, members of the legal profession, even judges. I've seen judges shaking like a leaf in terror, probably because they've been threatened if they go against the agenda.

For Georgina the conspiracy of masons is so strong that even individual judges are unable to act freely.<sup>564</sup> Charles and Anna, too, cite the perceived influence of the masons on the courts in

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<sup>563</sup> I will go into more detail about masonic conspiracy theories later in the chapter, however it is worth mentioning here that Freemason conspiracy theories were prominent enough in the UK in the 1980s to lead to a parliamentary enquiry. See: Home Affairs Select Committee, *Freemasonry in the Police and Judiciary*, Third Report from the Home Affairs Committee (House of Commons: London, 1996-97), 192. They're not exactly extinct now either, with Lord Berekeley submitting the following question in March 2016: 'To ask Her Majesty's Government, in the light of reports of collusion within the police forces and other agencies after the Hillsborough disaster, whether they will introduce legislation to prevent serving members of the police force and the judiciary from belonging to the freemasons.' HL1687, 9 May 2016, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-05-03/HL8167/>

<sup>564</sup> When asked to provide a percentage of judges they believed to be masons, neither Paul nor Georgina was able to put a figure on it, however, Russell estimated that it affected almost *all* judges: basing his estimate on a percentage of masons in a small area, he suggested: 'Take that number and extrapolate over all the judges in the UK. And you find out that virtually 100% of judges are freemasons'.

the epigraphs that open this chapter.<sup>565</sup> While Charles's claim is quite vague, citing a general masonic 'influence', Anna is quite explicit about the control masons have over the courts, illustrated by their ability to 'choose' to 'reward' a fellow mason to illustrate [falsely] that sometimes ordinary litigants can succeed.

The masonic conspiracy mentioned by interviewees is also coupled with a strong anti-Semitic element, where alongside the masonic influence, there is alleged to be a "Jewish" influence on the courts. Anna says, for example:

What I did, uh, I know that in these scandals in M---, I mean, a lot of the scandals in the country, the, the, um, I mean, like Shipman's obviously a Jewish freemason scandal, but certainly there are, a number of Jewish people involved in my scand-, both my scandals. Um the medical one in particular, um, so I thought, um because, because of the Jewish influence that um I needed a decent Jewish judge to stand up for what is right because you know, because I'm aware there's, that there is some thoroughly decent Jewish people who have got great family values but I'm also aware from personal experience and what my mother has told me that there are others who will do anything for money, um, and so I thought, this is an opportunity for him to stand up for the decent ones, yeah?

Georgina, too, makes claims about 'money Jews', and Russell also makes multiple anti-Semitic references to Zionism, and the 'world citizenry' of the Jews.<sup>566</sup> However, as Bernard Levin points out:

Freemasonry hysteria [. . .] is paralleled to the same principles as those of anti-Semitism, and indeed it has often been to a very considerable extent a stalking-horse for the more ancient vileness. It could hardly be otherwise; attacks on suspect Jewry have almost always been inextricably entwined with anti-freemasonry. Hitler lumped them together without distinction of any kind. <sup>567</sup>

It is certainly the case in this study that claims about Freemasons heavily overlap with anti-Semitic traditions, including assertions about control over the judiciary, banking and other areas.<sup>568</sup> For the purposes of this chapter, therefore, I am largely combining Freemason and

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<sup>565</sup> In addition, Paul also mentions the masons, albeit only once, when referring to the earliest dispute he remembers his family being involved in:

<sup>566</sup> Russell says: 'And of course the Jews believe in the bible that, that they are citizens of the world, the world is theirs, that is what they're striving for'.

<sup>567</sup> Bernard Levin, *The Times*, 30 November 1976.

<sup>568</sup> For an overview of some of the clichéd orthodoxies of anti-Semitism, a good starting point is Frank Felsenstein, *Anti-Semitic Stereotypes: A Paradigm of Otherness in English Popular Culture, 1660-1830* (Johns Hopkins University Press: Baltimore and London, 1995).

anti-Semitic conspiracy since it is arguable the language and attitudes of masonic conspiracy draws heavily on older anti-Semitic conspiracies if not always explicitly anti-Semitic in itself.<sup>569</sup> Finally, a common theme emerging across all of these conspiracies is the accusation of ‘corruption’ in the courts. As Georgina puts it: ‘I’m actually pretty angry with the whole, uh, justice system in Britain I think it stinks, um, you know, I, I, I, I can’t bear the corruption’. Charles says: ‘I just feel that, I’ve got no confidence in the system, I think they’re totally corrupt’.

So, what are we to make of these conspiracy theories? Offensive, yes. Anti-Semitic, very. Crazy: well, *yes*. It is hardly difficult to argue that LiPs who come to court and express these kinds of beliefs should be considered difficult, or vexatious or, frankly, “nuts”.<sup>570</sup> It is also hard to imagine how any engagement with these ideas doesn’t risk suggesting a sympathy that is unpalatable in the face of the hateful nature of some of these beliefs. But in this thesis I set out to engage with LiP perspectives; to understand how *they* understood their own experiences. And this is the challenge of this chapter: to find a way of approaching these accounts that might be useful, and able to tell us something about LiPs and their experiences. What can we *do* with these stories?

## CONSPIRACY THEORY: A SHORT HISTORY

Conspiracy theory has been an object of academic attention for a relatively short period of time; with the earliest research being in the discipline of psychology in the 1960s<sup>571</sup>, and the vast majority not emerging until the last twenty years, symptomatic of what political theorists Michael Butter and Peter Knight argue is evidence that conspiracy theory was considered (no irony intended) as a ‘fringe’ concern.<sup>572</sup> Today, however, conspiracy theory has gone mainstream, and research in the area is flourishing, prompted by an unprecedented context in which ‘fringe’ conspiracy theories are routinely deployed by world leaders and where the

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<sup>569</sup> It is important to note here that while Charles mentions the ‘masons’ in a quite off-hand way, he at no times says anything anti-Semitic at all, nor is there any indication he holds any such prejudices. As I will consider in more detail later, his conspiracist beliefs are much less developed than the other four interviewees routinely drawn on in this chapter who do routinely express anti-Semitic beliefs both connected to, and separate from, masonic conspiracy theories.

<sup>570</sup> I have argued earlier that ‘vexatious’ theoretically pertains to the proceedings, not necessarily the conduct of an individual, but it is easy to see how a LiP making claims in court about masonic conspiracies undermines or obscures any validity there might be *to* the proceedings they have brought or are defending.

<sup>571</sup> R Hofstadter, “The Paranoid Style In American Politics,” *The Paranoid Style in American Politics and Other Essays* (Harvard University Press: Cambridge, 1964).

<sup>572</sup> Michael Butter and Peter Knight, “Bridging the Great Divide: Conspiracy Theory Research for the 21st Century,” *Diogenes* 2016.

internet has enabled the dissemination and repetition of conspiracies in public discourse.<sup>573</sup> Butter and Knight, in an article considering the history of research into conspiracy theories, argue that two clear approaches to understanding conspiracy have emerged in academia. The first, most dominant, and the oldest, is rooted in the discipline of psychology. This approach thinks about conspiracism as a form of *pathology*. In this way of thinking, conspiracist theories are signs of conspiracist ideation and, concomitantly, a conspiracist mentality. As they explain it:

Early researchers in the field tended to take for granted that conspiracy theories are held by distinctive kinds of people with identifiable and flawed psychological characteristics: conspiracy theorists. Instead of investigating the structural, historical and cultural features of conspiracy theories, much work in psychology has sought to profile believers, and enumerate the personality and cognitive factors involved in what is usually termed – in a phrase that evokes an unwarranted level of diagnostic precision – ‘conspiracy ideation’.<sup>574</sup>

The focus in psychology studies of conspiracy is firmly trained on the individual and seeks to explain that individual’s maladjustment; why such a person might be prone to fringe beliefs or delusional ideas. While there is no literature specifically on conspiracy theory and LiPs (indeed, there is no literature directly focused on conspiracy theories and the law at all), there is a body of law-and-psychology, and law-and-psychiatry, literature that attempts to explain ‘obsessive’ LiPs.<sup>575</sup> Such literature supports Butter and Knight’s claim that identifying pathology is the most common approach to understanding unusual behaviours or beliefs.<sup>576</sup> These kinds of analyses of LiPs focus on obsessive litigation as an identifying pathological behaviour, often termed “querulousness” or “querulous behaviour”. Mullen and Lester, for example, in their study of ‘unusually persistent complainants’ argue querulousness can best be understood as:

a constellation of behaviours and attitudes, which may, or may not, arise secondary to a major mental disorder, such as schizophrenia, and may, or may not, be characterised by delusional phenomena. What primarily defines the concept, we believe, is a disorder of

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<sup>573</sup> Kurt Anderson, “How America Lost its Mind”, *Atlantic Monthly*, September 2017; Paul Rosenberg, “Conspiracy Theory’s Big Comeback: Deep Paranoia Runs Free in the Age of Donald Trump,” *Salon*, 1 January 2017.

<sup>574</sup> Butter and Knight, “Bridging the Great Divide,” 4.

<sup>575</sup> The slippage in terminology that I have earlier argued causes confusion arises again here, with work in this area shifting between ‘obsessive’, ‘vexatious’, ‘difficult’, and ‘querulent’ litigants, who are usually self-represented but not always explicitly defined as such. See Ian Freckleton, *Vexatious Litigants: A Report on Consultation with Court and VCAT Staff* (Victorian Parliament: Melbourne, 2015), 22.

<sup>576</sup> See, for example, Paul Mullen and Grant Lester, “Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour,” *Behavioural Science and the Law* 24 (2006); Ian Freckleton, “Querulent Paranoia and the Vexatious Complainant,” *International Journal of Law and Psychiatry* 11 (1988).



behaviour, and, like any pattern of behaviour, the routes to its emergence and the factors that enable and sustain it can be many and varied. Pathology in this conceptualisation does not lie exclusively in the subjects' mental state but in their behaviour and its impact on themselves and others.<sup>577</sup>

This focus on the pathology of individuals pursuing multiple complaints is also evidenced in the work of Sourdin and Wallace in Australia who note that:

It seems likely, and some court decisions report this, that there is a small number of SRLs who require more court time and are difficult to deal with and that this population may be greater in higher courts. These SRLs may be difficult to deal with because of personality disorders and behavioural factors, which may mean that a particular SRL is more likely to be in dispute and less likely to act in a rational, logical or helpful manner.<sup>578</sup>

For Sourdin and Wallace, mental health and behavioural issues will prevent some LiPs from being 'rational, logical or helpful.' This is in keeping with the association Mullen and Lester make above between querulousness and an underlying psychopathology.<sup>579</sup> While this thesis does not dispute the possibility of individuals acting as LiPs who may suffer from mental health problems, the critical issue here is the association made between the 'difficult' and the pathological. Sourdin and Wallace, for example, are suggesting that longer court time equates to behavioural issues. In Mullen and Lester's conception, too, those who are persistent complainants without success are automatically displayers of pathological behaviour.<sup>580</sup>

This association between pathology and difficulty suggests, then, that any disruption or difficulty, or extension of the legal proceedings is primarily attributable *to that difficult individual*. These individuals therefore pose a problem, and need to be separated from those litigants who are 'legitimate' complainers.<sup>581</sup> In addition, such individuals potentially pose a threat:

Attacks by the querulous on court officials, claims officials and politicians are by no means uncommon. In such cases there has often been a course of conduct characterized by

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<sup>577</sup> Mullen and Lester, "Vexatious Litigants," 334.

<sup>578</sup> Sourdin and Wallace, "The Dark Side," 8.

<sup>579</sup> Other similar pieces of work include RL Goldstein, "Paranoids in the legal system: The Litigious Paranoid and the Paranoid Criminal," *The Psychiatric Clinics of North America* 18 (1995); Grant Lester et.al, "Unusually persistent complainants," *British Journal of Psychiatry* 184 (2004).

<sup>580</sup> Hazel Genn, for example, argues that there are two 'types' of LiPs: those who are 'one-shotters', and those who are serial, querulous or vexatious litigants. See Genn, "Do It Yourself Law," 9. This division into two groups is echoed by Sourdin and Wallace in "The Dark Side" and Moorhead and Sefton in *Unrepresented Litigants*.

<sup>581</sup> Mullen and Lester, "Vexatious Litigants," 334.

increasingly threatening and intrusive activities, usually over many months, which, with the benefit of hindsight, takes on a sinister import. In a number of cases of serious or fatal violence, of which we have knowledge, clear and specific threats had been issued.<sup>582</sup>

Here we see again the shadow of the LiPs who might ‘spill blood’ in the courtroom.<sup>583</sup>

Another, related, trend in psychological and psychiatric literature on conspiracy theory identified by Butter and Knight tends to explain conspiracism in terms of cognitive error:

Instead of focusing on conspiracist personality as such, some psychologists have investigated the heuristics, cognitive biases and other forms of supposedly faulty reasoning involved in ‘conspiracy ideation’, such as mistaken causal attribution and an overreliance on intentionality (‘fundamental attribution error’), a faulty estimation of probability (‘conjunction error’), and a ‘stickiness’ to beliefs in the face of contrary evidence (‘confirmation bias’).<sup>584</sup>

These kinds of explanations are also evidenced in ‘difficult litigant’ literature. Mullen and Lester note that:

The cognitive style of the querulous is that of seeking confirmation of their viewpoint, seizing on supposed support, and rejecting or minimizing all counterexamples. This unfortunately is a common enough approach to the world, but in the querulous it is combined with a pedantic attention to selected details, which ignores broader patterns of meaning, and with a suspiciousness of the motives of any who question their interpretations.<sup>585</sup>

Such an approach, while less inclined to necessarily ascribe cognitive error to delusion or paranoia, focuses its attention on how and why LiPs are mistaken in their beliefs and the kinds of cognitive ‘errors’ they make.<sup>586</sup> There is no doubt that LiPs misunderstand, and LiPs make errors. But what these kinds of approaches also *do* is again locate the source of the difficulty within the individual. If the case takes too long, it is because the LiP is ‘difficult’. If the LiP persists in complaining, it is because they are querulous. If the LiP misunderstands, it is

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<sup>582</sup> Ibid, 345.

<sup>583</sup> District Judge Nick Crichton quoted in Langton-Down, “Litigants in Person Could Struggle.”

<sup>584</sup> Butter and Knight, “The Great Divide,” 5.

<sup>585</sup> Mullen and Lester, “Vexatious Litigants,” 342.

<sup>586</sup> Ian Freckelton “Querulent Paranoia and the Vexatious Complainant”; Ian Freckelton “Editorial: Vexatious Litigant Law Reform,” *Journal of Law and Medicine* 16 (2009): 721.

because of their cognitive difficulties. If the LiP displays fractious behaviour, this may be because of an underlying pathological condition.<sup>587</sup>

We are, as ever, too quick to pathologise LiPs, perhaps especially those who express ‘fringe’ beliefs. But we do damage to our own understanding of LiPs by making these kinds of assumptions, for three key reasons. Firstly, by assuming conspiracy theorists are pathological, we assume that what these individuals are saying is *untrue*. As Michael J. Wood points out: ‘it assumes that they are deluded and what they believe in cannot be so’.<sup>588</sup> While in this study, we can be confident that there is no masonic plot, there is a danger in dismissing all conspiracist claims. As Butter and Knight point out:

If believers in a Watergate conspiracy or an official cover-up in the Hillsborough football stadium disaster had been included in some of the psychological studies of conspiracy ideation before those stories were confirmed as proven conspiracies, would they have manifested the same traits as those who believe in stories that have not been proven?<sup>589</sup>

Take, for example, Mullen and Lester’s comments, with the above warning in mind. They argue that querulousness is found in

three broad types, unusually persistent complainants, vexatious litigants, and those who in pursuit of idiosyncratic quests harass the powerful and prominent with petitions and pleas. Excluded from this category are social reformers and campaigners who use litigation and complaint to advance agendas of potential public interest, even if they are pursuing unpopular causes in a disruptive manner.<sup>590</sup>

Fundamental to Mullen and Lester’s theory is a distinction that can be made between ‘worthy’ and ‘unworthy’ litigants predicated on whether their obsessive litigation has ‘potential public interest’. But, as Butler and Knight point out, how are we to know this if this kind of ‘social reform’ is often only vindicated or validated in hindsight?

Secondly, as Wood points out: ‘the conspiracy-theory label exerts its influence by shifting attention away from the validity of the claims and toward the competence and credibility of the person making them’.<sup>591</sup> Labelling someone a conspiracy theorist turns the entire question

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<sup>587</sup> See Ian Freckelton, *Vexatious Litigants: A Report on Consultation with Court and VCAT Staff* (Victorian Parliament: Melbourne, 2015) 7.

<sup>588</sup> Michael J. Wood, “Some Dare Call It Conspiracy: Labelling Something a Conspiracy Theory Does Not Reduce Belief in It,” *Political Psychology* 37, no. 5 (2016): 695.

<sup>589</sup> Butter and Knight, “Bridging the Great Divide,” 9.

<sup>590</sup> Mullen and Lester, “Vexatious Litigants,” 334.

<sup>591</sup> Wood, “Some Dare Call It Conspiracy,” 695.

into one of credibility. By displacing attention from what someone is saying to the competence of the individual, we undermine the potential seriousness of the claims. Harriet Washington's book on medical experimentation on African-Americans in the 20<sup>th</sup> century points out that those who suggested such experiments were taking place were considered 'paranoid,' which successfully shifted attention from the institution to the individual making the assertion. Of course, such 'paranoia' was later revealed to be all too true.<sup>592</sup> Again, while I am not suggesting that the conspiracies stated above are in any way a parallel, particularly to such a dark history of racial discrimination and violence, the structural issue at stake is the same. As Wood goes on to note: 'Calling something a conspiracy theory (or someone a conspiracy theorist) is seen as an act of rhetorical violence, a way of dismissing reasonable suspicion as irrational paranoia'.<sup>593</sup> Concentration on individual competence—or, more accurately when it comes to LiPs, incompetence—is very much in keeping with LiPs in the literature. LiPs are often poor performers, and poor communicators, and this is focused on at the expense of the substance of what they might be trying to communicate. But someone could be a difficult, or confused, or 'querulent' individual and still have a valid complaint.

Finally, the third issue with considering conspiracy theory the product of individual pathology is one where the 'rhetorical violence' of the claim prevents any investigation into the complaint. As Lance deHaven-Smith argues: 'the conspiracy-theory label comes with such negative baggage that applying it has "the effect of dismissing conspiratorial suspicions out of hand with no discussion whatsoever"'.<sup>594</sup> In short, to call someone's beliefs "nuts" forestalls a conversation about what might provoke these conspiracist ideas in the first place. By concentrating on the individual, psychiatric and psychological explanations of conspiracy theories and of difficult LiPs tend to ignore the contribution that legal processes themselves may make in shaping a LiP's beliefs or behaviours.<sup>595</sup>

#### CONSPIRACY IN THE SOCIAL SCIENCES

There is another way of approaching understanding conspiracy theories, however, which involves moving away from the psychological and psychiatric literature and moving towards the social sciences. The second, parallel research in conspiracy theory identified by Butter and Knight is located in the political sciences. Political science literature about conspiracy theories

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<sup>592</sup> Harriet Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* (Knopf Doubleday Publishing Group: New York, 2008).

<sup>593</sup> Wood, "Some Dare Call It Conspiracy," 695.

<sup>594</sup> Lance deHaven-Smith, *Conspiracy Theory in America* (Austin: University of Texas Press, 2013), 84.

<sup>595</sup> This is of course not entirely the case. See Sourdin and Wallace, "The Dark Side," 10. Genn, "Do-it-yourself law," 10.

posits them in a fundamentally different way to that of psychology and psychiatry. For many political scientists, the key to understanding conspiracy theories is to recognise that they are *collective and social processes*. As Butter and Knight express it: ‘The starting point would need to be the recognition that no matter what psychological traits are involved, conspiracy theories are essentially social constructs’.<sup>596</sup> They go on to argue that:

What makes conspiracy theories a distinctive way of explaining the world is not to be found solely in the psychology of individual believers, but in the shared structural elements of the conspiracy theories themselves. Researchers therefore need to investigate the cultural work conspiracy theories perform in different places and times, and the social relations that conspiracism both enables and curtails.<sup>597</sup>

In other words, concentrating on individual pathology fails to capture the structural conditions that might give rise to conspiracist beliefs. So, excavation of these structural conditions may offer a way in to understanding how these beliefs are produced and reproduced. This does not exclude the possibility of pathology, but it also doesn’t reduce a holder of conspiracy theories *to* a mere pathology. And this approach presents a unique opportunity to do something different with LiP conspiracist stories. Instead of assuming that these individuals are pathological and that this therefore invalidates anything they say, what might we find out by looking at the conditions under which such ideas emerge? What *work* are these conspiracy theories doing?

In the broadest sense, the work conspiracy theory *does* is provide an explanation of a negative experience or a failure. Conspiracists simply use a different explanation for why failure takes place; or rather, because they have a desire *for* a unified explanation of why this takes place.<sup>598</sup> As David Aaronovitch suggests, this belief is sometimes about ‘the unnecessary assumption of conspiracy when other explanations are more probable’.<sup>599</sup> But conspiracy theories also provide unified or simple explanations for experiences and phenomena that do not have such obvious explanations. Conspiracy theories therefore allow individuals who believe in them to identify a clear ‘enemy’ or have a clear explanation for ‘why’ something happened that may provide reassurance.<sup>600</sup> These aspects of conspiracy are underlined in this study, with the conspiracists in this study using their theories to provide an explanation for *why* they are having such bad experiences in the courts. However, in addition, as I will demonstrate, the

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<sup>596</sup> Butter and Knight, “The Great Divide,” 16.

<sup>597</sup> *Ibid.*, 16.

<sup>598</sup> Groh, “The Temptation of Conspiracy Theory,” 1.

<sup>599</sup> David Aaronovitch, *Voodoo Histories: How Conspiracy Theory Has Shaped Modern History* (Vintage Books: London, 2009), 5.

<sup>600</sup> Groh, “The Temptation of Conspiracy Theory,” 3.

conspiracies that such interviewees select *correspond* to these experiences of LiP exclusion and as such are indelibly linked to those experiences.

In the next section of the chapter, I turn to consider how the conspiracies evidenced by interviewees in this study are connected to their experience as LiPs. It is important to note, of course, that there is no doubt that conspiracist ideas are a convenient way for LiPs to interpret why the court has gone against them when they are convinced that they are right.<sup>601</sup> But all conspiracies are particular and they can tell us something about the social context in which they occur. I argue in the following section that the impetus for conspiracist explanation in this study is linked to LiP experiences of exclusion: the kind of exclusion that is experienced by all LiPs. This is not to say, of course, that what the interviewees assert are *true*. It is, however, to take seriously the idea that LiPs *themselves* consider it to be true, and to consider the consequences of these beliefs.

#### WHY FREEMASONS?

By far the most common conspiracy expressed by interviewees in this study relates to Freemasonry. But why the Freemasons? What work does *this* conspiracy do and under what conditions does it arise? Masonic conspiracy theories date back hundreds of years and evolve out of a broader fear of secret societies that arise in Europe in the late 17<sup>th</sup> and 18<sup>th</sup> century. The founding precept of such secret societies is that they are societies that are secretly working against the interests of the population to further their own agenda. Historically, the emergence and entertainment of such fears seems to be connected to periods of revolution or political unrest.<sup>602</sup> Daniel Pipes notes the link between Freemasons and conspiracy that arises in the 1790s, first in 1791 when a French priest attributes the moves against the Church to secret freemasonry. This is followed by two influential authors both claiming that freemasonry and/or the Illuminati are behind the French Revolution.<sup>603</sup> The work of John Robison, who published his book: *Proofs of a Conspiracy against all the Religions and Governments of Europe*, in 1797, and Augustin Barruel, whose book: *Memoirs Illustrating the History of Jacobinism*, was published in 1798 and translated into English in 1799 are 'responsible for the birth of modern

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<sup>601</sup> I have only made a note of two of the major conspiracist themes that emerged: fake courts and freemasons/Jews. However, it should be noted that in wider email correspondence in these informal advice networks, the targets varied considerably, including discussions of cover up of systematic child sexual abuse by politicians (the extremist version being the so-called "Hampstead" Scandal, as well as allegations against Desmond Tutu, and others.

<sup>602</sup> Freemasonry conspiracy has spiked at times such as the assassination of the Austrian arch-duke, and under the Nazis. See Daniel Pipes, *Conspiracy: How the Paranoid Style Flourishes and Where It Comes From* (Simon and Schuster: New York, 1999)

<sup>603</sup> Ibid.

conspiracy theories' according to Alex Kurtagic, who edited their republication in 2014.<sup>604</sup> Kurtagic notes that:

Robison and Barruel's respective texts bear all of the elements that characterise modern conspiracy theory on both sides of the Atlantic, including the idea of a sinister cabal orchestrating world events behind the scenes and the construction of a narrative directly linking the past to the present. Their application of conspiracy theory was thorough and influenced subsequent generations.<sup>605</sup>

For Kurtagic, and other scholars, masonic conspiracy has changed very little since its emergence in the 18<sup>th</sup> century, continuing to revolve around the idea of an influential secret society working in their own interests and against a (variously described) greater good. In this respect it is in some ways, alongside anti-semitism, the *Ur*-conspiracy. Fundamentally linked to anti-Semitic ideas, the conspiracy has been historically deployed by the Church, governments such as the Nazi regime, in the middle East, and beyond to attribute responsibility for political failures, political unrest and others to a masonic or Jewish influence, and to target or persecute minorities. In this study, interviewees clearly shared 'classic' conspiracist ideas about the masons: including the belief that masons were controlling things behind the scenes in the courtroom, that they had infiltrated the legal profession, and that such a 'secret society' had the power to decide which litigant would be successful. They would also help one another at the expense of non-masons. LiPs identify the legal profession in general, or many people within the legal profession as being part of a secret society. But why?

An obvious place to begin is with the difference in educational and socio-economic background between many LiPs and members of the legal profession. I have earlier argued that the legal profession is far from diverse, and parts of it, like the senior Bar, and the judges, tend to be dominated by those from a relatively small pool of privately educated individuals.<sup>606</sup> In addition, as Michael Blackwell has noted, family 'connections' seem to also play a role in supporting an ability to succeed in the profession.<sup>607</sup> The higher echelons of the legal profession tend to be dominated by those from a privileged education and economic background. These factors can certainly facilitate a perceived gap between legal professionals

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<sup>604</sup> The influence of these works cannot be overstated according to Kurtagic; Edmund Burke was a great admirer of Barruel and sent him a congratulatory message telling him how his conspiracist ideas fit with Burke's own experiences. See Alex Kurtagic in John Robison, *Proofs of a Conspiracy against all the Religions and Governments of Europe*, Alex Kurtagic, ed. (Abergele: Wermod and Wermod, 2014), xi.

<sup>605</sup> *Ibid*, x.

<sup>606</sup> JUSTICE, *Increasing Judicial Diversity*.

<sup>607</sup> Michael Blackwell, "Old Boys Networks."

and ‘ordinary’ individuals that can potentially stoke resentment, and lead to individuals being perceived as elite.<sup>608</sup>

This perceived ‘elitism’ is coupled with, and aggravated by, conceptions around the relative wealth and earnings of legal professionals. Within the legal profession, of course, income, and job stability vary radically, from those who earn precariously little, to those who are very well remunerated.<sup>609</sup> However, public perception has historically tended to view legal professionals as generally wealthy.<sup>610</sup> In addition, in this study, there was a perception that legal professionals were more interested in financial gain than in the wellbeing or justice for their client. As Paul expresses it:

Their [solicitors] job is to have money, they want income, their job is not to do your legal work. It’s not to solve problems, so, why give somebody a load of money? And then of course they sued me because I, um, I wouldn’t pay them, the, the, some of the money, I said well you haven’t done what I asked you to do.

Charles similarly argues: ‘solicitors get paid for their time, so the longer they, they, they take to do a case, the more money they get and that is basically what they do, they just took me for a ride for sort of five or six years, got thirty grand out of it’. Georgina says:

solicitors seem to me to be working to a hidden agenda, they get bought off. There’s a whole hiearcheal [sic] pecking order with solicitors and, um, you know they they, they are literally ending up, um, what’s the word I’m looking for, taking advantage of what they perceived to be vulnerable people so that they can make a lot of money. And it’s as if they’re all driven by money and very little else. And I just think that’s very tragic.

These factors open up a significant chasm between the perceived wealth and status of legal professionals versus the ‘ordinary’ layperson.<sup>611</sup> As Charles expresses it:

Well I actually think the, the legal system in this country, um, because all of these blokes go to Oxford and Cambridge and those sort of big colleges and they probably, unis, they

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<sup>608</sup> This is, of course, following Bourdieu’s sociological theory, endemic to the relative autonomy of any field and the association of that field within the wider field of power. It is also reflective of aspects of the ‘professional project’ as outlined by Larson.

<sup>609</sup> For information on solicitor pay, see The Law Society, *Private Practice Solicitors Salaries 2015* PC Holder Survey (Law Society: London, 2015).

<sup>610</sup> Marc Galanter, “The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse,” *University of Cincinnati Law Review* 66, no. 3(1998): 805-846.

<sup>611</sup> It is also notable that the three most virulent masonic conspirators in this study were all involved in disputes with their banks, allowing them to draw on classic anti-Semitic mythology around the control of banking and finance by “Jewish masons”.



probably go, they, well they, sort of the way they live and that sort of thing, I think they all kind of know each other and, uh, the actual legal institution is designed to just, generate money and rip off the general public because they don't do anything. You pay them thousands of pounds to do something for you, what they do is just generate tonnes and tonnes of paperwork but don't actually deal with anything you ask them to do.

There is a legitimate grievance here, when it comes to equality and class, gender and race-based representation in the courts. While this does not justify a masonic conspiracy, it does demonstrate how the specific nature *of* a conspiracy can illustrate a genuine systemic issue.

But in addition to issues with elitism and class-based exclusion in parts of the legal profession, there is also clearly, a significant issue with *trust* when it comes to members of the legal profession. While assumptions about solicitors' self-interest can be dismissed as based on traditional, popular stereotypes of lawyers, it is worth noting that in this study the LiPs had a good deal of contact with legal professionals, particularly solicitors, both from previously had legal representatives and from facing them in court. And this suggests there is an experiential dimension to their conspiracies: certain things that happen to LiPs that fuel their belief in a 'cabal'.

#### TRUST AND THE LEGAL PROFESSION

It is clear from these interviewees' belief that, as above, *trust*, or lack of trust, plays a significant role in shaping litigant attitudes and behaviours and this can result in the development of conspiracist beliefs. But how can we understand what the significance of trust is, and what it means, for litigants? It is here that the work of Tom Tyler becomes particularly useful. Tyler's work, rooted in psychology, concentrates on trying to understand how lay perceptions about justice and legitimacy are shaped or understood for laypersons in both civil and criminal processes. Tyler's 1990 book, *Why People Obey the Law*, seeks to explore the conditions under which individuals accept or perceive laws to be legitimate, as well as the conditions under which this acceptance might break down.<sup>612</sup> As such, this book, and his subsequent research, is particularly valuable to this study in helping to flesh out how the experiences of LiPs in this study may alter their beliefs and attitudes to civil justice, and 'the law' as they perceive it, more generally and how this might ultimately lead to conspiracising.<sup>613</sup> Tyler argues in *Why People Obey The Law*, that the dominant paradigm for how authorities generally understand obedience to the law is based on an instrumental

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<sup>612</sup> Tom Tyler, *Why People Obey the Law*.

<sup>613</sup> See also E Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice*; Tyler and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*.

perspective; that is, that people obey the law because they fear the consequences if they do not. However Tyler argues that this overlooks the importance of the *normative* arguments as to why people might obey the law. As Tyler expresses it:

Normative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behaviour.<sup>614</sup>

This concentration on the normative perspective is useful for this study as it is notable that interviewees in this study expressed strong beliefs or perceptions about justice that, after negative encounters and experiences, began to erode their faith in ‘justice’ more generally and this affected their behaviour and led to conspiracist beliefs.

Of course, the term ‘normative’ perception of justice is very broad, and such a category covers up a great many differences in perspectives. However, as Tyler points out, whilst there are a number of ways in which we can understand this, ‘distributive justice’ (caring about the fairness of the outcome) and ‘procedural justice’ (caring about the fairness of the process) are particularly useful approaches to understanding alternate approaches to the instrumentalist view on what constitutes legitimacy for laypersons. In particular, ‘procedural justice’, a term originated by Thibaut and Walker in their 1975 study of the same name, *Procedural Justice: A Psychological Analysis*, arguably plays an important role in understanding how litigants perceive fairness in their contact with the courts.<sup>615</sup> Procedural justice, with its emphasis on the fairness of processes, no less than the fairness of outcomes, and with its attention on what happens *during* proceedings, is a key lens through which to evaluate LiP experiences, and is one that rings true in this particular study.<sup>616</sup> As I set out to explore, getting LiP perspectives means understanding what *they* perceive to be important. Tyler and Zimmerman note, following Thibaut and Walker’s research:

What law has summarized under the “due process” rubric, social scientists capture as a bundle of interests, needs, or wants described in a variety of ways—vindication, attention, accountability, information, accuracy, comfort, respect, recognition, dignity, efficacy, empowerment, [and] justice. . . . Research on litigants . . . reveals a group of individuals who seek something in addition to money.<sup>617</sup>

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<sup>614</sup> Tyler, *Why People Obey the Law*, 3-4.

<sup>615</sup> John W. Thibaut, Laurens Walker, *Procedural Justice: A Psychological Analysis* (Elrbaum: New York, 1975).

<sup>616</sup> Tom Tyler, “What is Procedural Justice?: 103-136; Lind and Tyler, *The Social Psychology of Procedural Justice*.

<sup>617</sup> Nourit Zimmerman and Tom Tyler, “Between Access to Counsel and Access to

Indeed this study, as outlined in particular in the previous chapter, underlines that litigants are not only interested in ‘winning’, but instead have a complex range of desires when it comes to litigation. Whilst such complexity makes it potentially very difficult to talk about what litigants want, and why and how this affects legitimacy, the work of Zimmerman and Tyler is a particularly helpful way to try and think through this in this chapter. In their 2009 study, Zimmerman and Tyler set out to consider the experiences of *pro se* litigants in the U.S. and in particular to think about how not having representation may or may not affect ‘access to justice’. In going about this, Zimmerman and Tyler conclude that there are four key aspects of ‘procedural justice’ that play a strong role in shaping perceptions of legitimacy for litigants: ‘voice’ – where a litigant is able to tell their story, ‘neutrality’ – a belief that those arbitrating litigation are fair and treat people equally, ‘respect’- where litigants are taken seriously by professionals, and finally ‘trust’ – whether litigants perceive that authorities are listening to them, and trying to do what is just.<sup>618</sup> In the next section of the chapter, I will draw on these categories to consider how LiP negative experiences can lead to conspiracising and evaluate to what degree lack of ‘procedural justice’ underlies mistrust felt by LiPs in this study.<sup>619</sup> I will do this by focusing on the kinds of negative experiences reported in this study by LiPs. As I will argue, two clear areas of perceived unfairness from their perspective emerges: firstly, through LiPs’ belief that a represented opposition is treating them unfairly, and secondly, through perceiving themselves as being excluded from conversations that take place between legal professionals. As such the conspiracist ideas that emerge are, I will argue, less a product of pathology and more a poor choice of explanation for what contains the bones of a legitimate grievance.

#### INEQUALITY OF ARMS

Firstly, it was common for LiPs in this study to complain of unfair treatment by a represented opposition. Many interviewees believed that a represented opposition took advantage of them as a litigant in person, commenting on what they perceived to be the violation of equality of arms. For example, interviewees claimed solicitors would fail to disclose information they were required to provide before a hearing, only to hand the LiP a large folder full of documents outside the courtroom just as they were about to enter, or to provide them only on

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Justice,” 23.

<sup>618</sup> Ibid, 487-489.

<sup>619</sup> It is important to note that whilst the importance of ‘procedural justice’ has gained wide acceptance and empirical support, what particular aspects constitute such justice is more contested and differs in different accounts. For an overview of some of the questions raised by this, see Tyler, “What is Procedural Justice,” 103-135.

the day of the hearing.<sup>620</sup> Other situations LiPs related were ones where the judge would instruct the opposition to undertake certain tasks, such as the writing up of his instructions, or ask the opposition to disclose certain documents, and the solicitors would fail to provide any written information confirming these arrangements as requested.<sup>621</sup>

Eleanor tells the story, for example of something like this happening to her, but she makes a complaint and the judge listens to her:

Um they were basically sort of housekeeping type stuff. Have you served this, have you done that and why, why have you failed to, because I mean there was one case, one of the very first hearings, I'd served everything of mine on time and the barrister tried to serve something on me literally the moment that the hearing took place which I, as I pointed out to the judge and he agreed with me, I'd not had, I was not a qualified solicitor or barrister and I had not had time to read it therefore he was postponing the hearing to give me time to read it, digest it and respond to it and the barrister needed to not do this again because he would not take very kindly to you know, because it's like, you know, you've known where she is for months, you've not sent, you've had this, you know, you've had weeks to give it to her why have you, why are you just serving it on her at the beginning of the hearing knowing that she was a litigant in person.

We cannot, of course, know to what extent any of these claims are true or accurate. It is important to note, for example, that almost all the LiPs in this study only became LiPs after negative experiences with their own representation. In this respect, LiPs in this study already lacked trust in solicitors, which will probably make them more likely to find fault with legal professional behaviour, a form of 'confirmation bias'.<sup>622</sup> There is also a significant difference between a busy represented opposition being late in providing some information, and the deliberate withholding of information in an act of 'gamesmanship'. What we can know, however, is that if there *are* instances where LiPs do not receive information they are meant to receive, or if they are provided with materials late, regardless of *why*, they are much less able to deal successfully or effectively with such a scenario.

As outlined in Chapter Four, LiPs have disproportionately greater difficulties in redressing errors, or obtaining assistance. So should a LiP receive case materials late, he or she would not necessarily find sympathy from the judge in delaying a hearing. The LiP also may not be believed. Recent case decisions also suggest that LiPs will not be given any 'excessive

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<sup>620</sup> This kind of incident was narrated by Marie, Eleanor and Russell.

<sup>621</sup> This was noted by Charles and Russell.

<sup>622</sup> See Patrick Leman, "The Born Conspiracy," *New Scientist* 195, no. 2612 (2007).

indulgence' when it comes to timelines; that is, they are expected to conform to the same timelines afforded to legal representatives.<sup>623</sup> But perhaps a LiP may not realise they can raise an issue, or only learn this at a later date. In *Tinkler v Elliott*, for example, where Elliott's request to have a judgment set aside was deemed out of date at appeal court level, while the lodgement was technically 18 months late, Mr Elliott only received transcripts of the hearing (that he had not attended, being unwell with a medical certificate being provided) well over a year after it took place, thus most likely only learning of the possibility of having the judgment set aside at that point.<sup>624</sup> Similarly, in a situation where a LiP does not receive a copy of judicial instructions, LiPs will have a much harder time attempting to gain this information. They will also not necessarily have individuals who can assist them. They may not have the schedule that allows them to effectively follow these problems up. In summary, life is made much harder for LiPs in these situations.

While the likelihood is these narratives reflect administrative error, or workload related delay, we still cannot exclude the possibility—at least in some instances—that there is a degree of unregulated gamesmanship on the part of legal representatives. This may be because such gamesmanship is a regular part of tactics routinely adopted by some legal professionals.<sup>625</sup> Perhaps a more likely explanation is that a legal representative is simply capable of assimilating information far faster than a LiP and therefore is giving the LiP the same amount of time they would give another legal representative, and this is simply insufficient for a LiP. Neither exclude the possibility that a legal representative may be less inclined to rush to fulfil an obligation towards a LiP since they may speculate that a LiP will be less likely to be believed should they make a complaint. While the majority of the legal profession act ethically, this doesn't mean that there aren't those within the profession who are above such behaviour; the fact that the legal profession already has such a negative perception of LiPs only fuels this fear on the part of LiPs.

Much of this is of course, pure speculation, and based on unilateral accounts. But something we can consider is the ambiguous guidance given to legal representatives when it comes to LiPs. The 2015 guidelines issued by the Solicitors Regulatory Authority notes that, as ever, a lawyer's overriding duty is to the court, and then to their client.<sup>626</sup> In addition, any lawyer is

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<sup>623</sup> See *Tinkler & Another v Elliott* [2012] EWCA Civ 1289; *Bendore Bankas Snoras (in bankruptcy) v Yampolskaya* [2015] EWHC 2136 (QB)

<sup>624</sup> To be fair, the court did consider this issue, but decided that a strict timeline applied to LiPs anyway. So in this case the claimant's knowledge from reading the transcripts (presuming he did so on the day he received them) started in September 2011 but request to set aside judgment wasn't made until December 2011. The courts relied on their previous harshness on timelines.

<sup>625</sup> See Paolo Moro, "Rhetoric and Fair Play: The Cultural Background of Legal Ethics," *US-China Law Review* 14, no.2(2017): 72-83; Beth Henschen, "Judging in a Mismatch: The Ethical Challenges of Pro Se Litigation," *Public Integrity* (2017): 1-13.

<sup>626</sup> Law Society, *Litigants in Person: Guidelines for Lawyers* (Law Society: London, June 2015), 3.

forbidden from engaging in any behaviour that unnecessarily delays or misleads the court, or brings the profession into disrepute.<sup>627</sup> But when it comes to LiPs it is a bit more confusing. Under Chapter 11 dealing with ‘third parties’, the guidelines state that legal representatives must not take ‘unfair advantage’ of LiPs:

Taking ‘unfair advantage’ refers to behaviour that any reasonable lawyer would regard as wrong and improper. That might include: bullying and unjustifiable threats; misleading or deceitful behaviour; claiming what cannot be properly be claimed; or demanding what cannot properly be demanded. Such conduct is likely to be penalised if identified by a judge or upon complaint.<sup>628</sup>

But the guidelines then go on to say that:

Knowing and using law and procedure effectively against your opponent because you have the skills to do so, whether that be against a qualified representative or a LiP, is not taking ‘unfair advantage’ or a breach of any regulatory code [...]. you are under no obligation to help a LiP to run their case or to take any action on a LiP’s behalf. Moreover, you should be aware that by doing so you might, depending on the circumstances, be failing in your duties to your own client.<sup>629</sup>

So while legal representatives are forbidden from ‘taking advantage’ of LiPs (which in itself suggests that such a possibility must exist if the guidelines need to make this explicit), they are also not expected to change their behaviour in terms of deploying their skills. The problem here is that LiP difficulties rarely arise from out-and-out bullying or abuse; it is far more likely to be a subtler form of disadvantage that will come from their lack of skills – and this disadvantage is one where the courts have suggested that they are not particularly sympathetic.<sup>630</sup>

In addition, while legal representatives are not expected to assist LiPs, the guidelines do note that the court *can* ask legal representatives to fulfil certain tasks they wouldn’t normally have to do when they weren’t dealing with a LiP: such as preparing and copying bundles to provide to a LiP and to the court.<sup>631</sup> But this is something that seems to be a source of confusion to the legal profession since it seems in contradiction to the idea that they have no duty to assist a

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<sup>627</sup> Ibid, 3.

<sup>628</sup> Ibid, 5.

<sup>629</sup> Ibid, 5-6.

<sup>630</sup> *Tinkler v Elliott*;

<sup>631</sup> Law Society, *LiPs: Guidelines for Lawyers*, 8.

LiP.<sup>632</sup> In addition, it can cause conflicts with their own clients who may struggle to understand why their representative is ‘assisting’ the other side. It seems from the above, then, that it may be these kinds of requirements some LiPs argue aren’t being fulfilled. Arguably, such requirements put a burden on the legal representative, and it may be one which they struggle to fulfil within a given time frame, given their own workloads. Also, it seems legal representatives themselves may not be sure where their responsibilities, and duties, lie.

In summary, what is happening here is something of which we cannot be sure. But there are two issues that arise from these perceived experiences that matter: firstly, because there is an imbalance in skills and ability, any of these kinds of misunderstandings or behaviours substantially impacts upon a LiP. LiPs are much less able to work with such difficulties than legal representatives are. Secondly, such scenarios undermine LiP trust in the profession. Such a situation exposes the comparative powerlessness of LiPs compared with the legal profession and may stoke the perception that legal representatives are acting against them deliberately, in a situation where they hold far more cards.

In this respect, this kind of scenario - where an imbalance of knowledge or power is perceived to be being used against a LiP - could be perceived as indicative of a lack of *respect*. As Zimmerman and Tyler note, respect covers a broad area, but one aspect of significance in ensuring that individuals’ rights are protected and needs are considered: ‘Providing people with information about what to do, where to go, and when to appear, all demonstrate respect both for those people and for their right to have their problems handled fairly by the courts’.<sup>633</sup> The belief that LiPs are being excluded from access, and having unequal experiences, arguably indicates a lack of this aspect of ‘procedural justice’. Here then, whilst such inequality may not be deliberate, a hallmark of conspiracy theories in general, of course, is the converting of all error into design; so, no matter whether issues arise from accident, or error, they will be interpreted as significant or malignant by those who hold conspiracist ideas.

## PRIVATE CONVERSATIONS

The second experience of exclusion that provides fertile ground for masonic conspiracy is the perceived exclusion of LiPs from conversations. Interviewees commented on multiple experiences of conversations taking place without them between other actors in the case,

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<sup>632</sup> Ibid, 4; Thomas Crockett, “Do it Yourself: Any Further Guidance Since *Tinkler v Elliott?*,” *The Commercial Litigation Journal* (2013): 17.

<sup>633</sup> Zimmerman and Tyler, “Between Access to Counsel and Access to Justice,” 488.

including, at times, the judge and the opposition. Peter described the feeling as that of a 'mixing club':

Peter: In a criminal court you have the defence and the prosecution and they don't mix. These were like, it was like a club. And that, that sort of struck me as like 'hang on a minute'. I'm not even having a say here, and I came out and this is what's happening...you're totally in turmoil and that's something that's ignored. The impact of what happens on the, on the people involved.

Kate: Mixing club?

Peter: Well they seemed to be, I said club, you know, they're all in there, sort of like pals around the table and um, you don't know what's being said, so they're talking about you and you don't even know what, what they're saying and outside of the court in like what happens with social services specially...people meet and they've never met you before and they're judging you.

Talia describes a similar experience:

The hearing was on 22 June and they didn't respond to either my defence and counterclaim or my payment proposals. On 22 June the hearing was at two o'clock and I turned up at about twenty past one and found the Deputy District Judge talking to the advocate for the other side in the entrance hall and I'm going to complain to the MOJ [Ministry of Justice] about this. So the hearing lasted about three minutes and it was clear that the DDJ already knew what the other side wanted, they wanted an adjournment so that they could prepare an application to strike, strike down my defence and counterclaim...and this is...they hadn't done anything to that point, and so they got permission for an adjournment and that was until the eighth of September.

Similar experiences are narrated by Martin, Marie and others.<sup>634</sup> This perception seems to be key to the allegations of corruption for some. Charles, for example, says, when describing his distrust of the outcome of his case against his solicitors: 'they, um, maybe give each other a telephone call, obviously I don't know but there was definitely a lot of corruption involved'. Peter, too, notes:

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<sup>634</sup> Martin notes, when describing the behaviour of two solicitors involved in his case: 'they got very friendly with each other, obviously, things were happening'.



You hear people talk about corruption and it is, it's not just about money, it's about like the corrupt behaviour of like almost, well don't mention that... we'll just say this. Things have been decided and agreed without you even being there. You don't even know.

All the interviewees narrating these experiences mentioned that they felt disadvantaged by lack of access, excluded from crucial discussions concerning the case and many shared fears that key decisions were taking place in their absence, with some using this as the basis for allegations of 'corruption'. Of course, these 'meetings' may well be because these individuals work together, know each other socially, are being polite, or are attempting to facilitate the progress of the case without any malignant intentions. But it is not difficult to see why LiPs would interpret this behaviour distrustfully. Once again, such an exclusion emphasises LiP powerlessness. An obvious linkage between this experience and Zimmerman and Tyler's categories is that of 'neutrality': the idea that legal professionals are excluding LiPs from access to important discussions, or the belief that authorities are colluding with the other side are consistent with factors undermining trust in this neutrality. Zimmerman and Tyler note that neutrality is about decisions being open and transparently made; discussions behind closed doors clearly undermine this.<sup>635</sup>

In addition, while the meetings may indeed be entirely banal, or well-intentioned, there is a slippery slope here to genuine unfairness. Such familiarity and ease between legal professional and judge facilitate and reflect an environment where a legal professional is more likely to be believed than a LiP. Indeed, because of the deep-rooted pejorative attitudes towards LiPs, and the linking between repeated litigation and 'querulous' behaviour, it is perfectly likely that a LiP *is* less likely to be believed, or that their word will not be believed over a represented opponent. In this respect, it is arguable that such a scenario is also one that undermines the 'voice' category of procedural justice, as Zimmerman and Tyler outline. 'Voice' – the ability to tell one's story and be listened to – is one this study has repeatedly brought up. But as Zimmerman and Tyler note, voice is not simply about being able to speak; it is about being listened to. So conversations excluding LiPs clearly undermine this, even if LiPs are theoretically given other opportunities to speak.<sup>636</sup> The worrying implication here is that if LiPs are worried that they are treated differently, and more distrustfully, than legal representatives, than perhaps they should be, because they probably are. As George Bernard Shaw observed: 'All professions are conspiracies against the laity'.<sup>637</sup>

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<sup>635</sup> Zimmerman and Tyler, "Between Access to Justice and Access to Counsel," 487.

<sup>636</sup> *Ibid.*, 487,

<sup>637</sup> George Bernard Shaw, *The Doctor's Dilemma* (Auckland: The Floating Press, 2011), 39.

Summarising, then, the masonic conspiracy theory is predicated on a powerful secret society that acts in its own interest over the interests of others. In this context, it is easy to see that a number of factors LiPs experience can contribute to the fuelling of such ideas, such as the 'elite' background of many players in the legal profession, LiP exclusion from the social world of the legal profession, and the distrust in which LiPs may be held compared with legal professionals. These experiences of powerlessness are endemic to being a LiP. Such experiences are also illustrative of a lack of 'procedural justice'; in particular, voice, trust and neutrality. And it is a short step from perceiving these kinds of exclusions as inevitable consequences of the status of LiPs, to seeing masonic conspiracy as an explanation for LiP experiences.

#### CORRUPTION!

The second dominant conspiracy in this study is about a generalised 'corruption' in the courts, manifesting in 'fake' documentation', and, at an extreme, 'fake courts'. This kind of conspiracist thinking seems to be linked to believing legal representatives to be 'breaking the rules' through, for example, trying to pass off forged documents as real, or through 'cheating' the system. This conception of conspiracy is interesting because the emphasis here is on how the legal profession brings the courts into disrepute. Those who hold such conspiratorial attitudes frequently hold quite high expectations about the courts, only to have them disappointed. As Eleanor expresses it:

Basically, you are sold a myth that the British judicial system is the finest in the world, that it is fair, just, reasonable and concerned with finding out the truth. That is a load of fucking bollocks, pardon the French.

Georgina, for example observes that she believed very strongly prior to embarking upon legal proceedings, that every individual was 'equal before the law, uh, blah blah blah' before going on to note that:

as far as I am concerned it is all just words because they know very well there's no way in the rea-, reality of the set up that you can get a, a fair hearing in British courts across the board unless your, you get lucky. I think the courts in Britain are run like a lottery.

These beliefs are echoed by Martin, who says: 'Well I knew I had a case, and I knew I was right. And I knew I'd been turned over and maybe naïve, I actually believe in British justice

[laugh] so I thought if only I can get it together correctly and right, with the ability to show it, I will win’.

The idealistic expectations held by the interviewees in this study are in keeping with many laypersons understanding or beliefs about legality as understood in a ‘remote sense’, as noted by Ewick and Silbey in *The Common Place of Law*. As they observe, ‘one story’ told about law by their interviewees is where law is:

removed and distant from the personal lives of ordinary people. In this story, law is majestic, operating by known and fixed rules in carefully delimited spheres. The law exists in time and places that put it outside of, rather than in, the midst of everyday life.<sup>638</sup>

This description emphasises that those who have minimal or no experience of legal proceedings are far more likely to entertain idealistic notions of courts and legal proceedings. Such individuals also formulate ideas of justice that were arguably not related to the kinds of justice that may or may not be possible as an outcome of legal proceedings.<sup>639</sup> Indeed, the interviewees in this study are arguably *more* positive towards the legal system prior to commencing their claim than members of the public identified in Genn’s *Paths to Justice*.<sup>640</sup>

But the difficulty arises when these interviewees experience the courts, and realise that the law does not merely operate ‘by know and fixed rules’ or, indeed, in carefully delimited spheres’. As outlined in the previous chapter, many LiPs sought to attempt to obtain legal information and acquire it themselves, whether through university libraries, online or elsewhere. A source of distrust and anger for interviewees was when this hard-won knowledge was overlooked or disregarded by the judge. For example, Talia spent many months learning the *Civil Procedure Rules*, only to find that the judges did not necessarily stick to those rules during the proceedings:

Um, I didn’t, there are other things I didn’t expect. I didn’t expect some judges not to, uh, implement the Civil Procedure Rules which are rules, I mean they’re, they’re laid down in law, um, I really didn’t expect them, um, not to implement at all or only to implement the ones that favoured the over-mighty claimant. If, if a litigant in person as I’m finding just makes, you know, fails to comply with something or other, the other side will exploit it to the nth degree but the, certainly in my case, the other side has completely ignored timescales in a way that prejudices my uh rights in law, and no one has pulled them up at

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<sup>638</sup> Ewick and Silbey, *The Common Place of Law*, 28.

<sup>639</sup> See Bourdieu, “Force of Law,” 830.

<sup>640</sup> See Genn, *Paths to Justice*, 249.

all! And in two cases, they've submitted their, um, their claim, um, at less than 28 days, I should have 28 days to respond provided I put in the acknowledgement of service, and they cut a week off that by being late and nobody pulls them up on it.

As she goes on to say:

I have, I have really scrupulously told the truth all the way through and I've been completely fair to them to the extent of my ability, to the other side. And they've lied and lied and lied and it's broken the rules and taken advantage of their, um, greater bargaining power and resources and when it comes to decide whether to blem-, believe them or me, people like the FOS and judges believe them.

When Talia felt the judges themselves didn't follow the rules, this became a significant source of anger. This experience of Talia's was shared by other interviewees including Peter and Georgina.

This feeling that judges were 'breaking the rules' returns us to the gap between what legal skills *are* and how they are perceived by LiPs. LiPs attempt to acquire legal skills, and through repeated practice, to improve. However, they are not able to understand what legal skills are, instead tending towards an empty mimicry. Repeat experience does not improve performance because of the inconsistency in the way in which LiPs are treated. LiPs acquire more and more information but this does not improve their outcomes. As such, alternate explanations seem to be necessary to explain this failure, either through 'corruption' or 'fakery'.

Paul, for example, says:

So you had to, you know, set things up correctly and then you have to present the case in such a way the best you can so that there is no loophole for the judge to, to find against you unless there's cheating. So of course what I have observed as a litigant in person is dishonest lawyers, dishonest barristers, dishonest judges, dishonest senior judges, corruption at, even at a very high level.

In addition to corruption being the product of being excluded from conversations, corruption was also used quite widely by interviewees to signify their disbelief that a case they so

strongly believed in was unsuccessful.<sup>641</sup> But it isn't always clear what interviewees mean by the term corruption. I asked Martin to be more specific:

Kate: So what does corrupt mean?

Martin: It means that because it's a bank you are fighting or because it's a huge organisation you are fighting, the law goes with it.

Kate: Is that because of the bank's official clout or are you thinking more of the money?

Martin: All of it, um, I mean, you know I don't say it. What I'm trying to do is speaking abstract at the moment. Um, I am lucky because I've got [an organisation Martin is involved with] as an outlet, and I can actually see, um, that uh, the courts try very hard to be transparently straight, But you can see it from a litigants in person point of view right now, I mean this is almost the perfect example for you...no matter how hard you try, to say that the courts are trying very hard, you get a decision like this which goes against you and you think, oh that's corrupt.

As Martin makes clear, the 'corruption' allegations seem to spring from a combination of factors: the fear that they are being excluded from conversations, the relative powerlessness of the LiP, their failure despite considerable effort at a disproportionate cost to them, and the lack of an explanation that they understand as to why this is happening.

Similarly, the allure of the 'fake' documentation and courts claim seems to be that firstly, like all conspiracy theories, it explains why LiPs fail, despite considerable investment and energy directed into learning the law, often in situations where this is made extremely difficult. But secondly, interestingly, this conspiracy allows LiPs to preserve intact the belief that *they know the law better than those who would abuse it*. Take Talia's explanation of false templates: to conspire about an unstamped letter from the court suggests a strong belief in the 'perfection' of the courts, rather than an acceptance that individuals can make errors. Interviewees holding these beliefs do not seem to accept that courts may make mistakes, or that courts can mislabel documents or simply not always issue identical documents; that

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<sup>641</sup> Charles: 'You've won the case but you've basically lost because £90,000 was what I was supposed to pay the solicitors and I get £10 compensation for all that I've been through. So he was corrupt, I could see he was corrupt'.

someone might forget to sign something, or date something or anything else similar. This is perhaps attributable partially to having had idealised visions of justice as well as being rooted also in the need of LiPs to uncover something ‘wrong’ that can allow them to succeed in their claim.<sup>642</sup> Talia says:

It’s going to make me really unpopular but I believe as I’ve said to them, the rule of law it’s the most precious asset any civilised society can have and as a statutory authority they should be upholding the law, not breaking it for commercial gain.

It is also, of course, indicative of a conspiracist approach that tends to allocate meaning to what might be accidental or random incidents.

But the other feature to note is the degree to which such a conspiracy allows LiPs to retain a belief in their own hard-won ‘expertise’. That after significant efforts, they know the law, and how the law is supposed to be. This manifests not only in these kinds of conspiracist ideas about ‘faking’, but also in the ways in which repeat LiPs ‘counterchallenge’ legal authority. These LiPs attempt to assert their legal knowledge, or authority, arguing that it is the *courts* that are not observing the law, and that their knowledge, or their moral *claim*, is superior. This can be seen, for example, in the case of Paul who entered a courtroom and asked the judge ‘under what system of law’ the court proceedings would be held. As he explains, he was trying to ascertain that the burden of proof would be on the claimant, but he expressed it in the way he did to signal to the judge the knowledge he possessed about the ways in which he believed the courts did not always uphold decisions according to law. Talia, too, repeatedly tried to hold the court to ‘order’ by pointing out what she perceived to be the ignoring of basic procedure:

The, the, the judge on the 26<sup>th</sup> October not reading my bundle and then making a judgement against me, I mean that, that is wrong at every level. That is wrong in law, it’s wrong in, you know, European law, to pass a judgment against me without having heard my case, I mean she’ll say that she heard me because it says in the transcript you know, Talia X was there in person, but she hadn’t read the bundle and so, um, she didn’t, when I complained that the other side’s witness statements were all defective, which is a polite way of saying they told lies, all three of them, and for instance I think I mentioned to you, they’d um, in the third witness statement they’d [laughter] cited the mortgage loan conditions for properties secured, for loans secured on properties in Scotland which is completely and utterly irrelevant and they put this in the witness statement and then

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<sup>642</sup> Remember, for example, in Chapter Five Peter’s attempt to use the missing two weeks of temporary care orders to rescind the final Care Order where he had permanently lost custody of his son.

signed it as, you know, a statement of truth, um, but I got no opportunity to talk about any of that, um, the judge was doing what she'd been told to do, um, and I escaped by the skin of my teeth.

Georgina took her counterchallenge even further in our interview, rejecting law and parliament's role, saying instead that 'divine' justice outweighed them:

I realise now of course that I've got a very very strong sense of divine justice, you know, that essentially we're under no laws except God's law. Um, I go to the absolute because I think what people are calling law, which is statutes which are not law, they are statutes, they require consent, most of them have been passed with a show of hands, they have never been ratified through parliament, never can be ratified through parliament.

The conspiracising around corruption, 'fake' courts and legal professionals 'breaking the law' seem to reflect most strongly the issue of LiPs being unable to obtain quality information, and not having clear guidance as to what their role is. Legal information is largely kept out of their reach, and LiPs do not fully understand the complex nature of legal skills. This means that acquiring any information takes a significant amount of effort. But without the understanding of legal skills, this information does not necessarily assist them. As this thesis argues, repeated behaviour does not improve LiP performance. But for LiPs, they have acquired expertise. This expertise is being denied or disavowed (in their eyes) by the courts. They are routinely failing and they don't know why. They know the law (they believe). So the courts, and people within those courts, must be letting them down. It is not difficult to see here how this experience may lead to conspiracising.

In this respect, the conspiracy of 'corruption' carries strong echoes of an undermining of 'trust' as a subset of procedural justice according to Zimmerman and Tyler. They note that 'trust' is predicated on a litigant's perception on whether the authorities are honest or seeking to do what is right.<sup>643</sup> The cumulative effect of the kinds of exclusions above are those that militate against the development of trust for litigants: as such this can undermine perceptions of legitimacy. Zimmerman and Tyler note that: 'The experience that litigants have when they deal with the legal system is important because it shapes their willingness to accept decisions and their evaluations of the legal system'.<sup>644</sup> In this respect, exploring normative perceptions of justice and procedural justice can be illuminating in determining not just what enhances legitimacy, but what may undermine it. Tyler noted in *Why People Obey the Law*, that

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<sup>643</sup> Zimmerman and Tyler, "Between Access to Counsel and Access to Justice," 488.

<sup>644</sup> Ibid, 503.

Legitimacy can reside either in a person who occupies a position of authority or in an institution. Political and legal theories of legitimacy have emphasized that using legitimate institutions and rules when making decisions enhances the likelihood that members of the public will comply, even if they do not agree with the decisions or support those who have made them.<sup>645</sup>

So whilst legitimate institutions and rules enhance compliance, institutions and rules *perceived* to be illegitimate, as a consequence of exclusions, such as those procedural justice categories examined above, are likely to breed a lack of compliance, and a lack of trust. And this is precisely what this study shows: the more LiPs are excluded, the less likely they are to trust the legal proceedings. But this isn't a consequence of not 'winning', it is about the process, rather than the outcome: not being listened to, not being respected, not being valued. And this study supports the idea that litigants may enter into litigation with a high respect for legal proceedings only to have their negative experiences lead to a breakdown in trust that fosters conspiracising.

#### CONSEQUENCES

On reflecting on the above, then, many of the "hotspots" that LiPs experience that lead to conspiracising are from the processes of exclusion described throughout this thesis.<sup>646</sup> Ultimately, these processes of exclusion, which are commonplace, are emblematic of LiPs' lack of established place, or understood role in legal proceedings, beyond as exceptions who are treated with significant variation. They are also symptomatic, as above, of a lack of perceived procedural justice. These are significant factors in undermining LiP faith in the fairness of judicial proceedings. Believing firmly in the rightness of their case, any decisions that go against LiPs, or negative encounters with legal professionals, are perceived as undermining their faith in justice. While this may be due to overblown expectations and, at times, delusion as to the merits of their case, it is also due to the many and often processes of exclusion and lack of fairness many LiPs experience. In this study this caused all LiPs, not just the obvious conspiracists, to become more negative about the possibility of accessing justice. And for some individuals in this study, their failure could only be explained in terms of conspiracy.

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<sup>645</sup> Tyler, *Why People Obey the Law*, 29.

<sup>646</sup> This is of course not a uniform position. Many LiPs in this study would talk about varying experiences in different courtrooms or with different professionals that were more or less fair. However, the sources of unhappiness and unfairness were largely shared and attributable to this not understanding 'the rules of the game'.



So why does it matter if some LiPs are conspiracists? Firstly, of course, as this thesis has tried to argue, it matters because it matters to them. LiP experiences of the courts are negative and damaging. It is also of concern that there is such significant distrust of the legal profession. It also matters because LiPs who espouse conspiracist ideas cause difficulties for others. In addition, it is important because, as this study has tried to suggest, we also need to *listen* more to LiPs, rather than pathologizing them which does not really serve any other purpose than to reinforce LiPs as a monolithic ‘problem’ or burden to be dealt with. If we pathologise LiPs, we also dismiss their complaints, and these complaints, however offensive, are at least partially rooted in genuine experiences of exclusion. But there is a final, important factor to consider: how conspiracy spreads.

In this study, I have largely been talking about five or six individuals in this study who are clearly conspiracist, with the others not. But why do some LiPs come to be conspiracists then, and others not, if they share these similar experiences of exclusion? Perhaps it is because conspiracists are more willing to entertain certain kinds of explanations that others reject. For example, Eleanor clearly identifies her solicitors withholding information from her but is explicit that this is a product of ‘gamesmanship, echoing Ewick and Silbey’s summary of seeing the law as ‘tactical’:

Um, if the other party’s a litigant in person, go for it. If they’re not, think long and hard. Purely and simply, because you will not get a fair shake in the courts if you are a litigant in person and your opposing side is not, they’ve got representation, you will get screwed because it’s, as I say, unfortunately, not about the law in those circumstances, its’ about who’s got the most toys and who can do the best performance and who’s got the best ga-, who’s better at winning the game. Because that’s one thing I’ve learned through all of this, 2002 onwards, is the law is a game.

This willingness to conspire may well be rooted in personality, education, pathology, past experience or a host of other explanations beyond the scope of this project.<sup>647</sup>

However, it really isn’t as straightforward as that. While for convenience I have highlighted ‘obvious’ conspirators, the distinction is much blurrier. Some interviewees were clearly conspiracists, such as Georgina, Anna and Russell, and others were clearly *not*, such as Eleanor and Trevor. But many trod a much less clear line somewhere in between.<sup>648</sup> This manifested in

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<sup>647</sup> Some of these are outlined in the law and psychology, psychiatry literature detailed earlier in the chapter.

<sup>648</sup> However, Eleanor argues that she is certain her solicitor agreed a plea deal behind her back with the prosecution. This illustrates the very blurry line between conspiracy, exclusion and unfair treatment. Did this happen behind her back? Perhaps. If so, Eleanor is not conspiracist to think so, but one might

interviewees generally avoiding any recourse to conspiracist explanations, *except at certain moments*. Charles, for example, began to see conspiracy in the way he felt the legal profession was treating him, alluding periodically to the masons, but he was by no means as developed in his conspiracist outlook as Georgina or Anna. Marie, too, occasionally made statements connected to a belief that the Local Authority and solicitors conspired together, but otherwise made no claims to any kind of influence, whether Masonic or otherwise.<sup>649</sup> Martin is perhaps the most instructive example of this continuum, whereby he would at times talk of feeling that certain judges were ‘corrupt’ before catching himself and commenting on how easy it was to start to become a conspiracist. In this respect, conspiracist thinking might best be understood as existing along a spectrum, instead of being reserved for only the most ‘extreme’ LiPs. And if conspiracising is connected to repeated negative experiences, this suggests that all LiPs run the risk of becoming more conspiracy minded because of their experiences; so, any division between the “nutters” and the ‘normal’ is a false one.<sup>650</sup>

In addition, all of those who entertained the more extremist conspiracy ideas are individuals who, in the absence of formal legal advice, are part of *informal networks of advice*. In these advice exchanges, which take place via email, through Facebook groups, and other forms of online correspondence, group members email one another with suggestions, arguments and claims ranging across a whole series of issues and at an array of targets. The arguments are not based on any kind of proof or evidence, only on opinion and experience, and yet they are frequently taken up as fact by participating members.<sup>651</sup> These advice networks, which operate privately, are clearly of critical importance in shaping some of these more extreme beliefs. Research consistently shows that a believer in one conspiracy theory is more likely to believe in another.<sup>652</sup> However, while such private exchanges may be argued to be beyond the reach of legal influence, it is important to note that these networks of informal advice flourish at least partially *because quality advice is so difficult to access for LiPs*. In other words, in the absence of formal and accessible legal advice, many LiPs turn to the internet. Most interviewees in this

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equally argue that this did not happen and therefore she is attributing malign (if not conspiracist) motives to her solicitor.

<sup>649</sup> Groh, “The Temptation of Conspiracy Theory,” 11.

<sup>650</sup> This is supported by Oliver and Wood’s research suggesting that ‘conspiracist’ beliefs are observable in the population in general: J. Eric Oliver and Thomas Wood, “Conspiracy Theories and the Paranoid Style(s) of Mass Opinion,” *American Journal of Political Science* 58, no. 4(2014), 952.

<sup>651</sup> One such exchange involved the identifying of a ‘sympathetic’ judge to take up their cause of ‘exposing’ the influence of freemasons. Anna suggested Lord Neuberger, only to receive a flurry of emails accusing Lord Neuberger of being part of the ‘cover up’ and a mason himself. While these documents do not form part of the data specifically collected for this PhD, throughout this study I have been copied into correspondence from several LiPs in this study, enabling me access to these networks of information.

<sup>652</sup> See Ted Goertzel, “Belief in Conspiracy Theories,” *Political Psychology* 15.4(1994). Viren Swami et al, “Conspiracist Ideation in Britain and Austria,” *British Journal of Psychology* 102, no. 3(2011); Ken Drinkwater et al, “Reality Testing, Conspiracy Theory and Paranormal Beliefs,” *The Journal of Parapsychology* 76, no.1(2012).

study did and while some were able to see the poor or questionable quality of the information provided and steer clear, others embraced it and were clearly influenced by it.<sup>653</sup>

So if a LiP is unable to access reliable formal advice, they will turn to these networks.<sup>654</sup> And such exchanges can frequently share 'bad' information back and forth which can encourage and perpetuate conspiracy theories.<sup>655</sup> It is notable that when LiPs in this study talk about developing conspiracist ideas, they often speak in the language of revelation where something now obvious was 'revealed' to them, and more often than not, this has come from someone explaining 'what really happened' to them.<sup>656</sup> The role of informal advice networks is also important to explore because the other commonality amongst conspiracy theorists in this study is the desire to 'help' others see what they have seen.<sup>657</sup> All the interviewees in this study who explicitly entertained conspiracist ideas have subsequently sought to help other LiPs with their experiences, thus potentially perpetuating this kind of misinformation for future LiPs. It was notable that the most conspiracist LiPs in this study were the most active in attempting to assist other LiPs, through setting up websites, helping other LiPs with their casefiles, and through working as McKenzie Friends. Anna says:

Basically um we are people who are victims of corrupt courts and corrupt solicitors and we are educating people what to avoid. We're, we're sharing our experiences so that others don't suffer like we do so no, we're not very popular bur there's currently a consultation going on about what to do about McKenzie friends and I think as part of that, somebody I know has been set up to help bring it under tighter control so if you like I'm counteracting it by showing that McKenzie friends can, you know, are a very well worthwhile cause.

Georgina, Charles, Paul, Peter and Anna have all, in different ways, assisted LiPs as a response to their own experiences. This desire to help people, as well as the existence of these kinds of networks, also suggests a picture where repeated experiences of exclusion risk tipping those who hold borderline conspiracist views into full-blown conspiracy in the absence of better-

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<sup>653</sup> Charles and Talia for example thought that many of the groups they encountered on the internet were unreliable, or 'crazy'.

<sup>654</sup> This is therefore another possibility to be added to that Hazel Genn outlined in 2013. Reflecting on changes to legal aid she notes that some individuals may not come to law at all, while others may come without the benefit of advice. This study suggests the need to add a third category; that many will start to come to courts armed with 'bad' advice from informal networks. Genn, "Do It Yourself Law," 5-6.

<sup>655</sup> Groh, "The Temptation of Conspiracy," 3.

<sup>656</sup> For example, Georgina talks about wishing she had been 'more awake' eight years before when the alleged fraud was first taking place. Martin similarly 'discovers' what has happened to him through meeting someone who experienced something similar. Marie learns, through her contact with McKenzie Friends, that lawyers within the local authority cannot be trusted.

<sup>657</sup> One of the most common methods for doing so was to become a McKenzie Friend and use this as a platform for helping others.

quality information and advice, because they will turn to these networks for support and assistance.<sup>658</sup>

## CONCLUSION

In concluding, I want to make clear that I am not arguing that all LiPs are conspiracists. Most are not and may never become so. I am, though, arguing that there are important findings to draw from this study; firstly, there is a connection between the real experiences of exclusion LiPs face and entertaining conspiracist ideas. The experiences individuals have as a LiP can help to create, reproduce and aggravate conspiracist ideas. Secondly, conspiracist thinking isn't undifferentiated, but may better be understood in this study as a spectrum, with some LiPs completely embracing conspiracies explanations, others using them at times to explain certain points in their experiences, and others rejecting these ideas altogether.<sup>659</sup> This means that there is a real possibility that some LiPs may slip from disappointed expectations into these subtler forms of conspiracy. This study suggests the more LiPs lack access to good quality information, advice or even just basic assistance and sympathy, the more likely they are to find alternative explanations through informal advice networks, and the greater the risk that LiPs may interpret their negative experiences as being symptomatic of something more malevolent. This means a future of more conspiracist LiPs acting in a 'difficult' way for the courts. In this respect, such a finding suggests a clear impact on the courts. However, more importantly for this study, it evidences a real problem for LiPs.

This chapter, then, and this thesis, ends up where it started: with the idea of LiPs as 'pests', 'nuts' and 'loonies in person'. As I argued at the beginning of this thesis, since LASPO, and arguably earlier, the legal profession has feared the effect of more LiPs, focusing on their perceived pathology and the impact this 'querulous behaviour' will have on the courts. Perhaps ironically, or perhaps inevitably, the research of this chapter suggests that the legal profession is somewhat responsible for creating them in the first place. Going to law is disproportionately more difficult for LiPs and at its worst, put simply, it can make LiPs "crazy". In addition, recent policy shifts and austerity measures that have resulted in a decline of access to legal advice, basic assistance or even simple face-to-face contact are aggravating this situation considerably, creating a perfect storm of advice deserts, lack of human contact, and a proliferation of online networking between LiPs.

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<sup>658</sup> See Neil Dagnall et al, "Conspiracy Theory and Cognitive Style: a Worldview," *Frontiers in Psychology* 6(2015): 206.

<sup>659</sup> Both Martin and Charles are quite clear about their desire to avoid entertaining conspiracist ideas, but are also both at times clearly tempted by conspiracist explanations to explain their failures.

However, I want to end on a slightly more optimistic note. While nothing systematic can be done about individuals with pre-existing pathology, something *can* be done about redressing LiP experiences of systematic exclusion, at least partly. In this respect, forestalling the assumption that serial litigants are inevitably suffering from ‘querulous behaviour’ syndrome not only stops internalising responsibility in the LiP, but can also offer a better way forward for everyone. This involves confronting the idea that LiP difficulties are systemic, and are embedded in the civil justice system itself. In addition, we need to address the role and purpose of LiPs in a more coherent and systematic way. Perhaps then, there is a possibility that some of the more negative experiences told in these pages might be avoided. And that is what I will explore in the conclusion to this thesis: what can we do?

## CONCLUSION

This thesis has tried to understand more about what it is like to be a LiP. In the first two chapters I explored how LiPs are viewed by the legal profession and scholarship, considering why LiPs often have a negative reputation, and how they came to acquire this pejorative baggage. I then turned, through my empirical research, to flip perspectives and consider how LiPs themselves describe their experiences of litigation, and their attitudes towards legal professionals and process. As I conjectured at the outset of this research, a vast divide separates these two different perspectives; misunderstanding upon misunderstanding, deliberate, accidental, useful, detrimental, and all of these issues continue to throw hazards in the path of clear communication, eroding trust and accumulating like mounting debris on a highway. It is therefore quite difficult to see beyond the rubble or, to borrow a metaphor from writing *about* LiPs, to think about after the ‘flood’.

As I set out in the first and second chapters of this thesis, distrust and dislike of LiPs is deep-rooted and longstanding. And what LiP perspectives tell us is that this distrust cuts both ways; LiPs in this study have deeply negative experiences that lead them to dislike and distrust legal professionals in turn. So much of this distrust and dislike is grounded in gaps between ways of seeing. It is also rooted, as I have sought to argue, in the lack of *place* for LiPs. They don’t belong. They are made to feel that they don’t belong. This perpetuates not only their own negative experiences, but also the very likelihood of their being received in a hostile environment. And so a distrustful cycle carries on. In this conclusion then, we find ourselves at somewhat of an impasse. LiPs are badly and inadequately accommodated in the civil justice system. And more LiPs are coming into this system that has no clear place for them; in terms of resources, attitudes, and the workings of civil justice itself, which seems to preclude, or at least limit, recognition of LiP needs or desires. The dimension of the problem is vast, and seemingly intractable.

However, while the future for LiPs looks bleak, what I hope to have achieved in this thesis is not simply laying out the scale of the problem, but to also provide at least a partial corrective; some small steps or adjustments that may indeed be possible and which may, in a small way, make a difference. It is the delusion of every PhD student to have inflated ideas about what her thesis can ‘do’, so I want to be quite frank here. I am clearly not going to solve anything; not through a small study, not through a single thesis; of course not. Nor can I come up with a holistic, or developed proposal, which is again sadly beyond my reach and ability. But to

return to Clifford Geertz: ‘it is not necessary to know everything in order to understand something’.<sup>660</sup> I might paraphrase this to say that it is not necessary for me to solve anything, but that doesn’t mean that I can’t make some contribution towards that end. And so that is what this conclusion seeks to do: to not just summarise the problems, but to also start to think about what we might do.

What are the problems? As the first chapter of this thesis sought to demonstrate, there is a widely disseminated negative perception of LiPs. At different times, and in different jurisdictions, people representing themselves have been described as time wasters, difficult, “crazy”, obsessive and so on. The emphasis in such writing is on the difficulty LiPs cause others; through taking too long, through lacking legal skills, as well as through what is often conjectured to be fundamentally down to their psychological makeup or troublesome personality. As I have argued, inherent in these kinds of descriptions is an instinctive association between LiPs and vexatious litigants, and between LiPs and compulsive litigants. There is an implicit assumption in much of this writing that assumes LiPs are there out of choice, much in the same way that criminal retributivists perceive crime. Criminals choose to commit crimes, and LiPs choose to “commit law”. Ultimately, this paints a picture of LiPs as an overriding *problem* whose impact needs to be managed, or controlled.

Compounding this unflattering portrait of LiPs is the current context we find ourselves in: five years after the cuts to legal aid, which left those pursuing or defending civil claims almost completely without access to free advice or representation. As I have laid out in the first chapter, this has engendered something of a crisis when it comes to LiPs. Attention focused on LiPs has expanded exponentially because the expected rapid increase in numbers has raised considerable concern: how the courts will deal with the influx of LiPs, what legal professionals can do and whether their roles will be expected to change, and a host of other unanswerable questions. At times, this concern is elevated to the status of an explicit threat: evident in claims about potential LiP violence and abuse of others, including court users, court staff and legal professionals. This threat seems to be rooted in the concern that in the wake of LASPO there may be *too many* LiPs to be adequately controlled, or safely dealt with in the context of limited resources and funding cuts to court services. This concern is explicitly made, too, in the literature that draws diluvian analogies talking of flooding, tsunamis and waves; apocalyptic and catastrophic imagery to symbolise just *how* problematic LiPs are perceived to be by some practitioners and scholars in civil justice. But as the first chapter set out, and this thesis has maintained throughout, this conceptualisation of LiPs as threat can only be created and maintained through positioning LiPs as outsiders. Fundamental to the negative

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<sup>660</sup> Geertz, “The Interpretation of Cultures,” 20.

conception *of* LiPs, therefore, is that they are conceived of as “outside” of normal legal practice: LiPs are fundamentally aberrant.

Of course, this is not uniformly the case. As I laid out in my second chapter, there have always been sympathetic scholars and practitioners who have tried to assist LiPs, notably the influential and important work of Hazel Genn, as well as Rosemary Hunter, Mark Sefton and Richard Moorhead, John Baldwin, Elizabeth Trinder, Didi Herman and others. This thesis would not be possible without the illuminating work of these scholars, including the difficult groundwork of finding and interviewing LiPs, testing presuppositions and tracking policy developments and their effects at a time when LiPs were being largely ignored in research. It is important to emphasise, too, that there is a growing body of scholarship that seeks to understand the litigant in person. This includes the work of the Civil Justice Council, and their Litigants in Person Working Group, the work of Bob Lee and Tatiana Tkacukova at the University of Birmingham, the work of Julie McFarlane in Canada, and the recent project currently underway under Professor Grainne McKeever at Ulster University. Such literature has attempted to better understand LiP experiences and to offer suggestions for how to improve their experiences as well as how to minimise the impact on the courts.

There has also been a wave of guidance, research and policy about the LiP since LASPO. Such materials have been produced by the High Court, the Supreme Court, the Bar Pro Bono unit, the Law Society and numerous others. Networks of research and collaboration have also formed, including the LiP Network, doing important work in finding ways to better assist LiPs. I would therefore not wish to minimise the important work that has recently been done, and is continuing to be done in the area. However, this more recent work, while useful and illuminating in some ways, still arguably has certain limitations when it comes to understanding LiPs. Firstly, whilst such work is very important and is slowly growing, it remains constituted by a relatively small group of researchers, although it is growing. Secondly, such scholarship is made challenging by the almost total absence of data about LiPs; as I mentioned earlier in this thesis, figures for LiPs have only been published since 2014, and these are far from robust. This means that much of this research, including my own project, remains preliminary in the absence of better data.

Lastly, though, this thesis also sets out to argue that a limitation of at least *some* of this guidance and assistance for LiPs is that it can be, at least at times, primarily concerned with the future and status of the legal profession: the effect the cuts will have on the future of legal representation. Such motives of course do not preclude a meaningful effort at assistance, but they do reflect the primacy of legal representation as the ultimate objective. Essentially, such scholarship largely seeks to find ways of expanding or obtaining advice for LiPs. This is of



course invaluable and important, but the solution *here* is always: get a lawyer. And this poses a problem. Firstly, this is because the clock is not being turned back post LASPO. While over the course of this PhD there have been certain about-turns in conditions for lay litigants – such as the Supreme Court defeat of the raising of Employment Tribunal Fees<sup>661</sup> (and in the criminal sphere, the defeat of the Criminal Courts Charge), and while there are continuing discussions and proposed green papers about Family Court fees and access to legal aid, this simply isn't the case for civil justice more widely.<sup>662</sup> As the Bach Commission report, published in late September 2017, outlines, Labour's vision for legal aid advocates restoration of such aid to certain spheres, but does not propose reinstating it for non-family civil matters.<sup>663</sup> So this government, and the opposition, are certainly not proposing restoring legal aid for anyone within these pages. This means that 'get a lawyer' isn't a good enough answer.

In addition to this issue, however, this thesis has tried to hint at a deeper one; a fundamental contradiction that exists between the theoretical 'right' to self-represent and a civil justice system that makes this extremely difficult in practice, and where LiPs remain outsiders. So how did we get here? Why are LiPs outsiders? As I outlined in Chapter Three, this history is quite a specific one. The idea that people who represented themselves were always seen as aberrant simply isn't the case. It was common for individuals to act without legal representation for hundreds of years, in multiple different kinds of proceedings, such as manorial courts, Eyres, other forms of itinerant court proceedings and in the Courts of Request. But such a landscape was one where there were forums not dominated by the legal profession. The coming of the professional, and the professionalisation of the new County Courts, is a story of attorneys fighting for recognition and distinction in these new courts. But these developments limit self-represented litigants from being able to pursue or defend claims without legal expertise. By the end of this process, legal expertise and formal procedure has become the norm in civil proceedings. Being a 'LiP' therefore means something different to self-representation; it signifies the moment where self-representation becomes aberrant. To be a LiP is to occupy a role arguably defined by lack of judgment and lack of skill: the obverse of the legal professional. This means that LiPs exist in conceptual opposition to the mastery, colonisation and normality of the legal profession for resolving disputes. From this moment, self-represented parties are outsiders, and there is no place for them in this new, post *Judicature Act* world.

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<sup>661</sup> See *R (on the Application of UNISON) (Appellant) v. Lord Chancellor (Respondent)* 2017 UKSC 51.

<sup>662</sup> The Criminal Courts Charge was a system of fixed fees of up to £1200 that essentially penalise criminal defendants should they be found guilty of a criminal offence. It was introduced in April 2015 under Secretary of State for Justice Chris Grayling. The next justice secretary, Michael Gove, scrapped the charges after a select committee report highlighted the widescale problems and protests with such a charge. See House of Commons Justice Committee, *Criminal Courts Charge: Second Report of Session 2015-16* HC586 (The Stationery Office: London, 2015).

<sup>663</sup> The Bach Commission on Access to Justice, *The Crisis in the Justice System in England and Wales Interim Report* (Fabian Society: London, 2016).

It is important not to overstate the point: as mentioned above, LiPs are increasingly becoming a fact of life in multiple courts, and there are many people within the profession who actively seek to assist them. But they remain, *conceptually* at least, outsiders. And this ‘outsider’ status does something useful and productive; it emphasises the competency of the profession. One troubling question that arises from this study, then, is how can LiPs succeed? How can we ameliorate or improve LiP experiences in a legal world that, unconsciously or not, relies to some degree on their shortcomings? This odd positioning is ultimately echoed in some of the literature that demonstrates *fear* of the LiP: a situation where LiPs are ‘normal’ is a situation where legal professionals are giving way to another group in an area that they dominate. This issue surely provides some illumination as to why research on LiPs can be limited in what it can do: because it tends to reproduce the scenario that retains the LiP as outsider. It also explains the most significant research gap that this thesis identifies, and which was identified by John Baldwin twenty years ago: much of the research into LiPs, including more recent and sympathetic scholarship, focuses on the impact LiPs have on the courts. What about the impact of the courts on the LiP?

This is what this thesis set out to consider through my empirical research. What can we find out by talking to LiPs? Not in concert with legal professionals, nor with the aim of reconfiguring LiP comments into previous frameworks; but unilaterally, *in their own words*? To do this, of course, I argued we need to go ‘without the law’: find *other* ways of reaching LiPs that could, if not completely escape, at least partially avoid falling into the potential trap of seeing LiPs as a problem or of assuming the solution ought to be legal representation. Most importantly, I argued that we needed to find out more about the impact going to law has on the LiP: what is it like to pursue or defend a claim? As I contended throughout the second half of this thesis, the answer is, for these fifteen interviewees at least, is: it’s terrible. Interviewee after interviewee expressed the deep and negative impact these experiences had had on them, including loss of family, loss of jobs, loss of homes, loss of social lives and loss of identity. For some interviewees, their claims became all they had.

It is important to emphasise that this study is of a very small sample and as such, I do not want to overclaim based on these findings. However, at the very least, I argue the findings of this study potentially rebuts the idea that LiPs are choosing to “commit law”: no interviewee acted out of ‘choice’ as they understood it: rather they felt compelled or obliged to fight for something they perceived to be important in circumstances that were extremely difficult. In addition, whilst the significant and negative impact going to law can have for LiPs is perhaps to some degree recognised in family proceedings, this study has suggested it is not necessarily only those involved in the more obvious “worthy” claims who have difficult or challenging

experiences. No LiP in this study went to law for fun, and the negative impact experienced by interviewees was considerable. This finding suggests, I would argue, that we need to concentrate more on understanding this negative impact when researching LiPs in civil justice. Finally, I argue this study problematizes the distinction between ‘worthy’ and ‘unworthy’ litigants: this study has suggested that the complex individual histories of litigants often involve a development of litigious behaviour, or development of distrust: the long-term narrative challenges this distinction between ‘worthy’ and ‘unworthy’ litigants and this thesis contends overall it is arguably a false one; certainly it is unhelpful.

But what this study also found, beyond the depth of difficulties experienced by these LiPs, is that so many of these difficulties aren’t because of them, it is arguably embedded within the practice of civil justice itself. Interviewee after interviewee narrates scenarios where access to justice is made disproportionately *more* difficult, whether because of access to material, inaccessibility of language, incomplete understanding of required behaviour, restrictive opening times, limited access to advice, and more. This all points to a scenario of differential treatment. This study suggests therefore, that LiPs are being held to many of the same standards as legal professionals without the skills, privileges and networks that the latter possess. And they are perhaps at times blamed for these failures. Again, I want to emphasise that this was a very small study. But as I have contended throughout this thesis: this begs the question: how can a LiP be good? We are very familiar with the bad LiP in the literature: it is clear what it means to not succeed. But what does a good LiP look like? The lack of consistent guidance or clearly conceptualised role for LiPs results, in this study at least, in the experience of individuals being told that they have a right to self-represent, only to find the odds stacked against them when they set out to do so. In this respect, at least, it is arguably far more likely that they will fail than succeed.

And fail many do. With some exceptions, this study largely records and discusses experiences of failures. LiPs in this study fail to communicate what they wanted, LiPs fail to provide the right documentation, LiPs fail to succeed in their claims, LiPs fail to get the right information to the right person at the right time. There is no doubt that amongst these failures, there are overblown expectations, perhaps some poor preparation, and other difficulties that are due to the LiP themselves. In addition, of course, all this study has is *stories*; we don’t know “what happened”. But the stories that emerge are deeply troubling. Because this failure seems to be often attributable to things that the LiP simply doesn’t understand or will struggle to do anything about. Worryingly, an important finding from this study is that one of the worse, and least recognised, aspects of being a LiP is that they are at such a disadvantage when things go wrong: how will a LiP know how to deal with this? In the end, then, this study suggests not only that LiPs often fail (which we already knew), but that they often fail *and they*

*don't know why*. This is troubling on a basic level, suggesting we need to do a great deal more to understand what is happening here. But there are also significant consequences to these experiences of failures.

As the final chapter of this thesis set out, LiPs in this study understand failures in particular ways, and for some LiPs, the only way to understand why they repeatedly fail, despite the effort and *work* they put in, is conspiracy. But while such claims tend to reinforce negative attitudes some have towards LiPs (“loonies in person” and “nutters”), what this study suggests is that this conspiracising may be a response to the scenario that LiPs find themselves in: where they are given theoretical access to the courts, but where they cannot easily succeed, and where it is extremely difficult—if not impossible—to learn how to improve. The differential treatment LiPs in this study experience, the systemic exclusions they face, are symptomatic, I argue, of their fundamental lack of place in the legal system. It is this collective, systemic experience that gives rise to conspiracy; not aberrant psychopathology. But when such individuals come to court and express these ideas, this arguably serves to reinforce negative impressions of them and undermine their claims. And so we arrive at the challenging cycle: this study argues that negative experiences of justice exacerbates or perhaps even creates conspiracists in the first place. And so LiPs conspiracise, and so they fail again. And so on. And as this study also points to, the more LiPs fail, the more likely they may be to conspiracise, and so repeated failure can potentially lead to greater conspiracising. Most troubling of all, this study suggests that it is those who are the most conspiracy minded who are also the most likely to share information, often bad information, through advice networks, and through acting as advisers to LiPs. This means that this study suggests that in the absence of good advice, bad advice is more likely to flourish.

Clearly, we have multiple problems of significant scale. But as I set out to do in this chapter, I don't just want to lay out the scale of the problem. What can we do? As I have argued above, the findings in this study suggest some deep-rooted systemic problems that need addressing: firstly, this involves recognising the implication of the courts and legal professionals themselves in LiP experiences: how their practises and assumptions serve to reinforce and perpetuate the certain issues with LiPs. This involves considering how the failure of the LiP is linked to the success of the legal professional. How this is done is something for future study and research, but at the very least this study has demonstrated how much more we can understand about LiPs if we speak to them outside of the assumptions we place on them. If we don't do this, we will always fail to understand.

But I want to end on a more positive note. While the issues that this study points to are deep-rooted, there are surely ways to do small things to assist. Firstly, providing clearer guidance

for legal professionals would surely help. This might involve things like explaining to them the distrust LiPs feel when they see lawyers and judges gathering and conversing together without them. If legal professionals were more explicit about how and why this took place, or if they refrained from doing it, this could improve LiP experiences. Better explanations also seem called for here. While of course many judges try extremely hard to explain situations to LiPs, these explanations would work better earlier on in the process. Some of the worst experiences in this study came from LiPs failure to understand the financial consequences of not settling. This is surely something that can be built on in the mediation process so that the consequences are made more explicit than they currently are. I obviously cannot outline every possible proposed solution for LiPs. But I do believe that there are probably many relatively simple, inexpensive steps that could be done, and that I hope can be developed (and which I hope to continue developing after this thesis).

One mooted next step to assist LiPs is the coming online court. Lord Justice Briggs' report in July 2016 proposed that small claims be moved online.<sup>664</sup> The model suggested would follow the example set by British Columbia in Canada where they have already introduced such an online court.<sup>665</sup> In this proposed process, litigants would go through three stages; early 'triage' to identify problems through an automated system; arbitration with an appointed mediator, which would also take place online and finally, only if necessary, a judicial decision if litigants couldn't agree. Arguments in favour of an online court cite its greater accessibility for litigants, being online and circumventing the need to attend court.<sup>666</sup> In addition, this would also mean litigants could upload documents rather than sending them to a claims processing centre. While details have not been finalised, simplified proceedings are intended including the online court *not* being subject to the Civil Procedure Rules.<sup>667</sup> Such developments may indeed greatly assist in bypassing 'gatekeeper' issues referred to repeatedly in this thesis: the paper-bound nature of civil justice currently undoubtedly causes difficulties for LiPs.

However, there are areas of concern we need to consider before embracing such a court. The automated triage system means that litigants will not have any human contact until the arbitration process. The 'triaging' relies on a system that can categorise disputes. But this thesis has already raised the problem with these kinds of categorisation. LiPs rarely only have one problem, and struggle to separate out such issues. It is hard to see how an automated system will optimise this process, and the risk is that it may simply once again fail to be able to

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<sup>664</sup> Briggs, *Civil Courts*.

<sup>665</sup> The Civil Resolution Tribunal is available at: <https://civilresolutionbc.ca>

<sup>666</sup> Briggs, *Civil Courts*, 36-52.

<sup>667</sup> *Ibid*, 52.

comprehend the complexity of litigants' cases.<sup>668</sup> The presumption built in here is that individuals have discrete problems, and this research contradicts this, as other research has done before.<sup>669</sup> It is also hard not to see this drive towards online courts as another means of pushing litigants out of the courts into alternative proceedings, creating a 'second-tier' system, where litigants would no longer have the 'right' to access the courts. I have argued that this right, in practice, is largely a rhetorical one, but this court potentially takes this further by removing it altogether.

Beyond the online court, this thesis has also argued that we need to think about what a good LiP might be. The lack of clear role as it currently stands leads to considerable inconsistency, leaving LiPs unable to know how to behave, and unable to improve. This is a significant source of resentment for them. Is there a way of providing useful guidance that might better lay out the role? Can we make the role a positive one, one that contained within it the possibility of competency, rather than signifying its lack? The difficulty we face here, of course, is that to be a LiP is to *not* be a legal professional: and it is therefore hard to imagine how they can ever be 'good'. At the very least, though, admitting such inconsistencies that exist now would be a positive step.

Finally, this thesis has argued throughout that, whilst there has been a significant improvement in research and attention paid to LiPs, we are still at the very beginning of the process: we still have trouble understanding LiPs and their experiences. This difficulty forestalls any long-term improvements in LiP experiences. The most important development in this area must therefore be through better education: not just for the LiP, but for the profession as well. While some of this is beginning with the work the Personal Support Unit do with barrister training, much more could be done. We also need to stop talking of 'managing' LiPs and talk more seriously about accommodating them. We need to understand why LiPs come to law, and the challenges they pose, instead of seeing them as problems. To make any long-term difference, such education needs to move us beyond any lazy, pejorative assumptions we still at times make about LiPs: it needs to be predicated on a greater understanding of LiP experiences. We need to hear more of the kinds of stories told in this thesis.<sup>670</sup> And this means we must keep listening.

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<sup>668</sup> Most of the suggestions Lord Woolf himself made about necessary IT developments never took place with the system still entirely paper-dependent. This leads to other concerns about the poor history of IT development in the courts.

<sup>669</sup> Pleasence, *Causes of Action*; Balmer et al., "Worried Sick."

<sup>670</sup> The PSU provide a workshop as part of the Bar Professional Training Course (BPTC). Lizzie Iron, head of service at the PSU, invited me along to attend the workshop in 2016.

## POSTSCRIPT

Hi Kate,

Ever since 4 April 2017, I have been either staying [with] friends/relatives (4-25 April) or AirBnB-ing in S---- (25 April-15 August) but I couldn't afford to continue AirBnB-ing, without getting into more debt (bank overdraft). Last week, the local council finally agreed to provide temporary accommodation for me, from today, to enable me to save enough of my pensions to use as a deposit on renting a room instead of having to keep spending it on AirBnBs (or perhaps justice and law and order and sanity might start to prevail, re my flat). (I had to explain why, even though my family are the very people to whom I have a right to turn for help, my brother cannot have me to stay, because his wife won't allow it and is behaving like a total monster.)

Arrived at this guest house in I----, about an hour ago. As the booking was made by [the council] (who are paying), it signifies that I am now officially homeless. I may be here some weeks while I make other arrangements - I'd like to live in H----, for everything you need is in walking distance (public library, health centre, cycle shop, pubs, small supermarket), 90% of the mile-long High Street is Listed (300-400 year old buildings), and every vista lifts up the spirit. (I have been trying to rent a room and almost succeeded several times: it isn't easy because I don't drive - some rooms advertised are located in villages with no bus service - and because of my age - most people advertising rooms to rent stipulate an upper age limit for the new house-sharer, eg 40 or 35.) It is such a relief not to have to spend money I don't have on more AirBnB accommodation.

The room here is fine: larger than the bedroom at the (tenth!) AirBnB I left this morning, light, with "ensuite" loo and shower, tv, fridge. Door can be locked, and I have been given the key. I have opted not to have the breakfast provided (as I prefer to go on as at the AirBnBs for the past four months, making real coffee in the morning in the little cafetiere I have brought with me and having that with a bun or a few squares of a chocolate bar). So I won't need to have much contact with the other residents who, I guess (having seen two of them so far), are much "rougher" and more "shouty" than I am. Full meals can be cooked in the communal kitchen. But I do feel lucky: this is so much nicer than an emergency night shelter. And there is free wi-fi.

It is a short walk from here into the centre of I-----. I'll have to go out and buy a bowl, plate and cutlery this afternoon, as these are not provided (apparently they get broken or stolen too often). I'll also go to the little shop I found that sells Appleton crewel tapestry wool skeins and buy what I need to complete the second doll's house rug I am working on (to sell on eBay) and perhaps start a third one: finding that shop is a compensation for having to be in I-----.

Kind regards,

Talia.<sup>671</sup>

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<sup>671</sup> Email from Talia, 15.08.17, cited with permission.



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## APPENDIX A:

### QUESTIONNAIRE

#### Oral History of Litigants in Person

##### Interviewing Question outline

#### INTRODUCTORY QUESTIONS/BACKGROUND

Opening Question	Secondary Question[s]	Literature connection
1. What is your full name?		
2. When were you born?		
3. Where were you born?	If not in the UK: 3A) When did you first arrive in the UK?  3B) What was it like coming here?  3C) What do you remember from before you came here?	<i>Beyond providing basic demographic information, these questions are designed to establish an individual's self-defined ethnicity &amp; how they might define their national identity. This is in response to Hermann (2012)</i>

	<p><i>where Herman raises question of overrepresentation of BME individuals in vexatious litigant categorisation.</i></p>
<p>4. <b>What is your earliest memory?</b></p>	<p><i>The reasoning behind this question is to begin to pose open-ended relatively creative questions to allow the interviewee to pursue an individual line of response – this links to Luisa Passerini (1979) research on oral history and sensibility, Michael Frisch (1979) on oral history, Alessandro Portelli (1998).</i></p>
<p>5. <b>What language(s) did you speak at home?</b></p> <p>5A) Did you learn English as a second language?</p> <p>5B) Where did you learn English?</p>	<p><i>This follows from the above to try and consider to what degree language may play a role in facilitating/hindering participation. Are any of these individuals non-native English</i></p>



	<p><i>speakers? Do they perceive this to have had an effect? This links to questions raised about ESL by Moorhead (2003), Moorhead &amp; Sefton (2005), as well as Hermann (2012).</i></p>
<p>6. Can you tell me about the first place you remember living?</p>	<p><i>Following Passerini (1979); Darnton (1985); Geertz (2006) another open-ended question to get the interviewee to practice describing a particular location; part of developing individual detail that will hopefully enable them to be more evocative and descriptive when later discussing places they have been to in the course of their dispute.</i></p>
<p>7. Can you walk me through the flat/house where you lived?</p>	<p><i>This question is designed to get the interviewee to think in terms of place and layout, and to</i></p>

		<i>encourage them to not simply focus on people or speech; instead it allows them to re-imagine themselves in a particular place; this evocation of place can lead to stronger memories, from Hastrup (1990, 1994), Geertz (2006).</i>
8.	<b>Did you stay there [in this first place] long?</b>  If NO:  7A) Where did you go?  7B) What do you remember about the move?	
9.	<b>Who did you live with there?</b>  9A) Tell me about your [Mother /father/sibling/extended family member]  9B) Did your [...] go to college? University?  9C) Did your [...] do paid work?  9D) Who did you see most in your family	<i>This is an open-ended question designed to elicit information about family/home life without trying to pre-empt assumptions about who they might live with (e.g. not simply an assumption they live with a nuclear family). The purpose behind this is firstly to understand better the family and</i>

growing up?

9E) What was your relationship with [this person/these people] like?

*home life of individuals who act as LiPs , following Williams (2011), Moorhead & Sefton (2005), that attempted to gather some of this information) but secondly to also consider the family network these individuals existed/exist in: this may become pertinent when considering what steps individuals take in seeking advice – where do they go first? This connects to questions about advice seeking that Hazel Genn (1998) explored in Path to Justice and which this study seeks to broaden.*

*The questions are also designed to establish the degree to which the individual was happy in their home life – once again, without pre-*

			<i>empting a negative response, but enabling the individual to be as explicit as they want to be. This links to literature on supposed 'pathology' of LiP that presumes psychological trauma or difficulty can drive their motivation to seek 'justice', e.g. Taggart (2004).</i>
10.	<b>Were there rituals in your family?</b>	<b>If YES</b> <b>10A:</b> Can you tell me about these rituals?	<i>The thinking behind this line of questioning is to get them to articulate examples of practices that would be normal in their family, but may not be something others have experienced – re-questioning or accounting for the familiar. This links to Darnton's (1985) work on sensibility where he argues that an individual's way of seeing is best evoked at the moments of greatest differences.</i>
11.	<b>Were there activities your family did regularly?</b>	11A) Can you tell me about these activities?	

		<p><i>This also links to Bourdieu's research on naturalisation – whilst this is a fairly simple question, it is intended to get the interviewee to recognise and account for the familiar, rather than taking it for granted.</i></p>
<p>12. Is your family religious?</p>	<p>If YES:</p> <p>12A) did you go to services?</p> <p>12B) What do you remember about these services?</p> <p>12C) Did your family observe religious festivals?</p> <p>12D) What do you remember of the festivals?</p> <p>12E) Can you talk me through what you remember about a religious event?</p>	<p><i>This questioning partially links back to Hermann's (2012) research on BME backgrounds &amp; vexatious litigants, and partially is accounted for by supplying more demographic information about LiPs. However, another impetus is the degree to which religious education or socialisation may or may not link to particular ideas of justice or their accessibility in particular communities. For example, those raised in a Jewish</i></p>

	<p><i>or Muslim household may be aware of the particular practices of dispute resolution that those from other households may not. This goes to the question of Bourdieu's (1987; 2000) habitus formation and tries to elicit any early ideas about law and justice.</i></p>
<p><b>If NO:</b> 12A) was religion talked about in your house?</p> <hr/> <p><b>If YES</b> 12A) do you share the beliefs of your family or have your beliefs changed?</p> <p>12B) If so, how have they changed and why do you think that might be?</p>	<p><i>This questioning partially links back to Hermann's (2012) research on BME backgrounds &amp; vexatious litigants, and partially is accounted for by supplying more demographic information about LiPs. However, another impetus is the degree to which religious education or socialisation may or may not link to particular ideas of justice or their accessibility in particular communities. For</i></p>

		<p><i>example, those raised in a Jewish or Muslim household may be aware of the particular practices of dispute resolution that those from other households may not. This goes to the question of Bourdieu's (1987; 2000) habitus formation and tries to elicit any early ideas about law and justice. This questioning is designed to lead on from the above and potentially move from the specifics of religion to the question of ethics or morality that the individual may attribute to a religion or not; once again, the link is to habitus around beliefs about law and justice.</i></p>
<p>13. Do you remember any advice or guidance your parents/caregiver gave you when you were a child?</p>	<p>13A) What kind of morals did your parents pass on?</p>	<p><i>As above, this line of questioning is hopefully encouraging the interviewee to explicitly account</i></p>

			<i>for 'codes' that their parents gave them; all of this links back to identifying early beliefs about law and justice in habitus formation, as well as Passerini's (1979) argument as to evoking sensibility.</i>
14.	<b>Did your family discuss politics?</b>	<b>If YES</b> 14A) What kind of politics?  14B) What do you remember about these discussions?	<i>This question is an early one designed to consider whether or not certain assumptions made by literature (e.g. that on LiPs as pathological or vexatious, i.e. McKenzie (2009) are sustained; e.g. are LiPs more likely to be motivated by a perceived sense of injustice – and is this because of a general link to being openly 'political'?</i>
15.	<b>What were some rules in your house?</b>		<i>This is a question designed to get the interviewees to consider codes and rules that influence behaviour</i>



			<i>and thought although they are not formal 'laws'; this is to encourage them to think about the ways their own behaviour was influenced/the degree to which they internalised certain norms of behaviour – again this links to Bourdieu (1987; 2000).</i>
16.	<b>What happened if you broke the rules?</b>		<i>This question follows from the above to consider punishment and accountability; again considering how disputes were dealt with in their particular house, what consequences there were for 'bad' behaviour, and so on.</i>
17.	<b>What did your parents want for your future, do you think?</b>	17A) How did you know they wanted this?  17B) Did you want this too?	<i>This question aims to move towards questions of the gap between legal professionals and laypersons. Literature: Moorhead &amp; Sefton (2005); Williams (2011); Baldwin 1998, 1999) suggests LiPs</i>

	<p><i>are more likely to come from a poorer background – this is considering the degree to which opportunity was perceived in their particular household. What were their expectations about what their future would hold?</i></p>
<p>18. <b>Who were your earliest friends?</b></p>	<p><i>This is again establishing the individual's ability to make friends and how easy they found it; the literature link is back again to the question of pathology – do people who act as LiPs lack regular social skills?</i></p>
<p>19. <b>Where did you meet these friends?</b></p>	<p><i>This questioning, besides following the above, is also fleshing out the 'network of connections' of this individual as per the family questions: this is laying the groundwork for questions of</i></p>

		<i>advice (following Genn 1999).</i>
20. Did you go to their houses?	<p>20A) What was their home like?</p> <p>20B) What was their family like?</p> <p>20C) Was it [their house/family] like yours?</p> <p><b>IF DIFFERENT</b></p> <p>20D) how did you feel about this [difference]?</p>	<p><i>This line of questioning is designed to consider difference, if the interviewee perceives there to be any, between him/her and his/her peers. This difference could be attributed to socioeconomic circumstances, language, ethnicity, identity and so on and is deliberately broadly framed to allow the interviewee to pursue the difference they identify. This links back to demographic information about the socioeconomic or ethnic background of those who act as LiPs. This also asks them to consider from their perspective how aware they were, rather than</i></p>

			<i>assuming this awareness was present.</i>
21.	<b>Did anyone in your family work in law?</b>	If YES 21A) Who? And what do you remember about what they did?	<i>This line of questioning is designed to see how early an exposure individuals had to legal professionals; were they from a family with legal professionals in it; if so, would that influence what kind of career they would have and their later decisions? Would it affect how they sought advice? Contrarily, are these individuals less likely to be connected to legal professionals and therefore have less of an idea of what legal professionals might do? This links partly to Michael Blackwell's (2012) research on the degree to which family connections influence career choice; whilst Blackwell is</i>

	<p><i>talking about legal professionals, to what extent is this reflected in the inverse position; are those who act as LiPs from backgrounds where access to a legal career was not a perceived possibility?</i></p>
<p><b>If NO</b> 21A) did you know anyone who worked in law when you were a child?</p> <hr/>	<p><i>This line of questioning is designed to see how early an exposure individuals had to legal professionals; were they from a family with legal professionals in it; if so, would that influence what kind of career they would have and their later decisions? Would it affect how they sought advice? Contrarily, are these individuals less likely to be connected to legal professionals and therefore have less of an idea of what legal professionals might do? This links</i></p>

*partly to Michael Blackwell's (2012) research on the degree to which family connections influence career choice; whilst Blackwell is talking about legal professionals, to what extent is this reflected in the inverse position; are those who act as LiPs from backgrounds where access to a legal career was not a perceived possibility?*

## SCHOOLING/EDUCATION:

22. What was the first school you went to?

*This opens up a line of questioning about education, again trying to*

	<p><i>ascertain what kinds of behaviour was normalised, what their earliest predispositions were in terms of what they enjoyed and thought they might do in their future, and how they formed social networks, again all linking back to Bourdieu (1987; 2000) and habitus formation.</i></p>
<p>23. <b>What is your earliest memory at school?</b></p>	<p><i>Another question designed to enable the interviewee to again answer creatively about something particular and depart from a dispassionate or perceived 'factual' account of school, back to Passerini (1979), Frisch (1979) and Hastrup (2000).</i></p>
<p>24. <b>How did you find going to school?</b></p>	<p><i>Rather than asking if the interviewee 'liked' school, the question is designed to ask them more broadly about how they felt</i></p>

		<i>about schooling in general, giving them the opportunity to answer in a way they think is appropriate to their experience.</i>
25.	<b>Can you describe a particular subject that you studied and what the classes were like?</b>	<i>Another question to elicit a richer memory than a 'list' of a favourite subject. Asking the individual to describe a particular class and what they did may hopefully assist in making connected memories more complex.</i>
26.	<b>Did you remember any particular teachers? Why?</b>	<i>This question is to trigger specific memories, rather than a more by rote account of schooling; this can potentially ideally evoke a positive or negative memory that the interviewee can describe in detail</i>
27.	<b>Were you good at school?</b>	<i>Whilst this is a slightly leading question, it is here deliberately to get the interviewee to consider the</i>



	<p><i>degree to which they 'fit in' with the expectations of what was 'good' where they were; e.g. does the interviewee interpret this purely in terms of academic achievement? If so, what can this tell us about their particular experience? Or do they interpret this as behavioural? And so on. Once again, these questions link to habitus formation (Bourdieu 1987; 2000) more specifically to questions of social and education conformity. How well did they function within an institutional setting like a school? (Contra vexatious litigant literature, e.g. Taggart (2004); McKenzie (2009)</i></p>
<p>28. <b>Did you have many friends?</b></p>	<p><i>This question is again considering the degree to which they felt comfortable establishing a social</i></p>

	<i>network, in an institutional setting, were able to make connections with other individuals; this goes to individual psychology (contra the pathology literature) as well as to building up their social world.</i>
29. What is your happiest memory of school?	<i>This question is deliberately designed, at this point in the proceedings, to potentially bring out a positive experience that the interviewee can enjoy relating – whilst the substance can also be useful in learning what was of value to that individual as a child, it is also technical to ensure interviewee is not only being asked dry or distressing questions.</i>
30. And your unhappiest memory of school?	<i>This question will be asked depending on the above; is this individual already recounting</i>

	<p><i>unhappy memories? If so, it may not be useful in terms of making the interviewee uncomfortable; alternately, if the individual is presenting a uniformly rosy picture, this question can be used to get them to think about another way of seeing things (e.g. the questioning is designed as a form of 'interruption' to how the individual may have repackaged the narrative of their childhood, following Frisch (1979), Darnton (1985).</i></p>
<p>31. <b>What was your personality like as a child?</b></p>	<p><i>A very broad question designed to evoke the individuals' self defined subjectivity; it comes at this point in the proceedings because it will hopefully be influenced by the previous discussion and therefore won't simply be a two word</i></p>

			<i>response.</i>
32.	<b>Did you ever come across bullying?</b>	<b>If YES</b>	<i>This line of questioning is designed to move again towards law and disputes in an informal setting, but in a way that does not come across as accusatory. This structuring of the question enables the interviewee to account for bullying whether they simply viewed it, were a victim of it, or were responsible for it. The secondary questions are very rough outlines; the aim of the questions will be to get at the individual's sense of right and wrong in this situation, what informed that sense, and how well they felt the situation was dealt with. This will later link to questions about what a just outcome looks like.</i>
		32A) What is the bullying incident you remember?	
		32B) Was this at school or outside school?	
		32C) Was anything done about this bullying?	

<p>33. How many schools did you go to?</p>	<p>If MORE than 2-3</p> <p>33A) Why did you change schools?</p> <p>33B) What was starting somewhere new like?</p>	<p><i>This question goes to considering whether they had a more disrupted schooling than we might perceive to be the usual and what effect they perceived this to have on their ability to form social networks and their access to opportunities. Did they find this process destabilising, or conversely, exciting?</i></p>
<p>34. Were you interested in politics or law at school?</p>	<p>If YES</p> <p>34A) Do you remember studying anything along those lines?</p> <p>34B) What do you remember about what you learnt?</p> <p>34C) Were any subjects to do with law available to you at school?</p>	<p><i>This line of questioning moves specifically towards early experiences or perceptions of law and justice in a more explicit capacity. What did these individuals know about what politics or law was? What was their opinion of it at the time? What was this informed from? Did they see themselves as potentially heading in that</i></p>

	<p><b>If NO</b></p> <p>34A)What subjects interested you more?</p> <p>34B) Did you ever think about politics or law as a job choice?</p> <p>34C)Were any subjects to do with law available to you at school?</p>	<p><i>direction? (the literature connection here is partially to those who attribute LiP behaviour to those who wanted and failed to become legal professionals – see Williams 2011; MOJ 2013). All of these questions are again trying to get at predispositions towards the legal world and notions of justice, from Bourdieu (1987; 2000).</i></p>
<p>35. <b>Were you interested in performing arts or artistic subjects at school</b></p>	<p><b>If YES</b></p> <p>35A) Did you study any of these kinds of courses?</p> <p>35B) Which courses did you study?</p>	<p><i>This line of questioning is considering the potential ‘theatrical’ connection for individuals who act as LiPs. Some literature has suggested LiPs are motivated by self aggrandising desires to be ‘centre stage’ or to be able to ‘perform’ , e.g. Taggart (2004); McKenzie (2009). I am interested to see whether these individuals do enjoy</i></p>

			<i>public speaking and performance, and whether they identify as being particularly drawn to this or capable.</i>
36.	<b>Did you enjoy public speaking or debating at school?</b>		<i>As above</i>
37.	<b>Did you socialise much outside of school?</b>	<p><b>If YES</b></p> <p>37A) What kind of things did you do when socialising?</p> <p>37B) Whom did you socialise with?</p> <hr/> <p><b>If NO</b></p> <p>37A) Were you allowed to socialise?</p> <p>37B) What did you spend your time doing outside of school hours?</p>	<i>More questions on socialisation; to what degree did they have an independent social life with friends, or were they particularly studious/antisocial/had difficulties fitting in?</i>
38.	<b>What do you first remember wanting</b>		<i>This questioning links up with</i>

to do as a job?

*earlier questions about predisposition and opportunity; were there specific things the individual could imagine doing and others that weren't a possibility? Where does law fit on that spectrum? Linking back to Blackwell's (2012) research here as well as trying to establish if there is systemic disadvantage here.*

### TELEVISION/BOOKS/INTERNET:

39. Did you have a television when you were growing up? If YES  
39A) What did you watch in your house?

*This line of questioning is to identify information about law and justice and where it came from; i.e. does it connect with literature*



		<p><i>suggestion that most people's expectations are formed by television/internet? Also questioning designed to consider whether these expectations of law are formed based on criminal procedure as opposed to civil procedure.</i></p>
<p>40. <b>Did you have access to a computer when you were growing up?</b></p>	<p>If YES</p> <p>40A) Did you have an internet connection?</p> <p>If YES</p> <p>40B) What kind of sites did you visit?</p> <p>40C) Did you use social media?</p> <p>40D) What kinds of social media did you use?</p> <p>40E) Do you still use these social media today?</p>	<p><i>These questions are designed to a) as above, identify sources of information about law, but also to b) identify the degree of digital literacy individuals have and what later knock-on effect this might have in terms of i) seeking advice (Genn, 1999), ii) being able to complete forms/access information, e.g. Woolf (1995) and so on.</i></p>

<p>41. Were you interested in reading as a child?</p>	<p>If YES</p> <p>41A) What kind of things did you read in your house?</p>	<p><i>These questions are linked to the above, but also go to questions of literacy, language and class.</i></p>
<p>42. Did you follow the news when you were growing up?</p>	<p>If YES</p> <p>42A) where did you get most of your information about the news from?</p>	<p><i>Also a means of finding out sources of information about law.</i></p>

**CLASS/MONEY:**

<p>43. Were you aware of your social class growing up?</p>	<p>If YES</p> <p>43A) How were you aware of this class ?</p>	<p><i>A series of more explicit questions to ask interviewees directly about self-perceived issues of class and socioeconomic status. This links to self-perceived or subjective ideas of lack of equality and whether</i></p>
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		<i>this may play out in their acting as LiPs (as suggested by literature on vexatious litigants, e.g. Taggart (2004), McKenzie (2009), Hermann (2012)).</i>
44.	Did you feel your family were economically comfortable compared with your peers?	
45.	Were there things you wanted that you couldn't have?	

**EARLY ENCOUNTERS WITH LAW/BELIEFS ABOUT LAW:**

46.	Was anyone in your family involved in a dispute when you were growing up?	If YES 46A) What was the nature of the dispute?	<i>These questions are designed to identify how disputes were dealt with in their experience prior to</i>
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	46B) What was done about the dispute?		<i>the dispute they have made a claim about. The purpose of this is to go deeper into why these individuals went down a legal path eventually, what alternatives they saw, and how this informed that decision (literature connection: Genn (1999), as well as Felstiner, Abel and Sarat (1980).</i>
	46C) What was the outcome of the dispute?		
47.	<b>Did you ever go to court or know anyone who did?</b>	47A) Why?	<i>Whilst this is explicitly about court, whereas they may not attend court at all in their experiences as LiPs, I want to see if they have an embodied experience of being in a courtroom and what their impressions of the space was</i>
		47B) What do you remember about this?	
48.	<b>Did anyone in your family work as an advice giver or for a trade union?</b>		<i>This is a broader question to get at those who might have worked</i>

		<p><i>in campaigning, advice giving, public speaking or any other forward facing situation that may be involved in disputes in some way, without the presumption it would be legal; this goes to how the individual formulates approaches to dispute resolution and how/why they later pursue a legal claim. It also goes to later questions about advice and where these individuals might seek it.</i></p>
<p>49. <b>Did anyone in your family or whom you knew work in the law in any way?</b></p>	<p>If YES</p> <p>49A) What did they do?</p> <p>49B) Did you ever want to do that job?</p>	<p><i>These questions go to any direct and explicitly legal connection and what knock on effect this might have in understanding of law – goes to the question of gap of experience and knowledge – does having family connections</i></p>

			<i>make the law less intimidating or confusing?</i>
50.	<b>Did anyone in your family or whom you knew work as a social worker? Or a police officer? Or a probation officer?</b>	<p>If YES</p> <p>50A) What did they do?</p> <p>50B) Did you ever want to work in [this] area?</p>	<i>These questions are about whether there is a perceived link to a figure that works in a 'justice' capacity in some way.</i>
51.	<b>Do you remember any incidents where you felt something unjust had happened to someone you knew?</b>	<p>If YES</p> <p>51A) What was the incident of injustice?</p> <p>51B) What did you feel was unfair?</p> <p>51C) What did you think should have happened?</p> <p>51D) Did you discuss this with anyone at the time?</p>	<i>Again, a question designed to get at a specific experience of injustice to see what this was based on and why. This is a broad question to leave it up to interviewee, but also to consider what they might now say about resolving this dispute. This goes to Cowan and Hitchins (2007) and Ekelaar (2011). The question of what is perceived to be important or not important being a subjective one, and the degree to which these individuals</i>

		<i>perceive these events as important.</i>
52.	<p><b>Did you ever get into trouble growing up with your family or with anyone else?</b></p> <p>If YES</p> <p>52A) What kinds of things did you get into trouble for?</p> <p>52B) Were you a risk taker?</p>	<p><i>Another question to elicit whether the individual has any specific experiences of arrest, or punishment in a formal sense, or in a less formal sense. Did they perceive this to be just? What were the circumstances – it is another opportunity for the interviewee to narrate the circumstances of a dispute or wrongdoing in detail.</i></p>

**WORK/FURTHER STUDY:**

53.	After school, did you go on to college/university?	If YES 53A)What did you study?	<i>More demographic questions about the educational backgrounds of LiP: link to MOJ research, Williams (2011);MOJ 2013, as well as Moorhead &amp; Sefton (2005)– questions emerging are: does educational background influence ability to participate effectively? If so, how?</i>
54.	Did you have a clear sense at that time of what you wanted to do with your life?		
55.	What do you think influenced your choice in wanting to do that particular job?		<i>Asking interviewee to consider what led them to form their particular vocational desire. Was this limited by circumstances? Practical? Idealistic?</i>
56.	What was your first job?		<i>What kind of skill s</i>



	<p><i>backgrounds to LiPs have? What effect does this have on their ability to act as LiPs? This links to questions to do with digital literacy, administrative ability and so on; is it really a gap of legal knowledge that is of issue, or is it disadvantage based on lack of technical or administrative knowledge (if there is a perceived gap on the individual's part).</i></p>
<p>57. Can you describe the place you first worked?</p>	<p><i>Another locale question to get the individual reimagining themselves in the past in an embodied way. Links to Kirsten Hastrup (2002) and evoking place in ethnography/anthropology</i></p>

		<i>(see also Geertz, 2006).</i>
58.	<b>What were your co-workers like? Did you get along with them?</b>	<i>Yet another question about ability to form social networks and get on with others – linking to Hermann (2012) and other ‘pathology’ literature about the psychology of the Lip.</i>

**TODAY:**

59.	<b>Where do you live now?</b>	
60.	<b>Do you live with anyone?</b>	<i>Open question about current family or cohabitation</i>
61.	<b>Who do you consider your family</b> In your family	<i>Again, a question not pre-</i>

<p>today?</p>	<p>61A) what are some household rules?</p> <p>If CHILDREN</p> <p>61B) what kind of beliefs do you try and instil in them?</p>	<p><i>emptying what a family is or is not: but what is their current household like and how might this differ or not from childhood experience? How do these individuals regulate or discipline any children they might have?</i></p>
<p>62. Can you describe the neighbourhood where you now live?</p>		<p><i>These lines of questioning are to evoke similarities and differences to childhood growing up; evocation of current neighbourhood is another means to get an embodied perspective of their life today.</i></p>
<p>63. Do you live near to where you grew up?</p>		
<p>64. Is the neighbourhood like where you grew up or different?</p>	<p>If DIFFERENT</p> <p>64A) How is the neighbourhood different?</p>	

**FINANCES:**

65. Do you own a house or rent?	<i>More explicit financial questions going to stability and security. These indirectly link to later questions about why the individual doesn't have a lawyer – is this, as literature suggests, overwhelmingly because they lack the financial resources? (Baldwin 1998; MOJ 2013; Genn 1999; and so on).</i>
66. Would you like to own a house/move to a bigger property?	<i>All of these questions 67- 72 go to self-perceived economic stability or comfort; literature link is to a) perceived injustices</i>

		<i>(Hermann 2012, pathological LiPs), b) socioeconomic backgrounds of LiP and ability to access legal services.</i>
67.	Where would you ideally like to live?	
68.	Are you satisfied with your current income?	
69.	Can you do all the things you want to on your income?	
70.	Tell me about your healthcare. Do you have a regular doctor?	<i>What about access to services? This question is designed to get at whether individuals may or may not have private healthcare; also goes to state of health of individual or individual's family</i>

**POLITICS:**

<p>71. <b>Do you vote?</b></p>	<p><b>If YES</b></p> <p>71A) Have you always voted?</p> <p>71B) When did you start voting?</p> <p>71C) Why do you vote?</p> <hr/> <p><b>If NO</b></p> <p>71A) Have you ever voted?</p> <p>71B)When did you stop voting?</p> <p>71C) Why did you stop voting?</p>	<p><i>This question is designed to consider whether there is a link between political activity and being an LiP. Research suggests those who act on juries may be more likely to be politically involved; is there a predisposition/link between involvement in legal processes and being politically active?</i></p>
<p>72. <b>Do you belong to any organisations like a trade union, or an NGO?</b></p>	<p>72A) Which organisations do you belong to?</p> <p>72B) When did you join this organisation?</p> <p>72C) Why did you join this</p>	<p><i>This line of questioning is about experience in things like campaigning, public speaking, political organising and so on. Does the interviewee have skills in this area and will this a)</i></p>

	particular organisation ?	<i>facilitate potentially their ability to pursue a claim, or b) affect where they will later seek</i>
	72D) Have you ever been part of a campaign?	<i>advice?</i>
	72E) If so, which campaign were you part of and what did you do?	
73.	<b>Have you ever protested?</b>	<b>If YES</b>
	73A) Where did you protest?	
	73B) What was the protest for?	
	73C) What do you remember about that/those experience [s]?	
74.	<b>What do you think of politicians?</b>	74A) Have you ever considered becoming a politician?
		<i>A further question to evoke the degree to which the interviewee sees him/herself as a spokesperson for a cause/fighter for justice and so on (link to vexatious litigant material/Hermann (2012)).</i>

COMPLAINT AND DISPUTE EXPERIENCE:

75. How do you feel about speaking in public?		<i>This line of questioning links to previous skills but also goes to the behavioural aspect of participating in legal process; this links to my previous performance/law research, also Bourdieu on gaps that are not purely language (1987).</i>
76. Have you ever made a complaint about something before?	If YES 76A) Can you tell me about the complaint?	<i>This line of questioning is to tease out the spectrum of</i>



76B) How did you go about complaining?

76C) Were you satisfied with the outcome? Why/why not?

*complaints as perceived by the interviewee from more formal to less formal, e.g. have they written or posted a complaint online about an internet service provider, or a faulty product? Have they made a complaint at work? How seriously did they take this issue and did they perceive it was dealt with fairly; this again goes to questions of when and whether the interviewee chooses to 'formalise' disputes as opposed to trying to informally resolve them or 'lump' them. Again, there are links here to Felstiner, Abel and Sarat (1980) & Genn*

		<p><i>(1999), but this is not about explicit legal processes and other – but about evoking a broader spectrum of responses.</i></p>
<p>77. Have you ever been involved in a dispute before?</p>	<p>If YES 77A) Can you tell me about the dispute and what happened?</p>	<p><i>An open question to get a sense of whether this individual has been involved in any/multiple disputes. Link: vexatious litigant literature – are they involved in multiple disputes; is this therefore potentially about their psychology?</i></p> <p><i>Also a means of evoking a first person narrative – telling their story – something that will be repeated when interviewee is later asked about the claim</i></p>

		<i>they are pursuing and the nature of that dispute.</i>
78.	<b>How much did you know about making a legal complaint before this particular dispute you are involved in?</b>	78A) Where did you get your information from?
		<i>This is about self-perceived knowledge – having discussed implicit knowledge formation on education, skills, background, this is more about whether they felt prepared in anyway – if so, how and why?</i>
79.	<b>Had you heard about people without lawyers making complaints before?</b>	79A) What had you heard about these individuals?
		<i>Did they have contacts with other LiPs? This is going to the question of advice networks; do LiPs communicate with one another; is it more likely that you will act as an LiP if you know someone else who did? Does it matter if that person was successful? This addresses literature on why</i>

*people act as LiPs: financial necessity, desire to not have a lawyer, both.*

## BECOMING A LITIGANT IN PERSON: THE ISSUE AND MAKING IT A LEGAL CLAIM

80.	<b>Before the dispute you are currently dealing with, had you ever encountered a legal process before?</b>	If YES 80A) Can you tell me about that encounter with legal process?	<i>This line of questioning goes to explicit contact with legal processes if the interviewee has had any. As an adult, what impact has this experience had on their perception of the accessibility of legal process? Did they understand what was happening? Why / why not?</i>
81.	<b>Tell me about this current dispute: what happened, in your own words?</b>		<i>This question is central; what is the dispute to them? What is the</i>

*purpose of it? What is the full story? The idea behind this is to consider later whether they have ever been able to give a full account of it to someone in the proceedings themselves, and what value or importance they attach to it. This goes to literature on self-perceived importance (e.g. Ekelaar (2011), Cowan & Hitchins (2013), gaps between legal importance and 'non-legal' importance (e.g. Bourdieu theory (1987) and Moorhead & Sefton (2005)*

82. **What did you first try to do to resolve the dispute?**

*This line of questioning is to flesh out the before part of the legal claim; what are the other methods – do they link to their past experiences of disputes?*

			<i>Why make it legal? This links to Felstiner, Abel and Sarat (1980) &amp; Genn (1999) but tries to not assume that legal was the only way of resolving dispute or becoming more 'formal'.</i>
83.	<b>Did you talk to anyone about this dispute?</b>	83A) Who did you talk to about this dispute?  83B) What suggestions were made by these people?  83C) Did you agree with their advice?	<i>Going towards questions of advice, but starting at an informal setting: are these individuals reaching out to family and friends? What kind of information are they getting from these individuals? What are the very first steps taken when approaching resolving a dispute?</i>
84.	<b>Why did you decide to go to law with this dispute?</b>	84A) How did you feel about going towards a legal claim?	<i>This question I am only asking after a lengthy account of steps before/separate/different from a legal path. Why and when did they make the decision to pursue</i>

	<p><i>the claim legally? Because they felt this would be the 'formal' way to do it? Did someone else suggest it?</i></p>
<p>85. Are there circumstances where you might not have taken this dispute to law if something different had happened?</p>	<p><i>This question is designed to dig out alternatives; when did they take the legal path and what were the other options considered? Were they tried and failed? What might have happened that could have changed the course of events? This line of questioning is not just about the paths to law for LiPs but also a link to whether or not the individual was willing to compromise/settle, or whether they were intent on getting a specific validation of their claim; this goes to the vexatious litigant</i></p>

		<i>literature again.</i>
86.	<p><b>What does this dispute mean to you?</b></p> <p><b>How important is it?</b></p>	<p><i>Direct link here to Cowan &amp; Hitchins (2012) again, as well as broader literature on ethnography and sensibility: what is the perceived value to them (as opposed to legal understandings of how important it is/isn't).</i></p>

**ADVICE:**

87.	<p><b>Did you go to anyone for advice?</b></p> <p>If a family member or friend:</p> <p>87A) Why did you approach this person for advice?</p> <p>87B) What advice did they offer?</p>	<p><i>Explicit advice questioning here to flesh out what the sources of information there are about acting as an LiP and going to law; how aware they are of it;</i></p>
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	<p>87C) Did you follow their advice?</p> <hr/> <p>If a professional see following box Q 88</p>	<p><i>how useful they find it; whether informal networks are more heavily used than governmental resources and so on. Goes to policy literature; what is currently in place and are LiPs accessing it (e.g. work of outreach groups, PSUs, CABs, Woolf reform suggestions, civil procedure reforms).</i></p>
<p>88. <b>Did you ask any professionals for advice?</b></p>	<p>If YES</p> <p>88A) Whom did you ask for advice</p> <p>88B) Why did you contact that person?</p> <p>88C) Did you find this person helpful? How?</p>	<p><i>This question is designed to come after questions about advice without the presumption it would be a professional. Again the term professional is used here to not only designate a legal professional. Are these LiPs aware of CABs, PSUs, and university department LiP assistance projects?</i></p>

<p>89. Did you research disputes on the internet?</p>	<p>If YES</p> <p>89A) Which sites did you visit?</p> <p>89B) Which sites were most useful?</p>	<p><i>Similarly, are LiPs accessing the online resources for them? If so, which ones? Are there informal networks of LiPs?</i></p>
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**GOING IT ALONE:**

<p>90. Would you have preferred to have a lawyer? Why?</p>	<p><i>These questions are broad outlines but the idea behind this questioning is to tease out a more complex picture of why these people lack representation; e.g. did they intermittently receive legal advice? Did they not qualify for assistance? Did they decide not</i></p>
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			<i>to have a lawyer? If so, why? Is it a mix of these reasons? The secondary questioning is designed to test for multiple motives rather than assuming the reasoning is purely financial or purely out of desire.</i>
91.	<b>Was it your choice not to have a lawyer?</b>	If YES 91) Why did you not want a lawyer?	
92.	<b>Why did you not have a lawyer?</b>	If COST 92A) Did you try and get financial support for a lawyer?  92B) Did anyone help you with trying to obtain funding for a lawyer? Who was that?  92C) How easy was it to fill out the application form?  92D) Were you unsuccessful in your application? Why?  If OTHER/BOTH	<i>These questions go explicitly to questions about changing of legal aid; has this made people less able to access legal support and choose to go on anyway; linking to recent literature on effect of legal aid changes; perceived 'surge' in LIP numbers. (See Bevan 2013; Ekelaar 2011, Lord Neuberger speech 2013).</i>

<p>92E/92A) Were there any other reasons you didn't have a lawyer?</p>	<p><i>This line of questioning is also designed to consider how effective or helpful the assistance is when completing a form or lodging a claim.</i></p>
<p>93. Do you think a lawyer might have helped you? Why/why not?</p>	<p><i>These questions are designed to elicit attitudes to lawyers; literature link is to vexatious litigants and perceived dislike of or rejection of lawyers; generalised questions of distrust of lawyers; whether lawyers are perceived to be primarily financially motivated and so on. All links to filling in literature on why LiPs act as LiPs.</i></p>
<p>94. What do you think of lawyers?</p>	
<p>95. How did you feel about not having a</p>	

lawyer?

### HOPES FOR OUTCOME:

96. What outcome are/were you ideally hoping for in pursuing this dispute?

*The idea behind this line of questioning is to consider from their perspective what a just outcome would be; not what the law might perceive to be a fair settlement. What are the expectations LiPs bring to the dispute? Are they looking for validation of their claim? Financial reward? Compromise? (Literature links: Adler 2008; Galanter (1974) Roberts (2000)).*

97. What would be a just outcome for

*As above*

you in this dispute?	
<p>98. Would you be willing to compromise in reaching a settlement in this dispute?</p>	<p><i>As above: link again to vexatious litigant literature (e.g. McKenzie (2009), Taggart, (2004); is rejection of settlement attributable to personality issue or is it also/instead linked to a perceived difference of the importance/purpose of claim and perceived expectations of what the law can do?</i></p>
<p>99. Going into this dispute, did you believe you would get a fair result?</p>	<p><i>What degree of confidence did these individuals have in a 'just' outcome (whatever that perspective of just is)? This question is designed to set up the later questions about how these expectations were met/not met and how.</i></p>

## THE EXPERIENCE OF ACTING AS AN LIP:

100. Can you take me very carefully through the process of pursuing this claim? What was the first step you took in pursuing this complaint legally? Then what did you do?

*Similar to the above question that asks them to describe the dispute freely, this question asks them to give a narrative as they remember of what happened when they decided to pursue the claim. The open-ended nature of the question is designed to not presuppose that certain things happened (e.g. meeting judges, attending court) and will allow for what most impressed itself on*

		<p><i>the interviewee to emerge. The literature link is that of providing a potentially disruptive counter narrative (Fish and Feldman on interdisciplinarity) to previous interviews with LiPs that ask prestructured questionnaires that presume a particular pathway (e.g. Moorhead and Sefton (2005), Baldwin (1999)).</i></p>
<p>101. <b>Did you fill out a form?</b></p>	<p>101A) Where did you find this form?</p> <p>101B) Did someone help you fill it out? Who?</p>	<p><i>These questions are supplementary to help fill out the blanks if the interviewee is not as explicit or clear.</i></p>
<p>102. <b>Did you go somewhere in person to</b></p>	<p>102A) Where did you go?</p>	<p><i>These questions are</i></p>



<p><b>lodge a complaint?</b></p>	<p>102B) What happened when you lodged your complaint?</p>	<p><i>designed to elicit place and embodied memory, as per Hastrup (2000).</i></p>
<p>103. <b>Did you meet any judges?</b></p>	<p>If YES</p> <p>103A) Can you tell me about them?</p>	<p><i>Literature link) are LiP and judge relationships still pivotal? (E.g. 19<sup>th</sup> century literature, Woolf report (1995) on judges, contemporary reports on degree to which judges must 'accommodate' LiPs. What is the special relationship between them if there is one? Do LiPs perceive judges to be on their side? (See also Engler 1987)</i></p>
<p>104. <b>Did the person(s) you were disputing with have a lawyer?</b></p>		<p><i>Literature link: Increasingly common for one side to be represented and one side</i></p>

		<i>not to be, is this inequality of arms? Did the LIP perceive this?</i>
105. Did you meet with the other people in the dispute?	105A) Where did you meet with them?  105B) Can you tell me about the meeting?	
106. What was the place like where you met the other party you are in dispute with? Can you describe it to me?		<i>What places did they meet in? Chambers? Side rooms? Courts? What effect did the location have on their experience of how capable they were of acting? Link to Bourdieu (2000) and embodied behaviour.</i>
107. When you met with the other party, did you know what you were supposed to do?	If YES 107A) How did you know what you were supposed to do  107B) Did you understand the language used?	<i>Again, questions about the degree to which naturalised behaviour that is not articulated</i>

	<p>If <b>NO</b></p> <p>107A) Did anyone help you by telling you what you were supposed to do?</p> <p>107B) Did you understand the instructions they gave?</p> <p>107C) Did you understand the language used?</p>	<p><i>may disadvantage non-legal professionals. Did the LiP feel awkward, unsure? Also, language: could they speak normally?</i></p>
<p>108. <b>How did your experience of this dispute compare with how you imagined it?</b></p>	<p>108A) How did you feel about this? Was this what you had expected?</p>	<p><i>What was the LiPs perception of justice/legal proceedings and how did it compare? This is a broad question that hopefully opens up the question of settlement; did they expect to have to settle or reach a compromise? Was this suggested and when? How did they feel about</i></p>

	<i>this? (Genn 2013; Mulcahy 2013)</i>
109. What is your strongest memory of the proceedings?	<i>Another embodied memory question to elicit what the interviewee perceives as especially significant. Link to subjectivity – via Darnton (1985), Passerini (1979)</i>
110. Did you feel able to explain yourself?	<i>A further link here to language: were they able to narrate freely, or were they being asked to reconceptualise their dispute in legal language/terms? Link to Moorhead (2003) – legal versus social understandings of terms, Bourdieu (1987)– gap</i>

			<i>and symbolic violence</i>
111.	Did you feel you were listened to?		<i>E.g. was there a gap between what LiP perceived as mattering and what legal professionals did? Cowan &amp; Hitchins (2012) link</i>
112.	Who did you spend most of your time talking to during the proceedings?		<i>Was it another lawyer or a judge? Again, question is open ended to go to broad experience.</i>
113.	What was it like not having a lawyer during the proceedings?		<i>During the proceedings, what was not having a lawyer like? Did they change their minds about wanting one?</i>
114.	Did you feel sufficiently prepared to bring your dispute?		<i>How ready were you based on any advice they had had?</i>
115.	Did you meet many legal	115A) Whom did you meet?	<i>Again getting at</i>

<p>professionals?</p>	<p>115B) How did they treat you?</p> <p>115C) Did you feel they took your dispute seriously?</p>	<p><i>relationship between law and lay here in literature: are LiPs taken seriously or perceived to be?</i></p>
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### AFTER ACTING AS AN LIP

<p>116. What was the outcome? Did you feel the outcome was fair?</p>	<p><i>This question goes to any gap between legal perceptions of fair and equitable outcome, and the LiPs perception of a just outcome – is there a gap in expectations? This goes to literature on outcome that tends to presuppose that legally fair is the same as subjectively fair (e.g.</i></p>
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	<i>Moorhead (2003)&amp; Genn (1999).</i>
117. What effect has taking this dispute to law had on what you think about law and justice?	<i>What impact does acting as an LiP have on confidence in justice and access to it? This is a key question about experiences of law and the impact they have on public confidence.</i>
118. If you had to go through a similar experience again, what might you do differently?	<i>This question is key for considering what the LiP perceives themselves to have learnt from the experience – goes to questions of policy and what could be made clearer. Literature link: the guides provided to Queen’s Bench, 2012,</i>

	<i>High Court 2013).</i>
119. Was not having a lawyer harder or easier than you thought? Why?	<i>What did LiPs perceive as the major challenge of not being represented? Or advantage?</i>
120. Did you find the other people involved in the case helpful?	<i>An overall question towards end of interview to see how the LiP feels about legal professionals more generally.</i>
121. What would you tell other people coming to law without a lawyer that they should know?	<i>An important question: what advice would they have for others? Would they actively share it/support other LiPs?</i>
122. What is the one thing about going through this process you wish you had known in advance?	



123. Would you assist other people to act as LiPs/give them advice if they asked?

*Would they encourage others? What do they perceive to be key? What can this tell us about what might be useful for them to know earlier?*

#### WIDER EFFECTS OF ACTING AS LIP

124. Were your family supportive of you? If YES  
124A) How were they supportive?

*These questions go to the wider effect of pursuing claims in terms of stress, family disruption that may be more aggravated for non-legal professionals than for those who customarily work in dispute*

			<i>resolution.</i>
125.	Was the process of taking your dispute to law expensive?		<i>The idea of this line of questioning is to determine financial or other costs of process</i>
126.	Did going through this process have any effect on your life outside of it?	If YES 126A) Can you tell me about these effects?	<i>What are the long lasting effects if there are any of going to law? Beyond purely financial that legal studies may not identify?</i>
127.	Did you keep a record of what happened throughout your dispute?		
128.	Did you keep a diary or a blog or use social media?	If YES 128A) Did you find this helpful? How?	<i>Did they keep a record of what happened? Has this affected how they may remember it – goes to questions about the subjectivity of interviewee and the degree to which</i>

			<i>information must be interpreted in accordance with this subjectivity (e.g. Hastrup (2002), Passerini (1979), Darnton (1985).</i>
129.	Did you talk to other people also acting without lawyers?	If YES 129A) How did you make contact with them?	<i>These questions again go to whether there are LiP networks operating and whether they have stayed in touch with them. Are these advice sources perceived to be useful?</i>
130.	What do you think might have been helpful?		

**AFTERMATH AND EFFECTS ON BELIEFS ABOUT LAW:**

131.	Have you changed your beliefs about how fair law is?	If YES 130A) How have your beliefs changed?	<i>The last two are explicit but broad questions for</i>
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	<p>130B) Why have your beliefs changed?</p>	<p><i>interviewee to wind down by evaluating the overall impact of taking a claim on their beliefs. The aim is to get overall view but also to function as 'downer' questions, to conclude the interview on a thoughtful but not distressed note</i></p>
<p>132. Do you have different expectations about justice and law now?</p>	<p>If YES</p> <p>131A) How are these expectations different?</p> <p>131B) Why are they different?</p>	
<p>133. Status of LiPs? What needs to change? Research resources?</p>		

134. Is there anything else you would like  
to talk about that we have not  
discussed?

## APPENDIX B:



## PROJECT MATERIALS



### **Litigants in Person Oral History Interviews: Project Information Sheet**

I am a researcher who is interested in hearing the stories of people who have had little or no help from a lawyer in preparing their case. I believe that it is really important for the views of these people about the legal system are heard. The project is concerned with civil cases **not criminal cases**. If you would then like to participate, please contact me ([k.l.leader@lse.ac.uk](mailto:k.l.leader@lse.ac.uk)).

#### **What is this study for?**

We know far too little about what it is like taking a case to court for ordinary people who don't have lawyers. I am interested in asking these people what their experience of the legal system without the help of a lawyer was like. I want to find out what could help make the experience better.

#### **Who is conducting this study?**

This study is being carried out by Kate Leader, a postgraduate student in the Law Department at the London School of Economics and Political Science. It is being supervised by Professor Linda Mulcahy and Professor Nicola Lacey. The completed interviews will form part of the Sound Archive at the British Library (<http://sounds.bl.uk/>).

#### **What will I have to do?**

The study involves up to three interviews with you that will be recorded. The interview will take place at a time and place most convenient for you, such as your home. We can discuss where and when would be best for you once you have contacted me.

### **What kind of things will I be asked?**

As it is a life stories project, I am interested in asking you not just about your experiences of the legal system, but also about your background, childhood, education and work. It is possible some questions might be of a personal nature, but you do not need to answer anything you do not feel comfortable with.

### **Why should I participate?**

Too often, the only views of the legal system heard are those of lawyers and judges, and this project seeks to change that with your help. By talking to me, you have the chance to tell your story. You will also have the chance to be part of a permanent at the British Library where your interview can be listened to, and will form part of valuable research and education, for years to come.

### **What happens to the interviews afterwards?**

The interview recordings will be lodged permanently in the British Library Sound Archive. The British Library will keep a copy of this permanently for future researchers and other members of the public. You will also be given a copy of the full sound recording of the interview to keep once the project is completed. Your interview will form a valuable part of my research project and will be used in publications such as articles and books.

### **Is my privacy protected?**

We understand the importance of protecting your privacy. Although the recordings will make clear who you are, if you would like to close your recording for a period of time so it is not publicly available this can be organized and made into a Recording Agreement.

### **What is a Recording Agreement?**

A Recording Agreement confirms in writing that you are willing for your interview to be kept in the British Library archive. You can also decide how researchers can use it: for example, you can close parts of the recording for a period of time.

### **What if I want to change my mind?**

You can withdraw from the project at any time.

### **Where can I get further information?**

If you have any questions about this project, you can contact me at [k.l.leader@lse.c.uk](mailto:k.l.leader@lse.c.uk) and I would be happy to discuss this further with you.



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## **Litigants in Person Oral History Interviews: Further Details for Participants**

### **What happens to my interview once it's done?**

The interview recordings will be lodged permanently in the British Library Sound Archive. The British Library will keep a copy of this permanently for future researchers and other members of the public. You will also be given a copy of the full sound recording of the interview to keep once the project is completed. Your interview will form a valuable part of my research project and will be used in publications such as articles and books.

### **Is my privacy protected?**

We understand the importance of protecting your privacy. Although the recordings will make clear who you are, if you would like to close your recording for a period of time so it is not publicly available this can be organized and made into a Recording Agreement.

### **Your Recording Agreement:**



At the end of the interview, I will go through an Oral History Recording Agreement form with you, to make sure your interview is added to the British Library collection exactly as you want. The Agreement confirms you are willing for the recording to be archived and also lays out the terms under which your recording will be archived and made open to the public at the British Library.

The Recording Agreement lets you decide how researchers can use your recording both now and in the future. If you want to stop people accessing all or part of your recording there is space on the Agreement form to include this. If you do not wish to impose any access restrictions, then that section of the Agreement can be left blank.

If you do wish to restrict access to the recording [called an “embargo”] please tell us which parts and we can specify this on the form. You are required to give an end date to each restriction you specify, up to a maximum closure period of 30 years.

If you have requested an embargo for all or part of your recording, please note this means it is not possible for anyone to request access to it under the Freedom of Information [FOI] or Data Protection Acts, due to the confidential nature of the material. Once you are happy with all the details, I will ask you to sign this form.

If at a later date you want to change any of these details, you can contact the Oral History Curators at the British Library [oralhistory@bl.uk](mailto:oralhistory@bl.uk) or telephone 020 7412 7404.

Please note: once an interview is catalogued and archived at the British Library, the British Library does not destroy or delete interviews.

### **What if I change my mind?**

You can withdraw from the project at any time.

### **Where can I get further information?**

If you have any questions about this project, please get in touch with me at [k.l.leader@lse.c.uk](mailto:k.l.leader@lse.c.uk) and I would be happy to discuss this further with you.

# ARE YOU REPRESENTING YOURSELF IN COURT?

Would you like to be interviewed for a research project at the London School of Economics and Political Science?

The project is intended to collect **your story** about not having a lawyer. What was it like for you? What would you do differently? What do you think could be done to make the experience better for others?

By getting involved, your experiences can form part of a growing body of knowledge that can be used to help improve the experiences of others coming after you.

If you would like to participate, or to find out more, email Kate at

[contact@litigantstories.com](mailto:contact@litigantstories.com) or visit the website at

[www.litigantstories.com](http://www.litigantstories.com)



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