

**Coming off the Bench:
Self-Represented Litigants, Judges and the Adversarial Process**

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In 1976, Abram Chayes explained how a paradigm shift was taking place in civil litigation. Procedural innovations were linked to a series of substantive changes in the American legal order that signaled a move away from a traditional private law model of litigation toward a newer and more expansive public law model of litigation.¹ In charting this shift, Chayes explored a whole new approach to thinking about the legal process undertaken by judges. His overall assessment was very much to the point: “our traditional concept of adjudication and the assumptions on which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the role of the judge and the court within this model.”² Chayes’ work has had a massive effect upon the development of civil procedure and the adjudicative process in subsequent decades. His articulation of an expanded conceptualization of the role of the judge preserved what he believed was the “judiciary’s broader legitimacy by responding to, indeed by stirring the deep and durable demand for justice in society.”³

In the spirit of Abram Chayes, I want to insist that another paradigm shift is and should be taking place today. This shift challenges the current efficacy and legitimacy of the role of both the judge and the courts within an adversarial framework. Once again, to the extent that the existing legal process fails to serve the demands for justice for those who engage with it, there is need to rethink and reform the process. This present-day shift is being brought about by the increasing presence of self-represented litigants in the

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¹ David Kennedy and William Fisher III, eds., *The Canon of American Legal Thought* (Princeton, NJ: Princeton University Press, 2006) at 605 at 610-611.

² Abram Chayes, “The Role of the Judge in Public Law Litigation” (1976), 89:7 Harv. L. Rev. 1281; Kennedy and Fisher, *The Canon of American Legal Thought*, *ibid.* at 605.

³ Chayes, *ibid.* at 1316; Kennedy and Fisher, *ibid.* at 610.

civil litigation process. In some legal settings, self-represented litigants comprise the overwhelming majority of litigants.⁴ The reality is, therefore, that self-representation is becoming as much the norm as the exception.⁵ This fact alone necessitates a serious re-appraisal of the structure and dynamics of the adversarial process. For the majority of litigants entering the civil justice system without legal training, the organization and operation of the legal process is, at best, stressful to navigate and, at worst, indecipherable and inaccessible. However, when combined with the sense of disempowerment and disengagement felt by those who attempt to represent themselves (or do not litigate at all) as well as the emotional challenges associated with self-representation, the need for deep and systemic changes to the adversarial system become apparent.⁶ Without such reform, a large segment of the population will be unable to exercise their right to be heard and participate in a fair hearing. This undermines the legitimacy of the adversarial process and the legal institutions more generally.

As such, the need for a revised model of litigation with adversarial footings that addresses the current model's failure to include and engage self-represented litigants is of the highest priority.⁷ While there is not yet any agreed-upon notion of what a new adjudicative or adversarial paradigm might look like, there are signs that one is beginning to take shape. At a minimum, based upon the number as well as the views of self-represented litigants, there are clear indications that, as the traditional model and its underlying assumptions falter, a fresh appraisal of the litigation process and its operating assumptions is required.

⁴ See Julie Macfarlane, "Identifying and Meeting the Needs of Self-Represented Litigants," Final Report of the National Self-Represented Litigants Project (May 2013) at 122, available at www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf.

⁵ Recent statistics in the United States suggest that 76% of litigants in non-family civil courts are unrepresented and the vast majority of these litigants are defendants. In the family law context, the number is closer to 80-90% of litigants being unrepresented. See: Anna E. Carpenter, "Active Judging and Access to Justice" (unpublished manuscript, February 3, 2017) citing "The Landscape of Civil Litigation in State Courts" (2015) National Centre for State Courts (Williamsburg, Virginia) at iv, available at <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

⁶ Julie Macfarlane, *supra*, footnote 4; William L.F. Felstiner, Richard L. Abel and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1980-81), 15:3-4 Law & Soc. Rev. 631.

⁷ Jennifer Leitch, "Having a Say: Access to Justice as Democratic Participation" (2015), 4:1 U.C.L. J.L. & J. 76.

In the first section of this paper, I look at recent judicial examples of how judges have recognized and begun to respond to the challenge of increasing numbers of self-represented litigants. In this sense, members of the judiciary are confronting traditional assumptions about adjudication and are advocating for new approaches and processes that take better account of self-representation. The second section examines the assumptions that underlie the adversarial process and takes issue with the continued pertinence and efficacy of these assumptions. In the third section, I canvass the views of self-represented litigants on the challenges they face within the litigation process. The fourth section looks at changes that might be made in order to ensure that the adversarial process and the pivotal role of judges within the adversarial context might work more fairly. Throughout the paper, I will push through on the understanding that, when it comes to the adversarial process and the judges who operate within it, passivity is not the same as impartiality. Rather, if the adversarial process is to remain relevant, neutral and fair to all those who engage with it, it must embrace a more active role for the judiciary in dealing with self-represented litigants.

The Adversary System under Pressure

In a recent American example,⁸ Judge Richard Posner was confronted with the challenges associated with hearing cases involving self-represented litigants. In that particular case, Judge Posner undertook his own research relating to issues raised by a self-represented litigant and disputed by opposing counsel. This was considered by some to call his role as a neutral decision-maker into question.⁹ Specifically, during the hearing, Judge Posner had searched certain medical websites for information about a

⁸ *Rowe v. Gibson*, 798 F.3d 622 (U.S. C.A. 7th Cir., 2015). Judge Posner recently resigned from the U.S. Court of Appeals for the 7th Circuit. In articulating the reasons for his sudden departure, Judge Posner stated: “I was not getting along with the other judges because I was (and am) very concerned about how the courts treat *pro se* litigants, who I believe deserve a better shake.” Subsequent to his departure from the appellate court, Judge Posner published a book entitled *Reforming the Federal Judiciary* (self-published through Amazon on September 7, 2017) in which, among other issues, he seeks to critically examine how prose litigants are treated by the appellate court. See Debra Wiens, “Why did Posner retire? He cites ‘difficulties’ with his colleagues on one issue”, *ABA Journal* (September 7, 2017). Available at www.abajournal.com/news/article.

⁹ Debra Cassens Weiss, “Dissenter Blasts Posner’s Internet Research in Inmate’s Suit over Acid Reflux Treatment” (August 20, 2015), *ABA Journal*, online at www.abajournal.com/news/article/posners_internet_research_in_inmates_gerd_suit_leads_to_sparring_in_7th_cir.

prescription drug that the self-represented prison inmate claimed was being unfairly administered by staff at the prison in which he was incarcerated. The prison administration not only had counsel, but also presented expert testimony respecting the medication in question; this testimony was at best vulnerable to cross-examination. Judge Posner's fellow judges, while concurring in the result, found that Posner's independent research was advocating for one side. However, in response, Judge Posner queried whether "the unreliability of the unalloyed adversary process in a case of such dramatic inequality of resources and capabilities of the parties as this case is to be an unalterable bar to justice?"¹⁰ He felt that the inmate was ill-equipped to cross-examine the medical expert evidence presented by the prison administration through its counsel; this was notwithstanding that the expert evidence was susceptible to challenge in cross-examination. As such, Judge Posner believed, "it is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence."¹¹

The criticisms directed at Judge Posner respecting his intervention reflect a "current reluctance of the judiciary to assist self-represented litigants."¹² This criticism is rooted in assumptions about the traditionally passive role of the adversarial trial judge and concerns about bias, which are reflected in American case law that generally refuses to recognize a duty of judicial assistance.¹³ Notwithstanding these considerations, the new reality respecting the scope of self-representation within the civil justice system is forcing the judiciary to grapple with the question: "How far can a judge go in guiding and assisting a self-represented litigant in such a way as to avoid the possibly harsh or unjust

¹⁰ Weiss, *ibid.*

¹¹ Weiss, *ibid.*

¹² Jona Goldschmidt, & Loretta Stalans, "Lawyers' Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants" (2010) available at <http://ssrn.com/abstracts=1444745>.

¹³ Jona Goldschmidt, "Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Context" (2006) at 2, available at www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Judicial_Assistance.autocheckdam.pdf. This is notwithstanding recent changes to the American judicial canons that call for accommodation of self-represented litigants.

consequences resulting from their lack of familiarity with the judicial process?”¹⁴ In considering the role of the judge in the adversarial process, Neil Brooks suggested that:

if one party is not represented or if his representation is inadequate...[i]n such a situation, the adversary system will fail to achieve its objective...[and] the judge should not hesitate to intervene. Whatever dangers arise when a judge intervenes in such a situation, they are outweighed by the serious danger that is present if he does not intervene.¹⁵

Canadian judges are being confronted with similar challenges. However, in the Canadian context, it is recognized that adjudicators need to provide some judicial assistance in the course of a hearing. This duty has been articulated in several decisions.¹⁶ In Ontario, MacDonald J. of the Superior Court dismissed a motion for a mistrial that was based on her having assisted a self-represented party raise issues during the self-represented litigant’s examination and cross-examination. In her reasons for dismissing the motion for a mistrial, the trial judge stated,

[t]rial fairness requires ensuring that an unrepresented person is not denied a trial on the merits by her lack of knowledge of either the trial process or procedural or substantive law, or by the stress of appearing in court, or by a combination of those factors. Litigants have the right to appear in court without counsel and the right to a fair hearing regardless of whether they are legally represented. Since it is the trial judge who is required to give effect to those rights, doing so cannot amount to abandonment of the role of the trial judge and assumption of a counsel-like role.¹⁷

MacDonald J.’s concern about trial fairness caused her to conclude that while the adversarial system in “its purest form” provides a potential advantage to the represented party who is opposing a self-represented party, such an advantage must be measured against a commitment to fair trials; it must be deemed fair by “reasonable and informed observers of the trial process”.¹⁸ While tempered by a concern for impartiality and not

¹⁴ *Ibid* at 2.

¹⁵ Neil Brooks, “The Judge and the Adversary System”, in A Linden ed., *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) at 111.

¹⁶ For example, see *Barrett v. Layton* (2003), 69 O.R. (3d) 384, 128 A.C.W.S. (3d) 920, [2003] O.J. No. 5572 (Ont. S.C.J.); *A. (J.M.) v. Winnipeg Child & Family Services*, 2004 MBCA 184, 247 D.L.R. (4th) 490, [2005] 4 W.W.R. 652 (Man. C.A.), leave to appeal refused (2005), 383 W.A.C. 319n, 208 Man. R.(2d) 319n, 345 N.R. 392n (S.C.C.).

¹⁷ *Barrett v. Layton, ibid.*

¹⁸ *Ibid.*

assuming a “counsel-like” role, this approach to adjudication was upheld in a later decision of the Manitoba Court of Appeal.¹⁹

In a more recent decision in the Ontario Superior Court of Justice,²⁰ Justice Kristjanson examined her responsibilities *vis-à-vis* a self-represented litigant who was unknowingly seeking an order that would ultimately compromise his ability to pursue his action. While acknowledging that the judge cannot become an advocate for a party, and in so doing, “provide legal advice, advance new arguments for the self-represented litigant or advise on strategy”, Justice Kristjanson recognized that she also had certain conflicting responsibilities under the Canadian Judicial Council’s Statement of Principles on Self-Represented Litigants and Accused Persons. Ultimately, she determined that failing to advise the plaintiff of the potential consequences of the particular procedural steps he was taking would effectively cause him to lose a significant right. As such, she undertook to explain the relevant law and its implications and encouraged the plaintiff to seek advice from a lawyer.²¹ In deciding to provide the plaintiff with crucial information about his position, Kristjanson J. relied on the Judicial Council’s guiding principles which contemplate judges explaining the relevant law and its implications to a self-represented litigant before the self-represented litigant makes “critical choices”.²²

The efforts made by Kristjanson J. can be contrasted with another recent case heard by the Ontario Court of Appeal. In *Moore v. Apollo Health & Beauty Care*,²³ the Court of Appeal held that a small claims court judge had failed to inquire about seemingly conflicting statements that a self-represented litigant had made. While acknowledging the challenges faced by busy trial court judges in trying to ease self-

¹⁹ *Manitoba (Director of Child and Family Services) v. A. (J.)*, 2006 MBCA 44, 375 W.A.C. 50, 205 Man R (2d) 50 (Man. C.A.).

²⁰ *Im v. BMO Investorline Inc.*, 2017 ONSC 95, 275 A.C.W.S. (3d) 510, 2017 CarswellOnt 48 (Ont. S.C.J.) at paras. 4 and 5.

²¹ Coincidentally, Justice Kristjanson suggested the plaintiff attend at Pro Bono Law Ontario located on the main floor of the courthouse in downtown Toronto; the same office where the interviews with self-represented litigants discussed later in this paper were conducted.

²² Canadian Judicial Council, “Statement of Principles on Self-Represented Litigants and Accused Persons” (2006) at 7, available at www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf.

²³ 2017 ONCA 383, 278 A.C.W.S. (3d) 90, 2017 CarswellOnt 6742 (Ont. C.A.).

represented litigants into an adversarial court process, Brown J.A. was also clear in identifying the new reality (the growth of individuals representing themselves). He suggested that the consequence of this “often requires a trial judge to take the time to ask those few extra questions to nail down, with clarity for all, the claims of the self-represented person upon which he will adjudicate. Trial fairness requires no less.”²⁴ Accordingly, in order to ensure fairness in cases involving self-represented litigants, it is worthwhile to consider some of the operating assumptions that underlie the adversarial process and the adjudicator’s role within that process, as well as the self-represented litigants’ direct experiences attempting to access justice.

The Role of the Judge in the Adversarial Process

These cases represent recent examples of judges engaging in a more active and engaged role *vis-à-vis* self-represented litigants appearing before them. In many respects, this approach runs contrary to traditional notions about judicial impartiality and neutrality, notions that are closely associated with the administration of just proceedings in an adversarial system. The adversarial system engages two main principles, namely, that the parties have control over the initiation and termination of their claims, and that they prosecute their claims as they see fit once commenced. In the context of the adversarial process, methods that enhance the affected parties’ ability to participate in the decision-making strengthen the overall exercise, while efforts to compromise the parties’ participation serve to impair the decision-making endeavour.²⁵ Legitimacy in the decisions and the legal institutions generating the decisions is bolstered by the parties’ ability to engage and be heard in the process. Thus, the adversarial process incorporates a procedural system “in which the parties not the judge have primary responsibility for defining the issues in dispute and for carrying the dispute forward through the system.”²⁶ Closely associated with these principles is the understanding that the particular processes developed within an adversarial system are organized around the presentation and testing of evidence by the respective parties as opposed to the judge. Underscoring this process

²⁴ *Ibid.*, at paras. 46 and 48.

²⁵ Lon Fuller, “The Forms and Limits of Adjudication” (1978), 92 Harv. L. Rev. 353 at 364.

²⁶ Brooks, *supra*, footnote 15 at 93.

is the belief that “accurate fact-finding is likely to result if the parties motivated by self-interest are given the responsibilities of investigating facts and presenting arguments”.²⁷

As between different adjudicative processes, there are distinctions between the scope of the judge’s role within the context of the collection and presentation of evidence by the parties.²⁸ Within the adversarial model, judges are thought to function as neutral umpires who generally ensure that evenly matched legal representatives work within certain parameters defined by procedural fairness. This can be contrasted with an inquisitorial legal system in which more judges actively manage legal processes by conducting investigations, determining issues and controlling the presentation of evidence. By contrast, adversarial legal systems place all of these responsibilities squarely on the parties’ shoulders.²⁹ In an adversarial system, the assumption is that by not taking an active role in the administration or presentation of the case adjudicators will remain unbiased, unpartisan and, therefore, impartial in terms of their decision-making, thereby fulfilling a commitment to procedural fairness.³⁰ One of the rationales underlying this approach is that there is a risk of a psychological bias associated with the decision-makers’ participation in the investigation and presentation of evidence.

Impartiality is considered to be a fundamental tenet of procedural fairness, and thus, a cornerstone of the adversarial process. An impartial decision-maker is “one who is able to make judgments with an open mind, that is, one who comes to the decision-making table without his or her ‘mind already made up’ or without connections that

²⁷ *Ibid.* at 97.

²⁸ Fuller, *supra*, footnote 25 at 356.

²⁹ Russell G. Pearce, “Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help” (2004), 73:3 Fordham L. Rev. 969 at 972.

³⁰ In the American context, Sande Buhai’s comments regarding the role of the judge in the adversarial system have significant implications for self-represented litigants. She stated: “[p]erhaps because they are trained primarily as lawyers and not as judges, American judges tend to view their role as that of a neutral and impartial referee, consistent with the sporting theory of justice. They perceive their main job to be procedural—to ensure that the adversary system, quintessentially a contest between lawyers, operates efficiently and effectively.” See Sande L. Buhai, “Access to Justice for Unrepresented Litigants: A Comparative Perspective” (2009), 42 Loy. L.A. L. Rev. 979 at 994-95; Michelle Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law” (2015) 38:1 Dal. L.J. 119 at 123.

improperly influence the decision-making process”.³¹ Judicial impartiality is required for arriving at a decision that is based on the evidence presented, and for a rigorous testing of the evidence by opposing parties. Moreover, impartiality encourages confidence in the decisions ultimately made by the adjudicator, and in so doing, further fosters the legitimacy of the legal institutions in which the decisions are made.³² The focus on impartiality extends to the appearance of impartiality. In fact, the ethical code directing judges’ conduct in Canada notes that judges “must be and seen to be free to decide honestly and impartially on the basis of the law and evidence”.³³ Judges exhibit this commitment to impartiality by adopting a passive stance. Consistent with a passive stance, both adjudicators and the lawyers appearing before them often assume that the principle of impartiality imposes a strict prohibition on adjudicators assisting a party. In remarks made respecting judicial ethics, Lord Neuberger defined the judge’s passive role in the following manner:

[i]t is not a judge’s function to conduct the trial or any part of it. And such a course is fraught with dangers. An issue may have been avoided by both sides for good substantive or tactical reasons of which the judge is unaware. And if the judge appears to be batting for one party there is a real risk of justice not being seen to be done – especially if that party eventually wins.³⁴

This strict prohibition against assistance extends to those representing themselves as well. This is notwithstanding that traditional notions of impartiality evolved in a time when most litigants were represented by counsel, a fact that is no longer true in many Canadian courts. As such, the new reality of self-representation has brought two

³¹ Laverne Jacobs, “Caught Between Judicial Paradigms and the Administrative State’s Pastiche: ‘Tribunal’ Independence, Impartiality, and Bias” in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context*, 2nd ed. (Toronto, Canada: Emond Montgomery Publications, 2013) 233 at 234.

³² Flaherty, *supra*, footnote 30 at 133-135.

³³ Jona Goldschmidt & Loretta Stalans, “Lawyers’ Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants” (2012), 30:1 Windsor YB Access Just. 139 at 152; Canadian Judicial Council, *The Ethical Principles for Judges* (1998), available at [www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_principles_1998_en.pdf@statement/\(purpose\),princ.3](http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_principles_1998_en.pdf@statement/(purpose),princ.3).

³⁴ Lord Neuberger, “The Role of the Judge: Umpire in a Contest, Seeker of the Truth or Something in Between” (August 19, 2016) Singapore Panel on Judicial Ethics and Dilemmas on the Bench: Opening Remarks.

competing duties of the judiciary into focus, namely impartiality and the duty to protect individuals' right to be heard.

The Problem with Passivity

Notwithstanding the importance of protecting impartial decision-making, impartiality does not require passivity.³⁵ Moreover, a focus on the “appearance of judicial neutrality” has resulted in improperly equating judicial engagement with judicial non-neutrality.³⁶ Empirical research regarding judicial impartiality has cast doubt on the suggestion that judges are really unbiased and has instead suggested that what is really at stake is only the appearance of impartiality.³⁷ An appearance should not “impair a judge’s ability to intervene when he thinks it is necessary so long as the intervention is fair and dispassionate”.³⁸ Consequently, a focus on the appearance of neutrality has resulted in equating judicial engagement with non-neutrality and this, in turn, reinforces a passive approach to judging that actually serves to undermine true neutrality.³⁹

One of the problems with the assumption that passivity is commensurate with neutrality and impartiality is that it is based on a concept of the adversarial system that, in turn, makes other assumptions about the players within the system. It assumes that cases involve a contest between lawyers who are equally well versed and well-resourced in the requisite procedural and substantive law. As such, the assumption is that lawyer-represented parties are equally prepared for the legal contest.⁴⁰ Within the adversarial context, it is assumed that the fairest decision is made when “two men argue, as unfairly as possible, on opposite sides, for then it is certain that no important consideration will altogether escape notice”.⁴¹ However, this justification is open to various critiques, one

³⁵ Cynthia Gray, “Reaching out or Over-Reaching: Judicial Ethics and Self-Represented Litigants” (2007), 27:1 J. Nat’l. Assn. of Admin. Law Judiciary 97 at 105; Flaherty, *supra*, footnote 30.

³⁶ Richard Zorza, “The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear *Pro Se*: Causes, Solutions, Recommendations, and Implications” (2004), 17 Geo. J. Legal Ethics 423.

³⁷ Buhai, *supra*, footnote 30 at 982.

³⁸ Brooks, *supra*, footnote 15 at 104.

³⁹ Zorza, *supra*, footnote 36 at 440.

⁴⁰ Flaherty, *supra*, footnote 30 at 124.

⁴¹ Brooks, *supra*, footnote 15 at 108 (quoting MaCaulay).

of which is that a “contested theory of litigation” is inconsistent with obtaining the truth, particularly where parties are exclusively focused on presenting evidence favourable to their case and suppressing evidence that is unfavourable to their case. Moreover, in order to work properly, it assumes that the parties are equally matched in their endeavor; this is an assumption that is often idealistic at best.

These assumptions become even more problematic when one of the parties is represented by a lawyer and the other party is not. In these instances, remaining passive means judges fail to take account of the self-represented litigant’s lack of legal knowledge and experience, both of which affect the individual’s ability to present her case or respond to the opposing party’s case. Judge Posner’s self-represented inmate provides a compelling example in this regard. In most legal contexts, self-represented litigants are unable to participate because they are unfamiliar with the professional legal language spoken by lawyers and judges and with the procedures that take place in and out of the courtroom, not to mention the substantive legal issues raised in the case.⁴²

The disparity in knowledge and experience between lawyers and self-represented litigants calls the validity of a passive judicial attitude into question. The fact that the legal process is only known to the represented party creates a distinctly unfair process that actually serves to subvert impartial decision-making.⁴³ The problem, as witnessed firsthand by judges such as Posner and Kristjanson, is that, without a certain level of judicial assistance and/or engagement, many self-represented litigants run the risk of compromising positions and/or losing important legal rights because they are unable to frame their dispute in traditional legal terms and/or unable to present the evidence as expected by lawyer and judges. When judges remain passive, many self-represented litigants are also left feeling like outsiders in the process. The lawyers and judges operating within the civil justice system are very much insiders trained in the language and process of law while the self-represented litigants remain unable to access that same information and training. A consequence of this sense of exclusion is a reinforcement of a belief that only certain voices are likely to be heard within the civil justice system. All

⁴² Macfarlane, “Identifying and Meeting the Needs of Self-Represented Litigants”, *supra*, footnote 4 at 95.

⁴³ Flaherty, *supra*, footnote 30 at 136-138.

of this raises even more significant questions about the efficacy of a dispute process in which large numbers of disputants do not understand the procedure, receive no assistance when attempting to engage in the process and, as such, are left unable or unwilling to express themselves.

Thus, in attempting to safeguard the administration of a fair and just adversarial process in which parties can present their case to a neutral decision-maker, the adversarial process actually functions in an unfair fashion: there is a distinct advantage to certain parties (*i.e.*, represented parties). In fact, there is an argument that from an ethical standpoint, judicial passivity does not ensure neutrality in the case of self-represented litigants but rather represents an “affirmatively harmful” approach.⁴⁴ The further consequence is that many self-represented litigants cannot access the civil justice system in a meaningful manner.

Self-Represented Litigants’ and the Judiciary

In appraising the continued workability and legitimacy of the adversarial process, given the growth of self-representation, it is important to take account of the self-represented litigants’ perspective on their experiences engaging in the civil justice system.⁴⁵ The following discussion canvasses the views and perspectives of self-represented litigants who were interviewed about their experiences representing themselves in the civil justice system.⁴⁶ This was not meant to be a “customer satisfaction survey”, but rather, was meant to encourage self-represented litigants to reflect on their efforts to be heard in the litigation process. The theory is that this inquiry would provide useful insights into the attitudinal issues as well as structural challenges

⁴⁴ Carpenter, “Active Judging and Access to Justice”, *supra* note 5 at 16.

⁴⁵ Trevor CW Farrow, Ab Currie, Nicole Aylwin et al., *Everyday Legal Problems and the Costs of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016), online at www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf.

⁴⁶ The research project included interviews with self-represented litigants who sought assistance from a self-help legal centre in downtown Toronto. The objective of the research project was to better understand the self-represented litigants’ particular experiences representing themselves against opposing counsel and engaging with members of the judiciary in the course of their legal matter. The interviews adopted a qualitative narrative approach that encouraged the self-represented litigants to speak about their experiences in their own words. This research was part of the author’s doctoral research at Osgoode Hall Law School.

that confront adjudicators and non-lawyers. A review of the narratives data collected from these interviews reflects certain positive as well as negative aspects of the self-represented litigants' experiences in court. Together these experiences provide an opportunity to further explore ways in which adjudicators might better interact with self-represented litigants.

For some of the self-represented litigants interviewed, their experience of appearing before an adjudicator (whether it be a Master or a Judge) was positive in the sense that they felt that they were provided with an opportunity to engage with the court, and consequently, felt that they had been heard. For example, at the time of her interview, one self-represented litigant had just lost a motion on the production of documents requested at discovery. During the motion, she made submissions pertaining to the relevancy of certain documents. The Master hearing the motion ruled against her. However, when reflecting on the hearing, she said, "it was fair. We lost very well". In referring to the Master, the self-represented litigant further suggested that the adjudicator had been fair by guiding the questions. When pushed to articulate what a "fair adjudicator" looks like, the self-represented litigant suggested the Master was fair because she believed he was an empathetic listener who did not rush her through her submissions. Interestingly, the interviewee also suggested that moving her motion to the end of the day (when the courtroom was less full) meant that she did not have an 'audience' while making her submissions – this also contributed to a less intimidating experience.

In another example, a different interviewee described the adjudicator as "very nice and when she wrote her short form [decision], she explained it to me so I'd understand because I am not a lawyer, and she was wonderful".⁴⁷ Again, the self-represented litigant's positive experience was based on the fact that the judge legitimized the litigant's right to be there by treating the individual with respect, while at the same time explaining the steps such that the individual felt part of the process.

The positive perception of these self-represented litigants was often associated with adjudicators who took time to explain court procedures, indicated that they had

⁴⁷ Interview of EP dated December 15, 2014 at 4.

reviewed the self-represented litigants' materials and made efforts to understand the self-represented litigants' submissions by asking questions and seeking clarifications. Interestingly, in referring to the decisions rendered by the adjudicators, the self-represented litigants often further acknowledged that, while sympathetic to their position, the adjudicator's "hands were tied." Notwithstanding that the adjudicator was ruling against them, there was a link between the self-represented litigant's perceptions about their ability to participate in the process and the way in which the decision was presented to them. In some instances, individuals' perceptions about the fairness of a hearing were based, in part, on whether the adjudicator was seen to take account of the self-represented litigant's submissions in reaching a decision. This did not mean that the adjudicator necessarily agreed with the self-represented litigant's submissions. It was rather that the individual's position had been considered and the adjudicator in presenting her judgment explained the reasoning and the outcome. In this regard, one self-represented litigant noted,

Judge *** heard me, because he wrote a six-part endorsement. And he stepped up to the plate and read aloud my statements in court...[Interviewer: How did you feel about that when he did that?...]I thought it was awesome that he would be so openly supportive. He clearly saw there was a concern. But again his hands were tied. There's a lawsuit on the table but he very, very carefully worded that endorsement.⁴⁸

Unfortunately, not all of the self-represented litigants had positive experiences in court. Canvassing some of the self-represented litigants' negative experiences also highlights some of the tension between the expectations and assumptions held by self-represented litigants about what the judge's role should be. While it is important not to overstate the significance of one negative court experience on an individual's overall perceptions about the fairness of the legal process, it is also important to remember the significant role that judges continue to play in society. To many individuals, the judge has "a significant reservoir of respect and credibility, they have near total authority in the courtrooms, and they face a public with a desperate desire to feel that they will be listened to when they go to court."⁴⁹ In many respects, for the self-represented litigant,

⁴⁸ Interview of KC dated April 28, 2015 at 12.

⁴⁹ Zorza, *supra*, footnote 36 at 436.

the judge becomes the embodiment of a fair legal system: it is the individual who ensures that ‘justice is done’.⁵⁰ In fact, many self-represented litigants often feel that if they can just get in front of a judge (and have the judge listen to their story) then they could get “justice”.⁵¹ As such, when self-represented litigants are compelled to engage with adjudicators directly, it is not surprising that the role played by the judge becomes extremely significant to the non-lawyer’s conceptualization of access and justice more broadly.

From an attitudinal perspective, certain self-represented litigants interviewed described discomfiting interactions with adjudicators that often left them feeling embarrassed and ineffectual in representing themselves. Historical perceptions about self-represented litigants as vexatious litigants may influence attitudes and assumptions about non-lawyers appearing in court. However, it is again important to take account of the changing demographics respecting self-representation and its prevalence in a myriad of different legal contexts.⁵² As legal representation is essentially priced out of the reach of a majority of individuals, it can be assumed that large numbers of individuals with legitimate legal disputes will be obligated to represent themselves. Moreover, while self-represented litigants may be unsuccessful in their cases, that fact alone should not diminish the legitimacy of their claims.

One of the sources of self-represented litigants’ anxiety respecting these encounters was that, as non-lawyers, they are unfamiliar with courtroom rules and procedures. Yet, in many instances, they are expected to act in a fashion similar to legal professionals who attend regularly in these courts. In some instance, they were advised by the court that they would not be afforded any special consideration because of the fact they were self-represented. In one specific example, a self-represented litigant recounted an incident in

⁵⁰ Interestingly, Michelle Flaherty also suggests that self-represented litigants often view procedural rules as preventing them from telling their story with the consequence being that self-represented litigants often feel less confident in the fairness or legitimacy of a hearing that is defined by the same procedural rules with which self-represented litigants are unfamiliar. See Flaherty, *supra*, footnote 30 at 123.

⁵¹ Trevor C.W. Farrow, “What is Access to Justice?” (2014), 51:3 Osgoode Hall L.J. 957.

⁵² Ab Currie, *Nudging the Paradigm Shift: Everyday Legal Problems in Canada* (Toronto: Canadian Forum on Civil Justice, 2016), online at <http://cfcj-fcjc.org/sites/default/files/publications/reports/Nudging%20the%20Paradigm%20Shift%2C%20Everyday%20Legal%20Problems%20in%20Canada%20-%20Ab%20Currie.pdf>.

which the judge explicitly told him, “we will make no exceptions for you because you are a self-represented litigant”.⁵³ Such a blunt articulation of the court’s attitude toward the presence of self-represented litigants underscores the apprehension that many self-represented litigants feel when representing themselves. As a result, they worry about making mistakes, embarrassing themselves or missing opportunities to present their case. In one such example, the individual raised an issue with the court that had been overlooked and, as a result, was subject to a reprimand by the judge. In re-telling her account of the appearance, she expressed embarrassment at being yelled at by a judge in front of a courtroom of lawyers and clients. While judicial expressions of dissatisfaction with a particular party’s conduct may be justified, and thus not overly problematic, it is important to be cognizant of the inherent differences between how a self-represented litigant and a lawyer interpret the court’s reproach.

Another self-represented litigant recounted two very different court appearances related to a real estate case. In reflecting on these appearances, he highlighted some of the particular challenges he thought he faced as a self-represented individual in court – namely, as an “outsider” to the process both physically and in terms of experience and knowledge. Without any guidance from the court, a self-represented litigant can often lose an opportunity to engage due to unfamiliarity with the proper procedure and a corresponding fear about speaking out of turn (and consequently being reprimanded) or being wrong.⁵⁴ In this regard, he said,

...as a self-rep it’s kind of you’re really on the hot seat. Aside from that, again the procedural things, knowing when to speak, what to call who, how to refer to what, what to be careful of, what sort of rights you have, when you should speak, when you shouldn’t speak. I guess another point that was kind of an issue was just in terms of the vestments. The attorney

⁵³ Interview of QC dated November 13, 2014.

⁵⁴ Again it is important to note that pursuant to the lawyers’ professional code, lawyers are guided by the notion that they are obligated to represent their client zealously, which includes the obligation to “raise fearlessly every issue, advance every argument and ask every question, however distasteful.” See, for example: Law Society of Upper, *Rules of Professional Conduct* (October 1, 2014) at s. 5.1-1[1], online: www.lsuc.on.ca/uploadedFiles/NewRulesofProfessionalConduct-effectiveOct2014.pdf. This duty is likely to impact (or temper) the legal profession’s perception and interpretation of a judicial response in ways that are different from that of the non-lawyer representing her own claims.

of course has their robes as does the justice...We're the only one not wearing a robe.⁵⁵

This particular self-represented litigant's views of court proceedings were also significantly impacted in another respect. In describing the judge's approach, the self-represented litigant felt that the adjudicator showed little interest in hearing from him, because she said that she did not want to hear from him without any explanation as to the basis for so doing.

One of the risks associated with these perceptions is that the adjudicator is not interested in the individual's position or arguments and/or has pre-judged the particular matter. While lawyers may understand that such a comment is not necessarily negative (i.e., the lawyer's position does not raise significant issues or questions for the judge), self-represented litigants are likely to have the opposite understanding -- that the adjudicator does not wish to hear from the individual because she does not see the individual's position as valid or legitimate. Moreover, judges, accustomed to having a particularized conversation with the lawyers who appear before them, are not in a position to engage with non-lawyers who do not speak the traditional legal vernacular. The use of technical legal terms and even Latin terms -- one adjudicator repeatedly referring to *nunc pro tunc* in the course of a motion involving a self-represented litigant -- serve to isolate the non-lawyers and effectively preclude them from participating in the conversation.

A further consideration is that individuals who go to court to defend themselves are judged by individuals who they believe are disconnected from the realities of the litigants' lives; remembering again that the majority of self-represented litigants are in court because they cannot afford legal representation. This view was echoed by another individual who worried that the socio-economic and educational gap between judges and many self-represented litigants (as opposed to lawyers), made it difficult for judges to engage with self-represented litigants. This further reflects a perception about "insiders" and "outsiders" within the legal system.

⁵⁵ Interview of QH dated June 3, 2015 at 8.

The frustration exhibited by the self-represented litigants regarding their experiences with judges also resonated with volunteer lawyers who assist the self-represented litigants at the legal self-help centre. In discussing the importance to self-represented litigants of being “heard” by the adjudicator, one volunteer lawyer stated,

[s]o I understand that it’s frustrating to hear the guy mutter and move his papers and talk about irrelevant stuff. But I think the value of moving it to the bottom of the list, saying ‘okay listen I’m going to hear you out’...You have an hour, you booked an hour, you tell me everything you want to tell me for the next hour and I’m going to write my notes. I don’t know why there isn’t a little more empathy.⁵⁶

This view is consistent with some of the research that has studied individuals’ perceptions about procedural fairness. The research links the idea of “being heard” with perceptions about the fairness of legal processes.⁵⁷ More specifically, being heard influences whether individuals believe that they can meaningfully engage in the legal processes that affect them. These findings resonate with the self-represented litigants in the sense that the ability not only to present their case, but also to receive an indication from the adjudicator that their story was heard (often measured by the provision of reasons for the decision reached) significantly affected their sense of fairness. This is consistent with a political and psychological view that focuses on the importance of individuals’ meaningful participation in the decisions being made about them.⁵⁸ In the specific context of self-representation, meaningful participation most often will require judicial intervention in order to ensure that individuals are able to present their case and the judge clearly understands the case being presented by non-lawyers.⁵⁹ The difficult question becomes how the role of the adjudicator might be better imagined in an era of

⁵⁶ Interview of SB dated July 9, 2015 at 7-8.

⁵⁷ Tom R Tyler, “What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures” (1988), 22 *Law Society Rev.* 103; J. Thibault and L. Walker, *Procedural Justice: A Psychological Analysis* (New York: John Wiley and Sons, 1975); Allan E. Lind, Robin I. Lisak and Donald E. Conlon, “Decision Control and Process Control Effects on Procedural Fairness Judgments” (1983), 13:2 *Journal of App. Soc. Psy.*

⁵⁸ Sherry R. Arnstein, “A Ladder of Citizen Participation” (1969) *AIP Journal* 216; Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley, California: University of California Press, 1984); Susan Lawrence, “Justice, Democracy, Litigation & Political Participation” (1991), 73:3 *Social Science Quarterly* 464; Goldschmidt and Stalans, *supra*, footnote 32.

⁵⁹ Brooks, *supra*, footnote 15 at 101; Fuller, *supra*, footnote 25.

self-representation so as to ensure that self-represented litigants are heard and able to participate in their hearings.

In the examples discussed, the self-represented litigants who felt that they were listened to and taken seriously by the adjudicator generally had positive experiences in court. These positive experiences were, in several instances, unconnected to the ultimate outcome that they achieved in the hearing. In fact, in suggesting that the adjudicator's 'hands were tied,' it would appear that the self-represented litigants were often prepared to accept an unfavourable decision when they felt that the adjudicators took the time to listen to their position, explained the process, and articulated, in plain terms, the basis of their decision. Moreover, in acknowledging receipt and review of the self-represented litigants' written materials and/or oral submissions, the adjudicator was perceived to have legitimized the self-represented litigant's efforts to engage in the process, notwithstanding the legal validity of the claims made. In this sense, the self-represented litigant was not treated as an "outsider" or a nuisance, but rather, as an active participant in the process.

By contrast, a negative experience with a judge had the effect of compounding the self-represented litigant's perception of being an "outsider". The formal procedures followed in court, the informal practices known to counsel, the language used by lawyers and judges, and even the robes worn by the lawyers and judges all serve to highlight the perceived gulf between "insiders" (judges and lawyers) and "outsiders" (self-represented litigants). The perceptions of this gulf are further complicated by the view that lawyers and judges remain part of the same elite profession and, as such, inhabit a similar socio-economic sphere of which many self-represented litigants are not part.⁶⁰ Together this division between insiders and outsiders contributes to perceptions about social exclusion and the distinction between those individuals who may physically be able to gain entry to various legal institutions, but are otherwise unable to meaningfully participate in the decision-making processes that affect them. Individuals who are socially excluded suffer from economic disadvantage and are less likely to secure and/or be in a position to

⁶⁰ This view of judges and lawyers occupying an elitist guild is supported by the demographical data respecting self-represented litigants. See footnote 46.

protect rights that include employment, housing, health care and education.⁶¹ This lack of access to justice perpetuates disengagement and potentially marginalization: “a lack of access to justice results not just from factors tied to the subjective perceptions of those who are excluded. It also flows from social marginalization visited upon them by the societal mainstream.”⁶² In this sense, self-represented litigants may be marginalized in a system that is not designed to include their direct engagement and remains resistant to their participation.

In many respects, the attitudes and approaches adopted by adjudicators toward self-represented litigants may serve to widen this perceived gap rather than close it. In some examples, the adjudicators did not appear to take account of what the individual was saying, spoke to opposing counsel in legal terms not understood by the non-lawyer and/or scolded the non-lawyer for speaking out of turn or making a procedural mistake. When combined with a failure to actively engage with the self-represented litigant, this stance serves to exacerbate certain perceptions about the non-lawyer’s ability to engage as well as the fairness of the decision-making process.

A Paradigm Shift and A New Role for Adjudicators

These narratives are not meant to suggest that all judges act in one fashion nor that all self-represented litigants act in a similar fashion. However, the individuals’ experiences do highlight the need to examine how we better reconcile the roles played by members of the judiciary with the new reality within the civil justice system. The response cannot simply assume that simplified court forms and more legal information will be sufficient. In fact, the provision of simplified forms and additional legal information without systemic reform to the legal process creates a tension by which the non-lawyer’s expectations about her abilities to participate do not match her experience engaging with the legal process in court. Rather, the challenge is much more significant

⁶¹ Liz Richardson and Julian LeGrand, “Outsiders and Insiders’ Expertise: The Response of Residents of Deprived Neighbourhoods to an Academic Definition of Social Exclusion” (2002), 36:5 *Social Policy and Administration* 496

⁶² Roderick A. MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, W.A. Bogart & Frederick H. Zemans, eds., *Access to Justice for a New Century – The Way Forward*, (Toronto: The Law Society of Upper Canada, 2005) at 29.

and involves reappraising the assumptions that are made about the roles judges play within an adversarial system and how continued reliance on those assumptions provides an increasingly dysfunctional model of civil litigation as it pertains to the reality of self-representation. In this sense, the question can no longer be whether judges should assist self-represented litigants, but rather how judges might best assist self-represented litigants.

Contributing to this challenge is the need to remain mindful of certain of the process values that underscore an adjudicative system. These include the acceptability and legitimacy of the process by those who use it and the accuracy of the fact-finding processes developed within it.⁶³ The procedures that are developed in accordance with these process values also need to inform the responses to current challenges within the system. For instance, finality of disputes, dignity of the participants and impartiality are all important attributes of a procedural system that need to be accounted for in any changes to the legal process.

My focus will be on the values associated with judicial impartiality. As noted, operationalizing impartiality assumes judges will act as neutral umpires that facilitate the presentation of evidence by evenly matched legal professionals.⁶⁴ Given the complexity and professionalization of many legal procedures, not to mention the relevant substantive law, the preparation and presentation of a case typically necessitates expert legal advice and specialized information. In this sense, the parties, through their lawyers, maneuver through a complex legal process. However:

[w]here the law, the rules of procedure, and the legal processes are unintelligible or unfamiliar to one or more of the litigants, cases stop being a dialogue between informed and experienced participants within a framework designed to test evidence and facilitate truth seeking. Instead, cases turn into a frustrating exercise in imposing legal norms on parties who

⁶³ Brooks, *supra*, footnote 15 at 116-117.

⁶⁴ While discussed in the criminal context, Lloyd Weinreb notes that, in many litigation contexts, a system is neither exclusively adversarial nor exclusively inquisitorial. As such, it is important to choose a procedure that best serves the purposes and goals of the particular process. See: Weinreb, "The Adversary Process is Not an End in Itself" (1998) 2 J. Legal Ethics 59 at 59.

do not grasp their significance, and who see them as arbitrary, unfair, or simply unintelligible.⁶⁵

Despite this complexity and lawyer-control of the process, it is assumed that the judge remains a “neutral and impartial referee”.⁶⁶ However, “passivity and silence” from judges in situations where the lawyers are not equal in terms of the task of presenting their client’s respective cases distorts the “whole process of the administration of justice”.⁶⁷ The process fails to work properly if one of the underlying assumptions respecting the equal abilities of the parties is mistaken. Thus, rather than serving the adversary process by maintaining a neutral stance toward the parties, judicial passivity undermines that same process by failing to address flawed presentations and ensure that the parties are provided with an equal opportunity to present their best case.

Taken a step further, the particular realities associated with the growth of self-representation render traditional assumptions about judges and passive adjudication fundamentally untenable.⁶⁸ Without active intervention from an adjudicator, there is a risk of an inherent disadvantage to those who attempt to participate in legal processes, but are unfamiliar with the rules and procedures, particularly as they relate to the preparation and presentation of evidence. In particular, opportunities to present certain facts and respond to the facts presented by an opposing party are crucial aspects of the adversarial process. The procedures involving the presentation of evidence remain highly professionalized and, therefore, weighted in favour of legal professionals and their clients. Notwithstanding this, the objective must be to ensure that self-represented litigants are able to engage in the civil justice system on a level that is relatively

⁶⁵ Flaherty, *supra*, footnote 15 at 121.

⁶⁶ Sande L. Buhai, *supra*, footnote 30 at 994.

⁶⁷ Brooks, “The Judge and the Adversary System”, *supra* note 14 at 111.

⁶⁸ Citing an increase in the number of self-represented litigants and the fact that there are some legal contexts that are not well served by an adversarial context, Lord Chief Justice Thomas in the United Kingdom recently suggested that “[a]n inquisitorial system might be an improvement for litigants in person and secure a fair trial for all whilst doing so within limited and reducing resources”. Recognizing the significance of his comments within the context of the traditional adversarial system, Lord Chief Justice Thomas further commented that, “research would have to consider whether an inquisitorial procedure would require more judges or a ‘cadre of junior judges’”. See Owen Bowcott, “Inquisitorial system may be better for family and civil cases, says top judge”, *The Guardian* (March 4, 2014), available at www.theguardian.com.

commensurate with lawyers. In order to fulfill this objective, it is necessary that the judiciary engage with the self-represented litigants that appear before them.⁶⁹

In conceptualizing a shift in roles, it is important to explore some different approaches to reform that have been offered. Historically, self-representation was responded to with calls for more legal services, whether this meant traditional representation by counsel or modified services such as unbundled legal services. In essence, this is described as supply-side reform.⁷⁰ However, given the limitations associated with supply-side reform (including the financial costs associated with providing more legal representation as well as the sheer magnitude of self-representation), the provision of more lawyers and/or unbundled services is not likely to eliminate the growth of self-representation. As such, there have been more recent calls for the development of demand-side reform. Demand-side reform:

refers to the overhaul of the processes and rules that govern litigation so that they best serve the interests of the overwhelming majority of customers...the unrepresented. Effective demand side reform would review the procedural and evidentiary rules that commonly cause pro se litigants to stumble and require judges to develop facts that support established claims and defences, thus enabling meaningful participation in the court system by those who appear without counsel. Fundamental changes to the way disputes are processed and decided in the poor people's courts are needed to bring the operation of the legal system into alignment with the capabilities of the litigants who use it.⁷¹

The adversarial process as it currently operates has essentially been designed by and for lawyers. As such, it remains ill equipped to encourage or facilitate non-lawyer involvement. Consistent with demand-side reform is the need for a re-constituting of the judge's role within a reformed process. Specifically, changes to the procedural and evidentiary rules must be implemented by judges who take seriously their engagement with self-represented litigants as legitimate and deserving participants in the legal process.

⁶⁹ Flaherty, *supra*, footnote 30.

⁷⁰ Jessica K. Steinberg, "Demand-Side Reform in the Poor People's Court" (2015), 47 Conn L. Rev. 741 at 745.

⁷¹ Steinberg, *ibid.* at 746.

Lessons from the Administrative Law Context

Notwithstanding that there has been much debate about the extent to which administrative tribunals should adopt the procedural processes of the common law court systems,⁷² administrative law has operated on different assumptions. While the civil justice system has traditionally operated on the assumption that parties require lawyers to maneuver successfully through the system, the same is not always assumed about the administrative law context, particularly in certain tribunal settings.⁷³ In these settings, it is generally assumed that adjudicators may be active in assisting non-lawyers and, at the same time, remain impartial decision-makers.⁷⁴ Given that many administrative tribunals contemplate individuals appearing without counsel and have undertaken to develop processes that take account of that fact, perhaps it is time to reverse the thinking process and examine the operationalization of tribunals in terms of civil justice reform.⁷⁵ Like adjudicators presiding over tribunal hearings, it may be time for judges to adopt a more active role at trial when hearing cases involving self-represented litigants. Thus, drawing on an idea (*i.e.*, “substantive impartiality”) that has developed within the administrative law context, differently situated parties might be treated differently so that an adjudicator is able to ensure that the legal system is fair and navigable to all parties.⁷⁶ The key consideration is that the process is fair to all parties commensurate with their ability to participate. In this regard, the “test” is what enhanced engagement ensures that any

⁷² Colleen Flood & Jennifer Dolling, “An Introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path” in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context*, 2nd (Toronto: Emond Montgomery Publications, 2013) at 27..See also discussion by Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias” in which Michelle Flaherty comments on the fact that, “[o]ver the years, we [administrative justice system] have fallen very easily into a pattern of using the judicial model of adjudication as the basis for our understanding of a fair hearing. As we have seen, however, this judicial model of adjudication is not effective in contexts where representation is the exception rather than the norm.” Flaherty, *supra*, footnote 30 at 126.

⁷³ Zorza, *supra*, footnote 36 at 440.

⁷⁴ Russell Engler, “And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks” (1999), 67:5 Fordham L. Rev. 1987 at 2018.

⁷⁵ The author acknowledges that there are different jurisdictional considerations that potentially impact the scope of a tribunal’s statutorily derived powers and the inherent jurisdiction of the superior courts. However, the author still feels that in the context of self-representation, there are lessons to be learned from those adjudicatory settings that have been addressing the presence of non-lawyers.

⁷⁶ Flaherty, *supra*, footnote 30 at 139.

litigant, regardless of whether he or she has a lawyer, is able to present his or her case to an impartial adjudicator?⁷⁷

Questions about the nature of the adjudicator's role within administrative tribunal hearings have often been examined within the context of the dichotomy between the adversarial-inquisitorial models of judicial procedure.⁷⁸ This paper does not advocate a complete shift from an adversarial model to an inquisitorial model of dispute resolution. However, the issue of self-representation does raise serious and foundational questions about the need for a spectrum of judicial engagement that ensures that the adversary process operates in a fair and equitable fashion for all litigants. Thus, rather than framing the issues as a debate between adversarial and inquisitorial models of dispute resolution, a better way to approach questions about the role of the adjudicator would be to examine the "degree of intervention – ranging from a passive, reactive stance to a more proactive or intrusive one" – that attempts to reassure represented and unrepresented parties that their cases are heard on the merits.⁷⁹ In other words, different judicial contexts would require different levels of engagement by the adjudicator. This may range from informational assistance about the steps in a hearing through to active adjudication whereby the judge shapes the process and provides direction to the parties.

In the administrative context, active adjudication has been characterized as a "midway point" between the adversarial and inquisitorial models. It involves adjudicators not only providing information, but also shaping how the process unfolds. This includes efforts by the adjudicator to articulate the legal issues to be resolved (with input from the parties), explain the procedures to be followed (including an ordering of factual issues and the corresponding evidence to be presented), engagement with the parties respecting the evidence actually presented, and explanations of the decision

⁷⁷ D.A. Rollie Thompson, "The Judge as Counsel", Canadian Forum on Civil Justice (Spring 2005) at 5, online: <http://cfcj-fcjc.org/sites/default/files/docs/2006/thompson-en.pdf>.

⁷⁸ Robert Thomas, "From 'Adversarial v Inquisitorial' to 'Active, Enabling and Investigative': Developments in UK Administrative Tribunals" in Laverne Jacobs & Sasha Baglay, *The Nature of Inquisitorial Processes in Administrative Regimes* (Surrey, UK: Ashgate Publishing Limited, 2013) at 51-52

⁷⁹ Thomas, *ibid.* at 52.

rendered.⁸⁰ In the broadest of strokes and taking account of impermissible behaviour that would give rise to an apprehension of bias, there would be a flexible range of judicial direction and assistance necessary to ensure a level playing field for all of the parties.⁸¹

It is acknowledged that increased judicial assistance is not without challenges. One is that there will be a perceived apprehension of bias on behalf of the represented parties⁸² and/or an over-reliance by self-represented parties on the adjudicator hearing their case: effectively turning judges into advocates. The test respecting bias (and judicial disqualification) focuses on whether the reasonable person would view the judge's conduct as biased. The focus is on the apprehension or appearance of bias.⁸³ As a consequence, passivity has historically been viewed as a means of countering an appearance of bias. Passivity is associated with decision-making that does not contain a particular inclination or predisposition. In the context of passivity, the argument is that, "judicial impartiality and the parties' control of the process are two sides of the same coin".⁸⁴ Moreover, remaining detached from the fact-finding process is thought to counteract concerns about decision-makers' bias whereby a decision-maker investigates and thereby controls the facts upon which the same decision-maker will rely when rendering a judgment.⁸⁵ The criticisms leveled at adversarial judges who actively engage in the presentation of the cases before them is that such actions are likely to suggest that the judge has failed to remain an equal distance from both parties, is no longer neutral,

⁸⁰ Samantha Green and Lorne Sossin, "Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy" in Laverne Jacobs and Sasha Baglay, eds., *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Burlington, VT: Ashgate, 2013) at 71; Flaherty, *supra*, footnote 30 at 127 and 132.

⁸¹ Flaherty, *supra*, footnote 30 at 138.

⁸² Goldschmidt and Stalans, *supra*, footnote 33.

⁸³ *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.); *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, 231 D.L.R. (4th) 1 (S.C.C.); Goldschmidt and Stalans, *supra*, footnote 33 at 154.

⁸⁴ Sarah Cobb and Janet Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991), 16:1 Law and Soc. Inquiry 35 at 41; Brooks, "The Judge and the Adversary System", *supra*, footnote 15 at 114.

⁸⁵ Brooks, *ibid.* at 116; Paul Weiler, "Two Models of Judicial Decision-Making" (1968), Osgoode Hall L.J. 407; Natalie Cargill, "Confirmation Bias and the Law" (January 13, 2015), available at www.linkedin.com/pulse/confirmation-bias-law-natalie-cargill.

and has instead demonstrated a bias toward one of the parties.⁸⁶ These criticisms were leveled at Judge Posner when he took steps to inform himself of certain medical facts that significantly impacted the persuasiveness of the responding party's case. However, allegations of bias stemming from judicial engagement could be addressed (and hopefully minimized) by judges at the outset of the proceeding, wherein the judge sets out the nature and scope of her assistance and possibly allows the parties to engage in a discussion about her engagement.

A move away from a strict adherence to neutrality through passive adjudication toward a more flexible and active approach to judging provides an opportunity to better address self-represented litigants' needs.⁸⁷ Underscoring this shift is the recognition that judicial assistance does not signal the presence of a bias. Rather, there is a need to refocus neutrality such that it ensures fairness within the proceeding. This link between neutrality and fairness has been examined within the mediation context. Not dissimilar to the adversarial context, there is a tension between ensuring that the mediator is neutral regarding the parties' positions and objectives and ensuring that the parties can negotiate fair agreements.⁸⁸

Interestingly, traditional notions about the neutrality of the mediator have been influenced by the role of the adjudicator in the adversarial context. Moreover, similar to the party control exercised within the adversarial process, the mediation process also stresses party control over the process and, not insignificantly, control over the outcome.⁸⁹ Thus, by remaining neutral, the mediator allows the parties to shape the resolution of the dispute. However, there is a critique that these traditional notions of neutrality in mediation are insufficient in addressing questions of power, justice and ideology that underscore and legitimize certain dialogue in mediation and alienate other

⁸⁶ Brooks, *ibid.* at 115.

⁸⁷ Specifically, Thomas notes an overly active approach places too much power and trust in the adjudicators. There are concerns about pre-judgment and the need to ensure that adjudicators are properly trained to intervene. Additionally, there are practical challenges associated with ensuring that adjudicators have the resources necessary to intervene and manage cases more actively. See Thomas, *supra*, footnote 78 at 61.

⁸⁸ Cobb and Rifkin, *supra*, footnote 84 at 42.

⁸⁹ Ronit Zamir, "The Disempowering Relationship between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic" (2011), 11:3 Pepp Disp. Resol. L.J. 467 at 469.

discourse.⁹⁰ As a consequence, there is a call for mediators to engage in the dialogue rather than remain silent. This is done by “shaping problems in ways that provide all speakers not only an opportunity to tell their story but a discursive opportunity to tell a story that does not contribute to their own de-legitimization or marginalization”.⁹¹ In so doing, mediators potentially engage in a more active and enabling role that ensures that all of the parties are able to participate and be heard, thereby ensuring fairness both in terms of process and outcome.

In terms of passivity, the practical reality is also that many adjudicators no longer operate within a purely adversarial process. Instead, adjudicators operate within a modified adversarial system that requires judicial engagement at various stages of the legal process including pre-trial and case conferences, settlement conferences, and judicial approval of certain resolutions.⁹² Important data recently collected by the Canadian Forum on Civil Justice indicates that various courts and tribunals across Canada offer a variety “front-end, early resolution resources onsite” that include pre-trial conferences, informal resolution and case management, triage services, conciliation services, summary advice, pro bono services and mini trials. All of these services reflect a shift away from a traditional adversarial process and a move toward a “multi-door, multi-service model”.⁹³ Generally speaking, the growth of procedures such as case management has created a more active judiciary whose members perform certain managerial roles within the litigation process; these roles were traditionally controlled by the parties through their lawyers.⁹⁴ Arguably, the growth of these various procedural reforms reflect ongoing efforts to ensure fair hearings. In the American context, the

⁹⁰ Cobb & Rifkin, *supra*, footnote 84 at 62.

⁹¹ Cobb & Rifkin, *ibid.*

⁹² See: Lisa Moore, Nicole Aylwin & Trevor Farrow, *Canadian Access to Justice Initiatives: Justice Development Goals Status Report* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, March 2017), online: www.cfcj-fcjc.org/sites/default/files/docs/Canadian%20Access%20to%20Justice%20Initiatives%20Justice%20Development%20Goals%20Status%20Report.pdf at 25.

⁹³ *Ibid.* at 26.

⁹⁴ P.A. Sallman, “Change in the Adversarial System of Civil Dispute Resolution: Implications for the Judiciary” in Charles Sampford, Sophie Blencowe and Suzanne Condlin, *Educating Lawyers for a Less Adversarial System* (Sydney, Australia: The Federation Press, 1999) at 17.

United States Supreme Court decision of *Turner v. Rogers*⁹⁵ called for the use of “alternative procedure safeguards” in cases involving self-represented litigants.⁹⁶ The basis for such a call was grounded in the protection of an individual’s right to due process and in a recognition that non-lawyers face unique challenges when attempting to be heard in the legal system.⁹⁷

In light of very serious concerns about the ability of self-represented litigants to participate, and the corresponding call for judges to take a more active role in cases involving non-lawyers,⁹⁸ the question that arises is what would less traditional judicial approaches look like?⁹⁹ In particular, what approaches would assist litigants in developing their factual record, and engage in the litigation process notwithstanding a lack of legal training?¹⁰⁰

It is suggested that there are different ways through which to reform the procedural framework and the judicial role within it when dealing with self-represented litigants. One approach relies on informality both in terms of the scope of procedural rules governing the legal process and their application by judges. The belief is that, in the context of self-representation, judges should be granted broad discretion in deciding how best to manage trials in their courtrooms.¹⁰¹ However, this raises a concern that with a broad discretion comes broad discrepancies in the ways in which different judges alter (or decline to alter) the procedures to address self-represented litigants’ needs.

An alternative approach suggests that, consistent with a new judicial role, there should be a new procedural regime that is designed to accommodate self-represented

⁹⁵ 564 U.S. 431, 131 S. Ct. 2507 (2011).

⁹⁶ *Turner v Rogers*, 546 U.S. 431, 131 S. Ct. 2507 (2011).

⁹⁷ *Ibid.* It is also worth noting that the US Supreme Court also determined that a constitutional right to due process did not extend to the appointment of legal representation even when the litigant was facing imprisonment resulting from a civil contempt claim.

⁹⁸ For example, see: Buhai, *supra*, footnote 30; Richard Zorza, “An Overview of Self-Represented Litigation Innovation, its Impact, and an Approach for the Future: An Invitation to Dialogue” (2009), 43:3 Fam. L.Q. 519.

⁹⁹ Brent Cotter, “Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada” (2012), 63 U.N.B. L.J. 54 at 63.

¹⁰⁰ Engler, *supra*, footnote 74 at 2029.

¹⁰¹ Carpenter, *supra*, footnote 5 at 23.

litigants. Such a system would, “turn the current system of party-driven adjudication on its head, from the inception of a complaint through the enforcement of a judgment”.¹⁰² One of the focuses of a new procedural regime would be with respect to the rules surrounding the presentation and evaluation of evidence. Effectively, subject to privilege, all evidence would be admitted, but judges would have a duty to evaluate the evidence in terms of weight rather than admissibility. A procedural regime has the benefit of providing sufficient guidance to all those participating in the legal process, including lawyers, self-represented litigants and judges. Furthermore, it also alleviates the responsibility of self-represented litigants to admit their evidence and challenge the opposing party’s evidence. This would rest with the judge. However, developing a new legal framework of this breadth is a significant and timely endeavor and one that is likely to meet a good deal of resistance. At a minimum, there needs to be debate from and among those who are currently versed in the procedures and operate accordingly.

From a practical standpoint, and given the sizeable number of self-represented litigants continuing to enter the civil justice system, there is a need to incorporate immediate and necessary steps that ensure that self-represented litigants understand the process so that they are able to move their case through the various procedural steps and substantive issues.¹⁰³ Moreover, there is an urgent need to ensure, attitudinally, that the self-represented litigant is no longer viewed as a nuisance that effectively slows down the litigation process.

In terms of some of these immediate steps, the self-represented litigants interviewed had very definite views on when they felt they were heard and, by contrast, what left them feeling excluded from the process. These views provide a useful basis of discussion about how to approach more immediate judicial engagement. For self-represented litigants who had positive experiences presenting their cases to adjudicators, there were certain similar characteristics shared by the participants. First of all, on a very practical level, the self-represented litigants felt that the adjudicators took account of them in the courtroom. For example, the judge might move the self-represented litigant’s

¹⁰² Carpenter, *supra*, footnote 5 at 24.

¹⁰³ Thompson, *supra*, footnote 77 at 5.

matter to the bottom of the list of matters to be heard that day. At first glance, this might appear to be unfair to the self-represented litigant. However, it was noted that, by moving the matter to the end of the day, it was likely that the courtroom would be less full and, thus, less intimidating. Secondly, in these instances, the adjudicator took time to explain the process to the self-represented litigant; this included how the hearing would unfold, who would speak first, when there would be an opportunity to respond, etc. This initiative had the dual effect of easing the self-represented litigant's anxiety over legal formalities and providing her with a roadmap for the process. This is particularly important considering that many steps may not always be outlined in the Rules of Procedure. Alternatively, the rules as articulated may be applied differently in the courtroom.

Relevant to this type of judicial engagement is a need for transparency in the process pursuant to which the judge outlines an approach that is both active and neutral. In this context, transparency means that the audience actually sees what is going on in the institution, that the institution is trying to be open, and has adopted means of operating that attempts to guarantee that the parties actually understand what the judge is doing and why.¹⁰⁴ Important to this concept of transparency is the need for continued explanation of a novel process, of the rationale for a novel process, and of the decision ultimately reached. By doing so, the participants might better understand why an adjudicator may approach the process in a particular way, which may help to alleviate concerns about bias.

In the case of those self-represented litigants interviewed, in addition to taking time to explain the process, the adjudicators also took steps to engage the self-represented litigants in their submissions. For example, adjudicators demonstrated their engagement by asking questions, allowing time to respond, and signaling that they had read the self-represented litigants' materials and made efforts to understand their position. This is notwithstanding the fact that the self-represented litigants' materials often did not conform to traditional legal drafting expectations. At the conclusion of the proceeding, the commitment to explain the process to the self-represented litigant also extended to the

¹⁰⁴ Zorza, *supra*, footnote 36 at 437.

delivery of a written endorsement or a judgment with reasons provided in plain language.¹⁰⁵

The fairness and effectiveness of adjudication are promoted by “reasoned opinions”.¹⁰⁶ Without such opinions, the parties have to take it on good faith that their participation in the decision was real and the adjudicator has, in fact, understood and taken account of their proofs and arguments. Not only are reasoned opinions an integral part of the adjudicative process, but so too is the communication of the reasoned judgment in a clear manner. Such communication signals that the judge “heard” the individual and took account of her position and story in making the decision. More practically, in cases involving self-represented litigants, communication of the judgment helps to ensure that the individual understood the consequences and implications associated with the decision.

There are also more fundamental challenges involving the presentation of self-represented litigants’ cases that could be better addressed by judicial engagement. For example, the preparation and delivery of opening statements can be quite challenging for self-represented litigants who find it difficult to distinguish between appropriate opening statements and evidentiary statements.¹⁰⁷ One adjudicator in a tribunal setting has suggested dispensing with opening statements in cases involving self-represented litigants. Instead, at the commencement of the hearing, the adjudicator should set out the legal and factual issues to be decided in the case with the parties’ participation.¹⁰⁸ Another particular challenge for non-lawyers involves the application of certain rules of evidence; these can be virtually incomprehensible to many self-represented litigants. In

¹⁰⁵ Folger has suggested that when an individual does not have information about how decisions are made or receives ambiguous information about the decision-making process, she may rely on the outcome as evidence of the fairness of the process. See Robert Folger, “Distributive and Procedural Justice: Combined Impact of ‘Voice’ and Improvement on Experienced Inequity” (1977), 35:2 *Journal of Personality and Social Psychology* 108. Additionally, self-represented litigants in Small Claims Court proceedings may be provided with oral reasons for a decision at the time a decision is made - this practice often requires that they order the transcripts of the proceedings in order to decipher the result reached and the consequences for them going forward. The ordering of transcripts is a step that seems costly and counter-intuitive to the needs of self-represented litigants.

¹⁰⁶ Fuller, *supra*, footnote 25 at 388.

¹⁰⁷ Flaherty, *supra*, footnote 30 at 130.

¹⁰⁸ Flaherty, *supra*, footnote 30.

dealing with the presentation of and response to opposing parties' evidence, judges may need to control more directly how a party presents its evidence through explanations, the posing of questions and the parceling out of evidence on different issues. One interesting suggestion made in the context of reforms addressing the presentation of evidence is the creation of a "pre-trial examination (if necessary, by a judicial officer other than the ultimate adjudicator) of the nature and extent of evidence to be presented".¹⁰⁹ Such a pre-trial examination could vet the evidence the parties are proposing to present and, in so doing, provide specific direction regarding the scope, form and limits of the evidence needed. This could be of great benefit to self-represented litigants both in terms of understanding what is required of them and what to expect and prepare in respect of the opposing parties.

While many of these steps do not fundamentally change the judges' role in the sense that they must remain impartial as to the probative value of the evidence provided, the modified process does require judges to adopt a more active role in relation to the presentation of evidence. These two aspects of the adversarial procedure highlight examples of the need to re-examine the litigation process from the perspective of the self-represented litigants. Other aspects of the process such as preparation and presentation of pleadings (and by extension, summary judgment motions), oversight of the discovery process and cross-examination process are further examples that require re-examination in light of the rise of self-representation. In particular, the discovery process raises unique challenges as it occurs outside of the court setting, and in many respects, requires that those participating in the process self-regulate their behaviour. In this sense, it represents a particular challenge for self-represented litigants. This is because while legal counsel can rely on the fact that disruptive opposing counsel might be subject to judicial scrutiny through various interlocutory proceedings, self-represented litigants are not likely to pursue the same course of action when an opposing party is abusing the discovery process.

¹⁰⁹ L.T. Olsson J., "Combating the Warrior Mentality" in Charles Sampford, Sophie Blencowe and Suzanne Condlin eds., *Educating Lawyers for a Less Adversarial System* (Sydney, Australia: The Federation Press, 1999) at 11.

While many of these examples of judicial assistance appear modest in effort, the effect on the self-represented litigants' perceptions of their ability to participate and be heard can be significant. In many of the positive incidents recounted by the self-represented litigants interviewed, the individuals were either unsuccessful or only partially successful in persuading the court of their position. Notwithstanding their lack of success, their assessment of the fairness of the proceeding was more encouraging. Thus, while it may be frustrating from the judge's perspective to hear submissions from a non-lawyer who appears unfamiliar with the process and very likely is uncomfortable speaking, there is an important benefit to be gained by judges rejecting traditional notions of judicial passivity and formality. They might say to self-represented litigants, "[y]ou have an hour. You booked an hour, you tell me everything you want to tell me for the next hour and I am going to write my notes".¹¹⁰

The lessons learned from the self-represented litigants' narratives, other empirical research¹¹¹ and the emerging case law such as those discussed in this paper suggest that there is a spectrum of practical steps and strategies that need to be introduced to better address the presence and needs of self-represented litigants. In addressing concerns about the implications of these initiatives for the adversarial process and the judiciary's impartiality within that process, it is important to take account of the flexibility possessed by adjudicators within their own courtrooms. While guided by principles of procedural fairness and impartiality, adjudicators are otherwise afforded a certain degree of discretion in adopting a liberal interpretation of pleadings and civil procedure rules and in directing the course of a trial. In the appellate decision of *Limoges v. Investors Group Financial Services Inc.*, for example, the Manitoba Court of Appeal noted that measures such as advising a self-represented litigant to recast her cause of action, adjourning the trial so that the self-represented litigant could call a witness, and allowing a party to call a witness out of order may be appropriate as "strict compliance with the rules of evidence and procedure is not always necessary or efficacious particularly when one or both of the

¹¹⁰ Interview of SB dated July 9, 2015 at 7-8.

¹¹¹ Zorza, *supra*, footnote 36.

parties is self-represented”.¹¹² As such, it is incumbent on the adjudicator that she exercise her discretion in a manner that ensures that all parties, whether represented or not, are able to present their case.

Reflective of this shift in paradigm, the Canadian Judicial Council has taken positive steps toward a judicial approach that contemplates “engaged neutrality” when faced with self-represented litigants. The Supreme Court of Canada recently endorsed this approach in the case of *Pintea*.¹¹³ The Judicial Council’s statement of principles on self-represented litigants highlights the important role that judges must play in ensuring that self-represented litigants are provided with an opportunity to be heard. Specifically, the Judicial Council states that “[j]udges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation”.¹¹⁴ Justice Kristjanson’s decision to assist the self-represented litigant in her courtroom reflects the need to reform the approach that the judiciary takes in presiding over cases involving self-represented litigants. The Judicial Council suggests judges may, when hearing cases involving self-represented litigants, take added steps to explain the process, provide information about the law and evidentiary requirements, modify the order in which evidence is presented, and question witnesses. All of these steps contemplate a shift away from a traditionally passive judge towards a new actively engaged judge. However, it is worth noting that the principles outlined by the Judicial Council have been in place since 2006. As such, while it is important to outline broad principles that set a tone of accommodation, there is also a more immediate need to develop more concrete guidance that clearly delineates new roles for judges in cases involving self-representation.¹¹⁵ Delineation of concrete guidelines would be consistent with a shift in thinking that no longer considers whether judges should intervene in cases involving self-representation, but rather, how best to intervene to ensure a fair and meaningful legal process.

¹¹² *Limoges .v. Investors Group Financial Services Inc.*, 2003 ABQB 757, 125 A.C.W.S. (3d) 255, 2003 CarswellAlta 1268 (Alta. Q.B.) at para. 22..

¹¹³ *Pintea v Johns*, 2017 SCC 23, 2017 CarswellAlta 680, [2017] S.C.J. No. 23 (S.C.C.)

¹¹⁴ See: Canadian Judicial Council, “Statement of Principles on Self-Represented Litigants and Accused Persons”, *supra*, footnote 22.

¹¹⁵ Jessica K. Steinberg, “Demand Side Reform in the Poor People’s Court” (2015), 47:3 Conn L. Rev. 741.

There is also an argument that, to the extent that members of the judiciary engage with self-represented litigants, it will have a “trickle-down” effect on lawyers who appear before those judges. In this regard, judges have a crucial role to play in ensuring that self-represented litigants are heard within the courtroom, but also in terms of how other participants within the system (lawyers and court workers) act toward self-represented litigants. As judges begin to address self-represented litigants in different ways, there is likely to be a corresponding expectation on behalf of those judges that opposing lawyers will also begin to engage in a different fashion. This effect has particular ramifications for the processes that occur outside of the courtroom, such as cross-examinations and examinations for discovery. The American canons respecting judicial conduct require that judges “exercise their authority in the courtroom to prevent attorneys from bullying or misleading conduct meant to take advantage of a self-represented litigant”.¹¹⁶

Related to some of the fundamental questions about a more engaged role for adjudicators are operational concerns that a more active form of adjudication will cause additional delay and strain on an already over-burdened civil justice system. However, concerns about delay and additional costs cannot be what exclusively drive the functioning of courts. Furthermore, while concerns about increased costs and delay are relevant from a policy perspective, it is also important that serious account be taken of those attempting to access the legal system and the negative consequences associated with failing to provide meaningful access.¹¹⁷ Specifically, concerns about over-burdened courts, timely resolution of disputes and increased efficiency must be weighed against the needs and rights of individuals who are obligated to come before a legal system without legal representation.¹¹⁸ Moreover, consideration must be given to the harms associated with a continued disengagement by large segments of the population. The principal harms involve the de-legitimization of the legal process and the decisions made within it

¹¹⁶ Cynthia Gray, “Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants” (2007) 27:1 J Nat’l Ass’n Admin L Judiciary 97 at 115.

¹¹⁷ Carrie Menkel-Meadow and Bryant G. Garth, “Civil Procedure and Courts” in Peter Cane and Herbert M Kritzer, eds., *The Oxford Handbook of Empirical Legal Research*, (Oxford: Oxford University Press, 2010) at 699; Trevor C.W. Farrow, “What is Justice?” (2014), 51:3 Osgoode Hall L.J. 957.

¹¹⁸ See Jennifer Leitch, “Looking for Quality: The Empirical Debate in Access to Justice Research” (2013), 31 Windsor YB Access Just. 229.

and the potential exit of individuals from the justice system.¹¹⁹ In this sense, strengthening a self-represented litigant's ability to be heard requires continued direct engagement with the members of the public attempting to be heard in the legal system.¹²⁰

Conclusion

As I have sought to demonstrate, the signs of impending crisis within the civil litigation process are plain to see. Indeed, the existence of large numbers of self-represented litigants does not simply create difficult challenges *within* the legal process, but presents a huge and subversive challenge *to* the legal process itself and the role of the judiciary within it. As such, there is a pressing need to re-evaluate the existing adversarial model and to re-construe the judges' role within it. How the legal system responds to these fundamental challenges will be a good indication of whether there is a genuine desire to make substantive and substantial changes that best promote and advance access to justice. A continued disengagement by large numbers of litigants from legal processes and curial institutions is inconsistent with the equal application of the Rule of Law. It behooves lawyers and judges to put their own houses in order. If they do not, they risk bringing the legal system into further disrepute. Abram Chayes appreciated that fact over 40 years ago and, I maintain, he would do so today.

¹¹⁹ A Hirschman, *Exit, Voice and Loyalty Responses to Decline in Firms, Organizations and States* (Cambridge, Mass.: Harvard University Press, 1970).

¹²⁰ One interesting methodology involves the use of courtroom laboratories that allow for experimentation with various court procedures and for new processes to be tested. This avenue of research might also include interviews with observers in the courtroom laboratories and focus groups that observe new processes and procedures: Zorza, *supra*, footnote 36 at 453. Added to this is the need to directly engage members of the judiciary in discussions about how they do or should engage with self-represented litigants. This approach to research has been undertaken in the American context by scholars such as Anna Carpenter who conducted interviews with judges, and in so doing, explored whether specific judges were engaging in active judging, and if so, how it operated in practical terms and how judges prescribed meaning to active judging: Carpenter, *supra*, footnote 5 at 11. The overall focus going forward should be to conduct research on how innovations in legal process and judicial intervention might better enhance the self-represented litigants' ability to be heard.