

***PRO SE* LITIGANTS VS. LAWYERS: A RELATIONAL PERSPECTIVE ON
THE ADVERSARY SYSTEM**

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DEDICATION

To James; you are sorely missed

ABSTRACT

This thesis gives an account of how the adversary system harms *pro se* litigants. I first introduce the issue of *pro se* litigation, explaining that being a *pro se* litigant is not a choice but an inescapable harm. I then look to the ideals of justice, specifically the Rule of Law, to explain how the system fails to fulfill these ideals, and consequently fails to protect the dignity of a *pro se* litigant. I then examine the adversary system itself, explaining how the roles of the judge and lawyers lead to a failure in the system. Finally, I look at why the adversary system is thought to be important, as well as how, when coupled with the free market, it prevents a *pro se* litigant's access to justice. Ultimately, I argue the adversary system is not justified and needs to be changed or replaced with something less dignity-threatening.

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LIST OF ABBREVIATIONS

ABA	American Bar Association
DAM	Dominant Adversarial Model
LSD	Doctor of Juridical Science
PhD	Doctor of Philosophy

CHAPTER 1: INTRODUCTION

Generally, political and legal institutions in the Western World present themselves as treating all people equally. Indeed, one of the most repeated phrases we might have become accustomed to hearing is that we offer “equal justice under the law.” Equal justice under the law, however, “is usually taken to mean ‘equal access to justice,’ which in turn is taken to mean access to law” (Rhode, “Access” 1786). Yet, what is it to have equal access to law?

One important interpretation is that it means equal access to the court system. Under this interpretation, the court system is presumably the place to bring about justice. The question then becomes how the courts are supposed to distribute justice. We can ask, along with Elizabeth Anderson, what principles are responsible for “adjudicating the claims free, equal, reasonable, and mutually accountable persons make on each other, with respect to what they owe to each other” (Anderson 5-6). After all, a system of justice not only identifies what is due to a person,¹ but also how this is to come about.²

¹ In legal terms a “person” can be many things, such as an individual, a business, a group, a corporation, and so on. In this thesis, when I use the term “person” I am referring to a human individual, as in the sort of creature who can have dignity. However, in doing so I raise several interesting and complicated questions, for it is not immediately clear who or what dignity attaches to, let alone who or what is to be considered a human or even an individual. However, this debate goes well beyond the scope of this paper, so I will simply state that a “person” is a human individual who has dignity, and what that dignity entails I will explain in further detail in Chapter 3.

² So, as Robin West argues, “To do ‘legal justice’ means, in essence, to decide cases according to rules, and to decide cases according to rules, in turn, requires that likes be treated alike, and that unlikes be re-thought until their similarity with some pre-existing pattern is identified” (*Re-Imagining* 2). This understanding will be my definition of “justice” throughout this paper: if persons are not treated like their peers, or if one person gains more benefits (whatever they may be) than others, than there is no justice. Justice is only achieved when all individuals are treated alike, according to rules that can be reasonably assumed to be just.

In the United States specifically, the “American legal ideal is that both the wealthy and the pauper could have access to the courts and could be treated equally with the resulting decisions being as fair as possible” (Swank 374-375). However, we shall see that in the case of indigent litigants (persons also known as *pro se* litigants) in a legal system that is adversarial in nature, this is not the case, though it is not obvious why this is.

Therefore, the purpose of this thesis is to give an account of how an adversarial legal system, which I will refer to as *the adversary system*,³ harms a *pro se* litigant by making equal access to justice impossible. Given that the adversary system is most clearly exemplified by the legal system in the United States, America will be my main example throughout this thesis.⁴ I will argue against those who defend the adversary system, showing that such systems (coupled with a free market economy of legal services) create dignity-harms.

To do so, I will first introduce the issue of *pro se* litigation, explaining that being a *pro se* litigant is not a choice but instead an inescapable harm if an indigent person cannot afford a lawyer but still wishes to pursue justice. I will then look to the ideals of justice associated with an adversary system in order to demonstrate how the system fails to protect the dignity of a *pro se* litigant. To do this, I will examine the Rule of Law ideal, focusing on its formal and procedural aspects, and how it goes unfulfilled for *pro se*

³ The term “adversary system” is the generally accepted term used in the literature to refer to a legal system that is adversarial in nature. I will spend more time explaining what this means in Chapter 4.

⁴ However, this does not mean that other states which utilize similar legal systems do not encounter similar problems to those found in the United States. The issue of *pro se* litigation seems to be a product of a legal system that is adversarial in nature and is coupled with a free market economy of some kind. The aim of this thesis is to mount an argument for why this result is problematic for the Rule of Law.

litigants. I will then take a closer look at the adversary system itself, to determine why there is a breakdown in the realization of the Rule of Law ideal, which causes the dignity-harm to *pro se* litigants. Finally, I will look at the reasons the adversary system is thought to be so important, as well as how the system, coupled with the free market, prevents a *pro se* litigant's access to justice. Ultimately, I will argue that the adversary system is not justified and either needs to be changed or replaced with something less dignity-threatening.

CHAPTER 2: *PRO SE* LITIGANTS

What is a *pro se* litigant? *Pro se* is Latin, meaning “for oneself” or “on one’s own behalf” (“Pro Se”); while a *litigant* is a person who is in the process of suing another or being sued (“Litigant”). In short, a *pro se* litigant is a person who self-represents in court (Goldschmidt 1-2n2),⁵ without the in-court assistance of an attorney or a lawyer.⁶ Instead, it is the *pro se* litigant who is responsible for presenting her case inside the courtroom; she is also responsible for defending her case when it is questioned and challenged.

At first sight, we might think that a person choosing to forego hiring a lawyer and presenting her case on her own demonstrates a form of empowerment (Steinberg, “Demand” 754), which in turn suggests that there is “a healthy justice system permissive of different types of participation” (Steinberg, “Demand” 754). It may seem as though the system is such that a person has different options available to her when she goes to court. According to Stephan Landsman, this is a popular argument in America (and I would argue in other states as well) with respect to both litigants and persons who work inside the court system as “[i]t capitalizes on American beliefs about self-help and the Home Depot mindset—that we can, indeed, do it ourselves” (Landsman, “Pro Se” 237). Over

⁵ “‘Litigants in person’ [LIP] is the term used here [Israel] and in Commonwealth countries to refer to unrepresented parties. Most American courts refer to them as *pro se* (for himself, or in his own behalf) litigants, but courts in some Western American states (e.g. California and Arizona) use the term *pro per* litigants, short for in *propria persona*, or in one’s own proper person” (Goldschmidt 1-2n2).

⁶ It is important to note that a *pro se* litigant may have at some point spoken with, or received some form of assistance from, a lawyer in preparation for the presentation of her case. For example, a *pro se* litigant may have taken advantage of “lawyer-lite” services, such as “unbundled legal services” (Charn 2215): i.e. consulting a lawyer for only certain aspects of the person’s trial. See also Farley; and Rhode et al.. However, what makes the person *pro se* is that she is *entering* and *participating* in the courtroom without a lawyer.

the past few decades, the increase in access to information, coupled with the development of DIY culture (Henschen 34), has led many to believe that representing one's self in court is not an extraordinary idea. However, this image of the *pro se* litigant as the autonomous person choosing to represent herself in court out of healthy self-confidence is inaccurate, as many persons become *pro se* litigants only because they do not have any other option (Greacen 664).

This suggests that we need another understanding of what a *pro se* litigant is: a more nuanced and realistic one. In order to construct this understanding, it is helpful to trace the historical development of today's *pro se* litigant. This will provide us with the necessary background to understand the roots of today's problematic situation. Unlike nowadays, historically *pro se* litigants were predominantly incarcerated persons "seeking to challenge the constitutionality of their convictions . . . [and] almost all evince a strong belief that they have not been treated fairly by the state or federal government" (Zeigler and Hermann 162). Typically, the *pro se* litigants were arguing that their experience within the criminal court did not live up to the ideal of justice (Zeigler and Hermann 162). In the late 50s and early 60s, only about five per cent of *pro se* litigants in America were non-prisoners entering the civil courts (Zeigler and Hermann 160).

In the United States, this all began to change in 1962 when the Supreme Court granted a review of the lower court's decision⁷ in response to Clarence Earl Gideon's *pro se* petition, which claimed that he had been denied a fair trial because he had been forced to represent himself (Landsman, "Pro Se" 232). The resulting retrial in 1963, *Gideon v. Wainwright*, set the precedent that a person has a right to counsel when her liberty is at

⁷ A *certiorari*.

stake (Barton and Bibas 968)—as such, in the criminal court, if a person cannot afford a lawyer she will be provided with a state-appointed lawyer instead.⁸ This has not stopped prisoners from putting forward their petitions as *pro se* litigants, but it has enshrined the concept of guaranteed council in the minds of most Americans. It is now a matter of course that a person is to be accompanied by a lawyer when she enters the criminal court (Barton and Bibas 968). However, in the *civil* court, this is not the case for there is no legal right to counsel in America.⁹ Instead, persons are expected to obtain their own counsel; if they cannot afford to do so (or choose not to) the person must represent herself as a *pro se* litigant.

Since *Gideon*, there have been decades of activism attempting to bring about what has been coined a *civil Gideon*—which would guarantee a person counsel in civil matters (Steinberg, “Demand” 745).¹⁰ However, very little has come of it (Steinberg, “Demand” 745). The 1981 Supreme Court ruling in *Lassiter v. Dep. Of Social Serv. Of Durham County*, effectively destroyed the possibility of a *civil Gideon*, when it was “held that a mother facing termination of parental rights was not constitutionally entitled to the appointment of a lawyer” (Landsman, “*Pro Se*” 236). These hopes were further crushed by the 2011 ruling in *Turner v. Rogers*, where the Supreme Court ruled “that constitutional due process does not require appointment of counsel in civil contempt

⁸ There are many issues surrounding the provision of lawyers to those who cannot afford them within the criminal courts in America. I will not be addressing any of these issues, as this paper is predominately focused on the issue of *pro se* litigants within *civil* courts. For information on the difficulties posed by *Gideon* in the criminal courts see: Barton and Bibas; Chemerinsky; Bright and Sanneh; Blume and Johnson; and Richardson and Goff.

⁹ This is not necessarily the case in other adversary systems. See: Lidman.

¹⁰ For a more in-depth discussion of the arguments for a *civil Gideon* see: Goldschmidt; Levy; Aveil; Charn; Engler “Toward;” Engler “Turner;” and Failing and May 2-12. For Arguments against a *civil Gideon* see: Barton; Barton and Bibas; and Steinberg “Demand.”

cases, even where the losing party faces a term of incarceration” (Steinberg, “Demand” 745).

In both cases, a person stood to be harmed with respect to a significant aspect of her most basic interests: either by losing the custody of her child, or her liberty, depending on the outcome of the case. The Supreme Court ruled that even though there was a considerable potential harm in both cases, this potential harm was not significant enough to ensure the litigant was appointed a lawyer. It should be remarked that this reveals a very different attitude than the arguments in *Gideon*, given that the degree of potential harm seems to be similar to the harm of (temporarily) losing one’s liberty.

While the purpose of this thesis is to examine the situation and specific harm done to *pro se* litigants in civil courts rather than the criminal courts, we should nonetheless keep the difference between the two in mind. This difference will become important when I discuss the role of the lawyer within the adversary system in Chapter 4. For now, I shall only focus on the *pro se* litigants who enter the civil court.

2.1 PRO SE LITIGANTS: FOOLS OR VICTIMS?

Within the literature on civil *pro se* litigants (from now on referred to only as *pro se* litigants), there are two widely divergent ideas about what a *pro se* litigant is. A *pro se* litigant is either seen as a person realizing her autonomy by representing herself in court, or she is an invisible victim of a failing legal system.¹¹ Depending on which narrative you choose, who and what a *pro se* litigant is can appear to be a very different story; and as such, lead to very different attitudes about what should be done about them. I argue that

¹¹ She is invisible, because even though the World Justice project has recently ranked the United States “94th of 113 countries in the accessibility and affordability of civil justice” (Rhode et al. 2), the American legal system is still largely perceived as one of the best legal systems in the world (Cooper 205).

choosing the first leads to a deep and problematic misunderstanding.

For starters, if we see *pro se* litigation as a free choice, then we will perceive a person who becomes a *pro se* litigant as someone who has *chosen* to forgo the benefits of having a lawyer.¹² If this view is an accurate reflection of *pro se* litigation, then there is no obligation on the part of the legal system to improve access to the court system (Greacen 663). After all, a person will deserve whatever consequences result from their own free choice (Albrecht et al. 43).¹³ This attitude follows “from Justice Blackmun’s famous assertion that ‘one who is his own lawyer has a fool for a client’” (van Wormer 996). The person is thought to be foolish because the adversary system is complex and difficult to navigate.¹⁴ Choosing to enter the courtroom without a lawyer is like choosing to run uphill in the sweltering heat when your friend has offered to let you into her air-conditioned vehicle and drive you to the top and beyond.

This, however, is a vicious misunderstanding. For the other half of the *pro se* litigation narrative is that a significant portion of the population simply cannot afford to hire a lawyer. When such indigent persons have a civil legal issue, which requires the legal system to be resolved, they have no other option than to enter the court system as a *pro se* litigant. In turn, the lack of legal representation is an unfair disadvantage, almost

¹² Presumably, if this is the case, those who could not afford a lawyer would then be accommodated through legal aid or other *pro bono* legal services.

¹³ From this point of view, it can then be seen as acceptable that “although the self-represented are untrained in the procedural and substantive intricacies of the law, they are often held to the same standards as members of the bar” (van Wormer 997).

¹⁴ Also following from this conclusion, are arguments for what a lawyer should do to win her case against a *pro se* litigant: see Garland; Sabnis; Horan and Johnson; and Wilson and Hutchins.

like a punishment for their lack of necessary resources.¹⁵

To make matters worse, the example of America gives an indication that those who cannot afford a lawyer come from some of the most vulnerable populations. Rebecca Sandefur describes the demographics as such:

[P]oor people (those eligible for federally funded civil legal assistance) were about 30% more likely to report civil justice problems than were people with incomes in the top quintile. African Americans and Hispanics were more likely to report problems than were Whites. People who are unemployed, who suffer from an illness or disability, and people who are younger report more situations than the employed, the well, and the elderly. Certain life transitions—relationship dissolution and job loss, for example—are also associated with an increased incidence of civil justice problems. (447).

Groups of persons who are already vulnerable to injustice are also those who will have the most difficulty obtaining a lawyer (Sandefur 447). Thus, persons who are already harmed by the circumstances of their lives, are further harmed by a legal system which is supposed to act in ways to protect them.

One might be tempted to argue that a person who cannot afford a lawyer could simply pursue legal aid. However, at least in our example country, America, it is not so easy to come by free legal aid. Deborah Rhode points out that in 2015 there were only “5,000 [legal aid] attorneys, for a nation with over sixty million low-income individuals eligible for assistance” (Rhode and Cummings 488). To put it plainly, there are simply not enough lawyers who offer free legal services to meet the demand. Part of the problem stems for a severe lack of state funding, which “comes out to just \$5.85 per eligible person per year. In 2016, Americans spent more on Halloween costumes for pets than on

¹⁵ When I say “necessary resources” I am referring to thing like knowledge, skills, voice, money, time, ability, among other things. It is my catch-all phrase, which indicates that a *pro se* litigant is lacking in some—or all—of the resources she needs to prepare, present, defend, et cetera, her case in court.

LSC grants” (Rhode and Cummings 488). The American Bar Association (ABA) is no better at providing accessible legal services either. Rhode also points out that less than 1% of legal expenditures and lawyer’s *pro bono* time goes toward legal aid (“Access” 1819). As such, John Greacen points out that available legal aid only provides “legal representation to twenty percent of eligible persons with an “essential” civil legal need” (663). So, while legal aid exists, there is simply not enough of it to go around.¹⁶

This raises the question of why there is such a lack of funding for legal aid, let alone such a lack of *pro bono* services on the part of the ABA. A significant portion of the problem stems from economics: a lawyer’s choice of career and lawyers’ fees are greatly determined by the free market economy. Many lawyers will choose areas of law where the types of cases they accept offer larger monetary rewards or fame or both (Swank 380). Alternately, the sorts of cases that offer smaller monetary rewards or hardly any recognition at all, are areas skilled lawyers tend to ignore (Swank 380)—which are the sorts of cases *pro se* litigants typically have. Furthermore, since lawyers’ fees are also determined by the free market, the availability of skilled lawyers is determined by the market forces of supply and demand rather than necessity or need. I will examine the issues created by the free market system in more depth in Chapter 5. For the moment, it is sufficient to state that when a person is unable to afford a lawyer, or qualify for

¹⁶ Another problem that arises from this limited funding is that since the money comes from the government, certain issues cannot be represented by legal aid lawyers. Rhode argues that “[l]egal aid programs that accept federal funds also may not accept entire categories of cases or clients who seldom have anywhere else to go, such as prisoners, undocumented immigrants, or individuals with claims involving abortions, homosexual rights, or challenges to welfare legislation” (“Access” 1792).

assistance,¹⁷ she must enter the system as a *pro se* litigant—or forego legal action, and the pursuit of justice, altogether.

Now one might ask, why is it necessary to offer a *pro se* litigant accommodations at all? It would seem that if the *telos* of the system is equal access to justice, then offering a person equal access to the courts to present her own case should be a sufficient solution. The short answer is that it is incredibly difficult to present a case in a legal court without any legal training—which is what a *pro se* litigant is attempting to do. The long answer is more nuanced than that.

To begin with, while technologies like the internet have improved a person's access to legal resources, this access is not as universal as it may seem. The language used in law is complicated, technical, specific, and even archaic (Rhode, "What" 430); it can require years of study to grasp properly. A *pro se* litigant typically has no formal training for how to read or comprehend this language, and as a result, much of what is contained within legal scholarship and rulebooks are inaccessible to her. Consequently, even if a person gains access to the necessary documents, it may not be the case that she will be able to gain the requisite knowledge from them.¹⁸

¹⁷ It should also be noted that even if a person is not considered "poor" according to the federal guidelines, she still may not be able to afford a lawyer (Steinberg, "Demand" 752-753). Since the free market determines the legal fees, there are no real restrictions on how much a lawyer can charge for her services. This may force officially "non-poor" persons into *pro se* litigation—or out of litigation at all. For example, "in California, the average family law attorney may charge an hourly rate of \$300 as well as require a \$5,000 retainer" (Steinberg, "Demand" 752-753). If the monetary reward a person can get is less than \$5300, then the process of going to court is not worth the effort. As such, many persons choose not to pursue legal action, even if they are entitled to do so.

¹⁸ This is assuming, of course, that the person has easy and reliable access to the internet or law libraries—if she does not, then any potential resources to be found through them are not actually accessible. If a person lives in a rural community, for example, she may

To make matters more complicated, at least in America, a *pro se* litigant cannot even seek the aid of non-lawyers who work in the court system. The ABA has very tight restrictions on who can and cannot help persons with legal needs (Cooper 208).¹⁹ Arguably, this is to “protect consumers from nonlawyers who fraudulently present themselves as qualified legal services providers” (Longobardi 2045). However, this attempt to protect consumers puts a *pro se* litigant at a disadvantage if she cannot afford a lawyer. Instead, the *pro se* litigant is on her own and may only utilize her own skills and time to prepare her case.²⁰

Finally, and most importantly for the purposes of this thesis, even if a *pro se* litigant can find and understand the information she needs, there are many procedural barriers that still stand in her way. For example, in the United States, there are at least “140 discrete barriers that *pro se* parties must overcome to successfully litigate a case to completion” (Steinberg, “Adversary” 923). This means that there are at least 140 things a person can do wrong while preparing, going through, and completing the process of going to court—and, given what I have explained above, there is no clear way of finding out what these barriers are without proper legal training or assistance. These procedural mistakes can undermine the person’s case, and in turn, may cause her to lose a case she might otherwise have won.

But the problem is more complicated than that. Jessica Steinberg neatly

be far removed from things like law libraries; it may also be the case that the internet is not as reliable as it may be in an urban centre, further hindering her access.

¹⁹ See also: Rhode “Policing;” Clark; and Knake.

²⁰ This is an especially important point if, as most of us do, the person has other obligations in her life than preparing and presenting her case. Thus, a person who is a single parent, or works multiple job, or has other dependants, or any other number—or combination of—obligations, she is at a further disadvantage when it comes to the amount of time and energy available to her.

summarizes the obstacles facing a *pro se* litigant:

At the front end of a case, litigants must, among other things, articulate cognizable claims or defenses, complete pleadings in the proper format, serve the opposing party, prepare a proof of service, and file all proper documents with the court clerk. Once a complaint or answer has been successfully filed, a *pro se* party must schedule the proper hearings, interpret court notices, handle motions, propound and respond to discovery requests, and manage settlement talks—often with an opponent’s attorney. The *pro se* litigant who makes it to trial must contend with the rules of evidence, examine and cross-examine witnesses, and maintain proper courtroom demeanor. Those fortunate enough to win at trial must draft their own written orders—under very particularized rules—for the judge to sign. Failure to do so means the judgment is not final and is thus unenforceable. Even with a signed judgment in hand, the *pro se* litigant must pursue enforcement of the judgment without the court’s assistance. Enforcement is sometimes the thorniest part of litigation, requiring knowledge of specialized procedures to haul the losing opponent back into court, identify non-judgment-proof assets and income, and work with the sheriff’s office, the county recorder’s office, and other private and governmental entities to secure owed payments. (“Demand” 754-755).

In short, the chances that a person with no legal training or experience has of navigating these barriers successfully is incredibly slim. As such, many of the cases brought forward by *pro se* litigants are not successful: “The literature is rife with empirical evidence that represented parties achieve favorable case outcomes anywhere from two to ten times more often than *pro se* litigants” (Steinberg, “Demand” 744).

I will not engage with the specifics of any of these procedures in this thesis—that said, I believe Steinberg’s description, coupled with my previous explanations, are sufficient to demonstrate how difficult the task of self-representation actually is. I also believe these descriptions give a clear indication of why some view the choice of forgoing a lawyer (when one has the option of hiring said lawyer), as a poor one.

However, the conclusion drawn should not be that the *pro se* litigant deserves what she gets; instead, the conclusion should be that given the complexity of the adversary system, navigating the civil court without help is a potential harm. The view that a *pro se* litigant is a free, autonomous individual exercising her civil liberties, and

then suffering the consequences of this choice, is not only mistaken but dangerously so. Given that many persons have no choice but to become a *pro se* litigant, being a *pro se* litigant, in most cases, means suffering a harm. But how serious should we take this harm?

2.2 THE EMPIRICAL EVIDENCE

This leads us to the question of how many persons actually go through the court system as a *pro se* litigant. Unfortunately, this is a difficult question to answer, as even for the United States, which seems to have the most thorough discussion of *pro se* litigants, there is a significant lack of research surrounding *pro se* litigants' participation in the court systems (van Wormer 990). Even though it is known that the number of *pro se* litigants has been rising exponentially over the past three decades, there is still a significant gap in the empirical research on the subject (Rhode and Cummings 486).

However, what the available research does indicate is that the number of *pro se* litigants is large; it also indicates that the areas of law *pro se* litigants are dealing with can have a significant impact on the most basic interests of these persons. In fact, many of the cases deal with “basic human needs, such as those involving debt, housing, and children” (Rhode et al. 3); areas that are important to a person's daily life—even if the monetary amounts being dealt with are small.²¹ To state this problem plainly, a *pro se* litigant could

²¹ Earl Johnson argues that while those with more money tend to spend more money in an attempt to solve their legal problems, this does not mean that those with less money, who typically spend less to solve such problems, care less about the results of their trials (1249). In fact, while those with more resources stand to possibly lose more in terms of wealth when they lose their case, it is not often the case that these persons will lose things like their homes, children, or entire incomes, as those without resources to hire a lawyer may suffer (Johnson 1249). As such, Johnson argues that “the plain but often ignored truth that the financial stakes are not a proper measure of the real stakes involved in the personal ‘justiciable’ problems people face” (1249-1250).

stand to lose things like her life-savings, her home, or her children if she fails to win her case. Yet because the *pro se* litigant is indigent, the monetary amounts are typically small, and it is these small monetary amounts, coupled with the day-to-day importance of such issues (as opposed to those issues which bring fame when a lawyer wins a case), that encourages lawyers to find more exciting and rewarding work elsewhere.

In a survey of almost one million cases in 152 different American courts, the data seems to indicate that about “seventy-six percent of cases in the civil justice system now involve an unrepresented party” (Steinberg, “Adversary” 903). This percentage is an average, however, as some issues see a higher representation of *pro se* litigants than others.²² There are particularly high rates in the areas of “consumer law, housing, or domestic violence” (Steinberg, “Adversary” 903). In fact, it has been reported that in some states issues concerning family law—the area of law that is concerned with divorce, adoption and child custody, child protection, restraining orders, and such—have self-representation rates as high as eighty per cent (Rhode et al. 3).²³

I have already stated that if a person cannot afford a lawyer her options are to either forgo the pursuit of justice or to self-represent in court. Given the types of cases being brought into the court system by *pro se* litigants, it may very well be the case that the former option is not a choice one can make. If, for example, one’s home, child, or personal safety are being threatened, the struggle of self-representation may be worth the risk—even if it is only for the personal assurance of knowing one did all she could.

²² “Tenants and consumers, for example, are typically represented by counsel in less than ten percent of matters, while property owners and debt collectors have counsel in up to ninety percent of cases” (Steinberg, “Theory” 1582-1583).

²³ For discussions of empirical data see also: Henschen; Painter; Sandefur; Greiner and Pattanayak; and Smith and Stratford.

The thought that a person would deliberately decline the help of an available lawyer, for such important issues, is absurd. As such, the argument that a *pro se* litigant is usually someone who chooses to self-represent is itself a harm against indigent *pro se* litigants. It is harmful because it hides the reality that many *pro se* litigants are persons who enter the court system alone because they have no other choice. The argument is also harmful in that it perpetuates the idea that market-driven, adversary systems, like the current American legal system, functions in such ways that offer all persons access to justice. To the *pro se* litigant, who loses her apartment because she could not afford a lawyer to represent her against her landlord's illegal eviction, this justice is nothing but an unattainable dream. Subsequently, it is the case that simply having access to the court system is insufficient for meeting the requirements of justice.

The grim reality seems to be that millions of persons are harmed in this way, as it seems to be the case, at least in our example state, America, that “at least sixteen million unrepresented parties cycle through the civil justice system annually” (Steinberg, “Adversary” 903).²⁴ Given that this number may represent more than three-quarters of the court cases seen each year in America, it becomes clear that systems like the American legal system do *not* function in such ways that offer all persons access to justice.²⁵ The fact that the cases which *pro se* litigants bring to the court involve a person's basic human

²⁴ It is important to note that this number only represents those who go through the process of trying to win their case on their own. The research also indicates that only 30% – 40% of civil justice issues are brought into the courtroom (Swank 383). This means that a large number of civil justice issues are not brought to the attention of those in the legal system. See also: Sandefur.

²⁵ I acknowledged that the goal of all persons receiving justice in an equal manner is a utopic ideal. However, I am not here going to argue over the logistics of making this ideal a reality. I only wish to discuss how it is the case that the current adversary system ideal is very much failing to get anywhere close to this ideal of justice.

needs furthers this argument. This failure is harming persons who are already at a disadvantage in terms of financial resources, and as such, something within the adversary system must be changed. So, to answer my initial question in this section, we should take the harm of *pro se* litigants very seriously indeed.

2.3 THE ISSUES THAT NEED TO BE ADDRESSED

However, the purpose of this thesis is not to simply demonstrate that a *pro se* litigant is being harmed in some way; I believe I have just now made that point. Instead, this thesis is concerned with the *type* of harm a *pro se* litigant suffers, as well as with *how* this harm has come about. Once we have established answers for both questions, further projects can work to improve the situation for *pro se* litigants. I believe the issue of *pro se* litigation is a symptom of a much larger issue, the source of which can be found within the structure of market driven, adversary systems. However, to demonstrate how this is so will require a more in-depth analysis.

The analysis requires two things. First, I need to engage with the minimal conditions that a legal system has to fulfill in order to be legitimate. These conditions are often summarized under the heading “Rule of Law.” Second, I need to investigate the mechanisms responsible for the Rule of Law failures that make successful litigation impossible for *pro se* litigants. To do this I will discuss the nature and effects of the adversary system, looking to the United States as an example.

CHAPTER 3: THE RULE OF LAW

The Rule of Law is a normative ideal, which regulates the ways in which laws must be enacted, as well as how the legal system must interact with citizens who come into conflict with the law or those who appeal to it. Discussions of the Rule of Law usually coincide with discussions of democracy, human rights, and equality, among others, and it is typically accepted that the Rule of Law is an integral part of any system we commonly recognize to be democratic, minimally just, and equal.

The literature offers several different interpretations for the purpose of the Rule of Law ideal. However, the dominant argument is that the Rule of Law is in place “to shield, or protect, both the individual and the community from . . . the excesses of unadorned political power. Law is power’s antidote” (West, *Re-Imagining* 4).²⁶ According to this understanding, the state, by its very nature, is powerful while persons are weak. The use of the law by the state, therefore, needs to be constrained by Rule of Law principles in such a way that persons are protected.²⁷ This is the approach to the Rule of Law that I will be considering in this thesis. I will work from the assumption that, because the court is part of the state, the power that the court system has over a person *is* the power of the state. Thus, the Rule of Law must act to protect the person from the court system’s power as well.

²⁶ Another approach is to view the Rule of Law as a tool to make cooperative community through the creation of law (West, *Re-Imagining* 9)—thus the Rule of Law not only protects the person from the power of the state, but it also uses that power to create a community *for* persons (West, *Re-Imagining* 9). See also: West “Limits.”

²⁷ As well, since the state is a group of persons—rather than a rational entity of its own—included in this approach is the idea that it is the law that should rule over persons, not other persons. This ideal “encompasses the idea that a person in a position of power should not be left to his own devices, but should be subject to legal limitations” (Taekema 134).

Following Jeremy Waldron, we can identify three fundamental aspects of the Rule of Law: formal, procedural, and substantive. The *formal aspects* of the Rule of Law are concerned with “the form of the norms that are applied to our conduct” (Waldron, “Rule,” sec. 5.1). These formal aspects are mainly concerned with the structure of the laws and how they should function; they are the foundation which laws are built upon, meant to shape the way they are enacted and even their content in some ways. The *procedural aspects* define, among other things, how law should actually be applied to persons by legal officials and institutions. More specifically, the procedural aspects are concerned with things like how persons will have access to the courts to plead their case, as well as how hearings are to operate. Finally, the *substantive aspects* of the Rule of Law define the content of the law, so, for example, the law is coherent with such concepts as human rights. However, the claim that a substantive aspect of the Rule of Law exists is currently controversial and so I will not further discuss it in this thesis.²⁸

Since the Rule of Law is an already established ideal, I will use it to understand how adversary systems, like the one in the United States, are causing harm to *pro se* litigants. To do so, I will summarize the formal aspects, explaining how the adversary system does not fulfill the requirements for *pro se* litigants, which threatens their dignity. I will then demonstrate how the procedural aspects are also not being fulfilled, which further threatens the dignity of the *pro se* litigants to an even greater degree. This second analysis will suggest that the role of the lawyer is integral to a *pro se* litigant’s success in

²⁸ Some theorists, like Raz, argue that the Rule of Law “is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man” (Raz 211). On this argument, the substantive aspects are something added into the system of Rule of Law and are thus something separate from Rule of Law ideal itself.

court, but further analysis of the adversary system will be needed to understand why this is.

3.1 THE FORMAL ASPECTS OF THE RULE OF LAW

I shall begin with the formal aspects of the Rule of Law, as these principles lay the foundation of my argument about the harms done to a *pro se* litigant. While there is no clear agreement on the exact list of formal principles, it is generally agreed that the “[f]ormal conceptions of the rule of law do not . . . seek to pass judgment upon the actual content of the law itself” (Craig 467). As such, the formal aspects are typically not employed directly to determine if a specific law is good or bad. However, the formal aspects can, and do, push a legal system to function in a more just manner by setting boundaries for how laws may be generated. Given that *pro se* litigants are deprived of justice, it would seem that the formal aspects are a good place to begin my discussion.

Legal philosophers have articulated many different lists detailing what is necessary for the formal principles of the Rule of Law to be met.²⁹ Lon Fuller’s eight formal principles seem to be the most widely accepted and will, therefore, be the principles I primarily engage with.

For Fuller, a system of law works well when it meets the requirements of generality, publicity, prospectivity, intelligibility, consistency, possibility, stability (constancy), and congruency (*Morality* 39).³⁰ These formal aspects are what create the foundation of a legal system; not to have these principles realized, is, for Fuller, to create

²⁹ See also: Gowder; Raz 214-218; and Summers 1693-1695.

³⁰ Fuller argues that “there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute” (*Morality* 39).

“something that is not properly called a legal system at all” (*Morality* 39). To him, these eight principles also represent *the inner morality of law*: when they are upheld the law will be minimally good. As such, it is important to understand what it means to meet the eight formal principles he lists.

I shall now explain each of the eight principles and begin to explain what sort of system they lay the foundation for. As I go, we will see what each of Fuller’s principles implies for *pro se* litigants, and subsequently, if the principles are being fulfilled for them.

3.1.1 GENERALITY

Generality is the requirement that the law should be made up of general rules³¹ (Fuller, *Morality* 46). This may seem like an odd thing to state outright, but one could make the argument that instead of rules, legal authorities could make decisions on a case-by-case basis.³² The result would be arbitrary rule. From the perspective of the law’s subjects, all cases would be responded to in an *ad hoc* manner: there would be nothing to consistently base those judgments on except the opinion of the legal official (usually a judge) deciding the case, even if previously decided cases were similar in nature. The use of law in the form of general rules and precedent reduces this uncertainty and goes a long way in preventing the individual judge’s preferences from influencing these cases.³³

The principle of generality does not pose an immediate problem for a *pro se* litigant. The very fact that she is a *pro se* litigant does not cause persons to fail to treat her in a general manner in respect to the laws of the state. Nor does her being a *pro se* litigant

³¹ Here I mean “rules” in a wide sense.

³² Fuller offers the thought experiment of King Rex who attempts just this, and consequently fails to make any laws at all (*Morality* 33-38).

³³ For Fuller, there must be articulated general rules—though it does not necessarily matter if these general laws are broad or specific in nature (*Morality* 47).

necessarily entail that her case will not be judged according to general norms and rules. And finally, her being a *pro se* litigant does not mean that there are necessarily laws which will function in a way to specifically prevent her from participating in the necessary ways. However, the principle may pose a problem on the part of a judge in relation to the *pro se* litigant—a point I will return to when I discuss the principle of congruency.

3.1.2 PUBLICITY

Publicity is the need for laws to be promulgated—that is the laws must be *accessible* to those to whom the law applies. If a person is expected to abide by a law, she must know what the law is. If the law is secret, a person cannot act in a manner so as to avoid breaking the law, nor can she be prepared for the consequences of having broken the law. Waldron argues that “[t]hese are features that flow partly from the fact that laws are supposed to guide conduct” (“Rule,” sec. 5.1). As such, any law should be “public knowledge so that people can study it, internalize it, figure out what it requires of them, and use it as a framework for their plans and expectations and for settling their disputes with others” (Waldron, “Rule,” sec. 2).

However, Fuller does not believe that just because laws should be publicly accessible that people must also *know* them. This would lead to the absurd “expectation that the dutiful citizen will sit down and read them all” (Fuller, *Morality* 51). There can be an incredible amount of legislation enacted governing areas of a person’s day-to-day life, and even more, associated with areas she may or may not encounter at some point during her life. To expect persons to read, let alone remember, all this legislation is unrealistic. So, for Fuller, it is enough for the laws to be available to a person, so she can access them

when necessary.³⁴

There are two necessary conditions that follow from this argument: a person must know *where* to look for the laws and the laws must be made public in a *universally* accessible way. A lawyer is ideally trained to know where to look for the necessary laws, and she will also have access to the necessary databases and libraries in which to find them. A lawyer, from this perspective, ensures that the principle of publicity is adequately met for her client.

However, a *pro se* litigant does not have access to a lawyer. As such, the *pro se* litigant may have difficulties finding the necessary laws, let alone know what it is she needs to look for. While the internet may have resources available to direct a person toward the necessary information,³⁵ it is not necessarily the case that a *pro se* litigant will have easy or reliable access to the internet; the same is true of her living in close proximity to other resources such as law libraries.³⁶ So, while the laws may be accessible to the public in a broad sense, this accessibility is not universal in the meaningful way that is intended by the principle of publicity—it is simply not the case that all persons will be able to access the locations where the laws are housed.

A *pro se* litigant can only follow the laws she knows, and the failure on the part of the system to fulfill this principle leads to her lack of necessary knowledge. For example,

³⁴ It is also worth noting that without some general understanding of what areas of our life have rules associated with them, we would not be in a position to know to *look* for such laws. In this way it may be the case that meeting the principle of publicity requires the state to ensure that persons are aware of what areas of life may have rules that may apply to them. Alternately, this may mean that there are very few areas of law a person should remain ignorant of, even if she does not necessarily need to know the specifics of the laws contained in each area.

³⁵ Or, at the very least, have tips on how to search databases and the like.

³⁶ Both these points are especially pertinent to persons living in, for example, rural or indigent communities.

a *pro se* litigant's ignorance of the laws and legal norms associated with court procedures prevents her from properly preparing and presenting her case. In turn, a *pro se* litigant may be severely disadvantaged by this lack of knowledge, even though her ignorance was not a willful choice on her part. Consequently, we can see that the principle of publicity is *not* fulfilled for the *pro se* litigant.

3.1.3 PROSPECTIVITY

Laws must be *prospective* in nature. It must be the case that laws apply to issues of today or tomorrow; we cannot be expected to abide by laws that do not yet exist. Fuller argues that “[t]o speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose” (*Morality* 53). A person cannot act so as to avoid breaking a law that does not yet exist, so the creation of retroactive laws, especially those that criminalize certain acts, is not acceptable.³⁷ So, like publicity, the Rule of Law “require[s] that citizens be put on notice of what is required of them and of any basis on which they are liable be held to account” (Waldron, “Rule,” sec. 5.1). A person can only obey laws that already exist in the present, which, given the scope of my thesis, does not pose a problem for *pro se* litigants in our example state, America.

3.1.4 INTELLIGIBILITY

Laws also need to be *intelligible*. A person cannot obey a law which she cannot understand, nor can she understand ones that are too vague. This is also an important principle for the application of laws by those in power, for “it is obvious that obscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable

³⁷ However, there are times when retroactive law may be necessary, such as situations concerning taxes (Fuller, *Morality* 51-62).

without an unauthorized revision which itself impairs legality” (Fuller, *Morality* 63). If the law is not clear, then its subjects cannot rely on the law to guide their conduct.³⁸

Right away it should be clear that the principle of intelligibility is not a principle that is fulfilled for a *pro se* litigant. Remember, legal language is complicated, technical, specific, and even archaic (Rhode, “What” 430)—a person who does not have formal training may not be able to comprehend what is said in the necessary ways. This difficulty only increases if there is a language barrier of any kind, like, for example, English being a second language. As such, the principle of intelligibility seems to also not be fulfilled for the *pro se* litigant.³⁹

3.1.5 CONSISTENCY

Laws must be *consistent*. It is not acceptable if a person, trying to abide by one law, cannot help but break another. This situation is not only absurd, but it also creates a situation where a person may fear following either law for fear of punishment. More specifically, what Fuller fears are incoherent laws: “laws that fight each other, though without necessarily killing one another off as contradictory statements are assumed to do

³⁸ However, giving into the temptation of making laws clear by going into excessive detail is also undesirable for we then encounter the problem of the penumbra. The penumbra is “debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case” (Hart 607). If the law is “no vehicles in the park” no vehicles are allowed. Yet, I think most would argue that ambulances should be allowed into the park, despite their vehicular property. The ambulance exists in the penumbra: the grey area around a law where we do not necessarily want to make stark contrasts.

³⁹ This reality causes a dilemma: on the one hand, it is unreasonable to expect the law to be made plainer because “[t]he clearer the law, the more rigid it is, and rigidity is often a deficiency in the law” (Marmor 27). On the other hand, it is equally unreasonable to expect our basic educational institutions to teach everyone a sufficient amount of legal jargon.

in logic” (*Morality* 69). As such, these conflicting laws are not necessarily obvious, but they pose a significant problem to anyone caught between them. If laws conflict with each other, whether in an obvious fashion or not, a person cannot take actions to protect herself from the consequences of breaking the law. Ideally, all laws must work together, without the existence of any separate pockets of law; and these laws must make sense within a context of all the other laws.⁴⁰

Like the principle of prospectivity, the principle of consistency is not something that has been failed to be fulfilled for a *pro se* litigant specifically because she is a *pro se* litigant. This is not to say that there are not contradictory laws within the system, just that they are not necessarily associated with the issue of *pro se* litigation.

3.1.6 POSSIBILITY

Laws must be *possible* to obey. Just as it is not reasonable to both allow and prohibit a single action, it is also not reasonable to expect persons to do impossible things. Laws, therefore, must respect reasonable expectations of what a person is capable of doing.

On the surface, *possibility* does not seem to be a problem for a *pro se* litigant: at face value, the law is not asking the impossible of her; she is not being asked to fly or turn back time. However, as I will explain in more detail when discussing the adversarial aspect of the adversary system in the next chapter, a *pro se* litigant *is* expected to prepare and present her own case; it is her responsibility to do so. However, if a person cannot find, let alone understand, the laws and procedures she is supposed to comply with, then

⁴⁰ Since a single individual cannot know all the laws of the land, knowing enough of them will allow her to predict what a law could be and act accordingly. If laws are not consistent, then a person may have very little predictive power.

meeting the demands of these laws may not be something within the realm of possibility for her. In this sense, the court system might as well require her to fly for all the good it will do her. As such, the principle of possibility is not fulfilled for a *pro se* litigant.

3.1.7 STABILITY

Laws must be *stable*: they must not change too quickly. Law is something that changes over time—and necessarily so in some cases. However, if the laws change too quickly, a person will have trouble knowing what the laws are, let alone be able to rely on them to guide her behaviour or future planning.

Again, this principle is not necessarily problematic for a *pro se* litigant. However, given that the principles of publicity and intelligibility are not met, whether or not the laws are stable is not something a *pro se* litigant may have knowledge of—which, again, goes beyond the scope of this thesis.

3.1.8 CONGRUENCY

Finally, the law must be *congruent*: the law, and the application of the law, must be the same. David Luban argues that this eighth principle is different from the others. The first seven principles, he argues, “constrain what laws can say, what requirements can or cannot be included in the *corpus juris*. . . . [They are] constraints on law’s content, and—equally important—they have nothing to do with the procedures through which laws are enacted” (“Fuller” 35). The first seven principles are about what the laws *should* look like and, in turn, are aimed at persons who *create* laws. However, congruence is instead aimed at those who *administer* laws: “police, bureaucrats, judges, and arbitrators. It instructs them to follow the law impartially and with fidelity” (Luban, “Fuller” 33). I agree with Luban’s argument, and for this reason, I will return to the principle of congruence when I discuss the procedural aspects of the Rule of Law later in this chapter.

3.2 DIGNITY AND THE FORMAL PRINCIPLES

From this analysis of the seven formal principles, we can recognize three areas that are not being fulfilled by the adversary system for *pro se* litigants. The failure to fulfill the principle of publicity means that *pro se* litigants may have difficulty finding the necessary laws that are applicable to them; it also means that a *pro se* litigant, depending on her circumstances, may not even have access to the laws. The failure to fulfill the principle of intelligibility prevents a *pro se* litigant from understanding the laws—which is especially the case if there is already a language barrier of some kind. Finally, when the other two principles are not fulfilled, the principle of possibility is also unfulfilled for the *pro se* litigant, as she is not capable of obeying the laws, such as those explaining how to present her case to a judge.

We can now begin to see that the harm a *pro se* litigant suffers is a symptom of a Rule of Law failure. This failure, in turn, leaves a *pro se* litigant unprotected from the harm posed to her by the court system. Such harm, for example, can be the consequences applied to a person when she loses her case, such as being unjustly evicted from her apartment.

There is another harm that results from this Rule of Law failure, however, and it has to do with the ways in which a *pro se* litigant is prevented from defending herself and her case in the courtroom. Ideally, when the seven formal principles are fulfilled, all persons should be given a reliable rubric in relation to the laws which allow a person to make her own decisions about how she should conduct herself.⁴¹ The law is then built on

⁴¹ When we know what to expect from the system, and what the expectations are of us, we are more able, and therefore more likely, to make long-term plans—a precondition for meaningful freedom. Any project a person may work toward requires resources and

the assumption that a person “is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults” (Fuller, *Morality* 162).⁴² When a *pro se* litigant cannot find or understand the laws applicable to her case, then she is prevented from exercising her capacities in this way. This failure can then lead those in the court system to treat the person like an animal, utilizing the power of the system to essentially punish the *pro se* litigant for her failure to comply with the laws.

From this perspective, it may not be surprising that Fuller argues that “[e]very departure from the principles of the law’s inner morality is an affront to man’s dignity as a responsible agent” (*Morality* 162). Thus, the position into which a *pro se* litigant is forced in the court system is an affront to her dignity—it is dignity-threatening. The failure to fulfill the formal principles leaves a *pro se* litigant vulnerable to this dignity-threatening power.

3.2.1 WHAT IS DIGNITY?

This raises the question of what concept of dignity is being employed here, and

energy; if the person knows in advance that this might all come to naught because of laws she cannot currently know or find out about, she may be hesitant or unwilling to do so. In knowing the options and how to operate within a system, a person becomes free: she does not need to worry about other persons interfering in her affairs so long as she does not violate any laws or norms—or, at the very least, she will know there will be some action, on the part of authorities, which will strive to give her justice if someone does interfere (Hayek 221). Alternately, when the opposite is true, “not only are people’s expectations disappointed, but increasingly they will find themselves unable to *form* expectations on which to rely, and the horizons of their planning . . . will shrink accordingly” (Waldron, “Rule,” sec. 6). This is true for both short and long-term planning (Raz 291).

⁴² When this is the presupposed person who interacts with the court system, the system can then “count on people’s capacities for practical understanding, self-control, self-monitoring, and the modulation of their own behavior in regard to norms that they can grasp and understand” (Waldron, *Rank* 53). In this way, the laws, when possible, can guide the behaviour of a person through self-application rather than short-circuiting her rational processes by telling her what she must or must not do.

whether dignity in this sense is something worth respecting or even pursuing. I cannot here offer an exhaustive discussion of what dignity really is.⁴³ However, Waldron's understanding of dignity will provide the necessary understanding for the argument in this thesis.

For Waldron, "dignity is a status-concept, not a value-concept" ("Foundation" 134). In legal terms, a status is determined by a person's current situation and, in turn, determines "a particular package of rights, powers, disabilities, duties, privileges, immunities, and liabilities" (Waldron, "Foundation" 135). Being a student, for example, has a different list associated with it than the list associated with professor. As such, the status-term, which in the case of this example would be "student," would then represent all of these concepts, rights, and so on, which will then be associated with the person who has the status of being a student (Waldron, "Foundation" 135). This status-term, in turn, gives an "underlying coherence" to everything associated with the list, so it all hangs together according to a common rationale (Waldron, "Foundation" 136).⁴⁴

⁴³ How difficult that would be might become clear if we consider that the Universal Declaration of Human Rights "remains strategically silent about what key terms like 'human dignity' are supposed to mean—strategically, because of course it leaves everyone to fill in their own meaning" (Luban, *Ethics* 68). Even the *Stanford Encyclopedia of Philosophy* does not have a page dedicated to dignity, instead subsuming the topic under "Respect." However, respect does not seem to encapsulate what we mean when we speak of dignity, for respect is something that can be given, earned, lost, or taken away. It does not seem like we want something transient to anchor so much of our legal and political theory.

⁴⁴ Something appealing about Waldron's concept of dignity is that use of status is not necessarily exclusionary: "That X is a foundation for Y may be a relative rather than an absolute claim; the claim is that X illuminates Y in an interesting way or that claims like Y can be derived from X; it is not necessarily a claim that X is rock-bottom, as it were. It does not preclude the possibility of there being an even deeper value W that in turn illuminates X or from which conceptions like X can be derived" ("Foundation" 137-138). If there are deeper foundations than human dignity, then it may be the case that there are other status concepts which will allow for things like animal rights. This does not

All the concepts and arguments associated with how a human person should be treated are brought together and defended under the status-concept of human dignity.⁴⁵ According to Waldron, human dignity is a high status. He suggests that this high status is not dissimilar from the high status in a caste system; but instead of only one group of people having this status, all people are brought up to the highest level possible (“Responsibilities” 1120). Treating someone in a manner that is below this status level of having human dignity is to disrespect her (Waldron, “Responsibilities” 1120).

When he considers the implications of dignity for the way in which a person needs to be treated by a legal system, Waldron gives the following argument:

Dignity is the status of a person predicated on the fact that she is recognised as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organising her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others, in others’ attitudes and actions toward her, and in social life generally. (“Protects” 202).

This argument is similar to Fuller’s description of how the Rule of Law protects dignity: we notice the importance of respecting the person as a reasonable being, capable of determining her own life. However, with Waldron’s argument, not only is it important for the Rule of Law to respect the dignity of a person, the failure to do so can now clearly be

undermine the importance of human dignity as a concept, but instead allows for the inclusion of other persons in different, yet equally important, ways.

⁴⁵ Thus, Waldron argues that “[d]ignity as a status term then is not just an abbreviation of existing moral knowledge; it is the organization of that knowledge in relation to an underlying idea of the special and momentous importance of the human person. And everyone who uses the term “human dignity” makes an implicit promise to give an account of that importance” (“Philosophers” 19). Human dignity, though still not clearly defined in the philosophical literature, now indicates something important about the concepts being used.

seen as a harm: the failure to respect a person's dignity is to treat her in a way that is below her status as a human being. Or, to state this another way, "dignity is the rationale or value served by the rule of law, not one of the requirements following from the rule of law idea" (Taekema 141); dignity is what the Rule of Law is built upon and designed to protect.

As such, my own understanding of the dignity respected through realizing the Rule of Law is as follows: because respecting human dignity requires respecting the importance of people's ability to take the course of their own life seriously, and to direct it toward what they think of as a good life, a legal system respects dignity if it treats persons as autonomous agents who are capable of rationally acting and defending themselves. This is what the Rule of Law is supposed to help ensure.⁴⁶

3.2.2 AN OBJECTION TO FULLER'S DIGNITY ARGUMENT

Equipped with this concept of dignity, we are now in a position to understand why, to Fuller, realizing the Rule of Law according to his formal principles makes the law moral in a specific way: it protects people's dignity by treating them as reasonable beings and aims to respect their right to reliable self-determination.

In response to Fuller, some theorists suggest that fulfilling the formal

⁴⁶ I should here point out that understanding dignity as a status or rank does not entail that dignity is given by the state, or that it could be acquired or lost through the actions of oneself or others. Rather, the status of having the right to be treated as a reasonable being, capable of making her own decisions, is a status that is due to any, and all, human beings. Individuals and institutions (such as a legal system) can *honour*, *respect*, or *uphold* the dignity of another person; alternately, she can *harm*, *disrespect*, or *infringe upon* the dignity of another person. When the latter is occurring, the person whose dignity is being harmed is also being harmed, in some way, as a person. This harm does not necessarily need to be physical, as social situations—or lack there of—can also harm a person's dignity. This kind of harm can also be done by a legal system that does not respect dignity.

requirements of the Rule of Law ideal is not sufficient for the law to be moral, nor is it sufficient to ensure that its subjects are treated in ways that respect their dignity. In fact, Joseph Raz argues that the formal principles are only “capable of providing effective guidance” (293). To Raz, on their own, the formal principles do not do much relevant dignity-affirming work for us; the law is moral or immoral depending on its content, not its form (293). The formal principles of the Rule of Law, according to this argument, are more like tools for the effective guidance of human conduct rather than some foundation of morality. And just like any other tool used by humans, it can be used for results that can be viewed as both moral and immoral.

Concordantly, Waldron argues that all Fuller’s conception of the Rule of Law “requires is that the state should do whatever it wants to do in an orderly, predictable way, giving us plenty of advance notice by publicizing the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so” (“Concept” 7). The administration could apply the dictates of the laws just as they are supposed to, and yet the society could still be tyrannical of the likes of Nazi Germany or South Africa under Apartheid: so long as the rules are followed the requirements for the formal principles of the Rule of Law can be met—there is no guarantee the rules will be just, nor that the rules will protect dignity.

However, I believe that while these arguments have some merit, the conclusion that the formal Rule of Law ideal protect dignity can nonetheless be drawn. It is true that the first seven principles do not determine the actual content of the laws. However, as Luban argues, the principles do significantly constrain the laws by dictating what can and cannot be included within them and how they can be enacted. As such, the “rule of law

does deprive governments of some of their favorite devices of intimidation, namely vague laws, secret laws, retroactive laws, confusing and inconsistent laws, all of which are used to keep citizens cautious and fearful” (Luban, “Fuller” 40). Therefore, I think that it is more accurate to say that while the Rule of Law does not guarantee a moral system, it is instead a powerful tool against certain kinds of immorality that a legal system is capable of. While not sufficient for the protection of dignity, the formal Rule of Law ideal is nonetheless necessary.⁴⁷

I believe this argument is more in line with what Fuller intended. Fuller himself argues that “when I speak of legal morality, I mean just that. I mean that special morality that attaches to the office of law-giver and law-applier, that keeps the occupant of that office, not from murdering people, but from undermining the integrity of the law itself” (“Reply” 660). What Fuller aims at, then, is not to provide exhaustive rules for making good, moral law. Rather, he is concerned with prescribing the basic norms for how the relationship between those working to build the legal system and those subject to it is to be constituted. Law-givers, in this sense, owe it to the law-subjects that they go about the business of making law in a manner that respects the dignity of the law-subjects. So, as Kristen Rundle argues: “[a]t the heart of ‘the internal morality of law’ . . . is an idea of reciprocity. . . . to secure the legal subject’s fidelity to law, a lawgiver must enter into a relationship of reciprocity with her” (“Fuller” 500).⁴⁸

⁴⁷ As such, “the rule of law virtues [principles], though essentially functional, promote other goods that we value independently of, or in addition to, the function they serve in enabling the law to guide human conduct” (Marmor 8).

⁴⁸ For other similar discussions, see: Rundle *Forms*; Bennet “Hart;” Bennet “Leaving;” Murphy; and Eleftheriadis.

In this way, Raz is not incorrect: the content of the laws will determine if the law itself is moral or immoral. However, this is not Fuller's point. Fuller, through the formal principles, is attempting to make sure that the building of legal structures itself does not introduce new kinds of immorality (Rundle, "Fuller" 503).⁴⁹ As with any relationship, there will be a power dynamic between persons that may put one person at a disadvantage with respect to the other. The creation of law includes the introduction of a new kind of relationship: one between the legal officials (law-givers and law-appliers) and law-subjects. This relationship needs to be constrained such that it does not threaten the dignity of the law-subjects. *This* is the purpose of the formal Rule of Law ideal; it does not make law moral but instead guards against a certain kind of harm that can come from the introduction of law as such.⁵⁰

Following from this, I believe the reciprocal relationship Fuller describes can be visualized as a seesaw. When the relationship is reciprocal the board is level (see fig. 1), which means that the legal officials do not have more power over the law-subjects than necessary. In order to constrain the power of the law-giver, the form of the laws must be such that they respect the dignity status of every law-subject. However, as soon as the relationship between the law-giver and the law-subject shifts to favour either at the expense of the other, the relationship is no longer reciprocal, and the board on the seesaw

⁴⁹ Rundle argues that "Fuller's 'internal morality of law' is concerned with the generative conditions, prior to law, that are foundational to the possibility of law itself" ("Fuller" 503).

⁵⁰ Fuller argues, "that all we need do to accept the idea of an internal morality of the law is to see the law, not as a one-way projection of power downward, but as lying in an interaction between law-giver and law-subject, in which each has responsibilities toward the other" ("Reply" 661).

will no longer be level (see fig. 2). In this sense, the formal Rule of Law ideal works to keep the seesaw level.

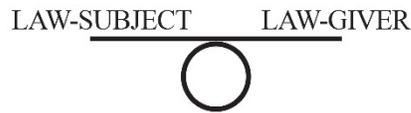


Fig.1. Reciprocal Relationship Between the Law-Subject and the Law-Giver

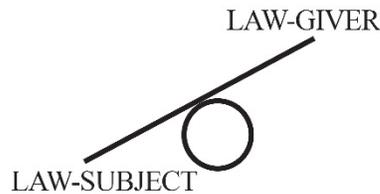


Fig. 2. Unbalanced Relationship Between the Law-Subject and the Law-Giver

3.3 CONCLUSIONS ON THE FORMAL PRINCIPLES

Returning, once again, to our *pro se* litigants, I can now argue that the failure on the part of adversary systems, like the American legal system, to realize the formal Rule of Law ideal for *pro se* litigants harms *pro se* litigants in two important ways: a *pro se* litigant is harmed by losing her case; she is also harmed by a system that does not treat her in ways that respect her dignity, and instead treats her in ways that more akin to how one would treat a naughty animal.

What follows from all of this, is that the issue of *pro se* litigation is a dignity problem. This problem stems from the failure of the adversary system to realize the formal Rule of Law principles for *pro se* litigants.

However, while we are now able to say that countries like the United States, which produce *pro se* litigants, fall below the standard that the Rule of Law sets, this does not yet tell us why this is so. This should be unsurprising. The Rule of Law is supposed to be a set of principles which describe the way the law should be; they are not diagnostic

tools showing us what went wrong when the law is not reflective of what we intend. What I have demonstrated with my analysis of the formal principles is that the harm *pro se* litigants—people who have no choice but to self-represent while seeking justice—experience in countries such as the United States, is an infringement of their dignity based on a lapse in the Rule of Law.

I explained earlier that there are also procedural aspects of the Rule of Law. Given that a *pro se* litigant encounters problems while in the courtroom, the procedural aspects are an even more important tool to further understand the harm they suffer. In the next section, I will summarize the procedural Rule of Law principles, as described by Waldron, and explain how much worse the dignity-threatening picture is for *pro se* litigants.

3.4 PROCEDURAL ASPECTS OF THE RULE OF LAW

The formal principles of the Rule of Law detail the minimal conditions one should expect a legal system to meet. In contrast, the procedural aspects are concerned with the parts of the legal process which happen inside the courtroom. It is here that the problems *pro se* litigants face reveal themselves even more obviously as lapses in the Rule of Law and, thereby, as dignity-harms. Waldron argues “the Rule of Law is violated when due attention is not paid to . . . procedural matters or when the institutions that are supposed to embody these procedures are undermined or interfered with” (“Procedure” 7). So, while it is important for the state to fulfill the formal aspects of the Rule of Law, it is equally important for the resulting laws to be applied in the correct ways: a system that fails in doing so would not be considered just.

In the last section, I discussed the new relationships that form with the introduction of the law-giver and the law-subject. Fuller, however, also mentions a law-

applier (“Reply” 660), who interacts with the law-subject. The law-applier, like the law-giver, also has an exorbitant amount of power over the law-subject; so, like the formal principles, the procedural principles are supposed to protect the law-subject from harm caused by the law-applier’s power. The relationship between the law-applier and the law-subject also needs to be reciprocal to prevent the procedural aspects of the legal structure from introducing a new immorality. In this way, the procedural principles also work to protect and respect the dignity of persons who enter the court system. The procedural principles can then be used to determine whether or not the procedural practices of a system are just. For our purposes here, I will be using the procedural principles to further identify the harm done to *pro se* litigants.

3.5 WALDRON’S PROCEDURAL PRINCIPLES

Like the formal aspects, there are also lists of procedural principles.⁵¹ The most prominent seems to be the list offered by Waldron, so it will be the one I will now discuss. Waldron offers a list of four⁵² procedural principles that he believes we should ideally see inside a legal system:

⁵¹ See Also: Tashima 264-265; and Solum 305-307.

⁵² Waldron also has a longer list, though the four I will be discussing effectively summarize most of these points.

“A. A hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, and so forth; B. A legally trained judicial officer, whose independence of other agencies of government is ensured; C. A right to representation by counsel and to the time and opportunity required to prepare a case; D. A right to be present at all critical stages of the proceeding; E. A right to confront witnesses against the detainee; F. A right to an assurance that the evidence presented by the government has been gathered in a properly supervised way; G. A right to present evidence in one’s own behalf; H. A right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case; I. A right to hear reasons from the tribunal when it reaches its decision that are responsive to the evidence and arguments presented before it; and J. Some right of appeal to a higher tribunal of a similar character” (“Procedure” 6).

- a) a hearing by an impartial and independent tribunal that is required to administer existing legal norms on the basis of the formal presentation of evidence and argument;
- b) a right to representation by counsel at such a hearing
- c) a right to be present, to confront and question witnesses, and to make legal argument about the bearing of the evidence and the various legal norms relevant to the case; and
- d) a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it. (“Rule,” sec. 5.2).

I will now discuss the procedural principles in the same way I discussed the formal principles: I will explain each principle in turn, assessing whether or not the principle is fulfilled for a *pro se* litigant. For the sake of simplicity, I have named each of the principles as follows: *the impartiality principle* (principle a), *the lawyer principle* (principle b), *the participation principle* (principle c), and *the responsive principle* (principle d). I will also here be discussing Fuller’s eighth formal principle of *congruence*, for, as I have previously mentioned, it is also a procedural principle.

3.5.1 THE IMPARTIALITY PRINCIPLE

a) A hearing by an impartial and independent tribunal that is required to administer existing legal norms on the basis of the formal presentation of evidence and argument.

The impartiality principle is the argument that a person has a right to a trial that is judged and decided in an impartial manner. It is also the argument that all the procedures used must adhere to the laws and legal norms which are pertinent to the case. The argument for impartiality is one of the most important arguments associated with the procedural aspects of the Rule of Law. Fuller argues that impartiality is important because a decision can only be just when the decision made is “as objective and as free from bias as it possibly can [be]” (“Adversary” 30). Therefore, if the *telos* of the adversary system is to pursue justice, the impartiality of the trial is a necessary component.

As will become apparent as I discuss the other four procedural principles, as well as the adversary system in the next chapter, the impartiality principle underlies all of these other concepts as well. So, it is necessary to understand why impartiality, in theory, is so important. For now, I will give a brief overview, but I will return to a more in-depth analysis of impartiality in the next chapter.

Ideally, when a case is judged and decided impartially, the circumstances surrounding a person's life, which may lead to her to being subject to things like stereotype, discrimination, oppression, or any other disadvantage, are irrelevant to her trial (unless such things are part of the reason the trial is taking place). The argument is that such attitudes and views can bias the opinion of a person's case, and in turn, taint the pursuit of legal justice in a way that puts the person at a disadvantage. If a person is equal before the law, then the trial itself needs to treat the person in as equal a manner as possible. When a trial is based on what is presented within the courtroom, rather than on extraneous information about things like the person's history, lifestyle, preferences, et cetera, then this will ideally limit the bias in a decision. What is judged then is the merit of the person's case, rather than the perceived merit of the person herself—which, in turn, respects the dignity of a person.

One of the ways procedures are kept impartial, is to have the judge not interfere in the presentation of the case. If a judge, for example, prompts the litigant for more information, the question could change how the litigant, or others in the courtroom, perceive the case being presented. In this way, the judge's interference may cause a bias to develop toward the case, or may signal to the litigant, or others in the court, that the judge herself has some bias toward the case. Either way, the participation of the judge may affect the trial in some way which may lead to results which cannot be considered

equal when compared to other trials in which the judge did not intervene. In turn, this interference infringes upon the dignity of the person, as well as the other persons whose cases have now been treated differently in comparison. In short, the interference of the judge allows the judge too much influence over the case, whether this result is well-intentioned or not, which in turn threatens or harms the dignity of those who enter the court system.

However, while the fulfilment of the impartiality principle seems to be necessary if the system is to respect the dignity of all persons, it is not a principle that benefits a *pro se* litigant in a meaningful sense. While it is the case that a *pro se* litigant may stand before a judge and *speak about* her case, she does not have the necessary skills to *present* her case in a way that conforms to the rules of presentation. Since a judge must remain impartial, the judge cannot ask the *pro se* litigant for clarification or help the *pro se* litigant present her case in any way. As such, the judge can only assess what the *pro se* litigant *says* and not what the *pro se* litigant is *attempting* to communicate—even if the judge is aware of what the litigant’s intentions are. Consequently, while the *pro se* litigant is allowed the space to speak, the impartiality principle prevents those who know the rules from helping the *pro se* litigant present her case. The *pro se* litigant’s case must then fall on deaf ears, which may cause the *pro se* litigant to lose her case.

While the *pro se* litigant is receiving the same treatment as another litigant who can properly present her own case, these dignity respecting procedures fail to respect the dignity of the *pro se* litigant. Instead, the fulfilment of the impartiality principle harms the *pro se* litigant because there are no other procedures in place which provide the *pro se* litigant with the necessary resources to aid her in the presentation of her case. Here we can begin to clearly see how the failure to fulfill the formal principles for the *pro se*

litigant cause other areas of the Rule of Law—in this case the procedural aspects—to become dignity-threatening as well. While the impartiality principle may be fulfilled, it is not fulfilled in a way that protects the *pro se* litigant from the dignity-threatening power of the law-applier, nor the adversary system in general. As such, the fulfilment of the impartiality principle does not take on a dignity-protecting role for the *pro se* litigant as intended.

3.5.2 THE LAWYER PRINCIPLE

b) A right to representation by counsel at such a hearing.

The right to counsel is the right to have another person, typically a lawyer, represent a person and present the person's argument to others. I will not be discussing the right to counsel here, as I will spend quite a bit of time discussing the role of a lawyer within an adversary system in the next chapter. However, very briefly: if a lawyer is the sort of person who can ensure that her client benefits from the fulfilment of the other procedural principles, as well as the previously described formal principles, then it would seem that a lawyer will be important to ensure that the dignity of her client is respected and upheld.

3.5.3 THE PARTICIPATION PRINCIPLE

c) A right to be present, to confront and question witnesses, and to make legal argument about the bearing of the evidence and the various legal norms relevant to the case.

The participation principle is the argument that a person has a right to participate in all the necessary ways in her own trial—this participation can be through such things as the presentation of her argument and evidence, as well as the questioning of witnesses, and responding to the case presented by the other party. Given that a trial is in some way

about the person, the person's dignity is only respected if she is allowed the opportunity to participate in a way that allows her to act autonomously and use her rational capacities. The act of participation is the person's opportunity to use the legal procedures available to her to defend herself from the excessive power of the court system.

Alternately, if a person is prevented from participating in her own trial, or prevented from contributing her part of the story, then the decision made will not be reflective of her autonomy or rational capacities. In turn, the decision may favour the case presented by the other litigant, which will put her at a disadvantage. Or, the judge, in making her decision on the case, could be using her power to decide the case in ways that are not respectful of the reciprocal relationship between her and the law-subject. In either case, the failure to realize the participation principle leaves a person vulnerable to the power of the court system, without any way to defend herself.

As we saw with the principle of impartiality, the participation principle is also fulfilled by the adversary system,⁵³ but not in a meaningful way that protects the dignity of a *pro se* litigant. While a *pro se* litigant may enter the courtroom and attempt to present her case, her lack of necessary resources prevents her from presenting her case in the necessary ways. As such, while the procedures associated with the presentation of the case may work to ensure a litigant is able to participate in her trial, they hinder a *pro se* litigant's presentation because she cannot use them effectively.

When a *pro se* litigant is unable to properly present her case, the procedures themselves become a barrier to the *pro se* litigant's meaningful day in court. In turn, the

⁵³ This, of course, is up for debate, given the increased use of ADR and other methods of deciding cases outside of the courtroom. See: Resnik; Landsman "Nothing;" Hollander-Blumoff and Tyler; Menkel-Meadow 101-102, 109; and Fiss.

procedures prevent a *pro se* litigant from being treated in ways that respect her dignity: she is prevented from participating meaningfully in a trial which will make an important decision about her life. Having decisions made for you is dignity-harming.

3.5.3.1 WALDRON'S DIGNITY ARGUMENT REVISITED

It is here that I must return to Waldron's conception of dignity and point out a problem with its underlying assumptions, which manifest clearly in the participation principle.

Waldron argues that "[d]ignity is the status of a person *predicated* on the fact that she is *recognised* as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her" ("Protect" 202; emphasis added). The person, therefore, is "entitled to give an account of herself . . . that others are to pay attention to" ("Protects" 202). On this argument, the person has a voice and is in a position to use and benefit from it. If we think about self-representation from this perspective, we are reminded of the first of two self-representation narratives: that a person forgoing a lawyer and presenting her own case is a form of empowerment. The person is independent and autonomous and does not require anyone else (in this case a lawyer) to do what she needs to do. This first narrative is the ideal that Waldon's dignity argument represents: the person's dignity is most clearly respected when she is in a position to demand this respect from others.

However, as I have stated several times, this is not the narrative that is reflective of a *pro se* litigant's experience in court. A *pro se* litigant does not have the necessary resources to explain herself in the appropriate ways, nor, for the same reasons, is she capable of demanding others pay attention to what she says. There are systematic barriers

in place that prevent this from happening, and as such the *pro se* litigant does not have a voice to use, let alone one that demands to be listened to.

If a person's dignity is established by others recognizing her independence and voice, then by Waldon's definition, a *pro se* litigant—and many other persons with other life circumstances that hinder their independence and voice⁵⁴—may not have their dignity respected because they are not in a position to *demand* of others *to* respect it. These persons may have an argument that their dignity is being harmed in some way, yet without a voice they cannot communicate this harm to those who may be harming them—or even to those who are in a position to help.

Given the demonstrated importance of respecting the dignity of a person, this seems to be a significant flaw in his argument: one that does not deal with the diversity and disparity of life circumstances that exist among all human beings. It is simply not the case that all individuals are independent and autonomous beings, for we are interconnected in important and necessary ways. We saw this with Fuller's argument for reciprocity: even our legal structures create connections between persons that affect those involved.

Due to the scope of this paper, I do not here have the opportunity to engage further with Waldron's argument. However, it would seem that basing dignity on a person's possession and use of her voice, when many persons do not have such voices, leaves a lot of persons vulnerable to dignity-threatening situations. With that said, I will continue to elaborate on the dignity-threatening situation of *pro se* litigants, with the intention of returning to this topic in another future thesis.

⁵⁴ See: Burrow; and Ficker.

3.5.4 THE RESPONSIVE PRINCIPLE

d) A right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it.

The responsive principle has two distinct parts. The first is the argument that a person has a right to hear what the decision is. The principle assumes that a person is capable of understanding, and, hopefully, accepting the reasons that ultimately lead to the judge's decision, and as such, is owed the reason for the decision. In this way, this principle relates to the outputs of a court proceeding: what happens inside the courtroom is going to affect the person in some way as she moves forward with her life. Fuller points out that “[e]ven if there is no statement by the tribunal of the reasons for its decision, some reason will be perceived or guessed at, and the parties will tend to govern their conduct accordingly” (“Forms” 357). Thus, respecting the dignity of the litigant requires communicating to her what the decision is and why it was made.

This, importantly, leads to the second argument, which is that the decision must be based only on what has been presented in the courtroom according to the legal norms pertinent to the case—a point I previously mentioned while discussing the impartiality principle. Given that a person has a right to participate in her trial, the responsive principle now takes this participation and ensures that only the information presented through it is allowed to be used to decide a person's case. In this way, the principle protects the dignity of a person by ensuring that what she is judged upon is only those things she had an opportunity to respond to during the trial. In turn, the consequences derived from the judge's decision are not something arbitrarily decided by the judge: the consequences themselves must come from the application of the legal norms which are applicable to the person's case. When the law-applier does so, she respects the law-

subject as someone who has the capacity to understand and follow rules, and is then answerable for her mistakes (Fuller, *Morality* 162).

However, the responsive principle, like the impartiality and participation principles, does not benefit the *pro se* litigant when it is fulfilled. If a *pro se* litigant is not able to present her case in the necessary ways, then she cannot participate in her trial in the necessary ways. Consequently, the judge's decision will not be reflective of what the *pro se* litigant intended, which means the *pro se* litigant is essentially excluded from influencing the outcome of the case. The final decision will not be a reflection of the *pro se* litigant's capacity to understand, follow, and use laws; and in turn, the decision will not respect the dignity of the *pro se* litigant. So, the responsive principle is not meaningfully fulfilled for a *pro se* litigant either and its fulfilment in a general sense harms the *pro se* litigant.

Having said that, the first part of the principle, which requires that the litigant be informed of why the decision was made, can be potentially helpful for a *pro se* litigant. At the very least, a *pro se* litigant can be informed that the decision was not reflective of her case. With this information the *pro se* litigant can then take the necessary steps to appeal the decision, giving her a second chance to present her case. However, the process of appeal is no less difficult than the original trial, so it may be a moot point.

3.6 CONCLUSIONS ON WALDRON'S PROCEDURAL PRINCIPLES

All four of the principles Waldron describes are designed to respect and uphold the dignity of the person inside the courtroom—and possibly ensure that this respect continues after she has exited the courtroom as well. The dignity of the person seems to be respected when: the trial procedures are impartial and free from bias; the person is given a legal advocate to help her prepare and present her case; when the person has the

opportunity to participate in all aspects of her case in a meaningful way; and when the person is told why the decision was made, and the decision itself is only based on what has been presented during the trial. In these ways, a person's trial will ideally be free from bias and will also give the person the opportunity to defend herself from the powers of the courtroom. As well, the procedural principles maintain the reciprocal relationship between the law-applier and the law-subject.

However, if all four of the procedural principles are fulfilled when the formal Rule of Law principles have not been realized for all persons (namely *pro se* litigants), then it is *not* the case that the procedural principles defend the dignity of all persons. Instead, the procedural principles become dignity-threatening because when a person, like a *pro se* litigant, is unable to abide by the necessary procedures, the principles prevent her from participating in the trial in a meaningful way.

From this perspective, a *pro se* litigant is harmed because she does not have the necessary resources to buy into the procedural principles' protection; and when she fails to do so, the procedural principles are turned against her. Yet this reversal is subtle and difficult to pinpoint. On the surface it seems as though a *pro se* litigant is benefitting from her participation in the court system, as she is not directly barred from pursuing justice, yet the failure to fulfill the procedural principles for *pro se* litigants effectively does just that.

3.7 FULLER'S CONGRUENCE PRINCIPLE

What I have described thus far is the purpose of the procedural principles from the perspective of the law-subject: how the procedures work to (or fail to) protect the law-subject's dignity. It is now time to discuss what these same principles mean to the law-applier. I believe that all four of Waldron's procedural principles are really just different

facet of Fuller’s principle of *congruence*. Yet Fuller’s description of congruence has more to do with how to constrain the activities of the law-applier than how these constraints benefit the law-subject—which marks an important difference from the perspective we have just seen from Waldron.

As I discussed in the previous section, Fuller argues that if a legal system realizes the first seven formal principles of the Rule of Law, the system will ideally be just. However, if the laws which fulfill these seven formal principles are not applied properly, then their realization is a moot point: to the law-subject there is no law to speak of (Fuller, *Morality* 39). As such, those who have the responsibility of enforcing laws (the law-appliers) play a very important part in the pursuit of justice—a failure on the part of the law-appliers leads to a failure in justice, as well as a failure to respect the dignity of those who enter the court system.

While I have spoken quite frequently about how a *pro se* litigant does not have the necessary resources to properly present her case, I have not yet discussed what this attempt looks like from the perspective of a judge. To a judge presiding over a case with a *pro se* litigant, it may or may not be apparent that the *pro se* litigant is struggling to present her case according to the pertinent legal norms.⁵⁵ If it is apparent to her, the judge may realize what the *pro se* litigant is attempting to say and she may then try to work with this assumption rather than what is *actually* said. This is what some judges have attempted to do in order to accommodate *pro se* litigants within their courtroom (Steinberg, “Adversary” 937-947).

⁵⁵ For a discussion on how some judges feel in this situation, see: Finkelstein 137-138.

This attempt to help the *pro se* litigant, while well-intentioned, undermines the principle of congruence, for the judge's application of the law in this situation is *ad hoc* rather than in accordance to the relevant legal norms.⁵⁶ Here is why: by attempting to guess at the *pro se* litigant's argument, the judge violates both the formal principle of generality, as well as the procedural principle of impartiality. The judge violates the principle of generality by treating the *pro se* litigant in a way that is different from how other litigants are treated. The judge violates the principle of impartiality because she has now taken steps to involve herself in the presentation of the *pro se* litigant's case—which in turn may lead her to have a bias in favour of the *pro se* litigant. The violations lead to two significant problems.

The first is that while the judge is acting in a way she hopes will help the *pro se* litigant, the fact that this help is not in response to what has actually been said in court undermines the dignity of the *pro se* litigant. The *pro se* litigant moves from the position of someone who can decide and articulate for herself, to the position of someone who has others decide for her what she means and even what she wants. When the judge acts on what she *assumes* to be the intentions of the *pro se* litigant, the judge, in a way, is

⁵⁶ Further complicating matters, in the United States at least, is the fact that “the ABA and most states have adopted commentary to Rule 2.2 of the *Model Code of Judicial Conduct*” (Greacen 664), which explains how a judge should work to accommodate a *pro se* litigant. However, the commentary is general in nature, and does not provide a solid foundation of rules for judges to work from (Greacen 664). As such, even though there are recommendations, these recommendations are left to the judge's discretion, leading to situations including *ad hoc* remedies and perhaps stereotypical judgments (Steinberg “Adversary;” and “Demand”). In a way the judge is placed in a double bind: she has to both act according to the law, but she must also interpret the law in some way to accommodate a *pro se* litigant. And since not all *pro se* litigants are the same, nor are the types of cases they bring forward, the actions taken are not the same either and are instead *ad hoc* in nature. Either way, the judge has been placed in a position where she is charged with ensuring justice is done yet has no clear direction on how to ensure that this indeed takes place.

ignoring the voice of the *pro se* litigant—which essentially silences the *pro se* litigant. This silence then leaves the *pro se* litigant vulnerable to the power the judge, as law-applier, has over her. This is especially the case if the solution offered is not actually reflective of what the *pro se* litigant intended when she attempted to present her case.

The second problem comes from a perspective I have not yet spoken of in this thesis: that of the other litigant. When a judge acts on what she assumes the *pro se* litigant is attempting to communicate rather than what the *pro se* litigant has actually said, the integrity of the other litigant's case is also compromised. While it is the case that the impartiality principle requires the judge to only respond to what has been said within the courtroom, the same is also true of the other litigant. Since it is not the case that the other litigant can read the judge's mind and understand what assumptions the judge has made about the *pro se* litigant's case, it is also not the case that the other litigant will be able to properly respond to the *pro se* litigant's presentation.

In short, the judge's interference in the *pro se* litigant's case places the other litigant in a position that is also dignity-threatening. The other litigant is now not given the benefit of the impartiality principle because the judge is acting in ways that benefit the *pro se* litigant. The other litigant is also prevented from fully benefiting from the participation principle because all the relevant information has not been communicated during the trial, so the other litigant cannot respond to it. And finally, the decision may not be reflective of what was presented during the trial, so she will not benefit from the responsive principle either.

When a judge fails to apply the laws in the appropriate ways, both litigants can be harmed by her doing so. Justice is not achieved by giving a *pro se* litigant an advantage over the other litigant; it is only achieved when both litigants receive justice equally. So,

even though there is a focus on the *pro se* litigant in this situation, there is an onus to treat the *pro se* litigant in an equal manner because of the potential harms to the other party if this equality is not achieved. As such, Fuller argues that in order for a trial to be fair, “each side of the controversy must be carefully considered and be given its full weight and value” (“Adversary” 31).

3.8 RECIPROCAL RELATIONSHIPS AND THE PROCEDURAL PRINCIPLES

It is here that I need to change my initial description of the reciprocal relationship. I originally described the relationship between the law-giver and the law-subject as being a balanced seesaw when ideally realized (see fig. 1). However, in the courtroom there are three parties whose relationships must be balanced: that of the law-applier (judge) and the two law-subjects (the litigants). The relationship between the law-applier and the law-subjects is therefore more complicated than the relationship between the law-giver and the law-subject I described above. Yet the relationship must still be equally balanced⁵⁷ if the resulting trial is to be just.

I now argue that the relationship between the three parties within the courtroom, in its ideal form, can be visualized as an isosceles triangle: with the two litigants (law-subjects) each being equally spaced from the judge (law-applier) (see fig. 3). When a judge attempts to help the *pro se* litigant, she is in effect moving closer toward the *pro se* litigant, changing the isosceles triangle into a scalene triangle (see fig. 4). When this happens, the reciprocal relationship shifts in favour of the litigant receiving extra help,

⁵⁷ It may not be necessary—or even possible, given the disparity in resources between citizens—to make the relationship between the two litigants equal. The relationship could, and probably should, be made equal in respect to the fact that both individuals have the same status as dignified beings. However, this is a line of argument unnecessary for this current thesis.

and in turn, shifts away from the other litigant. The dignity of all persons within the courtroom is of equal importance, and this must be respected throughout the process, even if the dignity of the *pro se* litigant seems to be most obviously at risk of being abused.

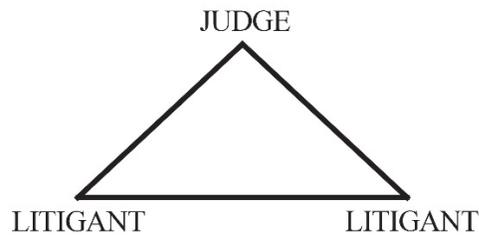


Fig. 3. Reciprocal Relationship Between the Judge and Two Litigants

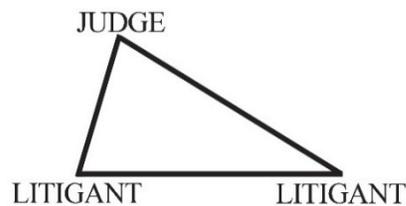


Fig. 4. Unbalanced Relationship Between the Judge and Two Litigants

What this discussion shows us, is that when there is a failure to realize the procedural principles for *pro se* litigants, the *entire* legal process may be undermined. The *pro se* litigant may be harmed by consequences she could not work to prevent, and the other litigant is harmed by her case being compromised by the lack of information given to her about what is happening within the courtroom. In short, when the procedural principles are not realized for the *pro se* litigant, there is a breakdown in the Rule of Law.

This is not to say that *pro se* litigants themselves are causing this problem with democracy, but rather, that the issue of *pro se* litigation is a symptom of an improperly functioning legal system. However, as I mentioned earlier, the formal and procedural aspects cannot be used to pinpoint these actual problems, only indicate where in the

adversary system these problems may exist. As it would seem, the Rule of Law breakdown is occurring somewhere within the adversary system itself, with *pro se* litigants as its most obvious victims (for remember, the other litigant may suffer harm as well).

In order to pinpoint the places where these breakdowns are occurring, and why, we must now turn our attention to the adversary system itself. In the following chapter, I will discuss the adversary system and the role of the judge and lawyers within it. I will argue that in order for the system to lead to just results, a litigant requires the aid of a lawyer. However, I will also argue that given this requirement, the adversary system is actually undermined by the role the lawyer is required to play.

CHAPTER 4: THE ADVERSARY SYSTEM

So far, I have been discussing *pro se* litigants within the adversary system without going into too much detail about how the system itself is configured. It is time to change that. For the purposes of this discussion, I will be focusing exclusively on the adversary system adopted by the United States.⁵⁸ It should here be noted that for the moment I will only be discussing the adversary system in its ideal state: one which presupposes that all litigants will have a lawyer; a fact I will be returning to later in this chapter. Already we can begin to see why not having a lawyer in a system that presupposes all persons will have access to a lawyer may be problematic for *pro se* litigants. However, to truly understand why this is a harm, as well as why the Rule of Law is breaking down, we need to properly understand what the adversary system requires of persons who work within it, as well as those who enter as a litigant.

In general, the adversary system is argued to be “a method of adjudication characterized by three things: an impartial tribunal of defined jurisdiction, formal procedural rules and, . . . assignment to the parties of the responsibility to present their own cases and challenge their opponents” (Luban, *Justice* 56-57). The *impartial tribunal* is usually represented by a judge⁵⁹ (or arbiter) who does not participate in the development of the litigants’ cases. The *formal procedural rules* are those rules which lay

⁵⁸ Within the United States, the adversary system is often associated with the citizenry’s sense of self and national identity and, as such, “there is a tendency among many people to treat reservations about the adversary system as assaults on the American Way” (Luban, *Justice* 58). Furthermore, it is suggested that “the adversary system of justice reflects the same deep-seated values we place on competition among economic suppliers, political parties, and moral and political ideas. It is an individualistic system of judicial process for an individualistic society” (Kutak 174).

⁵⁹ Or a judge and jury.

out the processes of the adversary system—these are the rules which should be informed and constrained by the formal and procedural aspects of the Rule of Law.⁶⁰ Finally, there are the *two litigants*, each of whom (in the ideal case) is accompanied by a legal advocate.

Understanding the adversary system thus requires an examination of three roles: those of the judge, the lawyer, and the litigants. I have spent most of this thesis explaining the role of the litigant, especially the difficulties a *pro se* litigant has in fulfilling their roles. It is now time for me to properly discuss the roles of the judge and the lawyer. The explanation of these roles will then lead to what I believe is the source of the dignity-threatening nature of the adversary system: how the roles imposed by the adversary system undermine the declared *telos* of the system.

4.1 JUDGES WITHIN THE ADVERSARY SYSTEM

Up until now, I have mentioned and briefly discussed that the judge must be an impartial party within the adversary system, but I have not properly explained how or why. Overall, the judge plays “a prominent and essential part in directing trials, ensuring impartial treatment of the litigants and their lawyers, guiding and instructing juries, and maintaining order and restraint in court-room procedures” (Dawson 27-28).⁶¹ While it is important for a judge to remain impartial throughout the trial, it is also important for the

⁶⁰ I will not discuss the specifics of these rules in this thesis, but I will here clearly state that these are the rules which fail to fulfill the Rule of Law ideal for *pro se* litigants.

⁶¹ Or as Engler clearly states: “The guidance in the Canons of Judicial Conduct comes from general language applicable to judges in all cases. Judges are required to ‘Uphold the Integrity and Independence of the Judiciary’ and ‘Avoid Impropriety and the Appearance of Impropriety.’ The concepts are intertwined with the obligation that judges act at all times in a manner that promotes public confidence in the ‘independence, integrity and impartiality’ of the judiciary. Judges must perform their duties ‘impartially, competently and diligently’, concepts requiring judges to perform their duties ‘fairly and impartially’ and ‘without bias or prejudice,’ while remaining ‘patient, dignified and courteous’” (Engler, “Ethics” 369-370).

judge to ensure that all other court proceedings remain impartial as well. It is in this way that the judge works to fulfill the formal Rule of Law principles such as the generality principle, as well as the procedural principles—especially the principle of congruence.

In being an impartial party, a judge is required not to interfere in the presentation of the case. A judge must not choose sides, nor decide the outcome of the case before the trial has completed; it is also important that the judge does not act in ways which lead others to believe she has acted in a biased way toward either of the parties. In fact, Fuller believes it is so important that the judge not interfere that he argues the procedural rules “must be such that they do not compel or invite him [the judge] to depart from the difficult role in which he is cast” (“Adversary” 31). As such, part of fulfilling the procedural aspects of the Rule of Law requires a judge not to break from her role of impartial arbiter—any deviation from this role constitutes a breakdown in the Rule of Law.

In order to hear a case impartially, the judge is required to listen in a meaningful way. This requires the judge to not have made up her mind beforehand, nor be influenced by outside sources that may bias the decision-making process. It is also important for the judge to not make any assumptions about what is presented before her. In short, the judge “cannot know how strong an argument is until [s]he has heard it from the lips of one who has dedicated all the powers of his [her] mind to its formulation” (Fuller, “Adversary” 31). The judge *was not a participant in the events of the case* (and must not have been), and as such she is charged to remain open to the presentation of the story and make a judgment based only on what is presented.

Fuller argues that the adversary system prevents the judge from drawing early conclusions based on patterns which may make the current case seem like other cases the

judge has heard before (“Forms” 383). Fuller is worried that “what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention” (“Forms” 383).⁶² Fuller believes that once a person has recognized a pattern, the way she views the case will be narrowed and may exclude relevant information which could lead to a different conclusion than the previous case. As such, the presentation of the evidence must be zealous and adversarial, in an attempt to keep the judge on her toes, denying her the opportunity to slump into this lazy way of surveying evidence.⁶³

The other problem Fuller raises is that when a judge interferes in a case by developing arguments for one of the parties, she moves from the position of arbiter to advocate and is unable to return to an impartial position after this participation. Fuller argues that:

When he [the judge] is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving,—in analysis, patience and creative power. (“Forms” 382).

⁶² Or, as Landsman states: “if the decision maker, strays from the passive role he risks prematurely committing himself to one version of the facts and failing to appreciate the value of all the evidence” (Landsman, “Brief” 715).

⁶³ Fuller argues that “[a]n adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances” (“Forms” 383). Since only the information presented during the legal process is allowed to determine the final decision, this process is thought to prevent the judge from taking external information through associating the current case with cases from the past.

If the judge is attempting to present the best version of the case of one party, then there is a significant amount of mental energy and investment in the development of that party's case. Furthermore, if the judge is doing this for both cases at the same time, then the judge will naturally begin to compare and contrast the two cases as she works to develop both sides of the story.

When it comes time to return to the role of impartial arbiter, what naturally follows, I believe, is that the judge will have a difficult time of pulling the two cases apart. The judge may also have difficulty separating both cases from her own intuitions and experiences. In short, by participating in the development of the case, the judge becomes involved in a way that may bias her either toward or against one or both litigants, which in turn will make the decision biased. Since the decision made by the judge is supposed to be the final decision on the matter, any bias may prevent a litigant from receiving justice. As such, it becomes clear that the impartiality of the judge is extremely important. We can also begin to understand why the procedural rules work to ensure this role is properly fulfilled, as well as why there is a breakdown in the Rule of Law when the role is not properly fulfilled.

Putting aside the litigants' lawyers for a moment, we can suppose that there are only three parties active during a trial: the judge and the two litigants. Given that the judge cannot interfere in the presentation of a litigant's case, and each litigant is attempting to present a better case than the other, it becomes clear that the only one who can present the litigant's case *to* the judge is the litigant herself. Since it can be assumed that the litigant wishes to win her own case, it becomes solely her responsibility to prepare and present the best case possible. Which is why it is assumed that, ideally, "the

parties' self-interest will ensure that all relevant material is presented and tested before the court" (Finkelstein 136).

So, to summarize, the adversary system requires the impartiality of the judge to keep the trial as free from bias as possible. When a trial is free from bias a person's case is judged in a way that fulfills the formal Rule of Law principle of generality, which ensures the person's trial is decided equally in comparison to other litigants. Since the impartiality is such an important aspect of a just trial, it is also the judge's responsibility to ensure that all the procedural rules, especially those that maintain the impartiality of the trial, are fulfilled as well—which in turn fulfills the procedural principle of congruence.

This leaves the litigant with the sole responsibility of presenting and defending her case to the judge. Consequently, when a *pro se* litigant struggles to present her case to a judge, the judge should not be allowed to help her: as soon as the judge does so, the separate roles each is required to fulfill begin to breakdown, which in turn begins to breakdown both the formal and procedural aspects of the Rule of Law.

This is only part of the story, however. We now need to look at how the lawyer fits into this account, and subsequently what happens when the lawyer's role is not fulfilled in the ideal way.

4.2 LAWYERS WITHIN THE ADVERSARY SYSTEM

In general, a lawyer is a person who is hired by a litigant to represent her and her interests, and as such, must perform various actions in order to attempt to win the case for the litigant. In other words, "[t]he advocates are expected [among other things] to provide the legal skills necessary to organize the evidence and formulate the issues" (Landsman, "Brief" 716). Since it is the sole responsibility of the litigant to prepare and present her

case to the judge, when the litigant hires a lawyer, it then becomes the lawyer's responsibility to do this job for her instead. In this way, the role of a lawyer within the adversary system is that of a *champion*—one who uses her knowledge of the system, as well as the authority associated with the role of lawyer, to present the best case possible for her client.

The role of the lawyer in the adversary system, and the relationship between the lawyer and her client, can be explained by Murray Schwartz' two principles: The *principle of professionalism* and the *principle of nonaccountability* ("Zeal" 544). The two principles combined form what Luban refers to as *neutral partisanship* (*Ethics* 20), which I will refer to as the *principle of neutral partisanship*.

The principle of professionalism shapes the way the lawyer may, or must, act for her client. Schwartz argues that "[w]hen acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail" (Schwartz, "Zeal" 544). Given that the trial itself must be impartial and free from bias, the lawyer is thus obligated to act in ways that only benefit her client. A lawyer cannot, for example, act in ways that may benefit herself or others at the expense of her client. As well, a lawyer cannot act in ways that may prevent harm to the other litigant *if* this may result in her client losing her case or prevents her client from obtaining the best possible outcome.

Thinking back to Fuller's argument about how an adversary presentation of a case can keep the judge on her toes ("Forms" 383), it becomes the lawyer's responsibility to present her client's case in such a way. As such, the lawyer must work to present the case in as zealous a manner as possible, utilizing her knowledge and skills to the best of her abilities. However, once this practice of zealous advocacy has begun, it is not appropriate

for the lawyer to ease up on the use of these tactics (Luban, *Ethics* 44). As soon as the lawyer does so, she is not doing her best to win the case for her client, and as such is not fulfilling the principle of partisanship. Thus, it is necessary for a lawyer to practice zealous advocacy regardless of who the other litigant is, even if this means she must practice what Luban refers to as *overkill* (Luban, *Ethics* 44).

The requirement of impartiality, coupled with the practice of zealous advocacy, leads to an important difficulty within the adversary system. The goal of winning a case subsequently lessens the obligations the lawyer has toward others. For example, the lawyer does not have an obligation, moral or otherwise, toward the other litigant involved in the trial—even if this other litigant is the state, or, as is the focused concern of this thesis, is a *pro se* litigant. This means that a lawyer, during the presentation of her client’s case, is allowed to do such things as ignore obligations to argue fairly, to avoid fallacies, et cetera, as long as the law does not expressly forbid them. In short, the requirement of impartiality places a lawyer in a position where her moral obligations to her client as a lawyer crowd out her moral obligation to others outside of this role.

This shift in moral obligations is explained by Schwartz’ principle of nonaccountability. Schwartz argues that “[w]hen acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved” (Schwartz, “Zeal” 544).⁶⁴ The principle of nonaccountability is

⁶⁴ Ideally these actions will be confined to the legal norms pertinent to her client’s case. Landsman argues that “[b]ecause the highly competitive nature of adversary procedure may tend to promote a win-at-any-cost attitude, the adversary system employs a set of ethical rules to control the behavior of counsel. To ensure the integrity of the process, tactics designed to harass or intimidate an opponent, as well as those intended to mislead or prejudice the trier of fact, are forbidden” (Landsman, “Brief” 716-717); for the purposes of this thesis, I will assume the actions of the lawyer will be within the boundaries set by the law.

necessary to protect the lawyer from prosecution, from being held liable for damages, or discipline (Schwartz, “Zeal” 544). If a lawyer must act in ways that only benefit her client, and she must do so in a zealous manner, punishing a lawyer for doing her job in the expected way would discourage the lawyer from properly doing her job in the first place—which in turn may decrease the chances that her client will win.

What follows from this, is that when a lawyer acts according to the principle of professionalism, she cannot be held accountable for her actions nor the consequences she brings about. The lawyer’s duty is to her client and her client alone, and she must not be punished for the actions she takes while fulfilling this role because she is *not allowed* to consider her own interests or moral obligations as she does so. This then, is the principle of neutral partisanship: the requirement that a lawyer put aside her own interests and beliefs in order to win her client’s case; when she acts in a zealous manner, utilizing all of her skills, she is protected from the consequences of these actions (so long as the actions are within the boundaries set by the law).

In this way, the conception of lawyer as champion is someone who will fight the good fight, doing what is necessary (within the boundaries set by the law) to win the case for her client. The lawyer as champion knows how to navigate the system, working to fulfill the formal Rule of Law aspects for her client, as well as the procedural Rule of Law aspects. In turn, the lawyer as champion works to defend and respect the dignity of her client.

4.2.1 RECIPROCAL RELATIONSHIPS WITH LAWYERS

I mentioned earlier that we can represent the reciprocal relationship between the judge and the two litigants by a triangle. When the triangle is isosceles—that is, when the two litigants are each *equally spaced* from the judge—then the case will be impartially

adjudicated and lead to just results: the reciprocal relationship between all three persons is in balance (see fig. 3). I can now begin to explain how the litigant's lawyer fits into this scenario.

Since a lawyer is hired to represent a person in court, her place within the triangle is that of standing between the litigant and the judge, mediating the relationship between the two. If the other litigant has a lawyer as well (as we are assuming, for the moment, that she does), then the relationship dynamics change between all five persons. Now the relationship between the judge and the two lawyers occupy the three points of an isosceles triangle, while the two litigants are removed, standing behind their lawyers. What is now created is an isosceles triangle standing upon a rectangular foundation, which, in its ideal state, is equally balanced (fig. 5). The question now becomes, how do we balance this rectangle? The answer lies with the competency of the lawyers.

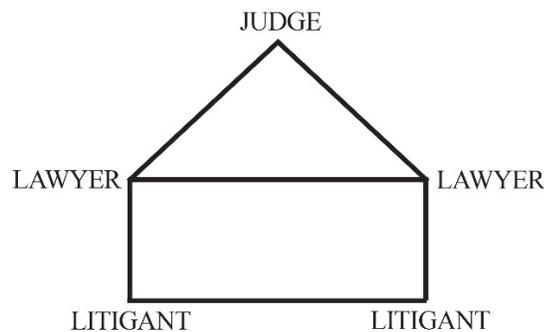


Fig. 5. The Reciprocal Relationship Between the Judge, Two Lawyers, and Two Litigants

In the ideal version of the adversary system, it is presupposed that all persons will have a lawyer. Given that a litigant is only responsible for presenting her own case, “individuals have no legal responsibility for the competence of their counterparts on the other side of the transaction and, consequently, have no obligation to share the benefits of

their own competence with the other side” (Kutak 174).⁶⁵ This, coupled with the principle of neutral partisanship, means there are no procedural constraints ensuring both lawyers will be equally competent—instead, it is quite the opposite: a lawyer must always do her best, regardless of the skill level of the other lawyer.

In turn, this means that if one litigant has a better lawyer than the other litigant, this litigant will have an advantage during the trial. In this way, the principle of neutral partisanship may create a sort of arms race for litigants: whoever can hire the better lawyer has a better chance of winning her case. I will return to this argument in the next chapter, for this line of reasoning leads to some dire consequences given that lawyers are often accessed through the free market. But for now, I shall talk about triangles.

When one litigant has a better lawyer than the other, the isosceles triangle becomes a scalene triangle. The better lawyer unbalances the reciprocal relationship between the judge and the other lawyer, moving the better lawyer closer to the judge, which, for example, may provide the better lawyer with more influence to persuade the judge. In turn, the rectangle, which was previously balanced, shifts in such a way that the litigant with the better lawyer is now pulled closer toward the judge: the rectangle becomes an irregular quadrilateral (fig. 6). The closer the client is drawn toward the judge, the more the trial tends to favour her case. However, as we saw with the judge interfering on behalf of the *pro se* litigant, this does not offer either litigant justice: it only gives the other litigant an advantage in the effort to win her case.

⁶⁵ Importantly, this is not the case in the criminal court, for “the state is not permitted to be indifferent about its adversary's incompetence. It must appoint counsel to assist its adversary in the preparation of a criminal defence, and should its adversary waive an important procedural right, it cannot accept that waiver unless the defendant has given it competently” (Kutak 177).

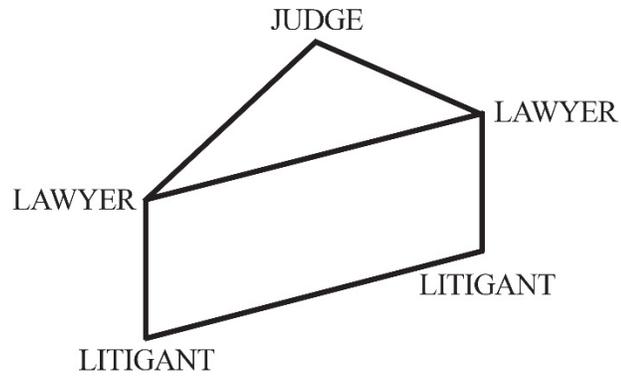


Fig. 6. The Unbalanced Relationship Between the Judge, Two Lawyers, and Two Litigants

However, if the *telos* of the adversary system is justice, then one litigant having a better lawyer than another is not acceptable. It is for this reason that Schwartz argues that “effective implementation of the [Adversary] system requires that the professional advocates satisfied two postulates: they must be equally competent, and they must be equally adversary” (Schwartz, “Zeal” 545).⁶⁶ When the ideal is realized, both litigants maintain their balanced relationship with the judge, which would then *ideally* lead to a just trial (see fig. 5).

If the adversary system relies on Schwartz’ ideal, and a failure to realize this ideal leads to a failure of justice, then the adversary system has a significant flaw. And the source of this flaw is that lawyers are human, humans who will always have different abilities and skillsets no matter how uniform their training is (Walpin 176-177). This is something Schwartz recognizes, arguing that “[t]he postulates do not—cannot—require

⁶⁶ More specifically, Schwartz argues: “The Postulate of Equal Competence is a shorthand way of saying that for the adversary system to function properly, the opposing representatives (advocates) should be roughly equal in their ability to perform their professional functions. The Postulate of Equal Adversariness is a shorthand way of saying that the opposing advocates should also be roughly equal in their dedication to the cause of their principals and in their opposition to the cause of their opponents” (“Zeal” 547).

true equality; they do assert that there should not be gross disparities in these respects” (“Zeal” 547).

However, even the stipulation that there be no *gross disparities* is problematic, especially when we consider that a *pro se* litigant does not just have an inferior lawyer: she has no lawyer at all. In terms of our triangles, the rectangular foundation no longer exists (fig. 7), clearly disadvantaging the *pro se* litigant. As such, the very fact that a *pro se* litigant enters the courtroom and attempts to present and defend her case undermines the justice putatively offered by the adversary system. Even if the *pro se* litigant may be able to find or understand the necessary laws and procedures, she certainly cannot be expected to be equal in competency or adversariness when compared to a lawyer. If a *pro se* litigant does not even have that knowledge, it is absurd to think that a lawyer and a *pro se* litigant do not have gross disparities between them in terms of legal skills and abilities. The dignity-threatening situation this puts a *pro se* litigant in is *no laughing matter*: it is tragic and surely should be remedied in any system that aims to be just.

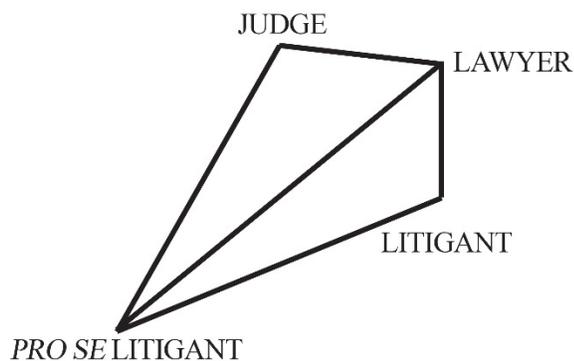


Fig. 7. The Unbalanced Relationship Between the Judge, the *Pro Se* Litigant, the Other Litigant, and the Other Litigant’s Lawyer

4.3 CONCLUSIONS ON THE ROLE OF THE LAWYER AND THE JUDGE

If we combine our knowledge of the complexity of the adversary system with this information about the responsibility one has for one's own case, we can see why the lawyer is of such importance in the ideal model of the adversary system—and, by extension, in the thoughts of Rule of Law theorists considering such a system. The success of a litigant's case in large part depends on the competency of her lawyer. In fact, Fuller argues that “[i]n a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate” (“Forms” 382). What this suggests is that Fuller *presupposes* that persons will have access to a lawyer because this system *requires* the presence of a lawyer.⁶⁷ This is likely to be one reason why Waldron includes the right to legal counsel as one of his of procedural Rule of Law principles.

However, Waldron underestimates just how important the lawyer principle actually is. As we have seen, when a *pro se* litigant has to represent herself, it does not matter if the principles of impartiality, participation, or responsiveness are largely fulfilled by the adversary system, because she cannot fully benefit from them without the help of a lawyer. All of the other procedural principles become difficult—if not impossible—to realize the moment a person does not have access to legal counsel.

⁶⁷ Fuller states this more starkly: “What is essential is that the accused have at his side throughout a skilled lawyer, pledged to see that his rights are protected. When the matter comes for final trial in court, the only participation accorded to the accused is that trial lies in the opportunity to present proofs and reasoned arguments on his behalf. This opportunity cannot be meaningful unless the accused is represented by a professional advocate. If he is denied this representation the processes of public trial become suspect and tainted” (“Adversary” 37).

So, Fuller and Waldron are correct: a litigant does need a lawyer if she is to be successful within the courtroom. However, it is the adversary system itself that requires these lawyers, not just the litigants; *for it is the absence of lawyers* that prevents the system from being just; i.e. the system's principle *telos* becomes *unachievable*. In this way, Fuller and Waldron both assume the adversary system is a brute fact, and the role of the lawyer is a necessary component of this system, used to protect and uphold the dignity of the litigant.

But it is *not* the case that the adversary system is a brute fact; the assumption that it is has obfuscated the harms the system causes. It is the system's dependence on the equally capable and equally adversary lawyers that makes the adversary system so fragile. As soon as the balance is upset it becomes very difficult to achieve just outcomes.

The requirements of impartiality on the role of the judge, while important, consequently require a litigant to be solely responsible for the presentation and defence of her own case. When lawyers are introduced into this arrangement, the judge's impartiality again forces a lawyer to only act in ways that will help to win her client's case, which requires her to act in a zealous and adversary way. In turn, it is only when the other lawyer is equally as competent and adversary that the lawyer herself cannot harm the other litigant through *overkill*. Remove the lawyer and the balanced and reciprocal relationships between the litigant and the judge become skewed in a way that obstructs justice.

Given the great potential for injustice, the justifications for the adversary system need to be good. Unfortunately, as I will now explain, there is no good justification—in fact, if we closely consider the justifications that have been offered, we will see the adversary system undermined further.

4.4 ARGUMENTS IN FAVOUR OF THE ADVERSARY SYSTEM

While discussing the role of lawyers in the adversary system, Luban describes three typical consequential justifications: the *truth, legal rights* (justice), and the *ethical division of labour* arguments (*Justice* 68-92).⁶⁸ While these justifications aim to explain, and even justify, the morally questionable actions of some lawyers within the adversary system, I believe these explanations shed light on how the adversary system functions as a whole. In turn, I believe they also serve the dual function of explaining how the role of the lawyer actually *undermines* the fragile balance of the adversary system, and in turn, leads to a breakdown in the Rule of Law.

4.4.1 TRUTH

The truth-seeking argument states that the adversary system is the best method for finding the truth in a case presented by two litigants. Why this is so has to do with a fourth important component of the adversary system that I have yet to properly explain: the role of argumentation.

4.4.1.1 ARGUMENTATION

In general, “[a]rguments offer evidence, or provide reasons, for claims made . . . [and are] minimally composed of premises (one or more) and a conclusion” (Govier 45). An argument, in short, is given when a person attempts “to provide evidence in favour of some point of view” (Groarke, sec. 2). The person presenting the argument has some information she wishes to communicate to others in order to persuade them to accept a claim—namely, the argument’s conclusion. In the case of a litigant, she is presenting

⁶⁸ Luban also discusses three non-consequential justifications: that adversary advocacy is *intrinsically good*, the *human dignity argument*, and the *social fabric argument* (*Justice* 68-92). However, I will not be discussing them here.

some version of the events, which are pertinent to the case, and which establishes premises which, ideally, will support her conclusion. The premises can only support the conclusion of her argument effectively when they are presented in a way her audience perceives as credible. As such, “[a] major function of argument is to rationally persuade others that the conclusion is true or reasonably acceptable—to render it believable on the grounds stated in the premises” (Govier 45).

Argument, in a legal setting, is thus used as a tool to present each litigant’s side of the story. Sometimes the premises presented by each party will be similar, or even the same, yet often the conclusions of both parties differ. Yet because legal conclusions do not necessarily follow deductively from legal and factual premises, the kind of argument used can deploy the same premises to support one or the other conclusion. In this way, the purpose of the argument presented by one litigant is to convince the impartial tribunal that her conclusion is most likely to be true. Since the other litigant is attempting to counter or cast doubt on this conclusion, the litigant must act to defend her argument (Govier 243).

Argumentation theory has developed different ideal models of arguing. The model that best fits the adversarial model of legal adjudication is known as *the DAM-model—the dominant adversarial model* (Stevens and Cohen 3).⁶⁹

According to the idealized DAM-model, adversarial argument functions on a Darwinian principle, where the presentation, rebuttal, and defence of arguments is seen as a sort of competition in which only the best argument wins (Stevens and Cohen 3). In its ideal form, the process itself sees that the

Arguers argue against one another to test the acceptability of a conclusion by exposing it to the strongest possible objections. The opponent finds and presents

⁶⁹ There are other models as well, which utilize concepts such as deliberation, cooperation, negotiation, among others. For more information see: Walton.

these objections. The proponent's task is to defend the conclusion by equipping it with a justification and by answering objections. (Stevens and Cohen 3).

The two arguers, and their arguments, are necessarily in conflict with each other in some way, and by undermining the other argument, or by improving one's own in response, each arguer attempts to best the other.

It is important to note that "[t]he model works only if each arguer concentrates on the task of winning the argument" (Stevens and Cohen 3). For the adversarial process to work, both parties must attempt to best the other and win. The adversarial nature thus comes from the struggle to defeat the argument presented by the other person, as the other person attempts to do the same in return. In short, a person argues in an adversarial way when "people occupy roles which set them against each other, as adversaries or opponents" (Govier 242).

4.4.1.2 THE TRUTH-SEEKING ARGUMENT

The *truth-seeking argument* finds its foundation in this adversarial process. In favour of the DAM-model, it is argued that the process of developing, countering, and defending claims supposedly eliminates the weakest parts of the competing arguments. Since the objective of adversarial argument is to win, each lawyer must strive to make the strongest argument she could possibly make prior to the trial, then proceed to defend this argument as she attempts to undermine the argument presented by the other lawyer. The assumption is that the better argument is more likely to have a true conclusion, so whichever argument proves to be the strongest will ideally *be* the truth. This is why, according to the principle of neutral partisanship, both parties must zealously present their case: to ensure that this process of finding the best answer is successful.

Luban argues that the truth-seeking argument does not work, however. Luban

points out that the truth-seeking capabilities of the adversary system are difficult to study, as “we do not, after a trial is over, find the parties coming forth to make a clean breast of the conflict and enlighten the world as to what really happened. A trial is not a quiz show with the right answer waiting in a sealed envelope” (*Justice* 68). Since the decision made by the judge is final, the result cannot be inquired into afterwards in order to find out if the decision actually reflected the truth.⁷⁰ As such, there is no empirical data, based on case results, to either prove or disprove that the adversary system leads to truth. So, for Luban, the argument for truth is not as iron clad as proponents of this view would like to think.⁷¹

Luban’s second argument against the truth-seeking argument is that if it is indeed the case that the truth is the goal, then the principle of neutral partisanship may actually undermine the truth-seeking justification. Luban argues that if the obligations start “from the standpoint of the client’s interest, [then] the adversary lawyer reasons backward to what the facts must be, dignifies this fantasy by labeling it her ‘theory of the case,’ and then cobbles together whatever evidence can be offered to support this ‘theory’” (*Justice*

⁷⁰ And this is probably necessarily the case. Scott Aikin points out that the goal of an argument (in this case a legal argument) is to fully resolve an issue, so both persons can move forward afterward without doubting the end result of the process (260). However, if there is any doubt, on either the winning or losing side, then “the resolution will always have a hue of insufficient scrutiny and, hence, lose its luster of legitimacy” (Aikin 260). As such, to open a resolved case to further questioning will undermine not only the case itself, but the relevance of the process—and perhaps the legal system itself, if it turns out the decision did not actually reflect the truth. This does not, however, exclude the possibility of appeal. Though, since the process of appealing a decision happens within the court system, it can be seen as just another step toward fully resolving the issue.

⁷¹ Luban argues that it is thus not surprising then that arguments in favor for the truth-seeking function “have mostly been non-empirical, a mix of *a priori* theories of inquiry and armchair psychology” (*Justice* 69).

73).⁷² If the client's interests are what is at stake (as is required by the principle of neutral partisanship), rather than the truth, then the presentation of the evidence has already shifted away from the truth-seeking goal.⁷³

Furthermore, it is not only the case that the lawyer is presenting the case she believes will win, she is doing so in a way that will hopefully secure the story against the other lawyer's attacks (within the boundaries set by the law). Such tactics include, but are not limited to, discrediting opposing testimony, regardless of its truth-value; exploiting the incompetence of the other lawyer; as well as using rhetorical tactics to obscure the truth (Finkelstein 136).⁷⁴ These tactics are seen as acceptable, however, because presumably, they are within the boundaries set by the law, and the "opposing lawyer will engage in exactly the same process" (Finkelstein 136).

While the underlying assumption is that the tactics used by the lawyer will be kept in check by the other lawyer's equal competency and equal adversariness, the process does not necessarily further the truth-seeking objective. Instead, while both lawyers are attempting to confuse the matter at hand, the judge alone is left to discover the truth based only on what has been presented to her—which is necessarily the case, as the role of

⁷² Ray Finkelstein argues that it is "[t]he lawyer's job is to mould this raw version of events into a narrative which is most credible and capable of withstanding the exigencies of legal process" (136).

⁷³ Presumably, what is in the client's interests is to win the case, regardless of what actually happened.

⁷⁴ Finkelstein argues that "the parties' self-interest does not aid the search for truth in a system where it is routine: (1) for opposing testimony to be discredited regardless of whether it is true or not; (2) for the incompetence of opposing counsel to be exploited; (3) for material facts to be omitted from pleadings or withheld due to privilege; (4) for probative evidence to be excluded; or (5) for counsel to indulge in sophistry and rhetorical manipulation of which the primary aim is to obscure the truth" (136).

impartiality requires the judge not to interfere, and also requires the lawyers to present and defend only the case of their own client.

However, if the argument for the adversary system is that the process leads to the truth, then it seems counter-intuitive to allow lawyers to work actively to hide the truth from the judge—even if the tactics used are legally permissible. It may be the case that the judge may recognize that some crucial information has been left out that would contribute to her judgment of the situation, but given her role of impartiality, she cannot request this information. As such, while it is the responsibility of the judge to decide what is most likely the truth of a case, it would seem that it is also the responsibility of the lawyer to aid in this process if truth is indeed the goal.

Yet, according to the principle of neutral partisanship, this may be exactly opposite of what the lawyer is obligated to do: the lawyer is to represent the client and the client's interests, *not* the truth. So, unless the truth happens to coincide with the interests of the client, it is not necessarily the case that a lawyer will have the truth as a goal—in fact, it may be her goal to *hide* the truth.

Furthermore, I argue that if the truth will not further the client's interests, or allow the client to win, then the truth itself is something extraneous to the client's case; in this way, pursuing the truth would be to defend something other than the client, which would undermine the principle of neutral partisanship, and perhaps even the obligation to represent only one's case before the judge.

A proponent of the DAM-model might here argue that the lawyer will be unable to hide the truth, for only arguments that lead to the truth will be the strongest. However, this presupposes two things: that at least one lawyer will be pursuing the truth, and that both lawyers will actually be equally competent and equally adversary. Both

presuppositions are undermined by the humanity—and therefore, fallibility—of the lawyers and their clients. The full truth may not be in the interest of either client, which may prevent one or both lawyers from seeking to expose it. As well, it simply may not be the case, even if one lawyer did want to expose the truth, that she will have the ability to do so effectively if the other lawyer is more skilled than she. So again, the principle of neutral partisanship undermines the truth-seeking argument.

Therefore, Luban states that “[i]t is hard to defend adversary fact-finding on the ground that it is the best way of ensuring that judges and juries get the most information, when the lawyer’s ‘finesse and art and technique’ consists of keeping awkward facts out of court” (*Ethics* 35). If finding the truth is up to the judge alone, and it is also the lawyers’ role to hide the truth from the judge (in ways that may be considered immoral outside of the role of lawyer), then it does not seem to be the case that truth-seeking is the actual goal of the adversary system. If this is indeed the case, then the adversary system cannot be justified by the claim that it works well to discover the truth, for it seems that the opposite is sometimes true: the adversary system seems to also work well as a device to *hide* the truth.

I argue that this argument also demonstrates that the role of the lawyer, as what I will now refer to as the *vicious champion*, is not justified either. While the adversary system requires lawyers so that it can function properly, the way the system requires lawyers to act (i.e. as vicious champions) undermines its proper functioning. In this way, the actions necessitated by the system are not sustainable—instead leading to a breakdown in the adversary system itself, as well as the Rule of Law. When *pro se* litigants are brought into the mix this breakdown becomes tragic.

This grim picture only gets grimmer, unfortunately, as I will demonstrate while explaining the second argument: the argument for legal rights, or justice.

4.4.2 LEGAL RIGHTS (JUSTICE) ARGUMENT

The legal rights argument, simply put, is that “the adversary system guarantees that each party to a legal proceeding has his or her rights fully protected by an advocate” (Donagan 127). What this looks like in practice is that a litigant is provided with “a zealous adversary advocate who will further her interests” (Luban, *Justice* 74), working “to get everything the law can give (if that is the client’s wish)” (Luban, *Ethics* 42). Again, the role of the lawyer, within the adversary system, is to protect the interests of her client; now, included in these interests, are most likely her legal rights, or rather the pursuit of justice. Thus, if it can be demonstrated that a lawyer can sufficiently defend the rights of the client, then the adversary system is justified.⁷⁵

Luban argues that this argument is nevertheless misleading, stating that

My legal rights are *everything I am in fact legally entitled to*, not *everything the law can be made to give*. For obviously a good lawyer may be able to get me things to which I am not entitled, but this, to call a spade a spade, is an example of infringing my opponent’s legal rights, not defending mine. (*Ethics* 42).

When the lawyer works to get everything the law can be made to give, instead of what the client is due, the decision of the case may be reflective of the lawyer’s skills rather than justice. If this is the case, the client, in receiving benefits she may not have been entitled to, puts the other litigant in a position where she may not (and very likely *does not*) receive what she was entitled to.

⁷⁵ It should here be noted that this argument is especially focused on the *criminal court*, a point I will return to in the next chapter.

However, even if this may be the case, once this practice of zealous advocacy is in place, the lawyer needs to continue to be zealous. Luban argues that “if lawyers were given discretion to back off from zealous advocacy, they would have to prejudge the case themselves by deciding what the legal rights actually are in order to exercise this discretion. Lawyers would be usurping the judicial function” (*Ethics* 44). As such, the lawyer may not be allowed to make the distinction between what her client is entitled to and what she can get the law to give. Instead, she must pursue it all, leaving it to the judge to sort out what each litigant is actually entitled to.

This conclusion leads us to the same scenario I argued was present in the truth-seeking argument. The adversary system requires a lawyer to act in ways accordant with the principle of neutral partisanship, yet the role the lawyer is required to take (as the vicious champion) undermines the system’s *telos*. However, in this kind of situation, it prevents the adversary system from protecting the legal rights of the litigants.⁷⁶ Thus, it is not the case that the adversary system is justified because it is the best system to protect the legal rights of all litigants, nor is it the best system for finding the truth. The next argument, the *ethical division of labour*, makes this point even more clear.

4.4.3 THE ETHICAL DIVISION OF LABOUR ARGUMENT

Since neither the truth-seeking nor legal rights argument justifies the adversary system, I turn to Luban’s third consequentialist justification, the *ethical division of labour* argument. This argument is essentially a combination of the truth-seeking and justice

⁷⁶ Interestingly, Alan Donagan points out that, in the criminal court, “[w]hat the adversary system guarantees is that each party will have an advocate, not that each party’s rights will be successfully protected by that advocate” (127).

arguments (Donagan 128), however, it has a greater focus on the role of the system itself, rather than the actions of the persons within it.

The *ethical division of labour* argument is a “checks-and-balances theory” (Luban, *Ethics* 45), in which the system ensures that each person cannot achieve more than she is allowed within the system. A lawyer is justified in her zealous advocacy because the opposing lawyer will be using the same techniques, which in turn will be constrained by the judge according to the legal norms pertinent to the case (Luban, *Ethics* 45). Ideally, both lawyers will be equally competent and equally adversary, thus preventing each other from unbalancing the reciprocal relationship between both lawyers and the judge. The ethical division of labour argument thus attempts to justify the actions of those within the system with the belief that the system is self-correcting: when one person goes too far the system will rectify this mistake (Luban, *Ethics* 45).⁷⁷ The system, when ideally realized, protects people from being harmed by those within it.

As it stands, this argument coincides with my explanation of the roles of the judge and the lawyer within the adversary system. But we can now see that the actions of persons within the system are only justified by the system itself: one can justifiably be a vicious champion because the system will not allow any potential *overkill* to harm the other litigant. Therefore, these actions can only be justified if the whole system is justified.

⁷⁷ More specifically, the argument is as follows: “[a] functionary in a well-designed checks-and-balances system can simply go ahead and perform his duties secure in the knowledge that injuries inflicted or wrongs committed in the course of those duties will be rectified by other parts of the system” (Luban, *Ethics* 45).

However, given the previous two arguments, it becomes apparent that it is not possible for the adversary system to be justified because it cannot balance the roles of each person within the system in the necessary ways.

I thus argue that the idea of a system of checks and balances is actually misleading.⁷⁸ Rather than a tool of correction, the relationship between the judge and the two lawyers is exposed as being extremely fragile. As soon as one lawyer is more competent, or the judge is unable to discover the truth among the presented information, the checks and balances fail to protect a litigant from the zealous and adversary tactics of the other lawyer. When the litigant who is being harmed happens to be a *pro se* litigant, the results can be disastrous.

4.5 CONCLUSIONS ON THE ADVERSARY SYSTEM ARGUMENTS

What is now apparent is that while on the surface it seems that a *pro se* litigant is harmed when she cannot properly present her case to the judge, the reality is much more complex. The *pro se* litigant is harmed because there is a breakdown of the Rule of Law which harms her dignity. The *pro se* litigant is not given the benefits of the Rule of Law because she does not have the necessary resources (namely a lawyer) for these benefits to be available to her. The *pro se* litigant needs a lawyer because the adversary system is set up in such a way that the absence of a lawyer causes the system to fail which harms the *pro se* litigant—leading to unjust results. As such, the adversary system causes injustice rather than justice when a litigant does not have a lawyer.

⁷⁸ This coincides with Luban, when he concludes “[h]ad we found a justification for the adversary system on other grounds, we would not have needed to turn to the ethical division-of-labor argument to begin with.” (*Ethics* 46).

A *pro se* litigant, from this perspective, is caught up in the adversary system's failure. It is a failure which harms her dignity, but it is also, and more substantively, a failure which causes her to lose cases which concern her basic life interests. The system, which is ideally supposed to provide justice for all, instead takes persons from the most vulnerable groups of society and not only fails to provide them with justice, but takes away what little they have, and calls doing so just.

According to both Luban and myself, all three of the consequentialist arguments fail, this in turn suggests that the adversary system is not justified. However, while Luban argues that the adversary system is worth keeping (*Ethics* 56),⁷⁹ I must disagree. Given how easily the system can fail and cause harm—and *is* causing harm to at least 16 million indigent litigants each year, in our example state, America—the adversary system is not a justifiable system of adjudication.

This leads to the question of what can be done, or even what can the adversary system be replaced with? These are questions that go beyond the scope of this thesis. However, the question of “why do we have the adversary system?” may lead others to develop answers for those important questions. As such, in the next and final chapter, I

⁷⁹ Luban argues that while all six of the arguments in defence of the adversary system fail to properly justify the system, the adversary system is the still best legal system for the following pragmatic reasons: “The justification is this: First, the adversary system, despite its imperfections, irrationalities, loopholes, and perversities, seems to do as good a job as any at finding truth and protecting legal rights. None of its existing rivals is demonstrably better, and some, such as trial by ordeal, are demonstrably worse. Indeed, even if one of the other systems were slightly better, the human costs—in terms of effort, confusion, anxiety, disorientation, inadvertent miscarriages of justice due to improper understanding, retraining, resentment, loss of tradition, you name it—would outweigh reasons for replacing the existing system. Second, some adjudicatory system is necessary. Third, it's the way we have done things for at least a century. These propositions constitute a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stick with what we have” (*Ethics* 56).

will discuss a plausible reason why the adversary system might be seen as important in places like the United States, as well as why this reason causes problems in the civil court system—and ultimately for *pro se* litigants. I will also discuss how this problem is exacerbated by the free market.

CHAPTER 5: CRIMINAL VS CIVIL PARADIGMS

At the beginning of my discussion of *pro se* litigants, I pointed out that there is a difference between the criminal and civil court systems. The adversary system itself seems to recognize this difference, as it is only in the criminal court that a person is guaranteed access to a lawyer. This seems to suggest that a litigant in the criminal court faces an even greater threat than the adversary system itself poses to all litigants. It is now time for me to explain why this is.

As I briefly mentioned while introducing the ideal of the Rule of Law, one of the approaches to the Rule of Law is that it is in place to protect persons from the overwhelming power of the state (West, *Re-Imagining* 4). Given that laws are created and enforced by the state, the state is the only power authorized to dispense punishment when persons violate the laws (Duff and Hoskins sec. 2); as such, the state is necessarily threatening. If this is true, then the judicial process—the judge included—must act as the intermediary between the person and the state. The courtroom is the place where this protection takes place.

The person's day in court is her last opportunity to present her case; it may also be her last opportunity to receive justice. If the judge were a mere representative of the state, the judge might weigh the good of the state (or the common good) more heavily than what the person is due given her legal rights. Again, if the *telos* of the adversary system is justice—and it must respect and honour the dignity of all persons as this justice is dispensed—then a bias toward the interests of the state is unacceptable.

If the state is what the person needs protection from, then the judge, who is supposed to be impartial and unbiased, must, in some way, be distinct from the state. In the United States, for example, judges are chosen from a selection of lawyers, who have

already had a successful career before taking the position of judge (Dawson 27). In this way, the judge is seen as having the necessary experience to understand the process of adjudicating within the adversary system, while at the same time remaining a citizen of the state rather than a member of the state administration.⁸⁰

However, all of these arguments are made for the criminal court. The only time we need to protect a person from the possible juggernaut that is the state is when she stands to lose her rights as a citizen. But this paper is concerned with *pro se* litigants who enter the civil court. It seems that I have so far been neglecting this fact.

This has not been an oversight on my part, but instead, an attempt to lead to an important point: the adversary system, along with the principle of neutral partisanship, and everything else associated with both, are most often observed and argued for with the criminal court in mind.⁸¹ In fact, Schwartz argues that the defence lawyer is often seen as “the archetype of the advocate in the adversary system” (Schwartz, “Zeal” 548)—and the defence lawyer is charged with protecting her client from the power of the state.

If the purpose of the lawyer, and in turn the judge, is to act as the barrier between the person and arbitrary action by the state, everything in the adversary system follows from that premise. To hide the truth from the judge, on the part of the lawyer, is justified because the state must prove, beyond a reasonable doubt, that the person is guilty. A lawyer is justified in zealous presentation of argument and action because the state most

⁸⁰ Or, if this is not the case, the judge is someone who is elected in (Dawson 26). This supposedly gives the citizens an opportunity to have control over who will be acting as the intermediary between themselves and the state. This may, however, create different concerns over things like voter equity and minority voices within the election process.

⁸¹ Interestingly, many of the philosophers I have been discussing have acknowledged, somewhere in the papers I have cited, that the criminal paradigm does not properly represent what happens within the civil paradigm. See: Schwartz, “Professionalism” 548-550; Luban, *Justice* 63-66; and Menkel-Meadow 97.

likely possesses greater resources and abilities than a single lawyer. The system needs to have checks and balances in place to ensure that if something goes wrong the person can appeal a ruling so that the state cannot take away a person's liberty without just cause. It seems to be assumed that the justifications for the adversary system work, on some level, if it is the state itself that is being harmed by the actions of the zealous lawyer.

However, what happens within the civil courts is not analogous, because the person does not necessarily need protection from the state when she enters the courtroom. In fact, it is more often the case that the person is entering the courtroom alongside another person with whom she has some disagreement. As such, “[i]n a civil contest between two civilians, . . . the ability to ensure that the state does not become a juggernaut is most often not needed” (Schwartz, “Zeal” 554). When a person in the civil court loses her case, she loses things like resources rather than her liberty—but it is not the state or the community who gain from this loss, as one might suspect both would gain from seeing a guilty person go to prison. Instead, the person who wins the case receives resources or legal rights at the expense of the person who loses.

The underlying presupposition here is that the two civilian persons who are entering the court are in some way equal: both have equal access to the court system; both ideally have equal access to a lawyer. Given the adversarial nature of the adversary system, the two persons, with their lawyers, should be able to present their cases and the judge will come to the truth of the matter. However, as I have already explained, it is *not* the case that the adversary system necessarily leads to truth. Nor is it the case that both persons will be equal, as the issue of *pro se* litigation clearly demonstrates.

However, if the criminal case is the paradigm case, then it is not the harm to the *pro se* litigant that is being focused on, but instead the potential harm to the state. Of

course, given the power of the state, it is presupposed that the state is strong enough to endure such harm—which is precisely the problem. The disparity between the power of the defendant and the state are so large that the tactics used to protect the defendant must be zealous and adversary. In turn, it is assumed that the power available to the two litigants in the civil court is not only relatively equal to the other, but the amount of power available to either pales in comparison to that of the state. If it is assumed that the checks and balances of the adversary system are adequate enough to protect the person from the state in the criminal court, then they must also be effective in balancing the minimal power one litigant has over the other in the civil court.

But of course, it is *not* the case that both litigants will be equal. Imagine the disparity between a *pro se* litigant and a billionaire, or worse a corporation (which is considered a “person” as far as court proceedings are concerned); these scenarios should be equally as alarming as the disparity between the litigant and the state. Thus, Luban himself points out, “the state is not the only concentration of enormous power in modern society” (*Justice* 63).

It is for this reason that Luban argues that some civil trials should fall under the category of the criminal paradigm, “namely those between the powerless individual and the private megalith” (*Justice* 65). In this way, there would be certain civil trials, where the potential for harm to the litigant, if she does not have appropriate legal aid, would be too great, and the power imbalance too unjust, to be allowed. The civil trial, in this case, should instead be treated similarly to the criminal cases in terms of procedures, though now “the roles of the parties are reversed—the government stands in as a benign surrogate, a fairy godmother for the menaced individual and the private adversary assumes the wicked-witch role of the state” (Luban, *Justice* 65). Presumably, one form

this benign surrogate can take would be a state-appointed lawyer. However, even though this helps to correct the economic disparities between an indigent person and a large corporate entity, it does not ameliorate other differences between the average civil trial and those in the criminal courts.

I believe this tension is found in the perceived difference between the powers of the state, and, say, a landlord who refuses to fix a leaky roof. It seems that by Luban's criteria, the stakes are not high enough to warrant the use of what little legal aid resources there are. In fact, Benjamin Barton and Stephanos Bibas argue that given the stakes in capital punishment cases for indigent persons, it would be absurd to direct such precious resources toward issues of leaky roofs, unjust evictions, or child custody cases (991). So, while it is obvious that the person in the criminal court requires help, the person in the civil court is left to obtain her own lawyer because the threat is less.

Given that these threats are weaker, it may be possible to argue that the adversary system may not be necessary to deal with civil cases. Yet Fuller argues that in the civil trial there is still a need for an adversary presentation, for while a person may not lose her liberty, there is a social stigma that may come along with the final verdict ("Adversary" 38-39). To Fuller, the consequences of the civil trial, while less significant in appearance, are still important to the litigant—social stigma can, of course, affect how someone lives their life. As such, for Fuller, the adversary system is still the form of legal adjudication that should be used, regardless of whether the case is criminal or civil in nature.

This leads us back to the argument that a person has a right to a lawyer—but in this case, this argument needs to be extended to *all* persons entering either the criminal or civil courts. This, in turn, also leads us back to the argument for a civil *Gideon*—an argument that, in America, has been long defeated by the Supreme Court (Steinberg,

“Demand” 745). However, if it is the case that the adversary system is the legal system that should be used in the civil courts, and the adversary system requires a lawyer to function in a just way, then civil litigants are also entitled to legal representation when they cannot afford it. In this way, the American Supreme Court is blocking the pursuit of justice by ignoring the calls for a civil *Gideon*.

In turn, this conclusion may be supported by Fuller’s formal Rule of Law principle of possibility. If the Rule of Law ideal is to be fulfilled for all litigants, then it may simply not be the case that a person can self-represent in court. In fact, it may not even be a just argument to say that a person should try—or even have the *opportunity* to try. This may be why Luban bites the bullet and agrees with the argument put forward by Rabeea Assy⁸² that there should *not* be a right to self-representation, for the act of self-representation is itself harmful (“Self-Representation” 46). It is simply not the case, given the nature of the adversary system, and how fragile of a balance of roles that it requires, that a person can effectively represent herself.

While this may seem like a solution to the *pro se* litigant’s problem, we are led right back to the point made by Rhode: that, in American at least, there simply is not enough legal aid to go around (Rhode and Cummings 488). For the provision of lawyers to be successful, there would need to be a significant increase in the amount of legal aid available to indigent litigants, as well as a significant increase in the number of lawyers willing to represent such cases.

⁸² Assy argues that the harms of self-representation are too great and as such should not be permitted. See: Assy *Injustice*; and Assy “Self-Represented.” For arguments against Assy’s argument, see: Goldschmidt; and Toy-Cronin.

I will return to this argument in a moment. For now, one need only to look at the dismal example put forward by state-appointed lawyers in the criminal court to recognize that simply giving people state-appointed lawyers in the civil court will do very little to solve the problem of *pro se* litigation.⁸³ Furthermore, giving people lawyers will not address any of the underlying issues with the adversary system that I have been discussing in this thesis.

It is at this point, I believe, that a prudent individual might suggest we should look at other sorts of legal systems for inspiration and guidance. Other legal systems may make the judicial process for persons in the civil court—especially *pro se* litigants—less treacherous. Given that a litigant needs a lawyer to properly represent her case, a system that provides lawyers to all persons may be the required solution. However, lawyers are persons participating in the free market—this is especially the case in the United States, but also in most other liberal countries as well. A move to socialize lawyers may be moot, for the best lawyers will not go into such public service roles given they could earn more elsewhere. In turn, this leads to the final part of my argument in this thesis: how the free market exacerbates the harms of the adversary system.

5.1 LAWYERS IN THE FREE MARKET

I have previously mentioned that one of the barriers preventing a *pro se* litigant from hiring a lawyer is the cost of said lawyer—and that this cost is determined by free market forces. I have also stated that another barrier that results from the free market, is that lawyers may choose what work and which clients they will accept. Given that a person requires a lawyer to successfully navigate the adversary system, and the free

⁸³ To get an idea of the problems found in the criminal court, see: Kessel; Richardson and Goff; Factor; Halon and Malia; and Patton.

market prevents some persons from hiring a lawyer, it would seem that the free market also poses a threat to dignity. In fact, I will now argue that it is indeed the case that the free market is not only dignity-threatening, but also dignity-harming.

Throughout the latter half of this thesis, I have used the arguments of Murray Schwartz to explain the role of the lawyer within the adversary system. Overall, in both of the papers I cite, Schwartz presents arguments for protecting lawyers from having to accept clients they deem undesirable, or clients whose morals they cannot agree with. I will now take a moment to examine both of these arguments from the perspective of a free market for lawyers before returning to the dignity-threat posed by the adversary system.

5.1.1 THE DIGNITY OF LAWYERS

In “The Professionalism and Accountability of Lawyers,” Schwartz argues that there is a tension between those who are licenced to practice law refusing to accept clients and the consequent need to oblige some lawyers to accept such clients (“Professionalism” 694). Schwartz recognizes that “[p]articularly in the case of lawyers, compelling arguments can be made that no person should be unable to realize his or her legal rights because of an inability to procure the assistance of a licensed legal practitioner” (“Professionalism” 694). Nevertheless, there is a worry that in requiring lawyers to take on unwanted clients there will be a lack of “protective controls and regulations” (Schwartz, “Professionalism” 694), which may lead to lawyers accepting clients they are not comfortable representing. Which, given the principle of neutral partisanship, is worrisome, for a lawyer must do what is necessary to win the case for her client. This in turn, may require the lawyer to take actions she deems as personally unacceptable, yet are necessary for the fulfilment of her role as advocate. Acknowledging this worry, Schwartz

suggests that if there is a group action, where all lawyers must at some point accept undesirable clients, “[t]he lawyer should then properly be able to claim immunity from moral accountability” (“Professionalism” 694).

This argument is important, for it reminds us that the dignity of the lawyer is also a factor which must be considered when assessing how just a legal system is. A lawyer is first and foremost a person—she is not just a tool to be used by the client to further the client’s own interests. In this way, the ability to have a choice of cases seems to be an important part of being a lawyer, for it respects the lawyer as an autonomous individual who can choose and decide for herself. Since this is the argument we are making in favour of litigants in general, but especially for *pro se* litigants, we cannot deny this same respect for the lawyer.

However, this respect for the dignity of the lawyer has an ironic twist if the lawyer works in a free market, like the one in the United States. I briefly mentioned that a lawyer is free to navigate the free market as she wishes: which means her fees and the areas of law she works in, are influenced by the market forces of supply and demand. This, coupled with the fact that the adversary system is set up in such a way that only successful lawyers move on to be successful judges (Dawson 27),⁸⁴ may necessitate choices that further her own career. In turn, it may be the case that a lawyer may make decisions that will benefit her own life rather than benefit someone else in the community.⁸⁵

⁸⁴ Also, Buhai: “American judges are either popularly elected or appointed by popularly elected executives who may have no legal training themselves and are not part of the judicial branch” (993).

⁸⁵ Or may be required to make, depending on her own life’s circumstances.

Going back to Schwartz' point about accountability, once a lawyer is working for a client, the principle of neutral partisanship requires her to do what is necessary to win the case for her client. If the lawyer allows her own bias to interfere in the case, then her client is not receiving the full benefit of an adversary advocate and may possibly be denied the justice she may deserve. For Schwartz, it is thus important for a lawyer to commit wholly to her client during the trial ("Zeal" 544).

However, I believe that this argument has a less savoury implication when coupled with the free market. If the lawyer must act in her client's best interest, then it is not the case that the lawyer can act in her *own* interest during the trial—unless her own interests happen to coincide with the interests of her client. A lawyer cannot act selfishly when she is representing her client. What this implies is that a lawyer must act in her own self-interest *prior* to accepting a client, if she is to act in her own interest at all.

In this way, if it is the case that there will be certain cases, or certain areas of law, that will further her career, or her life in general, then these are the areas the lawyer will be encouraged to choose clients from. Since the free market allows, and even encourages, lawyers to follow these opportunities, a lawyer can turn her back on potential clients who are in need of help. In fact, Drew Swank argues that within the free market, "where little or no profit motive exists—where the potential client is a plaintiff in an unprofitable case, a defendant, or where only injunctive or declaratory relief is sought—the market is highly unlikely to provide the necessary representation" (380). In short, the lawyer will go where the profit is.

From this perspective, Robert Kutak's argument makes unsavoury sense: "[t]he American adversary process at large is in most respects Darwinian. The principles of individual monopolization of personal competence and indifference to the incompetence

of others imply a ‘survival of the fittest’ theme. In the adversary system, there is no obligation, as a general rule, to aid others” (177-178). The Darwinian aspects of the DAM-model can be seen as having extended into the relationships between lawyers and potential clients, encouraging a lawyer to put herself first before choosing her client. In the free market, there is no force to obligate the lawyer to help anyone she does not want to help. When combined with this survival of the fittest attitude, it follows that a lawyer will always put herself and her own interests first before taking on the role of lawyer.

5.1.2 THE WORTH OF LAWYERS

In my explanation of Schwartz’ requirement that lawyers be equally adversary and equally competent, I mentioned that this argument may encourage a sort of arms race as litigants strive to hire a more adversarial or more competent lawyer in an attempt to sway the trial in their favour.⁸⁶ If a lawyer may charge more for her services because she has greater skills than other lawyers around her, then a person with more money is capable of tipping this balance by hiring her. As such, having more money allows a person to hire a better lawyer. This undermines Schwartz’ argument to be sure, but there is nothing in the free market to prevent such hiring practices from happening. Quite the opposite, in fact: supply and demand will dictate who can charge what, and unfortunately for a *pro se* litigant, this process will most likely not work in her favour.

⁸⁶ Already, from this perspective, one can point to an inherent flaw in the adversary system: a person may hire a better lawyer if the person has more money, yet the system itself requires that both cases be presented in an equal way so that the cases themselves are evaluated fairly and justly. Income disparities then encourage an unjust system—a point that Donagan also makes, stating: “In a society in which there are great inequalities of wealth and influence, and in which the law and judicial practice are such that rich litigants can exhaust the resources of poor ones by such maneuvers as delaying trial, the adversary system will work injustice” (Donagan 124).

From this perspective, if a civil *Gideon* were enacted within the free market, it still will not be the case that most lawyers with extraordinary skills will be representing the indigent litigants. Instead, the skilled lawyers will mostly continue to pursue the cases which offer them more rewards, while those lawyers who cannot charge such fees (or those who choose not to) will wind up working for the typically lower fees associated with state-appointed work.

Worse still, lawyers who may desire to work in the areas of law where indigent litigants require help would not be well rewarded for their efforts, and instead be overworked and possibly overwhelmed by the demands placed upon them. Again, this does not respect the dignity of the lawyer, nor, in the greater scheme of things, does this solve the problem of *pro se* litigation in a meaningful way. In this scenario, a *pro se* litigant, though she is provided with a lawyer, may still not benefit from the Rule of Law ideal, and may still have her dignity threatened by the adversary system.

5.1.3 CONCLUSIONS ON LAWYERS IN THE FREE MARKET

What should be gathered from all of this, is that the free market makes an already dignity-threatening system even more troubling: it allows those who are supposed to act as champions for the clients who need them, to turn away from said clients and pursue their own interests.⁸⁷ In short, lawyers are incentivised to pursue their own dreams upon

⁸⁷ It may also be the case that a lawyer pursues her own interests out of necessity: the cost of a law degree is also influenced by the free market and can also leave the person with crippling debt. In turn, the lawyer may go after opportunities that will provide her with the necessary resources to pay it off; even though these opportunities are not what she would pursue if she were to have an option to choose otherwise. This raises yet another problem when we consider the dignity of lawyers, as well as their role within the legal system, and society as a whole.

the backs of the very persons they are supposed to be helping and protecting—they are prioritizing their own success over the dignity of everyone else.⁸⁸

That is not to say that the philosophers I have been engaging with have not given this matter any thought, for they have. Luban suggests “that lawyers are not like other private business people. If we are to think of lawyers in market terms, we should say that society has granted lawyers an exclusive license to market the law itself, a good manufactured by the political community for the joint and shared benefit of its citizens” (“Human” 379). A lawyer, in this sense, is a trustee, with the community and all of the citizens included within the lawyer’s concern (Luban, “Human” 379). From here, Luban argues that there is a human right to a lawyer, given what is at stake if a person does not have access to legal aid (Luban, “Human” 379-381).

However, as I have already argued, Luban’s argument is just an ideal. There is nothing about the adversary system that encourages or rewards lawyers for acting as trustees—in fact, I have made the argument more than once, that considering the good of others goes against the principle of neutral partisanship, as well as the principle of impartiality. A case cannot be swayed by the interests of others, even if basic morality tells us this *should* be the case.

⁸⁸ I am not here arguing that this is what lawyers do intentionally, or that these are the consequences that lawyers are necessarily aiming for. Lawyers are all trained in similar ways, in systems that encourage certain behaviours—all while living in societies driven by the free market ideal coupled with an emphasis on independence and autonomy. Nor do I believe that all lawyers fall into this description as there are many lawyers who work tirelessly to help those in need, even at the expense of advancing their own careers or improving their own lives. Unfortunately, these lawyers are few in number. And the fact of the matter is that these market-driven practices result in one group of persons—arguably a group that already benefits greatly from their position in society—gaining advantages because of a failure to help another group of persons.

Given that all the arguments I have engaged with in this thesis argue that a person should have access to a lawyer, or that a lawyer is necessary, a free market system, encouraging lawyers to sell their skills only to the highest bidder, is an affront to justice. Furthermore, if the adversary system itself is dignity-threatening, as I have also argued, then the fact that access to lawyers is driven by the free market is itself another dignity-threatening aspect of the adversary system. It is unacceptable to argue that a system *needs* to be adversarial, and that people have a *human right* to a lawyer, and then to completely ignore all the systemic barriers that are in place which prevent persons from attaining said lawyer.

6.0 CONCLUSIONS

Let us return one final time to the *pro se* litigant, who, standing before the gates of the law, gathers her resolve. She does not have access to the necessary resources to hire a lawyer, whose prices are bloated by the dictates of the free market. She does not have the requisite knowledge she will need to present her case, let alone to properly present her evidence; nor is she prepared, or trained, to deal with the adversarial practices of the other party she will meet inside the courtroom. The *pro se* litigant may or may not be aware that the judge will not help her, and she may or may not be aware that she is completely alone on this legal journey she is about to embark on. What she does know is that having the ability to self-represent is seen as an extension of her autonomy and that it embodies the idea that with enough effort one can achieve greatness—if only she works hard enough.

Ironically, once the trial is over and she has lost her case, the only thing the *pro se* litigant can autonomously decide for herself is whether or not the loss was a result of a personal failure to be great, or the failure of the adversary system to be great *for* her. I hope for her sake that she will decide on the latter, directing her anger and frustration to where it belongs: not at herself, but at the legal system that has failed to provide her with the justice she deserves.

What can be done to help this *pro se* litigant, and the millions of others standing behind her, waiting for their day in court? To me, there are two clear options: either change the adversary system to make it less adversarial or socialize people's access to lawyers.

I am aware that neither option is appealing to those who buy into capitalist ideals—however, the harm experienced by the *pro se* litigant should be equally

unappealing. A *pro se* litigant should not have to lose her home, her life-savings, or her children because she cannot afford the help of a lawyer. The reality is that the adversary system is broken. It can either be replaced, or something must be changed so that the required lawyers are always where they need to be to prevent the adversary system from doing as much harm as it now does.

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