Understanding the Market for Personal Legal Services to Improve Access to Civil Justice in Canada

by

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Abstract

This dissertation draws upon a mixed-method research design to propose a person-centred conception of access to justice. A person-centred conception of access to justice focuses on how people experience civil justice situations and the difficulties that they have finding help to remedy those situations. This conception of access to justice is quite different from the conception that has been articulated within the Supreme Court of Canada's caselaw and within most Canadian legal writing about access to justice problems.

Building from a person-centred conception of access to justice, I argue that access to justice problems are best understood as a form of privation, rather than as a crisis besetting the legal system. I also elaborate the core content of the person-centred conception by drawing on Martha Fineman's vulnerability thesis.

My reconceptualization of access to justice emerges from: (1) an extensive analysis of the landscape of legal service providers in Canada; (2) my analysis of the experiences related by interview participants (n=9) who had suffered personal justiciable problems; and (3) an analysis of the After the JD dataset, which offers insights into the relationship between lawyers' organizational settings and the kinds of work that they do. The interview study, while numerically small, illustrates that empirical work on access to justice which begins from existing institutional frameworks risks overlooking significant dimensions of access to justice problems.

Based on my research, I propose four tangible steps to improve access to justice in a way that builds from a person-centred conception of access to justice. These steps are: (1) decreasing first-step barriers for justice-seekers by creating holistic, independent advice institutions; (2) reforming how personal legal services are regulated and delivered; (3) developing an interdisciplinary field of access to justice research, modelled on epidemiology; and (4) encouraging widespread political engagement with access to justice as an important social policy issue.

Lay Summary

This research develops a new way of thinking about access to justice problems in Canada by proposing a person-centred conception of access to justice. This approach is significantly different from how Canadian courts and many legal writers describe access to justice. The person-centred conception is based on an analysis of the legal service landscape in Canada, interview research with people who have had access to justice problems, and analysis of data on how lawyers do their work. Based on this research, I propose four tangible steps to improve access to justice problems in Canada.

Preface

This dissertation is the original, unpublished, and independent work of Andrew Pilliar.

The research for this project has been approved by the University of British Columbia's Behavioural Research Ethics Board (certificate H16-00880).

Some analysis in this dissertation is based on a dataset from the Third Wave of the After the JD study. The views and conclusions stated herein are those of the author and do not necessarily reflect the views of individuals or organizations associated with the After the JD study.

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List of Abbreviations

ABS	Alternative business structures
AJD	After the JD
CABx	Citizens Advice Bureaux
CanLII	Canadian Legal Information Institute
CRT	Civil Resolution Tribunal
CSO	Civil society organization
FLSC	Federation of Law Societies of Canada
LSC	Legal Services Corporation
NAC	National Action Committee on Access to Justice in Civil and Family Matters
NFP	Not-for-profit organization
PLEI	Public Legal Education and Information
PSM	Public service motivation

Acknowledgements

This dissertation has had a long gestation, and I owe thanks to many whose support has allowed me to work on it over the years.

I want to acknowledge my gratitude for the opportunity to live and work as an uninvited guest on traditional and unceded territories while completing this dissertation, first of the xʷməθkʷəy̓əm (Musqueam), Skxwú7mesh (Squamish) and səlilw̓ətaʔɬ (Tsleil Waututh) Coast Salish peoples, and later within Secwépemc'ulucw, the traditional and unceded territory of the Secwépemc people.

I also want to extend my profound gratitude to the interview participants who generously shared their lived experiences and ideas regarding access to justice. These interviews have formed a core part of this research, and I have spent many hours trying to imagine how these experiences could lead to a better shared future.

I could not have hoped for better guidance and support than I received from my supervisory committee members, Dr. Patrick Francois, Dr. Emma Cunliffe, and Dr. Mary Liston. They were unfailingly generous with their time, humane with their comments, and rigorous with their critiques. I want to thank Mary in particular for her patience and thoughtful engagement as my supervisor over the years. She has been a model supervisor and I have appreciated her guidance, humour, and wisdom.

The Peter A Allard School of Law has been a stimulating community in which to work on this dissertation. I want to acknowledge and express my thanks in particular to Joanne Chung, Dr. Ljiljana Biukovic, and Dr. Douglas Harris for conversations and support. Thanks also to Neil Lloyd for discussing topics in economics and statistics which have informed some of my work on this dissertation.

Finally, I want to express my deep gratitude and love to my family, and in particular, to my parents, Bob and Penny, my mother-in-law, Allison, my wife, Megan, and my children, Sydney, Ewan, and Callum.

Dedication

For Sydney, Ewan, and Callum

Chapter 1 – Putting People at the Centre of Access to Justice

1 Introduction

This dissertation is about conceptualizing, understanding, and improving access to justice. It is about putting people at the centre of access to justice.

The topic of "access to justice" has been ascendant in the Canadian legal profession in recent decades.[1] Many within the legal profession have called access to justice a "crisis".[2] Research shows that almost 50 percent of adults in Canada experience at least one significant legal problem over a three year period, but few seek or obtain legal services to help deal with such problems.[3] Despite prominent calls to action, reports, and even some government support, access to justice remains a nebulous concept for many, is largely ignored outside the legal profession, and has not demonstrably improved.

To address these problems, I propose a person-centred conception of access to justice. This is a new turn in Canadian access to justice research and is a departure from previous conceptions that have been, in one way or another, dependent on the concept of the rule of law for their normative force. Instead, I suggest that a legal system built around the model of universal human vulnerability holds significant promise to invigorate research and policy approaches to improve

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[1] See e.g. The Right Honourable Beverley McLachlin, "The Challenges We Face" (Address delivered at the Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada <www.scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx>; Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act, Final Report* (Ottawa: Canadian Bar Association, 2013) [Reaching Equal Justice]; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) [NAC Report]. See also The Right Honourable Richard Wagner, "Access to Justice: A Societal Imperative" (Address delivered at the 7th Annual Pro Bono Conference, Vancouver, British Columbia, 4 October 2018), online: Supreme Court of Canada <www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx>.

[2] See e.g. Jennifer Bond, David Wiseman, & Emily Bates, "The Cost of Uncertainty: Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector" (2016) 25 J L & Soc Pol'y 1 at 3-4.

[3] Canada, Department of Justice, *The Legal Problems of Everyday Life The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* by Ab Currie (Ottawa: Department of Justice, 2007) at 10, online: <www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07_la1-rr07_aj1/rr07_la1.pdf> [Legal Problems of Everyday Life]. See also Trevor CW Farrow et al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016) at 6, online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf> [Cost of Justice].

access to justice. It does so by offering a framework which is both universal and sensitive to individual contexts. It provides a normative lens to focus access to justice on those who need it – people.

Building access to justice around a person-centred conception is important because it can generate a feasible way to correct the current trajectory of the legal system.[4] There is good reason to think that the formal mechanisms of the legal system are distant from the lives of many people.[5] As a social institution, the legal system is often perceived as removed, unhelpful, and a place to turn only as a last resort. This is problematic, since law and legal instruments have increasingly encroached on everyday life in recent decades. Everywhere, our lives are regulated, circumscribed, and intersected by legal concepts and structures. We live, as legal scholar Gillian Hadfield aptly describes, in a "law-thick" world.[6]

I suggest that a legal system can be a tool to empower individuals and to make populations more resilient. It can become a responsive social institution which is attentive to each person. It can be a prime location for the ongoing investigation of what "justice" should mean in specific contexts.

In addition to this conceptual innovation, the dissertation also contributes new mixed-methods research to help better understand two aspects of access to justice problems. First, it employs small-scale interview research which helps to reveal how people respond to problems that have a legal dimension. This research contributes to the field of advice-seeking behaviour in the context of legal services. Second, the dissertation provides results and discussion from a novel analysis of data on how lawyers create and deliver legal services. This analysis is relevant to recent discussions of legal services regulation and provides insight into the structure of the legal profession.

[4] The meaning of "legal system" and other related terms is discussed in the next section of this chapter.
[5] See e.g. Trevor CW Farrow, "What is Access to Justice" (2014) 51:3 Osgoode Hall LJ 957 at 972-974; Rebecca L Sandefur, "Access to What?", (2019) 148:1 Dædalus 49 at 49-50; Elizabeth Chambliss, "Marketing Legal Assistance" (2019) 148:1 Dædalus 98 at 98.
[6] Gillian K Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans" (2010) 37 Fordham Urb LJ 129 at 133.

Finally, the dissertation provides recommendations, based on the foregoing research, to implement person-centred access to justice in Canada. These recommendations include both policy modifications for legal regulators, and suggestions for future research.

The dissertation proceeds as follows. The remainder of this chapter defines key terms and then introduces the participants of the small-scale interview research noted above.

In Chapter Two, I describe and critique one current conception of access to justice. I lay out the judicial conception of access to justice that Canadian courts have constructed and elaborated on in recent years. I contend that this conception is inadequate because it is too narrow and therefore is ineffective in the face of prevailing access to justice problems.

Chapter Three maps out the institutional and market terrain upon which conventional conceptions of access to justice rest. Legal services are largely delivered by market mechanisms in Canada, and this chapter provides a high-level map of that market.

In Chapter Four, I review existing research on the market for legal services that is helpful in contextualizing access to justice problems. The chapter focuses on three areas: 1) regulation, competition, and pricing; 2) the labour market for legal services; and 3) consumer behaviour in the personal legal services market.

Chapter Five describes and critiques an expanded vision of access to justice that has emerged in Canada in recent years through prominent reports and in academic writing.[7] It also explores some additional visions of access to justice that move beyond the judicial conception, while remaining tethered to the rule of law. While these visions improve on the conventional judicial conception laid out in Chapter Two, key weaknesses remain. This chapter concludes by arguing that we need a new conception of access to justice to fully meet human needs and the requirements of substantive justice.

In Chapter Six, I report the results of new research into demand for legal services. This aspect of my study explores how individuals who were faced with a significant legal problem respond to that problem. It therefore draws on and contributes to academic literature regarding advice-

[7] See e.g. NAC Report, *supra* note 1; Jane Bailey, Jacquelyn Burkell, & Graham Reynolds, "Access to Justice for *All*: Towards an 'Expansive Vision' of Justice and Technology" (2013) 31 Windsor YB Access Just 181.

seeking behaviour. For this portion of my research, I conducted detailed interviews with nine individuals who experienced a significant problem with a legal dimension – either a personal injury or a government benefits problem. Conducting a small-n interview study with people who have experienced the kinds of problems that have formed the basis for previous Canadian research studies has several benefits. It allowed me to gain new perspectives on how people without legal training experience and respond to problems that lawyers would define as legal problems. It illustrated how access to justice is realized – or frustrated – within an assembly of state and social processes. This in turn led me to the conviction that solutions to the access to justice challenge must similarly be imagined from the vantage point of those who experience those challenges.

In Chapter Seven, I explore how legal service providers create and deliver legal services. After describing existing research on how personal legal services are delivered, I report the findings of a quantitative study. This study suggests that not-for-profit law firms may provide some advantages over for-profit firms in delivering personal legal services in some circumstances. I conclude this chapter by discussing some intriguing differences between lawyers working in not-for-profit settings and those working in for-profit firms.

Taking the insights from Chapters Six and Seven into account, I then make my main normative argument for a person-centred conception of access to justice in Chapter Eight. This conception takes some inspiration from the expansive vision of access to justice discussed in Chapter Five but pays attention to the foundational commitments of the conception by situating human vulnerability at the core of the promise of access to justice. In making this foundational shift, I necessarily relegate some other normative foundations, such as the rule of law, to a secondary role.

Chapter Nine draws together the preceding pieces into suggestions to sustainably and meaningfully improve access to justice in Canada, before concluding in Chapter Ten.

Finally, detailed descriptions of the methodologies used in this dissertation are contained in Appendices A and B.

2 Defining Key Terms

Before introducing the individuals at the heart of this dissertation, I will clarify some terms that are used throughout. Although I have tried to use terms consistently, some terms are contested or used in different ways by different researchers. As a result, some quotations may use a term in a different way than I have been using that term. This clarification section is intended to help reduce confusion about these differences.

One of the most significant terms in this dissertation is "access to justice" itself. Indeed, clarifying what I mean by access to justice forms the basis for much of Chapters Two, Five, and Eight. But it is important to note at the outset that the idea of "access to justice" has been used with increasing frequency in recent years in Canadian legal discourse, though its use has not always been accompanied by a thorough or clear explanation of what the term means to the person employing it.[8] As I will discuss in Chapter Two, I use access to justice as a concept which admits of multiple conceptions, and will draw out and critique some of these existing conceptions before offering my own, person-centred conception.[9]

Two other terms that are often associated with access to justice are the "legal system" and the "justice system". While these terms are sometimes used interchangeably, a long-standing jurisprudential debate exists over the relationship between law and justice.[10] In this dissertation, I will generally refer to the legal system rather than the justice system. As Chapter Seven particularly demonstrates, I take a capacious view of what the legal system incorporates: in my use, it includes courts and tribunals, but also laws and information about laws and legal practice. It includes not only lawyers and judges, but also paralegals, public legal education organizations, and community advocates who impart information about law (whether that information is accurate or not).

This leads to questions about who provides legal services and how they do so. I have chosen to identify those who work within the legal system as "legal service providers". This phrase includes lawyers, paralegals, and associated support staff, such as legal administrative assistants.

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[8] See Catherine R Albiston & Rebecca L Sandefur, "Expanding the Empirical Study of Access to Justice" (2013) Wis L Rev 101 at 105.
[9] See Chapter Two, below.
[10] See e.g. Leslie Green, "Positivism and the Inseparability of Law and Morals" (2008) 83:4 NYUL Rev 1035.

But it also includes individuals whose work includes providing legal information, for example social workers and non-lawyer staff members at public legal information organizations. The question of who provides legal services can be highly contentious.[11] I intend "legal service providers" to be a broad and inclusive term; where context requires, I will refer to specific jobs or professions, such as lawyers, using those narrower terms.

I also divide legal services into a sub-domain of "personal legal services". This denotes legal services that are provided to human individuals, as opposed to organizations such as corporations, governments, or not-for-profit organizations.

Finally, it is important to introduce some terms and concepts related to demand for legal services. These terms will be used predominantly in Chapters Three and Six. "Unmet legal needs" research refers to research, often conducted by survey, which attempts to understand how often people within a society need and obtain access to legal services. These legal needs can be problems, such as a dispute with a neighbour or a personal injury, but can also include other situations that might benefit from legal goods or services, such as needing a will.[12] Unmet legal needs research has been conducted since at least the mid-20th century in many countries around the world. Beginning in the late 1990s, socio-legal scholar Hazel Genn revolutionized that research and laid the groundwork for subsequent legal needs research.[13] Unlike earlier studies, Genn's work uses a population-representative sample and is based on the concept of a "justiciable event". A justiciable event has been defined as a matter:

> which raised legal issues, whether or not it was recognised by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.[14]

This differs from previous survey methods in that it emphasizes the event itself, rather than whether that event was identified as legal. Earlier studies risked under-reporting results since

[11] See e.g. Robert W Gordon, "Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History" (2019) 148:1 Dædalus 177; Felice Batlan, *Women and Justice for the Poor: A History of Legal Aid, 1863-1945* (New York: Cambridge University Press, 2015).
[12] Herbert M Kritzer, "The Antecedents of Disputes: Complaining and Claiming" (2011) 1:6 Oñati Socio-Legal Series 1 at 8.
[13] Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart Publishing, 1999).
[14] *Ibid* at 12.

respondents who were asked about legal problems may have failed to recognize some events as being legal in nature.

While unmet legal needs research, particularly that based on the concept of justiciable events, has been influential, some scholars have argued that the term "unmet legal needs" is misapplied. For example, socio-legal scholar Rebecca Sandefur has suggested that legal *needs* implies a normative frame that does not follow from the descriptive nature of the research.[15] That is, without being able to say whether people are better off seeking to resolve a problem through legal means, it is impossible to assert a circumstance as a legal need. In some instances, for example, it may be preferable from the perspective of an individual to buy an electric fan rather than seek legal recourse against a landlord for inhospitable living conditions.[16] In response to this critique, some researchers have referred to examples of non-criminal justiciable events not as unmet legal needs, but rather as "civil justice situations".[17]

These sometimes-subtle differences in terminology can seem unnecessary or hard to keep track of, but they are important. Being attentive to the terminology around access to justice is a necessary precondition for examining the issue at the heart of this dissertation – grounding a conception of access to justice in people's experience of injustice.

3 Meeting the People at the Heart of Access to Justice

Recognizing the importance of access to justice to people who experience injustice is a consistent theme in this dissertation. Too often, as Chapters Two and Five contend, efforts to improve access to justice have focussed on improving legal institutions rather than on the affected individuals. To avoid this tendency, this dissertation prominently features the experiences of people who have lived with access to justice problems. Nine people sat down with me to discuss a significant personal injury or government benefits problem they had experienced

[15] Rebecca L Sandefur, "What We Know and Need to Know about the Legal Needs of the Public" (2016) 67 SCL Rev 443 at 451.
[16] This hypothetical example is not to suggest, however, that claims against landlords should generally be disregarded in favour of self-help measures. It is merely to give a possible example of a situation where a non-legal resolution may be preferable to a legal one.
[17] See e.g. Sandefur, *supra* note 15 at 450-451.

within the past three years.[18] The participants were recruited from neighbourhood houses in the Greater Vancouver area, and were previously unknown to me.[19]

The two problem types – personal injury or government benefits problem – were used in recruitment materials because, while they appear to occur at similar rates across the population, they differ significantly in whether they are perceived to be "legal" in nature.[20] While personal injury problems are perceived as legal at relatively high rates, government benefits problems are perceived as legal at relatively low rates. Further, while personal injuries lead to a relatively high level of advice-seeking behaviour, government benefits problems lead to one of the lowest rates of advice-seeking. By selecting research participants who had experienced one of these two types of problems, I hoped to be able to discern different patterns in how people perceived these problem types. Initially, I viewed a small-scale interview research study as a good pilot project in this area to assess whether participants who had experienced different problem types would describe thinking about their experiences in ways that clearly differed on the basis of problem type. As discussed later in Chapter Six, no such clear difference emerged from the data collected in this study. While the sample size and recruiting techniques used for this study are too limited to allow generalization based on this apparent null result, the study has yielded some unexpected insights into how people constructed their understanding of available options, as also discussed in Chapter Six. The process and findings in this study may be useful in creating future studies to examine this point in more detail.

These interviews form the basis for the research described in Chapter Six, and are also woven throughout the text to demonstrate and serve as a reminder that access to justice problems are problems for people.[21]

This introductory chapter serves, therefore, not only as an introduction to the dissertation, but also as an introduction to the interview participants whose experiences animated much of this

[18] I conducted a total of 11 interviews, but unfortunately had to exclude two of those interviews because the legal problem the individual experienced fell outside the range of problems that were the focus of the research.
[19] See Appendix A, below, for more information about neighbourhood houses and the recruitment methods used.
[20] See e.g. Legal Problems of Everyday Life, *supra* note 3 at 12-13 (reporting incidence rates for personal injury problems of 2.9%, and incidence rates for social assistance and disability benefits problems at 1.2% and 1.0%, respectively); Farrow et al, *supra* note 3 at 8 (reporting incidence rates for personal injury problems at 2.5%, and incidence rates for social assistance and disability benefits problems at 1.6% and 1.2%, respectively).
[21] A detailed explanation of the research methodologies used in this dissertation is found in Appendix A.

research. The interviews focussed largely on how each person responded to the problem or problems they experienced. In many cases, I saw that an individual experienced both kinds of problems in which I was most interested. For example, a personal injury often gave rise to government benefits problems.

Below, I briefly describe the types of problems that each interview participant described, and some of the response steps that each person took. These vignettes introduce the participants, who will be referred to throughout this dissertation.[22] Chapter Six focusses largely on the interview participants and contains the most discussion about the problems they described and their responses to those problems.

Note that these introductions and the later analysis should not be understood as objective descriptions of "how things were".[23] Rather, they are the culmination of a series of contingencies: how an interview participant perceived the events that were the focus of the interview; what the interview participant remembered and presented during the interview; the researcher's choice of questions and prompts; the relationship between the researcher and interview participant during the interview; and the researcher's subsequent decisions about how to characterize the interview information. The research encounter is a co-created space, comprised of decisions, responses, and interactions on the part of both the interview participant and the researcher. This includes the nature of the initial recruitment materials, the location of the interview, and the verbal and unspoken communications between researcher and participant before, during, and after the interview. As such, the characteristics of not only the interview participant, but also the researcher are important. As researchers Anne Pezalla, Jonathan Pettigrew, and Michelle Miller-Day have noted:

[22] I have changed the names of each interview participant to protect their privacy. Also, I have omitted or changed some geographical or other details to protect privacy.

[23] For further discussion on the points made here, see Emma Cunliffe, "(This Is Not a) Story: Using Court Records to Explore Judicial Narratives in R. v Kathleen Folbigg" (2007) 21:1 Australian Feminist Law Journal 71; Emily C Bishop & Marie L Shepherd, "Ethical Reflections: Examining Reflexivity Through the Narrative Paradigm" (2011) 21:9 Qualitative Health Research 1283; Heather Elliott, Joanna Ryan & Wendy Hollway, "Research Encounters, Reflexivity and Supervision" (2012) 15:5 International Journal of Social Research Methodology 433; Barbara Fawcett & Jeff Hearn, "Researching Others: Epistemology, Experience, Standpoints and Participation" (2004) 7:3 International Journal of Social Research Methodology 201; Anne E Pezalla, Jonathan Pettigrew, & Michelle Miller-Day, "Researching the Researcher-as-Instrument: An Exercise in Interviewer Self-Reflexivity" (2012) 12:2 Qualitative Research 165.

> Because the researcher *is* the instrument in semistructured or unstructured qualitative interviews, unique researcher attributes have the potential to influence the collection of empirical materials.[24]

Although I have taken steps to try to acknowledge and reduce my preconceptions and implicit biases in respect of this research, it is not possible to eliminate these entirely. At the time of the interviews, I presented as a white, male researcher in my mid-thirties. Although I took steps to minimize the "legal" nature of the research, some evidence of this association was evident to each participant. For example, each interview consent form acknowledged my affiliation with the Peter A. Allard School of Law at the University of British Columbia. I present this information to acknowledge that the narratives recounted in this dissertation – like all narratives – are constructed. Appendix A contains a more detailed discussion of the nature of these research encounters.

Table One sets out the problem type or types that each interview participant identified, along with some socio-demographic information. In order to introduce the participants in a bit more detail, brief descriptions of each participant follow Table One. Participants are presented in the order in which the research interviews took place.

[24] Pezalla, Pettigrew, & Miller, *supra* note 23 at 166 [emphasis in original].

Table 1: Description of interview participants

Name	Problem Type	Socio-Demographic Information
George	Personal injury and government benefits problem	Age at time of interview: 56 Gender: Male Education: Finished community college Employment Status: Unemployed or looking Household Income: <$25,000
Michael	Government benefits problem	Age at time of interview: 66 Gender: Male Education: Finished high school Employment Status: Retired Household Income: <$25,000
Justine	Personal injury	Age at time of interview: 52 Gender: Female Education: Graduate or professional degree Employment Status: Unemployed or looking Household Income: <$25,000
Anthony	Personal injury and government benefits problem	Age at time of interview: 43 Gender: Male Education: Graduate or professional degree Employment Status: Student Household Income: <$25,000
Pat	Government benefits problem	Age at time of interview: 53 Gender: Female Education: Finished community college Employment Status: Disability Household Income: <$25,000
Alex	Government benefits problem	Age at time of interview: 55 Gender: Non-binary Education: Finished high school Employment Status: Disability Household Income: <$25,000
Mia	Personal injury	Age at time of interview: 66 Gender: Female Education: Finished undergraduate university Employment Status: Retired Household Income: <$25,000
Chris	Personal injury and government benefits problem	Age at time of interview: 56 Gender: Male Education: Finished undergraduate university Employment Status: Seeking disability benefits Household Income: <$25,000
Sara	Personal injury and government benefits problem	Age at time of interview: 32 Gender: Female Education: Finished undergraduate university Employment Status: Working part-time Household Income: <$25,000

a) George

George was in his mid-50s at the time of our interview, which took place in his apartment in Vancouver. Just under three years before our interview, George had been assaulted in his apartment by several strangers. George was injured during the assault and spent time in hospital as a result. He described the assault as a significant one that "changed [his] life".[25] This was the personal injury that George discussed during his interview. In addition, George had also been dealing with an unrelated appeal with respect to a government disability benefit around the time of the assault. This was the government benefits dispute that George discussed during his interview.

In response to his personal injury, George contacted the police, government agencies, an elected official, his church, a support group, and family members. George also tried to contact the media and a telephone legal information service, but both attempts went unanswered. George also dealt with medical service providers as a result of his injury.

George dealt with his government benefits problem by turning to medical service providers, government officials, a social worker, a financial advisor, some community advocates, family members and friends who had experienced similar problems. George noted that he did extensive online research for this problem and found useful information from a justice-related not-for-profit organization.

George indicated that he was not satisfied with how his personal injury problem had been dealt with. By comparison, he described being relatively satisfied with how his government benefits problem was dealt with, though he described that process as "time consuming… [with] a lot of hurdles… a lot of bureaucracy… a lot of red tape… a lot of forms".[26]

[25] Interview of George (May 12, 2016) [George interview].
[26] *Ibid*.

b) Michael

Michael was in his mid-60s at the time of our interview, which took place in a coffee shop in Vancouver. Michael's interview focussed on a government benefits dispute. Specifically, Michael had been disputing the amount of public pension he was receiving and had been doing so for 15 months at the time of our interview. One of the things that Michael described missing most in the course of this dispute was access to a bus pass. As he described it, "because I'm waiting for these benefits, I can't get a bus pass. Which health-wise is bad for me, because when I had a bus pass I could go all over the place and walk, and walking is my exercise".[27]

Michael had tried to deal with the matter himself, but had also contacted government representatives, a community advocate, and had sought assistance from a friend who had dealt with a similar type of dispute in the past. Michael was still attempting to resolve this problem when we spoke.

c) Justine

Justine was 52 when she participated in her interview, which took place in a park in Vancouver. Justine described a personal injury that greatly affected her. While she was recovering from an injury to her hand which had altered her ability to work, Justine fell while walking down a city street. The fall resulted in damage to her teeth, knee, and hand. Importantly, the fall damaged nerves in the hand that was most functional at the time, meaning that Justine was unable to use either of her hands properly. Justine focussed on the second injury as the more devastating for her. As she described it, "that other one [the first hand injury], well this is still a problem, but I was thinking I could probably do… find work, right? But then when this happened [the second injury], so I'm now, like, I've got two hands that aren't up to snuff."[28]

[27] Interview of Michael (May 16, 2016) [Michael interview].
[28] Interview of Justine (June 9, 2016) [Justine interview].

Justine described obtaining medical assistance for her injury and recovery. She also sought help from family and friends, her church, a community advocate, and a counsellor before ultimately finding some helpful assistance from a community association.

Justine was not at all satisfied with how her problem had been dealt with at the time we spoke.

d) Anthony

Anthony was 44 when he participated in an interview outside his apartment in Vancouver. Anthony described both a personal injury and a government benefits problem. Anthony's personal injury occurred when a previous landlord sprayed his apartment with a substance that Anthony believed to be toxic. Anthony explained that exposure to this substance exacerbated some existing health problems, and resulted in his hospitalization.[29] Anthony described his government benefits problem as an ongoing dispute with government about receiving disability and other benefits that he believes he is entitled to, but that the government refused to provide.

Regarding his personal injury, Anthony described seeking assistance from a wide range of people and organizations. In addition to seeking help from medical service providers, Anthony contacted the police, government officials, an elected politician, his church, friends, and members of his family. Anthony also called a telephone legal information line, contacted numerous private lawyers to see if any could help him, and was trying to find a community advocate at the time of our interview.

In dealing with his government benefits problem, Anthony also contacted government officials, an elected politician, his church, friends, and members of his family. He called a telephone legal information line, sought assistance from a public legal information and education source, and sought assistance from a community advocate.

Anthony was not satisfied with how either his personal injury or his government benefits problem had been dealt with.

[29] Interview of Anthony (June 9, 2016) [Anthony interview].

e) Pat

Pat was 50 years old when her government benefits problem began. We spoke about her responses to this problem in her apartment in Vancouver. Pat described receiving a letter from a government agency informing her that benefits for a dietary supplement, which she had been receiving for years and depended upon, would be cut off. This was a significant problem for Pat.[30]

Pat described seeking assistance from a wide range of sources to try to deal with this problem, including medical service providers, family members, government officials, an elected politician, friends, and the police. She also attempted to contact a community advocate, though she was unable to actually speak with anyone from the community agency.

Pat was still dealing with this problem when we spoke.

f) Alex

Alex identified as a non-binary transgender person during our interview in a Vancouver coffee shop.[31] Alex described a government benefits dispute. Alex had been receiving government benefits, but encountered difficulties relating to whether the government would deduct or claw back monies that Alex received from family members. Alex noted that this problem "really upset me" and put them "in a state of fear".[32]

Alex described seeking help from a family member, friends, an elected politician, a support group, Alex's church, mental health support workers, and staff members in Alex's supportive housing community.

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[30] Interview of Pat (June 15, 2016) [Pat interview].
[31] Interview of Alex (July 21, 2016) [Alex interview]. I very much regret that I failed to clarify Alex's preferred gender pronouns during our interview. In this dissertation, I will use the singular "they" to refer to Alex, in part because Alex identified as non-binary, and also to help protect Alex's identity. I am aware that in making this choice I may be acting counter to Alex's own preferences, and I apologize to Alex if this is the case.
[32] *Ibid*.

Alex was not satisfied with how the government benefits problem was resolved.

g) Mia

Mia was in her late 60s when she participated in an interview.[33] The interview took place in a community agency in Vancouver. Mia described a personal injury that had taken place while she was travelling in the United States. Mia fell while walking and shattered one of her leg bones. This injury required surgery and extensive rehabilitation. Unfortunately, Mia had no applicable medical insurance at the time. Mia described the physical consequences of her injury as significant, however, she also noted that during the course of her treatment and recovery she reconnected with many old social contacts, and this had a positive effect on her life.

Mia responded to her injury by seeking medical assistance, and by depending upon strangers, friends, members of her religious community, government officials, and family members. She also benefitted from the insurance policy of the establishment where she had fallen, though this was something that the establishment followed-up on voluntarily. Mia did not need to press this issue beyond raising the possibility.

Ultimately, Mia described being satisfied with how her personal injury was handled and resolved.

h) Chris

Chris was 56 when we discussed his personal injury and government benefits problems in a park in Vancouver. Chris described several events, noting that the problems were linked: "because of personal injury, problems with government benefits happened."[34] Chris first described a "disability issue that crept up, a personal illness, that may have come from an injury – we don't know."[35] This led to work interruptions, and subsequently to ongoing problems in trying to

[33] Interview of Mia (July 22, 2016) [Mia interview].
[34] Interview of Chris (October 4, 2016) [Chris interview].
[35] *Ibid*.

access appropriate government benefits. The personal injuries and government benefits problems each had a significant negative effect on Chris.

In response to the personal injury problems, Chris sought assistance from medical service providers, his union, his employer, friends, and family members.

In response to his government benefits problems, Chris sought assistance from an even wider range of people and organizations. He sought assistance from his union, an employee assistance program, the building manager in his residence, his private insurance provider, the police, government officials, and an elected politician. Chris also made use of a library, a legal information telephone line, free legal consultation services, a community advocate, and he spoke to a private lawyer.

Chris was still dealing with his personal injuries and his government benefits problems when we spoke.

i) Sara

Sara was in her early 30s when her interview took place in a private room in a university library. Sara described experiencing both a personal injury and related government benefits problems. At the time of her injury, Sara had just finished her first week of classes at a postsecondary education institution. While walking, she "got into what they call a freak pedestrian accident."[36] This event left Sara with significant head injuries and a broken arm. She was taken to hospital, and after a period of recovery realized that she would not be able to study or work as she had previously done. This led to Sara's government benefit problem, in which she struggled to navigate the application process to obtain and retain income supplements while she was unable to work. Each of these events was significant for Sara and had a substantial negative impact on her life.

Sara's responses to the personal injury included receiving assistance from medical professionals, and she also sought assistance from government officials, police, her union, her academic

[36] Interview of Sara (November 7, 2016) [Sara interview].

institution, and family members. Sara also called a medical information telephone line, a legal information telephone line, and spoke with a private lawyer about her situation.

In response to the government benefits problem, Sara also sought assistance from medical professionals, government officials, her union, social workers, as well as friends and family members. Sara also used a public legal education website and contacted a community advocate for assistance.

At the time of our interview, Sara was still dealing with both her injury and the government benefits problem.

The experiences described by these nine interview participants may not be fully representative of how people across Canada respond to access to justice problems, but they are instructive. They provide detail and context which is necessary to glimpse the range of ways in which people respond to problems with a legal aspect. From other, nationally representative research we know that civil justice problems are ubiquitous in Canada, as they are in many countries.[37] We also know that those problems, and the resources and capacities to respond to those problems, are not evenly distributed throughout the population.[38] People at or near social margins appear to experience clusters of civil justice problems, and often have relatively fewer resources to deal with those problems, compared to population averages.[39] Where interview participants experienced difficulties in responding to problems, there is good reason to believe that others may experience similar or even more pronounced difficulties. The ubiquitous nature of civil justice problems, the concentration of some of those problems within particular sub-populations,

[37] See e.g. Sandefur, *supra* note 14. See also World Justice Project, "Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries" (2019), online (pdf): <worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf>.
[38] See Legal Problems, supra note 3; Cost of Justice, *supra* note 3.
[39] See Legal Problems, *supra* note 3 at 44-47. See also Sandefur, *supra* note 5 at 53. I use the term "social margins" to denote groups of people with shared characteristics that have often been regarded as outside society's dominant norms. For example, Currie's research noted that being disabled, being a member of a visible minority, being Indigenous, receiving social assistance, being young, and having a low income were each related to a higher likelihood of reporting multiple justiciable problems. But it is important to remember that marginality is a constructed, complicated, and relative term. See e.g. Sam Turner & Rob Young, "Concealed Communities: The People at the Margins" (2007) 11 Int J Histor Archaeol 297.

and the uneven distribution of resources to deal with those problems are troubling and present a significant distributive justice problem.[40]

Further details about the narratives of the interview participants are woven throughout this dissertation, with an explicit focus on these narratives in Chapter Six.

4 The Human Side of Access to Justice in Canada

I began this chapter by indicating that this dissertation is about conceptualizing, understanding, and improving access to justice.

If these three things – conceptualizing, understanding, and improving – are the spine of this dissertation, the interviews are its metaphorical heart. They animate the conception of person-centred access to justice. They signify the importance of reimagining a legal system premised upon the experiences of people who are the potential users of that system. This is why these interviews have featured prominently in this introduction, and why they will be referenced throughout the dissertation.

This dissertation critiques some existing conceptions of access to justice, and offers a novel, person-centered conception rooted in human vulnerability. I argue that this person-centred conception is a more potent and useful normative framework to improve access to justice than other existing conceptions. This work takes place in Chapters Two, Five, and Eight.

Recognizing that much more research needs to be done to translate a person-centred conception of access to justice into reality, the dissertation also contributes to understanding access to justice problems. It does this through research using two complementary methodological approaches: exploratory interview research on advice-seeking behaviour, and quantitative research on how

[40] Distributive justice is concerned with the socially just allocation of resources. It focuses on how benefits, goods, costs, and risks are distributed across group members and assesses the justness of those outcomes. There are three major schools thought relating to distributive justice: Rawlsian justice, utilitarianism, and luck egalitarianism. This dissertation draws on the work of some distributive justice thinkers, but a detailed engagement with theories of distributive justice is beyond the scope of this project.

legal professionals organize themselves to provide legal services. This work takes place in Chapters Six and Seven.

The dissertation also offers suggestions on how to improve access to justice, both by suggesting policy reforms and also by outlining future research that will help to advance the conception of access to justice elaborated in this dissertation. This work takes place primarily in Chapter Nine.

As I noted earlier in this chapter, access to justice is often described as a crisis. That is a misleading epithet.[41] A crisis denotes a turning-point.[42] Civil justice problems are personal crises for the thousands of people who struggle with those problems on a daily basis, as they were for many of the interview participants, but there has been little indication in recent decades that this situation is poised to change. As legal scholar Efrat Arbel has observed in the context of the mass incarceration of Indigenous people in Canada, describing the situation as a crisis is a "fundamental mischaracterization" that suggests that the status quo "is somehow exceptional or temporary, as crises are", when that phenomenon is demonstrably neither.[43]

Access to justice problems are less a crisis than a chronic condition.[44] But perhaps more fittingly, the current state of affairs is a privation.[45] Privation denotes absence, loss, or deprivation. This privation resonates in multiple ways. Access to justice problems are an ongoing hardship and absence of justice for people. For those people, the privation is the absence of a just resolution to a problem or just access to resources. To be clear, the person-centred conception of access to justice that I set out in this dissertation seeks to make this perspective the focal point of reform efforts. But access to justice problems are simultaneously a privation for the legal system. These problems demonstrate failure on the part of the legal system to respond to social needs, and

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[41] Andrew Pilliar, "What will you do about access to justice this year?" (16 October 2016), online (blog): Legal Aid Ontario: <www.legalaid.on.ca/2019/10/16/andrew-pilliar-what-will-you-do-about-access-to-justice-this-year>.
[42] *OED Online*, Oxford University Press, March 2020, online: <www.oed.com/view/Entry/44539> sub verbo "crisis". The definition includes: "A vitally important or decisive stage in the progress of anything; a turning-point; also, a state of affairs in which a decisive change for better or worse is imminent; now applied esp. to times of difficulty, insecurity, and suspense in politics or commerce."
[43] Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 CJLS 437 at 452.
[44] *Supra* note 41.
[45] *OED Online*, Oxford University Press, March 2020, online: <www.oed.com/view/Entry/151613> sub verbo "privation". The definition includes: "1. Philosophy The condition of being deprived of or lacking an attribute or quality formerly or properly possessed; (more generally) the loss or absence of a quality; an instance of this.; 2.a. The action of depriving a person or thing of, or of taking something away; the fact of being deprived of something; deprivation. Now rare.; 2.b. Law. The action of depriving a person of an office or position".

through this failure the legal system is deprived of the voices and views of those it has excluded.[46] Finally, access to justice problems are a privation for society at large. They demonstrate that society's current institutions cannot satisfy a fundamental human need, namely the desire for justice.

With this introduction in place, I now turn to present the conventional judicial understanding of the concept of access to justice, explain what that judicial conception entails, and demonstrate why it is an inadequate footing from which to remedy the access to justice privation in Canada.

[46] See e.g. Pivot Legal Society, "Supporting victims of police violence: Bobbi's story" (8 January 2018), online: *Pivot Legal Society* <www.pivotlegal.org/supporting_victims_of_police_violence_bobbi_s_story>. In the words of lawyer Doug King (embedded video at 2:29-3:08): "I think it's important for our clients to access justice, but I think it's equally important for the justice system to have access to them. If our society is going to grow, if it's going to develop in a way that we want it to, these stories need to be told and these people need to have a seat at the table… In terms of access to justice and people like Bobbi, if she has access to justice then we all benefit… if she obtains that sense of justice then it's not just good for her, it's good for all of us."

Chapter 2 – Access to Justice: The Canadian Judicial Conception

1 Inaccessible Justice

Sara was just starting post-secondary studies when she experienced a freak injury. After the injury, she "went from somebody who was in school full time to somebody who is now on government assistance."[47] Over the course of the next 18 months, she struggled to navigate through medical and government benefit systems. Seeking legal assistance appeared to be peripheral to Sara's overall recollection of how she dealt with her injury, explaining that "I was dead broke, and I'm like 'how the hell am I going to pay a lawyer, and who the hell would do that on contingency?'… So, no. There was no hope in hell."[48] But reflecting on her experiences, she wonders if things could have been different: "I think that if there had been either something different in my experience, like, for example,… if I had found one of my employers to be more accommodating, I probably wouldn't be here on assistance right now. So, I find that extremely frustrating."[49]

Another interview participant, Anthony, has lingering questions about whether a former landlord exposed him to unsafe chemicals in his apartment. But he has had recurring difficulty finding help in trying to understand what he could do to try to hold his former landlord accountable. He described getting nowhere after talking with friends, family members, and government agencies. Eventually, he realized "'well, I need an advocate.' I know that I'm not capable of keeping my cool… And so, I knew right away I needed somebody else to speak for me."[50] But Anthony has been unable to find an advocate to help him understand whether he has any legal recourse. This has left him feeling frustrated and alienated.[51]

Sara and Anthony had access to justice problems. Each experienced a non-trivial life event that had a significant legal aspect. But each of them encountered frustrating barriers in trying to address and resolve their legal issues.

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[47] S*upra* note 34.
[48] *Ibid.*
[49] *Ibid*.
[50] *Supra* note 28.
[51] *Ibid*.

These vignettes can help to ground a much larger and often abstract question: what does "access to justice" mean, and why might improving it be important to Canadians?

Access to justice seems hard to oppose. As legal and political science scholar Austin Sarat has written, "[o]ne can hardly imagine anyone who would speak out against accessible justice or who would advocate justice that is inaccessible."[52] But the phrase is also slippery and vague. The two nouns evoke only broad normative ideas. There is no quantitative adjective, and so the term connotes no sense of sufficiency (think, by contrast, of "*universal* health care"). This leaves the term quite open to different meanings. Does access to justice simply imply a right to physically attend at a courthouse? Or does it guarantee a right to a specific "just" outcome? The options are almost limitless.[53]

As socio-legal scholars Catherine Albiston and Rebecca Sandefur have noted, "access to justice" is often used without excavating the meaning or implications of the concept.[54] This is problematic because it allows the phrase "access to justice" to circulate as words untethered to any particular conception of justice, and consequently without any normative force. Canadian legal scholar Patricia Hughes has argued that "access to justice" is often invoked abstractly as a "system problem" without engaging with the specific circumstances and context of those who actually experience access to justice problems.[55]

Legal philosopher Ronald Dworkin has offered a useful distinction between concept and conception, which I adopt in this dissertation. Dworkin explained this distinction as follows, using the example of "fairness":

> When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the

[52] Austin Sarat, "Book Review: Access to Justice" (1981) 94 Harv L Rev 1911 at 1911.
[53] Indeed, many see "justice" as necessarily open-textured. See Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press, 2009). Sen describes justice as "inescapably discursive" (at 337) and suggests that "'Discussionless justice' can be an incarcerating idea" (at 337). See also Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 Law and Philosophy 137.
[54] *Supra* note 8 at 105.
[55] Patricia Hughes, "Advancing Access to Justice Through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31 Windsor YB Access Just 1 at 2-3.

> heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.[56]

This dissertation presents several conceptions of the concept of access to justice. Laid bare, the concept of access to justice means that a system for determining and obtaining justice should be accessible to people and others regarded as valid justice-seekers. Different conceptions, however, provide different answers to the questions of how, to whom, and for what ends justice should be made accessible. These conceptions provide different content to the concept and answer the question of what accessible justice looks like differently.

In this chapter, I will describe the oldest and most conventional conception of access to justice in the Canadian legal community. It is the conception of access to justice as expressed by the Supreme Court of Canada and other courts. I call this the Canadian judicial conception of access to justice. In Chapter Five, I turn to a second conception that has gained prominence through several major reports in recent years. This conception has been described as the "expansive vision conception" of access to justice. I also discuss some additional, more capacious conceptions of access to justice that are also tethered to the rule of law. In each of Chapters Two and Five, I offer a critique of the Canadian judicial and the expansive vision conceptions, before expounding my alternative person-centred conception of access to justice in Chapter Eight.

Despite my critiques here and in Chapter Five, it is important to both acknowledge the conceptions that I critique and to recognize other work that proceeds beyond those conceptions. The person-centred conception I set out in Chapter Eight responds to the conceptions that I describe in this chapter and in Chapter Five. Further, many scholars who have paid attention to problems of access to justice – as well as others working to improve access to justice – operate with richer and more nuanced senses of access to justice than either the judicial or expansive vision conceptions that I describe in this dissertation. For many in the field of access to justice, recognizing the important role of people when thinking about access to justice problems has been

[56] Ronald Dworkin, "A Special Supplement: The Jurisprudence of Richard Nixon", *The New York Times Review of Books*, May 4 1972.

a key aspect of their work.[57] I draw upon and am indebted to much of this prior work in setting up my own, person-centred conception of access to justice.

2 Caselaw and Access to Justice

Many people consider access to justice to be grounded in the rule of law, which is a foundational principle in the Canadian legal system. For example, legal scholar Faisal Bhabha has suggested that "access-to-justice forms an integral part of the rule of law in constitutional democracies."[58] Canadian courts have explicitly connected access to justice to the rule of law.[59] But grounding a conception of access to justice in the rule of law confines that conception to a relatively barren soil.

The rule of law is itself a difficult concept to pin down. Indeed, the rule of law has been described as an "essentially contested concept", meaning that the proper use of the concept is inherently a matter of unending debate.[60] This owes to the very nature of any essentially contested concept: its core contains complex normative positions that are unlikely to yield consensus or widespread agreement in a pluralistic society. Other essentially contested concepts include, for example, "art", "democracy", "Christianity", "power", and "freedom".[61]

Yet the essentially contested nature of the rule of law does not mean that it is a concept without definition. A detailed discussion of the rule of law is beyond the scope of this dissertation, but some explanation of the core of the concept is necessary to provide a footing for the discussion that follows as well as a contrast among the differing conceptions of access to justice. In the West, the concept of the rule of law was first articulated by Aristotle as the idea that laws, not

[57] For example, the concept of justiciable events pioneered by Genn and refined in subsequent legal needs studies foregrounds the perspective of members of the public by focussing on everyday problems instead of describing them initially as legal.
[58] Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial Legislative and Grassroots Dimensions" (2007) 33:1 Queen's LJ 139 at 140.
[59] See further discussion in this section, below.
[60] Richard Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 Columbia L Rev 1 at 7. The term "essentially contested concept" traces to WB Gallie, "Essentially Contested Concepts" (1956) 56 Proceedings of the Aristotelian Society 167.
[61] Waldron, *supra* note 53 at 148.

men, should rule within society.[62] The rule of law is often understood to guarantee that "all persons in the polity will possess formal equality, ensuring that elected officials and high-ranking members of the executive branch of government will be held legally accountable like any other person."[63] The "legal core" of the rule of law has been described by legal scholar Mary Liston as "a metalegal principle organizing a subsidiary set of standards that generate legal validity and contribute to political legitimacy because legal subjects judge the lawmaking capacity and resulting laws as worthy of respect."[64] Legal scholar Jeremy Waldron has described the rule of law as composed of disparate principles, including principles that address "the formal aspects of governance by law[,] principles that address its procedural aspects[,] and principles that embrace certain substantive values."[65] Further, the rule of law is commonly associated with certain institutional arrangements, such as "impartial, public, and independent tribunals charged with resolving disputes between individuals, as well as among the state and affected groups and individuals."[66]

As lawyer Andrea Cole and legal scholar Michelle Flaherty have noted, "Canadian jurisprudence… has developed its own understanding of the rule of law."[67] The rule of law is recognized in Canadian caselaw as an unwritten principle of the Canadian constitution with the following content:

1. It applies to state officials as well as private individuals;[68]
2. It requires the creation and maintenance of positive laws;[69]
3. The relationship between individuals and the state must be regulated by law;[70]

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[62] See B Jowett, "Politics" in *Aristotle's Politics: Writings from the Complete Works: Politics, Economics, Constitution of Athens*, ed by Jonathan Barnes & Melissa Lane (Princeton: Princeton University Press, 2016) at 88-89 (Bk III, 1287a).
[63] Mary Liston, "Rule of Law" in George Thomas Kurian, ed, *The Encyclopedia of Political Science* (Washington, DC: CQ Press, 2011) at 1493.
[64] *Ibid*.
[65] Jeremy Waldron, "The Rule of Law" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2020 ed, online: <https://plato.stanford.edu/archives/spr2020/entries/rule-of-law/>.
[66] *Supra* note 63 at 1494.
[67] Andrea A Cole & Michelle Flaherty, "Access to Justice Looking for a Constitutional Home: Implications for the Administrative Legal System" (2016) 94 Can Bar Rev 13 at 19.
[68] See *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 59.
[69] *Ibid* at para 60.
[70] See *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 71.

4. It is related to the principle of judicial independence;[71] and
5. It is related to the principle of access to justice.[72]

The explicit connection between the rule of law and a principle of access to justice is a recent addition to Canadian caselaw, and I will discuss this in greater detail below.

The content of the rule of law as recognized in Canadian judicial decisions is minimal, rather skeletal, and conservative. This is likely because of judicial prudence and anxieties about constitutionalizing only one conception of the rule of law (given persistent disagreement as discussed above). Cole and Flaherty note that because the rule of law is a constitutional principle in Canada, defining the "rule of law" is accordingly a weighty exercise. They suggest that "these potentially broad implications have inspired a cautious judicial approach to defining the rule of law."[73] Importantly, the key relationship underlying the judicial conception is the relationship between legal subjects and legal actors, institutions, and processes that form part of the domestic legal system (note that I will map out the features of the legal system that are important for understanding the reality of how access to justice works in the next chapter).

This narrow rule of law conception has grounded much of the Canadian caselaw that has implicated access to justice concerns. In a line of key cases that have explicitly considered access to justice concerns, Canadian courts have drawn on the rule of law to formulate a formal understanding of what access to justice entails. This judicial conception is quite literal: access to justice stems from physical access to legal institutions (like courtrooms) and extends only slightly beyond that - to include, for example, the right to commence a legal proceeding. In other words, the rule of law conception of access to justice is tightly connected to matters that go to the core of what the judiciary considers its jurisdiction under the constitution and the doctrine of the separation of powers. It is also animated by formal, rather than substantive equality, in that

[71] See *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 80. See also *Mackin v New Brunswick (Minister of Finance)* 2002 SCC 13 at para 34 (*sub nom Rice v New Brunswick*); *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 134.
[72] See *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 38-39 [*TLABC*]. See also *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 214.
[73] Cole & Flaherty, *supra* note 67 at 20.

judges presume all legal subjects should have access to these institutions and processes without inquiring deeply into whether these legal subjects have the means or capacity to do so.

In *BCGEU v British Columbia (AG)*[74] the Supreme Court of Canada considered the concept of "access to justice" explicitly for the first time.[75] The case arose from a strike by provincial government workers in British Columbia. The Chief Justice of the British Columbia Supreme Court, Allan McEachern, was concerned about the effects of the strike on the administration of justice and court officials, particularly the union's request that people not cross the picket line without a union-issued authorization pass. Although the picket line outside the Vancouver courthouse was orderly and peaceful, the Chief Justice nevertheless charged the picketers with criminal contempt and issued an injunction to prevent picketers from blocking physical access to the court. The Chief Justice held that he had a constitutional duty to keep the courts open, not close them. The union appealed the injunction to the Supreme Court of Canada, which upheld the injunction. In doing so, the Court described access to courts as a necessary component of the rule of law, writing that "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[76] Flaherty and Cole describe this case as "a first foray into connecting access to justice with constitutional principles."[77]

The Supreme Court of Canada set out an apparently robust intention to defend access to courts, adopting the following passage from the BC Court of Appeal:

> *We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens.* It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category.[78]

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[74] [1988] 2 SCR 214 [*BCGEU*].
[75] Note that this case was decided concurrently with *Newfoundland (Attorney General) v NAPE*, [1988] 2 SCR 204, which addressed similar issues and also invoked "access to justice".
[76] *Supra* note 74 at para 25.
[77] Cole & Flaherty, *supra* note 67 at 23.
[78] *BCGEU*, *supra* note 74 at para 26 [emphasis added].

In fact, however, this apparently robust defence of access to courts was largely limited to *physical* access, which was the issue at the heart of *BCGEU*. Picketers who impeded physical access frustrated the judiciary's duty to administer justice effectively. Further, the decision has been interpreted as a guarantee of a negative right (that is, preventing physical barriers to entry), rather than as requiring any positive rights such as requiring governments to promote access to courts.[79] In this sense, the decision endorses formal equality rather than substantive equality which may make more demands on governments to equalize access to legal actors, institutions, and processes.

The Supreme Court recognized the constitutionally guaranteed right of access to courts and entrenched that right of access to the courts, but not access to justice *per se*. The integrity of the legal system was the core concern in this case.

Following *BCGEU*, in the 1990s and early 2000s lower courts grappled with the connection between access to justice and the rule of law in the context of taxes and fees for court and legal services. In these early cases, claimants sought to invalidate legislatively imposed taxes on legal services on constitutional grounds (i.e., federalism, unwritten principles such as judicial independence and the rule of law, and *Charter* arguments such as a violation of the section 15 equality guarantee). For example, in *John Carten Personal Law Corporation v British Columbia (AG)*,[80] the British Columbia Court of Appeal dismissed a lawyer's claim that a tax on legal services was an improper indirect tax on the incomes of lawyers.

Writing in dissent in *John Carten*, BC Chief Justice Allan McEachern wrote that access to courts was a necessary component of the rule of law. In his view, the concept of the rule of law requires access to courts and possibly also other legal services in order to give legal subjects *access to the remedies* they may be entitled to under law. He supported this view with reference to the common law and the *Charter*.[81] Chief Justice McEachern (the same judge who, a decade earlier, issued the original injunction in *BCGEU*) would have found a tax on legal services unconstitutional in some cases, based in part on the reasoning in *BCGEU*.

[79] Cole & Flaherty, *supra* note 67 at 24.
[80] (1997), 153 DLR (4th) 460 (BCCA).
[81] *Ibid* at paras 67-74.

In *Pleau v Nova Scotia (Prothonotary)*,[82] the Nova Scotia Supreme Court considered whether fees imposed to start and continue litigation were an invalid tax disguised as a fee. While the court found that some of the fees were constitutional, it found some others, which required litigants to pay an increasing rate for their court time in trial or appeal, to be unconstitutional. In reaching this conclusion, the court relied on *BCGEU* and the connection between access to justice and the rule of law, but only in the sense that Canadians have a constitutionally guaranteed right of access to the courts which cannot be infringed by physical barriers or fees that unreasonably hinder, impede or deny access to courts or do not have a sufficient nexus between the cost of the service provided and the amount charged. Notably, the reviewing court found that none of the plaintiffs fell under any of the protected grounds for the purposes of accessing the *Charter*'s section 15 equality guarantee against discrimination.

The Ontario case of *Polewsky v Home Hardware Stores Ltd*[83] also dealt with the constitutionality of court fees, but this time in the context of whether the Ontario Small Claims Court could waive those fees to preserve access to the court. In this case, Victor Polewsky asked the courts to waive Small Claims Court fees that, he argued, limited his ability to access justice. Mr. Polewsky's sole sources of regular income were fixed disability and social assistance benefits. The Ontario Superior Court of Justice found that the Small Claims Court did not have the power to waive fees without explicit statutory language permitting it to do so. The Superior Court also found, however, that a common law constitutional right of access to courts rendered the Small Claims Court fees unconstitutional unless they were accompanied by a provision allowing those fees to be waived or reduced where necessary.[84] The court held that "the Rule of Law infuses this court's determination of the issues", and that the combination of the unwritten constitutional principle of the rule of law and the common law constitutional right of access to the courts required courts to be able to waive or reduce fees to preserve access.[85]

This is the first case that has real import for my broader conception of access to justice. The reviewing court recognized that Mr. Polewsky was poor and disabled and vulnerable. But since poverty was not recognized as an analogous ground of discrimination under the *Charter* at that

[82] (1998), 186 NSR (2d) 1 (NS SC).
[83] (2003), 66 OR (3d) 600 (SCDC).
[84] *Ibid* at paras 59-76.
[85] *Ibid* at para 76.

time, his equality argument failed. The dissent in *John Carten* and the decisions in *Pleau* and *Polewsky* suggest that Canadian courts were – albeit haltingly and in limited ways – beginning to recognize access to justice as more than an issue of physical access.

In 2007 the Supreme Court of Canada decision in *British Columbia (AG) v Christie* demonstrated that Canada's top court was not yet willing – on the facts of that case – to constitutionally entrench that broader conception.[86] This case again dealt with the issue of taxes on legal services, and whether such taxes impermissibly inhibited access to justice. Dugald Christie was a Vancouver lawyer who acted primarily for low income persons and challenged a provincial tax on legal services. Christie was successful at the British Columbia Supreme Court, and at the Court of Appeal, where a majority found that the tax was "unconstitutional as offending the principle of access to justice, one of the elements of the rule of law."[87] At the Supreme Court of Canada, however, the court held that "general access to legal services is not a currently recognized aspect of the rule of law."[88] The Court found that the provincial legislation was constitutional, and the tax was permitted.

More recently, however, the Supreme Court appears to have endorsed a broader conception of access to justice in the face of continuing concerns about the depth of access to justice problems in Canada. In *Trial Lawyers Association of British Columbia v BC(AG)*[89], the Supreme Court of Canada held that court hearing fees in British Columbia were unconstitutional because they denied access to courts. Writing for the majority, then-Chief Justice Beverley McLachlin turned to s. 96 of the *Constitution Act, 1867*, which guarantees the jurisdiction of provincial superior courts, to hold that the impugned hearing fees were unconstitutional because they inhibited access to the courts. While the provinces have a valid power to levy hearing fees under s 92(14) of the Constitution Act, 1867, this power is not unlimited and a province therefore cannot enact legislation that removes part of the inherent jurisdiction of the superior courts by denying litigants access to these courts. The majority also relied on reasoning based on unwritten principles of access to justice and the rule of law to find that hearing fees were unconstitutional because laws will not be given effect or be able to challenge state power if they cannot bring

[86] 2007 SCC 21 [*Christie*].
[87] *Christie v British Columbia*, 2005 BCCA 631 at para 76.
[88] *Christie*, *supra* note 86 at paras 21, 27.
[89] *TLABC*, *supra* note 72.

legitimate issues to court. In doing so, the majority effectively broadened the Court's recognition of access to justice to one rooted not only in the unwritten constitutional principle of the rule of law, but also in the s. 96 guarantee of judicial independence. Bringing these sources together, Chief Justice McLachlin wrote that "the connection between s. 96 [of the constitution] and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*".[90] She also noted that "[a]s access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice."[91]

In a forceful dissent, Justice Rothstein charged that the majority was "enter[ing] territory that is quintessentially that of the legislature" in order to make government provision of legal services more affordable.[92] Rothstein argued that the majority was ignoring its own s. 96 jurisprudence, creating a new and expanded scope for s. 96 that was not founded in the constitutional text.[93] He further argued that the majority was improperly using the unwritten principle of the rule of law to invalidate legislation – a use of unwritten principles that the court had long cautioned against.[94]

Justice Cromwell also issued short reasons, effectively concurring in the result with the majority, but doing so based on principles of administrative law rather than on constitutional grounds.[95]

Flaherty and Cole interpret the majority's decision in *TLABC* as affirming that "access to justice flows not from the rule of law, generally and as suggested in *BCGEU*, but rather from one of its discrete dimensions – the supremacy of the law."[96] In their view, this "seems to give access to justice the status of an unwritten constitutional principle", and note that it "may become a basis to invalidate legislation in its own right."[97] The principle of access to justice therefore possesses the possibility that the judiciary will add more content and further differentiate it from the principle of the rule of law—perhaps eventually even on grounds of substantive equality. Yet the divergence of Justice Rothstein and, to a lesser extent, Justice Cromwell from the majority of the

[90] *Ibid* at para 38.
[91] *Ibid* at para 39.
[92] *Ibid* at para 82.
[93] *Ibid* at paras 90, 93.
[94] *Ibid* at paras 96-102.
[95] *Ibid* at paras 70-79.
[96] Cole & Flaherty, *supra* note 67 at 33.
[97] *Ibid*.

seven judges who heard this case suggests that the majority's analysis of the principle of access to justice in Canadian constitutional law is not settled.

It is also worth noting that a major concern for Justice Rothstein in his dissent was the court's poor institutional position to decide matters that may have significant effects on government spending. While courts frequently do make orders with potentially significant effects on government budgets, they generally do so where there is a clearly defined constitutional right or prohibition.[98] The imprecise nature of the principle of access to justice in Canadian law, and the courts' cautious approach to the nature of a constitutional right to counsel, suggest that any development of access to justice in Canadian law will likely be cautious and incremental, rather than liberal and systemic.[99]

3 Shortcomings of the Judicial Conception

This caselaw reveals that the conception of access to justice, as interpreted by the Supreme Court of Canada, has generally been bound to a minimalist conception of the rule of law. While Flaherty and Cole argue that the *TLABC* decision grounds access to justice in something more fundamental than the rule of law principle – namely in constitutional language of "the supremacy of the law" – the distinction does not meaningfully broaden what is entailed. Recalling Liston's observation that the rule of law is commonly associated with institutional arrangements such as "impartial, public, and independent tribunals", the majority's reasoning in *TLABC* can be understood as consonant with a version of the rule of law that embraces the notion of independent courts.[100]

Importantly, whether access to justice is characterized as a component or sub-principle of the rule of law or as something rooted in the supremacy of law, the conception of access to justice set out in Canadian case law is a relatively narrow, negative right, generally manifested as a right of formal access to courts and to legal processes. The focus of this conception of access to justice

[98] See e.g. *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78. The rights or prohibitions may also be statutory. See e.g. *Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445, appeal denied *Canada (AG) v Canadian Human Rights Commission*, 2013 FCA 75.
[99] For discussion of the right to counsel, see *Christie*, *supra* note 86.
[100] Liston, *supra* note 63 at 1494.

is largely on the institutions of law and on the legal system as well as the legal actors who operate within them. Those people who *use* the laws and the legal system play only a minor supporting role in explaining why access to justice is valuable. This formalism and conservatism may be expected from any court-led conception of access to justice. While Canadian caselaw has made much more use of the term "access to justice" in recent decades, and acknowledging the possibility of evolution in the courts' conception of access to justice, there are nevertheless good reasons to suspect that judicial reasoning dealing with access to justice will remain focussed on an institution-based conception in the future.[101]

At least two shortcomings of any such conception are apparent. First, building access to justice by reference to another open and contested concept leaves the idea of access to justice vulnerable to the frailties of the referent concept. In the case of the rule of law, the theoretical framework adopted in Canadian caselaw is minimal, and this in turn limits the potential scope of access to justice. Thin versions of the rule of law yield only formalist and proceduralist commitments, such as limitations on the power of the sovereign state and formal rights to access law and courts which are commonly understood to be due process rights.[102] In the caselaw, people appear only in the role of legal subjects and their voices are often suppressed. The judicial conception of access to justice offers a guarantee of formal, rather than substantive equality. Indeed, there may be good jurisprudential reasons to favour a thin conception of the rule of law over a thicker one. But doing so offers insufficient room to grow anything more than a formalist conception of access to justice.[103] And for reasons discussed in Chapters Five and Eight, formalist concepts of access to justice are insufficient to address access to justice problems in Canada.

Second, the rule of law provides a poor conceptual framework with which to animate efforts to engage members of the public to reform the legal system. It provides no way of responding to the critiques of those who suggest that the legal system's reform efforts have been forestalled by failure to adequately engage with the particular barriers and contextual challenges faced by

[101] For example, a search of the Canadian Legal Information Institute (CanLII) database of Supreme Court of Canada decisions for the term "access to justice" from December 31 1876 to December 31 2019 yields 11 decisions from 1876 through the end of 1999, 16 decisions between 2000 and the end of 2009, and 55 decisions between 2010 and the end of 2019. CanLII describes its Supreme Court of Canada database coverage as follows: "This collection includes all judgments published in the Canada Supreme Court Reports (SCR) since its inception in 1875. The database also includes a few decisions not reported in the SCR." See <https://www.canlii.org/en/ca/scc/>.
[102] See Brian Z Tamanaha, "The Rule of Law for Everyone?" (2002) 55:1 Current Leg Probs 97.
[103] *Ibid*.

members of the public.[104] A rule of law conception foregrounds institutional concerns and largely ignores the individuals who are enmeshed within the legal system. Legal scholar Trevor Farrow has noted that in recent years, despite the advent of promising access to justice reforms, "the voices in the room have almost invariably been those of academics, lawyers, judges, government representatives and the like" rather than those of members of the public.[105] In order to create a legal system that is more hospitable for people, it is necessary to put people – rather than an institutional abstraction – at the conceptual centre of that system. This dissertation aims to ensure that people are the focus in redesigning the justice system and that the views of those people are heard.

4 Beyond the Rule of Law

Access to justice is an important cognate of the rule of law, and it is appropriate that caselaw acknowledges that connection. It is also not surprising that suggestions for reform of the justice system should be concerned about the operation of the actual legal system. But the judicial conception of access to justice rooted in the rule of law doesn't offer a sufficient normative foundation from which to build meaningful access to justice.

This chapter has elucidated the current conception of access to justice found in Canadian caselaw. Although that caselaw will develop, I have argued that the Canadian judicial conception of access to justice is likely to remain tethered to the concept of the rule of law, a concept which itself has been narrowly understood in Canadian law. Moreover, a conception of access to justice which is predicated on an institutional focus is insufficient to respond to the access to justice problems currently unfolding. We must look elsewhere for a more satisfying conception of access to justice.

The current judicial conception of access to justice promises formal equality at most. A hallmark of formal equality is an inattention to the context in which legal subjects are situate. Part of the context that is relevant to considerations of access to justice is how legal services are produced and distributed. In order to move past formalism, it is necessary to develop a nuanced

[104] *Supra* note 55.
[105] Farrow, *supra* note 5 at 2.

understanding of what institutions and opportunities exist for individuals to engage with law and legal issues. I now turn to an analysis of how legal services have traditionally been created and distributed in Canada.

Chapter 3 – Understanding the Market for Justice: Mapping the Suppliers of Personal Legal Services in Canada

1 Navigating the Access to Justice Landscape

This chapter outlines the market for legal services generally, and about the market for personal – rather than corporate – legal services in particular. The survey is not exhaustive, but rather is intended to highlight our current levels of understanding in areas most likely to be important to improve access to justice. For the remainder of this chapter, I will use the term "legal services" to refer to both goods and services that convey legal information. As discussed below, the legal marketplace includes both goods – such as legal information documents, wills, incorporation documents, litigation pleadings – and services, such as diagnosing a legal problem and providing legal advice.

The chapter is divided into three sections. After this introductory section, Section Two provides an overview of the institutions and organizations that supply the personal legal services market in Canada. This overview includes subsections on service providers, regulators, and financial infrastructure, and helps to illustrate what options a person might encounter in seeking to resolve an everyday legal problem. For example, where could someone seeking a divorce turn for help? The section gives a rough map of the "legal ecosystem" in which all of the interview participants found themselves. In cartographic terms, the map is a small-scale rather than large-scale map; a macro-level representation rather than one on a micro-level.[106] It aims to describe three basic features of the legal ecosystem: who provides legal services? Who regulates these services? And who pays for these services? Section Three concludes.

Recognizing and responding to the dynamics of the legal services market is an important step in moving past the formalism of the rule of law conception of access to justice. Accordingly, this chapter and Chapter Four's review of research on the legal market set the stage for Chapter Five,

[106] Cartographers use "small-scale" to refer to maps that cover large areas, but with relatively little detail. "Large-scale" maps, by comparison, cover smaller areas in more detail. See *OED Online*, Oxford University Press, March 2020, online: <www.oed.com/view/Entry/325403> sub verbo "small-scale"; OED Online, Oxford University Press, March 2020, online: <www.oed.com/view/Entry/394583> sub verbo "large-scale".

which describes an "expansive vision" conception of access to justice which incorporates some of the context of the legal services market.

2 The Landscape of Legal Service Institutions in Canada

In every common law system, legal services are created and distributed largely through market mechanisms.[107] Yet our understanding of the specific dynamics of those markets is surprisingly thin.[108] This state of ignorance is particularly pronounced when it comes to the market for personal legal services, which is the market sector most directly implicated in the most important access to justice problems.[109] In this section, I briefly map the institutions that provide the vast majority of personal legal services in Canada. This map introduces the important players in the legal services market and establishes the connections among many of those players. This background information is necessary framing for the more in-depth analysis of how the personal legal services market functions, discussed later in this dissertation.

Figure One illustrates this chapter's focus on the service providers, the regulators, and the financial infrastructure behind the market for legal services in Canada. The individual is located at the centre of this diagram, to emphasize the fundamental role of people in the personal legal services landscape. Figure One depicts the major legal service providers available to people seeking legal information or legal services in Canada. These service providers are identified in boxes one through six. Service providers identified in blue are permitted to provide legal advice to clients, though the scope of that permission varies. Lawyers enjoy a broad right to receive information from, and give legal information and advice to, their clients. Paralegals and notaries are also permitted to both receive and give information to clients, but as discussed below, the scope of this permission is more limited than that afforded to lawyers. Service providers identified in green are generally limited to providing legal information, rather than advice. For example, advocates receive client information and provide legal information in many Canadian

[107] See Jon Johnsen, "Studies of Legal Needs and Legal Aid in a Market Context" in *The Transformation of Legal Aid: Comparative and Historical Studies*, ed by Francis Regan et al (Oxford: Oxford University Press, 1999).
[108] Gillian Hadfield, *Rules for a Flat World* (New York: Oxford University Press, 2017).
[109] *Supra* note 6.

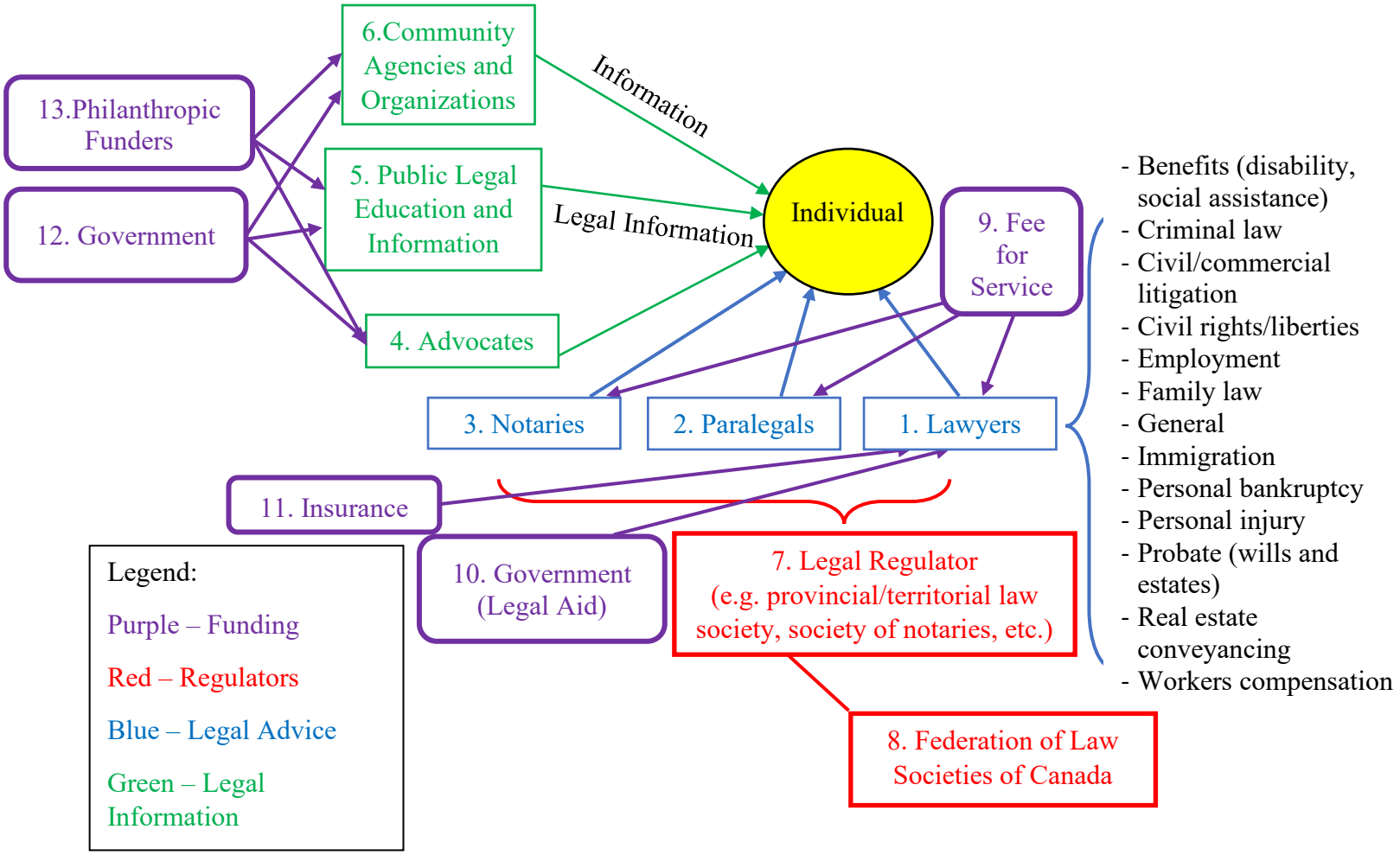

Figure 1: Schematic representation of personal legal service providers available to individuals in Canada.

jurisdictions, though this relationship is often not formally recognized by legal regulators. Further, public legal education and information organizations provide legal information to individuals, but generally do not elicit information about those individuals. Similarly, community agencies and organizations may provide legal information to individuals but may do so without the deliberate oversight from regulated legal professionals that differentiates public legal education and information. The diagram also demonstrates the jurisdiction of legal service regulators, which are illustrated in red in boxes seven and eight. Finally, the sources of payment for legal services are illustrated in purple in boxes nine through 13. These include fee-for-service arrangements, which are common among lawyers (and may also be permitted for paralegals and notaries). Other payors include insurers, government – both via legal aid programs and through grants to community organizations – and philanthropic funders. Each of these are discussed in greater detail below.

This mapping omits some of the major institutions most often associated with the legal system, namely courts and similar dispute resolution bodies. Courts, administrative decision-makers, tribunals, and quasi-public and private dispute resolution bodies are major components of the legal system, but a full consideration of these mechanisms of dispute resolution lies beyond the scope of this dissertation. Acknowledging the importance of courts, administrative decision-makers, tribunals, and other dispute resolution bodies for the legal system, their roles in that system have been relatively well-described in a significant literature.[110] Adding to that literature is not the purpose of this chapter, which will instead focus on other, less-well described aspects of the legal services market.

I have made some choices to prioritize concision over exhaustiveness in this chapter. The nature of the Canadian federal system, in which the provinces are responsible for many aspects of the administration of justice, means that some provincial variability is not captured here. This is particularly true for differences between provinces with a common law legal system and Quebec, whose legal system is based in large part on civilian legal traditions.[111] The nature of legal orders

[110] For a discussion of some of this literature, see e.g. *The Oxford Handbook of Empirical Legal Research*, ed by Peter Cane & Herbert M Kritzer (New York: Oxford University Press, 2010).
[111] See e.g. Denis LeMay, "The Quebec Legal System: An Overview" (1992) 84:1 Law Libr J 189.

is further complicated by the fact that the federal government retains constitutional authority for the operation of legal systems in Canada's three territories, though the nature of that authority is not uniform.[112]

The fact that this mapping effort is limited to Canadian law is also in no way intended to undermine or deny the continuing presence of diverse Indigenous legal orders throughout the territory of Canada, some of which have influenced the development of the Canadian legal system.[113] However, the nature of legal services arising through Indigenous legal orders is outside the scope of this project.

a) Personal legal service providers

Who provides legal services?

Throughout Canada, legal services are largely provided by lawyers. Table One sets out employment and remuneration data for legal service providers in Canada. This data is based on Statistics Canada's census data.[114] This table illustrates the sizeable wage difference, both in median and average terms, between lawyers and others such as paralegals, notaries, and legal assistants. It also provides some sense of the number of people working in the legal services field, suggesting that lawyers constitute a majority of workers in that field. This data does not, however, provide insight about dynamics within each of these occupation types.

In recent years, other data suggests that the number of practicing lawyers across Canada has held relatively steady at approximately 100,000 individuals.[115] This amounts to approximately 255

[112] For example, federal powers to govern in the territories are devolved to locally elected territorial governments through the *Yukon Act*, SC 2002, c7, *Northwest Territories Act*, SC 2014, c 2, s 2, and the *Nunavut Act*, SC 1993, c 28. The *Nunavut Act* is itself shaped by the terms of the Nunavut Land Claims Agreement, signed by representatives of the Government of Canada, Government of the Northwest Territories, and what is now Nunavut Tunngavik Incorporated in 1993.
[113] See John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada", in *The Oxford Handbook of the Canadian Constitution*, ed by Peter Oliver, Patrick Macklem, & Nathalie Des Rosiers (New York: Oxford University Press, 2017).
[114] Statistics Canada, *2016 Census of Population*, Catalogue No 98-400-X2016281 (Ottawa: Statistics Canada, 30 May 2018).
[115] See Federation of Law Societies of Canada, "2017 Statistical Report", online (pdf): <flsc.ca/wp-content/uploads/2019/04/2017-Stats-Report.pdf>; Federation of Law Societies of Canada, "2016 Statistical Report",

lawyers per 100,000 people.[116] The legal profession, however, is not monolithic: there are important distinctions in how lawyers organize and provide legal services. In addition, as both Figure One and Table Two make clear, while lawyers may provide most legal services in Canada, other professions and providers deliver some legal services, or enable lawyers to do their work by providing additional or complementary support.

Table 2: Employment and remuneration within the legal services sector in Canada, 2016 (Data from Statistics Canada).

Job Title (National Occupational Classification Code)	**Total Employment (2016)**	**Median Wages, Salaries and Commissions ($Cdn)**	**Average Wages, Salaries and Commissions ($Cdn)**
Lawyers and Quebec notaries (NOC 4112)	95,745	92,233	117,966
Paralegal and related occupations (NOC 4211) [Includes notaries public outside Quebec]	30,845	47,426	49,420
Legal administrative assistants (NOC 1242)	42,175	44,586	44,352

This subsection on personal legal service providers is further divided into the following parts in order to capture the heterogeneity of legal service providers in Canada: private-sector lawyers, government and non-profit lawyers, paralegals and notaries public, and advocates, community

online (pdf): <flsc.ca/wp-content/uploads/2018/04/Statistics-2016-FINAL.pdf>; Federation of Law Societies of Canada, "2015 Statistical Report", online (pdf): <flsc.ca/wp-content/uploads/2014/10/2015-Stats-Report-FIN.pdf>; Federation of Law Societies of Canada, "2014 Statistical Report", online (pdf): <docs.flsc.ca/2014-Statistics.pdf>.

[116] Note that this number is based on taking the numbers in Table One and estimates of the Canadian population generated by Statistics Canada (with a current population estimate of 37.59 million people). There has been some work on comparing the number of lawyers in a nation to others. See e.g. J Mark Ramseyer & Eric B Rasmusen, "Comparative Litigation Rates" (2010) Harvard John M Olin Centre for Law, Economics, and Business Discussion Paper No 681. Ramseyer & Rasmusen estimate that there are 292 lawyers per 100,000 people in Canada. By comparison, they calculate that the United States has 380 lawyers per 100,000 people, England and Wales has 277 per 100,000, Australia has 259 per 100,000, while Japan has 23 per 100,000, and France has 70 per 100,000.

organizations, and others. The classification moves from more to less regulated service providers.

i. Private-sector lawyers

Lawyers provide legal services in a variety of organizational settings in the private sector. I am using the descriptor "private sector" to define lawyers who are paid by non-governmental sources and generally organize in for-profit firms. Despite my blanket categorization, it is important to note some important lines of segmentation within the private-sector bar which contribute to its inherent diversity. For example, some private-sector lawyers specialize in work for particular client groups, such as union-side or management-side law firms in the labour context.[117] Other private-sector lawyers specialize based on the subject-matter of their practices, such as family law lawyers, intellectual property lawyers, or personal injury lawyers. There are many different kinds of private-sector firms and lawyers.

Still, there are some important commonalities. A large percentage of private sector lawyers across Canada work in solo practices, which may include administrative support staff or paralegals in addition to the lawyer.[118] Lawyers may also work in private firms, which can range from a two-person partnership to several hundred lawyers with significant support staff.[119] Mid-sized and larger law firms may be organized as partnerships or, in many provinces and territories, as Limited Liability Partnerships.[120] Many of these larger firms also use management

[117] See e.g. Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (Philadelphia: Temple University Press, 1996).
[118] See e.g. Federation of Law Societies of Canada 2017 Statistical Report, *supra* note 115 (listing approximately 15,000 lawyers working in solo practices). There are some difficulties with the FLSC numbers, including the fact that the practice sizes of lawyers in Quebec are not listed (though those of members of the Chambre de Notaires are). Also, the FLSC numbers include "professional corporations", which are usually, but not always, formed by single lawyers. These professional corporations are often members of larger law firms. Further, the FLSC numbers list only the numbers of different types of firms, such as solo, firms with 2-10 lawyers, firms with 11-25 lawyers, firms with 25-50 lawyers, and firms with 51+ lawyers, and that this makes it difficult to estimate how many lawyers work at large (i.e. 51+ lawyer) firms across Canada. While these national statistics have become much better in recent years as provincial law societies have increasingly coordinated their information-gathering and sharing practices, the limited nature of the data on practicing lawyers across Canada illustrates the larger problem of a scarcity of reliable data about most aspects of the legal services marketplace.
[119] For some discussion of the importance of administrative support staff to legal practice in Canada, see e.g. Andrew Pilliar, "Exploring a Law Firm Business Model to Improve Access to Justice" (2015) 32 Windsor YB Access Just 1 [Exploring]; Andrew Pilliar, *Exploring a Law Firm Business Model to Improve Access to Justice and Decrease Lawyer Dissatisfaction* (LLM Thesis, University of British Columbia, 2012) [unpublished] [LLM].
[120] See e.g. *Law Society Act*, RSO 1990, c L.8, s 61.1; *Legal Profession Act*, SBC 1998, c 9, s 83.1; *Legal Profession Act*, RSA 2000, c L-8, s 8; *Legal Profession Act*, SM 2002, c 44, s 25; *Legal Profession Act*, SNS 2004, c 28, s 25;

or professional services firms to formally employ and manage their support staff.[121] In some provinces, lawyers may also organize as corporations. Many lawyers have incorporated as personal law corporations for tax purposes, but some law firms have implemented corporate structures.[122]

In addition, some lawyers work for particular businesses as in-house counsel. In these roles, lawyers provide legal services to a single client – the business that employs their services.

ii. Government and non-profit lawyers

In addition to private practice, lawyers may also work for governments. While cities and regional governments may have full-time legal staff, the majority of government legal work occurs at the provincial and federal levels, where the respective Ministry of Justice (or Ministry of the Attorney General) often employs dozens to hundreds of lawyers and support staff. Other government-linked administrative institutions, such as the Canadian Human Rights Commission[123] or various ombudsperson offices,[124] may also act on behalf of individuals or organizations at no cost (though these services often require an application process and do not guarantee representation or advocacy as of right). Some of these services may also provide information that falls outside the strict definition of legal advice, such as with ombudsperson positions.

Lawyers may also work in non-profit settings. For example, Ontario retains a network of community legal clinics which are at least partially funded by Legal Aid Ontario to provide community-based legal services. In most other provinces, as discussed below, this "staff model" of legal aid has been replaced by a tariff model. Other not-for-profit legal practices may exist separate from government, though most of these rely upon government or charitable grants.

Legal Profession Act, SY 2017, c 12, s 43; *Regulation respecting the practice of the profession of advocate within a limited liability partnership or joint-stock company and in multidisciplinarity*, CQLR c B-1, r 9.

[121] See e.g. Stephan Kaiser & Max Ringlstetter, *Strategic Management of Professional Services Firms: Theory and Practice* (Heidelberg: Springer, 2011).

[122] See e.g. The Law Society of British Columbia, "Information: Incorporation of a Law Practice" (7 February 2019), online (pdf): <www.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-misc/lawcorp-info.pdf>.

[123] See *Canadian Human Rights Act*, RSC 1985, c H-6, s 26; "Canadian Human Rights Commission", online: *Canadian Human Rights Commission* <www.chrc-ccdp.gc.ca/eng>.

[124] See e.g. *Ombudsperson Act*, RSBC 1996, c 340; "Ombudsperson British Columbia", online: *Office of the Ombudsperson of British Columbia* <bcombudsperson.ca/>.

iii. Paralegals and notaries public

Paralegals may also assist in providing legal services, although the scope of their work varies. In Ontario, paralegals are regulated by the Law Society of Ontario, and may operate as independent legal professionals (without the oversight of a lawyer) within a defined scope of practice, such as representing clients in immigration, landlord and tenant disputes, small claims matters, and some limited criminal matters.[125] In most other provinces and territories, paralegals assist lawyers, and must work under the supervision of lawyers. In British Columbia, lawyers may designate paralegals to provide some expanded services to clients, but the lawyer remains responsible for all work done by these designated paralegals.[126] Becoming a paralegal generally requires a two-year college degree or equivalent.[127] Voluntary paralegal associations, such as the Canadian Association of Paralegals, serve representative and governance functions.[128]

Notaries public are another legal profession which differs significantly across Canada. In most provinces, notaries are appointed by the provincial or territorial government to authenticate documents, administer oaths, and witness signatures on official documents. In British Columbia, however, notaries are a self-regulating profession with a much wider scope of practice that can include acting for clients in limited real estate transactions, wills and estate planning, and other non-litigation matters, in addition to authenticating documents.[129] Notaries in Quebec have an even more extensive scope of practice, owing both to the nature of Quebec's civil justice system and to Quebec's particular history.[130] Notaries in Quebec are a self-regulating profession, and perform a wide range of legal services for clients. The distinction between a lawyer and a notary in Quebec bears some similarity to the distinction between a barrister and solicitor in many

[125] See e.g. *Law Society Act*, *supra* note 120 at s 2; Law Society of Ontario, "Paralegals", online: *Law Society of Ontario* <lso.ca/paralegals>.
[126] See Law Society of British Columbia, *Law Society Rules*, Vancouver: Law Society of British Columbia, 2020, rule 2-13.
[127] See e.g. Law Society of Ontario, "Accredited Paralegal Education Programs", online: *Law Society of Ontario* <lso.ca/becoming-licensed/paralegal-licensing-process/paralegal-education-program-accreditation/accredited-programs>.
[128] See e.g. Canadian Association of Paralegals, online: *Canadian Association of Paralegals* <caplegal.ca/en/>.
[129] See *Notaries Act*, RSBC 1996, c 334.
[130][130] See e.g. Chambre des notaires du Québec, "History of Notarial Practice in Québec", online: *Chambre des notaires du Québec* <www.cnq.org/en/history-notarial-practice-quebec.html>.

common law systems, whereby barristers are empowered to appear before courts and tribunals, whereas solicitors are empowered to draw up and validate documents.[131]

iv. Advocates, community organizations, and others

Some provinces also permit advocates to assist and, in some cases, appear in court with individuals – especially individuals who otherwise represent themselves.[132] Advocates are generally prohibited from receiving payment for their services, but may be paid by community associations or not-for-profit societies to provide a range of services, including support with legal problems.

Many community organizations exist to provide legal information to members of the public. This can include community organizations that provide incidental legal information in the course of their other operations, but also includes community organizations which exist specifically to provide legal information to members of the public. These latter organizations, which form the Public Legal Education and Information ("PLEI") sector, are often funded by government, not-for-profit, or charitable grants, and are generally limited to provide only general legal information, rather than specific legal advice.[133] In addition, legal materials are often available to members of the public at no cost, both through courthouse libraries in each province,[134] and through the advent of online reporting of legal decisions (and some commentary). This free online repository of primary legal materials is best exemplified by CanLII, which provides access to reported court and tribunal decisions from all provinces, territories, and federal courts.[135]

In addition to these community organizations, which often provide legal information for free, a significant business cluster provides "do-it-yourself" or standardized legal materials analogous to

[131] See e.g. *Notaries Act*, CQLR c N-3, ss 15-16; *Act respecting the Barreau du Québec*, CQLR c B-1, ss 128-129.
[132] See e.g. Provincial Court of British Columbia, "Support Person Guidelines", online: *Provincial Court of British Columbia* <www.provincialcourt.bc.ca/about-the-court/court-innovation/SupportPersonGuidelines>.
[133] For a list of provincial PLEI organizations, see Government of Canada, "Custody and Parenting" (last modified 03 July 2017), online: *Department of Justice* <www.justice.gc.ca/eng/fl-df/parent/plei-eij.html#bc>. See also Public Legal Education, "The History of PLE" (no date), online: *Public Legal Education Canada* <http://www.plecanada.org/what-is-ple/history/>.
[134] Though note that these are generally only available in relatively large urban centres.
[135] Canadian Legal Information Institute, (last visited May 29 2020), online: *CanLII* <www.canlii.org/en/>. Coverage for this reporting varies by jurisdiction.

"Wills for Dummies". These include will kits and online incorporation packages but can extend to include significant other legal products also.[136]

Immigration consultants are another group of service provider who may advise and assist in immigration matters. They may charge clients for their services, which are limited to issues related to immigration, refugee, and related matters.[137]

This survey demonstrates that although lawyers are often regarded as the paradigmatic legal service provider, there are important distinctions both among types of lawyers and between lawyers and other legal service providers. This picture is not, however, dictated solely by forces of supply and demand. It is instead one whose lines are drawn by regulators empowered to licence legal service providers. The next subsection explores the role of legal service regulators.

b) Regulators

Who regulates legal services providers and how?

Overarching the delivery of legal services in Canada is an extensive regulatory structure. This subsection briefly outlines that regulatory structure by explaining the roles of three different actors in legal services regulation: government, law societies and other non-governmental regulators, and professional associations.

i. Provincial and territorial governments

Throughout Canada the role of legal service provider is shaped by legislation enacted by provincial and territorial governments.[138] The regulation of legal services is a matter which is preserved for provincial governments by Canada's Constitution, except in the case of the territories, where the federal government has delegated responsibility for legal services to the

[136] See e.g. Alison Sawyer, *Complete Canadian Wills Kit*, CD-ROM (North Vancouver: Self-Counsel Press, 2015).
[137] See Immigration Consultants of Canada Regulatory Council, (last visited May 29 2020), online: *Immigration Consultants of Canada Regulatory Council* <iccrc-crcic.ca/>.
[138] See e.g. *Law Society Act*, *supra* note 120; *Legal Profession Act* (British Columbia), *supra* note 120; *Legal Profession Act* (Alberta), *supra* note 120; *Legal Profession Act* (Yukon), *supra* note 120.

territorial legislatures.[139] Canada's ten provinces and three territories have all passed legislation to create law societies, and those law societies have, in turn, generally made lawyers the exclusive (or near-exclusive) group of people able to engage in the "practice of law".[140] This exclusivity or near-exclusivity is formally predicated on the understanding that the legal profession's self-regulatory powers are to be regulated "in the public interest".[141]

This enabling legislation also grants ongoing oversight and regulation of the legal profession to the provincial and territorial law societies. In some provinces, notably Quebec and British Columbia, enabling legislation also exists to explicitly create notaries public as a self-regulating profession with a defined scope of practice.[142] As noted above, paralegals are also self-regulated in some provinces, with a defined scope of practice.

ii. Law societies and other legal regulators

Provincial and territorial law societies control the process of becoming a lawyer by requiring individuals to graduate from an "accredited" Canadian law school which these societies have the power to designate.[143] In addition, outside Quebec's civil system, Canadian law schools are second-entry degrees, meaning that law students ordinarily obtain an undergraduate degree prior to entering law school.[144] Individuals who wish to become lawyers must have the means, competencies and commitment to undertake the long and expensive education and accreditation process in Canada. The education system, therefore, may inadvertently contribute to access to justice problems by limiting numbers or streamlining career choices due to financial concerns.

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[139] See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, Appendix II, No 5. See also *Canada (AG) v Law Society of British Columbia*, [1982] 2 SCR 307.
[140] See Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham: Edward Elgar, 2015). See also John Pearson, "Canada's Legal Profession: Self-Regulating in the Public Interest?" (2015) Can Bar Rev 555.
[141] See e.g. *Legal Profession Act* (British Columbia), *supra* note 120. See also Pearson, *supra* note 140 at 570-571.
[142] *Notaries Act*, *supra* note 131. See also *Notaries Act*, *supra* note 129.
[143] Lawyers or law students trained in jurisdictions outside Canada may also become Canadian lawyers by passing a series of equivalency exams, set by the National Committee on Accreditation. See Federation of Law Societies of Canada, "National Committee on Accreditation" (last visited 29 May 2020), online: *National Committee on Accreditation* <nca.legal/>.
[144] There are exceptions. Some law schools will accept students who have completed three years of a four-year degree, and some may make allowances for "mature students" to attend law school without having completed an undergraduate degree. But these are now rare. See e.g. "Apply to Ontario Law Schools: OLSAS – Program Requirements Overview" (last modified 5 November 2019), online: *Ontario Universities' Application Centre* <www.ouac.on.ca/guide/olsas-program-requirements/>.

After law school, students in most provinces and territories are required to apprentice with a lawyer for a period of about a year, a process known as "articling".[145] The process of becoming a lawyer also requires passing bar exams, being adjudged to satisfy "character requirements", and paying annual professional and insurance fees to the provincial or territorial law society.[146]

In recent years, provincial and territorial law societies have formed a national association, known as the Federation of Law Societies of Canada ("FLSC"), whose stated aims are to strengthen "Canada's system of governance of an independent legal profession" through efforts to coordinate among law societies, promote national standards, and represent law societies both domestically and internationally.[147] While Canadian law societies have generally been less active than their counterparts in the United States in enforcing unauthorized practice of law regulations, this remains a role for all law societies and is exercised on occasion.[148] In the United States, efforts to vigorously enforce bars on the unauthorized practice of law have been criticized for their effects of discouraging innovation in providing legal services to address access to justice problems.[149]

In addition to entry requirements for lawyers, educational requirements may also exist for individuals to become a paralegal or a notary public. The education requirements for each of these professions are shorter in duration compared to those to become a lawyer. For example, becoming a paralegal in Ontario requires completion of a post-secondary degree, which is often offered at the college level.[150]

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[145] Some lawyers act as clerks for judges in full or partial substitution for articling. In December 2018, the Law Society of Ontario approved an option for lawyers to obtain a license to practice law in that province through a "Law Practice Program" which allows law school graduates to become lawyers by taking a course and participating in a work placement program. See "Law Practice Program" (last modified May 2020), online: *Law Society of Ontario* <lso.ca/becoming-licensed/lawyer-licensing-process/law-practice-program>.

[146] See e.g. Law Society of British Columbia, "What You Need to Know if You Plan to Practise in BC" (last visited 29 May 2020), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/becoming-a-lawyer-in-bc/what-you-need-to-know-if-you-plan-to-practise-in-b/>.

[147] Federation of Law Societies of Canada, "Our Mission" (last visited 29 May 2020), online: *Federation of Law Societies of Canada* <flsc.ca/about-us/our-mission>.

[148] See e.g. *Maddock v Law Society of British Columbia*, 2020 BCSC 71.

[149] See Gillian K Hadfield & Deborah L Rhode, "How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering" (2016) 67 Hastings LJ 1191 at 1194, 1214.

[150] See e.g. Law Society of Ontario, "Accredited Paralegal Education Programs", online: *Law Society of Ontario* <lso.ca/becoming-licensed/paralegal-licensing-process/paralegal-education-program-accreditation/accredited-programs>.

iii. Voluntary professional associations

In addition to the provincial and territorial law societies, legal service providers have also formed voluntary professional associations to provide networking, skills development, and advocacy for their members. The largest of these is the Canadian Bar Association, which is active in all provinces and territories, but there are also other bodies.[151] These organizations often provide representational services for members including advocacy to various levels of government on matters of interest to the profession.

This brief overview has used regulation in a broad sense to include not only the organizations and bodies that set and enforce codes of conduct and terms of operation for legal professionals, but also the associations of those organizations and the voluntary organizations to which legal services professionals belong. The next subsection introduces a survey of the financial infrastructure behind legal services.

c) Financial infrastructure

Who pays for legal services?

Answering this question is not entirely straightforward, and is bedevilled by scarce reliable data on the cost of legal services in Canada.[152] This subsection proceeds by briefly describing the types of financial models of legal service delivery: fee-for-service models, *pro bono* delivery of legal services, insurance schemes, legal aid, and other government and not-for-profit sources of payment for personal legal services. Fee-for-service is the most common arrangement for legal service delivery by lawyers, while *pro bono*, insurance, and legal aid models are generally more limited. Other government and not-for-profit sources refer to organizations that provide legal

[151] See Canadian Bar Association, (last visited 29 May 2020), online: *Canadian Bar Association* <cba.org/Home>. See e.g. Indigenous Bar Association, (last visited 29 May 2020), online: *Indigenous Bar Association* <indigenousbar.ca/ >; Canadian Association of Black Lawyers, (last visited 29 May 2020), online: *Canadian Association of Black Lawyers* <cabl.ca/>; Trial Lawyers Association of BC, (last visited 29 May 2020), online: *Trial Lawyers Association of BC* <www.tlabc.org/>; Bar of Montreal, (last visited 29 May 2020), online: *Bar of Montreal* <www.barreaudemontreal.qc.ca/en>; Canadian Association of Paralegals, (last visited 29 May 2020), online: *Canadian Association of Paralegals* <caplegal.ca/en/>.

[152] See further discussion in Chapter 4, below.

information but these services are often offered by non-lawyers and do not include the full panoply of legal services that lawyers do. After sketching these different types of models, Chapter Four provides a review of scholarship that discusses how these models and services ought to function in relation to the concept of access to justice and what insights can be gleaned regarding the behaviour of individuals who consume legal services. This subsection, then, lays the ground for the consideration of the demand side of the market contained in Chapter Four and developed further in Chapter Six.

i. Fee-for-service

In many cases, clients pay fees to legal service providers for services rendered. This arrangement is often based on an hourly fee (plus disbursements). Some legal service providers also offer services on a flat-fee basis.[153] Fees for some litigation matters, such as class actions, are often structured on a contingency basis, where a client is only responsible for payment if their case is successful. All Canadian jurisdictions have some regulation contingency fees, through a combination of law society codes of conduct, legislation, and the statutory powers or inherent jurisdiction of tribunals and courts.[154]

Payment in a litigation context is also affected by the existence of a fee-shifting costs regime, whereby unsuccessful parties are often required to pay for part of the successful party's legal costs.[155]

ii. Pro bono

Legal service providers may also provide free, or *pro bono*, legal services. Although no mandatory professional requirement to provide pro bono services currently exists, many law societies and voluntary organizations encourage pro bono work as part of a lawyer's overall practice. There are no formal client intake requirements for pro bono work, though a number of firms (especially larger firms) have developed policies to govern what types of pro bono work

[153] See e.g. Law Society of British Columbia, "Common billing practices" (last visited 29 May 2020), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/working-with-lawyers/lawyers-fees/>.
[154] See Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective", in *The Justice Crisis: The Cost and Value of Justice*, ed by Trevor CW Farrow & Lesley A Jacobs, (Vancouver: UBC Press, 2020).
[155] See e.g. Erik S Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2011) 36 Queen's LJ 113.

lawyers will be allowed to do.[156] In many provinces and jurisdictions, community organizations exist to help connect people and organizations seeking pro bono help with lawyers willing to engage in pro bono representation.[157]

iii. Insurance

Insurance plays a significant part in many forms of litigation in Canada. For example, in situations where a party carries insurance (such as car or property owners), terms of insurance will often give the insurer the right and obligation to carry on legal action in the name of the insured. Other types of insurance, such as director liability insurance or professional insurance, provide coverage (and legal defence) in the event a claim or legal proceeding is initiated against an insured. In addition to these general insurance scenarios, legal expense insurance has also grown in Canada in recent years. This form of insurance provides some coverage explicitly for legal matters such as legal professional expenses, court costs, and disbursements.[158] Legal expense insurance can also provide coverage for general legal advice. This model of providing legal services is used more extensively in some jurisdictions in Europe where it is often bundled with automobile or home insurance.[159]

iv. Legal aid

Legal aid may be available for individuals facing some kinds of legal problems. In two cases, the Canadian courts have affirmed a constitutionalized right to counsel where an individual faces criminal charges that could result in loss of freedom,[160] and where there is a real prospect of losing custody of a minor child.[161] If an individual is unable to afford counsel in these situations, the government is required to provide a lawyer or funding to these individuals to retain a lawyer. In some provinces and territories, legal aid may be available for matters outside of these

[156] Francesca Bartlett & Monica Taylor, "Pro bono lawyering: personal motives and institutionalised practice" (2016) 19:2 Leg Ethics 260 at 272.
[157] See e.g. Access Pro Bono, (last visited 29 May 2020), online: *Access Pro Bono* <accessprobono.ca/>.
[158] See e.g. DAS Legal Protection Inc., "Why Legal Expense Insurance?" (last visited 29 May 2020), online: *DAS Legal Protection Inc.* <www.das.ca/About-Us/Why-Legal-Expense-Insurance.aspx>.
[159] See Sujit Choudhry, Michael Trebilcock, & James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance", in *Middle Income Access to Justice*, ed by Michael Trebilcock, Anthony Duggan, & Lorne Sossin (Toronto: University of Toronto Press, 2012) at 393.
[160] See *R v Rowbotham* (1988), 25 OAC 321, 41 CCC (3d) 1 (CA).
[161] See *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46.

constitutionally required cases, such as for assistance in family or landlord and tenant disputes. Funding for provincial legal aid comes primarily from federal transfers, but additional funding comes directly from the provinces and from some donations and cost-recovery efforts.[162]

v. Other government and not-for-profit sources

Finally, funding for community organizations (including PLEI organizations) comes from both government sources and from not-for-profits and charities. For example, the Law Foundation of British Columbia funds community advocacy organizations throughout British Columbia. The Law Foundation of BC is a non-profit foundation established by provincial legislation and funded largely through interest on lawyers' trust accounts in British Columbia.[163] Similar analogous organizations exist in most other provinces and territories.

3 Factors in Access to Justice Problems: The Need to Chart New Territory

This mapping of the landscape of Canada's legal institutions and organizations demonstrates that legal services in Canada are largely created and distributed through market mechanisms. This market is a regulated one, and there are examples of both non-market activity (such as pro bono work) and public subsidy for some market activities (such as legal aid funding). In addition, the legal marketplace is buttressed by public and philanthropic funding for organizations that provide legal information to the public at low or no cost. But beyond mapping the legal services landscape, there has been surprisingly little research to investigate the effectiveness of the institutions in that landscape, and their relative contributions to access to justice problems. The following chapter surveys that research.

[162] See e.g. House of Commons, *Access to Justice Part 2: Legal Aid: Report of the Standing Committee on Justice and Human Rights* (October 2017) (Chair: Anthony Housefather).
[163] See e.g. The Law Foundation of British Columbia, "2018 Annual Report" (last viewed 29 May 2020), online (pdf): *Law Foundation of BC* <www.lawfoundationbc.org/wp-content/uploads/2019/04/2018-TLFBC-AR-FINAL-ELEC.pdf>.

Chapter 4 – Understanding the Market for (In)Justice

1 The Creation and Distribution of Legal Services

There are significant gaps in how well we understand the market for legal services, particularly the market for personal legal services. Despite these gaps it is still important to canvass the current state of understanding of how that market functions. This chapter describes the state of research on how the legal services market works.

Perhaps surprisingly, no academic sub-discipline explicitly focusses on the workings of the market for legal services. This differs from the extensive research on other professional service markets, such as the health care market.[164] Although there has been some useful work on the dynamics of the market for legal services, there is much more that remains unknown. As law and economics scholar Gillian Hadfield puts it, "[w]e are living in the information age, and we know next to nothing about how our legal infrastructure is working or how to make it work better."[165]

Why is there relatively little analysis of the market for legal services? Several possible answers exist. In part, as is discussed later in this dissertation, there is a data scarcity issue.[166] The failure to collect good quality data about the legal system and those using it hinders research efforts. Another reason, and one that might explain the dearth of careful micro-econometric studies of legal services, is that while the field of law and economics has grown significantly over the past 50 years, it has focussed – in North America at least – more on analysis of how economic thinking could influence judicial reasoning and less on the legal market itself.[167] Another likely factor is a lack of research capacity among those trained in both legal and economic methods, though this appears to be changing with the emergence of the empirical legal studies movement.[168]

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[164] See e.g. Sherman Folland, Allen C Goodman, & Miron Stano, eds, *The Economics of Health and Health Care*, 3rd ed (Upper Saddle River, NJ: Prentice Hall, 2001).
[165] Hadfield, *supra* note 108 at 218.
[166] See Chapter 9, Section 4, below.
[167] See e.g. Martin Gelter & Kristoffel Grechenig, "History of Law and Economics" (April 2014), Preprints of the Max Planck Institute for Research on Collective Goods, at 5-6, online (pdf): *Max Planck Institute for Research on Collective Goods* <homepage.coll.mpg.de/pdf_dat/2014_05online.pdf >.
[168] *Ibid* at 6.

Despite the dearth of research on the legal services market, there have been some studies and projects that have focussed in the area. This chapter outlines research on three components of the legal services market that are important for improving access to justice: 1) the relationship between regulation, competition, and pricing, 2) the legal services labour market, and 3) consumer behaviour in the personal legal services market. These parts touch on issues of both supply of and demand for legal services and introduce ideas that will be expanded upon in Chapters Six and Seven. While these aspects of the market for personal legal services are not the only ones that are important for improving access to justice, they are areas that deserve to be highlighted because of recent research developments in cognate fields that offer promising potential.

2 Regulation, Competition, and Pricing

Compared to other aspects of the legal market, the regulation of legal services has received a significant amount of academic attention. Legal regulators manage the delivery of legal services in a variety of ways, but the regulatory tools available to regulators can be divided into two key modes. Regulators can use input regulations, such as education and licencing requirements, or output regulations, such as regulatory standard-setting and enforcement (through mechanisms such as disciplinary processes or civil liability), to accomplish their regulatory goals.[169] Law and economics scholar Michael Trebilcock – one of the most notable commentators on the regulation of legal services over the past 40 years – has long argued that law societies should focus their regulatory resources on output regulation over input regulation.[170] Output regulation places the regulatory focus on things that matter to clients or to society, such as whether a legal service provider is delivering competent services, rather than on other things, such as having a law degree, which act as proxies for outputs and which can mask the unnecessary expansion of regulation.

[169] Michael J Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 Alta L Rev 215 at 219.
[170] See, e.g., *ibid*; Michael Trebilcock, "Regulating Legal Competence" (2001) 34 Can Bus LJ 444; Michael J Trebilcock, Carolyn J Tuohy, & Alan D Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for The Professional Organizations Committee* (Toronto: Ontario Ministry of the Attorney General, 1979).

Legal scholar Noel Semple has produced a very helpful guide to legal professional regulation in the common law world.[171] Semple reviews the state of legal service regulation throughout the common law world, analyzes the policy implications and justifications of different regulatory approaches, and synthesizes suggestions for future regulation. But of most interest for present purposes are Semple's summaries of critiques of legal service regulation, and his efforts to connect regulatory concerns to access to justice.

Semple traces economist George Stigler's notion of "regulatory capture" as a critique of lawyer self-regulation, finding its roots in Adam Smith's arguments that professional entry rules amount to "rent-seeking".[172] That is, according to regulatory capture theory, regulators tasked with protecting public interests may instead favour the commercial interests of those they regulate – in this case members of the legal profession – leading to inflated prices and sub-optimal arrangements from the perspective of society as a whole. Semple describes subsequent economic literature on the matter as "an elaboration and empirical buttressing of Smith's position."[173] Semple positions regulatory capture, understood both through economic and sociological lenses, as one of the key risks to legal self-regulation, but argues that the threat of capture is insufficient to justify government regulation over self-regulation as a means to reform.[174]

Semple finds a more compelling justification for regulatory change in access to justice problems. After describing the significant access to justice problems found in North America, Semple notes that "[t]he North American access to justice literature has paid some attention to regulation, but it does not yet include a comprehensive analysis."[175] Nevertheless, there has been some work to suggest how regulation impedes access to services, and Semple agrees with law and economics scholar Gillian Hadfield's argument that the access to justice problem "is fundamentally a problem of economic regulation."[176] Semple finds that economic studies on both the costs of input regulation and limits on law firm ownership offer a compelling basis to suggest that existing regulations likely do have an adverse effect on the accessibility of legal services.[177]

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[171] Semple, *supra* note 140.
[172] *Ibid* at 116.
[173] *Ibid* at 117.
[174] *Ibid* at 132.
[175] *Ibid* at 145.
[176] *Ibid* at 146, citing Gillian K Hadfield, "The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law" (2014) 38 Intl Rev L & Econ 43.
[177] Semple, *supra* note 140 at 182.

Semple and others have suggested, as one possible ameliorative step, widening the scope of who can provide paid legal services with the hope of encouraging the creation of a more dynamic market with inherent cost- and quality-signalling properties.[178]

When goods and services are created and distributed overwhelmingly by market mechanisms, as they are in the market for personal legal services, regulators should attend to ensuring that the marketplace fosters competition among service providers. Yet there is little evidence of such attention, and academic research focussing on competition in the market for legal services has often approached the issue from the perspective of legal analysis of lawyer codes of ethics and other regulatory devices, rather than through a detailed economic analysis.[179] This seems a glaring oversight since attention to ethical codes is a poor substitute for more detailed analysis of whether the market for legal services creates conditions for effective competition over price and other aspects of service delivery, such as quality.

Some research on those market dynamics has found that decreased regulation can lower the cost of legal services. In 1989, economist Simon Domberger and law professor Avrom Sherr conducted an analysis of the effects of the then-recent deregulation of conveyancing services in England and Wales.[180] Conveyancing "describes the legal work associated with buying and selling real estate property", and covers both transferring property and arranging legal formalities of mortgage financing.[181] After pressure from consumer groups during the 1970s and early 1980s, the British government passed legislation to take away the monopoly on conveyancing that solicitors had enjoyed for 200 years. Intriguingly, although the legislation was passed by the Conservative government of Margaret Thatcher, the bill which spurred deregulation of the conveyancing market was introduced by a Labour member of parliament.[182] The research by Domberger and Sherr, which included both theoretical models and empirical research, demonstrated that the threat and subsequent entry of new service providers into the

[178] *Ibid* at 291-293. See also Gillian K Hadfield, "More Markets, More Justice" (2019) 148:1 Dædalus 37.
[179] See e.g. Gerry Singsen, "Competition in Personal Legal Services" (1988) 2 Geo J Leg Ethics 21.
[180] Simon Domberger & Avrom Sherr, "The Impact of Competition on Pricing and Quality of Legal Services" (1989) 9 Intl Rev L & Econ 41.
[181] *Ibid* at 41.
[182] *Ibid* at 43.

conveyancing market resulted in an immediate reduction of prices for conveyancing services by one third.[183]

Yet other studies have also suggested that licencing does not demonstrably increase the price of legal services. In 1995, economists Dean Lueck, Reed Olsen, and Michael Ransom used data gathered from law firms in Washington, DC, to compare the effects of market forces and regulation on fees and lawyer incomes.[184] Their findings showed little support for the common presumption that licencing restrictions increase prices; instead, they found that market supply and demand forces were "the dominant determinants of prices and incomes in the legal profession".[185] While Lueck, Olsen, and Ransom did not refer to the UK study by Domberger and Sherr, they noted that their results should be treated with caution, in part because of the "extremely heterogeneous" nature of the legal profession.[186] They noted that some types of practice might be able to use regulation in their own interest without those effects becoming obvious in their limited data set.[187] Given the profitable nature of conveyancing practice in the UK, and the 200 year period of solicitor monopoly before deregulation, it is possible that the results observed by Domberger and Sherr could therefore be an example of this heterogeneity.[188]

Writing in 2014, economists Vikram Maheshri and Clifford Winston estimated that "[c]onsumers and firms spend some $200 billion annually on legal services [in the United States], but little is known about the factors that influence lawyers' prices for those services because comprehensive data on attorneys' fees and services have not been publicly available."[189] Using newly-available data gleaned from an online legal fee listing platform, they found "substantial heterogeneity in the rates for [specific] services around an average rate of roughly [US]$300/hour."[190] Based on

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[183] *Ibid* at 55.
[184] Dean Lueck, Reed Olsen, & Michael Ransom, "Market and Regulatory Forces in the Pricing of Legal Services" (1995) 7:1 Journal of Regulatory Economics 63.
[185] *Ibid* at 80.
[186] *Ibid*.
[187] *Ibid*.
[188] *Supra* note 180 at 41.
[189] Vikram Maheshri & Clifford Winston, "An Exploratory Study of the Pricing of Legal Services" (2014) 38 Intl Rev L & Econ 169 at 169.
[190] *Ibid*. The practice of "scraping" legal fee information from law firm websites, as was apparently used in this study, likely yielded a series of challenges. First, price data is limited to law firms that list prices on their websites, which the authors note. Second, other studies have suggested that there can be significant variation between law firms' posted prices and the prices they actually charge. See e.g. Arthur Best, "Lying Lawyers and Recumbent Regulators" (2015) 49:1 Ind L Rev 1.

these results, they observed that "[e]conomic theory does not appear to derive unambiguous predictions about the distribution of prices in a market in which entry is restricted but pricing is not."[191] Their analysis found little evidence to support lawyer regulation as a tool of consumer protection. They argued that "[c]onsumers' ability to assess a lawyer's quality would likely improve in a more competitive market for legal services that eliminated occupational licensing because more information that bears on a legal practitioner's competence would emerge."[192]

Maheshri and Winston decried the relative absence of empirical research on competition and pricing of legal services, and suggested that this outcome may be related to the lack of ready sources of detailed, disaggregated data about lawyer prices and incomes.[193] To the extent that this lack of data is a problem in the United States, it is likely even more pronounced in Canada. While commercially available data about pricing for legal services does exist, this data often suffers from at least two significant defects, particularly for efforts to understand the market for personal legal services. First, most sources of data about law firm pricing are based on voluntary reporting, and risk biases not only in who reports, but also on the veracity of those reports.[194] Second, and of arguably greater importance, the focus of many data collectors is on the corporate legal services hemisphere. Reporting rates for personal legal services are typically very low and lag far behind those of corporate legal services. This yields data with high uncertainty and low analytical value.[195]

Noel Semple has compiled the most detailed survey of lawyer prices for personal legal services in Canada.[196] Drawing on data from commercial sources and also from academic databases, Semple has suggested that mean hourly fees for Canadian lawyers range between Cdn$204 and $386.[197] While this is helpful data, it largely does not allow for disaggregation according to type

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[191] *Supra* note 189 at 170.
[192] *Ibid* at 173.
[193] Of course, another reason for the lack of research, and perhaps a contributory factor to the lack of raw data, is the fact that many common law jurisdictions around the world prohibited most forms of lawyer advertising, including price advertising, until the 1970s, 1980s, and 1990s. See Chapter Seven, Section Three, below.
[194] See e.g. Canadian Lawyer, "Compensation" (last visited 29 May 2020), online: *Canadian Lawyer* <www.canadianlawyermag.com/surveys-reports/compensation>.
[195] Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2015) 93:3 Can B Rev 639 at 649 (describing the existing data for personal legal services offering "an impressionistic, but still useful, picture of the fee landscape for lawyers.").
[196] *Ibid*.
[197] *Ibid* at 653.

of law, firm size, or geography. As with much information about the market for personal legal services, the best available data still leaves much to be desired.

3 The Legal Services Labour Market

One key component of any market analysis is the supply of labour. As noted in the previous section and in Chapter Three, many legal services have been restricted to lawyers through much of the 20th and 21st centuries. Legal regulators, particularly those in the United States, have largely confined legal service delivery to lawyers throughout most of the 20th and 21st centuries.[198] Accordingly, labour market analysis relating to legal services has focussed almost exclusively on lawyers.

In 1974, labour economist Richard Freeman prepared one of the first detailed analyses of the market for new lawyers in the United States.[199] Freeman noted enormous increases in both law school enrollment and starting salaries at major New York law firms in the late 1960s, and analyzed these changes in the legal labour market using a recursive "cobweb" model.[200] This research suggested that recent increases in law school enrollment were tied to economic conditions in the profession, and predicted (incorrectly) that the market for new lawyers would be depressed throughout the 1970s as the glut of then-recent law school graduates began to practice.[201] Freeman's research represents some of the first explicitly economic work to understand part of the market for legal services, and is important because it attempted to demonstrate a connection between the providers of legal services and demand for legal services.

The most comprehensive broad analysis of the market for lawyers was completed by University of Chicago economist B. Peter Pashigian in 1977.[202] Drawing on census and tax data in the US

[198] See previous section, also Chapter Three, Section Two, Subsection b, above.
[199] Richard B Freeman, "Legal 'Cobwebs': A Recursive Model of the Market for New Lawyers" (1975) 57:2 Review of Economics and Statistics 171.
[200] The cobweb model appears to have been coined by Nicholas Kaldor in 1934, and describes a cyclical pattern of supply and demand, triggered by a lag in feedback about levels of supply and demand. The model is described as a cobweb because a supply and demand curve, with a plot of iterated price and quantity projections over time, creates a spiral and begins to look like a cobweb after repeated iterations.
[201] *Supra* note 199 at 179.
[202] B Peter Pashigian, "The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers" (1977) 20:1 JL & Econ 53.

between 1920 and 1970, Pashigian examined the relative effects of two exogenous effects: economic activity (represented by Gross National Product) and the amount of lawyer regulation. In contrast with Freeman's cobweb model, Pashigian found that cobweb oscillations did not describe the market for lawyers over the study period.[203] Instead, Pashigian determined that "[t]he most important determinant of the demand for legal services and for lawyers is real gross national product. Shifts in the demand for lawyers are due for the most part to changes in real income."[204] Pashigian also found small but significant effects on the demand for lawyers relating to micro-level effects such as levels of marital instability.[205] This research is notable both for its finding of correlation between general economic conditions and demand for legal services, and also is one of the most systematic studies of the economics of the legal labour market to date.

Writing in 1992, labour economist Sherwin Rosen reviewed lawyer demography and earnings since Pashigian's work.[206] Commenting on the need for greater subtlety and detail in explaining demand for legal services, Rosen observed that:

> [u]ndoubtedly, rising demand for legal services [causes] high entry rates [into the legal profession], but it is more difficult to identify specific indexes of career earnings that can account for their year-to-year variation. Interpreted broadly, the data suggest that the supply of new entrants to law is fairly elastic with respect to career prospects, even though the present value calculations in this article leave much to be desired.[207]

Rosen also noted evidence which suggested the growth of large law firms and class action lawsuits was creating "extremely large earnings among a relatively small, elite group of lawyers", describing these effects as akin to what happens to stars in music or art where similar stratification occurs.[208]

Rosen was not the first to describe a significant stratification within the legal profession. In the late 1970s, law professor John Heinz and sociologist Edward Laumann conducted a detailed study of the composition of the Chicago bar.[209] Included in their oft-cited findings was the

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[203] *Ibid* at 81.
[204] *Ibid* at 72.
[205] *Ibid*.
[206] Sherwin Rosen, "The Market for Lawyers" (1992) 35:2 JL & Econ 215.
[207] *Ibid* at 242.
[208] *Ibid* at 242-243.
[209] John P Heinz & Edward O Laumann, *Chicago Lawyers: The Social Structure of the Bar,* revised ed (Evanston, IL: Northwestern University Press, 1994).

division of lawyers into two "hemispheres": one dedicated primarily to serving large organizational clients (usually corporations) and employed in large law firms; the second serving largely individual clients and small businesses and engaged in solo practice and small partnerships.[210] This division has proven to be both influential and enduring for any analysis of the market for legal services, and has been complemented by a follow-up survey in the early 21st century which reproduced and extended some of the analysis of the original Chicago lawyers study.[211]

In Canada, Noel Semple has extended the dual hemisphere model in a way that has direct implications for access to justice. Noting that Heinz and Laumann further subdivided the individual and small business hemisphere into "personal plight" and "personal business" groups, Semple has examined the former to understand how Canadian personal plight lawyers structure their services. Personal plight legal services are defined by their focus on real person clients with disputes, and include work such as "criminal defense, plaintiff-side personal injury work, and divorce practice."[212] By contrast, personal business legal services include "legal services related to financial transactions, such as drafting or probating a will, arranging the transfer of residential real estate, or buying or selling a small business."[213] The list of personal legal services set out in Chapter Three is reproduced in Table Three below, but now broken down into personal plight and personal business domains. Semple suggests that personal plight practice is a relatively sheltered part of the legal marketplace, one that has some structural resistance to trends of offshoring and computerization evident in other types of legal service.[214] These structural protections include the need for a "local human touch" in some work, such as attending court, the resistance of some tasks to outsourcing, and the resistance of other tasks to standardization and routinization.[215]

[210] *Ibid*.
[211] See e.g. John P Heinz et al, *Urban Lawyers: The New Social Structure of the Bar* (University of Chicago Press, 2005).
[212] Noel Semple, "Personal Plight Legal Practice and Tomorrow's Lawyers" (2014) 39:1 J Leg Prof 25 at 32.
[213] *Ibid* at 31.
[214] *Ibid* at 33.
[215] *Ibid* at 33-36.

Table 3: Division of personal legal work into 'personal plight' and 'personal business' domains (after Semple)

Personal Plight	**Personal Business**
Benefits (disability, social assistance)	Employment
Criminal law	General
Civil/commercial litigation	Probate (wills and estates)
Civil rights/liberties	Real estate conveyancing
Employment	
Family law	
Immigration	
Personal bankruptcy	
Personal injury	
Workers compensation	

Finally, a significant amount of work on aspects of the legal labour market has been undertaken to understand how law firms attract, retain, and promote lawyers, and how lawyers conceive of their work in relation to their professional and personal identities. While some of this work is applicable to the individual hemisphere of the legal marketplace, much of this research has focussed instead on large law firms that serve the large organization hemisphere, and so is not relevant for this dissertation.[216]

While it is encouraging to see that there has been *some* research attention to the labour market for legal services, the limited nature of that research, particularly as it relates to personal legal services, emphasizes how much room there is for research focussed specifically on the market for personal legal services. Two aspects of this research gap are crucial for my research. First, although lawyers are the predominant profession empowered to provide paid legal services in

[216] See e.g. Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (Chicago: University of Chicago Press, 1994); Marc Galanter & William D Henderson, "The Elastic Tournament: The Second Transformation of the Big Law Firm" (2007) 60:6 Stan L Rev 1867; Marc Galanter & Thomas M Palay, "Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms" (1990) 76:4 Virginia Law Review 747; Tom Ginsburg & Jeffrey A Wolf, "The Market for Elite Law Firm Associates" (2003) 31:4 Fla St U L Rev 909; Brendan O'Flaherty & Aloysius Siow, "Up-or-Out Rules in the Market for Lawyers" (1995) 13:4 Journal of Labor Economics 709.

most Canadian jurisdictions, little to no research attention has been paid to other forms of legal service providers.[217] As noted in Chapter Three, these other actors range from legal services provided by paralegals and notaries public, to work done by advocates, PLEI organizations, and community organizations which provide legal information to members of the public. Understanding how non-lawyer legal service providers organize, produce, and distribute legal information and advice is an important part of comprehending the personal legal services ecosystem. Second, this brief review of research on the legal services labour market illustrates that lawyers have often been assumed to behave as classical wealth-maximizing rational actors. To the extent that economic research in recent years has acknowledged and explored the limitations of this assumption, it would be useful to consider whether, and to what extent, lawyers display preferences and respond to incentives other than pecuniary ones. Chapter Eight begins to engage in research to explore this issue in greater detail.

4 Consumer Behaviour in the Market for Personal Legal Services

The problem of consumer behaviour in the market for personal legal services raises questions that span several academic disciplines, from psychology to economics and sociology. This section proceeds by examining three different facets of the legal services market that impact consumer behaviour: 1) the emergence of legal issues; 2) the effects of information asymmetries; and 3) and insights from behavioural economics.

a) Emergence of legal issues

Over the past 20 years, the socio-legal tradition has explored the "paths to justice" that people follow after encountering a "justiciable problem".[218] As explained in Chapter One, a justiciable problem is a personal problem which may have a legal component, but which need not be identified as legal by the individual who is experiencing it. Following the pioneering work of socio-legal researcher Hazel Genn in the United Kingdom, "unmet legal needs" research has

[217] *Supra* note 11.
[218] See *supra* note 13.

shifted the focus of access to justice research away from legal institutions and to the experiences and perceptions of members of the public.[219]

Unmet legal needs research surveys a representative sample of the population in order to understand the frequency and types of legal problems each person experiences, as well as how those people respond to those problems. Importantly, the survey scripts or questionnaires used in this research ask respondents to identify significant problems they have recently experienced, but do not identify those problems as necessarily "legal".[220] The point of this approach is that respondents need not have taken any steps to resolve their problem within the legal system, nor even need to have understood their problem to be legal in nature. Instead, the researchers identify the incidence rate of justiciable problems. In this way, unmet legal needs research seeks to uncover latent legal problems in the population, even when the respondents do not see their problems as legal.

A key finding from this research is that the type of problem tends to be the major determining factor in people's decisions about whether they will seek legal advice and services for their problem.[221] In addition, multiple studies have yielded "good evidence" for further conclusions that cross legal jurisdictions, such as: 1) civil justice problems are ubiquitous across the population; 2) marginalized or disadvantaged populations report higher rates of civil justice problems and more negative consequences as a result of those problems; 3) most people do not seek professional legal help for their civil justice problems; and, 4) while cost is a factor in why people do not seek professional legal help, it plays a secondary role to belief that problems are not legal or that professional help would not be useful.[222]

But these points of consensus also highlight gaps and deficiencies in understanding access to justice problems. Socio-legal researchers Pascoe Pleasence, Nigel Balmer, and Stian Reimers suggest that problem type does not offer a satisfactory or sufficient explanation of what drives advice-seeking behaviour, and that:

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[219] *Ibid.*
[220] *Ibid.*
[221] *Ibid.*
[222] *Supra* note 15 at 443-444.

> …there must be something lying beneath; something about the people who suffer personal injuries, the nature of personal injuries, people's understanding of lawyers or the law in relation to personal injuries, the type or range of services that solicitors offer, or the legal remedies that are available in respect of personal injuries.[223]

The interview research for this dissertation, which is discussed in Chapter Six, builds from this observation.

In addition to the unmet legal needs studies, socio-legal research has engaged in theoretical work examining how people transform everyday experiences into legal grievances. In the early 1980s, scholars William Felstiner, Richard Abel, and Austin Sarat proposed the "naming, blaming, and claiming" typology to explain how "unperceived injurious experiences" are – or are not – transformed into claims within the legal system.[224] In brief, this theory suggests that events must be perceived as injurious (i.e. "naming"), caused by specific others ("blaming"), and communicated to that other or others with a request for remedy ("claiming").[225] This theoretical model has proven to be both influential and durable.[226] Recently, a variant of this typology expands the scope of the typology to include not just injurious experiences, but any experience which has a legal dimension.[227] This revised typology consists of the following steps:

1. Knowing you have a legal issue;
2. Understanding your service and process options;
3. Making and deploying a strategy;
4. Participating in the justice process;
5. Negotiating, defending, proving, representing; [and]
6. Making sense of outcomes and enforc[ing] them.[228]

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[223] Stian Reimers, Nigel J Balmer & Pascoe Pleasence, "What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes" (2011) 1:6 Oñati Socio-Legal Series 3 at 3-4.
[224] William LF Felstiner, Richard L Abel, & Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…" (1980) 15:3/4 Law & Soc'y Rev 631.
[225] *Ibid* at 633-636.
[226] See e.g. *supra* note 12.
[227] See Roger Smith, "Artificial Intelligence and Access to Justice: Hitting the Wall" (06 June 2019), online (blog): *Law, Technology and Access to Justice* <law-tech-a2j.org/ai/artificial-intelligence-and-access-to-justice-hitting-the-wall>.
[228] *Ibid*.

It is hard to overstate the importance of information in these typologies. Yet research on information acquisition by legal consumers is "almost nonexistent" as compared to the significant research on information acquisition by health information seekers.[229] Without knowing that a matter is legal in nature, or that appropriate service providers exist, it is nearly impossible to deal appropriately with that matter. Accordingly, research on information dynamics has important implications for the legal marketplace. I turn to information dynamics research in the next subsection.

b) Effects of information asymmetries

Legal services often present problems of information asymmetries between consumers and service providers. An information asymmetry occurs when a seller of goods or services has greater knowledge about the goods or services than does a potential buyer.[230] Indeed, a commonly cited justification for legal service regulation is the significant information asymmetry that can exist between producer and consumer.[231]

Many legal services are considered a type of "credence good" in the economic literature. Credence goods are found in markets where it is expensive or impossible for consumers to assess the quality of available goods or services either before or after those services have been selected. This situation leads to an asymmetry in power and makes consumers vulnerable.[232] Credence goods represent an extreme form of information asymmetry, and can give rise to the kinds of market breakdown famously theorized by economist George Akerlof.[233] Specifically, because sellers in a credence goods market have a significant expertise advantage over buyers, this type of market invites three types of problem: 1) overprovision, whereby sellers provide more goods

[229] See Sheila O'Hare & Sanda Erdelez, "Legal Information Acquisition by the Public: The Role of Personal and Environmental Factors" (2017) 54:1 Proceedings of the Association for Information Science and Technology 298 (noting that research on information acquisition by legal consumers is "almost nonexistent" and contrasting this with the significant research on information acquisition by health information seekers).
[230] See e.g. George A Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84:3 Quarterly Journal of Economics 488.
[231] *Supra* note 170 at 446.
[232] Rudolf Kerschbamer & Matthias Sutter, "The Economics of Credence Goods – a Survey of Recent Lab and Field Experiments" (2017) 63:1 CESifo Economic Studies 1.
[233] *Supra* note 230.

than necessary; 2) underprovision, whereby sellers provide insufficient goods; and, 3) overcharging, whereby sellers provide appropriate goods, but overcharge for those goods.[234] The issue of how to address information awareness within the population, as well as information asymmetries between consumers and providers of legal services, is therefore an important one.

That is not to say, however, that all types of legal services, or all types of consumer-seller interaction, share these same information asymmetries. Law professors Ray Worthy Campbell and Michael Trebilcock have each noted that information asymmetries are often significantly reduced or eliminated in dealings between sophisticated corporate counsel and outside lawyers.[235] As Campbell explains, the growth of the general counsel position, most of whom have been senior lawyers in practice, means that corporate clients (acting through their general counsel) are often nearly as knowledgeable about the legal context of a situation as the external lawyers are.[236]

Campbell's analysis represents an applied example of earlier theoretical modelling. Writing in 1974, Marc Galanter suggested that consumer heterogeneity would affect how different types of consumers behave in seeking and obtaining legal services.[237] The foundational insight that potential consumers of legal services can be divided into "repeat players" and "one-shotters" has been oft-repeated in subsequent research.[238] Further, this dichotomy largely mirrors the bifurcation of the bar noted by Heinz and Laumann several years later, with many repeat players served by the corporate bar, while most one-shotters depend upon services from the personal legal service bar.[239]

Galanter worked through how one-shotters might be expected to "play" the litigation "game" differently from repeat players. Among his insights, he noted that repeat players are able to structure their dealings to provide an advantage for future litigation, enjoy economies of scale

[234] *Supra* note 232 at 2-3.
[235] See Ray Worthy Campbell, "Rethinking Regulation and Innovation in the U.S. Legal Services Market" (2012) 9:1 NYUJ L & Business 1 at 34; See also *supra* note 170 at 447.
[236] Campbell, *supra* note 235 at 34.
[237] Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9:1 Law & Soc'y Rev 95.
[238] See e.g. Joel B Grossman, Herbert M Kritzer, & Stewart Macaulay, "Do the 'Haves' Still Come Out Ahead?" (1999) 33:4 Law & Soc'y Rev 803.
[239] *Supra* note 209.

and have access to specialists, have opportunities "to develop facilitative informal relations with institutional incumbents",[240] have more freedom to play the odds,[241] and can play for rules.[242] Galanter also noted that predisposition towards rules and the legal system may also affect parties' likelihood to engage in litigation.[243] Although this may affect both repeat players or one-shotters, Galanter suggested that community-based aversion to legal dispute resolution is much more likely to be a barrier for one-shotters.[244]

These insights about the dynamics of consumer information differences have implications for how legal services should be regulated. French economists Camille Chaserant and Sophie Harnay have considered the regulatory implications of legal services as credence goods.[245] They suggest that the nature of many legal services as credence goods leads to three types of problems:

> First, clients cannot tell with certainty whether they need legal services, creating a hidden information problem. Second, they are not able to assess the quality of the needed service ex ante. Third, they do not know ex post whether the service they bought involves the right level of effort by the lawyer, creating a hidden action problem.[246]

Chaserant and Harnay suggest that legal regulators should take the heterogeneity of legal services seriously in order to provide more appropriate and effective regulation. Although many legal services display the properties of credence goods, described above, Chaserant and Harnay argue that many others display search characteristics or more closely resemble "experience goods".[247] Experience goods are characterized by having properties that are easily assessed after purchase. Accordingly, information about these types of goods may be effectively transmitted by creating an information exchange between those who have purchased goods and prospective purchasers. "Search goods," by comparison, are characterized by having properties that are easily assessed prior to purchase. As they note, economic analyses of the legal marketplace have

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[240] *Supra* note 237 at 4.
[241] Repeat players can adopt a strategy to maximize gain over a number of cases, even at the risk of occasional maximum loss. On the other hand, one-shotters are more likely constrained to adopt a "minimax" strategy of minimizing the risk of maximum loss.
[242] Repeat players can lobby governments and regulators for rule changes, or contest litigation with an eye to their precedential effect. See *supra* note 237 at 4-9.
[243] *Ibid* at 10-13.
[244] *Ibid* at 12.
[245] Camille Chaserant & Sophie Harnay, "The Regulation of Quality in the Market for Legal Services: Taking the Heterogeneity of Legal Services Seriously" (2013) 10:2 European Journal of Comparative Economics 267.
[246] *Ibid* at 279 [citations omitted].
[247] *Ibid* at 280.

typically focussed on the heterogeneity of consumers, bifurcated between regular and occasional users, but not on possible heterogeneity of the services themselves.[248]

Chaserant and Harnay have worked through the implications of legal service heterogeneity for regulation, ultimately concluding that "the desirable level of regulatory protection does not rest on the type of the consumer, but rather on the type of the legal service that a lawyer is delivering."[249] In this view, market-based solutions – that is, a "light" regulatory touch – perform well for legal services that resemble search or experience goods, while a more invasive regulatory framework will be appropriate for legal services with credence good characteristics.[250] This analysis has important implications for how information about legal services is made available to potential consumers.

c) Insights from behavioural economics

Research confirms that access to justice problems correlate with other social inequality problems. As legal sociologist Rebecca Sandefur has written:

> Currently, we decide how to allocate legal expertise based largely on three factors: potential clients' willingness to seek legal assistance; potential clients' ability to pay; and, the willingness and interests of specific local providers to do particular kinds of work. In this context, socioeconomic inequalities become justice inequalities, and "geography is destiny," in the sense that available services are determined not by people's actual needs but rather by what happens to be available where they happen to live.[251]

This observation reflects, in part, mechanisms of production and distribution that are insensitive and non-responsive to the different social situations and contexts of potential consumers of legal services. One emerging area of economic research that may hold useful insights for access to justice research is that of behavioural economics.

[248] *Ibid*.
[249] *Ibid* at 283.
[250] *Ibid* at 283-285.
[251] *Supra* note 15 at 459.

In recent decades, behavioural economics has supplemented and, in some cases, supplanted assumptions in classical economics about how individuals actually behave in particular situations.[252] These insights are particularly appropriate in considering how individuals make decisions about dealing with legal matters, and accordingly should form a significant part of ongoing research into consumer behaviour in the legal services market.

For example, some recent research has explored how structural and situational factors, such as poverty, can affect the decision-making processes of individuals making a range of everyday life decisions.[253] Economist Eldar Shafir has reviewed research which demonstrates how the social situation of poverty – rather than the cognitive abilities of those who experience poverty – creates predictable biases in some decision-making contexts.[254] Shafir notes, for example, that living in poverty can result in individuals focussing on immediate problems at the expense of other problems that may have greater overall implications, but are less urgent.[255] While Shafir suggests that this example of cognitive bias has implications for issues like "saving for a child's eventual education, or for retirement", it also has clear implications for legal issues as well, such as whether to prepare a will or directions relating to custody of children upon the death of a parent or guardian.[256] Some of this research also suggests policy responses to compensate for predictable limitations on decision-making.[257] As economists Marianne Bertrand, Sendhil Mullainathan, and Eldar Shafir write:

> the poor may exhibit basic weaknesses and biases that are similar to those of people to other walks of life, except that in poverty, there are narrow margins for error, and the same behaviors often manifest themselves in more pronounced ways that can lead to worse outcomes.[258]

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[252] See e.g. Raj Aggarwal, "Animal Spirits in Financial Economics: A Review of Deviations from Economic Rationality" (2014) 32 International Review of Financial Analysis 179 at 182.
[253] See Eldar Shafir, "Decisions in Poverty Contexts" (2017) 18 Current Opinion in Psychology 131 [Decisions]; Eldar Shafir, "Poverty and Civil Rights: A Behavioral Economics Perspective" (2014) 2014:1 Ill L Rev 205; Anandi Mani et al, "Poverty Impedes Cognitive Function" (2013) 341 Science 976. See also Anuj K Shan, Sendhil Mullainathan & Eldar Shafir, "Some Consequences of Having Too Little" (2012) 338 Science 682.
[254] Decisions, *supra* note 253.
[255] *Ibid* at 132-133.
[256] *Ibid* at 133.
[257] See e.g. Marianne Bertrand, Sendhill Mullainathan & Eldar Shafir, "Behavioral Economics and Marketing in Aid of Decision Making Among the Poor" (2006) 25:1 Journal of Public Policy & Marketing 8.
[258] *Ibid* at 8.

While the example of behavioural research which touches on decision-making in situations of poverty is of obvious relevance for access to justice research, other aspects of behavioural economics research are also likely important. For example, research on loss aversion may be relevant to underestimating how people assign value of some legal services, especially when the up-front cost seems large.[259]

5 Transforming the Creation and Distribution of Legal Services

For each of the interview participants – for George, Michael, Justine, Anthony, Pat, Alex, Mia, Chris, and Sara – their response to their significant life problem was affected by a number of factors. Many of these factors were undoubtedly personal or subjective, in that they reflected that person's worldview and experiences. But they all have in common the fact that they were choosing from options made available, at least in part, by how the legal system works in Canada.

One of the most important suggestions from the accumulated body of research is the need to stop regarding the legal marketplace as homogeneous. Indeed, it is more apt to recognize the existence of many sub-markets, many of which are affected by significantly different forces. Within these markets, heterogeneity often exists along several axes, including the nature of services offered, the production methods used to create those services, the types of producers in the marketplace, and the decision-making behaviours of potential consumers. Working out the implications of such a complex, multi-focal dynamic is not simple, but it is necessary.

To simplify this task somewhat, access to justice researchers should recognize the market quadrants that are most likely implicated for their work. This means focussing on producers of personal legal services and the factors that may limit this supply-side. It also means analyzing how the normative goals of improving access to justice – which are discussed further in Chapter Eight – are likely to intersect with different types of legal services, namely which of these services exhibit properties of credence, search, or experience goods.

[259] See e.g. Eyal Samir, *Law, Psychology, and Morality: The Role of Loss Aversion* (New York: Oxford University Press, 2014).

This dual-faceted work of developing more nuanced demand-side understanding of how people respond to potential legal problems and of suggesting how to encourage legal service providers to develop goods and services that respond to access to justice needs, forms the basis of the next chapters. These chapters do not, and cannot, provide complete answers to the significant and complex problems of access to justice. As noted, data and research on legal services and legal infrastructure, and particularly data and research aimed at improving access to personal legal services is missing.[260] There are many reasons for this, likely including a paucity of researcher capacity in undertaking mixed-methods and interdisciplinary research on legal service delivery, a persistent reticence to admit that legal services are distributed by market mechanisms, and a lack of transparency from legal actors regarding factors such as pricing.[261]

Moreover, a significant structural disadvantage exists for access to justice researchers compared with, for example, researchers interested in inequality in the health market.[262] As Hadfield notes, this is a problem caused not just by a lack of government-sponsored research, but also a lack of interest from legal service providers:

> In a sense, there's no money for research on legal infrastructure because there is no 'there' there. Lawyers research what the law is. Economists and other policy-oriented researchers study what the law should be – to promote trade or investment in new technologies, improve incentives for workplace safety, or design cost-effective taxes, for example. But hardly anyone studies how law works as a system, what determines the system's costs and efficacy. There is very little systematic work on how to build law where it does not already exist or make it work more effectively. There are no fields of study in law comparable to the fields of public health or epidemiology… There is simply nothing comparable, publicly or privately produced, with respect to legal infrastructure.[263]

The implication of this lack of data and research, as Hadfield points out, is that the effectiveness of any policy initiative to reform the legal system – including efforts to improve access to justice

[260] See *supra* note 108.
[261] See e.g. Geoffrey C Hazard Jr, Russell G Pearce, & Jeffrey W Stempel, "Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services" (1983) 58 NYU L Rev 1084; Renee Newman Knake, "Legal Information, the Consumer Law Market, and the First Amendment" (2014) 82 Fordham L Rev 2843.
[262] *Supra* note 108.
[263] *Ibid* at 215.

– is unknowable. There is currently no chance of knowing whether policy changes have had an ameliorative effect if there is no baseline research from which to measure.[264]

The mapping described in Chapter Three and the research on the market for legal services described in this chapter – limited though it is – indicate that there is much more in how legal services are created and distributed than is caught by the judicial conception of access to justice described in Chapter Two. In recent years, the legal community in Canada has moved beyond the judicial conception to a more expansive vision of access to justice. That conception is described and critiqued in the next chapter.

[264] *Ibid* at 218.

Chapter 5 – Expanding the Conception of Access to Justice

1 More Than Just Formalism

In academic and extra-judicial writings, discourse around access to justice in Canada has increasingly sought to expand the conception of access to justice by explicitly considering both *what* access to justice means and *who* should benefit from improved access to justice.[265] As part of this discourse, prominent reports have embraced a conception of access to justice which builds from the judicial conception but incorporates increased attention to the context of legal service delivery. This conception has been described by legal scholars as an "expansive vision" of access to justice.[266]

While the judicial conception of access to justice is largely inattentive to the context of legal service delivery, the expansive vision conception recognizes that understanding the interests of both users and providers of legal services is crucial to improve access to justice. This builds on the type of mapping done in Chapter Three.[267] Accordingly, the expansive vision conception broadens its scope to include the creation and delivery of legal services, and offers up a customer or user-focussed ethos that borrows from the fields of marketing and management theory.[268]

Despite this improved scope, I argue that the expansive vision conception is still insufficient to address access to justice problems because of its imprecise and errant core normative commitments.

This chapter begins by setting out the nature of the expansive vision conception of access to justice in Section Two. In Section Three, I discuss shortcomings of this conception, including the conception's fundamentally institution-focussed nature. Section Four explores whether *any*

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[265] Bailey, Burkell, & Reynolds, *supra* note 7 at 182.
[266] *Ibid* at 205.
[267] See NAC Report, *supra* note 1. The preparatory work for this report included four preliminary reports, including one from the "Access to Legal Services Working Group", which detailed changes in legal service delivery models, and also one from the "Prevention, Triage and Referral Working Group", which focussed on service providers such as PLEI organizations.
[268] See e.g. Russell S Winer, "A Framework for Customer Relationship Management" (2001) 43(4) California Management Review 89.

institution-based conception of access to justice could offer a satisfying vision of access to justice, ultimately finding the answer to be "no". Section Five concludes.

2 The Expansive Vision Conception

Law professors Jane Bailey, Jacquelyn Burkell, and Graham Reynolds have traced the contemporary discourse of access to justice in Canada.[269] They highlight the emergence of the expansive vision of access to justice from a number of influential reports, and suggest that this conception of access to justice is one that has become prominent within the Canadian legal community.[270] This conception is marked by a vision of society "in which the public has the knowledge, resources and services to effectively deal with civil and family law matters" through preventative, informal, and formal means"[271] and it emphasizes the following tenets:

1. Justice services are accessible, responsive and citizen focused;
2. Services are integrated across justice, health, social and education sectors;
3. The justice system supports the health, economic and social well-being of all participants;
4. The public is active and engaged with, understands and has confidence in the justice system and has the knowledge and attitudes needed to enable citizens to proactively prevent and resolve their legal disputes; and
5. There is respect for justice and the rule of law.[272]

Looking at these five requirements, we can see how the expansive conception has built on the rule of law and has integrated insights gleaned from the type of research presented in Chapters Three and Four.

Similarly, the final report of the National Action Committee on Access to Justice in Civil and Family Matters ("NAC") described accessible justice in the following way:

[269] *Supra* note 265.
[270] *Ibid* at 205.
[271] NAC Report, *supra* note 1.
[272] *Supra* note 265 at 190.

> …a more expansive, user-centered vision of an accessible civil and family justice system is required. We need a system that provides the necessary institutions, knowledge, resources and services to avoid, manage and resolve civil and family legal problems and disputes. That system must be able to do so in ways that are as timely, efficient, effective, proportional and just as possible.[273]

Bailey, Burkell, and Reynolds suggest that this expansive vision of access to justice is laudable because it both offers a "comprehensive approach to deliverables", and because it considers a "full spectrum of beneficiaries".[274] A comprehensive approach to deliverables means that the concept does not confine access to justice to courts and tribunals. Other processes and institutions, such as "partnerships with health and social service agencies", and preventative steps to avoid disputes, are included within this conception of access to justice.[275] A full spectrum of beneficiaries refers to the fact that while access to justice problems are likely ubiquitous, different people experience those problems in different ways and with different effects. Accordingly, addressing access to justice problems requires attentiveness to differences among social groups.[276] Both of these are significant moves away from the court-centric nature of the judicial conception described in Chapter Two. This attention to both "beneficiaries" and "deliverables" requires an improved understanding the legal services landscape, such as that done by the mapping in Chapter Three.

Several aspects of the expansive vision conception are notable. First, it claims to foreground the public in conceptualizing justice problems, rather than the legal system or those working within that system. Second, it recognizes that legal problems may not intersect with the existing legal system. Third, it recognizes a wide range of tools to address justice problems, and places value not only on resolving existing disputes, but on preventing future disputes.

The rule of law remains an important normative anchor for the expansive vision of access to justice. For example, the expansive vision explicitly includes "respect for justice and the rule of law" among its core elements.[277] Further, another influential report on access to justice, the Canadian Bar Association's *Reaching Equal Justice* report, begins by suggesting that "[p]ublic

[273] NAC Report, *supra* note 1 at 2.
[274] *Supra* note 265 at 190, 192.
[275] *Ibid* at 192.
[276] *Ibid* at 193.
[277] *Ibid* at 190.

confidence in the justice system is declining", and argues that the importance of access to justice lies in preserving the integrity of the justice system.[278] The Canadian Bar Association report also explicitly links access to justice to both the rule of law and to democracy at other points throughout.[279] Similarly, the NAC report notes that "[t]he current system, which is inaccessible to so many and unable to respond adequately to the problem, is unsustainable."[280] Finally, several of the working group reports upon which the NAC report is based describe the rule of law concerns as at the core of access to justice. For example, two of the four working group reports upon which the NAC report was based include the following statements:

> "Access to justice is a corollary of the rule of law and as [sic] is essential to the social and economic well-being of civil society";[281]
>
> "The linkage between access to family justice and the rule of law is direct and immediate";[282] and
>
> "The public court process is of vital importance to Canada… For the system to be effective, it must operate in a way that is just, efficient, and proportionate to the needs and resources of the citizens it is designed to serve… According to the former Chief Justice of Ontario, as cited by the Chief Justice of Canada, 'access to justice is the most important issue facing the legal system.'"[283]

While the expansive vision of access to justice described by Bailey, Burkell, and Reynolds represents a significant broadening of the concept of access to justice when compared with the narrow version evident in Canadian caselaw, its significant mooring in the rule of law as its animating normative frame undermines the potency of the conception.

3 Shortcomings of the Expansive Vision Conception of Access to Justice

The expansive vision conception of access to justice builds and improves on the judicial conception. But even this expansive vision conception fails to rise to the challenge of remedying

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[278] Reaching Equal Justice, *supra* note 1 at 14.
[279] *Ibid* at 50.
[280] NAC Report, *supra* note 1 at iii.
[281] Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words: Final Report of the Family Justice Working Group* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 5.
[282] *Ibid* at 63.
[283] Action Committee on Access to Justice in Civil and Family Matters, *Report of the Court Process Simplification Working Group* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2012) at 1.

access to justice problems. Although the expansive vision conception advocates for improved access to justice, it does not offer a theoretically grounded vision of how to do so. Legal scholar Patricia Hughes argues that many of the reports which set out the expansive vision of access to justice fail to particularize and pay attention to the specific causes and effects of access to justice problems:

> These recent reports have taken centre stage in efforts to reform the civil legal system, in particular the family law system. Too often, however, the studies pay little attention to a more holistic analysis of the "access to justice" problem, one which explores the meaning of the concept of "access to justice", and which scrutinizes the system from the viewpoint of particular groups (such as members of Aboriginal communities, persons with disabilities, women or racialized women). The reports attracting attention consider "justice" almost in a vacuum; while making brief and, in some cases, mere passing references to particular grounds of marginalization, they place their recommendations in an ostensibly neutral legal system. They do not identify the frameworks within which they promote changes. For example, generally speaking, they do not explain how their reforms would promote a particular form of equality and thus do not consider how these reforms would effect broader change.[284]

This is a fundamental critique. While Hughes and Bailey, Burquell, and Reynolds all acknowledge that the expansive vision conception of access to justice may "take into account various factors such as low education or disability",[285] or recognize "the importance of tailoring responses to meet the (potentially different) needs of various stakeholder groups",[286] this conception avoids engaging with substantive equality discourses in significant ways.[287] Hughes observes that this is often not the purpose of such reports: "their purpose is to propose practical reforms that can be applied in the legal system, specifically in the courts or in the delivery of legal services and the like and sometimes more broadly to include non-legal actors."[288] But failing to connect the legal system's role in reinforcing relations of inequality "risk[s] perpetuating an underclass of persons excluded from justice."[289] Further, failing to engage in significant analysis of the relationship between the legal system, justice, and inequality risks

[284] *Supra* note 55 at 2-3.
[285] *Ibid* at 3.
[286] *Supra* note 265 at 192.
[287] *Supra* note 55 at 3.
[288] *Ibid*.
[289] *Ibid* at 3-4.

wasting an opportunity to meaningfully improve access to justice in any reform of the existing system.

Hughes states that the challenge of responding to the disparate access to justice barriers faced by all groups "is a significant one and it is not surprising that reports seeking to bring about changes do not always address the complex web of factors that create barriers to justice."[290] She suggests that a detailed understanding of the complex barriers faced by different people is necessary in order to meaningfully improve access to justice.[291] Recognizing the tension between a desire to "'stop talking' and to 'start acting' to reform the system"[292] and doing the complex work of trying to understand and address community-specific and often intersectional barriers to accessing justice, Hughes hypothesizes that some common traits among disparate communities may give rise to "factors of similarity" that "may provide a means to bridge the gap between more complex explorations and the desire to implement specific solutions that are not necessarily dedicated to particular groups."[293]

These criticisms also point out a problematic indeterminacy at the core of the expansive vision conception of access to justice. Although this conception calls for the creation of a "user-centred" legal system, the precise meaning and implications of that focus is unclear. Should access to justice focus on those who are currently using the legal system? Should the focus be broader, on all persons within Canada's jurisdiction? Different answers to this and related questions yield very different results in what the concept of access to justice entails. And while it is tempting to imagine that working through different possibilities will yield an acceptable outcome, failing to identify the proper focus of the concept of access to justice leaves the concept unacceptably vague.

Hughes's critique draws out the tension between the universal and the particular in addressing access to justice. The expansive vision of access to justice is laudably broad, but it does not explicitly set out its motivating norms. It is not self-actuating. Recall the brief stories of Sara and Anthony from the beginning of Chapter Two.[294] Would either a judicial or expansive vision

[290] *Ibid* at 4.
[291] *Ibid* at 7.
[292] *Ibid* at 6.
[293] *Ibid* at 7.
[294] See Chapter Two, above.

conception of access to justice help to address their frustrations and challenges? Both Sara and Anthony were aware that they had formal access to courts, and even that lawyers or other legal service providers exist to offer legal services. But both experienced difficulties in navigating the panoply of legal (and other) institutions that affected them, and both experienced difficulties in finding legal service providers who *would* provide assistance.

The expansive vision conception offers more scope for reform in that it pledges to make justice services responsive, accessible, integrated across health and other sectors, and aimed to support the "health, economic and social well-being of all participants". But without explicitly setting out how justice services *should be* responsive, accessible, and supportive, there is very real concern that the sterile formalism of the rule of law concept will supersede the other aims of the expansive vision. This is the concern that Hughes has given voice to, and it is one that resonates with the stories of Sara and Anthony. Sara described finding many parts of the health and social services sectors that she encountered to be difficult to penetrate, with the exception of one or two helpful individuals who paid attention to her specific questions and concerns and helped her find resources she needed.[295] Anthony found that despite the existence of organizations and institutions that were formally there to help him access justice, his personal history as a recovering drug-user prevented him from receiving any meaningful support to understand whether he had any legal recourse.[296]

4 The Limited Potential of Alternative Institution-Based Conceptions

Having criticized both judicial and expansive vision conceptions of access to justice, might another institution-linked concept provide a better grounding for a broader conception of access to justice? There are a few good candidates originating out of social contract theory or theories of citizenship. Legal scholar David Dyzenhaus, for example, has suggested that key normative reasons for embracing the concept (and legal principle) of access to justice as well as correlative justifications for state-based legal aid can be found in Thomas Hobbes's "publicity principle,"

[295] *Supra* note 36.
[296] *Supra* note 29.

which is linked to a state's commitment to the rule of law.[297] In Dyzenhaus's analysis, the social contract by which subjects trade obedience to a sovereign for protection by the law is empty if those subjects cannot avail themselves of the benefits of the law. Accordingly, "[s]ubjects must both know their legal entitlements and be able to get them enforced… [this] requires more than knowledge of legal entitlements; it also requires effective access to them."[298] This is a foundational component of the bargain, and represents "what the sovereign has to do in order to exercise power through law."[299]

Alternatively, sociologist TH Marshall offered a conception of access to justice grounded in his description of civic citizenship, which explicitly enumerates a "right to justice" among its demands. Indeed, Marshall gave a special place to this right to justice, noting that it "is of a different order from the others, because it is the right to defend and assert all one's rights on terms of equality with others and by due process of law. This shows us that the institutions most directly associated with the civil rights are the courts of justice."[300] Both Dyzenhaus and Marshall work with the basic insight that in a common law legal system, rights are in a profound sense meaningless without a remedy. Judicial review — that is, the ability to vindicate a right or demand that public officials meet their legal duties and responsibilities — is therefore both a process and a remedy in and of itself and that means that courts ought not to be substantively *in*accessible.[301]

Both of these approaches are important because they move beyond a thin rule of law-predicated conception of access to justice, while incorporating the principle of the rule of law. Both Dyzenhaus and Marshall, in different ways, tie the importance of access to justice to the fabric of political arrangements. They demonstrate that other normative frameworks are possible. But both also suffer from a similar fundamental weakness and help to illustrate why institution-focussed

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[297] See David Dyzenhaus, "Normative Justifications for the Provision of Legal Aid" in *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Toronto: Ontario Legal Aid Review, 1997) at 475-477.
[298] *Ibid*.
[299] *Ibid*.
[300] TH Marshall, "Citizenship and Social Class" in TH Marshall & Tom Bottomore, eds, *Citizenship and Social Class* (London: Pluto, 1992) at 8.
[301] See Mary Liston, "Administering the Canadian Rule of Law" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed, (Toronto: Emond, 2018) at 148. See also Angus Grant & Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed, (Toronto: Emond, 2018) at 353, 359.

concepts of access to justice are ultimately insufficient. Economist and philosopher Amartya Sen criticizes institution-centric thinking about justice in the following terms:

> There is a long tradition in economic and social analysis of identifying the realization of justice with what is taken to be the right institutional structure… There are, however, good evidential reasons to think that none of these grand institutional formulae typically deliver what their visionary advocates hope, and that their actual success in generating good social realizations is thoroughly contingent on varying social, economic, political and cultural circumstances.[302]

This comment cuts to the core of the problem with most conventional conceptions of access to justice. In Sen's view, justice is fundamentally personal and context-sensitive, and ideal (or "transcendental", as Sen describes them) theories of justice fail to properly grapple with the world we find ourselves in.[303] Conceptions of access to justice that do not address this personal and contextual nature similarly fail to yield meaningful help for those who experience access to justice problems. They will then fail to realize the core content of the concept of access to justice. Moreover, a focus on institutions can interfere with a critical evaluation of how those institutions actually work in practice:

> Institutional fundamentalism may not only ride roughshod over the complexity of societies, but quite often the self-satisfaction that goes with alleged institutional wisdom even prevents critical examination of the actual consequences of having the recommended institutions… whatever good institutions may be associated with, it is hard to think of them as being basically good in themselves, rather than possibly being effective ways of realizing acceptable or excellent social achievements.[304]

In Sen's analysis, *any* institution-focussed conception of access to justice is therefore insufficient. Placing institutional fundamentalism at the core of a conception is corrosive and undermines efforts to mitigate or ameliorate formalism by cladding the conception with the window-dressing of context sensitivity. Accordingly, a different *kind* of conception is needed.

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[302] *Supra* note 53 at 83.
[303] See e.g. Zofia Stemplowska, "Sen's Modest Justice" (2014) 5:2 Jurisprudence 376 at 376-377.
[304] *Supra* note 53 at 83.

5 Moving Beyond Institutional Arrangements by Focussing on the Person

These critiques suggest that we must look beyond institutional arrangements in building a worthwhile normative framework for access to justice. Chapter Eight takes up this challenge and lays out a conception of access to justice that is truly person-centred and is rooted in the idea of shared human vulnerability. But before we get there, the next two chapters present new research on how people who experience access to justice problems currently respond to their problems, and on the dynamics of how personal legal services are created and distributed. These chapters help to deepen our understanding of both the supply-side and demand-side elements of access to justice. In doing so, they further prepare the groundwork to explain why the person-centred conception of access to justice presented in Chapter Eight is more promising than any of the institutional conceptions currently on offer.

Chapter 6 – Faces of Access to Justice Problems

1 Introduction

This chapter adds to demand-side research on access to justice problems. It starts by presenting, in Section Two, three narratives from individuals interviewed for this dissertation. All three narratives involve women who experienced significant personal injuries and their stories help illustrate some of the key dynamics that may underlie how people navigate responses to justiciable problems. I chose these three interviews because they represent rich exemplars of how different people grappled with justiciable issues and therefore provide a useful scaffold for the analysis of the access to justice issues that arise in these and in other interviews and which will be discussed later in this chapter.[305]

Section Three analyzes these and other interview data and situates the interview findings within the broader literature. Many of the research interviews appear to support existing findings, but the interviews also suggest some novel directions for future research. While the number of interviews in this study is small, they nevertheless reveal some aspects of access to justice problems that have been overlooked by existing research. A detailed account of how I situate myself, and how the interview process was designed, is recounted in Appendix A.

Section Four distills and summarizes the key points and contributions of this interview research.

As discussed in Chapter One, it is important to acknowledge the constructed nature of these narratives.[306] Qualitative interview research does not merely report objective truths.[307] The answers and narratives do not simply appear; they are the product of interactions between the interviewer and the interview participant, starting with the participant's experience of an event, and extending through their retrospective construction of that event from memory, the interviewer's recruiting efforts, and the interview and post-interview process. The questions that the interviewer asks – and possible questions that are not asked – are very much a part of the

[305] A detailed methodology of both the interviews and their analysis is found in Appendix A.
[306] See Chapter One, Section Three, above.
[307] See e.g. Bishop & Shepherd, *supra* note 23 at 1284.

narrative creation. The interviewer's demeanour and background also form part of the process of narrative creation, both at the time of the interview and as the interviewer interprets, reflects on, and recounts the interview.[308] In creating the interview process, I have attempted to be appropriately reflexive throughout the process. But as I recount the narratives that I have interpreted from several interview participants, I must acknowledge the subjective, contingent, and co-created nature of the interview process for the resulting analysis and conclusions drawn.

This study adds to existing research, but I think it is important to identify some of the study's limitations. Although this project was planned as small-scale interview research, the final sample size was smaller than expected. This is likely due to the limited number of sites used for recruiting and the restriction of recruiting participants who had experienced one of two justiciable problems. Due to the small number, limited geographic distribution, and socio-economic homogeneity of interview participants, the interview research cannot claim to refute or confirm conjectures or conclusions from other studies that draw on broader and more representative population samples. But this research does offer some broadly relevant insights. Though it samples fewer individuals than other studies, it explores the experiences of those individuals at higher levels of resolution than other studies. By finely focussing on how interview participants interpreted justiciable events and perceived their available response options, this research offers an opportunity to understand these experiences in rich detail. Consequently, this research offers new context and yields new insights about advice-seeking behaviour that may have evaded previous large-scale research. Accordingly, this and later chapters take these insights forward by offering suggestions for how future large-scale research can investigate the contextual factors that appear to have shaped how interview participants understood their situations. This small-scale study provides a model for a larger study with more heterogeneous participants in the future. The fine focus of this research is, as I argue later in this dissertation, the kind of person-centred, context-sensitive approach that is particularly necessary to improve access to justice, and leads to novel interventions such as introducing an independent, holistic problem-solving institution. This intervention is discussed in more detail in Chapter Nine, Section Two.

[308] *Ibid* at 1285-1286.

2 Three Narratives: Sara, Justine, Mia

This section sets out three narratives of interview participants who experienced a problem or problems that had a legal dimension. Interview participants were recruited on the basis of having experienced one or both of two types of justiciable problem - either a personal injury or government benefits problem – over the past three years. These two problem types were selected because existing research suggests that they occur at similar rates across the population, but fall at opposite ends of the spectrum of whether they are perceived to be "legal" in nature.[309] Each of the interview participants described here experienced a significant personal injury, and two of the three – Sara and Justine – also dealt with problems around obtaining benefits after their injuries.

a) Sara's story: Falling through the cracks

Recall Sara, who was just starting post-secondary education when she experienced a significant freak mishap. She sustained multiple head injuries and a broken arm. Sara described the impact of the injury and following events on her as a "negative five" on a rating scale from +10 to -10, where +10 represented the single best thing to ever happen to her, and -10 represented the single worst thing to ever happen to her.[310] Sara estimated the approximate monetary cost of her injury as approximately $2500 per month in terms of costs incurred and lost income.[311]

Sara described being helped initially by a stranger, who called an ambulance to take her to hospital. Initially, Sara found she "didn't get a lot of support when [she] was in the emergency room."[312] She described being treated for her physical injuries, but left without any sense of where to turn for further support:

> …it was a very kind of weird and slow process for me because no one had told me 'hey you've had actually a pretty serious head injury, your arm is really not in a good place, and you know, you should really have someone trying to help

[309] See Chapter One, Section Three, above.
[310] *Supra* note 36.
[311] *Ibid*.
[312] *Ibid.*

> you sort through daily things like, you know, all the weird things that you're going to be experiencing.' And I didn't get any of that help. So, for me it was a really strange process.[313]

Sara remembered receiving some help initially from family members, as well as receiving some support that was given by her post-secondary institution. But she also described frustration at having to make multiple return visits to the hospital, frustration at not receiving more information about her prognosis from medical staff, and frustration in trying to deal with her job and obtain income support while she was unable to work.[314]

Once Sara realized that her injuries would have an ongoing effect on her life and her ability to participate in the workforce, she contacted an insurer, the city, and the police to try to understand if she could obtain any compensation. None of these organizations provided assistance to Sara. Sara described this period of time as "really strange and I was having a really hard time coping with everything."[315] Eventually, in crisis Sara phoned a provincial medical help line. Although Sara had dealt with a large number of medical professionals and other support workers, this was the first time she described the information she received as helpful and comprehensive:

> I don't know how I lucked out, but I got a nurse who actually worked in a head trauma recovery unit. So maybe it was just good timing, maybe they just had somebody on who was free who could talk about it with me. I have no idea how their system works, but she was awesome. She, like, literally spent like an hour on the phone with me and she was like "this is what you're going through. This is what to expect, and this is what you have to do to get yourself better." And it was just like no one had told me any of these things, and I'm like "oh, ok, now it makes a bit more sense." And it was hard, but it was really helpful. And it was probably, up until that point, the most help that someone had given me to deal with all of this. Which is kind of sad, that, you know, somebody on the phone, rather than all these people I'd had contact with, who could have helped me, just didn't[.][316]

As with several of the interview participants, Sara's personal injury gave rise to problems dealing with government benefits.[317] Once Sara had exhausted most of her savings, she turned to

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[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid.*
[317] *Ibid.* This was also true for interviews with George, Anthony, and Chris.

a social worker to whom she had been referred as part of her rehabilitation, only to be told that there were few income support options available:

> I think the best the social worker said I could get was perhaps a crisis grant. But to get that, I would have to get an eviction notice first, and then go to the office and then hope that they would take it seriously and give me the money that I needed. Meanwhile, the landlords are aware of what your situation is, and, you know, probably doesn't want somebody that they think might be a welfare bum living in their house. So that was how it worked.[318]

Ultimately, Sara found that it took more than one year to obtain provincial disability assistance.[319]

Sara attempted to make use of legal services but found that most of them were unable to help her. After her injury, Sara sought legal assistance from several lawyers. One of these lawyers explained to Sara that because of the details of how her injury occurred, the prospects for financial recovery were remote. Sarah appreciated this lawyer's attention and honesty:

> [H]e was great. He was like "ok, you know what, let me look into it and get back to you." And he said because of the nature of the person who had caused the injury, because I didn't know who they were, because it would – not be impossible, but it would be difficult to get around the privacy laws to get this person's name – and I was pretty sure that this person was themselves on a government supplement, it was next to impossible to get any money out of it. And he was really honest, and he said "I'm really sorry to see you fall through the cracks. But legally, there's really nothing that you could recoup." So that was the end of that.[320]

In addition to speaking to a lawyer, Sara also called a legal help phone line, informed her union and worked with an appointed advocate, worked with resource people who she encountered in the course of her rehabilitation, and contacted the police, the city, and an insurer. Sara also made significant use of online resources, including finding information about government benefits from a public legal help organization and using Google to find lawyers who specialized in dealing with head injuries.[321]

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[318] *Supra* note 36.
[319] *Ibid.*
[320] *Ibid.*
[321] *Ibid.*

In acting as she did, Sara indicated that cost was a noteworthy but not overriding factor, remarking that she thought that someone with more money would have had access to better legal help: "I kind of figured 'no, I'm sure if I had a lot of money , something would be…' Look at Sidney Crosby. [laughter]".[322]

Sara also described a strong sense of fear and confusion about where to go and what to do. This confusion was more pronounced when dealing with her personal injury. By the time she was dealing with government benefits disputes, Sara knew where to go, but found the process itself to be frustrating and slow. While she wanted to get on with her life, Sara was uncertain of her rights regarding government benefits. This contrasts with her view that she was "pretty clear" about her rights regarding the personal injury.[323]

Although Sara's story included some examples of encountering people she found helpful and who provided assistance – such as the stranger who helped her immediately after her injury, the helpful nurse on the provincial medical help line, and even the lawyer who explained that she had no legal claim – the general tenor of her experience was one of systems failing to live up to expectations. One strong theme that emerges from Sara's description of her experience is one of falling through the cracks of various systems and feeling unsupported:

> "I really could've used some more support…and never got it";
>
> "I fell through the cracks in the medical system";
>
> "[The lawyer] was really honest, and he said 'I'm really sorry to see you fall through the cracks. But legally, there's really nothing that you could recoup.' So that was the end of that."[324]

A second strong theme addresses the effects of luck in people's lives and how the way we structure our institutions can exacerbate, rather than mitigate, the impact of bad luck. We see this in Sara's apt perception about how strange her experiences seemed to her, in retrospect:

> …it's weird that this, like, weird, random thing became all these different things at once. It came from what was like an accident to, like, a problem I was dealing with, to it was a big medical issue, to a social problem, because that's

[322] *Ibid.*
[323] *Ibid.*
[324] *Ibid.*

> just the way the society is structured. And it's weird how they just lump everybody together.[325]

Sara recognized how one event led to a cascade of other events that magnified problems in her life. This cascade was not unavoidable, but was shaped by her injury, her subject position as a young, female person who experienced precarious work and the demands of the education system, and—crucially—the "way the society is structured". The interaction of these and other factors left her vulnerable to falling through the cracks in the legal system.[326]

b) Justine's story: Not knowing where to turn

Justine was 50 years old when she experienced a problem using her hand. This was a significant set-back, because she needed to be able to use her hand for her career. While trying to find work accommodation or a change that would allow her to take up a new career, Justine fell on the street. As a result of the fall, she crushed a nerve in her other arm, preventing her from working again. Justine described being unsure of what to do, mentioning that "at no time did I know that I could get benefits."[327]

Justine described the fall as being a "negative 10" on the rating scale – in other words, the worst thing that had ever happened to her.[328] Immediately after her fall, Justine went to a medical clinic for treatment. Several weeks later, still in significant pain, she returned to the clinic and then went to another doctor, who diagnosed a crushed nerve. Justine described an initial period of just wanting to get on with her life:

> I just hoped it would get better. I didn't want to go through any process of contacting the city. I did take pictures at the time, because I… well, it wasn't at the time, it was like a week later, because it's still the same problem there. And I thought, well, I would contact the city and tell them what happened just to prevent it happening to someone else. But then I just couldn't deal with my

[325] *Ibid.*
[326] There is a rich literature on the relationship among luck, welfare, and equality. See e.g. Michael Otsuka, "Justice as Fairness: Luck Egalitarian, Not Rawlsian" (2010) 14 J Ethics 217. A detailed discussion of this literature is beyond the scope of this dissertation.
[327] *Supra* note 28.
[328] *Ibid.*

> own life, so that was the last thing I was thinking of. I had way too many problems.[329]

After eventually receiving her diagnosis, Justine was unsure about what to do next. She mentioned that she "also didn't know how to ask for help. I didn't know where to go to get help."[330] Justine described having some familiarity with the legal and medical systems, but not with other potential support systems: "I know about lawyers, I know about doctors, but I don't know about anything… I didn't know about anything in the community. I didn't know about where services are."[331] She described being discouraged from pursuing any claims by family members and friends:

> …they would say 'Well, you can't do anything. The city won't help you with that. They're just going to change that.' But nobody that I know had told me about any kind of community service or anything. Ok? So, I didn't know how to access help.[332]

Justine felt alone, and described the difficulties attendant on that loneliness, in trying to respond to the challenges in her life:

> I'll say this: I had no support network. I was everybody's support network. Big mistake. But I don't know how that happened over the years, you know? So as bad as this all is, and as horrible as this all is, I can always see another side. And the other side is wow, I met wonderful people now at [a neighbourhood house] and I've… you know, there's been good things that I guess you could say came out of it, but now I'm in financially bad times.[333]

Justine's experiences informed her views on how social systems might be reformed:

> …after having all this garbage happen in my life, boy, I tell you, I could re-write the systems… they should have an intake person. Not some computer thing. Like, fine for the information, but they should still talk to someone initially, right away. When it's a medical problem. Right? 'Cause I had a medical problem, it's not like I was on unemployment insurance because I lost my job. I couldn't do my job because I couldn't do anything. Right? So, they should have an intake person right away saying "look so we don't know the trajectory, but here are all these things. You will need this, this, and this. You will need help…" … If I would've known about a food bank. If I would've known about these things that I could access at that time, I would not be in the

[329] *Ibid.*
[330] *Ibid.*
[331] *Ibid.*
[332] *Ibid.*
[333] *Ibid.*

> financial situation that I'm in now, which is tapped out. I was in good standing financial order. Even when this happened. But there was nobody to say "you may need this, you may need this. Here's a huge list, here's all these people in your community. Start.[334]

Justine also commented on the difficulty of trying to find appropriate support services, including legal services, at a time of stress and vulnerability:

> This is a ridiculous amount of time in life, right? Especially when you're injured. You're already hurting. Do you know what I'm saying? It's sort of a tiered thing. You're upset because you can't work. You're hurting. You're not eating right. You're not sleeping right. And then you have to go on this wild goose chase for lawyers and doctors appointments, which are just annoying.[335]

Like Sara, Justine's story speaks to being unsupported in a time of need by multiple social systems and groups of people. Recounting her experiences appeared to raise strong feelings of unhappiness and disappointment for Justine, as well as frustration that "the system" was not more responsive to her needs. Justine's comments also depicted a sense of being overwhelmed by events, and of being confused about how best to respond to those events.

c) Mia's story: With a little help from her friends

Mia was 64 years old when she slipped and fell during a period of prolonged travel in the United States. She did not have medical insurance. Her fall left her with a shattered leg, which required complex surgery and more than 12 screws and plates to repair the damage. She described falling and shattering her leg as "one of the worst things I've experienced", with a physical aspect of "negative eight or nine" on the rating scale. But she also described some "very positive consequences" with a rating of "positive seven", such as re-forming connections with people she hadn't been in touch with in a long time.

Mia also described having an overall positive experience in dealing with her injury. She was initially helped by strangers, one of whom had medical training and was able to stabilize her leg. Having no medical insurance, she described hesitating in deciding how to respond: "you've got

[334] *Ibid.*
[335] *Ibid.*

this play of I don't want to spend money I don't need to spend, but this is a serious injury, I need to be seen."[336]

Mia went initially to a clinic, which assessed and x-rayed her injury and then sent her to hospital for further medical imaging. At the hospital, she saw an orthopaedic surgeon who indicated that she would need complex surgery to repair her leg, and who told her to expect a significant recovery process. Mia decided to return to Canada for surgery. But Mia noted that because she had been travelling for an extended period of time, she "had no home to come back to."[337] Fortunately, Mia was able to arrange to stay with a friend upon her return to Canada. Further, her friend "was a social worker, so she knew the ropes about the hospital referral," and counselled Mia to go straight to a hospital emergency room upon arriving back in Canada, rather than trying to obtain a referral from a Canadian doctor.[338] Mia brought her medical imaging from the United States with her, and was operated upon almost immediately.

What is perhaps most striking about Mia's story is the degree to which social connections gave rise to positive outcomes. In addition to finding accommodation and medical system know-how in Canada, Mia also described receiving support from friends and acquaintances while she was still in the United States, and drawing on a "web of connections" in Vancouver to find effective treatments and supports after her surgery.[339] Mia drew upon this web even in making her initial decision about how to respond to the injury:

> …the decision to not go to the hospital was based on two factors. One… I thought that I was not dealing with a break. I was very conscious that I did not have medical insurance, and so, you know, if this was a thing that was going to heal naturally, take care of itself, I would rather do that. So then the next morning, the decision was based on the fact that the physiotherapist at the place where I was staying had connected with a physiotherapist friend of hers in Vancouver who had said "here are the risk factors. You know, if you're older than 55 or something, if you're this, if you're that. And if you cannot bear to put weight on that leg, even for a couple of steps, then you should definitely seek medical help." And I think I answered three out of four of those categories… And so, I thought "ok, this needs medical attention." And so, then I consented to going in and from that point I just did whatever they told me.[340]

[336] *Supra* note 33.
[337] *Ibid.*
[338] *Ibid.*
[339] *Ibid.*
[340] *Ibid.*

Mia did not describe feeling lost or frustrated at any point in responding to her injury. As she put it, "I was very well taken care of. I mean, I didn't always know, but I was connected with people who knew."[341]

Mia was also aware of apparently fortuitous events – note the importance of luck here again – that eased her experiences and helped to resolve problems. These even applied to potentially legal matters: "you know, it's a history of things like that. You know, just happening in exactly the right place. As it turned out, the place where I was staying had slip and fall insurance."[342] As a result, Mia found that "the system was very supportive to me."[343] Indeed, Mia did not even have to take independent steps to find that she was covered by insurance at the location where she fell, which was on the grounds of the residential facility where she was staying at the time. The custodians of the residence looked into their insurance and notified Mia that she might be covered.[344]

The web of support that Mia drew on was something that she had built over the course of her life, even where she had not done so consciously. For example, Mia told the following story about the person who she ultimately stayed with during her recovery in Vancouver:

> And I'll tell you just one magical little detail about this: the woman that I ended up staying with was one of the people – she'd been in a women's support group that I belonged to 20 years ago. And I had actually – I hadn't had her email address, I just had the email of somebody else in the group and I emailed her and she said "well, I'm not in Vancouver anymore, but I'll forward your email to the people who are." And this woman responded and said "well, I'd be happy to help you out." And once we had a chance to talk face to face, she said, "I don't know if you remember, but 20 years ago, when we were in that group together and I was going through my divorce, you opened your home to me and I stayed with you for a couple of months."… Once she reminded me, I remembered very clearly. It didn't come into my mind. She said, "I'm very happy to be able to repay that karmic debt."[345]

It is also worth noting that the support from others at key points afforded Mia an opportunity to consciously consider how best to proceed. In addition to her decision-making process about whether to go immediately to the hospital in the United States, she also described intentionally

[341] *Ibid.*
[342] *Ibid.*
[343] *Ibid.*
[344] *Ibid.*
[345] *Ibid.*

soliciting help from her network of connections in Canada: "I mean, they're not a group anymore. It's just the individual people have gone their ways, but I thought, you know, there's a web of connection that I have belonged to and that might…"[346]

Mia did not consider making use of legal services in responding to her injury. In her words, "You know, my mind doesn't go to the legal system as an option. Which is interesting, because one of my brothers is a lawyer."[347] Mia considered her experience to be largely a family and community matter, in the sense that "I called my community around me, or they were there".[348]

In addition to having a brother who is a lawyer, Mia has also had significant prior experience with the legal system. She described being married and divorced twice and used the legal system through both divorces. Mia described the legal system as something that she would use only as a last resort:

> I don't have an aversion to the legal system. I have… I guess I have a feeling that it, for me, it would be a very last resort. I would try a lot of other ways of dealing with things earlier… I dislike confrontation. And so, whenever I see that one choice looks like it's going to involve confrontation and one choice isn't, unless there are strong reasons the other way, I will go with the choice that doesn't. And getting involved in the legal system is going to involve confrontations.[349]

While Mia experienced a significant personal injury, the strength of her extensive social network appeared to provide her with the information and other resources that she needed, when she needed them, in order to allow her to navigate her way through institutions in a relatively smooth way.

[346] *Ibid.*
[347] *Ibid.*
[348] *Ibid.*
[349] *Ibid.*

3 Analysis: Sensing Injustice and Understanding Response Factors

a) Sensing injustice

The three interviews with Sara, Justine, and Mia help to highlight some important aspects of how people respond to life events with a potentially legal aspect. All of the interviews in this study contextualize the decision-making pathways employed by individuals who have experienced a justiciable issue.[350]

I chose to discuss the narratives of Sara, Justine, and Mia in detail for several reasons. First, each experienced a significant personal injury that was not obviously caused by the intentional action of another (differentiating these from, for example, the assault that George experienced). This is important because while personal injuries often lead to relatively high levels of using legal services, as discussed below, I posit that this association may be weaker when there is no individual or entity that is obviously and directly responsible for the injury. Another reason for choosing these three narratives to discuss in detail is that each placed the significance of their personal injury (or resultant government benefits problem in Sara's case) at a different part of the scale. Justine rated her event at a -10, meaning that the personal injury she experienced was akin to the worst thing she had ever experienced. By contrast, Mia was unique among the interview participants in explicitly attaching some positive results to her experience (describing the non-physical consequences of her injury as +7 on the rating scale, even though she rated the physical consequences at a -9). Sara fell between these two extremes, rating the significance of her personal injury as a -5, and the significance of her government benefits problem at a -2. Figure Two below sets out the ratings given by each interview participant about the scale of significance of the event for them.

[350] Legal needs surveys often employ in-depth surveys with a sub-set of the total survey group. But few of these have focussed explicitly on the decision-making process and factors that influenced how people responded to justiciable problems. There has been notable socio-legal research that has employed qualitative interviews to understand aspects of how people encounter legality. See e.g. Patricia Ewick & Susan S Silbey, *The Common Place of Law* (Chicago: University of Chicago Press, 1998).

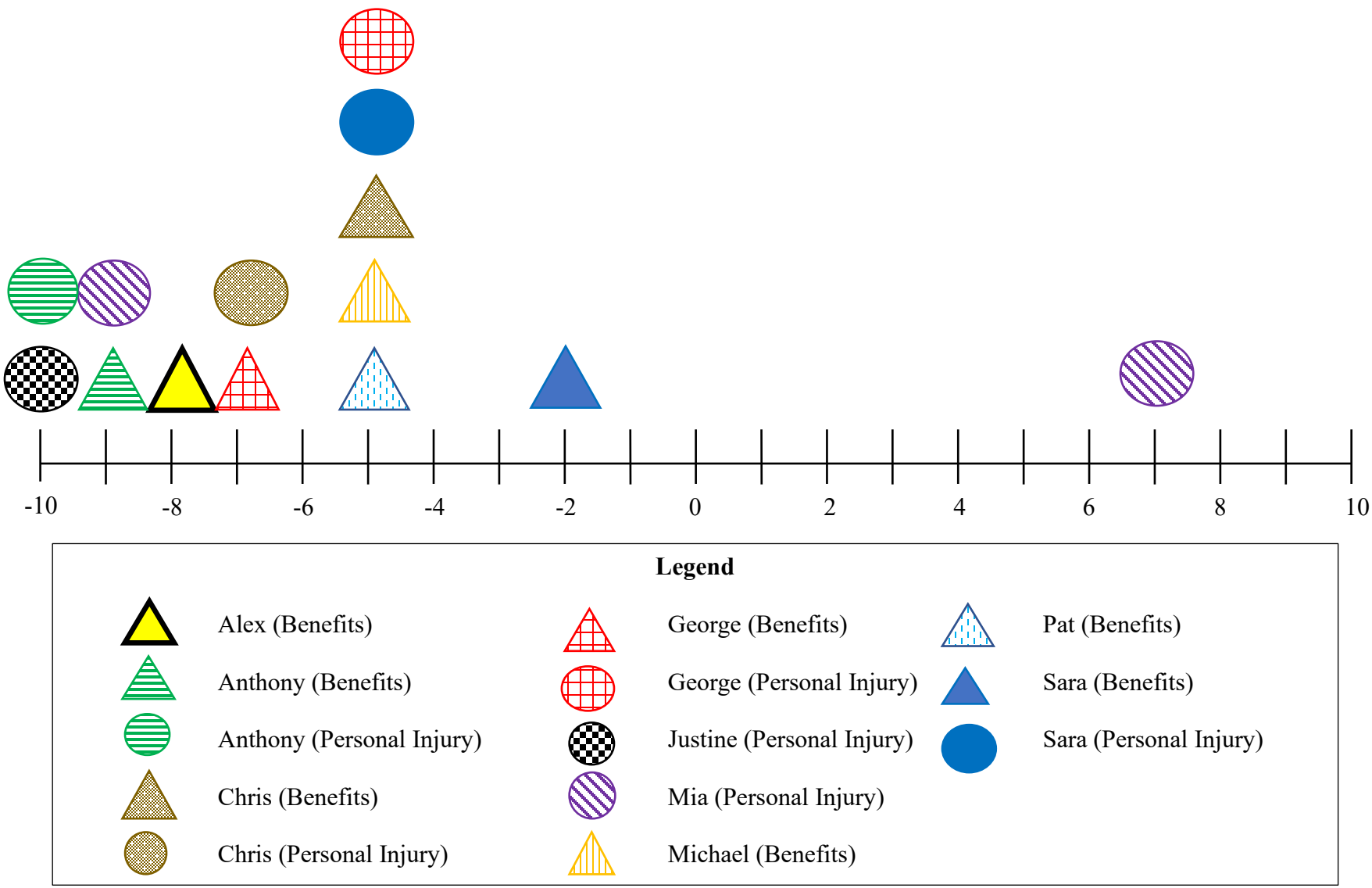

Figure 2: Significance of events for interview participants

Finally, another aspect that I find notable about these three narratives is the sense of emotion conveyed during each interview. That is, Sara and Justine described events that appeared to leave a strong negative impression upon them, and did so using language and other means of communication (such as body language, pauses, asking for a break from the interview) that conveyed the sense that the events they were discussing affected them greatly. On the other hand, Mia's descriptions at times took on an almost joyful quality, particularly as she described how her personal injury had led to renewed social connections. Sara's and Justine's experiences in this regard were similar to most of the other interview participants. Nearly all of the interview participants described feeling confused and let down by the systems they tried to work through, whether those were legal, governmental, medical, or other social systems.

b) Analyzing the factors that contribute to system failure and understanding how to respond

Why did Sara, Justine, George, Anthony, Pat, Alex, and Chris convey a sense of being failed by the system, and of being embittered by their experiences? Conversely, why did Mia tell stories of resilience and growth in spite of (or because of) her experiences? There is much to consider in these questions, but one plausible answer is that many of the interview participants found themselves in a position of vulnerability and were not sufficiently assisted through that vulnerability by legal or other supports. On the other hand, those who told positive stories drew on rich social networks to compensate for their vulnerabilities, and as a result did not experience the kind of unexpected fall that the others experienced.

In a 2011 review of advice-seeking behaviour research, law and society scholars Pascoe Pleasence, Nigel Balmer, and Stian Reimers noted that in the UK, "people seek formal advice for only about half of their justiciable problems, and that advice is sought from solicitors' firms in only thirteen percent of instances."[351] Reported rates of formal advice-seeking and legal advice-seeking in Canada are 33.8% and 11.7%, respectively, which are slightly lower than levels in the

[351] *Supra* note 223 at 3.

UK.[352] Pleasence and colleagues state that "[t]he question of what drives the use of lawyers… remains largely unanswered."[353]

Problem type has been consistently identified across jurisdictions as "the key driver of advice seeking" behaviour, and the most important single driver of whether legal advice is sought.[354] But it is unclear why problem type plays such a relatively important role.[355] How problem type acts in each individual's decision-making process, and why some problem types but not others give rise to advice-seeking behaviour at relatively high rates, are also unclear. Some research has suggested that the perception of a problem as "legal" in nature may be an important aspect of whether that problem leads to advice-seeking behaviour.[356] Other factors which have been examined for influence on advice seeking behaviour include demographics,[357] income,[358] social standing or social connections,[359] past experience,[360] awareness of available services,[361] problem severity,[362] and characterization of problems as legal or not.[363] The effects and possible interactions of these factors remain a subject of ongoing research. For example, "men have been found to be less likely to obtain advice about justiciable problems than women,… though this difference does not appear to extend to legal advice…, and is not always evident."[364] Research has also suggested that young people are much less likely to obtain advice than others, and also that ethnicity and disability status have sometimes been found to be associated with general and

[352] Legal Problems, *supra* note 3 at 56. Note that Currie does not differentiate between "formal advice" and "informal advice". Research in the United Kingdom has described "formal advice" as follows: "Formal advice can take many forms, and may involve little or no reference to rights or formal dispute resolution processes." See Pascoe Pleasence, Nigel Balmer, & Alexy Buck, *Causes of Action: Civil Law and Social Justice* (Norwich, UK: The Stationery Office, 2006) at 89.
[353] *Supra* note 223 at 4.
[354] *Ibid* at 3.
[355] See Chapter Four, Section Four, above.
[356] *Supra* note 223.
[357] *Ibid* at 4.
[358] *Ibid* (suggesting that there is "good evidence that – in jurisdictions with established legal aid programs – those on lower middle incomes are least likely to access lawyers"). Others have suggested that income actually plays a very small role in determining advice seeking behaviour compared to problem type. See e.g. *supra* note 15.
[359] *Supra* note 223 at 4.
[360] *Ibid* at 4-5 (whether this experience is first degree or shared by someone within the household).
[361] *Ibid* at 5.
[362] *Ibid*.
[363] *Ibid*.
[364] *Ibid* at 4.

legal advice seeking behaviour.[365] Research on the relative and integrated effects of these factors is still emerging.

This subsection interweaves findings from the interviews with existing research to explore similarities and differences. In addition, the interviews help to suggest aspects of decision-making behaviour that have been overlooked or understudied in existing literature. The subsection is further divided into seven parts, based on factor types or respondent-centred variables that have been found to affect decision-making behaviour in existing literature, as well as areas that appear to have been understudied:

1. Problem type;
2. Previous experience;
3. Legal capability;
4. Problem characterization;
5. Social support and responsiveness of others;
6. Information seeking; and
7. Cost.

Although these are presented discretely, there is likely interaction among these variables. For example, while it seems reasonable to assume that identifying a problem type takes place early in the process of responding to an event, that identification can be influenced by previous experience, legal capability, social support, and information seeking behaviours.

i. Problem type

The steps by which individuals transform everyday life events into legal problems has been famously theorized to follow a "naming, blaming, claiming" pathway as discussed in Chapter Four.[366] According to this model, an individual *must first identify* a life event as somehow injurious ("naming"), and must attach blame for that injury to someone or something else ("blaming") before deciding to seek some kind of retribution from that other person or entity ("claiming"). The naming, blaming, claiming typology has remained enduring and salient for

[365] *Ibid.*
[366] See Chapter Four, Section Four, Subsection a, above.

over 40 years, though it is limited in the sense that it applies to legal disputes rather than all types of legal issues.

Problem type has often been identified as a key predictor of whether a person who has experienced a justiciable problem will seek advice, and what type of advice they will seek.[367] But not all correlations between problem type and response hold among jurisdictions.[368] Pleasence, Balmer, and Reimers have noted, for example, that "problems concerning negligent accidents are strongly associated with lawyers in the United Kingdom and Canada…, while the reverse appears to be the case in Japan, Australia, New Zealand and Hong Kong."[369] While the reasons for different associations may be related to different legal options in different states, this variance at least suggests that problem type may mask other factors that influence response pathways.

Using online survey data from the United Kingdom, Pleasence, Balmer, and Reimers found that "problem type had a highly significant impact on choice of adviser".[370] While the interviews conducted in this study cannot confirm or disprove the well-established association between problem type and response, they may be able to shed light on *how* problem type can influence response.

One such factor is attribution of causation. For example, the interview with George focussed on a personal injury in which the participant most definitely attributed causation to another.[371] George's injury stemmed from a home invasion in which he was assaulted. This led to hospitalization and ongoing health problems. According to the literature, personal injuries – particularly those where cause in fact is attributed to another – lead to legal advice-seeking at a relatively high rate.[372] Further, George had significant previous experience retaining lawyers during his business career.[373] Nevertheless, George did not contact a lawyer, and did not consider doing so until well after his injury:

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[367] See *supra* note 223; *supra* note 12 at 13.
[368] *Supra* note 223 at 3.
[369] *Ibid*.
[370] *Ibid* at 16.
[371] See Chapter One, Section Three, Subsection a, above.
[372] *Supra* note 223.
[373] *Supra* note 25.

> …that's something that didn't even occur to me at the time. And, you know, I thought of afterwards, I thought I probably should have sought some legal action.
>
> Q. How far after did you?
>
> A. Probably a couple of years later. Like probably a year ago I thought "maybe I should have pursued something." You know, 'cause there was a bit of out of pocket expense, but it was more about fear, and you know, like why isn't anything being done to these people?374

George had contacted others to help deal with his problem. These others included the police, medical professionals, family members, government offices, elected officials, a support group, a religious congregation, and even members of the media. Clearly, George did not decide to "do nothing" about the personal injury. But he appeared to be motivated more by a sense of wanting to prevent similar injuries from occurring to others in the future and did not see legal advice as a pathway to achieve this.[375]

George's case suggests that problem type does not provide a complete explanation of decision-making choices. George's advice-seeking decisions seem to have been driven by concern for others, rather than a desire for compensation. His motivation might have been different if George had suffered larger monetary losses that he attributed to others.[376] Similar desires to address causes of injury rather than seek personal compensation were evident in other interviews. Justine described taking pictures of where she had fallen on a city street in order to "prevent it happening to someone else."[377] But she did not seek legal advice to address her injury or seek to hold others legally accountable.

This suggestion may fit with recent research on what individuals with different problems hope to receive from others when they seek advice. The link between problem type and information seeking will be addressed further in subsection vi) below.

The interviews revealed another aspect of how people respond to justiciable problems that has been mentioned in past research and may be useful for future research. For those who

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[374] *Ibid*.
[375] *Ibid*.
[376] George described "a bit of out of pocket expense", but was ultimately able to secure financial support through government benefit programs.
[377] *Supra* note 28.

experienced a personal injury problem, government benefits problems often followed on quite closely.[378] Other studies have noted that justiciable problems tend to cluster, though the precise ways in which those clusters develop remains largely unstudied and of potential interest.[379] Further, this observation may help to inform the design of future unmet legal needs studies, since there remains wide variation in how, and how many, problem types are assessed through broad surveys.[380]

ii. Previous experience

Previous experience, either direct or by close associates, appears to have a measurable effect on decisions to seek assistance. Pleasence, Balmer, and Reimers have noted that "[p]ast experience, both at the personal and household level have also been shown to influence advice seeking."[381] This resonates with many of the stories told by interview participants. For example, Pat, who described dealing with government benefits problems, was put off seeking legal assistance for her problem because of having a poor view of the lawyers who had been involved in her mother's divorce:

> The reason is that in the past, my Mom with her divorce, I've gone the gauntlet trying to find stuff. They [i.e. lawyers] say that they offer pro bono, but when you ask them… after doing the initial consult, he turns to me and goes "I need a $5000 retainer." That's not pro bono.[382]

Further, in explaining why they didn't consider contacting legal aid for their problem, a number of respondents noted the difficulty of obtaining any funding through legal aid from prior experience or second-hand information, describing applying for legal aid as "a waste of time".[383]

Citing results in England and Wales, Pleasence, Balmer, and Reimers observe that "advice seeking strategies [appear] to cluster by respondent and within households, with past strategies

[378] See interviews with George, Anthony, Chris, and Sara. Justine also reported using benefits as a result of her personal injury, but did not describe a benefits problem *per se*.
[379] See e.g. Legal Problems, *supra* note 3; *supra* note 15; *supra* note 12 at 11.
[380] P Pleasence, NJ Balmer, & RL Sandefur, "Apples and Oranges: An International Comparison of the Public's Experience of Justiciable Problems and the Methodological Issues Affecting Comparative Study" (2016) 13:1 J Empirical Leg Stud 50 at 68-69.
[381] *Supra* note 223 at 4.
[382] *Supra* note 30.
[383] *Ibid*. See also interviews with Anthony, Alex, and Chris.

more likely to be adopted again."[384] In view of some of the interview responses, and considering the discussion of characterization above, personal experience "at the personal and household level" may not be sufficiently precise to explain advice-seeking behaviour. Instead, the nature of that prior experience may be important. Future research in this area should examine not just prior exposure to lawyers and other legal service providers, but the nature of that prior exposure, as part of a broader effort to understand how different types of legal consciousness affect how individuals respond to potentially legal problems.

iii. Legal capability

Another concept that may be related to prior experience is that of "legal capability". Legal capability has recently emerged as a potentially useful respondent-centred variable in understanding how people respond to justiciable events. Pleasence, Balmer, and Catrina Denvir analyzed responses to justiciable problems based on whether respondents exhibited knowledge and resources in relation to their particular justiciable issue that made them "higher capability" or "lower capability" in terms of that problem.[385] They categorized respondents to the 2010 and 2012 waves of the English and Welsh Civil and Social Justice Panel Survey as "higher capability" in relation to a problem where "respondents suggested they knew their rights either 'mostly' or 'fully' from the outset, and where respondents knew something about the majority of adviser types they were asked about in general questioning and had a relatively high subjective legal empowerment scores."[386] Respondents were categorized as "lower capability" where they "suggested they knew their rights only 'partly' or 'not at all' at the outset, and where respondents knew something about a maximum of 5 of the 10 types of adviser they were asked about in general questioning and had a relatively low subjective legal empowerment score."[387]

The authors note that the survey data gathered to assess capability, though broader than information gathered in previous studies, was nevertheless limited to "a relatively small number of variables."[388] Further, the survey was not designed to probe any causal connections between

[384] *Supra* note 223 at 5.
[385] Pascoe Pleasence, Nigel J Balmer, & Catrina Denvir, "How People Understand and Interact with the Law" (June 2015) at 159, online (pdf): *The Legal Education Foundation* < https://www.thelegaleducationfoundation.org/wp-content/uploads/2015/12/HPUIL_report.pdf>.
[386] *Ibid*.
[387] *Ibid*.
[388] *Ibid* at 160.

capability and responding behaviour.[389] Nevertheless, the research suggested that respondents with different capability levels reported markedly different problems, and very different problem resolution strategies for those problems.[390] They found that:

> Where respondents had lower capability, they were far more likely to do nothing about their problem and far less likely to handle their problems alone. In addition, informal, advice sector and legal advice were all comparatively more likely for lower capability respondents.[391]

They also noted a significant difference in levels of satisfaction with problem progress and outcome between higher and lower capability respondents. Higher capability respondents reported being happy with progress and outcome in 78% of problems, while lower capability respondents reported being happy only 48% of the time.[392] Lower capability respondents were also more likely to report that their problems remained ongoing, had lower levels of resolving problems by agreement, and were more likely to be associated with adverse consequences.[393] They also noted that there were significant demographic differences between higher capability and lower capability respondents:

> …lower capability respondents were far more likely than higher capability respondents to have been young (16-24) or old (75 or older), black and minority ethnic, renting in the public sector, living in flats, without academic qualifications, in routine manual occupations and affected by physical and/or stress-related health problems.[394]

Legal researchers Hugh McDonald and Julie People have noted, discussing legal capabilities, that:

> Gaps in peoples' legal consciousness, literacy, awareness or empowerment are widespread... This includes gaps in knowledge or understanding of legal rights, the 'legal' character of problems, awareness and understanding of potential legal remedies and of available legal information and advice services. Such gaps may not only proscribe or otherwise undermine legal capability, and

[389] *Ibid.*
[390] *Ibid* at 160-161.
[391] *Ibid* at 161.
[392] *Ibid* at 162.
[393] *Ibid* at 162-165.
[394] *Ibid* at 168.

> thereby constrain legal problem-solving action and resolution, but beget unmet legal need.[395]

These findings seem to fit well with many of the interview responses. For example, Justine described difficulties in finding assistance – or even knowing that assistance was available. This is consonant with previous suggestions that preferences in advice-seeking behaviour may be due to a lack of familiarity with local services.[396] Accordingly, Justine expressed significant frustration at the difficulty she experienced in trying to understand her options. Similarly, Alex, who described trying to deal with government benefits problems, noted that without some fortunate assistance from a housing support worker, they would not have known how to deal with the benefits problems. The sense of not knowing where to go or how to deal with a life event as a significant factor was noted by almost all of the interview participants.[397]

iv. Characterization

A fourth important factor that explains advice-seeking behaviour is the role of characterization. The likelihood of perceiving a life event as legal may play an important role in the transformation of that life event into something that might require legal advice. Pleasence, Balmer, and Reimers have found that "regardless of problem type, characterising a problem as 'legal' led to a large significant increase in the likelihood of respondents suggesting they would choose a legal adviser", though choosing a non-legal adviser appeared to be unaffected by problem characterization.[398] They suggest that "[i]f people fail to recognise or characterise problems as 'legal', this is likely to impact upon their choice of adviser, making legal advice less common regardless of problem type."[399] Personal injuries were often characterized as "legal" in nature.[400] Conversely, government benefits problems were characterized as legal at a rate of only

[395] Hugh M McDonald & Julie People, "Legal Capability and Inaction for Legal Problems: Knowledge, Stress and Cost" (2014) 41 Updating Justice 1 at 2.
[396] A Patel, N J Balmer & P Pleasence, "Geography of Advice Seeking" (2008) 39:6 Geoforum 2084 at 2089-2092.
[397] See interviews with George, Michael, Justine, Anthony, Pat, Chris, and Sara.
[398] *Supra* note 223 at 17.
[399] *Ibid* at 6.
[400] *Ibid* at 9-10. The authors sub-divided personal injuries into "personal injuries caused by another", which yielded a characterization rate of almost 80%, and "personal injuries not caused by another", which yielded a characterization rate of around 65%.

about 50%.[401] Once problems are characterized as legal, there is a significant increase in the likelihood of turning to legal advice.[402]

Among the interviews conducted in the present research, I could find no apparent connection between characterization and choice of advisor, nor apparent difference in characterization between personal injury and government benefits problems. Nevertheless, the interviews may help to elucidate how people come to characterize some events as legal or non-legal in nature, and how that characterization affects advisor choice.

For Chris, seeing problems as likely legal in nature was a product of upbringing and exposure to the legal system. Chris described a series of personal injuries and protracted disputes over government benefits.[403] Chris explained that "I think legally a lot because of my dad [who was a lawyer], working with my dad when I was younger."[404] Chris also characterized his approach to some problems in terms of his upbringing, explaining that, having been raised in an upper-middle class neighbourhood, "[t]hrough high school, through friends, we all learned, 'You talk to the top first. You never talk to the bottom.'"[405] On the other hand, Justine, who characterized her problems as legal but did not turn to legal services, described being brought up in a social context where she "was told never to ask for help."[406]

These comments suggest that legal processes and legal ideology may be in some ways closer to the core of Chris's worldview, compared with, for example, Justine's or George's. Recall that George, who experienced a personal injury and had dealt with lawyers in his business career, did not see his personal injury as legal in nature or think to seek legal assistance, despite involving the police and others and having previous business experience dealing with lawyers.[407] Unlike Chris, George did not describe his relationship with lawyers in a personal way – George's relationship with legal service providers appeared to be exclusively professional in nature.

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[401] *Ibid* at 10. The authors used the category of "Problems with benefits grants and pensions".
[402] *Ibid* at 11.
[403] *Supra* note 34.
[404] *Ibid*.
[405] *Ibid.*
[406] *Supra* note 28.
[407] *Supra* note 25.

Thinking about law as more or less constitutive of personal worldviews and social interactions recalls work on legal consciousness. Legal sociologists Susan Silbey and Patricia Ewick have famously described the study of legal consciousness as "understand[ing] how legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings."[408] Their development of legal consciousness as cultural practice transcends what they describe as attitudinal and epiphenomenal approaches to legal consciousness, with the former focussing "solely on individual ideas" about legality, and the latter "determined solely by forces beyond the individual".[409]

Pleasence, Balmer, and Reimers have stated that there has been relatively little focus on how life problems are transformed in people's minds into ones that might require advice.[410] Characterization appears to be an important factor in how individuals respond to life events, but how and why some types of events are characterized as legal (or not) remains poorly understood.

v. Social supports and responsiveness of others

An interesting – and unexpected – result of the interview research was the importance of social connections, or the absence thereof, in how people responded to justiciable problems.

Research suggests that most people deal with civil justice problems on their own, without seeking any form of assistance.[411] When people do seek assistance of some kind, relying on family and friends has been reported as the second most common way in which people respond to civil justice situations.[412]

As Ewick and Silbey write:

> Everyday life occurs as interactions among friends, among colleagues, among family members, between consumers and merchants. These relationships are the raw materials out of which disputes and legal cases emerge. Even where

[408] *Supra* note 350 at 35.
[409] *Ibid* at 38.
[410] *Supra* note 223 at 6.
[411] Legal Problems, *supra* note 3 at 55; Rebecca L Sandefur, "Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study" (8 August 2014), online (pdf): *American Bar Foundation* <www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf> at 11.
[412] *Ibid*. Although Currie does not break out family and friends as a distinct category, he notes that those seeking non-legal assistance are the second largest category of individuals, after self-helpers.

> dispute or conflict is absent, which is most often, these interactions are grounded in normative expectations infused with legal language and concepts… familial, emotional, medical, or economic aspects may be reshaped by legal action, but the nonlegal aspects are not entirely erased. They are, in this sense, the raison d'être of the legal action and persist as a residue or supplement to legality.[413]

Researchers have paid relatively little attention to the importance of social support networks in responding to justiciable events.[414] But the importance of social networks in helping individuals to understand and deal with their problem was pronounced in many of the interviews.

For example, Alex described receiving "a fair bit of… official and unofficial support", in the form of members of a mental health support team, a supportive housing staff person, and Alex's brother-in-law.[415] Alex expressed the strong opinion that their efforts to resolve a government benefits problem would have been insurmountable without the assistance of members of this social network.[416]

Similarly, Justine described feeling largely lost, frustrated, and despondent in trying to respond to her personal injury until a serendipitous encounter at a neighbourhood house connected her to a range of social and personal supports.[417] She described the encounter as one that helped her traverse an uncertain liminal space after her injuries:

> There was the person I was, and then this person who is in between. And I wasn't even sure, sort of, what my identity at that point is… [Then the neighbourhood house staff member] says "please come." And I said "ok." And then I said, you know, I started talking, and we talked about some stuff, and she said, "you know, we offer a counselling service if you're interested." And I said "yes, I'm interested." So, from there I found out about all sorts of things… So, someone like me, in a position like me… there's two different worlds, you know? There's my world that I had, that I lost because of the first injury, and then there's this nebulous world of you don't know who you are any more, and then there's this world of we help people. [laughter] That I didn't even know… And I didn't even know if they helped people like me yet. I didn't know any of that."[418]

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[413] *Supra* note 350 at 249.
[414] Though some research in China and Japan has focussed on how social or family connections can facilitate use of the legal system. See *supra* note 223 at 4.
[415] *Supra* note 31.
[416] *Ibid*.
[417] *Supra* note 28.
[418] *Ibid*.

While this chance encounter helped Justine access services, it also demonstrates the highly contingent nature of encountering helpful services.

Justine's story also illustrates that not all social connections are perceived as helpful for the person addressing a justiciable problem. Justine described how family members and friends dismissed and diminished her problem:

> …they would say "Well, you can't do anything. The city won't help you with that. They're just going to change that." But nobody that I know had told me about any kind of community service or anything.[419]

This aligns with previous research by Pleasence, Balmer, and Denvir, who found that, among those dealing with a justiciable problem, "[a] significant minority reported they hadn't known what could have been done or thought action would have made no difference."[420] It is perhaps unsurprising then, that friends and family members might take a similar posture and act to discourage an individual from action, whether that advice is well-informed or not. This point demonstrates the importance of social connections being able to provide *well-informed* assistance.

Another example that speaks to both the importance of social supports and the contingent nature of those supports is Sara's story. Several times, she described the importance of having others to encourage her, direct her, or provide other supports to allow her to continue to take steps in response to both her personal injury and her government benefits problem. For example, describing the importance of financial help from her social network:

> It was a really, really hard time, and I'd actually asked some people who were close to me if they could, you know, spot me some money. Cause I mean, it was literally like I had nothing in the bank. And I was short – big short on rent, and you know… Asked my Dad, and he said "no, I don't have it." Asked a couple of other people and finally I asked one person I knew, and they were like "yeah, I can do it for you just this once." And that's how I was able to pay rent. And if I didn't have that person in my life, like, I wouldn't have probably been able to keep my house.[421]

[419] *Ibid.*
[420] *Supra* note 385 at ii.
[421] *Supra* note 36.

On another occasion, Sara described almost giving up on her benefits claim due to feelings of stress and uncertainty: "It almost was [too much]. It almost was. I got a lot of, like, encouragement from one of my best friends' parents. They were just like 'stick with it, kiddo, because, like, you're entitled to this.'"[422]

Finally, Sara also indicated that some of her support came from professional people with whom she became acquainted in the course of her recovery:

> I think the reason I had such a successful time with [part of the benefits claim], even though I had to argue, was because I had social workers back me up at [the rehabilitation centre]. And I think if those people hadn't been in my life, I would have probably had a really hard time getting it or wouldn't be on assistance right now.[423]

Perhaps the most striking example of how a supportive social network can help to address problems is Mia's story. Mia's extensive network of social supports allowed her to navigate through various systems relatively smoothly. As noted earlier, drawing on social supports with relevant professional or personal experience allowed her to effectively make use of the medical system in the United States in a way that minimized her financial costs, allowed her to find medical treatment in Canada in a timely and effective way, and enabled her to find accommodation in Canada on relatively short notice.[424] Indeed, Mia's use of her social network appears to have been conscious. Describing how a "chance" encounter with a physical therapist obviated the need for further surgery after her injury, she explained that "…through my web of connections I connected with a new therapist. And after about three treatments, I realized that I didn't need the surgery. He had addressed, you know, the pain that I had worried about. So, I called up and cancelled the surgery."[425] Of all of the interview participants, Mia was one of only two who reported being satisfied with how her problem was handled.[426]

The correlation is also evident from the participants' experiences: a lack of social supports or a lack of responsiveness from others exacerbates problems. Sandefur has observed that

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[422] *Ibid.*
[423] *Ibid.*
[424] *Supra* note 33.
[425] *Ibid*.
[426] *Ibid*. The other interview participant who reported being satisfied was Michael, who also drew on his social network – in the form of a friend who had been through a similar type of benefits problem – in order to deal with the problem relatively effectively.

"experiences of difficulty or failure in trying to satisfactorily resolve certain kinds of problems" can lead to resignation and inaction when facing further problems.[427] This pattern of behaviour was evident in a number of the interviews.

Although he did not seek assistance from a lawyer, George did attempt to find some legal help through a telephone legal assistance line, but did not receive a response and did not pursue the matter further:

> I did do a telephone legal... [A local non-profit organization] had a pro bono program. But I think I phoned and left a message and never got a phone call back. Or if I did, I missed it. I didn't pursue the legal thing very much.[428]

George also described similar stories of feeling let down by others he contacted but who did not help to address his problem. He was ultimately unsatisfied with how his problem was handled, and even though he was still dealing with the effects of the problem at the time of the interview, he had largely given up on trying to secure assistance. He described feeling very frustrated by inaction on the part of others, and cited "just wanting to get on with life" as the biggest factor in how he responded to the injury:

> I mean, my health wasn't in that great a shape, and I'm getting worn out doing this, and I realized that I'm getting sicker by trying to pursue this, than if I just let it go… obviously no one was going to do anything, so unless I take care of it myself, which I had made the decision I wasn't going to do, I'm just going to put this behind me.[429]

Similarly, Pat described a strong aversion to lawyers based on personal experiences, but also noted that her eventual attempts to contact a legal clinic met with silence: "I left a message, never got a call back. So that tells me that they're swamped. They're under-funded, don't have enough people."[430] Pat ultimately described feeling helpless and discouraged, and had largely given up on pursuing her matter any further.[431]

The interviews appear to suggest that effective use of a well-informed social network can be important to avoid or address justiciable problems. This observation warrants further research

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[427] Rebecca L Sandefur, "The Importance of Doing Nothing: Everyday Problems and Responses of Inaction" (2007) Transforming Lives: Law and Social Process 112 at 124.
[428] *Supra* note 25.
[429] *Ibid*.
[430] *Supra* note 30.
[431] *Ibid*.

and exploration, as the significance of social networks has not been emphasized in past access to justice research. Among the participants in this study, however, this factor emerged as a strikingly important determinant of how a justiciable event affected participants' quality of life.

vi. Information seeking

While social networks can provide support in many ways, perhaps the most interesting aspect of social networks in relation to access to justice is how they may help individuals find and process information. Information science scholars Sheila O'Hare and Sanda Erdelez have noted that although there is a lack of research on how potential consumers of legal services acquire information, some recent studies have begun to incorporate "theories recognizing that individuals acquire information as a part of routine activities, both through acts of searching and incidentally as a part of passive monitoring of everyday life".[432] Addressing how individuals obtain information is particularly important because, as Pleasence, Balmer, and Denvir have noted, "[a] steadily growing number of studies of the public's understanding of law point to a substantial knowledge deficit, though the deficit appears greater in some areas of law than others."[433] These knowledge deficits are not matters of chance, but rather, according to Pleasence, Balmer, and Denvir, instantiations of social phenomena that often reinforce social inequalities:

> Holding erroneous beliefs about the law is not simply a matter of chance ignorance. We have previously argued that legal reality and the public's perception of legality are each coherent and distinct, with the latter fuelled and entrenched by attitudes and social norms. One consequence of this is that erroneous beliefs are likely to prove stubborn to dislodge.[434]

Pleasence, Balmer, and Denvir report that individuals seeking advice to deal with personal injuries, for example, "most often hoped for advisers to sort out problems".[435] In contrast, respondents with debt problems expected to talk over their problems with an advisor, while respondents with employment problems were looking to have their rights explained to them.[436]

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[432] *Supra* note 229 at 299.
[433] *Supra* note 385 at iii.
[434] *Ibid*.
[435] *Ibid* at viii.
[436] *Ibid*.

For George, the naming, blaming and claiming steps appear to adequately describe his response to the injurious incident, but his goal of ensuring community safety led him to take steps other than seeking legal advice. For Justine, although she recognized that her injury may have been caused by a dangerous part of a city street, she decided against claiming against the city, encountering what Herbert Kritzer has described as the "claiming barrier".[437] Again, the reason for her response pathway appears to be influenced less by the problem type than by her motivations and goals. Accordingly, it may be useful for future unmet legal need studies to address the range of motivations and goals – perhaps on a continuum between self-interest and other-interest – as possible correlates of advice-seeking behaviour.

Problem type can also sometimes be directly linked to the advice source that individuals turn to. For most of the government benefit problems described in the interviews, those individuals had to make contact with government departments in order to understand the nature of the benefits they were seeking or to apply for them. Having made contact with one source of "advice" – albeit a representative of the government department that was itself the locus of the individual's problem – many of the interview participants described feeling less inclined to contact other "formal" advisors.[438]

Further, some interview participants indicated that the prospect of challenging government was one that made them wary of seeking help to make a claim, particularly legal help.[439] These interview participants expressed doubts that legal service providers could, or would, take on government on behalf of a client. For example, Sara indicated that she was reticent to retain a lawyer for her government benefits problems because "I also know at the same time that no lawyer wants to take on the government."[440] When asked how she knew this, Sara recounted a story told to her by an acquaintance about how someone with a significant personal injury had been unable to find a lawyer to help. Sara explained further that "I don't think it's just that lawyers aren't willing, but I think that they can always get out-lawyered by the Crown. I mean, it's just how it's going to happen."[441] Accordingly, how people encounter and process

[437] *Supra* note 12.
[438] See interviews with George, Michael, Alex.
[439] See interviews with Alex, Chris, Sara.
[440] *Supra* note 36.
[441] *Ibid*.

information about justiciable events is an understudied area. Future research should focus on understanding people in their social context, rather than viewing them as atomized individuals. O'Hare and Erdelez have written that "[s]tudies have shown that source characteristics (e.g., quality and accessibility) and information source types (e.g., relational and nonrelational sources) influence the selection of information resources".[442] The role of relational sources appears to be an under-studied area of how legal information is acquired.

vii. Cost

Rebecca Sandefur has suggested that there is an emerging consensus that "[t]he cost of legal services or court processes plays a secondary role in people's decisions about how to handle the civil justice situations they encounter."[443] This finding is consonant with the experiences of many of the interview participants.

For example, while cost was identified as a significant limiting factor for Sara, Justine, and Mia, none of them described it as a dominant component of their decision-making. This was similar for many of the other participants. Anthony explained that he would have pursued his claim differently if he had access to more money, but cost was not the greatest factor that affected how he responded to his personal injury.[444] He indicated that "had I been in a financial position to do so, I would've hired PIs [private investigators] and this would have turned out much differently."[445] Cost was not a factor at all for George or Michael, while it was a limiting factor, but not the greatest factor, for Alex.[446] By contrast, cost *was* the most significant factor for Pat.[447]

Suggesting that cost was not the dominant factor in how people responded to justiciable problems does not mean that financial scarcity should be dismissed as unimportant. Indeed, some of the behavioural economics research noted in Chapter Four points out that living in contexts of relative poverty can have wide-ranging effects, from restricting cognitive bandwidth to inducing

[442] *Supra* note 229 at 300.
[443] *Supra* note 15 at 444.
[444] *Supra* note 29.
[445] *Ibid*.
[446] *Supra* note 25; *supra* note 27; *supra* note 31.
[447] *Supra* note 30.

people to prioritize short-term necessities over long-term wellbeing.[448] Both Sara and Anthony noted that if they had more financial resources, they expected that how they responded to their problem would have changed significantly.[449] But it remains that cost was far from the only major barrier that people faced. This is important, because it suggests that simply lowering the cost of legal services may be unlikely to trigger widespread access to legal services.

4 Better Understanding the Challenge of to Access Justice

This chapter has offered some support, and some new directions, to the still-emerging study of how people understand and respond to justiciable events in their lives. Based on a small number of, in-depth interviews in the Vancouver area, this research contributes to existing research in seven areas:

1. Problem Type: While problem type has been widely reported as a correlate of advice-seeking behaviour, this research does not offer support for those findings. This does not weaken previous research, however, since the scale and recruitment methods used in this study are a design limitation that prevent this research from being used to confirm or dispute previous findings. But the research does suggest that the pathways by which problem type are associated with different response strategies may be mediated by differences in the goals and motivations of those who experience justiciable problems. This study also suggests that some problem types, such as government benefit disputes, may have "built in" advice pathways due to the nature of those problem types. Finally, the high rate at which personal injuries were accompanied by government benefit problems may be a useful point of discussion for further research on the clustering of legal problems.
2. Previous Experience: In line with reported research, previous experience with different service providers appeared to be an important factor for many, though not all, research participants.

[448] *Supra* note 253.
[449] *Supra* note 29; *supra* note 36.

3. Legal Capability: To the extent that research participants relied on the personal experience of others, questions of legal capability emerged, as it appeared that some participants drew broad conclusions about the availability and effectiveness of advice options that were not always accurate.
4. Characterization: While this research could not confirm or disprove previous findings on how people characterize life events as either legal or non-legal, it suggests that characterization may itself relate not just to attributes of the problem, but also to ideologies that people have adopted.
5. Social supports and responsiveness of others: One of the most striking dimensions to emerge from the research interviews was the degree to which people appeared to rely on their social networks to help them understand and respond to justiciable problems. This has implications for individuals without a robust social network, and also for individuals whose social network may be poorly informed about service availability or legal rights. This is an apparently under-studied area that merits more research attention.
6. Information Seeking: This research confirms that efforts to understand how people encounter and process information about justiciable matters should include their social networks and other social context. This conclusion flows from, and is deeply connected to, the immediately preceding point about social supports. Poor responses by potential service providers can lead to inaction and resignation even among those who attempt to contact a wide range of advisors.
7. Cost: As others have found, cost appears to be a significant decision-influencing factor for many individuals. But cost was not the dominant factor for most research participants.

These findings speak to the importance of understanding responses to justiciable events in a contextual way. While some factors, such as cost, are often assumed to dominate decisions about how to respond to justiciable events, a more nuanced understanding of how people transform life events in ways that may lead them toward or away from different responses has important implications for structuring delivery of legal and other services.

The need for this contextual understanding of individuals facing justiciable events points to the need for a more person-centred conception of access to justice than either the judicial or expansive vision conceptions discussed previously. Chapter Eight will build on the results of this

chapter to outline the key elements of a person-centred conception. But before doing so, the next chapter will explore another critical limitation on efforts to improve access to justice: the ways in which legal services are created and delivered.

Chapter 7 – The Mismatch between the Supply and Demand Sides of the Market for Personal Legal Services

1 The Creation and Distribution of Personal Legal Services

While it is important to understand the dynamics of how people experience unmet legal needs, that understanding is of little use without a similarly well-developed understanding of how legal services are created and distributed. As noted in Chapter Four, while there has been some research on the "supply-side" of legal services, that research is relatively thin.[450]

One area that *has* received a relatively high level of scholarly attention is that of legal services regulation.[451] Research on legal services regulation has drawn scholars with an interest in legal ethics, sociology of the legal profession, and economics.[452] In recent years, Canada has seen significant debate about legal regulation and access to justice. Much of this debate has focussed on whether regulators of the legal profession should allow legal service firms to be owned by non-lawyers in so-called "Alternative Business Structures" ("ABS"). This debate implicates and challenges some of the institutions mapped in Chapter Three.

This chapter uses the recent debate over ABS as an entry point into a larger discussion: how should legal services be created and supplied in order to sustainably improve access to justice? While there is likely no single answer to this question, my hope is that this chapter helps to broaden the discussion of what options should be available in providing legal services.

After briefly outlining the main points in the debate and describing some recent research on ABS in Section Two, I will explore how organizational structure has emerged as an important consideration shaping the supply of legal services. In Section Three, I will discuss recent research that suggests that private, for-profit models of legal service delivery often fail to improve access to justice. In Section Four, I present general labour economics arguments which suggest that across the economy, at least for some types of work, not-for-profit organizations

[450] Chambliss, *supra* note 5.
[451] See e.g. *supra* note 170; *supra* note 140; *supra* note 6.
[452] *Ibid*.

may have some structural advantages over for-profit enterprises. Adding to that research, in Section Five I describe and analyze a dataset of lawyers in the United States that helps to shed light on whether the trends observed for not-for-profit organizations broadly may be applicable to legal service delivery. The chapter closes by discussing the implications of the existing literature and the findings from the present study for delivery of accessible legal services.

2 The Alternative Business Structures Debate

The regulation of the legal profession has been a topic of debate within Canada over the past 15 years, as it has been in other common law jurisdictions.[453] Legal scholar Nick Robinson has suggested that this focus on regulation is driven by several factors: the growing crisis of access to justice, reduced state funding for legal aid, and recognition of the limitations of *pro bono* services as a response to access to justice problems.[454] In response to these problems and constraints, some have called for liberalization of legal service regulation or deregulation of the legal profession.[455] As Robinson describes, "[p]erhaps the most prominent and controversial deregulatory approach is to allow for non-lawyer ownership of legal services."[456]

Throughout Canada, as in many common law jurisdictions, legal regulators require lawyers to be the sole owners of legal service organizations. This requirement is often justified as necessary to ensure the independence of the legal profession, and to ensure that decisions taken within law firms are done firmly in accordance with the legal and ethical duties to which lawyers are bound.[457] Proponents of ABS argue that more open ownership will allow an influx of capital into law firms, and may also allow those with non-legal expertise to innovate how law firms operate.[458]

In the early 2000s, several Australian states started allowing non-lawyers to invest in or own law firms outright. In 2011, legal regulators in England and Wales followed suit. These changes have

[453] Note that Canada is not exclusively a common law jurisdiction, since Quebec draws on a civil law tradition.
[454] Nick Robinson, "When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism" (2016) 29:1 Geo J Leg Ethics 1 at 3.
[455] See e.g. *supra* note 149.
[456] *Supra* note 454 at 4.
[457] See e.g. *supra* note 140.
[458] *Ibid*.

spurred calls for similar regulatory change in Canada and in other parts of the common law world.

In Canada, advocates for ABS have often invoked access to justice concerns to justify regulatory change. According to this line of argument, allowing non-lawyer ownership of law firms could inject capital and outside expertise into law firms. Doing so would help to drive down the costs of legal services. This might happen through economies of scale, as outside investors aggregate legal practices and develop systems to improve legal practice management, or it might happen through investment in disruptive innovations that allow for more efficient delivery of legal services.[459]

In 2016, Robinson examined whether there was any evidence from Australia or England and Wales to suggest that ABS improved access to justice. Robinson's research merits close examination because it is the most detailed effort to date to understand whether ABS in practice has lived up to the hopes of its proponents. Describing his paper as an attempt to "fill the current knowledge gap facing regulators by undertaking the most extensive empirical investigation of the impact of non-lawyer ownership to date", Robinson drew on case studies and available data to examine whether the claims in support of, or against, access to justice gains from ABS were made out.[460]

The paucity of data related to the legal system, as noted in Chapters Three and Four, created roadblocks for Robinson's analysis. He noted that "[n]one of the jurisdictions has reliable or systematic data on the price of legal services".[461] So instead of directly measuring whether ABS affected prices for legal services, Robinson engaged in proxy analysis, assessing whether any legal sectors had received significant investment in the aftermath of allowing ABS. For those sectors that received an influx of capital, Robinson engaged in case study research to determine whether there was any discernable effect on access to justice. Drawing on Clayton Christensen's work on disruptive innovation, Robinson focussed his case study research "on examining new models of delivering legal services seemingly spurred by non-lawyer ownership, as… this type

[459] See e.g. Edward M Iacobucci & Michael J Trebilcock, "An Economic Analysis of Alternative Business Structures for the Practice of Law" (2013) 92 Can Bar Rev 1.
[460] *Supra* note 454 at 6.
[461] *Ibid* at 16.

of innovation is most likely to lead to significant gains in access or to raise new professionalism concerns".[462]

Looking at the United Kingdom, Robinson cautioned that assessing the success or failure of ABS to improve access to justice was bedevilled by potential confounding factors that were difficult to control for. For example, legislation to allow ABS was passed just before the financial crisis of 2008, and so the uptake of ABS when it became available in 2011 may have been dampened by the after-effects of the crisis.[463] Also, major cuts to the legal aid system in the UK took effect in 2013, so assessing whether ABS may have improved access to justice is difficult against the backdrop of cuts widely regarded to have had a significant effect in degrading access to justice.[464]

By August 2014 more than 360 ABSs had been registered in the UK.[465] These were "disproportionately" concentrated in sectors such as personal injury, consumer, social welfare, and mental health law, as measured by market share, though Robinson noted that for the last three of these, significant market share was occupied by a small number of ABSs.[466]

Robinson then examined ABSs in the personal injury and family law sectors. While observing that personal injury ABSs "created new innovations, brought in new types of investors, and generated larger economies of scale", Robinson found limited access gains from these entrants.[467] There *was* a decline in personal injury cases in the UK from 2011-2012 to 2014-2015, but the reasons for that overall decline (and increases in some sub-types of personal injury claims) were difficult to assess.

Turning to family law, Robinson examined the case of Co-operative Legal Services, an ABS owned by the Co-operative Group, a member-owned organization active in the grocery, pharmacy, banking, funeral care, and farming sectors.[468] The growth of Co-operative Legal Services was remarkable. It started in 2006 with no budget and no staff but grew to a staff of 342 and annual turnover of £23 million by 2014. Yet despite being one of the largest providers of

[462] *Ibid* at 17.
[463] *Ibid* at 19.
[464] *Ibid*.
[465] *Ibid* at 20.
[466] *Ibid*.
[467] *Ibid* at 21.
[468] *Ibid* at 26.

family law services in the UK, "it has not been able to halt a massive increase in the number of unrepresented litigants in UK family courts as a result of legal aid cuts that took effect in 2013."[469] Robinson observed that the incidence of family law disputes where neither party had a lawyer more than doubled between 2011 and 2014.[470] While this does not demonstrate that Co-operative Legal Services was ineffectual, "by far the predominant driver of changes in access to representation in family law disputes in the United Kingdom is not the rise of ABSs like Co-operative Legal Services, but cuts in legal aid."[471]

In Australia, which has had longer experience with ABS, Robinson noted that most ABSs have not actually received much or any outside investment, but rather have been used by lawyers to restructure their firms for tax and succession advantages.[472] Nevertheless, Robinson found that one prominent Australian ABS with outside investment, Slater & Gordon, had grown at a rate similar to its peers, was no more likely than those peers to engage in pro bono work, and may avoid taking on some types of cases out of fear that those cases might adversely affect the firm's outside shareholders.[473]

Robinson concluded that the evidence to date has not demonstrated that alternative business structures would, on their own, increase access to justice.[474] While the conditions under which Robinson engaged in his analysis, such as the lack of reliable data on the price for legal services, are less than optimal, it is hard to dispute his conclusion that the introduction of ABS has not led to a noteworthy increase in access to justice.

3 Limitations of For-Profit Models

Robinson concluded his paper by suggesting that the access to justice gains of ABS have been overstated. Based on his research, however, he suggested that there may be some access to justice gains depending on who the ABS investors are and what sector of the legal service market

[469] *Ibid* at 27.
[470] *Ibid*.
[471] *Ibid* at 28.
[472] *Ibid* at 30.
[473] *Ibid* at 31-33.
[474] *Ibid* at 61-62.

is involved.[475] Robinson suggested that consumer owned firms or non-profit law firms may be better positioned than for-profit law firms to deliver accessible legal services.[476]

In a similar vein, law professor David Wiseman has critiqued the potential of ABS to improve access to justice but has suggested that a more focussed approach might yield positive gains. Wiseman has called for "establishing specific measures, integrated into the regulatory framework for allowing ABS, to expand the reach of access to justice gains and, in particular, to meet the justice needs of people living on low income."[477] Wiseman has described this approach of integrating access to justice goals into the ABS regulatory framework as "ABS+".

For Wiseman and Robinson, concerns about access to justice gains from ABS appear to be rooted in questions about why investors would choose to invest in segments of the legal services market that, though underserved, appear to offer more meagre returns on investment than other sectors. As Robinson describes it:

> Non-lawyer owners are likely to be attracted to legal sectors, like personal injury, that are relatively easy to commoditize and where expected returns are high. However, these lucrative sectors are less likely to have an access need because of long-standing practices like conditional or contingency fees. More generally, many areas of legal work may be difficult to scale or commoditize, such as aspects of family or immigration law that require significant tailoring to the specific situation of the client, meaning non-lawyer ownership will be less likely to occur in these areas or bring unclear access benefits.[478]

Wiseman makes a similar point, arguing that:

> ABS entities, as profit-seeking participants in the private, paying, market for legal services, will generally lack an economic incentive to aim innovations in existing legal services, or developments of new legal services, at people living on low income, due to their lack of purchasing power.[479]

These points seem to underestimate the potential of innovation to disrupt conventional ways of delivering services. Recall that cost plays a significant, though not dominant, role as a barrier to legal services. It may be that unless the costs of legal services fall dramatically, those who most

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[475] *Ibid* at 41.
[476] *Ibid*.
[477] David Wiseman, "Access to justice and legal profession regulation in Canada: to ABS, to not ABS or to ABS+?" (2015) 18:1 Leg Ethics 78 at 81.
[478] *Supra* note 454 at 15.
[479] *Supra* note 477 at 81.

keenly experience access to justice problems will be unlikely to purchase the types of legal services currently on offer. But the promise of innovation is not simply reducing cost through economies of scale. Rather, it is the possibility of delivering something differently, and perhaps of delivering something that people previously did not think they wanted or needed.[480]

Nevertheless, absent disruptive innovation there are some historical examples in the legal services field that seem to bear out the concerns of Robinson and Wiseman. In the late 1970s and early 1980s, several law firms in the United States took advantage of the deregulation of advertising by legal professionals in order to deliver accessible legal services. Legal scholar Nora Freeman Engstrom has documented how, in the immediate aftermath of the US Supreme Court decision that allowed lawyer advertising in the United States, costs for routine legal services did appear to drop.[481] But, in the decades that followed, legal advertising appeared to shift predominantly to the personal injury segment of the legal services market. Moreover, Freeman Engstrom reports that those who advertised legal services for personal injury clients appeared to charge more for their services than their non-advertising counterparts.[482] Further, many of the standard-bearers in the push to allow legal advertising, legal clinics such as Jacoby & Myers and Bates & O'Steen, moved from community legal clinics in the early 1980s to become rather conventional personal injury law firms within a matter of years.[483]

Given this history, simply allowing outside investment in legal service providers seems unlikely to improve access to justice. But the ABS debate highlights an interesting point. Those who are likely to invest in law firms are more interested in pecuniary return than in improving access to justice for its own sake. Further, the heterogeneity of legal services means that potential investors can pick and choose sectors to invest in, and those sectors that promise greater returns are not necessarily those that have the greatest access to justice needs. This leads to some important questions: what returns motivate actors in the legal services marketplace? Might non-pecuniary motivations be harnessed to improve access to justice?

[480] See e.g. *supra* note 178 at 40-41; *supra* note 108 at 227-228.
[481] Nora Freeman Engstrom, "Advertising and the Contingency Fee Cost Paradox" (2013) 65:4 Stan L Rev 633.
[482] *Ibid* at 667-668.
[483] *Ibid* at 658.

4 Not-for-Profit Advantages

Robinson draws on the example of Co-operative Legal Services to suggest that consumer-owned firms or not-for-profits "may be better able to follow a social mission" such as improving access to justice.[484] He has also argued that explicitly tethering the purpose of a legal provider to access to justice goals is important, suggesting that "a jurisdiction could encourage that non-lawyer owned companies be set up as benefit corporations, explicitly stating that directors must consider not only maximizing profits in the decisions they make, but also increasing access to justice."[485] There has been some case study research on law firms set up specifically to provide legal services in ways to improve access to justice, and this type of firm seems to implicitly draw on the idea that mission motivated workers differ from others in the legal marketplace.[486] Law professor Gail Henderson has also suggested that community contribution companies, which are enterprises where profits are subordinated to a "community benefit", could provide a vehicle to deliver accessible legal services.[487] Recently, the Law Society of Ontario has launched a registration system to allow lawyers and paralegals to provide legal services through civil society organizations ("CSOs"), such as charities and not-for-profits. As of May 14, 2020, ten CSOs were listed on the Law Society of Ontario's website as having registered.[488]

In spite of these suggestions and developments, there has been relatively little detailed analysis of why not-for-profit models may be better situated to provide accessible legal services. Even if untrammeled ABS does not offer a solution to improve access to justice, what evidence is there to suggest that not-for-profits should play a role in providing accessible legal services? In fact, some economic research suggests that there are reasons to believe that not-for-profit organizations may be particularly well-suited to deliver at least some types of legal services that respond to access to justice needs.

There is a significant literature exploring the nature of the not-for-profit sector in society, and work in this area has grown in recent years. Not-for-profit organizations ("NFP"s) differ from

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[484] *Supra* note 454 at 41.
[485] *Ibid* at 57.
[486] See LLM, *supra* note 119.
[487] Gail E Henderson, "Could Community Contribution Companies Improve Access to Justice" (2016) 94:2 Can Bar Rev 209.
[488] See Law Society of Ontario, "Civil Society Organizations" (last modified 14 May 2020), online: *Law Society of Ontario* <lso.ca/about-lso/initiatives/civil-society-organizations>.

for-profit organizations in that any profits made cannot be distributed to the members or controllers of NFPs. This is known as the "non-distribution constraint".[489] The following sections survey some of this recent work on NFPs, before turning to a close comparison of NFPs and for-profit firms in the legal context.

a) Theoretical approaches to NFPs

Since at least the early 1980s, economists have puzzled over why NFPs exist in a market economy. While there are several theoretical approaches to this question, three in particular are relevant for this dissertation: market failure theory, public goods theory, and labour donation theory.

i. Market failure theory

Legal scholar Henry Hansmann popularized the "market failure theory" of NFPs.[490] According to this theory, NFPs act as trusted institutions in markets with significant information asymmetries. Since no one stands to benefit from increased profits, owing to the non-distribution constraint of NFPs, there is a decreased incentive to reduce the quality of the product or service produced.

ii. Public goods theory

Another influential theory of NFPs – "public goods theory" – was formulated by economist Burton Weisbrod in the 1970s and 1980s.[491] Public goods are defined in the economic literature as having two key characteristics: being nonrivalrous and nonexcludable. The former means that one person's use of the good does not prevent others from using it. The latter means that it is impossible or very difficult for one person to prevent another from using the good. According to Weisbrod's public goods theory of non-profit organizations, NFPs arise to provide public goods

[489] See Henry B Hansmann, "The Role of Nonprofit Enterprise" (1980) 89:5 Yale LJ 835.
[490] *Ibid*.
[491] See e.g. Burton A Weisbrod, "Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy" in Edmund S Phelps, ed, *Altruism, Morality, and Economic Theory* (New York: Russell Sage Foundation, 1975) 171; Burton A Weisbrod, "Nonprofits in a Mixed Economy" in *Research Forum* (Washington, DC: Independent Sector, 1987) 105.

when governments fail to meet latent demand for those public goods. Accordingly, governments provide services which cater to the median voter, but this leaves some citizens' demands unmet.

Weisbrod's more general work on NFPs also contributed to the early understanding of labour economics in the NFP sector. In the early 1980s, Weisbrod noted a wage differential between the for-profit and NFP sectors, with the latter earning significantly less than the former.[492] Weisbrod's study is particularly relevant for this dissertation because it drew on data about lawyers in the for-profit and private NFP sectors. Weisbrod found that NFP lawyers earned approximately 20% less than their for-profit counterparts, that they were aware of this difference, and that their economic sacrifice appeared to be permanent in nature. Weisbrod suggested that lawyers working in the NFP sector had different preferences than those in the for-profit sector.[493]

iii. Labour donation theory

This aspect of Weisbrod's work was influential in developing the "labour donation theory" of NFPs. Weisbrod's observation of a significant negative correlation between wage and working in an NFP was reproduced across the economy overall.[494]

In her 1989 study, labour economist Anne Preston suggested that this wage differential was the result of "a supply of workers willing to accept a reduced wage in order to work for firms that generate positive social externalities."[495] This hypothesis, that workers might knowingly forego higher wages in exchange for some kinds of positive social externalities, raises interesting possibilities for access to justice-improving work, since it suggests that legal service providers who can credibly demonstrate that they are improving access to justice might have a structural advantage in recruiting some lawyers or other legal service workers. For this hypothesis to hold, we would need to assume that increased access to justice can be understood as a positive social externality, or as contributing to other positive externalities. Some kinds of access to justice improvements likely are positive externalities. For example, producing information about how to

[492] Burton A Weisbrod, "Nonprofit and Proprietary Sector Behavior: Wage Differentials among Lawyers" (1983) 1:3 Journal of Labor Economics 246.
[493] *Ibid* at 260.
[494] Philip H Mirvis & Edward J Hackett, "Work and Work Force Characteristics in the Nonprofit Sector" (1983) 106:4 Monthly Labor Review 3. See also Anne E Preston, "The Nonprofit Woker in a For-Profit World" (1989) 7:4 Journal of Labor Economics 438.
[495] Preston, *supra* note 494 at 460.

avoid or resolve legal problems, or raising awareness about how legal tools can increase wellbeing are likely positive externalities. Indeed, these examples may even be "public goods" in Weisbrod's theory.

Intriguingly, not all studies have found evidence of a pervasive wage gap between for-profit work and NFPs. In 2001, economist Laura Leete found either no gap or a slight *increase* in wages for NFPs, compared to for-profit firms, when considering the economy overall. Leete's analysis differed from some previous studies in that it focussed on wage differences between nonprofit and for-profit organizations "that are apparent between comparable workers within comparable occupations and industries".[496] This modification attempted to give a more detailed picture of wage differentials by controlling for demographic and human capital factors, location, occupation, and industry.[497]

Leete's findings of no economy-wide wage differential masked, as she acknowledged, "an array of both positive and negative significant effects" in sub-sets of the overall economy.[498] Her findings supported previous findings of NFP wage differentials within certain industries or occupations, such as nurses in nursing homes[499], lawyers[500], and day-care workers.[501]

Commenting on this difference across sectors, economist Daniel Jones has noted that although there is evidence of workers donating labour, "the circumstances under which this leads to wage differentials is unclear."[502] Jones offers a model in which NFPs use relatively lower wages to screen for workers motivated by a desire to do the work that the NFP engages in.[503] As Jones notes, this screening technique appears to work well in industries where NFPs account for a relatively low share of total work, such as legal services.[504] But he suggests that

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[496] Laura Leete, "Whither the Nonprofit Wage Differential? Estimates from the 1990 Census" (2001) 19:1 Journal of Labor Economics 136 at 137.
[497] *Ibid* at 147-151.
[498] *Ibid* at 153.
[499] George J Borjas, HE Frech III & Paul B Ginsburg. "Property Rights and Wages: The Case of Nursing Homes." (1983) 18:2 Journal of Human Resources 231.
[500] *Supra* note 492.
[501] Anne E Preston, "The Effects of Property Rights on Labor Costs of Nonprofit Firms: An Application to the Day Care Industry." (1988) 36:3 Journal of Industrial Economics 337.
[502] Daniel B Jones, "The Supply and Demand of Motivated Labor: When Should We Expect to See Nonprofit Wage Gaps?" (2015) 32 Labour Economics 1 at 2.
[503] *Ibid*.
[504] *Ibid* at 10.

> …in order for a wage differential to exist, it must be in firms' interests to maintain low wages. Once the number of workers demanded by nonprofits exceeds the number of "motivated" workers, firms must raise their wages. This, then yields the prediction that the existence of a nonprofit wage differential within a particular industry depends on how much labor nonprofits demand relative to for-profits, with wage differentials existing only in industries with relatively low nonprofit shares of labor.[505]

Accordingly, the NFP wage differential should disappear where NFPs represent a relatively high proportion of the industry overall. Jones finds this to be the case by examining the nursing home industry in detail across localities. In localities where a large proportion of nursing homes are NFPs, the wage gap between NFPs and for-profit homes shrinks or disappears.[506] But in localities where NFPs make up a small proportion of the total, the negative wage differential appears to be significant.[507] Jones also demonstrates that the quality of NFP work is highest when NFP share is low, and decreases as NFP share increases.[508]

A key construct in Jones's study is the assumption that some workers are driven by non-pecuniary desires to work for an NFP. Jones's study does not elucidate the exact nature of these non-pecuniary desires for these "motivated" workers, but Jones acknowledges that understanding the role of non-monetary motivations has been an area of increased interest in recent years.[509]

b) Assumptions about motivation and incentives in theories about NFPs

Previous scholarship on the labour donation theory has offered several reasons why individuals might donate labour to an NFP. Hansmann's market failure theory suggests that workers who care about the quality of goods or services their workplace produces may be willing to trade off wages against the kind of assurance afforded by NFP structure.[510] Law professor and economist Susan Rose-Ackerman has argued that the NFP structure signals to committed workers that

[505] *Ibid* at 11.
[506] *Ibid* at 8-9.
[507] *Ibid* at 8-9, 11.
[508] *Ibid* at 11.
[509] *Ibid* at 2-3.
[510] *Ibid* at 3.

"their selflessness is not enriching someone else."[511] And others have suggested that workers may receive a "warm glow" or "moral satisfaction" from contributing to the work of a NFP.[512]

Economists Patrick Francois and Michael Vlassopoulos have dissected the ways in which economists have modelled pro-social motivation, contrasting "action-oriented" altruism with "output-oriented" altruism.[513] They associate action-oriented altruism with situations where an individual receives a "warm glow" from the act of contributing to the production of goods or services, while output-oriented altruists care about the overall value of the goods or services produced.

Public service motivation ("PSM") offers a further refinement on pro-social incentives. PSM emerged as a theoretical construct in public administration literature to account for altruistic motivations to serve a community or nation among many in the public service sector.[514] PSM comprises attributes such as commitment to public interest, sense of civic duty, commitment to social justice, compassion, and self-sacrifice.[515] Research on PSM has influenced, and been influenced by, several disciplines, including economics, psychology, political science, and public administration.[516]

Research into PSM has demonstrated that it can increase the likelihood of working in the public sector over time,[517] is positively linked to prosocial behaviour,[518] and can be associated with

[511] Susan Rose-Ackerman, "Altruism, Nonprofits, and Economic Theory" (1996) 34:2 J Econ Lit 701 at 719.
[512] See Preston, *supra* note 494; Robert H Frank, "What Price the Moral High Ground?" (1996) 63:1 1.
[513] Patrick Francois & Michael Vlassopoulos, "Pro-social Motivation and the Delivery of Social Services" (2008) 54:1 CESifo Economic Studies 22 at 23.
[514] See James L Perry, "Measuring Public Service Motivation: An Assessment of Construct Reliability and Validity" (1996) 6:1 Journal of Public Administration Research and Theory 5; Patrick Francois, "'Public Service Motivation' as an Argument for Government Provision" (2000) 78:3 Journal of Public Economics 275 at 275-276. See also James L Perry & Wouter Vandenabeele, "Public Service Motivation Research: Achievements, Challenges, and Future Directions" (2015) 75:5 Public Administration Review 692.
[515] Perry, *supra* note 514 at 6-7.
[516] Perry & Vandenabeele, *supra* note 514 at 693.
[517] Bradley E Wright & Robert K Christensen, "Public Service Motivation: A Test of the Job Attraction-Selection-Attrition Model" (2010) 13:2 International Public Management Journal 155.
[518] Marc Esteve et al, "Prosocial Behavior and Public Service Motivation" (2016) 76:1 Public Administration Review 177.

increased levels of job satisfaction and engagement.[519] But PSM has also been critiqued as an imprecise construct with unclear antecedents.[520]

Much of the research described here touches on the question of what role intrinsic motivation plays in job search and career engagement. This and related questions have been the subject of significant academic interest very recently. Writing in 2018, economists Timothy Besley and Maitreesh Ghatak reviewed recent developments in how prosocial motivation affects incentive structures in organizations and noted the importance of selecting individuals whose motivations match with organizational structure.[521] They suggested that:

> [i]f the world is indeed populated by motivated agents with nonpecuniary goals, then a whole host of questions arise about how to put such motivation to good use. Although we have applied these ideas to studying incentives, there is a wider agenda that studies how organization structure (e.g., for-profit versus nonprofit firms) and external factors such as market forces and social norms shape prosocial motivation and drive selection on motivation to organizations and sectors.[522]

Pressing further into the issue of incentive design, economist Lea Cassar and business professor Stephan Meier have surveyed the role of meaning as a nonmonetary incentive in the workplace.[523] They acknowledge the importance of recognizing heterogeneity in workers' preferences, including in preferences for meaningful work.[524] They also call for better understanding of the interaction of monetary and nonmonetary incentives.[525] This call in turn raises the matter of "motivation crowding", a phenomenon that also seems to be gaining traction since it was introduced in the late 20th century.[526] Motivation crowding is the theory that

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[519] Katherine C Naff & John Crum, "Working for America: Does Public Service Motivation Make a Difference?" (1999) 19:4 Review of Public Personnel Administration 5.
[520] Adrian Ritz, Gene A Brewer, & Oliver Neumann, "Public Service Motivation: A Systematic Literature Review and Outlook" (2016) 76:3 Public Administration Review 414 at 414, 422-423.
[521] Timothy Besley & Maitreesh Ghatak, "Prosocial Motivation and Incentives" (2018) 10 Annual Review of Economics 411.
[522] *Ibid* at 436.
[523] Lea Cassar & Stephan Meier, "Nonmonetary Incentives and the Implications of Work as a Source of Meaning" (2018) 32:3 Journal of Economic Perspectives 215.
[524] *Ibid* at 232.
[525] *Ibid* at 233.
[526] See e.g. William G Resh, John D Marvel, & Bo Wen, "Implicit and Explicit Motivation Crowding in Prosocial Work" (2019) 42:4 Public Performance & Management Review 889.

providing extrinsic incentives – such as monetary rewards – to encourage work or behaviour can reduce or undermine intrinsic motivation to perform that work or behaviour.[527]

This recent work on incentives and meaning also connects to some earlier work on job satisfaction. In 2005, economist Matthias Benz found that NFP workers experienced higher levels of job satisfaction than for-profit workers, and that these higher levels were not explained by fringe benefits.[528] Benz concluded that NFPs offered "substantial intrinsic work benefits"[529], and that NFPs "seem to have a competitive advantage in motivating and satisfying their workers"[530] compared to for-profit firms. Looking at the legal profession, psychology professor Kennon Sheldon and law professor Lawrence Krieger found similar results, noting that "money", or extrinsically oriented, jobs in law were associated with lower levels of well-being than "service", or intrinsically oriented, law jobs.[531]

This brief review of research on NFPs, motivations, and incentives helps to frame the research questions for the present study. Is there evidence that negative wage differentials still exist between for-profit and NFP lawyers? What are the work and client dynamics of these different sectors? And do these different sectors of the legal profession attract individuals with different levels of other-regarding preferences?

5 The Praxis of Other-Regarding Lawyering: Integrating Theory and Data

The data used in the present study comes from the third wave of the After the JD ("AJD") study.[532] This longitudinal study followed a nationally representative cohort of law school graduates in the United States. The third wave of the study took place in 2012 and followed up with lawyers who had been admitted to the bar in the year 2000. Lawyers were surveyed about

[527] See e.g. Bruno S Frey & Reto Jegen, "Motivation Crowding Theory" (2001) 15:5 Journal of Economic Surveys 589.
[528] Matthias Benz, "Not for the Profit, but for the Satisfaction? – Evidence on Worker Well-Being in Non-Profit Firms." (2005) 58:2 Kyklos 155.
[529] *Ibid* at 173.
[530] *Ibid* at 174.
[531] Kennon M Sheldon & Lawrence S Krieger, "Service Job Lawyers are Happier than Money Job Lawyers, Despite their Lower Income." (2014) 9:3 The Journal of Positive Psychology 219.
[532] See Bryant G Garth et al, "After the JD" (last visited 29 May 2020), online: *American Bar Foundation* <www.americanbarfoundation.org/research/project/118>.

their personal and professional lives, and the dataset contains a wealth of information about demographics, practice settings, work and client types, as well as information about lawyers' goals, explicit motivations, and levels of satisfaction with aspects of their careers. Although the underlying dataset is longitudinal, I have only used snapshot cross-sectional data from the third wave of this dataset.

As an iterated survey, it is to be expected that response rates will decrease with each wave of the survey. That is, the range of potential survey participants is restricted to those who participated in the previous wave of the survey. While the overall response rate for the AJD study in wave two was 50.6 percent, the overall response rate for wave three was approximately 35% of those who had originally participated in the first wave. This rate amounted to 53% of individuals who had previously participated in the first or second wave.[533]

The survey data contains a variable for the type of organization in which respondents worked. The possible organization variables are listed in Table Four. Part-time and unemployed respondents were excluded from the analysis, as were respondents who did not work primarily as lawyers.

For the present analysis, only those lawyers working in solo practice, for a private law firm, or in a not-for-profit setting were considered. The included variables are shaded in Table Four. Lawyers working for government were excluded, as were those working for educational institutions (many of whom are likely law professors), and those working as in-house counsel for corporations.[534] As discussed below, public defender programs are a kind of hybrid setting, and have been included in some comparisons but not others.

[533] The American Bar Foundation & The NALP Foundation for Law Career Research Education, "After the JD III: Third Results from a National Study of Legal Careers" (2014) at 15, online (pdf): *American Bar Foundation* <http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf>.
[534] Note that military and labour union lawyers were also excluded. An additional ground for excluding these lawyers was the small sample size of only nine and three lawyers, respectively.

Table 4: Organization categories in the After the JD study (shading indicates variables included in analysis for this dissertation)

Type of Organization	**Number of Responses**	**% of Total**
Solo practice	219	10.67
Private law firm	911	44.40
Federal government (including judiciary)	133	6.48
State or local government (including judiciary)	259	12.62
Legal services	26	1.27
Public defender	40	1.95
Public interest organization	23	1.12
Other non-profit organization	24	1.17
Educational institution	15	0.73
Professional services firm (e.g. accounting, investment banking, consulting)	35	1.71
Other Fortune 1000 industry/service	198	9.65
Other business/industry	122	5.95
Labor union, trade association	3	0.15
Military	9	0.44
Other	35	1.71
Total	**2052**	**100**

Of the organization categories listed in Table Four, those of "legal services", "public interest organization", and "other non-profit organization" are likely all non-profit settings. While the non-profit nature of the "public interest organization" and "other non-profit organization"

categories is self-evident, it may be helpful to explain what the "legal services" category means. In the United States, "legal services" refers to working for a federal- or state-funded civil legal aid organization. The Legal Services Corporation ("LSC") is a federal not-for-profit organization that provides funding to local legal services offices throughout the United States to deliver civil legal aid services.[535] In addition to the federal LSC, many state and local bar associations have set up local legal services corporations to fund and deliver civil legal aid. For example, the website of the Legal Services Corporation of Virginia explains that:

> The Legal Services Corporation of Virginia (LSCV) was formed and incorporated in 1975 by the Virginia State Bar, the Virginia Department of Social Services and the Virginia Legal Aid Association to develop, fund, coordinate and oversee the delivery of civil legal services to the poor in Virginia.[536]

The Legal Services Corporation of Virginia website further explains that civil legal aid in the state is delivered through "nine regional Legal Aid programs and a statewide support center… that operate out of 35 offices and serve every city and county in Virginia."[537] Similar arrangements appear to be in place in most, if not all, states.[538]

Public defenders are a potentially complicated type of practice. Public defenders are lawyers who are appointed by courts and paid for by state or federal governments. The nature of the public defender's practice can vary between states, with some states using staff lawyers from an office of public defenders, others using lawyers in private practice, and others using a mix of these approaches.[539] As such, public defenders often work in non-profit organizations, but those organizations may have some similarities with government, solos, and private firms.

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[535] Legal Services Corporation, "About LSC" (last visited 29 May 2020), online: *Legal Services Corporation* <www.lsc.gov/about-lsc>.
[536] Legal Services Corporation of Virginia, "About LSCV" (last visited 29 May 2020), online: *Legal Services Corporation of Virginia* <www.lscv.org/>.
[537] *Ibid*.
[538] For example, all of the following are non-profit legal aid providers for the states beginning with "A": Legal Services Alabama (last visited 29 May 2020), online: *Legal Services Alabama* <www.legalservicesalabama.org/>; Alaska Legal Services Corporation (last visited 29 May 2020), online: *Alaska Legal Services Corporation* <www.alsc-law.org/>; Community Legal Services, (last visited 29 May 2020), online: *Community Legal Services* <clsaz.org/> (serving Arizona); Arkansas Legal Services Online, (last visited 29 May 2020), online: *Arkansas Legal Services Online* <www.arlegalservices.org/center>.
[539] See e.g. The American Bar Association, "Primary Indigent Defense at Trial Level" (last visited 29 May 2020), online: *The American Bar Association* <www.americanbar.org/groups/legal_aid_indigent_defendants/indigent_defense_systems_improvement/publications/> (for descriptions of various US public defender programs).

a) Work and client types

Figure Three sets out the types of work that lawyers in these organization types most often engaged in.

The charts in Figure Three have been coloured to indicate work likely to involve personal clients (blue colours) or organizations (red colour). Some types of work, such as civil/commercial litigation and general practice, have been coloured purple to indicate types of work that may involve personal or organizational clients. Other types of work, such as public utilities, administrative law, health law, and environmental law, have been coloured yellow or green to indicate that these types of work do not obviously indicate personal or organizational clients. Finally, "other" types of work are designated gray.

These charts suggest some similarities between solo, legal service, and public interest organization lawyers, all of whom appear to engage in types of work that are likely to involve personal clients. Solo, legal service, and public interest organizations engage in family law work more than 10% of the time, with criminal, immigration, and civil rights work forming significant percentages of other work for the three practice settings, respectively.

By contrast, private firm lawyers engaged in only one type of work that was obviously personal in nature, with family law work forming 5% of total work. A significant percentage of work in private firms is performed on matters that likely have organizational clients, while the single largest type of work, civil/commercial litigation, is indeterminate in nature.

Unsurprisingly, public defenders engaged overwhelmingly in criminal law work.

The greatest variety of work types appeared in the "other not-for-profit" category. The largest single work type in this category was "general corporate" work, which likely indicates that lawyers in this organizational setting often perform corporate work for their not-for-profit employer. Accordingly, organizational clients represent a significant source of work for lawyers in the "other not-for-profit category".

Figure Four provides deeper insight into how work in private firms differs based on the size of those private firms. Two-person firms actually look much more like solo lawyers in the types of

work they perform than they do like larger private firms. This same observation holds, to a lesser degree, for firms with three to ten lawyers. But as private firms grow, the relative proportion of work for personal clients drops, while work for organizational clients grows.

Turning to the types of clients serviced by lawyers in each organizational setting, an even clearer picture emerges. Figure Five sets out charts of the top client types by organization setting. Again, solo lawyers, legal service lawyers, public defenders, and lawyers at public interest organizations report working for mid- to low-income individuals significantly more than any other type of client. While private firm lawyers also report working for mid- to low-income individuals more than any other client type, the difference is much lower (21% versus 20% for other large or mid-sized businesses), and personal clients are not the largest category if all personal clients and all organizational clients are grouped together.

Again, the "other not-for-profit" category differs from the other not-for-profit settings, with non-profit organizations forming a majority of the clientele for these lawyers. Mid- to low-income individuals do, however, make up a large minority of clients for this organizational setting.

Figure Six again reveals differences within private firms based on firm size. Even more starkly than the differences evident in Figure Two, the charts in Figure Four suggest dramatic differences between the clients of smaller private law firms and those of the largest firms. While personal clients make up a majority of total clients for firms of ten or fewer lawyers, that number drops to 27% of total clients for firms with between 11 and 50 lawyers, and only 6% for firms with more than 50 lawyers. In addition, that 6% for large law firms was drawn from wealthy clients; clients from mid- to low-income backgrounds were not a sizeable source of clients at all.

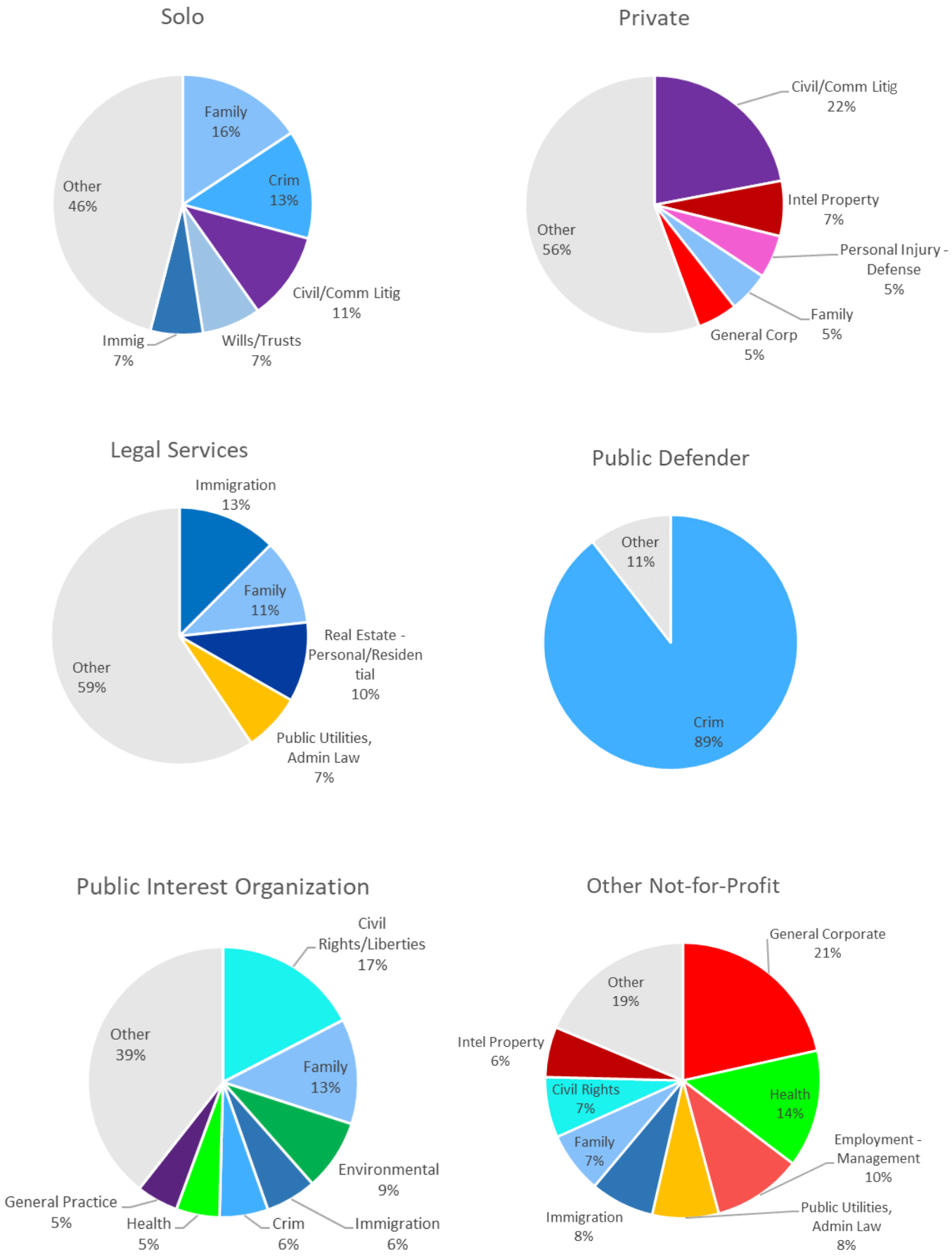

Figure 3: Top areas of work (by organization type), mean percentages of total time per area

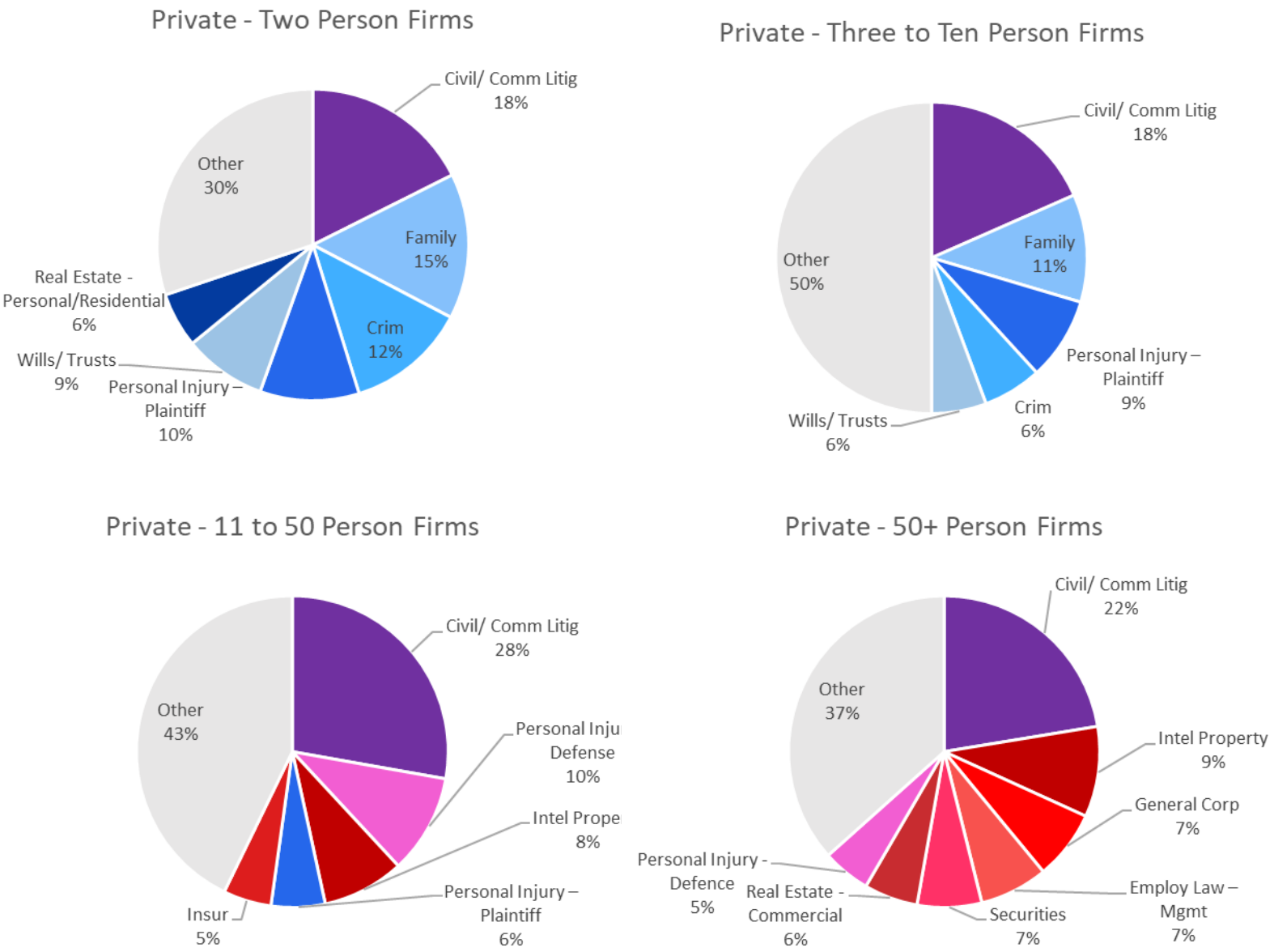

Figure 4: Top areas of work (by private firm size), mean percentage of total time per area

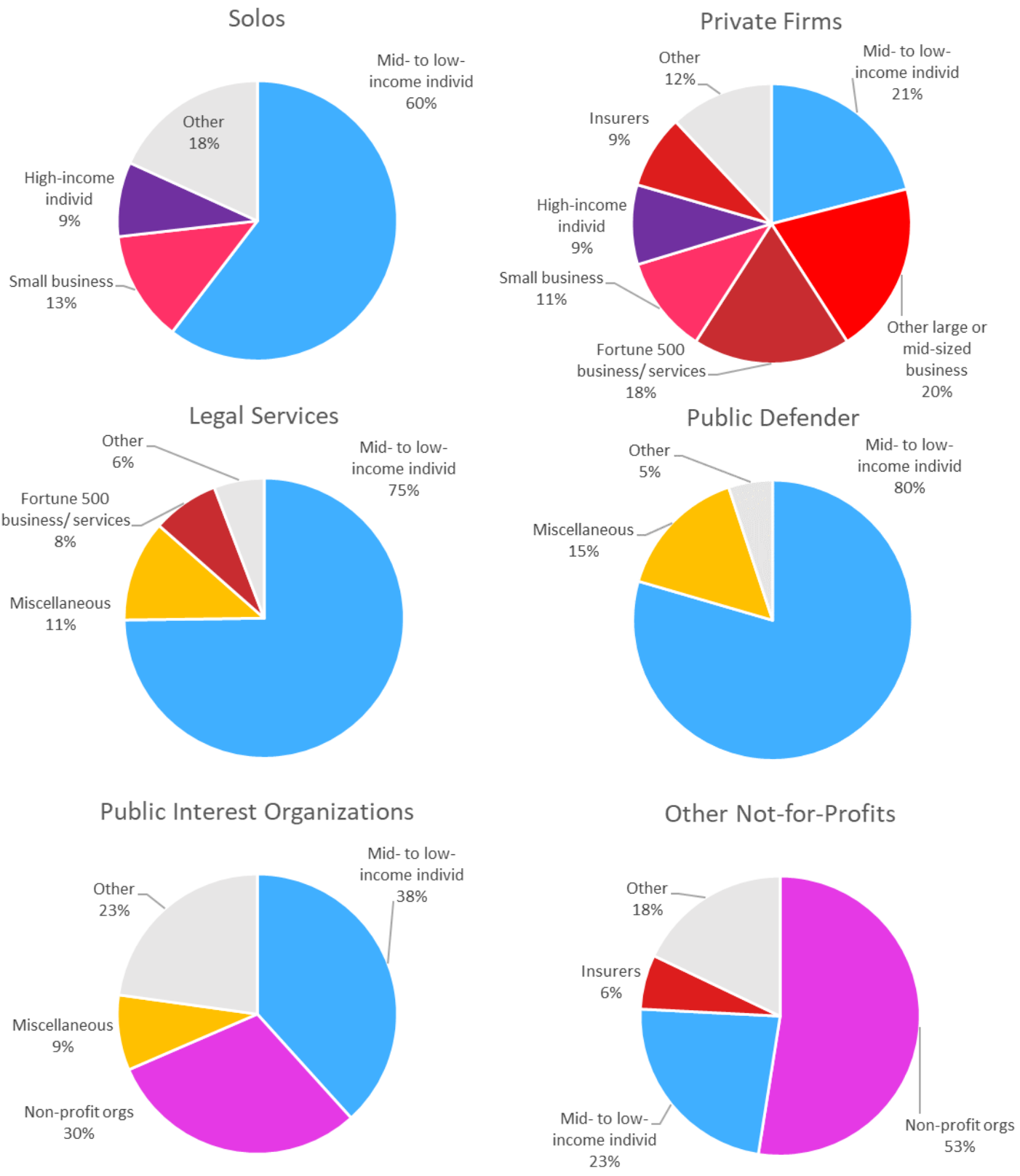

Figure 5: Top types of client (by organization type), mean percentages of total time per client type

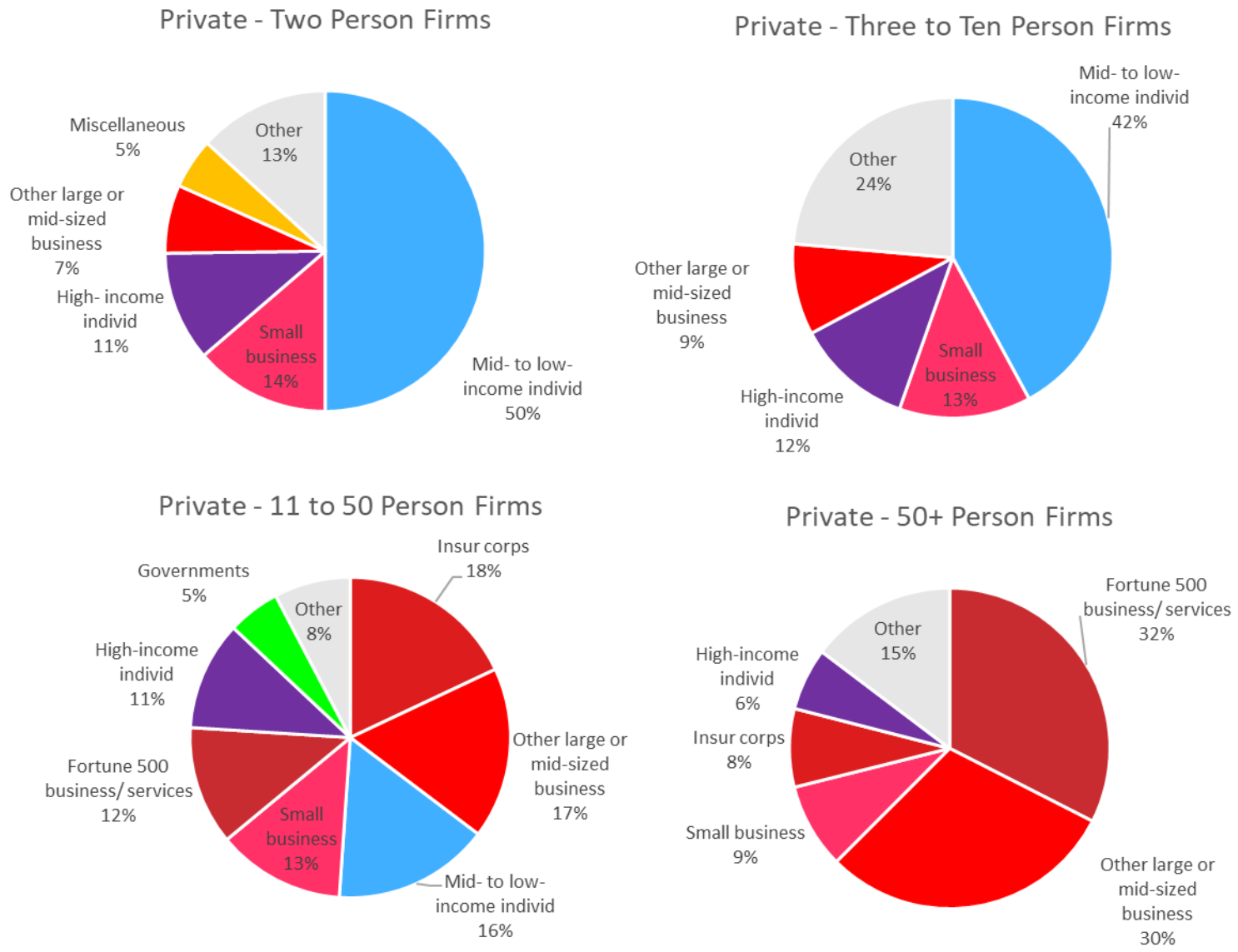

Figure 6: Top types of client (by private firm size), mean percentages of total time per client type

b) Job choice factors and long-term goals

The AJD 3 study also asked respondents to rate the importance of various factors in choosing their current job. The list of factors is set out in Table Five.

Table 5: List of factors in taking your current job

Factors

Compensation	Prestige of the organization
Benefits	Diversity of the workplace
Opportunities to be involved in management	Potential to balance work and personal life
Opportunities to grow my practice	Opportunity to do socially responsible work
Better support (e.g. secretarial, tech, etc.)	Match of employer's mission and mine
Office environment/collegiality	Substantive interest in a particular field of law
Hours	Personal relationships with coworkers
Location	Other
Size of the organization	

Respondents rated these factors using a rating scale ranging from one to seven, with one indicating "not important at all", and seven indicating "extremely important".

As with work types and client types, there were notable differences in the means for many of these factors, depending on organizational setting. For this analysis, the legal service, public interest organization, and other non-profit organizations were grouped together as a single not-for-profit cluster (the "NFP Cluster"). This grouping was done to facilitate analysis between the solo, private, and not-for-profit organizational settings. Public defenders were excluded from the NFP Cluster because of the potentially varied nature of their organizational settings, as noted above. In addition, since public defenders depend almost exclusively on one type of client and one type of work, namely criminal defence work for mid- and low-income clients, this singular

focus makes public defender practice demonstrably different from other not-for-profit work settings.

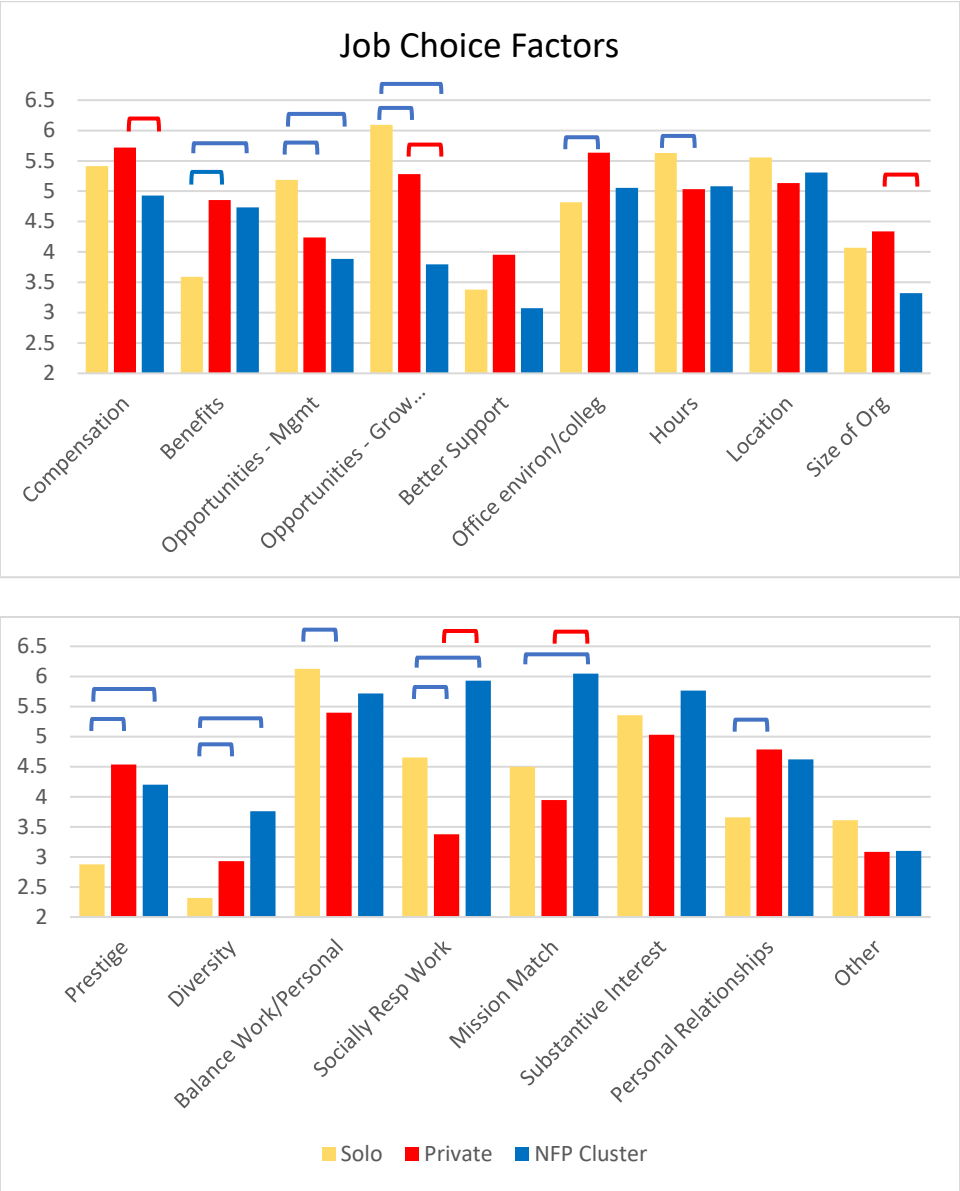

Figure 7: Importance of factors in taking current job
(brackets indicate statistically significant difference, one-way ANOVA, $p<0.005$, Bonferroni adjustment; blue brackets denote differences between solo and other organization types; red brackets denote differences between private and other organization types).

As illustrated in Figure Seven, while there are some similarities between lawyers in the three different organizational settings, there are also key differences, particularly between lawyers in private practice and those working in not-for-profit settings.[540]

In particular, compensation was a more important factor for lawyers in private practice compared to lawyers in not-for-profit settings. By contrast, not-for-profit lawyers rated doing socially responsible work and mission match as important factors at a higher rate than private firm lawyers. As noted in Figure Seven, these findings were statistically significant.

There were, however, other important job choice factors that did not differ markedly between private firm lawyers and not-for-profit lawyers. For example, both groups rated the importance of balancing work and personal life at similar levels of importance. In addition, there were some job choice factors that did not differ significantly among solo lawyers, private firm lawyers, or not-for-profit lawyers, such as location and substantive interest in a particular field of law.

It is also important to note that the factors reported in Figure Seven represent some of the most important of all factors in different organizational settings. For example, the top three job choice factors for private firm lawyers were "compensation", "office environment/collegiality", and "potential to balance work and personal life". The top three job choice factors for NFP Cluster lawyers were "match of employer's mission and mine", "opportunity to do socially responsible work", and "substantive interest in a particular field of law". For solo lawyers, the top three factors were "potential to balance work and personal life", "opportunity to grow my practice", and "hours".

In addition to job choice factors, participants in the AJD 3 study were also asked to rate the importance of several long-term goals. The list of goals is set out in Table 3.

[540] Analysis using the NFP Cluster was also replicated using each of the component organizational categories. All of the differences and levels of statistical significance reported here for the NFP Cluster were also observed for each of the components. In addition, no significant differences were observed among the individual elements of the NFP Cluster.

Table 6: List of long-term goals

Goals	
Intellectual challenge	Have a satisfying personal life
Help individuals	Become a bar leader
Accumulate great wealth	Become a high-ranking corporate executive
Become an influential person	Move into management
Change or improve society	Become a politician
Have a satisfying career	Become a judge

Respondents rated these goals using a one to five rating scale, with one indicating "not at all important" and five indicating "extremely important".

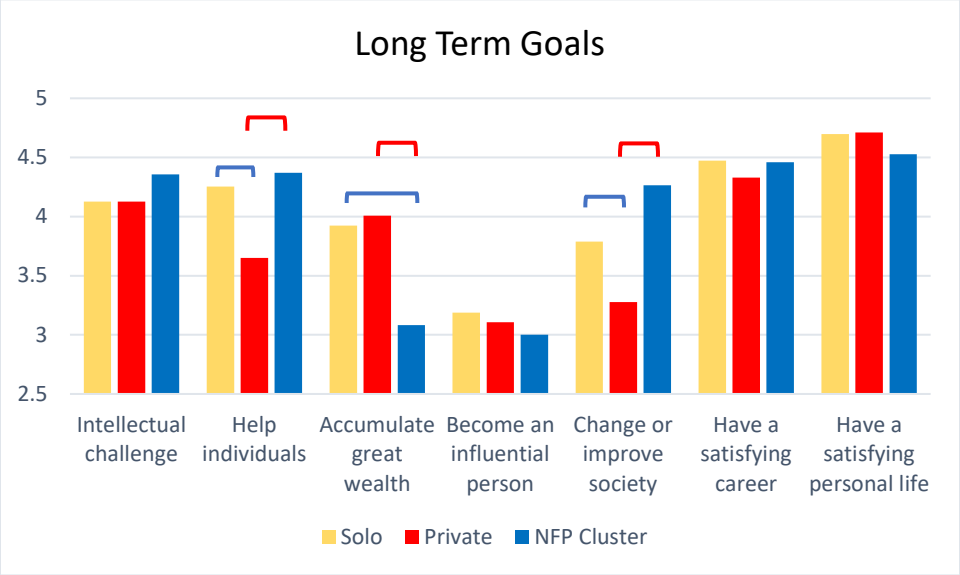

Figure 8: Importance of long term goals
(brackets indicate statistically significant difference, one-way ANOVA, $p<0.005$, Bonferroni adjustment; blue brackets denote differences between solo and other organization types; red brackets denote differences between private firms and NFP Cluster).

Figure Eight shows the mean ratings for various long-term goals, by practice setting. Some goals were excluded from this graph if their mean level of importance did not exceed 2.5 in any of the organizational settings.

As with job choice factors, some long-term goals did not vary significantly among the three organizational settings under analysis. NFP Cluster lawyers did, however, report higher levels of importance for both "help individuals" and "change or improve society" compared to private firm lawyers. NFP Cluster lawyers also attached significantly lower levels of importance to the long-term goal of "accumulate great wealth", compared to both private firm and solo lawyers.

c) Integration and analysis

It is important to take heterogeneity seriously among service-providers. Since the Chicago lawyers study of the early 1980s, lawyers have often been noted to belong to one of two hemispheres: those who serve personal clients and those who serve organizations.[541]

While the "two hemispheres" theory has been influential, it can be overstated. The authors of the Chicago study wrote that

> [l]awyers who serve major corporations and other large organizations differ systematically from those who work for individuals and small businesses, whether we look at the social origins of the lawyers, the prestige of the law schools they attended, their career histories and mobility, their social or political values, their network of friends and professional associates, or several other social variables.[542]

But they also noted that "it would, of course, be a mistake to overdraw the precision of the cleavage between the corporate and personal client hemispheres".[543] Indeed, as they observed, "[t]here are, in some respects, larger differences within the hemispheres than between them."[544]

The present study offers further detail about the line between the bar's two hemispheres.[545] Specifically, this study demonstrates that lawyers who work for people are predominantly found

[541] *Supra* note 209.
[542] *Ibid* at 127-128.
[543] *Ibid* at 128.
[544] *Ibid.*
[545] *Ibid.* See also *supra* note 211.

in solo and small firm practices, but also in not-for-profit settings. Further, while large private firms rely almost exclusively on organizations – that is, corporations – for their business, another segment of the legal marketplace that serves organizational clients is that of lawyers working in not-for-profit settings who provide legal services for those not-for-profits.

These results fit with previous findings which suggest that work for personal clients tends to be done by lawyers working in solo or small firm settings, rather than at large law firms.[546]

Another key point is that this research suggests that there are predictable differences in preferences between lawyers who work in private firms and those who work in the not-for-profit sector. This is a novel contribution to the literature.[547] The job choice factors data suggests that private firm lawyers value monetary compensation more highly than not-for-profit lawyers, while the latter prize changing society and mission match much more highly than private firm lawyers. While this data is suggestive, it does not demonstrate inherent differences between lawyers in these two sectors. Based on previous research showing that lawyers in not-for-profit settings receive lower levels of compensation compared to those in private practice, it is reasonable for compensation to be a more important factor for lawyers choosing to work in a private firm setting compared to those choosing to work in not-for-profit settings.[548]

The data on long term goals, however, aligns with the job choice findings and suggests that private firm lawyers hold predictably different goal preferences compared with lawyers in not-for-profit settings. Specifically, lawyers in not-for-profit settings attach significantly higher levels of importance to helping individuals and changing society, compared with private firm lawyers, and significantly lower levels of importance to accumulating wealth.

Finally, it is worth noting that solo lawyers differ in interesting ways from both private firm lawyers and not-for-profit lawyers. Solo lawyers are similar to not-for-profit lawyers in attaching significantly higher importance to helping others and changing society, when compared with

[546] S*upra* note 211 at 69-70.
[547] Some previous studies have certainly explored values and opinions among lawyers. See e.g. *ibid* at 179-202. This research, however, focussed on political viewpoints and opinions on social matters, rather than on factors and goals more proximately connected to work and incentives.
[548] See e.g. *supra* note 492.

private firm lawyers. But unlike their colleagues in not-for-profit settings, solo lawyers appear to behave like private firm lawyers when it comes to the importance of accumulating wealth.

While these findings are novel and interesting, their limitations must be acknowledged. First, as self-reporting data, assessments of job choice factors and long-term goals may be influenced by subjective biases.[549]

For example, the social worlds of different work settings may help to create different forms of social desirability based on those settings.[550] Surrounded by business clients and business-focussed colleagues, lawyers working in large private firms may come to see accumulating wealth as more important than they did before they began their job. Conversely, it might be difficult for a lawyer in a not-for-profit setting to admit to valuing wealth based on values absorbed since the lawyer began working in that setting. Further research might usefully explore this in greater depth by comparing the results from the third AJD survey with data from the two earlier surveys.

In addition, while this data demonstrates differences in mean preference levels among different practice settings, further analysis could analyze the extent to which differences in long term goals correlate with other socio-demographic factors. Since the data source in this research is comprised of a single year of law school graduates, the data cannot capture any differences that exist among different lawyer cohorts. It would also be interesting to compare the self-reported levels in this research to those in other professions, or in the general population.

Finally, this research is obviously relevant to the United States, given that the dataset is comprised of US law school graduates. While there is good reason to suggest that much of the existing research on pro-social motivation and the role of different motivations may be relevant in Canada, it remains that the findings in this chapter are only suggestive for future Canadian research.[551] Given that this dissertation has otherwise focussed on access to justice problems in Canada, it would be very useful to replicate this analysis using a Canadian lawyer dataset.

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[549] For discussion of limitations of self-reported data, see e.g. Stewart I Donaldson & Elisa J Grant-Vallone, "Understanding Self-Report Bias in Organizational Behavior Research" (2002) 17:2 Journal of Business and Psychology 245.

[550] For discussion on this point, see *supra* note 211 at 49, 191.

[551] The findings in this dissertation do echo some Canadian research. For example, the importance of mission motivation for some Canadian lawyers is discussed in LLM *supra* note 119 at 69. See also Ronit Dinovitzer, "Law

Nevertheless, in spite of these limitations, this research can make a useful contribution to debates about improving access to justice. Given the existing calls for not-for-profit law firms to address access to justice problems, it is important to understand that lawyers who work in not-for-profit settings appear to be motivated by different things than lawyers who work in private firm settings. Paying attention to these differences is necessary in attempting to design legal services which will improve access to justice in a sustainable and long-term way.

In *Urban Lawyers*, the authors speculated that wealthy clients might give rise to different types of incentives for lawyers to work with them. In addition to the allure of monetary compensation, they suggested that wealthy clients might demand "carefully crafted, original solutions", and that lawyers working for such clients might therefore "get the satisfaction of doing creative work."[552] By contrast, if clients lack funds, "[t]he incentive will be to dispose of matters as quickly as possible" and matters for these clients are accordingly more likely to be "defined as routine".[553] "If lawyers value money and intellectual satisfaction," they continued, "those who can get high-end work will take it… Those who cannot will either do what is left or leave the profession."[554] These assumptions, that lawyers value money and intellectual satisfaction, are tested in the present research. Indeed, the authors of Urban Lawyers acknowledged the possibility that there are stable differences among lawyers regarding preferences, noting that "perhaps lawyers also care about public service or justice or emotional satisfaction. It is not clear that all of them seek to maximize their wealth."[555]

That some lawyers seek things other than wealth maximization should not be surprising, but it fits well with the growing understanding of the role of pro-social and other forms of non-pecuniary incentives in economic literature. As discussion of access to justice problems has become common in the legal profession, it may be that lawyers motivated by pro-social factors may seek to leverage non-pecuniary incentives to recruit and screen like-minded lawyers.

Acknowledging that non-pecuniary incentives can be important is not, however, to say that they are as influential across the population as monetary incentives. This research demonstrates that

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and Beyond: A National Study of Canadian Law Graduates" (last visited 29 May 2020), online (pdf): <individual.utoronto.ca/dinovitzer/images/LABReport.pdf>.

[552] *Supra* note 211 at 49.

[553] *Ibid*.

[554] *Ibid*.

[555] *Ibid*.

while non-pecuniary factors are highly important for lawyers in not-for-profit settings, pecuniary factors are highly important for both private firm lawyers and for solo lawyers. To ignore or downplay financial incentives is to ignore or downplay a major incentive for most lawyers.

It is possible that lawyers may be more highly motivated by financial incentives than the population at large. Trying to assess the relative importance of different incentives may be a fruitful avenue for future research. If lawyers are more highly motivated by financial incentives than the general population, responding to access to justice problems may involve reforming law school admission processes to ensure that future lawyers do not prize money above all else. Recruiting and training pro-social lawyers may be an important future reform. If work to improve access to justice is seen as motivating by some lawyers, choosing a not-for-profit organizational structure will allow some firms to attract pro-socially motivated lawyers while keeping wages relatively low.[556] If, however, not-for-profit access to justice firms become common, the relative wage advantage for those firms will likely disappear.[557]

Another path altogether is to reform the delivery of legal services so that personal legal work is more highly valued and is compensated at a level similar to that of corporate legal work. Indeed, it seems naive to rely on a minority of pro-socially motivated lawyers to deal with access to justice problems, rather than reforming how legal services are delivered – an admittedly formidable long-term challenge – in order to make personal legal services attractive to lawyers who value pecuniary rewards.

In addition to financial returns, reducing the differences between the bar's two hemispheres will also require efforts to adjust the prestige attached to each hemisphere. As noted by sociologists Erin Leahey and Laura Hunter, "working in high-status practice areas, serving business clients rather than individuals and engaging in "pure" tasks that require not simply diagnosis and treatment but also inference are prestigious kinds of work that benefit practitioners' careers and compensation."[558] These suggestions are developed further, among others, in the following chapters.

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[556] See *supra* note 502.
[557] *Ibid*.
[558] Erin Leahey & Laura A Hunter, "Lawyers' Lines of Work: Specialization's Role in the Income Determination Process" (2012) 90:4 Social Forces 1101 at 1102 [citations omitted].

6 Innovating Not-for-Profit Access to Justice

This chapter has focussed narrowly on an aspect of how legal services should be supplied in order to foster sustainably improved access to legal services. Taking its starting point from the fallout from debates over non-lawyer ownership of law firms, the chapter has reviewed recent research from economics and other fields to suggest that not-for-profit legal service firms may indeed offer some structural advantages to improve access to justice. That is, not-for-profit firms which can credibly assert a commitment to the mission of improving access to justice may be able to attract workers with a particular commitment to that social goal. Yet while NFPs may be a viable part of how accessible legal services should be delivered, there are reasons to suppose that they cannot be the only type of legal service. Further, without a major change in how NFPs are perceived and valued, they will likely only be able to function if they are able to attract workers willing to accept lower salaries in exchange for organizational commitments to improving access to justice. While these motivated workers clearly exist within the legal profession, their relative abundance is unclear. Nevertheless, these insights help to suggest a path to improve access to justice, a topic which is developed further in the next two chapters.

Chapter 8 – Toward a Person-Centred Conception of Access to Justice

1 Lessons Learned from Previous Conceptions

To this point, I have argued that the judicial and expansive vision conceptions of access to justice offer poor frameworks from which to offer effective and sustainable solutions to the access to justice privation that currently exists in Canada. Indeed, I have argued that *any* conception of access to justice that is premised on institutional fundamentalism is incapable of the contextual sensitivity required to properly animate access to justice. Anchoring access to justice in the rule of law or in other institutional structures such as civic citizenship leaves access to justice tethered to a minimalist normative structure that offers a path only to formal, rather than substantive, justice. This is an insufficient point from which to resolve access to justice problems.

While the expansive vision conception of access to justice is more promising than the judicial conception, it is still too limited to offer comprehensive solutions. Although the expansive vision incorporates some recognition of context by acknowledging a range of different legal services that can play different roles in addressing access to justice problems, it remains practically focussed on the institutions of justice rather than on those seeking justice. As such, while this conception includes language acknowledging the importance of putting the public at the centre of access to justice efforts, it offers no tools by which to do so. The normative heart of this conception is attenuated when it comes to the people who experience access to justice problems. Similarly, other institution-focussed conceptions of access to justice will invariably suffer from this fundamental defect.

Chapters Six and Seven have demonstrated that there are opportunities to both better understand how individuals perceive and respond to access to justice problems, and also to design legal services which better respond to those access to justice problems. What is missing is the right normative conception of access to justice which can integrate these opportunities.

This chapter offers a novel conception of access to justice which holds promise to fill this gap: a truly person-centred conception of access to justice. After discussing some work in legal theory that foreshadows a person-centred conception in Section Two of this chapter, Section Three

locates the core of the person-centred conception in Martha Fineman's understanding of human vulnerability as a potent theoretical instrument. Section Four elaborates on human vulnerability as it relates to access to justice, while Section Five explores some implications of placing vulnerability at the centre of a conception of access to justice. I then conclude this chapter by suggesting that a person-centred conception of access to justice rooted in human vulnerability offers a demonstrably superior approach to access to justice than other contemporary theoretical approaches.

2 The Need for Responsive Law: Toward a Person-Centred Conception of Access to Justice

Moving from abstract and institutional conceptions to context-sensitive ones resembles the move from autonomous law to responsive law suggested by legal sociologists Philip Selznick and Philippe Nonet.[559] Selznick and Nonet define "autonomous law" as a legal paradigm in which "the overriding preoccupation is the preservation of institutional integrity."[560] In this paradigm, "law insulates itself, narrows its responsibilities, and accepts a blind formalism as the price of integrity."[561] By contrast, "responsive law" is a paradigm in which law "retains a grasp on what is essential to its integrity while taking account of new forces in its environment", and does so by "perceiv[ing] social pressures as sources of knowledge and opportunities for self-correction."[562]

Selznick and Nonet associate autonomous law, which has been the norm in Canada and many other democracies, with the ideal or institutional form of the rule of law.[563] They describe this paradigm as one marked by "the formation of specialized, relatively autonomous legal institutions that claim a qualified supremacy within defined spheres of competence".[564] They note that autonomous law is a "resource for *taming* power… a legal and political aspiration, the creation of 'a government of laws and not men.'"[565] They contrast this legal motif with

[559] Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transaction, 2001).
[560] *Ibid* at 76.
[561] *Ibid* at 76-77.
[562] *Ibid* at 77.
[563] *Ibid* at 53.
[564] *Ibid.*
[565] *Ibid.*

responsive law, which attempts to make law "more responsive to social needs",[566] is driven by the desire to solve problems, and is result-oriented.[567]

Responsive law provides a fitting schema for many aspects of the expansive vision of access to justice described above. Selznick and Nonet suggest that responsive law should encourage people to increasingly interact with law and legal institutions, and thereby helps to generate complaints and activism from diverse communities. This increased engagement, flexibility, and responsiveness brings new energy to legal institutions. The concept of responsive law resonates with legal scholar Roderick Macdonald's five waves typology of access to justice, which presaged the expansive vision of access to justice and explicitly advocated for increasing representation within legal institutions.[568] Selznick and Nonet suggest that responsive law can improve the competency of legal institutions, both by broadening access to legal institutions, but also by broadening the scope of legal inquiry.[569] They argue that "the enlargement of legal participation goes beyond increasing the democratic worth of the legal order. It can also contribute to the competence of legal institutions."[570]

Explaining Selznick's assessment of the ambition and potential of a responsive legal system, professor of law and social theory Martin Krygier has written that:

> Repressive, arbitrary, purely instrumental law is a predominantly state-centred matter, but the rule of law in this integrative sense [i.e. responsive law] is something quite else. It is, ideally and to differing extents in practice, not just a wall separating one from the other, not merely a club wielded by one against the other, but more like a bridge between state and society, pylons firmly planted on both sides of the divide, traffic flowing in both directions, and steady, unfearful, and productive interaction occurring between persons on both sides… When that happens, law is what Habermas has called an 'institution' of the everyday life world itself, available to citizens as a resource and protection in their relations with the state and with each other. It is not a mere 'medium' for the transmission of power.[571]

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[566] *Ibid* at 73.
[567] *Ibid* at 84. Selznick and Nonet also discuss a third schema, "repressive law", but that discussion is not directly relevant for this dissertation.
[568] *Supra* note 265.
[569] *Supra* note 559 at 97-98.
[570] *Ibid* at 98.
[571] Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press, 2012) at 265 [citations omitted].

If responsive law promises a reformulated dynamic of power among individuals and with the state, how might that reformulated dynamic be achieved?

The move from autonomous law to responsive law represents a shift in a central animating idea from the rule of law to a person-centred legal system. This is the same shift that is required in our understanding of the importance of access to justice. But this shift should raise questions about what law can and should promise regarding justice. Is it tenable to suggest that everyone seeking a just outcome in a pluralistic society will have their hopes fulfilled by the legal system?

Legal scholar Jeremy Waldron has considered what legal justice can offer through the prism of another of Philip Selznick's ideas, namely his suggestion that "[l]aw is not necessarily just, but it does promise justice."[572] Selznick recognized a distinction between law "as an operative system" and justice "as a moral ideal."[573] In exploring the connections between the two, Waldron analogizes the law-justice relationship to the relationship between "hospital" and "actual nonharmfulness":[574]

> No one understands the term 'hospital' unless he understands what hospitals are *for*. To describe one's establishment as a hospital is to hold out the promise of healing and care – even though it might turn out that the procedures actually used in a given institution, making this promise, are in fact harmful or hurtful to the patients… we don't withdraw the term [hospital] the instant the mere fact of harmfulness is discovered, if we are sure that the institution in question has the treatment of the sick and the wounded as its aim. So this is a case where the analytic separability of 'hospital' and 'actual nonharmfulness' conceals a deeper aspirational connection between the two.[575]

After exploring the "institutional evidence" of a connection between law and justice[576] and the depth of the possible connection[577], Waldron proceeds to analyze what *kinds* of justice law might

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[572] See Jeremy Waldron, "Does Law Promise Justice?" (2000) 17 Ga St U L Rev 759 at 759 [Georgia]; Jeremy Waldron, "Does Law Promise Justice?" in Robert A Kagan, Martin Krygier, & Kenneth Winston, eds, *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Lanham, MD: Rowman & Littlefield, 2002) 99 at 99 [Legality and Community]. See also Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992) at 443.
[573] Selznick, *supra* note 572 at 443.
[574] Legality and Community, *supra* note 572 at 101-102. While "actual nonharmfulness" is not a term often associated with hospitals, I suspect that Waldron preferred it for analytical clarity to other related terms, like "healing" or "care".
[575] *Ibid* at 102.
[576] *Ibid* at 102-105.
[577] *Ibid* at 105-107.

promise.[578] He notes that Selznick's claim about the relationship between law and justice is most interesting if the justice it refers to is substantive, rather than formal, justice.[579] Waldron concludes that law can, and should, promise to engage with different notions of justice.[580] Indeed, he notes that disputes "about what justice amounts to or how it is best promoted" are among the most important and contentious debates in society, and he finds at least some of these debates well-suited to consideration within a legal system.[581]

Waldron describes Selznick's claim that law promises justice as "powerful and important".[582] But while he finds this claim to be validated, he rejects the suggestion that law can actually promise substantive justice in a particular case, reasoning that different conceptions of justice in a pluralistic society will necessarily preclude a stable example of substantive justice in any given matter.[583] Instead, law promises an interest in achieving substantive justice by using procedures (i.e. mechanisms of formal justice) which tend to increase the engagement with, and achievement of, substantive justice over time.[584] These practices and procedures help to create conditions that allow substantive justice to be realized: "[t]he idea is that law already shows and teaches a sort of concern for substantive justice in its commitment to formal justice."[585]

Waldron also develops a claim that "law helps us *coordinate* the pursuit of justice."[586] That is, while law may not necessarily promote a specific outcome, goal, or substantive result, it "promises coordination in pursuit of such goal."[587] This gives rise to an important observation:

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[578] *Ibid* at 108.
[579] *Ibid* at 111. To be precise, Waldron further differentiates between "substantive legal justice" (after Aristotle) and "substantive natural justice", and claims that Selznick is interested in the latter. My references to substantive justice here refer to Waldron's "substantive natural justice" – I have reduced the term here only for the sake of brevity. Waldron differentiates between formal and substantive justice by drawing on HLA Hart: formal justice amounts to "treating like cases alike, and different cases differently", without any way of determining what constitutes relevant likeness in a given situation. The "supplement" of determining what counts as relevant likeness is what Waldron describes as "substantive justice". Substantive justice, in this sense, is self-actuating, and validates both a right and an associated remedy. The substantive justice/formal justice binary is not identical to, but is also not entirely orthogonal to, substantive justice and procedural justice. Procedural justice confers rights to procedural steps, but does not guarantee any remedy in addition to those process rights.
[580] *Ibid* at 108.
[581] *Ibid* at 112.
[582] *Ibid*.
[583] Georgia, *supra* note 572 at 782-783.
[584] Legality and Community, *supra* note 572 at 111.
[585] Georgia, *supra* note 572 at 777.
[586] Legality and Community, *supra* note 572 at 114.
[587] *Ibid* at 115.

unlike some goals that can be achieved unilaterally[588], achieving justice (in many conceptions of that term) is essentially "comparative", to use Waldron's term.[589] Another way of putting this is to reiterate that justice is necessarily concerned with the relations between law's subjects.[590]

Waldron also recognizes, at least in common law systems, an attribute that is uncommon to most other social or governance institutions, namely law's concern with the particular parties before it. He notes that:

> we do think it scrupulously important in law to get the issue focused in a way that is particularly attentive to what the parties – s1 and s2 – have at stake in the matter. It is not enough to get the choice right as between policy X and policy Y: we must get it right so far as its distinctive bearing on these two litigants concerned. That is the focus in law, and all we do about consistency and relevant reasons and treating like cases alike is done in that focus, rather than on the merits of X and Y considered on a broader front.[591]

While Waldron's discussion refers to the context of litigation, the same degree of particularity is also relevant to law in other manifestations. Consider the examples of entering into a contract or drafting a will or even being tried for a criminal offence. In each case, the law is concerned with the particular subjects it engages with (whether those subjects are natural or legal people). Waldron's analysis suggests that law's attention to the particular circumstances of those before it creates a connection, through formal procedural justice, to an interest in substantive justice.

This particular attention to the claims and concerns of the people enmeshed with the law is a powerful point that should be given greater emphasis. Thinking back to the examples of Sara and Anthony, many of the frustrations they described in trying to navigate legal and other systems were caused by being treated impersonally or without due attention.[592] Offering subjectively appreciated, particularized attention to those with legal needs is an important component of what a worthwhile concept of access to justice entails. Personalized attention in the course of pursuing substantive justice is a necessary component of an accessible justice system.

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[588] Waldron uses the example of wealth maximization.
[589] Legality and Community, *supra* note 572 at 115.
[590] As Waldron puts it: "…what it is just for A to do about B may be interdependent with what it is just for C to do about D; if A and C do not coordinate their pursuit of justice, injustice may result no matter how just each of their unilateral responses to the particular case in front of them may seem." See *ibid* at 116.
[591] Georgia, *supra* note 572 at 777-778.
[592] See Chapter Two, Section One, above.

Waldron's exploration of the connection between law and justice by reference to Selznick is helpful in several ways. First, it explores and tests Selznick's claim that law promises justice, modifying that claim to suggest that law promises an interest in substantive justice. That is, according to Waldron law provides a forum for contesting views about what amounts to substantive justice in any given situation, while remaining agnostic about the nature of that justice.[593] Second, it recognizes law as an institution to coordinate concern about, and pursuit of, justice. It does so by creating a forum to argue about what justice requires and also by recognizing justice as comparative and ultimately relational. Third, it suggests that law is uniquely placed among social institutions to develop and maintain a special concern for the particular subjects and circumstances before it.

As Waldron has written, discussing the relationship between formal and substantive justice, "[t]he idea seems to be that formal justice itself – the very discipline 'of subjecting conduct to the governance of rules' – starts us off down a road that heads inexorably in the direction of a growing commitment to 'respect for the person, self-restraint in the use of power, and reasoned justification'."[594] This normative framework is still lacking a conception of *who* lies at the core of access to justice. Who is the person in a person-centred conception of access to justice? What does the legal system owe to that person in order to ensure that they can access justice?

A key challenge in finding such a theoretical framework is discerning one that can account for both the desire for universality and the need for particularity. One of the most notable tensions in the discourse around access to justice, and one apparent in Hughes's critique of generic solutions, is whether efforts to understand and improve access to justice problems are universal in nature, or whether they should be targeted more narrowly. For example, for long periods the methodologies associated with studying unmet legal needs were targeted at low income populations. Only within the past 20 years have studies of unmet legal needs expanded to include the whole population.[595] Law and economics scholar Michael Trebilcock has suggested that a major challenge to sustaining legal aid programs in recent years has been the lack of universality of those programs, leading to increasingly eroded political support when compared to universal

[593] Note that this claim is open to critique: a system which affords more access to those with significant resources cannot be said to be agnostic about matters of distributive justice.
[594] Legality and Community, *supra* note 572 at 111.
[595] See e.g. *supra* note 13.

social programs such as health care.[596] Given a desire for universality and the challenges of particularity, how can we build an appropriate theoretical foundation for person-centred access to justice?

3 The Core of the Conception: Universal Human Vulnerability

One fruitful approach that offers a way to transcend the universal/individual dichotomy is the vulnerability theory proposed by legal theorist Martha Fineman.[597] This analytical framework takes human vulnerability, which is a necessary product of human embodiment, as a potent touchstone by which to revitalize the state's relationship to its citizens.[598] By placing this idea at the centre of the concept of access to justice, we can generate a normative framework that is both attentive to the particular needs of each individual and also universal in scope.

Fineman describes vulnerability as "universal and constant, inherent in the human condition"[599], and as "…the characteristic that positions us in relation to each other as human beings, as well as forming the basis for a claim that the state must be more responsive to that vulnerability."[600] It is "the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise."[601] In Fineman's analysis, vulnerability is a concept that is important "for its potential in describing a universal, inevitable, enduring aspect of the human condition",[602] and one "freed from its limited and negative associations"[603] such as "victimhood, deprivation, dependency, or pathology."[604] Fineman's effort to rehabilitate vulnerability and move it away from negative associations like deprivation resonates with the idea of moving away from the privation of access to justice

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[596] Michael Trebilcock, *Report of the Legal Aid Review 2008* (Toronto: Ministry of the Attorney General, Ontario, 2008) at 74.
[597] Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20:1 Yale JL & Feminism 1.
[598] *Ibid* at 19.
[599] *Ibid* at 1.
[600] Martha Albertson Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics" in Anna Grear & Martha Albertson Fineman, eds, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (New York: Routledge, 2016) at 13.
[601] *Supra* note 597 at 9-10.
[602] *Ibid* at 8.
[603] *Ibid*.
[604] *Ibid*.

problems.[605] She develops the concept of vulnerability explicitly to "develop a more complex subject around which to build social policy and law; this new complex subject can be used to redefine and expand current ideas about state responsibility toward individuals and institutions."[606]

While people try to minimize the risks and effects of harmful events, the chance of harm is uneven over the life course and among different people. As Fineman notes, "we are positioned differently within a web of economic and institutional relationships, [and] our vulnerabilities range in magnitude and potential at the individual level."[607] The experience of vulnerability is "greatly influenced by the quality and quantity of resources we possess or can command."[608] But vulnerability is ultimately a common experience among all people, everywhere, at all points in history.

Fineman has suggested that vulnerability's universality offers more than is possible through other normative frameworks. Commenting on the limitations of equality theory predicated on non-universal group characteristics, Fineman writes that:

> …the most troubling aspects of organizing equality discourse around identity characteristics is that it distorts our understanding of a variety of social problems and takes only a limited view of what should constitute governmental responsibility in regard to social justice issues. Identity categories have become proxies for problems such as poverty or the failure of public education systems. The focus only on certain groups in regard to these problems obscures the institutional, social, and cultural forces that distribute privilege and disadvantage in systems that transcend identity categories.[609]

An embodied, socially embedded vulnerable subject is a significant improvement over the idealized, abstracted liberal subject who has historically been the focus of public policy. Fineman has suggested that vulnerability theory "has some significant strength as an independent universal approach to justice, one that focuses on exploring the nature of the human, rather than the rights, part of the human rights trope."[610] Others have also commended vulnerability theory for its strength in this regard. Legal scholar Nina Kohn has suggested that an advantage of

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[605] See Chapter One, Section Four, above.
[606] *Ibid* at 1-2.
[607] *Ibid* at 9-10.
[608] *Ibid*.
[609] *Supra* note 600 at 15-16.
[610] *Ibid* at 13.

vulnerability theory is that it "encourages comprehensive approaches to addressing inequality and vulnerability, not simply piecemeal population-by-population interventions that fail to create fundamental change."[611] While Kohn has noted that this aspect of the theory did not appear to be a particular point of focus for Fineman, it is one that has been valued – and critiqued – not only by Kohn but by others.[612]

Fineman's approach to the vulnerable subject also offers some distinct advantages over other contextual and person-centred theoretical frameworks. Since I have drawn on Amartya Sen's criticisms of institutional fundamentalism, it is useful to contrast the vulnerability approach to Sen's lauded capability approach. There are some strong affinities between the two since both place emphasis on what individuals specifically require in their particular contexts. Yet while both the capability approach and the vulnerability theory envision social policies that respond to the particular contexts of individuals to promote their abilities to pursue life opportunities on their own terms, the vulnerability theory encompasses universality in a useful way, as Kohn has noted. The vulnerability theory is explicitly framed to apply to all people, given the inherent vulnerability that is present in human life. This more grounded aspiration to universality adds an important dimension to contextualized individual responsiveness, and one that may be pragmatically useful by creating a normative framework in which all citizens in a polity may see themselves reflected in the framework over their lifespan.

In addition, vulnerability theory properly emphasizes that responding to access to justice problems may require diverse forms of interventions, with implications beyond those typically delivered by legal professionals. Placing vulnerability theory as a cornerstone of the person-centred conception of access to justice recognizes that responding to access to justice problems will often require non-legal resources to address an individual's vulnerabilities. This is important and should be distinguished from approaches to access to justice that focus primarily on an individual's legal capabilities.

Further, vulnerability theory provides an immanent connection between theory and practice in relation to access to justice. Responding to a person's particular vulnerability requires being

[611] Nina A Kohn, "Vulnerability Theory and the Role of Government" (2014) 26:1 Yale JL & Feminism 1 at 10.
[612] *Ibid*. See also Elizabeth L MacDowell, "Vulnerability, Access to Justice, and the Fragmented State" (2018) 23:1 Michigan J Race & L 51 at 78.

attentive to that person's particular social and economic position, context, and the relationships in which that person is embedded. Placing vulnerability theory at the core of a conception of access to justice provides a linkage between the normative framework animating calls to improve access to justice and the methods that should be employed to heed that normative call. Vulnerability theory requires being attentive to the actual experiences of people with access to justice problems and designing solutions that are responsive to their preferred outcomes.

Fineman has used the vulnerability theory as an anchor to argue for a "responsive state", which she describes as:

> a state that recognizes that it and the institutions it brings into being through law are the means and mechanisms whereby individuals accumulate the resilience or resources that they need to confront the social, material, and practical implications of vulnerability. As such, a responsive state also recognizes that it has a responsibility to monitor the activities of its institutions to ensure that they function in an appropriate, egalitarian manner.[613]

This description recalls both the expansive vision of access to justice and also Selznick and Nonet's idea of responsive law. But Fineman's vulnerable subject provides a more detailed normative framework to give effect to these visions. For example, through a vulnerability lens, a responsive state might act on access to justice needs by assessing and supplementing individual needs on a highly sensitive, personalized basis.

Turning back to Sara and Anthony, this might mean personalized responses to compensate for their vulnerabilities. Sarah might receive financial resources to retain a lawyer, who could in turn help her negotiate accommodations with her employer. Anthony might receive detailed information to help him understand whether he has a legal claim. And for each, as discussed below, the specific resources provided would respond to the individual's particular vulnerabilities. For Sara, this might also entail having someone to depend on after her freak accident. This person would help her access the resources and processes she needed. If Sara already had well-established social or family networks, support for Sara might not be a single resource person, but rather informational and resource supports for members of Sara's networks, to ensure that she received appropriate information from people she trusted. For Anthony, this might mean having a support person to help him find the right resources and processes he

[613] *Supra* note 600 at 19.

needed. This might not mean that Anthony would ultimately be successful in a claim against his former landlord, but it would mean that Anthony could feel that he was able to access the right process to have his grievance heard.

Adopting Fineman's concept of the vulnerable subject in the context of access to justice, we might recast law and justice institutions as ones that seek to address human vulnerability and contribute, so far as possible, to restore the subject to a supported, and if possible thriving, state of being.[614] As Fineman notes, this work must be attentive to the particular situation of the individual in their complex social context, and as such, this work must be relational.[615]

Fineman describes at least five types of important human "assets" that are relevant in considering vulnerability and resilience and that social institutions can provide: physical assets, human assets, social assets, environmental assets, and existential assets.[616] Physical assets are physical or material goods, such as wealth and property, "that determine our present economic quality of life and provide the material basis for accumulation of additional sustainable resources in the form of savings and investments."[617] Human assets are defined as "innate or developed abilities to make the most of a given situation", such as health, education, and employment.[618] Fineman further defines these as "those goods that contribute to the development of a human being, allowing participation in the market and making possible the accumulation of material resources that help bolster individuals' resilience in the face of vulnerability."[619] Social assets are "networks of relationships from which we gain support and strength"[620], such as family, friends, and other associations. Environmental assets are "conferred through our position in relation to the physical or natural environments in which we find ourselves",[621] and might include things like water and access to nature. Existential assets are things that "help us to understand our place within the world and allow us to see meaning and beauty in our existence" through systems of belief or aesthetics such as religion, culture, or art.[622] Law and justice, contested as they are, are

[614] See *supra* note 597 at 13 (referring to "resilience").
[615] *Ibid* at 13.
[616] *Supra* note 600 at 22.
[617] *Ibid*.
[618] *Supra* note 597 at 14.
[619] *Supra* note 600 at 23.
[620] *Ibid*.
[621] *Ibid*.
[622] *Ibid*.

interstitial among these asset classes. For example, the results of a divorce case might assign physical assets, such as property and income, among the former spouses, or might touch on social assets, such as custody arrangements for children. But a person-centred conception of access to justice would want to ensure that the people going through the divorce process were afforded resources from different asset classes to ensure that they could move through the process in a way that contributes to their resilience, rather than in a way that takes advantage of and increases their vulnerability. Conceptualizing access to justice through the person-centred lens of vulnerability leads to a contextually aware and potent antidote to the privations currently manifested by access to justice problems.

A person-centred conception of access to justice thereby offers an invigorated analytical framework with which to elaborate what improved access to justice should entail. By imagining institutions and relationships that improve access to justice as means of responding to and compensating for specific, contextual human vulnerabilities, we can re-cast justice institutions as more than guarantors of formal rights (though they would still play this role), but also as tools with which to positively contribute to resilience and human flourishing.

4 Making a Person-Centred Conception of Access to Justice Real

What could this transformation look like in real terms? Vulnerability theory has been criticized for being difficult to translate into policies and actions.[623] This section will explore possible ways to effectively translate vulnerability theory into a person-centred, accessible, justice system. While a detailed exploration of possible translation options is beyond the scope of this dissertation, it is important to offer some direction on how translation work might proceed.

It is worth noting at the outset that legal systems can already play the role of shoring up human vulnerabilities, though this is not a universal, or even necessarily common, perception or experience. Insofar as legal tools are effective in, for example, compelling a former spouse to pay fair spousal and child support to another, or in enabling people to start organizations to create wealth for themselves and their communities, or in contributing to changes in law and

[623] See e.g. *supra* note 611 at 11, 13.

policy that enhance baselines of human dignity, legal tools play constructive roles in responding to vulnerability. To be sure, these are "best case" examples, and do not speak to the frustrations often attendant in trying to use legal tools or the extensive inequality of access to those tools. But it is important to note that some examples of how the legal system could respond to vulnerabilities already exist.

One possible way to give effect to the aspirations of vulnerability theory to improve access to justice is to draw on person-centred tools that have recently begun to be applied to legal reforms. Legal scholar Margaret Hagan has written extensively about human-centred legal design as a strategy to improve access to justice. Hagan describes this approach as "the application of human-centered design to the world of law, to make legal systems and services more human-centered, usable, and satisfying."[624]

Human-centred design has been described as "a relatively recent approach to design and problem solving in which the abilities, needs, and desires of the people affected by the design solution are integral to every aspect of the design and development of solutions."[625] Human-centred design includes a series of processes, mechanics, and mindsets in order to solve human problems in ways that are "usable, useful, and engaging."[626] Hagan notes that design is often mistakenly reduced to aesthetics, but that design can take place at a variety of levels, ranging from particular information or product design to system design.[627] In human-centred design applications, "the design of a product or process includes the development of the basic idea through its implementation with a focus on the people affected."[628]

As a central tenet of effective human-centred design, Hagan exhorts legal designers to build, test, and "iterate or abandon" ideas.[629] Testing should focus on gathering feedback from users in a participatory process. This type of process was recently used by British Columbia's Civil

[624] Margaret Hagan, *Law by Design*, (last visited 29 May 2020) at Chapter 1, online: <www.lawbydesign.co/en/legal-design/>.
[625] Mary Lou Maher, "Human-Centered Design" in Steven G Rogelberg, ed, *The SAGE Encyclopedia of Industrial and Organizational Psychology*, 2nd ed (Thousand Oaks, CA: SAGE Publications, 2017), online: <dx.doi.org.ezproxy.library.ubc.ca/10.4135/9781483386874.n228>.
[626] *Supra* note 624.
[627] *Ibid*.
[628] *Supra* note 625.
[629] *Supra* note 624 at Chapter 2.

Resolution Tribunal ("CRT") to develop a pioneering public online dispute resolution system.[630] This system has employed significant legal design principles, such as co-designing justice processes with the public and testing the effectiveness of those processes on an ongoing basis.[631]

Human-centred design offers procedures and approaches to ensure that people are at the centre of reforms. This is important in redesigning the legal system to make it person-centred, but it is not sufficient to create a person-centred justice system based on vulnerability theory. In order to do so, further substance is required.

Nina Kohn has pointed out that while Fineman's vulnerability theory has many positive aspects, it can be difficult to apply in practice. She observes that many efforts to move "beyond a relatively abstract discussion of vulnerability theory to recommend specific laws" often result in applications that do not live up to the theory's promises of universality and particularity.[632] Further, Kohn suggests that "[v]ulnerability theory provides little guidance as to how to prioritize among vulnerable subjects when allocating limited financial resources and political capital. Indeed, it makes such differentiation more problematic by emphasizing the universality of vulnerability."[633]

This is a significant critique. But there may be ways past this barrier. For example, by focussing on individual vulnerability and assessing what types of assets would compensate for that vulnerability, it may be possible to treat differently situated people with different vulnerabilities in different ways. Recalling Sara and Anthony, this means providing informational resources for Anthony and legal representation for Sara, based on their particular needs in their particular contexts.

Kohn also has concerns that operationalizing Fineman's vulnerability theory can too easily lead to unintended paternalism. As a corrective, she suggests that vulnerability theory proponents should recognize the psychological benefits of personal autonomy, and ensure that individuals are presumptively able to enhance their levels of autonomy so long as doing so does not lead to

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[630] Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2017) 3 McGill Journal of Dispute Resolution 113.
[631] *Ibid* at 123-124.
[632] *Supra* note 611 at 11.
[633] *Ibid* at 13.

negative externalities.[634] In practice, this means treating vulnerability as a relational property rather than one inherent in an individual: "policies would target people based on their vulnerability to a particular threat or problem. This would be consistent with a conceptualization of vulnerability not as an innate quality of a person but rather as a result of a relationship between an individual and his or her environment."[635] Further, Kohn emphasizes that this approach will require policy-makers "to move beyond stereotypes and presumptions about who is or who is not vulnerable to a particular problem to an evidence-based understanding of social needs and risks."[636] Doing so could fit well with a process based on human-centred design, as described above, since human-centred design places value on working with those affected by policies in a co-design process, and also places value on gathering evidence about the effects of the policy or item being designed.

Finally, it is worth pointing out that using human-centred design to implement vulnerability theory has some consonance with another prominent design approach: that of universal design. Over the past 40 years, universal design has emerged as a design approach – first in architecture and urban design, later in education and other social policy disciplines – which has been defined as "a process that enables and empowers a diverse population by improving human performance, health and wellness, and social participation.[637] Universal design shares with vulnerability theory an approach which is explicitly universal in nature, but also which acknowledges and responds to individual-level differences. Moreover, since universal design's aspirational goals are to improve human performance, health and wellness, and social participation, accomplishing these goals can be understood as supplementing and responding to specific vulnerabilities.

Further exploration of how vulnerability theory, human-centred design and universal design could be brought to bear in the justice system to improve access to justice are beyond the scope of this chapter. But these ideas will surface again in Chapter Nine.

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[634] *Ibid* at 22.
[635] *Ibid* at 23.
[636] *Ibid* at 25-26.
[637] Edward Steinfeld & Jordana Maisel, *Universal Design: Creating Inclusive Environments* (Hoboken: John Wiley & Sons, 2012) at 29.

5 Further Implications of Person-Centred Access to Justice

Having grounded the concept of access to justice in a person-focused normative framework based on Fineman's vulnerable subject, what does this imply for what access to justice requires?

Answering this question provides some normative direction in how to interpret and respond to findings of unmet legal need, which show that significant legal problems are ubiquitous in Canadian society. Law and society scholar Herbert Kritzer has suggested that unmet legal needs studies imply that everyone should always have legal assistance for a legal problem. He compares this implication to health care to demonstrate its absurdity:

> We would never say that everyone should always get medical attention when a medical problem arises. We do not go to see a doctor (or nurse practitioner or physician's assistant) every time we have a cold or we stub-and possibly break-a toe... We need to put the number of "unmet legal needs" of any particular group into perspective.[638]

Kritzer is not alone in noting that "[n]ot every legal need would benefit from the involvement of a lawyer".[639] Legal sociologist Rebecca Sandefur has argued that determining when an experience amounts to a civil legal need is a matter with both empirical and normative components. As she describes it, "[o]nce we could agree on the set of situations that require legal expertise either technically or normatively, we would then be in a position to ask when the need for that expertise goes unmet. This can be made into an empirical question."[640]

This is an important question for several reasons. Sandefur has noted that permitting people to resolve potentially legal problems without recourse to legal apparatus may have an autonomy-enhancing function in some circumstances. She notes that "[p]eople are perfectly capable of handling some situations on their own without understanding the legal aspects of those problems, in the sense that the problem is resolved in a way that is roughly consistent with the law but without reference to it or contact with it."[641] In addition, premature or unnecessary recourse to legal mechanisms can lead to unwanted and unnecessary use of resources, on the part of both the state and the parties involved. Leading Canadian legal sociologist Ab Currie has cited the

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[638] Herbert M Kritzer, "Examining the Real Demand for Legal Services" (2008) 37 Fordham Urb L J 255 at 257.
[639] Milan Markovic, "Juking Access to Justice to Deregulate the Legal Market" (2016) 29:1 Geo J Leg Ethics 63 at 70.
[640] *Supra* note 15 at 452.
[641] *Ibid* at 451.

hypothetical example that sometimes fixing a leaky roof in a rental housing unit requires a ladder rather than recourse to a tribunal.[642] And as law professor Milan Markovic and others have noted, resources that could be spent to improve access to justice might be better spent on other social services.[643]

From the perspective of a person who has experienced a problem with legal implications, simply leaving people to resolve matters on their own or find appropriate resources can be problematic.[644] Commenting on the challenge of assessing whether people adequately respond to unmet legal needs, Sandefur notes:

> Asking litigants and potential clients about their experiences does not go far in answering [the question of what constitutes a legal need] ... people often believe they understand their situations, the possible courses of action, and the likely outcomes. Sometimes they are correct, and sometimes they are disastrously wrong. Lay people can be poor judges of whether they have enacted their rights, because they may well have no idea what their rights are and what remedies are actually available to them. Consequently, they may believe that they have handled a situation well, when in fact more or different legal expertise could have completely changed the game.[645]

This point resonates with some of the interviews conducted for this dissertation. For example, Justine experienced a career-interrupting injury while walking on a city street. She spoke about the difficulty of trying to find services while also recovering from an injury and trying to adapt to new limitations in life. And although she later took pictures of the site of her injury, with a thought to trying to hold the city accountable, she ultimately did not take steps to do so. In her words:

> Q. And when you say you took photographs of the area where you fell, was that to…
>
> A. Show them [i.e. the city] that it's really bad there. That it's dangerous.
>
> Q. So they could fix it? So nobody else would…

[642] Legal Problems, *supra* note 3 at 5.
[643] *Supra* note 639 at 66.
[644] A similar idea has been framed, in the context of family law, as "bargaining in the shadow of the law". See RH Mnookin and L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950. See also Robert Mnookin, "Divorce Bargaining: The Limits on Private Ordering" (1985) 18:4 Mich JL Reform 1015.
[645] *Supra* note 15 at 453.

> A. Yeah. But then I just had my own life to deal with. And I couldn't… I just had way too much pressure.[646]

In addition, Justine had friends and family members who offered less-than-helpful advice along the way:

> Family members and friends, but they would say "Well, you can't do anything. The city won't help you with that. They're just going to change that." But nobody that I know had told me about any kind of community service or anything. Ok? So, I didn't know how to access help… But basically, I had absolutely zero idea what to do. So unfortunately, I fell through the cracks, I would say. Or fell off the rails.[647]

Turning to Fineman's vulnerability theory presents a promising way to address the question of when access to justice is impaired. Fineman suggests that "attention to the situation of the vulnerable individual leads us to redirect focus onto the societal institutions that are created in response to individual vulnerability."[648] Returning to Fineman's discussion of asset classes, these ideas can be applied to the field of access to justice. To the extent that the legal system gives individuals a venue in which to make justice claims, it is an institution nonpareil by which to ensure that the state is being responsive, as Fineman advocates. We might go so far as to say that effective access to justice is integral to Fineman's idea of a responsive state. Further, access to justice can be essential in nurturing resilience. For example, access to some legal services, such as starting a business or other life planning tools, can improve economic assets, while others, such as the ability to contest a lawsuit or make a claim, can help to bolster economic and human assets. Seen in this way, the goal of ensuring access to justice becomes more than merely affording access to legal institutions or instruments; it becomes a way to respond to life's inevitable vulnerability, and thereby presents a rich antithesis to the sterile privation of current access to justice problems.

Determining how to respond to access to justice concerns therefore requires an assessment of an individual's holistic assets. A person might choose to forego the assistance of a lawyer or might decide not to take a matter to court, having decided that the risks or negative outcomes of that process outweigh any potential positive outcomes. If that decision is made in a context of access

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[646] *Supra* note 28.
[647] *Ibid*.
[648] *Supra* note 597 at 13.

to sufficient financial resources, adequate information and understanding of the individual's legal position, and supportive relationships with friends, family members, or service providers, it is hard to see that there is an access to justice problem. But if these assets are depleted, then there is cause for concern about whether that choice is freely made or is driven by objectionable resource inequalities. This is a situation where a responsive state should take steps to bolster those depleted assets.

Assessing whether access to justice has been infringed at the level of the person may seem an onerous task. But it is exactly the type of analysis that Hughes called for in critiquing the current state of proposed "solutions" to access to justice problems in Canada:

> …it is only through deliberate and systematic analysis of how these characteristics affect the effectiveness or accessibility of the proposed solutions to increase access to justice that their purpose can be achieved by putting in place appropriate measures to counteract their non-availability to vulnerable litigants. The risk is that these solutions will be viewed as providing the answer – or at least a partial answer. For example, unbundled legal services have already gained the imprimatur of several law societies who have primarily identified the concerns as those related to their institutional governance issues rather than their effectiveness for some litigants.[649]

Hughes also notes that common experiences among individuals may be clustered in order to increase administrative efficiency, but this is only possible if the starting point is a sufficiently particularized concern with actually understanding the barriers to justice faced by different people.[650]

In responding to access problems, providing access may accordingly require different types of assets for each individual. Physical assets in this case may refer to things like the financial resources to afford legal services, the ability to physically access legal information, legal service providers, courts or tribunals, and perhaps also legal standing in some situations. Human assets in an access to justice context refer to awareness that certain life events might have a legal dimension to them, and a sense of comfort in being able to seek and use legal services. Social assets in this context might refer to having relationships with individuals who can help not only

[649] *Supra* note 55 at 7.
[650] *Ibid*.

provide good legal advice, but also do so in a way that builds up the individual's sense of dignity and self-worth.

This has significant implications for the types of access-improving responses that may be appropriate in different situations. It may be helpful to construct an example. For a person with sufficient physical, human, social, environmental and existential assets, there may be no need for assistance in accessing appropriate legal help. But for an individual with generally good assets, but with a low level of awareness of legal information, a different response will be needed. Consider the importance of accurate information in approaching a problem with a legal dimension. It would seem objectionable for someone to decide to not pursue an issue on the basis of incorrect or inaccurate information about the law or their rights. This is part of the reason why legal regulators insist on regulating legal advice.[651] In such situations, providing that person with access to legal information may be sufficient to provide access to justice. But if that person has low levels of human or social assets, it may be necessary to ensure that legal information is provided through the conduit of a trusted advisor that the person can turn to for social support in addition to legal information. A legal service provider who is able to provide the social resources required may accordingly be an appropriate choice to help address access problems in this circumstance. This last case suggests that relational aspects of access to justice can be important. If we imagine access to justice as simply access to law, or even as a particular outcome, we miss this important aspect of access to justice.

This approach provides a way of responding to Hughes's critiques of the expansive vision conception of access to justice and ensures that access-improving efforts attend to particularized barriers to justice while preserving the prospect of universality.

6 A Person-Centred, Accessible, Legal System

In this chapter, I have built from the argument, made in Chapters Two and Five, that the current normative frameworks that dominate access to justice discourse in Canada are insufficient.

[651] See e.g. *supra* note 140.

The concept of access to justice found in Canadian caselaw, which is tied to a relatively minimalist concept of the rule of law, leads to formalism that is incapable of addressing access to justice problems. While the expansive vision of access to justice is more promising, it too has serious shortcomings. These include an underdeveloped analysis of the subject of the expansive vision, whether that subject is described as a member of "the public", a "user", or in some other way. This generic framing of the subject leads, as Patricia Hughes has argued, to ineffectual reforms that fail to properly grapple with the community histories and lived experiences of those who are most affected by access to justice problems. In addition, the expansive vision is still significantly tethered to the concept of the rule of law. While this is an important descriptive point – the concept of access to justice, however it is framed, is critical for the rule of law to have normative force – the rule of law should not be a major animating principle driving the schema of access to justice reforms. As Amartya Sen has argued, institution-focussed conceptions of justice are fundamentally flawed because they are inattentive to context and results. Grounding the concept of access to justice in the institution of the rule of law introduces these core frailties into access to justice.

Rather than rely on an institution-focussed conception of access to justice, we should instead choose to explicitly connect access to justice to individuals in society. Pursuing a person-centred concept of access to justice would move the promise of the legal system away from the autonomous law model described by Selznick and Nonet, and toward their view of responsive law. This shift offers a thicker conception of what law can and should offer to those seeking justice. Following Waldron, while legal justice cannot offer substantive justice to each claim-seeker, it should nevertheless promise an interest in substantive justice, and a forum in which to contest what justice means. Further, law can offer an abiding commitment to pursue justice, and can do so by maintaining a concern for the specific individuals and circumstances before it.

In order to ensure that this person-centred conception of access to justice does not suffer from the same limitations as the rule of law and expansive vision conceptions, we need to work through *who* that person at the centre of the concept is. Fineman's vulnerability theory presents a promising theoretical lens that offers both particular concern with the lived experiences of each individual, and also preserves universal scope. By engaging with analysis of how a range of personal assets may position a person to respond to a potential legal event in their life, we can

create a more nuanced understanding of what barriers that person may face in accessing justice, and how that person can be best supported to overcome those barriers. This, in turn, may lead to the creation of a range of services and supports that stretch beyond what has traditionally been considered part of legal services. The tools to realize the promise of vulnerability theory will have to be developed, but the models of human-centred design and universal design offer promising guides to do so.

Chapter 9 – Creating and Sustaining Accessible, Person-Centred Justice

1 Four Sustainable Steps to Implement and Improve Person-Centred Access to Justice

This chapter lays out what steps might reliably and sustainably improve access to justice in Canada. All previous chapters have prepared the ground for the synthesis that follows.

This dissertation has provided novel analysis and original research that will help inform how legal service delivery should be improved to address access to justice problems. My research has focussed on three areas: 1) suggesting what a person-centred approach to access to justice should mean, based on the concept of vulnerability; 2) exploratory research on how individuals actually respond to justiciable events in their lives; and 3) exploring the conditions under which not-for-profit organizations might be better situated, compared with for-profit organizations, to provide accessible legal services.

These insights are valuable, but they are not exhaustive. They offer some detailed directions for future research and also support some potential policy directions, such as the discussion in Chapter Seven regarding optimally structuring not-for-profit legal services. In this penultimate chapter, I will integrate some insights from this research, and will also make bolder recommendations for structural changes that may be necessary to achieve sustainable improvement in access to justice as I have conceived it in this dissertation.

Drawing on the research in the previous chapters, this chapter makes the case for four systemic changes that might improve access to justice. These are: 1) reducing first step barriers facing individuals; 2) reforming how legal services are delivered to individuals; 3) supporting increased and ongoing research on the demand for and supply of personal legal services; and 4) increasing political engagement in the issue of access to justice.

These suggestions fit within the conception of a responsive state that takes seriously the possibility of institutional pluralism in the justice system and earnestly seeks to advance and implement a person-centred conception of justice. Returning to the idea of responsive law expounded by Philip Selznick and Philip Nonet just discussed in Chapter Eight, these

suggestions represent ways to expand the remedial possibilities inherent in "legal institutions", while recognizing that doing so makes these institutions "at once more accessible and more vulnerable."[652] This chapter offers details about what responsive law might look like that are absent from Selznick and Nonet's original work and which therefore build upon it. As Robert A. Kagan explains in his introduction to the second edition of Selznick and Nonet's book, *Law and Society in Transition*:

> Law and Society in Transition devotes relatively little attention to the range of institutional forms that responsive law can take. It might be argued, however, that the struggle concerning responsive law has been triggered by American legal reformers' particular institutional choices as much as by the ideals they have sought to advance.[653]

Indeed, though this dissertation has emphasized the need for person-centred access to justice, that need is made stark by the failure of many existing justice institutions to meaningfully take account of diverse needs within the population over a long period. These suggestions, then, are intended to make justice institutions more relevant and responsive to the lives of individuals whose lives are permeated with law (whether they know it or not), and who experience human vulnerability in the shadow of law.

2 Decreasing First-Step Barriers

This dissertation buttresses the common findings of demand-side research that demonstrate how individuals are often unsure about where to turn or what to do if they have a problem that has a legal dimension.[654] As noted in Chapter Six, not knowing where to go to deal with a problem was a commonly cited significant factor affecting how survey participants responded.[655] For example, Sara described turning to an insurer, the city government, and the police in the aftermath of her personal injury and in order to understand whether she could receive any compensation. She found these agents to be unhelpful.[656] Justine recalled the challenges of

[652] *Supra* note 559 at 117.
[653] *Ibid* at xxii.
[654] See *supra* note 15.
[655] See Chapter Six, Section Three, above.
[656] *Supra* note 36.

finding help after her personal injury, and of not knowing that she might be entitled to benefits.[657]

This finding is not surprising given prior research that suggests that people often do not characterize everyday problems as "legal" in nature – even when they are.[658] Unlike health problems, which often have a relatively well-defined scope of application,[659] many everyday problems that may have a legal facet are not easily understood as potentially legal in nature. Moreover, even when a person comprehends the nature of their problem, they don't necessarily know where to turn to find a remedy. Almost all the interview participants reported conducting internet research to better understand how to respond to their problem. While this finding is unsurprising, it is new data. There is a paucity of research on how individuals in Canada search for information about legal problems.[660]

Furthermore, and as my research confirms, emerging research from the field of behavioural economics suggests that those who are experiencing significant stresses in their lives – often caused by or related to the problem they are confronting – may experience specific and predictable limitations on their ability to effectively respond.[661] In other words, those who most need to make good decisions about how to respond to significant life problems may also be the most poorly-placed to understand, plan, and respond.

The obvious conclusion that this dissertation advances is that people facing significant life problems need different kinds of support to respond appropriately to those problems. How might this happen?

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[657] *Supra* note 28.
[658] See *supra* note 15 at 448-450.
[659] This is not true of all types of health problems. For example, while a broken limb is likely to trigger an understanding of the appropriateness of medical care, other problems, such as mental health problems or other "unseen" conditions, are less likely to trigger a similar understanding.
[660] But see Jena McGill et al, "Emerging Technological Solutions to Access to Justice Problems: Opportunities and Risks of Mobile and Web-based Apps" (13 October 16), online (pdf): *University of Ottawa* <commonlaw.uottawa.ca/sites/commonlaw.uottawa.ca/files/ksg_report_-_mcgill_et_al_oct_13_final_to_send_to_sshrc.pdf>. See also Catrina Denvir, Nigel J Balmer, & Pascoe Pleasence, "Portal or Pot Hole? Exploring How Older People Use the 'Information Superhighway' for Advice Relating to Problems with a Legal Dimension", (2014) 34 *Ageing & Society* 670.
[661] See e.g. Katrin Starcke & Matthias Brand, "Effects of Stress on Decisions Under Uncertainty: A Meta-Analysis" (2016) 142:9 Psychological Bulletin 909.

In part, this amounts to increasing public awareness of legal information, which is an aspect of what socio-legal researchers Nigel Balmer and Pascoe Pleasence have referred to as "legal capability". They describe legal capability as "the disparate capabilities required for people to have opportunity to resolve problems fairly, including how to make decisions 'about whether and how to make use of the legal system.'"[662] But as this definition makes clear, although legal information is necessary, it is not sufficient. Rather, people often need help in understanding how legal information is relevant in the specific context of their lives and may need assistance in making decisions about how best to proceed. This resonates with many of the interview responses noted in Chapter Six, in that people often struggled to understand where to go to best resolve their problem.[663] Moreover, existing justice institutions do not fill this need. As Balmer and Pleasence note, "[a] consistent finding of legal-needs surveys has been the peripheral role of formal justice institutions in helping people address their problems".[664] We need a new, person-centred institution to help individuals take the first step of understanding how best to deal with their problem.

What would this new institution entail? Rather than starting from the presumption that people are aware that they are dealing with a legal problem, we should assume at the outset only that people are aware that they have a problem – that there is something in their life that is not unfolding as they think it should.[665] Next, the threshold to engaging with the institution should be very low. This should entail offering services at no cost or at very low cost, multiple points and pathways of access to the service, and service delivery manners that anticipate and accommodate individual needs and preferences.[666] Third, the information provided should be of high-quality, but should focus on diagnosing the problem and then either resolving it or referring to legal or other service providers. And finally, the institution should be able to create a relationship with the individual that ensures confidentiality and assures the individual that the institution is acting

[662] Pascoe Pleasence & Nigel J Balmer, "Justice & the Capability to Function in Society" (2019) 148:1 Daedalus 140 at 141.
[663] See Chapter Six, Sections Two and Three, above.
[664] *Supra* note 662 at 143.
[665] Rebecca Sandefur has emphasized the importance of access to justice responses that are not "law-centric". See e.g. Rebecca L Sandefur, "The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy" (2009) 42:4 Loy LA L Rev 949.
[666] This may mean offering services in person in addition to online and should draw on concepts of human centred design to ensure that individuals feel validated and genuinely welcome when using services. This also likely means ensuring that services are culturally-sensitive and are competent in a variety of other ways (such as being trauma-informed, physically and intellectually accessible, trans-competent, etc.).

solely in their best interest. In other words, the institution should be an independent, holistic problem-solving institution.

An institution in this vein has arguably been found before in various places in the United States in the late 19th and early 20th centuries. Legal historian Felice Batlan has chronicled the rise of organizations in cities such as Chicago, which provided varied services to support women in situations of need.[667] These organizations provided legal assistance as and when needed, and acted as a point of contact and reassurance for women who had few or no other resources to draw upon. These organizations formed some of the earliest examples of legal aid organizations in North America. But as Batlan notes, the gendered professionalization of these organizations in the early 20th century resulted in specialization and the loss of many of the accessible and holistic features of some of the early women's organizations.

Yet there is also, in fact, a model currently in use in other jurisdictions that meets many of the criteria set out above. It is the Citizens Advice Bureau, versions of which are active in the United Kingdom, Australia, and New Zealand.[668]

The origins of CABx date to the 1930s. Shortly before the Second World War began, social service agencies in the UK developed a proposal for citizens advice bureaux to be created throughout the country, in large part to help the civilian population adjust to the privations anticipated with the onset of war.[669] Initially a mix of formal and informal advice offices, the service transformed in the post-war years into a service to assist people in navigating the contours of the then-newly emerging welfare state.[670]

Today, Citizens Advice operates as an independent provider of advice services to individuals throughout the United Kingdom.[671] It consists of a national office and over 280 independent

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[667] *Supra* note 11.
[668] "Citizens Advice" is the current name of the umbrella organization in the UK, but it was previously known as the Citizens Advice Bureau (CAB or CABx in plural form). The CABx moniker is still employed in some other jurisdictions, including Australia and New Zealand. In this dissertation, both Citizens Advice and CAB/CABx will be used interchangeably unless otherwise noted.
[669] Jean Richards, *Inform, Advise and Support* (Cambridge, UK: Lutterworth Press, 2001) at 1-2.
[670] *Ibid* at 5-7.
[671] Citizens Advice, "About Citizens Advice" (last visited 29 May 2020), online: *Citizens Advice* <www.citizensadvice.org.uk/about-us/>.

community-based organizations.[672] In Australia, citizens advice bureaux are found in the states of Western Australia, Victoria (where they are now known as Community Information and Support Victoria), and Queensland. In New Zealand, 80 citizens advice bureaux exist throughout the country. While Citizens Advice originally provided advice face-to-face in local offices, its services have become more diverse, and include both phone and online advice services. While most community offices have some full-time staff, the majority of people who provide services through Citizens Advice are trained volunteers.[673]

Importantly, while some of the work of Citizens Advice touches on legal matters, CABx does not self-identify as a legal organization. By the late 1970s, "at least one-third of enquiries [received by CABx] contained a legal element and…more than half of these were answered by bureau workers themselves without further referral."[674] Responding to problems with a legal element is now a mainstay of contemporary CABx work.[675]

The development of CABx as institutions that help address legal problems was undoubtedly aided by the permissive approach of UK legal regulators on the issue of who can give legal advice.[676] Nevertheless, even with this regulatory permissiveness, the relationship between CABx and the legal profession in the UK has not always been smooth.

For example, early in the institution's history, many CABx had difficulty finding appropriate lawyers to refer out to. As author Jean Richards describes in her history of Citizens Advice Bureaux, bureaux staff often heard from clients that generalist lawyers were not able to effectively address the clients' issues, being themselves largely unfamiliar with the types of personal legal problems that people presented with.[677] Accordingly, bureaux staff and volunteers began to increasingly deal with legal issues themselves. Richards notes that dealing with legal

[672] Citizens Advice, "Annual Report 2017/18" (August 2018) at 10, online (pdf): *Citizens Advice* <www.citizensadvice.org.uk/Global/CitizensAdvice/Governance/Citizens%20Advice%20annual%20report%202017_18.pdf>.
[673] *Ibid*.
[674] *Supra* note 669 at 150.
[675] See e.g. *supra* note 352 at 103-113.
[676] *Supra* note 665 at 964.
[677] *Supra* note 669 at 152.

issues on a regular basis contributed to "a sharpening up of many of the [CABx] workers' abilities when dealing with the law."[678]

While many CABx now retain specialty legal advisors on a paid or voluntary basis, the partnership between CABx and legal service providers has not been without friction. During the early years of the citizens advice bureaux, the bureaux often experienced tension with lawyers at both the local and national levels. As Richards describes, solicitors often warned bureaux against giving any kind of legal advice, and this in turn "made many bureau workers nervous and contributed to the feeling that there was an almost mystical character in the law as a profession."[679] At the same time, many bureau workers also displayed "a strong feeling that many lawyers were not really much use. The reasons for this… reaction were rooted in two facts (i) the number of complaints made about the inefficiency or sluggardy [i.e. sluggish behaviour] of solicitors (some of which complaints were undoubtedly justified) and (ii) the lack of knowledge shown by many solicitors of the areas of law which impinged most painfully upon the clients coming into bureaux, for example housing law."[680] These points illustrate an apparent disconnect between services provided by traditional legal service providers – lawyers – and the services delivered by a person-focussed holistic advice institution.

This latter point also indicates that one of the key benefits of the CABx model was to provide useful information and advice for people in dealing with areas of law that were under-served by legal professionals. By the late 1980s, the UK CABx national office noted that welfare rights issues were also "traditionally under-served by solicitors".[681] In response, CABx began providing information services to fill this gap, but did so both by providing information to the public and also by providing information and training to solicitors.[682] This represents a maturation of the relationship between legal service providers and holistic advice providers, and illustrates the potential of seeing these services as complementary rather than antagonistic.

In addition to filling a gap in substantive areas of legal work, CABx also play an important role in helping people to understand their rights and whether they should use additional legal

[678] *Ibid* at 154.
[679] *Ibid* at 149.
[680] *Ibid*.
[681] *Ibid* at 155.
[682] *Ibid*.

services. Legal scholar Samuel Kirwan has written about the role of CABx "in 'translating' legal frameworks for individuals seeking to understand and engage with the problems that are dominating their lives (most frequently those concerning benefits, debt, housing and employment)."[683] Kirwan suggests that CABx are an important mediating institution in developing legal consciousness within the UK populace.

Importantly, that mediating role is made possible by the relationship-focussed nature of CABx work. Kirwan suggests that "[c]ommunicating and explaining legal information in each case relies upon a labour that cannot be reduced to the information being provided or even the typical flow of the advice interview."[684] Kirwan describes the work of advice bureaux workers as "relational legal labour", a concept that emphasizes the necessity of advice workers forming meaningful relationships with clients before attempting to help those clients understand what options exist to deal with a problem they have experienced. This description resonates with the idea of human and social assets discussed in Chapter Eight.[685] Specifically, it exemplifies what a person-centred approach to access to justice rooted in universal vulnerability might entail, by ensuring that individuals are provided not only with informational resources, but also with human and social resources when needed.[686]

Kirwan found two particular forms of relational legal labour to be important in how Citizens Advice advisors helped to translate everyday experiences into legal ones. In the first form, advisors played a role in "constructing clarity". For clients "for whom the weight of worry, anxiety or shame is hindering their ability to deal with their problems", advisors encountered clients holistically, understanding that clients' concerns were not pre-packaged, but needed to be parsed by working through not only the intellectual components of the client's situation, but also by helping to understand the emotional content of their situation.[687] As Kirwan describes it:

> …the primary task of advisers is to be able to explain legal concepts in everyday language and bind them to the problem at hand. This is enabled by a 'relational legal labour' whose goal is to form the conditions in which clients

[683] Samuel Kirwan, "The UK Citizen Advice Service and the Plurality of Actors and Practices that Shape 'Legal Consciousness'" (2016) 48:3 Journal of Legal Pluralism and Unofficial Law 461 at 462.
[684] *Ibid* at 463.
[685] See Chapter Eight, Section Three, above.
[686] *Ibid*.
[687] *Supra* note 683 at 468.

> can move problems that arouse anxiety and distress to the abstract and impersonal field of options, procedures and consequences.[688]

The second type of relational legal labour that Kirwan describes is that of "constructing ownership". This emerges in situations where "a degree of emotional investment is required of clients if they are to take ownership of their problems."[689] Kirwan describes this, at least in the case of debt problems, as often taking the form of "the client who 'doesn't care'."[690] In response to these clients and situations, Kirwan notes that advisors employ several tactics. These can include "forthright" discussion with clients to highlight the potential adverse effects of their situation, or discussions where advisors "focus attention back upon the client as a subject with everyday attachments: this is what could happen to you, rather than this is how the law defines your problem."[691] Kirwan notes that "this shifting of attachments towards consequences and responsibility is dependent upon a relationship of authority between the adviser and client".[692] But even so, this relationship of authority is predicated upon the party with authority using that authority to enhance the legal capacity of the party without authority. Accordingly, this type of relational legal labour illustrates an unexpected way in which holistic person-centred advice institutions can provide not only legal information, but additional assets needed to decrease the first step barriers to responding to legal problems.

The two forms of relational legal labour match up well with research on how stress affects decision-making—an association that was briefly discussed earlier in this section.[693] Reviewing research on decision making and stress, psychologists Katrin Starcke and Matthias Brand found that studies show that "an optimal level of stress may exist for making advantageous decisions, a level that is neither too high nor too low."[694] Relating this to Kirwan's findings, the role of advisors in constructing clarity may be to reduce client stress levels sufficiently to allow clients to make decisions. Conversely, in constructing ownership, advisors may play a role in increasing client stress levels, by impressing the personal implications of failing to act, in order to allow

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[688] *Ibid.*
[689] *Ibid* at 469.
[690] *Ibid*.
[691] *Ibid*.
[692] *Ibid* at 470.
[693] See Chapter Nine, Section Two, above.
[694] Katrin Starcke & Matthias Brand, "Decision Making Under Stress: A Selective Review" (2012) 36:4 Neuroscience and Biobehavioral Reviews 1128 at 1243.

clients to make good decisions.[695] In this way, the two types of relational legal labour described by Kirwan may play opposed but complementary roles in bringing disparate individuals closer to optimal decision-making conditions.

Kirwan's study suggests that holistic advice services play an important role in helping individuals to understand how legal services may be relevant to problems they have experienced. Importantly, Kirwan's findings suggest that, at least for some individuals, this role requires more than providing relevant information, but rather requires making an emotional and relational connection with clients.

This point has implications for what types of legal services should be delivered in an "arelational" setting (for example in an automated or do-it-yourself way) versus those that might require person-to-person contact. This is an important insight to consider when thinking about the supply of legal services. Kirwan notes that the question of whether "this intensely relational work" is reliant on a face-to-face meeting with clients is a point of debate among CABx advisers:

> While face-to-face remains the enduring image of the Citizens Advice service, as the national organization in England and Wales pushes towards improving waiting times and reliability on its phone service, streamlining its online self-help and developing pop-up chat boxes, it is increasingly one among many advice "channels" offered by the service. These changes have significant consequences for the reach, image and geographic scales of the service, but also for the question of how the translation of life into law is carried out.[696]

In addressing this concern, it is helpful to recall the heterogeneity of legal needs that the interviews from Chapter Six disclosed as well as the diversity of types of people who experience legal needs. For example, while face-to-face meetings might be appropriate for some clients, a phone or video call might be more valuable to clients who are geographically distant from an advisor or whose schedules would not permit a visit to an advisor during business hours. Other clients might not need access to relational legal work but might benefit from access to information which could be provided online or otherwise. Again, an approach to access to justice

[695] Note that this possible connection is posited only for the purpose of suggesting future research directions, and not to suggest that this is a proven mechanism of action in this case.
[696] *Supra* note 683 at 468.

rooted in vulnerability analysis may offer new tools in assessing when people need legal information, and when they need other supports to effectively respond to their situation.

In deciding how to best structure independent, holistic problem-solving services, the emerging legal design movement discussed in Chapter Eight offers some ideas about how to develop new programs and services that are responsive to actual human needs. Some of these approaches have recently been put to use in designing novel ways of delivering targeted legal information.[697] But there are also opportunities to build capacity for such services within extant organizations. For example, as discussed in Chapter Three, public legal education and information organizations currently play a significant role in providing legal information to members of the public in all provinces and territories.[698] But these organizations, being explicitly legal in name and nature, may miss out on individuals who do not perceive their life problems to be legal in nature. Many PLEI organizations recognize this limitation, and take steps to provide legal information in non-legal settings, such as by presentations to community organizations or co-locating services with general community services, such as libraries or health services.[699] Another potential pathway involves providing better support for advocates and advocacy organizations that deliver legal information and further supports in community settings.[700] Indeed, these options are not necessarily opposed to each other. It is entirely possible, and probably optimal, for a general advice institution to support and deepen existing services that provide forms of legally informed advice. The example of how CABx in the UK grew to support and provide education for lawyers in discrete areas of underserved practice is a potential positive model.

For all of these paths – whether designing new institutions or building on existing ones – it is important to bear in mind the necessary attributes of services that effectively lower the first-step barriers to resolving problems. These are 1) a holistic and person-centred, rather than legally-bound, approach to human problems; 2) services offered at low or no cost, and with multiple engagement pathways, to encourage use of the service by lowering possible barriers; 3) high service quality in order to effectively diagnose problems and refer as necessary; and 4)

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[697] *Supra* note 630.
[698] See Chapter Three, Section Two, Subsection a, above.
[699] See e.g. Beth Bilson, Brea Lowenberger, & Graham Sharp, "Reducing the 'Justice Gap' through Access to Legal Information: Establishing Access to Justice Entry Points at Public Libraries" (2017) 34 Windsor YB Access Just 99.
[700] See e.g. *supra* note 140 at 289.

independence and confidentiality, to ensure that individuals are able to actually confide in service providers without fear of adverse consequences.

3 Reforming Personal Legal Service Delivery

In addition to reducing first-step barriers to information and advice, sustainably improving access to justice also requires re-thinking how legal services for people are delivered. There are important structural differences between personal and organizational clients and also between the service providers who cater to those different clients. Efforts to improve access to justice need to engage with these key differences.

Framing access to justice as explicitly person-centred draws attention to how individuals and organizations differ when it comes to legal services. For example, Chapter Four discussed Marc Galanter's oft-cited exposition of the relatively advantaged position of "repeat players" in the market for legal services, compared with "one-shotters". Corporations and governments are the paradigmatic repeat players, while individuals are the paradigmatic one-shotters. As Ray Worthy Campbell has noted, this structural difference has important implications for things such as information asymmetries.[701] Repeat players are often in a much better position to understand their need for legal services and to assess the effectiveness of those services. Indeed, much of the confusion and frustration that many interview participants described when looking for appropriate and responsive help seems to accord with these predictions.[702] Beginning to recognize the heterogeneity of legal service consumers by treating organizations and people differently should open up opportunities to mitigate these information asymmetries. While repeat players may not need help obtaining information about legal service providers, one-shotters would likely benefit from mandated information disclosure from service providers, such as price and markers of service quality.[703]

[701] *Supra* note 235.
[702] See Chapter Six, Section Three, above.
[703] See e.g. Olivier Bonroy & Christos Constantatos "On the Use of Labels in Credence Goods Markets" (2008) 33:3 Journal of Regulatory Economics 237.

Further, socio-legal research over the past several decades has demonstrated that there is already a *de facto* division within the legal profession between those practicing law for people and those practicing law for organizations.[704] Analysis in Chapter Seven supports that finding, though it is important to note that there is some overlap between "law for people" and "law for organizations" in some practice settings. Specifically, Figures Five and Six in Chapter Seven demonstrate that personal clients are by far the most common client type for solo lawyers and lawyers working in many not-for-profit settings.[705] For private, multi-lawyer law firms, however, personal clients represent a much smaller relative proportion of clients.[706] Indeed, aggregating types of client suggests that organizational clients account for approximately 49.4% of total time, on average, for multi-lawyer firms, compared with 29.7% of total time for individual clients. Moreover, disaggregating the multi-lawyer private firm sample indicates further disparities in keeping with the findings of Heinz and Laumann.[707] As Figure Six demonstrates, individual clients become an even smaller relative source of work as law firm size increases.[708]

There are, it should be noted, some exceptions to the general trend that large law firms focus on law for organizations over law for people. For example, the data reported in Chapter Seven suggests that personal injury work, both plaintiff-side and defence-side, forms a significant part (6% and 10% by total time, respectively) of work for firms with 11-50 lawyers.[709] This may help explain the fact that "mid- to low-income individuals" account for an average of 16% of clients by total time for firms of this size.[710] Further, while some categories of work are easily identified as work for individuals or work for organizations (for example, family law versus general corporate law), one of the most common types of work reported across practice settings and firm sizes, "civil/commercial litigation", yields no such inherent identifier.

If we accept that, on the whole, there are divisions on both the client and service provider sides between personal legal work and legal work for organizations, this fact should inform efforts to

[704] *Supra* note 209.
[705] See Chapter Seven, Section Five, above.
[706] *Ibid*.
[707] *Supra* note 209.
[708] See Chapter Seven, Section Five, above.
[709] *Ibid*.
[710] *Ibid*.

address access to justice problems. In particular, this has implications for how service providers are trained, how they are regulated, and how they structure service delivery.

a) Implications for training

The analysis in Chapter Seven not only supports the finding of a bifurcated legal profession. It also suggests that lawyers in private practice have different preferences in choosing their career compared to those who practice in not-for-profit settings. Specifically, lawyers working for private firms were significantly more likely to indicate that compensation was the most important factor in choosing their job, compared with lawyers practicing in not-for-profit settings.[711] Lawyers practicing in not-for-profit settings were most likely to choose "mission match" or "opportunity to do socially responsible work" as prime factors, neither of which were of high importance to lawyers in private practice.[712]

These findings suggest that lawyers in these two sectors are motivated by different factors. Previous research by psychology professor Kennon Sheldon and law professor Lawrence Krieger has suggested that lawyers engaged in "service" work, such as legal aid, poverty law, and work for not-for-profits, report higher levels of well-being and lower levels of alcohol abuse than lawyers engaged in "money" work, such as corporate and commercial work.[713] This finding about relative levels of well-being is surprising, in part because "money" lawyers earned significantly more income than "service" lawyers, and income is usually positively associated with well-being.[714] The authors draw on the distinction between intrinsic and extrinsic values employed by self-determination theory, and suggest that their results indicate that people should factor utilities other than income into their decision-making.[715] Previous work by Sheldon and Krieger has shown negative changes in motivation and values among first year law students,

[711] *Ibid*.
[712] *Ibid*.
[713] *Supra* note 531 at 222-223.
[714] *Ibid* at 222, 224.
[715] *Ibid* at 224. See also Richard M Ryan & Edward L Deci, "Self-determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being" (2000) 55:1 American Psychologist 68; Edward L Deci & Richard M Ryan, "The 'What' and 'Why' of Goal Pursuits: Human Needs and the Self-Determination of Behavior" (2000) 11:4 Psychological Inquiry 227.

linked to a decrease in intrinsic motivation in favour of extrinsic motivation.[716] They also note that "money" jobs generally "have higher status for graduates and are open only to those with the highest grades."[717]

The valorization of "money" jobs implicitly represents valorization of work for organizations instead of work for individuals. Indeed, reports abound about how corporate practice is lionized by law students, including in Canada.[718] This suggests that the current model of legal education may encourage applicants who are particularly interested in the trappings of corporate practice, compared to those who hope to provide legal services to individuals.

Chapters Three and Four suggested that treating legal services as a monolithic entity is problematic. Yet for individuals hoping to provide legal services to organizations and for those hoping to provide personal legal services, the training is formally identical. In both cases, lawyers receive a law degree after seven years of post-secondary education, including three years of law school. In both cases, lawyers spend a period articling for another lawyer or law firm before being called to the bar.

Acknowledging differences between personal legal services and legal services for organizations and acknowledging that improving access to justice requires improving personal legal services should give rise to changes in how law is taught and who it is taught to. Recognizing that multiple factors may influence decisions about what types of work legal professionals engage in could help re-frame legal service delivery. Rather than focussing on the nature of the professional designation (i.e. "lawyer"), it may be more helpful instead to ask what types of client a future legal service provider wants to work with. This election might be linked to different education requirements and might also be linked to different funding for education. Law schools might consider adapting their intake processes to better identify applicants who are interested in providing personal legal services. Law students engaging in personal legal services might be offered student debt forgiveness programs unavailable to those working in law for organizations. And the content of law school should change to better prepare students to provide

[716] *Supra* note 531.
[717] *Ibid* at 220.
[718] See e.g. Desmond Manderson & Sarah Turner, "Coffee House: Habitus and Performance among Law Students" (2006) 31:3 Law & Soc Inquiry 649 at 664.

personal legal services. Indeed, reforming personal legal services may also require training new types of service providers who are explicitly focussed on providing legal services to individuals.

b) Implications for regulation

Recognizing heterogeneity in both demand for legal services and in how those services are supplied may also mean departing from a homogeneous regulatory structure for legal service providers. Legal service regulation has been the subject of significant debate in recent years, and some of those debates have focussed on proposals to make legal services regulation more responsive to actual practice and to social needs. Noel Semple has critiqued the legal profession's "universalist conduct assurance rules" for their failure to account for differences in practice realities.[719] One implication of his critique is recognizing that norms of conduct that may be appropriate for one type of legal practice may be entirely inappropriate for another:

> A classic example is the expectation of zealous, 'no stone unturned' advocacy, which emerged in the criminal defense paradigm but may be much less appropriate in many civil litigation contexts. Litigating the average family law dispute with the zealousness which would befit a death penalty defense may impose devastating financial and non-financial costs on the client and on other family members.[720]

Semple has also noted that legal regulation "in most cases offer[s] the same formal protection to the largest and most legally sophisticated multinational corporation… [as it does for] the most vulnerable refugee claimant."[721]

Different regulation for personal legal service providers might entail advertising regulations that specifically aim to reduce the types of information asymmetries that affect personal legal services more than other types of legal services. These regulations might take the form of requiring up-front advertising of costs, creating platforms to disseminate review information about the quality of legal services, rules encouraging second-opinions, or other strategies to

[719] *Supra* note 140.
[720] *Ibid* at 94-95.
[721] *Ibid* at 95.

mitigate information asymmetries, particularly for credence and experience goods. They might also implement different fee structures for different types of practice.

Differential regulation might also require different approaches to who can provide legal services, as discussed in Chapter Seven and in the subsection above. That is, non-lawyer legal service providers, potentially including paralegals, advice-sector workers and volunteers, or others, might be trained or authorized to provide some kinds of personal legal services, to create a continuum of service options for individuals seeking legal information or assistance. These regulatory approaches could also be further detailed to respond not only to the dichotomy between organizational and personal legal services, but to account for the significant heterogeneity of legal problems discussed in Chapter Four.[722]

Differential regulation is not without problems. Law professor Dana Remus has criticized calls to bifurcate regulation of the legal profession, arguing that doing so fails to acknowledge "the extent and significance of links that connect the profession's two hemispheres", notably those forged through common training and socialization, and "common responsibility for the fairness and integrity of our legal system."[723] Remus has also critiqued recent calls for relaxing regulation for both personal legal services and corporate legal services. She notes that calls for regulatory changes in each of the two hemispheres are driven by different motives. In the personal legal services hemisphere, she finds that advocates of relaxed regulation – including allowing more types of legal licencing (i.e. paralegals and limited license legal technicians) – reason "that some legal services are better than none, and that many of the needed services are simple and routine".[724] In the corporate hemisphere, calls for relaxed regulation emerge from the observation that many corporate clients do not suffer from information asymmetries, and should be afforded greater autonomy in dealing with their lawyers.[725] Remus acknowledges that "structural imbalances" exist between the two hemispheres of the legal profession, and that corporate-sphere clients enjoy much more power, and are often more successful in using the legal system, than personal-sphere clients.[726]

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[722] See Chapter Four, Section Four, above.
[723] Dana Remus, "Hemispheres Apart: A Profession Connected" (2014) 82:6 Fordham Law Review 2665 at 2666.
[724] *Ibid* at 2670.
[725] *Ibid* at 2671.
[726] *Ibid* at 2672-2674.

While Remus is right to caution against blanket deregulation of the personal legal services market, she underestimates the advantages of regulation that recognizes the heterogeneity of the legal services market and is tightly focussed on the specifics of each market segment. While tailoring regulation to different market dynamics imposes more work on regulators than does a one-size-fits-all approach, this is by no means an insurmountable task if sufficient research on the dynamics of those market segments exists.

Remus also notes that some personal clients are likely to be particularly vulnerable to the deleterious effects of bad legal advice, citing the effects of having a bad criminal defence lawyer, for example.[727] She suggests that "it is often impossible to know in advance whether a bankruptcy, divorce, or other legal interaction will be simple and straightforward, or whether it will implicate hidden and complicated legal issues."[728] She further suggests that advocates without a law degree will be far less likely to recognize and manage these issues than lawyers.[729]

These points ought to be considered in future legal design. But they should not stop efforts to differentiate legal regulation now. Instead, in the spirit of human-centred legal design, these issues should be addressed in a proactive and community-engaged way over time and alongside an iterative reform process. Legal regulators should engage with members of the public to co-design regulatory systems for personal legal services that help to improve the experience of access to justice seekers. This ethos animated the institutional design of the CRT in BC, which was discussed briefly in Chapter Eight. Where issues of concern are identified, such as concerns about whether non-lawyer service providers can adequately address complex issues or refer out to those who can, these issues should be explored and workable solutions devised. But these efforts must take place in an applied, public, and interdisciplinary way that involves members of the public, rather than through theoretical disputes about what might or might not work in practice.

Many challenging issues will have to be sorted out in terms of how personal legal services should be regulated. For example, many legal problems will involve an interface between an individual and an organization. Remus notes that "a majority of all court cases in the United

[727] *Ibid* at 2676.
[728] *Ibid*.
[729] *Ibid*.

States involve individual litigants on one side and corporate or organizational litigants on the other."[730] While this is a real concern, it may be overstated. Focussing on litigation imbalances fails to acknowledge the wide range of personal legal services that are predicated on life planning, rather than dispute resolution. Further, where conflicts between individuals and organizations recur on a regular basis, there is every reason to believe that personal legal service practitioners may specialize to respond to those circumstances. An unmistakable advantage of bifurcating regulation of legal services, however, is the opportunity to think clearly about the needs of natural persons compared with corporate persons.

c) Implications for service delivery

Treating personal legal services differently from legal services for organizations will also have significant implications for how those services are delivered. Again, it will be useful to move beyond the personal/organization dichotomy to respond to the scope of heterogeneity among personal legal services.

Taking unmet legal needs surveys as a starting point, we can identify a vast array of different personal legal problems that individuals commonly experience. For example, the Cost of Justice Project considered 17 different categories of personal legal problems, with each of those categories containing multiple sub-categories.[731] Delving deeper into the specific nature of each of these problem types may yield further insight about how personal legal services should be delivered. For example, building on the two problem types most closely examined in this dissertation, personal injuries and government benefit disputes, it is noteworthy that several personal injury problems also later led to government benefits problems. Being aware of this concatenation of problems could help providers of personal legal services take steps to try to prevent ensuing benefits problems. This type of deep awareness of how problems manifest can

[730] *Ibid* at 2672.
[731] Cost of Justice, *supra* note 3.

be obtained by experience but might also be transmitted to new service providers by detailed attention to different types of personal legal problems at a granular level.[732]

Further, analyzing types of legal problems at fine levels of granularity may yield insights about how information about those problem types should best be communicated, and how services to address those problems should best be delivered. Concretely, analyzing types of personal legal problem in detail should yield insight into what parts of different legal services can be routinized, and what parts of those services do not lend themselves to routinization. As an example, the Cost of Justice Project survey included questions about problem sub-types, for benefits and personal injury problems, indicated in Table Seven. Working through possible responses to these problem types represents a viable approach to understanding what work tasks may be involved in responding to these types of problems. For example, under the "personal injury" category, "injury or health problem at work" could trigger a series of routine questions about the client's work setting and other factors to help assess whether the injury is covered under provincial workers safety legislation.[733]

Of course, simply analyzing problem types is of limited value. As Patricia Hughes has noted, it is important to engage with the particular circumstances of justice-seekers in addition to the types of problems they experience.[734] In this example, it is important to understand whether a person injured at work *knows* about their rights, knows where to commence a claim, and has the necessary linguistic, literacy, cognitive, and psycho-social competencies to complete a claim report. Assessing how legal tools are used by individuals, and revising those tools to improve usability, is a task well-fitted to a human-centred legal design approach.[735] But in order for those design approaches to be successful, a necessary precursor is to take heterogeneity seriously at both the demand and supply sides.

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[732] For example, Jean Richardson recounts how CABx volunteers often had better knowledge about how to deal with personal legal problems based on repeated experience with clients, than did generalist solicitors who did not often deal with personal legal problems. *Supra* note 669.
[733] Indeed, this kind of information *is* sometimes available for this type of injury. See e.g. Work Safe BC, "How workers report a workplace injury or disease" (last visited 29 May 2020), online: *Work Safe BC* <www.worksafebc.com/en/claims/report-workplace-injury-illness/how-workers-report-workplace-injury-illness>.
[734] *Supra* note 55.
[735] See Chapter Eight, Section Four, above.

Table 7: Problem categories and sub-categories used in Cost of Justice Project questioning

Problem Category	**Sub-category**
Social Assistance/Welfare Benefits	Problems obtaining social assistance or with the amount of assistance
	Problems obtaining old age security, or Guaranteed Income Support
	Problems with other government assistance, such as housing, benefits for disabled children
Disability Assistance	Problems obtaining federal CPP disability pension
	Problems obtaining provincial disability pension
	Problems obtaining private disability pension
	Problems obtaining workers compensation relating to disability
Personal Injury	Injury or health problem at work
	Injury or health problem in public place or commercial establishment
	Injury from traffic accident
	Injury or health problem from being a victim of a crime

This proposal to begin treating personal legal services differently from legal services for organizations is not without weaknesses. In addition to the critiques noted above, it might seem short-sighted to focus on access to justice at the level of the individual, at the risk of excluding community or group efforts to obtain justice. Although I have re-defined access to justice as

person-centred in this dissertation, I recognize that relationships and community play an often constitutive role in well-being and even in understanding what justice implies at the level of the individual. It may seem perverse, therefore, to exclude organizations from my conception of access to justice. Does this imply that organizations cannot pursue access to justice through a bifurcated legal system?

In response to this criticism, I suggest only that analysis of access to justice problems, and of personal vulnerability, must *start* at the level of the individual, but does not end there. Of course, it is necessary to consider an individual in relation to their family, community, employer, or other organizations in determining how best to respond to their desire for justice. But this does not negate the potential value of an explicitly recognized personal legal services sphere.

It is also important to note a significant limitation of these suggestions. The data which suggests a bifurcated legal system is largely derived from the United States. While some points, such as the likely information differences between most personal clients and repeat-player organizations, undoubtedly exist in Canada as in the United States, it would be useful to re-create the analysis in this section using Canadian data before prescribing policy changes.

This section has suggested that reforming how legal services are delivered is an important part of sustainably improving access to justice. Drawing on how I have defined access to justice problems, I have suggested that personal legal services should be treated distinctly from legal services for organizations and should be given priority for reform efforts to improve access to justice. This bifurcation is a first step, but the reality is that the heterogeneity on both supply and demand sides should be taken seriously in efforts to remodel legal service delivery. This has implications for legal service education and training, regulation, and how personal legal services are delivered. But as noted, these suggestions also require further research. The need for further research is the focus of the following section.

4 Committing to Ongoing Research

The intent behind the recommendations for institutional change given in the preceding two sections is to generate further discussion about efforts to sustainably improve access to justice.

But these suggestions have not been worked through in meticulous detail. In part, that is because these proposals need significant further research in order to decide how best to implement them. This precondition highlights a further suggestion for change. At present, there is insufficient research on access to justice issues. Meaningfully improving access to justice requires recognizing access to justice research as a field worthy of academic interest and research funding. This section sets out several essential directions for future research to follow.

Noticing the paucity of high-quality research on access to justice topics is not new. I have previously noted that Gillian Hadfield has contrasted the relatively meagre research on the legal services market – particularly the market for personal legal services – with research in the healthcare field.[736] While she notes that healthcare research is now funded and supported in large part by private interests, such as pharmaceutical companies, she also observes that contemporary medical research has often built on a scaffold of publicly funded research.[737]

Few institutions – private or public – have an interest in conducting or supporting access to justice research. As Chapter Three identified, while *some* research granting bodies – such as provincial law foundations – are particularly interested in access to justice, these bodies are relatively few in number and their budgets are almost invariably split between supporting academic research at universities and providing funding for access to justice programs.[738] While much has been written about the need to encourage innovation in providing legal services to make those services more accessible, considerably less has been said about the need for high quality research to understand what innovations are likely to actually reduce the barriers to justice that people experience.

While Hadfield notes the importance of private-sector research funding for medical research, it is important to appreciate the role of public-sector research funding and support that gave rise to the present state of medical research. Indeed, the close connection and cooperation between many universities and publicly funded hospitals and research laboratories was a hallmark of the

[736] See Chapter Four, Section One, above.
[737] *Supra* note 108 at 212-218.
[738] See Chapter Three, Section Two, Subsection c, above.

development of the field of public health in the United States and elsewhere during the 20th century.[739]

The type of necessary relationships found in the health sector suggests that sustained research on access to justice may need a government-linked catalyst to both build researcher capacity and provide stable funding for justice-sector research. Importantly, this research field should be interdisciplinary, drawing not only – or even primarily – from legal researchers, but also from economics, sociology, social psychology, and other disciplines. Epidemiology presents a potentially suitable model for sustained access to justice research. The development of a field to understand the incidence rate, across the population and across the lifespan, of significant justice-related problems, and how to best prevent or resolve those problems, would add tremendously to the scope of possible interventions to improve access to justice.

Existing institutions also have a role to play in improving access to justice research. Most notably, legal regulators should take on a greater role in seeking to understand the dynamics of the market for legal services; that is, legal regulators should play a prominent role in researching their area of regulation. The idea of a regulator playing a research role is not new. The apex regulator of legal services in the United Kingdom, the Legal Services Board, has engaged in research as part of its mandate since it started operating in 2010.[740]

The idea that legal systems and justice institutions might become more actively self-studying is one that is inherent in the idea of responsive law and can therefore be alive to meeting the problems that a person-centred conception of access to justice requires. As Robert A. Kagan notes:

> In a world of responsive law, legal institutions – courts, regulatory agencies, alternative dispute resolution bodies, police departments – are periodically studied and redesigned to improve their ability to fulfill public expectations. In a world of responsive law, legal values more fully pervade a wide range of

[739] See e.g. Institute of Medicine (US) Committee for the Study of the Future of Public Health, *The Future of Public Health* (Washington, DC: National Academies Press, 1988). See also US Department of Health, Education, and Welfare, *Highlights in the History and Organization of the National Institutes of Health 1945-1975* (last visited 29 May 2020), online (pdf): *National Institutes of Health* <history.nih.gov/download/attachments/8883708/nihhistoryhightlighst1945_1975.pdf>.
[740] See e.g. Legal Services Board, "Research" (last visited 29 May 2020), online: *Legal Services Board* <www.legalservicesboard.org.uk/research>.

> institutions – schools, business corporations, governmental bureaucracies. That is the world we now live in."[741]

While Canadian justice institutions engage in some research and data gathering at present, the scope of that research and data gathering is insufficient to address access to justice problems. For example, courts in most Canadian jurisdictions have begun tracking and reporting in annual reports and other like materials some aggregate data about numbers of court users and types of cases heard.[742] Similarly, many law societies require licenced legal professionals to complete a mandatory annual practice declaration that includes information such as types of work done and number of hours of pro bono work completed. Unfortunately, much of the data collected by these public or quasi-public agencies is not made readily available for other sector participants or for researchers. Greater collaboration and cooperation between different institutional actors such as courts, government justice ministries, legal regulators, and the academic research sector could create better opportunities for meaningful engagement with access to justice issues.[743]

This section's call to action goes beyond legal service regulators. A responsive state has a stake in ensuring that people have actual access to legal services that are helpful for them, and that the law and legal services develop in a way that is socially useful. Accordingly, justice institutions should elevate their efforts to gather data about, and conduct research into, how well they function as institutions. They should also be expected, as a default, to make that data available for researchers to analyze and critique those institutions. This should be a minimal standard for responsive public institutions.

5 Pursuing Political Engagement

Finally, and in support of the three previously mentioned goals, access to justice must be recognized as an issue of universal social significance that requires political engagement. Since

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[741] *Supra* note 559 at xxiv-xxv.
[742] See e.g. British Columbia Court of Appeal, "Annual Report 2019" (last visited 29 May 2020), online (pdf): *BC Courts* <www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2019_CA_Annual_Report.pdf>.
[743] See e.g. M Jerry McHale, "The Justice Metrics Problem" (23-24 March 2017), online: *Access to Justice Center for Excellence* <static1.squarespace.com/static/5532e526e4b097f30807e54d/t/590a60968419c273fe4dd99c/14938523>.

current research demonstrates that almost 50% of the adult population will experience a significant justiciable problem over a three year period, it is likely that access to justice problems over a lifetime are universal.[744] But in order to foster conditions for sustained research, structural change to how personal legal services are delivered, and for the introduction of new institutions to decrease first step barriers, broad political engagement is necessary. Access to justice must be seen to be an important issue across the political spectrum.

In order to obtain broad support to improve access to justice, members of the public must be aware of the ubiquity of access to justice problems and offered solutions that promise meaningful life improvements. Indeed, one of the key advantages of using a vulnerability approach to re-interpret the concept of access to justice is the universal nature of human vulnerability. Responses to access to justice problems have often been suggested within the legal profession and proposals to improve access to justice have, perhaps unsurprisingly, often involved suggestions that affect actors in the justice system. Yet because access to justice problems are universal in nature, responses to these problems must be the subject of broad social discussion and political engagement.

Political scientist Iris Marion Young proposed a model of human responsibility that entails the recognition that the project of improving social structures is widespread and diffuse.[745] In Young's conception, which she terms the "social connection model" of responsibility, individuals bear responsibility for acting to improve social structures in which they participate or from which they benefit.[746] Young argues that by partaking in social structures that yield injustices, individuals have to inquire about responsibility not only for their own circumstances, "but also in what ways we should understand ourselves responsible for the background conditions of others' lives that are produced by structured institutional relations."[747] Read with Fineman's vulnerability thesis, Young's approach intimates a responsibility for addressing structural injustices, such as access to justice problems, that extends beyond the legal profession, beyond government, to each individual. That universal responsibility connects back to the importance of involving people with the legal system and ensuring that individuals take

[744] Cost of Justice, *supra* note 3.
[745] Iris Marion Young, *Responsibility for Justice* (New York: Oxford University Press, 2011).
[746] *Ibid* at 105.
[747] *Ibid* at 39-40.

"ownership" over the institutions of justice that undoubtedly affect them throughout their lives. In a sense, this call to recognize our shared and universal responsibility to improve justice is a necessary correlate of living in a "law thick world".[748] In order for people to not be left at the mercy of laws about which they do not know and do not understand, developing new institutional responses to the reality of our "law thick world" offers some hope that the legal system can be repurposed not as a tool of victimization, but rather as a means of helping to reduce and mitigate human vulnerability.

To accomplish this, access to justice advocates should encourage institutional pluralism in the legal system that offers meaningful connections to justice and a variety of legal service delivery models at the community level. In Canada, this means supporting both general community advocacy programs and specifically supporting the revitalization and operation of Indigenous legal orders. It means supporting the growth of community-level justice systems, community-embedded justice providers, and non-state efforts to improve access to justice. It also means fostering conditions which encourage state-based programs and policies to promote sustainable, person-centred access to justice in line with these forms of institutional pluralism.

The hope behind this section's recommendation is that raising the public profile of access to justice outside the legal profession may foster a shift within the legal profession, perhaps by encouraging individuals to valorize personal legal services as desirable forms of work. In addition to valorization, political support will be necessary to ensure sufficient funding is allocated to support ongoing research, to reform the delivery of personal legal services, and to develop problem-solving services.

Adopting a political posture that understands and acts upon the idea of person-centred access to justice is a significant undertaking. Not least, it requires grappling with how the state should respond to universal human vulnerability. As suggested in Chapters Two, Five and Eight, this requires re-centring the focus of justice institutions away from abstract ideals such as the rule of law, and instead focussing on how justice institutions can respond to varied manifestations of human vulnerability. Doing so requires engaging with the lived experiences of justice-seekers, and also requires a detailed and nuanced understanding of the heterogeneity of personal legal

[748] *Supra* note 6.

problems and their possible solutions. Replacing the narrative of an access to justice crisis with the more apt framework of access to justice problems as privations, and adopting a person-centred conception of access to justice rooted in shared vulnerability, offer routes to deeper and more widespread engagement with access to justice as an important and compelling societal expectation.

6 Into the Unknown

This chapter has taken the key positions and findings of this dissertation, reported in Chapters Two through Eight, and has built out from them to make four recommendations of steps to sustainably improve access to justice in Canada. These four recommendations are:

1) to decrease first-step barriers by creating holistic, independent advice institutions that are capable of at least diagnosing legal problems;
2) to reform personal legal service delivery to respond to the heterogeneity of different personal legal problems;
3) to develop and sustain an interdisciplinary field of research on access to justice, modelled on the field of epidemiology; and
4) to encourage political engagement with access to justice problems as universal problems beyond the legal profession.

Realizing these recommendations is no small endeavour. But behind the four main recommendations proposed in this chapter, there lurks a persistent but unstated concern: that developing more accessible justice systems might actually work and, consequently, that those systems will be unable to withstand the latent demand pressures that are suddenly released. This is a floodgates argument, and one that is familiar to those who have dealt with legal policy arguments. This argument itself reveals the nature of a legal system that is inherently opposed to and afraid of people, rather than committed to them. By contrast, it would be inequitable to prevent people from seeking medical services when they are needed because of hypothetical concerns about overuse. Concerns about overuse are more properly dealt with by structuring system costs and incentives, and by interposing a variety of professionals to assess patient claims when they present. The same approach should obtain for legal services.

Chapter 10 – Ending the Access to Justice Privation

This dissertation has explored access to justice issues in a Canadian context and has extended access to justice research in several novel ways. First, this dissertation has detailed a person-centred conception of access to justice rooted in Martha Fineman's vulnerability thesis. Doing so expands and deepens the discussion of what access to justice should be by suggesting a theoretical framework that is both universal and flexible enough to be responsive to individual particularities. Moreover, I have suggested how this concept of access to justice might be operationalized, notably by drawing on recent efforts to bring human-centred design approaches to the field of law.

Second, I have identified and mapped the market for personal legal services in a way that opens up ground for further research. By explicitly recognizing the predominant role of market mechanisms in creating and distributing legal goods and services, this research helps to clarify the importance of understanding the dynamics of those market mechanisms, both in delivering legal goods and services and in failing to do so in ways that live up to the normative commitments required of a person-centred concept of access to justice. In doing so, I suggest that research on behavioural economics and information asymmetries may be particularly apt in helping to understand these market dynamics.

Third, this dissertation draws on a small number of detailed interviews with individuals who encountered particular kinds of justiciable events to better understand how individuals in a large metropolitan city in Canada respond to events with a legal dimension. The interview research described in this dissertation builds upon scholarship about advice-seeking behaviour and unmet legal needs research to present a more nuanced and contextualized understanding of how individuals may experience and respond to legal events in their lives. While this research supports some conclusions in the existing literature, it also suggests new directions for future work. In particular, these interviews suggest that many individuals sought information and assistance from a wide range of people and organizations, and that the strength of an individual's social support network had a direct bearing on the degree to which a justiciable event adversely affected them. This suggests that approaching advice-seeking behaviour by focussing primarily on the individual who has experienced a justiciable event may be too narrow. Instead, a context-

sensitive approach that seeks to understand where people turn for information, how they filter that information, and the role played by social support networks in that process presents may offer a more robust approach to how and why people respond to justiciable events as they do. This insight presents an opportunity to apply research in behavioural economics and information asymmetries, as noted above, directly to access to justice problems. It also connects to an aspect of Martha Fineman's vulnerability theory that lies at the core of the person-centred conception of access to justice by highlighting the importance of social assets, such as supportive, friends, family, and communities, for those seeking justice. This in turn resonates with Iris Marion Young's notion of shared responsibility for justice, by connecting individual (but universal) vulnerability to access to justice outcomes through the mediating web of social, community, and legal structures.

Fourth, I have contributed original quantitative research, using the third wave of the US After the JD dataset, to better understand differences in how lawyers populate different organization types, how those different organization types work for different customers and perform different types of work, and how the preferences of lawyers in those organizations differ. This research builds on sociological and economic research into the legal profession and non-pecuniary work incentives, and suggests that encouraging legal service providers to sustainably improve access to justice may require either encouraging lawyers who value non-pecuniary incentives to move into personal legal service positions at a greater rate, or may require a thoughtful and thorough restructuring of the personal legal services market to properly match incentives to the needs outlined by a person-centred concept of access to justice.

Finally, I have drawn together the various strands of research in this dissertation to suggest four discrete tasks to improve access to justice in Canada. First, I suggest taking steps to lower first-step barriers facing individuals who have experienced justiciable problems. In doing so, I suggest that institutions and policies should attempt to recognize the particular vulnerability of each individual, and rather than implementing class-based entitlements, should focus on assessing relative levels of individual assets, such as physical, human, and social assets, and responding to these relative levels in a tailored fashion. One model for doing so may be a form of general public advice organization, such as the model pioneered by Citizens Advice in the United Kingdom. Second, I have suggested that the legal services field should be bifurcated between

legal services for organizations and legal services for persons. Not only does this bifurcation match up with a division that exists within the legal profession, but it would also allow legal regulators to better match regulations to the diverse needs of different potential customers. Specifically, given the likely much steeper information asymmetries between legal service providers and clients in the personal legal services market, different regulatory requirements are likely required in this hemisphere compared to those needed among those who provide legal services to organizations. Third, I have suggested, as others have, that sustainably improving access to justice is not a simple task and requires ongoing and serious research. I have suggested that research should be organized on a framework of understanding demand for and supply of legal services, under the normative canopy of person-centred access to justice, as I have described it. Indeed, I call for the creation of a type of legal epidemiology to foster ongoing research interest in how people seek and obtain solutions to everyday justice problems. Fourth, I have argued that many of these suggestions will only be tenable if interest in access to justice broadens beyond existing legal service providers and those who have experienced the legal system, to become a matter of mainstream political interest. I suggest that the universal framework of vulnerability offers a way to make concern for access to justice mainstream, but also that legal services must aspire to be genuinely helpful in order to have political resonance. I draw on the work of Iris Marion Young to suggest that access to justice problems are properly understood as forms of systemic inequality, and that her social connection model of responsibility imparts a generalized but individualized responsibility to try to improve access to justice.

While I hope that this research contributes to the growing field of access to justice research in Canada, it is nevertheless important to recognize some of the limitations and shortcomings of this research. For example, although the demand-side research set out in Chapter Six provides some detailed insight into how individuals have responded to justiciable problems, that insight is tempered by both the limitations of the interview format, and the highly unrepresentative nature of the interviews. That is, as discussed in both Chapter Six and in Appendix A, the conclusions drawn from the interviews depend very much upon my abilities as a researcher to properly frame and conduct the interviews, and to then analyze the narratives presented in those interviews. As I have noted, although I have attempted to use reflexive approaches to mitigate my biases, it is impossible (and indeed, likely undesirable) to eliminate those biases entirely. The conclusions

that I have drawn in this qualitative research are therefore likely different from conclusions another researcher might draw. Further, although there is value in paying close attention to the nine narratives that form the basis of the interview research in this dissertation, the nine individuals who agreed to participate in research interviews are certainly not representative of the Canadian population. While this research may provide insights for future research, this is not a sufficient basis from which to design policy suggestions for immediate implementation. Turning to Chapter Seven, the dataset which forms the basis for the research is, as I have noted, based on lawyers in the United States. Accordingly, while my conclusions about differences in market structures and individual preferences may be interesting, the research should be replicated using a Canadian dataset before making any serious suggestions to reform the supply of legal services in Canada.

As with all research, the limitations of this study provide fodder and direction for future research. For example, the interview research set out in Chapter Six could be scaled up to recruit significantly more participants. Doing so would yield a richer set of narratives from which to draw insights about how different individuals responded to different justiciable events. It might be useful to tailor some of the interview questions to try to elicit more detail about how individuals relied on others for information that helped them respond to their justiciable problem. Further, it might be useful to attempt to measure relative levels of vulnerability, using the asset classes described in Chapter Eight, to test whether there is any correlation between how individuals respond to justiciable events and their relative levels of vulnerability. In addition, broadening the scope of recruitment to include different geographic locations and to ensure a broader array of socio-economic backgrounds may further help to make the findings of future research more generalizable.

The research in Chapter Seven could be supplemented not only by using a Canadian dataset, but by engaging in follow-up qualitative research with lawyers who work in the various practice settings described.[749] Further, this research should expand beyond practicing lawyers, to include research on other types of legal service providers. In particular, given the optimism that some attach to technological innovations to improve access to justice, it would be useful to gauge what types of preferences motivate those working in the access to justice innovation space. That is,

[749] See *supra* note 551.

individuals and organizations working to design new products in order to maximize pecuniary returns for themselves or their investors might be expected to pursue different methods, and may have different concepts of access to justice, than those motivated to improve access to justice because of a desire to improve society or explicitly help others.

There is no shortage of possible research that could help to improve access to justice. But, as I have noted, research itself is not enough. Research and advocacy can and should play complementary roles in moving concern for improving access to justice outside the legal profession, and into the social mainstream. It is worth noting that many of the interview participants explicitly discussed hopes that their experiences could help to change institutions and systems so that others in the future can experience better and more just processes and outcomes.[750] As Anthony put it at the end of his interview, there is value in recounting the experiences of those who have been frustrated in seeking access to justice:

> Somebody's got to listen, right? If somebody's writing it down, then there's a chance that somebody will read it. And the more people that read it, or know that this stuff's going on, maybe people will say "you know what? We need to deal with this.[751]

[750] See, for example, interviews with George, Michael, Justine, Anthony, Alex, Mia, Chris, and Sara.
[751] *Supra* note 29.

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Appendix A – Methodology for Qualitative Research Used in Chapter 6

1 Background

The dissertation uses several types of methodologies. Both appendices provide a detailed discussion of the selected methodologies, their justifications, and their limitations.

The interview research conducted for this dissertation built on the findings from previous unmet legal needs studies and scholarship on advice-seeking behaviour that were surveyed in Chapters Four and Six. The research described in Chapter Six was designed to serve as small-scale exploratory research to determine whether semi-structured interviews have the potential to yield new insights into how individuals faced with justiciable problems experience and respond to those problems.

Unmet legal needs research in the United Kingdom, the United States, Canada, and elsewhere has established that many individuals do not seek legal advice – or, indeed, any third-party assistance – for a large percentage of justiciable problems.[752] But while this research has yielded insights about what factors appear to affect dispute resolution behaviour across the general population and within some sub-groups, there is very little research on how individuals weigh those factors as they deal with justiciable problems in the course of their lives. That is, while there are some trends apparent from population-level quantitative research, there is relatively little empirical work exploring the decision-making process from the perspective of the person who has experienced a justiciable event.

The interview research in this dissertation sought to explore the interaction of the factors discussed in Chapter Six, such as problem type, past experience, and problem characterization, by conducting semi-structured interviews with individuals who have experienced either a non-trivial personal injury or a government benefits problem within the past three years. Semi-structured interviews employ some interview questions or theme areas, but the interview participants can deviate from these questions to explore issues that emerge in the course of the interview. The inclusion criteria for this study were chosen because the time frame and non-

[752] See *supra* note 13; *supra* note 352; *supra* note 15; Legal Problems, *supra* note 3; Cost of Justice, *supra* note 3. Note that justiciable problems, by definition, are "significant" problems.

triviality criteria are often used in unmet legal needs research, including recent Canadian unmet legal needs research.[753]

As noted in Chapter One, the two problem types, personal injury and government benefits problem, were selected because although they occur at similar rates, they fall at opposite ends of the spectrum of whether they are perceived to be legal in nature.[754] This study did not seek to select interview participants based on other possible factors, such as income or demographics. Given existing research suggesting the dominance of problem type as a factor, this research project sought to explore how individuals think about responding to a justiciable problem by selecting participants on the basis of problem type. During the interviews, however, demographic, income, and additional factors were explored, as explained below.

2 Study

From January through July 2016, recruiting posters and cards were placed in seven neighbourhood houses around the Greater Vancouver area. Neighbourhood houses are place-based nodes of social service delivery that have roots in the settlement house movement.[755] Neighbourhood houses are not-for-profit or charitable organizations, and while many of their services may be funded by government programs, they are independent organizations. In the Greater Vancouver area, a number of neighbourhood houses operate under the auspices of a central agency, the Association of Neighbourhood Houses of British Columbia.[756] Some other neighbourhood houses operate independently, outside the umbrella of the Association.[757] The social services offered at neighbourhood houses vary, but often include programs for immigrants, new parents, elders, and similar programs designed to provide helpful resources for community members. As such, neighbourhood houses offer an opportunity to encounter individuals with varied life experiences, many of whom benefit from the low- or no-cost programs provided by

[753] *Ibid*.
[754] See Chapter One, Section Three, above.
[755] See SR Lauer & MC Yan, "Neighbourhood Houses and Bridging Social Ties" (Vancouver: Metropolis British Columbia Centre of Excellence for Research on Immigration and Diversity, 2007) at 15-16.
[756] Association of Neighbourhood Houses BC, "Home" (last visited 29 May 2020), online: *Association of Neighbourhood Houses BC* <anhbc.org/>.
[757] See e.g. Collingwood Neighbourhood House, "Home" (last visited 29 May 2020), online: *Collingwood Neighbourhood House* <cnh.bc.ca/>.

the neighbourhood houses. The seven neighbourhood houses involved in this research project included both independent houses and members of the Association of Neighbourhood Houses of British Columbia. I made efforts to contact all neighbourhood houses in the Greater Vancouver area, though not all of those houses ultimately consented to being involved in the research.

These recruiting materials were divided into two types. One set of materials asked for study participants who had experienced "any problems or disputes with government benefits over the past three years", while the other asked for participants who had experienced a personal injury over the same time frame. Both sets of materials were prominently displayed side-by-side in each neighbourhood house. In most participating houses, these materials were displayed at or near the reception desk, which is a common feature in all neighbourhood houses included in this research. Similar posters, with tear-away contact information, were also posted on bulletin boards in each neighbourhood house.

In order to place materials at each neighbourhood house, I met with staff members at each house in order to explain the study and ask for their assistance in helping to guide house users to the study materials. These meetings ranged from one-on-one meetings with a single staff member to presentations to entire neighbourhood house teams. I followed up with most of the neighbourhood houses approximately every month to ensure that they had a supply of materials and to answer any questions or concerns that may have arisen.

All of the interview materials asked potential participants who were interested in participating in a one-hour interview to contact me, either by email or by phone. Once a prospective participant made initial contact, I provided them with the study consent form, either by email, mail, or by leaving a hard copy of the consent form with them. All potential interview participants were given at least two business days to review the consent form. After this, I followed up with each prospective participant to inquire whether they were willing to participate in an interview, and if so, to set up a time and location for each interview. Participants received a copy of their consent form, and also received a list of free or low-cost legal and counselling resources, in case they wanted any further assistance in dealing with their justiciable problem or in seeking assistance to deal with the emotional or psychological effects of those problems.

Interviews took place at a variety of locations, including in participants' homes, at neighbourhood houses, at coffee shops, or at outdoor parks. In all cases, I took steps to ensure

that interviews were conducted in locations that could ensure a reasonable degree of confidentiality. For example, coffee shop interviews were conducted at locations that had meeting rooms that could be reserved in advance for private meetings away from other customers.

Interviews were limited to one hour in duration, unless the interview participant indicated an interest in continuing to speak past the one-hour period. The interviews were conducted using a semi-structured format, which included the use of an interview script. The script included questions designed to elicit information about the type of problem the participant had experienced, what they did in response to that problem, and what factors played a role in their response. For example, the interview script – which can be found at the end of this appendix – asked participants to describe who they spoke to in the aftermath of their problem experience, and then provided a series of prompts to assess the involvement of particular types of individuals and organizations who have been described as common sources of information in academic literature. Where it appeared that interview participants wanted to offer additional information that they felt was important or relevant, I encouraged them to do so. I intervened on occasion to request that interview participants not volunteer information that could potentially identify specific individuals, and tried to guide participants away from speaking about the details of their legal problem in order to ensure that the interviews focussed on their responses, rather than on the problem itself. I did this in order to minimize any risk that research materials could be compelled for disclosure in connection with legal proceedings relating to the interview participants. At the end of each interview, all participants completed a one-page questionnaire – a copy of which is also found below – which provided limited demographic information about their age, gender, education, and income levels.

All interviews were recorded on a digital audio recorder. These were then transcribed, either by me or by a commercial transcription agency that had agreed to be bound by the confidentiality requirements of this research study. In total, 11 individuals took part in a recorded interview. Two of these interviews were precluded from analysis because the nature of the problems described in the interviews fell outside the inclusion criteria described above.

3 Analysis

The nine usable interviews were selectively coded based on several lines of inquiry. These lines of inquiry, or topic areas, were developed and built into the interview script, based on findings from existing scholarship on advice-seeking behaviour.[758] These topic areas are set out in Table Eight. Although the number of interviews and the non-random recruitment method limit the generalizability of this research, it was still possible to examine whether interview answers and trends appeared to correspond with the role of different factors reported in previous research.[759]

In addition to coding interview answers in the domains identified in Table Eight, each interview was also reviewed using a type of open coding.[760] Open coding refers to the process of building theory and categories from the ground up, based on the interview data itself. It has been described as:

> the initial intensive interplay of an interpretive or interrogatory and often intuitive process between researcher and data by which the raw data, including words, phrases, events, or actions, are broken down, taken apart, or analyzed for their potential or relevance to the identification and conceptualization of phenomena that emerge from collected data.[761]

That is, passages of interviews in which participants described matters, such as how they responded to problems, were reviewed and coded with a view to trying to understand what each participant was describing, quite apart from expectations that are suggested by existing literature. This coding was then reviewed to discern any commonalities or patterns between respondents.

Based on these two types of coding, this research seeks to both test existing theories and hypotheses, and potentially generate new ones. Sociologist Robert R. Faulkner has described his own grounded theory research as including both concept exploitation and concept exploration.[762]

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[758] See e.g. *supra* note 15.
[759] See Chapter Six, Section Three, above.
[760] See e.g. Udo Kelle, "'Emergence' vs. 'Forcing' of Empirical Data? A Crucial Problem of 'Grounded Theory' Reconsidered" (2005) 6:2 Forum: Qualitative Social Research 1.
[761] "Coding: Open Coding" in Albert J Mills, Gabrielle Durepos & Elden Wiebe, eds, *Encyclopedia of Case Study Research* (Thousand Oaks, CA: Sage, 2010) at 156.
[762] Robert R Faulkner, "Improvising on Sensitizing Concepts" in Anthony J Puddephatt, William Shaffir, & Steven W Kleinknecht, eds, *Ethnographies Revisited: Constructing Theory in the Field* (New York: Routledge, 2009) at 80.

Table 8: Interview coding domains

Topic Area	**Examples**
Problem type	Personal injury; government benefits problem
Significance to interview participant	Ranked on scale of -10 to +10
Estimated monetary value of problem	Estimates ranged from a few hundred to several thousand dollars
People/organizations who you discussed this problem with	Family members, friends, private lawyer, community advocate, telephone assistance line, legal aid, government official, elected politician, police, library, public legal education and information organization, support group, church or religious organization, union, bank/insurer, other
Factors in deciding how to deal with this problem	Cost, didn't know where to go, wanted to get on with life, fear, not important enough, didn't think anything could be done, uncertain of rights, relationship with other side, other party was right, too stressful, hard to access help, previous experience, other
What description fits the problem	Bad luck, moral problem, private, criminal, part of God's plan, legal, social, bureaucratic, family or community, none, other
Prior experience with a similar type of problem	Direct experience, friend/family has had similar experience, no prior experience

He describes the former as "receiving, refining, and extending existing knowledge", and the latter as "improvisation, experimentation, and the discovery of new knowledge".[763] In a similar way, the dual role of this interview research is both to test and refine existing theory about advice-seeking behaviour, but also to provide an opportunity to discover aspects of advice-seeking that are often missing from the existing literature. The results of this dual coding and ensuing analysis are contained in Chapter Six but are also woven throughout the dissertation.

As mentioned in Chapters One and Six, it is important to situate this analysis of the interview data in a properly reflexive context. In part, this means acknowledging the constructed nature of the narratives that are recorded in the transcriptions, and the partial and contingent nature of these and any conclusions drawn from them. Social researchers Heather Elliott, Joanna Ryan, and Wendy Holloway have drawn on Judith Butler's conceptions of self and narrative to note the dual nature of interviewees' accounts, which "both convey[] narrative information and also function[] to express desire and to act upon the scene of interlocution itself."[764] To present narratives created from interview experiences as a kind of objective truth ignores this dual nature, and understates the effects of the context of the research encounter in helping to shape the narrative itself.

Since the research encounter is a "co-created space", and the narratives that arise from that encounter are similarly co-created, it is important to acknowledge the researcher's role and persona in that co-creation.[765] Accordingly, it is important to situate myself and discuss some of my decisions and reactions to the interviews. I am a white male who was in his mid-30s at the time of the interviews. In my phone exchanges and email correspondence with potential participants, I attempted to present a neutral and "professionally detached" demeanour in describing the study and making arrangements to meet with potential participants. Although I made efforts to present the study as general social research in order to avoid prompting participants to focus on "legal" aspects of their experiences, the nature of the study and the fact that the consent form was printed on law school letterhead was likely to alert participants to the legal focus of this research. During the interviews, I attempted to present an affirming and

[763] *Ibid*.
[764] Heather Elliott, Joanna Ryan, & Wendy Holloway, "Research Encounters, Reflexivity and Supervision" (2012) 15:5 International Journal of Social Research Methodology 433 at 433-434.
[765] *Ibid* at 433.

engaged demeanour to the research participants.[766] This meant that I freely discussed some of my reasons for conducting the study, some of my experiences with neighbourhood houses, and tried to encourage participants to discuss their experiences with as little fear of judgment as possible. For example, here is one exchange from the interview with Justine:

> Q. Wow.
>
> A. Right? But they call me a liar and tell me that I'm BS-ing and everything and to just get out of here. And so that's a lot of stress for me. And so that has tainted this to some degree, I would say, quite honestly. Because you know what? [Pause, begins to cry] It'll help someone, your study.
>
> Q. I hope so. And thank you for taking the time. So, do you want to take a pause for a sec? I'll turn this off.
>
> A. Sorry.
>
> Q. No, it's ok.
>
> ***[Pause]***
>
> Q. Yeah. You are tough. So just a couple more questions, then there's a chance at the end for you to talk about anything else that's come up in the interview that you want to go into more detail about. But… So, for this question, I'd like you to give just a yes or no answer. I think you've already sort of answered it, but do you know any lawyers, paralegals, or other legal service providers?
>
> A. Yes.

In this interview I sensed that Justine was looking for some affirmation as the interview progressed, and accordingly modified my tone and posture to try to encourage her to discuss her thoughts and experiences as much as possible. I became aware of the need for this slight shift in my demeanour based on some brief comments early in the interview that suggested some defensiveness or a desire for affirmation. For example, at one point earlier in the interview my effort to continue working through a list of survey prompts led to a response from Justine that made me aware that she might have been looking for more affirmation of her experiences than I had been offering to that point:

> Q. So talking about the fall…

[766] *Supra* note 23.

A. And it's their fault, by the way. I'll just throw that in there, and then I've got pictures I can show you.

Q. Ok. Let me just work through…

A. You don't care. Ok. You don't care.

Q. No, it's not that I don't care, it's just that…

A. You've got to go through the list.

Although I made efforts to create a conversation space that was as free from judgment as possible, it remains that interview participants likely knew that I had some experience with legal matters, and this may have affected their willingness to share parts of narrative, particularly parts that may have presented them in a negative or embarrassing light. I consciously tried to avoid discussing my experiences in practice as a lawyer, in order to try to keep the interviews focussed on the participants' experiences, rather than on the law or the legal system.

Finally, it is important to note that my personal attributes have played a role in my analysis of the interview transcripts. Although I took steps to mitigate some of my biases by engaging in an open coding process and trying to be mindful of my preferences, the choices that I made in coding the interview transcripts are nevertheless subject to my own predilections to perceive some types of patterns and relationships more readily than others. For example, as someone who has volunteered at a neighbourhood house and based on my attraction to relational theories of self and community, it is perhaps unsurprising that I would identify the role of social and community connections as important sources of information for the individuals I interviewed. But although I may have chosen to focus on topics that another might not have, it remains that those topics were discussed and described by the interview participants, and accordingly formed part of their narrated experiences.

4 Interview Questions

The following is a copy of the interview script used for all interviews:

Individuals Research Interview Script and Questions

Thank you for taking the time to participate in this research interview on your experiences relating to a personal injury or government benefits dispute. You've returned the signed consent form to me, and understand that I'll be recording this interview. This should take about an hour, but you can end the interview at any time. If you don't want to answer a question, you can pass on it. If you've given me a contact address or email, I will send you a copy of your transcribed interview, and a copy of my completed research.

I. Problem Description

1) How did you learn about this research project?

2) Have you experienced a personal injury or a government benefits problem over the past three years (i.e. since [MONTH] 2013)?

3) Were there any other personal injury or government benefits problems in the time period we're talking about? [If so, repeat following questions for each problem.]

4) What type of problem did you experience? A personal injury or a government benefits problem?

    a) [Government benefits include: social assistance, old age security, Guaranteed Income Supplement, housing benefits, benefits for disabled family members, government disability support, etc.]

    b) [Personal injuries include: injuries or health problems at work, injuries or health problems resulting from a traffic accident, an injury or health problem as a result of being a victim of crime, or an injury or health problem in a public place or commercial establishment]

5) Without giving details about the problem, please briefly tell me: **[Note that the interviewer will intervene to prevent participants from providing details about the problem other than those asked for.]**

    a) When did it start happening?

b) How old were you at the time?

c) Have you experienced problems like this before?

d) In what city or region did this happen?

II. Effect on Everyday Life

6) Was this a significant problem or dispute in your life? By "significant" I mean it was a big enough problem that you felt it could not be easily solved, and ignoring it would result in some disadvantage or negative consequences that you wanted to avoid.

7) Overall, on a scale of -10 to +10, how negative (or positive) was this problem in your life? -10 represents the single worst thing that has happened to you, 0 is neutral, and +10 represents one of the most positive events in your life.

   a) Would you like to comment about that rating?

8) Can you estimate the money value that was involved in the problem?

III. Problem Response

9) What did you do about the problem?

   a) [For personal injuries:] Did you seek medical attention as a result of this injury or health problem?

10) Can you explain to me how you decided to respond this way? Please feel free to discuss your thinking, other options you considered, and things that influenced your decision.

11) Did you discuss this problem with anyone else?

   a) If so, who?

12) Did you contact or try to contact anyone about the problem?

   a) Please tell me why or why not, if possible.

13) Just to make sure we've covered off everyone, I'm going to go through a list of people to try to jog your memory. Let me know if you contacted or tried to contact any of the following:[ROTATE ANSWERS]

a) A family member

b) A private lawyer

c) A paralegal

d) A community advocate

e) A telephone legal information service

f) A free legal service or clinic

g) Legal Aid

h) A government office

i) An elected official

j) The police

k) A library

l) A public legal education organization

m) A support group

n) A church or religious congregation

o) A union or professional association

p) A bank, insurance company, or other private organization

q) Any others?**[If any positive responses:]**Why did you decide to try to talk with these people?

14) Were any of the following factors in your decision? If so, please tell me how important each factor was: [ROTATE ANSWERS]

   a) Thought it would cost too much

   b) Didn't know what to do/where to go to get help

   c) Wanting to get on with life

   d) Fear

   e) Wasn't important enough

   f) Did not think anything could be done

   g) Was uncertain of my rights/legal rights

   h) Didn't want to damage my relationship with the other side

   i) Thought the other party was right

   j) Would have been too stressful

   k) Help was too far away/hard to access

   l) Had a previous problem and knew there was no use in getting help

   m) Other?

15) Did you use the internet in trying to decide how to respond?

   a) If so, what did you do online? What did you search for?

16) When you think about the problem now, which - if any - of the following descriptions best indicates the character of the situation for you: [ROTATE ANSWERS]

   a) Just bad luck or part of life,

   b) A moral issue,

c) A private matter (i.e. not something to involve others with),

d) A criminal matter,

e) Part of God's plan,

f) A legal matter,

g) A social matter,

h) A bureaucratic matter,

i) A family or community matter (i.e. something to be dealt with within the family or community),

j) none of these.

IV. Current Status

17) Are you still dealing with this problem? **[Interviewer will intervene if names or details that may be privileged are discussed.]**

a) If yes, are you currently looking for assistance to deal with this problem? **[Interviewer will intervene if names or details that may be privileged are discussed.]**

b) If not, could you please tell me how the problem was resolved?

18) Were you satisfied with this resolution?

V. Previous Experiences

19) Have you experienced any other personal injury or government benefits problems before?

a) If so, please tell me briefly what the problem was, when it happened, and what you did about it.

20) Have you seen any family members, friends, or acquaintances deal with personal injury or government benefits problems before?

a) If so, please tell me briefly what the problem was, when it happened, and what the person did about it.

21) Have you experienced any other significant problems or disputes in your life? By "significant" I mean it was a big enough problem that you felt it could not be easily solved, and ignoring it would result in some disadvantage or negative consequences you would have wanted to avoid.

a) If so, please tell me briefly what the problem was, when it happened, and what you did about it.

22) Have you seen any family members, friends, or acquaintances deal with any significant problems or disputes?

a) If so, please tell me briefly what the problem was, when it happened, and what the person did about it.

23) In answer to this next question, I'd like you to give just a yes or no answer. Do you know any lawyers, paralegals, or other legal service providers?

24) If you answered yes, without using names or giving details please briefly describe how you know this person or these people. **[Interviewer will intervene if names or details that may be privileged are discussed.]**

25) Without using names or giving details, have you ever talked to a lawyer about a legal matter? **[Interviewer will intervene if names or details that may be privileged are discussed.]**

26) That basically concludes the interview. Before I stop the recording, is there anything that we haven't covered in this interview that you'd like to mention? **[Interviewer will intervene if names or details that may be privileged are discussed.]**

Thank you for taking the time to participate in this interview. Please take a minute to complete the following demographic questionnaire.

5 One-Page Questionnaire

The following is a copy of the one page demographic information questionnaire that each interview participant was asked to complete:

Demographic Information **Interview # _____**

1. Current Age: _____

2. Gender:

   Male □ Female □ Other □_____

3. What is the highest level of education you have reached?

   Didn't finish high school □ Finished high school □

   Finished community college □ Finished undergraduate university □

   Graduate or professional degree □

4. Which of the following best describes your present employment status?

   Working full-time □ Working part-time □

   Unemployed or looking for a job □ Stay at home full-time □

   Student □ Retired □

   Other □ _____

5. What is the range of your total household annual income?

Under $25,000 □ Between $25,000 and $50,000 □

Between $50,000 and $75,000 □ Between $75,000 and $100,000 □

Over $100,000 □

Appendix B – Approach to the Use of Quantitative Research in Chapter 7

The quantitative research described in Chapter Seven uses data collected as part of the After the JD study (the "AJD study"). The AJD study is a longitudinal research effort in the United States to track the life and career development of individuals who were admitted to the bar in the year 2000.[767] The study includes three waves in which a nationally representative cohort of lawyers participated in a survey to provide a snapshot of their personal lives and professional careers. These waves took place in 2002-2003 (Wave 1), 2007-2008 (Wave 2), and 2012-2013 (Wave 3). The analysis in this dissertation draws on data collected only during Wave 3. The AJD study has been sponsored and supported by different organizations at different times, but the sponsors for Wave 3 included the American Bar Foundation, the National Science Foundation (Grant # SES-1023067), the National Association for Legal Career Professionals (NALP), and the NALP Foundation for Law Career Research and Education. All of these organizations, except the NALP Foundation, were sponsors of Waves 1 and 2 also.[768]

1 Sampling Method

The study used a two-stage sampling method to initially identify and recruit participants. In the first stage, the United States was divided into 18 strata by region and by new lawyer population. One primary sampling unit was identified in each of these strata, and these primary sampling units included a mix of major urban centres, large centres, and smaller markets. In stage two, individuals were sampled from each of these primary sampling units to produce an aggregate sample that reflected the national population of new lawyers. In addition, an oversample of individuals from minority groups, such as people who identify as Black, Hispanic, or Asian, was

[767] Robert L Nelson et al, "After the JD, Wave 3: A Longitudinal Study of Careers in Transition, 2012-2013, United States" (2014) Inter-university Consortium for Political and Social Research at 14.
[768] See *Ibid*; Robert L Nelson et al, "After the JD 2: A Longitudinal Study of Careers in Transition, 2007-2008, United States" (2012) Inter-university Consortium for Political and Social Research [AJD2]. See also Bryant G Garth et al, "After the JD – Wave 1: A Longitudinal Study of Legal Careers in Transition Data Collection: May 2002 – May 2003, United States" (2013) Inter-university Consortium for Political and Social Research [AJD1].

included.[769] All selected individuals were contacted to complete a survey either by mail, online, or by phone.[770]

In the first wave, 8225 eligible individuals formed the initial sample; of these, 4538 individuals responded to the survey, which is a response rate of over 50%, and 71% of individuals who could be located.[771] By the second wave, 3705 eligible respondents completed the survey.[772] This included both respondents who had participated in the first wave, and also those who were part of the original sample but did not complete the first survey. 70.4% of respondents from the first wave participated in the second wave.[773] The third wave included only individuals who had responded to either the first or second waves of the study. This yielded complete surveys from 2862 individuals, which is a response rate of 53% of people who had participated in at least one of the previous waves.[774]

In May 2016, I was granted access to the data from the AJD study's third wave, after the AJD study team approved my application to use this data for this dissertation. The use of this data has been governed by the terms of an agreement with the American Bar Foundation, acting through Dr. Robert L. Nelson, the AJD study's principal investigator.

2 Analysis

The views and conclusions stated in this dissertation are those of the author and do not necessarily reflect the views of individuals or organizations associated with the After the JD study.

Quantitative data analysis in this dissertation was done using Stata statistical software.[775] After the AJD data was imported into Stata, the dataset was cleaned to eliminate responses from unemployed individuals, those who indicated they were working part time, and those who

[769] *Supra* note 767.
[770] *Supra* note 768.
[771] *Ibid*; *supra* note 767.
[772] *Supra* note 768.
[773] *Ibid*.
[774] *Supra* note 767.
[775] StataCorp, *Stata Statistical Software*, Release 16 (College Station, TX: StataCorp LLC, 2019).

indicated that they were not practicing as a lawyer. Dummy variables were created for gender, marriage status, race, law school rank, and organization type.

In addition, some synthetic variables were created based on the variables used in the AJD study. For example, a total income variable was created by combining values for survey responses to separate questions about annual salary, annual bonus, any profit sharing or equity distribution, stock options, and any other form of compensation that survey respondents may have received. Missing data was included in this synthesis. For instance, if a respondent reported an annual salary and an annual bonus but had missing data in the other possible compensation variables, the total income for that individual was calculated to include annual salary and annual bonus values. This total income variable was then used to create further income-related variables, such as hourly income (based on estimating total work hours from hours worked over the past week). Another important synthetic variable, as discussed in Chapter Seven, is the not-for-profit work setting variable.[776] This variable was created by combining results from individuals who worked in either "legal service", "public-interest organization", or "other non-profit organization" settings. As discussed in Chapter Seven, other possible non-profit organization settings, such as "public defender" or "educational institution" settings, were excluded from the synthetic not-for-profit setting variable because the types of work done in those settings seemed to differ significantly from the types of work done in legal service, public-interest organization, and other non-profit organization settings.[777]

Data analysis using Stata was refined over time, and not all analyses were included in the final dissertation. Analyses that were used in the dissertation were recorded as .do files, which allows reproduction of each step in the analysis by loading that file. All analyses conducted using Stata, whether included in the dissertation or not, were recorded using Stata's log recording function. These log and .do files are on file with the author and are available for review upon request.

[776] See Chapter Seven, Section Five, above.
[777] *Ibid*.