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FROM BEAR GARDENS TO THE COUNTY COURT: CREATING THE LITIGANT IN PERSON

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ABSTRACT. *Negative attitudes towards litigants in person (LiPs) are long-standing. But despite their persistence, no study has ever considered: how did we get here? This is what this article sets out to do, analysing when the term LiP first appears, and the context in which this occurs. I argue this moment is a by-product of broader changes taking place for the legal profession in the nineteenth century. Drawing on Larson's "professional project" I argue the new county courts become a battleground for attorneys to distinguish themselves, and it is the introduction of certain kinds of distinction that undermines the self-represented party. This article ultimately argues that the LiP role is not simply self-representation, but is rather self-representation that can only occur in the latter stages of the professional project. This means, perversely, that the creation of the term LiP does not indicate the facilitation of lay participation in legal forums; it marks instead the moment when they are displaced. As I conclude, this displacement has profound consequences for LiPs to this day.*

KEYWORDS: *litigants in person, civil justice, socio-legal studies, the legal profession, legal history.*

> This [section of the *County Courts Chronicle*] will be dedicated to the Suitor, whether by Attorney or in person. Firmly convinced that the ultimate interests of the Attorney and the Client are *the same;* that law may be too cheap as well as too dear; that bad law is worse than no law; and that there is substantial truth in the proverbial description of the man who is "his own lawyer".[1]
>
> This [case] seems an exemplification of a hackneyed observation that a man who is his own lawyer has not a Solomon for his client.[2]
>
> TRIAL LASTS TWELVE DAYS: And Litigant Speaks for Nine of Them.[3]

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1 *County Courts Chronicle* (hereafter *CCC*), 1 June 1847, p. 10.

2 *CCC*, 1 September 1866, p. 194.

3 *Western Times*, 4 November 1927, p. 16.

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I. Introduction

This article seeks to understand how we came to acquire some of the dominant beliefs and attitudes we have about self-represented parties, or litigants in person (LiPs) in England.[4] With some important, and generally more recent exceptions, self-represented parties have been frequently described in a negative light, particularly by legal professionals, who have both in the UK and overseas often considered them to be vexatious, time wasting, disturbed, incompetent or a combination of all of the above.[5] This attitude has become even more noticeable in the UK since the passage of the Legal Aid, Sentencing and Punishment of Offenders Act in April 2013 cut legal aid for most civil claims, and sparked concern over the threatened increase of LiPs on the court system.[6] Whilst such criticism is as likely to relate to concern about the impact on the court system as it is to any perceived prejudice towards LiPs, and, whilst there is no doubt that many legal professionals and scholars actively seek ways to improve LiP experiences,[7] this negativity has potential consequences for LiPs when they try to pursue or defend claims. But despite the persistence of these attitudes, no study has ever considered: how did we get here? Were people who represented themselves always considered negatively? Or is this the result of historical changes: if so, when and how? This is the task this article sets out to accomplish. As I will show, pursuing these questions is a distinct task to undertaking a history of self-representation. The term LiP is a modern one and taking this term as synonymous with self-representation fails to consider how important the moment of historical

[4] "LiP" is used in England, Wales and Northern Ireland. "Party litigant" is the Scottish term. Self-represented litigant ("SRL") is preferred in Canada, New Zealand and Australia, and "pro se litigant" is the US term.

[5] See T. Sourdin and N. Wallace, "The Dilemmas Posed by Self-Represented Litigants: The Dark Side" (2012) 32 Access to Justice 61; M. Taylor, "Querulent Behaviour, Vexatious Litigants and the Vexatious Proceedings Act 2005 (Qld)", conference paper delivered at the Australasian Institute of Judicial Administration, *Assisting Unrepresented Litigants: A Challenge for Courts and Tribunals*, Sydney, 15–17 April 2014; I.P. Robbins and S.N. Herman, "*Pro Se* Litigation – Litigating Without Counsel: Faretta or For Worse" (1976) 42 Brook.L.Rev. 629; M.K. Ridley, "The Right to Defend Pro Se: *Faretta v. California* and Beyond" (1976) 40 Ala.L.Rev. 365; D. Swank, "The Pro Se Phenomenon" (2005) 19 B.Y.U.J.Pub.L. 373, at 384.

[6] G. Langton-Down, "Litigants in Person Could Struggle to Secure Access to Justice", *Law Society Gazette*, 19 January 2012; J. Hyde, "Judges Call for Urgent Overhaul to Cope with Surge of LIPs", *Law Society Gazette*, 5 July 2013; J. Greenwood, "Legal Aid: Children Suffer", *Law Society Gazette*, 22 July 2013; C. Baksi, "Litigant in Person Punches Wife during Hearing", *Law Society Gazette*, 21 October 2013.

[7] See H. Genn and Y. Genn, *The Effectiveness of Representation at Tribunals*, Report to the Lord Chancellor (London 1989); R. Moorhead and M. Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, Department of Constitutional Affairs Research Series 2/05 (London 2005); J. Baldwin, "Litigants' Experiences of Adjudication in the Civil Courts" (1999) 18 C.J.Q. 12; P. Lewis, "Litigants in Person and their Difficulties in Adducing Evidence: A Study of Small Claims in an English County Court" (2007) 11 International Journal of Evidence and Proof 24; L. Trinder, R. Hunter, E. Hitchings, J. Miles, R. Moorhead, L. Smith, M Sefton, V. Hinchly, K. Bader and J. Pearce, *Litigants in Person in Private Family Law Proceedings* (London 2014); R. Lee and T. Tkacukova, *A Study of Litigants in Person in Birmingham Civil Justice Centre* (Birmingham 2017); G. McKeever, L. Royal-Dawson, E. Kirk and J. McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (Belfast 2018).

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transformation is from a general idea of self-representation to the creation of the LiP as a specific role. To understand *how* LiPs came to be understood as they are today demands a critical investigation of the creation of the term itself.

This article then, is a study of a particular moment: when the term LiP first appears, and the context in which this takes place.[8] I argue that this moment is a by-product of broader changes taking place in the legal profession and in legal adjudication, culminating in the sweeping Judicature Acts which create the modern superior courts. It begins with the founding of the new county courts in 1847 and ends with the appearance of LiP as a term in case law, and in general parlance, by the 1880s. As I will show, in a remarkably short period of time, these new county courts, theoretically designed to provide greater access to justice for poorer litigants, become infiltrated by legal professionals, who bring in their wake a desire for greater formality of procedure and content, and this makes it harder and harder for individuals to act without lawyers.[9]

Blaming "formality" and the "legal profession", however, for creating the LiP is an oversimplification. Instead I will argue in this article that what happens can best be understood as emblematic of Magali Sarfatt Larson's "professional project" in action.[10] Drawing on Larson's framework I will show that the new county courts become a battleground for attorneys to claim their place in a legal profession that actively discriminates between the "higher" calling of the Bar and the "lower" rungs of the rank-and-file practitioners.[11] This battle is a battle for *distinction* that takes place through the marking out of legal representatives from laypersons, the normalisation of legal expertise and the attempt to crack down on unqualified representatives.[12] It is the attempt to introduce these kinds of distinction into the county courts that creates the LiP. What I will show, then, is that the LiP role is not simply that of self-representation. It is self-representation that occurs, and *only* occurs, in the context of the latter stages of the professional project. Perversely, this also means that the

[8] Whilst some references can be found to individuals conducting their own cases, these are rare, usually in criminal cases, and it is only the county courts where this reportage happens more regularly. One example of the former can be seen in *The Morning Post*, 8 April 1848, p. 7, where a criminal defendant "represented herself with a good deal of skill and occasioned much amusement in the Court by the ingenious manner in which she cross examined the witnesses".

[9] As Margot Finn argues in *The Character of Credit*, the argument that lawyers dominate the county courts is too simplistic; rather, the new county courts bring anxieties as to who has the right to appear, and under what circumstances. M. Finn, *The Character of Credit: Personal Debt in English Culture, 1740–1914* (Cambridge 1993).

[10] M.S. Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley 1977).

[11] The "rank-and-file" practitioners are the attorneys and solicitors, with attorneys practising in courts of common law and solicitors practicing in Chancery. This division ends in 1874 with the Judicature Acts when all attorneys become solicitors. Significantly, as the *County Courts Chronicle* notes, the attorney's function in the county court becomes more and more that of an advocate. See *CCC*, 1 October 1847, p. 96.

[12] This crackdown was unsuccessful, with "agents" appearing well into the 1900s. See Finn, *Credit*, p. 257.

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creation of the term LiP does not indicate the facilitation of lay participation in legal forums; it marks instead the moment when they are displaced.[13]

II. A Note on Sources and Scope

It is important to start this article by stating that this is not a history, either of the county courts, or of nineteenth-century changes in legal adjudication.[14] Instead, what I attempt to do in this article is narrower: I try to understand what is happening for self-represented parties at the time the county courts are founded and in the following decades, seeking to shed light on how the term LiP came about and how such an individual came to be so looked down upon. However, such a task does necessitate understanding of the pre-existing landscape of self-representation prior to the founding of the county courts, knowledge of the county courts themselves, and understanding of developments in the legal profession.[15] I therefore draw on several legal historians whose work is essential in constructing my argument: in particular, Patrick Polden's *A History of the County Court of England*, Margot C. Finn's *The Character of Credit: Personal Debt in English Culture, 1740–1914*, H.W. Arthur's *Without the Law* and the work of Christopher Brooks, especially *Lawyers, Litigation and English Society since 1450*.[16] It is perhaps an irony that to write about people without lawyers, one must spend most of one's time talking about legal professionals. But self-representation only exists as a concept in relation to legal representation, and so they remain indelibly linked.

In addition to the legal historical literature that provides a background to this analysis, this article draws on two primary sources for information about the county courts: first, the House of Commons (HC) and House of Lords (HL) debates that took place around the establishment of these courts, and which took place over a nearly thirty-year period from 1821 until 1849. My research into the HC and HL debates was based on the

[13] By displaced, I refer not to physical displacement (as litigants in person continued, and continue to come), but rather the moment where they are displaced from being "normal" in legal discourse and instead presented as marginalised from the "real work" of courts.

[14] The nineteenth century is a time of far-reaching changes: such developments touch on this research but remain tangential enough that dealing with them directly would take this research too far from the key questions. See R.W. Andrews, *The Supreme Court of Judicature Acts, and the Appellate Jurisdiction Act, 1876: With Rules of Court and Forms to May, 1880* (London 1880). See also M. Lobban, "Preparing for Fusion: Reforming the 19th Century Court of Chancery, II" (2004) 22 L.H.R. 565.

[15] My exclusive focus on the county courts is because it is only through the creation of these courts in 1847 that we begin to hear from unrepresented parties for the first time. This is because it is the first time that the unrepresented litigants start to come routinely into contact with the legal profession in the same court. This means that legal reporters had an incentive to report on proceedings, and to publish in places like the *County Courts Chronicle*, and its parent publication, the *Law Times*.

[16] Finn, *Credit*; P. Polden, *A History of the County Court, 1846–1971* (Cambridge 1999); H.W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in 19th Century England* (New York 1985); P. Brand, *The Origins of the English Legal Profession* (Oxford 1992); C. Brooks, *Lawyers, Litigation and English Society since 1450* (London and Rio Grande 1998); C. Brooks and M. Lobban (eds.), *Communities and Courts in Britain: 1150–1900* (London and Rio Grande 1997).

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online searching of the database of Hansard using "county courts" as the key search term.[17] I read any debate explicitly mentioning the county courts as a means of understanding the grounds on which the legislation establishing the new courts was introduced.

Secondly, and most importantly, this article draws on the *County Courts Chronicle*, a publication that was founded with the introduction of the new county courts in 1847 and which continued until 1920.[18] The *County Courts Chronicle* provides court reports, editorials, discussions of relevant legislative and procedural reforms, and letters to the editor from both litigants and lawyers: as such it offers an unmatched insight into debates taking place around the time. The alteration in the *Chronicle's* style and focus is a useful method of charting the shifts in process relating to the LiP that I seek to identify in this article. As I will show, within a short space of time, the *Chronicle* goes from being a journalistic, almost gossipy, account of cases, many of which have unrepresented parties, to becoming a distinctly different publication in keeping with the development of the professional project.

It is important to note here, though, that although the *County Courts Chronicle* is an invaluable resource, I am aware that there is a danger in relying too heavily on it for evidence of what happened in the county courts.[19] Even in the first year of its publication, where the number of cases reported was significantly higher than the number reported 10 or 20 years later, this was only ever a fraction of the proceedings actually taking place. What we *can* do is consider the reporting in the *Chronicle* as indicative of what was important to the authors (legal professionals) and their audience (largely legal professionals).[20] The diminishment of cases reported involving self-represented parties in later editions of the *Chronicle* does not indicate that they disappear (we know that they do not), but it does tell us that they are marginalised from what is perceived

[17] Other search terms included "small debts" and "small debts act" as the working title for some of the earlier proposals that preceded the County Court Act.

[18] *The County Courts Chronicle* was absorbed into the *Law Times* in 1920 and ceased to be a separate publication before disappearing altogether.

[19] My exclusive focus on the *County Courts Chronicle* is largely a matter of necessity; it is the only paper reporting regularly on the county courts. Its parent and sister publications (see n. 20) do also on occasion write stories about the county courts and where relevant they have been included. However, until 1855 with the abolition of the stamp duty on newspapers, there is not a wider press to report on cases. After stamp duty abolition, local presses begin to run stories on the county courts and again, where this is relevant, they have been included. For more information on the development of press on legal proceedings, see M.P. Jones, *Justice and Journalism: A Study of the Influence of Newspaper Reporting upon the Administration of Justice by Magistrates* (Chichester 1974), pp. 38–39.

[20] While I have been unable to find any explicit circulation figures, the publishers of the *CCC* were also those involved in the publication of legal circulars, most notably the *Law Times* which began in 1843 and ran until 1965, billing itself as a publication for "law and lawyers". Its sister publications included *The Jurist*, *Solicitors' Journal* and *Legal Journal.* We can therefore speculate that the *CCC* was for a select, mainly legal professional, audience. A *Chronicle* entry described it as "well known" as the "organ of the legal profession". *CCC*, 1 March 1858. See also E. Sunderland, "The English Struggle for Procedural Reform" (1925) 39 H.L.R. 725, at 734.

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to be the "real work" of the courts, or at the very least that they are marginalised from the dominant interests of that publication: that of legal professionals arguing matters of legal interest.[21] It is this marginalisation that I argue to be critical to how the concept of the LiP developed.[22]

III. The Professional Project

An important theoretical building block for this research is the work of Magali Sarfatt Larson, whose 1977 work *The Rise of Professionalism: A Sociological Analysis* outlines what Larson terms the "professional project". For Larson, the professional project is:

> the process by which producers of special services sought to constitute and control a market for their expertise. Because marketable expertise is a crucial element in the structure of modern inequality, professionalization appears also as a collective assertion of special social status and a collective process of upward social mobility . . . Professionalization is thus an attempt to translate one order of scarce resources – special knowledge and skills – into another – social and economic rewards.[23]

Larson's work emphasises the uncrossable gap between lay and law, arguing that this gap is a deliberate consequence of this professional project. In this respect, Larson's work chimes with the scholarship of Pierre Bourdieu, whose 1987 article "The Force of Law: Towards a Sociology of the Juridical Field" establishes this gap as a conceptual framework that reinforces the relative autonomy of the juridical field.[24] Similar to Bourdieu's idea of *habitus*, Larson too does not claim that such a project is necessarily a conscious undertaking.[25] As she notes, when she uses the term: "it does not mean that the goals and strategies pursued by a given group are entirely clear or deliberate . . . [T]he term 'project' emphasises the coherence and consistence that can be discovered ex post facto in a variety of apparently

[21] Polden, *County Court*. The fact that the only publications reporting on county courts are legal publications, of course, suggests the potential issue that any representation of self-represented litigants is going to be more likely to be cast in a negative light. However, I believe the focus is justified for two reasons: first, because the way in which lawyers perceive self-represented litigants is in fact foundational to the notion of a litigant in person, and so the refracted lens of the *Chronicle* is incredibly useful for charting this. Secondly, we know from other sources, and from the work of scholars like Paul Johnson, that litigants representing themselves persist, even if they are not talked about; see P. Johnson, "Creditors, Debtors and the Law in Victorian and Edwardian England" (1996) *LSE Working Papers in Economic History* No. 31/96.

[22] My analysis of the *County Courts Chronicle* is based on searching the database Newspaperarchive.com which provides access (at a fee) to editions of the *Chronicle* from the year 1846 onwards. However, while online editions are available until 1904, and the publication itself continued for sixteen years after this online database ends, I chose not to continue to read further than the 1890s as, by this time, the term LiP had been well established and was appearing in multiple contemporary newspapers.

[23] Larson, *The Rise of Professionalism*, pp. xvi, xvii.

[24] P. Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field" (1987) 38 Hastings L.J. 805.

[25] P. Bourdieu, *The Field of Cultural Production: Essays on Art and Literature* (New York 1993), pp. 162–64.

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unconnected acts."[26] In this respect, this article draws on Larson to illuminate *retrospective* developments but does not suggest that there is a simple, structuralist account of such complex changes. Ultimately, long-term alterations in practice come down to a complex web of individual behaviour shaped by social belief and education, such as is illuminated by the scholarship and contemporary accounts of commentators, legal historians and those who study the legal profession.[27] However, what makes Larson's work of particular value is her attention to how the dual goals of the professional project – consisting of both monopolisation of the market and the attainment of social status – develop. Laying out the historical development of professions, Larson traces the way in which professions emerge in the nineteenth century in a political and economic context marked by the emergence of new markets and the movement of rural populations towards urban centres. As she notes, "the modern model of profession emerges as a necessary response of professional producers to new opportunities for earning an income".[28]

Larson argues that critical to the development of a profession is attention to standardisation of practice, the development of a "cognitive commonality", and the move to eliminating any competition from unregulated actors. All of these tendencies are oriented towards the ultimate goal, which is the social distancing of these professionals from non-professionals, and the consequent status that arises from this distinction.[29] I draw on Larson's work to argue that much of the difficulties that LiPs experience is a by-product of this professional project. Seen through the lens of the professional project, LiPs are not simply laypersons. Instead they are also individuals who are not appropriately educated, regulated, licenced or trained to be taking on legal work. This analysis opens up another possibility as to why LiPs are talked about pejoratively. This is not only because they are deemed insufficiently competent, but because their growing presence constitutes a threat towards the monopoly of the legal profession.

Finally, it is important to nuance Larson's framework with close attention to the specificities of nineteenth-century legal practitioners. For this purpose, the work of Christopher Brooks is essential. As Brooks persuasively argues, rather than seeing the nineteenth century as a time of the "rise of professions", the specific case of the law might better be described as a *re*professionalisation that takes place during the nineteenth century after a significant period of decline in the seventeenth and eighteenth centuries. As Brooks notes, this earlier period was marked by a significant decline in practitioners as well as a falling off of standardisation of methods

[26] Larson, *The Rise of Professionalism*, p. 6, n.
[27] Polden, *County Court*, pp. 815–19. Contemporary accounts are provided by the *CCC*, *Law Times* and the HC debates.
[28] Larson, *The Rise of Professionalism*, pp. 9–10.
[29] Ibid., at p. 77.

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of admission to the profession. Brooks argues that it is therefore not clear that lawyers map on to what "might be called a classical agenda of 'professionalisation'". For Brooks, the risk of applying contemporary theories of professionalisation, such as Larson's model, is that of anachronism. Instead he suggests that:

> [r]ejecting professionalisation as a characterisation of the way the present differs from the past opens the door to a consideration of lawyers for what they were: a diverse group of people who were at the centre of the creation and exchange of one of the major social discourses of the day: the set of norms, practise and ideologies known collectively as "the law".[30]

I would argue, however, that it is possible to take into account Brooks's caution without having to dismiss Larson. It is clearly essential to be careful about any overarching or simplistic claims that obscure the diversity of those practising within the profession. However, this does not stop a framework of professionalism being useful for charting developments that affect self-represented parties without falling into anachronism. As such, I will draw on Brooks's and other historians' research on the legal profession throughout this work to qualify Larson's thesis.

IV. Before 1847: Self-Representation in Civil Proceedings

The presence of self-represented parties in civil proceedings is a long-standing feature of English legal history.[31] As Paul Brand notes: "England before the middle of the twelfth century was a country without professional lawyers largely because there was little for them to be expert about."[32] Prior to the emergence of the legal profession, litigants brought their suits in person. The introduction of specialised King's Justices and tribunals created the initial need for specialists. From the thirteenth century onwards, the courts used a writ system that required legal experts to advise litigants as to which of the recognised causes for action inhered in their particular case; whilst the details were recorded orally from the litigant, it was then written down by the clerks of Chancery.[33] There were also professional pleaders who presented the case in court.[34] The superior courts were therefore dominated by legal representatives from a very early point, as they relied on expertise in substantive issues and pleading.[35] Once representatives were involved, their involvement raised the costs of

[30] Brooks, *Lawyers*, p. 186.
[31] For the parallel story of criminal proceedings, see J. Langbein, *Origins of Adversarial Criminal Trial* (Oxford 2003).
[32] Brand, *Origins*, p. 5.
[33] Ibid., at p. 34.
[34] By the time we reach the establishment of superior courts under Henry II, we have courts where Brand notes almost all litigants were "outsiders", ibid., at p. 69.
[35] P. Tucker, "London's Courts of Law in the Fifteenth Century: The Litigant's Perspective" in Brooks and Lobban (eds.), *Communities and Courts in Britain*, p. 29.

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appearance, thus excluding many individuals who could not afford to hire representatives.[36] It was, simply, probably not a practical option to pursue matters in these courts unless one had money to spend, and potentially to lose. It is therefore misleading to suggest that legal representation ends *any* individual's ability to self-represent. Even before lawyers, this ability was already largely limited to those with resources.[37]

It is apparent, then, that the courts at Westminster were inaccessible to laypersons from an early stage. But these were not the only courts in pre-nineteenth-century England. Self-representation continued to flourish in other courts and tribunals, such as the Anglo-Saxon derived hundred courts and the manorial courts, alongside a host of specialised tribunals that existed throughout England and Wales well into the nineteenth century.[38] Several factors help explain why self-representation continued in these courts: first, many of these courts and tribunals remained primarily oral with individuals able to attend and give their complaints on the day. This meant that disputes were resolved quickly, and also meant that, with no elaborate writ system, literacy was not necessary.[39] Secondly, there was no need for legal expertise as adjudication was not necessarily bound by precedent, and there were no superior courts to which these courts had to answer.[40] Finally, these courts were held locally, making them not only more physically accessible to those who could not travel to London, but also tribunals that could dispense a kind of communal justice that the Westminster courts could not.[41]

This is obviously a simplified overview of diverse and complex tribunals. But I provide this narrative to draw out two important points for this article. First, it is inaccurate to claim that self-representation becomes impossible only in the nineteenth century. Self-representation always required facilitation by certain factors to be effective: proceedings that are oral, and forms of adjudication that do not rely on knowledge of legal doctrine. It is when litigants lose access to these kinds of proceedings that self-representation becomes more difficult. Secondly, understanding that England is a landscape of multiple courts and tribunals in the mid-nineteenth century helps to understand the impact of the County Courts Act 1846. This is

[36] See M. Hastings, *The Court of Common Pleas in the 15th Century* (Ithaca 1947), p. 169.

[37] Brand, *Origins*, p. 9. It is important to note, however, Brooks's research demonstrating that a wider section of the population accessed early modern courts than has been assumed to be the case. See Brooks, *Lawyer*s, pp. 15–16.

[38] For an overview of this multi-court landscape, see Arthurs, *Without the Law*.

[39] Some tribunals required an initial written plaint, but the clerks at the courts themselves could draft this on the oral application of the plaintiff.

[40] This is not the case for the Eyres, which did employ common law and which travelling King's Justices established from 1176 without legislative authority.

[41] For a fuller account of communal justice and local courts, see J.H. Baker, "The Changing Concept of a Court" in J.H. Baker (ed.), *The Legal Profession and the Common Law: Historical Essays* (London 1986).

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because this Act does not simply create a new court for litigants; it replaces another one – the courts of requests.

V. The County Courts and the Courts of Requests

The County Courts Act 1846 came into force in 1847. This Bill, which was debated, drafted and redrafted over a nearly thirty-year period,[42] did not create county courts, which in fact already existed, but was intended to reform them in order to provide an accessible and inexpensive forum for pursuing small debts.[43] The superior courts were accessible only to the wealthy, required legal representation, and were criticised for their "dilatory" proceedings. Joseph Parkes, writing about his own experience of the Warwick Assizes of 1827, says: "I brought an action for £25. It was defended; six witnesses, besides the respective attorneys and parties, attended five days: I obtained a verdict: my costs to the defendant were £66, and probably his own costs due to his attorney would be an additional sum of £50; thus the original debt in dispute was more than quadrupled."[44] In addition, by the 1300s, the superior courts were applying a rule that they would not give judgment for damages under 40s., and this amount remained in place by the 1800s.[45] Although the relative value had decreased markedly, meaning 40s. was less than 500 years ago, it still amounted to more than a trivial sum in the nineteenth century. The fact that a suit's importance was formally determined by how much financially was at stake, barring it from the superior courts was criticised by Jeremy Bentham, among others: "What to one man may be trivial, to another may be of high importance. In pecuniary cases, the smaller the sum in dispute the less reserve is used in branding the conduct of parties with the charge of litigation, of which, in such cases, the reproach is apt to fall principally, if not exclusively, to the plaintiffs share."[46] As Bentham, and other contemporary commentators, including Sir Robert Peel, Viscount Althorp and Lord Falconer, argued, the arbitrary corollary between financial value and merit misrepresented what the value of the suit may be for the individual bringing it.[47]

[42] Polden, *County Court*, pp. 5–37.

[43] As I go on to outline, the new county courts both replace the old county courts *and* close down the courts of requests. See HC Deb. vol. 10 cols. 303–4 (23 February 1824). See also Finn, *Credit*, pp. 236–77.

[44] J. Parkes, *The State of the Court of Requests and the Public Office of Birmingham, with Considerations on the Increase and Prosecution of Crime in the County of Warwick, Etc* (Birmingham 1828), p. 5.

[45] The Statute of Gloucester c. 8 from 1176 stated that writs for goods had a minimum value of 40s. but this appears to be a separate financial floor from the above, which was superior court practice from around this time but never formally linked to it.

[46] J. Bentham, *A Protest Against Law Taxes* (London 1795), pp. 34–36.

[47] See R. Peel, HC Deb. vol. 17 cols. 1350–61 (20 June 1827). See also Lord Brougham, HC Deb. vol. 24 cols. 243–89 (29 April 1830).

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This statute meant that any suits of lesser value had to be pursued in the lower courts. And the existing county courts were considered by many to be as bad as the superior courts. These courts shared the charges of delay and expense levelled at the superior courts, but were also regularly accused of corruption and criticised for their infrequency.[48] John Smith, in an early HC debate on county court reform:

> [p]resented a petition from the inhabitants of Brighton, complaining of the serious evils which arose from the abuses of the practice of the County Courts . . . among others he mentioned the case of a poor woman, who was sued for a debt of 14s., and an execution being taken out against her for that sum, and for 15s. costs upon it, her goods were seized for a sum considerably exceeding the amount of both debt and costs; her bed, her pillows, and several other articles of furniture were taken from her . . . nothing was returned.[49]

Politicians and jurists, then, proposed the county court legislation ostensibly as a means of extending justice to poorer litigants, and as an explicit reaction to the inaccessibility of the current courts.[50] However, although there were altruistic motives involved, the legislation was less about giving access to justice for poorer litigants than allowing tradesmen to pursue poorer individuals for debts.[51] Most importantly, the implication of comments made by figures such as Lord Falconer is that the Act was needed to provide courts where there were no courts before, or only the bad old county courts.[52] But this assumption ignores the courts of requests.

Courts of requests were courts where cases were decided locally according to "equity and good conscience". As Shaunnagh Dorset points out this means that such a court was:

> neither a court of common law nor equity, and decisions were to be made according to the more discretionary norms of "real justice and good conscience" . . . [S]uch courts were designed to allow matters to be determined in a manner that was shorn of the need for technicalities, difficult pleading or even lawyers, and they were often run by laypersons.[53]

As Margot Finn argues, courts of requests practice was one of "equitable reasoning". This equitable reasoning "referred less to the formal practices of the central court of Chancery, than to tempering the strict letter of the law by taking account of particularistic, mitigating personal circumstances".[54]

48 Arthurs, *Without the Law*, p. 16.
49 J. Smith, HC Deb. vol. 17 cols. 297–9 (9 April 1827).
50 Ibid.
51 See Johnson, "Creditors, Debtors", pp. 1–32.
52 Indeed, this is precisely the case made in one of the earliest pamphlets directly discussing "accessibility of justice' published in 1830. See Editorial, "Mr Brougham and Local Judicatories" (1830) 13 Westminster Review.
53 See S. Dorset, "Destitute of the Knowledge of God: Maori Testimony before the New Zealand Courts in the Early Crown Colony Period" in D. Kirkby (ed.), *Past Law, Present Histories* (Canberra 2012), pp. 46–47.
54 Finn, *Credit*, p. 205.

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Each court of requests was a separate entity created by local municipal statute.[55] The cases in question in these courts were usually small and the procedures were relatively simple, and parties could testify in person.[56] The courts of requests were also popular. By 1847, these courts existed in over four hundred locations and dealt with several hundred thousand suits annually, with the "defendants derived overwhelmingly from the lower and working classes".[57] This was where the majority of small debts claims were made, alongside a host of other kinds of minor disputes. As H.W. Arthurs puts it: "It is hardly an overstatement to say that, for most Englishmen of the period, the local Court of Request dispensed the only form of civil justice they would ever know."[58] Far from there being no forum for litigants pursuing small claims, there were courts already operating that were successful.[59]

So why do the drafters of the County Courts Act 1846 argue that the new county court is needed? One explanation is that the courts of requests were no place for those who considered themselves members of the legal profession.[60] As a *Chronicle* correspondent would note later: "Courts of request were bear gardens in noise and confusion, and their character was at the lowest ebb."[61] While there is some evidence of attorneys involved in the courts of requests, such individuals were looked down on as debasing the reputation of the profession.[62] Courts of requests do occasionally appear in the HC debates about the new county courts, but are not depicted in a flattering light. Lord Brougham expresses a typical attitude here: "It happens that tradesmen, who know nothing of law, and who may not have much occupation in their own business, preside in these Courts of Request, and administer justice as well as might be expected. I say it is better to have these courts and these judges than to have none."[63] So, while the courts of requests were considered to serve a purpose while there was no better alternative, they were generally considered beneath the dignity of the profession.[64]

55 Ibid., at p. 47; Polden, *County Court*, p. 47.
56 Ibid. See also Arthurs, *Without the Law*, p. 26. Testifying in person is distinct to self-representation, referring to a party in the case giving a sworn account of what happened to a court.
57 Finn, *Credit*, p. 18.
58 Arthurs, *Without the Law*, p. 26.
59 See Polden, *County Court*, p. 11.
60 A barnstorming address by the Lord Chancellor in 1830 outlines the reasons to "absorb" the courts of conscience or requests and create the new county courts. It can be found in HL Deb. vol. 1 cols. 707–40 (2 December 1830).
61 *CCC*, 1 July 1847, p. 34.
62 Finn argues that there is "active hostility" to the profession in these courts of requests, with Bath banning legal professionals from acting as judges and fining attorneys £20 for appearing in court, and with this practice and attitude being "commonplace". Finn, *Credit*, p. 205. See also Brooks, *Lawyers*, p. 42.
63 Lord Brougham, HC Deb. vol. 24 cols. 243–89 (29 April 1830). See also Caldwell, quoted in Finn, *Credit*, p. 221.
64 *The Legal Observer* or *Journal of Jurisprudence* notes in 1830: "It is a striking and important fact that public opinion has always been against such courts as are now contemplated. The decent part of the community feel it discreditable to resort to them, and even the very rabble despise them" (vol. 1, p. 104).

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But another, more persuasive explanation for why the courts of requests are replaced, can be found through examining the criticism in closer detail. Such criticism demonstrates that, for many in the legal profession, the courts of requests were not just undignified, they were not *courts* at all. The language of the criticism evidences this: these courts were, as above, described as "bear gardens".[65] Other commentators refer to them as "but tribunals".[66] Such language is more than a character assessment: it is a policing of boundaries, symptomatic of what John Griffiths identified as "legal centralism". Griffiths defines legal centralism as the idea that: "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."[67] Courts and tribunals operating outside of the auspices of this central administration are therefore not real courts. But legal centralism is a claim, not a fact. As Marc Galanter comments in his article on indigenous law and legal pluralism: "Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions."[68]

Following Griffiths and Galanter, the County Courts Act 1846 can be read as an ideological claim to a specific kind of justice – a justice that can only be found via the legal profession. The statute's preamble explicitly states that: "it is expedient that the Provisions of such Acts should be amended, and that One Rule and Manner of proceeding for the Recovery of Small Debts and Demands should prevail throughout *England*."[69] As such, the County Courts Act is more than simple reform: it is part of a wider thrust of legal centralisation taking place throughout the nineteenth century, dismantling unregulated courts and transforming them into new areas of practice for the profession.[70]

The County Courts Act, then, is drafted to provide *proper* courts for poorer litigants. These new courts will be overseen, and ideally frequented, by legal professionals.[71] As Patrick Polden states: "from the point of view of the profession . . . it was imperative that the county courts should be established on a basis that would give lawyers access to a lucrative new area of practice."[72] Here we see the mix of altruism and self-interest that largely characterises these developments. So, while it would be overstating to say that the new county court was established purely in the pursuit of a professional monopoly, it would be naïve to believe that this was not also a

[65] *CCC*, 1 July 1847, p. 34.
[66] Ibid.
[67] J. Griffiths, "What Is Legal Pluralism?" (1986) 18 J. Legal Plur. 1, at 3.
[68] M. Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1981) 13 J. Legal Plur. 1, at 10.
[69] Preamble, County Courts Act 1846.
[70] H.W. Arthurs, "Without the Law: Courts of Local and Special Jurisdiction in Nineteenth Century England" (1984) 3 J.Leg.Hist. 130, at 143–44.
[71] Larson, *The Rise of Professionalism*, pp. 9–10.
[72] Polden, *County Court*, p. 43.

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factor in its development.[73] In keeping with Bourdieu's sociological theory, instead, we can see these two motives are entirely blended. It is not the case that the legal profession want a monopoly of the new courts purely out of self-interest.[74] Instead, they genuinely believe that their presence will serve the ends of justice.[75] This attitude is exemplified in this *County Courts Chronicle* editorial in the year the Bill passed: "There is undoubtedly an inclination at present to stand aloof from the County Courts – to look upon the practices as *low*, and to leave it to the lowest grade of practitioners … But this is a grievous mistake, and if persisted in will be seriously injurious both to the Courts and to the Profession."[76]

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

VI. An Occupational Hierarchy

At this point it is far too simplistic to keep referring to the "legal profession" as a monolithic group, particularly if we want to understand what happens in the county courts and how it affects self-represented parties. This is because the legal profession, like any other profession, has its own occupational hierarchy. More than that, the status of the law as one of the "older professions" means that its professional structures were developed earlier than that of many other professions.[77] While it is important not to get lost in these histories, it is essential to note the gap between members of the profession who practised at the Bar and those who occupied a lower status in the profession – the rank-and-file attorneys and solicitors. While such divisions persist in different forms today, these divisions historically cut deeper. They were indicative of a distinct class difference: those admitted to the Bar came from loftier backgrounds, compared with attorneys and solicitors who were from humbler origins.[78] In the pre-nineteenth century, this division denoted the difference between practitioners at the Bar who were considered "gentleman", and those who were seen *by* the Bar as merely working for money.[79]

[73] Ibid.

[74] Christopher Brooks notes: "there was a conflict between the professional desire to maintain a monopoly over specialised fields of knowledge and the belief that these were too important to society at large for them to be withheld". *Lawyers*, p. 234.

[75] Bourdieu, "The Force of Law", p. 819.

[76] *CCC*, 1 July 1847, p. 33; see also p. 35 on legal professionals giving "character" to a court.

[77] Law is considered to be one of the "old professions", along with medicine and the Church.

[78] This is arguably still the case for the Bar, whose members are disproportionately drawn from Oxbridge and public schools. See M. Blackwell, "'Old Boys' Networks, Family Connections and the Legal Profession" [2012] P.L. 426.

[79] D. Duman, "The Creation and Diffusion of a Professional Ideology in Nineteenth Century England" (1979) 27 The Sociological Review 113, at 115. See also D. Duman, "Pathway to Professionalism: The English Bar in the Eighteenth and Nineteenth Century" (1980) 13 Journal of Social History 615, at 622.

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This was of course not the case for attorneys who lacked these social privileges and who were dependent on a steady income to survive. But the late-eighteenth and early-nineteenth century was a time of radical changes: new markets opened up in new urban centres, and the class structure of the whole country changed with it, from one structured on landowners and peasants, to one centred around the market.[80] The consequences for the legal profession of these changes are significant. While up until this point, the Bar had thrived on a pre-nineteenth-century guild-like exclusivity, at this time, as T.H. Marshall notes: "The professional had to change his ground. He had to admit that his occupation was laborious, like the tradesman's – and even to glory in the fact – but to assert that it was labour of a superior kind. The idea of service became more important than the idea of freedom."[81]

In the legal profession, this changing of ground happened at both the higher and the lower ends: the Bar re-oriented itself, subscribing to a model of service. But large sections of the "lower rungs", increasingly made up of the new, socially-mobile middle class, were also eager to improve their own prospects. But this did not preclude a continuing emphasis on the division between barrister and attorneys. As Brooks notes: "Drawing heavily on classical antecedents and humanist approaches to jurisprudence, the Inns of Court and the Bar claimed that theirs was a scientific subject which involved 'liberal' learning. By contrast, the attorneys were often described as merely 'mechanical' practitioners of a distinctly lower social and political status."[82]

An illustration of the Bar's sense of being superior, both in education and in class, is evidenced in the *County Courts Chronicle* in 1848, where the speaker – a barrister – emphasises the "superior" class of practitioners at the Bar: "the Bar look upon the judges as one of themselves, and only of equal rank and status in society. But the attorneys are of a class below the Court in professional, rank, and have not the same status in the world."[83]

The division between upper and lower rungs of the legal profession was therefore not simply a social one, but was actively policed. Attorneys were discouraged from joining the Inns of Court and could only join the Bar if they "abandoned their practice in the lower branch for at least two years before being called".[84] In short, at the time of the founding of the county courts many areas of practice in the superior courts were inaccessible to

[80] Marx and Engels identified this as central to the development of the "cash nexus". See K. Marx and F. Engels, *The Communist Manifesto* (London and New York, 2013), 61.

[81] T.H. Marshall, "The Recent History of Professionalism in Relation to Social Structures and Social Policy" (1939) 5 The Canadian Journal of Economics and Political Science 325.

[82] Brooks, *Lawyers*, p. 150.

[83] *CCC*, 1 March 1848, p. 193. Attempts to restrict access to advocates in favour of the Bar were met with anger and virulent debate: see also the *Law Times* 19 (3 July 1852), p. 117.

[84] Larson, *The Rise of Professionalism*, p. 11.

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the lower rungs of the profession because they did not have rights of audience, with the Bar enjoying a total monopoly on superior court advocacy.

In this context, then, the new county court becomes critically important because it offers a new site of practice to attorneys and through them, a means of establishing themselves and becoming recognised advocates.[85] Such a move could both distinguish them from lay practitioners as well as allow them to access areas of practice previously the exclusive reserve of barristers.[86] This echoes Larson's argument of the "double" nature of the professional project which "intertwines market and status orientations, and both tend towards monopoly – monopoly of opportunities for income in a market of service, on the one hand, and monopoly of status in an emerging occupational hierarchy, on the other".[87] The new county courts were therefore not only a new forum for poorer litigants to pursue debt claims or a new area for legal professionals to expand into. They were also an opportunity for attorneys to stake a claim to be taken seriously as advocates. And it is when attorneys begin staking their claim that the LiP begins to emerge.

VII. The Early Years of the County Court

In June 1847, the first edition of the *County Courts Chronicle* was published, advertising itself on its masthead as a monthly publication by the editor and contributors of the *Law Times.* At this point, the courts themselves had been in operation for less than two months. The front cover is dedicated to notices of the next county court sessions on each circuit, followed by seven pages of law reports from across the country. The bulk of the rest of the publication is devoted to specific subsections on particular roles. The mission statement the *Chronicle* outlines for itself is: "to provide for all who are engaged in the County Courts, whether as Judges, Clerks, Bailiffs, Practitioners or Suitors, a medium for mutual information and intercommunication on the matters relating to the administration of justice by a tribunal which is of incalculable importance."[88]

The tone of the first edition is journalistic and experimental. The *Chronicle* itself acknowledges the provisionality of its current layout and arrangements, and the court reports themselves frequently give descriptive accounts of the circumstances of the courts in addition to specific cases. For example: "Narbeth, May 20. There were thirty-six cases entered. The courtroom, which is much too small, was crowded to excess with upwards of

85 As Paul Johnson notes, although there was never an acknowledged "County Court Bar", it was attorneys (and later, solicitors) who gained a near monopoly on representation in the new county courts. Johnson, "Creditors, Debtors", pp. 11–12.

86 For more discussion on the relevant merits of attorneys versus barristers, see also: *CCC*, 7 January 1850, p. 14; *CCC*, 1 March 1870, p. 63; *CCC*, 2 March 1868, pp. 81–82; *CCC*, 1 February 1868, p. 53; *The Jurist*, 26 June 1852, p. 205.

87 Larson, *The Rise of Professionalism*, p. 79.

88 *CCC*, 1 June 1847, p. 11.

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100 persons being obliged to wait in the street outside."[89] In the reports themselves, self-representation is clearly common, with up to half the cases in the first half a dozen issues involving at least one individual appearing in person, if not on both sides. It is difficult to make any estimates of the proportion of self-representation in general because the reports are only of a fraction of the cases that were heard. But it is reasonable to assume that an even higher proportion than that which appears in the law reports self-represented in actuality.[90] This is because there is an explicit agenda on the part of the *Chronicle* to report cases of *legal* interest. For example, in Berwick, on 29 May: "At the first Court there were twenty-five cases entered, while at the last there were upwards of sixty. The only case interesting to that of the Profession" was followed by an account of a dispute between an agent and a represented defendant.[91]

For a case to be of legal interest the concept must be understood in legal terminology: this is more likely to arise in cases with represented parties. Consequently, matters of unrepresented parties are more likely to go unreported. However, although the *Chronicle* is staffed by members of the profession, with their concomitant clear interest in drawing out relevant legal issues, the publication commits itself to the interests of self-represented parties as well as that of the profession. The *County Courts Chronicle* dedicates a section to the "Suitor", in other words, to the litigant, who was more likely than not to be self-representing. This section is filled with information that is intended to assist such individuals. As the editor explicitly states in the epigraph opening this article, a Suitor in person and an attorney representing a client are of equal dignity and status.[92] At this point, then, we may safely observe that self-representation is seen by the authors of the publication as relatively normal.[93]

So, although I have made much of the radical transformation resulting from the County Courts Act 1846, it began as an attempt to combine the introduction of more professional practices without completely dismantling what came before, thus retaining enough of the old courts of requests to ensure the new court's popularity. This hybridity can be seen in several ways. To start with, and crucially, the County Courts Act clearly outlines the right of trained attorneys to represent litigants and restricts the ability of other third parties to act as representatives[94]: "[o]ne of the most serious

[89] Larson, *The Rise of Professionalism*, p. 3.
[90] An 1858 commentator notes that "for the most part the business of the court is either conducted without the assistance of professional men" or by unlicensed attorneys. See *CCC*: 2 July 1855, p. 131; 1 February 1853, p. 25; 1 February 1852, p. 26; 9 August 1850, p. 513; 1 March 1859.
[91] *CCC*, 1 June 1847, p. 4. This is echoed by the account from 27 April session at Whitby: ibid., at p. 6.
[92] Ibid., at p. 10.
[93] From the beginning of the *CCC* the normality of being unrepresented was linked to the perceived simplicity of the case. See in particular *CCC*, 1 July 1855, p. 131; *CCC*, 1 February 1860, p. 15. For more evidence on the normality of individuals representing themselves, see *CCC*, 2 July 1860, pp. 15–16.
[94] This includes those who were not legal professionals but who still acted for others, including family members or work colleagues, in a paid or unpaid capacity. The early days of the county court show

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evils to which the suitors resorting to inferior tribunals have been exposed – that of being duped into the employment of sham practitioners – has already received a very decided check from the Judges presiding at Southwark and in Bloomsbury."[95]

Indeed, who had the right to appear, for whom and under which circumstances is a critical issue.[96] The crackdown on unregulated individuals is one Larson argues is characteristic of the professional project, and it receives regular and consistent coverage in the *Chronicle* over the years.[97] At the same time, in the early days of the county court a fees cap is in place, stopping legal representatives from claiming costs from the court in any proceedings less than 5l (£5).[98] This means that the county courts were working towards greater regulation of the profession by weeding out third parties, but also restricting access to legal representation in practice as the majority of disputes fell below this threshold.[99] This is in keeping with the intention stated by the initial proposers of the new county courts that they would be as accessible and simple as possible.[100]

There is also a clear attempt to link the county courts to the superior courts in an effort to legitimate them: the *Chronicle* advises that the judges keep an eye to the "dignity", "decorum" and "tone" of the superior courts. The following extract is typical of these kinds of editorials:

> The new courts, for all practical purpose, dispense very nearly the same law as the superior courts, and have jurisdiction over almost as many subjects. True, the amount is limited; but that does not affect the real importance of the Courts; for the same legal questions, the same philosophy of evidence, the same care in the judgment, the same skill in the advocacy are required, whether the sum in dispute be 20l or 50l.[101]

some instances of family members being allowed to act as proxy, and others where they are not. This inconsistency is rectified through the increased crackdown on any unrepresented parties, meaning family members and agents alike were prevented from representing a claimant or defendant. There is an interesting link to be made here between the desire of the legal profession to stamp out non-legal representation and the later relationship between the courts and McKenzie Friends.

95 *CCC*, 1 July 1847, p. 28.

96 For more on the fascinating question on who has the right to appear, and the role of women as agents, see Finn, *Credit*, pp. 255–57.

97 See e.g. *Martin v Marshall*, *CCC*, 2 August 1847, p. 43. See also CCC: 1 April 1848, pp. 9–15; 1 June 1848, p. 270; 1 January 1849, pp. 21–22; 1 May 1849, p. 119; 1 December 1856, pp. 231–32; 2 February 1857, pp. 37–38; 1 July 1858, p. 161; 1 September 1859, p. 121; 1 April 1862, p. 92; 1 July 1862, p. 140; 1 June 1865, p. 122; 1 January 1869, p. 313; 1 January 1869, p. 2; 1 May 1863, p. 85.

98 County Courts Act 1846, s. 91.

99 There are no court statistics available from the early days of the county court; however, the *CCC* publishes court statistics for 1867, which notes that of 872,437 plaints issued, 864,193 were issued for sums under 20l. Whilst this is more than the 5l limit described above, it is still evidence that the vast majority of cases dealt with in the county court 20 years into its existence were still overwhelmingly very small debts. See *CCC*, 1 January 1868, p. 27. Another bulletin on court statistics comes in the following year: see *CCC*, 1 November 1868, pp. 541–42.

100 See R. Peel, HC Deb. vol. 17 cols. 1350–61 (20 June 1827).

101 *CCC*, 1 July 1847, pp. 34–35. See also *CCC*: 2 December 1867, p. 282; 1 May 1858, p. 112; 1 August 1868, p. 187.

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On the one hand, this is reflective of the concerted desire to get these county courts more in line with the "dignity" of superior court proceedings, thus making them an appropriate forum for respectable professionals. But, on the other hand, there was still no appeal avenue *to* the superior courts for the vast majority of cases. As the Newcastle County Court judge points out: "I am not bound by the specific rules of practice of the superior courts, nor by those of the County Court."[102]

The attempt to achieve this new hybrid court, where professional standards could be introduced, while informality and simplicity could be retained, runs into difficulties quickly. We can see this in the cases reported in the *Chronicle* in the 1840s. For example, in *Phillips v Edwards*, the plaintiff in person fails to make out his case and applies for an adjournment: this is granted but only on condition he pays the defendant's costs for attendance that day. But in Newcastle, an illiterate man who fails to bring his daughter to assist him in his plaint is also allowed to adjourn without paying defendant costs.[103] In Warwickshire, the judge states that he will not allow anyone to speak for the plaintiff except a member of the plaintiff's family, but in *Phillips v Edwards*, the brother of the party asking for adjournment is not allowed as the judge refuses to recognise him.[104] Similarly, in *Lloyd v Jones* the judge will not recognise the plaintiff's wife.[105] Inconsistencies between judges emerge very early, indicative of the separate municipal existence of the previous courts of requests.[106]

This also means that the question of who should have *legal* representation, and under what circumstances, also varies. Many judges expressly argue that they want to encourage the presence of attorneys in the new county courts.[107] But other judges argue that legal representation is unnecessary, stressing that lawyers are a "luxury, not a necessity".[108] In *Jennings v Shepherd*, "His Honour said he should be glad to allow costs where there was any necessity for an attorney's attendance; but in ordinary cases he should not, nor would he lay down any rule, but judge each case *per se*".[109]

[102] *CCC*, 1 June 1847, p. 1. At the time the judge states this (1847), there are no formal practice rules for county courts, nor do county court decisions bind other county courts in horizontal precedent. Consequently, the judge is free to make a determination not based on any other court's judgment. According to the County Courts Act, only sums over the value of £5 could be taken to an appeal court, and only at the discretion of the judge. County Court Act 1846, c. 95, s. XC.

[103] *CCC*, 1 June 1847, p. 1.

[104] Ibid., at p. 2.

[105] Ibid., at p. 2.

[106] These inconsistencies are particularly marked on the question of who has the right to appear in court. There is, as previously noted, a clear desire to crack down on the uncredentialed "sham lawyers". But at the same time, sympathetic commentators note that the majority of those who wish to pursue a claim are tradespersons who have multiple business responsibilities which may mean appearing in person is difficult, but who are seeking relief for such a small amount that employing a legal representative would not be a cost effective decision. See *CCC*, 1 April 1852, p. 45.

[107] This is echoed by the judge in *Martin v Marshall* (2 August 1847).

[108] *CCC*, 1 July 1847, p. 5.

[109] Ibid.

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Lack of consistency is also apparent in the court environment itself, which greatly exercises the *Chronicle* from the beginning. Consider, for example, this memorable account of Brentford County Court in 1847:

> The Court is held at a public-house, in a room capable of accommodating a hundred or a hundred and fifty persons; the judge, clerk, high bailiff, &c being all seated together at a common tavern table, none of them being distinguished by any badge of office . . . there must have been not less than five hundred people present, at the lowest calculation. These were distributed in the court (as many as it would most inconveniently hold), and the rest all over the house nearly, the greater part being on the staircase, and a great many, both there and in the court, intoxicated and withall noisy. The disgraceful confusion which these state of things produced is perfectly indescribable; not to be witnessed, I hope and believe, in any other court of law in the kingdom.[110]

The choice of venue, a public house, draws attention to the lack of dedicated court buildings at this point in time.[111] The writer goes on to note:

> It was the whole work, and hard work, too, of the poor wicket keeper or sub bailiff to prevent regular pitched battles, to say nothing of "words of violence" to check which his continued entreaty was – "Silence, ladies! silence! You really must be quiet, ladies; and go out if you want to talk." But little the "ladies" reckoned, or the gentlemen either, for they still cut their jokes and vented their wrath, as the humour was upon them, in the most boisterous manner.[112]

The gloriously mixed metaphors employed by the distressed attorney above emphasises that what he sees is not what he recognises as proper court practice. This is due to the absence of uniformity and distinction which leads to a lack of respect by the audience and other participants (who, outrageously, feel that they had the right to speak: even *women!*):

> But while these accounts are an entertaining demonstration of the lack of standardisation of practice in these new courts, what they also reveal is the social anxiety felt by these attorneys. Larson notes that: "Without . . . visible signs, respectable common practitioners found themselves helpless against the competition of the unscrupulous and the inept, who proliferated in unregulated markets."[113] I argue, following Larson, that it is the battle for "visible signs" that the *Chronicle* wages in the early years of the County Court.[114]

And this explains why attorneys are so upset by proceedings such as that taking place at Brentford. It also explains why time is spent in the *Chronicle* discussing the regulation of dress. One upset writer complains

110 *CCC*, 1 September 1847, p. 77.
111 See C. Graham, *Ordering Law: The Architectural and Social History of the English Law Court to 1914* (London 2003).
112 *CCC*, 1 September 1847, p. 77.
113 Larson, *The Rise of Professionalism*, p. 12.
114 Polden, *County Court*, p. 43.

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in August 1847 of a professional wearing a "ginger-beer blouse", commenting that it was "wholly out of place and, under the circumstances, disgraceful".[115] While this might come across at first glance as snobbish, it emphasises the importance of distinction in legitimating courts and the practitioners operating within them. Attorneys are trying to work out *what a proper court is* in the shadow of the nineteenth-century superior courts. It is the growth of these markers of distinction that starts to undermine self-representation, as we begin to see from the 1850s onwards.

VIII. The Disappearance of the Self-Represented Party

> To the Editor of the CCC
>
> Sir – I have before now expressed my opinion at some length on the CCs. Perhaps you will allow me however to summarise my reasons for thinking any further extension of jurisdiction in these courts most undesirable. 1. The fact of the many *small* yet *defended* and virulently contested cases between an uneducated plaintiff and an obstinate defendant. Everyone who has practised in the rural districts knows the result: Dreadful waste of time, impeded business, and ruffling of judicial equanimity.[116]

The 1850s, 1860s and 1870s in the county courts was a time of increasing standardisation of practice and creeping formality that manifests in several different areas. By this period, there are codes of rules, all judges have seven years of experience at the Bar and there are qualified registrars.[117] Successive alterations to the statute also raises the ceiling on the amount that can be disputed.[118] The fees cap for attorneys is also continuously raised.[119] This move was, undoubtedly, partially in response to the *Chronicle*'s repeated advocacy. Both changes mean that by the 1860s and 1870s financial recompense was reasonable enough not to exclude attorneys from the county courts, and more begin appearing. At the same time, regulations are tightened to ensure that only credentialed individuals can act as representatives, with an emphasis on weeding out "sham attorneys".[120]

On top of these developments, calls for a greater connection to superior courts result in the eventual fusing of the county courts to the appeal circuit

[115] *CCC*, 2 August 1847, p. 59. For other references to judicial costume, dress and dignity, see *CCC*: 1 August 1868, p. 187; 2 December 1867, p. 282.
[116] *CCC*, 1 December 1870, p. 285.
[117] Johnson, "Creditors, Debtors", p. 11.
[118] This begins at amounts below £20 (or higher amounts if the parties agree that the amount awarded will not exceed £20) in 1847. It is then raised to £50 in 1850 and £100 in 1903.
[119] Section 91 of the original act determines the ceiling of pay awardable to an attorney in the county courts. By 1850 a separate section of the Act (section 6) deals specifically with fees to be paid to attorneys and barristers, with provision stating that it should not exceed 2 pounds 10 shillings and that court costs are to be allocated at the discretion of the judge. This is revisited in 1852, 1856 and 1875, with continual incremental rises in fees before the 1882 reform essentially moving the question of fees into the court costs, thus facilitating an expansion of professional presence.
[120] Larson, *The Rise of Professionalism*, p. 14.

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in the 1870s.[121] This was part of wider, sweeping changes to the courts through the Judicature Acts of the 1870s.[122] This fusion does not result in universal acclaim. As one *Chronicle* correspondent expresses it, such fusion would be "subjecting a sphere to the rule of the square".[123] As he goes on: "we have often to protest against the public's allowing itself to be guided upon questions of law reform by the profession, whose habits or interests are bound up with the abuses."[124] However, this development also reflects the county court's success. By the 1870s it is adjudicating on almost all civil matters, having been granted jurisdiction on bankruptcy and admiralty matters. Common practitioners now have access to areas of practice that had once been completely out of their reach.[125]

These changes are reflected in the *Chronicle*, which by the mid-1850s is a noticeably different publication. By late 1849 the *Chronicle* is reporting relevant superior court decisions.[126] While it is only logical that superior court decisions are reported on once there are precedents that bind the court, the decision to include superior court decisions *before* there are official appeal courts underlines the *Chronicle*'s strong desire to emphasise that the county courts are of equal respectability and scrupulousness to the superior courts. These changes also mean that the county court reports are given much less prominence than originally, with the bulk of reporting now being of superior court decisions.

By June of 1849, there are 18 pages of superior court decisions before reaching the county court decisions (covering less than six pages). Ten years later, in June 1859, the *Chronicle* contains only three pages of county court reports out of 16 pages in total. By June 1869, county courts accounts are no longer listed: the report section is dedicated to superior courts only, and they are grouped together by subject matter (contract, equity and so on).[127] There are four county court reports, each of which reports a single case, represented on both sides, with extended discussion on a point of law for between half a page to two pages. This format continues throughout the 1880s, with it being difficult to find any county court reports in the publication let alone a self-represented party.[128] By 1889 the *Chronicle* is

[121] *CCC*, 6 May 1850, p. 138.
[122] *CCC*, 1 July 1875, p. 163.
[123] *CCC*, 6 May 1850, p. 138.
[124] Ibid.
[125] An account of a Junior Bar meeting in the *CCC* describes this accumulation of jurisdiction as resulting in attorneys effectively "stealing" their work and suggesting they are owed compensation. See *CCC*, 1 February 1868, p. 53.
[126] *CCC*, 1 December 1849, p. 328.
[127] This formula continues into the 1870s onwards, giving for example a table of contents where the subheading under "contract" might be: "Liverpool county court; a novel question of ownership liability" *CCC*, 1 December 1870, p. 266.
[128] Again, it is important to reiterate that the majority of cases in the county court were still small debts, and probably still unrepresented – but in the absence of clear statistics on representation, this remains speculative.

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described as: "a report of cases required in the County Court and argued and determined in the Superior Courts."[129]

Throughout this period, we also see repeated advocacy by the *Chronicle* to formalise procedure even further. The following extract comes from the *Chronicle* in 1870: "I ask why should not a defendant be obliged to set out in writing a statement of his defence, and deliver it to the plaintiff or his attorney within a limited time before the hearing, and that in default the plaintiff be at liberty to sign judgement if the cause exceed a certain criteria?"[130] The idea that defendants should submit written outlines of their defence is not new; in fact the initial proposal came in 1849, two years into the new county courts.[131] But what they *do* point to is the degree to which the presence of legal professionals in the court is normalising the need for legal skills. The argument outlined above is an argument recognisable today: that it is a simple matter to submit a written statement in Plain English. But as we already know, such a requirement is far from a simple task for a self-represented litigant.[132]

And here we see the slippery slope: as more attorneys frequent the county court, legal skills become seen as essential. As a concerned letter writer notes in 1868: "now we fear very much that the extended jurisdiction has been given to the CC without sufficiently providing facilities for the useful exercise of it. Procedure has not been adapted to the needs of the suitors."[133] This shift happens without necessarily recognising how these changes may exclude self-represented parties from being able to act effectively.[134]

IX. A Change in Attitude

The changes taking place in the county courts result in a sea-change in attitude towards self-representation in the *Chronicle* too. In 1852, the *Chronicle* emphasises that "every man has a common law right to appear and conduct his own case in any Court in the kingdom".[135] But The Suitor section has disappeared by August 1849, indicating a presumption of the normality of legal representation even at this early point. From

[129] *CCC*, 1 July 1889.
[130] *CCC*, 1 December 1870, p. 270; see also *CCC*, 1 November 1870, p. 247.
[131] *CCC*, 1 February 1849, p. 49.
[132] It is also during this time that the stamp duty on newspapers is abolished, leading to more press reporting on matters of interest in the courts, including, occasionally that of self-represented parties. For example, in 1860 the *London Observer* reports on *Sneddon v Sneddon*, noting: "In the probate and divorce court, a judgment was given … favourable to the lady who, with so much ability and self-possession, has conducted her own case before the court after her counsel declined to proceed", 12 November 1860, p. 6. The tone of admiration here indicates that those who represent themselves can be looked on in a heroic light – in this case, because the lady had no choice but to represent herself when her counsel would not. The self-represented litigant winning against the odds is a recurring theme, reminiscent of more modern examples, such as the *McLibel* case (*see McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366).
[133] *CCC*, 1 February 1868, p. 39.
[134] This is not always the case. In 1849 the *Chronicle* praises the county court's ongoing use of "plain English" instead of formal pleading. *CCC*, 1 February 1849, p. 44.
[135] *CCC*, 1 June 1847, p. 10.

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1852 to 1862, the section reporting county court decisions is renamed "County Court Curiosities". This section covers "amusing" incidents, frequently ones that occur at the expense of self-represented litigants.[136] A good example of the tone of this section is reported in the memorable case of: "Who "robbed" the dead pig? *Damage to a pig*, 6."[137] In this case, the parties are both self-represented and the dispute is over whether or not the defendant disembowelled ('robbed') a pig to the value of 6 s. of innards against the instructions of the plaintiff. Citing the exchanges verbatim, the report becomes a kind of mini-play complete with laughter from the court, and dramatic escalation, culminating in the plaintiff flopping the pig corpse out onto the courtroom table: "(continued laughter, while plaintiff tumbled the two lumps of pork about the court-table with extraordinary agility, to the great amusement of the spectators)."[138]

Most significantly, in September 1866 the *Chronicle*, reporting an incident involving a self-represented party, comments: "This seems an exemplification of a hackneyed observation that a man who is his own lawyer has not a Solomon for his client."[139] By this time, then, we have a reversal of the original 1849 stance of the *Chronicle* seen in the opening epigraph of this article. As we saw then, there was a commitment to the role of self-representation in the county courts and an implicit presumption of its normality. But less than 20 years later, the idea that an individual would go to the county court without a lawyer is seen as indicative of a lack of judgment.

This belief in self-represented parties' lack of judgment is made explicit by one *Chronicle* writer in 1859 advocating the abolition of trial by jury.[140] The author outlines what exactly legal training gives: "The faculty of hearing without being deluded by sophistry and eloquence … The Greeks fabled that the Goddess of Wisdom sprang fully armed and grown from the head of Zeus. The English seriously believe that judicial wisdom springs forth mature from every tradesman's head. This is a fit article of faith for a nation of shopkeepers."[141]

This argument – that those who were not lawyers lacked the ability to pursue or defend a claim effectively – is common in the *Chronicle* from the

[136] *CCC*, 1 February 1860, p. 14.
[137] Ibid., at pp. 12–13.
[138] Ibid. The reportage of humorous cases, whether involving self-represented parties or not, is common in the wider press mentions of the county courts at the time. Where cases are reported they tend to be those that may be of wider interest – sometimes for legal reasons, but often because they are unusual. For example, multiple papers, including *The Guardian* and *The Patriot* reported on the case of Mr. Samuel Marsden, whose cat had been shot by a gamekeeper. *The Patriot* notes the "considerable amusement" of the court as the defence sought to establish that cats were "*ordo fere naturae*, and therefore worse than worthless". See *The Guardian*, 2 January 1850, p. 9; *The Patriot*, 3 January 1850, p. 2.
[139] *CCC*, 1 September 1866, p. 134.
[140] *CCC*, 1 August 1859, p. 108.
[141] Ibid.; *CCC*, 1 June 1859, p. 66.

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1850s onwards.[142] The irony here is that, while the argument for the necessity of legal skills is initially targeted at weeding out "sham" attorneys, it eventually undermines self-represented parties too. Once the proposition that only properly educated, credentialed and regulated professionals can provide representation, the discourse quickly widens to suggest that only such qualified individuals have any business at all being in court.

These changes do not, however, stop individuals from self-representing. As Paul Johnson points out: "There was no obvious sign of this growing legal formalism crowding out the layman's direct access to the due process of law."[143] But the self-represented party tends to be either ignored, or mocked and derided, by the 1870s.[144] At this point, this is arguably because self-represented parties cease to be valued informants. Because they lack the specialism to understand the nature of their dispute in legal terms, the information they contribute becomes irrelevant and counterproductive. Thus, two factors exist that persist today: a derogatory attitude towards self-represented parties, and a tendency to render such parties invisible in official legal accounts.

X. Whoops! We Let the Litigants in

> AMUSING INCIDENT AT THE LAW COURTS
>
> In a Divisional Court of Queen's Bench on Wednesday, Miss Carroll, a lady well known in the courts as a litigant, appeared in person before Mr Justice Denman and Mr Justice Vaughan Williams. She said she had an "ex parte" application to make
>
> – *Mr Justice Denman*: What is your name?
>
> – *The Applicant*: Octavia Carroll; otherwise, "the lady without a name" (Laughter.). My application is this: – I have obtained two orders to enable me to call witnesses, but the committee of the Incorporated Law Society keep the orders and will not give them up to me.
>
> – *Mr Justice Denman*: But we can't do anything unless we have the order before us. We have nothing to go upon.
>
> – *The Applicant*: My Lord, give unto Caesar that which is Caesar's. (Laughter.)
>
> – *Mr Justice Denman*: There is nothing before us.
>
> – *The Applicant*: My Lord, England expects that every man this day will do his duty (laughter).

[142] *CCC*, 1 June 1847, p. 5; *CCC*, 1 January 1861, pp. 25–26; *CCC*, 1 December 1870, p. 285.
[143] Johnson, "Creditors, Debtors", p. 17.
[144] E.g. the self-represented party is an "eccentric and talkative little man". *CCC*, 1 October 1870, p. 14. See also *CCC*, 1 January 1861, pp. 25–26; *Grantham Journal*, 15 August 1891, p. 7.

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– *Mr Justice Denman*: I can't help that (Laughter). We have no duty to do now. Sit down.

– Miss Carroll then made a profound bow and left the court.[145]

The above sketching out of the development of the county court seeks to demonstrate the degree to which self-representation becomes derided in tandem with broader developments in the nineteenth-century professional project. But what does this mean for the creation of the term litigant in person? The term itself never appears in the *County Courts Chronicle.*[146] But it does begin to appear in other publications in the 1880s. By the time it appears, it almost invariably refers to the pathological or vexatious litigant: "Mrs Thompson, the well-known litigant in person at the London Law Courts, was charged at Marlborough Street Police Court with being drunk in Piccadilly. The defendant emphatically denied the offence, but the constable's view as to her condition was confirmed by medical evidence and a small fine was imposed by Mr Hannay."[147]

In 1884, the *London Evening Standard* is talking of woman who is "well known" as a "lady litigant in person".[148] In 1890, *The Morpeth Herald* too refers to a lady "litigant in person".[149] While the proceedings relating to Mrs. Thompson, referred to above, are obviously criminal, it suggests the kind of individual that was indicative of those who self-represented. Mrs. Thompson, serially litigious and incompetent, is already recognisable as the standard LiP we see today.[150] By the time the term appears, it is also clear that successful LiPs are exceptional.[151]

But what exactly does the term mean? The term's first appearance in case law, in 1896, simply notes that "in case law, every litigant in person has an absolute right of audience".[152] But what this article has sought to

[145] *Grantham Journal*, 15 August 1891, p. 7.
[146] *CCC*, 1 September 1866, p. 194.
[147] *Falkirk Herald*, 20 October 1897, p. 7.
[148] *The Standard (London Evening)*, 5 November 1884, p. 3.
[149] *Morpeth Herald*, 21 June 1890.
[150] *Yorkshire Evening Post*, 27 September 1922, p. 5.
[151] See *Pall Mall Gazette*, 18 January 1894; *The Star, Guernsey*, 6 May 1890; *Dundee Evening Telegraph*, 30 July 1913. An interesting case in point of the growth of high profile LiPs is that of Georgina Weldon, whose story could fill a whole book, much less a footnote. Mrs. Weldon, whose husband tried to have her committed, successfully brought civil suits against all those who had attempted to have her committed: she was known for conducting multiple lawsuits at one time, and for always representing herself. As a high-profile personality and a prominent spiritualist, her cases were reported with relish by numerous publications: see e.g. the *London Magnet*, 6 April 1885; *Lloyds Weekly London Newspaper*, 16 March 1884; *The Guardian*, 30 July 1884. The tone in which she was discussed is typical; much was made of her spiritualism, with the papers noting she believed her dog "had the spirit of a man". When the courts suggested hearing voices was a sign of madness, she noted: "Joan of Arc heard voices: was she crazy? You see, I do not believe in mad doctors, but I do believe in spirits." See *Lloyds*, 16 March 1884, p. 7.
[152] *The Queen v Justices of London* [1896] 1 Q.B. 659, 662. This case is significant in underlining LiPs' rights of access into the higher courts; earlier newspapers reported cases where LiPs were denied a hearing. See e.g. the *Edinburgh Evening News*, 10 August 1892. While this is a Scottish case it is notable that the LiP prevented from being heard protests that there is no evidence of such a rule banning self-represented litigants.

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demonstrate is that a "litigant in person" is much more than this. It is a concept that only makes sense where legal representation is the norm. More than this, the term only exists in the context where self-represented parties have lost their less formal forums. The term LiP references the context of a formalised legal process indicative of the latter stages of the professional project: where unregulated practitioners have been largely stamped out, and where there is strict attention placed on distinction of legal practitioners from the lay. The appearance of the term, then, does not signify the LiP's incorporation into legal process; instead it marks their *distance* from what is legally appropriate. LiPs are created in the moment where they are no longer competent: they are established as a phenomenon by virtue of their failure to mimic legal professionals. The LiP's incompetence, then, is not a failure of their role, it *is* their role. Their inability to perform successfully (although there are exceptions, these are only considered as exceptions) reinforces the need for legal professionals.[153]

Tellingly, while self-represented parties are mocked in the *Chronicle*, criticism of LiPs is overwhelmingly found in the higher courts (perhaps telling us why the term never appears in the *Chronicle*).[154] For example, in 1892 the *Gloucester Herald* runs an interview with a county court judge. The judge notes the difficulties caused by litigants in person in the superior courts, compared with the relatively trouble-free experience of them in the lower courts, where as we have seen, they were complained about by legal professionals, but persisted, largely under the radar. And this leads to the most compelling reason *why* LiPs are talked about the way they are: because the fusing of the county courts to the appeal circuit gave self-representing parties access to the superior courts. This means that parts of the legal profession that had no association with the county courts – specifically the Bar and the superior court judiciary – met self-represented litigants for what is likely to be the first time in their professional lives. It is their collision with the unrepresented parties who had been operating in parallel court processes, *separately* from those working in the superior courts, that creates the LiP. This is why the term does not appear in the *County Courts Chronicle*, and emerges at the time of fusion with the appellate courts. The decision to integrate the county courts with the superior courts seems to have been taken *without realising* that not only would standardised practice filter downwards but that self-represented parties would also filter upwards: and by the time they got there, they were LiPs.[155]

[153] See Letter from "Parochial Critics" *CCC*, 1 November 1870, pp. 261–62.
[154] *Aberdeen Evening Express*, 9 August 1892.
[155] Another good example of the growth of high profile litigious LiPs is that of Alexander Chaffers. Chaffers, a former solicitor, mounted multiple claims in multiple courts that eventually lead to him being the first individual branded a vexatious litigant and prevented from pursuing further litigation. His litigation spree began in the 1870s and continued for decades, including at one point suing the Archbishop of Canterbury in the county courts. His conspiracist claims, which became increasingly outlandish, set the template for much of what we perceive to be emblematic of the stereotype of a litigant in

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XI. Conclusion

In this article I have argued that the LiP – and attitudes towards the LiP – are inseparable: the LiP is a role of failure, created as a by-product of the professional project in action, seen through developments in the new county courts, which include increasing standardisation and distinction. Critical to this development is the fusing of the county courts to the superior ones: once LiPs gain access to the superior courts, the "gap" between their skills, behaviour and knowledge and the higher court proceedings mark them out as far from what can be considered appropriate or productive. But while this explains *why* there is such a negative attitude towards LiPs – they are productively anomalous and their presence emphasises the competence of the profession – this has never prevented individuals from self-representing. LiPs are still there, even if they are not written about. The very irritation in which they are held by many legal professionals tells us of their continued presence. The problem, of course, is that when legal records only record matters of "legal interest", most actions involving LiPs fly beneath the radar, which is why we do not find it easy to find material about them and it is why we have so much trouble understanding their perspectives.

What this article has tried to show is that whilst LiPs operate in an environment constituted by a professionalism that functions through exclusion of non-credentialed parties, it is difficult to envision LiPs as being perceived positively. So whilst LiP behaviour may vary from individual to individual, the wider negative perceptions may have much less to do with anything specific LiPs *do*, and far more to do with the structural development of a profession that, in its success in extending its ambit to the lower courts, has largely displaced the self-represented party.

person. For an excellent and detailed account of Chaffers life and suits, see M. Taggart, "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" [2004] C.L.J. 656.

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