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## **TOWARDS A THEORY OF LEGITIMATE ACCESS: MORALLY LEGITIMATE AUTHORITY AND THE RIGHT OF CITIZENS TO ACCESS THE CIVIL JUSTICE SYSTEM**

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It is undeniable that the new information technologies of the last few decades have been put to many public uses that increase citizen access to the civil justice system. Nearly every state, for example, has published its statutory codes on official websites that can easily be found through legal portals,<sup>1</sup> making the content of such codes readily accessible to citizens from the convenience of their homes. Similarly, many state agencies publish online legal forms that were formerly available only at certain physical locations, such as a courthouse or municipal building. Incorporating these technologies into the legal system has made it much easier for many citizens to access the civil justice system.

Nevertheless, such technologies, if improperly used, can instead diminish the access of many citizens to the civil justice system. One obvious concern is that many citizens lack effective access to the new information technologies because they either cannot afford such access or lack the necessary education to take advantage of them. Devoting limited public resources to publishing public documents exclusively on the web, for example, can effectively exclude such persons from access to those documents. Another concern is that some persons with access to the new technologies may not be able to take full advantage of them. Information published using streaming video technology, for example, is not available to many disabled persons who rely on text readers unable to read video.

Given that these technologies can be used in ways that potentially harm citizens by decreasing their access to the civil justice system, it is reasonable to think that there are general moral principles that govern the

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\* I am extremely indebted to Adrienne Cobb and R. Lee Sims for their generous help with some of the research and to Marsha Iverson, Public Relations Specialist for the King County Library System.

1. See, e.g., FindLaw, State Resources, at <http://www.findlaw.com/11stategov> (last visited Jan. 28, 2004).

state's use of such technologies.<sup>2</sup> At the most abstract level, these principles constrain state behavior by defining a general right on the part of citizens to access the civil justice system. The permissibility of incorporating any given technology into the civil justice system would be at least partly determined by whether it violates the general right of access that is defined by these principles.<sup>3</sup>

This Article considers the issue of what the state is morally obligated to provide by way of citizen access to the civil justice system. It begins by describing the general problem of morally legitimate authority and how it bears on the problem of access to the civil justice system. It then identifies three different approaches to the general problem of morally legitimate authority and argues that none of these approaches warrants thinking that the state is morally obligated to provide each citizen with perfectly equal access to the civil justice system. The argument concludes that the three approaches to legitimacy converge on two principles: one that defines an affirmative obligation (the Reasonable Access Principle) to provide to each citizen what is minimally necessary to develop and defend a plausible legal position, and one that defines a negative obligation (the Equality Principle) to refrain from restricting access to the civil justice system for reasons that deny the equality of every moral person.<sup>4</sup>

Three observations about the character and scope of the argument and thesis would be helpful. First, the thesis is not that the two principles identified exhaust the scope of the state's obligations regarding citizen access to the civil justice system; it is rather that these two principles define necessary conditions for moral legitimacy in this regard. Second, as the title suggests, the argument purports to be no more than a step "towards" a theory of legitimate access and is hence somewhat schematic in character; a fully adequate defense of the Reasonable

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2. Presumably, any act that can potentially harm innocent persons is subject to the requirements of morality—though these requirements may differ according to whether the agent is an individual or a state. See *infra* Part I for more discussion on this point.

3. Since there may be other relevant moral principles, the claim that a particular use does not violate the general right of access does not imply that it is morally permissible; the use may violate other principles.

4. This approach has an advantage for skeptics of reductive approaches to theorizing about legitimacy. If one believes, as I do, that there is a plurality of basic principles that jointly define the conditions of legitimacy (rather than just one principle), then an analysis showing that three plausible candidates for inclusion in a non-reductive theory of legitimacy converge on two principles goes a long way towards making the case that any plausible non-reductive theory of legitimacy will include these two principles.

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Access and Equality Principles would require more space than is available here. Third, the Article does not discuss the new information technologies except where helpful to illustrate a particular issue. While the various ways in which the new technologies can be misused highlight the need for a general theory of legitimate access, the principles defining the foundation for such a theory can be developed without discussing these misuses. Indeed, as a logical matter, the uses to which a state might put these technologies present application-contexts for the two principles of legitimate access; such principles apply to these examples and are not justified by these examples.

### I. THE PROBLEMS OF ACCESS AND MORALLY LEGITIMATE AUTHORITY

#### A. *The Centrality of Access to the Justice System in the Protection of Legal Rights*

Legal systems regulate behavior through the promulgation of legal rules and principles.<sup>5</sup> These legal rules and principles typically purport to establish duties that require subjects to behave or refrain from behaving in certain ways. Sometimes these duties are unconditional (though not necessarily absolute), as in the case of the criminal rule that prohibits assault and in the case of the tort rule that requires us to protect other persons from reasonably foreseeable injuries that might proximately result from our behavior. Sometimes these duties are conditional, as in the case of the general contract rule that requires us to honor the terms of agreements into which we freely enter.

In many instances, these legal duties purport to give rise to legal rights. *X*'s legal duty to refrain from assaulting *Y* is fairly characterized as defining a legal right on the part of *Y* against *X* that *X* not assault *Y*.<sup>6</sup>

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5. The issue of whether legal systems have some unique defining function is controversial among legal philosophers. Lon L. Fuller believed that a definition of law must include the idea that the law's essential function is to "achiev[e]...[social] order... through subjecting people's conduct to the guidance of general rules by which they may themselves orient their behavior." Lon L. Fuller, *A Reply to Professors Cohen and Dworkin*, 10 VILL. L. REV. 655, 657 (1965). Other philosophers deny that law has any unique conceptual function, arguing that legal systems can be deployed to achieve a variety of purposes. See, e.g., Stephen Perry, *The Varieties of Legal Positivism*, 9 CAN. J.L. & JURISPRUDENCE 361 (1994).

6. Wesley Newcomb Hohfeld argued that, as a conceptual matter, claim-rights correlate with duties or obligations in the following way: "if *X* has a right against *Y* that he shall stay off the former's land, the correlative (and equivalent) is that *Y* is under a duty toward *X* to stay off the

Likewise,  $X$ 's legal duty to take reasonable measures to protect  $Y$  from reasonably foreseeable injuries that might proximately result from  $X$ 's behavior is fairly characterized as defining a legal right on the part of  $Y$  against  $X$  that  $X$  not negligently injure  $Y$ . Indeed, the recognition, creation, or establishment of legal rights, if not conceptually essential to the existence of a legal system, is utterly central to legal practice in legal systems that resemble ours in theoretically salient respects.

However, the recognition, creation, or establishment of a legal right by statutory or judicial promulgation has little prudential value to the putative holders if the legal system does not provide some mechanism for addressing violations of those rights.<sup>7</sup> To protect a legal right in a prudentially meaningful way, the law must do two things.<sup>8</sup> First, and most obviously, it must attach some legal consequence to the violation of a right: the law must stipulate either that the violating party is subject to some requirement that self-interested rational agents are likely to regard as undesirable or that the aggrieved party is eligible for some form of relief that self-interested rational agents are likely to regard as desirable. Second, it must provide some mechanism by which the person whose right is violated may activate those consequences against the person who violates that right.

Though legal theorists tend to focus on the first of these features, it is clear that both are needed to endow a legal right with even minimal prudential value. In worlds like ours, where the interests of rational self-interested agents frequently conflict, a right that can always be violated without any legal consequences whatsoever has no prudential value whatsoever to the holder of the right. But this is no less true of a right that fails to provide some mechanism by which the right-holder can

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place." WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 38 (1919). It is a conceptual truth, then, that part of what constitutes  $X$  as having a right against  $Y$  that  $Y$  perform (or refrain from performing)  $a$  is that  $Y$  has an obligation or duty to perform (or refrain from performing)  $a$  and that duty is owed to  $X$  rather than someone else. While it is fair to say that there is probably more to the claim that  $X$  has a right against  $Y$  than just that  $Y$  has an appropriate obligation that is owed to  $X$ , it is uncontroversial that  $Y$ 's having a duty to  $X$  is at least part of what it means to say that  $X$  has a right against  $Y$ .

7. By "prudential value," I mean value from just the standpoint of a rational agent's self-interests. *Self-interests* should not be confused with *selfish* interests. Brushing my teeth conduces to my self-interests without necessarily conducing to any selfish interests I might have. The notion of selfishness is a morally normative term that connotes disapprobation.

8. I have in mind here only conceptually possible worlds that contain beings who instantiate the same psychological features that human beings instantiate. It is possible that a legal system might have prudential value without these features in a world of angels who regard the interests of others as highly as they regard their own interests. But this is not the world in which we live.

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activate those consequences. No matter how undesirable the legal consequences of violating a right might be to the offending party, those consequences cannot engage the offending party's prudential interests unless there is some mechanism for activating them. Similarly, no matter how desirable those legal consequences might be to the aggrieved party, those consequences cannot engage the aggrieved party's prudential interests unless there is some mechanism for activating them.

The problem of access, then, is utterly central to the practices of any legal system that purports to establish rights with prudential value to rational self-interested agents—no less so than the problem of assigning consequences to violations. Accordingly, the question of what sort of mechanisms a legal system ought (as a matter of utility, fairness, or justice) to provide for aggrieved parties to activate these consequences is no less central to normative legal theory and political morality than the question of what sorts of consequences ought (as a matter of utility, fairness, or justice) to be attached to the violation of various rights.

### *B. The Problem of Morally Legitimate Authority*

The problem of justifying state authority arises because the state enacts laws that purport to dictate the behavior of those who reside within the physical boundary of the state. As Joseph Raz aptly puts the matter:

A government does not merely say to its subjects: "Here are our laws. Give them some weight in your considerations. But of course you may well be justified in deciding that on balance they should be disobeyed." It says: "We are better able to decide how you should act. Our decision is in these laws. You are bound by them and should follow them whether or not you agree with them."<sup>9</sup>

There are two features of moral concern here. The first is that the state purports to preempt the citizens' own judgments about what they ought to do by issuing directives the citizens are required to obey regardless of whether they want to do so.<sup>10</sup> The second is that the legal directives of the state are backed with coercive measures that are impermissible in any other context: it is hard to think of any other context in which one person or set of persons can legitimately incarcerate or execute another

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9. Joseph Raz, *Government by Consent*, in *AUTHORITY REVISITED* 81 (J. Roland Pennock & John W. Chapman eds., 1987).

10. See, e.g., JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* (1994) (especially ch. 10).

person. The need to justify state authority arises, then, because the state issues preemptive directives that are enforced with measures that are commonly regarded as presumptively wrong.

While the problem of state authority is especially acute in the criminal context where the violation of a legal rule is frequently linked to lengthy periods of incarceration, the state's authority in civil contexts also stands in need of moral justification. If the availability of coercive mechanisms is most conspicuous in the criminal context, such mechanisms also play a central role in civil litigation: other things being equal, the point of bringing a civil lawsuit for a plaintiff is to secure a coercive order from the court that requires the defendant to do something. In tort law, the plaintiff seeks a coercive order of money damages. In contract law, the plaintiff seeks a coercive order for either money damages or specific performance. It is fair to say, however, that any plaintiff who brings a civil suit in *any* legal system that even remotely resembles this one is asking the court not only for a judgment, but also—and equally importantly—for a court order enforcing that judgment.

Indeed, behind every judicial order lies the power to impose sanctions for contempt of court.<sup>11</sup> Contempt sanctions can be civil or criminal in nature.<sup>12</sup> What distinguishes civil and criminal contempt is not the conduct giving rise to the sanction; both cases involve conduct that, in some way, obstructs the administration of justice pursuant to law. What distinguishes civil and criminal contempt is the purpose for which the sanction is imposed. Civil contempt is imposed to induce a party to comply with a particular order of the court and is hence primarily remedial in nature.<sup>13</sup> Criminal contempt is imposed to punish a party for behavior, and not to induce compliance with court orders; though a punitive measure may have the secondary effect of inducing a recalcitrant subject to comply with the order, its primary purpose remains punitive.<sup>14</sup>

In either case, though, the tools available to the court are the same. Civil and criminal contempt sanctions may include incarceration<sup>15</sup> as well as fines,<sup>16</sup> and may include even the power to coerce enforcement

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11. See WASH. REV. CODE § 2.28.010 (2002).

12. See *id.* §§ 7.21.030–.040.

13. See *id.* § 7.21.030.

14. See *id.* § 7.21.040.

15. See *id.* § 7.21.030(2)(a).

16. See *id.* § 7.21.040.

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from other relevant persons, such as the attorneys for the relevant parties.<sup>17</sup> It is this power that enables judges to enforce their orders even in civil cases where they cannot plausibly be characterized as imposing direct or indirect sanctions. Without the contempt sanction, judges would have, at the very most, indirect means for enforcing orders requiring payment of civil damages, specific performance, or civil injunctions.

Insofar as state coercion is thus central to enforcing the criminal *and* civil law, its role must be justified in both of those contexts. The state's authority to incarcerate a defendant in a civil suit for failing to obey a court order is no less problematic from the standpoint of political morality than its authority to incarcerate a criminal defendant for violating a criminal statute. The application of coercive force to people in *any* context requires some sort of theoretical account that shows it is justified; to the extent that people have a presumptive moral claim to autonomously direct their own behavior, the state's exercise of coercive authority over the individual comes into direct conflict with such a moral claim and hence requires moral justification.

### *C. Theories of Legitimacy and Access to Justice*

There are a variety of theories that attempt to specify the conditions under which the state may legitimately enforce its laws. Some of these theories are both comprehensive and reductive in the sense that they attempt to justify all the coercive practices of the state by reference to one or two general moral principles. Contractarian theories, for example, argue that the state's general authority to coercively dictate behavior is morally justified because citizens either have consented to such authority<sup>18</sup> or would consent to it under ideal conditions.<sup>19</sup> Since, on this line of analysis, autonomous moral agents can create binding obligations for themselves by means of consensual agreements (ideal or actual), such agreements are morally sufficient to justify the state's use of coercive mechanisms, in effect, to enforce laws that are posited pursuant to the terms of the agreement.

Other theories focus on particular areas of law, attempting to show that the use of coercive mechanisms to enforce those areas can be morally justified. For example, John Stuart Mill's influential claim that

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17. *See id.* § 7.21.030(2)(c)–(d).

18. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. 8, § 95 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1690).

19. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 10 (2d ed. 1999).

the state can justifiably prohibit only those acts that are “harmful to others” specifies the limits of the state’s legitimate lawmaking authority to criminalize behavior.<sup>20</sup> Normative theories of punishment supplement such accounts by showing that the state’s authority to criminalize behavior is legitimately backed by the power to incarcerate and possibly execute those persons who engage in proscribed behavior.<sup>21</sup>

Theories that justify the state’s authority in areas of civil law tend to be more specific, focusing on the content of a particular substantive area of law, rather than on a general capacity of the state to enact civil regulations of behavior. For example, Charles Fried justifies the content of the contract law by showing it coheres, for the most part, to uncontroversial moral principles governing promises.<sup>22</sup> Jules Coleman justifies the content of tort law by showing that it embodies a legitimate conception of corrective justice.<sup>23</sup> Robert Nozick argues that property law is justified to the extent that it coheres with moral principles that define a natural right to property, which includes the authority to freely alienate one’s interest in property by a variety of morally effective consensual mechanisms.<sup>24</sup>

While there are a number of theories attempting to describe the conditions of procedural legitimacy, they have largely focused on the criminal context. For example, these theories focus on the procedural rights that a criminal defendant should have, which include (but are not limited to) a right to a fair trial, a right to competent representation, a right to appeal, and a right to be acquitted if the evidence does not meet the “beyond a reasonable doubt” standard.<sup>25</sup> Normative theories of criminal procedure attempt to describe the principles that determine whether a trial is “fair,” representation is “competent,” and so on.

The general issue of what kind of access to the civil justice system a state must provide in order to be legitimate has received comparatively little attention from normative legal and political theorists. While legal

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20. JOHN STUART MILL, *ON LIBERTY* 10 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

21. For a helpful summary of the various normative theories of punishment, see Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

22. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 2–27 (1981).

23. JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 13–53 (2001).

24. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 150–53 (1974).

25. See, e.g., Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 513–15 (1975); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1192–99 (1979).

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theorists have devoted considerable space to critically evaluating the requirements of various rules and principles of civil procedure,<sup>26</sup> the focus of such efforts is different from the general normative issue of how much access to civil justice is minimally needed for state legitimacy. In the typical case, the issue is whether a particular rule or interpretation of the rule is consistent with the constitutional requirements of due process—which, for all practical purposes, simply assumes that the United States Constitution defines the morally appropriate standards of access. For this reason, one can criticize the rules of civil procedure as being too lenient or too restrictive without developing a general theoretical account of how much access is minimally consistent with the legitimacy of a legal system. The assumption that the Constitution defines legitimate standards of access to civil justice provides an implicit standard for evaluating the rules of civil procedure that ostensibly circumvents the need for a general theory of legitimate access.

If academic lawyers have paid little attention to such issues, legal and political philosophers have paid even less. A search of the Philosopher's Index, which is the most comprehensive database of abstracts for philosophical books and articles, for the phrase "access to justice" failed to turn up even one abstract; in contrast, the phrase "distributive justice" turned up 435 abstracts.<sup>27</sup> While searches for the terms "civil liability" and "due process" yielded thirty abstracts,<sup>28</sup> none had anything to do with the issue of general access to the justice system in civil cases. In addition, not one of sixteen leading anthologies for courses in philosophy of law and political philosophy<sup>29</sup> featured even one article on

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26. It is important to note that such issues include many that are implicated by the more general issue. For example, a number of articles have been written on the subject of whether courts should waive filing fees and other financial impediments in cases of indigent plaintiffs. *See, e.g.*, John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923); Harry P. Stumpf, *Law and Poverty: A Political Perspective*, 3 WIS. L. REV. 694 (1968). Such discussions typically assume, without argument, more general principles of legitimacy that are applied to the specific facts. In contrast, my concern here is to argue for these general principles of legitimacy by grounding them in three general approaches to theorizing about moral legitimacy.

27. Search conducted on August 18, 2003. The Philosopher's Index is available commercially online at <http://www.dialog.com>.

28. Search conducted on August 18, 2003.

29. APPLIED SOCIAL AND POLITICAL PHILOSOPHY (Elizabeth Smith & H. Gene Blocker eds., 1994); JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM (Robert L. Hayman, Jr., et al. eds., 2d ed. 2002); JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW (George Christie & Patrick Martin eds., 2d ed. 1995); JUSTICE AND ECONOMIC DISTRIBUTION (John Arthur & William Shaw eds., 2d ed. 1991); LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY (David Dyzenhaus & Arthur Ripstein eds., 1996); LLOYD'S INTRODUCTION TO JURISPRUDENCE (M.D.A. Freeman ed., 7th ed. 2001); THE NATURE

the subject. Although such observations are anecdotal in character, they seem pretty clearly to show that the general problem of access has gotten comparatively little attention from philosophers.<sup>30</sup>

Given the centrality of access to the legitimate operation of institutions that purport to establish and recognize rights, this is a truly remarkable omission. Since, as I argued above, the establishment and recognition of legal rights can have no prudential value whatsoever to citizens in the absence of a mechanism that enables them to activate certain kinds of legal consequences when those rights have been violated,<sup>31</sup> adequate access to the justice system is essential to ensure that legal rights have prudential value to citizen rights-holders. If it is true, as classically liberal theories of legitimacy typically assume, that the normative point of state authority is to serve the interests of citizens by establishing and recognizing rights,<sup>32</sup> then adequate access to the civil justice system is a necessary condition for moral legitimacy. The problem of access is no less central to theories of legitimacy than the

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AND PROCESS OF LAW (Patricia Smith ed., 1993); PHILOSOPHY OF LAW (Joel Feinberg & Jules Coleman eds., 7th ed. 2004); PHILOSOPHY OF LAW (Conrad Johnson ed., 1993); THE PHILOSOPHY OF LAW (Frederick Schauer & Walter Sinnott-Armstrong eds., 1996); PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson ed., 2003); POLITICAL PHILOSOPHY: ESSENTIAL SELECTIONS (Aeon J. Skoble & Tibor R. Machan eds., 1999); READINGS IN THE PHILOSOPHY OF LAW (John Arthur & William H. Shaw eds., 3d ed. 2001); READINGS IN THE PHILOSOPHY OF LAW (Keith Culver ed., 1999); SOCIAL AND POLITICAL PHILOSOPHY (George Sher & Baruch A. Brody eds., 1999); SOCIAL IDEALS AND POLICIES: READINGS IN SOCIAL AND POLITICAL PHILOSOPHY (Steven Luper ed., 1999).

30. Even the most eminent political philosophers seem to overlook the problem of legitimate access. For example, John Rawls's principles of justice are intended to guide the "basic structure of society," which he describes as follows:

[T]he basic structure of society is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time. The political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form, all belong to the basic structure. The basic structure is the background social framework within which the activities of associations and individuals take place. A just basic structure secures what we may call background justice.

JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 10 (2001). The omission of any mention of the importance of access to the justice system to the basic structure of society by arguably the most eminent political philosopher in the last one hundred years speaks volumes about the lack of attention philosophers have paid to the issue.

31. See *supra* Part I.A.

32. For the leading discussion of this conception of authority, see, for example, RAZ, *supra* note 10, ch. 10. The remainder of this Article will assume that the moral point of a state is to serve its subjects.

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problem of identifying the substantive constraints on legitimate lawmaking activities.

For this reason, a comprehensive understanding of moral legitimacy requires an understanding of the conditions of morally legitimate access. Since no state can be fully legitimate without guaranteeing adequate access to the civil justice system, it follows that a fully comprehensive theory of legitimacy must specify the conditions that are minimally necessary for morally legitimate access to the civil justice system. No general theory of legitimacy, then, can succeed without including a theory of morally legitimate access. The absence of a general theory of morally legitimate access leaves a profound gap in our understanding of legitimate state authority.<sup>33</sup>

Moreover, the foregoing considerations suggest an important adequacy constraint on general theories of legitimate access. If the moral point of the state is to serve the prudential interests of its subjects by establishing and protecting rights, then the state must ensure that its practice with respect to rights is sufficient to endow those rights with prudential value to the rights-holders. Since a legal right cannot have any prudential value unless it provides a mechanism that enables rights-holders to activate consequences that conduce to their prudential interests, it follows that a state must provide minimal access to such mechanisms to assure that its legal rights are prudentially valuable. This requirement, then, defines an important adequacy constraint on general theories of morally legitimate access: no theory of legitimate access can be adequate from the standpoint of classical liberalism without assuring sufficient access to the civil justice system to guarantee the prudential value of legal rights to all rationally self-interested citizens.

## II. THE STRONG PRINCIPLE OF EQUAL ACCESS

It is tempting to think that the question of how much access to the justice system a legal system is obligated to provide in civil matters, as a matter of political morality, has a straightforward answer: perfectly equal access. On this view, the principle that all citizens have utterly equal moral worth, a principle presumably assumed by every plausible theory

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33. A gap that subsequent parts of this Article attempt to close.

of legitimacy, implies that every citizen should have utterly equal access to the justice system in civil disputes.<sup>34</sup>

While it is difficult to state the principle without vagueness, what this Article calls the Strong Principle of Equal Access (SPEA) can be expressed somewhat more rigorously as follows. According to SPEA, the legal system should take affirmative measures to ensure that every two citizens have *exactly* the same level of access to whatever official resources are available for the judicial redress of grievances in the civil context. If one citizen *X* has greater access to some resource or mechanism *m* of the civil justice system than another *Y*, then an injustice has occurred that the state must remedy by providing whatever is needed to ensure that *Y* has the same access to *m*.<sup>35</sup> Otherwise put, the state must take affirmative steps to ensure that no one person's access to the civil justice system is more difficult or burdensome than any other person's access.

This Part of the Article argues that satisfaction of SPEA is not a necessary condition for moral legitimacy. To this end, it considers three different theories of legitimacy that might be adduced in support of SPEA and argues that none provides a foundation for this principle. While perfectly equal access might ultimately be ideal in a utopian world where material resources are unlimited, such access is not required in this world where the quantity of resources that can be deployed by the state in any one area is limited by material conditions of scarcity.

#### A. *The General Principle of Equality*

The principle that affirms our moral equality as human beings is grounded in our status as moral persons.<sup>36</sup> Each of us has certain properties, capacities, and potentialities that confer the inviolable moral status of personhood. This status comes with a full-blown array of

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34. The idea that citizens have utterly equal worth should not be construed as inconsistent with the claim that some moral agents have morally good character and deserve praise for their actions and some have morally bad character and deserve blame, censure, or punishment.

35. Strictly speaking, the inequality can be remedied by diminishing the access of *X*, rather than increasing the access of *Y*. But, from the standpoint of morally legitimate access, this guts SPEA of any assurance of even minimal access to the justice system. On this purely formal construction of the principle, a state of affairs in which no one has any access to any mechanisms that would facilitate the resolution of civil disputes would be consistent with SPEA. It is clear that, if it is to define meaningful constraints on what a legitimate state may do at all, SPEA must assume that someone has minimal access to such mechanisms. What follows assumes such a construction.

36. Again, this should not be construed in a manner inconsistent with our ordinary judgments of character. *See supra* note 34.

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general moral rights typically thought to include rights to life, liberty, and property; indeed, as Mary Anne Warren defines the notion, to be a moral person *is* simply to be a full-fledged member of the moral community.<sup>37</sup> To the extent that each person has a full set of moral rights, it follows that every human being is entitled to equal respect. The general principle of equality is ultimately a consequence of more theoretical claims governing humanity and personhood.

There is little dispute that states, as well as individuals, are constrained by the moral principle of equality. As a matter of political morality, states have no more liberty than any citizen to *violate* (as opposed to *infringe*) a person's right to life.<sup>38</sup> Of course, it may be true that states can permissibly kill persons in circumstances where individuals cannot; if, for example, capital punishment is morally legitimate, it seems clear that only the state can permissibly execute someone. But, assuming the permissibility of capital punishment, this is not because a person's right to life does not give rise to obligations on the part of the state; the state is no less obligated to respect the life of an innocent person than is any individual. It is rather that a person may be executed, as a general moral matter, only under circumstances that can be ensured by the state (or something approximating a state); a suitably reliable finding of guilt in circumstances that afford defendants a fair chance to defend themselves is, presumably, a necessary prerequisite to the legitimate administration of the death penalty.

It is tempting to think that SPEA can be straightforwardly deduced from the principle of equality. If every person has a full and equal set of rights that bind both the state and individuals, then the state must provide every person with a full and equal right to access the justice system in the civil context. But this implies that the state is morally obligated to ensure that every two citizens have exactly the same access to the civil justice system. On this line of reasoning, then, SPEA is simply a corollary of the principle of equality.

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37. Mary Anne Warren, *On the Moral and Legal Status of Abortion*, *MONIST*, Jan. 1973, at 43, 53.

38. By definition, to say that a right has been "infringed" is to say only that someone has acted in a way that is inconsistent with the holder's interest in that right; strictly speaking, then, the claim that a right has been infringed is a purely descriptive claim that connotes no moral judgment as to whether or not the infringement is wrong. In contrast, to say that a right has been "violated" is to say that the right has been infringed by some act and that the relevant act is morally wrong. Accordingly, it is a conceptual truth that it can be permissible for an individual or entity to infringe a right, but not to violate a right.

As it turns out, however, this very natural inference is problematic. The claim that every person has a full set of equal moral rights does not imply that the state must, as a moral matter, ensure perfect equality in every morally relevant respect. Every known state, for example, allows considerable inequality in the distribution of material resources among its citizens. While some political theorists believe that such inequalities are justified to the extent that they conduce to overall utility,<sup>39</sup> others believe that such inequalities are justified only to the extent that they conduce to everyone's advantage.<sup>40</sup> But every classically liberal political theorist believes that a substantial number of these inequalities can, as a matter of political morality, legitimately be permitted by the state.<sup>41</sup>

Here it is crucial to note that inequalities in wealth are not inert with respect to the exercise of the very rights to which personhood gives rise. Persons with more wealth will, for example, be better able to exercise their expressive rights in politically sensitive contexts than persons with less wealth. Indeed, it is not only easier for wealthy persons in democratic societies to win a position in government; it is easier for them to run in the first place. Running for an elected office may require the payment of a substantial filing fee and other expenses that make it comparatively more difficult for less affluent persons. While it is reasonable to think that there are moral limits on how much inequality in this regard may permissibly be allowed by the state, it is also reasonable to think that some such inequality is permissible if it is permissible for the state to allow theoretically significant inequality in the distribution of resources.

The same is true for access to the civil justice system. Strictly speaking, a strong principle of equal access, like SPEA, requires the state to take affirmative steps to ensure that it is no more difficult for one person to access the justice system in a civil context than it is for *any other person*. But if, as a logical matter, the state can allow substantial inequality in the distribution of resources needed to exercise the right to free speech consistently with the principle of equality, it follows that, as a logical matter, the state can allow some inequality of access to the civil justice system consistently with the principle of equality. If, for example, it is legitimate to require filing fees as a prerequisite for filing a civil

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39. See, e.g., RICHARD B. BRANDT, *MORALITY, UTILITARIANISM, AND RIGHTS* 380 (1992).

40. See, e.g., RAWLS, *supra* note 19.

41. Indeed, as a matter of definition, a theory is "classically liberal" only insofar as it purports to legitimate the basic structure of a constitutional democracy that protects private property and other basic rights.

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lawsuit, then it will be somewhat more difficult for less affluent persons who must pay such fees<sup>42</sup> to access the civil justice system than for more affluent persons.

To the extent, then, that the principle of equality is grounded in the status of every human being as a moral person, it does not logically imply that the state must take affirmative steps to ensure perfectly equal access to either elected office or to the civil justice system. The status of personhood confers rights to life, liberty, and property that are equal to those of any other person. But it does not confer a right to conditions that ensure that it is no more difficult to exercise those rights than it is for any other person. Insofar as the state is obligated to provide equal protection of the rights associated with moral personhood, this obligation, by itself, does not entail an obligation to provide utterly equal access to the civil justice system. Though it is clear that there are moral limits on the extent to which the state may permit inequality of access to the civil justice system, it is equally clear that some inequality of access is logically consistent with the general principle of equality as grounded in principles regarding moral personhood. If this is correct, then SPEA is not a logical consequence of the general principle of equality.

### *B. Utilitarian Theories of Legitimacy*

According to utilitarianism, the moral value of any act is fully determined by its effect on net aggregate utility among members of the community.<sup>43</sup> Utilitarian moral theories posit a particular state of affairs as objectively good (i.e., the promotion of aggregate utility) and define an act as morally right to the extent that it promotes this favored state of affairs (i.e., to the extent that it promotes aggregate utility) and morally wrong to the extent that it fails to promote this favored state of affairs. Since an act's effect on utility is an extrinsic feature of the act,<sup>44</sup> utilitarian theories presuppose that the moral quality of an act does not depend on its intrinsic (or inherent) features and hence that no act is

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42. The qualification "who must pay such fees" accounts for the possible case where the state is morally obligated to waive filing fees in the case of severely impoverished citizens.

43. Utility is usually defined in subjective terms of happiness, pleasure, or well-being. As we will see in this Part, this definition creates epistemic difficulties in evaluating acts under utilitarianism.

44. An act can have radically different consequences depending on the circumstances of its performance. For example, whether the act of giving a medication to someone promotes utility depends on to whom the medication is given. Whereas giving chemotherapy, which is highly toxic, to cancer patients can improve their utility, giving it to healthy persons can worsen their utility by increasing the probability that they develop certain kinds of cancer in the long-term.

inherently good or inherently bad. Acts are good (or bad) only insofar as they conduce (or fail to conduce) to the utility of members in the community.<sup>45</sup>

As a general moral theory, utilitarianism applies both to acts of individuals and to acts of the state. Applied to the state, it implies that the state's lawmaking authority is constrained by a duty to enact laws that maximally promote aggregate community utility. As political theorist Henry Sidgwick phrases the point:

[T]he true standard and criterion by which right legislation is to be distinguished from wrong is conduciveness to the general "good" or "welfare." And probably the great majority of persons would agree to interpret the "good" or "welfare" of the community to mean, in the last analysis, the happiness of the individual human beings who compose the community; provided that we take into account not only the human beings who are actually living but those who are to live hereafter . . . . Accordingly, . . . the happiness of the persons affected [is] the ultimate end and standard of right and wrong in determining the functions and constitution of government.<sup>46</sup>

Utilitarian theories of legitimacy, then, assess acts of the state entirely in terms of whether they sufficiently conduce to the favored state of affairs (i.e., maximal promotion of utility among the citizenry). The state's sole obligation, on this view, is to act in ways that have the effect of maximally promoting net utility among its citizens.<sup>47</sup>

Like any other proposed state measure, the legitimacy of SPEA is thus fully determined, according to utilitarian theories of legitimacy, by whether it adequately promotes the utility of its citizens. Accordingly, the test for assessing SPEA under utilitarian theories of legitimacy is whether, other things being equal, a state that takes affirmative measures

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45. This distinguishes consequentialist theories like utilitarianism from deontological theories, which assert that the moral quality of some acts is determined entirely by their intrinsic features. On this view, for example, lying is intrinsically wrong—and hence wrong regardless of whether it happens to promote community utility.

46. Henry Sidgwick, *Utility and Government*, in *SOCIAL AND POLITICAL PHILOSOPHY*, *supra* note 29, at 35.

47. John Stuart Mill argued that considerations of utility justified the general principle that the state can legitimately prohibit only those acts that are harmful to others. On Mill's view, utility is most likely to be maximized in a society where people are free to develop and act on their own conceptions of the good; people who are allowed to pursue their own values and plans are more likely to develop the sorts of skills and abilities that will make them useful to other people. MILL, *supra* note 20, chs. II–III. *See generally* JOHN STUART MILL, *UTILITARIANISM* (Oxford U. Press 1998) (1871) (providing a general account of Mill's utilitarianism).

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to ensure that no one person has greater ability than any other to access the civil justice system is more likely to maximize utility among its citizens than a state that permits some inequality of access. If not, then it would be illegitimate for the state to adopt SPEA as a principle of access.

Unfortunately, the task of evaluating SPEA is complicated by the fact that there are serious epistemic difficulties involved in assessing the legitimacy of complex institutional practices under utilitarianism. One difficulty is that our ability to determine in advance what the consequences of any complex practice will be is highly limited because there are a variety of social conditions that can causally interact with elements of the practice in unpredictable ways; the more possible variables there are, the more difficult it is to reliably determine which of a substantial number of outcomes is the most likely.<sup>48</sup> A second difficulty is that it is just not clear how to go about making the interpersonal utility comparisons that would have to be made in order to properly evaluate a complex institutional practice. To determine whether I should treat John to his favorite meal or Jane to her favorite meal, I would have to determine whether John gets more enjoyment out of his favorite meal than Jane gets out of hers, which requires a direct comparison of John's and Jane's subjective mental states—something to which only John and Jane have direct access. As Robert Goodin explains the problem, “[i]nsofar as utility refers essentially to a state of mind . . . , taking a utility reading requires me to get inside someone else's head.”<sup>49</sup> Because of such difficulties, a utilitarian analysis of SPEA will have to be limited to a comparatively rough assessment of the most salient possible consequences; for this reason, the analysis in this subpart will be somewhat more schematic and speculative than the analysis in the preceding Part.<sup>50</sup>

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48. For a general discussion of such difficulties, see HEIDI HURD, *MORAL COMBAT* (1999) (especially ch. 8).

49. Robert Goodin, *Utility and the Good*, in *A COMPANION TO ETHICS* 245 (Peter Singer ed., 1991).

50. In this connection, it is worth noting that even the most famous of utilitarian arguments are typically schematic in these respects. For example, Mill justifies his view that the only legitimate criminal laws are those that prevent harm to others (i.e., the so-called Harm Principle) largely on the strength of an identification of three possible consequences of allowing freedom to act in ways that do not harm others: such freedom (1) conduces to the development of a person's rational faculties; (2) is psychologically satisfying; and (3) conduces to debate that increases the likelihood of discovering truth. While these are, of course, obvious possibilities, it is notable that Mill's discussion does not (and could not, given the epistemic difficulties) go much beyond identifying three of a fairly large number of possible outcomes. See MILL, *supra* note 20, chs. II–III.

As a first step towards evaluating SPEA, it is helpful to note that legal norms permitting attorneys to represent clients on a contingency basis<sup>51</sup> provide the poor with substantial access to the civil justice system.<sup>52</sup> The availability of representation on a contingency basis helps to ensure that less affluent plaintiffs can obtain adequate legal representation in cases involving serious injury that allegedly results from a defendant's breach of duty. The ability of attorneys to recover contingency fees that, strictly speaking, exceed the costs of their services calculated according to a reasonable hourly rate enables them to accept cases that they could not otherwise accept because of their uncertain outcomes.<sup>53</sup> The permissibility of contingency fees thus allows less affluent plaintiffs with economically significant injuries to access the civil justice system in cases where the expected outcomes are comparatively uncertain. Accordingly, the rules permitting contingency fees increase net aggregate community utility by promoting the utility to less affluent plaintiffs.

It is reasonable to think that net aggregate community utility could be further increased by transferring some material resources from the most affluent citizens to the least affluent citizens to improve the latter's access to the civil justice system. Recent studies suggest that the poorest citizens in the United States are underserved by the civil justice system. For example, a 1994 survey by the American Bar Association disclosed, among other things, that more than fifteen percent of low income

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51. For example, The Washington Rules of Professional Conduct provide that "[a] fee may be contingent on the outcome of the matter for which the service is rendered." WASH. RULES OF PROF'L CONDUCT R. 1.5(c) (2003). The rules further provide that

[a] contingent fee consisting of a percentage of the monetary amount recovered for a claimant, in which all or part of the recovery is to be paid in the future, shall be paid only (i) by applying the percentage to the amounts recovered as they are received by the client or (ii) by applying the percentage to the actual cost of the settlement or award to the defendant.

*Id.* 1.5(c)(2).

52. Indeed, Philip Corboy argues that contingency fees are morally justified in virtue of increasing the access of less affluent persons to the justice system. Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIG., Summer 1976, at 27; see also Peter Karsten, *Enabling the Poor To Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231 (1998).

53. As a general matter, whether or not an attorney can justify accepting a contingency case on economic grounds is determined, in part, by the probability of favorable outcomes and the percentage of the recovered amount that the attorney can permissibly charge. The higher the percentage, the stronger the economic justification for taking the case. See *infra* Part II.C (detailing the calculation of "expected values" in prudential decision-making); see also Thomas J. Miceli & Kathleen Segerson, *Contingent Fees for Lawyers: the Impact on Litigation and Accident Prevention*, 20 J. LEGAL STUD. 381 (1991) (providing an economic analysis of contingency fees).

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households have a civil legal problem that they cannot afford to formally pursue;<sup>54</sup> if the results of the survey are correct, then a significant number of the 34.5 million Americans who live in households with incomes below the poverty level are still not being adequately served by the civil justice system.<sup>55</sup> Given that the poorest citizens must struggle to satisfy their basic needs while the richest can satisfy their most extravagant wants, one can plausibly argue that the disutility associated with the material difficulties experienced by the poorest citizens in attempting to enforce their rights outweighs the utility to the wealthiest of the material resources that would collectively be needed to alleviate some of these difficulties.

But it is also reasonable to think that the public costs associated with alleviating *each* of the inconveniences experienced by all but the wealthiest citizens outweigh the public benefits associated with providing such citizens with easier access to the civil justice system. Insofar as SPEA requires eliminating every relative inconvenience in accessing the civil justice system, it will require compensating less affluent citizens for a host of costs not incurred by the richest citizens. SPEA would require, for example, that the state compensate the poor for whatever wages they lose in pursuing a lawsuit because wealthier citizens commonly receive their income in salaries that are guaranteed and can hence take time off from work, when needed, to pursue a lawsuit without being financially penalized by their employers. Similarly, SPEA would require that the state compensate the poor for any miscellaneous expenses they incur in accessing the justice system, such as unusual transportation costs or the costs of paying for adequate childcare. Though no studies provide a reliable basis for predicting the direct costs of such measures, it is reasonable to hypothesize that these costs are not trivial.

Taking these steps, however, is likely to result in further costs to taxpayers by increasing the number of lawsuits and thereby adding to a growing burden on the civil justice system. Because the costs associated with pursuing a lawsuit are not insubstantial, they likely deter a significant number of lawsuits among less affluent would-be plaintiffs.<sup>56</sup>

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54. CAROLYN A. ELDRÉD & ROY W. REESE, INST. FOR SURVEY RESEARCH AT TEMPLE UNIV., REPORT ON THE LEGAL NEEDS OF THE LOW-INCOME PUBLIC (1994).

55. U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 1998, at vi (1999), available at <http://www.census.gov/prod/99pubs/p60-207.pdf>.

56. This, of course, is true of any material good: the more it costs, the less likely any particular buyer is likely to purchase it.

Reducing these costs and their deterrent effects would make it considerably more likely that would-be plaintiffs—at all income levels—litigate their disputes. This would result in a significant increase in judicial workload that would likely require more facilities and more personnel—resources that taxpayers would ultimately have to subsidize.

Some of these increases are undoubtedly justified from a utilitarian standpoint. If, for example, the costs associated with pursuing a lawsuit deter many less affluent individuals from initiating suits that they would win against more affluent defendants, reducing those costs would increase overall utility in the community. Since the marginal utility of money diminishes with additional increments,<sup>57</sup> the value of such sums to less affluent would-be plaintiffs is greater than the value of such sums to more affluent would-be defendants. Insofar as the relevant sums of money are more useful to the less affluent would-be plaintiffs than to the more affluent would-be defendants, the disutilities associated with enabling these suits would, other things being equal, be outweighed by the utilities.

But some of these increases probably cannot be justified from a utilitarian standpoint. To the extent that equalizing access is likely to increase the number of meritorious lawsuits by less affluent plaintiffs, it is also likely to increase the number of non-meritorious lawsuits by such plaintiffs. As a general matter, such lawsuits tend to decrease overall utility—even apart from the costs of such litigation to taxpayers: while the losing plaintiff's utility is at best unchanged by the loss, the winning defendant's utility is diminished by having to expend material resources to defend against a lawsuit that lacked an adequate basis in law. Since non-meritorious lawsuits are rarely conducive to the utility of either plaintiffs or defendants, increases in such lawsuits cannot be justified on utilitarian grounds. Accordingly, to the extent that implementing SPEA would tend to increase the number of non-meritorious lawsuits, it would diminish net community utility.

There are, of course, a host of additional costs associated with devoting more resources to the civil justice system. Many citizens believe that the existing tax burden is unfair<sup>58</sup> and resent being taxed for

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57. See, e.g., BRANDT, *supra* note 39, at 380.

58. According to the most recent Harris Poll on the topic, only twenty-one percent of respondents believe the current tax system does not need to be revised. Income Tax, Harris Poll No. 23 (Apr. 14, 1999), available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=25](http://www.harrisinteractive.com/harris_poll/index.asp?PID=25).

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measures that effectively redistribute income.<sup>59</sup> While one might reasonably believe that such resentment is misplaced, it is irrelevant from the standpoint of utilitarianism. What matters from this standpoint is only that net aggregate community utility is diminished and the needed tax increases are likely to significantly increase such resentment, thereby significantly diminishing public utility. Accordingly, insofar as the implementation of SPEA would impose burdens on taxpayers that diminish their utility (whether measured in terms of satisfied preferences, happiness, or pleasure), it results in further effects that decrease net aggregate community utility.

The general thrust of these admittedly speculative considerations,<sup>60</sup> then, seems to point in the direction of a principle that, on the one hand, provides less affluent citizens with more access than they currently have but that, on the other, stops well short of providing perfectly equal access. While the benefits associated with an increase in meritorious lawsuits provide a plausible utilitarian argument for increasing the access of the poor to the civil justice system, the costs associated with an increase in non-meritorious lawsuits provide a plausible utilitarian argument for providing somewhat less than the perfectly equal access required by SPEA. If this is correct, then SPEA cannot be justified on utilitarian grounds.

### C. *The Rawlsian Conception of Justice as Fairness*

Perhaps the most fundamental idea in John Rawls's famous theory of justice as fairness is "the idea of a society as a fair system of social cooperation over time from one generation to the next."<sup>61</sup> Implicit in the claim that society is a fair system of cooperation, as Rawls understands that claim, are two further claims: (1) the terms that govern societal cooperation ought to be reasonably acceptable to each participant; and (2) those terms ought to be reasonable from the standpoint of the participant's own prudential interests.<sup>62</sup> Accordingly, Rawls attempts to

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59. See STEVE FARKAS & JEAN JOHNSON, PUBLIC AGENDA, THE VALUES WE LIVE BY: WHAT AMERICANS WANT FROM WELFARE REFORM (1996) (indicating that sixty percent of whites and forty-eight percent of blacks believe that, at most, welfare should temporarily provide the "basics" in emergency circumstances).

60. It is important to reiterate that utilitarian arguments of this sort are inevitably speculative for the reasons discussed above in this subpart.

61. RAWLS, *supra* note 30, at 5.

62. *Id.* at 6.

identify the fair terms of cooperation by means of a hypothetical agreement among rational participants: in his view, the principles of justice constraining the state's lawmaking activities are those that would be chosen by rational persons in an "original position."<sup>63</sup>

The crucial idea of the original position is defined by three elements of normative theoretical importance. First, persons in the original position must be free and equal so as to preclude any unfair bargaining advantages among the parties. As Rawls points out, "if it is to be a valid agreement from the point of view of political justice[,] . . . these conditions must situate free and equal persons fairly and must not permit some to have unfair bargaining advantages over others."<sup>64</sup>

Second, persons in the original position are assumed to be concerned only to maximize their own interests, and are not assumed to take an interest in the welfare of other persons.<sup>65</sup> The reason is that the most that can be assumed about the motivations of human beings is that they are motivated by their own prudential interests. While many humans are motivated by altruistic considerations, not all are. To ensure that the principles chosen by persons in the original position are universally acceptable, Rawls defines the original position in such a way that the only psychological assumptions on which it depends are true of every human being.

Third, and most importantly, persons in the original position are shielded from information about their own contingent abilities and circumstances by the so-called veil of ignorance.<sup>66</sup> Persons behind the veil of ignorance do not know, for example, how smart, athletic, physically attractive, socially adept, wealthy, or healthy they are. As Rawls describes this feature of the original position:

[N]o one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor again does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society.

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63. RAWLS, *supra* note 19, at 15–19.

64. RAWLS, *supra* note 30, at 15.

65. RAWLS, *supra* note 19, at 10.

66. *Id.* at 118.

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That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve.

The persons in the original position have no information as to which generation they belong.<sup>67</sup>

Persons in the original position, then, know nothing about the abilities and properties that distinguish them from other persons. In effect, such persons know no more about themselves than they do about any other person; what knowledge they have about themselves is limited to knowledge of those properties that they share with every other person.

The point of the veil of ignorance is to seal off information that is irrelevant as far as justice is concerned.<sup>68</sup> Although the principles of justice are chosen by rational agents concerned only to advance their own interests, they must do so only on the basis of information that is morally relevant. Information about people's intellectual abilities is morally irrelevant because those abilities depend largely on circumstances over which they have little control: who their parents are, where they were born, and how much education they have are largely matters of luck. While such fortuitous circumstances are, of course, relevant with respect to one's prudential deliberations, they are irrelevant with respect to one's moral deliberations—and the choice of principles of justice is ultimately a moral choice. Accordingly, persons in the original position must choose principles that will advance their interests no matter what abilities and propensities they turn out to have.

The imposition of the veil of ignorance prevents persons in the original position from adopting an interest-maximizing principle for pursuing their prudential interests. In conditions of full information, rationally self-interested agents can pursue a strategy that aims at

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67. *Id.*

68. As Rawls puts this important point:

[I]t seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles. It also seems widely agreed that it should be impossible to tailor principles to the circumstances of one's own case. We should insure further that particular inclinations and aspirations, and persons' conceptions of their good do not affect the principles adopted. The aim is to rule out those principles that it would be rational to propose for acceptance, however little the chance of success, only if one knew certain things that are irrelevant from the standpoint of justice. For example, if a man knew that he was wealthy, he might find it rational to advance the principle that various taxes for welfare measures be counted unjust; if he knew that he was poor, he would most likely propose the contrary principle.

*Id.* at 16–17.

maximizing their own utility. In particular, such agents can assess the expected value of each act *A* by calculating the differential between the expected benefit of *A* (i.e., the magnitude of the benefit associated with *A* multiplied by its probability) and the expected cost of *A* (i.e., the magnitude of the cost associated with *A* multiplied by its probability) and selecting the act with the highest expected value.<sup>69</sup> By selecting the act with the highest expected value, agents optimize their prospects for maximizing their own utility.

In conditions of highly restricted information, however, rationally self-interested agents must adopt a more conservative “maximin” strategy and choose behaviors that are minimally necessary to protect themselves against highly undesirable outcomes. As Rawls describes it, the maximin strategy “tells us to identify the worst outcome of each available alternative and then to adopt the alternative whose worst outcome is better than the worst outcomes of all the other alternatives.”<sup>70</sup> The maximin rule, unlike the ordinary prudential strategy of maximizing expected value, takes into account only the relative magnitude of the worst possible outcomes; it does not take into account any information that assesses the comparative probabilities of the various options because such information is not available. In effect, then, rationally self-interested agents deploy the maximin strategy as a means for avoiding the worst of undesirable outcomes.

While some authors argue that the maximin strategy is not the only rational strategy applicable in situations of high risk and uncertainty,<sup>71</sup> it should be clear that the maximin strategy is rationally deployed in such situations. A somewhat perverse example is helpful in illustrating the point. From the standpoint of prudential rationality alone,<sup>72</sup> it is rational

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69. While agents do not typically ground their behavior in explicit mathematical calculations of probability, this is true for a variety of reasons that do not call the general principle into question. First, in most instances, the relevant probabilities are known to be 1. For example, the probability of the only material cost of a candy bar—its price—is 1. Second, in circumstances in which the material probabilities are not known to be 1, the agent has only a rough feel for the relevant values. In such situations, the role that explicit calculations normally play is played by a rough intuitive process of weighing the outcomes.

70. RAWLS, *supra* note 30, at 97.

71. See, e.g., John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality?: A Critique of John Rawls's Theory*, 69 AM. POL. SCI. REV. 594 (1975).

72. The standpoint of prudential rationality seeks nothing more than the maximization of one's own interests. While it is probably true that a purely prudential standpoint is rarely appropriate, it is crucial to realize here that moral considerations are not relevant with respect to making purely prudential decisions. Accordingly, the following example brackets any considerations of morality,

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for someone with full information to play the most dangerous games if the prize is large enough and the odds of losing are remote enough. Whether it is prudentially rational, for example, to play a game of Russian roulette with one bullet depends on the amount of the prize and on the number of empty chambers in the gun. While it would clearly be irrational to play if I know the prize is one dollar and there is only one empty chamber in the gun, it is clearly rational to play if I know the prize is one hundred million dollars and there are six billion empty chambers;<sup>73</sup> one incurs a substantially greater risk of death every time one gets into an automobile. In these cases, there is sufficient information to adopt an interest-maximizing strategy that will sometimes dictate playing the game. But a more conservative maximin strategy is appropriate from the standpoint of prudential rationality if I lack information about some of the salient probabilities. For example, if I am not told how many empty chambers there are in the gun, it is clearly rational to adopt a maximin strategy that requires me to decline the game as a means of avoiding the worst of undesirable outcomes.

Although the motivation for the veil of ignorance is largely moral, its effect on the deliberations of agents in the original position is prudential in character. Since the veil of ignorance denies people any information about themselves that would tell them how likely they are to win or lose in society, they must adopt a more conservative prudential strategy for selecting the principles of justice than the interest-maximizing strategy that is available in conditions of full information. They must, as a matter of prudential rationality, choose those principles that are minimally necessary to enable them to avoid the very worst outcomes. Since a maximin strategy will enable them to do this, it is rationally deployed by agents in the original position.

Rawls believes that persons in the original position will avoid the very worst outcomes by choosing a principle that affords them maximum liberty compatible with everyone else's having comparable liberty and a principle that assures that economic inequalities will conduce to their benefit no matter where they wind up in society. According to the

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which would function to deter the agent from playing the game. The only issue in deciding whether or not to play is whether doing so maximally conduces to one's self-interest.

73. This is subject to one qualification: if one believes that God exists and punishes suicide with eternal and infinite suffering in hell, then the expected cost of the game is infinite no matter how small the probability of losing. Since a finite expected benefit is infinitesimally small relative to an infinite expected cost, it is irrational to play the game on such theistic assumptions no matter how big the prize and how small the probability of losing.

Liberty Principle, “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with similar liberties for others.”<sup>74</sup> According to the Difference Principle, “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”<sup>75</sup> Persons in the original position thus use a maximin strategy to enable them to avoid catastrophic situations in which their freedom is denied or in which economic inequalities are permitted at their expense.

To evaluate SPEA from the standpoint of someone in the original position, then, we need to identify the worst outcomes of all the available alternatives to determine whether the worst outcomes under SPEA are preferable to the worst outcomes under all other principles. At the outset, it is easy to identify the very worst outcome: the very worst outcome is a catastrophic situation in which one has been severely injured by the negligent or willful behavior of another party and cannot enforce one’s right to compensation because one cannot access the civil justice system. In such circumstances, people have lost their capacity to make livings and lead meaningful lives because of the culpable behavior of another person, but cannot exercise their right to compensation from the former because they lack access to the civil justice system that would enforce their rights against the responsible party. Parties in this situation have no guarantee that they can even feed themselves; in a very literal sense, then, the very worst possible outcome is potentially life-threatening.

There are a number of principles that would permit this catastrophic outcome. This, for example, is the worst possible outcome of any principle that excludes, on its face, persons in any particular group from all access to the civil justice system for any reason whatsoever. But it is also the worst possible outcome of any principle that arbitrarily conditions access to the justice system upon the payment of a fee that is sizable enough to ensure that the least affluent people in a society cannot afford access to the justice system.<sup>76</sup> To avoid this outcome, then, a person in the original position must select a principle that assures that no class of persons is excluded from access to the civil justice system either

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74. RAWLS, *supra* note 19, at 53.

75. *Id.*

76. The reason for the qualifier “arbitrarily” is that, as will be argued below, people in the original position would not accept an absolute principle that requires the public to subsidize the access of the least affluent citizens because they have to guard against a situation in which they must sacrifice important material needs to subsidize another person’s access. See *infra* this Part & Part III.C.

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for reasons of class membership or for financial reasons not related to the costs of such access and the quantity of material resources generally available to the society.

SPEA clearly satisfies this criterion. Insofar as SPEA assures that every person has perfectly equal access to the civil justice system, it is logically inconsistent with any principle that excludes, on its face, persons in any particular group from access to justice for whatever reason. Further, insofar as SPEA guarantees minimal access to the justice system, it is logically inconsistent with any principle that conditions access to the justice system upon payment of a fee sizable enough to permit some, but not all, to access the justice system.

While selecting SPEA would clearly enable an agent to avoid the very worst outcomes, SPEA is nonetheless problematic from the standpoint of someone in the original position. The worst outcomes under SPEA, though not as bad as the worst outcomes of a principle that has the effect of arbitrarily denying some persons access to the civil justice system, are sufficiently undesirable that a rationally self-interested agent would seek to avoid them from the original position. Because it is clear that the costs of perfectly equal access are substantial, they will have to be borne by comparatively affluent citizens. Accordingly, it is conceivable under SPEA that more affluent citizens will have to make significant material sacrifices to pay their share of the very substantial costs of perfectly equal access. While this will probably not require a person to defer satisfaction of a basic material need, it may require a person to defer or even give up satisfaction of a want that is sufficiently urgent or passionate as to provoke considerable unhappiness and resentment in the agent.<sup>77</sup>

In this connection, it is helpful to observe that although persons in the original position have some understanding of political and economic theory,<sup>78</sup> they “do not know the particular circumstances of their own

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77. Such a reaction would, for example, be quite natural in someone who sees a similarity between taxation for redistributive purposes and forced labor. As Robert Nozick expresses the similarity:

Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities . . . . This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you. Just as having such partial control and power of decision, by right, over an animal or inanimate object would be to have a property right in it.

NOZICK, *supra* note 24, at 172.

78. RAWLS, *supra* note 19, at 119.

society.”<sup>79</sup> That means that they do not know whether the societies in which they live are comparatively prosperous or comparatively poor. Since they are thus shielded from any information that would tell them whether their tax burdens in subsidizing perfectly equal access will require significant sacrifices, the maximin strategy requires them to guard against the worst outcome—a state of affairs in which they have to sacrifice some of their most important wants to pay their share of the costs of perfectly equal access. Such prospects, then, provide rational self-interested agents in the original position with a powerful incentive to look for another principle that avoids such outcomes.

Moreover, it is clear that there are alternative principles that would avoid the very worst outcome of being denied access to the civil justice system. As it turns out, SPEA is not the least restrictive principle that would avoid these outcomes. Any principle that guarantees that people will not arbitrarily be denied access to the civil justice system will enable them to avoid the very worst outcome of being denied access to civil justice when it cannot be justified by considerations having to do with the costs of access and the quantity of resources available to society.<sup>80</sup> Since such a principle is logically compatible with allowing some inequality of access, a person in the original position need not choose a principle that, in effect, guarantees that no person will have more convenient access to the civil justice system than any other person.

For these reasons, it is reasonable to think that SPEA would not be chosen by a rationally self-interested agent in the original position. Since the worst outcomes under SPEA involve significant disadvantage, a rationally self-interested agent would prefer any other principle that avoids the very worst possible outcome without allowing another outcome as disadvantageous as the worst outcome under SPEA. Further, since there are less burdensome principles than SPEA that avoid the very worst outcome, it is reasonable to think that someone adopting a maximin strategy would select one of these other principles. Accordingly, the adoption of SPEA cannot be justified by Rawls’s theory of justice.

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79. *Id.* at 118.

80. *See supra* note 76 (explaining the qualifier “arbitrarily”).

## Towards a Theory of Legitimate Access

### III. TOWARDS A THEORY OF ACCESS: TWO PRINCIPLES

This part of the Article argues that the three different approaches to legitimacy converge on two principles that state necessary conditions for minimally legitimate access to the civil justice system. The first principle defines a negative obligation that requires only that the state refrain from certain types of action:

*The Equality Principle (EP):* The state is morally obligated not to exclude any person from access to any resource provided by the civil justice system for reasons that explicitly or implicitly deny the equal moral status of every human being.

As is readily evident, EP does not guarantee any positive right to access any particular resource; it requires only that the state not discriminate with respect to what resources it provides for reasons inconsistent with the moral equality of every human being.

Insofar as EP is therefore consistent with a state of affairs in which no person has access to any legal resources whatsoever, it operates in the following way. While EP does not require the state to provide access to any resources at all, it prohibits excluding people from access to any resource the state does provide for reasons that deny their status as moral persons.<sup>81</sup> For example, while EP does not guarantee access to some resource to women, it implies that women may not be excluded from access to that resource for reasons that are sexist in character. To the extent, then, that any other class of human beings has access to that particular resource, EP requires that women must be afforded access to it unless there is some reason for excluding them that is not sexist in character.

By itself, satisfaction of EP could not be sufficient for morally legitimate access according to the adequacy condition described above at the end of Part I. As observed there, most classically liberal theories presuppose that the legitimizing function of the state is to promote the common good by serving the prudential interests of its citizens. Because this requires the state, at a minimum, to establish and protect legal rights in a manner that endows those rights with some prudential value to its citizens, no set of access principles can be sufficient for legitimate access without guaranteeing the prudential value of legal rights to the rights-holders. Because EP is logically compatible with a state of affairs in

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81. As argued above, it is a human being's status as a moral person that ensures his or her moral equality with every other human being. *See supra* Part I.

which no one has access to any legal resources and hence with a state of affairs in which no one has the ability to activate the legal consequences that endow legal rights with prudential value, EP could not exhaust the conditions of morally legitimate access.

Accordingly, EP must be supplemented with a principle guaranteeing that citizens have sufficient access to the civil justice system to endow their legal rights with prudential value. What is needed, then, to adequately define a minimally legitimate right of access is a principle that defines a positive right of access to what is minimally needed to activate the relevant legal consequences.<sup>82</sup> The following principle is an affirmative norm that purports to do exactly that:

*The Reasonable Access Principle (RAP):* The state is obligated to provide every person with reasonable access to all resources that are minimally necessary (1) to develop an informed plausible view about their legal rights and responsibilities and (2) to competently prosecute or defend lawsuits implicating their rights or responsibilities.

The operative concept of reasonableness in RAP is intended to govern the distribution of costs among citizens and should be understood as incorporating the following principles.<sup>83</sup> First, the costs to any one citizen of subsidizing another citizen's access should not be greater than the benefit to the latter and should not, in any case, require the former to sacrifice satisfaction of needs or wants vital to well-being. Second, subsidized access is reasonable only to the extent that its aggregate public benefits exceed its aggregate public costs. Third, citizens should not be forced by their own economic circumstances to forgo access to minimally necessary legal resources when they have vital material interests at stake in being able to defend legal positions unless access to these resources cannot be subsidized consistently with the first two principles. In effect, the first two principles define limits on the extent to which the state can coercively require more affluent citizens to subsidize the access of less affluent citizens to the civil justice system; the last principle defines an affirmative obligation to transfer resources, subject

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82. This assumes, of course, that the relevant legal consequences have prudential value. If the legal consequences lack prudential value, then the ability to activate those consequences also lacks prudential value.

83. What is and is not "reasonable" is determined by recourse to substantive normative standards. As the term is normally used, the relevant standards include moral principles of fairness. To say, for example, that people are behaving in a manner that is unreasonable, on this ordinary usage, is partly to say that they are behaving unfairly.

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to the first two principles, to ensure that the poorest citizens can defend vital material interests.<sup>84</sup>

Thus construed, RAP is sufficient to endow legal rights with positive prudential value to all rights-holders and hence satisfies the relevant adequacy condition. Regardless of how costs are distributed among the citizenry, RAP defines an unconditional obligation on the part of the state to provide every citizen with access to every resource minimally necessary to defend a plausible legal position. Accordingly, RAP defines a positive right on the part of every citizen to have access to resources that, taken together, are sufficient to enable a competent adult to defend an informed legal position.<sup>85</sup> By itself, this assures that rational self-interested agents are able, in principle, to activate the legal consequences that endow legal rights with prudential value and hence, together with the prudential value of those consequences, guarantees the prudential value of legal rights.

Even so, it is important to emphasize that EP and RAP do not purport to exhaust the state's obligations with respect to access. The claim here is that satisfaction of EP and RAP is necessary for a state's civil justice practices to be legitimate, and not that satisfaction of EP and RAP is sufficient for a state's civil justice practices to be legitimate. Strictly speaking, EP and RAP are compatible with the existence of additional principles that must be satisfied by the state for its civil justice practices to be legitimate—though, as we have seen, such principles will not include SPEA.<sup>86</sup> In this sense, EP and RAP represent just a step towards

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84. The rationale for defining “reasonable” in terms of whether certain benefits exceed certain costs is that the ordinary sense of the term incorporates substantive moral content and is hence incompatible with both utilitarianism and Rawls's theory. It is incompatible with utilitarianism because utilitarianism assumes that all moral qualities of an act are fully determined by its effects on community utility. It is incompatible with Rawls's view because persons in the original position are screened from their own particular moral views and are thus not in a position to agree on any principle that incorporates moral content. But while the operative notion is defined in purely non-normative terms, we will see that it is morally justified on each of the three conceptions of legitimacy. Thus, although the notion does not explicitly incorporate any substantive moral ideals, I will argue below that it satisfies three different sets of them. *See infra* Part III.A–C.

85. Taken together, all the resources that are minimally necessary to develop and defend a legal position are minimally sufficient to do so. People who have access to every resource that is minimally necessary have access to everything they need in order to develop and defend legal positions; it follows that they have access to materials that are minimally sufficient to develop and defend legal positions.

86. Indeed, it is reasonable to think that the state is morally obligated to provide more resources to persons who are not sufficiently competent to defend their own interests; as is readily evident, EP and RAP are utterly indifferent with respect to such requirements.

a general theory of morally legitimate access, and not a fully comprehensive theory of legitimate access.

A. *The General Principle of Equality*

EP is a straightforward corollary of the general principle of equality. As will be recalled, the general principle of equality affirms the moral equality of all human beings *qua* persons and hence requires that every human being be treated with equal respect—an obligation that applies to both persons and states. It is clear, as a logical matter, that any behavior towards human beings for reasons that deny them equal status as moral persons is inconsistent with the obligation to treat them with equal respect. The obligation to treat all persons with equal respect requires, at the very least, respect for their status as moral persons with full and complete sets of rights. To the extent, then, that the state is morally obligated to treat every human being with equal respect, it follows that the state may not exclude any person from any resource provided by the civil justice system for any reasons that explicitly or implicitly deny the equal moral status of every human being.<sup>87</sup>

While the principle of equality does not logically imply RAP, RAP coheres with the principle of equality and is hence justified by it. The obligation to treat each person with equal respect implies, *a fortiori*, an obligation to treat each person with respect, and minimal moral respect for a person requires respect for his or her autonomy.<sup>88</sup> Insofar as moral personhood confers upon a person full membership in the moral community with a complete set of moral rights and responsibilities, it entitles that person to respect for at least those decisions that do not violate the rights of other persons. Indeed, it is hard to make sense of the idea that one could treat a person with morally minimal respect without a commitment not to interfere with those decisions and behaviors that do not in any way implicate the rights of others.<sup>89</sup>

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87. *See supra* Part II.A.

88. Most deontological theories of legitimacy treat autonomy as a basic value. John Rawls, for example, presupposes that agents in the original position are fully autonomous—a feature that is necessary to ensure the moral validity of the agreement on principles of justice. *See* JOHN RAWLS, *POLITICAL LIBERALISM* 77–81 (1993). In contrast, consequentialist theories protect autonomy only insofar as it conduces to the relevant favored state of affairs. Since the general principle of equality discussed here is a deontological one derived from deontological considerations about moral personhood, it is reasonable to infer that it requires minimal respect for autonomy.

89. To say this is not, however, to presuppose any particular conception of what rights others have. Such rights may be quite expansive as political liberals believe or less expansive as political conservatives believe. Thus, for instance, this statement is agnostic with respect to whether

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Respect for autonomy clearly requires that the state provide people with access in principle to what is minimally needed to adequately defend their legal interests. The obligation to respect autonomy undoubtedly implies substantive limits on the state's legitimate lawmaking abilities; it presumably requires, at the very least, that the laws of the state allow persons a certain level of freedom to frame, express, and execute their own values as long as doing so does not violate the rights of others. But if respect for autonomy requires allowing people to steer their own course, it also requires, *a fortiori*, allowing people to steer their own course with respect to developing and defending informed and plausible legal positions. Since it is, by definition, impossible for people to develop and defend informed and plausible legal positions without having access to what is minimally necessary to do so, the state is obligated to allow, as a matter of principle, each citizen access to those resources that are necessary (1) to develop informed plausible views about their legal rights and responsibilities or (2) to prosecute or defend lawsuits implicating their rights or responsibilities.

It is, however, not enough that the state allows such access in principle; it must also take morally reasonable steps to ensure that every citizen can, as a practical matter, access the justice system when needed to defend legal interests that are vital to well-being.<sup>90</sup> If the state is going to limit the options available to citizens for defending their vital interests by coercively enforcing a monopoly over the use of force in resolving disputes, then it must ensure that each citizen has morally reasonable access to what is minimally needed to defend his or her vital interests without resorting to force. It would be unfair for the state to preempt citizens' ability to coercively defend their own interests without ensuring that they have morally reasonable opportunities to avail themselves of the state's civil justice system. The obligation of equal respect seems to imply that the state take morally reasonable steps to ensure that all citizens are able to access the civil justice system (and hence the state's monopoly on coercive force) when their vital interests are at stake.

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consenting adults have an unrestricted right to engage in sexual relations—a subject of dispute between political conservatives and political liberals.

90. Because we are talking about what is required by deontological principles, the appropriate notion of reasonableness is the ordinary one that incorporates moral principles of fairness. I will argue that the principles that define the notion as it appears in RAP are reasonable in the ordinary moral sense of the word.

But given that the costs of providing access to such resources must ultimately be borne by citizens, there are limits to how much the state can, as a moral matter, reasonably demand from one class of citizens by way of subsidizing the access of another class of citizens.<sup>91</sup> Equal respect for those whose incomes will have to be coercively taxed to subsidize such access surely entails limits on how much they may be taxed for such purposes; it seems clear, for example, that citizens could not legitimately be required to pay ninety percent of their incomes to assure some utopian level of access to the civil justice system.

If it is not entirely clear exactly where to draw the line on how much citizens can legitimately be taxed to ensure that others have adequate access, RAP certainly expresses a plausible candidate for such a limit. Equal respect for each citizen seems to require that no citizen be forced to absorb a cost that is greater than the benefit it makes possible to another citizen. Respect for citizens' autonomy seems to mandate that they not be asked to subsidize other persons' access if it requires them to sacrifice interests vital to their own well-being. Finally, respect for citizen autonomy seems to require recognition of the sacrifices that must be made to earn a living; coercively taxing citizens beyond the point where the public benefits exceed the public costs seems to squander those citizens' hard-earned resources and hence seems inconsistent with any principle that requires recognition of the sacrifices they must make to earn a living. If this is correct, then RAP is, at the very least, presumptively justified under the general principle of equality.

### *B. Utilitarian Theories of Legitimacy*

Utilitarian moral theories, including utilitarian theories of legitimacy, presuppose a principle of equal respect: according to this principle, no person's utility—whether measured in terms of pleasure, happiness, or well-being—may be accorded greater weight in moral deliberations than any other person's interests. As Peter Singer phrases this important point:

[W]hen I make an ethical judgment [under utilitarian moral theories,] I must go beyond a personal or sectional point of view and take into account the interests of all those affected [by our actions]. This means that we weigh up interests, considered simply as interests and not as my interests, or the interests of

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91. Again the relevant sense of "reasonable" here is the ordinary sense. *See supra* note 90.

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Australians, or of people of European descent. This provides us with a basic principle of equality: the principle of equal consideration . . . [requires] that we give equal weight in our moral deliberations to the like interests of all those affected by our actions.<sup>92</sup>

Whatever it is, then, that confers membership in the community of moral persons according to utilitarianism,<sup>93</sup> it requires that every moral agent, individual or institutional, accord each person equal respect by assigning as much weight to that person's utility as to any other person's utility.<sup>94</sup>

Interpreted in light of this foundational commitment, utilitarian theories of legitimacy clearly imply EP. The argument is straightforward. Insofar as the state excludes any person from access to some legal resource for a reason that denies the equal moral status of every human being, it disregards the utility of that person relative to those of other persons. To utterly exclude someone from a resource for such reasons is to do so without any regard for whether access to that resource would conduce to her utility. But disregarding the utility of one person *P* in making a moral decision about her is equivalent in effect to a strong form of discounting *P*'s utility relative to the utility of other persons; it has exactly the same effect as always assigning no value to *P*'s utility because it makes decisions about how to treat *P* turn entirely on the consequences to the utility of other persons.<sup>95</sup> Since the state is therefore obligated not to disregard the utility of any person under utilitarianism and since the state cannot exclude a person from access to legal resources for any reason that denies her equality without utter disregard for that person's utility, it follows that the state is obligated not to disregard a person's utility for a reason that denies her equality.

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92. PETER SINGER, *PRACTICAL ETHICS* 21 (2d ed. 1993).

93. While this is sometimes thought to involve the capacity for rationality, Peter Singer argues that the capacity for suffering confers a right to equal consideration on animals. *See id.* ch. 2.

94. Indeed, this feature of utilitarianism has frequently been criticized as setting a standard that is unreasonably high. For example, Bernard Williams argues that the duty of equal consideration requires persons to subordinate the projects that give meaning to their lives in order to promote the utility of other persons and is hence inconsistent with respect for autonomy. Thus, for example, utilitarianism would require me to give up philosophy, which I love, to study medicine, which I do not, if doing so would maximally promote utility. *See* J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

95. For example, a state that denies women the right to vote on the ground that women do not have the same moral status as men has effectively excluded women from voting for reasons that have nothing to do with the utility to women of being able to vote and everything to do with the utility *to men* of women not being allowed to vote.

Accordingly, if utilitarianism's principle of equal consideration is true, then EP must also be true.

To justify RAP from the standpoint of utilitarianism, we need to go beyond utilitarianism's formal commitment to equal respect and assess the relevant utilities and disutilities. Utilitarianism, as will be recalled, defines the moral value of an act entirely in terms of its extrinsic effects on community well-being. Thus, utilitarian theories of legitimacy imply that the sole obligation of the state is to act in ways that maximally promote net aggregate utility among its citizens. While EP can be justified as a logical consequence of utilitarianism's principle of equal consideration, RAP is not a logical consequence of this principle because it is consistent with much stronger principles like SPEA.<sup>96</sup> For this reason, whether RAP is justified under utilitarianism depends entirely on its effects on net aggregate community utility.

RAP's guarantee of access to resources that suffice to enable a competent adult to defend a legal position promotes the utility of potential plaintiffs.<sup>97</sup> Rational agents would experience significant disutility if seriously injured by the culpable conduct of someone they could not sue because they lacked access to the necessary legal resources. It is important to note, however, that the relevant disutilities are not limited to the obvious ones associated with not being able to extract compensation from the culpable party, which are greater for less affluent would-be plaintiffs than for more affluent would-be plaintiffs. They also include the resentment that naturally accompanies being denied access to the civil justice system when needed to hold a culpable party accountable for serious injuries, which are presumably as significant for more affluent would-be plaintiffs as they are for less affluent would-be plaintiffs.

For similar reasons, RAP's guarantee of access generally promotes the utility of potential defendants. Rational agents would incur significant disutility if they were defendants in a civil lawsuit seeking substantial money damages without having access to the resources

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96. It is a basic theorem of logic that if each of two inconsistent propositions is consistent with a proposition *A*, then *A* implies neither of those propositions. For example, the proposition that apples are red is inconsistent with the proposition that George Bush is president and with the proposition that George Bush is not president. Hence the proposition that apples are red does not imply either of those latter propositions. *See, e.g.*, ELLIOT MENDELSON, INTRODUCTION TO MATHEMATICAL LOGIC (4th ed. 1997).

97. It should be recalled here that access to every resource minimally necessary for such purposes implies access to resources that, taken together, are minimally sufficient for such purposes. *See supra* note 85.

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needed to pursue plausible legal defenses. As before, the relevant disutilities are not limited to those associated with the unfavorable outcome—though having to pay substantial money damages is undeniably a very unhappy outcome for most people. They also include the significant unhappiness most people would experience at the very prospect of not being able to tell their sides of the story because they are denied access to the civil justice system.<sup>98</sup>

Nevertheless, a positive right of access also creates theoretically significant disutilities. Insofar as RAP requires that people have access to every resource minimally necessary to defend an informed legal position, it requires that the state incur significant expenses that must be passed on to taxpayers. As one might expect, the costs to the state of creating, sustaining, and making accessible resources it would not otherwise have to worry about are substantial. A recent survey showed that the direct costs of tort litigation in the United States reached \$205 billion in 2001—2.04% of the gross domestic product that year;<sup>99</sup> given that tort disputes are only one source of civil litigation, one can expect that the costs are significantly higher for civil litigation as a whole. But insofar as the costs of such resources have to be borne by taxpayers, the provision of those very resources impose disutilities on the very persons who are supposed to benefit from those resources; indeed, the direct costs to each U.S. citizen of tort litigation was \$721 in that year,<sup>100</sup> which amounted to a “litigation tax” of almost \$2900 for a family of four. As is readily evident, these costs impose significant disutilities on the very citizens who stand to benefit from RAP.

Even so, it seems clear that the utilities outweigh the disutilities for most people—at least if their behavior in other contexts is any indication. Most people, for example, experience considerable unhappiness at even the prospect of developing a serious illness without being able to afford appropriate medical care. To eliminate this prospect, people who can afford it typically purchase health insurance despite the substantial disutility it imposes in the form of expensive monthly premiums. While it is unfortunately true that there are too many

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98. This class of disutilities helps to explain why rights matter so much to us: they give us peace of mind by purporting to diminish (if not eliminate) the prospect that some evil will be done to us.

99. TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2002 UPDATE—TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 7 (2003), *available at* [http://www.towersperrin.com/tillinghast/publications/reports/2002\\_Tort\\_Costs\\_Update/Tort\\_Costs\\_2002\\_Update\\_rev.pdf](http://www.towersperrin.com/tillinghast/publications/reports/2002_Tort_Costs_Update/Tort_Costs_2002_Update_rev.pdf).

100. *Id.* at 11.

Americans without adequate health insurance,<sup>101</sup> it is because they cannot afford it—and not because they do not want it. Rational self-interested persons are typically willing to shift material resources, when they can afford to do so, from the pursuit of other material goods to purchase insurance policies that protect them against the risk of incurring very significant disutilities. Indeed, this is why insurance companies are typically profitable to begin with.

The same sort of reasoning applies to RAP. While the provision of such resources must be subsidized by taxpayers at considerable expense to themselves, it is reasonable to hypothesize that taxpayers regard the disutility associated with the costs of such measures as being significantly outweighed by the utility that comes with the peace of mind of knowing that one will not find oneself in a situation in which one needs to develop and defend a plausible legal position but cannot do so because one is denied access to what is minimally needed to do so. RAP can thus be justified under utilitarian theories of legitimacy in the same way that the purchase of health insurance can be justified by comparison of the relevant utilities and disutilities associated with buying and not buying it.

Of course, there is one difference between the two situations. Whereas individuals are typically responsible for only the costs of their own health insurance, RAP will sometimes make some individuals responsible for the costs of ensuring effective access of other individuals. Insofar as RAP authorizes the state to require that one class of citizens subsidize the access of another class of citizens, it contains a redistributive element that could arguably give rise to significant disutility in the form of resentment among those who must subsidize the access of other persons.

Nevertheless, RAP minimizes the risk that such disutilities would ultimately outweigh the utilities of subsidized access by sharply limiting the extent to which any citizen can be asked to subsidize the access of less affluent citizens. For starters, RAP does not permit the state to require one citizen to subsidize another's access when doing so would force the citizen to sacrifice the satisfaction of important material wants. In addition, RAP attempts to ensure that transfers of wealth are cost-efficient in two important respects—one individual and the other

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101. According to a recent U.S. Census Bureau report, 43.6 million Americans went without health insurance in 2002. See U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2002 1 (2003), available at <http://www.census.gov/prod/2003pubs/p60-223.pdf>.

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collective. First, RAP ensures that an individual will never be asked to bear a personal cost that is out of proportion to the benefit to others. Second, RAP ensures that the community as a whole will not be taxed for measures that do not result in aggregate public benefits that exceed their aggregate public costs. These features of RAP diminish the risk of significant citizen resentment by reducing the likelihood that citizens will regard their responsibility for subsidizing other citizens' access as unfair or excessive—natural sources of the sort of resentment that might ultimately undermine RAP's justifiability under utilitarian principles. For such reasons, it is plausible to conclude that RAP is justified under utilitarian theories of legitimacy.

Even so, the possibility of such public resentment calls attention to one potentially troubling feature of RAP. Insofar as consideration of public costs includes such subjective factors as taxpayer resentment, RAP implies that redistributive measures that guarantee effective access for less affluent citizens are justified only to the extent that they are minimally acceptable to the taxpaying public. While it would take considerable unhappiness on the part of taxpayers to outweigh the obvious utilities that such redistributive measures create, one can conceive of states of affairs in which taxpayer resentment exceeds the utility of such access to the poor. If, for example, taxpayers are sufficiently self-centered and beneficiaries are sufficiently disinterested, taxpayer resentment would outweigh the utilities to the poor of having effective access to the civil justice system. In that situation, RAP would not authorize the state to adopt redistributive measures to ensure that less affluent citizens can afford to access the civil justice system—though, of course, RAP would in such circumstances guarantee them access in principle.

Indeed, one might be tempted to think that this admittedly disturbing possibility constitutes a counterexample that refutes RAP, but this would be a mistake. As unfortunate as this state of affairs would admittedly be, it is compatible with other important shared moral commitments. For example, such a state of affairs is compatible with the general principle of equality and the underlying principles defining the status of moral personhood;<sup>102</sup> as argued in the last subpart, respect for people's autonomy limits what can be coercively required from them by way of material contribution to the well-being of other persons. If a comparison

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102. As we will see in the next subpart, it also harmonizes nicely with Rawls's conception of justice as fairness.

of relevant benefits and costs is not the ultimate standard of morality, it certainly limits the extent to which the resources of one person can legitimately be transferred by coercive measures like taxation to promote the utility of other persons. For this reason, it would arguably be wrong for the state to coercively require one set of persons to subsidize access for other persons if the public costs exceeded the public benefits.<sup>103</sup> Thus, the worst-case scenario under utilitarianism is not a counterexample that warrants rejecting RAP.

C. *The Rawlsian Conception of Justice as Fairness*

As will be recalled, the principles of justice defining the state's legitimate lawmaking authority are, on Rawls's view, those that would be chosen from a position of highly limited information by free and rational persons concerned only to advance their own interests. The Rawlsian veil of ignorance deprives people of any information that would enable them to assign probabilities to the various ways in which their lives might turn out on the ground that such information has nothing to do with what is just or fair. While the rationale for depriving people of such information is moral in character, the effect of the veil of ignorance is practical: it forces people to move from an interest-maximizing strategy to a more conservative maximin strategy that looks to avoid the very worst outcomes.<sup>104</sup>

In evaluating whether EP and RAP would be chosen from the original position, it is crucial to emphasize the role that minimal access plays in making possible the development and pursuit of a plausible legal position. People who lack access to what is minimally needed—and hence necessary—for pursuing plausible legal positions cannot even begin to protect their interests in the case of legal disputes: people cannot competently prosecute or defend lawsuits if they do not have access to what is necessary to do so. Indeed, it is true, as a logical matter, that it is

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103. Here it is helpful to note that this unfortunate state of affairs is only likely to occur in extremely poor societies in which most persons struggle to meet their basic needs. In such societies, the state would not be obligated to shift resources from some persons to pay for the access of other persons because this could not be done without requiring the former to sacrifice satisfaction of material wants—something that no one can legitimately be coerced to do. In somewhat more affluent societies where most persons have a small surplus over what is needed to satisfy their basic needs, RAP would require, at most, shifting resources to assure that every person has access to sufficient legal resources in cases where vital basic interests are at stake. From the standpoint of ordinary moral commitments, these results seem quite reasonable.

104. *See supra* Part II.C.

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not possible for a person to develop or defend an informed legal position without access to what is necessary to do so.<sup>105</sup>

The value of such ability to rational agents concerned to advance only their own interests from an original position of limited information is clear. As far as principles of access are concerned, the worst possible outcomes for rational self-interested agents worried about the possibility of legal conflicts with other people involve situations in which they are denied access, whether for legal or factual reasons, to what is minimally needed to defend their legal interests. It is true, of course, that how bad these outcomes are for agents varies indirectly with their material resources; other things being equal, the more material resources they have, the better they can tolerate the costs of being denied access to what they need to defend their interests. But since, from the original position, the agents do not know what their material prospects are, they must seek to avoid the worst outcomes. And, from the standpoint of people who lack information about their own material prospects, the very worst outcome is utterly unacceptable: to be completely denied access to what is minimally necessary to defend important legal interests. People in such situations face substantial threats to their well-being.

Accordingly, rational self-interested agents employing a maximin strategy from the original position would reject any principle of access compatible with such outcomes. As will be recalled, the maximin strategy requires rational self-interested agents to minimize the worst possible outcome by choosing the principle that allows for the least objectionable among worst possible outcomes.<sup>106</sup> Thus, if there are any principles with a less objectionable worst outcome than complete lack of access, a person in the original position would choose from among such principles. From the standpoint of prudential rationality, any principle that is compatible with being utterly denied access to what is minimally needed to defend a legal position is unacceptable.

The maximin strategy dictates the adoption of EP because *any* principle that logically implies the negation of EP (i.e., the general “principle” that it is permissible to deny human beings access to legal resources for reasons incompatible with their status as moral persons) is compatible with these unacceptable outcomes. Insofar as the state adopts a rule that allows it, as a general matter, to deny human beings access to

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105. The proposition that it is necessary that *P* is logically equivalent to it is not possible that not-*P*. See, e.g., BRIAN F. CHELLAS, *MODAL LOGIC: AN INTRODUCTION* (1980).

106. See *supra* Part II.C.

legal resources for these reasons, it creates the possibility that agents in the original position might be utterly denied access to what they need to defend legal positions. Since the worst outcomes under EP involve, at most, (misplaced) resentment about someone's access to the justice system,<sup>107</sup> the maximin strategy requires rejecting any principle that implies the negation of EP (which, of course, includes the negation of EP itself).<sup>108</sup> Accordingly, the maximin strategy requires the adoption of EP to assure agents that they cannot permissibly be denied access to something they need to defend their legal interests for reasons that deny their equality as moral persons.

Nevertheless, adopting EP is not sufficient to fully eliminate outcomes that are unacceptable from the original position. The reason for this is that EP, by itself, does not suffice to guarantee access of all persons to what is minimally needed to defend one's legal interests when necessary. Insofar as EP prohibits only exclusion for discriminatory reasons (i.e., reasons that explicitly or implicitly deny any human being's status as a moral person), it is logically compatible with a state of affairs in which a person is denied access for non-discriminatory reasons. As a logical matter, the state would not violate EP by requiring payment of prohibitively expensive fees for access to legal resources that do not reflect the costs as long as such a measure is not logically grounded in a denial of any human being's personhood.

To block all such unacceptable outcomes, people employing a maximin strategy would have to begin by choosing a rule that guarantees them access in principle to what is needed to defend their legal interests—no matter what societal or generational circumstances in which they find themselves. From the standpoint of prudential rationality, the prospect of being arbitrarily denied access to what they need to defend a legal position when significant material interests are at stake is simply unacceptable. For this reason, rational self-interested agents employing a maximin strategy from the original position would choose a rule that, like RAP, defines a positive right that guarantees access, in principle, to the civil justice system.

But a principle that guarantees only access in principle will not suffice to block all outcomes in which the agent in the original position is

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107. In particular, it would involve resentment that some human being who is mistakenly thought not to be a person has access to the justice system. It should be clear that this is a less objectionable outcome from the standpoint of prudential rationality than being denied access for reasons that deny one's personhood.

108. Every proposition logically implies itself.

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denied access to the legal system, because a person who is guaranteed access in principle might lack the needed financial resources to take advantage of such access. From the original position, however, the selection of a principle that minimizes the risk of these outcomes is complicated by the fact that principles assuring meaningfully effective access to the civil justice system will likely require coercive redistributive measures that implicate other interests that agents in the original position are concerned to protect. Accordingly, the agent seeking a principle that provides greater access than one guaranteeing access in principle will have to give some thought to how the costs will be distributed.

In deciding among principles of access, then, rational self-interested agents in the original position must guard against two outcomes that threaten vital interests. First, since the claim that one has access in principle does not imply the claim that one has adequate material resources to effectively access the civil justice system, agents must guard against the possibility of being unable to afford access to the civil justice system when they need it to defend vital legal interests. Second, because citizens will ultimately be coercively taxed to pay for the costs of access, agents must guard against the possibility of having to sacrifice significant material wants to subsidize someone else's access to the justice system.

Unfortunately, there is no principle that would simultaneously foreclose the possibility of both outcomes. Any principle that forecloses the possibility of anyone's being denied effective access to the justice system can do so only by leaving open the possibility that the agent might be required to forego satisfaction of significant material wants to subsidize the access of less affluent citizens. Depending on the economic situation of the society, a guarantee of effective access might require significant sacrifices on the part of more affluent citizens. Similarly, any principle that utterly forecloses the possibility of anyone's having to forego satisfaction of significant material wants to subsidize someone else's access creates the possibility that the agent might be denied access to the civil justice system for economic reasons. Depending on the economic situation of the society, a guarantee of limited taxation for subsidized access might have the effect that some less affluent citizens cannot afford to access the civil justice system when they need to.

Accordingly, it is reasonable to think that agents in the original position would attempt to achieve exactly the sort of balance between the two outcomes that RAP purports to achieve. To minimize the risk

that the agents might be required to make material sacrifices to subsidize someone else's access that are not justified by the benefits, they would choose a principle that limits the extent to which they can be coercively required to bear the costs of someone else's access: they will never be asked to make either significant material sacrifices or sacrifices that are greater than the benefits they make possible for other persons. To minimize the risk that the agents might be unable to access the civil justice system in cases where their vital interests are at stake, they would choose a principle that requires the state to guarantee effective access in such cases to the extent that it does not require those subsidizing such access to sacrifice their own vital interests.

For such reasons, agents in the original position would guard against such undesirable outcomes by choosing a principle that guarantees, at most, access to the justice system that is "reasonable" in the sense that the benefits to those who receive such access outweigh the costs to those who must subsidize such access and require no citizen to sacrifice vital interests to subsidize another citizen's access. Agents pursuing a maximin strategy from the original position must find a prudentially acceptable way to optimize the worst outcomes to which they might be subject depending on how their lives go. They must therefore guard against outcomes that, on the one hand, deny them access to what they need to defend legal positions and, on the other, require them to sacrifice significant material desires to reduce the inconveniences of accessing justice when the public costs of doing so exceed the public benefits. If we construe the notion of "reasonableness" as being defined in terms of public benefits outweighing public costs, then RAP will optimize the worst possible outcome to which an agent in the original position might be subject. Thus, it is fair to conclude that an agent in the original position would supplement EP with RAP as a means of excluding all of the most unacceptable outcomes.

#### IV. CONCLUSION

This Article attempted to take a significant step towards a general theory of morally legitimate access. It argued that none of the three most influential approaches to morally legitimate authority requires the state to provide citizens with perfectly equal access to the civil justice system; it is legitimate for the state to allow some inequalities with respect to how easy or burdensome it is for a citizen to access the civil justice system. Further, the Article argued that these three approaches to legitimacy converge on two principles: one that defines an affirmative

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obligation (i.e., the Reasonable Access Principle) to provide to each citizen what is minimally necessary to develop and defend a plausible legal position and one that defines a negative obligation (i.e., the Equality Principle) to refrain from restricting access to the civil justice system for reasons that deny the equality of every moral person. Taken together, these two principles define necessary conditions for the legitimacy of a state's civil justice practice. While there is surely much to be done in working out a theory of legitimate access, these two principles represent a significant step towards a fully comprehensive theory of access.

Washington Law Review

Vol. 79:31, 2004