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Theorizing Access to Civil Justice

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Abstract

Despite more than half a century of reform efforts, access to civil justice is still understood to be in a state of crisis. Part of the reason for this is because there is no consensus among the legal community on the meaning of justice in this context. This paper seeks to provide a much-needed theoretical underpinning to the access-to-civil-justice movement. It advances 'justice as fairness,' as articulated by the American philosopher John Rawls, in conjunction with Lesley Jacobs' model of equal opportunities, as a suitable theory in which to frame the access-to-civil-justice movement. I explain why this framework is appropriate for pluralistic democracies like Canada and how it can be used to define measures of justice. This exercise is thus not simply a theoretical discussion, but rather is intended to be used as a practical framework to assess current and proposed policy initiatives.

Keywords: *Access to Justice; Theories of Justice; Justice as Fairness; Equal Opportunities*

1. Introduction

An often-repeated maxim within the Canadian legal community is that access to civil justice is in a state of crisis.[1] Despite more than half a century of reform efforts individuals still struggle to effectively resolve their legal problems and, in some instances, simply abandon their problems entirely.[2] Part of the reason that reform efforts have yet to solve this crisis is that there is no consensus among the legal community on the meaning and definition of access to civil justice.[3] Historically, and from a global perspective, access to civil justice was simply

1. See Action Committee on Access to Justice in Civil and Family Matters, "Canada's Justice Development Goal:2020" (2021) online (pdf): *Action Committee on Access to Justice in Civil and Family Matters* https://static1.squarespace.com/static/60804beaba3bc03016513a59/t/609d9ab372b8f876777a7ee9/1620941495000/jdgreport2020challengechange.pdf.
2. See Trevor C W Farrow et al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016) online (pdf): *Canadian Forum on Civil Justice* https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1149&context=olsrps.
3. See Action Committee on Access to Justice in Civil and Family Matters "Access to Civil and Family Justice: A Roadmap for Change" (2013) online (pdf): *Action Committee on Access to Justice in Civil and Family Matters* https://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf; CBA Access to Justice Committee, "Reaching Equal Justice: An Invitation to Envision and Act" (2013) online (pdf): *Canadian Bar Association* https://www.cba.org/Publications-Resources/Resources/Equal-Justice-Initiative/Reaching-Equal-Justice-An-Invitation-to-Envisi-(1). This is also the case internationally. See e.g. Rebecca Sandefur, "What We Know and Need to Know About the Legal Needs of the Public" (2016) 67:2 SCL Rev 443 at 451-52.

equated with access to the courts and to lawyers.[4] This limited definition, however, is conceptually inadequate for several reasons. From a pragmatic standpoint, most legal problems never make it before the formal law and, in any event, the formal law is not always the best place to resolve those problems.[5] As such, a movement that is primarily concerned with the needs of the individual—as opposed to the needs of court administration, for example—requires a more expansive definition of justice. From a theoretical perspective, an expanded definition of justice is needed to prevent the access-to-civil-justice project from being frozen in a particular time and place. To illustrate, the modern movement predates the *Canadian Charter of Rights of Freedoms*[6] by approximately twenty years.[7] If we were to equate justice with mere access to the courts then many of the legal rights and entitlements that are enshrined by the *Charter* and are acknowledged as belonging within the scope of the movement would have been excluded simply because there was no procedural mechanism for their redress. These injustices, however, existed regardless of whether the courts recognized them as legitimate.[8] As such, it behooves the access-to-civil-justice project to have a standard of justice that is independent of court recognition.

Despite this need for an expanded definition of justice, much of the literature does not engage with theoretical discussions of justice. There are, of course, notable exceptions; however, such examples are still uncommon within the literature and not meaningfully incorporated into the policy and programing.[9] Scholarship in this field is more typically exemplified by either empirical studies that examine how people understand and interact with the law[10] or academic

4. See Roderick A Macdonald, "Access to Civil Justice" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Reserach* (Oxford University Press, 2010) 493. See also Mauro Cappelletti & Bryant Garth, *Access to Justice, Vol I, Bks 1&2: A World Survey* (Dott A Giuffrè Editore, 1978).

5. See Ab Currie, *Nudging the Paradigm Shift: Everyday Legal Problems in Canada* (Canadian Forum on Civil Justice, 2016).

6. See *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*].

7. See Mauro Cappelletti & Bryant Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27:2 Buff L Rev 181.

8. See Marc Galanter, "Access To Justice in a World of Expanding Social Capability" (2010) 37:1 Fordham Urb LJ 115.

9. See e.g. Pascoe Pleasence & Nigel Balmer, "Justice & the Capability to Function in Society" (2019) 141:1 Daedalus 140; Rebecca Sandefur, "Access to What?" (2019) 141:1 Daedalus 49; Jennifer A Leitch, "Having A Say: 'Access to Justice' as Democratic Participation" (2015) 4:1 UCL Journal of Law & Jurisprudence 76; Trevor C W Farrow, *Civil Justice, Privatization, and Democracy* (University of Toronto Press, 2014); Hilary Sommerlad, "Some Reflections on the Relationship Between Citizenship, Access to Justice, and the Reform of Legal Aid" (2004) 31:3 JL & Soc'y 345; Roderick Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor YB Access Just 287.

10. See e.g. Pascoe Pleasence, Nigel J Balmer & Catrina Denvir, "Wrong About Rights: Public Knowledge of Key Areas of Consumer, Housing, and Employment Law in England and Wales" (2017) 80:5 Mod L Rev 836; Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories From Everyday Life* (University of Chicago Press, 1998); Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (University of Chicago Press, 1990); David M Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community" (1984) 18:4 Law & Soc'y Rev 551.

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critiques of existing legal processes.[11] In other words, access-to-civil-justice scholarship typically focuses on issues of access while presupposing that there is a commonly accepted conception of justice.[12] Although this presumption is understandable given the practical and real world applicability of the project, grounding the access-to-civil-justice movement in a theory of justice is also needed to address a major practical problem that limits the ability of the movement to achieve its intended goal: namely, the lack of available metrics to assess the effectiveness of reform efforts and to assist with the development of policies.[13] In order to develop such metrics, the access-to-civil-justice community must first define what it is they wish to measure.[14]

This paper seeks to conceptualize a theory of justice to provide a theoretical underpinning to the access-to-civil-justice discussion. While it does this primarily from a Canadian perspective, its intention is to make an international contribution that is broadly applicable to the access-to-civil-justice movement. For the purpose of this discussion, justice is understood to reside within the context of existing democratic orders. In other words, the institutions that create and administer the laws are presumed to be legitimate and are presumed to aspire to advance justice—whatever that might be. The reason for this is because the movement that this paper engages with is fully situated within the legal system and takes for granted that the institutions and the laws are the framework within which justice operates.[15] This is not to say that the institutions or the laws cannot be criticized—in fact much of the access-to-civil-justice literature calls for reform of the institutions and laws—rather, it is to emphasize that the purpose of this paper is to support the development of practical measures for assessing access-to-civil-justice policies, not to reimagine the constitutional framework

11. See e.g. Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dal LJ 119; Nicholas Bala, "Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (University of Toronto Press, 2012) 271; Anthony Duggan & Iain Ramsay, "Front-End Strategies for Improving Consumer Access to Justice" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (University of Toronto Press, 2012) 95.

12. See Cappelletti & Garth, *supra* note 7 at 182.

13. See CBA Access to Justice Committee, *supra* note 3 at 144-46; Action Committee on Access to Justice in Civil and Family Matters, *supra* note 3 at 23. Recognizing the importance of this issue, several organizations within Canada have begun to develop access-to-civil-justice metrics. However, as of yet, none of these organizations have placed their proposed metrics within a theoretical framework. See e.g. Calibrate Solutions, "Measuring Access to Justice: A Survey of Approaches and Indicators in A2J Metrics Initiatives*"* (2019) online (pdf): https://calibratesolutions.ca/s/SWD-A2J-Metrics.pdf; Yvon Dandurand & Jessica Jahn, "Access to Justice Measurement Framework Measurement" (2017) online (pdf): *ICCLR* https://icclr.org/wp-content/uploads/2019/06/Access-to-Justice-Measurement-Framework_Final_2017.pdf?x56541; Standing Committee on Access to Justice, "Access to Justice Metrics: A Discussion Paper" (2013), online (pdf): *Canadian Bar Association* https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/Access_to_Justice_Metrics.pdf.

14. See Macdonald, *supra* note 4 at 517.

15. See Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (University of Toronto Press, 2012).

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of the country. To reiterate and summarize, it is still possible to critique the various legal orders for not living up to their ideals under this proposed theoretical framework; however, in order to engage with the access-to-civil-justice movement, justice, as conceptualized here, needs to align with the aims of existing political institutions within democratic societies.

This paper advances 'justice as fairness,' as articulated by the American philosopher John Rawls, in conjunction with Lesley Jacobs' model of equal opportunities, as a suitable theory in which to frame the access-to-civil-justice movement. Although there are other formulations of justice that could be used as a principled foundation for the movement, justice as fairness is appropriate for two important reasons. First, Rawls is arguably the most influential political philosopher of the twentieth century and his conception of justice as fairness has been critical in shaping modern western legal thought. As such, the existing legal framework that this paper engages with clearly aligns with a Rawlsian conception of justice. Second, and perhaps more importantly, Rawls' theory of justice as fairness is both pluralistic and democratic. As will be discussed below, it is pluralistic because it takes into account differing moral, religious, and philosophical beliefs, and it is democratic because it demands reflective deliberation on its subject. Both of these characteristics are necessary for any theory of justice to be relevant in a modern globalized world.

The first section of this paper explores Rawls' theory of justice as fairness. It begins by explaining why Rawls believed his theory was an appropriate conception of justice for society. The paper then maps out the theory, noting that it contains two dimensions: procedural fairness and background fairness. This first section, however, also notes that Rawls' theory precludes any examination of outcomes which I argue is necessary for a complete theoretical framework of justice. As such, this section introduces Lesley Jacobs' model of equal opportunities in order to add a third dimension of justice, being stakes fairness. The next three sections explore in detail each of these dimensions, further elaborating on how they can define measures of justice. The final section synthesizes these ideas and demonstrates how this theory impacts the access-to-civil-justice movement. In this way, this exercise is not simply a theoretical discussion; rather, it is intended to be used as a practical framework to assess current and proposed policy initiatives.

2. Justice as Fairness

2.1 Introduction

John Rawls was an American political and moral philosopher who articulated a concept of justice from the perspective of a liberal, pluralistic, and democratic society.[16] Rawls notes that there are many types of justice—such as justice as

16. As noted by Rawls, there are many ways in which one can examine the idea of justice. Natural law, for example, views justice as objective and universal. It is not a creation of the state but manifests itself in the world either by divine order, the human condition, or moral principles.

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it pertains to international state relations, as it pertains to attitudes of persons, or as it pertains to persons themselves. However, his work is concerned with justice as the basic structure of an organized society. His theory is premised on the notion that one of the most fundamental aims of a democratic society is to encourage and maintain a system of fair social cooperation over time from one generation to the next.[17] He defines social cooperation as being distinct from mere socially coordinated activity in that social cooperation includes terms of reciprocity (where participants accept reasonable rules provided everyone else accepts them) and rational advantage (where participants who accept the rules are attempting to advance their own good).[18] With this objective of a democratic society in mind, Rawls notes that it is the role of justice to specify these fair terms of social cooperation and determine what the most acceptable political conception of it is.[19]

Rawls understands justice as a foundational requirement for a society that is organized around a common goal of advancing the good of its members.[20] This type of justice he terms social justice and he situates it within the context of a society where individuals and institutions must cooperate for mutual advantage.[21] The reality of these societies, he notes, is that conflict will arise as interests will differ. Justice dictates the principles to address these conflicts through the assignment of rights and duties as well as the distribution of burdens and benefits. A well-ordered society is one where everyone knows and accepts the same principles of justice and that the social institutions work to satisfy these principles. Institutions are defined broadly to mean a public system of rules that delineates offices and positions, along with the rights and duties associated with them.[22] Institutions thus include things like parliaments and markets as well as rituals and procedures such as trials or systems of property ownership.[23] Rawls emphasises the importance of having an agreed-upon concept of justice within a society by stating that the failure to adopt one inevitably leads to mistrust among members of society, which in turn undermines coordination, efficiency, and stability.[24] One problem in a modern pluralistic state is that not all members of a society will affirm the same conception of justice, as people have differing moral, religious, and philosophical beliefs.[25] However, Rawls argues that in a pluralistic society one can find a shared political conception of justice within

See e.g. HLA Hart, *The Concept of Law*, 2d ed (Oxford University Press, 1994) at 185-93. This paper, however, is not embarking on a comprehensive examination of these philosophical traditions. Rather, it utilizes Rawls' conception of justice as fairness as a lens to approach modern access-to-civil-justice issues.

17. See John Rawls, *Justice as Fairness: A Restatement*, ed by Erin Kelly (Belknap Press, 2003) at 5.
18. *Ibid* at 6.
19. *Ibid* at 7.
20. *Ibid* at 5.
21. See John Rawls, *A Theory of Justice* (Belknap Press, 1971) at 15.
22. *Ibid* at 55.
23. *Ibid.*
24. *Ibid* at 6.
25. See Rawls, s*upra* note 17 at 33-34.

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a reasonable overlapping consensus of its members' beliefs.[26] Rawls proposes that justice as *fairness* is one such conceptualization that can be drawn from a reasonable overlapping consensus in that, according to Rawls, every reasonable person—no matter their moral, religious, or philosophical beliefs—will agree that public conflicts should be dictated by principles of fairness. Justice as fairness can thus be understood to be drawn from the public political culture in that it does not presuppose a particular moral, religious, or philosophical belief.

2.2 The Original Position

In order to arrive at justice as fairness as an appropriate conception of justice in a pluralistic society, Rawls has the reader imagine a community containing no institutions, wherein all participants are ignorant of not only their own personal characteristics and talents but also their social and historical circumstances.[27] In essence, members of this nebulous pre-society have no knowledge of their religion, their ethnicity, or their nationality. Moreover, these members are not aware of their gender, race, or social status. They are a blank slate of reasonable individuals tasked with imagining how society should be ordered. This state of being Rawls terms the "veil of ignorance" and he uses it as a heuristic device for decision making in a context where community decisions have the potential to advantage or disadvantage one group of people over another.[28] Rawls argues that in such a situation, reasonable individuals would accept 'fairness' as the optimal conception of justice, as it would allow them to most effectively advance and secure their own interests without risking being subject to disproportionate burdens. While it will be discussed in greater detail below, fairness, in this context, refers to a fair equality of opportunity and benefits among all members of society constrained only by certain fundamental civil liberties. Amartya Sen explains that a Rawlsian idea of fairness can be understood as "a demand to avoid bias in our evaluations, taking notes of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interest, or by our personal priorities or eccentricities or prejudices. It can broadly be seen as a demand for impartiality."[29] Thus, a reasonable individual, even if acting in pure self-interest, would not want a conception of justice that, for example, precluded women from participating in society, because under the veil of ignorance that individual does not know if they are a woman or not and, as such, does not know if such a rule would negatively affect them.

Rawls' conception of justice is essentially contractual in nature in that the principles of justice derive from the agreement of all reasonable members of the community. This can be contrasted with a utilitarian approach, for example, where the institutions of justice are arranged not out of agreement, per se, but out

26. *Ibid* at 32-33.
27. See Rawls, *supra* note 21 at 12.
28. *Ibid* at 24.
29. Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009) at 54.

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of an ordering that best maximizes the benefits among the greatest number of people.[30] While the social contract has a strong tradition within post-enlightenment political philosophy, Rawls' reliance on it for his original position has been criticized by Amartya Sen, among others, on several grounds.[31] For one, Sen sees the contractual approach as fundamentally parochial in nature.[32] It does not allow for a global view since it is only concerned with the views and opinions of those who agreed to the contract. He notes that societies have influence on each other and that there is a problem with ignoring the perspectives of those who are not party to this contract but are, nonetheless, affected by its decisions. Sen argues that the objectivity inherent in reasonableness demands that voices from elsewhere be given serious scrutiny even if those voices do not possess a deciding vote.[33] Since Rawls' original position does not allow for voices or opinions from outside the system, it likewise precludes comparative concepts of justice. Sen also criticized the paramountcy of reason in Rawls' original position, noting that while reasonableness is connected to notions of objectivity and impartiality, the 'reasonable person' of Rawls clearly possesses some normative elements (e.g. what is reasonable to you might not be reasonable to me). However, Sen is still sympathetic to this construction, since it is focused on the process of open-minded and reflective argument.[34] Interestingly, Sen offers a potential alternative to Rawls original position suggesting that a vision of justice should come from a variant of Adam Smith's 'impartial spectator.'[35] Like Rawls' reasonable person, the impartial spectator is an objective heuristic free from bias and able to reflect on society; however, the impartial spectator is not necessarily limited to people within the community.[36] In fact, the impartial spectator requires that this exercise be open and include the perspective of others.[37]

The original position has also been critiqued on a variety of other grounds by other scholars.[38] Perhaps the most well-known political philosopher to have engaged with Rawls is Ronald Dworkin, who criticized the original position as one that claims to be objective, but in reality is deeply rooted in the liberal

30. See Rawls, *supra* note 21 at 15.
31. Ronald Dworkin, for example, argued that the conjectural agreement to a hypothetical contract does not provide an independent argument in favour of fairness. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) at 150-59.
32. See Sen, *supra* note 29 at 70-72.
33. *Ibid* at 128-30.
34. *Ibid* at 42-43.
35. *Ibid* at 44-46, 130-38.
36. *Ibid* at 44-46.
37. *Ibid* at 126-28.
38. Michael Sandel, for example, questioned Rawls' claim that justice was the single most important consideration in assessing the basic structure of society. See Michael J Sandel, *Liberalism and the Limits of Justice*, 2d ed (Cambridge University Press, 1998). From a feminist perspective, the original position has been critiqued for excluding the family unit from its assessment of fairness. See e.g. Susan Moller Okin, "'Forty Acres and a Mule' for Women: Rawls and Feminism" (2005) 4:2 Politics, Philosophy & Economics 233. Meanwhile, critical race theorists have criticized the original position for, among other things, its failure to acknowledge the social realities of race and its role in the historical development of societies. See e.g. Tommie Shelby, "Race and Ethnicity, Race and Social Justice: Rawlsian Considerations" (2004) 72:5 Fordham L Rev 1697.

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tradition of post-enlightenment Europe.[39] Dworkin understands Rawls' original position as being constructivist in the sense that moral judgments are constructed from intellectual devices—e.g., the original position—and then applied to practical situations as opposed to being discovered as some meta-physical higher truth.[40] In other words, the constructivist approach argues that moral truths are not needed to defend a theory of political justice. However, for Dworkin, the original position is not a neutral exercise since members must choose between differing philosophical traditions and decide which is superior. The tradition that Rawls settled on was a humanist one that presumes a common dignity.[41] Dworkin sees this constructivist approach as being flawed since there is no practical way to identify common principles of justice apart from elevating some historical and political traditions above others.[42] To Dworkin, Rawls' project was important, but it was not a morally neutral one.

Such criticism of the original position provides fascinating depth to the discussion of justice as fairness. Evident from this discussion, however, is that there is no consensus among political philosophers on how a society should arrive at a conception of justice. Fortunately, it is unnecessary for this paper to resolve this debate prior to engaging with the substance of Rawls' theory. Thus far, these critiques have been about how Rawls arrived at his destination, not the destination itself. In other words, the arguments presented do not comment on whether Rawls' principles of fairness are themselves a sound conception of justice; rather, they are a critique on claims that justice as fairness is derived from objective reason, that it reflects our neutral interests, or that it is universalist in nature. All of these critiques may be true; however, they do not necessarily undermine the validity of conceptualizing justice as fairness. It is arguable, for example, that a Rawlsian conception of justice would satisfy the impartial spectator favoured by Sen should the impartial spectator subject justice as fairness to an objective scrutiny. That is, an unbiased observer from another community may very well see Rawls' idea of justice as being a good way to organize society. Similarly, Dworkin—himself a proponent of objective moral truths—is not disagreeing with Rawls' per se, but calling on him to acknowledge that his philosophy elevates post-enlightened humanism above others.[43]

What is important to remember for the purpose of this paper is that the original position is merely a thought experiment created to justify a particular conception of justice. And regardless of whether it is an effective—let alone possible—mechanism for this task, Rawls' conception of justice is perhaps the best equipped to provide a theoretical foundation of justice for a modern liberal democratic country for two reasons: it is pluralistic, and it is democratic. It is pluralistic not in the sense that it is a relativist theory or one that allows for subjective

39. See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) at 63-66, 166-68.
40. *Ibid* at 63.
41. Dworkin, *supra* note 31 at 182.
42. *Ibid* at 65-66.
43. See Dworkin, *supra* note 39.

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assessments of justice, but in the sense that it looks for common ground among differing moral and religious traditions. Any acceptable conception of justice needs to acknowledge the reality of the modern globalized world we live in, and the diversity of beliefs among peoples. It is democratic because it asks us to engage in a process of solitary deliberation wherein we reflect and debate on how institutions of justice should be organized.[44] In other words, by undergoing this exercise, we recognize the opinions of others and address moral disagreements in open rational debate: a process that is fundamental to democratic deliberation. In essence, the original position is an effective device to contemplate how society should be organized because it moves the focus of discussion from one of pure self-interest to the interest of the community while allowing for self-realization.[45]

2.3 Principles of Justice as Fairness

According to Rawls, justice as a foundational basis for a society that wishes to organize its institutions to allow for a fair system of social cooperation over time will encompass two fundamental principles as follows:

> (a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society.[46]

The first principle refers to the specific liberties that have traditionally been articulated by liberal thinkers: liberties such as the freedom of thought and conscience, freedom of association, and the liberties articulated by the rule of law.[47] This specific list of liberties is justified as being a necessary prerequisite to citizenship that is both free and equal because these rights protect and secure the right of individuals to judge the justness of institutions and policies, and allow individuals to pursue their own conception of the good.[48] Conversely, other social entitlements that we may conceptualize as a right do not belong in this first principle because they are not necessary for "the acquisition and the exercise of political power."[49] For example, while justice as fairness requires a basic level of material wealth to allow for independent exercise of political will, the first principle would not guarantee a right of inclusion in a particular social class. Likewise, while the first principle may require a right to property ownership

44. See Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996) at 37-39.
45. See Sen, *supra* note 29 at 204.
46. Rawls, *supra* note 17 at 42.
47. See Rawls, *supra* note 21 at 61.
48. See Rawls, *supra* note 17 at 45.
49. *Ibid* at 48.

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generally to allow for sufficient independence to exercise moral powers, it would not necessarily require a right to housing.[50] Rather, the distribution of housing benefits, whose demands are much broader than the first principle, is the subject of the second principle and will be discussed below. In this way, Rawls explains that the first principle is about covering constitutional essentials while the second principle speaks to a legislative stage.[51] And like the relationship between constitutions and legislations, the second principle is subordinate to the first principle such that basic civil liberties have priority over social and economic redistribution.[52] In this way Rawls distinguishes his distributive model from utilitarianism, which prioritizes the greatest good for all and which, in doing so, arguably does not take into account the person as an individual.[53]

While the first principle speaks to individual liberties, the second principle speaks to when social and economic inequalities are acceptable. In other words, this principle addresses how to distribute benefits and burdens fairly among members of society. To do this, the second principle contains two sub-components or dimensions: fair equality of opportunity, and the difference principle. Under the first dimension—fair equality of opportunity—every member has a legal right to compete for offices and benefits.[54] In other words, no one should be denied access to a position due to an arbitrary characteristic such as race, gender, or social status. Everyone is entitled to equal opportunity not from an efficiency point of view—since it may be possible that everyone benefits by restricting positions to certain classes of people—but on the basis that denying people equal opportunity would deny those people the rewards, such as wealth and privilege, that flow from holding offices, and thus deny them the ability to fully realize one's self—something that Rawls argues is a primary human good.[55] To Rawls, the fair distribution of opportunities should fundamentally be a matter of procedural justice. Rawls argues that under an ideal incarnation of procedural justice the distributive outcome of a social system will always be fair so long as the proper procedures have been followed.[56] As such, this first dimension of the second principle can be understood as a demand for procedural justice.

Procedural justice as a dimension of justice as fairness, however, needs to be distinguished from the common law principles of *natural justice* and *procedural fairness*. Under Canadian common law, natural justice is owed to any person that is party to a judicial or quasi-judicial hearing. Natural justice has been defined to

50. *Ibid* at 114.
51. *Ibid* at 47-48.
52. Echoing both Dworkin and Sen, Michael Sandel questions the absolute priority of civil rights over any other conception of the good, and Rawls' claim that the principles underlying justice as fairness do not depend on any comprehensive moral or religious conception. See Sandel, *supra* note 38. See also Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books, 1983); Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985).
53. See Rawls, *supra* note 21 at 27.
54. *Ibid* at 72.
55. *Ibid* at 84.
56. *Ibid* at 86.

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include specific procedural rights such as the right to adequate notice of a hearing, the right to a fair hearing, and the right to an unbiased decision maker during the hearing.[57] Procedural fairness, on the other hand, applies to administrative decisions. Historically, administrative decisions were not subject to principles of natural justice; however, the courts recognized that the distinction between a quasi-judicial and an administrative decision is often difficult to determine, as administrative decisions may also have an immense impact on the individual.[58] As such the courts have ruled that where an individual's rights, privileges, or interests are affected by an administrative decision, that person is entitled to a basic level of what they call procedural fairness.[59] The precise content and requirements of procedural fairness are variable and context specific, depending on numerous factors, but could include the right to present one's case fully, the right to written reasons, or the right to an impartial and open process.[60] Unlike natural justice, the common law principle of procedural fairness does not necessarily mandate a formal hearing and, depending on the type of decision, may simply require that the person affected be notified.

Although there is overlap between the common law principles of natural justice and procedural fairness, with the Rawlsian dimension of procedural justice they are conceptually different. The common law principles refer to specific rules that apply to certain decision-making processes, whereas Rawls' procedural justice is broader and examines all systems in which burdens and benefits are allocated. Rawls' procedural justice therefore applies not just to legal disputes, but to other aspects of society that might be thought of as more political in nature, such as regulatory policies or social programing. For example, it would be a clear breach of procedural justice if only men were allowed to attend post-secondary institutions since these positions would not be open to everyone under conditions of fair equality of opportunity. The implication of this is that procedural justice speaks not just to the processes of a system but also to the legitimacy of a system itself. If an institution was to perpetuate inequality by ensuring that offices and positions were not open to everyone under conditions of fair equality of opportunity, then that institution itself should not exist. The iconic example of this would be a system of land ownership such as serfdom or slavery that prevents an entire class or race of people from competing for the highest offices.

The difficulty in maintaining procedural justice over time, however, is that wealth and property accumulate in fewer hands and, in doing so, undermine equality of opportunity, as those with wealth and property seek to preserve their share by denying others entry into positions of power.[61] Rawls recognized that

57. See e.g. *Emerson v Law Society of Upper Canada* (1984), 44 OR (2d) 729 at para 26.
58. See *Nicholson v Haldimand-Norfolk (Regional Municipality) Commissioners of Police,* [1979] 1 SCR 311 at para 23.
59. See e.g. *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at para 28.
60. *Ibid* at paras 21-27.
61. See Rawls, *supra* note 17 at 53.

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even if offices have no legal bars to attainment, reality may prevent those who do not share in the wealth and class of current office holders from obtaining the position. Thus, Rawls further notes that what is important for this second principle is not just that these offices and positions be open to everyone formally, but also that everyone has a meaningful opportunity to attain them regardless of the social class one is born into.[62] In order to ensure that everyone has a meaningful opportunity to attain offices and positions, Rawls introduces the second dimension of the second principle, or what he terms the difference principle, wherein economic inequalities can only exist if their existence benefits the least advantaged members of society.[63] Rawls illustrates this point with the tired trope often used to justify free-market capitalism. He compares the relatively high income of the entrepreneurial class to the low-income of unskilled labourers, and notes that this inequality is only justified if removing it would make the unskilled labourers worse off.[64] He states that if the inequality promotes innovation, such that material benefits created by the entrepreneurial class spread throughout the system and make the position of the unskilled labourers better off in the long run, then the inequality is justified.[65] Under the difference principle, wealth does not have to be distributed equally, rather it has to be distributed in such a way that it is to everyone's advantage.[66] "Injustice, then, is simply inequalities that are not to the benefit of all."[67] In this way, the difference principle relates back to his conception of a society whose purpose is organized around the goal of advancing the good of all of its members.

2.4 Equality of Opportunity

Rawls contribution to a liberal theory of justice was significant in that it recognized the impact of social-economic factors in a society's ability to guarantee an equality of opportunity over time. However, his focus was on establishing the rules that ensure a fair society—basic liberties, equality of opportunity for all, and the difference principle—and not the outcomes themselves. This is of concern because outcomes, just like processes, may be subject to a critique of fairness and can lead to inequality over time. This is particularly the case in two situations. First, if a competition is arranged in such a way that the winner takes everything and the loser walks away with nothing, and second, if one competition has an undue and arbitrary influence on other competitions. As will be discussed below, both situations raise concerns of fairness and threaten to destabilize fair equality of opportunity.

62. *Ibid* at 44.
63. It should be noted that in the original statement of justice as fairness, Rawls discussed background justice first before discussing procedural justice. See Rawls, *supra* note 21 at 60. Rawls states that the difference in the revision is merely stylistic. Rawls, *supra* note 17 at 43.
64. See Rawls, *supra* note 21 at 78.
65. For a critique of the argument that inequality can be justified on grounds of incentivization see G A Cohen, *Rescuing Justice and Equality* (Harvard University Press, 2008) at 27-86.
66. See Rawls, *supra* note 21 at 61-62.
67. *Ibid* at 62.

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Recognizing this problem, Lesley Jacobs proposed a three-dimensional model for equal opportunities that built on Rawls' second principle of justice. This model needs to be understood as a regulative ideal to be used within competitive frameworks. That is, it examines how competitions, be it a legal dispute or a job application, for example, can be regulated to ensure an egalitarian distribution of resources.[68] The first two dimensions of Jacobs' model—which parallel Rawls' theory of justice as fairness—are procedural fairness and background fairness.[69] Jacobs defines 'procedural fairness' as encompassing the formal rules that are specific to a particular competition.[70] The exact parameters of what is procedurally fair are usually dependent on what is at stake in the competition. Where one's liberty is at stake, for example, there would be very high requirements of procedural fairness. Conversely, a municipality changing the waste collection schedule would likely require a minimal amount of procedural fairness. In either event, however, there need to be basic rules that ensure everyone has a fair chance and equal opportunity of engagement. The clearest example of a breach of Jacobs' procedural fairness would be institutional rules that exclude certain classes of people from participating in a competition outright.[71] For example, a rule that prevented women from joining the legal profession would be an obvious breach of procedural fairness. Jacobs notes that while breaches of procedural fairness do occur, the formal requirements of procedural fairness are rarely a source of contention in today's modern democracies.[72] The second dimension of Jacobs' model of equal opportunities is called 'background fairness' and speaks to the starting position of those involved in a competition. Background fairness recognizes that social inequalities translate into unfair starting positions within a competition and looks to level the playing field among competitors. For Jacobs, background fairness is rooted in the concept of status equality. Jacobs notes that status equality does not require all individuals in a competition to start with the same resources, nor carry the same level of human capability, but rather that all people enjoy the same standing within a competition.[73] He suggests that the presumption of innocence in criminal trials is one example of status equality wherein everyone accused of a crime—regardless of one's wealth, class, race, or other characteristics—begins the trial at the same starting position.[74]

The third dimension of Jacobs' model for equal opportunities is called 'stakes fairness' and is concerned with outcomes. As noted above, it is patently unfair in almost all competitions for a 'winner' to take all and, as such, there needs to be a

68. See Lesley A Jacobs, *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (Cambridge University Press, 2004) at 13.
69. As evident from the proceeding sections, Rawls used the terms 'procedural justice' and 'background justice' when discussing justice as fairness. For the sake of clarity and consistency, however, this paper adopts the terminology of Jacobs.
70. See Jacobs, *supra* note 68 at 16.
71. *Ibid.*
72. *Ibid.*
73. *Ibid* at 29.
74. *Ibid* at 30.

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distribution of benefits among the participants.[75] For example, think of two pianists who spend their life perfecting their skills at interpreting Chopin's masterpieces. While both excel at their craft, one is marginally better than the other. Given the equal input and near equal skills of the two, stakes fairness might see it as problematic if one of the pianists shot up to international fame and fortune while the other struggled in poverty. As well as winner-take-all situations, stakes fairness is also concerned with limiting the effects of one competition on another. This concern is based on the belief that it is patently unfair for a competition to consider criteria that are completely irrelevant to that competition. For example, Jacobs argues that financial success in the labour market should not influence one's educational prospects, since the accumulation of wealth is irrelevant to scholastic accomplishment.[76] In other words, one should not be able to receive top honours from a university simply by paying more money. For Jacobs, stakes fairness is fundamental to preserving equality of opportunity over time by ensuring that benefits within a competition are distributed fairly and that one competition does not have undue influence over another.

2.5 Summary

Rawls' theory of justice as fairness provides a framework that can serve as a basis for conceptualizing access to civil justice. According to Rawls, justice as fairness encompasses two principles: first, justice requires that individuals possess certain basic liberties, which allow them the freedom to judge the institutions that govern justice and allow them to develop their own conception of the good; second, justice requires that social and economic inequalities be subject to an equality of opportunity among positions and offices and exist only in so far as they are to the greatest benefit of the least-advantaged. This second principle can thus be understood to contain two dimensions of justice, which act to ensure a fair distribution of opportunities and benefits from generation to generation. These dimensions are procedural fairness and background fairness.[77] However, these two principles are not sufficiently comprehensive to fully assess access-to-civil-justice initiatives, since they preclude any examination of outcomes, and a third dimension is needed. Jacobs provided this dimension in the form of stakes fairness—which seeks to assess the fairness of outcomes—in his theory of equal opportunities.

While Rawls' first principle regarding civil liberties is important to contextualize the discussion, it is his second principle, complemented by Jacobs' theory of equal opportunities, that is most helpful in establishing a framework for analyzing legal and social policies. As noted above, to engage with the access-to-civil-justice conversation, this paper is not trying to reimagine Canadian society

75. *Ibid* at 37-39.
76. *Ibid* at 43.
77. To reiterate, 'procedural fairness' as a dimension of 'justice as fairness' needs to be distinguished from the administrative law principle also termed 'procedural fairness'. Despite the potential confusion, I have chosen this terminology for the sake of consistency.

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wholesale and presumes that Canada already guarantees the basic liberties as required by the first principle. In other words, this paper accepts that the constitutive stage—being the first principle of justice—is complete. Arguably this approach limits my project by confining it to the existing political institutional order. That is, by focusing on the legislative stage, this project is precluded from assessing whether Canada's scheme of liberties does in fact guarantee its citizens sufficient freedom to judge the institutions that govern justice and to develop their own conception of the good. For example, Canada does not recognize most social and economic rights—such as the right to higher education or the right to an adequate standard of living—at least in the sense of first-order rights that would constrain government policy.[78] Some may critique this as a gross omission within Canada's basic constitutive structure; they may ask whether individuals are truly able to judge the institutions of justice if they do not have a living wage, for example. While a critique of Canada's scheme of basic civil liberties is a valid exercise, it is not one that engages with this paper. Rather, this paper is proposing a theoretical framework that can be used to analyze existing access-to-civil-justice policies and initiatives independent of the exact scope of the first principle. As such, the following sections will examine each of the three dimensions of fairness introduced above in greater detail and elaborate on how they can be understood as practical regulatory measures of justice.

3. Procedural Fairness

3.1 Introduction

Procedural fairness fundamentally refers to the rules that ensure all offices and benefits are open to everyone under conditions of equality of opportunity. Rawls emphasized that this principle applies not only to the hierarchical design of organizations but also to the rules that govern the distribution of benefit.[79] In other words, rules and processes should be arranged such that all persons who possess equal talent and ability, as well as the motivation to employ them, have the same educational and economic prospects regardless of individual characteristics such as social class, race, or gender. Thus, if the rules of a competition are designed in a way that one group is favoured above another simply due to a characteristic that is irrelevant to that competition, then procedural fairness is offended. If, for example, a woman was denied the opportunity to apply for a position simply due to their gender, then procedural fairness would likely be violated.[80] Similarly, if an individual was charged a higher interest rate on a loan simply

78. In 2019, Canada passed the *National Housing Strategy Act*, SC 2019, c 20, s 313, which recognizes a right to adequate housing. However, it is not yet known how the courts will interpret this piece of legislation or what practical impact, if any, it will have.

79. See Rawls, *supra* note 21 at 61.

80. This analysis would necessarily be context driven since there may be instances where gender, for example, is arguably a legitimate job qualification. One such example might be a counsellor at a women's shelter.

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because they belonged to a minority community, procedural fairness would be offended, since they were not given an equal opportunity to compete for the loan.

3.2 Perfect, Imperfect, and Pure Procedural Fairness

Rawls identifies three types of procedural fairness: perfect, imperfect, and pure.[81] According to Rawls, perfect procedural fairness should be strived for when a just outcome is dependent on a particular pre-existing criterion. A criminal trial, for example, is dependent on the actual guilt or innocence of the accused, and a miscarriage of justice would occur should an innocent person be convicted. To avoid such a miscarriage of justice, perfect processes and procedures are needed to be designed to ensure that the court reaches the required outcome. An example of such perfect procedural fairness provided by Rawls involves the cutting of a cake.[82] In this example, the desired outcome is that everyone gets an equal share of the cake. To guarantee this happens, Rawls suggests that the person who cuts the cake chooses their piece last. Presuming everyone desires the biggest slice of cake possible, the cutter is incentivized to cut absolutely equal shares of the cake since they will be left with the smallest piece if they do not cut all slices equally. In this way the procedure—being the rules determining how the cake is cut—is designed to ensure that the desired outcome is achieved.[83] Imperfect procedural fairness exists where there is a desired outcome; however, there is no procedure that can guarantee it. Given the complexity of the criminal law system and all the demands that flow from it, the example of a criminal trial is a more realistic representation of imperfect procedural fairness where, no matter how fairly the procedures are designed and how closely the processes are followed, there is still the possibility of a miscarriage of justice and an accused being wrongfully convicted.[84] This reality evidences that perfect procedural fairness is not much more than a theoretical goal: Rawls himself notes that "perfect procedural justice is rare, if not impossible, in cases of much practical interest."[85] With that said, arranging institutions and rules in a manner that could approximate as close as possible perfect procedural justice is one aim of justice as fairness. Procedural rules, such as those that allow a party to present evidence to an impartial adjudicator or those that mandate the provision of adequate notice of a hearing, are examples of how institutions strive to approximate perfect procedural fairness and ensure that a fair decision is reached.

In some instances, however, it is difficult, if not impossible, to assess whether an outcome is objectively just. Even if one is privy to all the facts of a case, one may still ask if, for example, a $50,000 insurance payout is adequate compensation for an injury suffered. Why not $55,000 or $45,000? Or perhaps, one may argue, that no amount of money can be viewed as adequate compensation for the

81. See Rawls, *supra* note 21 at 85.
82. *Ibid* at 85.
83. *Ibid* at 84-85.
84. *Ibid* at 85-86.
85. *Ibid* at 85.

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injury suffered.[86] Similarly, if two or three equally qualified persons apply for a single position one cannot say—without adding additional facts—that it is a miscarriage of justice to appoint one of them over the other. In such examples a just outcome is not dependent on a particular pre-existing criterion such as guilt or innocence, rather the 'justness' is dependent on the processes that are followed. If the processes are fair, then the result will be just simply by virtue of the rules being followed. When this occurs, Rawls believes that pure procedural fairness is achieved.[87] An example of pure procedural fairness provided by Rawls involves gambling where winnings could be distributed multiple ways depending on the betting rules.[88] No single gambler has a pre-existing claim to the winnings and thus, regardless of how winnings are divided, the outcome will be considered just so long as the betting rules are followed.[89]

Like perfect procedural fairness, however, pure procedural fairness is more of a theoretical condition than a practical one. A coin toss can be used to illustrate a situation where neither outcome—heads nor tails—can make an independent claim to being more just. Yet in any real-life application to legal, political, or economic decision making there will almost always be a pre-existing claim to a more just outcome: the more deserving candidate should be appointed, those in greatest need should be given government benefits, or an estate should be divided equally among beneficiaries. Regardless of whether or not an outcome is dependent on a pre-existing criteria the goal of the institution remains the same: rules should be designed in such a way that they come as close as possible to guaranteeing a just outcome. Unfortunately, it is impossible to assess whether processes or procedures approximate either perfect or pure procedural fairness, since this would require infallible knowledge of what the just outcome should be: be it guilt or innocence, compensation or deprivation, or simply the right decision. One possible alternative to practically assess procedural fairness, therefore, is to examine whether the participants themselves judge a particular proceeding to be just or not.

While participants may not be well situated to judge the justness of an outcome, they are well situated to judge the fairness of the processes. In his book *Why People Obey the Law,* Tom Tyler notes that an individual's judgment of procedural fairness can be measured either by looking to instrumental concerns or to normative concerns.[90] While instrumental concerns focus on the outcomes of a proceeding, normative concerns look to other indicators that have little or nothing to do with the final outcome. Somewhat counter-intuitively, it turns

86. This touches upon the larger question of incommensurability wherein one value, for example equality, cannot be said to be better than another value, such as liberty. See Joseph Raz, *The Morality of Freedom* (Oxford University Press, 2009).
87. See Rawls, *supra* note 21 at 87-88.
88. *Ibid* at 86.
89. Jacobs would likely critique this assessment, suggesting that even in instances where the processes are fair and are followed, one can still have unjust distributions where, for example, the winner takes all. This issue is addressed in the section on stakes fairness, below in Section 5.
90. See Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006) at 163.

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out that the final outcome of a proceeding has little impact on an individual's assessment of its fairness. Rather, it is the normative qualities that are the most important determinant of whether an individual is satisfied with a legal procedure.[91] Tyler notes that there are seven or eight independent normative variables that contribute to how fair people view processes to be. Of these, however, four tend to have the most impact on assessments of procedural justice. These are voice, trustworthiness, interpersonal respect, and neutrality.[92]

3.3 Normative Concerns

The first variable that has a large impact on whether an individual believes that a process is fair is that of voice. This variable refers to an individual's ability to participate in a proceeding and the opportunity to express their views or tell their stories. As noted by Tyler, "[v]oice effects have not been found to be dependent on having control over outcomes. Instead, people have been found to value the opportunity to express their views to decision-makers in and of itself."[93] As an example of its importance, Tyler points to the fact that victims of crime will value the opportunity to give victim impact statements at sentencing hearings regardless of the sentence that the accused received.[94] In one sense, aspects of voice have long been held by the common law to be a fundamental requirement to any decision-making process that affects the rights or interests of a person. The maxim *audi alteram partem*, one of the twin pillars of natural justice, states that no person who is affected by a decision should have a decision made against them without first having the opportunity to plead their case.[95] Voice, however, speaks not just to the formal opportunity to plead a case, but also to the ability to participate in a proceeding more broadly. Michelle Flaherty notes that Canada's adversarial system assumes that the parties have the ability to understand the complicated rules of procedure and present their positions effectively, which may not be the case, especially, for example, with self-represented litigants.[96] Thus, while an individual may have the technical opportunity to participate in a proceeding, the reality is that they may not be able to do so effectively. In such instances, procedural fairness may be threatened because, even if the processes lead to a just outcome, the individual will have perceived them as unfairly denying them a voice in the proceedings.

Tyler defines the second variable, trustworthiness, as an assessment of whether a third party is motivated to treat them in a fair manner, be concerned about their needs, and consider their arguments. This is the most influential factor

91. *Ibid.*
92. See Tom R Tyler, "Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform" (1997) 45:4 Am J Comp L 871 at 887.
93. *Ibid.*
94. *Ibid.*
95. See e.g. *McRae v Marshall*, [1891] 19 SCR 10 at 30.
96. See Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dal LJ 119 at 124.

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in an individual's determination of the fairness of a legal authority.[97] Trustworthiness is inherently tied to the first variable since people will not believe they have been given an opportunity to tell their story unless they believe the adjudicator has sincerely considered their arguments. Trustworthiness can apply to both individual adjudicators, as well as institutions. While no doubt an adjudicator's behaviour will affect whether an individual trusts them, feelings of distrust may also arise out of the complicated rules of procedure that are beyond the adjudicator's control. For example, Flaherty, who drew on her experience as an adjudicator for the Ontario Human Rights Tribunal, notes that some rules of evidence—such as those governing the admission of similar fact and good character evidence—may not be understood by self-represented litigants and seen as unfair since it bars them from presenting what they feel is relevant and determinative evidence.[98] In such circumstances, procedural fairness will be questioned since the litigant believes that the adjudicator failed to consider their case on the merits.

Interpersonal respect, the third variable, refers to the courtesy extended by people in authority to those with whom they are dealing. Tyler notes that when treated with courtesy and dignity, individuals have a greater sense that the process was fair.[99] The reason interpersonal respect is important is because it shows that the person in authority is taking the dispute or problem of the individual seriously. In doing so, it reaffirms one's social status and worth in the community.[100] Commenting on a study of racialized youth in Toronto, Janet Mosher observed that the notion of mutual respect was commonly cited as a requirement for justice.[101] To the youth, respect meant that the authority figures needed to acknowledge them and understand their reality. Pervasive stereotyping by authorities, however, meant that the youths were misjudged and prevented authority figures from understanding their lived experiences. It is evident that this behaviour seriously undermined any sense of procedural fairness the youth may have had in their experiences with authority and displays the importance of interpersonal respect to procedural fairness.

The fourth variable that has an impact on individuals' perception of procedural fairness is neutrality. Neutrality refers to an individual's belief that a decision maker was free from bias when making their decision. According to Tyler, "[n]eutrality includes assessments of honesty, impartiality, and the use of facts, not personal opinions, in decision-making."[102] It is noted that these assessments are important because people are seldom in a position to know the "correct" outcome and therefore use evidence of neutrality as a proxy.[103] The individuals

97. See Tyler, *supra* note 92 at 889.
98. See Flaherty, *supra* note 96 at 127-28.
99. See Tyler, *supra* note 92 at 891.
100. *Ibid* at 892.
101. See Janet E Mosher, "Lessons in Access to Justice : Racialized Youths and Ontario's Safe Schools" (2008) 46:4 Osgoode Hall LJ 807 at 849.
102. Tyler, *supra* note 92 at 892.
103. *Ibid.*

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interviewed for the study of Toronto marginalized youth often felt that they were "marked" and singled out for harsh and inappropriate treatment by school officials and the police based on the neighbourhoods in which they lived, the clothes they wore, their race, their gender, or who they were friends with.[104] They often felt that when it was their word against that of someone in authority, the authority would win and that there was not a neutral person or institution to appeal to for assistance.[105] It is clear that this sense of partiality among school officials contributed to their perception that school disciplinary procedures were essentially unfair. In such circumstances, any process or procedure, regardless of the outcome, will be viewed as unjust.

3.4 Summary

According to Rawls, procedures should be designed in such a way that outcomes become just by virtue of following the procedures. Unfortunately, in any real-world situation it is difficult, if not impossible, to objectively know whether a process leads to a just outcome or not. As such, in order to assess whether processes are fair, we should look to the participants' assessment of normative concerns such as voice, trustworthiness, interpersonal respect, and neutrality. If individuals believe that they have not been able to tell their story or have their case heard by an impartial mediator, for example, then they have not been given an opportunity to participate equally in the competition and procedural fairness has not been met. In this way, these variables act as practical proxies for determining whether a process or procedure is fair.

4. Background Fairness

4.1 Introduction

In *A Theory of Justice*, Rawls sets out two fundamental and interconnected components that underpin the second principle of justice as fairness: first, equality of opportunity, and second, the distribution of benefits.[106] As discussed above, equality of opportunity is connected to procedural fairness in the sense that the rules governing a competition must ensure that everyone, regardless of arbitrary characteristics like race, gender, or social class, has an equal prospect of success. The problem with equality of opportunity alone, however, is that it may be subject to charges of formalism.[107] In most liberal democratic countries it is rare to see any institution post formal barriers to a competition based on irrelevant criteria such as race, gender, or religion. In Canada, for example, there is an extensive network of human rights legislation that prevents such discrimination

104. Mosher, *supra* note 101 at 831.
105. *Ibid* at 842.
106. See Rawls, *supra* note 21 at 78.
107. See Jacobs, *supra* note 68 at 11.

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from formally occurring. Nonetheless, history has shown that formally legislated equality does not mean that there is meaningful opportunity for everyone.[108] In order to make equality of opportunity meaningful in practice, Rawls recognized that there needs to be a mechanism to preserve an equality of social conditions.[109] As such, Rawls proposed the difference principle, which speaks to the distribution of benefits and how public resources are allocated.

4.2 Difference Principle

Rawls conceptualized the difference principle as a mechanism to prevent wealth and benefits from accumulating unfairly, while allowing for some justifiable inequality to exist. Rawls understood that even if the basic institutions were arranged such that offices and benefits were formally available under a scheme of equal opportunity, those with greater natural abilities or talents would accrue a disproportionate amount of wealth over generations. This 'natural lottery' of abilities and talents was as arbitrary as any other factor like race or gender and thus an unstable way to arrange society. In other words, an individual benefiting simply because they are born with greater natural endowments is no more justifiable, from a moral standpoint, than an individual benefiting simply because they are a Caucasian male. If there is no attempt to regulate the social contingencies beyond formal equality of opportunity, then society would coalesce into what Rawls termed a natural aristocracy.[110] For this reason Rawls contended that some distributive mechanism was necessary to ensure a fair equality of opportunity over time. Since the purpose of social justice is to establish the rules that allow individuals and institutions to cooperate for mutual advantage, the guiding principle behind this distributive mechanism must also be that social inequalities be arranged to everyone's mutual advantage. Rawls concedes that the idea of social inequalities being arranged to everyone's advantage is ambiguous, and examines two principles that may explain what is meant by common advantage: the principle of efficiency and the difference principle.[111] Of these principles, Rawls supports the difference principle as the necessary basis on which to distribute wealth and income.

Law and economic scholars argue that one purpose of justice is to increase economic efficiency through the distribution of resources.[112] Rawls explains that according to this school of thought, an optimally efficient arrangement is one where it is impossible to improve any one person's position without making another person's position worse off: the so-called 'Pareto optimality'.[113]

108. See e.g. Charles M Haar & Daniel Wm Fessler, *Fairness and Justice: Law in the Service of Equality* (Simon & Schuster, 1986).
109. See Rawls, *supra* note 21 at 72.
110. *Ibid* at 74.
111. *Ibid* at 60ff.
112. See e.g. Richard A Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2:2 J Leg Stud 399.
113. See Rawls, *supra* note 21 at 66-67.

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The difficulty for legal theorists is trying to determine the most efficient way of arranging legal rights such that there is an equilibrium.[114] One famous thought experiment that illustrates how the idea of economic efficiency operates in law involves a cattle herder whose property neighbours a farmer's field.[115] On occasion, the cattle will inevitably wander onto the farmer's property and trample some crops. To avoid paying damages, the cattle herder could build a fence to prevent the cattle from wandering; however, the cost of building said fence would have to be less than the cost of the damage done to the crops to warrant this action. If the cost of fencing exceeded the damages done to the crops, then the cattle herder would be better off just paying the farmer directly for the damages and therefore, from an efficiency perspective, the laws should not be arranged in a way that forces the cattle farmer to build a fence. To complicate the scenario, and to illustrate the difficulty in finding an optimal efficiency, one should also account for the costs incurred by the farmer when planting the crops (seed, labour, fertilizer, etc.) such that it may not be optimal from the herder's perspective to simply pay the full market price for the damaged crops. Rather, to maximize the output of both parties without making the other worse off, the farmer should leave the field fallow and the herder pay the difference between the cost of planting and the revenue that would be generated by the crops. The efficiency principle thus asks us to compare various social arrangements and choose the one that generates the greatest total yield of benefits among all parties involved.

When applied to rights and duties, efficiency would be by reference to the expectations of the parties such that optimal efficiency would exist when it is impossible to change the rules without lowering the expectations of at least one individual.[116] For Rawls, however, efficiency cannot serve as a distributive mechanism because there are many institutional and social arrangements that may be considered optimal—in the sense that it is not possible to change the arrangement of rights and duties in a way that does not lower the expectation of at least some—but cannot be considered just.[117] He states, for example, that it may be impossible to reform serfdom under the efficiency principle alone. In this example, regardless of how much the serfs gained, the landowners would experience some loss and thus this reform would not be considered optimally efficient.[118] One may argue that a modern democracy could employ the efficiency principle as a basis to distribute wealth and benefits provided the background institutions guaranteed certain civil rights such as those prohibiting discrimination. According to Rawls, however, even when the principle of efficiency is constrained by certain background institutions there is still the problem with preserving an equality of social conditions over time.[119]

114. See e.g. R H Coase, "The Problem of Social Cost" (1960) 3 JL & Econ 1.
115. *Ibid.*
116. See Rawls, *supra* note 21 at 70.
117. *Ibid* at 70-71.
118. *Ibid* at 71.
119. *Ibid* at 72.

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The difference principle articulated by Rawls is another way to conceptualize distributive justice and one that mitigates against arbitrary factors such as social class and the natural lottery. To Rawls, the problem with efficiency is the indeterminateness of it, in that there is no particular position in which to judge the social and economic inequalities of the background structures.[120] As noted above, many types of institutional arrangements that may seem repugnant—such as serfdom—could be justified as being efficient. The difference principle seeks to remove this indeterminateness by creating an objective mechanism that arranges social inequalities. According to the difference principle, any social or economic inequality that exists must be to the benefit of the least advantaged members of society. In other words, inequalities can exist within society, but they must be arranged in such a way that everyone benefits. Benefits, in this context, refers to an expectation of improved well-being in terms of one's life prospects as viewed from one's social station.[121] The difference principle states that the advantages enjoyed by some cannot be justified solely on the grounds that they outweigh the disadvantages suffered by others. Rather, social inequality can only be justified if an individual would prefer their prospects with the existence of this inequality to their prospects without it.[122] In other words, an inequality can only be justified when the difference in expectation is to the advantage of the individual who is worse off.[123] Thus, it may be perfectly acceptable under the difference principle to pay a medical doctor a higher salary than an office clerk if doctors are in short supply and their skills are needed to improve the health of the entire community. Arguably, by paying higher salaries to doctors, society is incentivising individuals to become doctors, which benefits the entire community. Since the most advantaged cannot gain under this arrangement unless the least advantaged also gain, the difference principle satisfies the social justice objective of mutual benefit. Interestingly, Rawls argues that the difference principle is compatible with the principle of efficiency.[124] The reason for this is that if the difference principle is satisfied, then it is impossible to make any one person better off without making someone else worse off, thus achieving Pareto optimization.

Background fairness speaks to whether institutions are arranged in a way that ensures all members of society are able to participate fully within it and is necessary to ensure that equality of opportunity is meaningful rather than just formal. For Rawls, this means that benefits must be distributed in such a way that the least advantaged are made better off. One serious flaw in this conception, however, was identified by Jacobs, who contends that Rawls over-emphasized the role of natural talents and abilities in determining the distribution of wealth. Jacobs notes that other factors, namely inherited wealth, play a much greater role

120. *Ibid* at 75.
121. *Ibid* at 64.
122. *Ibid.*
123. *Ibid* at 78.
124. *Ibid* at 79.

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in generating social and economic inequalities than do natural talents and abilities.[125] In fact, Jacobs argues that social science evidence rigorously rejects the idea that natural endowments lead to inequalities and, rather, all inequalities need to be understood as a result of social and economic factors.[126] If natural talents alone do not result in social and economic inequalities, as Jacobs contends, then the difference principle arguably serves no purpose. That is, there is no need for a mechanism to counter the accumulation of wealth by the mythical natural aristocracy once the background institutions are arranged fairly. Without a distributive element, the focus of background fairness returns to fair equality of opportunity. In order to assess whether the basic institutions of a society are truly arranged such that offices and positions are available under fair equality of opportunity, Jacobs provides an alternative tool for assessing regulatory policies in his three-dimensional model of equal opportunities, which he refers to as 'status equality'.

4.3 Status Equality

To ensure that procedural fairness is meaningful, Rawls argued that social and economic inequalities can only exist if they are to the benefit of the least advantaged. While this proposition is still an exemplar summation of an egalitarian perspective of justice, Jacobs criticizes Rawls for supplementing fair equality of opportunity with the difference principle.[127] Jacobs explains that if the concern is really about ensuring that every individual has an equal opportunity to meaningfully participate in a competition, then what background fairness really requires is that the initial starting points for individuals entering a competition be fairly situated. While wealth can act as a proxy for starting positions, fundamentally it is still just a proxy. The real currency of background fairness is status equality. Status equality does not mean people necessarily start with the same wealth or resources, or even with the same functionality or ability to affect the outcome, but rather that they enjoy the same *moral* status.[128] Unlike social status—which may refer to an individual's position within social stratification—moral status talks about a person's place in the moral universe. Deeply rooted in ethical philosophy, the notion of moral status states that all individuals, regardless of individual characteristics such as gender or race, share a common humanity and thus, regardless of social class, should have equal prospects of achievement.[129] The corollary to this is that no individual has a higher moral claim to an office simply due to their membership in a particular group. Status equality thus speaks to an individual's ability to access any position of power including those where the law is administered or created, such as law schools, legislatures, policing, judicial offices, and regulatory bodies. Status

125. See Jacobs, *supra* note 68 at 499.
126. *Ibid* at 50, 56.
127. *Ibid* at 50-51.
128. *Ibid* at 31.
129. See Rawls, *supra* note 21 at 73.

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equality also speaks to one's standing before the law. For example, Jacobs expresses how an action like racial profiling is antithetical to status equality because it uses race as a proxy for criminal misconduct. By categorizing individuals as more or less likely to commit a crime based on their race, racial profiling places people on different standings within a police investigation and thus subjects some to a lower moral status.[130] Perhaps the best example of status equality before the law is the principle of the presumption of innocence.[131] Regardless of class, race, or gender, all accused stand in the same position at the outset of trial. Though some may be able to afford a better lawyer, everyone is always entitled to this presumption of innocence. Status equality can thus be understood as the regulatory mechanism necessary to ensure a meaningful equality of opportunity within a competition.

To Jacobs, background fairness hinges on the moral status of the participants at the outset of a competition rather than a mechanism for distributing benefits. Focusing on material inequalities at this stage is misguided, since wealth is simply a proxy for status.[132] That is, resources can certainly level the playing field—expensive lawyers during a trial, for example—but the real issue is whether the participants have equal moral standing. On face value, focusing on status equality as opposed to wealth seems to overlook the massive inequalities that are allowed by the free-market and the ensuing advantages they offer.[133] It is hard to argue that, in a real-world setting, a self-represented litigant who cannot afford a lawyer is situated fairly against a multi-national company with a nearly unlimited legal budget. However, according to Jacobs, this concern is better dealt with in his third dimension of equal opportunities, being stakes fairness. As will be discussed below, stakes fairness becomes the mechanism for the redistribution of wealth over the long term to ensure that a genuine equal opportunity is maintained over generations.

4.4 Summary

Background fairness is concerned with whether background institutions are arranged such that individuals are able to fully participate and engage with society. According to Rawls, background fairness requires that the distribution of benefits—or burdens—be arranged in a manner that the least advantaged is better off.[134] This ensures that equality of opportunity remains meaningful. Jacobs, however, argued that Rawls overemphasized the idea of natural endowments, which are more of a myth and the product of social inequalities, and that meaningful equality of opportunity really requires that we examine whether all participants enjoy the same standing—or moral status—within a competition.[135]

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130. See Jacobs, *supra* note 68 at 36-37.
131. *Ibid* at 30-32.
132. *Ibid* at 34.
133. See Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1975) 9 Law & Soc'y Rev 95.
134. See Rawls, *supra* note 21 at 61.
135. See Jacobs, *supra* note 68 at 45.

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Jacobs, however, notes that certain goods and resources should not be the subject of a competition, and points to health care and elementary-level education as being two such examples.[136] In these situations, society accepts that everyone is entitled to a basic set of benefits and therefore resources should not be allocated according to a competitive framework. Nevertheless, resources are limited and thus begs the question of how limited resources should be distributed to the population, if not by competition.

In these situations, where benefits should not be subject to a competitive model, we can return to Rawls' difference principle to provide guidance, as it is one formulation of distributive fairness that allows for an objective assessment of distribution. Here Rawls asks whether the resulting inequalities act in a way to make the least advantaged better off. As an analytic tool, we can apply the difference principle by looking at whether the beneficiaries of any distributive program expect that their life prospects will be improved. As such, it can be argued that Canada's health care system, which provides universal coverage for medically necessary health services, conforms to justice as fairness, since providing services to those according to need makes the least advantaged—e.g., the sickest—better off.[137] This analysis thus provides two practical measures to critique access-to-civil-justice initiatives from a background fairness perspective. In the context of a competition, we can utilize Jacobs' status equality lens and ask whether all participants enjoy the same moral standing, whereas in the non-competitions context we can utilize Rawls' difference principle and ask if the initiative makes the least advantaged better off.

5. Stakes Fairness

5.1 Introduction

Inevitably when speaking of justice people will look to the final outcome of a competition or proceeding as a determinant of fairness. In a 2012-2013 study about perceptions of justice, the people interviewed often identified how the outcomes of a particular problem were just as important for their conception of justice as were the procedures.[138] Interestingly, an examination of outcomes is commonly ignored or glossed over in much of the access-to-civil-justice literature. This, to a degree, is not surprising because, as noted by Roderick A. Macdonald, access to civil justice originated as a critique of the civil litigation process.[139] As such, there is a presumption that the rule of law, and justice by

136. *Ibid* at 13.

137. See Health Canada, "Canada's Health Care System" (2011), online: *Government of Canada* https://www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html.

138. See Trevor C W Farrow, "What is Access to Justice ?" (2015) 51:3 Osgoode Hall LJ 957 at 971-72.

139. See Roderick Macdonald, "Access to Justice in Canada Today" in Julia Bass, W A Bogart & Frederick Zemans, eds, *Access to Justice for a New Century—The Way Forward* (Law Society of Upper Canada, 2005) 19 at 104-10.

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extension, is firmly established within the legal system, and the only problem is with the processes and barriers that make it difficult to bring an issue to a dispute resolution body.[140] More recently, however, there has been a refocus on the more substantive aspects of justice, as authors try to bring to light the experiences of individuals within the legal system and the ongoing marginalization of certain communities by legal actors.[141] These authors make clear that any modern examination of access to civil justice cannot ignore the outcomes that are a result of the processes they may be critiquing.

There is, however, an inherent difficulty in trying to measure outcomes. In order to assess whether an outcome is objectively 'just,' a measure requires a predetermined conception of the right decision, which may not be possible given the divergent moral, religious, and philosophical beliefs in a pluralistic society. For this reason, Rawls argued that pure procedural justice—wherein the outcome is just by virtue of following the procedures—is preferable to justice that requires a 'right' decision independent of the procedures followed.[142] The problem with ending the analysis here is that it precludes any assessment of the outcomes. Even under conditions of pure procedural justice, an outcome may still be critiqued as being patently unfair in two situations: first, where the winner takes everything, and second, where the outcome arbitrarily impacts another competition.[143]

5.2 Amount at Stake

Under principles of stakes fairness, winner-take-all competitions are rarely if ever fair. As such, stakes fairness argues that the outcomes of a competition need to be constrained and distributed more widely among the participants to ensure a more equitable division of burdens and benefits.[144] Jacobs illustrates this insight with the example of a professional boxing match. These competitions are rarely arranged in such a manner that the winner takes all: while the winner of the fight may be awarded a much higher prize, the loser is still given part of the purse.[145] This arrangement reflects intuitive notions of how benefits should be distributed. There are several reasons why a competition organized in a winner-take-all manner may be viewed as unfair. First, if multiple parties have to extol great amounts of time, effort, and resources just to enter into that competition it may be opposed to egalitarian principles that they walk away with nothing should they lose. In instances like this, some of the benefits need to be distributed from the winner to the loser in order to compensate everyone for their investment. The boxing match example above is a good illustration of this. Often combatants train

140. See Mosher, *supra* note 101 at 843-44.
141. See e.g. Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32:1 Windsor YB Access Just 149; Sarah Buhler, "'Don't Want to Get Exposed': Law's Violence and Access to Justice" (2017) 26 J L & Soc Pol'y 68.
142. See Rawls, *supra* note 21 at 87-88.
143. See Jacobs, *supra* note 68 at 38.
144. *Ibid.*
145. *Ibid* at 15.

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for many months before a fight and it would be inequitable for them to receive nothing for this investment. In other situations, the difference in performance between the winner and loser is completely subjective or absolutely marginal. Think of the two piano players mentioned at the beginning of this paper: if it is not possible to objectively claim that one interpretation of Chopin is better than the other, then it would be arbitrary for one pianist to horde all benefits simply on the subjective opinion of one influential critic. A third reason a winner-take-all competition may be viewed as unfair is when the benefits of the competition are so high that they have little rational connection to performance. Think of how executive compensation is often grossly out of proportion with the average earnings of their employees, or how executives are often rewarded for failure.[146] In these instances, there is a clear disconnect between performance and reward, and stakes fairness would argue that executive pay should be constrained so that other participants in the competition—e.g. the employees and the community—may receive some of the benefits. Stakes fairness can thus be used as a practical regulatory tool. For example, to mitigate problems associated with unemployment, governments have enacted numerous programs such as employment insurance, workfare, income support, or family benefits. While there are all sorts of justifications for these policies, Jacobs makes an argument that many of these programs can also be justified using stakes fairness. Under this analysis, governments redistribute benefits and constrain what is at stake within the labour market to ensure that the competition does not become a winner-take-all affair.[147]

On first inspection, the redistributive component inherent to stakes fairness arguably sounds like a reframing of Rawls' difference principle. However, Jacobs contends that they are fundamentally different. The primary distinction between stakes fairness and the difference principle is that the difference principle is used to justify infringements to equal opportunities, whereas stakes fairness regulates what equal opportunities require.[148] That is, Rawls recognized that there are inequalities in society and asked when these inequalities can be justified; the difference principle allows for inequalities to exist provided they are to the benefit of the least advantaged. In this way, the difference principle is independent of equality of opportunity and, arguably, in tension with it since there may be times when unequal opportunities actually benefit the least advantaged. In these instances, according to Rawls' hierarchy, equal opportunities would trump the difference principle.[149] In contrast, stakes fairness examines outcomes and comments on whether they support or undermine fair equality of opportunities:

146. See e.g. Mark Thompson, "CEOs Are Being 'Rewarded' For Failure", *CNN* (21 April 2016), online: https://money.cnn.com/2016/04/21/investing/executive-pay-reward-for-failure/; Roland Jones, "CEOs Lay Off Thousands, Rake in Millions", *NBC News* (1 September 2010), online: http://www.nbcnews.com/id/38935053/ns/business-us_business/t/ceos-lay-thousands-rake-millions/#.X4DZQu0pBpg.

147. See Jacobs, *supra* note 68 at 162-68.

148. *Ibid* at 41-42.

149. See Rawls, *supra* note 17 at 61.

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it is an integral part of the equal opportunities analysis rather than a free-standing justification for infringement.

5.3 Influence on Competitions

Along with concerns over a winner-take-all competition, stakes fairness is also concerned with the effect of one competition over other opportunities. The simple premise here is that success or failure in one competition should not make one more likely to succeed or fail in another opportunity.[150] The classic example of this is that financial wealth should not translate into academic achievement. The underlying rationale for this principle is that the participants of each competition should only be judged on criteria that are relevant to that specific competition. To return to the example just mentioned, an individual's financial success has no rational connection to the academic merits of their dissertation and thus the student's net worth should not be a factor in determining whether they should be awarded a doctorate. This principle of relevant criteria is reflected in the common law of evidence, which precludes the crown from leading evidence of past crimes in criminal trials against the accused if their sole purpose is to prove the accused committed the current offence that they are charged with. This type of character evidence is generally seen as irrelevant to the current offence. In other words, just because an accused robbed somebody in the past does not mean they robbed this particular person: evidence of the past robbery does nothing to substantiate the current accusation. Jacobs acknowledges that this aspect of stakes fairness appears to overlap with concerns of background fairness since it can be characterised as being concerned with an individual's standing within a competition.[151] Like background fairness, stakes fairness is also concerned with the influence of arbitrary factors. However, Jacobs contends that stakes fairness is an appropriate place to examine the impact that competitions have on each other since the underlying concern of stakes fairness is on regulating the outcomes as opposed to the process itself. In other words, background fairness assesses the impact of arbitrary characteristics within a competition, whereas stakes fairness assesses the arbitrary impact of one competition on another.

5.4 Summary

Stakes fairness provides a practical tool to examine the outcomes of any given competition and to assess whether these outcomes are fair from a justice as fairness perspective. Stakes fairness contains two aspects. First, it holds that competitions arranged in a winner-take-all manner are almost universally unfair and that the benefits and burdens of these types of competitions need to be distributed more widely among participants. Second, stakes fairness also holds that success or failure in one competition should not impact the prospects of success or failure

150. See Jacobs, *supra* note 68 at 38.
151. *Ibid* at 43.

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in another opportunity. This final dimension of Jacobs' model of equal opportunities therefore allows for a critique of outcomes.

6. Conclusion

The primary purpose of this paper was to provide a theoretical underpinning to the access-to-civil-justice discussion. In doing so I offer an alternative approach to developing metrics by first grounding the discussion within a theory of justice. This is not meant to supplant the work and achievements of organizations that are currently developing measures. Rather, it intends to support this work by providing that normative standard that remains elusive and undefined. I argue that John Rawls' theory of justice as fairness in conjunction with Jacobs' model of equal opportunities provide a comprehensive framework that can be used to practically assess access-to-civil-justice policies and initiatives. Under this framework, metrics that purport to assess access-to-civil-justice initiatives need to speak to at least one of the three principles of justice as fairness. That is, there needs to be a rational connection between the metric and either procedural fairness, background fairness, or stakes fairness. If not, the metric is not measuring access to civil justice. For example, measuring how many cases are cleared from a court docket within a given time frame is not an adequate metric as it does not speak to any principle of justice; rather, it is an administrative metric that speaks to how quickly the system can clean up its own records. Conversely, metrics that measure efforts to promote gender or racial equity may be understood as measuring access to civil justice, since there is a connection between the metric and background fairness.

Apart from measuring specific initiatives, this framework can also be used to broadly critique recurring themes within access-to-civil-justice policy. Two themes in particular warrant examination from a justice as fairness perspective because they are commonly used by policy makers to justify reform efforts. The first theme, modernization, has been a persistent focus of civil justice reform efforts since the dawn of the access-to-civil-justice movement.[152] While it is often framed in terms of legal processes and procedures, appeals for modernization may also be directed toward other aspects of the legal system. For example, when the Action Committee on Access to Justice in Civil and Family Law released its landmark report on access-to-civil-justice reform, it identified the delivery of legal services, the substantive family law, and court and tribunal infrastructure all as being in need of modernization.[153] As a method for improving access to civil justice, modernization draws its legitimacy from a narrative that emphasizes antiquated and outdated systems.[154] These systems are seen as being barriers to

152. See Cappelletti & Garth, *supra* note 7.
153. See Action Committee on Access to Justice in Civil and Family Matters, *supra* note 3.
154. See e.g. Adrian Clarke, "Why Blockchain Belongs in the Courtroom", *Entrepreneur* (15 November 2018), online: https://www.entrepreneur.com/article/322880; Glenn Kauth, "Ontario Lagging in Court Technology", *Law Times* (31 December 2012), online: https://www.lawtimesnews.com/news/general/ontario-lagging-in-court-technology/259806.

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justice in and of themselves and, as such, changing them will necessarily improve access to civil justice.[155] Such was the narrative that Supreme Court Justice Rosalie Abella drew on in a speech advocating for the need to modernize the legal profession:

> And yet, with all these profound changes over the last 114 years in how we travel, live, govern and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way as we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Can we say that about any other profession?[156]

The evident problem with this narrative is that it risks conflating modernization with access to civil justice. While old processes may indeed act as barriers to justice, the new processes that replace them are not necessarily more just or accessible by definition. For example, there is a deep concern that vulnerable communities, who often struggle to access reliable internet, will face additional challenges as more court processes shift to online formats.[157] If these concerns materialize, rather than promoting access to civil justice, such modernization efforts would actually increase inequalities by making it more difficult for certain socio-economic groups to participate meaningfully within the legal system. There is no doubt that modern processes, such as those made possible by technology, can and have improved the user experience for many; however, this does not mean that modernization is synonymous with improved access to civil justice.

A second theme that has consistently been the focus of access-to-civil-justice thinking is that of efficiency. Within the context of civil reform programs, efficiency-based arguments play a central role in driving policy, for numerous reasons. From a supply-side perspective, increasing fiscal pressures mean that governments are continuously looking for ways to reduce their own costs, and increased efficiencies offer one way to do this.[158] From a demand-side perspective, increased efficiencies are often seen as a way to decrease the cost of law to the consumer, while at the same time increasing the flexibility and responsiveness of the service provider.[159] Like modernization, increased efficiencies may have a positive impact on access to civil justice if those efficiencies are actually passed on to the user. However, efficiency-based arguments often prioritize cost-saving measures over other normative concerns such as equity, fairness, or the public

155. For a discussion that critiques the assumption that technology necessarily enhances access to justice see Jane Bailey, Jacquelyn Burkell & Graham Reynolds, "Access to Justice for All: Towards an 'Expansive Vision' of Justice and Technology" (2013) 31:2 Windsor YB Access Just 181.

156. Rosalie Silberman Abella, "Our Civil Justice System Needs to Be Brought Into the 21st Century", *The Globe and Mail* (24 April 2020), online: https://www.theglobeandmail.com/opinion/article-our-civil-justice-system-needs-to-be-brought-into-the-21st-century/.

157. See Bailey, Burkell & Reynolds, *supra* note 155 at 199-200.

158. See e.g. Michael Trebilcock, "Report of the Legal Aid Review 2008" (2008), online: *Ontario Ministry of the Attorney General* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf.

159. See Farrow, *supra* note 9 at 203-12.

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interest.[160] In these situations, justice is characterized as being no different than any other marketable product, which is clearly problematic. Unlike other goods and services, the purpose of justice is to allocate rights and distribute benefits fairly to ensure equal opportunity, and an inefficient process may be required in order to accomplish these goals.[161] In other words, efficiency, from an access-to-civil-justice perspective, should not be an end in itself, but rather a means to help achieve access to civil justice.[162]

Any access-to-civil-justice reforms that are centred on themes of modernization or efficiencies should first be contextualized in terms of their impact on procedural fairness, background fairness, and stakes fairness in order to ensure that the primary beneficiary is the individual. This framework thus aligns with the growing consensus among the Canadian access-to-civil-justice community that the focus of reform must be on those who use the system as opposed to those who work within it.[163] The implications of this framework for lawyers and other professionals who are interested in access to civil justice is that they should orient their services in a way that promotes meaningful equality of opportunity. The most obvious way to do this would be to provide more affordable services so that individuals are not denied legal advice merely because of their socio-economic status. However, there are other more nuanced ways that legal service providers can promote access to civil justice. For instance, there is an increasing awareness that legal problems do not arise in isolation from other social problems.[164] Issues of mental health, for example, that may require professional counselling may also be directly connected to issues with a legal element, such as housing, debt, or employment. In order to address these multi-faceted issues, there has been a call to move towards a multidisciplinary service model where lawyers work side-by-side in the same centres as counsellors, teachers, nurses, mediators, and other professionals.[165] This so-called 'holistic' approach to legal services acts in a way to increase the status equality of individuals by recognizing needs beyond the immediate legal issue that may impact their problem. To illustrate, take two people who are dealing with an identical wrongful dismissal claim based on absenteeism. If one of them also has a problem with addiction, then the two are not entering the legal competition at the same starting point. By adopting a holistic approach, non-legal factors can be accounted for and addressed, and in doing so help ensure background fairness.

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160. *Ibid* at 203.
161. *Ibid* at 287.
162. *Ibid* at 284-92.
163. See Action Committee on Access to Justice in Civil and Family Matters, *supra* note 3; CBA Access to Justice Committee, *supra* note 3.
164. See Ab Currie, "The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians" (2009), online: *Government of Canada Department of Justice* https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/index.html.
165. See Brenda Jacobs & Lesley Jacobs, "Multidisciplinary Paths to Family Justice: Professional Challenges and Promising Practices" (2010), online (pdf): https://www.lco-cdo.org/wp-content/uploads/2010/11/family-law-process-call-for-papers-jacobs.pdf.

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The necessity of a theoretical framework for the development of access-to-civil-justice metrics is clear; a theory is necessary to define exactly what the movement is trying to measure. The examples presented in this section, however, also illustrate how such a framework can be used as a practical regulatory device. That is, policies can be critiqued against this framework and practices can be informed by it. In doing so, this paper seeks to inform future work by providing a theory of justice that can be incorporated into access-to-civil-justice policy and programing.

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