WITH ACCESS AND JUSTICE FOR ALL

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"[N]othing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community—than the physical capacity, the public approval, and the legal right to be abroad in the land."[1]

—Jacobus tenBroek

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1 Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 841 (1966).

INTRODUCTION

Access has become an increasingly significant concept in struggles for social justice in recent decades, particularly in two contexts: the access to justice movement and the disability rights movement. Both the access to justice movement and the disability rights movement emerged in the 1970s and both are concerned with structural barriers that members of disadvantaged groups experience in social, political, and legal interactions.

The access to justice movement emphasized the impact of socioeconomic disparities and other forms of inequalities on the accessibility level of the legal system to all persons.[2] It exposed the substantial gap that exists between the promise of two liberal ideals—equality before the law and the rule of law—and the ability of members of different groups in society to effectively enjoy that promise. The access to justice movement's basic argument is that this unequal access to the legal system violates the equal protection of the law and infringes the ability of individuals and groups to exercise their fundamental rights.[3] While the access to justice movement did address issues relating to gender and race, it did not dedicate much attention to disabled people and the particular challenges and disadvantages that they face in their interaction with the legal system.

The disability rights movement's struggle for access showed that the exclusion of persons with disabilities from the public sphere was not only the outcome of stigma, but also the product of an exclusionary environment that includes physical and structural barriers. In the absence of access, disabled people cannot benefit from the services and opportunities that are available to the public at large and are unable to

2 *See infra* Section III.A.

3 *See* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

exercise their rights as citizens of equal value and status.[4] In response, the disability movement demanded the removal of barriers, called for the re-design of the public sphere, and introduced the principles of Universal Design.[5] Nevertheless, while the disability rights movement was engaged with issues relating to access to justice, it was not always explicit about it, and when it did, it tended to focus on the narrow, though fundamental, issue of legal capacity.[6] Only recently, several pioneering studies started developing a broader understanding of disability and access to justice.[7]

This Essay maintains that the combination of the "right to access" and "access to justice" reveals a multiplicity of sites where the ideas of the two movements intersect and interact, including legal capacity rules, physical access to courts and legal tribunals, access to legal proceedings and legal representation, communication, information, language barriers, socioeconomic impediments, structural biases affecting the legal process, and more.[8] It also teaches about the mutual lessons that they have for each other.

The Essay begins with a suggested normative framework to the legal right to access to justice, based on the International Convention on the Rights of Persons with Disabilities (CRPD or the Convention).[9] It brings together Article 12, which deals with legal capacity and access to support while exercising one's legal capacity; Article 13, which mandates effective access to justice and effective participation in all legal proceedings; and, Article 9, which deals with accessibility in general and offers a rich understanding of access that, I argue, can and should inform any discussion on access to justice.[10]

Next, this Essay offers a theoretical basis for the right to access that rests on three foundations: a disability critique, a political perspective, and a social perspective. I argue that access is a pivotal concept in promoting the rights of persons with disabilities since accessibility, in its broad sense, is the foundation for the entire struggle for disability rights; it is the key for participation in the public sphere and for personal decision-making in the private sphere.

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4 *See infra* Part II.

5 *See infra* Section II.C.

6 On legal capacity, see *infra* Section III.B.1.a.

7 Most comprehensive among them is: EILIONÓIR FLYNN, DISABLED JUSTICE?: ACCESS TO JUSTICE AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (Routledge 2016) (2015) [hereinafter DISABLED JUSTICE]. For additional important discussions, see ARLENE S. KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS 221–34 (2015); Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. INT'L & COMP. L. 281 (2011).

8 *See infra* Section III.B.

9 United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

10 *Id.* art. 9, 12 & 13.

Then, the Essay turns to access to justice and offers a typology that rests on three levels of analysis moving from the formal and the procedural, to the substantive and the just; each is characterized by a specific set of barriers. The first level is *access to court* and it concerns the denial of access to the legal system through formal, physical, and procedural barriers, which I call *entry barriers*. The second level is *access to law* and it addresses an array of *process barriers* that concern the various structural, cultural, and psychological obstacles that may affect one's ability to use the law, even in absence of formal barriers. The third level concerns *access to justice* and addresses *outcome barriers* relating to the design, the content, and the application of the existing legal rules, which are highly affected by social power relations and structural biases. Together, these three levels of discussion reveal a detailed and comprehensive picture of barriers that disabled people face in their interaction with the legal system and with related systems of benefits and support.

This Essay concludes with some comments about the potential contribution of this comprehensive understanding of access to justice not only for disabled people, but for other disadvantaged groups—and for all.

I. THE LEGAL FRAMEWORK: A FORMAL RIGHT TO ACCESS TO JUSTICE

The CRPD was a landmark convention for many reasons: it was the first convention of the twenty-first century; it was a product of joint work of governmental as well as non-governmental delegations that together negotiated its terms; it established unique monitoring bodies; and particularly important for the purpose of this Essay, it was the first convention to acknowledge the right to access to justice as an internationally-recognized right.[11] Clearly, disabled people are not the only ones to suffer from lack of access to justice, but they are certainly the only ones to get such rights explicitly and formally acknowledged in the international arena, as stipulated in Article 13 of the CRPD, which carries this title.[12]

This Essay maintains that in order to fully comprehend the scope and nature of the acknowledged right to access to justice, a broader framework than Article 13 is needed based on additional Articles of the CRPD. It requires a conceptualization that links disability theory and

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11 Theresia Degener, *Foreword* to DISABLED JUSTICE, *supra* note 7; *see also* Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 2–4 (2008); HUMAN RIGHTS & DISABILITY ADVOCACY (Maya Sabatello & Marianne Schulze eds., 2014).

12 CRPD, *supra* note 9, art. 13.

access to justice literature. The legal framework that I offer here relies on three Articles from the CRPD: Article 12, which mainly deals with legal capacity and decision-making; Article 13, which deals with access to justice more broadly, with an emphasis on equal access to the legal process; and, Article 9, which deals with accessibility in its broadest sense.[13] Together, these three Articles provide a broad recognition of a comprehensive right to access to justice to disabled people. They demonstrate the potential scope of the right to access and the important role that it plays in guaranteeing and promoting the rights of disabled people more generally.[14]

So far, Article 12 received the most attention among disability law scholars and advocates.[15] Article 12 deals with legal capacity and with access to support while exercising one's legal capacity. The Article announces that persons with disabilities have the right to full recognition as "persons before the law" and calls for the revocation and revision of the old regimes of guardianship laws.[16] Its implications are revolutionary.

Legal capacity has long been the greatest preliminary barrier faced by many disabled people, affecting their civil status as legal subjects and their ability to enter the realm of law, to use the law as a tool, and to maximize their rights.[17] For persons with disabilities everywhere, capacity and guardianship laws provide the legal means to vindicate their rights. The purpose behind these laws was to protect disabled people from themselves, as the assumption was that they could not make rational decisions for themselves, as well as to protect others from possible wrong decisions and actions by disabled people.[18] Unfortunately, these laws enabled severe violations of many disabled people's rights, taking away their ability to have control over their own

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13 *Id.* at art. 9, 12, 13.

14 *See* DISABLED JUSTICE, *supra* note 7, at 34–40 (on the interconnectedness of Article 13 with other provisions of the CRPD); KANTER, *supra* note 7, at 222–23; CRPD, *supra* note 9, at 45–46 (on the particular relevance of Articles 9 and 12 to access to justice).

15 *See, e.g.*, Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 SYRACUSE J. INT'L L. & COM. 429 (2007); Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8 (2012); Eilionoir Flynn & Anna Arstein-Kerslake, *Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity*, 10 INT'L J.L. CONTEXT 81, 88–102 (2014).

16 CRPD, *supra* note 9, art. 12.

17 Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 163–170 (2010).

18 *Id.*; A. Frank Johns, *Guardianship Folly: The Misgovernment of* Parens Patriae *and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—a March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 6–28 (Vicki Joiner Bowers ed., 1997).

lives, to have a voice in financial, medical, or other matters, making them devoid of legal status, and susceptible to abuse and exploitation.[19] Some commentators called it a civil death.[20]

Indeed, already in 1966, Article 16 to the International Covenant on Civil and Political Rights (ICCPR) stipulated that "[e]veryone shall have the right to recognition everywhere as a person before the law."[21] However, like in many other human rights matters, existing international instruments, whether general or specific to a certain group (e.g., women, racial minorities, children, etc.), were insufficient to protect the rights of disabled people.[22] The CRPD acknowledged this situation and mentioned it as one of the reasons for the need for a disability-specific international convention.[23]

Article 12 offers an alternative vision in which disabled people "enjoy legal capacity on an equal basis with others in all aspects of life," and States Parties "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[24] Article 12, then, requires the states not only to abolish guardianship laws but also to provide support mechanisms, pointing at the emerging mechanism of supported decision-making. This mechanism was developed by disability rights advocates and is gradually gaining more support.[25] In some jurisdictions, it even achieved formal legal recognition.[26]

As opposed to Article 12, which deals with the denial of legal subjectivity and the vindication of one's rights, Article 13 offers a broader vision of access to justice; a vision that is relevant to all persons with disabilities in their various interactions with the legal system. According to Article 13:

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19 *See* Dhanda, *supra* note 15; Johns, *supra* note 18.

20 GERARD QUINN, FROM CIVIL DEATH TO CIVIL LIFE: PERSPECTIVES ON SUPPORTED DECISION-MAKING FOR PERSONS WITH DISABILITIES (Dec. 20, 2015), https://www.nuigalway.ie/cdlp/documents/Tbilisi%20State%20University%20Talk%20GQfinal%20Dec%202015.pdf.

21 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 177 (Dec. 16, 1966) [hereinafter ICCPR].

22 Gerard Quinn & Theresia Degener, U.N. Office of the High Comm. for Human Rights, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 23–26, U.N. Doc. HR/PUB/02/1 (2002); Kayess & French, *supra* note 11.

23 CRPD, *supra* note 9, pmbl., ¶ k.

24 *Id.* at art. 12(2)–(3).

25 Dinerstein, *supra* note 15, at 8; Salzman, *supra* note 17, at 180–81, 231–34.

26 For recent developments in Israel and India, see Rebecca Naomi Davies et al., *Guardianship and Supported Decision Making in Israel*, 11 ADVANCES MENTAL HEALTH & INTELL. DISABILITIES 54 (2017); Mukul Inamdar et al., Comment, *Does "Supported Decision-Making" in India's Mental Health Care Bill, 2013, Measure up to the CRPD's Standards?*, 1 INDIAN J. MED. ETHICS 229 (2016). For a general review, see Soumitra Pathare & Laura S. Shields, *Supported Decision-Making for Persons with Mental Illness: A Review*, 34 PUB. HEALTH REVIEWS, Dec. 2012, at 1.

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[27]

Article 13's main focus is access to legal proceedings. Yet, as Eilionóir Flynn argued, it offers a broad understanding of access to legal proceedings that extends to other realms and to less obvious aspects of the legal process.[28] The Article mentions "effective access to justice" and "effective" participation in all legal proceedings. Repeating the word effective twice refers to access and participation that are not formal or technical, but rather substantive and meaningful, and alludes to the need for structural reforms. The Article also refers to disabled people as direct or indirect participants, thereby acknowledging the many roles they may play in legal proceedings, primarily as litigants, defendants, victims, and witnesses, but potentially also as lawyers, judges, and jury members.[29] Furthermore, Article 13 employs a broad understanding of the legal process: it specifically mentions *all* legal proceedings, which may include criminal as well as civil proceedings, administrative hearings, and quasi-judicial tribunals, and it covers the preliminary stages that precede the formal stage of a trial, including any inquiries run by investigative and other agencies.

So far, only a limited right to access to justice was acknowledged in the international sphere. Article 14 to the ICCPR proclaims that "[a]ll persons shall be equal before the courts and tribunals" and be entitled to a fair trial.[30] Although detailed and important, this Article too did not provide enough protection to disabled people[31] and was limited in scope since it referred only to criminal justice. Article 14 seems to reflect the dominant understanding of access to justice in the mid-twentieth century as a fair criminal trial.[32] It could be that because of this dominance, until recently, the greatest achievement relating to disability in the field of access to justice was the adoption of specific rules concerning accommodations for disabled people in criminal procedure and evidence law.[33]

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27 CRPD, *supra* note 9, art. 13.

28 DISABLED JUSTICE, *supra* note 7, at 40–45; *see also* Ortoleva, *supra* note 7, at 284, 286.

29 CRPD, *supra* note 9, art. 13; *see also* DISABLED JUSTICE, *supra* note 7; KANTER, *supra* note 7, at 223; Ortoleva, *supra* note 7, at 299–307.

30 ICCPR, *supra* note 21, art. 14. For a discussion on access to justice and it origins through various international instruments, see DISABLED JUSTICE, *supra* note 7, at 21–48; Ortoleva, *supra* note 7, at 292–99.

31 *See* CRPD, *supra* note 9, pmbl., ¶ k; *see also* DISABLED JUSTICE, *supra* note 7, at 23–24, 66.

32 RHODE, *supra* note 3, at 47–64.

33 *See, e.g.*, Sagit Mor & Osnat Ein-Dor, *Invalid Testimony: Disability and Voice in the Criminal Procedure*, 16 MISHPAT U'MIMSHAL L. REV. 187 (2014) (Isr.); Neta Ziv, *Witnesses with*

The standard in both Articles 12 and 13 is "on equal basis with others," that is, access which is not inferior to the access provided to persons without disabilities.[34] At the same time, however, these provisions require State-supported mechanisms that would allow the equal enjoyment of access. Article 12 requires support in exercising one's legal capacity mechanism, and Article 13 requires the "provision of procedural and age-appropriate accommodations" that would facilitate effective participation.[35] The requirement to provide support and accommodations is at the heart of disability rights and disability theory and is inherent to issues of disability access, as I show in this Essay.[36]

Lastly, Article 9 deals with accessibility in general and is only rarely mentioned in the context of access to justice. In this Essay, I argue that Article 9 adds an important layer to the legal framework as it opens new possibilities to think broadly about access to justice, beyond legal capacity and legal proceedings, and enriches our very notion of access:

> 1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia: (a) Buildings, roads, transportation and other indoor and outdoor facilities . . . ; (b) Information, communications and other services, including electronic services and emergency services.[37]

I maintain that Article 9 offers a rich understanding of access that can, and should, inform any discussion on access to justice.[38] The

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Mental Disabilities: Accommodations and the Search for Truth—the Israeli Case, 27 DISABILITY STUD. Q. 18 (2007) [hereinafter Ziv, *Witnesses*]; DISABLED JUSTICE, *supra* note 7, 108–11. For specific legislation in the United States, see Crime Victims with Disabilities Awareness Act, Pub. L. No. 105–301, 112 Stat. 2838 (1998).

34 CRPD, *supra* note 9, art. 12, 13.

35 *Id.*

36 *See, e.g.*, SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861 (2004); Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689 (2014) [*hereinafter* Stein, *Accommodating Every Body*].

37 CRPD, supra note 9, art. 9.

38 *Id.*; *see also* Andrea Broderick, The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities (Nov. 20, 2015) (Ph.D. dissertation, Maastricht University), http://digitalarchive.maastrichtuniversity.nl/fedora/get/guid:17dc193e-9ce9-40b4-8aeb-9b3756a275ae/ASSET1.

Article opens with drawing a connection between access and the principles of living independently and full participation, which are fundamental to the disability rights movement's vision of inclusion, and are relevant to the legal context as well. This close connection exposes the dual nature of access as both instrumental to achieving other goals and a goal in and of itself: the goal of having accessible society and an accessible legal system.

Article 9 offers a comprehensive understanding of access that includes the physical environment, transportation, information, and communications, as well as access to other facilities and services that are open or provided to the public.[39] It also addresses the often-neglected disparities between urban and rural areas, thereby inserting a geographical dimension that is particularly relevant to issues of access.

Article 9 therefore extends our notion of access to justice to the built environment and to the provision of services and their entire surroundings in a broad range of realms and capacities. It encompasses access to court buildings as well as to enforcement and investigative bodies, judicial and quasi-judicial tribunals, administrative authorities, and virtually all government agencies. It underscores the role of accessible transportation for mobility and movement to and from facilities that are part of the legal system, provide legal services, or allocate rights and benefits. In addition, it addresses the important role that information and communication play in accessing the various agencies and services that the legal system entails, particularly in today's society. Finally, it acknowledges the economic, geographical, cultural, and other differences between urban and rural areas that lead to grave disparities in accessibility generally, and in access to justice, specifically.

Section 2 of Article 9 specifies different measures that promote accessibility, to which States Parties commit, including, *inter alia*, developing accessibility guidelines, ensuring that private entities follow accessibility norms, providing accessibility training, as well as providing various forms of assistance and support, such as signage in Braille and in easy to understand forms, live assistance (e.g., guides, readers, and sign language interpreters), and more.[40] Applying all these measures to the legal system will advance a more accessible system and will enhance access to justice.

While Article 9 focuses at first on *ensuring access*, it later on emphasizes the importance of *barrier removal*.[41] The Article specifically

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[39] Anna Lawson, *Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities:* Nyusti and Takács v Hungary, 30 SOUTH AFRICAN J. ON HUM. RTS. 380 (2014); Janet E. Lord, Presentation at the U.N. CRPD Committee: (Oct. 7, 2010), http://www2.ohchr.org/SPdocs/CRPD/DGD7102010/submissions/JanetELord.doc.

[40] CRPD, *supra* note 9, at art. 9.

[41] Lord, *supra* note 39, at 7.

mandates "the identification and elimination of obstacles and barriers to accessibility" as part of the States' duties.[42] Barrier removal is an important strategy for disability access that points at the role of attitudinal and environmental barriers in the production of disability. It coincides with the CRPD's general approach to disability, according to which "disability results from the *interaction* between *persons* with impairments *and attitudinal and environmental barriers* that hinders their full and effective participation in society on an equal basis with others . . . ."[43] Barrier removal acknowledges the role of social and structural barriers in the exclusion of disabled people from the public sphere and brings a message of responsibility over past injustices and of willingness to repair them.

The CRPD also mentions the principle of Universal Design, the most advanced version of universal access that aims to make "the design of products, environments, programs and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design."[44] Yet, it "shall not exclude assistive devices for particular groups of persons with disabilities where this is needed."[45] This principle was not fully integrated in the Convention's vision of access, only in the General Obligations section, where States Parties committed "to undertake or promote research and development of universally designed goods, services, equipment and facilities," and to "promote universal design in the development of standards and guidelines."[46] While Article 9 does not mention Universal Design, such vision can and should guide our understanding of access to justice, as I later argue in more detail.

Clearly, then, applying the accessibility obligation to the legal system has far-reaching potential. All of the above demonstrates the broad impact that accessibility legislation may have on the accessibility of the legal system for persons with disabilities. Yet I argue that this vision of access and accessibility is relevant, not only to disabled people, but to everybody. A system that is more accessible to disabled people is more accessible to many other people. Furthermore, other groups can learn and benefit from the conceptual framework that disability has to offer to access to justice struggles.

As stated earlier, while all members of disadvantaged groups in society are facing barriers and difficulties in their interaction with the legal system and in their efforts to pursue justice, only disabled people enjoy a legally-recognized human right to access to justice. This is one

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42 CRPD, *supra* note 9, at art. 9.

43 *Id.* at pmbl., ¶ 5 (emphasis added).

44 *Id.* at art. 2 (defining universal design).

45 *Id.* at art. 2.

46 *Id.* at art. 4, ¶ 1(f); Lord, *supra* note 39, at 7.

of the greatest achievements of the disability rights movement and other groups should follow.

The next Part will further develop the notion of access from a disability theory perspective, to infuse the legal discussion with a deeper understanding of disability and access.

II. ACCESS AND DISABILITY

Access is the foundation for disability rights, both conceptually and practically. Conceptually, it exposes the spatial logic of the exclusion that disabled people experience and the vision of inclusion that disability rights promote. Practically, it underscores the underlying conditions that allow the implementation and realization of disability rights. This premise is unique to the disability struggle. Although all groups suffer from exclusion and lack of access, and all groups would enjoy a right to access tailored to their needs and their experiences, only disabled people have put it at the center, have named and conceptualized access as a right, and have developed a comprehensive accessibility legislation that rests on a civil rights paradigm. A well-developed and conceptualized right to access of persons with disabilities can inspire and benefit other groups, as well, in their struggles for social change as it provides a better framework to fight existing social institutions and practices than a traditional civil rights framework. A well-developed and conceptualized right to access is also the basis for a fully developed right to access to justice for disabled people and for all. This Part offers such conceptualization and it rests on three layers: access and social construction, the political dimension of access, and the social dimension of access.

A. *Access and the Social Construction of Disability*

The first theoretical foundation for a fully developed right to access is disability studies, a theoretical perspective that in recent decades produced a rich scholarship of disability critique in various academic fields.[47] Disability studies have entered the legal sphere as well, through the writing on disability rights and the development of disability legal studies (DLS).[48] DLS brings together the tenets of disability studies and

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[47] *See, e.g.*, DAN GOODLEY, DISABILITY STUDIES: AN INTERDISCIPLINARY INTRODUCTION (2011); SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY (1998); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990).

[48] Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 426–28, 444 (2011); Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and*

critical legal theory to explore the sociolegal construction of disability. It is therefore most suitable for interrogating the inner logic of access and developing a critical account of accessibility as a legal concept. I suggest that the essence of this critical account in the context of access is that *it is society that fails disabled people by putting barriers and obstacles that deny their full participation, and not disabled persons who fail to meet society's norms and expectations*. Such an account challenges the manner in which society is built and designed, and points at its material and symbolic implications.[49] It therefore has a transformative potential that may contribute to more general discussions about access to justice and access to law of any disadvantaged social group.

The traditional approach to disability is an individualistic approach, often called "the individual model," which views disability as a misfortune, a personal tragedy, a stroke of bad luck.[50] The individualistic approach is accompanied by a medical approach, often called the "medical model" that gives priority and authority to medical knowledge and to the medical profession in defining disability and in dictating the social response to disability and disablement.[51] Both the individual approach and the medical approach to disability put the individual and her perceived deficiencies at the center of their attention and tend to ignore the role of social forces and the social structure in disablement processes. The individualistic approach aspires to "fix" the individual so that he will meet society's stated and unstated norms and expectations. The medical approach provides the tools for that "fix" and determines its limits through the logic of individual cure, care, and rehabilitation.[52] Under this view, the inability to move freely in the public sphere and to enjoy what public facilities and services offer to nondisabled people, and the limiting impact that it has on disabled people's ability to make choices in the private sphere, are all part of this "cruel fate." Moreover, it is the person's responsibility to overcome these obstacles or to accept his fate as undeniable. The legal regime that served this view was mostly comprised of welfare laws that narrowly define eligibility criteria for benefits or regulate the operation of social

Neglect in Israeli Disability Policy, 18 YALE J.L. & HUMAN. 63 (2006) [hereinafter Mor, *Between Charity*].

49 *See* tenBroek, *supra* note 1; *see also* Robert L. Burgdorf, Jr., *Equal Access to Public Accommodations*, 69 MILBANK Q. 183 (1991) [hereinafter Burgdorf, *Equal Access*].

50 MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 30–33 (1996); GOODLEY, *supra* note 47, at 5–6.

51 *See* MARTA RUSSELL, BEYOND RAMPS: DISABILITY AT THE END OF THE SOCIAL CONTRACT 15 (1998); TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS 15–19 (2006); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 117–138 (1996); GOODLEY, *supra* note 47, at 6–8; LINTON, *supra* note 47, at 2–3; *see also* LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 23–49 (1995).

52 Paul Abberley, *Disabling Ideology in Health and Welfare—the Case of Occupational Therapy*, 10 DISABILITY & SOC'Y 221 (1995).

services.[53] From a historical perspective, it mostly legislated, and therefore legitimized, medical knowledge and social engineering enterprises of the late nineteenth to mid-twentieth centuries.[54]

In contrast, the social approach, or the social construction approach, that is dominant among disability studies scholars and disability rights advocates, offers an alternative vision that views disabled people as equal members in society and disability as a product of social construction and social interaction.[55] This view is often associated with the early "social model" of disability, that was originated in the United Kingdom, but has since developed and became more sophisticated.[56] The social construction approach rejects the view of disability as an inherent difference, but rather views disability as a contextual and relational phenomenon resulting from the interaction between the person and the environment.[57] Disability studies scholarship examines the social, cultural, political, economic, legal, and historical forces that have pushed persons with disabilities to the margins of society in all respects.[58] At the same time, it explores the embodied experience of disability, of life in a body that constantly challenges social expectations as well as its own limitations.[59] This way, lack of access becomes a matter of social exclusion and social responsibility—a form of social disablement. Therefore, society should acknowledge its part in the historical exclusion of disabled people and should act to fix that injustice by restructuring its own institutions and redesigning the public sphere.

A social construction approach also mandates a positive understanding of disability through the prism of human diversity or human variation.[60] This view replaces the older framework which views

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53 Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809 (1966).

54 Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985); Mor, *Between Charity*, *supra* note 48, at 79–82.

55 Armantine M. Smith, *Persons with Disabilities as a Social and Economic Underclass*, 12 KAN. J.L. & PUB. POL'Y 13, 21 (2002); OLIVER, *supra* note 50, at 22; RUSSELL, *supra* note 51; *see also* Quinn & Degener, *supra* note 22, at 13–19.

56 SHAKESPEARE, *supra* note 51, at 9–53.

57 Theresia Degener, *Disability in a Human Rights Context*, 5 LAWS 35 (2016); GOODLEY, *supra* note 47; LINTON, *supra* note 47; *see also* WORLD HEALTH ORG., WORLD REPORT ON DISABILITY (2011) [hereinafter WORLD REPORT ON DISABILITY]; SHAKESPEARE, *supra* note 51.

58 For a global survey of this effect, see WORLD REPORT ON DISABILITY, *supra* note 57.

59 JENNY MORRIS, PRIDE AGAINST PREJUDICE: TRANSFORMING ATTITUDES TO DISABILITY (1991); Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12 DISABILITY & SOC'Y 325 (1997); SHAKESPEARE, *supra* note 51.

60 Adrienne Asch, *Disability, Bioethics and Human Rights*, *in* HANDBOOK OF DISABILITY STUDIES 297 (Gary L. Albrecht et al. eds., 2001); Richard K. Scotch & Kay Schriner, *Disability as Human Variation: Implications for Policy*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 148 (1997);

disability through the lens of medical pathology and abnormalcy.[61] A human diversity approach does not focus on the medical characteristics of any impairment, syndrome, or illness, but rather emphasizes the general ethical commitment to recognize, accept, and integrate all groups in society, including persons with disabilities.[62] It challenges the normal versus abnormal opposition and points at the power structures that turn a human variation into a social and political difference.[63] This means, in the context of planning processes, that places and services should imagine all members of society as their potential users, and consider their needs from the outset.[64] This view matches the philosophy of Universal Design which advocates "the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or special design."[65] Overall, the general shift is from reforming the person to meet social norms and expectations, to transforming society to meet the variety of bodily shapes, mental and cognitive capacities, and neurological features that exist, from birth through the life course, or with aging.

A DLS analysis adds a legal dimension to the disability critique and explores the role of law in the above processes. Within this framework, the law does not merely reflect prevalent societal approaches toward disability nor the power relations within which they are situated. Rather, it plays an active role in their formation and transformation.[66] The law informs social relations and is informed by them. At times, the law acts through direct and explicit regulation, whether coercive or liberating; at times, it acts indirectly, through partial or no regulation. All forms of operation inevitably send a message about right and wrong, the permitted and the unpermitted, the regulated and the unregulated.[67] In

Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75 (2007); John Swain & Sally French, *Towards an Affirmation Model of Disability*, 15 DISABILITY & SOC'Y 569 (2000).

61 GOODLEY, *supra* note 47, at 5–6; LINTON, *supra* note 47, at 22–25, 133–35; DAVIS, *supra* note 51, at 29–35.

62 DAVIS, *supra* note 51, at 23–49; Abberley, *supra* note 52.

63 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 173–224 (1990).

64 Rob Imrie, *Oppression, Disability and Access in the Built Environment*, *in* THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES 129 (Tom Shakespeare ed., 1998); Sally S. Scott et al., *Universal Design for Instruction: A Framework for Anticipating and Responding to Disability and Other Diverse Learning Needs in the College Classroom*, 36 EQUITY & EXCELLENCE EDUC. 40, 41 (2003); BAGENSTOS, *supra* note 36, at 21.

65 As defined by Ron Mace, the founder of Universal Design. *About UD*, CTR. FOR UNIVERSAL DESIGN, https://projects.ncsu.edu/ncsu/design/cud/about_ud/about_ud.htm (last visited Nov. 10, 2017). The principles of universal design are broadly drafted: equality, flexibility, simplicity and intuition, perceptible information, minimizing risk factors (e.g., tolerance for error), low physical effort, and enabling space for use. *The Principles of Universal Design*, CTR. FOR UNIVERSAL DESIGN, https://projects.ncsu.edu/ncsu/design/cud/about_ud/udprinciplestext.htm (last visited Nov. 10, 2017).

66 Mor, *Between Charity*, *supra* note 48, at 73–75.

67 *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144. U. PA. L. REV. 2021 (1996).

the era of disability rights, the law tends to be more explicit. Yet, its impact depends on the formulation, interpretation, and implementation of those rights by the legislature, in courts, and by government agencies. A truly disability rights–oriented legal regime should openly and explicitly acknowledge the nature of disability as a socially constructed category, be aware of the historical exclusion of disabled people and its continuing manifestations, and be open to reexamining existing legal arrangements and their impact on disabled people's lives.[68]

This line of critique reveals that *accessibility is fundamentally about the spatial exclusion to which disabled people are subjected*. The underlying pattern of disability discrimination is the formation of separate spheres for disabled and nondisabled persons.[69] These separate spheres are authorized and legitimized by the law that allows, and often regulates, their operation. This pattern encompasses all fields of life: institutional housing, special education, sheltered employment, designated transportation, separated sports activities, distinct legal status (wards), and so forth. Consequently, disabled people have disappeared from the public arena. They have received separate services, in separate places, of separate quality, based on the assumption that they are inherently different and are not part of the human variety who deserves to share the public sphere.[70] Thus, a vicious circle is created: lack of access reinforces stigma, and intensified stigma deepens fears and alienation, which in turn support segregation and spatial exclusion.[71] The disability critique challenges this underlying logic of segregation and turns it from a taken-for-granted, or inevitable, social reality into a contested terrain that treats segregation as context-dependent, and questions the socio-political context that produced it and continues to maintain it.[72]

Disability rights' scholars and advocates have responded to this reality and made accommodations and accessibility an inseparable part of any disability rights legislation.[73] By doing so, they have redefined discrimination and equality.[74] Hence, the term "discrimination"

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68 *See* Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1177–89 (2004).

69 Rob Imrie & Marion Kumar, *Focusing on Disability and Access in the Built Environment,* 13 DISABILITY & SOC'Y 357, 361–62 (1998); Imrie, *supra* note 64; *see also* BRENDAN GLEESON, GEOGRAPHIES OF DISABILITY (1999) (discussing the growing field of disability and geography).

70 tenBroek & Matson, *supra* note 53, at 815–16. For a general overview of the struggle to end that spatial segregation with an emphasis on ending institutional housing, see DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION 33–48 (2011).

71 Rob Kitchin & Robin Law, *The Socio-Spatial Construction of (In)accessible Public Toilets*, 38 URB. STUD. 287, 290 (2001).

72 TANYA TITCHKOSKY, THE QUESTION OF ACCESS: DISABILITY, SPACE, MEANING (2011).

73 BAGENSTOS, *supra* note 36, at 55–75; Crossley, *supra* note 36.

74 DISABILITY AND EQUALITY LAW (Elizabeth F. Emens & Michael Ashley Stein eds., 2013).

includes the unwillingness to provide reasonable accommodations and the term "access" entails the removal of social and environmental barriers. Without these components, the commitment to disability rights is meaningless.

B. *Access/ibility—the Political Dimension*

In this Section, I argue that the idea of access, in its broad sense, constitutes the basis for the entire disability rights struggle.[75] Lack of access prevents the inclusion and participation of disabled people in the public sphere, both physically and symbolically. Moreover, it obstructs the ability to make choices in the private sphere because it limits the range of available options.

The right to access has a political dimension: it is the right to enjoy universal civil and human rights.[76] As stipulated in the CRPD's preamble: "the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms . . . ."[77] Full accessibility in its broad sense enables persons with disabilities to benefit from the same range of options and possibilities that are available to the public at large, and may even expand those possibilities further.[78] The right to access makes it possible for disabled people to demand access and brings universal rights closer to their original promise. In the absence of a right to access, universal human rights are meaningless for disabled people.[79]

Understanding the right to access as the basis for the realization of rights discloses the close proximity between accessibility and personal liberty, specifically freedom of movement and freedom of choice.[80] These basic liberties are fundamental to any civil or human rights regime. Yet the spatial exclusion that characterizes disabled people's lived experience renders disabled people devoid of those liberties. Ensuring a freedom of movement for disabled people requires an accessible public sphere and a workable right to access. It means going

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75 Michael Ashley Stein, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 167 (Janet E. Lord ed., 2008); tenBroek, *supra* note 1.

76 Gerald Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, *in* HUMAN RIGHTS AND DISABLED PERSONS 69, 72 (Theresia Degener & Yolan Koster-Dreese eds., 1995); Smith, *supra* note 55, at 38.

77 CRPD, *supra* note 9, at pmbl., ¶ v.

78 *See* Burgdorf, *Equal Access*, *supra* note 49, at 185–87; tenBroek, *supra* note 1, at 849–50.

79 Lawson, *supra* note 39, at 381.

80 Harlan Hahn, *Disability and the Urban Environment: A Perspective on Los Angeles,* 4 ENV'T & PLAN. D: SOC'Y & SPACE 273, 283–284 (1986).

beyond stigma, prejudice, and attitudinal barriers to more structural aspects of planning and environmental design.[81]

The close connection between the right to access, personal liberty, and freedom of choice demonstrates, yet again, that the boundaries between the private and the public, and hence between the personal and the political, are blurred. While accessibility is primarily about the design of the public sphere, having an accessible public sphere enables disabled persons to realize personal preferences and to live fully and independently.[82] Clearly, there is no such thing as unlimited freedom of choice. However, persons with disabilities encounter an additional layer of obstacles and barriers due to lack of access to buildings, transportation, information, and services. It therefore affects disabled people's choices in all spheres of life, including employment, education, and housing opportunities; banking and health services; leisure activities; and, even the purchasing of food and clothes.

To conclude, access makes universal rights effective for disabled people; otherwise, they are not universal. The same is true for access to justice. An accessible legal system and accessible society at large are fundamental to the realization of justice for disabled people. The right to access and the right to access to justice complement and strengthen one another—they allow us to fight for an accessible society as well as to fight for an effective right to fight for one's rights.[83] It makes universal human rights truly universal, particularly if the same principles of access will be applied to other groups as well.

C. *Access/ibility—the Social Dimension*

This Section adds a social dimension to the political dimension of the right to access. I argue that the political dimension is incomplete without its complementary social dimension, which addresses the socioeconomic aspects of access that a classical civil-political rights discourse tends to overlook, or lacks a language to sufficiently address.[84]

First, as disability legal scholarship already acknowledged and emphasized, disability rights, by nature, constitute a unique mix of civil-political rights and social rights.[85] Disability rights cannot rely solely on

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81 *Id.*; TITCHKOSKY, *supra* note 72.

82 Burgdorf, *Equal Access*, *supra* note 49; tenBroek, *supra* note 1.

83 Ortoleva, *supra* note 7, at 285–86.

84 Ruth Gavison, *On the Relationships Between Civil and Political Rights, and Social and Economic Rights*, *in* THE GLOBALIZATION OF HUMAN RIGHTS 23 (Jean-Marc Coicaud et al. eds., 2003); Farrokh Jhabvala, *On Human Rights and the Socio-Economic Context*, 31 NETH. INT'L L. REV. 149 (1984).

85 KATHARINA HEYER, RIGHTS ENABLED: THE DISABILITY REVOLUTION, FROM THE US, TO GERMANY AND JAPAN, TO THE UNITED NATIONS (2015); Neta Ziv, *The Social Rights of People with Disabilities: Reconciling Care and Justice*, *in* EXPLORING SOCIAL RIGHTS: BETWEEN THEORY

negative liberties; instead they have to include affirmative duties that bind the State as well as private actors.[86] A liberal negative right to access may lead to a prohibition against discrimination in entering and using public facilities, and the removal of attitudinal barriers that are rooted in stigma and prejudice. Yet, in a society that is so deeply organized and built to create and maintain a spatial segregation, the prohibition against discrimination is insufficient.[87] The redesign of the built environment and the removal of structural and institutional barriers require a different logic that supports and even mandates a duty to provide reasonable accommodations and a duty to make public spaces accessible.[88] These will inevitably require positive action and the investment of considerable resources to rectify past injustices and to make sure future planning meets newly established standards. Without those affirmative duties, disability rights are an empty promise.

Secondly, accessibility ameliorates the impact of economic inequalities on a person's ability to exercise her rights and expand the range of options that they have. Lack of access allows the well-off to better navigate the system and to privately acquire what they need or wish. Those who do not have private resources depend on free or affordable services that the public system provides. They rely on the existing education system, housing possibilities, or healthcare services. The disability angle is particularly important here since disabled people are more likely to be poor, and poor people are more likely to be disabled.[89] In an inaccessible society, the extra costs of disability are higher, and disabled people are prone to poverty and economic marginality.[90] This effect is true for middle class people as well, as they too will most likely not be able to privately finance workplace accommodations, private transportation, personal assistance, educational support, and accommodated housing.[91] The right to access has, therefore, a distributive aspect pertaining to resource allocation, equality of opportunities, and poverty prevention.

AND PRACTICE 369 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007) [hereinafter Ziv, *Social Rights*]; Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004).

86 Stein, *supra* note 60; Ziv, *Social Rights*, *supra* note 85.

87 Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C-R C-L. L. REV. 413 (1991).

88 tenBroek, *supra* note 1; Stein, *Accommodating Every Body*, *supra* note 36; Burgdorf, *Equal Access*, *supra* note 49.

89 Deborah L. Little, *"Sit Home and Collect the Check": Race, Class, and the Social Construction of Disability Identity*, *in* 5 RESEARCH IN SOCIAL SCIENCE AND DISABILITY: DISABILITY AS A FLUID STATE 183, 191 (Sharon N. Barnartt ed., 2010); Sagit Mor, *Disability and the Persistence of Poverty: Reconstructing Disability Allowances*, 6 NW. J.L. & SOC. POL'Y 178, 184 (2011); tenBroek & Matson, *supra* note 53, at 809; Smith, *supra* note 55, at 21–23.

90 John Cullinan et al., *Estimating the Extra Cost of Living for People with Disabilities*, 20 HEALTH ECON. 582 (2011); Smith, *supra* note 55, at 20–21; WORLD REPORT ON DISABILITY, *supra* note 57, at 39–44.

91 Smith, *supra* note 55.

In conclusion, the theoretical foundation of the right to access proposed here relies on three elements: the social construction of disability that emphasizes the spatial exclusion to which disabled people are subjected; the political dimension of the right to access that links accessibility with liberty and emphasizes the role of access in making disability rights meaningful; and, the social dimension that complements the political dimension by emphasizing the affirmative duties of the State and private actors and the important role of access in minimizing the effect of socio-economic disparities. Applying this theoretical basis to access to justice will make the rights to access to justice more effective and meaningful, both for disabled people and for the public at large.

III. DISABILITY AND ACCESS TO JUSTICE

So far, I have offered my own reading of the CRPD's framework for access to justice and have suggested a theoretical foundation for the right to access that should infuse and enrich the discussion on access to justice and disability. In this Part, I will draw on the access to justice literature and offer a comprehensive approach to disability and access to justice.

A. *Access to Justice: Theoretical Framework*

The access to justice movement emerged in the 1960s, and in the decades that followed, gained more impact and expanded its scope. Following the insights of legal realism, it exposed the gap between the law in the books and the law in action in the context of two fundamental legal principles: the rule of law and equality before the law.[92] The movement uncovered the impact of social, economic, and cultural inequalities among social groups in society on access to the legal system and its services, and on the scope of protection provided by the law to those groups.[93] Its advocates argued that this unequal access to the legal

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92 Bryant G. Garth & Mauro Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 186 (1978); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009); RHODE, *supra* note 3, at 3, 66; *see also* Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981); Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law That the Social Contract Demands*, 37 FORDHAM URB. L.J. 157 (2009).

93 Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339 (2008); RHODE, *supra* note 3, at 3–14; Garth & Cappelletti, *supra* note 92; *see also* NATIONAL CONFERENCE ON WOMEN AND ACCESS TO JUSTICE: A REPORT (2006), http://pldindia.org/wp-content/uploads/2013/02/Access_to_Justice.pdf.

system violates the equal protection of the law and infringes upon the ability of individuals and groups to exercise their legal and fundamental rights.

According to the early work of Mauro Cappelletti and Bryant Garth:

> The words "access to justice" are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system . . . . First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just.[94]

These words capture the dual essence of access to justice as an ideal: on a formal-procedural level, it means securing equal access to the legal system, mainly to courts; on a material-consequential level, it means securing individual and social justice.[95] Both levels of discussion are important for my analysis. The first level takes a process approach and emphasizes the importance of procedural justice for all, regardless of socioeconomic status, disability, or other forms of social disadvantage. The second level focuses on just outcomes and is therefore closer to a notion of substantive justice that depends on just legal rules and judicial decisions.[96] The underlying assumption of procedural justice is that good process yields good, or at least better, outcomes, without committing to a particular notion of "the good."[97] In fact, the very notion of access to justice carries this assumption: that with access comes justice. As such, it is also less controversial than the demand for "just results" that is obviously more contentious, mostly due to ideological differences about the good and the just.[98]

Yet, as the following discussion reveals, the very distinction between substantive justice and procedural justice is also controversial. The challenging relationships between form and substance, and process and outcome, have exposed the insufficiency of formal access to bringing just outcomes in a system that is characterized by systematic

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94 Garth & Cappelletti, *supra* note 92, at 182.

95 *See* DISABLED JUSTICE, *supra* note 7, at 11–16 (containing an analysis of access to justice, quoting the above statement, and addressing the relationships between the substantive and procedural approaches).

96 RHODE, *supra* note 3, at 5–6; DISABLED JUSTICE, *supra* note 7, at 11–16.

97 *Cf.* David Lyons, *Substance Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745 (1987); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394–98 (1996); David Lewis Schaefer, *Procedural Versus Substantive Justice: Rawls and Nozick*, 24 SOC. PHIL. & POL'Y 164 (2007); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

98 Russell Cropanzano & Maureen L. Ambrose, *Procedural and Distributive Justice Are More Similar Than You Think: A Monistic Perspective and a Research Agenda*, *in* ADVANCES IN ORGANIZATIONAL JUSTICE 119, 129 (Jerald Greenberg & Russell Cropanzano eds., 2001); Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1403, 1415–16 (1979).

biases and hierarchies against disadvantaged groups and underrepresented interests.[99] These biases are often so inherent to the legal system—through the content of the legal rules or the behavior and worldviews of the involved legal actors—that they undermine the ability to maintain a vision that is purely formal and procedural. The very right to access and the ideal of accessibility, that combine structure with substance, as formerly presented, suggest that such a division is questionable, if at all possible or desirable.

I suggest the following typology that organizes the discussion on access to justice around three levels of analysis: access to courts, which follows a formal and narrow approach to access to justice; access to law—a broader framework that focuses on the legal process and legal consciousness; and, access to justice—a substantive approach that searches for just outcomes. Each level of analysis is characterized by a respective set of barriers: entry barriers, process barriers, and outcome barriers, which together explain the various types of impediments that may hinder the realization of equality before the law.

Access to the courts: Access to courts is the narrowest formulation of a right to access in the legal context. It focuses on formal procedural aspects of access to courts and other legal instances. The barriers under this category are *entry barriers* since they concern the absolute denial of access to legal instances due to a subdivision of formal, material, or physical barriers. Such *formal barriers* include direct legal rules that block one's ability to file suit or to continue with a suit, namely limitation, finality, and legal capacity, or contract-based provisions that prevent one from suing.[100] By *material barriers*, I refer to the impact of litigation costs and socioeconomic parameters on the ability to pay court fees or legal fees to a lawyer, as well as diffused interests or low value claims that make a lawsuit unworthy of pursuing.[101] In response, several mechanisms have developed that provided partial solutions to these problems: State-sponsored legal aid,[102] small claims courts,[103]

99 Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3, 3–4 (2009).

100 For finality, see Lord Dyson, Address at Edinburgh University: Time to Call it a Day: Some Reflections on Finality and the Law (Oct. 14, 2011), https://www.supremecourt.uk/docs/speech_111014.pdf. For limitation, see Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453 (1997). For legal capacity, see *supra* Part I. For pre-dispute arbitration clauses, see Jonnette Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*, 51 MCGILL L.J. 693 (2006).

101 Frank I Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 22 DUKE L.J. 1153 (1973) (litigation fees); RHODE, *supra* note 3, at 24–46; Garth & Cappelletti, *supra* note 92, at 186–90, 194–96 (discussing costs of litigation, diffused interests, and low value claims).

102 RHODE, *supra* note 3, at 47–78; Garth & Cappelletti, *supra* note 92, at 197–99; *see also* Johnson, *supra* note 92.

103 RHODE, *supra* note 3, at 81–87; Garth & Cappelletti, *supra* note 92, at 241–55.

group representation, and class actions.[104] Lastly, *physical impediments* include the impact of military or civil closure or curfew on the ability to file suit.[105] Among these, critiques relating to material barriers received the broadest support and yielded relative success in the form of legislative reforms.

Access to law: The discussion on access to law involves a wider range of barriers, which I call *process barriers*, *which affect the utilization of law*, and may prevent persons from claiming their rights even in the absence of formal barriers. They include an array of structural, social, cultural, and mental barriers that affect the fairness of the legal process and the legal system more broadly as they expose the deeper impact of power relations on the design of the legal system and its accessibility to a wide range of classes and populations.[106] The barriers under this category may include: *spatial barriers* relating mainly to roads of access and the availability of services and public transportation, which are affected by center-periphery disparities[107]; *communication and language barriers* that mainly affect ethnic and national minorities, migrants, and immigrants but also concern the generally inaccessible and alienating nature of the legal language[108]; *informational barriers*, relating to access to information about the law, including the content of substantive legal rules and their application in specific situations, the nature of the legal process, the content of legal procedures, and the availability of legal services[109]; *awareness barriers*, relating mainly to naming and blaming, that is to the ability to conceptualize an offensive experience as a matter of injustice, resulting, for instance, from discrimination, negligence, or sexual assault[110]; other *psychological and cultural barriers* may relate to the level of alienation from, or trust in, the legal system, particularly when socioeconomic marginality intersects with identity-based social exclusion.[111] Moreover, additional *economic barriers* may further and

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104 Garth & Cappelletti, *supra* note 92, at 209–22; *see also* Roger H. Trangsrud, *Introduction: Class Actions and Access to Justice*, 82 GEO. WASH. L. REV. 595 (2014) (special issue on class action).

105 Yoram Rabin, *The Right of Access to Courts—from an Ordinary to a Constitutional Right*, 5 HAMISHPAT 217, 219–20 (2000) (Isr.).

106 ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 40–42 (2017).

107 Mark Blacksell, *Social Justice and Access to Legal Services: A Geographical Perspective*, 21 GEOFORUM 489 (1990).

108 Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227 (1996).

109 Maurits Barendrecht, *Legal Aid, Accessible Courts or Legal Information? Three Access to Justice Strategies Compared*, 11 GLOBAL JURIST 3 (2011); Graham Greenleaf et al., *The Meaning of 'Free Access to Legal Information': A Twenty Year Evolution*, 1 J. OPEN ACCESS TO L. 1 (2013).

110 William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 LAW & SOC'Y REV. 631 (1980).

111 For psychological factors, see *id.* at 644, 651; Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC'Y REV. 655 (1980). For cultural

intensify any of the above barriers, making intersectionality an important factor in the analysis, whether it is spatial, informational, or awareness barriers.[112] This wide range of barriers is relevant to the person's capacity to claim his rights, under any realm of law, from welfare benefits to civil wrongs, to constitutional protection. They are located at the intersection between procedural and substantive justice and expose the complexities of naming, blaming, and claiming, even in absence of formal barriers, and their potential impact on the outcome of the legal process and the evolution of law.

Access to justice: The term "access to justice" expands the discussion further by addressing the second aspect of Cappelletti's statement relating to "just outcomes." I call the barriers under this category *outcome barriers* as they concern *biases in the structure and the content of substantive legal rules and of judicial decisions*, even when a lawsuit was filed and a trial was in place. These structural biases extend to the legislative and regulatory arenas, where legal rules are produced and therefore influenced by the presence or absence of political representation of the affected groups and interests, and by the quality of that representation. These barriers may stem from power dynamics in the legal process, including: *power differences between the parties*, such as differences in bargaining power, as the literature on the "haves" versus "have nots" teaches us through the concept of repeated players versus one-shotters[113]; *cognitive and ideological biases* affecting investigative and enforcement agencies as well as judicial discretion in decisions concerning the initiation of a trial or the results of a trial[114]; *unequal access to law and policy-making* affecting the opportunity to shape the structure and content of legal rules in different legislative and regulatory arenas[115]; and biases in the *landscape of legal norms*, which render some claims inferior to others, such as the inherent inferiority of social and group rights, and other claims impossible or extremely difficult to pursue due to inadequate legal language and tools to define them as injustice and to ask for redress.[116]

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factors, see Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373 (2002); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

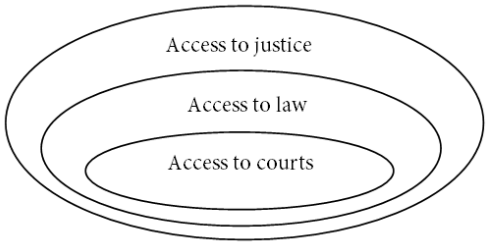
112 RHODE, *supra* note 3, at 8–9, 11, 13; White, *supra* note 111.

113 Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Garth & Cappelletti, *supra* note 92, at 190–95.

114 Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004).

115 *See, e.g.*, Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 35–41 (1987).

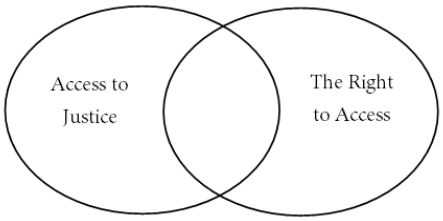
116 YUVAL ELBASHAN, STRANGERS IN THE REALM OF LAW: ACCESS TO JUSTICE IN ISRAEL, 89–127 (2005) (Isr.) (addressing the inferiority of social rights and its impact on access to justice); Felstiner et al., *supra* note 110, at 643–44.



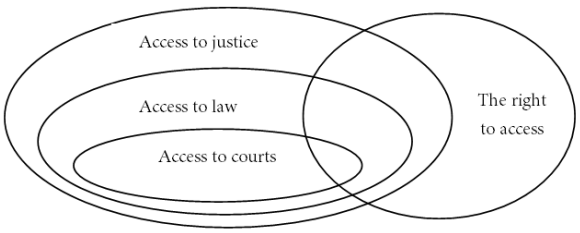
As the above drawing illustrates, the three layers of analysis move from the narrow to the broader level, each containing its former: access to courts is minimal in scope and may be discussed in isolation as a prerequisite for broader issues concerning access to law and justice; access to law includes access to courts but does not necessarily cover access to justice; access to justice is most comprehensive, encompassing both access to courts and access to law, as well as deeper structural and institutional concerns. Furthermore, the broader the discussion, the more explicit the connection between process and substance, and between entry and outcome. Still, all discussion levels involve political and social dimensions: each seeks to mitigate various forms of inequalities and to enhance the ability of individuals to be heard, to claim their rights, and to have an impact on the production and implementation of legal norms.[117] Even the narrow level of access to courts enables disadvantaged groups to participate in the legal field, even if in a limited manner.

B. *Disability and Access to Justice*

The discussion on disability and access to justice is based on two ideas which partially overlap: access to justice, on the one hand, and disability access, on the other hand, as the drawing below illustrates:



Many issues of disability and accessibility are not related to law and justice, and some issues of access to justice are not necessarily related to disability, but the overlapping area is larger than expected at first sight. The following drawing illustrates this partial overlap with greater detail:



117 Garth

The following provides a general overview of the different arenas in which access to justice and disability access intersect and interact.

1. Access to Courts

a. Formal Legal Barriers: Legal Capacity

As previously discussed, legal capacity and guardianship laws have long been the most fundamental legal barrier facing disabled people.[118] Such laws are essentially about disabled people's access to courts, to the legal process, and to just judicial outcomes. While originally envisioned as a protective measure, the result was the absolute, or the near absolute, renunciation of rights, and an opening for further violation of one's rights. Thus, legal capacity and guardianship laws were commonly implemented in a sweeping manner that deprived persons who were declared incompetent not only of their status as legal subjects, but also of their right to independent legal representation in the very process that announced them legally incapable or in consequent disagreements with their guardian. These laws granted guardians with the power to control the person's body, property, and financial resources. And because the person was declared incompetent, it was not necessary to act according to her will or to consult with her about her preferences, aspirations, or needs. This power structure created a high risk of abuse, exploitation, and conflict of interests with very little monitoring and supervision.[119]

Since the enactment of the CRPD, there has been a growth of global momentum in the search for alternatives to guardianship, such as supported decision-making.[120] Article 12 provides that disabled people have the right to full recognition as "persons before the law," that they should "enjoy legal capacity on an equal basis with others in all aspects of life," and that States should provide them with appropriate support.[121] The immediate implications are the abolishing of guardianship laws, at least as we know them, and the creation, instead, of softer, dynamic, and individually tailored options that maximize the person's autonomy through networks of support that foster each person's ability to make decisions regarding her own life.[122] In addition, this development mandates closer supervision over guardians or supporters to prevent abuse and exploitation.

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118 *See supra* text accompanying notes 15–20.

119 For a broad historical overview of guardianship in the United States, see Johns, *supra* note 18.

120 Dinerstein, *supra* note 15; Flynn & Arstein-Kerslake, *supra* note 15, at 88–102.

121 CRPD, *supra* note 9, at art. 12.

122 *See* sources cited *supra* notes 25–26.

Further implications may concern additional aspects of access to courts, access to legal proceedings, and access to justice, as discussed below: making courts fully accessible, facilitating access to criminal, civil, and other proceedings, including the very process of appointing guardians or decision-making supporters, training judges and other legal actors to implement the new legislation and to decide cases that involve persons who were formerly lacking legal capacity.[123] The ramifications of these dramatic changes will be examined in the future.

b. Physical Barriers

The question of physical impediments brings up the architectural aspects of inaccessible court buildings and other legal instances that constitute an absolute denial to the actual place where justice is exercised. Responding to this problem requires establishing general accessibility laws concerning access to public facilities (in line with Article 9 to the CRPD), as well as specific accessibility standards that address the particularities of access to courthouses.[124] These rules should apply to any judicial and quasi-judicial instance including administrative tribunals and committees, disciplinary and ethics committees, and the like. A broader approach to access will consider additional spatial barriers in and around the building that may hinder the participation in one's own trial or legal proceedings (in line with Article 9, paragraph 2 of the CRPD). I will discuss this approach further below, in the context of access to law and process barriers.

Persons living in closed institutions may also experience absolute denial of access to legal proceedings. These people are usually under a strict guardianship regime, but on top of that, they cannot leave the institution. They have no independent connection to the outside world, let alone the ability to seek legal assistance, particularly if their claim is against the institution in which they live.[125] People in closed institutions are, therefore, under a constant "social curfew" and are physically barred from filing a legal claim.

c. Socioeconomic Barriers

The classical literature on access to justice was particularly concerned with the impact of socioeconomic disparities on access to courts and on access to legal services. While these issues may not have a particular disability angle, they are still extremely relevant for disabled

123 DISABLED JUSTICE, *supra* note 7, at 94–104.

124 Peter Blanck et al., *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 825 (2004); DISABLED JUSTICE, *supra* note 7, at 84–90; Ortoleva, *supra* note 7, at 305–07, 316.

125 One possible solution for this issue is ombudsman. *See* John J. Regan, *When Nursing Home Patients Complain: The Ombudsman or the Patient Advocate*, 65 GEO. L.J. 691 (1977).

people due to the intricate relations between poverty and disability. As mentioned earlier, disabled people tend to be poor, and poor people tend to be disabled.[126] This is why access is a social issue.[127] Many persons with disabilities live in economic marginality because they live on insufficient disability allowances or earn low wages. When this low income is coupled with the extra costs of living with disability, particularly in an inaccessible society that offers inadequate social services, the economic barriers to filing a lawsuit grow higher.

The disability angle becomes paramount when examining whether the general solutions that the access to justice movement developed, such as the process and forms to file for exemption of court fees, small claims courts, and class action proceedings, are in fact accessible. Thus, for example, class action is widely used for the promotion of disability rights, to the level that it causes concerns for possible abuse.[128] In this context, access questions seem immaterial since such claims do not require the physical involvement or presence of the members of the suing group. However, if disabled members of the suing class wish to actively participate in the legal proceedings, questions of access to court surface back. Similarly, additional process barriers and outcome barriers may also be at play.

One of the greatest achievements of the access to justice movement was the establishment of legal aid services for people who cannot otherwise afford legal representation.[129] Yet, questions of access to legal aid services due to disability-related concerns and needs are not often discussed. These concerns may include physical barriers to these services, informational and communication barriers, and possible biases in the representation of disabled clients.[130]

2. Access to Law

Access to law discusses the gamut of structural, spatial, mental, and other process-related barriers affecting one's ability to utilize the law for the maximization of his rights. Here too, disabled people encounter unique barriers that require specific attention.

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126 *See supra* text accompanying notes 89–91.

127 *See supra* Section II.C.

128 The relative success of disability-based class actions in the United States generated a counter-reaction that views those actions as frivolous actions and the persons filing them as serial plaintiffs acting in bad faith. *See* Carri Becker, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L.J. 93, 97–99 (2006).

129 *See* sources cited *supra* note 102.

130 Ortoleva, *supra* note 7, at 300–03.

a. Spatial Barriers in and Around Courts

The discussion of access to law enables one to go beyond physical access to the courthouse. It expands the analysis to additional spatial barriers, such as roads of access to and from the court, or any legal facility. These may include aspects relating to center and periphery, urban and rural areas, and the impact of accessible public transportation on those disparities. Additional spatial barriers pertain to the arrangement of the space within courthouses or any facility where legal or quasi-judicial proceedings may take place. They are often closely related to information and communication barriers as they concern the ability to move freely and independently within the building, to participate in court proceedings, and to obtain information about the activities that take place in the building and the supplied services.

These include, for instance, accessible signage and service counters, accessible passageways and elevators, and accessible forms and informational brochures.

b. Access to Legal Proceedings

Access to legal proceedings is distinct from access in and around courts as it involves broader environmental, structural, and systematic barriers.[131] It is relevant to many disadvantaged groups since participation in the legal process is affected by social and cultural inequalities, particularly when linguistic disparities are at play. However, disability raises unique concerns and issues, as Article 13 to the CRPD attests, and as demonstrated below.

The most immediate and evident issue that Article 13 covers is access to criminal proceedings. As mentioned earlier, the early understanding of access to justice focused on the criminal system. In the context of disability too, access to criminal proceedings was the first issue to be recognized and legislation that provides accommodations in the criminal process is quite common in many countries.[132] That was probably because of the greater historical legitimacy to securing a fair criminal trial for defendants,[133] which has now been expanded to disabled defendants. Another reason was the growing awareness to victims' rights, specifically the need to provide equal protection to disabled victims of crime due to their increased vulnerability.[134]

The accommodation of the criminal process usually focuses on persons with intellectual and psychosocial disabilities, who might encounter greater difficulties when interrogated by the police or while

131 *See, e.g.*, Douglas M. Pravda, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 VAL. U. L. REV. 927 (2011).

132 *See* sources cited *supra* note 33.

133 *See* sources cited *supra* notes 30–31.

134 Ziv, *Witnesses*, *supra* note 33; *see also* KANTER, *supra* note 7, at 223–28.

testifying in court without proper accommodations.[135] It typically addresses both the preliminary investigative stage and the trial stage of court testimony. Yet Article 13 calls attention to an additional, less established layer of access, relating to persons with visual, hearing, mobility, or speech impairments, who may as well encounter physical and communication barriers in their interaction with investigative bodies or in their attempt to provide testimony in court.[136] Without appropriate accommodations, due process is denied, and the court's ability to find the truth and reach substantive justice is harmed.[137]

Still, the focus on criminal proceedings is insufficient. Suitable accommodations and support will benefit disabled litigants and witnesses in a civil case, too.[138] A closer reading of Article 13 reveals a comprehensive approach to access to legal proceedings that requires a unified system of process accommodations regarding all types of criminal, civil, administrative, disciplinary, ethical, and quasi-judicial proceedings. Such a unified approach will address all types of disabilities as well as diverse types of constituencies: litigants and their counsels, witnesses, attorneys, judges, juries, and the public at large.

Access for disabled litigants: access for litigants in legal proceedings may include various types of accommodations, including captioning sign language services, verbal description of documents' content, a permit to record the hearing, reasonable consultation time between clients and their lawyers, and verbal description of the courtroom and the interactions within it.[139]

Access for disabled witnesses: Witnesses include any disabled person summoned to testify in court, either as a litigant or otherwise.[140] These accommodations include, for instance: using hearing assistive systems while giving testimony, verbal description of the attendees, exhibits and documents, sitting instead of standing when needed, using alternative communication devices and methods, accommodated court settings, accommodated methods of inquiry to minimize the threatening effects on persons with intellectual or psychosocial disabilities, and more. At the same time, unwanted accommodations should not be imposed on witnesses in a patronizing manner.

Access for disabled counsels, judges, and juries: Courthouse and

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135 *See* sources cited *supra* note 33.

136 Katrina R. Miller, *Access to Sign Language Interpreters in the Criminal Justice System*, 146 AM. ANNALS DEAF 328 (2001); Ortoleva, *supra* note 7, at 307–12.

137 Ziv, *Witnesses*, *supra* note 33.

138 Blanck et al., *supra* note 124.

139 Len Roberson et al., *American Sign Language/English Interpreting in Legal Settings: Current Practices in North America*, 21 J. INTERPRETATION 1 (2011); DISABLED JUSTICE, *supra* note 7, at 90–94; Ortoleva, *supra* note 7, at 300–03; Blanck, et al., *supra* note 124, at 831–38; Pravda, *supra* note 131, at 937–41.

140 Pravda, *supra* note 131.

courtroom design should also envision disabled people as lawyers, judges, and juries, thereby acknowledging that persons with disabilities can and should serve in those roles despite numerous barriers to the profession.[141] Lack of access may reinforce those barriers, while access would facilitate their participation and send a message of inclusion. Similarly, since serving on a jury is a civil duty, accessible jury participation would reinforce disabled people's citizenship.[142] Disabled lawyers, judges, and juries should therefore enjoy all of the above-mentioned communication related to accommodations. The participation in legal proceedings of disabled counsels, judges, and juries contributes to access to justice more generally—it breaks stigma, lowers bias, and brings disabled people's voices to the judicial process.

Access for the public at large: Courtroom accessibility allows disabled people to attend a trial in a free and easy manner like any other person.[143] Permanent full accessibility in the courthouse and courtrooms, accompanied by individual accommodations by demand, will serve all potential attendees of a trial or a hearing. These include physical access and communications methods, such as audio systems, transcription services, and sign language interpretation that would allow the understanding of all interactions among judges, lawyers, litigants, and witnesses during the trial. The duty to make courtrooms accessible and to provide accommodations to the public at large also follows from the publicity principle of court proceedings, a basic component of the rule of law that allows public scrutiny of courts' activities. It also facilitates public participation, either in support of a specific cause, out of an interest in a specific trial, or general interest in legal proceedings.

Fully accessible legal proceedings require, then, a vision of universal access, one that follows the principles of Universal Design. That means, first, that all proceedings are universally accessible as possible in the first place, and additional individual accommodations are openly provided and easy to obtain.[144] It also means that disability must serve as an integral part of the planning process of courthouses and legal institutions alike. This way, access measures are simpler, cheaper, and more aesthetic.[145] Moreover, the more the space is universally accessible, the greater it benefits a broader audience than just

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141 Ortoleva, *supra* note 7, at 303–05; Blanck et al., *supra* note 124, at 830–38; Pravda, *supra* note 131, at 942–50, 958–60. On barriers to the legal profession, see Alex B. Long, *Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism*, 47 U.C. DAVIS L. REV. 1753 (2014).

142 Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1 (1997); DISABLED JUSTICE, *supra* note 7, at 112–14.

143 Pravda, *supra* note 131, at 962–64.

144 *Supra* text accompanying notes 64–65; Pravda, *supra* note 131, at 941–42.

145 *See supra* note 65 (discussing the principles of universal design); Blanck et al., *supra* note 124, at 836.

disabled people.[146] Conversely, when accommodations are provided individually, the benefits for nondisabled persons are limited. Finally, truly universal access means inclusive design that envisions broader audiences, and accounts for their needs as an integral part of the planning process.

Access to legal proceedings demonstrates the close affiliation between the political dimensions of both disability access and access to law and justice: both enable disabled persons to realize their rights and to participate in shaping the content of their rights through litigation.[147]

c. Access to Legal Information

i. Access to Information About Legal Services

The following addresses several aspects of access to legal information. Access to information about legal services is the most important among them. It refers to any information given to the public at large, or to individuals that may concern the general operation of legal services or the particularities of a specific legal proceeding.[148] Such information may be provided in writing or verbally, by forms, leaflets, brochures, and other publications, including letters, notices, and information given by telephone. It may concern administrative aspects, substantive information regarding rights and entitlements, or supporting services such as legal aid, and the very process of requesting accommodations in the legal process.

Full access to such information entails the provision of accessible print, linguistic simplification, signage, voice files, digital files, reading aloud, Braille, hearing assistive systems, sign language, and other forms of assistive communication technologies. When universal access is not feasible, a formal process for individual accommodations is preferable. Making information about the legal process available and accessible in many forms will benefit all disabled legal actors (including lawyers, judges, and the like) and will serve the public at large, particularly those who face communication and linguistic barriers. Furthermore, applying the logic of disability access to additional groups will make the system even more accessible.

ii. Access to Court Files

Access to court files refers to any written or other information submitted or delivered to the court in a particular case. Access to court files and the documents they contain is essential for disabled lawyers and judges and other legal actors. It is also imperative for disabled

146 Blanck et al., *supra* note 124, at 836, 839.
147 Ortoleva, *supra* note 7, at 285–86.
148 *Id.* at 299–300.

litigants in proceedings that involve them: it strengthens their position in the proceeding, and allows them to take an active role in a legal process that may affect their liberty, financial condition, personal relations, eligibility for benefits, etc. Thinking more broadly about access to court files also involves access by uninvolved disabled people, who may have an interest in a specific file for other reasons, including researchers and activists, or the public at large. It may also extend to archived materials. Today, digital courts and the electronic submission of pleadings and other materials is on the rise.[149] With disability access in mind, proper design of such new systems may significantly increase access to court files.[150]

iii. Simplified Legal Language

A third aspect of access to legal information concerns the nature of legal language and its impact on the accessibility of legal texts, legal documents, and legal information to lay persons, generally, and to disabled people, specifically. The legal language is a distinct professional language characterized by a complex syntax and unique rules of discourse.[151] This complexity creates knowledge and information gaps, impedes the formation of legal consciousness, causes alienation, and decreases trust in the legal system as a just system.[152] These criticisms brought about the plain language movement in law that seeks to change the bureaucratic, archaic, and intricate features of the legal language as employed in legislation, legal documents, contracts, court judgments, and so forth.[153]

The objectives of the plain language movement coincide with the objectives of linguistic simplification for persons with cognitive and developmental disabilities. Linguistic simplification was recently extended to legal texts as well.[154] However, an imposed duty to simplify legal texts, such as legislation, court decisions, and contracts, seems particularly challenging to the legal field. This is not only because of the

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149 KATSH & RABINOVICH-EINY, *supra* note 106, at 151.

150 Blanck et al., *supra* note 124.

151 Garth & Cappelletti, *supra* note 92, at 245 n.209; *see also* PETER BUTT & RICHARD CASTLE, MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE 1–5 (2d ed. 2006); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963); ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007).

152 John Gibbons, *Introduction: Language and Disadvantage Before the Law*, *in* LANGUAGE AND THE LAW 195, 195–98 (John Gibbons ed., 1994); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 819–21, 828–29 (1987); BUTT & CASTLE, *supra* note 151, at 112–26.

153 Mark Adler, *The Plain Language Movement*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 67 (Peter M. Tiersma & Lawrence M. Solan eds., 2012); BUTT & CASTLE, *supra* note 151, at 76–109.

154 Shira Yalon-Chamovitz, *Invisible Access Needs of People with Intellectual Disabilities: A Conceptual Model of Practice*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 395 (2009).

high costs linguistic simplification may involve, but more so because of the attention to accurate drafting, on the one hand, and the nature of legal texts as open for interpretation, on the other. Additional hidden interests may be related to maintaining professional exclusivity and privilege.[155]

Clearly, a right to access legal texts, through linguistic simplification, would promote the simplification of the legal language for all. While this may still be far from realization, access to information about the legal service, as mentioned above, through linguistic simplification of legal forms, informational materials, and information concerning the general operation of the service, would undoubtedly contribute to all levels of access to justice.

d. Access to Disability Benefits and Administrative Agencies

A broad understanding of access to law should also encompass access to bodies auxiliary to the courts, including investigation and enforcement bodies, and government agencies that grant rights, entitlements, and benefits, either specifically to disabled people or to the public at large. Thus, accessible police stations enable disabled people to file complaints and to undergo accommodated interrogation. Similarly, accessible social security and social welfare offices would enable disabled people to maximize their rights and benefits; an accessible tax system would allow for the easy paying of taxes; and other accessible agencies would allow for an easier means of obtaining a passport or driver's license.

Making all public buildings, services, agencies, and authorities accessible would enable disabled persons to realize their rights, entitlements, duties, and benefits, whether disability-related or not. It means envisioning disabled persons as citizens of equal status who take an active role in social, political, and public life. A broad understanding of access to these services should include all aspects of access, including physical access to, in, and around these facilities, roads of access, accessible information, and communication. It means accounting for all aspects of access to courts, access to law and access to justice that this Essay enumerates.

3. Access to Justice

Access to justice, as I proposed earlier, broadens the scope of the discussion from access to courts, which narrowly focuses on entry barriers, and access to law, which examines the role of process barriers

155 For the various reasons that prevent change, see BUTT & CASTLE, *supra* note 151, at 6–38.

in access to legal proceedings, towards outcome barriers that pertain to the design and content of legal norms. It concerns the deepest effects of social power relations on the legal system and its ability to produce just results. While the need to address formal barriers is accepted with almost sweeping consensus, and process barriers are widely recognized, addressing the political and ideological nature of legal norms and the process of their production is unsettling, and may undermine the legitimacy of that process.

a. Rules Biases

Access to justice depends first and foremost on the availability of effective legal tools for the promotion of disability rights, primarily the availability of substantive legal norms that support the claims that disabled people raise. The CRPD and national disability rights laws enable persons with disabilities to bring claims relating to equality, discrimination, and violation of rights, which were formerly not possible.[156] Clearly, in the absence of recognition that disability-based discrimination is prohibited, such claims are denied, or not even submitted.[157] Similarly, without acknowledging that the duty to provide accommodations is part of disability equality law, many disability discrimination claims would have been rejected.[158] However, such recognition depends on a deep understanding of disability as a system of oppression and as socially constructed.[159] Once disability rights achieve formal recognition, they pave the way to courts and other forms of legal action and legal mobilization.[160] In the context of access, a formal right to access provides an effective legal tool to fight for accessibility. Furthermore, it facilitates the discussion on access to courts, access to law, and access to justice. In sum, the very recognition of a right to access is in itself a move towards access to justice, as it provides the tools to fight against the spatial exclusion that disabled people experience. The absence of disability rights creates a rule bias against disabled people.

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156 Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975); Stein, *supra* note 75, at 174–77.

157 Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987).

158 *See, e.g.*, BAGENSTOS, *supra* note 36, at 55–75; Crossley, *supra* note 36; *see also* Burgdorf, *Equal Access*, *supra* note 49 (raising a similar claim with regard to accessibility as discrimination).

159 Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 160 (1999) (analyzing the pro-defendant bias of the U.S. Supreme Court following the Americans with Disabilities Act (ADA), which is partly because conservative judges may simply be hostile to the ADA).

160 MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 82–91(1994).

Still, not all disability rights enjoy wide support and recognition. So far, the CRPD provides the most comprehensive disability rights document, containing provisions concerning all aspects of life.[161] While most domestic disability rights laws include provisions concerning employment discrimination and access, they may not include provisions or separate legislation concerning inclusive education, independent living, access to healthcare, family-related rights, or dignified disability allowances. These rights often suffer from structural inferiority that negatively affect one's ability to file a lawsuit or to reach a just judicial result. This inferiority is often associated with the structural bias against social rights.[162] Disability rights are affected by this inferiority because they are inherently social. Even disability civil rights include affirmative duties, require state intervention in the market, and demand the redistribution of societal resources.[163] This dual inferiority of disability as a contested category, and of social rights as secondary rights, infringes disabled people's access to justice.

b. Cognitive Biases

Formal recognition of rights is not sufficient; their application and implementation are affected by social stigma and cognitive biases relating to the meaning of disability and the place of disabled people in society.[164] These are affected by the social construction of disability as a personal tragedy and medical pathology, and by the social structure of spatial segregation that reinforces stigma and prejudice. Therefore, even when a disabled person files a lawsuit, reaches the court, stands for her rights, and asks for the court's protection, she may encounter a judge who is affected by implicit bias and inadequate familiarity with the law's background and objectives, which may lead to the dismissal of her arguments.[165] This concern applies to all areas of law, including, for instance, employment discrimination, independent living, legal capacity and guardianship, accommodation in criminal proceedings, and to every case in which a disabled person is involved. These latent barriers affect the application and interpretation of legal rules, even when the rules are just.[166] Thus, while accessibility legislation contributes to access

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161 HUMAN RIGHTS AND DISABILITY ADVOCACY (Maya Sabatello & Marianne Schulze eds, 2013); Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287 (2007); HEYER, *supra* note 85, at 168–69.

162 Daphne Barak-Erez & Aeyal M. Gross, *Introduction: Do We Need Social Rights?: Questions in the Era of Globalisation, Privatisation, and the Diminished Welfare State*, *in* EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 1 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

163 *See supra* Section II.C; *see also* Ziv, *Social Rights*, *supra* note 85.

164 DISABLED JUSTICE, *supra* note 7, 106–11.

165 *See* Colker, *supra* note 159.

166 Weis, *supra* note 142, at 14–17 (discussing disqualifying prospective jurors with

to justice, its full implementation depends on a transformation in the way disability is understood, discussed, and utilized in legal as well as in public discourse. Addressing this problem requires a disability reform in legal teaching and training.[167]

c. Access to Lawmaking and Policy Design

The power to shape the content of legal norms is affected by the degree of access to legislative, regulatory, and policy-making processes.[168] The greater the access of disabled people to these arenas and the more they can play active roles in these processes, the greater the chance that the rules would reflect their life experience and express their preferences, as the slogan "nothing about us without us" dictates.[169] It is therefore important to make legislative and regulatory processes accessible to disabled people in all respects as discussed so far, including all government offices and meeting venues where legislative, regulatory, and policy-making proceedings take place. Disabled people may participate in these processes not only as disability advocates; they may also serve as professionals, experts, government officials, and representatives of other organizations and interest groups, as interested parties, or as concerned citizens. Lastly, access to lawmaking is important not only when the issue explicitly involves disability, but in any legislative or regulatory process, since any legislation affects disabled people as part of the general public.[170]

The discussion on access to justice illustrates the fluid lines between access to courts, access to law, and access to justice: How can one benefit from access to courts in the absence of access to the legal process? How can one benefit from access to the legal process in the absence of adequate legal rules to bring a claim to court? And how can one expect a just outcome if cognitive biases affect judicial discretion? In the absence of access to lawmaking and to policy design, the structured inferiority of persons with disabilities in the legal arena is perpetuated and even intensified. Only a multilevel analysis would yield both equal access and just results on both individual and social levels.

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disabilities because of bias).

167 DISABLED JUSTICE, *supra* note 7, at 117–40.

168 *Id.* at 141–70.

169 Sagit Mor, *Nothing About Us Without Us: A Disability Challenge to Bioethics*, *in* BIOETHICS AND BIOPOLITICS IN ISRAEL: SOCIO-LEGAL, POLITICAL, AND EMPIRICAL ANALYSIS (Hagai Boas et al. eds., forthcoming 2017); *see also* DISABLED JUSTICE, *supra* note 7, at 142–44.

170 Mor, *supra* note 169, at 110–11.

CONCLUSION: ACCESS FOR ALL AND JUSTICE FOR ALL

The legal developments in the realm of disability rights in the international and national arenas in recent decades have far-reaching implications on access to justice for disabled people, and potentially for all. They offer a comprehensive vision of access to courts, to law, and to justice that addresses entry barriers, process barriers, and outcome barriers. They constitute a precedent for a legally recognized right to access to justice, either explicitly, as in the CRPD, or implicitly, through legislation concerning access to public facilities and services. They provide a model and language to all disadvantaged groups to fight for access, generally, and for access to justice, more specifically. They offer a critical account of access and accessibility that aims at transforming society, rather than reforming the person, through the redesign of social institutions, the removal of structural and environmental barriers, and the inclusion of all affected groups as integral parts of future planning processes. A fully accessible legal system would allow all human beings to fully enjoy all existing legal facilities and services as equals, while minimizing the impact of social power relations and economic inequalities. Consequently, it will more likely produce just results for all.