EDUCATIONAL OPPORTUNITY AND THE LIMITS OF LEGAL OBLIGATION

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I. INTRODUCTION

It is often thought that courts should recognize a fundamental right to education under the Federal Constitution.[1] The courts, however, have been less receptive to this idea.[2] This Article offers reasons for courts to reconsider this position.

Crucially, this Article points out an important implication of denying basic educational opportunity. Specifically, failing to provide a minimally sufficient opportunity for basic education undermines any claim to morally binding general legal authority over those persons denied such opportunity. That is, persons denied basic educational opportunity typically have no moral obligation to obey the dictates of the established legal regime. For such persons, the regime is, under mainstream theories, illegitimate.[3] This conclusion should provoke a reconsideration of whether it is justifiable, overall, to fail to acknowledge or meaningfully enforce a federal constitutional right to an educational opportunity that is minimally sufficient for broad regime legitimacy.

This Article begins with a look at the most relevant Supreme Court cases,[4] with a more extensive examination of the provocative, if short-lived, Sixth Circuit case of *Gary B. v. Whitmer*.[5] Then, the broader jurisprudential and practical problems associated with the federal constitutional right to educational opportunity are addressed.[6] In particular, the problems that seem to plague the idea of a "sufficient" opportunity are examined.[7] As it turns out, the problems associated with a minimally sufficient opportunity are reasonably addressable.

This Article concludes by discussing the regime legitimacy dilemma. Under mainstream theories of legal authority, persons who are denied a minimally sufficient educational opportunity have no prima facie moral obligation to recognize the authority of the relevant legal system.[8] Once we recognize that the legitimacy of our authority is at stake, we may be more willing to reassess the value of a federal constitutional right to educational opportunity.

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[1] For recent surveys of the continuing efforts, see, e.g., Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059 (2019); Areto A. Imoukhuede, *Enforcing the Right to Public Education*, 72 ARK. L. REV. 445 (2019); Malhar Shah, *The Fundamental Right to Literacy: Relitigating the Fundamental Right to Education After Rodriguez and Plyler*, 73 NAT'L LAW. GUILD REV. 129 (2016).

[2] *See* cases discussed *infra* Section II.

[3] *See infra* Section IV.

[4] *See infra* Section II. A.

[5] *See infra* Section II. B.

[6] *See id.*

[7] *See infra* Section III.

[8] *See infra* Section IV.

II. FROM *BROWN* THROUGH *GARY B.* AND THE STATE CONSTITUTIONAL CASES

A. THE MAJOR SUPREME COURT CASES

The historic case of *Brown v. Board of Education*[9] demonstrates some elements of judicial ambivalence toward educational opportunity. *Brown* famously declares that "[t]oday, education is perhaps the most important function of state and local governments."[10] *Brown* then refers to compulsory school attendance[11] and "great expenditures"[12] for education.[13] Requiring a student's physical presence in a school building, or their virtual appearance online, as well as school expenditures, are all educational inputs rather than educational outcomes. They are not, in themselves, measurements of student learning, or even of the degree of realistic opportunity to learn.

The obvious practical importance of educational opportunity is not presently couched in terms of any federal constitutional right to a minimally sufficient opportunity. Educational opportunity is clearly essential to some vital purposes. But the Court in *Brown* balks at inferring therefrom any substantive federal constitutional right to any minimal educational opportunity.[14]

Certainly, when a state has chosen to provide educational opportunity, it must "be made available to all on equal terms" as a matter of federal constitutional equal protection.[15] In other words, where a state chooses to provide a vital educational opportunity, it must then do so on the basis of some unspecified vision of equality.[16]

The Court in *Brown* thus focuses on a vision of equality of educational opportunity. The problem, though, is that equality of access has essentially no relationship to sufficiency of access.[17] Two students, each with little or no

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[9] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[10] *Id.* at 493.
[11] *See id.*
[12] *Id.*
[13] The Court goes on to elaborate the practical importance, in several respects, of "education in a democratic society" for individuals and for the society as a whole. Thus education is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing them for later professional training, and in helping them to adjust normally to their environment. These days, it is doubtful that any child may reasonably be expected to succeed in life if they are deprived of the opportunity of an education. *Id.*
[14] *See id.*
[15] *See id.*
[16] *See id.* For some time, student achievement levels and degrees of inequality of student performance have remained disturbing. *See, e.g.*, Cris de Brey, *New Report Shows Increased Diversity in U.S. Schools, Disparities in Outcomes*, NCES BLOG (Jun. 20, 2019), https://nces.ed.gov/blogs/nces/post/new-report-shows-increased-diversity-in-u-s-schools-disparities-in-outcomes; Dana Goldstein, *'It Just Isn't Working': PISA Test Scores Cast Doubt On U.S. Education Efforts*, N.Y. TIMES (Dec. 5, 2019), https://www.nytimes.com/2019/12/03/us/us-students-international-test-scores.html; Sarah D. Sparks, *Low Scorers Losing Ground On NAEP*, EDUC. WEEK (Apr. 25, 2018), https://www.edweek.org/teaching-learning/low-scorers-losing-ground-on-naep/2018/04.
[17] The ideas of equality and equal protection clearly involve many and varied complications. *See, e.g.*, R. George Wright, *Equal Protection and the Idea of Equality*, 34 L. & INEQ. 1 (2016). Thus we might say, for example, that Milo the Wrestler and the sedentary desk worker are not being treated equally, or not being given equal opportunity to pursue their respective careers, if each is afforded precisely a 2,000 calorie daily diet. Such a diet is insufficient for Milo's needs as a wrestler while it may be appropriate for a sedentary desk worker.

realistic access to education, can in that sense have equal access to education. Concretely, two students who are permitted or even required to appear in a largely empty and non-functional school building are also being granted equal educational opportunity.

The problem, though, is that such educational opportunities, while equal in the ways in which *Brown* is interested, are also insufficient opportunities for most practical purposes. A trivial, but equal, educational opportunity will not be an opportunity sufficient for any of the vital purposes cited by the Court in *Brown*.[18] Receiving a trivial, if still equal, educational opportunity undermines a person's prima facie moral obligation to comply with regime directives.[19]

The Court then addressed educational opportunity issues at the federal level in *San Antonio Independent School District v. Rodriguez*.[20] The majority found no such fundamental right, explicit or implicit, within the Constitution.[21] The Court's focus in *Rodriguez* was largely confined to complex issues of equity in public school funding and finance.[22] The typical intractability of such issues may have contributed to the Court's negative result.

At various points, the majority in *Rodriguez* referred to equality of educational opportunity;[23] to adequacy or sufficiency of educational opportunity;[24] and to an absolute or complete deprivation of educational opportunity.[25] The Court read the idea of "equal" protection in this context to require not "absolute equality or precisely equal advantages,"[26] but something less.[27]

In this regard, the *Rodriguez* majority noted that the less than strict equality of funding among schools had not resulted in an "absolute denial"[28] of any student's educational opportunity.[29] Specifically, the Court observed that "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[30] This language intriguingly holds open an equal protection claim where students have indeed been denied the opportunity for some level of free speech capability and meaningful participation in the political process.[31]

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[18] *See supra* notes 10–13 and accompanying text.
[19] *See infra* Section IV.
[20] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
[21] *See id.* at 17–18.
[22] *See id.*
[23] *See id.* at 23–25.
[24] *See id.*
[25] *See id.*
[26] *Id.* at 24.
[27] *See id.* at 37. In other constitutional areas, the Court has been willing to insist upon fairly precise "relative" equality, even where conceptual and measurement problems are present. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725 (1983) (holding that a one-person-one-vote apportionment is equal, and rejecting a redistricting plan providing for a 1% difference in population-based voting strength from the smallest to the largest voting district). There is, of course, a sense in which all judgments of equality or inequality are "relative" to the persons at issue.
[28] *Rodriguez*, 411 U.S. at 37.
[29] *See id.*
[30] *Id.*
[31] Plainly, constitutionally protected speech does not presuppose, and need not manifest, any degree of literacy. For a sense of the less-than-uniform legal treatment of actual or alleged illiteracy with respect

But any such declaration would be dicta under the circumstances of *Rodriguez*.[32]

In the meantime, though, the Court majority in *Rodriguez* reiterates the familiar claim that "the [practical] importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of . . . the Equal Protection Clause."[33] Whether this principle would apply with the same force to educational opportunity claims brought on substantive due process or other constitutional theories is left unaddressed. In any event, the majority repeats that "the Constitution does not provide judicial remedies for every social and economic ill."[34]

It is certainly possible to argue that educational opportunity is of practical importance, but no more practically important than, say, access to shelter from the elements.[35] On this approach, if educational opportunity is no more practically essential than nutrition or shelter, and there is no federal constitutional right to the latter, then no such right to the former need be inferred.

On the approach recommended below,[36] however, there is a crucial distinction between physical needs and some minimally sufficient educational opportunity. Specifically, under a variety of social contract and other approaches to legal obligation, there is a vital difference between the two kinds of cases. A socially-contracting party who is chronically poor but reasonably well-educated may or may not be subject to exploitation with respect to any bargained terms of a social contract.[37] But in contrast, persons who have been denied any minimal educational opportunity sufficient for these very purposes lack the capacity to enter bindingly into any broad social contract discussions in the first place.[38] A person who is poor but educated may be still able to engage effectively in social-contract-level discourse. A person with insufficient educational opportunity for these purposes cannot so engage, and thus cannot be morally bound by any resulting social contract terms of legal obligation.

Of course, when the Court, or anyone else, speaks of minimal sufficiency in any context, there must at some point be at least rough grounds for mapping out a distinction between what counts as sufficient and insufficient. In the context of *Rodriguez*'s equal protection arguments, the Court disclaims any relevant expertise or familiarity with local circumstances.[39] More helpfully, and in accordance with our recommendations below,[40] the Court does indicate that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than

to voting, compare Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding that some literacy tests as prerequisites to voting are unconstitutional) with Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 51–54 (1959) (unanimously holding that literacy as a prerequisite to registering to vote is not, in and of itself, unconstitutional).

[32] *See Rodriguez*, 411 U.S. at 36–37.

[33] *Id.* at 30 (citing prior case authority).

[34] *Id.* at 32 (quoting the housing availability case of Lindsey v. Normet, 405 U.S. 56, 73 (1972)).

[35] *See Lindsey*, 405 U.S. at 73.

[36] *See infra* Section IV.

[37] *See* discussion about the Rawlsian veil of ignorance in the original position, *infra* notes 208–217 and accompanying text.

[38] *See infra* Section IV.

[39] *See Rodriguez*, 411 U.S at 41.

[40] *See infra* Section II.B.

does public education."[41] Drawing on a wide range of independent perspectives on education is indeed recommended in this context.

The dissenting opinion in *Rodriguez* points out that the constitutional passage at issue is indeed an equal protection clause, rather than an adequate or sufficient protection clause.[42] But on this basis, the dissenting opinion then disclaims any constitutional interest in even gross inadequacies[43] or insufficiencies[44] of educational opportunity, as distinct from unjustified inequalities.[45] The dissenters in *Rodriguez* can envision no manageable standards for determining when an educational opportunity is minimally sufficient.[46] But considerations of equal protection, like many other areas of the law, will also typically require judicial judgments of the constitutional sufficiency or insufficiency of one set of circumstances or another. In any event, neither the majority nor the dissenters in *Rodriguez* were inclined to take seriously the idea of an adequate or minimally sufficient educational opportunity for any constitutional purpose, whether focusing on school funding or not.

The later case of *Plyler v. Doe*[47] provided a legal victory for undocumented alien children seeking admission to the Texas public school system.[48] The majority in *Plyler* achieved this result largely by modifying the typical equal protection test of minimum security in favor of a somewhat less deferential test.[49] In the *Plyler* majority's approach, legislative rationality requires not merely any legitimate state goal, either conceivable or actually attained, but a goal that also can be characterized as "substantial."[50] This less deferential version of minimum scrutiny[51] allowed the *Plyler* majority to rebut the government's claims as to the consequences of entirely excluding undocumented alien children from public schools.[52]

The *Plyler* majority's motivation in more stringently interpreting minimum scrutiny doubtlessly reflected the Court's ambivalence toward the availability of public school education. The *Plyler* Court acknowledged, and indeed perhaps broadened,[53] the sense in *Rodriguez* that "[p]ublic education is not a 'right' granted to individuals by the Constitution."[54] But the Court also distinguished public education from a typical item of mere social benefit legislation.[55] The Court cited several cases for the fundamental importance of education not only to the well-being of the individual,[56] but in

[41] *Rodriguez*, 411 U.S. at 50.
[42] *See id.* at 70, 89–90 (Marshall, J., dissenting).
[43] *See id.* at 90.
[44] *See id.* at 89.
[45] *See id.*
[46] *See id.*
[47] Plyler v. Doe, 457 U.S. 202 (1982).
[48] *See id.*
[49] *See id.* at 224.
[50] *Id.*
[51] For discussion, see Justice Thurgood Marshall's observations in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 455–61 (1985).
[52] *See Plyler*, 457 U.S. at 224–28.
[53] In the sense of not explicitly restricting this dictum to equal protection claims.
[54] *Plyler*, 457 U.S. at 221 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)). It is not entirely clear why the *Plyler* majority placed the word "right" in quotations marks in this context.
[55] *See id.*
[56] *See id.*

"maintaining our basic institutions"[57] as well. For the latter point, the Court quoted extensively from *Brown*.[58]

B. THE *GARY B.* LITIGATION

It is this judicial ambivalence toward public school educational opportunity that the more recent Sixth Circuit case of *Gary B. v. Whitmer*[59] attempted to address. The panel opinion in *Gary B.* understood the complaint as alleging the deprivation "of a basic minimum education, meaning one that provides a chance at foundational literacy."[60] The plaintiffs ascribed this deprivation to "poor conditions within their classrooms, including missing or unqualified teachers, physically dangerous facilities, and inadequate books and materials."[61] Making these specific causal claims might well help with issues of justiciability. But it would be unfortunate if these causal claims then limited the scope of any remedies for the denial of an opportunity for basic literacy.[62] Ultimately, though, the plaintiffs in *Gary B.* asked for a judicial recognition of a "fundamental [federal constitutional equal protection and due process] right to a basic minimum education."[63] The panel opinion took this to be a question that the Supreme Court had never definitively resolved.[64]

As reported by the panel opinion, the complaint in *Gary B.* discussed the conditions in the plaintiffs' schools in unusually blunt terms.[65] The complaint alleged that "[p]laintiffs sit in classrooms where not even the pretense of education takes place."[66] The plaintiffs claimed to attend "schools in name only."[67] The schools in question were said to "wholly lack the capacity to deliver basic assess to literacy, functionally delivering no education at all."[68] The relevant schools were thus "not truly schools by any traditional

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[57] *Id.*

[58] *See id.* at 222–23. *Brown* itself had left open the possibility of a state's declining to offer any public education at all. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (quoted in *Plyler*, 457 U.S. at 223).

[59] Gary B. v. Whitmer, 957 F.3d 616 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020) (en banc) (mem.). In this 2-1 vacated panel decision, Judge Murphy dissented, largely on separation of powers and judicial competency grounds. For discussion of this case at one stage of the litigation or another, see, for example, Kristine L. Bowman, *Education Reform and Detroit's Right to Literacy Litigation*, 75 WASH. & LEE L. REV. ONLINE 61 (2018); Carter G. Philips, *A Class Action Lawsuit For the Right to a Minimum Education in Detroit*, 15 NW. J.L. & SOC. POL'Y 412 (2020); Kimberly Jenkins Robinson, *A Constitutional Right to Education Fulfills Our Democratic Promise*, REAL CLEAR EDUC. (May 8, 2020), https://www.realcleareducation.com/articles/2020/05/08/a_constitutional_right_to_education_fulfills_our_democratic_promise_110417.html; Aaron Tang et al., *A Constitutional Right to Literacy For Detroit's Kids?*, N.Y. TIMES (Apr. 26, 2020) https://www.nytimes.com/2020/04/26/opinion/gary-whitmer-detroit.html.

[60] *Gary B.*, 957 F.3d at 620–21. A basic minimum education for many purposes would also include a chance at minimal numeracy as well. *See Understanding Literacy and Numeracy*, CTRS. DISEASE CONTROL & PREVENTION (Nov. 13, 2019), https://www.cdc.gov/healthliteracy/learn/understanding literacy.html. For some costs of more advanced levels of innumeracy, *see* JOHN ALLEN PAULOS, INNUMERACY: MATHEMATICAL ILLITERACY AND ITS CONSEQUENCES (1990).

[61] *Gary B.*, 957 F.3d at 620.

[62] *See infra* notes 129–140 and accompanying text.

[63] *Gary B.*, 957 F.3d at 621.

[64] *See id.*

[65] *See id.* at 624–27.

[66] *Id.* at 624.

[67] *Id.*

[68] *Id.*

definition or understanding of the role public schools play in affording access to literacy."[69]

The plaintiffs' causal assertions were grouped, more concretely, under the respective headings of "teaching, facilities, and materials."[70] Among the teaching-related allegations were substantial and chronic teacher shortages,[71] culminating, in one instance, with "an eighth grade student . . . put in charge of teaching seventh and eighth grade math classes for a month because no math teacher was available."[72]

Under the heading of "facilities," the plaintiffs made a number of striking factual claims. These included classroom temperatures regularly above ninety degrees;[73] temperatures below freezing;[74] "hot, contaminated and undrinkable" water;[75] leaking roofs and broken windows covered with cardboard;[76] and a chronic vermin infestation.[77] The last point was especially appalling, as "[m]ice, cockroaches, and other vermin regularly inhabit Plaintiffs' classrooms, and the first thing some teachers do each morning is attempt to clean up the rodent feces before their students arrive. Hallways and classrooms smell of dead vermin and black mold."[78] Relevant photographs were attached to the complaint.[79]

Finally, under the heading of "materials," the plaintiffs alleged a chronic shortage of appropriate textbooks.[80] In some cases, there were allegedly so few copies available that a single copy had to be shared "among four or more students"[81] at a time, with no textbooks being available for any homework assignments.[82] In some instances, school libraries were unavailable or effectively nonexistent.[83] The most basic school supplies were often absent.[84]

The plaintiffs then alleged that the above-cited conditions led to educational levels that were characterized as "abysmal."[85] The plaintiffs alleged that "[a]chievement data reveal that in Plaintiffs' schools, illiteracy is the norm. The proficiency rates in Plaintiffs' schools hover near zero in nearly all subject areas."[86] But to the plaintiffs' equal protection constitutional theory, the Sixth Circuit panel responded negatively. The complaint, "while reflecting the awful conditions faced in Plaintiffs' schools, has not alleged any disparity in the state's allocation of resources between their schools and others."[87] Nor did the plaintiffs point to any specific

[69] *Id.*
[70] *Id.*
[71] *See id.* at 625.
[72] *Id.*
[73] *See id.* at 626.
[74] *See id.*
[75] *Id.*
[76] *See id.*
[77] *See id.*
[78] *Id.*
[79] *See id.*
[80] *See id.*
[81] *Id.*
[82] *See id.*
[83] *See id.*
[84] *See id.* at 627.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 633. Of course, if there really were no meaningful differences among public school districts statewide, this would undermine equal protection violation claims, setting aside all race and ethnicity

objectionable governmental policy or practice beyond the above references to teaching, facilities, and materials.[88]

Beyond the equal protection theory, the plaintiffs had also alleged, interestingly, that the state's mandatory education requirement restricted their freedom of movement and freedom from state custody in an arbitrary, unjustified fashion, given the absence of any meaningful educational process to justify such restraints.[89] But the Sixth Circuit panel dismissed this theory as well for not being specific enough, including providing insufficient notice.[90]

These dismissals, however, left alive the plaintiffs' main issue of whether the plaintiffs "have a fundamental [federal constitutional] right to a basic minimum education, meaning one that provides access to literacy."[91] On this front, the plaintiffs argued that minimally sufficient literacy opportunity is required for the meaningful exercise of other constitutional rights[92] and for "the possibility of political participation."[93] The Sixth Circuit panel opinion refused to dismiss the plaintiffs' claim in this respect.[94] The panel's favorable response assumed that "without the literacy provided by a basic minimum education it is impossible to participate in our democracy."[95]

Elaborating, the panel declared that "a basic minimum education—meaning one that plausibly provides access to literacy—is fundamental because it is necessary for even the most limited participation in our country's democracy."[96] More specifically, the panel argued that "[e]ffectively every interaction between a citizen and her government depends upon literacy. Voting, taxes, the legal system, jury duty—all of these are predicated on the ability to read and comprehend written thoughts."[97]

The panel opinion's approach thus sought to combine the indisputable practical value of access to literacy, especially for those directly affected, with an argument for the realistic necessity of literacy for civic and political participation in a democracy.[98] On this basis, the panel determined that "Plaintiffs have a fundamental right to a basic minimum education, meaning one that can provide them with a foundational level of literacy."[99]

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differences in resources and opportunities. But this would only intensify the distinct constitutional concern for minimal adequacy of educational opportunities on a statewide basis.

[88] *See id.* The reluctance of student plaintiffs and their attorneys, even with amicus and interest group assistance, to specify in advance the supposed causal mechanisms and most effective means of cure and redress is, in this context, to be commended.

[89] *See id.* at 638, 640.

[90] *See id.* at 638, 641.

[91] *Id.* at 642.

[92] As has been said of the implied federal constitutional right to vote in state elections. *See* Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 670 (1966); League of Women Voters v. Brunner, 548 F.3d 463, 476 (6th Cir. 2008).

[93] *See Gary B.*, 957 F.3d at 642.

[94] *See id.* at 642, 648.

[95] *Id.* at 642.

[96] *Id.* at 652.

[97] *Id.* at 652–53. Further, the panel asked how someone denied literacy can "understand and complete a voter registration form? Comply with a summons sent to them in the mail? Or afford a defendant due process when sitting as a juror in his case, especially if documents are used as evidence against him?" *Id.* at 653.

[98] *See supra* notes 92–97 and accompanying text. For a Citizenship Clause-focused alternative approach, see Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006).

[99] *Gary B.*, 957 F.3d at 662.

Overall, the panel decision in *Gary B.* was, on the question of the fundamentality of literacy, clearly on the right track. The majority opinion's heart was equally in the right place. But there are obvious responses to the specific arguments adopted in *Gary B.* On its own terms, the *Gary B.* majority overstates its claims. Ironically, though, the crucial problem with the logic of *Gary B.* is that it did not, and perhaps could not, examine the relevant considerations at an even more basic, underlying level, as we note below.[100]

Doubtless, literacy, as well as some degree of numeracy, is ordinarily required in order to take full advantage of most civic and political opportunities and to maximally fulfill most civic responsibilities. Taking full advantage of the opportunities for civic and political participation, however, also typically requires further education well beyond mere basic literacy. A certain level of income and wealth, along with sufficient mental and physical health and leisure, is normally required as well. Clearly, there are many socially alterable prerequisites to the meaningful, let alone full, exercise of many civic and political opportunities. And most of these prerequisites are not typically thought of as matters of federal constitutional right.

With the *Gary B.* panel, let us take voting[101] as representative of the key civic and political activities for which literacy is alleged to be a prerequisite. It is true that the Voting Rights Act of 1965[102] did not flatly prohibit all literacy tests with respect to voting, apart from any associated denial of equal protection on the basis of race or ethnicity.[103] The effects of illiteracy on daily functioning, including its civic and electoral dimensions, are undeniable.

But it overstates matters to claim, as the *Gary B.* panel does, that voting in federal or state elections is "predicated on the ability to read and comprehend written thoughts."[104] Those who are denied literacy but who wish to vote are not generally prohibited from doing so (formally or in substance), assuming no further impediments and the availability of absentee or mail-in ballots, or perhaps some form of assistance or accommodation.[105] Or at least, it is difficult to imagine a federal constitutional right to literacy that dramatically affects voting patterns.

Certainly, illiteracy itself also does not prevent persons from listening to and speaking with others on political matters, testifying or otherwise speaking at public meetings, or responding to Census and other text-based surveys where someone is available to assist.[106] In these respects as well, the realistic barriers to the exercise of the franchise most likely take forms other

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[100] *See infra* Section IV.

[101] *See supra* note 97 and accompanying text. We set aside the possibility that electoral voting may not be especially significant in some respects, when considered at the level of an individual voter. *See generally* ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE (2d ed. 2016).

[102] *See* Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101 et seq.).

[103] *See id. See also* the cases cited *supra* note 31.

[104] *See supra* note 97 and accompanying text.

[105] Note, by way of loose comparison, the circumstances of visually impaired voters, particularly under the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 52 U.S.C. § 20104), as discussed in *Center of Excellence in Nonvisual Access*, NAT'L FED'N OF THE BLIND, https://www.nfb.org/programs-services/center-excellence-nonvisual-access (last visited Aug. 3, 2020).

[106] Assistance of one sort or another may well be available with respect to the voter registration process. *See generally How to Register to Vote*, USA.GOV, https://www.usa.gov/register-to-vote (last visited Aug. 3, 2020).

than the illiteracy of the disenfranchised party. This is again not to deny any of the respects in which illiteracy impairs the most valuable or fullest exercise of the franchise. But that is not what the *Gary B.* panel opinion is claiming.

The *Gary B.* panel also points, understandably, to the role of jury service among civic rights, responsibilities, and democratic participation.[107] But that is also an oversimplification to claim that jury duty is "predicated on the ability to read and comprehend written thoughts."[108]

It is clear, on the one hand, that in order to qualify for jury service in the federal court system, one must "be adequately proficient in English to satisfactorily complete the juror qualification form."[109] A number of states also require English language literacy, above and beyond the ability to speak and understand English, as a minimum qualification for jury service.[110]

On the other hand, if the plaintiffs in *Gary B.* sought to serve on juries within the state of Michigan itself, illiteracy might conceivably not constitute a legal bar. By statute, Michigan vaguely requires only that prospective jurors "be able to communicate in the English language."[111] It is still possible that prospective jurors who have been denied literacy could still be subject, in a given case, to peremptory challenge or challenge for cause.[112] But such vulnerabilities do not amount to a denial of all meaningful civic participation.[113] In any event, it is unclear how a general federal constitutional right to an opportunity for literacy would impact challenges for cause.

Nor is Michigan the only state that draws, or at least raises the possibility of, an important distinction for purposes of jury service between literacy and an ability to understand and communicate in English. California, for example, requires that a prospective juror be able to "understand English enough to understand and discuss the case."[114] Similar, if not more inclusive, language is common under a number of state jury rules.[115] Persons denied an

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[107] *See supra* note 97 and accompanying text.

[108] *See id.*

[109] *See Juror Qualifications*, U.S. CTS., https://www.uscourts.gov/services-forms/jury-service/juror-qualifications (last visited Aug. 3, 2020).

[110] *See, e.g.*, *A Guide to Jury Service*, ILL. ST. BAR ASS'N, https://www.isba.org/public/guide/juryduty (last visited Aug. 3, 2020) (requiring jurors in Illinois to be "able to read, write, and understand the English language."); *Indiana – Jury Duty Laws, Jury Selection, Juror Qualification*, JURYDUTY101, https://www.juryduty101.com/states/indiana (last visited Aug. 3, 2020) (requiring Indiana jurors to be "able to read, speak, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily a juror qualification form."); *Frequently Asked Questions About Juror Service in New Jersey*, N.J. CTS., https://www.njcourts.gov/jurors/assets/juryfaq.pdf (last visited Aug. 3, 2020) (citing NJ STAT. ANN. § 2B:20-1 requiring New Jersey jurors more generally to "be able to read and understand the English language."); *Jury Service in Texas*, TEX. JUD. BRANCH, http://www.txcourts.gov/about-texas-courts/juror-information/jury-service-in-texas (last visited Aug. 3, 2020) (requiring Texas jurors, even more generally, to "be able to read and write.").

[111] MICH. COMP. LAWS § 600.1307a(1)(b) (2020).

[112] MICH. COMP. LAWS § 768.12 (2020). Consider the possibility of document-intensive cases, whether civil or criminal.

[113] *See supra* note 110 and accompanying text.

[114] Jud. Council Cal., Court and Community: Information and Instructions for Responding to Your Juror Summons, https://www.courts.ca.gov/documents/Court_and_Community.pdf (last visited Aug. 3, 2020).

[115] *See How Do I Find Out More About Jury Duty?*, FLA. CT. CLERKS & COMPTROLLERS, https://www.flclerks.com/page/HDI_Jury_Duty (last visited Aug. 3, 2020); *Jury Basics*, GA. SUPERIOR CTS., https://georgiasuperiorcourts.org/jury-basics (last visited Aug. 3, 2020); OSBA Comms. & Secs., *Law Facts: Jury Service*, OHIO ST. BAR ASS'N (Mar. 17, 2014), https://www.ohiobar.org/public-

opportunity for literacy may well be denied, on those grounds, the fullest scope of trial juror experiences. But this is, again, not the argument made by the panel in *Gary B.*[116]

After the *Gary B.* panel decision was vacated by the en banc Sixth Circuit,[117] the case was settled on significant, but less than constitutionally seismic, terms.[118] Among the major terms, Governor Gretchen Whitmer agreed to ask the legislature for roughly one hundred million dollars in literacy funding[119] to provide $40,000 in educational funding to each of the seven individual plaintiffs,[120] to provide $2.72 million in literacy funding for the district schools,[121] to advise school districts on literacy-related strategies and equity considerations,[122] and to create literacy and equity task forces and policy committees.[123] This settlement is to be commended, especially to the extent that it neither precludes nor endorses any specific strategic paths to genuinely enhancing literacy in advance of further data and discussion.[124]

The *Gary B.* litigation raises, in stark relief, a number of vital questions that cannot be nationally resolved by a settlement among litigating parties. To begin with, recourse to state-level constitutional law has been uneven in its results. State courts may not read their own state constitutional rights to education as providing for an enforceable right to an education of any particular quality.[125] Such questions may seem to implicate the separation of powers, take courts beyond the scope of their expertise, be best resolved through the political and legislative process, or be otherwise non-justiciable.[126] However, in the proper circumstances, some courts remain

resources/commonly-asked-law-questions-results/law-facts/law-facts-jury-service; *Learn About Juror Eligibility and Disqualification*, MASS.GOV, https://www.mass.gov/info-details/learn-about-juror-eligibility-and-disqualification (last visited Aug. 3, 2020); *General Information*, NYJUROR.GOV, http://nyjuror.gov/juryQandA.shtml#MustReport (last visited Aug. 3, 2020) (New York jurors must "be able to understand and communicate in the English language"); *Wisconsin – Jury Duty Laws, Jury Selection, Juror Qualification*, JURYDUTY101, https://www.juryduty101.com/states/wisconsin#qualifications (last visited Aug. 3, 2020).

[116] *See supra* note 110 and accompanying text.

[117] *See* Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (en banc) (mem.).

[118] *See* Valerie Strauss, *Michigan Settles Historic Lawsuit After Court Rules Students Have a Constitutional Right to a 'Basic' Education, Including Literacy*, WASH. POST (May 14, 2020, 9:50 AM), https://www.washingtonpost.com/education/2020/05/14/michigan-settles-historic-lawsuit-after-court-rules-students-have-constitutional-right-basic-education-including-literacy.

[119] *Id.*

[120] *See id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] In contrast, some suits have prematurely focused quite narrowly on particular alleged causes of purported federal constitutional rights violations. *See, e.g.*, Vergara v. State, 246 Cal. App. 4th 619 (2016) (focusing on teacher retention rules); King v. State, 818 N.W.2d 1 (Iowa 2012) (focusing on lack of statewide standards, assessments, and teacher-related policies). A further complication in the *Gary B.* case is that any new targeted funding enters an environment of both favorable and unfavorable trends in Detroit public school funding. *See, e.g.*, Koby Levin, *Bipartisan Deal Uses Federal Dollars to Cushion Michigan Schools as They Prepare for Cuts Next Year*, CHALKBEAT DET. (July 22, 2020, 6:35 PM), https://detroit.chalkbeat.org/2020/7/22/21334907/bipartisan-michigan-school-spending-deal-federal-dollars.

[125] *See, e.g.*, Campaign for Quality Educ. v. State, 246 Cal. App. 4th 896 (2016); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996).

[126] *See Campaign for Quality Educ.*, 246 Cal. App. 4th at 911; *Comm. For Educ. Rights*, 672 N.E.2d at 1191. *See also, e.g.*, Citizens for Strong Schs., Inc. v. Fla. St. Bd. of Educ., 262 So. 3d 127 (Fla. 2019) (per curiam) ("[p]etitioners fail to present any manageable standard by which to avoid judicial intrusion into the powers of the other branches of government.").

willing to reach the state constitutional merits[127] and set forth benchmarks with respect to educational opportunity and quality.[128]

For courts that recognize either a federal or a state constitutional right to an opportunity for literacy, the crucial lesson for litigants is to resist the temptation to focus the litigation prematurely on specifically alleged causes of the lack of literacy in question. Premature specificity as to the cause of illiteracy may add an apparent concreteness to the litigation. The specific litigation focus adopted may, however, serve the perceived interests of established interest groups, at the expense of the interests of the plaintiffs and those similarly situated. Any specifically alleged causes of a denial of literacy are likely to understate the crucial "causal density"[129] and causal complexities actually involved.

There is currently no well-grounded consensus as to the most important and manageable causes of substantial illiteracy in the public schools. Consider a sampling of possible candidates for a significant causal role. We might start with, say, defective teacher retention policies.[130] Then there is the lack of teacher-related policies in conjunction with a lack of statewide standards and assessments.[131] It is often thought that teacher quality, rightly measured, may be significant.[132] Excessive class size is also frequently cited.[133] Denial of student opportunities to acquire sufficient substantive background knowledge is pointed to as well.[134] Inadequate or misdirected school funding in general is of course a frequent focus.[135] Differences in

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[127] See, for example, the thoughtful balance of considerations struck in Delawareans for Educ. Opportunity v. Carney, 199 A.3d 109 (Del. Ch. 2018) (deferring to the political branches except where the legislature's standards are not met, or are set abysmally low); Cruz-Guzman v. State, 916 N.W.2d 1, 9–12 (Minn. 2018) (finding justiciability of state constitutional law claim); William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414 (Pa. 2017) (to similar effect).

[128] *See, e.g.*, Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206 (Conn. 2010) (focusing on the opportunity to advance through high school to higher education; full democratic participation; and equality in competing for productive employment); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (specifying seven "goal" capacities and nine "minimal" essentials of a state constitutionally "efficient" system of public schools, including as a "goal" the capacity to "compete favorably . . . in academics or in the job market"); Gannon v. State, 443 P.3d 294, 296 (Kan. 2019) (per curiam) (citing *Rose*, 790 S.W.2d 186); Gannon v. State, 319 P.3d 1196, 1227 (Kan. 2014) (citing *Rose*, 790 S.W.2d 186); Abbeville Cnty. Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999) (declaring a "minimally adequate" education as requiring, among other elements, "the ability to read, write, and speak the English language, and knowledge of mathematics and the physical sciences.").

[129] *See* Jim Manzi, *What Social Science Does—and Doesn't—Know*, CITY J. (Summer 2010), https://www.city-journal.org/html/what-social-science-does—and-doesn't—know-13297.html (discussing the problems of real-world causal density).

[130] *See supra* note 124 and accompanying text.

[131] *See id.*

[132] *See, e.g.*, Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 AM. ECON. REV. 2633, 2634 (2014); Eric A. Hanushek et al., *The Achievement Gap Fails to Close: Half Century of Testing Shows Persistent Divide Between the Haves and the Have Nots*, 19 EDUC. NEXT 8, 17 (2019).

[133] *See, e.g.*, Ting Shen & Spyros Konstantopoulos, *Estimating Causal Effects of Class Size in Secondary Education: Evidence from TIMSS*, RSCH. PAPERS IN EDUC. 1 (2019) (noting the typical presence of uncontrolled confounding factors). For some complications, see Eric A. Hanushek, *Teacher Quality*, *in* TEACHER QUALITY 1, 7 (Lance T. Izumi & Williamson M. Evers eds., 2002).

[134] *See, e.g.*, E.D. Hirsch, Jr., WHY KNOWLEDGE MATTERS 83, 170 (2016); DOUG LEMOV, COLLEEN DRIGGS & ERICA WOOLWAY, READING RECONSIDERED: A PRACTICAL GUIDE TO RIGOROUS LITERACY INSTRUCTION (2016).

[135] *See, e.g.*, William S. Koski, *Beyond Dollars? The Promise and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897 (2017); *Public School Expenditures*, NAT'L CTR. FOR EDUC. STAT. (Apr. 2020), https://nces.edu.gov/programs/coe/indicator_cmb.asp (last visited Aug. 6, 2020); Eric A. Hanushek, Alfred A. Lindseth & Michael A. Rebell, *Many Schools Are Still Inadequate: Now What?*, EDUC. NEXT (Nov. 19, 2009), https://www.educationnext.org/many-schools-are-still-inadequate-now-what. In particular, there is debate over the possible effects of administrative

family resources and opportunities are pointed to,[136] along with differences in exposure to environmental toxins.[137] Adverse effects of charter and private school alternatives to public schools are also discussed.[138]

These and other possible causes of illiteracy in public schools may overlap and interact with one another. Their importance may vary with context and geography. Each has its own complications. Focusing on any single consideration, or any combination thereof, may have unintended consequences. And there can be no guarantee that the most vital remedies will be politically easy to implement in practice.

For our purposes, the lesson is to place only limited judicial trust in the specific remedies emphasized by the attorneys and advocacy groups most directly involved in any litigated case. The best initial judicial response, given our present state of knowledge, will often be to encourage locally-focused studies and locally-focused competition among alternative approaches. The courts typically lack the personal expertise to simply impose, on insufficient evidence, the most effective remedies for denials of literacy.[139] Judicial humility suggests instead that the courts begin by establishing literacy benchmarks, opening what would amount to a competition among the contending approaches, and eventually assessing the local and national evidence[140] in favor of those approaches, alone or in combination. The resulting judicial mandate implementing the most locally promising approaches might well face organized interest group resistance. But in this context, realistic access to literacy opportunity should take priority over the conflicting interests of those who would impair that access.

hirings. *See* Mark J. Perry, *Chart of the Day: Administrative Bloat in U.S. Public Schools*, AEI (Mar. 9, 2013), https://www.aei.org/carpe-diem/chart-of-the-day-administrative-bloat-in-us-public-schools; Alex Tabarrok, *Rising Education Costs Stem Primarily From More Teachers and Bigger Salaries*, *Not Administrative Bloat*, FOUND. ECON. EDUC. (May 30, 2019), https://fee.org/articles/rising-education-costs-stem-primarily-from-more-teachers-and-bigger-salaries-not-administrative-bloat.

[136] For a broad focus, see JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983); *see also* Eric A. Hanushek, *What Matters for Student Achievement*, EDUC. NEXT (Jan. 13, 2016), https://www.educationnext.org/what-matters-for-student-achievement.

[137] *See, e.g.*, Emily A. Benfer, *Contaminated Childhood: The Chronic Lead Poisoning of Low-Income Children and Communities of Color in the United States*, HEALTH AFF. (Aug. 8, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170808.061398/full (citing a wide range of studies).

[138] *See, e.g.*, DIANE RAVITCH, REIGN OF ERROR 3–5 (2013); Max Eden, *Issues 2020: Charter Schools Boost Results For Disadvantaged Students and Everyone Else*, MANHATTAN INST. (Jan. 28, 2020), https://www.manhattan-institute.org/issues-2020-charter-schools-benefits-for-low-income-minority-students; Matt Barnum, *Critics of Charter Schools Say They're Hurting School Districts. Are They Right?*, CHALKBEAT (Jun. 11, 2019), https://www.chalkbeat.org/2019/6/11/21108318/critics-of-charter-schools-say-they-re-hurting-school-districts-are-they-right. As public school enrollments shrink in a given area, whatever the cause, funding levels based on enrollment also shrink. Detroit public school enrollment has, in particular, decreased substantially over recent decades. *See* Kristine L. Bowman, *Education Reform and Detroit's Right to Literacy Litigation*, 75 WASH. & LEE L. REV. ONLINE 61, 66 (2018).

[139] *See supra* note 126 and accompanying text.

[140] While local circumstances will doubtless often matter, the courts should also be made aware of plausible and popular approaches that have evidently failed in other localities.

III. ACCESS TO LITERACY AND THE IDEA OF SUFFICIENCY

The path from *Brown*,[141] *Rodriguez*,[142] and *Plyler*[143] to *Gary B.*[144] involves a shift in emphasis from educational equality to educational sufficiency.[145] To a degree, the literature has tracked this shift.[146] In some respects, equality and sufficiency are linked.[147] But it is also true that educational opportunities could be equal but insufficient for all, or for some purposes sufficient, while remaining unequal. So, we must understand the idea of a sufficient educational opportunity for whatever purposes we may have in mind.

The idea of a sufficient opportunity for sufficient literacy, for some given purpose, is certainly not self-defining.[148] Some clarification of the idea of sufficiency, in general and in literacy contexts, is thus necessary. In the context of allocating goods and opportunities in general, the theory of sufficiency begins clearly enough. Rather than focusing on any variety of equality, the primary focus is on sufficiency in the sense that ideally, "everyone should have enough."[149] The center of moral and legal attention is thus on "benefitting the badly off,"[150] or those who are in the relevant respect below a certain threshold level.[151]

Writers who focus on sufficiency are often concerned with attaining broad, if not universal, sufficiency for a variety of basic natural and cultural needs.[152] Often cited as among those needs is one degree or another of education.[153] Martha Nussbaum would require universally "at least a

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[141] *See supra* notes 9–19 and accompanying text.

[142] *See supra* notes 20–46 and accompanying text.

[143] *See supra* notes 47–58 and accompanying text.

[144] *See supra* notes 59–140 and accompanying text.

[145] The idea of equality is, however, so multi-dimensional that a full account of sufficiency will involve referring to equality and inequality in one sense or another. *See generally* R. George Wright, *supra* note 17, at 1; Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 916, 920 (2016) ("equality of educational opportunity and educational adequacy . . . are interlocked"); Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 480 (2014) ("equality and adequacy are not mutually exclusive, . . . they are mutually reinforcing").

[146] *See, e.g.*, Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595, 595 (2007); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 97 (2013); William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 615 (2006) ("[o]ver the past two decades, education policy's orienting guide star has shifted from equity to adequacy"). For a broad survey, see JUSTIN DRIVER, THE SCHOOL HOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 242–313 (2018). For commentary on Driver's work, see Michelle Adams & Derek W. Black, *Equality of Opportunity and the Schoolhouse Gate*, 128 YALE L.J. 2302, 2319 (2019); Jill LePore, *Is Education a Fundamental Right?*, NEW YORKER (Sept. 3, 2018), https://www.newyorker.com/magazine/2018/09/10/is-education-a-fundamental-right.

[147] *See supra* note 145.

[148] *See* Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 176 A.3d 28, 55 (Conn. 2018) ("[T]he phrase 'minimally adequate' is not self-defining.").

[149] Harry G. Frankfurt, On Inequality 7 (2015).

[150] Iwao Hirose, Egalitarianism 112 (2015).

[151] *Id.*; *see also* Liam Shields, *Sufficiency Principle*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS 1 (Hugh LaFollette ed., 2019) ("[p]rinciples of equality call for an equal distribution of benefits and burdens, while principles of sufficiency call for everyone to have enough, whether or not that is equal."); Roger Crisp, *Equality, Priority, and Compassion*, 113 ETHICS 745, 757 (2003).

[152] *See, e.g.*, MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 33 (2001). Professor Nussbaum's approach emphasizes at least minimal human flourishing. *See id.*; *see also* GEORGE SHER, EQUALITY FOR INEGALITARIANS 132 (2014).

[153] *See, e.g.*, Anderson, *supra* note 146, at 597; NUSSBAUM, *supra* note 152, at 33; SHER, *supra* note 152, at 132; LIAM SHIELDS, JUST ENOUGH: SUFFICIENCY AS A DEMAND OF JUSTICE 98 (2016).

threshold level"[154] of thought-capability "informed and cultivated by an adequate education, including, but [not] limited to, literacy and basic mathematical and scientific training."[155] George Sher would have the state "cause each citizen to attain a suitable level of education."[156] Liam Shields' understanding of "sufficient autonomy"[157] would require "basic reasoning skills"[158] and familiarity with common fallacies and rhetorical ploys.[159] And Elizabeth Anderson would require that "every student with the potential and the interest [] receive a K-12 education sufficient to enable him or her to succeed at a college that prepares its students for postgraduate education."[160]

Each of these approaches is morally defensible. Perhaps the substance of each of these approaches should be recognized as a federal constitutional right. Our focus, however, is not directly on matters of constitutional right. The focus is instead on the logical consequences of denying literacy opportunities to any persons that are then still claimed to be morally bound to recognize the legitimate authority of the established legal regime, as we discuss below.[161]

Our own approach, like the approaches of Professors Nussbaum, Sher, Shields, and Anderson, above, depends on some understanding of the idea of "sufficiency." For our purposes, though, no controversial understanding of the idea of sufficiency is necessary. We need only a workable idea of a sufficient opportunity for sufficient literacy for a particular specified purpose, with no commitments to a more developed theory of the idea of sufficiency.

The first point to note is that contrary to what sufficiency theorists often claim,[162] sufficiency may have a relative or comparative dimension. It is true that we can usually think of, say, a sufficient diet for some given person in non-comparative terms. A diet of some number of calories and nutrients for the person may be sufficient for whatever purpose we have in mind. But even with respect to diet, what counts as sufficient for an athlete may turn on what that athlete's competitors are consuming. Sufficiency in that context may turn not only on lifting a specified weight, but on lifting a greater weight than one's competitors, which may depend on those competitors' diets.

In our context, sufficient literacy may include the non-comparative ability to read well enough to respond to a traffic sign. But there may also be comparative dimensions to sufficient literacy as well. Whether one is

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[154] NUSSBAUM, *supra* note 152, at 33.

[155] *Id.*

[156] SHER, *supra* note 152, at 132. *See also* JOHN STUART MILL, ON LIBERTY ch. V, at 189–90 (Gertrude Himmelfarb ed., 1974) (1859) (requiring universal education).

[157] SHIELDS, *supra* note 153, at 98.

[158] *Id.*

[159] *See id.*

[160] Anderson, *supra* note 146, at 597. Of course, a student's potential for, and interest in, more advanced education will depend in part on the nature and quality of the educational opportunity already received or denied.

[161] *See infra* Section IV.

[162] *See* the discussion of supposedly non-comparative sufficientarianism in Wright, *supra* note 17.

sufficiently literate to become a viable employee, for example, may turn on the degrees of literacy of one's competing job applicants.[163]

Secondly, while the idea of sufficient literacy will sometimes have a comparative dimension, we need not make broad claims as to how sufficient opportunity and equal opportunity relate to each other. For our purposes, equal opportunity for literacy between two groups is of limited value if the opportunities for both groups are grossly insufficient. There is no reason to believe that increasing the number of literate persons must also increase inequalities in literacy, or in any other respect. Common sense would suggest the opposite. In general, the secondary effects of enhancing literacy opportunities can, for our purposes, safely be assumed to be manageable.[164]

Third and finally, there is a concern about arbitrariness in officially adopting any particular threshold level for sufficiency. Realistically, how is the level of sufficiency to be recognized?[165] In particular, how is a court to recognize a sufficient opportunity for literacy, or sufficient literacy itself, when they see it? Won't any particular dividing line between sufficiency and insufficiency be arbitrary, and therefore unacceptable?

This concern is understandable, but ultimately of little consequence. The problem of vagueness is familiar, in its nature and degree, across many areas of the law. To begin, consider Bertrand Russell's observation that to one degree or another, "all language is vague.[166] If we are to have legal language, especially at the level of broad constitutional principles, some degree of vagueness is both tolerable and inevitable.[167]

Still, it may be disturbing to think of some specified level of literacy as sufficient, but a level only slightly lower as insufficient, with important implications flowing from the minimal differences between these two neighboring levels. But this is again a familiar sort of tolerable vagueness. Philosophers have long referred to the sorites problem[168] when any chosen

[163] For reference to the comparative dimensions of education, see Liam Shields, Anne Newman & Debra Satz, *Equality of Educational Opportunity*, STAN. ENCYC. OF PHIL. (May 31, 2017), https://plato.stanford.edu/entries/equal-ed-opportunity.

[164] Increasing the numbers of literate persons might have adverse competitive effects on anyone who is still denied an opportunity for literacy. In any such case, the moral claim of those still denied such an opportunity is further strengthened. Those still denied a literacy opportunity should be compensated for such a denial, as through redistribution of income, wealth, and other opportunities. For further discussion, *see* Robert Huseby, *Sufficientarianism*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (William R. Thompson ed., 2019); Robert Huseby, *Sufficiency and the Threshold Question,* 24 J. ETHICS 207, 207 (2020); Larry S. Temkin, *Equality, Priority, Or What?*, 19 ECON. & PHIL. 61, 65 (2003) (rejecting the claim that "once people are 'sufficiently' well off there is no reason to give priority to a worse-off person over a better-off person"). Finally, we need take no position on 'triage' questions, such as whether those 'closest' to sufficient literacy, or those 'furthest' from sufficient literacy, should be helped first, or with greater efforts. Maximizing the number of persons just barely above sufficient literacy is certainly one option, but other concerns may come into play. *See, e.g.*, Paula Casal, *Why Sufficiency Is Not Enough*, 117 ETHICS 296, 298 (2007).

[165] *See, e.g.*, Casal, *supra* note 164, at 312–14; Shlomi Segall, *What Is the Point of Sufficiency?*, 33 J. APPLIED PHIL. 36, 36 (2016) (noting critiques of "the arbitrary location" of any designated threshold of sufficiency).

[166] Bertrand Russell, *Vagueness*, 1 AUSTRALASIAN J. PHIL. 84, 84 (1923). *See generally* Matti Eklund, *Recent Work On Vagueness*, 71 ANALYSIS 352 (2011); TIMOTHY WILLIAMSON, VAGUENESS (1996).

[167] For some vague limits, see Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926).

[168] The sorites problem can be understood through the example of the gradations between someone who is clearly bald, and someone who is clearly not bald. We naturally assume that a person who is not bald does not become bald through the loss of a single hair. And there is no conspicuous difference between the non-bald person with n-1 hairs, and a person with n-2 hairs. And so on, indefinitely. But at some point, the person in question can be described as bald, with no dramatic transition point. Yet we still manage, in practice, with the ideas of baldness and non-baldness. *See generally* Eklund, *supra* note 166,

dividing line has similar cases on both sides of that line.[169] But we have no realistic alternative to placing such dividing lines according to our interests and purposes.

Thus, for example, we set voting age minimums,[170] even though adopting a slightly different voting age will always have substantial evidence in its favor. Even if we did not set a uniform voting age and instead granted the franchise on some other basis, we would still have to draw arbitrary lines among similar persons.

Similarly, the constitutional requirement that the President occasionally communicate the State of the Union[171] is also open to the sorites problem.[172] At some point on the broad spectrum between submitting a detailed annual document and sending merely a single ambiguous emoticon, we might well say that the President's effort is insufficient to comply with the State of the Union message requirement.

More broadly, at some inevitably vague point, we would also reasonably say that a President's efforts in taking care that a law is being faithfully executed[173] is legally insufficient.[174] At some point, reducing the legal procedures used by the government in resolving a given dispute becomes insufficient process, rather than due process.[175] Or we might ask how much evidence is sufficient to survive a directed verdict motion, beyond mere references to reasonableness.[176] We might also ask how much assistance of counsel is minimally sufficient, in the sense of reasonably effective,[177] either in general or in a given case.

These examples of inevitable and tolerated vagueness in constructing basic legal categories could be multiplied indefinitely. The courts should resolve questions of legal sufficiency and insufficiency in context, as there is no such thing as sufficiency in the abstract. Nor, more specifically, is there such a thing as sufficient literacy in the abstract. Below, we consider the crucial problem of insufficient literacy for the specific purpose of justifying a legal regime as morally binding, legitimate, and authoritative with respect to those persons denied literacy.

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at 352; Dominic Hyde & Diana Raffman, *Sorites Paradox*, STAN. ENCYC. OF PHIL. (Mar. 26, 2018), https://plato.stanford.edu/entries/sorites-paradox. Otherwise formulated, but at least equally useful, is Larry Alexander, *Scalar Properties, Binary Judgments*, 25 J. APPLIED PHIL. 85 (2008).

[169] *See* the authorities cited *supra* note 171.

[170] *See, e.g.*, U.S. CONST. amend. XXVI § 1.

[171] *See* U.S. CONST. art. II, § 3. This is not to suggest that any such dispute would be justiciable.

[172] *See supra* note 171 and accompanying text.

[173] *See* U.S. CONST. art. II, § 3.

[174] *See generally, e.g.*, Dep't of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891 (2020); Heckler v. Chaney, 470 U.S. 821 (1985).

[175] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333–35 (1976) (introducing the vague three factor balancing test).

[176] *See* FED. R. CIV. P. 50(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–52 (1986).

[177] See, for example, the statutorily superseded case of Strickland v. Washington, 466 U.S. 668 (1984). For a broader survey, see Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C.L. REV. 425 (2011).

IV. LITERACY AND LEGAL OBLIGATION

Out of the materials discussed above, one could easily construct a case for a federal constitutional right to literacy, but that is not our direct aim. Instead, our aim is to point out one important implication of our current state of affairs. We begin with the broad premise that sufficient opportunity for sufficient literacy can be relevant to whether the parties involved have a morally binding obligation to comply with the dictates of any otherwise legitimate legal regime.

Briefly put, access to literacy is necessary if the legal regime is to hold authority with respect to those persons denied such access. Crucially, persons are—on mainstream theories of legal obligation—not morally bound[178] to recognize the authority of the legal regime if they have been denied access to minimal literacy.[179] Recognizing this truth would be valuable in itself for understanding what fairness requires and for promoting other valuable ends. Among the latter, certainly, could be enhancing opportunities for literacy and recognition of a federal constitutional right to such an opportunity.

The idea of a moral obligation to obey thus focuses on whether persons have a sufficient reason, on some valid theory, to do as the regime directs, apart from any reasons that do not assume the morally binding authority of that regime.[180] A regime may lack legitimate authority over some persons even if the regime prohibits some unjustifiable acts or promotes some instances of mutually beneficial coordination among persons.[181]

Historically, a number of distinct approaches to the question of legal obligation, authority, and legitimacy have maintained some prominence.[182] Most such approaches can be traced back at least to the time of Socrates.[183] Prominent among the approaches referred to by Socrates is that of an obligation to obey the regime based on one's proper gratitude for benefits received from that regime.[184] Not surprisingly, education is among the gifts from the state referred to by Plato's depiction of Socrates.[185] Socrates has the personified Laws of Athens argue that "since you were brought into the

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[178] That is, even prima facie or presumptively bound, as distinct from absolutely or conclusively morally bound. *See generally* DAVID ROSS, THE RIGHT AND THE GOOD (Philip Stratton-Lake ed. 2004) (1930).

[179] This follows again on mainstream theories of obligation, even if the regime is entirely admirable and legitimate in other respects. And there are of course always moral reasons for everyone's engaging in pro-social acts, and avoiding anti-social acts, whether the legal regime is legitimate, in general or with respect to any persons or groups. *See generally* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970).

[180] *See id.* Thus one is not necessarily endorsing a legal regime's authority in one's not murdering others, or even in driving with reasonable concern for the safety of others, if one is motivated primarily by considerations that do not rely upon the moral legitimacy of the regime. *See generally* John M. Finnis, *Law as Co-ordination*, 2 RATIO JURIS 97 (1989); Matthias Brinkman, *Coordination Cannot Establish Political Authority*, 31 RATIO JURIS 46 (2018).

[181] *See* Brinkman, *supra* note 180, at 46.

[182] For a broad survey of the major theories, see generally R. GEORGE WRIGHT, LEGAL AND POLITICAL OBLIGATION: CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY (1992). For present purposes, we neither endorse nor critique any such theory on the merits.

[183] *See* PLATO, EUTHYPHRO, APOLOGY, CRITO, PHAEDO, THE DEATH SCENE (F.J. Church rev. trans., 1956) (c. 399 B.C.E.).

[184] *See id.* at 60. For a recent discussion citing contemporary literature, see Terance McConnell, *Gratitude, Rights, and Moral Standouts*, 20 ETHICAL THEORY & MORAL PRAC. 279 (2017); *see also* A.D.M. Walker, *Political Obligation and the Argument from Gratitude*, 17 PHIL. & PUB. AFF. 191, 191–211 (1988).

[185] *See* PLATO, *supra* note 183, at 60 [Steph. p. 50].

world and raised *and educated* by us, how . . . can you deny that you are our child and our slave . . . ?"[186]

Any theory of legal obligation[187] will inevitably be subject to reasonable critique. Our interest in the family of gratitude-based theories focuses merely on the idea that an education, as provided by the regime itself, is of central importance. In the case of Plato's depiction of Socrates, it might be possible to argue that Athens provided a valuable education that allowed Socrates to flourish, to realize his crucial capacities, and even to constitute his very identity. Perhaps complying with the edicts of the regime might, in Socrates's case, be an appropriate expression of gratitude.

But those circumstances are far removed from those of, say, the plaintiffs in *Gary B.*[188] Consider the assertion in *Gary B.* that "[p]laintiffs sit in classrooms where not even the pretense of education takes place."[189] The "schools in name only"[190] are said to "wholly lack the capacity to deliver basic access to literacy, functionally delivering no education at all."[191] Yet the plaintiffs were legally required to attend such schools,[192] given the unavailability, for many, of better alternatives. Assuming this denial of any realistic opportunity[193] for basic literacy, gratitude theory is hardly in any position to establish a moral obligation on the part of those denied such opportunities to adhere to the regime's dictates.[194]

Theories of obligation, though, often center on something like fairness, fair opportunities, or reciprocity, rather than on gratitude.[195] In one prominent approach to a fairness theory,[196] the goods and services in question must be sufficiently worth providing,[197] be "indispensable for satisfactory lives,"[198] and involve a fair distribution of burdens and benefits.[199] Consider, on this basis, whether persons in circumstances akin to those in *Gary B.* would typically be morally bound by a fairness account of legal obligation.

For these purposes, we may assume that some level of literacy and other dimensions of education could count, perhaps along with personal security

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[186] *Id.* (emphasis added). *See generally* DUDLEY KNOWLES, POLITICAL OBLIGATION: A CRITICAL INTRODUCTION 138 (2010).

[187] Including the "negative" view that no such prima facie moral obligation ever holds.

[188] *See* the educational settings and conditions referred to *supra* notes 65–86.

[189] *See supra* text accompanying note 66.

[190] *See supra* text accompanying note 67.

[191] *See supra* text accompanying note 68.

[192] *See supra* text accompanying note 89.

[193] That is, apart from any state constitutional proclamations of a right to education and in the absence of realistic alternatives to local public schools. Literacy obtained through a private, rather than public, school might not suffice to ground any moral obligation based on gratitude to recognize the regime's supposed binding authority.

[194] It remains technically possible that a state might deny minimal opportunity for literacy to particular groups of people, while at the same time conferring benefits on such persons of such magnitude—perhaps greater than on the educationally privileged—as to establish regime legitimacy through a gratitude theory. Given the correlations between denial of literacy and disfavored statuses in other dimensions of civic life, such as sheer physical security, this avenue does not seem at all promising.

[195] Fairness or reciprocity, perhaps along with gratitude, is one possible interpretation of the theory set forth in JOHN STUART MILL, ON LIBERTY ch. IV, at 141 (Gertrude Himmelfarb ed., 1974) (1859). *See also* George Klosko, *The Principle of Fairness and Political Obligation*, 97 ETHICS 353 (1987); A. John Simmons, *The Principle of Fair Play*, 8 PHIL. & PUB. AFF. 37 (1979); JOHN RAWLS, A THEORY OF JUSTICE 342–43 (rev. ed. 1999) (1971).

[196] *See* GEORGE KLOSKO, POLITICAL OBLIGATIONS (2005).

[197] *See id.* at 6.

[198] *Id.*

[199] *See id.*

and other goods, as sufficiently worth providing.[200] Some sufficient degree of education may often be necessary for flourishing and even for a satisfactory life.[201] But that leads directly into the crucial problem: for there to arise a moral obligation of regime obedience on a fairness theory, there would then also have to be a sufficiently fair distribution of the benefits of education.[202]

The problem here is that for persons in *Gary B.*'s circumstances, anything even loosely resembling a sufficient and minimally fair distribution of education opportunity is remote, if not receding.[203] Some contemporary students have realistic access to education opportunities, within or beyond institutional school settings, that facilitate full educational development. Other students, as in *Gary B.*, through no fault of their own[204] could hardly be more adversely situated with regard to basic educational opportunities. To find fairness in the current distribution of vital basic educational opportunity would be to impeach the credibility of fairness theories of obligation themselves.

There remain several alternative theories of legal obligation. Rather than attempt to survey them all,[205] to ultimately similar effect, let us focus on the most currently influential versions of the family of social contract theories of obligation. Again, the aim is not to endorse or critique any particular approach to legal obligation. Rather, the idea is that on such mainstream approaches, those denied any opportunity for minimal literacy bear no moral obligation to the established legal regime.

One form or another of the family of social contract theories of legal obligation has been prominent for millennia.[206] The best-known modern version is perhaps that of John Locke.[207] However, the most currently influential social contract theory, broadly understood, is that of John Rawls.[208] A survey of Rawls's loosely contractarian "original position"[209] is beyond the scope of our concerns. All we need, though, is a sense of what Rawls assumes regarding the most relevant capacities of all those who may

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[200] *See supra* text accompanying note 197.

[201] *See supra* text accompanying note 198. *See also* the cases cited throughout Section II conceding the vital practical importance of education.

[202] *See supra* text accompanying note 199. *See also* RAWLS, *supra* note 195, at 343–43.

[203] *See, e.g.*, Emily Oster, *Private 'School Pods' Are Coming. They'll Worsen Inequality*, WASH. POST (July 23, 2020, 3:00 AM), https://www.washingtonpost.com/outlook/2020/07/23/pods-school-private-online-education-inequality.

[204] For elaboration of some underlying considerations, see Peter Vallentyne, *Brute Luck, Option Luck, and Equality of Initial Opportunities*, 112 ETHICS 529, 529–57 (2002).

[205] Note, though, that contemporary natural law theories of legal obligation typically link legitimate legal authority to, among other considerations, the pursuit of some form of a "common good" that need not track majority preferences. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154, 359–60 (2d ed. 2011) (focusing on promoting an inclusive common good and the several underlying basic human goods, specifically including the good of knowledge, by means that impose no unjust or inequitable burden on particular persons or groups). *See also* JONATHAN CROWE, NATURAL LAW AND THE NATURE OF LAW 114, 130–31 (2019) (noting the indispensability of education to the pursuit of the basic human goods, while recognizing "significant inequalities in access to education . . . in contemporary democracies").

[206] See the largely incoherent invocation of a social contract theory in the context of PLATO, *supra* note 183, at 59–60.

[207] *See* JOHN LOCKE, *Second Treatise*, *in* TWO TREATISES OF GOVERNMENT ch. II, § 15, at 318 (Peter Laslett rev. ed. 1963) (1678) (persons as in a "state of nature" "till by their own Consents they make themselves Members of some Politick Society").

[208] *See* RAWLS, *supra* note 195, at 15–16, 92, 120, 122–23.

[209] For a standard account thereof, see SAMUEL FREEMAN, RAWLS 141–97 (2007).

choose to enter into the process of developing the Rawlsian social contract. We focus, in other words, on what Rawls's theory presupposes of the potentially contracting parties.

Rawls famously rules out any knowledge of or ability to leverage any arbitrary advantages conferred on us by our own natural and social circumstances.[210] The Rawlsian "original position" may not involve any interpersonal bargaining, or any real negotiation, at all.[211] But there are some indispensable qualities that nonetheless must be held by any Rawlsian contractor.

For our purposes, it is crucial that for Rawls, all such potentially contracting parties must be rational[212] persons who are also capable of ranking,[213] and rationally choosing[214] from, a range of abstract, broadly formulated potential principles.[215] The Rawlsian potential contractors are presumed to be not only rational, but equally so.[216] They are also presumed to have access to, and the ability to process and apply, all the general information (including basic facts about the world) necessary to rationally choose between alternative general principles of justice.[217]

Whether Rawls is well-justified in making these assumptions is again not our concern. The point, rather, is that Rawls's theory joins those referred to above[218] in leaving persons denied basic literacy or other minimal educational opportunity outside the scope of any binding moral obligation to accept the regime as a legitimate authority. Whatever the substantive principles of justice that Rawlsian contractors might adopt, one simply cannot meet the requirements to be a contracting party in the first place if one has been denied the educational opportunities of basic literacy, and any form of education that depends upon basic literacy. Persons who have been denied minimal educational opportunity cannot, in general, possibly meet what Rawls assumes to be necessary for meaningful participation in the choice of the most basic principles of justice.

This is not to say that the ultimately chosen basic principles of justice could not, at some level, incorporate a fair opportunity for literacy.[219] Perhaps

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[210] Thus the 'veil of ignorance,' as referred to in RAWLS, *supra* note 195, at 17, 120–23.
[211] *See id.* at 120–21.
[212] *See id.* at 16.
[213] *See id.* at 16, 123.
[214] *See id.* at 16.
[215] *See id.* at 15–16.
[216] *See id.* at 120–22.
[217] *See id.* at 16, 123. *See generally* FREEMAN, *supra* note 209, at 141–97. Among the actual substantive principles thought by Rawls to be worthy of adoption, at a fairly specific level, is a recognition of the value of education. Thus Rawls argues that "resources for education are not to be allotted solely or necessarily mainly according to their return . . . in productive trained abilities, but also according to their worth in enriching the personal and social life of citizens, including [] the less favored. As a society progresses the latter consideration becomes increasingly more important." RAWLS, *supra* note 208, at 92. More or less analogous assumptions underlie Jurgen Habermas's discourse ethics. *See, e.g.*, Jurgen Habermas, *Discourse Ethics: Notes On a Program of Philosophical Justification*, *in* THE COMMUNICATIVE ETHICS CONTROVERSY 60, 86 (Seyla Behabib & Fred Dallmayr eds., 1990) (presuming a universally inclusive ongoing conversation on the basis of free, equal, open, undominated, and uncoercive dialogic interaction).
[218] *See supra* notes 195–205 and accompanying text.
[219] *See supra* note 217, as well as Rawls's broader concern for fairness and equality in basic life opportunities for pursuing basic social goods. On educational opportunities and fairness in particular, see T.M. SCANLON, WHY DOES INEQUALITY MATTER? 58–59 (2018). Scanlon's broader contractarianism

any reasonable set of chosen basic principles of justice would indeed incorporate a universal, meaningful opportunity for literacy. That would certainly be commendable. But reaching any such consensus, on Rawls's theory, presupposes that all contracting parties possess capacities that are denied to, for example, the plaintiffs in the *Gary B.* case.[220] Such persons cannot enter into, and thus cannot be morally bound by, any Rawlsian social contracting process.

Nor can Rawls's prerequisites to socially contracting be weakened to avoid this result. Persons who have been denied the opportunity for literacy cannot even hypothetically be magically granted literacy; knowledge of the world; or a grasp of general abstractions without, in effect, being changed into a completely different person. Their priorities, interests, and values might well be completely different. The hypothetical literate version of an illiterate person is, as well, not the authorized contracting agent of that illiterate person. Nor, finally, is there any theory of merely partial legal authority over persons whose opportunity for literacy was insufficient but is somehow judged to be fairly close to sufficient.[221]

V. CONCLUSION

In sum, then, the major contemporary theories of legal obligation do not treat the deprivation of an opportunity for basic literacy as merely a possible rights violation, or even as a constitutional-level deprivation of a fundamental right. We do not normally think of victims of constitutional rights violations as beyond the scope of any prima facie moral obligation to obey the law. The logic of legal obligation establishes not merely that involuntary illiteracy is a possible rights violation, but also an exclusion from formal membership in the legal community.[222] Under the circumstances, this exclusion means that, according to mainstream theories, the parties excluded from fundamental educational opportunities generally bear no morally binding prima facie obligation to obey the dictates of the legal regime. This crucial consequence must be taken into account when we think about a possible federal constitutional right to an education.

follows Rawls in assuming the ability of potential contractors to engage in abstract conceptualizing about broad principles. *See* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 5 (rev. ed. 2000).

[220] *See supra* Section II.B.

[221] That is, we have no clear sense of what it would mean to be, say, 80% capable of the minimum Rawlsian requirements, or to be therefore 80% bound by any resulting social contract. The closest the law seems to come to any such possibilities, by remarkably loose and distant analogy, might be the doctrine of necessaries, by which a minor who is able to generally disaffirm a contract may still have some obligation to pay for vital goods and services with which they have been supplied. *See, e.g.*, E. ALLEN FARNSWORTH, 1 FARNSWORTH ON CONTRACTS § 4.5, at 450–51 (3d ed. 2004).

[222] As distinct from a person's choosing to leave a legal community, or committing some act of war, insurrection, or treason against the legal regime.