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# Beyond Disability Civil Rights

## **Abstract**

[Excerpt] This Article argues that to be effective, both domestic and international disability rights must adopt a disability human rights paradigm. Such a framework combines the type of civil and political rights provided by antidiscrimination legislation (also called negative or first-generation rights) with the full spectrum of social, cultural, and economic measures (also called positive or second-generation rights) bestowed by many human rights treaties.<sup>16</sup> By acting holistically, this agenda accounts for factors normally exogenous to civil rights laws and ensures that individuals can flourish and participate in their societies. Accordingly, our intention is to share some thoughts on how to best provide disabled citizens with equal opportunity rather than “merely” equal treatment. Internationally, States and civil society organizations have been developing innovative and effective equality measures. We draw on their experiences in providing examples of how disability legislation and policy can be developed to implement a more holistic human rights approach. These lessons are also pertinent for invigorating the ADA.

## **Keywords**

disability, disability rights, human rights, discrimination, public policy. Americans with Disabilities Act, ADA

## **Comments**

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# Beyond Disability Civil Rights

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## INTRODUCTION

About 10% of the world's population, some six hundred million people, has a disability.<sup>1</sup> Disabled persons nevertheless account for 20% of the world's poorest individuals, a phenomenon that exists across developing and developed countries.<sup>2</sup> These impoverished conditions persist despite efforts by American and international disability rights advocates to ensure the equality of people with disabilities, as evidenced by the growing number of countries that have enacted disability-related legislation.<sup>3</sup> Unfortunately, the continuing economic inequities and social exclusion of disabled persons worldwide severely calls into doubt the efficacy of these efforts. It also begs the question of whether any country adequately protects its disabled citizens.

Historically, disability rights advocates have used the social model of disability to fight for equal treatment. At the forefront of this endeavor, American advocates expressed the social model of disability through a civil rights prism whose tenets paralleled earlier advocacy on behalf of people of color and women.<sup>4</sup> Their most significant result was the 1990 promulgation of the Americans with Disabilities Act ("ADA"), prohibiting disability-based discrimination.<sup>5</sup> As an exemplar of the social model, the ADA has played a leading role in developing disability law

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Valuable feedback was received at Harvard, Northeastern, and Renmin workshops.

1. THE SECOND ANNUAL REPORT ON THE IMPLEMENTATION OF THE USAID DISABILITY POLICY 2 (2000), available at [http://pdf.dec.org/pdf\\_docs/PDABT610.pdf](http://pdf.dec.org/pdf_docs/PDABT610.pdf).

2. *Id.*

3. See Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, in *DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES* 3, 122–24 (Mary Lou Breslin & Sylvia Yee eds., 2002) (providing a catalogue).

4. See generally JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* (2003).

5. 42 U.S.C. § 12101 (2000).

outside the United States, with more than forty countries adopting formulations of the statute.<sup>6</sup>

Yet despite its laudable achievements, the ADA contains design and implementation shortcomings. The legislation is unable to adequately protect Americans with disabilities in many aspects of their lives. Even ADA proponents admit that the statute has not engendered noteworthy improvements in the employment sphere.<sup>7</sup> Consequently, people with disabilities remain socially marginalized and mired in poverty.<sup>8</sup> Perhaps most trenchantly, as a practical matter, disabled Americans continue to be excluded from the fundamental right of voting.<sup>9</sup> In sum, despite many positive affects American disability civil rights legislation has not—and structurally cannot—bring about equality on their own.

Furthermore, the *exclusive* focus of American disability rights advocates on the civil rights aspect of disability law and policy is ultimately counter-productive. The efficacy of any law depends on considerations beyond its mere existence. This is especially true for civil rights laws seeking to prevent discrimination against a targeted group; legislation needs to transform society's institutional structures and attitudes towards marginalized individuals if they are to be treated equally. Because the ADA does not account for exogenous affects, the civil and political rights of disabled Americans, including those contained in the ADA, are far from protected.

Nevertheless, American legal scholarship on disability law and policy remains almost exclusively grounded in traditional civil rights discourse.<sup>10</sup> Establishing disability's role within the larger canon of antidiscrimination law is a commendable form of advocacy. American courts and legal commentators continue to resist the notion that the ADA is the same in kind as more traditional civil right legislation, notably Title VII of the Civil Rights Act of 1964 (Title VII).<sup>11</sup>

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6. See Degener & Quinn, *supra* note 3.

7. See generally THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (David C. Stapleton & Richard V. Burkhauser eds., 2003) (providing econometric studies and policy essays).

8. For example, the 2005 employment rate among working age people with disabilities was 38%, and the poverty rate among the same group was 25%. CORNELL UNIV., REHAB. RESEARCH AND TRAINING CTR. ON DISABILITY DEMOGRAPHICS AND STATISTICS, 2005 DISABILITY STATUS REPORTS, at Summary, available at [http://www.ilr.cornell.edu/edi/disabilitystatistics/StatusReports/2005-pdf/2005-StatusReports\\_US.pdf?CFID=21113391&CFTOKEN=85573403](http://www.ilr.cornell.edu/edi/disabilitystatistics/StatusReports/2005-pdf/2005-StatusReports_US.pdf?CFID=21113391&CFTOKEN=85573403).

9. See Michael Waterstone, *Civil Rights and the Administration of Elections—Toward Secret Ballots and Polling Place Access*, 8 J. GENDER RACE & JUST. 101, 104 (2004) (arguing that Americans with disabilities do not have equal access to a “secret and independent ballot, and voting in a polling place,” which are “hallmarks of an effective and informed right to vote”).

10. This assertion can be verified by comparing the thousands of articles published by United States law journals on various aspects of the ADA to the relative handful that address comparative issues.

11. 42 U.S.C. § 2000e (2000).

Consequently, explaining why disability rights are part and parcel of the larger civil rights oeuvre may help judges, as well as society at large, to a truer appreciation of the notions underlying the ADA.<sup>12</sup> The self-referential emphasis can also be understood as a by-product of the significant role that the ADA has played in the United States and internationally in developing disability law. Indeed, on the rare occasions when American legal academics consider disability law from a comparative approach, they suggest the ADA as a model for improving foreign measures relating to disability.<sup>13</sup>

However, given the structural flaws inherent in the ADA and the consequences of those shortcomings, an alternative approach to civil rights is required for the future development of disability law and policy. Within the human rights realm, steps have been taken to protect individuals with disabilities on both the domestic and international levels.<sup>14</sup> Most immediately, the forthcoming United Nations Convention on the Rights of Persons with Disabilities (UN Disability Rights Convention) will require States to ensure statutory protection for their disabled populations and to formulate implementation policies.<sup>15</sup> Hence, it is imperative to identify good legislative practices that can be used as models by States, especially for the majority that lack domestic disability-related measures. Further, problems with current legislation, including those associated with the ADA, must be identified to avoid repeating missteps and to aid future implementation.

This Article argues that to be effective, both domestic and international disability rights must adopt a disability human rights paradigm. Such a framework combines the type of civil and political rights provided by antidiscrimination legislation (also called negative or first-generation rights) with the full spectrum of social, cultural, and economic measures (also called positive or second-generation rights)

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12. See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 585 (2004) (arguing that ADA accommodations are an appropriate, reasonable, and well allocated antidiscrimination device).

13. See, e.g., Eric A. Besner, Comment, *Employment Legislation for Disabled Individuals: What Can France Learn from the Americans with Disabilities Act?*, 16 COMP. LAB. L.J. 399, 412–20 (1995); Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 LAW & SOC. INQUIRY 723, 723 (2002).

14. Most prominently by United Nations soft laws and resolutions that contain aspirational statements but lack legal enforceability. See Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 82–83 (2007).

15. G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007). The treaty was adopted by general consensus at the United Nations on December 13, 2006, and became open for signatures by States parties on March 30, 2007. *Id.* Updated information about the treaty is available at <http://www.un.org/esa/socdev/enable/index.html>. The text of the Convention on the Rights of Persons with Disabilities [hereinafter UN Disability Rights Convention] is available at <http://www.un.org/esa/socdev/enable/documents/tccconve.pdf>.

bestowed by many human rights treaties.<sup>16</sup> By acting holistically, this agenda accounts for factors normally exogenous to civil rights laws and ensures that individuals can flourish and participate in their societies. Accordingly, our intention is to share some thoughts on how to best provide disabled citizens with equal opportunity rather than “merely” equal treatment. Internationally, States and civil society organizations have been developing innovative and effective equality measures. We draw on their experiences in providing examples of how disability legislation and policy can be developed to implement a more holistic human rights approach. These lessons are also pertinent for invigorating the ADA.

The Article proceeds as follows: Parts I and II briefly overview the origins, moral salience, and limitations of the social model’s disability civil rights agenda. Next, Part III advocates for a more integrated, human rights-based approach to disabled empowerment based on a disability human rights paradigm as exemplified by the forthcoming UN Disability Rights Convention. Finally, Part IV briefly illustrates how international practices, in line with a disability human rights based framework can facilitate the development of more effective disability legislation and policy.

### I. DISABILITY RIGHTS AS CIVIL RIGHTS

Historically, society viewed persons with disabilities through a medical model that considered “handicapped” individuals as naturally excluded from mainstream culture. Due to this medical based pathology disabled persons have been either systemically excluded from social opportunities, as in the case of receiving social welfare benefits in lieu of employment, or have been accorded limited participation in those opportunities, for example by having their education circumscribed to separate schools.<sup>17</sup>

In contrast to a medical model, disability rights advocates have argued for a social model of disability. According to this view, the constructed environment and the attitudes that it reflects play a central role in creating what society labels as “disability.” Thus, factors external to a person’s impairments determine how disabled that individual will be

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16. Broadly stated, first generation rights are thought to include prohibitions against State interference with rights that include life, movement, thought, expression, association, religion, and political participation. They are often referred to as “negative rights.” Second generation rights focus on basic standards of living that States must ensure, such as the availability of employment, housing, and education. These are frequently thought of as “positive rights.”

17. See Kenny Fries, INTRODUCTION TO STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT 1, 6–7 (Kenny Fries ed., 1997) (noting that “this view of disability . . . puts the blame squarely on the individual”); CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT 11 (1988) (averring that the “medical/pathological paradigm” of disability, which stigmatizes the disabled by conditioning their inclusion only “on the terms of the ablebodied majority”).

from functioning in a given society.<sup>18</sup> A blunt version of the social model is that of feminist disability rights advocate Susan Wendell, who avers that “the entire physical and social organization of life” has been created with the able-bodied in mind.<sup>19</sup> A more nuanced description is by philosopher and disability rights commentator Anita Silvers.<sup>20</sup> She argues that being biologically anomalous is only viewed as abnormal due to unjust social arrangements, most notably the existence of a hostile environment that is “artificial and remediable” as opposed to “natural and immutable.”<sup>21</sup>

The social model has become the dominant theme advanced by the disability rights movement. American disability rights proponents view discriminatory attitudes toward disabled citizens as the key obstacle to social inclusion;<sup>22</sup> thus, they have pursued an antidiscrimination approach modeled after previous civil rights statutes, most notably Title VII.<sup>23</sup> We refer to these antidiscrimination aspirations collectively as the disability civil rights agenda.

Beginning in the 1970s, the disability civil rights agenda progressively influenced United States legislation towards the social model of disability.<sup>24</sup> A primary example is the Rehabilitation Act, which prohibits recipients of federal funds from discriminating against disabled persons.<sup>25</sup> At the same time, these instruments continued certain medical model notions by determining that individuals are disabled due to “special” medical problems and were therefore dependent on social

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18. As explained by one of the originators of the theory, the social model is based on three major postulates: (1) the primary problems faced by disabled persons stem from social attitudes rather than from functional limitations; (2) all facets of the man-made environment are shaped or molded by public policy; and (3) in a democratic society, public policies represent prevailing public attitudes and values.

Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN'S STUD. 97, 105 (1994).

19. SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 39 (1996).

20. See Anita Silvers, *Formal Justice*, in *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 13, 75 (Anita Silvers et al. eds., 1998).

21. *Id.*

22. See, e.g., Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825, 830 (2003) (equating, on moral grounds, intentional disability exclusion with other forms of disparate treatment); Stein, *supra* note 12 (demonstrating that disability-based exclusion is based on many, previously defeated, social conventions regarding women and people of color).

23. See generally Robert L. Burgdorf Jr., “*Substantially Limited*” *Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 417–18 (1997) (describing attempts to amend Title VI and Title VII of the Civil Rights Act of 1964 to include a prohibition against discrimination on the basis of physical or mental disability).

24. The title of sociologist Richard Scotch's classic story of the disability rights movement concisely sums up this dynamic: RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS* (2d ed. 2001).

25. 29 U.S.C. § 794 (2000).

services and institutions. Any ambivalence was firmly settled by the 1990 Congressional enactment of the ADA, which signaled the social model's legislative victory in the United States.<sup>26</sup> Congress recognized the historical exclusion of disabled persons from society and characterized this segregation as artificial, sustained by the "continuing existence of unfair and *unnecessary* discrimination and prejudice."<sup>27</sup> As an antidiscrimination statute, the ADA entitles people with disabilities to be treated equally to the general population.

The American disability rights movement has strongly influenced its international counterparts to mobilize for equality as expressed through the social model's precepts. The results are demonstrated by the 1980s passage of United Nations proclamations<sup>28</sup> and soft laws.<sup>29</sup> Perhaps the most notable among these is the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.<sup>30</sup> None of these measures, however, are legally binding.

Encouraged by the ADA's passage, international advocates have increasingly sought legally binding domestic approaches to protect disabled citizens. Frequently, they have drawn on the ADA's provisions as a template.<sup>31</sup> In consequence, many of these statutes are grounded in antidiscrimination theory. Yet despite its popularity as a framework one must approach the ADA as an exemplar with a good deal of caution. That the statute has not lived up to its aspirations for improving the lives of disabled Americans suggests that it is time to consider the limitations of the civil rights approach. It also suggests there is much to learn from an international, more expansive notion of equality and rights.

## II. SOCIAL MODEL/CIVIL RIGHTS LIMITATIONS

The disability civil rights agenda has exerted a powerful influence in

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26. Richard K. Scotch, *Making Change: The ADA as an Instrument of Social Reform*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 275, 275 (Leslie Pickering Francis & Anita Silvers eds., 2000).

27. 42 U.S.C. § 12101(a)(2), (9) (2000) (emphasis added).

28. See, e.g., G.A. Res. 37/53, ¶ 11, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/53 (Dec. 3, 1982) (declaring 1983–1992 as the International Decade of Disabled Persons); G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/52 (Dec. 3, 1982) (announcing 1981 as the International Year of the Disabled).

29. Most significantly, the General Assembly adopted a World Programme of Action concerning Disabled Persons to encourage the development of national programs directed at achieving equality for persons with disabilities. G.A. Res. 37/52, ¶ 1, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/52 (Dec. 3, 1982).

30. G.A. Res. 48/96, ¶ 1, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/96 (Dec. 20, 1993). Enacted in the same year as the Standard Rules, and also worthy of note, is the Vienna Declaration and Programme of Action, which broadly defines prohibited barriers as any "physical, financial, social or psychological" obstacles that "exclude or restrict full participation in society." World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶64, U.N. Doc A/CONF.157/23 (July 12, 1993).

31. See Degener & Quinn, *supra* note 3, at 20–21.

revising legal regimes affecting disabled persons. These measures are crucial but limited. Because social model advocacy is grounded exclusively in formal equality notions, legislatures have promulgated civil rights protection; by definition these antidiscrimination prohibitions do not encompass positive rights such as equality measures. Put another way, civil rights are directed at ensuring equal treatment but not equal opportunity. As a result, the ADA and similarly formulated statutes are not adequately empowered to bring about disabled citizens' full social inclusion.

Disability rights advocates have successfully invoked the social model's view that disability-related exclusion is an avoidable and remediable social construct. Their influence is clearly reflected in the ADA's legislative history. Congress was presented with a catalog of evidence on the historical exclusion of people with disabilities from American society.<sup>32</sup> As a result of that testimony Congress was persuaded that the overall status of disabled Americans was dismal, concluding that the group had historically been "relegated to a position of political powerlessness in our society" and "continually encounter[s] various forms of discrimination."<sup>33</sup> Congress, moreover, concluded that this exclusion arose from unwarranted prejudice.<sup>34</sup> Hence, the ADA was premised on the social model's belief that peoples' functional limitations are caused by the socially constructed environment, such that the repercussions of having a disability are mutable.<sup>35</sup>

However, despite the success of disability rights advocates in invoking the social model, the full inclusion of a socially marginalized group requires invoking both negative and positive rights; antidiscrimination prohibitions can prospectively prevent prejudicial harm, while equality measures are needed to remedy inequities that exist due to past practices. Moreover, failing to counteract the unequal position of people with disabilities perpetuates their social stigma and the attitudes that maintain subordination. Thus, employment-related antidiscrimination prohibitions are only effective when linked with equality measures (such as hiring preferences) that alter workplace hierarchies and cultures.<sup>36</sup>

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32. Congress summarized its conclusions as to this evidence in the ADA's Findings section. 42 U.S.C. § 12101.

33. *Id.* § 12101(a)(5), (7).

34. *Id.* § 12101(a)(3).

35. See generally Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 Soc. Sci. J. 87 (1985). But see Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. (forthcoming 2007) (averring that the social model "has no policy implications").

36. Parenthetically, one group of academic commentators claims that, from a legal point of view, nothing can be done regarding entrenched workplace culture and attendant race- and sex-based biases in the United States. See, e.g., Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA

Unfortunately, the disability civil rights agenda has not embraced both first- and second-generation rights. This is because the social model has been proscribed to a rigid concept of formal justice that narrowly treats similarly situated people as alike. And so long as the extent of disabled versus non-disabled equality is assessed in terms of sameness, it cannot adequately account for programs seeking to raise the group to an equal level through treatment that is more than equal. By limiting itself to the boundaries of the social model, the disability civil rights agenda has neglected these complementary means of institutional restructuring. In consequence, although the social model seeks to remove institutional barriers, a central means of achieving that goal has been neglected.

The disability civil rights agenda's adherence to the social model's notions of formal justice as sameness also limits its application in two further respects. First, the social model argues that people with disabilities would not be marginalized if prevailing social convention used inclusive concepts, for example the architectural theory of Universal Design.<sup>37</sup> Yet, while Universal Design continues to evolve, it does not include all disabled persons because some have environmental restructuring needs that surpass current parameters. Second, social model advocates have relied exclusively on the provision of reasonable accommodations in the workplace as an equalizing employment measure.<sup>38</sup> These "reasonable" parameters do not embrace all individual differences among disabled persons. Reasonable accommodation requirements mandate environmental restructuring to the level of equal treatment but not to the level of extra-reasonable accommodations that some individuals may require.<sup>39</sup> Thus, disabled workers are not entitled to sundry accommodations that could achieve equal employment opportunities or to a variety of measures that could ameliorate historic

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L. REV. 701, 705 (2006) (arguing that disparate impact theory has only proven useful in a limited universe of testing cases); Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 758 (2000) (book review) (suggesting that employment discrimination law cannot "actually alter the dominant norms of most workplaces or the kinds of roles that men and women play within them"). *But see* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 865 (2006) (arguing that the ADA, which has not been systemically applied to workplace culture issues, has positive but untapped potential). It is worth noting that the sceptics operate within traditional civil rights boundaries.

37. For discussions confined within the disability-specific context, see generally SELWYN GOLDSMITH, *UNIVERSAL DESIGN: A MANUAL OF PRACTICAL GUIDANCE FOR ARCHITECTS* (2000) and ROBERT IMRIE, *INCLUSIVE DESIGN: DESIGNING AND DEVELOPING ACCESSIBLE ENVIRONMENTS* (2001).

38. Christine Jolls, *Commentary, Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643 (2001). Ironically, both legal commentators and judges so deeply subscribe to the opposite point of view—that ADA accommodations raise disabled workers above a level equilibrium—one commentator has termed this prevailing but erroneous perspective as "canonical." *Id.* at 643–44.

39. For a comprehensive treatment of what constitutes "reasonable," see Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 81 (2003).

discrimination.<sup>40</sup>

Further, the disability civil rights agenda's atomistic focus on civil and political rights has encumbered American policy makers from producing a holistic disability policy framework that includes measures beyond antidiscrimination legislation. Obtaining gainful employment, for example, is contingent on connected factors such as the availability of healthcare, accessible transport, and vocational training.<sup>41</sup> However, the disjuncture between first- and second-generation rights in the civil rights agenda manifests in antidiscrimination laws and policies that do not link socially contingent exclusion in diverse sectors with artificial exclusion from the workplace.<sup>42</sup> This may be because policy makers view second-generation type rights as beyond their political mandate. This would explain why Congress responded to evidence of disability-based social exclusion by promulgating the ADA as a traditional antidiscrimination device.<sup>43</sup> In addition, policy makers may not be fully attuned to the life circumstances of people with disabilities. American (and other) legislators may not be aware that some people with disabilities are able to perform essential job functions but cannot do so because of external limitations; or that some disabled persons fall beyond the reach of sameness criteria but that their employment would nonetheless be valuable both for them as individuals and for society at large.<sup>44</sup>

To illustrate the disconnect in American disability policy, consider the lack of extra-statutory support given the ADA's employment mandate. Title I was intended as the most expedient method of bringing about social and economic equality for people with disabilities.<sup>45</sup> Nevertheless, it took nearly a decade to pass initiatives that allowed disabled persons receiving public assistance to maintain their health care coverage while transitioning to employment.<sup>46</sup> During this period, and

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40. For example, the United States government could provide funding for the differential cost between reasonable and extra-reasonable accommodations.

41. Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1685 (2000).

42. A clever exception is Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 9 (2004), which suggests that second generation type provisions be construed as part of the ADA's reasonable accommodation mandate.

43. Scotch, *supra* note 26, at 276 ("Using the Civil Rights Act of 1964 as a legislative template, the ADA seeks to eliminate the marginalization of people with disabilities through established civil rights remedies to discrimination.").

44. See Stein, *supra* note 39, at 174-77 (describing Social Benefit Gain Efficient Accommodations in which individual workers and society at large, but not necessarily employers, benefit in a Kaldor-Hicks manner from employing workers with disabilities).

45. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 926-27 (2003) (noting that disability rights advocates sold the ADA to Congress in large measure as a means of increasing employment and thus decreasing public benefit dependence).

46. See, e.g., Ticket to Work Incentives Improvement Act of 1999, 42 U.S.C. § 1305 (2000); Workforce Investment Act of 1998, 20 U.S.C. § 1901 (2000). *But cf.* Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1132 (2006) (questioning the salience of welfare to work initiatives in the absence of a clear understanding of what comprises "work"). Information on the Ticket to Work and Work

despite Senator Dole's efforts,<sup>47</sup> no job training programs were promulgated on behalf of the disabled, although they were developed for other historically disadvantaged groups as part of the dramatic welfare reforms.<sup>48</sup> Indeed, to date no federal job program exists on behalf of workers with disabilities. Moreover, although ADA Title II requires that public transportation be made readily accessible to passengers with disabilities, its implementation has been slow.<sup>49</sup>

Consequently, while the ADA forbids employment discrimination, the means by which disabled Americans can obtain and keep gainful employment have not been provided. As a result, the ADA cannot adequately ensure the inclusion of people with disabilities.<sup>50</sup> This is evidenced empirically by the fact that post-ADA disabled Americans continue to experience disproportionately high rates of unemployment and poverty.<sup>51</sup> The problem is heightened in the most socially marginalized among people with disabilities—those facing double discrimination (for example, women and ethnic minorities with disabilities), and the intellectually and psychosocially disabled.<sup>52</sup>

To remedy the limitations of the disability civil rights agenda and thereby ensure social inclusion and equality, we advocate adopting a disability human rights paradigm. This framework moves beyond the social model's emphasis on formal equality by acknowledging that disabled persons are entitled to equality by virtue of their equal humanity, not because they satisfy sameness norms. Consequently, it acknowledges that variation exists among all individuals, including those conventionally categorized as disabled. Under this human rights approach, all individuals with disabilities are entitled to civil rights measures combined with equality measures.

### III. HOLISTIC DISABILITY HUMAN RIGHTS THEORY

International instruments have tracked the United States policy shift toward expressing the social model of disability through a civil rights lens. This is an admirable move away from the medical model of

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Incentives Improvement Act and the Workforce Investment Act is available at <http://disability.law.uiowa.edu/index.htm>.

47. Bob Dole, *Are We Keeping America's Promises to People with Disabilities?—Commentary on Blanck*, 79 IOWA L. REV. 925 (1994).

48. See, e.g., Workforce Investment Act of 1998, 42 U.S.C. § 9201.

49. This is because the statute focuses on key (urban) stations, and allows for progressive implementation as well as alternative paratransit systems. 42 U.S.C. § 12112 (2000).

50. This point was noted almost a decade ago by Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 71, 75 (1997).

51. See *supra* note 8.

52. See, e.g., Henry Korman, *Clash of the Integrationists: The Mismatch of Civil Rights Imperatives in Supportive Housing for People with Disabilities*, 26 ST. LOUIS U. PUB. L. REV. 3, 40 (2007) (“There is . . . a substantially higher rate of poverty among disabled families of color compared to white disabled households.”).

disability. Nonetheless, States that rely solely on antidiscrimination laws to bring about equality for their disabled citizens will encounter the same shortcomings as those experienced in the United States following the ADA's promulgation.

Fortunately, the new millennium has raised the prospect of combining disability-related antidiscrimination norms and equality measures through a human rights approach with the expected ratification of the UN Disability Rights Convention.<sup>53</sup> To implement the treaty's mandates, States parties will need to address within their specific cultural and socioeconomic contexts how (rather than if) positive and negative rights will be combined in a manner that ensures the equality of their disabled citizenry.

We propose a holistic disability human rights paradigm to facilitate States in developing future human rights based laws and policies. The human right to development and the capabilities approach are two previous models that embrace a holistic approach. After describing and critiquing these schemes, we set forth the disability human rights paradigm. This framework encompasses the best aspects of the social model of disability, the human right to development, and the capabilities approach, while avoiding their respective shortcomings.

#### A. THE HUMAN RIGHT TO DEVELOPMENT

The most progressive human rights model put forward in international instruments is the human right to development.<sup>54</sup> Officially recognized by a 1986 United Nations General Assembly declaration, this framework combines civil and political rights, and economic, social, and cultural rights within a single instrument, and emphasizes the interrelationship and indivisibility of all the human rights.<sup>55</sup>

The human right to development has precipitated acceptance of the interrelationship between first- and second-generation rights by academics,<sup>56</sup> States,<sup>57</sup> and international agencies.<sup>58</sup> This is due to growing

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53. See, *supra* note 15 and accompanying text.

54. See generally Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137 (2004).

55. G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/128/Annex (Dec. 4, 1986) [hereinafter Human Right to Development].

56. See, e.g., Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 3 (1988); Anne Orford, *Globalization and the Right to Development*, in PEOPLES' RIGHTS 127, 178 (Philip Alston ed., 2001).

57. See Alan Rosas, *The Right to Development*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 247, 248 (Asbjorn Eide et al. eds., 1995) (averring that the human right to development gave developing nations a moral basis in which to ground their demands for more equitable distribution of worldwide resources from more developed nations). The United States cast the only dissenting vote to the Declaration on the Right to Development. In 1993, however, it committed in principle to the right to development at the Vienna Second UN World Conference on Human Rights. See generally Arjun Sengupta, *The Human Right to Development*, 32 OXFORD DEVELOP. STUD. 179 (June 2004).

recognition that human rights “require both positive action and restraint by the state if they are going to be effective.”<sup>59</sup> Recent United Nations instruments concur with this consensus and emphasize incorporating both types of rights. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women<sup>60</sup> demonstrates this integrated approach to human rights by demanding both prevention of direct discrimination and reinvention of environments to eviscerate the more subtle effects of cultural bias.<sup>61</sup> As a general example, the right to vote requires both freedom from restraints on political expression and affirmative government expenditure in facilitating the franchise’s exercise.<sup>62</sup>

The human right to development can make an important contribution to a disability human rights model because it stresses that human rights are indivisible and interconnected.<sup>63</sup> When applying the human right to development, neither generation of rights is given precedence over the other. Moreover, the development process and its outcomes are equally valued.<sup>64</sup>

Despite its merits, the human right to development encounters resistance from States (and non-State actors) adhering to retrogressive notions that inter-generational rights are immiscible.<sup>65</sup> Additionally, the

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58. Notably, the Office of the High Commissioner on Human Rights maintains a research unit whose goal is to coordinate development tasks within the United Nations system using this approach. G.A. Res. 48/141, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/141 (Dec. 20, 1993).

59. JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 25 (2d ed. 1998).

60. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/180/Annex (Dec. 18, 1979).

61. *Id.* at arts. 1–2 (requiring States “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”), art. 5 (mandating that States parties modify behavior patterns arising from stereotyped notions of either sex as inferior or superior); see also HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 197 (2d ed. 2000) (adding that “[t]he formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life”).

62. STEINER & ALSTON, *supra* note 61, at 852; see also Brad R. Roth, *The CEDAW as a Collective Approach to Women’s Rights*, 24 MICH. J. INT’L L. 187, 203 (2002) (“[A] line between ‘direct’ and ‘indirect’ interferences with the range of chosen activity seems not only arbitrary, but potentially obfuscatory, absolving politics of responsibility for the greater part of the real impediments to chosen activity, and characterizing as ‘free’ a polity in which individuals are as effectively constrained, perhaps, as those in an ‘unfree’ polity.”).

63. See Human Right to Development, *supra* note 55; see also STEINER & ALSTON, *supra* note 61 at 247 (“The interdependence principle . . . reflects the fact that the two sets of rights can neither logically nor practically be separated in watertight compartments.”).

64. See generally Sengupta, *supra* note 57; Margot E. Salomon, *Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development*, 23 NETH. QUART. HUM. RTS. 409 (2005).

65. See generally PETER UVIN, *HUMAN RIGHTS AND DEVELOPMENT* (2004) (arguing against this notion by pointing out that human rights and development agendas have similar and overlapping goals).

June 2007]

BEYOND DISABILITY CIVIL RIGHTS

1215

human right to development raises as yet unanswered pragmatic questions about which individuals are protected, what are the contents of their rights, and how those rights should be operationalized. For example, are individuals protected due to traits that essentialize their humanity, like rationality, or because they exist as humans? Are rights predicated on group-based characteristics or on individual need? And is the purpose of these rights to distribute resources, equalize treatment, and/or equalize opportunity?<sup>66</sup>

More trenchantly, disability has been conspicuously absent from United Nations-sponsored recommendations for implementing the human right to development. An appointed United Nations task force<sup>67</sup> has imparted suggestions on challenges raised by the Millennium Development Goals.<sup>68</sup> These projects include many disability-related issues (for example, poverty, health and HIV status). Nevertheless, the working group's recommendations failed to address the specific needs of people with disabilities.<sup>69</sup>

In sum, the human right to development advances the field of human rights protection by accentuating the indivisible and interconnected nature of human rights within a single normative framework. At the same time, the scheme is as vulnerable as the more traditional versions of human rights to monitoring, content, and prioritization concerns. The framework also has yet to engage the circumstances of people with disabilities. Only broad institutional solutions, such as those currently contemplated by the United Nations reform agenda directed at human rights treaty monitoring bodies, can

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66. Put in practical terms, a key challenge in implementing the human right to development lies in States striking the right balance between negative and positive rights. Take, for example, the European Union's Framework Directive prohibiting discrimination in employment on the basis of disability. Council Directive 2000/78, 2000 O.J. (L 303) 16 (EU). The Directive requires individual employers to take "appropriate measures" to provide reasonable accommodations. *Id.* at art. 5. However, it is neutral as to whether Member States may support disabled employment through "specific measures" (i.e., equity modifiers). *Id.* at art. 7. An undetermined issue is how Member States with pre-existing programs—such as the employment quota system operated in Germany—will respond to the Directive's purely antidiscrimination mandate. See generally Lisa Waddington, *Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion*, in *DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE* 107 (Anna Lawson & Caroline Gooding eds., 2005) (setting forth the Directive's requirements and assessing its implementation); Fiona Geist et al., *Disability Law in Germany*, 24 *COMP. LAB. L. & POL'Y J.* 563 (2003).

67. United Nations High-Level Task Force on the Implementation of the Right to Development, C.H.R. Res. 2004/7, ¶ 9, U.N. Doc. CHR/RES/2004/7 (Apr. 13, 2004).

68. UN Millennium Development Goals, <http://www.un.org/millenniumgoals> (last visited Apr. 20, 2007).

69. See U.N. Econ. & Soc. Council, Comm'n on Human Rights, Working Group on the Right to Dev., *Right to Development*, E/CN.4/2005/25 (Mar. 3, 2005). The absence of disability awareness may have been a consequence of the lack of consultation with disability NGOs in the process.

adequately amend monitoring deficiencies.<sup>70</sup> A capabilities approach, however, addresses concerns about the content and moral priority of human rights, and provides a productive space for understanding their implementation on behalf of disabled persons.

#### B. THE CAPABILITIES APPROACH

The capabilities approach was originated by Nobel prize-winning economist Amartya Sen and greatly expanded by philosopher Martha Nussbaum.<sup>71</sup> Capability theory provides a rich avenue for understanding what obligations States owe individuals to ensure their flourishing. The central goal of the capabilities approach is agency. It seeks to provide individuals with the means through which to develop their potential regardless of whether targeted recipients of resources elect to use them.<sup>72</sup> The framework embraces both first- and second-generation rights by recognizing that ensuring citizens' abilities requires prescriptions on impediments as well as affirmative institutional support. As such, the capabilities approach relates the same objectives espoused in the human right to development, but provides more guidance on the otherwise abstract content and moral priority of those rights.<sup>73</sup>

The capabilities approach avers that all people are individually worthy of regard, autonomy, and self-fulfillment. Further, that every person must be treated as an end in herself, rather than as the instrument of the ends of others.<sup>74</sup> Accordingly, the scheme rejects welfare metrics commonly applied in economic-based studies, such as per-capita GNP, on the ground that these indicators cannot adequately illuminate the life

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70. The efficacy of United Nations human rights treaty monitoring bodies is a subject that far exceeds this Article. Briefly, the most recent attempt at overhauling the system was given impetus by the Secretary-General's second reform report of 2002, which calls for more coordination among monitoring bodies, greater standardization of reporting requirements, and increased monitoring at the national level. The Secretary-General, *Strengthening of the United Nations: An Agenda for Further Change, delivered to the General Assembly*, U.N. Doc. A/57/387 (Sep. 9, 2002).

71. See, e.g., MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Amartya K. Sen, *Development as Capability Expansion*, in *HUMAN DEVELOPMENT AND THE INTERNATIONAL DEVELOPMENT STRATEGY FOR THE 1990S* 94 (Keith Griffin & John Knight eds., 1990). Nussbaum's framework is harmonious with much of what Sen argues, but also differs in several significant ways. An elaboration of the underlying differences is provided by David Crocker. David Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, Part II*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 153 (Martha C. Nussbaum & Jonathan Glover eds., 1995); David A. Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic*, 20 *POL. THEORY* 584 (1992).

72. Thus, women in a particular country may decline educational opportunity and abide by their nation's traditional norm of home-based care giving.

73. Admittedly, because the capabilities approach (as well as the disability human rights paradigm discussed below) operate from the realm of ideal theory, neither can satisfy technical questions raised in the context of limited resource rationing.

74. See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 56 (2000) (laying out the "principle of each person as end").

circumstances or needs of any particular individual.<sup>75</sup> This is because individuals may require different levels of resources in order to achieve their potential.<sup>76</sup>

Nussbaum's capability scheme diverges significantly from Sen's by determining what fundamental entitlements States owe their citizens.<sup>77</sup> Accordingly, she has enumerated a list of ten central capabilities that individuals require to flourish.<sup>78</sup> These functions, she avers, are essential because being able to engage in them is a uniquely human—as opposed to animal, or mechanical—mode of existence. Put another way, central capabilities appraise the quality of an individual's life by determining whether they achieve “universal” functions and so live a “truly human” existence.<sup>79</sup>

To be considered just political arrangements under Nussbaum's capability scheme, States must provide sufficient resources to enable people to be raised up to the basic threshold level of ten central

75. See MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 33 (1999) (explaining that merely inquiring into average GNP figures fails to “ask about other constituents of life quality, for example, life expectancy, infant mortality, education, health, and the presence or absence of political liberties, that are not always well correlated with GNP per capita”).

76. Comparing results published in the United Nations Development Programme's annual Human Development Report series illustrates this point. Without fail one can find countries with substantially identical per capita GNP figures whose rates of female literacy vary wildly. Yet one would be hard pressed to argue that the women in countries with lower individual literacy live well in relation to those in higher individual literacy States, despite the equivalence in average (seemingly gender-neutral) GNP determinants. One also cannot determine from the aggregate GNP figures how much resource distribution any particular woman in any given State requires to achieve literacy. See generally UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORTS*, <http://hdr.undp.org/reports/default.cfm> (last visited Apr. 20, 2007).

77. See NUSSBAUM, *Supra* note 74, at 78. Sen describes capabilities as “what a person can, in fact, do or be,” distinguishing the distribution of goods from the capability to use them. AMARTYA SEN, *INEQUALITY REEXAMINED* 37 (1992). He acknowledges that some individuals, including disabled persons, have both fewer resources and less ability to convert resources to capabilities. *Id.* at 37–38. The result is that some persons require more resources than others. *Id.* Hence a uniform entitlement scheme has the potential to be both under- and over-inclusive. *Id.* at 113. Sen has declined to form or support a capabilities list, believing that such a catalog would undercut democratic political discourse. He has, however, assisted in the design of the United Nations Development Program's Human Development Reports, which are notable for failing, thus far, to address the situation of disabled persons. See Martha C. Nussbaum, *Poverty and Human Functioning*, in *POVERTY AND INEQUALITY* 47, 47–48, 61 (David B. Grusky & Ravi Kanbur eds., 2006).

78. Nussbaum's ten central capabilities are as follows: life (the faculty to live one's full lifespan); bodily health (having good health, including reproductive capability); bodily integrity (freedom of movement and bodily sovereignty); senses, imagination, and thought (cognizing and expressing oneself in a “truly human” way); emotions (loving, grieving and forming associations); practical reason (critical reflection and conscience); affiliation (self-respect, empathy and consideration for others); other species (being able to co-exist with other species and the biosphere); play (the ability to enjoy recreation); and control over one's political environment (via meaningful participation) and material surroundings (through property ownership and holding employment). See NUSSBAUM, *supra* note 74, at 78.

79. See NUSSBAUM, *supra* note 71, at 35, 71.

capabilities.<sup>80</sup> Further, since each capability is a separate component in her theory, States cannot provide for one capability beyond the threshold (for instance, a superlative healthcare system), while denying or limiting another (e.g., denying women the franchise or limiting its salience).<sup>81</sup>

Nussbaum concludes that central capabilities “have a very close relationship to human rights.”<sup>82</sup> This statement is overly modest, for the capabilities approach relates in philosophical terms the same objectives as those contained in the human right to development. Her capability scheme, moreover, improves that human rights framework by providing content to its otherwise abstract aspirations. However, although Nussbaum’s capabilities approach provides strong guidance for conceiving of human rights as a means of ensuring general human flourishing, it falls short as a universal theory because of its failure to enable the flourishing of all people with disabilities. These shortcomings are due to several interrelated reasons.

To begin with, Nussbaum’s capability scheme does not fully recognize the humanity and equality of those who function below the ten central capabilities. This is because only those individuals who come close to attaining those enumerated functions can live a “fully human life” that is “worthy of human dignity.”<sup>83</sup> In consequence, her constructed minimum either excludes or qualifies the inclusion of certain persons with intellectual disabilities (and other lower functioning individuals)

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80. The requirement is based on a State’s desire for legitimacy. See FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* 33 (1996) (arguing that when states do not adequately protect their citizens, they in turn lose their moral arguments that sustain sovereignty).

81. NUSSBAUM, *supra* note 74, at 81, 85.

82. *Id.* at 97.

83. NUSSBAUM, *supra* note 71, at 181. This is a deeply troubling point in Nussbaum’s scheme, and so worthy of elaboration. She consistently avers, following Kantian norms, that the capabilities approach values every individual as an end and as worthy of full dignity. Nevertheless, in order to set a limit on who should receive State resources, the qualities of living a dignified human life are defined by a list of central capabilities. See NUSSBAUM, *supra* note 74, at 78–80. Consequently, individuals who fall below those markers are tragic cases and, according to Nussbaum, in that respect not fully human. Nussbaum makes this point in several places, including her evaluation of the life of Sessa, Eva Kittay’s severely intellectually disabled daughter. Because Sessa cannot attain threshold capability levels needed to live a “fully human life,” two possibilities arise. “[E]ither we say that Sessa has a different form of life altogether, or we say that she will never be able to have a flourishing human life, despite our best efforts.” NUSSBAUM, *supra* note 71, at 187. Since Sessa is not vegetative and displays human qualities of affection and affinity, Nussbaum concludes that she is not a different form of life. *Id.* Rather, Sessa is someone for whom a “flourishing human life” that is “worthy of human dignity” is out of the question. Nussbaum’s determination is in direct conflict with traditional human rights theory that rejects the idea of gradation among humans. As explained by Jack Donnelly, “Human rights are, literally, the rights that one has simply because one is a human being. . . . Human rights are equal rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all).” JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* 10 (2d ed. 2003).

from society.<sup>84</sup> Societies applying Nussbaum's capabilities approach would lose enormous benefits from other capabilities that these individuals could develop, whether love, empathy, or participation in employment.

Furthermore, although the capabilities approach seeks to protect social interaction, it does not sufficiently ensure participatory justice at a level that guarantees disabled persons' meaningful contact with the population at large.<sup>85</sup> Nussbaum's model *is* concerned about participatory justice as evidenced by the inclusion of respect and human dignity as two key elements.<sup>86</sup> However, it does not require that those two capabilities be expressed in mainstream circumstances.<sup>87</sup> As a result, States abiding by Nussbaum's scheme might not garner the advantages of having their disabled populations fully socially engaged.

Additionally, Nussbaum's framework is directed towards achieving average capability levels rather than maximizing individual talents. This is because her list of ten central capabilities calibrates functioning to species typicality.<sup>88</sup> Consequently, Nussbaum's scheme limits State

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84. For example, society must channel funds "through a suitable arrangement of guardianship" for many people with intellectual disabilities. NUSSBAUM, *supra* note 71, at 193; *see also id.* at 195–211 (providing domestic and international examples of guardianship that "maximize autonomy"). In reaching this determination, Nussbaum may be relying on rationality because of her Aristotelian leanings. *See generally* Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992); Martha Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, OXFORD STUD. IN ANCIENT PHIL. 145 (Supp. 1988). As to other lower functioning individuals without intellectual disabilities—consider the socially incontinent or the sexually impotent—under this definition, the full implications exceed the boundaries of this Article, but it bears noting that the same logic applies to persons beyond the severely intellectually disabled persons who are prominently featured.

85. Undergirding this notion is a prevailing normative assumption that in a just society everyone should have the ability, if they so choose, to interact with and take part in general culture because "individuals cannot flourish without their joining with other humans in some sort of collective activities." Anita Silvers, *People with Disabilities*, in THE OXFORD HANDBOOK OF PRACTICAL ETHICS 300, 318 (Hugh LaFollette ed., 2004). Jacobus tenBroek and Floyd Matson first made this assertion in the context of welfare benefits by arguing that meaningful social participation means not only caring for those who are unable to work through the welfare system, but more importantly, assuring that disabled persons are able to engage in society at large. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 840 (1966).

86. NUSSBAUM, *supra* note 71, at 80–81.

87. Specifically, Nussbaum asserts that Sessa Kittay lives a more socially participatory life at a segregated facility than she did in her parent's home. *See supra* note 83. That may well be true, and if so, Sessa has benefited. However, one can interpret the capabilities approach (even to Nussbaum's consternation) to permit people with severe intellectual disabilities to live in group homes that (unlike Sessa's) are also completely segregated from mainstream society so long as the residents interact with their peers and carers in a respectful and non-humiliating manner.

88. The concept of normal species functioning is derived from bioethicist Norman Daniels, who argues that a universal right to health care must be circumscribed to instances of ensuring or revising the "normal species functioning" necessary for individuals to arrive at the "normal opportunity range" of function within their respective societies. NORMAN DANIELS, *JUST HEALTH CARE* 26–35 (1985); Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 PHIL. & PUB. AFF. 146, 158–60 (1981).

obligations to the point at which individuals achieve that baseline threshold, and does not require resources for developing functions above those minimal levels.<sup>89</sup> This is the case even if individuals cannot (or choose not to) achieve functioning in all ten capabilities. A dramatic consequence of States applying such a framework is that entire areas of human potential will be left untapped.<sup>90</sup>

Finally, because Nussbaum presumes the list of ten capabilities to comprise universal functions that individuals can choose to achieve, she does not consider the framework to impose culturally generated, external moral imperatives on others.<sup>91</sup> Yet, social pressure to exercise capabilities and their associated functioning is a familiar and harmful phenomenon. It arises in large measure because societies do not grasp the notion that there are times when individuals choose to live their lives in an “abnormal” manner contrary to “universal” values; moreover, that those determinations are not made from ignorance of, or aversion to, truly desired outcomes.<sup>92</sup>

The capabilities approach has enormous potential for determining the extent of State obligation towards ensuring equality and social justice. The scheme recognizes that all individuals require both resources and the opportunity to utilize those resources to achieve their potential.

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89. As applied, Nussbaum uses species typicality both factually and normatively. The baseline is not only the level of capability that humans typically enjoy, but also the threshold level demanded for a life of human dignity. We thank Anita Silvers for pointing out the possibly insurmountable difficulties of invoking species typicality as a standard without also stigmatizing and excluding individuals who cannot be brought up to that level. See Silvers, *supra* note 85, at 306.

90. To illustrate, Nussbaum’s capabilities approach does not provide resource distribution to child prodigies or savants to enable either group to exceed a species typical norm by developing their special talents. This is because resources to these individuals (assuming they were otherwise capable of attaining the ten capabilities) would stop being distributed at the point that they achieved an average human functioning level.

91. That people would choose not to achieve their own full potential raises a concern to Nussbaum, namely that of preference deformation. This concept posits that circumstances exist in which people’s basic preferences (which they would recognize if unimpeded) are negatively influenced by external social forces, such as traditional hierarchies or religious beliefs. Some scholars rely on the existence of truly universal values that are common to all cultures and faiths, even if expressed in different ways. See, e.g., HANS KÜNG, *A GLOBAL ETHIC FOR GLOBAL POLITICS AND ECONOMICS* (1998); HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Na’im ed., 1992). Other scholars, however, decry these universal concepts as potentially culturally invasive. See, e.g., WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 97–99 (1995); Michael Ignatieff, *Human Rights as Idolatry*, in *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 53 (Amy Gutman ed., 2001).

92. Consider, for example, the debate over cochlear implants. Some hearing impaired individuals prefer their status and would not use cochlear implant technology. This is especially true for those who consider themselves part of the Deaf community. But once the technological capability exists to enable deaf people to access aural communication, social pressure is brought to bear on their using this technology rather than relying on sign language interpreters. See, e.g., Canadian Association of the Deaf, *Cochlear Implants*, [http://www.cad.ca/en/issues/cochlear\\_implants.asp](http://www.cad.ca/en/issues/cochlear_implants.asp) (last visited Apr. 20, 2007).

Moreover, as with the human right to development, the capability theory wisely incorporates first- and second-generation human rights when asserting the bases underlying, and content comprising State obligations. Nevertheless, Nussbaum's capabilities approach comes up short as a universal theory because it fails to adequately realize all individuals' equal humanity and dignity, their right to full social participation, and the moral imperative of developing individual talents. Accordingly, the disability human rights paradigm adopts the finest elements of the capabilities approach while also amending its limitations.

### C. THE DISABILITY HUMAN RIGHTS PARADIGM

The disability human rights paradigm combines the best aspects of the social model of disability, the human right to development, and ultimately the capabilities approach, to create a holistic and comprehensive rights theory.

As with the social model of disability, the disability human rights paradigm stresses society's role in constructing disability, and its responsibility to rectify disability-based exclusion.<sup>93</sup> The framework acknowledges the role that social circumstances play in creating disabling conditions, and seeks to remake the environment as a means of ensuring the full equality and inclusion of persons with disabilities.<sup>94</sup>

Like the human right to development, the disability human rights paradigm acknowledges the interrelationship of first- and second-generation rights. Adopting such a holistic approach to human rights protection allows the framework to avoid the dichotomous difficulties encountered by the social model of disability,<sup>95</sup> as well as that raised by early (now-superseded) feminist scholars who similarly over-emphasized sameness at the expense of difference.<sup>96</sup> Moreover, the disability human rights paradigm gains advantage from communitarian notions recognizing the effect of inter-relationships upon individuals' ability to flourish in society.<sup>97</sup> As Belden Fields noted, "Human potentialities are

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93. See generally Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971) (arguing that a duty to remedy past exclusion exists when the amelioration is readily achievable).

94. See Stein, *supra* note 12 (explaining why ADA workplace accommodations are an appropriate, reasonable and properly allocated civil rights remedy).

95. See *supra* Part II.

96. See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996).

97. This point is made persuasively by feminist theorist Christine Koggel who avers that equality "asks what moral persons embedded and interacting in relationships of interdependency need to flourish and develop" instead of "limiting itself to an account of what individuals need to flourish as independent autonomous agents." CHRISTINE M. KOGGEL, *PERSPECTIVES ON EQUALITY: CONSTRUCTING A RELATIONAL APPROACH* xi (1998).

developed within a web of cultural, economic, and social relationships that are both facilitating and constraining.”<sup>98</sup> Put another way, we all depend on one another and develop in relation to each other.<sup>99</sup>

Following on the capabilities approach, the disability human rights paradigm states a moral imperative for societies to provide resources for developing human potential. Its core modifications include an emphasis on intrinsic human worth rather than functioning, and a focus on the flourishing of individual talents rather than on Nussbaum’s minimum “universal” levels of central capability functions.

Thus, in contrast to Nussbaum’s capability theory, the disability human rights paradigm emphasizes the equal dignity of disabled persons and acknowledges their autonomy in directing their own development regardless of whether they reach species-typical functioning levels required by the ten central capabilities. A disability perspective views her “normatively fundamental” and “universal” species typical list as inherently flawed by able-bodied cultural bias as to what functionality must be achieved to live a “truly human” life. Accordingly, a disability-based conception views persons with severe intellectual disabilities—whether or not capable of rational thought at a capability level—as living truly human lives that are worthy of dignity. Moreover, the claim of severely intellectually disabled persons on State resource distribution, and the attendant recognition of their dignity and autonomy, is not contingent on guardians as intervening proxies.

Perhaps most significantly, the disability human rights paradigm focuses on enabling individuals to achieve their specific talents, rather than average overall capabilities as measured against functional baselines. Talents are more individual-specific than capabilities, and by definition are not universally shared. A disability-based perspective therefore acknowledges individual difference and provides for special needs. Accordingly, while Nussbaum focuses on capabilities that are common to human beings, a disability rights framework addresses talents that are crucial for individual human flourishing.

Utilizing a disability framework allows us to appreciate potential from the bottom up, rather than from the top down, and to consider developing peoples’ talents to ensure their flourishing. A disability human rights paradigm maintains that cultivating one’s talents is at the

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98. A. BELDEN FIELDS, *RETHINKING HUMAN RIGHTS FOR THE NEW MILLENNIUM* 76–77 (2003). For ways that disability theory can learn from both feminist and communitarian theory, see Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105 (2005).

99. See, e.g., Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989) (“[R]elatedness is not, as [the liberal] tradition teaches, the antithesis of autonomy, but a literal precondition of autonomy, and interdependence a constant component of autonomy.”).

core of being human and that talent needs to be viewed as its own end rather than a means to another end, such as achieving species-typical levels of functioning in each of a list of ten central capabilities. The development of some talent is a moral imperative owed to every person, and for some it may be less than for others.

The disability human rights view of human life is not only about individual flourishing, but also about dignity. It therefore necessitates a greater view of all persons contributing to, and being present in, society. Adopting this perspective emphasizes the indivisibility of human rights and also makes the argument that global society cares about the inclusion and role that all people have in our world. An integrated human rights approach that values each individual for his or her own worth asks what qualities an individual has and in what ways developing her talents can benefit both that individual as well as society.

Moreover, while Nussbaum's capabilities approach bars a partial distribution of resources that does not increase agency in each of its ten categories, the disability paradigm focuses on the development of individual talent and thereby avoids the all-or-nothing requirement. In doing so, the framework also offers an alternative response to the prioritization concerns common to human rights.

#### D. IMPLICATIONS FOR THE DEVELOPMENT OF DISABILITY LAW AND POLICY

The effect of using the disability human rights paradigm can be illustrated in terms of the future development of disability-related employment laws and policies.

This model acknowledges that all people have equal dignity, value, and autonomy, and are worthy of self-fulfillment through gainful employment experiences. This entitlement goes beyond that required by either the social model or the capabilities approach because it is not contingent on the extent that particular individuals are able to achieve function at a level of either sameness or threshold levels. States are thus obligated to ensure that all disabled people have the freedom to work and contribute to society. This entitlement applies equally to the intellectually disabled and others who may be viewed as failing to achieve minimal functional capability levels.

The framework defines disability as a socially constructed denial of capabilities arising due to lack of means (like income), the physical environment (for example, gratuitously built stairs), or prevailing social mores (including cultural attitudes and institutional structures) that culminates in lost opportunity. A person's capacity for employment is viewed by the paradigm as dependant on individual talent, means, and opportunities. States must therefore consider the extent that resources and opportunities are available to disabled people in order to identify obstacles to their employment. For example, a wheelchair user may

sustain increased transportation costs when attaining accessible employment at a distant location; she may also incur additional opportunity costs because discriminatory attitudes prevent the use of her full qualifications. Thus, medical model definitions of disability are inherently flawed and obfuscatory.

The disability human rights paradigm builds on the social model and the capabilities approach in recognizing the amendable nature of social exclusion. However, the model diverges from both those schemes by requiring policy makers to provide resources for disability-based inclusion that exceed minimal levels. A visually impaired worker, for instance, may have greater needs than a peer with average vision because she requires assistance reading printed documents. Only the disability human rights paradigm requires the provision of an individual or machine exceeding reasonable cost and enabling above-average function. States are thus obligated by this framework to employ equality measures.

Along the same lines (and again in contrast to either the social model or Nussbaum's capability scheme), the disability human rights paradigm enables the development of individual talent and acknowledges special needs. It appropriates resources to develop individual talent whose cost or function exceeds those respective schemes' minimal norm limitations. This is because, under the disability human rights approach additional resources are allocated to assist employment by developing a person's capability in one area even when other functional capabilities are lacking. A person with autism, for instance, may have a special talent for math but little capability for social empathy. That individual has a right to resources for education and vocational training to develop their math talent above the species typical level, and a right to gainful employment that makes use of that talent even if the cost is economically unreasonable. The freedom to determine if or how to develop talent remains with the citizen, not the State.

The disability human rights paradigm highlights the importance of social participation. Consequently, vocational training and employment opportunities need to be available in mainstream conditions that ensure the possibility of genuine social inclusion. The framework requires resource allocation to enable open or supported employment; it rejects State resource allocation in compelled isolated institutional settings, like sheltered workshops that do not allow adequate societal participation or labor market opportunities. At the same time, the social space an individual occupies should be a matter of personal choice. An individual with a psychosocial disability, for example, might prefer telecommuting to work. The disability human rights paradigm, unlike the social model or the capabilities approach, would allocate resources to enable this preference as a matter of ensuring that individual's autonomy and dignity.

Like the right to development, the disability human rights paradigm applies to both the process and outcome of human rights. The framework necessitates the participation of people with disabilities in the process of societal reconstruction so that they may assert their rights. States must collaborate with disabled persons (and other civil society stakeholders) when designing labor legislation, and attendant monitoring and implementation procedures. The disability human rights paradigm also imposes on States a moral obligation to enable disability employment that is not vitiated by limited national socioeconomic development or capacity. When resources are lacking within a State, the moral responsibility continues to fall on outside States and non-state actors. Consequently, it is imperative to develop disability capacity and good practices to enable international cooperation.

Holistic human rights obligations toward the disabled will be required with the expected ratification of the UN Disability Rights Convention.<sup>100</sup> The treaty will make the integration of civil rights and equality measures a global imperative by including both negative and positive rights by expressly calling attention to their indivisibility.<sup>101</sup> The UN Disability Rights Convention's ratification will compel States with existing disability-related laws and policies, as well as the majority of those currently without such measures, to revise or create national strategies towards their disabled citizens that provide for both civil rights and equality measures.<sup>102</sup> The disability human rights paradigm offers a template for realizing these goals, both in terms of process and outcome.

#### IV. GOOD PRACTICE EXAMPLES

Employment plays a universal and central role in the development of individual talent, notions of self-worth, and the ability to exercise citizenship rights.<sup>103</sup> Yet worldwide, disabled workers of employable age encounter severe difficulties attaining gainful employment.<sup>104</sup> Prejudicial

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100. See *supra*, note 15 and accompanying text.

101. In pertinent part, the UN Disability Rights Convention's purpose is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities," by reaffirming "the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination." UN Disability Rights Convention, *supra* note 15, at art. 1, pmb. (c).

102. *Id.* at arts. 4, 33.

103. See, e.g., JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 63-101 (1991) (exploring the connection between work and citizenship); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886 (2000) (noting the importance of work as "constitutive of citizenship").

104. The unemployment rate for disabled persons is estimated to be two to three times higher on average than the relative non-disabled rate in industrialized States. See Ann Elwan, POVERTY AND DISABILITY: A SURVEY OF LITERATURE 1990, at 12 (The World Bank, Social Protection Discussion Paper Series No. 9932, 1999), available at <http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172608138489/PovertyDisabElwan.pdf>. In the Asia Pacific region, for example, the disabled

attitudes and practices often deprive aspiring employees with disabilities from having the skills, resources, and opportunities to enter the workforce. This is a significant problem that must be addressed for reasons of social justice and economic development.<sup>105</sup> Also, States parties will legally be obligated to attend to this issue pursuant to the forthcoming UN Disability Rights Convention.<sup>106</sup> Importantly, the treaty specifically endorses the use of equality as well as antidiscrimination measures in ensuring the right to employment.<sup>107</sup> Like the disability human rights paradigm, the right to social participation in an open and inclusive workplace is mandated.<sup>108</sup> This right extends to all workers with disabilities, and especially to the most socially stigmatized, such as the intellectually disabled.

Accordingly, we provide a range of good practice examples from the employment realm as models for States to apply the holistic disability human rights paradigm to alleviate employment barriers. These practices include: inclusive vocational training, habilitation and rehabilitation;<sup>109</sup> inclusive employment services; quota regimes; self-employment initiatives; partially reserved occupations; preferential contracts; positive cultural attitude change campaigns; and collaborations with non-state actors. Equality measures directed towards people with disabilities or employers include trial employment; assistance in supported employment; vocational guidance; technical advice; and financial incentives including loan schemes, grants, subsidies, transportation assistance, and tax concessions. Multiple measures will be required to respond to the diverse individual and occupational needs of people with

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unemployment rate is roughly twice that of other citizens, and has been reported to be as high as 80 percent. Debra A. Perry, *Vocational Rehabilitation and Employment: From Principles to Practice*, <http://www2.ilo.org/public/english/region/asro/bangkok/ability/vrefpp.htm> (last visited Apr. 20, 2007). Typically, individuals with intellectual disabilities, women, and the poor are among the most vulnerable segments of the disabled population, and experience the greatest levels of social exclusion.

105. For example, the International Labour Organization recently estimated the cost of socially excluding disabled workers as \$1.9 trillion per year. Press Release, International Labour Organization, ILO Welcomes New UN Convention on Rights of People with Disabilities (Dec. 14, 2006), *available at* [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang--en/WCMS\\_080627](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_080627).

106. See UN Disability Rights Convention, *supra* note 15, at arts. 24, 26, 27.

107. *Id.* at art. 27 (endorsing “the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”).

108. *Id.* at art. 27, para.1(h).

109. The term habilitation references general educational training, including that geared towards employment. In this sense, it need not be restricted to people with disabilities. Historically, rehabilitation has referenced activities directed at assisting (often newly) disabled persons to re-enter society. Although a term of art, some disability rights activists dislike its usage because they feel it reflects a retrogressive notion that the disabled have to be “cured”—or at least trained—to re-enter society. Political scientist Ruth O’Brien calls this perception the “whole man” schema. RUTH O’BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* 7 (2001).

disabilities, especially those experiencing compound forms of exclusion such as women with disabilities and disabled persons living in isolated rural areas. Accordingly, programs should respond to individual needs.

Each example offered is worthy as a model, but is not flawless. Nor are any of the suggested good practices guaranteed to succeed when transplanted. Disability is a societal construct. To successfully transpose these models they must be developed to respond to distinct cultural and institutional environments. To achieve meaningful social reconstruction States must consider both the process and outcome aspects of human rights in legislative, policy, and program design. In doing so, three elements are crucial. First, collaborating with civil society (especially disabled persons and their organizations) so that citizens have both input and ownership in programs that target their wellbeing. Second, integrating these policies across administrative and judicial departments, thereby ensuring that they are holistically implemented. Third, positively altering cultural attitudes towards persons with disabilities so that the positive measures States promulgate on their behalf are readily received.

#### A. VOCATIONAL TRAINING

People with disabilities have been excluded from employment opportunities due to lack of sufficient and appropriate State supported vocational training, habilitation, and rehabilitation. Several deficiencies have historically limited these programs. Segregated facilities and workshops can further instantiate the social exclusion experienced by persons with disabilities. They can also limit the range of opportunities for disabled workers by creating narrow cultural expectations about their capabilities, for instance, by providing only those skills deemed culturally appropriate for particular subgroups of the disabled, such as sewing for the deaf community. Additionally, when State programs are operated in isolation from employers they often fail to provide training that is responsive to market forces. The extent of these difficulties is magnified for the large proportion of disabled persons living in isolated and rural settings, because exiting programs tend to focus on centrally populated areas.<sup>110</sup>

Conversely, programs can reflect a disability human rights paradigm through acknowledging and responding to individual difference, specific

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110. For example, about 80% of disabled Chinese persons are rural residents. Yutaka Takamine, *Disability Issues in East Asia: Review and Ways Forward* 6 (World Bank, Working Paper No. 29299, 2004), available at <http://go.worldbank.org/CPKPUFEC20>. Notably, in Heilongjiang province, 40% of rural disabled people could work, but lacked adequate training to do so. See INT'L LABOUR OFFICE, *Green Certificate Training Project, China, Raising Scorpions to Raise Income and Reduce Poverty—Integrating People with Disabilities into Agricultural Training in Rural China*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC 112, 112 (Debra A. Perry ed., 2003) [hereinafter *Green Certificate Training Project*].

needs, and talents. By making vocational training inclusive, a broader array of options may be offered that encompass the diverse interests and talents of individual people with disabilities. A disability rights perspective also mandates that training opportunities include the most socially marginalized people. Accessible technology can expand educational opportunities for isolated disabled persons through long-distance learning. And market-driven training can enable disabled people to contribute to their community and global economy. These dynamics can help States to conquer discriminatory attitudes about the capabilities of people with disabilities. Two agricultural examples illustrate these points.

One preferred practice example is the Chinese Green Certificate Training Project.<sup>111</sup> Historically, disabled farmers have not been part of rural development programs.<sup>112</sup> This was initially true of the Green Certificate plan that was developed to improve farmers' agricultural yields and thus their economic condition.<sup>113</sup> Propelled by the Heilongjiang Disabled Persons Federation, that province's government included disabled persons in the scheme.<sup>114</sup> A novel collaboration between the Chinese Disabled Persons Federation, Department of Labor and Social Security, and the Department of Agriculture, Fishery, and Animal Husbandry allowed successful implementation of the mandate, with each entity contributing complimentary expertise and resources.<sup>115</sup> The vocational training course taught rural people with disabilities new agricultural skills, including raising scorpions (which are used in traditional Chinese medicine) and fish, thereby enabling them to earn relatively high income with minimal investment.<sup>116</sup> To encourage the inclusion of farmers with disabilities, training quotas were instituted by geographic area, facilities received additional instruction in educating the disabled, and additional financial support was allocated.<sup>117</sup> Equality measures provided to the disabled included flexibility in the programs length and testing, and apprentice-like instruction for those with special needs and the geographically isolated.<sup>118</sup> Additional financial support for expenses such as food and transportation enabled more of the impoverished disabled community to take part.<sup>119</sup>

A second, similar example provided vocational training

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111. See *Green Certificate Training Project*, *supra* note 110, at 112–19.

112. See *id.* at 112.

113. *Id.*

114. *Id.* at 115–16.

115. *Id.* at 112.

116. *Id.*

117. *Id.* at 116.

118. *Id.*

119. *Id.*

opportunities for physically and intellectually disabled farmers in Thailand through a mushroom growing venture in the poor Northeastern region of Ubon Ratchathani.<sup>120</sup> The Thai Ministry of Labor and Social Welfare, the United Nations Food and Agriculture Organization Regional Office, and Thailand's Rural Development Office jointly supported the project, showing the potential for developing inclusive programming through innovative international collaborations between States and non-state actors.<sup>121</sup> Commercial mushroom production was chosen because of the small initial investment and lower physical exertion required for cultivation.<sup>122</sup> Instructors were educated in how best to train persons with disabilities.<sup>123</sup> Among the equality measures provided were alternative farming methods (such as using one's feet rather than hands), practical instruction as many were illiterate, motivational coaching, and designs for accessible mushroom growing houses readily constructed from local supplies.<sup>124</sup> On returning to their communities, participants were able to train additional persons in their communities, thereby inducing local positive attitude change.<sup>125</sup>

States often lack legislation or policies mandating disability-inclusive vocational training. Participation of people with disabilities in policy design and as trainers can ensure that programs are both integrated and responsive to specific social environments. Requisite equality measures can comprise additional training of educators, accessible construction, adapted tools, flexible training and evaluative procedures that are responsive to special needs, financial assistance, and transportation. Collectively, these preparatory measures can enable disabled persons to gain new skills, and achieve and retain self-confidence, independence and social participation through active workplace involvement. Notably, an integrated policy approach requires linkage between vocational training and employment services.

#### B. EMPLOYMENT SERVICES

A significant barrier for disabled persons wishing to enter the workforce is the absence of State-sponsored employment services. This is especially true for individuals with intellectual and psychosocial disabilities who experience extremely high unemployment levels because of stigma. To enable meaningful supported occupational opportunities

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120. See Population & Soc. Integration Section, *U.N. Econ. & Soc. Comm'n for Asia & the Pacific, Mushroom Production for People with Disabilities*, in *PATHFINDERS: TOWARDS FULL PARTICIPATION AND EQUALITY OF PERSONS WITH DISABILITIES IN THE ESCAP REGION*, U.N. Doc. ST/ESCAP/2170 at 57, available at <http://www.unescap.org/esid/psis/publications/spps/02/spps02.pdf>.

121. See *id.* at 58.

122. *Id.* at 59.

123. *Id.* at 60.

124. *Id.* at 61.

125. *Id.* at 63, 65-69.

for those individuals, some States provide mainstream and targeted employment services that include job placement, vocational counseling, training, technical, and financial assistance. Exemplary States educate disabled persons and employers about legislation, opportunities and afford equity measures like internships, job coaches, assistive devices, transportation, employment subsidies, and tax credits. These schemes are further facilitated when States collaborate with private enterprise, trade unions, and civil society groups. A pair of good practice examples from the Asia region illustrates these principles.

The Hong Kong Labor Department established the Self-Help Integrated Placement Service program in 2000 to assist individuals with psychiatric disabilities in conducting their own job searches and reduce their dependency on state-supplied placement officers.<sup>126</sup> The scheme teaches job-seeking skills including interviewing techniques, educates potential workers about the labor market, motivates participants, encourages independent use of resources (like computers that are available in the state placement agency) and monitors each individual's progress.<sup>127</sup> The program was so successful that its mandate was expanded from those with psychiatric disabilities to all persons with disabilities.<sup>128</sup>

Even employers willing to engage disabled workers may need assistance to achieve this goal. The Japan Organization for Employment of the Elderly and Persons with Disabilities is a special administrative organization that instructs employers both before and after the hiring process on legal obligations, workplace accommodations, and the availability of government grants to offset hiring costs; and it supplies job coaches.<sup>129</sup> The agency provides vocational services to assist disabled employees. Local Vocational Centers provide services like occupational assessment, preparatory training for the work environment including social skills and motivation instruction, and job coaching.<sup>130</sup> The Association also coordinates its activities with the mainstream Public

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126. See DEBORAH WAN, TRAINING AND EMPLOYMENT OF PEOPLE WITH DISABILITIES: HONG KONG SAR 2002 29–34 (2004), available at <http://www.ilo.org/public/english/region/asro/bangkok/ability/download/hongkong-final.pdf>; see also INT'L LABOUR OFFICE, *Self-Help Integrated Placement Service, Hong Kong SAR, Promoting Themselves—Preparing People to Find Jobs in Hong Kong SAR*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC, *supra* note 110, at 175, 175 [hereinafter *Promoting Themselves*].

127. See *Promoting Themselves*, *supra* note 126, at 176–77, 179.

128. *Id.* at 175.

129. See INT'L LABOUR OFFICE, *Japan Association for Employment of Persons with Disabilities, Japan, Policy Can Make a Difference—But Employers Sometimes Need Help Following the Laws in Japan*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC, *supra* note 110, at 167, 167–74.

130. *Id.* at 170.

Employment Security Office.<sup>131</sup> Disabled workers should have access to targeted and mainstream employment services.<sup>132</sup>

Employment services play an important role in providing disabled people with vocational skills and access to the supported and open labor market. These services can provide employers with the confidence and ability to hire people with disabilities. However, persistent negative cultural perceptions regarding the disabled necessitate using equality measures to create an inclusive employment environment.

### C. QUOTA REGIMES

Quota systems are an equality measure commonly employed on behalf of disabled workers. Preferably, they legally obligate private and public employers to hire either a minimum percentage or an absolute number of employees with disabilities. If possible, these duties should also be coupled with sanctions enforceable through a combination of civil or criminal penalties, and levies. Hiring preference schemes enjoy some advantage over civil rights measures because as overt affirmative measures they claim neither to achieve formal equality, nor economic efficiency. Quota regimes have been adopted in Europe, the Asia Pacific region, and in Africa.<sup>133</sup>

Three problems are common to the use of quota schemes. First, quota regimes are ordinarily directed at medium and large sized private and/or public enterprises, and not smaller ventures. Through this selective application, quotas often fail to include employers of significant numbers of workers and thereby diminish their efficacy. Relatedly, when quota systems are not applied to the public sector, States lose the opportunity to demonstrate good practice and change discriminatory attitudes. Second, quota regimes often meet resistance precisely because they are designed to reconstruct workplace hierarchies. Yet many States do not effectively implement or enforce their quota systems. Thus historically, the putative influence and practical affect of this equality measure has been uneven. Third, some enterprises technically comply with quota schemes by employing the least severely disabled people and disregarding those most stigmatized, such as the intellectually disabled. Other businesses employ disabled persons in segregated subsidiary settings that do not integrate these workers into mainstream society. Still other employers prefer to pay fines rather than hire persons with

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131. *Id.*

132. *See id.*; *see also* IKEDA TSUTOMU & HATTORI KANETOSHI, THE STATUS OF TRAINING AND EMPLOYMENT POLICIES AND PRACTICES FOR PEOPLE WITH DISABILITIES IN JAPAN 58 (Dec. 2002) (draft), available at <http://www.ilo.org/public/english/region/asro/bangkok/ability/download/japan.pdf>.

133. *See* DEBORAH COHEN, THE WAR COME HOME: DISABLED VETERANS IN BRITAIN AND GERMANY, 1914–1939 (2001) (historical account of European quota practices). For a contemporary overview, *see* LISA WADDINGTON, DISABILITY, EMPLOYMENT, AND THE EUROPEAN COMMUNITY 219–53 (1995).

disabilities, preventing societal reconstruction.

Quota regimes are most effective when they are targeted, judiciously implemented, and have rigorous enforcement mechanisms. Quota systems should expressly target the most socially excluded individuals with disabilities, namely women, indigenous group members, and the intellectually and psychosocially disabled. These schemes must also ensure that the work provided is meaningful, and conducted in an integrated environment. Applying quota regimes to all sectors and significant numbers of employers would greatly increase their impact on social inclusion. So, too, will programs directed at changing social attitudes. Additionally, States need to extract levies from non-complying industries, and invest those funds on behalf of disabled workers to increase accessibility and provide inclusive vocational training, employment services, and employer incentives. Finally, to be effective, quota regimes need to be used in conjunction with other equality measures as part of a holistic employment framework. Examining the Japanese quota system lays bare these criterions.

Japanese law mandates a quota system for persons with disabilities.<sup>134</sup> The scheme was initially applied to the physically disabled, but was expanded to cover persons with intellectual and psychiatric disabilities.<sup>135</sup> Private enterprises of more than 300 workers must maintain a minimum 1.8% rate of disabled workers or pay a levy of 50,000 yen per month per absent worker.<sup>136</sup> Government allowances are paid to employers of more than 300 workers who exceed this minimum, as well as to employers of 300 or fewer workers when more than 4% are disabled.<sup>137</sup> State-related employers face a 2.1% quota.<sup>138</sup> Severely disabled persons are counted as two people against the quota rate.<sup>139</sup> The scheme allows disabled persons to work part-time if needed, and to work at home and telecommute.<sup>140</sup>

The Public Employment Security Office enforces the quota system, and can make public their compliance data, including the names of both

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134. See Japan Organization for Employment of the Elderly and Persons with Disabilities, The Levy System for Employing Disabled Persons, <http://www.jeed.or.jp/english/a-3.html> (last visited Apr. 20, 2007) [hereinafter JEED]; see also Int'l Disability Network, *Japan*, in INTERNATIONAL DISABILITY RIGHTS MONITOR 2005: REGIONAL REPORT OF ASIA 78, 78-79 (2005) [hereinafter *Japan IDR*].

135. See *Japan IDR*, *supra* note 134, at 78.

136. JEED, *supra* note 134.

137. *Id.*

138. *Japan IDR*, *supra* note 134, at 79.

139. JEED, *supra* note 134.

140. INT'L LABOUR OFFICE, ILO INFOCUS PROGRAMME ON SKILLS, KNOWLEDGE & EMPLOYABILITY, JAPAN COUNTRY PROFILE, EMPLOYMENT OF PEOPLE WITH DISABILITIES: THE IMPACT OF LEGISLATION (ASIA AND THE PACIFIC) 25 (2003) [hereinafter JAPAN COUNTRY PROFILE], available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1193&context=gladnetcollect>.

recalcitrant and voluntarily abiding employers.<sup>141</sup> It also assists in formulating hiring and business plans for employers.<sup>142</sup> Over the thirty-year period in which Japan has had an employment quota system, the rate of disabled employees in the private sector has risen to 1.47%; the government rate of 2.14% exceeds the 2.1% quota minimum.<sup>143</sup> This success is not unqualified, since many companies elect to pay the levies rather than hire disabled workers, and others use a loophole in the law to establish segregated subsidiary companies.<sup>144</sup>

Japan thus illustrates good practice by targeting the intellectually disabled, applying the quota system to both the public and private sectors, and employing a levy and grant system. At the same time, Japan is currently considering how to revise its disability employment quota system in light of complaints as to its efficacy, as well as pressure from disability rights groups seeking to pass antidiscrimination legislation.<sup>145</sup>

Quota systems can enable disabled persons to undertake productive work in inclusive settings and assist in changing social attitudes about the capability of disabled workers, two necessary ingredients for ensuring the effective implementation of disability employment policies.

#### D. CULTURAL ATTITUDE CHANGE

State action to promote positive attitude change towards disabled persons is vital. Perspective-altering measures may be targeted at employers, the disabled community, their families, and the general public (especially school-age children whose attitudes have not yet calcified). These campaigns can demonstrate the potential capabilities of workers with disabilities to employers, and heighten the self-esteem of disabled people. Additionally, they can inform disabled people and employers of existing legal rights and obligations.

In Hong Kong, the Marketing Consultancy Office (part of the Hong Kong Social Welfare department) has used marketing techniques to identify and educate employers on the benefits of hiring disabled workers.<sup>146</sup> The agency also formed a collation of non-governmental

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141. *Jpan IDR*M, *supra* note 134, at 78; *see also* DPI-Japan, *Position Paper on Self Help Groups* app. B-5 (Oct. 2006), <http://www.worldenable.net/agents2006/paperdpjapan.htm> (describing the efforts of DPI-Japan Advocacy Center in lobbying for the release of 9,040 Tokyo companies in default of their quota obligations).

142. *See Japan IDR*M, *supra* note 134, at 78-79.

143. *Id.* at 81-82 (citing JAPAN COUNTRY PROFILE, *supra* note 140).

144. *Japan IDR*M, *supra* note 134, at 78.

145. In March 2005, Professor Michael Stein testified to a Japan Diet Committee on the implications of adopting an antidiscrimination statute. *See* Michael Ashley Stein, *Americans with Disabilities Act Policy Implications for Reforming Japanese Disability Employment Law, Proceedings of a Presentation to the Japan Diet*, JAPAN DISABILITY F. BULL. (Apr. 2005) (Japanese translation).

146. *See* INT'L LABOUR OFFICE, *Marketing Consultancy Office, Hong Kong, Opportunity in Numbers—A Progressive Government Initiative in Hong Kong SAR Creates an Alliance of NGOs to*

organizations (NGOs) to better compete for larger employment contracts, and prepare disabled workers for potential open market opportunities.<sup>147</sup> Using this strategy, businesses such as Italian Motors Ltd. were encouraged to contract a NGO to clean showroom cars, a service delivered by intellectually disabled employees.<sup>148</sup> Marketing techniques have also been used to support these efforts, with NGO coalition services and products promoted in the media through free advertising opportunities, and in editorials. The patented brand “SEPD” (“Support the Employment of People with Disabilities”) has been marketed in a number of venues including the Hong Kong International Airport.<sup>149</sup>

Also in Hong Kong, the Labor Department acts in conjunction with employers’ associations to arrange exhibitions and seminars that increase employer awareness of the capabilities of disabled people.<sup>150</sup> Each year an Outstanding Disabled Employees Award is given by the Labor Department to an employee with a disability, and an Enlightened Employers Award is bestowed on an employer energetically ensuring the employment of disabled workers.<sup>151</sup> Such programs are likely to enhance the successful implementation and enforcement of other equality measures.

By contributing to their communities, disabled employees and entrepreneurs act as role models and stimulate positive cultural perspectives toward the community of people with disabilities.

#### E. SELF-EMPLOYMENT INITIATIVES

Small businesses and self-employment are important sources of work for people with disabilities, especially because of their frequent exclusion from open labor market opportunities.<sup>152</sup> States can empower disabled entrepreneurs to establish successful enterprises by providing technical assistance such as business training and development, and financial support that includes low interest loans and tax incentives. States also can assist disabled persons organizations, NGOs, and social enterprises to develop small businesses that employ workers with disabilities. Three country examples exhibit some of these good

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*Adopt to a Changing Economy*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC, *supra* note 110, at 208, 208-09.

147. *Id.* at 208.

148. *Id.* at 211.

149. *Id.* at 213-14. Further information on Marketing Consultancy Office and SEPD is available at <http://www.info.gov.hk/mcor/english/sepd/profile.html>.

150. See WAN, *supra* note 126, at 50.

151. *Id.*

152. See Peter D. Blanck et al., *Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583, 1594 (2000).

practices.

In Vietnam, a disability-targeted program of the National Fund for Employment has provided low interest loans to the Vietnam Blind Association.<sup>153</sup> The scheme has stimulated self-employment with the creation of more than 300,000 registered businesses in the period 2000–2001.<sup>154</sup> The program's success is demonstrated by a 0.79% overdue debt rate for disabled entrepreneurs in 2001 as compared to 6.55% non-disabled overdue debt rate, establishing that disabled people can manage credit.<sup>155</sup>

The Cambodian Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation and the International Labour Organization have jointly supported a thriving project involving peer training, with financial support from the Finnish Embassy in Bangkok, and AGFund.<sup>156</sup> The success case replication method was used, in which flourishing entrepreneurs train people with disabilities in informal apprenticeships.<sup>157</sup> The project's staff identifies profitable entrepreneurs in markets (e.g., basket weaving and soymilk production) that can sustain additional workers, and invites them to train disabled persons.<sup>158</sup> The trainees with disabilities also receive financial assistance with fees, as well as grants and loans to allow them to establish their own enterprises.<sup>159</sup> Subsequently, disabled entrepreneurs often train other disabled people. An International Labour Organization medal acknowledged the project's success, which allows poor and isolated people with disabilities the opportunity to become self-employed; and the Cambodian government has agreed to extend this venture to additional provinces.<sup>160</sup> The program now specially targets women with disabilities.<sup>161</sup>

In Hong Kong, a Marketing Consultancy Office project provides

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153. See INT'L DISABILITY NETWORK, *Vietnam*, in INTERNATIONAL DISABILITY RIGHTS MONITOR 2005: REGIONAL REPORT OF ASIA 136, 136–39 (2005) [hereinafter *Vietnam IDRM*].

154. *Id.* at 138.

155. *Id.* at 138–39.

156. See INT'L LABOUR OFFICE, *Alleviating Poverty Through Peer Training, Cambodia, Transferring Skills Villager to Villager—Alleviating Poverty Through Peer Training in Cambodia*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC, *supra* note 110, at 85, 85–93 [hereinafter *Transferring Skills*]; see also INT'L LABOUR OFFICE, REPORT OF THE DIRECTOR-GENERAL, DECENT WORK IN ASIA: REPORTING ON RESULTS 2001–2004, FOURTEENTH ASIAN REGIONAL MEETING 73–74 (2005).

157. *Transferring Skills*, *supra* note 156, at 89.

158. *Id.* at 87, 91.

159. See *id.* at 89.

160. *Id.*

161. The focus on gender, as well as other information relating to ILO AbilityAsia projects is provided on the International Labour Organization, Regional Office for Asia and the Pacific homepage, <http://www.ilo.org/public/english/region/asro/bangkok/>.

grants to NGOs to establish small businesses with a minimum of 60% disabled workers. The grant supports the enterprise's initial capital and operational expenses.<sup>162</sup> The Rehabilitation Alliance Hong Kong is an example of a disabled persons organization that was awarded funding. It successfully operated 7-11 convenience store franchises under this scheme, employing a majority of physically and intellectually disabled workers.<sup>163</sup> Not only have these stores been profitable, they were selected as "best performance" franchises among Hong Kong's 7-11 outlets. The Rehabilitation Alliance's experience demonstrates that useful equality measures to aid disabled workers may include job sharing, job coaches, substitute employees, flexible work hours, and written instructions.<sup>164</sup>

State cooperation with non-state actors can effectively create self-employment opportunities for disabled workers. Entrepreneurs with disabilities who demonstrate their business acumen can stimulate attitude change both in the corporate world and within the disability community. When addressing self-employment, an integrated policy approach will also consider accessibility, transportation, health care, and targeting those who experience multiple forms of discrimination.

#### F. PREFERENTIALLY RESERVED OCCUPATIONS

Occupations can be exclusively or partially reserved for people with disabilities. The Republic of Korea has reserved massage exclusively, and acupuncture, fortune telling, and moxibustion (a form of traditional Asian medicine) partially, as occupations for visually impaired people.<sup>165</sup> These employment choices reflect culturally perceived notions regarding blind peoples' capabilities.<sup>166</sup>

Reserving an occupation exclusively creates opportunities for workers with disabilities, but it also precludes those individuals from exploring other talents as advocated for by the disability human rights paradigm. Indeed, in South Korea massage is often the only vocational

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162. Information is provided by the Marketing Consultancy Office (Rehabilitation), Social Welfare Department, and The Government of the Hong Kong Special Administrative Region. See SOCIAL WELFARE DEP'T, THE GOV'T OF THE HONG KONG SPECIAL ADMINISTRATION REGION, GUIDE TO ENHANCING EMPLOYMENT OF PEOPLE WITH DISABILITIES THROUGH SMALL ENTERPRISE PROJECT, at 2-3 (2003), available at <http://www.swd.gov.hk/dc/rehab/3Eguide04e.pdf>.

163. See INT'L LABOUR OFFICE, *Rehabilitation Alliance Hong Kong, Hong Kong SAR, A Convenience for Everyone—People with Disabilities Open a 7-11 Store in Hong Kong SAR*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC 123, 123-26 (Debra A. Perry ed., 2003).

164. *Id.* at 123-28.

165. See DAL YOB LEE, THE STATUS OF TRAINING AND EMPLOYMENT POLICIES AND PRACTICES FOR PEOPLE WITH DISABILITIES IN THE REPUBLIC OF KOREA 52 (Dec. 2002), available at <http://www.ilo.org/public/english/region/asro/bangkok/ability/download/korea.pdf>.

166. See Mindy Bruton, *Touchpoints: Massage and Politics in South Korea*, MASSAGE THERAPY REVIEW, Feb. 2007, at 4, [www.cortiva.com/pdf/deepMTR-Feb-2007.pdf](http://www.cortiva.com/pdf/deepMTR-Feb-2007.pdf).

training available in the special education system for the blind, and the only post-education employment option.<sup>167</sup> Employment field reservations also reinforce cultural misperceptions about the abilities of disabled workers (including those workers' self-perception) and heighten negative social attitudes toward disabled people for being, ironically, "privileged."<sup>168</sup> Exclusively reserving an occupation for any one group prevents talents from developing in those individuals, contravening the disability human rights paradigm. The Constitutional Court of Korea recently ruled that the exclusive reservation of massage on behalf of the visually disabled was unconstitutional and opened the profession to the non-disabled.<sup>169</sup>

Culturally sensitive, partial occupational reservations may at times be beneficial. In extremely exclusionary environments, these measures can demonstrate the capability of disabled people and ensure (much like quotas) a certain number of jobs on behalf of workers with disabilities. Such reservations, however, need to be combined with inclusive vocational training and awareness raising programs that develop and demonstrate the individual talents of people with disabilities. Preferential contracts for goods and services are an additional equity measure that can be implemented. Such contracts can encourage broader occupational avenues for disabled workers, and assist supported employment.<sup>170</sup>

#### G. COLLABORATION

State-supported disability employment efforts can be rendered more effective by collaborating with other stakeholders, including employers, employer associations, trade unions, NGOs, and especially disabled persons. Such partnerships can both expand and enhance the

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167. The practice of setting aside massage for blind individuals can be traced back to the Japanese occupation in 1913. *Id.* The massage offered by blind practitioners differed from that provided by sighted massage workers. *Id.*

168. See Damien Carrick, *The Law Report: Level Playing Field or Blind Alley* (Australian National Broadcasting Corporation Broadcast July 11, 2006) (transcript available at <http://www.abc.net.au/rn/lawreport/stories/2006/1681412.htm>).

169. The decision drew an angry response from disability activists, in large part because of the generally limited employment options. Hundreds protested at the parliament building, and an extreme case committed suicide. See Hyo-sik Lee, *Blind Calling for Exclusive Rights in Massage Business*, KOREA TIMES, June 1, 2006; *A Blow for the Blind*, THE ECONOMIST, June 22, 2006. The National Assembly returned the exclusive niche to the blind via a regulation that is now once more being contested in the Constitutional Court. Bruton, *supra* note 166.

170. For example, following lobbying by disability advocates, the South Korean legislature passed a law requiring the government to preferentially purchase certain material goods, including trash bags, from people with disabilities. See INT'L LABOUR OFFICE, *Eden House, Republic of Korea, Cleaning Up and Creating Work—How Trash Bags Raise the Self-Esteem and Incomes of People with Multiple and Severe Disabilities in the Republic of Korea*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC, *supra* note 110, at 63, 65.

employment opportunities available to workers with disabilities. Collaborations with employers can ensure that training and services are linked to employment opportunities. Partnerships with trade unions and employer associations can assist advocacy for inclusive practices.

An important challenge facing governments is how to provide adequate and appropriate supported and transitional employment. Unfortunately, many States continue to support sheltered workshops offering isolated and menial “make-work” employment, while neglecting to provide transitional (i.e., shifting from segregated to labor market) or open employment opportunities. Well-designed transitional employment opportunities are market-oriented, offer diverse employment and skill levels, and are geared toward easing workers with disabilities into the supported or regular workforce. Supported and transitional employment opportunities can be successfully created and facilitated in public private collaborations. Partnerships between the State, trade unions, private enterprise and civil society groups are all potentially beneficial. Equity measures like workplace training, job coaches, job sharing, flexible work schedules, and transportation assistance can further facilitate collaborative efforts. A pair of good practice examples illustrates these principles.

The Singapore Ministry of Community Development and Sports established the Bizlink Centre in conjunction with private enterprises to link entrepreneurs with an underemployed disabled workforce.<sup>171</sup> Through this collaboration Bizlink has expanded disabled employment opportunities by convincing industry of the benefits of tapping into this underused and unappreciated labor pool. This partnership, in collaboration with NGOs, has allowed the Centre to provide market driven employment and respond to the individual needs of people with disabilities. It provides a variety of employment services from supported and transitional employment to open market placement.<sup>172</sup> Among the job opportunities created were telemarketing and call centers for the visually disabled, and a housekeeping service for the intellectually disabled.<sup>173</sup> The Centre’s production workshop offers both market relevant training (having sub-contracted for the manufacture of machine parts and digital archiving) and supported employment. Equality devices

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171. See INT’L LABOUR OFFICE, *Bizlink, Singapore, Support Doesn’t Always Mean Welfare—A Unique Community Service in Singapore Promotes Independence of Citizens with Disabilities*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC, *supra* note 110, at 157, 157-66 [hereinafter *Bizlink*].

172. See generally Justin Tan-hong Tuen, *Effects of the Economic Crisis on the Placement of People with Disabilities in Singapore*, 2 ASIA & PAC. J. ON DISABILITY 1 (1999) (discussing the role played by the Bizlink Centre of Singapore).

173. See *Bizlink*, *supra* note 171, at 161.

provided include job coaches and transportation.<sup>174</sup> Workshop employees receive wages, compensation, and retirement benefits.<sup>175</sup> Notably, the Bizlink workshop initially employed only workers with disabilities, but to heighten its size and flexibility now hires workers without disabilities. It has thus mainstreamed in reverse.<sup>176</sup>

A trade union and the government jointly support Employment Support Centers in Japan, underscoring the potential of such collaboration.<sup>177</sup> The union has also worked with employers' associations to encourage companies to employ disabled workers from the Centers.<sup>178</sup> This partnership applies dual leverage on businesses to expand employment opportunities for the disabled, from the ground up and at the management level.<sup>179</sup> Among the services provided are vocational training, job counseling, supported employment for intellectually disabled workers (including those with autism), and open employment placement assistance.<sup>180</sup> The aim is to endow intellectually disabled employees with market relevant skills, and then ease their entry into the labor market through a progression of occupational and social skill education, simulated work sessions, and internships.<sup>181</sup> Job coaches, accommodations, and adaptations are provided at each level.<sup>182</sup>

Supported employment (including sheltered workshops) can be an effective practice benefiting from state non-state alliances. However, this scheme must be treated with caution and used only in limited circumstances, for example as a conduit to the open labor market. We stress that the standard approach to employees with disabilities should be one directed at creating opportunities for those workers to experience decent and dignified working conditions in fully integrated settings.

Collaborative efforts between government, the private sector, and a trade union demonstrates that efficacy and synergy arise when different parts of society join forces to ensure the full inclusion of workers with disabilities in market-oriented employment. It further highlights the benefit of multisectorial collaboration in disability employment

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174. *Id.* at 161, 164–65.

175. *Id.*

176. *Id.* at 165.

177. INT'L LABOUR OFFICE, *Kanagawa Regional Council of the Japanese Electrical, Electronic and Information Union, Japan, Commitment to Community Service—A Trade Union Helps Open the Employment Field to People with Disabilities in Japan*, in MOVING FORWARD: TOWARD DECENT WORK FOR PEOPLE WITH DISABILITIES: EXAMPLES OF GOOD PRACTICES IN VOCATIONAL TRAINING AND EMPLOYMENT FROM ASIA AND THE PACIFIC, *supra* note 110, at 221, 221–22 [hereinafter *Kanagawa Regional Council*].

178. *Bizlink*, *supra* note 171, at 165.

179. *Id.*

180. *Kanagawa Regional Council*, *supra* note 177, at 221, 224–26.

181. *Id.* at 222.

182. *Id.* at 224–26.

legislative, policy, and program design.

#### CONCLUSION

This Article demonstrated that civil rights alone cannot ensure social and economic equality for the 600 million persons with disabilities worldwide. Instead, States must apply a holistic and integrated human rights approach as set forth in the disability human rights paradigm. This framework recognizes the importance of both first- and second-generation rights, and so embraces antidiscrimination as well as equality measures. The UN Disability Rights Convention is similarly oriented, and will obligate States to take this approach. We therefore urge all countries, including the United States, to fulfill their moral obligation of ensuring the equality of their disabled citizens by ratifying and implementing the United Nations treaty. Notably, the UN Disability Rights Convention will also require States to engage in disability-inclusive development practices, thereby extending disability equality beyond national borders.

The disability human rights paradigm applies to both the process and outcome of human rights. It necessitates the participation of people with disabilities (along with other stakeholders) in the process of societal reconstruction so that they may claim their rights. To comply with this framework, States must collaborate in policy design, implementation, enforcement, and monitoring with people with disabilities, their families, advocates, and organizations, as well as other aspects of civil society. This will ensure a sense of ownership among those citizens targeted by the process. Including disabled persons also makes it more likely that the policies enacted will accurately reflect their social conditions, and have greater impact on their daily lives. Only in these ways can equality be ensured for people with disabilities of a level required by the forthcoming UN Disability Rights Convention.

Finally, it bears noting that by assuring the inclusion and equality of disabled persons, States also benefit other socially excluded groups, such as ethnic minorities, women, and the poor. This is due to two reasons. First, that the group classified as “disabled” often overlaps significantly with other socially marginalized groups. Second, because focusing on individual need in the manner required by the disability human rights paradigm allows States to develop the individual talents of other excluded groups. Thus, although we addressed the issue of disability human rights in this Article, the type of rights advocated ultimately transcend the disability category. This connection underscores the universality of disability, both as a human rights issue and as part of the human experience.