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Disability Human Rights

Michael Ashley Stein

# Disability Human Rights

Michael Ashley Stein<sup>†</sup>

*Responding to the absence of an international treaty expressly protecting people with disabilities, the United Nations General Assembly will soon adopt a disability-based human rights convention. This Article examines the theoretical implications of adding disability to the existing canon of human rights, both for individuals with disabilities and for other under-protected people. It develops a “disability human rights paradigm” by combining components of the social model of disability, the human right to development, and Martha Nussbaum’s version of the capabilities approach, but filters them through a disability rights perspective to preserve that which provides for individual flourishing and modifying that which does not. This Article maintains that Nussbaum’s capabilities approach provides an especially fertile space within which to understand the content of human rights. However, because her scheme excludes some intellectually disabled individuals and conditions the inclusion of others, it falls short of a comprehensive framework. Amending Nussbaum’s capabilities approach to develop the talents of all individuals results in a disability human rights paradigm that recognizes the dignity and worth of every person. This Article also argues that a disability rights paradigm is capable of fortifying human rights in two ways: first, it can reinforce protections afforded to groups already protected, such as women; and second, it can extend protections to people currently not protected, such as sexual minorities and the poor. Ultimately, the disability rights paradigm*

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*indicates that human rights protection can progress from a group to an individual basis. Repositioning disability as an inclusive concept embraces disability as a universal human variation rather than an aberration.*

#### INTRODUCTION

More than six hundred million people, or about 10% of the world's population, have some type of disability.<sup>1</sup> Around 80% of disabled persons live in developing countries, where they experience material deprivation and social exclusion.<sup>2</sup> For example, only 2% of disabled children in such countries receive any schooling.<sup>3</sup> Nevertheless, no existing United Nations human rights treaty expressly protects people with disabilities. To claim protection under a United Nations convention, disabled individuals must either invoke a universal provision or embody a separately protected characteristic. For instance, a woman with a disability may not claim protection based on her disability status alone, but may claim protection from torture or from sex discrimination.

As a result of these limitations, only a handful of disability-based human rights claims have been asserted under these "hard laws." By contrast, a series of General Assembly resolutions, declarations, and protocols explicitly reference disability. Yet these "soft laws" are not legally enforceable. Consequently, no existing international human rights instrument is both applicable to and enforceable by individuals on the basis of disability. In response to this void, the United Nations commissioned an Ad Hoc Committee to consider an international convention specifically protecting the human rights of disabled persons. As of this writing, that committee has drafted articles for consideration by the General Assembly.

This Article examines the theoretical implications of adding disability protections to the existing canon of human rights, both for individuals with disabilities and for other under-protected people.<sup>4</sup> To do so, it develops a "disability human rights paradigm" that combines components of the social model of disability, the human right to development, and philosopher

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1. GERARD QUINN ET AL., HUMAN RIGHTS AND DISABILITY 1 (2002), available at <http://www.nhri.net/pdf/disability.pdf>.

2. See THE SECOND ANNUAL REPORT ON THE IMPLEMENTATION OF USAID DISABILITY POLICY 1-2 (2000), [http://pdf.dec.org/pdf\\_docs/PDABT610.pdf](http://pdf.dec.org/pdf_docs/PDABT610.pdf). For a sense of how the varying levels of disability are reported from country to country, see Statistics Div., U.N. Dep't of Econ. & Soc. Affairs, *Human Functioning and Disability*, available at <http://unstats.un.org/unsd/demographic/sconcerns/disability/default.htm> (last visited Aug. 13, 2006).

3. See QUINN ET AL., *supra* note 1, at 1.

4. Although the proposed convention is an expedient framework for discussing the repercussions of incorporating disability-based rights into the extant body of human rights treaties, my arguments do not depend on its passage. At the same time, I freely admit that I favor enactment of the proposed convention, and, moreover, that I am privileged to have been involved in its development.

Martha Nussbaum's version of the "capabilities approach,"<sup>5</sup> but filters these frameworks through a disability rights perspective to preserve that which provides for individual flourishing and modify that which does not.

Nussbaum's capabilities approach generally values the dignity, autonomy, and potential of all individuals, and views each as his or her own end. In doing so, her framework provides an elegant normative theory of human rights as a means of ensuring human flourishing. However, Nussbaum's scheme does not sufficiently account for the development of individual talent. This is because it requires that individuals be capable of attaining each of ten functional abilities as a prerequisite to being "truly human" and thus wholly entitled to resource distribution. Consequently, her framework excludes some individuals with intellectual disabilities, and only indirectly assists others.<sup>6</sup>

A more inclusive approach is the disability human rights paradigm, which maintains as a moral imperative that every person is entitled to the means necessary to develop and express his or her own individual talent. This paradigm compels societies to acknowledge the value of all persons based on inherent human worth, rather than basing value on an individual's measured functional ability to contribute to society. Accordingly the framework assesses ability from the bottom up, embracing all individuals—including those excluded by Nussbaum's capabilities approach—and accounting for their functional variations. By putting potential talent above function, the paradigm I offer embraces disability as a universal variation rather than as an aberration. This approach is necessary if human rights are to apply to all humans.

This Article also argues that disability-based human rights necessarily invoke both civil and political ("first-generation") rights, as well as economic, social, and cultural ("second-generation") rights to a greater degree than previous human rights paradigms. Broadly stated, first-generation rights largely occupy the focus of human rights practitioners and advocates. These rights are understood as promoting equal treatment among individuals, and include prohibitions against State interference.

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5. Strictly speaking, the capabilities approach originates with Amartya Sen's development economics theories. *See, e.g.,* AMARTYA K. SEN, DEVELOPMENT AS CAPABILITY EXPANSION, IN HUMAN DEVELOPMENT AND THE INTERNATIONAL DEVELOPMENT STRATEGY FOR THE 1990S I (Keith Griffin & John Knight eds., 1990) [hereinafter SEN, DEVELOPMENT AS CAPABILITY EXPANSION]. The premises proffered, by Nussbaum and Sen, respectively, provide essential support for arguments made in this Article. In Parts III.B-C., I build on—and strongly critique—Nussbaum's version to help model a framework for human rights because I find her feminist perspective conducive to disability rights discourse. I utilize Sen's economic methodology primarily in Part IV.B. to argue in favor of extending human rights protection to the poor because of its deeper link to development economics.

6. By logical extension Nussbaum's capabilities approach also excludes some individuals with non-intellectual disabilities as well as certain lower functioning individuals without disabilities. A full discussion exceeds the boundaries of this Article.

Sometimes these rights are thought of as “negative rights.”<sup>7</sup> Examples of first-generation rights are the rights to life, movement, thought, expression, association, religion, and political participation.<sup>8</sup> Second-generation rights are traditionally the province of development agencies. These rights are understood as providing equal opportunity, and are often thought of as “positive rights.”<sup>9</sup> Second-generation rights generally focus on standards of living, including issues such as the availability of housing and education.<sup>10</sup>

Tying first- and second-generation rights together illustrates how the disability human rights paradigm can be applied to other people. The social attitudes underlying disability-related exclusion manifest more overtly than those causing isolation of other groups. Applying a disability paradigm highlights the effect of social exclusion, and points out the need of ensuring that the human rights of all socially marginalized groups are protected. As a result, the disability human rights paradigm reaffirms that established human rights protections, like those extending to women, require indivisible application of first- and second-generation rights as envisioned by the third-generation human right to development. The disability framework also maintains that human rights protections should be applied to other marginalized people, such as sexual minorities and the poor. Ultimately, the disability rights paradigm indicates that human rights protection can progress from a group to an individual basis. Thus, in addition to advocating for disability-specific protection paralleling that of established human rights instruments—itsself a rare exercise in legal literature<sup>11</sup>—I proffer an argument for extending disability-based human

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7. Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122 (1958) (declaring that authentic liberty is simply the absence of “the deliberate interference of other human beings within the area in which I could otherwise act”).

8. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6, para. 1, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (“Every human being has the inherent right to life.”) [hereinafter ICCPR]; ICCPR, *supra*, art. 9, para. 1 (“Everyone has the right to liberty and security of person.”); ICCPR, *supra*, art. 12, para. 1 (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”); ICCPR, *supra*, art. 18, para. 1 (“Everyone shall have the right to freedom of thought, conscience and religion.”).

9. See, e.g., International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 11, para. 1, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, 993 U.N.T.S. 3 (Dec. 16, 1966) (“States parties . . . recognize the right of everyone to an adequate standard of living”) [hereinafter ICESCR]; Berlin, *supra* note 7, at 123 (defining positive liberty as the result of self-reliance and the ability to direct one’s own agency).

10. It is significant that development agencies have only more recently embraced first-generation rights. Human rights scholars have long criticized these entities for neglecting human rights to focus exclusively on subsistence issues, meaning food and clean water. See, e.g., Philip Alston, *The Fortieth Anniversary of the Universal Declaration of Human Rights*, in *HUMAN RIGHTS IN A PLURALIST WORLD* 1, 11-12 (J. Berting et al. eds., 1990).

11. A notable exception is *THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL* (Stanley S. Herr et al. eds., 2003) (publishing the proceedings of a 1995 conference convened at Yale Law School) [hereinafter *DIFFERENT BUT EQUAL*].

rights concepts to other socially excluded individuals.<sup>12</sup> The paradigm therefore stakes out a distinct perspective on human rights law, one I hope will encourage further discussion.

Parts I and II set forth the existing canon of disability-based human rights protections. Part I considers current United Nations instruments pertaining to disability, and briefly recounts the efforts underway to pass a convention on behalf of disabled persons. Part II describes the social model of disability in contrast to the medical model, and discusses its growing influence on the formation of international instruments as well as its limitations in overall human rights discourse. Parts III and IV consider the implications of applying a disability human rights paradigm both to persons with disabilities and other groups. Part III develops the paradigm by integrating Martha Nussbaum's version of the capabilities approach with the social model of disability and the human right to development. Part IV argues that the clearly indivisible nature of disability-based rights presents a strong exemplar, indicating the ability to understand established human rights as similarly undividable, and creates the possibility for extending human rights protection to other vulnerable populations. This Article concludes with a few thoughts on the potential consequences of viewing disability as universal to rather than abnormal from the human condition.

## I

### THE SCOPE OF DISABILITY HUMAN RIGHTS

Each of the seven core United Nations treaties theoretically applies to disabled persons in varying degrees, but are rarely applied in practice. Compounding this problem, General Assembly soft laws explicitly referencing disability are legally unenforceable. An international convention specifically protecting the human rights of disabled persons will soon be considered by the General Assembly.

#### A. *Hard Laws: United Nations Core Treaties*

Since its formation after the Second World War, the United Nations has promulgated seven core legally enforceable human rights treaties.<sup>13</sup>

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12. The only comparable analysis I am aware of is Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996), which sought to extend Americans with Disabilities Act reasonable workplace accommodations to members of constitutionally protected classes.

13. Whether treaties are actually enforced, as well as the broader question of whether international law is "law," has long been the subject of academic debate, the resolution of which goes far beyond this Article. For now it bears noting that perhaps the most significant objection to the notion of enforceability is the observation that under international law States parties retain the ability to opt out of treaties, in whole or in part, as well as to reserve independent understandings of their application.

Each of these hard laws implicitly protects persons with disabilities, but to varying degrees. To invoke these protections, disabled persons must either fall under a universal provision or possess a separately protected characteristic in addition to his or her disability. To date, no United Nations human rights treaty expressly applies to individuals on the basis of a disability-related characteristic.<sup>14</sup>

Two components of the International Bill of Human Rights,<sup>15</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>16</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>17</sup> are universal in scope.<sup>18</sup> The same is true for the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).<sup>19</sup> Although disability is not specifically mentioned in

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For two very different perspectives on the implications of this State prerogative, compare Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003) (maintaining that traditional understandings of treaty ratification do not adequately account for the likelihood of national compliance) and Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (asserting that some number of States ratify human rights treaties as a means of avoiding observance), with Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (arguing that international human rights treaties encourage domestic legal norm changes) [hereinafter Goodman & Jinks, *How to Influence States*], and Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 13 EURO. J. INT'L. L. 171 (2003) (same, while also critiquing the empirical evidence upon which Hathaway based her conclusions). For a harmonizing approach, see Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. (forthcoming 2007).

14. Similarly, disabled persons are not explicitly included in non-treaty United Nations instruments. For example, both the Charter of the United Nations and the Universal Declaration of Human Rights promote human rights, but neither expressly references disability. *See, e.g.*, U.N. CHARTER art. 55, para C. (expressing an aspiration to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”); Universal Declaration of Human Rights, G.A. Res. 217A (III), arts. 1-2, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) (proclaiming that “all human beings are born free and equal in dignity and rights” and are “entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”) [hereinafter Universal Declaration].

15. *See* Office of the High Comm’r for Human Rights, *Fact Sheet No. 2 (Rev. 1): International Bill of Human Rights*, <http://www.unhchr.ch/html/menu6/2/fs2.htm> (the International Bill of Human Rights is a collection of international instruments, including the Universal Declaration, ICCPR, ICESCR, and two Optional Protocols).

16. ICCPR, *supra* note 8.

17. ICESCR, *supra* note 9.

18. *See, e.g.*, ICCPR, *supra* note 8, at pmb. (averring that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”); ICESCR *supra* note 9, at art. 2, para. 2 (the rights enumerated in the ICESCR “will be exercised without discrimination of any kind as to race, colour . . . or other status”).

19. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. GAOR, 39th Sess., Annex, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

any of these treaties, they technically include all human beings within their respective provinces.<sup>20</sup>

In addition to these three universal treaties, the General Assembly has enacted four hard law treaties protecting people based on specific identity characteristics unrelated to disability.<sup>21</sup> In chronological order, these are: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);<sup>22</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);<sup>23</sup> the Convention on the Rights of the Child (CRC);<sup>24</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW).<sup>25</sup> The CRC alone among these treaties contains a specific disability-related article; it requires that States parties recognize the rights of children with disabilities to enjoy “full and decent” lives and participate in their communities.<sup>26</sup> However, the relative financial constraints of States parties tempers the obligation. Moreover, the CRC

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20. See generally Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, in HUMAN RIGHTS AND DISABLED PERSONS 69 (Theresia Degener & Yolán Koster-Dreese eds., 1995) [hereinafter HUMAN RIGHTS AND DISABLED PERSONS]; Philip Alston, *Disability and the International Covenant on Economic, Social, and Cultural Rights*, in HUMAN RIGHTS AND DISABLED PERSONS, *supra*, at 94; Manfred Nowak & Walter Suntinger, *The Right of Disabled People Not to be Subjected to Torture, Inhuman and Degrading Treatment or Punishment*, in HUMAN RIGHTS AND DISABLED PERSONS, *supra*, at 117.

21. These provisions are a mixed blessing. On the positive side, they provide an additional avenue of protection for disabled persons experiencing “double discrimination” based on more than one identity characteristic. For example, a person may suffer prejudice as a result of being disabled and of Inuit heritage. On the negative side, they only protect individuals who encounter discrimination serially. Because disability is almost uniformly relegated to “other” status, disabled people’s rights are frequently overlooked. One example of such disregard is the Declaration that proceeded from the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance that was convened in Durban, South Africa. See World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance, Aug. 31-Sept. 8, 2001, *Durban Declaration and Programme of Action*, U.N. Doc. No. A/CONF.189/12, available at <http://www.unhcr.ch/pdf/Durban.pdf>. Although the Declaration encourages the General Assembly to enact disability specific human rights protection, it does not include disability among the otherwise inclusive catalog of identity statuses it deemed to suffer discrimination. See *id.* at para. 180. More trenchantly, individuals whose rights are violated “solely” due to their disability identity receive no added protection.

22. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), at 47, U.N. GAOR, Supp. No. 14, U.N. Doc. A/6014 (Dec. 12, 1965) [hereinafter ICERD]; see generally Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT’L L. 283 (1985).

23. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979) [hereinafter CEDAW].

24. Convention on the Rights of the Child, G.A. Res. 44/25, at 166, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC].

25. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, at 261, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Dec. 18, 1990) [hereinafter ICPMW].

26. CRC, *supra* note 24, at art. 23, para. 1.

does not mandate children with disabilities be treated or considered equal to children without disabilities.<sup>27</sup> Hence, except for the CRC's limited concern for disabled children, persons with disabilities are not yet a group with specific protection.

In a 1993 report, a Special Rapporteur cautioned that in the absence of specific treaty protection, human rights abuses against the disabled would likely continue without redress.<sup>28</sup> Unfortunately, this prediction has largely been borne out. In the decade following the report, seventeen disability-related complaints have been asserted under core United Nations instruments. Of these claims, thirteen were declared inadmissible by their respective monitoring committees.<sup>29</sup> The larger implication is that at present six hundred million persons with disabilities worldwide have implied but not actual human rights protection.

### B. *Soft Laws: United Nations Declarations and Resolutions*

In contrast to hard law treaties that do not enumerate specific disability protections, a number of soft laws expressly provide for disabled individuals.<sup>30</sup> These include General Assembly designations of the International Year of the Disabled in 1981,<sup>31</sup> and the International Decade

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27. See CRC, *supra* note 24, at art. 23, paras. 1-3 (“[T]he disabled child has effective access to and receives education, training . . . preparataion for employment and recreational opportunities in a manner conducive to the child’s receiving the fullest possible social integration and individual development.”). The equality of disabled children has, however, been emphasized by the United Nations Commission on Human Rights. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Rights of the Child*, para. 22, U.N. Doc. E/CN.4/RES/2001/75 (Apr. 25, 2001); U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Rights of the Child*, para. 29, U.N. Doc. E/CN.4/RES/2000/85 (Apr. 27, 2000); see generally Thomas Hammarberg, *The Rights of Disabled Children—The UN Convention on the Rights of the Child*, in HUMAN RIGHTS AND DISABLED PERSONS, *supra* note 20, at 147.

28. See LEANDRO DESPOUY, REPORT ON HUMAN RIGHTS AND DISABLED PERSONS paras. 280-81 (1993), available at <http://www.un.org/esa/socdev/enable/dispaperdes0.htm> (noting that “persons with disabilities are going to find themselves in a legal disadvantage in relation to other vulnerable groups” because “unlike the other vulnerable groups, they do not have an international control body to provide them with particular and specific protection”).

29. The ICESCR, the CRC, and the ICPRAMW do not allow the assertion of individual complaints. Individual complaints can be brought under the ICCPR, the CAT, the CEDAW, or the ICERD. The website maintained by the office of the High Commissioner for Human Rights contains detailed information on the operation of the United Nations human rights treaty bodies. See Office of the U.N. High Comm’r for Human Rights, <http://www.unhchr.ch> (last visited Sept. 26, 2006). The decisions of the three relevant monitoring committees can be accessed through the Netherlands Institute of Human Rights web page. See Neth. Inst. of Human Rights, *Welcome to the Sim Documentation Site*, <http://sim.law.uu.nl/sim/Dochome.nsf> (under case law) (last visited Oct. 6, 2006).

30. An overview of the basic documentation is maintained by a special unit of the Division for Social Policy and Development from the United Nations Department of Economic and Social Affairs. See United Nations Enable Webpage, [www.un.org/esa/socdev/enable](http://www.un.org/esa/socdev/enable).

31. International Year of Disabled Persons, G.A. Res. 36/77, at 176, U.N. GAOR, 36th Sess., Supp. No. 77, U.N. Doc. A/RES/36/77 (Dec. 8, 1981).

of Disabled Persons from 1982-1991.<sup>32</sup> The United Nations has also passed resolutions such as the Declaration on the Rights of Mentally Retarded Persons,<sup>33</sup> and the Declaration on the Rights of Disabled Persons.<sup>34</sup> Additionally, the General Assembly adopted a World Programme of Action Concerning Disabled Persons (WPA) to encourage the development of national programs directed at achieving equality for people with disabilities.<sup>35</sup>

Most significant among the soft laws are the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules),<sup>36</sup> which are monitored by a Special Rapporteur.<sup>37</sup> The drawback to these soft laws is that, as resolutions, they lack legally binding power.<sup>38</sup>

### C. *The Proposed United Nations Convention*

Acting on previous proposals to address the lack of specific human rights protection for disabled persons,<sup>39</sup> in December 2001 the General Assembly established an Ad Hoc Committee to consider enacting a disability-based human rights instrument.<sup>40</sup> The Ad Hoc Committee in turn

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32. Implementation of the World Programme of Action Concerning Disabled Persons, G.A. Res. 37/53, at 186-87, para. 11, U.N. GAOR, 37th Sess., Supp. No. 53, U.N. Doc. A/RES/37/53 (Dec. 3, 1982).

33. Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), at 93, U.N. GAOR, Supp. No. 29, U.N. Doc. A/8429 (Dec. 20, 1971).

34. Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), at 88, U.N. GAOR, Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975).

35. World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, at 185, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/RES/37/52 (Dec. 3, 1982) [hereinafter World Programme].

36. Standard Rules on the Equalization of Opportunities for Persons With Disabilities, G.A. Res. 48/96, at 202, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/RES/48/96 (Dec. 20, 1993) [hereinafter Standard Rules].

37. The first Special Rapporteur for Disability, Bengt Lindqvist of Sweden, was appointed in 1994, and had his commission renewed in 1997 and in 2000. See United Nations Enable, *The Special Rapporteur on Disability of the Commission for Social Development*, <http://www.un.org/esa/socdev/enable/rapporteur.htm> (last visited Oct. 6, 2006). The current Special Rapporteur for Disability is Sheikha Hissa Al Thani of Qatar. *Id.* For an insider's perspective on the role of the Special Rapporteur, see Bengt Lindqvist, *Standard Rules in the Disability Field—A New United Nations Instrument*, in HUMAN RIGHTS AND DISABLED PERSONS, *supra* note 20, at 63.

38. See, e.g., The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS), U.N.C.H.R. Res. 1997/33, U.N. ESCOR, 53rd Sess., U.N. Doc. E/CN.4/1997/150 (Apr. 11, 1997); The Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. Res. 46/119, at 188, U.N. GAOR, 46th Sess., Supp. No. 49, U.N. Doc. A/46/49 (Dec. 17, 1991).

39. Notably, in 1987, Italy proffered a convention draft during the forty-second session of the General Assembly. See U.N. GAOR, 42d Sess., 16th mtg., U.N. Doc. A/C.3/42/SR.16 (Oct. 19, 1987). Sweden did the same two years later at the General Assembly's forty-fourth session. See U.N. GAOR, 44th Sess., 16th mtg., U.N. Doc. A/C.3/44/SR.16 (Oct. 24, 1989).

40. Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/168, U.N. GAOR, 56th Sess., Supp. No. 168, U.N.

authorized a working group to draw up a human rights treaty proposal.<sup>41</sup> On January 16, 2004, the working group issued “Draft Articles”; on August 25, 2006, the last day of its eighth session negotiating and amending the proposed treaty, the Ad Hoc Committee adopted the revised Draft Articles.<sup>42</sup> The General Assembly is likely to adopt the convention during the sixty-first session. The Draft Articles reaffirm the seven core treaties<sup>43</sup> and operationalize their content. In pertinent part, the Articles state their purpose as “to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities,”<sup>44</sup> and enunciate essential principles guaranteeing disabled individuals “individual autonomy and independence,” “full participation,” and “inherent dignity and worth.”<sup>45</sup> Thus the Draft Articles include both first- and second-generation rights,<sup>46</sup> and expressly call attention to their indivisibility.<sup>47</sup> By way of enforcement, the proposed instrument mandates collecting statistics and submitting reports to

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Doc. A/RES/56/168 (Dec. 19, 2001). A detailed description of the political process behind the United Nations decision to go forward with a disability human rights convention is set forth in the (United States) National Council on Disability (NCD), Newsroom, *UN Disability Convention—Topics at a Glance: History of the Process*, [http://www.ncd.gov/newsroom/publications/2003/history\\_process.htm](http://www.ncd.gov/newsroom/publications/2003/history_process.htm) (last visited Oct. 3, 2006).

41. Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities, *Report of the Working Group to the Ad Hoc Committee*, para. 1, U.N. Doc. A/AC.265/2004/WG.1 (Jan. 27, 2004). The working group included twelve nongovernmental organizations (“NGOs”). *See id.* at para. 2. The inclusion of NGOs at this stage was unprecedented in the normal course of treaty development at the United Nations, and can be interpreted as acquiescence to NGOs’ assertion of “nothing about us without us.” Nonetheless, a countersignal was also sent to the disability community by locating the working group in New York—the location of United Nations expertise on soft laws—rather than in Geneva, where core human rights treaties are deliberated.

42. *See* Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities, *Draft Convention on the Rights of Persons with Disabilities and Draft Optional Protocol* (2006), available at <http://www.un.org/esa/socdev/enable/rights/ahc8adart.htm> [hereinafter *Draft Articles*].

43. *Id.* at pmbl., para. d.

44. *Id.* at Article 1. The Draft Articles state this goal is to be brought about through the use of “international cooperation.” *Id.* at para. j; *see also* CRC, *supra* note 24, at annex, pmbl. (“[r]ecognizing the importance of international co-operation”); CEDAW, *supra* note 23, at 194 (“[a]ffirming that the strengthening of . . . mutual cooperation among all States” is necessary for effectuation).

45. *Draft Articles*, *supra* note 42, at pmbl. (l), (k), (a).

46. Among the first- and second-generation rights enumerated are: rights to life, equality, expression, privacy, education, employment, health, habilitation and rehabilitation, social benefits, political and social participation, access to public venues, mobility independence, recreation, as well as freedom from discrimination, torture and abuse. *Id.* at arts. 10, 12, 21, 22, 24, 27, 25, 26, 28, 29, 30, 9, 18, 30, 15-16. For a discussion of how these rights intersect and are harmonious with the capabilities approach, *see infra* Part III.B.

47. *Draft Articles*, *supra* note 42, at pmbl., para. c (“Reaffirming the universality, indivisibility and interdependence of all human rights and fundamental freedoms . . .”) (emphasis omitted).

domestic monitoring bodies,<sup>48</sup> developing national policies for disabled citizens,<sup>49</sup> generally promoting positive attitudes toward persons with disabilities,<sup>50</sup> and establishing a treaty body similar to those of the existing seven core conventions.<sup>51</sup>

Unfortunately, the Draft Articles leave several central terms, including “disability” and “accessibility,” conspicuously undefined<sup>52</sup> because of political motivations.<sup>53</sup> Yet the Draft Articles do expansively define “discrimination” as “any distinction, exclusion or restriction” that affects “the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms.”<sup>54</sup> The Draft Articles, and the definitions included therein, indicate a significant shift in how the international community views human rights, suggesting a willingness to rethink the sparse human rights protections specifically provided to persons with disabilities.

## II

### THE SOCIAL MODEL OF DISABILITY

The social model of disability asserts that contingent social conditions rather than inherent biological limitations constrain individuals’ abilities and create a disability category. Beginning in the 1970s, international soft laws addressing disability have increasingly adopted precepts from the social model. Nevertheless, because advocates have limited the social model to formal equality theory, its application is limited within the human rights arena.

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48. *See id.* at art. 31 (“States parties undertake to collect appropriate information, including statistical and research data.”); *id.* at art. 33 (States parties are responsible for establishing systems for monitoring implementation).

49. *See id.* at art. 4, para. B; art. 33.

50. *See id.* at art. 8. These measures include instigating “public awareness campaigns,” mainstreaming public education, and “encouraging” positive images of the disabled in the mass media. *Id.* at art. 8, para. 2 (a)-(c).

51. *Draft Articles, supra* note 42, at art. 34.

52. *See id.* at art. 2 (definitions).

53. Specifically, to secure broad support in the General Assembly, several of the Working Group members believed these definitions should be purposely left vague so that States parties could interpret them according to their own legal and social cultures. Put another way, there was strong feeling among the participating government bodies that human rights enforcement is chiefly a local issue. As related in the NCD newsroom, the United States took an even more removed position, asserting that the matter of disability-related rights, in any form, was a “largely domestic mission” that individual states ought to pursue on their own initiatives. *See Nat’l Council on Disability (NCD) Newsroom, supra* note 40 (quoting Ralph Boyd, former U.S. Assistant Attorney General for Civil Rights). For that reason, the United States rarely participated in the convention process and does not intend to ratify any resultant instrument. *See id.* (U.S. would “participate in order to share our experiences . . . [but] not with the expectation that we [the U.S.] will become party to any resulting legal instrument.”).

54. *See Draft Articles, supra* note 42, at art. 2.

A. *The Social Model versus the Medical Model*

The common misperception of disability conforms to the “medical” model, which views a disabled person’s limitations as inherent, naturally and properly excluding her from participating in mainstream culture. Under this framework, people with disabilities are believed incapable of performing social functions because of medical conditions that impair various major life activities. As a consequence of this notion, disabled persons are either systemically excluded from social opportunity—such as receiving social welfare benefits in lieu of employment—or are accorded limited social participation—such as the case of educating disabled children in separate schools.<sup>55</sup>

In contrast to the medical model, disability studies scholars have long argued for an understanding of disability through a “social” model.<sup>56</sup> This framework maintains that the socially engineered environment and the attitudes reflected in its construction play a central role in creating “disability.” According to the social model, collectively mandated decisions determine what conditions comprise the bodily norm in any given society.<sup>57</sup> Thus, factors external to a disabled person’s limitations are really what determine that individual’s ability to function.<sup>58</sup> Just as some cultures view female leaders as less capable than male leaders,<sup>59</sup> most

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55. See generally Kenny Fries, *Introduction*, in *STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT* 6-7 (Kenny Fries ed., 1997) (noting that “[the medical] view of disability . . . puts the blame squarely on the individual”); CLAIRE H. LACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* (1988) ([T]he “medical/pathological paradigm” of disability stigmatizes the disabled by conditioning their inclusion only “on the terms of the able bodied majority.”).

56. Disability studies is an academic discipline analogous to that of critical race or feminist theory, with dedicated university departments. See Gary L. Albrecht et al., *Introduction: The Formation of Disability Studies*, in *HANDBOOK OF DISABILITY STUDIES* 1, 1-8 (GARY L. ALBRECHT et al. eds., 2001).

57. See generally Richard K. Scotch & Kay Schriener, *Disability as Human Variation: Implications for Policy*, 549 *ANNALS AAPSS* 148 (1997).

58. See Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 *S. CAL. REV. L. & WOMEN’S STUD.* 97 (1995); Ron Amundson, *Disability, Handicap, and the Environment*, 23 *J. SOC. PHIL.* 105 (1992). The framework derives from both British and American disability rights scholars, although the latter have written more extensively on the legal implications of the model. Some scholars credit Michael Oliver with originating the social model theory. See MICHAEL OLIVER, *SOCIAL WORK WITH DISABLED PEOPLE* 23 (1983) (the social model is “nothing more fundamental than a switch away from focusing on the physical limitations of particular individuals to the way the physical and social environments impose limitations on certain groups or categories of people”). Political scientist Jacobus tenBroek made an early contribution to the development of the social model of disability in his classic article. See Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 *CALIF. L. REV.* 841, 842 (1966) (demonstrating how people with disabilities were historically held to higher duties of care in respect to the law of torts because they were perceived as inherently less able to engage in social functions).

59. See, e.g., *THE ETHNOGRAPHY OF MALINOWSKI: THE TROBRIAND ISLANDS 1915-18* 111, 128-31 (Michael W. Young ed., 1979) (the Trobriand society is a matrilineal society, believing that fathers have “nothing to do with the formation of [their child’s] body,” and that all lineage passes through the

societies have historically assumed disabled persons are less capable than nondisabled persons.<sup>60</sup> The social model underscores the manner in which disability is culturally constructed.<sup>61</sup>

### B. *The Social Model and United Nations Instruments*

International resolutions relating to disabled persons were initially steeped in the medical model.<sup>62</sup> Particularly influential among post-World War II international instruments was the “whole man” schema of

mother’s side of the family); ROBERT BRIFFAULT, *THE MOTHERS: THE MATRIARCHAL THEORY OF SOCIAL ORIGINS* 194-95 (1931) (classifying various American Indian tribes, such as the Navajo and Cheyenne, as matriarchal).

60. See, e.g., Jerome E. Bickenbach, *Disability Human Rights, Law, and Policy*, in *HANDBOOK OF DISABILITY STUDIES* *supra* note 56, at 565, 567 (noting the commonly held assumption that “[d]isability is an abnormality, a lack, and a limitation of capacity”). The results of a recent study of prevailing attitudes towards individuals with intellectual disabilities across ten very different countries reflect this misperception. See *MULTINATIONAL STUDY OF ATTITUDES TOWARD INDIVIDUALS WITH INTELLECTUAL DISABILITIES: GENERAL FINDING AND CALLS TO ACTION* (2003), available at [http://www.soill.org/pdfs/multinational\\_study.pdf](http://www.soill.org/pdfs/multinational_study.pdf). However, a minority of cultures believe people with disabilities are especially capable of various functions. In certain Asian countries—for example China—visually-impaired people are frequently trained and valued as masseuses. Moreover, it is illegal for those with ordinary vision to be employed as a masseuse in Taiwan. See *DPP City Councilors Say Lei Received Sighted Massage*, *TAIPEI TIMES*, Sept. 27, 2003, at 3, available at <http://www.taipeitimes.com/News/taiwan/archives/2003/09/27/2003069422>. Indeed, there are social anthropologists who claim that the notion of “disability,” at least as a negative concept, is Western in origin and remains unknown to certain cultures, including some African societies. See, e.g., Aud Talle, *A Child is a Child: Disability and Equality among the Kenya Maasai*, in *DISABILITY AND CULTURE* 56 (Benedicte Ingstad & Susan Reynolds Whyte eds., 1995); Benedicte Ingstad, *Mpho ya Modimo—A Gift from God: Perspectives on “Attitudes” Toward Disabled Persons*, in *DISABILITY AND CULTURE*, *supra*, at 246.

61. Philosopher Anita Silvers provides an eloquent application of the social model of disability to the accommodations required by the Americans with Disabilities Act (ADA), and her underlying theory applies equally well to the statute’s international progeny. ANITA SILVERS, *Formal Justice*, in *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 13 (Anita Silvers et al. eds., 1998). She argues that being physiologically anomalous is viewed as abnormal only because a dominant group imposed conditions favorable to its own circumstances, and not because of “any biological mandate or evolutionary triumph.” *Id.* at 73. Accordingly, the social model of disability recognizes the source of disabled people’s relative disadvantage as a hostile environment that is “artificial and remediable” instead of “natural and immutable.” *Id.* at 74-75. “If the majority of people, instead of just a few, wheeled rather than walked, graceful spiral ramps instead of jarringly angular staircases would connect lower to upper floors of buildings.” *Id.* at 74. Thus, a wheelchair-user experiences disability through antagonistic surroundings, including lack of access to workplaces, educational programs, medical services, and other areas open to the public. Because the ADA accommodations seek to eliminate subordination of individuals with disabilities, Silvers argues that the statute implicitly utilizes the social model of disability, and as such is a product of formal and equalizing justice.

62. The same may be said for both the United States and Europe. See, e.g., RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* (2d ed. 2001) (assessing the motivations impelling United States policy); Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 *COMP. LAB. L.J.* 62 (1996) (examining the theories informing European employment policies).

vocational rehabilitation.<sup>63</sup> This method sought to “treat” disabled persons to facilitate their social participation. In this way, the method further instantiated the medical model’s notion that people with disabilities, rather than society, must change.<sup>64</sup> For example, the General Assembly and the United Nations Economic and Social Council adopted a series of resolutions during the 1950s and 1960s directed both at preventing future disability and at rehabilitating existing disabilities.<sup>65</sup> Indeed, the title of the Economic and Social Council’s 1950 resolution—Social Rehabilitation of the Physically Handicapped—indicates a policy targeting disabled people as the locus of treatment, rather than the external environment.

However, beginning in the 1970s international instruments evidenced a gradual shift from the medical model to the social model of disability.<sup>66</sup> Consequently, both the 1971 Declaration on the Rights of Mentally Retarded Persons and the 1975 Declaration on the Rights of Disabled Persons acknowledge the equality of disabled individuals.<sup>67</sup> Yet, these instruments possessed vestiges of the medical model by assuming individuals are disabled due to “special” medical problems that require segregated social services and institutions as remedies.<sup>68</sup> It was the following decade that saw a more thorough adoption of the social model of disability in United Nations instruments.<sup>69</sup>

Acting on the aphorism “[f]ull participation and equality,” the United Nations proclaimed 1981 the International Year of the Disabled, and the

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63. The term originates with political scientist Ruth O’Brien. See RUTH ANN O’BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* (2001).

64. See HOWARD A. RUSK, *REHABILITATION MEDICINE* (1964); HENRY HOWARD KESSLER, *REHABILITATION OF THE PHYSICALLY HANDICAPPED* (2d ed. 1953). The timing of the medical model, as advanced by these two medical practitioners, was hardly coincidental. Scientific advances made during World War II resulted in higher survival rates for severely wounded soldiers. See, e.g., *SURGERY IN WORLD WAR II: NEUROSURGERY* (John Boyd Coates, Jr. ed., 1959) (describing medical advances in neurosurgery, particularly in relation to treating spinal cord injuries).

65. See MARIA RITA SAULLE, *DISABLED PERSONS AND INTERNATIONAL ORGANIZATIONS* (1982) (providing a catalog of these resolutions); see also U.N. Econ. & Soc. Council [ECOSOC], *Social Rehabilitation of the Physically Handicapped, Report of the Social Commission*, 6th Sess., U.N. Doc. No. E/AC.7/L.24 (July 13, 1950).

66. International soft laws are comparable to legislation passed in the United States and Europe over that same period requiring the provision of reasonable accommodation as an ameliorative to disabling environments. See generally BRIAN J. DOYLE, *DISABILITY DISCRIMINATION: THE NEW LAW* (1996); CHRISTOPHER G. BELL, U.S. COMM’N ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* (1983).

67. For example, the Declaration on the Rights of Mentally Retarded Persons declares that persons with disabilities have the same civil and political rights as other human beings. Declaration on the Rights of Mentally Retarded Persons, *supra* note 33, at para. 4.

68. See, e.g., *id.* at pmb. (emphasizing the need to protect disabled persons and their access to segregated services); Declaration on the Rights of Disabled Persons, *supra* note 34, at para. 8 (underscoring the needs of disabled persons to “special” services).

69. QUINN ET AL., *supra* note 1, at 30 (characterizing the change as “an irreversible shift”).

succeeding decade as the International Decade of Disabled Persons.<sup>70</sup> More significantly, in 1982 the General Assembly also enacted the path-breaking WPA.<sup>71</sup> Although this pronouncement reiterated the twin medical model goals of preventing and rehabilitating disability, it also advocated equalized opportunities for the disabled.<sup>72</sup> The latter aspiration was defined as “the process through which the general system of society, such as the physical and cultural environment” is rendered accessible.<sup>73</sup> Moreover, the WPA emphasized the insufficiency of rehabilitation to achieve this purpose. Instead, “[e]xperience shows that it is largely the environment which determines the effect of an impairment or a disability on a person’s daily life.”<sup>74</sup>

Continuing the trend toward full adoption of the social model, the 1990s were “a banner period for disability law.”<sup>75</sup> Passed in 1993, the Standard Rules remain the central United Nations document regarding disabled persons. The Standard Rules build on the WPA, both emphasizing the equality of people with disabilities and defining disability as a byproduct of social construction. For example, the instrument underscores the need to change general societal misperceptions about the disabled as well as provide sufficient services to support their full inclusion.<sup>76</sup> Though the Standard Rules are monitored by a Special Rapporteur,<sup>77</sup> the instrument is soft law and legally unenforceable. The Standard Rules nevertheless stress that States parties are under “a strong moral and political commitment” to ensure “the equalization of opportunities” for disabled persons.<sup>78</sup>

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70. World Programme, *supra* note 35, at 185.

71. *Id.*

72. Equalizing opportunities was defined as “the process through which the general system of society, such as the physical and cultural environment” is rendered accessible. World Programme of Action Concerning Disabled Persons 1 (1982), available at <http://www.un.org/esa/socdev/enable/diswpa01.htm>.

73. *Id.*

74. *See id.* at 2.

75. Theresia Degener, *International Disability Law—A New Legal Subject on the Rise: The Interregional Experts’ Meeting in Hong Kong*, December 13-17, 1999, 18 BERKELEY J. INT’L L. 180, 184 (2000).

76. *See* Standard Rules, *supra* note 36, at rules 1, 4. The social model of disability is reflected in the articulation of the Standard Rules’ aspirations: “the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.” *Id.* at introduction, para. 25.

77. Reports issued by the Special Rapporteur are available at U.N. Enable, *The Special Rapporteur on Disability of the Commission for Social Development*, <http://www.un.org/esa/socdev/enable/rapporteur.htm>.

78. For a discussion of the unenforceability of the Standard Rules, see Dimitris Michailakis, *The Standard Rules: A Weak Instrument and a Strong Commitment*, in *DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE* 117 (Melinda Jones & Lee Ann Basser Marks eds., 1999). The Standard Rules stress that States parties are under a strong moral and political commitment to ensure the equalization of opportunities for disabled persons. *See* Standard Rules, *supra* note 36, at introduction, para. 14.

The Vienna Declaration and Programme of Action (Vienna Declaration) was also enacted in 1993.<sup>79</sup> It was not directed specifically toward disability rights,<sup>80</sup> but it nonetheless stressed the prevalence of disabled persons. Moreover, the Vienna Declaration assisted in accelerating the trend toward the social model of disability by maintaining that disabled persons “should be guaranteed equal opportunity through the elimination of all socially determined barriers,” including any “physical, financial, social or psychological” obstacles that “exclude or restrict full participation in society.”<sup>81</sup>

Finally, passage of the Americans with Disabilities Act (ADA) during this period bears special notice.<sup>82</sup> While domestic in scope, it has to date influenced more than forty countries to enact similar—and at times nearly verbatim—legislation.<sup>83</sup> The European Union’s Employment Framework Directive adopts key ADA definitions,<sup>84</sup> and the Draft Articles follow suit.<sup>85</sup> Accordingly, international disability rights advocates point to the statute as a model worthy of emulation.<sup>86</sup>

The social model has also been well supported in the new millennium. The General Assembly World Summit on Social Development acknowledged the necessity of changing the socially constructed environment in accordance with the Standard Rules “to empower persons

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Moreover, the Standard Rules obligate States parties “to create the legal bases . . . to achieve the objectives of full participation and equality for persons with disabilities,” to “ensure that organizations of persons with disabilities are involved in the development of national legislation concerning” their rights, and to eliminate “[a]ny discriminatory provisions against persons with disabilities.” *Id.* at rule 15.

79. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/CONF. 157/24 (July 12, 1993) [hereinafter *Vienna Declaration*].

80. *Id.* at para. 5 (“All human rights are universal, indivisible and interdependent and interrelated.”).

81. *Id.* at para. 64 (disabled persons “should be guaranteed equal opportunity through the elimination of all socially determined barriers,” including any “physical, financial, social or psychological” obstacles that “exclude or restrict full participation in society”).

82. 42 U.S.C. §§ 12101 (2000).

83. 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* (Mary Lou Breslin & Silvia Yee eds., 2002).

84. For a discussion of the role and content of reasonable accommodation under the EU directive, see Lisa Waddington, *The Framework Employment Directive from a Disability Perspective: Reasonable Accommodation and Positive Action*, in *DISABILITY RIGHTS’ ACTIVIST AND ADVOCATES TRAINING MANUAL 19* (2005).

85. See, e.g., *Draft Articles*, *supra* note 42, at art. 27, para. i (requiring States parties to make reasonable accommodations).

86. See, e.g., Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 *LAW & SOC. INQUIRY* 723 (2002); Eric A. Besner, *Employment Legislation for Disabled Individuals: What Can France Learn from the Americans with Disabilities Act?*, 16 *COMP. LAB. L.J.* 399 (1995). Despite this trend, there are some disability rights advocates, including myself, who caution against adopting ADA-type rights protection exclusively. See *infra* Part II.C.

with disabilities to play their full role in society.”<sup>87</sup> But perhaps the most progressive enunciation in an international instrument is found in the Draft Articles, which recognize “the importance of accessibility to the physical, social and economic environment” as a means of “redressing the profound social disadvantage of persons with disabilities.”<sup>88</sup> By this recognition, the Draft Articles transcend the social model and adopt a “human right to development” approach, integrating first- and second-generation rights.

### C. *Limitations of the Social Model*

The above historical overview attests to the social model’s powerful and constructive influence on international and domestic instruments. Nevertheless, because the framework’s advocates have invoked only formal equality theory, the model encounters two obstacles. First, because it expressly relies on notions of corrective justice, the social model must overcome erroneous but strongly held notions that the world inevitably excludes disabled persons. Second, and of greater significance, because it exclusively concentrates on first-generation rights, the social model is prevented from invoking a full range of second-generation rights.

In asserting that the socially constructed environment creates disabling conditions, the social model avers that altering that environment allows disabled persons to participate in society at large. Reasonable workplace accommodations are a typical example of correcting artificially prejudicial conditions previously held out as “neutral.” Providing accommodations in the workplace changes existing hierarchies, ultimately suggesting a lack of inevitability in the structure and conception of particular occupations. By removing unnecessary barriers to participation, accommodations bring about equality as conceived by formal justice.<sup>89</sup> However, because the social model is based exclusively on this notion of corrective justice, it must overcome the deeply entrenched fallacy that society justifiably excludes disabled persons due to their inherent limitations.<sup>90</sup> In seeking to win this fight, social model advocates have taken an over-inclusive position of rejecting *all*, instead of many or most, disability-related exclusions as arising from arbitrarily selected biological

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87. G.A. Res. S-24/2, para. 66, U.N. Doc A/RES/S-24/2 (July 1, 2000). *See also* Theresia Degener, *Disabled Persons and Human Rights: The Legal Framework*, in HUMAN RIGHTS AND DISABLED PERSONS, *supra* note 20, at 9, 20-33.

88. *Draft Articles*, *supra* note 42, at pmb., paras. t, v.

89. *See* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (arguing that ADA-mandated accommodations are consistent with other antidiscrimination measures in that each remedies exclusion from employment opportunity by questioning the inherency of established workplace norms, and by engendering cost when altering those norms) [hereinafter Stein, *Same Struggle*].

90. The view is so prevalent that one scholar has termed it “canonical.” Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643-44 (2001).

norms.<sup>91</sup> This effort is unnecessary because correcting exclusionary conditions (and the attitudes supporting them) need not be contingent on the application of first-generation rights alone. Instead, social inclusion is better facilitated under a human rights paradigm that applies civil and political rights (that equalize treatment) in combination with economic, social, and cultural rights (that equalize opportunity).

This brings forward the second, and more important, problem: while the social model's precepts are essential to civil rights assertions, they ultimately fall short within the human rights field. The social model draws an inclusive, yet firm line at equal treatment of equally situated individuals,<sup>92</sup> thereby effectively excluding additional second-generation support for disabled persons not contingent on narrower corrective justice notions.<sup>93</sup> By contrast, second-generation rights recognize that all disabled persons are entitled to equal opportunities because of their equal humanity, not because they reach levels of functional sameness,<sup>94</sup> and thereby allows for individual differences among people with disabilities.

In so doing, second-generation rights cover two circumstances. They encompass entitlements that benefit persons with disabilities who fall outside standard sameness arguments. This is because *some* individual variations are not accounted for, even when using broad and inclusive principles, for instance those contained in the architectural concept of Universal Design.<sup>95</sup> Second-generation rights also include measures that

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91. A particularly strong version of this assertion is that of feminist and disability rights advocate Susan Wendell who avers that "the entire physical and social organization of life" has been created with the notion in mind that "everyone w[as] physically strong, as though all bodies were shaped the same, as though everyone could walk, hear, and see well, as though everyone could work and play at a pace that is not compatible with any kind of illness or pain." SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 39 (1996). Wendell's point, although valid, should not be overstated. Because I generally agree with the disability studies perspective, but disagree on the extent of its application, I have used the term "artificial" to mean avoidable (because it is either arbitrary and/or can be remedied through a manageable cost) when discussing ADA accommodations. See Stein, *Same Struggle*, *supra* note 89.

92. In other words, the social model is predicated on treating like cases alike. For what is perhaps the earliest exposition of this theory, see ARISTOTLE, *NICOMACHEAN ETHICS* 118-19 (Martin Ostwald trans., 1962) (professing that things that are alike should be treated alike).

93. Social, economic, and cultural rights are derived from the field of social justice which advocates treating all individuals equally, whether or not they are in fact equal. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 302-03 (1971) (defining distributive justice generally as the theory that "[a]ll social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored").

94. "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 AND PRACTICE* 10 (2003).

95. The central tenet of Universal Design is an "approach to creating environments and products that are usable by all people to the greatest extent possible." R. Mace et al., *Accessible*

are necessary to effectuate first-generation rights. Thus, while first-generation rights may prohibit discrimination in employment, second-generation rights make labor market participation possible by providing health care, education, and employment preferences and quotas. By limiting their advocacy to first-generation rights, social model proponents have neglected further empowering possibilities.<sup>96</sup> The adoption of a “disability human rights” model can solve these limitations.

### III

#### THE DISABILITY HUMAN RIGHTS PARADIGM

This Part outlines the disability human rights paradigm, which integrates the best features of the social model of disability, the human right to development, and Martha Nussbaum’s capabilities approach to create a comprehensive view of rights. The social model stresses society’s role in constructing disability and its responsibility to rectify disability-based exclusion. Yet, because advocates have justified this scheme exclusively through formal justice notions, the model has neglected economic, social and cultural rights. The human right to development, which underlies the Draft Articles, seamlessly combines first- and second-generation rights, thus avoiding a major shortcoming of the social model of disability. At the same time, this framework is as vulnerable to monitoring, content, and resource prioritization concerns as are more traditional versions of human rights. Martha Nussbaum’s capabilities approach

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*Environments: Toward Universal Design*, in DESIGN INTERVENTIONS: TOWARDS A MORE HUMANE ARCHITECTURE 155, 156 (Wolfgang Prieser et al. eds., 1991). Although the inclusive nature of Universal Design extends beyond disability, e.g., Selwyn Goldsmith, *Access all Areas*, 213 ARCHITECTS’ J. 42 (2001) (asserting that universal design encompasses not only people with disabilities but also parents with small children and women forced to wait for public toilets), it is nevertheless frequently described as a disability-specific issue. For rebuttals of this perspective, see ROBERT IMRIE, *DISABILITY AND THE CITY: INTERNATIONAL PERSPECTIVES* (1996).

96. Clarification is in order. Disability rights advocates applying the social model to this hypothetical instance would surely argue that both public transportation systems and health care systems that excluded disabled persons based on socially contingent factors (e.g., physically inaccessible buses and insurance policies that exclude coverage for people with AIDS) were artificial in nature (because there was no reason to have buses with steps as opposed to ramped ones, and that there was no intrinsic difference between treating pneumonia arising from the flu as opposed to HIV). What disability rights advocates have not traditionally done is link the two concepts so that equality in the artificially excluded workplace also mandates equality in the artificially excluded public transportation and health care areas. The reason for this disconnect is that the two arguments cannot be joined so long as the underlying basis of their assertions is formal justice, meaning that the extent of disabled versus non-disabled equality is assessed in terms of sameness under civil rights statutes that focus on the acts or omissions of one actor (whether an employer or a public service entity) rather than of society at large. This subtle weakness of disability rights advocacy has recently been taken up by Samuel Bagenstos. He points out that as far as the ADA is concerned, there is no statutory reason why the provision of a reasonable accommodation ought to stop at the workshop door. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 26-32 (2004) (discussing the importance of proper health care to ensure greater employment opportunities).

creates a fertile space within which to understand the reach and content of the human right to development. However, because her scheme requires levels of minimal function as a condition precedent to acknowledging an individual's equal humanity and social participation, it is fundamentally under-inclusive of some people with intellectual disabilities, conditions the inclusion of others through proxies, and inadequately accounts for the development of individual talent. By harnessing the assets of the human right to development and the capabilities approach, the disability human rights paradigm overcomes the foregoing limitations. It both acknowledges the role that social circumstances play in creating disabling conditions and insists on the development of all individual talent.

#### A. *The Human Right to Development*

The human right to development is the most recent theory of human rights and underlies contemporary treaties, including the Draft Articles. This third-generation of human rights integrates civil and political rights with economic, social, and cultural rights.<sup>97</sup> Consequently, the human right to development avoids a major conceptual and practical shortfall of the social model of disability. Nevertheless, this framework can neither avoid nor satisfy three concerns endemic to human rights treaties: the efficacy of monitoring devices, the sufficiency of content, and prioritization issues when State resources are limited.<sup>98</sup>

Though of comparatively recent origin, the right to development has gained purchase over the past several years. In 1986, the General Assembly's Declaration on the Right to Development established development as a human right.<sup>99</sup> Subsequently, the 1993 Vienna Declaration proclaimed the right to development was "a universal and inalienable right" as well as "an integral part of fundamental human rights."<sup>100</sup> In 1998, the United Nations Commission on Human Rights approved a resolution requiring the United Nations Economic and Social

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97. See generally Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 435-52 (1981).

98. For additional, more tangential concerns, see Stephen P. Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137 (2004).

99. Declaration on the Right to Development, G.A. Res. 41/128, at 183, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/128 (Dec. 4, 1986). A few General Assembly resolutions referenced the right to development prior to the DRD. See, e.g., U.N. ESCOR, 33d Sess., Supp. No. 6, at 74-75, U.N. Doc. E/CN.4/1257; U.N. ESCOR, 35th Sess., Supp. No. 6, at 107, U.N. Doc. E/CN.4/1347; U.N. ESCOR, 37th Sess., Supp. No. 5, at 238, U.N. Doc. E/CN.4/1475.

100. *Vienna Declaration*, supra note 79, at para. 10; see also High Commissioner for the Promotion and Protection of All Human Rights, G.A. Res. 48/141, at 261, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/RES/48/141 (Dec. 20, 1993) (General Assembly mandate that the High Commissioner for Human Rights organize "a new branch whose primary responsibilities would include the promotion and protection of the right to development") [hereinafter High Commissioner].

Council to appoint both an Independent Expert and an open-ended working group on the right to development.<sup>101</sup> The Office of the High Commissioner on Human Rights maintains a research department to coordinate development tasks within the United Nations system.<sup>102</sup>

Though lacking legal enforceability, the human right to development nonetheless persuaded academics,<sup>103</sup> United Nations agencies,<sup>104</sup> and States<sup>105</sup> to accept the inextricable interrelationship among first- and second-generation human rights. Unfortunately, for reasons development scholar Peter Uvin decries as both outmoded and counter-productive, this generational rights divide manifested into a partition of labor and perceived expertise among international actors.<sup>106</sup> Influenced by the human right to development, many experts now share Uvin's belief that first- and second-generation rights are neither conceptually, nor pragmatically immiscible.<sup>107</sup> Cass Sunstein finds exclusive focus on one of these types of rights

101. E.S.C. Res. 72, at 229, U.N. ESCOR, 54th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1998/177 (1998).

102. High Commissioner, *supra* note 100, at 262 (mandating the OHCHR "Research and Right to Development Branch" to "[r]ecognize the importance of promoting a balanced and sustainable development for all people" and to "to enhance support from relevant bodies of the United Nations system for this purpose." For the Independent Expert's perspective, see Arjun Sengupta, *Development Co-operation and the Right to Development*, in HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJORN EIDE 371 (Morten Bergsmo ed., 2003).

103. 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 (1988) [hereinafter Alston, *Making Space for New Human Rights*]; see also Henry J. Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 BUFF. HUM. RTS. L. REV. 25 (1998); James C.N. Paul, *The Human Right to Development: Its Meaning and Importance*, 25 J. MARSHALL L. REV. 235 (1992); Anne Orford, *Globalization and the Right to Development*, in PEOPLE'S RIGHTS 127 (Philip Alston ed., 2001).

104. For instance, the United Nations Development Programme now explicitly connects these rights in its annual Human Development Reports. See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2003, MILLENNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY (2003), available at <http://hdr.undp.org/reports/global/2003/> [hereinafter MILLENNIUM DEVELOPMENT COMPACT].

105. See Alan Rosas, *The Right to Development*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 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).

106. PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT (2004). Uvin argues against this prevailing notion by pointing out that both agendas have similar and overlapping goals. To give one example, he notes that if a human rights perspective is added to a traditional development goal of providing subsistence, then the problem of guaranteeing sufficient food in a country is revised towards identifying the factors that limit that availability, that is, "the wide range of mechanisms that exclude some groups from services or resources the state makes available; the way discriminatory employment, land, credit, inheritance or education policies." *Id.* at 161.

107. See, e.g., HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 247 (2d ed. 2000) ("The interdependence principle, apart from its use as a political compromise between advocates of one or two covenants, reflects the fact that the two sets of rights can neither logically nor practically be separated in watertight compartments."); C.B. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL 111-12 (1973) (disputing Berlin's fixation on negative liberty by pointing out the material prerequisites to meaningful choices).

theoretically artificial and unsatisfying.<sup>108</sup> Jack Donnelly goes further, asserting all human rights “require both positive action and restraint by the State if they are going to be effectively implemented.”<sup>109</sup> As an example, he points out that the right to vote requires both freedom from restraints on political expression and affirmative government expenditure in facilitating the franchise’s exercise.<sup>110</sup>

Recent United Nations instruments concur with the academic consensus and emphasize incorporating these rights. The CEDAW 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>111</sup> One may say the same for recent instruments specifically relating to disabled persons. During the 1995 World Summit for Social Development, the General Assembly stated that ensuring equal employment for disabled persons requires not only reorganization of the workplace environment, but also direct “measures which enhance education and acquisition of skills,” and indirect measures such as hiring and retention incentives for employers.<sup>112</sup> Similarly, the Committee on the CRC requires creating conditions to ensure disabled children’s “dignity” and “self-reliance” by eliminating prejudice and promoting “active participation in the community” through meaningful access to education, rehabilitation services, and health care.<sup>113</sup> The Draft Articles likewise challenge the role the constructed environment plays in excluding people with disabilities from participating in civil and political life, and charges societies to make broad-based changes altering entrenched social norms.<sup>114</sup> By juxtaposing positive and negative rights within the same scheme, the human right to development ultimately avoids the perils associated with their division. In this respect, incorporating the human right to

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108. See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* 5 (U. of Chicago, Public Law and Legal Theory Research Paper Series, Working Paper No. 36, 2003) (rights “cannot exist simply with government abstinence”).

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

110. *Id.*; 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.”).

111. STEINER & ALSTON, *supra* note 107, at 197 (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”).

112. G.A. Res. S-24/2, para. 67, U.N. Doc A/RES/S-24/2 (July 1, 2000).

113. See CRC, *supra* note 24, at art. 23, para. 1.

114. See generally *Draft Articles*, *supra* note 42.

development into the current disability rights paradigm improves on the social model of disability.

Though its ability to integrate first- and second-generation rights is valuable, the human right to development maintains concerning limitations. This model cannot overcome or provide more satisfactory solutions to three problems common to human rights frameworks.<sup>115</sup> The first problem is effective monitoring of international instruments. As one commentator has archly but accurately put it, the current monitoring system “constitute[s] some of the most powerless, under-funded, formulaic, and politically manipulated institutions of the United Nations.”<sup>116</sup> This opprobrium may well prove true for monitoring any disability human rights treaty. Ultimately, in the absence of either dramatic change to the politics of world governance or radical treaty body reform,<sup>117</sup> the efficacy of monitoring any human rights treaty largely depends on extra-legal factors that cannot be built into instruments. These concerns include moral persuasion, political pressure, and the willingness and ability of nongovernmental organizations (NGOs) and grassroots movements to raise social awareness.<sup>118</sup>

The second problem the human right to development shares with other human rights treaties is that it fails to provide adequate guidance on its substance and boundaries. In some measure, this is a practically driven, semi-intentional design flaw. As aspirational statements drafted to garner widespread support, human rights conventions are often necessarily

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115. Uvin identifies debates over “Western-centrism” as a fourth, insurmountable concern. UVIN, *supra* note 106, at 31. However, some commentators claim that central themes of human rights theory are common to all cultures and faiths, even if expressed in different ways. *See, e.g.*, HANS KUNG, A GLOBAL ETHIC FOR GLOBAL POLITICS AND ECONOMICS (1998); ABDULLAHI AHMED AN-NA’IM, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (1992).

116. UVIN, *supra* note 106, at 140.

117. The efficacy of the United Nations treaty system 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, Strengthening of the United Nations: An Agenda for Further Change, U.N. Doc. A/57/387 (Sept. 9, 2002), which calls for more coordination among monitoring bodies, greater standardization of reporting requirements, and increased monitoring at the national level.

118. *See* Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 641 (2003) (distinguishing human rights as moral, rather than legal, rights). Some exogenous factors are described in Goodman & Jinks, *How to Influence States*, *supra* note 13. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1303-29 (2003), use game theory to demonstrate the efficacy of international judicial decisions in the absence of sanctions, and provides empirical data support from the International Court of Justice’s docket. In very stark contrast, JACK LANDMAN GOLDSMITH & ERIC. A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005), proffers a realpolitik explanation for international adjudication based on rational actor theory that is largely immune from external influence.

expressed at a high degree of abstraction.<sup>119</sup> Consequently, these instruments' stated goals often fall short of their objectives, due in part to a lack of substantive content. Ambiguous—and sometimes even unambiguous—treaty terminology can mean very different things depending on a State's laws, norms, and culture.<sup>120</sup>

The third problem beleaguering the human right to development concerns prioritization of resources. Human rights instruments often contain language limiting application in relation to the financial capabilities of State parties.<sup>121</sup> In accordance with these textual limitations, States short of funds are more likely to implement rights that are either easier to achieve or are perceived as having greater utility or political cachet. Conversely, States are less likely to promote rights where realization is thought either more challenging, less encompassing, or out of political favor.<sup>122</sup>

While only broad institutional solutions can adequately amend monitoring deficiencies, Martha Nussbaum's capabilities approach deals with the concerns about practical content and moral priority of human rights, and provides a productive space for understanding their implementation.

### B. *The Capabilities Approach*

Philosopher Martha Nussbaum advocates providing individuals with the means to achieve full human potential, and enumerates a list of "universal" capabilities that describe such flourishing.<sup>123</sup> Her scheme

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119. See generally Karl E. Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, 25 U. BRIT. COLUM. L. REV. 69, 98 (1991).

120. See Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, in HUMAN RIGHTS: CONCEPTS AND STANDARDS 31, 33 (Janusz Symonides ed., 2000).

121. See, e.g., Universal Declaration, *supra* note 14, at art. 22 (limiting responsibility "in accordance with the organization and resources of each State"); ICESCR, *supra* note 9, at art. 2, para. 1 (States must undertake steps "to the maximum of its available resources"); CRC, *supra* note 24, at art. 4 ("States parties shall undertake such measures to the maximum extent of their available resources"). Thus, the caution expressed by the Independent Expert that allocation concerns should not be "used as a pretext for avoiding action." U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on the Right to Dev., *Study on the Current State of Progress in the Implementation of the Rights to Development*, at para. 29, U.N. Doc. E/CN.4/1999/WG.18/2 (July 27, 1999) (prepared by Arjun K. Sengupta).

122. See David Copp, *Equality, Justice, and the Basic Needs*, in NECESSARY GOODS: OUR RESPONSIBILITIES TO MEET OTHERS' NEEDS 113, 113 (Gillian Brock ed., 1998) (noting that neither egalitarian nor liberal theories regarding distribution of social goods adequately address issues of prioritization).

123. As part of her continuing research agenda, Nussbaum has applied the capabilities approach to women in a number of contexts. To date, the fullest enunciation of her theory, and the one I reference most for the sake of convenience, is MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) [hereinafter NUSSBAUM, CAPABILITIES APPROACH].

provides an elegant normative theory addressing human rights aspirations and content. As currently comprised, however, Nussbaum's capabilities approach excludes certain intellectually disabled individuals and treats others as unequal participants by measuring abilities downward from a standard of "species typicality."<sup>124</sup>

*1. The Capabilities Approach as it Informs the Human Right to Development*

Articulated as a universal feminist political philosophy, Nussbaum's version of the capabilities approach maintains that public political arrangements must provide citizens with the means through which to develop their full human potential as defined by ten central capabilities: 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 employment.<sup>125</sup> While this catalog does not comprise a "complete theory of justice," Nussbaum considers these functions essential because engaging in them is a uniquely human, as opposed to animal or mechanical, mode of existence. Put another way, Nussbaum maintains that her ten central capabilities collectively define "the presence or absence of human life."<sup>126</sup>

Since each central capability is a separate component of this theory, States must provide each at a threshold level to ensure basic human functioning, and cannot provide for one component beyond the threshold while denying or limiting another. Nussbaum concedes that some of the central capabilities include what John Rawls called "natural goods," or commodities occurring serendipitously, the existence and extent of which States cannot always balance out (like attractive physical features).<sup>127</sup> Nonetheless, Nussbaum asserts that political principals can fulfill their

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124. The notion originates with 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. See, e.g., NORMAN DANIELS, *JUST HEALTH CARE* 26-35 (1985); Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 *PHIL. & PUB. AFF.* 146, 158-60 (1981).

125. NUSSBAUM, *CAPABILITIES APPROACH*, *supra* note 123, at 78.

126. *Id.* at 35, 72.

127. RAWLS, *supra* note 93, at 62.

obligations by leveling out the social bases underlying the distribution of natural goods. Hence, while governments cannot guarantee the emotional health of all women, they can create an environment conducive to ensuring emotional health through suitable family law, rape prohibition and prosecution, and public safety regulation.<sup>128</sup>

Central capabilities are also “combined capabilities,” which Nussbaum defines as “internal capabilities *combined with* suitable external conditions for the exercise of the function.”<sup>129</sup> As an example, a physically healthy woman who has the internal capability for sexual gratification may nevertheless lack the combined capability to pursue her sexuality because of repressive social constructs, whether religious, moral, or related to reproductive health.<sup>130</sup> In such a case, the State has not met its obligations to its citizenry because it has not provided an environment in which the combined capability can be expressed.

The capabilities approach avers that all people are individually worthy of regard, autonomy, and self-fulfillment.<sup>131</sup> Accordingly, Nussbaum rejects the welfare metrics commonly applied in development studies, such as per capita GNP and the general utility of wealth maximization. Instead, she avers that personalized welfare accounts are more trenchant than those derived from broad, anonymous proxies.<sup>132</sup> General economic growth “does not by itself improve the situation with regard to literacy and health care,” nor does it adequately illuminate the circumstance of any particular individual.<sup>133</sup> Nussbaum requires that each and every person be treated as an end in herself, rather than as the instrument of or agency to the ends of others.

The central goal of the capabilities approach is to provide individuals with the means through which to develop themselves, regardless of whether they elect to do so.<sup>134</sup> Through her political theory, Nussbaum seeks to endow people with the agency to choose.<sup>135</sup> Because the functions set forth as central

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128. NUSSBAUM, CAPABILITIES APPROACH, *supra* note 123, at 82.

129. *Id.* at 84-85 (emphasis in original).

130. *Id.* at 85.

131. Ultimately, this tenet is called the “principle of each person as end.” *Id.* at 56 (emphasis omitted).

132. This reasoning provides an additional argument against aggregate analysis of public good, for an absence of political liberty could not conceivably “be made up for by tremendous economic growth.” *Id.* at 81.

133. *Id.* at 32-33.

134. Her list, is therefore, “a list of capabilities or opportunities for functioning, rather than of actual functions” because it “protects spaces for people to pursue other functions that they value.” NUSSBAUM, CAPABILITIES APPROACH, *supra* note 123, at 74.

135. That people would choose not to achieve their own full potential raises a secondary concern, 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. Nussbaum’s response, which draws on

capabilities are intrinsically rooted in the human condition, they are arguably universal in nature. She presumes them to be culturally sensitive because as universal values they are not considered to impose external—sometimes labeled foreign—moral imperatives on other nations.<sup>136</sup>

Nussbaum's conclusion that central capabilities "have a very close relationship to human rights"<sup>137</sup> is overly modest; the capabilities approach relates the same objectives espoused in the human right to development. Moreover, her capabilities scheme improves the human rights framework by providing content to its otherwise abstract aspirations of protecting autonomy, ensuring dignity, and developing personal capacity. Yet, Nussbaum's capabilities approach falls short as a universal theory because it either excludes or only indirectly includes certain individuals with intellectual disabilities.

## 2. *The Capabilities Approach as Under-Inclusive of Some Intellectually Disabled Persons*

Despite the theory's cogency, disability rights advocates can take issue with the capabilities approach for being under-inclusive on two grounds.<sup>138</sup> First, the approach does not go far enough towards empowering disabled persons with the "right to be in the world."<sup>139</sup> Historically, the disabled have been among the most marginalized individuals,<sup>140</sup> and predicating their social inclusion on notions of societal contribution will not improve this status. Second, Nussbaum's scheme fails to recognize the

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the work of scholars as diverse as Gary Becker, Richard Posner, Thomas Scanlon, and Amartya Sen, is that her approach makes the possibility of central capabilities (which should be universally appealing) available, but does not force the issue. *Id.* at 115-22.

136. Nussbaum acknowledges that "even if one defends theory as valuable for practice, it may still be problematic to use concepts that originate in one culture to describe and assess realities in another." *Id.* at 36. Conversely, she also notes the cultural arrogance of assuming that particular values originate with particular countries, for example, assuming that sex equality is an American construct in the face of counter-cultural examples that include India's passage of a sex-based equal rights amendment in 1951. *Id.* at 39. Of course, not everyone agrees with these propositions. For the views of two scholars who decry, in varying degrees, the cultural invasiveness of human rights norms, see MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (2001); WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).

137. NUSSBAUM, *CAPABILITIES APPROACH*, *supra* note 123, at 97.

138. Although I take issue with Nussbaum's position on capabilities as far as individuals with intellectual disabilities, I stress my admiration for and agreement with the majority of Nussbaum's work and thank her for a willingness to discuss our different perspectives.

139. tenBroek, *supra* note 58, at 842. Jacobus tenBroek and Floyd Matson 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 engage in society at large. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 809-10 (1966).

140. The point is borne out by reading the ADA's Legislative Findings section documenting adverse conditions encountered by people with disabilities living in the United States, the world's wealthiest nation. *See* 42 U.S.C § 12101 (2000).

full dignity of those functioning below her ten central capabilities. Consequently, this constructed minimum excludes certain persons with intellectual disabilities from full participation in society.

A key ingredient missing from Nussbaum's model is an adequate concept of "participatory justice," or the ability of disabled persons to have meaningful contact with the population at large.<sup>141</sup> Undergirding this notion is a prevailing normative assumption that in a just society everyone should have the ability to interact with and take part in general culture.<sup>142</sup> Participatory justice parallels the social model's assertion that, but for the existence of artificial barriers, people with disabilities would play an equal part in society. It further asserts that a just society makes participation a moral imperative. Thus, even if a State cannot financially provide for a full range of human rights, it can still acknowledge a moral obligation to impart them.<sup>143</sup> Accordingly, participatory justice underscores that human rights seek the elimination of disability-related barriers to equal social participation.<sup>144</sup>

However, by assessing social participation via functionality, Nussbaum's capabilities list limits participatory justice for intellectually disabled persons by not sufficiently ameliorating the social invisibility and exclusion they experience. Instead, her capabilities list erects barriers to social participation similar to the practice of predicating human

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141. Nussbaum's model *is* concerned about participatory justice as evidenced by the inclusion of respect and non-humiliation as two key elements. For instance, Nussbaum asserts that Sescha, Eva Kittay's severely disabled daughter, lives a more socially participatory life at a segregated facility than she did in her parent's home. That may well be true, and so Secha has benefited. However, one can interpret the capabilities approach to permit people with severe intellectual disabilities to live in group homes that (unlike Sescha Kittay'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. Nussbaum would likely disagree with this wholly exclusionary situation, but it is one that can be interpreted from the way her model is set out. *See generally* Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217 (2004); Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

142. "[I]ndividuals 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., 2003).

143. A State can also consider what practices and capacities it values and then allocate some (small) proportion of its restricted resources towards that end. Currently, Malawi is using this approach. Correspondence from Minister June Ntabaz to Professor Michael Stein (December 21, 2004) (on file with author). A cynical argument can also be made that developing nations eagerly press the United Nations towards second-generation rights in order to obligate more developed nations to financially assist their implementation.

144. This idea animates the Draft Articles. For example, the convention requires States parties to "take effective and appropriate measures to enable persons with disabilities to live and to be fully included as members of the community" and to be present in all aspects of mainstream society. *See, e.g., Draft Articles, supra* note 42, at art. 19 ("States parties shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.").

development on economic viability. Conditioning human development on economic viability rather than inherent dignity is a deeply troubling notion, and one that Nussbaum has rigorously and justifiably criticized.<sup>145</sup> The application to persons with disabilities is particularly disconcerting because historically, mainstream society rationalized disabled persons' exclusion on the assumptions that they were more expensive and contributed less to society than non-disabled.<sup>146</sup> A stark statement of this perspective is that of neo-Hobbesian philosopher David Gauthier. He utilizes this assertion to justify ministering to the disabled in a lesser manner than to the elderly, proclaiming that while the aged "have paid for their benefits by earlier productive activity," one may speak only "euphemistically of enabling [the disabled] to live productive lives, when the services required exceed any possible products."<sup>147</sup> A more nuanced treatment of this theme is found in the context of the ADA, where empirically unsubstantiated pleas for efficiency supply an economically rational motivation for employers to withhold accommodations from disabled workers.<sup>148</sup> Such economic justification has led to regimes that systematically bar disabled people from fulfilling their agency as citizens.<sup>149</sup> The many presumably well-intentioned yet paternalistic welfare systems that provide subsistence to

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145. See, e.g., Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 229 (1992) (dismissing the notion that macroeconomics can accurately reflect the quality of life within a country because the "measure does not even concern itself with the distribution of resources and thus can give good marks to a country with enormous inequalities").

146. Nearly all Disability Studies commentators accord some influence (whether resulting in overt or unconscious differential treatment) to the phenomenon of "existential anxiety." The term originates with political scientist Harlan Hahn, who asserted that repugnance to disabled bodily difference, combined with fear of also attaining such variation in the future, results in a sociological desire to segregate people with disabilities from the mainstream. See, e.g., Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 43-44 (1988); Harlan Hahn, *Towards a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87 (1985).

147. DAVID GAUTHIER, *MORALS BY AGREEMENT* 18 n.30 (1986).

148. The most thoughtful enunciation of this position is Mark Kelman, who distinguishes between the societal norms that exist against "simple discrimination" and those norms which mandate the provision of "accommodation." See Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001); MARK KELMAN, *STRATEGY OR PRINCIPLE?: THE CHOICE BETWEEN REGULATION AND TAXATION* (1999); see also *Bd. of Trustees v. Garrett*, 531 U.S. 356, 372 (2001) (practices that unquestionably discriminate against disabled employees for economic reasons are constitutional because "it would be entirely rational" for state employers "to conserve scarce financial resources by hiring employees who are able to use existing facilities" rather than accede to ADA requests).

149. This is the thrust of the arguments made by historian Deborah Stone in arguing that "[t]he very act of defining a disability category determines what is expected of the nondisabled—what injuries, diseases, incapacities, and problems they will be expected to tolerate in their normal working lives." DEBORAH A. STONE, *THE DISABLED STATE* 4 (1984).

people with disabilities in lieu of workplace participation are emblematic of this problem.<sup>150</sup>

Second, by setting minimal standards, Nussbaum's list of central capabilities fails to acknowledge the full humanity and equality of individuals functioning below her idealized norm, especially those with intellectual disabilities. Initially, Nussbaum wrote that society ought to value individuals with intellectual disabilities on social justice grounds unrelated to a capabilities approach.<sup>151</sup> She pointed out the parallels between caring for the disabled and caring for the young or elderly, and noted women's unequal role as caregivers in those contexts.<sup>152</sup> Correspondingly, she maintained that in contrast to the purely reciprocal position embodied by social contract theory, social justice requires enhancing women's capabilities so they can provide care to persons with disabilities and others in need.<sup>153</sup> But Nussbaum left unaddressed the explicit question of whether the capabilities model is applicable to those with intellectual disabilities. On the one hand, inclusion of intellectually disabled persons seemed implicit. The capabilities approach emphasizes human dignity and values individuals as an end. On the other hand, inclusion of intellectually disabled persons seemed implausible. Persons with reduced cognitive ability to reason or perform other capabilities are not embraced by criteria viewing these processes as indicative of being "truly human."<sup>154</sup>

In her latest book, Nussbaum attempts to resolve the problem of including intellectually disabled persons in her capabilities approach. In doing so she strikes a curious and undesirable compromise by excluding some persons with intellectual disabilities from her framework and including others only indirectly.<sup>155</sup> Because the capabilities list is "so

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150. Theresia Degener states the case bluntly: "Persons with disabilities are regarded as being incapable of living as autonomous individuals." Theresia Degener, *Disability as a Subject of International Human Rights Law and Comparative Discrimination Law*, in *DIFFERENT BUT EQUAL*, *supra* note 11, at 151, 154. *See also* tenBroek & Matson, *supra* note 141, at 809-10 ("Throughout history the physically handicapped have been regarded as incompetent to aid themselves and therefore permanently dependent upon the charity of others . . .").

151. Martha C. Nussbaum, *Capabilities and Disabilities: Justice for Mentally Disabled Citizens*, 30 *PHILOSOPHICAL TOPICS* 133 (2002).

152. NUSSBAUM, *CAPABILITIES APPROACH*, *supra* note 123. For an extensive treatment of this phenomenon, see JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

153. Some social science research supports the notion that caregivers ought to be given priority when it comes to redistribution of resources. *See, e.g.*, Avery Russell, *Applied Ethics: A Strategy for Fostering Professional Responsibility*, 28 *CARNEGIE Q.* 1, 5 (1980) (case study indicating that individuals with vulnerable dependents ought to be preferred over others).

154. NUSSBAUM, *CAPABILITIES APPROACH*, *supra* note 123, at 78.

155. MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006) [hereinafter *NUSSBAUM, FRONTIERS OF JUSTICE*].

normatively fundamental,” she explains, only those individuals who come close to attaining the enumerated functions live a “fully human life” that is “worthy of human dignity.”<sup>156</sup> Those who are unable to reach these bottom lines, including some proportion of the intellectually disabled, are in Nussbaum’s view “extremely unfortunate” and exist at a level “beneath which a decently dignified life for citizens is not available.”<sup>157</sup> Thus, although a just society generally mandates that people with intellectual disabilities receive capabilities resources,<sup>158</sup> some will not; for some others, society must channel funds “through a suitable arrangement of guardianship.”<sup>159</sup>

With these assertions Nussbaum subtly alters her previous capabilities approach, requiring a minimal level of function as a prerequisite to full participation. Because certain intellectually disabled persons are without the ability to achieve each of Nussbaum’s bottom lines, even dignity and justice cannot justify the direct allocation of resources for them to flourish. Thus, while Nussbaum’s capabilities framework can apply to poverty—indeed, it derives from Amartya Sen’s position on poverty alleviation—it cannot apply to certain instances of intellectual disability. This is ironic for three reasons. First, there is a strong factual and causal interrelationship between poverty and disability. Second, while Nussbaum’s capabilities approach adheres to established norms of functionality, Sen’s original capabilities approach does not require a threshold to guide or justify allocations to individuals with different needs.<sup>160</sup> Third, and consequently more perplexing, Nussbaum’s analysis falls prey to the same error she identifies as plaguing social contract theory, (and especially Rawls) namely, that social goods beneficiaries are required to provide adequate contributions back to society to justify receiving equal distribution.<sup>161</sup>

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156. *Id.* at 181.

157. *Id.* at 192, 179.

158. *Id.* at 98-100.

159. *Id.* at 193; *see also id.* at 195-211 (providing domestic and international examples of guardianship that “maximize autonomy”).

160. Distinguishing distribution of goods from the capability to use them, Sen rejects the use of a resources or primary goods list as the sole basis of comparison. AMARTYA SEN, *INEQUALITY REEXAMINED* 31, 38 (1992).

161. An explanatory note is warranted. Throughout her scholarship, and especially in *FRONTIERS OF JUSTICE*, Nussbaum takes great pains to rebut the position maintained by John Rawls and other philosophers subscribing to social contract theory. Those commentators maintain that to justify the distribution of primary goods, recipients must adequately contribute to society. In other words, the prevailing philosophical belief she strongly rebuts is that resource distribution should be tied to an individual’s capacity to contribute to others. It is therefore odd that the idea of contribution has crept into Nussbaum’s capabilities approach. Yet by setting species typicality as the level of capability that is the threshold for cutting off resource distribution, Nussbaum applies this determination both as a descriptive and a normative qualification, and in so doing *FRONTIERS OF JUSTICE* may be read as letting this idea back in.

Ensuring the dignity of disabled people requires an opposite approach. It entails recognizing them for their intrinsic value as people and not as a means towards other ends. This dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth rather than their net marginal product. Such an integrated human rights approach asks about the qualities of an individual and how developing her talents can benefit both her and society. By amending Nussbaum's scheme to treat these problems of under-inclusion, it is possible to create a space within which to more fully understand the content of human rights. The next Section discusses how the disability human rights paradigm serves this goal.

### *C. The Disability Human Rights Paradigm*

Combining the best elements of the social model of disability, the human right to development, and Nussbaum's capabilities approach, the disability human rights paradigm provides a comprehensive framework for ensuring the development of individual talent. Like the social model of disability, the disability human rights framework stresses society's role in constructing disability and its responsibility to rectify disability-based exclusion. Like the human right to development, it urges the interrelationship of first- and second-generation rights. And like the capabilities approach, it states a moral imperative for societies to provide resources for developing human potential. Its core modifications include a focus on the cultivation of individual talents rather than Nussbaum's minimum "universal" levels of functioning, and an emphasis on intrinsic

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This is because Nussbaum's use of species typicality is both factual and normative. As applied, it is not only the level of capability that humans typically enjoy, but also the threshold level demanded for a life of human dignity. But why should the level of capability typical of the species also be the level needed for achieving or preserving a dignified life? If this equation is intuitive, it probably is because we associate species typical levels of capability as being valuable because they enable us to care for ourselves and to be perceived as contributing to others. By contrast, lower than typical species functioning is undignified and not truly human because those individuals are a burden to society. Nussbaum frames her arguments in terms of choice, and values species typical levels of capability as an important justification for allocating resources to bring everyone up to these levels. Her capability approach is set forth in terms of agency, and Nussbaum believes that people need not exercise their capabilities. In fact, however, social pressure to exercise capabilities and their associated functioning is a familiar phenomenon. Consider, for example, the debate over cochlear implants. Once the technological capability exists to enable deaf people to access aural communication, social pressure is brought to bear on deaf individuals to use this technology rather than rely on sign-language interpreters precisely because the species typical mode of communicating makes them better able to contribute without being burdensome to others.

I thank Anita Silvers for pointing out the difficulties (possibly insurmountable) of invoking species typicality as a standard without also inviting the stigmatization and exclusion of those who cannot be brought up to the standard.

human worth rather than contribution as the moral foundation for state resource allocation.

The disability human rights framework focuses on allowing individuals to achieve their specific talents, rather than focusing on a lack of overall capabilities as measured against a functional baseline. Talents are more specific to individuals than capabilities, and by definition are not universally shared. Utilizing a disability framework allows society to appreciate potential from the bottom up rather than from the top down through developing people's talents to ensure their flourishing. A disability human rights paradigm maintains that developing one's talents is at the core of being human, and one must view talent as its own end rather than a means to another end—such as achieving species-typical levels of functioning for certain capabilities. The development of talent is a moral imperative that all societies owe to each of their citizens, even if citizens' relative talents are unequal. Thus, the disability human rights paradigm's view of human life is not only about individual flourishing, but also about dignity, autonomy, and individuality, and so necessitates a greater view of all persons contributing to and participating in society. Moreover, the capabilities approach bars distribution of resources that do not increase agency to baseline levels in all ten categories. By contrast, the disability paradigm focuses on the development of individual talent and permits resource distribution to individuals whose agency can be increased in any category. In doing so, the disability framework avoids the all-or-nothing requirement of Nussbaum's capabilities approach, and permits greater flexibility when States prioritize their resource allocation.<sup>162</sup>

Considering some of Nussbaum's examples illustrating how the capabilities approach applies to intellectually disabled persons helps illustrate the inclusive difference between a disability human rights paradigm and her framework. While arguing on social justice grounds for the care of people with intellectual disabilities, Nussbaum describes the lives of three intellectually disabled children. Philosopher Eva Feder Kittay's daughter Sesha has cerebral palsy and is severely intellectually disabled. Public intellectual Michael Bérubé's son Jamie has Down syndrome.<sup>163</sup> Nussbaum's nephew, Arthur, has Asperger and Tourette

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162. 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. By contrast, a disability human rights approach would provide resources for the members of both groups who are impaired in some respects but gifted in others to exceed species typical levels of the capabilities they can achieve, regardless of whether they could attain species typicality in all ten capabilities.

163. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 155, at 133-36.

syndromes.<sup>164</sup> Each has a distinct personality and needs. Sesha loves pretty dresses, dancing to music in her wheelchair, and returning her parents' hugs.<sup>165</sup> Jamie is a fan of B.B. King, Bob Marley, and the Beatles, and has a clever wit.<sup>166</sup> Arthur deeply understands the theory of relativity and other scientific quandaries, and is politically savvy.<sup>167</sup>

According to Nussbaum's central capabilities metric, these children may not become sufficiently economically productive to repay society for the resources they use.<sup>168</sup> Sesha and Jamie are unlikely to achieve practical reasoning capabilities.<sup>169</sup> Arthur has "few social skills" and "seems unable to learn them."<sup>170</sup> Yet each child is endowed with a minimum level of at least two of the ten central capabilities: emotions and play.<sup>171</sup> And each has talents that can be developed and encouraged. Sesha expresses emotions and affinity.<sup>172</sup> Jamie and Arthur are likely to be employed and exercise a range of citizenship abilities.<sup>173</sup>

However, because Sesha (in contrast to Jamie and Arthur) will not achieve central capabilities even with greater resource distribution, and because she needs the entire range of capabilities to live a "fully human life" that is "worthy of human dignity," two possibilities arise according to Nussbaum: "either we say that Sesha 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."<sup>174</sup> Since Sesha is not vegetative and displays human qualities of affection and affinity, Nussbaum concludes that Sesha is not a different form of life. With a "flourishing human life" also out of the question, Nussbaum concludes that a just society would, if scientifically possible, have genetically removed Sesha's disabilities.<sup>175</sup> Accordingly, Sesha is excluded from Nussbaum's capabilities approach because she is deemed incapable of reaching the required functional levels.

Not surprisingly, Eva Kittay (as Sesha's mother) argues that persons with intellectual disabilities ought to be respected for their intrinsic value

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164. *Id.* at 97.

165. EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 166, 172, 154-55 (1999); NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 155, at 96, 134.

166. MICHAEL BÉRUBÉ, *LIFE AS WE KNOW IT: A FATHER, A FAMILY, AND AN EXCEPTIONAL CHILD* 147, 155 (1996); NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 155, at 97, 133.

167. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 155, at 96-98. Distressed over the modality of President Bush's 2000 election, Arthur insisted on referring to him as the "Resident." *Id.* at 170.

168. *Id.* at 128.

169. *Id.* at 94-96.

170. *Id.* at 96.

171. *Id.* at 96-98, 134.

172. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 155, at 96-98, 134.

173. *Id.* at 98-99, 128.

174. *Id.* at 181, 187.

175. *Id.* at 192-93.

as human beings.<sup>176</sup> To conclude, as Nussbaum does, that “Sesha’s life is . . . unfortunate, in a way that the life of a contented chimpanzee is not unfortunate,” because her capabilities are tragically out of step with those of most members of her species community, is itself out of step with the notion that the flourishing of each individual is itself a moral imperative.<sup>177</sup>

The disability human rights paradigm adopts Kittay’s view on this point.<sup>178</sup> The framework seeks to encourage the talents of all children because their human dignity is equal to that of children without intellectual disabilities—not because they are able to rise to an expected functional level.<sup>179</sup> In taking this stance, the disability human rights framework likewise rejects Nussbaum’s position that Sesha, and people like her, cannot live a “fully human life” or that those lives cannot be “decently dignified” or “worthy of human dignity.”<sup>180</sup>

Returning to Nussbaum’s other examples, her capabilities approach would distribute resources to develop Jamie and Arthur’s potential. She sees the expense as justified, even if the resources required by each child are much greater than those required by others, because everyone deserves to be brought as close as possible to the standard level of functioning shared by the majority of society. Thus, Nussbaum’s capabilities approach includes persons with intellectual disabilities who (unlike Sesha) are able

176. Kittay stresses, in the communitarian tradition, the nature of our interconnectedness with one another and the value that connection creates regardless of the range of our capabilities. This is because, in her view, severely disabled persons increase their friends’ and families’ agency for caring and moral connection. KITTAY, *supra* note 165. As stated by one feminist scholar, “a relational conception of the self suggests that we come to know ourselves and others only in a network of interactive relationships and that this shapes and is necessary for exercising self-determining capabilities.” CHRISTINE KOGGEL, PERSPECTIVES ON EQUALITY: CONSTRUCTING A RELATIONAL APPROACH 127-28 (1998). Put another way, we all depend on one another, and develop in relation to each other. See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. L. & FEM. 7, 12 (1989) (“[R]elatedness is not, as our [liberal] tradition teaches, the antithesis of autonomy, but a literal precondition of autonomy, and interdependence a constant component of autonomy.”).

177. NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 155, at 192.

178. As Belden Fields noted, “[h]uman potentialities are developed within a web of cultural, economic, and social relationships that are both facilitating and constraining.” 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).

179. In this way, the gap in Nussbaum’s capabilities theory dovetails with Norman Daniels’s perception of disability, namely, that those individuals with disabilities for whom redistribution of health care resources would fail to help achieve a normal range of opportunity ought not to receive that social wherewithal. See, e.g., Norman Daniels, *Justice and Health Care*, in HEALTH CARE ETHICS 290 (Donald VanDeVeer & Tom Regan eds., 1987) (maintaining that society ought to redistribute resources in the form of health care to those disabled people whose receipt would enable their function).

180. One must also wonder who would care for Sesha under Nussbaum’s capabilities approach if Eva Kittay was not able to provide support.

to achieve baseline functions. However, these individuals are included in the capabilities scheme only by proxy through their respective guardians, and do not directly receive resources.<sup>181</sup> Consequently, the capabilities approach denies their individual autonomy.

In contrast to this surrogacy arrangement, the disability human rights paradigm emphasizes the equal dignity of all persons, and acknowledges their autonomy in directing their own development. Accordingly, some individuals may require the provision of guardians or others to facilitate effective use of state resources towards enabling their talents, but the initial right to those resources is not contingent on intervening proxies. The disability framework, therefore, continues to focus on personal dignity as a key element in human rights discourse, whereas Nussbaum's approach continues to use functional ability as a metric to justify distribution. That is, the disability perspective closely echoes classic human rights theory in asserting that full equality is an intrinsic good to which everyone is entitled.<sup>182</sup>

In addition to bringing the existing goals of human rights discourse into view, the disability human rights paradigm can also refocus these aspirations through an emphasis on individual need. The next Part explores the potential of extending a disability paradigm to other human rights frameworks, and discusses the subsequent implications.

#### IV

##### EXTENDING THE DISABILITY HUMAN RIGHTS PARADIGM

The disability human rights paradigm can be extended retrospectively to groups already protected under United Nations instruments, as well as prospectively to people not currently protected. Considering these possibilities causes us to rethink the human rights agenda in different ways and toward different ends.

##### A. *Retrospectively*

Recent identity-specific human rights instruments integrate first- and second-generation rights as a means of protecting targeted populations.<sup>183</sup> In practice, however, the holistic approach of the human right to

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181. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 155, at 128-34.

182. For a general jurisprudential argument along much the same line, see LARRY S. TEMKIN, *INEQUALITY* (1993).

183. The ICERD targets racial discrimination that has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." ICERD, *supra* note 22, at part 1, art. 1. The CRC, likewise combining first- and second-generation rights, recognizes "that every child has the inherent right to life" and charges parties to "ensure to the maximum extent possible the survival and development of the child." CRC, *supra* note 24, at art. 6, paras. 1-2.

development has not been effectively enforced,<sup>184</sup> and has been subjected to criticism precisely because of its steadfast linkage of first- and second-generation rights.<sup>185</sup> The disability rights framework provides us with a strong reminder of how important it is to transcend this divide rather than ask what type of right has precedence for human rights. This is in large part because the attitudes motivating disability-based exclusion frequently manifest in the creation of a prohibitive environment. Ameliorating such barriers underscores the notion that ensuring equality in any meaningful sense requires not only the assertion of negative rights, but also the reconstruction of our world through positive initiatives if we mean to value and include every individual's participation. For the disability human rights paradigm, neither type of right is more important than the other. The fact that each is integral suggests international frameworks need to utilize and embrace both equally.<sup>186</sup>

The CEDAW offers a particularly clear example of a failed application of the integrated human rights model. In order to advance the concept of a State's obligation to establish equality between men and women, the treaty calls for parties to eliminate all forms of discrimination against women and "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or

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184. Indeed, many NGOs consider the enforcement of economic, social, and cultural rights as either pragmatically infeasible or beyond their basic mandates. Compare, e.g., ARYEH NEIER, *TAKING LIBERTIES: FOUR DECADES IN THE STRUGGLE FOR RIGHTS* xxix-xxx (2003) (President of the Open Society Institute asserts that economic, social, and cultural rights are not legitimate rights), with Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63 (2004) (Executive Director of Human Rights Watch explains that NGOs are most effective, and so concentrate, on using shaming methods against clear first-generation rights violations), with Leonard S. Rubenstein, *How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth*, 26 HUM. RTS. Q. 845 (2004) (Executive Director of Physicians for Human Rights points out that NGOs need not choose one generation of right over another, but can seek justice in both instances by collaborating with peer organizations), and Alston, *Making Space for New Human Rights*, *supra* note 103 (human rights doyen criticizes Amnesty International for representing its mandate as enforcing the Universal Declaration of Human Rights, but in reality only implementing parts of that treaty).

185. Recall the discussions, many centering on China, about how some nations prioritize either CP or ESC at the expense of the other. See, e.g., Charles H. Brower II, *NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights*, 36 VAND. J. TRANSNAT'L L. 1533, 1536-45 (2003) (discussing the fundamental differences between the two forms of rights in practice, and Western nations' reluctance to provide ESC rights ordered in the ICESCR).

186. See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (2d ed. 1980). Alternatively, Shue sets forth three State obligations in relation to human rights: the duties to respect, protect, and fulfill human rights. The first two may be thought of as requiring a State to refrain from violating an individual's human rights and to protect that person from violations by non-State actors. The third, however, mandates the State to proactively and positively provide the means by which to achieve human rights.

enterprise.”<sup>187</sup> To transform women’s role and place in society, the CEDAW further mandates States parties modify behavior patterns arising from stereotyped notions of either sex as inferior or superior.<sup>188</sup> As a hard law treaty, the CEDAW is an ambitious attempt to rework the social geography by interweaving first- and second-generation rights—attempting to effect deep legal, social, and cultural transformation of women’s role in society.<sup>189</sup>

Despite the CEDAW’s structure, assertions of women’s rights under the convention often invoke only first-generation civil and political rights.<sup>190</sup> By this limiting invocation, practitioners have fallen in step with early—and now superseded—feminist scholars who eschewed gender difference by arguing for equal treatment on the basis of sameness, rather than essentializing the significance of difference to understanding women’s equality.<sup>191</sup> This tension between absolute notions of sameness and difference in asserting equal treatment parallels the difference of opinion between social model advocates and those seeking to incorporate second-generation rights into the disability discourse. Ironically, this type of dichotomous perspective is exactly what the CEDAW attempts to forestall by embracing notions of formal justice (as sameness) and redistributive justice (as difference) thereby attempting to avoid the artificial divide

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187. CEDAW, *supra* note 23, at 194, arts. 1-2. The CEDAW defines discrimination as any action that impairs women’s full and equal enjoyment of their human rights. CEDAW, *supra* note 23, at 194, art. 1. See generally Renee Holt, *Women’s Rights and International Law: The Struggle for Recognition and Enforcement*, 1 COLUM. J. GENDER & L. 117 (1991); NATALIE KAUFMAN HEVENER, *INTERNATIONAL LAW AND THE STATUS OF WOMEN* (1983).

188. CEDAW, *supra* note 23, at 195, art. 5.

189. See, e.g., M. Christina Luera, *No More Waiting For Revolution: Japan Should Take Positive Action To Implement the Convention on the Elimination of All Forms of Discrimination Against Women*, 13 PAC. RIM L. & POL’Y J. 611, 615-16 (2004) (discussing the broad and ambitious goals of the CEDAW in Japan).

190. Lisa A. Crooms, *Indivisible Rights and Intersectional Identities or, “What do Women’s Human Rights Have to do With the Race Convention?”*, 40 HOW. L. J. 619, 627 (1997), discusses the general conception of first-generation rights as privileged over second-generation rights, and applies that concept to women’s rights. This in turn has affected the practice of NGOs and other entities monitoring human rights violations. See generally KATARINA TOMASEVSKI, *DEVELOPMENT AID AND HUMAN RIGHTS REVISITED* 113-14 (1993) (explaining that human rights are thought to prevent states from abusing people, while development is typically aimed at increasing economic growth and satisfying basic needs). For a comparative analysis of how women’s civil and political rights are asserted, see Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19 (2005). However, these complaints have not targeted the broader remedies that could be invoked under the CEDAW provision requiring States to “modify the social and cultural patterns of conduct” that perpetuate stereotypical gender roles. Laura Grenfell, *The Participation of Afghan Women in the Reconstruction Process*, 12 HUM. RTS. BRIEF 22, 22-23 (2004).

191. The point is made by Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L. J. 89 (1996); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

between positive and negative rights.<sup>192</sup> This dynamic also goes against contemporary feminist theory advocating transcendence of the sameness-difference debate. As one commentator astutely noted, “the CEDAW framework, which embraces both universalism and particularism to some degree, is probably the best and perhaps the only available legal strategy for escaping [the difficulties of] rights-based essentialism.”<sup>193</sup>

Similarly, under a disability human rights paradigm the source and type of equality—whether equal treatment or equal opportunity—is irrelevant. However, because attitudes fomenting disability-related exclusion manifest to a greater degree in critiquing an environment’s social construction, the framework provides an exemplar for why and how first- and second-generation rights applicable to women should be viewed and implemented holistically.

In recognizing the interrelationship of first- and second-generation rights, the disability human rights paradigm is not different in kind from the human rights vision of other treaties, and in fact should be viewed as kindred to the CEDAW. Accordingly, adding disability protections to the existing human rights canon simply acknowledges the extent to which “neutral” attitudes manifest in unnecessary and avoidable exclusion, and makes clear the deep necessity of retrenching institutions and the social situations they create and maintain. In so doing, the disability human rights framework reaffirms a woman’s fundamental right against discrimination, and underscores a woman’s right to a supportive landscape. However, the disability dynamic also has the potential for responding to individual need over group-based identity. This alternative, more ambitious implication would create a dramatically different, although not mutually exclusive, perspective on reconfiguring human rights.

### B. Prospectively

In theory, global provisions contained in hard laws such as the ICCPR and the ICESCR protect all humans equally.<sup>194</sup> In reality, individuals not currently specified under hard law treaties—for example, sexual minorities and the poor—must fall under an additional protected identity criterion to

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192. See generally Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, in GENDER AND HUMAN RIGHTS 13, 51 (Karen Knop ed., 2004); Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 1 (Dorinda G. Dallmeyer ed., 1993).

193. LACEY, *supra* note 191, at 13, 51; Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights*, in RECONCEIVING REALITY, *supra* note 192, at 143, 155; see also HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000).

194. See discussion *supra* Part I.A.; see also MICHAEL FREEMAN, HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH 60 (2002) (defining civil rights as “deriv[ing] from the laws or customs of particular societies,” whereas human rights are those one has simply by virtue of being human).

receive human rights recognition. The disability human rights paradigm can solve this problem and bring both sexual minorities and the poor within human rights protection. Protecting the rights of sexual minorities advances the disability human rights framework's goal of eliminating the notion that atypical people are of lesser worth. Granting poor people the opportunity to develop human agency advances the paradigm's aspiration of responding to individual need. Extending rights protection to these two groups—and the individuals within—causes us to rethink the objectives animating a human rights agenda.<sup>195</sup>

One way to view human rights is to consider them existing along a continuum that progressively extends towards marginalized groups. New instruments are thus vehicles through which to remove mistaken justifications for socially constructed exclusion.<sup>196</sup> Prior to addressing the needs of disabled persons, the global community recognized the rights of other excluded groups through enactment of identity-specific instruments that went beyond the universal coverage of the ICCPR and the ICESCR. Consequently, prejudicial social conventions directed at members of these groups are now considered morally unacceptable and are legally prohibited.<sup>197</sup> Disability-based human rights—reflected in both existing soft laws and the evolving Draft Articles—are the most recent instruments empowering a socially excluded group with human rights.<sup>198</sup>

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195. Jerry Mashaw has suggested that, when discussing disability-related policy choices, foundational issues should be eschewed in favor of pragmatic and prudential considerations. See generally Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 221 (1994). I agree that policy discourse ought to include concrete proposals, and so proffer a vision of what a disability human rights paradigm would look like, but strongly disagree that “just” theorizing is inadequate. See also Martha C. Nussbaum, *Why Practice Needs Ethical Theory: Particularism, Principle, and Bad Behavior*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 50 (Steven J. Burton ed., 2000) (asserting that philosophical theorizing is a necessary ingredient in analyzing large systemic issues).

196. For parallels of this perspective within the race and sex civil rights categories, see Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L. J. 471, 489-90 (1990) (noting that “[s]ex stereotyping in the workplace is embedded in a complicated matrix of interlocking beliefs” based on socially constructed definitions of “male” and “female”); see also Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (noting the pervasive and racist nature of seemingly neutral legal norms).

197. Adherents of behavioral economic scholarship would argue that a law's very existence, in turn, shapes individual preferences by changing their taste for specific outcomes beyond the traditional effect of sanctions through altering behavior. This can be either because the new law carries a symbolic social meaning, or because it affects the way individuals mediate that symbolic social meaning. For a survey of the literature and an initial application of the theory to disability law, see Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 U. VA. L. REV. 1151, 1181 (2004).

198. Interestingly, while disability is protected in the United States at the federal level, sexual orientation is not. The opposite was true in Europe until Article Thirteen of the European Convention

The theories underlying the disability human rights paradigm can be used to extend protections to sexual minorities—most typically gays and lesbians—subjected to pervasive and systemic discrimination in many countries, if not worldwide.<sup>199</sup> At the same time, some commentators acknowledge that sexual minorities should receive negative rights protection, but argue that they are an inappropriate target for second-generation rights. This is because, in their view, sexual minorities are not necessarily economically worse off due to social exclusion.<sup>200</sup> This proposition is empirically and normatively flawed. Empirically, it is highly questionable that sexual minorities have not experienced monetary harm through discriminatory experiences. Much like other minority group members, sexual minorities do not invest in and develop their potential if certain career paths or opportunities are deemed unattainable.<sup>201</sup> And sexual minorities are not in a position to challenge exclusion from

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was amended to include disability. M. A. Stein, *Anti-Discrimination Law and the European Union*, 62 CAM. L. J. 508, 508-09 (2003).

199. See generally WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999). Doing so, however, first requires acknowledging the socially contingent nature of many cultural norms that are otherwise taken for granted as “natural” and “normal.” As observed by Robert Gordon: “[T]he power exerted by a legal regime consists [of] . . . its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.” Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984). See also ALAN HYDE, *BODIES OF LAW* 231 (1997) (“Law veils its own power . . . by pretending to find what it in fact makes itself.”). These norms include, among others, heterosexuality, opposite sex monogamy, and male-female human reproduction. See generally Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Arguments from Immutability*, 46 STAN. L. REV. 503 (1994). Each of these conditions has a strong counterfactual. Consider homosexuality, same sex unions, and the increasingly prevalent use of scientifically assisted reproduction. As to the former, numerous articles are published in the *Journal of Homosexuality*; as to the latter, see JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* (1997). Accepting one version of social ordering over another is a matter of communal choice, not biological or logical necessity. Understanding this elective as an elective paves the way forward for equal treatment of sexual minorities. See generally Janet E. Halley, *The Politics of The Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989). Admittedly, some people do not feel that sexual minorities are an appropriate group for either civil or human rights protection. This sentiment has been borne out in recent years in the United States, as demonstrated both by the defeat in Congress of a bill which would have prohibited workplace discrimination based on sexual orientation. See Chai R. Feldblum, *The Federal Gay Civil Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149 (John D’Emilio et al. eds., 2000) (describing the failure to pass the proposed federal Employment Non-Discrimination Act). This sentiment is also demonstrated by the passage in eleven states during the 2004 election of same-sex marriage ban referenda. See generally Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 WM. & MARY BILL OF RTS. J. 1493 (2006).

200. This is also a dilemma that Nussbaum argues causes difficulty to Rawls’s theory because his allocation of primary goods is based on insufficiently nuanced distribution principles. See Nussbaum, *FRONTIERS OF JUSTICE*, *supra* note 155, at 178-84.

201. See generally M.V. LEE BADGETT, *MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN* (2001) (empirically debunking commonly held myths of homosexual affluence).

particular prospects if they do not first consider those options viable.<sup>202</sup> However, even if sexual minorities who are dissuaded from thriving in a particular manner end up economically well off, they still suffer violations to individual dignity and personal flourishing. This is particularly true if they pursue social advancement by repressing elements of their identities.<sup>203</sup> Extending disability human rights to sexual minorities remedies this problem by addressing historical and group-based subordination.<sup>204</sup>

The disability-based framework also promises an alternative, ambitious reconfiguring of human rights by moving from group-based protection to individualized assessment. This shift is dramatically illustrated by expanding rights protection to the poor, an idea advocated by Nobel Prize winner Amartya Sen.<sup>205</sup> Because Sen avoids the language of human rights—his assertions arise from development economics—I attempt to add to his powerful assertions by framing them in terms of rights. Thus the disability human rights paradigm acts as a bridge between group-based rights discourse and Sen’s progressive vision that responds to individual need.<sup>206</sup>

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202. Like other self-fulfilling prophecies, this is a Catch-22: certain workers are disadvantaged in the workplace because they are believed to have lower net productivity values. In turn, those workers invest less in their own human capital because they believe that they will be disadvantaged in the workplace. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1640 (1991) (“[S]tatistical discrimination encourages minorities to underinvest in human capital, which in turn makes statistical discrimination rational.”).

203. Kenji Yoshino argues that sexual minorities assimilate in three different ways: converting, (changing their underlying identity) passing, (retaining their underlying identity but masking it to observers) and covering (retaining and disclosing their underlying identity, while allowing it to be revealed to acute observers). Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). For sociological accounts of the effect that identity repression has on gay men, see Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 3 J. HEALTH & SOC. BEHAV. 38, 39-42 (1995), and JAMES D. WOODS & JAY H. LUCAS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 74-75 (1993).

204. See, e.g., Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-49 (1983); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

205. For representative examples of his enunciation, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) [hereinafter SEN, *DEVELOPMENT AS FREEDOM*]; SEN, *DEVELOPMENT AS CAPABILITY EXPANSION*, *supra* note 5, at 94. Briefly stated, Nussbaum’s framework arises from Aristotelian principles and is harmonious with much of what Sen argues, but also differs in several significant ways. For an elaboration of these differences, see David A. Crocker, *Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic*, 20 POL. THEORY 584 (1992); David A. 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).

206. Although I reframe matters of distributive justice in this Article using “rights talk,” one could also use the currency of “welfare,” understood objectively rather than subjectively in terms of preference satisfaction. I elect “rights talk” mainly for its strategic advantage. It is easier to enshrine a normative principle in a legal document, like a treaty, while acknowledging that there might not be a

Poverty arises from and is perpetuated by multidimensional factors requiring systemic responses.<sup>207</sup> Beyond an obvious lack of wealth in the material sense, being poor translates into diminished health, reduced access to education and other basic social goods, marginalized participation in political processes, and an overall diminished ability to develop personal talent.<sup>208</sup> It is highly appropriate for the United Nations Millennium development projects to focus on poverty alleviation,<sup>209</sup> for the annual United Nations Development Reports to recognize poverty as a central metric,<sup>210</sup> and for the World Bank to vow to focus on poverty alleviation in addition to issuing loans to developing nations.<sup>211</sup> These international bodies recognize that long term, effective responses to poverty are inextricably linked to the enhancement of human rights.<sup>212</sup>

In developing his thesis treating poverty alleviation as an economic/political right, Sen argued that income deprivation is capability deprivation; it deprives the poor access to essential goods and services.<sup>213</sup> In other words, redistributing wealth provides persons living in impoverished conditions the means to achieve employment, education,

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difference in result from utilizing other currencies. On the “choice of currency issue,” see Richard J. Arneson, *Welfare Should be the Currency of Justice*, 30 CANADIAN J. PHIL. 497 (2000).

207. For a perspective by the Chair of the Millennium Development Goals, see JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* (2005).

208. “Poverty both affects, and is affected by, other human rights violations.” Joe W. Pitts III, *The First U.N. Social Forum: History and Analysis*, 31 DENV. J. INT’L L. & POL’Y 297, 298 (2002); see generally David Durman, *The Dynamics of Poverty and Race in South Africa, 1994-1999*, 9 GEO. PUBLIC POL’Y REV. 69, 70 (2003) (“Lack of access to health care, education, and employment opportunities also increase a household’s likelihood of poverty.”).

209. Specifically, the United Nations aims to halve the proportion of people living in poverty or hunger, as defined by earning less than one dollar a day, by 2015. See MILLENNIUM DEVELOPMENT COMPACT, *supra* note 104.

210. See MILLENNIUM DEVELOPMENT COMPACT, *supra* note 104; U.N. DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 1997*, available at <http://www.undp.org>.

211. See DEEPA NARAYAN ET AL., *VOICES OF THE POOR: CRYING OUT FOR CHANGE* 32 (2000) (the World Bank’s position “reinforces the case for making the well-being of those who are worse off the touchstone for policy and practice”).

212. See The Chairman-Rapporteur, *Report of the Chairman-Rapporteur: The Social Forum*, para. 50, delivered to the Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2002/18 (Aug. 9, 2002) (explaining that the purpose of the U.N. Social Forum was to address the need “to give special voice to new actors, including the poor and the marginalized and their organizations, which have no space within the United Nations system”); Kaushik Basu, *On the Goals of Development*, in *FRONTIERS OF DEVELOPMENT ECONOMICS: THE FUTURE ON PERSPECTIVE* 61, 65 (Gerald M. Meier & Joseph E. Stiglitz eds., 2001) (stating that “in evaluating an economy’s state or progress, we must focus primarily on how the poorest people are faring”).

213. These arguments are set forth in a chapter entitled “Poverty as Capability Deprivation.” SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 205, at 87-110.

health care, and gender equality. The essence of his argument is that alleviating impoverishment is instrumental rather than intrinsic.<sup>214</sup>

Sen then takes the capabilities approach further, arguing that poverty differs from traditional group-based need in two ways. First, the effects of poverty must be appraised and counteracted individually. Second, a greater allocation of resources is needed for indigent people to reach an optimal functional level than for other individuals.<sup>215</sup> While Nussbaum's capabilities approach adheres to established norms of functionality, Sen's original capabilities approach does not require a threshold to guide or justify allocations to individuals with different needs. Rather, normative expectations about the most effective application of resources should not constrain the allocation of those resources to the poor. This latter assertion is consistent with the broad social reconstruction Nussbaum is attempting but does not achieve because of a flaw in the scope of her capabilities framework.<sup>216</sup>

Approaching poverty as a category for human rights protection would signify a dramatic shift in which individuals are formally endowed with identity-based rights. Established hard law treaties target particular groups in an effort to ameliorate human rights violations experienced by individuals within those categories. Extending human rights protections to the poor is in contrast to this established trend by emphasizing the value of individual identity over that of a group-based characteristic. In protecting individuals regardless of historically targeted group status, this focus removes the necessity of determining who is morally worthy of receiving this benefit, itself a prudentially difficult and possibly unjustifiable distinction. Such a shift also recognizes that opportunity involves a spectrum rather than a bright line of abilities.

Refocusing human rights empowerment and resource redistribution on the needs of particular individuals also helps accomplish three positive goals. First, it eliminates prejudice in a different manner than is currently perceived possible. This is because group identity norms by definition equate with negative stereotypes; otherwise, there would not be a need to eliminate civil or human rights violations. Raising individual identity and need over group identity and need can therefore circumvent the

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214. *Id.* At this point, one could plausibly argue that it is not any inherent limitation of disability, female gender, or particular ethnicity that creates capability deprivation, but rather the correlation of these characteristics with the means of accessing goods and services.

215. *Id.*

216. John Foster-Bey, *Bridging Communities: Making the Link Between Regional Economies and Local Community Development*, 8 STAN. L. & POL'Y R. 25, 27 (1997) (outlines the culture of poverty thesis by stating: "[P]overty is not merely a function of lack of income, but also results from social disorganization and unproductive behavioral traits that imbue low-income people with a sense of inferiority, conditioning them to accept their status as unavoidable. These beliefs create a set of psychosocial barriers—a culture of poverty—that perpetuate poverty from generation to generation.").

reinstantiation of negative stereotypes.<sup>217</sup> Second, it focuses on individual, rather than group-based need, and thus can encourage the development of individual capacity. This dynamic is in sync with the human rights emphasis on protecting individual dignity and the capabilities approach's emphasis on each person valued as an end. Moreover, as an empirical matter, overlap is likely to exist between the categories,<sup>218</sup> including the tremendous prevalence of poverty among people with disabilities,<sup>219</sup> women, and ethnic minorities.<sup>220</sup> Third, it requires that human rights be integrated rather than fractured.<sup>221</sup> This is evidenced by its concentration on individual need, which in turn reaches out to group-based need. For example, note the absence of the word "disability" from each of the respective United Nations Millennium projects relating to poverty, health, and HIV status, though each is factually linked to disability.<sup>222</sup> Recalibrating the aim of the human rights discourse as a response to individual need would develop the capacity of all individuals on the basis of their inherent worth and potential. As such, disability-based rights

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217. This point is made in the disability context by Anita Silvers, *Double Consciousness, Triple Difference: Disability, Race, Gender and the Politics of Recognition*, in *DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE*, *supra* note 78, at 75.

218. For a discussion of the interface between disability and gender at the international level, see Theresa M. Degener, *Disabled Women and International Human Rights*, in *3 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 267* (Kelly D. Askin & Dorian M. Koenig eds., 2001). For a broader discussion of the implications of double discrimination in this context, see the contributions in *GENDERING DISABILITY* (Bonnie G. Smith & Beth Hutchison eds., 2004); *WOMEN AND DISABILITIES: THE DOUBLE HANDICAP* (Mary Jo Deegan & Nancy A. Brooks eds., 1985).

219. According to the World Bank, one-fifth of the poorest individuals have a disability. See ANN ELWAN, *POVERTY AND DISABILITY: A SURVEY OF THE LITERATURE* (The World Bank Social Protection Paper No. 9932, 1999). See also tenBroek & Matson, *supra* note 141, at 809 (claiming that "poverty and disability are historically so intermeshed as to be often indistinguishable"). See also James D. Wolfensohn, *Poor, Disabled and Shut Out*, *WASH. POST*, Dec. 3, 2002, at A25 (statement by president of the World Bank that "research shows that disabled people are also more likely than other people to live in grinding poverty").

220. Women, for example, constitute some 60% of the working poor, as reported by the U.N. Int'l Research & Training Inst. for the Advancement of Women, *Women and Poverty: New Challenges*, available at <http://www.un-instraw.org/en/images/stories/Beijing/womenandpoverty.pdf> (last visited Oct. 6, 2006). Using health and education data as alternative indicators of women's poverty levels also clearly indicates women's disadvantage relative to men in places such as South Asia, where "women have only about half as many years of education as men and female enrollment rates at the secondary level are only two-thirds the male rates." World Development Report 2000/2001, *Attacking Poverty: Opportunity, Empowerment, and Security* 4, available at <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/overview.pdf> (last visited Oct. 6, 2006).

221. This point is demonstrated by the absence of disability as in the essays comprising *DYING FOR GROWTH: GLOBAL INEQUALITY AND THE HEALTH OF THE POOR* (Jim Yong Kim et al. eds., 2000).

222. See sources and citations, *supra* note 107. By contrast, Christopher McCrudden correctly argues that one of the most effective, albeit perplexing, methods for effectuating human rights is to mainstream them into all levels of government decision making. Christopher McCrudden, *Mainstreaming Human Rights*, in *HUMAN RIGHTS IN THE COMMUNITY: RIGHTS AS AGENTS FOR CHANGE* 9 (Colin Harvey ed., 2005).

function as a capabilities-based bridge between established norms and future aspirations attending to individual need and talent development.

#### CONCLUSION

This Article examines the theoretical implications of adding disability protections to the existing canon of human rights, both for individuals with disabilities and for other under-protected groups. It combines the best elements of the social model of disability, the human right to development, and Nussbaum's capabilities approach to proffer a disability human rights paradigm that provides a comprehensive framework for ensuring the development of individual talent. This Article maintains that Nussbaum's capabilities approach provides an especially fertile space within which to understand the content of human rights. Nonetheless, Nussbaum's scheme falls short as a comprehensive framework because it excludes some individuals with intellectual disabilities and does not fully include others. Amending her approach to develop the talents of all individuals—even those Nussbaum considers not "truly human"—creates a disability human rights paradigm that comprehensively recognizes the dignity and worth of every individual.

Because disability rights invoke civil and political rights as well as economic, social, and cultural rights, the disability rights framework presents a strong reaffirmation that established human rights protections are similarly indivisible. Both types of rights are essential if hard laws are to be effective. Hence, groups whose rights have historically been divided between generational rights—such as women—could be strengthened by the disability rights paradigm. Applying a disability framework retrospectively to women reaffirms the need for a holistic approach to human rights that can prohibit discrimination and rework social landscapes. Moreover, utilizing a disability-based perspective could also extend human rights to currently unprotected people, including sexual minorities and the poor. Extending a disability human rights paradigm to these groups empowers vulnerable populations in very different ways. Sexual minorities have been excluded from social opportunities due to prejudicial social convention. Their protection thus follows an established and linear progression. The poor, however, do not possess immutable group-based identity characteristics. Poverty alleviation as a human right is a response to individual need and so raises a different set of human rights issues. Each of these possibilities—retrospective and prospective application of the disability rights paradigm to other groups—requires us to reexamine the bases underlying existing notions of human rights protection.

Finally, the assertions in this Article are unique. Instead of only advocating disability-specific protection paralleling established human

rights instruments, the Article also proffers an initial argument for extending disability-based human rights concepts to other groups. In doing so, this Article advocates for a dramatic shift in perspective by centering disability within the analytical framework. Considering the ability of disability-based notions to enrich the rights of already protected groups rather than analyzing the ability of traditionally accepted norms to be applied to the disabled is a dramatic change in rights discourse.

Historically, persons with disabilities have been among the most politically marginalized, economically impoverished, and least visible members of society. Many societies have viewed and continue to view this social exclusion as natural, or even a warranted consequence of the inherent inabilities of disabled persons. Adopting a disability human rights model—and then extending it to other groups—repositions disability as a universal and inclusive concept. As human beings, each of us has strengths, weaknesses, abilities, and limitations. A disability human rights framework prioritizes potential over function, and recognizes the value of every individual for his or her own end. It assesses the efficacy of human rights protection in light of exogenous factors that impact each person's development. Doing so embraces disability as a universal human variation, rather than as an aberration.

