

DISABILITY HUMAN RIGHTS

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Responding to the absence of an international treaty expressly protecting people with disabilities, the United Nations is sponsoring a disability-based human rights convention. The Article examines the implications of adding disability to the existing canon of human rights by adopting a disability human rights paradigm. It argues that, because disability rights necessarily invoke civil and political rights, as well as economic, social, and cultural rights, a disability framework presents a strong exemplar for viewing established human rights protections as being similarly indivisible. Hence, groups whose rights historically have been divided, for example, women, could be strengthened. Moreover, utilizing a disability-based perspective could also extend human rights to currently unprotected individuals, including sexual minorities and the poor. Building on (as well as critiquing) the feminist political philosophy of Martha Nussbaum, the Article maintains that the “capability approach” provides a cogent space for understanding the scope of disability-related, as well as general, human rights. It demonstrates that, because a capabilities framework values each person as his or her own end, it can be combined with a disability framework to offer a normative theory of human rights that enables individuals to flourish more completely. The Article concludes with some thoughts on the broader ramifications of viewing disability as a universal experience. In arguing that disability-based rights concepts should be extended to other groups (rather than the reverse), the Article stakes out a unique perspective.

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INTRODUCTION

More than six hundred million people, or about ten percent of the world's population, have some type of disability. About eighty percent of those individuals live in developing countries, where they are subject to material deprivation and social exclusion.¹ All are vulnerable to various forms of discrimination. To provide a single, but graphic example, in developing parts of the world only two percent of children with disabilities receive any schooling.² Nevertheless, none of the existing United Nations human rights treaties expressly include people with disabilities within their respective provenances. To claim human rights protection, disabled individuals must either invoke a universal provision or embody an additional protected group characteristic. For instance, a woman with a disability may claim protection from sex-based discrimination. As a result, to date only a handful of disability-based human rights claims have been asserted under these "hard laws." Conversely, a series of resolutions, declarations and protocols explicitly reference disability, but these "soft laws" are not legally enforceable. In sum, no existing international human rights instrument is both applicable to, and enforceable by, individuals on the basis of their "disability" status. Responding to this lacuna, the United Nations commissioned an Ad Hoc committee to develop an international convention directed at protecting the human rights of disabled persons. As of this writing, articles are being drafted for consideration by the General Assembly.

This Article examines the theoretical implications of adding disability to the existing canon of human rights protection by adopting a disability human rights paradigm. Thus, although I use the proposed convention as an expedient

¹ See SECOND ANNUAL REPORT ON THE IMPLEMENTATION OF USAID DISABILITY POLICY 2 (2000). For a sense of the varying levels of disability reported from country-to-country, see United Nations Department of Economics and Social Affairs, Statistics Division, available at <<http://www.unstats.un.org/unsd/disability/default.asp>>.

² GERARD QUINN et al., HUMAN RIGHTS AND DISABILITY 11 (2002).

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framework for discussing the repercussions of disability-based human rights concepts, my arguments are not dependent on passage of the present instrument.³ Instead, the purpose of this Article is to analyze the broader conceptual effects of incorporating disability-based rights into existing human rights treaties, and also extending them to other unprotected individuals. Building on (and also critiquing) the feminist political philosophy of Martha Nussbaum, the Article argues that a “capability approach” provides a fertile space within which to understand the content of disability-based human rights, and subsequently, the human rights of other groups.⁴ The capabilities framework values the dignity, autonomy, and potential of all individuals, and views each person as his or her own end. In so doing, it provides a normative theory of human rights that can be combined with a disability framework to enable individuals to develop their talents and flourish more completely.

The Article also argues that, because a disability-based paradigm necessarily invokes both civil and political (also called, “first generation”) rights, as well as, economic, social, and cultural (or, “second generation”) rights, it offers a prototype for viewing other more established human rights protections also as indivisible. Such a reconceptualization is especially pertinent for women, whose rights in practice have historically been divided between first and second generation entitlements. Additionally, it maintains that viewing human rights through a disability lens that seeks to counteract socially constructed inequities facilitates arguments in favor of extending protection to additional vulnerable populations, including sexual minorities and the poor.

Each of these arguments requires us to step back and reexamine the bases underlying existing notions of human rights theory. Applying a disability framework retrospectively to women reaffirms the need for a holistic approach to human rights that not only prohibits discrimination, but also reworks the surrounding social landscape. Both these dynamics are necessary if hard laws, which to date have been under-utilized, are to be effective. Extending a disability

³ At the same time, I freely admit that I favor enactment of the proposed United Nations convention; moreover, that I am privileged to be involved in its composition.

⁴ Strictly speaking, the capability approach originates with Amartya Sen’s development economics theories. 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 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.

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human rights paradigm to sexual minorities and to the poor empowers susceptible populations, but in very different ways. As a group, sexual minorities have been excluded from social opportunity due to prejudice. Their protection, therefore, follows an established and linear progression of previous human rights protection. 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, although not mutually exclusive, human rights discourse. Finally, the proposals in this Article are unique. Instead of advocating disability-specific protection paralleling that of established human rights instruments -- itself a rare exercise in legal literature⁵ -- it proffers an initial argument for extending disability-based human rights concepts to other groups.⁶ In doing so, this Article stakes out a distinct perspective on human rights law, and one that I hope will encourage further discussion.

As a baseline, Parts I and II set forth the world of disability-based human rights protection. Part I analyzes the extent to which existing United Nations instruments pertain 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, its growing influence on the formation of international instruments, and the limitations of this framework for human rights discourse. The implications of applying a disability human rights paradigm, both for persons with disabilities and for other groups, are then considered in Parts III and IV. Part III develops a disability human rights paradigm, beginning with the human right to development. Next, it builds on and critiques Martha Nussbaum's capability approach scholarship as a rich and normative space for applying these protections. Combining the two frameworks results in the disability human rights paradigm whose application is described. Having set forth a holistic and fertile manner for viewing human rights, Part IV argues that the clearly indivisible nature of disability-based rights presents a strong exemplar for viewing established human rights protections as being similarly undividable. It also creates the possibility for extending human rights protection to other vulnerable populations, including sexual minorities and the poor, but in different ways. The Article concludes with

⁵ 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).

⁶ The only parallel I am aware of is Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, 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.

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some thoughts on the potential consequences of viewing disability as being universal to, rather than abnormal from, the human condition.

I. THE SCOPE OF DISABILITY HUMAN RIGHTS

Each of the seven core United Nations treaties is applicable to disabled persons to varying degrees in theory, but rarely in practice. At the same time, General Assembly resolutions explicitly referencing disability are legally unenforceable. A United Nations-commissioned task force is currently developing an international convention that would specifically protect the human rights of disabled persons.

A. *United Nations Core Treaties*

Since its formation after the Second World War, the United Nations has promulgated seven core, legally enforceable, human rights treaties.⁷ Each of these hard laws may be said to include people with disabilities within their purview, but only in varying degrees. To be protected by these instruments, disabled persons must either fall under a rarely enforced ecumenical provision, or possess an identity characteristic in addition to that of their disability. No current United

⁷ Whether treaties are enforceable in practice, as well as the broader question of whether international law is actually “law” for the same reason, has been the subject of a long 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. For two very different perspectives on the implications of this State prerogative for the enforcement of human rights treaties, *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 *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).

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Nations human rights treaty is expressly applicable on the basis of a disability-related characteristic.⁸

Two components of the International Bill of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”),⁹ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),¹⁰ are each universal in scope.¹¹ The same is true for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).¹² Therefore, although the characteristic of disability is not specifically mentioned in these treaties, all human beings (whether or not disabled) are technically included within their respective provinces.¹³

⁸ The same may be said of the non-inclusion of disabled persons under other United Nations, non-treaty 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. X. (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), U.N. GAOR, 3d Sess., at 71, Preamble, Art. II, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration] (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.”).

⁹ G.A. Res. 2200A (XXI), U. N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

¹⁰ G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16 at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3 (1966) [hereinafter ICESCR].

¹¹ *See, e.g.*, ICCPR *supra* note 9, at Preamble (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 10, at Article 2(2) (undertaking that the rights enumerated in the ICESCR “will be exercised without discrimination of any kind as to race, colour . . . or other status.”).

¹² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984).

¹³ *See generally* Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, in HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 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 *id.* at 94; Manfred Nowak & Walter Suntinger, *The Right of Disabled People*

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Despite the formal inclusion of all people under the above three instruments, the General Assembly has enacted four additional hard law treaties. Each of these conventions protects people on the basis of certain identity characteristics that can overlap with, but are otherwise unrelated to disability.¹⁴ In chronological order these are the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”),¹⁵ the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”),¹⁶ the Convention on the Rights of the Child (“CRC”),¹⁷ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (“ICPMW”).¹⁸ The CRC, uniquely among these treaties, contains a specific article requiring States parties to recognize the rights of children with disabilities to enjoy “full and decent” lives and to participate in their communities.¹⁹ That obligation, however, is tempered by the relative financial constraints of States parties. Moreover, the CRC does not mandate that children

Not to be Subjected to Torture, Inhuman and Degrading Treatment or Punishment, in id., at 117.

¹⁴ These provisions are a mixed blessing. On the positive side, they provide an additional avenue of protection for those disabled persons experiencing “double discrimination,” meaning prejudice based on more than one identity characteristic, for example, being disabled and of Inuit heritage. Nevertheless, they can only do so for those individuals who encounter discrimination serially. Even then, because disability is almost uniformly relegated to “other” status, the groups’ rights become overlooked. One example of this 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. 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. The document is posted at the website of the United Nations High Commissioner for Human Rights, available at <<http://www.unhchr.ch/pdf/Durban.pdf>>. More trenchantly, individuals whose rights are violated “solely” due to their disability identity receive no added protection.

¹⁵ G.A. Res. 2106 (XX), U.N. GAOR, Supp. No. 14, at 47, U.N. Doc. A/6014 (1966). See generally Theodore Meron, *The Meaning and Reach of the International Convention for the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INTL L. 283 (1985).

¹⁶ G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1981) [hereinafter CEDAW].

¹⁷ G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 161, U.N. Doc. A/44/49 (1989) [hereinafter CRC].

¹⁸ G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49, at 262, U.N. Doc. A/45/49 (1990) [hereinafter ICPMW].

¹⁹ CRC, *supra* note 17, at Article 23(1).

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with disabilities be treated or considered as equal to children without disabilities.²⁰

Hence, although the United Nations has promulgated identity-specific hard law protection beyond the three universally protective human rights treaties described above, with one limited exception, persons with disabilities have not yet been included among the group of specially protected individuals. In a 1993 report, a Special Rapporteur cautioned that in the absence of specific treaty protection, human rights abuses against disabled persons would likely continue without redress.²¹ Unfortunately, this prediction has largely been borne out. In the decade following the report, seventeen disability-related individual complaints have been asserted under core United Nations instruments, and the respective monitoring committees declared thirteen of these inadmissible.²²

Consequently, at present six hundred million persons with disabilities worldwide have theoretical, but not practical, United Nations human rights core treaty protection.

²⁰ CRC, *supra* note 17, at Article 23(1)-(3). The equality of disabled children has, however, been emphasized by the Commission on Human Rights. *See, e.g.*, Rights of the Child, E.S.C. Res. 2001/75, U.N. ESCOR, Comm'n on Hum. Rts., 57th Sess., U.N. Doc. E/CN.4/RES/2001/75, at para. 22; Rights of the Child, E.S.C. Res. 2000/85, U.N. ESCOR, Comm'n Hum. Rts., 56th Sess., U.N. Doc. E/CN.4/RES/2000/85, at para. 29. *See generally* Thomas Hammerberg, *The Rights of Disabled Children: The UN Convention on the Rights of the Child in Degener & Koster-Dreese*, HUMAN RIGHTS AND DISABLED PERSONS, *supra* note 13, at 147.

²¹ LEANDRO DESPOUY, REPORT ON HUMAN RIGHTS AND DISABLED PERSONS paras. 280-81 (1993) (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.").

²² The ICESCR, the CRC, and the ICPRAMW do not currently provide for the assertion of individual complaints, thus individual complaints can only 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, and is available at <<http://www.unhchr.ch>>. The decisions of the three relevant monitoring committees can be accessed through the Netherlands Institute of Human Rights web page, available at <<http://sim.law.uu.nl/sim/Dochome.nsf>>. *See also* Arlene Kanter, *Globalization of Human Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241 (2003) (discussing a handful of human rights cases involving disability brought before the European Court of Human Rights and the Inter-American Court of Human Rights).

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B. United Nations Declarations and Resolutions

In contrast to the hard law treaties that do not enumerate disability, a number of soft laws expressly target individuals for human rights protection on the basis of a disability classification.²³ These include the General Assembly's designation of 1981 as the International Year of the Disabled,²⁴ and the period 1982-1991 as the International Decade of Disabled Persons.²⁵ The United Nations has also passed resolutions for the Declaration on the Rights of Mentally Retarded Persons,²⁶ and for the Declaration on the Rights of Disabled Persons.²⁷ 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 persons with disabilities.²⁸

Most significant among the soft laws is the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (the "Standard Rules"),²⁹ which are monitored by a Special Rapporteur.³⁰ As will be demonstrated below in Part II.B., these soft laws are significant in that they mark an international shift towards a social model of disability, itself a transitional stage towards a human right to development approach. For the present, however, it bears noting that as resolutions (rather than as treaties) they lack legally binding power.³¹

²³ 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, and is available at <www.un.org/esa/socdev/enable>.

²⁴ G.A. Res. 77, U.N. GAOR, 36th Sess., Supp. No. 77, at 158, U.N. Doc. A/RES/36/77 (1981).

²⁵ G.A. Res. 53, U.N. GAOR, 37th Sess., Supp. No. 53, U.N. Doc. A/RES/37/53 (1982).

²⁶ G.A. Res. 2856 (XXVI), U.N. GAOR, Supp. No. 29, at 92, U.N. Doc. A/8429 (1971).

²⁷ G.A. Res. 3447 (XXX), U.N. GAOR, Supp. No. 34, at 88, U.N. Doc. A/10034 (1975).

²⁸ G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (1982).

²⁹ G.A. Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49, at 202, U.N. Doc. A/48/49 (1993).

³⁰ The first Special Rapporteur, Bengt Lindqvist of Sweden, was appointed in 1994, and had his commission renewed in 1997 and in 2000. The current Special Rapporteur, is Sheikha Hessa Al-Thani of Qatar. For an insider's perspective on the role of the Special Rapporteur, see Bengt Lindqvist, *Standard Rules in the Disability Field: A United Nations Instrument*, in HUMAN RIGHTS AND DISABLED PERSONS *supra* note 13, at 63.

³¹ Other significant soft laws are the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, AG/RES. 1608 29th Sess., O.E.A. Doc., OEA/Ser. P AG/doc.3826/99 (June 7, 1999); the International Guidelines on HIV/AIDS and Human Rights, U.N.C.H.R. Res. 1997/33, E.S.C. Res.

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In sum, numerous resolutions and declarations have been passed expressly on behalf of people with disabilities. However, as soft laws they cannot be legally enforced.

C. The Proposed United Nations Convention

Acting on previous proposals,³² in December 2001 the General Assembly established an ad hoc committee to consider enacting a disability-based human rights instrument.³³ After two sessions, the ad hoc committee in turn appointed a working group to draw up a proposed human rights treaty.³⁴ On January 16, 2004, the working group issued “Draft Articles” which it presented back to the Ad Hoc committee.³⁵ Subject to negotiation and emendation, the Draft Articles are likely to be passed by the General Assembly in late 2006 as a follow-up to the 2005

1997/33, U.N. ESCOR, Comm’n on Hum. Rts., 53rd Sess., U.N. Doc. E/CN.4/1997/150 (1997); and the International Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. Res. 46/119, U.N. GAOR, 46th Sess., Supp. No. 49, Annex, at 188, U.N. DOC. A/46/49 (1991). The former, enacted by the Organization of American States, is remarkable as the first binding intergovernmental disability-related human rights treaty.

³² Notably, Italy proffered a convention draft during the forty-second session of the General Assembly in 1987, see U.N. Doc. A/C.3/42/SR.16, and Sweden did the same two years later at the General Assembly’s forty-fourth session. See U.N. Doc. A/C.3/44/SR.16. 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 newsletter, *available at* <http://www.ncd.gov/newsroom/publications/2003/history_process.htm>.

³³ United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 168, U.N. GAOR, 56th Sess., Supp. No. 168, U.N. Doc. A/RES/56/168 (2001).

³⁴ *Id.* at U.N. Doc. No. A/AC.265/2004/WG.1 (2004). The working group included twelve non-governmental organizations (“NGOs”). *Id.* Their inclusion at this stage was unprecedented in the normal course of treaty development at the United Nations, and can be interpreted as acquiescence to the NGO assertion of “nothing about us without us.” Nonetheless, a counter-signal was also sent to the disability community through the placement of 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. The same may be said for placement of the body monitoring the Standard Rules.

³⁵ See Draft Articles for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *available at* <<http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm>> [hereinafter Draft Articles].

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initiation of the United Nations Millennium Development Goals. These goals include many disability-related issues (for example, poverty, health, HIV status), although they do not themselves reference disability.³⁶

In pertinent part, the Draft Articles reaffirm each of the seven core United Nations treaties,³⁷ state their purpose “to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,”³⁸ and enunciate essential principles of guaranteeing “dignity, individual autonomy,” “non-discrimination,” “full inclusion,” and “equality of opportunity.”³⁹ The Draft Articles include both first and second generation rights,⁴⁰ and expressly call attention to their indivisibility.⁴¹ By way of enforcement, the proposed instrument

³⁶ The Millennium Goals are *available at* <<http://www.un.org/millenniumgoals>>. The above is a summary history of the Draft Articles. Readers wishing more background details, including the varying position papers submitted by governments and non-governmental organizations can review a variety of websites they maintain, including United Nations Department of Economic and Social Affairs, *available at* <<http://www.un.org/esa/socdev/enable/rights/humanrights.htm>>; Disabled Peoples International, *available at* <<http://www.dpi.org/en/resources/topics/topics-convention.htm>>.

³⁷ Draft Articles, *supra* note 35, at Preamble (d).

³⁸ *Id.* at Preamble (j). The Draft Articles’ statement that this goal is to be brought about through the use of “international cooperation,” *id.*, echoes language from previous treaties. *See* CRC, *supra* note 17, at Preamble (“Recognizing the importance of international co-operation”); CEDAW, *supra* note 16, at para. 6 (“Affirming that the strengthening of . . . mutual cooperation among all States” is necessary for effectuation).

³⁹ Draft Articles, *supra* note 35, at Article 3. Subsequently, the Draft Articles require among the catalogue of general obligations the incorporation of disability issues “into all economic and social development policies and programmes” as well as the use of “universally designed (i.e., ecumenically usable) goods, services, equipment and facilities.” *Id.* at Article 4.1 (c), (f).

⁴⁰ *Id.* at Preamble (r) (noting that the convention intends to promote disabled persons’ “participation in the civil, political, economical, social and cultural spheres with equal opportunities, in both developing and developed countries.”). Among the first and second generation rights enumerated are: rights to life, equality, expression, privacy, education, employment, health 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. passim*. For a discussion of how these rights intersect and are harmonious with the capability approach, see *infra* Part III.B.

⁴¹ “Reaffirming the universality, indivisibility and interdependence of all human rights and fundamental freedoms.” Draft Articles, *supra* note 35, at Preamble (c).

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mandates the keeping of statistics and reports to monitoring bodies,⁴² the development of domestic policies in conjunction with disabled nationals,⁴³ and the general promotion of positive attitudes towards persons with disabilities.⁴⁴

Several central terms including “disability,” “discrimination on the ground of disability,” and “accessibility” are conspicuously undefined,⁴⁵ in large measure due to political motivations. Specifically, to secure broad support in the General Assembly, several of the Working Group members believed that these definitions ought purposely to be 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 was chiefly a local issue.⁴⁶ Nevertheless, the term discrimination is itself expansively defined as “any distinction, exclusion or restriction” that affects “the recognition, enjoyment or exercise by persons with disabilities, on an equal footing, of all human rights and fundamental freedoms.”⁴⁷

The social model of disability, the manner in which it has gained prevalence among international instruments, and its primary shortcomings, are discussed next, in Part II.

II. THE SOCIAL MODEL OF DISABILITY

The social model asserts that contingent social conditions, rather than inherent biological limitations, are responsible for limiting peoples’ functional capabilities and creating a “disability” category. Beginning with the 1970s, soft international instruments have increasingly adopted precepts from the social

⁴² *See id.* at Article 31.

⁴³ *See id.* at Article 4.3.

⁴⁴ *See id.* at Article 8. These measures include instigating “public awareness campaigns,” mainstreamed public education, and “encouraging” positive images of the disabled in the mass media. *Id.* at 8.2.

⁴⁵ *See id.* at Article 2.

⁴⁶ *Id.* As related in the NCD newsletter, *supra* note 32, the United States took an even more removed position, asserting that the matter of disability-related rights, in any form, were a “largely domestic mission” that individual states ought to pursue on their own initiatives. For that reason, the United States rarely participates in the convention process and does not intend to ratify any resultant instrument.

⁴⁷ *See* Draft Articles, *supra* note 35, at Article 2. The next section specifies that the term discrimination takes in “direct, indirect and systemic” as well as “discrimination based on an actual or perceived disability.” *Id.*

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model. Nevertheless, because the social model's roots are fixed in formal equality theory, it has limited application within the human rights arena.

A. The Social Model

Disability studies scholars have long argued for a "social" (or "minority") model of disability.⁴⁸ This framework maintains that it is the physically engineered environment, and the attitudes that are reflected in its construction, that play a central role in creating the condition termed "disability." According to the social model, many factors that are exogenous to a disabled person's own limitations are really what determine the extent to which that individual will be able to function in a given society.⁴⁹ This perception is in stark contrast to the "medical" model of disability, which views a disabled person's limitations as naturally (and so, properly) excluding her from participating in the mainstream culture. Under the medical model, people with disabilities are perceived as incapable of social function because medical conditions have impaired their major life activities. In consequence, disabled persons have either been systemically excluded from social opportunity (as in the case of receiving social welfare benefits in lieu of employment) or have been accorded limited participation (for example, educating disabled children in separate schools).⁵⁰

An early contribution to the development of the social model of disability was made by political scientist Jacobus tenBroek.⁵¹ TenBroek argued that

⁴⁸ Disability studies is an academic discipline analogous to that of critical race or feminist theory, with dedicated university departments. Gary L. Albrecht et al, *The Formation of Disability Studies*, in HANDBOOK OF DISABILITY STUDIES 1-12 (GARY L. ALBRECHT et al. eds., 2001).

⁴⁹ For detailed explanations, see Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4. S. CAL. REV. L. & WOMEN'S STUD. 97 (1994); Ron Amundson, *Disability, Handicap, and the Environment*, 23 J. SOC. PHIL. 105 (1992).

⁵⁰ See generally Kenny Fries, *Introduction*, in STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT 6-7 (Kenny Fries ed., 1997) (noting that "this view of disability . . . puts the blame squarely on the individual."); CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* (1988) (averring that the "medical/pathological paradigm" of disability, which stigmatizes the disabled by conditioning their inclusion only "on the terms of the able bodied majority").

⁵¹ 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 originate the social model theory with MICHAEL OLIVER, *SOCIAL WORK WITH DISABLED PEOPLE* 23 (1983) (the social model is "nothing more fundamental than a

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disabled peoples' own physical limitations had far less to do with their ability to participate in society than did "a variety of considerations related to public attitudes," most of which were "quite erroneous and misconceived."⁵² The framework has been utilized by academics from other disciplines, particularly feminist scholars, to challenge misconceptions about the necessarily inherent exclusion of biologically atypical individuals.⁵³

Philosopher Anita Silvers provides an eloquent application of the social model of disability within the context of Americans with Disabilities Act ("ADA") accommodations,⁵⁴ and her underlying theory applies equally well to the statute's international progeny.⁵⁵ Silvers argues that being physiologically anomalous is only viewed as abnormal because a dominant group has imposed conditions that are most favorable to its own circumstances, rather than because of "any biological mandate or evolutionary triumph."⁵⁶ According to her, the social model of disability traces the source of disabled peoples' relative disadvantage to the existence of a hostile environment that is "artificial and remediable" as opposed to "natural and immutable."⁵⁷ Thus, from the perspective of a person mobilized in a wheelchair, disability is experienced by lack of access to workplaces, educational programs, medical services, and other areas otherwise open to the public. Since ADA accommodations seek to eliminate subordination of individuals with disabilities, Silvers argues that it is a product of formal and equalizing justice,

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.").

⁵² See Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (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).

⁵³ See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 101-09 (1990); see also MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 306 (2004) (noting that "a handicap does not exist simply 'by nature'" rather "it only becomes a handicap when society treats it in certain ways").

⁵⁴ 42 U.S.C §12101 (2000).

⁵⁵ ANITA SILVERS, *Formal Justice*, in DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13 (Anita Silvers et al. eds., 1998).

⁵⁶ *Id.* at 73.

⁵⁷ *Id.* at 74-75. She maintains further that "[i]f 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.

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rather than of redistributive or material justice. This is especially true because, in her view, the ADA acknowledges that equal access to goods and opportunity is not a special benefit. Rather, the statute sanctions intervention into existing social constructs by questioning an environment that artificially disadvantages people with disabilities.⁵⁸

The social model recognizes that notions of what bodily conditions, and therefore which people with those conditions, comprise the norm in any given society are contingent on collectively mandated decisions.⁵⁹ Accordingly, it may be as equally plausible in one culture to have female leaders as it is in another to seek out male principals.⁶⁰ And, just as most societies historically have assumed that disabled persons are less capable than nondisabled individuals,⁶¹ a minority of cultures believes that people with disabilities are especially capable of various functions.⁶² Indeed, there are social anthropologists who claim that the notion of “disability,” at least as a negative concept, is Western in origin and remains

⁵⁸ *Id.* at 119-27 (“The ADA facilitates formal intervention into the rules of social games by permitting questions to be raised about the justification of whatever disparately disadvantaging impact they may have.”).

⁵⁹ See generally Richard K. Scotch & Kay Schriener, *Disability as Human Variation: Implications for Policy*, 549 ANNALS AAPSS 148 (1997).

⁶⁰ 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 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 Navaho and Cheyenne, as matriarchal).

⁶¹ See, e.g., Jerome E. Bickenbach, *Disability Human Rights, Law, and Policy*, in HANDBOOK OF DISABILITY STUDIES *supra* note 48, at 565, 567 (noting the commonly held misperception that “disability is an abnormality, a lack, and a limitation of capacity.”). This point can be seen by comparing the results of a recent study of prevailing attitudes towards individuals with intellectual disabilities across ten very different countries. See MULTINATIONAL STUDY OF ATTITUDES TOWARD INDIVIDUALS WITH INTELLECTUAL DISABILITIES (June 2003), available at <http://www.csde.umb.edu/research/Multinational_study_03.pdf>.

⁶² 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 China. See *DPP City Councilors say Lein received sighted massage*, Taipei Times, Sept. 27, 2003, available at <<http://www.taipeitimes.com/News/taiwan/archives/2003/09/27/20030694221>>.

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unknown to certain African cultures.⁶³

B. The Social Model and United Nations Instruments

International resolutions relating to disabled persons were initially steeped in the medical model of disability, but have increasingly moved towards the social model.⁶⁴ Particularly influential among post World War II instruments endorsing the medical model was the “whole man” schema of vocational rehabilitation.⁶⁵ This method sought to “treat” disabled persons as a means of permitting their social participation, and in doing so, further instantiated the medical model’s notion that it is people with disabilities, rather than society, that must change.⁶⁶ Notable among these post-war instruments are a series of resolutions adopted by the General Assembly and the United Nations Economic and Social Council during the 1950s and 1960s that were directed both at preventing future disability and in rehabilitating existing disabilities.⁶⁷ For instance, the Economic and Social Council’s 1950 resolution for the “Social Rehabilitation of the Physically

⁶³ 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 *id.* at 246.

⁶⁴ The same may be said for both the United States and Europe. See, e.g., RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS* (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).

⁶⁵ The term originates with political scientist Ruth O’Brien. For a full expression of her theory, see RUTH O’BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* (2001).

⁶⁶ The views of the two leading practitioners of vocational rehabilitation from that period are set forth in HOWARD A. RUSK, *REHABILITATION MEDICINE* (1964); HENRY H. KESSLER, *REHABILITATION OF THE PHYSICALLY HANDICAPPED* (1953). The timing of the medical model, as advanced by these two medical practitioners, is hardly coincidental. Scientific advances made during the Second World War, a conflict in which several influential Western States had participated, 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).

⁶⁷ See MARIA RITA SAULLE, *DISABLED PERSONS AND INTERNATIONAL ORGANIZATIONS* (1982) (providing a catalog of these resolutions). The American parallels are the Vocational Rehabilitation Amendments of 1954, Pub. L. No. 83-565, 68 Stat. 652 (1954).

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Handicapped” included provisions aimed specifically at the “Social Rehabilitation of the Physically Handicapped.”⁶⁸

Beginning in the 1970s, international instruments began evidencing a shift from the medical to the social model of disability.⁶⁹ 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.⁷⁰ Nevertheless, these instruments reflect the medical model by determining that individuals are disabled due to “special” medical problems, and so are dependent on social services and institutions.⁷¹ The following decade, however, “marked an irreversible shift” to a social rights model of disability.⁷²

Acting on the aphorism “[f]ull participation and equality,” the United Nations proclaimed 1981 as the International Year of the Disabled, and the succeeding period as the International Decade of Disabled Persons.⁷³ More significantly, in 1982 the General Assembly also enacted the path breaking WPA.⁷⁴ Although this pronouncement reiterated two medical model goals of preventing and rehabilitating disability, it also initiated a shift towards the social model by advocating the equalization of opportunities for the disabled. This last aspiration was defined as “the process through which the general system of society, such as the physical and cultural environment” is rendered accessible. Moreover, the WPA emphasized that the traditional response of rehabilitation was insufficient to achieve this purpose. Instead, “[e]xperience shows that it is largely

⁶⁸ Report of the Social Commission (Sixth Session), 13 July, 1950.

⁶⁹ 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); U.S. Commission on Civil Rights, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* (1983).

⁷⁰ For example, the Declaration on the Rights of Mentally Retarded Persons, *supra* note 27, at para. 4, declares that persons with disabilities have the same civil and political rights as other human beings.

⁷¹ *See, e.g., id.* at Preamble (emphasizing the need to protect disabled persons and their access to segregated services); Declaration on the Rights of Disabled Persons, *supra* note 29, at para. 8 (underscoring the needs of disabled persons to “special” services).

⁷² QUINN et al., *supra* note 2, at 30.

⁷³ G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51, at 185, U.N. Doc. A/37/51 (1983).

⁷⁴ G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (1982).

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the environment which determines the effect of an impairment or a disability on a person's daily life."⁷⁵

Continuing the trend towards adoption of the social model, the 1990s "was a banner period for disability law."⁷⁶ Passed in 1993, the Standard Rules remain the central United Nations document relating to disabled persons. The Standard Rules build on the WPA, both in emphasizing the equality of disabled persons and in defining disability as a by-product of the socially constructed environment. For example, the instrument underscores the necessity of changing general societal misperceptions about the disabled and providing sufficient services to support their full inclusion.⁷⁷ Despite their monitoring by a Special Rapporteur,⁷⁸ the Standard Rules as soft law are not legally enforceable. They nevertheless stress that States parties are under "a strong moral and political commitment" to ensure "the equalization of opportunities" for disabled persons.⁷⁹

Enacted in the same year as the Standard Rules, and also worthy of note, is the Vienna Declaration and Programme of Action ("Vienna Declaration").⁸⁰ Although not directed specifically towards disability (somewhat ironically, because the main purpose was to underscore the "universal" nature of human

⁷⁵ See *id.* at para. 12, 21.

⁷⁶ Theresia Degener, *International Disability Law – A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999*, 16 BERKELEY J. INT'L L. 180, 184 (2000).

⁷⁷ See Standard Rules, *supra* note 29 at Rule 1, Rule 4. That the Standard Rules explicitly enunciate a social model of disability can be seen in the articulation of its 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 paras. 25-26.

⁷⁸ Reports issued by the Special Rapporteur are *available at* <www.disability-rapporteur.org>. For an account of how the Standard Rules are nevertheless inadequately enforced, 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 Bassar Marks eds., 1999).

⁷⁹ See Standard Rules, *supra* note 29, at para. 14. 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.

⁸⁰ Vienna Declaration and Programme of Action, A/CONF. 157/24 (1993) [hereinafter Vienna Declaration].

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rights),⁸¹ it nonetheless stressed the universality of disabled persons. Moreover, the Vienna Declaration accelerated the trend towards a social model of disability by maintaining that disabled persons “should be guaranteed equal opportunity through the elimination of all socially determined barriers” among which it included any “physical, financial, social or psychological” obstacles that “exclude or restrict full participation in society.”⁸² Finally, the ADA’s passage during this period bears special notice. While it is domestic in scope, to date some forty-six countries have enacted similar (at times nearly verbatim) legislation.⁸³ The European Union’s employment Framework Directive likewise adopts key ADA definitions,⁸⁴ and there are indications that the Draft Articles will follow suit.⁸⁵ Accordingly, international disability rights advocates frequently point to the statute as a model worthy of emulation.⁸⁶

The social model was well instantiated by the new millennium. Thus, when the General Assembly held a (non-disability specific) World Summit on Social Development, it acknowledged the necessity of implementing the Standard Rules in order “to empower persons with disabilities to play their full role in society” by changing the socially constructed environment.⁸⁷ Perhaps the most

⁸¹ *Id.* at para. 5 (“[a]ll human rights are universal, indivisible and interdependent and interrelated.”).

⁸² *Id.* at para. 64.

⁸³ 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 & Sylvia Yee eds., 2002), provides a list of ADA-progeny.

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 *E.g.*, Draft Article 7, *supra* note 35, would require 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 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, when advising governments and agencies) who caution against adopting exclusively ADA-type rights protection. Among the reasons for this trepidation are those set forth in relation to the social model, *infra* Part II.C.

⁸⁷ U.N. Doc. A/CONF.166/9, annexes I (Declaration) and II (Programme of Action), at para. 66. The shift towards a social model is also evidenced by the actions of specialized international agencies. *See* Theresia Degener, *Disabled Persons and Human Rights: The*

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progressive enunciation of a social model approach in an international instrument is potentially found in the Draft Articles. These 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” and promoting “their participation. . . with equal opportunities.”⁸⁸ However, as will be seen in Part III.A., the Draft Articles also go beyond the social model by adopting a human right to development approach that integrates first and second generation rights.

To summarize, although international instruments initially began viewing disability from a medical model perspective, they have increasingly implemented the social model of disability.

C. Limitations of the Social Model

The social model of disability has exerted a powerful and constructive influence over international instruments, as well as domestic ones. Nevertheless, because the framework is derived from formal equality theory it contains a pair of shortcomings. By invoking notions of corrective justice, the social model must overcome deeply held (however unfounded) beliefs that resist the idea of a world that unjustifiably excludes disabled persons. Of greater significance is that the concentration on first generation rights precludes the social model from invoking the full range of economic, social, and cultural rights. Both these conceptual weaknesses are avoided through application of the more holistic theory of a human right to development, as shown below, in Part III.A.

Recall that the social model of disability asserts that the externally constructed environment, rather than inherent limitations, creates the condition known as “disability.” Conversely, ameliorations to these culturally contingent conditions allow disabled persons equal opportunity to participate in society at large. According to the social model, reasonable workplace accommodations are a typical example of correcting artificially prejudicial conditions that were previously held out as “neutral.” This is because the provision of accommodations changes existing workplace hierarchies on the theory that there was nothing inevitable about the way particular occupations were previously conceived; by removing unnecessary barriers to disabled participation, accommodations bring

Legal Framework, in Degener & Koster–Dreese, HUMAN RIGHTS AND DISABLED PERSONS, *supra* note 13, at 20-33.

⁸⁸ Draft Articles, *supra* note 35, at Preamble (q); Preamble (r).

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about equality. For that reason, the social model is aimed at achieving, and grounded in the theory of, formal or corrective justice.⁸⁹

The social model has empowered the disabled with a potent moral argument as to why certain conditions are unnecessarily exclusionary. Nonetheless, because its justifications are those of purely formal justice (rather than a combination of formal and distributive justice), it is vulnerable to two associated shortcomings. First, by invoking notions of corrective justice, the social model must overcome erroneous but deeply held beliefs that resist the notion of accommodations as part of the antidiscrimination agenda.⁹⁰ In other words, due to the framework's exclusive grounding in formal justice, to effectuate its precepts requires winning a battleground of ideas in which the resistance far outweighs the support.⁹¹ Moreover, in seeking to win the battle of ideas, the social model has taken an over-inclusive position of rejecting *all* (instead of many, or most) disability-related exclusion as arbitrarily caused by biological norms.⁹² By contrast, due to the indivisible nature of human rights, this effort need not be

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).

⁹⁰ Altering an instantiated "nomos" -- meaning a socially accepted definition of the normative universe -- requires success in asserting "the politics of recognition," and as such is a difficult task. For the origin of the term, and an initial application, see Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) (noting that "we, as a society, constantly re-create in order to understand and engage our surroundings."). For a discussion of what constitute the politics of recognition, see Charles Taylor, *The Politics of Recognition in*, MULTICULTURALISM 25 (Amy Gutmann ed., 1994).

⁹¹ The view is so prevalent that one scholar has termed it "canonical." Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 643-44 (2001).

⁹² 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 was 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, *supra* note 89.

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made for it does not matter if ameliorating exclusionary conditions is the result of applying civil and political rights as opposed to economic, social, and cultural rights.

Second, and more globally, while the social model's precepts are essential to civil rights assertions, they are ultimately self-defeating within the human rights field. The social model draws an inclusive line at equality of opportunity for equally situated individuals.⁹³ It thereby effectively excludes additional second generation support that disabled persons could benefit from that is not contingent on corrective justice notions.⁹⁴ These rights cover two circumstances. First, entitlements that could benefit persons with disabilities who fall outside the standard sameness arguments because at present their individual variations would not be accounted for even using broad and inclusive principles, for instance those contained in the architectural concept of Universal Design.⁹⁵ The second are significant rights to which all disabled persons are entitled not because of their equality to a baseline norm, but instead due to their equality as fellow human beings.⁹⁶ These include second generation rights that are necessary in order to

⁹³ In other words, the social model is predicated on treating like cases alike. For perhaps the earliest exposition of this theory, see ARISTOTLE, *NICOMACHEAN ETHICS* 118 § 1131a-b (Martin Ostwald trans., 1962) ("professing that "[t]hings that are alike should be treated alike").

⁹⁴ 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* 302-3 (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.").

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 Environments: Toward Universal Design*, in *DESIGN INTERVENTIONS: TOWARDS A MORE HUMANE ARCHITECTURE* 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 (March 15, 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 "Human rights are, literally, the rights that one has simply because one is a human being ... Human rights are *equal* rights: either one is or is not a human being, and therefore has the same human rights as everyone else (or none at all)." JACK DONNELLY, *HUMAN RIGHTS IN THEORY & PRACTICE* 10 (2003).

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effectuate first generation rights, like readily available health care or education as a means of easing job market entry. They can also extend to the broader reworking of social landscapes provided by economic, social, and cultural rights, for instance, preferences and quotas in employment (in equality jurisprudence terms, affirmative action or special measures) that are needed to make an already uneven playing field somewhat even. In limiting itself to civil and political rights, the social model neglects these further empowering provisions.⁹⁷

The next Part demonstrates how a human right to development avoids these difficulties, argues that a capability approach creates a fertile space for beginning to grapple with human rights discourse, and demonstrates how combining the two into a disability human rights paradigm best addresses the rights of persons with disabilities. Subsequently, Part IV analyzes the implications of extending a disability framework, both retrospectively and prospectively.

III. THE DISABILITY HUMAN RIGHTS PARADIGM

The human right to development, which underlies the Draft Articles, seamlessly combines first and second generation rights. In consequence, it avoids the shortcomings of the social model of disability. At the same time, this framework

⁹⁷ 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 to 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 the civil rights contained in the ADA cannot be effective without attendant social benefit support, and then argues 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).

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is as vulnerable to concerns over monitoring, content, and prioritization as are more traditional versions of human rights. The capability approach creates a fertile space within which to understand the reach and content of the human right to development. However, because Nussbaum's scheme requires levels of minimal function as a condition to acknowledging an individual's equal humanity and social participation rights, it excludes some people with intellectual disabilities (as well as other individuals with sub-optimal capacities). Consequently, although her capability approach provides strong guidance for conceiving of human rights as a means of ensuring general human flourishing, it does not sufficiently account for the development of individual talent. The disability human rights paradigm that I propose combines the best features of the human right to development and the capability approach to create a holistic view of rights. It acknowledges the role that social circumstances play in creating disabling conditions, and also seeks to remake those conditions to encourage the development of individual talent.

A. *The Human Right to Development*

The human right to development is the most recent theory of human rights and so underlies many contemporary treaties, including the Draft Articles. This "third generation" of human rights is also the most integrated approach to international instruments because it combines civil and political, with economic, social, and cultural, rights.⁹⁸ In consequence, the human right to development avoids the conceptual and practical shortfalls of the social model of disability. Nevertheless, this framework can neither avoid nor satisfy three concerns endemic to all human rights treaties, namely, the efficacy of monitoring devices, the insufficiently concrete content of the rights proposed, and precedence issues that arise when state resources are limited.⁹⁹ Concerns over monitoring can be addressed only by broad institutional solutions; the latter two issues are addressed by the capabilities approach in Part III.C.

In 1986, the General Assembly's Declaration on the Right to Development ("DRD") first established development as a human right.¹⁰⁰ Subsequently, the

⁹⁸ See generally Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980's?*, 33 RUTGERS L. REV. 435, 435-52 (1981).

⁹⁹ 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).

¹⁰⁰ G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, at 183, U.N. Doc. A/RES/41/128 (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,

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1993 Vienna Declaration proclaimed that the right to development was “a universal and inalienable right” as well as “an integral part of fundamental human rights.”¹⁰¹ Five years later, the United Nations Commission on Human Rights approved a resolution requiring the United Nations Economic and Social Council to appoint both an Independent Expert and an open-ended working group on the right to development.¹⁰² The Office of the High Commissioner on Human Rights, meanwhile, maintains a research department whose goal is to coordinate development tasks within the United Nations system.¹⁰³

As a resolution rather than a treaty, it bears reminding that the DRD lacks binding power and is contingent on moral persuasion. Nonetheless, the DRD has precipitated acceptance of the interrelationship among first and second generation human rights by academics,¹⁰⁴ international agencies,¹⁰⁵ and States.¹⁰⁶ Broadly

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.

¹⁰¹ Vienna Declaration, *supra* note 80. *See also* G.A. Res. 48/141, U.N. GAOR, 48th Sess., Supp. No. 49, at 261, U.N. Doc. A/48/141 (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.”).

¹⁰² E.S.C. Res. 72, U.N. ESCOR, Comm’n on Hmn. Rts. 44th Sess., Supp. No. 3, at 229, U.N. Doc. E/CN.4/1998/177 (1998). Dr. Arjun Sengupta, a well-regarded economist, was appointed as the Independent Expert, and has been prolific in issuing reports to the working group.

¹⁰³ G.A. Res. 141, U.N. GAOR, 48th Sess., Supp. No. 49, at 262, U.N. Doc. A/48/49 (1993), mandates the OHCHR “Research and Right to Development Branch” to “recognize 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 (Morton Bergsmo ed., 2003).

¹⁰⁴ *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). *See also* Henry J. Steiner, *Rights and Economic Development: Converging Discourses?*, 4 HUMAN 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).

¹⁰⁵ For instance, the United Nations Development Programme now explicitly connects these rights in its annual Human Development Reports. *See Millennium Development Goals and Targets*, in UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN

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stated, first generation rights have largely comprised the focus of human rights practitioners, and are thought to include prohibitions against State interference with rights that include life, movement, thought, expression, association, religion, and political participation.¹⁰⁷ They are conceptualized by what philosopher Isaiah Berlin famously referred to as “negative rights.”¹⁰⁸ Second generation rights, which focus on standards of living such as the availability of housing and education,¹⁰⁹ have become the province of development agencies. These are thought of as “positive rights.”¹¹⁰

DEVELOPMENT REPORT 2003, MILLENNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY, THE MILLENNIUM DEVELOPMENT COMPACT (2003), available at <<http://hdr.undp.org/reports/global/2003/>> [hereinafter MILLENNIUM DEVELOPMENT COMPACT]. See also ANDREW JONES, DEFINING CHARACTERISTICS OF THE RIGHTS-BASED APPROACH (CARE 2001) (“A rights-based approach deliberately and explicitly focuses on people achieving the minimum conditions for living with dignity. It does so by exposing the root causes of vulnerability and marginalization and expanding the range of responses.”).

¹⁰⁶ See Alan Rosas, *The Right to Development*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 248 (Asbjorn Eide et al. eds., 1995) (averring that the DRD gave developing nations a moral basis in which to ground their demands for more equitable distribution of worldwide resources from more developed nations).

¹⁰⁷ See, e.g., ICCPR, *supra* note 9 at Art. 6, para. 1 (“Every human being has the inherent right to life.”); Art. 9, para. 1 (“Everyone has the right to liberty and security of person.”); Art. 12, paras. 1-4 (“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.”); Art. 18, para. 1 (“Everyone shall have the right to freedom of thought, conscience and religion.”).

¹⁰⁸ ISAAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 122 (1958) (declaiming that authentic liberty is simply the absence of “the deliberate interference of other human beings within the area in which I could otherwise act.”).

¹⁰⁹ It is significant that development agencies have only more recently embraced second 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*, in HUMAN RIGHTS IN A PLURALIST WORLD, INDIVIDUALS AND COLLECTIVES 1, 11-12 (J. Berting et al. eds. 1990).

¹¹⁰ See, e.g., ICESCR, *supra* note 10, at art. 11, para. 1 (“States Parties ... recognize the right of everyone to an adequate standard of living”); BERLIN, *supra* note 108, at 123 (defining positive liberty as the result of self-reliance and the ability to direct one’s own agency).

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Unfortunately, for reasons that development scholar Peter Uvin correctly decries as both outmoded and counter-productive, this inter-generational conceptual divide between rights categories has manifested in a partition of labor and perceived expertise by international agencies.¹¹¹ Many experts share Uvin's skepticism that first and second generation rights are either conceptually or pragmatically immiscible.¹¹² Cass Sunstein, for instance, notes that focusing on only one of these types of rights to the mutual exclusion of the other is theoretically artificial and unsatisfying.¹¹³ Jack Donnelly goes further in asserting that all human rights "require both positive action and restraint by the state if they are going to be effective."¹¹⁴ By way of example, he points out that the right to vote requires both government expenditure in providing the means by which the franchise can be exercised by its citizens, as well as restraining prohibitions against political expression.¹¹⁵

¹¹¹ 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.

¹¹² *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).

¹¹³ *See* CASS R. SUNSTEIN, *WHY DOES THE AMERICAN CONSTITUTION LACK SOCIAL AND ECONOMIC GUARANTEES?* 5 (University of Chicago Public Law and Legal Theory Research Paper Series, Working Paper No. 36, 2003) (rights "cannot exist simply with government abstinence.").

¹¹⁴ JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 25 (1997).

¹¹⁵ *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.").

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Recent United Nations instruments concur with the academic consensus and emphasize incorporating these rights. This integrated approach to human rights can be seen clearly in the CEDAW provisions directed both at preventing incidents of direct discrimination and at reinventing environments to eviscerate more subtle effects of cultural bias.¹¹⁶ The same may be said, with increasing frequency, regarding statements and interpretations of instruments relating to disabled persons. During the 1995 World Summit for Social Development, for instance, the General Assembly stated that ensuring equal employment opportunity for disabled persons required not only re-organization of the workplace environment, but also “measures which enhance education and acquisition of skills” as well as indirect measures such as hiring and retention incentives for employers.¹¹⁷ The Committee on the CRC has similarly interpreted Article 23 as it relates to children with disabilities. Accordingly, it requires the creation of conditions that ensure those children’s “dignity” and “self-reliance” by eliminating prejudice, and also by promoting their “active participation in the community” through meaningful access to education, rehabilitation services, and health care.¹¹⁸ The Draft Articles challenge the role that the constructed environment plays in excluding people on the basis of their disability from participating in civil and political life. They also defy societies to make sufficient changes to alter broad social norms.¹¹⁹ The tactic employed by the human right to development therefore avoids the perils associated with the social model of disability.

By the same token, however, the human right to development cannot evade or provide more satisfactory solutions to three concerns that are common to human rights regimes, although a capability approach responds to the last two.¹²⁰ The first

¹¹⁶ STEINER & ALSTON, *supra* note 112, at 197, add that “The normal 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.”

¹¹⁷ Report of the World Summit for Social Development, A/CONF.166/9, para. 67. (April 19, 1995).

¹¹⁸ See CRC, *supra* note 17 at Art. 23, para. 1.

¹¹⁹ See generally Draft Articles, *supra* note 35, at Article 24 (Education); Article 26 (Habilitation and Rehabilitation); Article 30 (Participation in Cultural Life, Recreation, Leisure and Sport).

¹²⁰ Uvin identifies debates over “Western-centrism” as a fourth, insurmountable concern. UVIN, *supra* note 111, 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

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difficulty is effective monitoring of international instruments. As one commentator has archly (but accurately) put it, the current system of monitoring processes “constitute some of the most powerless, under-funded, formulaic, and politically manipulated institutions of the United Nations.”¹²¹ This opprobrium may well prove true for the monitoring of a disability human rights treaty, despite the Draft Articles proposing a more progressive monitoring mechanism.¹²² Ultimately, in the absence of either dramatic changes in the politics of world governance, or radical treaty body reform (which, incidentally, is currently under consideration),¹²³ the efficacy of monitoring any human rights treaty is largely contingent on extra-legal factors that cannot be built into those instruments. These include moral persuasion, political pressure, and the willingness of non-governmental organizations (“NGOs”) and grassroots movements to raise social awareness.¹²⁴

(1998); ABDULLAHI AHMED AN-NA’IM, *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* (1992).

¹²¹ UVIN, *supra* note 111, at 140.

¹²² The Draft Article on monitoring requires States Parties to “give due consideration to the establishment or designation of a coordination mechanism to facilitate related action in different sectors and at different levels.” The NGO topical working group (on which I serve) has expressed a strong view that disabled persons need to be involved in monitoring the Convention both on the domestic and the international level. Comments on the Draft Text, Draft Article 33: Monitoring, available at <<http://www.un.org/esa/socdev/enab/rights/wgdca25.htm>>.

¹²³ 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, which calls for more coordination among monitoring bodies, greater standardization of reporting requirements, and increased monitoring at the national level.

¹²⁴ 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 7. 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.

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An additional common critique of human rights instruments is that they fail to provide adequate guidance as to their 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 expressed at a high degree of abstraction.¹²⁵ Consequently, these instruments' stated goals can (and do) fall short of their objectives, due at least in part to lack of concrete content. Ambiguous, and sometimes even unambiguous treaty terminology, can mean very different things depending on a given State's laws, norms, and culture, including whether that State has a culture of legal compliance.¹²⁶

The third issue is that of prioritizing resources. Human rights instruments routinely contain language limiting their application in relation to the wherewithal available to State parties.¹²⁷ When funds are in short supply, rights that are either easier to achieve or are perceived as having greater utility (or political cachet) are more likely to be implemented. Conversely, rights whose realization are thought either more challenging or less ecumenical (or out of political favor) are less likely to be promoted.¹²⁸ However, even if a State, and especially one in an early stage of economic development, cannot actually provide for the full range of human rights, it can acknowledge a moral obligation to impart them.¹²⁹

¹²⁵ See generally Karl Klare, *Legal Theory and Democratic Reconstruction*, 69 U. BRIT. COLUMB. L. REV. 97, 98 (1991).

¹²⁶ See Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, in HUMAN RIGHTS: CONCEPT AND STANDARDS 31, 33 (Janusz Symonides ed., 2000).

¹²⁷ See, e.g., Universal Declaration, *supra* note 8, at art. 22 (limiting responsibility "in accordance with the organization and resources of each State"); ICESCR, *supra* note 10, at art. 2, para. 1 (States must undertake steps "to the maximum of its available resources"); CRC, *supra* note 17, 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." Arjun Sengupta, Study on the Current State of Progress in the Implementation of the Rights to Development, Comm'n on Hmn. Rts., 56th Sess., E/CN.4/1999/WG.18/2, at para. 29 (July 27, 1999).

¹²⁸ 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).

¹²⁹ 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* (on file with author). A cynical argument can also be made that developing nations

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As will be demonstrated next in section B, a capability approach addresses concerns about the content and (moral) priority of human rights, and provides a productive space for understanding their practical implementation. At the same time, Nussbaum's capability approach does not acknowledge the equality of individuals functioning below an idealized norm, especially those with intellectual disabilities, and in consequence denies their full human rights. Section C merges the aspirations of the human right to development with the content provided by a capability approach into a disability human rights paradigm. This framework is aimed at recognizing all individuals' potential, and at ensuring that they receive the means through which to develop latent talent.

B. The Capability Approach

Feminist philosopher Martha Nussbaum advocates that individuals be provided the means through which to achieve their full human potential as enumerated in her list of "universal" capabilities.¹³⁰ As currently comprised, Nussbaum's capabilities approach extends to intellectually disabled individuals, but as unequal participants. It also measures people's abilities downward from a standard of "normal species function."¹³¹ Amending her approach creates a space within with to understand the reach and content of disability-based and, as we shall see in Part IV, also non-disability based human rights.

Nussbaum's capability approach initially addressed the continuing and inequitable circumstances causing women worldwide to have unequal access to

eagerly press the United Nations towards second generation rights in order to obligate more developed nations to financially assist their implementation.

¹³⁰ As part of her continuing research agenda, Nussbaum has applied the capability 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 *CAPABILITIES APPROACH*].

¹³¹ The term is derived from bioethicist Norman Daniels, who argues that a universal right to health care must be circumscribed to instances of ensuring or revising the "normal species functioning" necessary for individuals to arrive at the "normal opportunity range" of function within their respective societies. See, e.g., NORMAN DANIELS, *JUST HEALTH CARE* 26-35 (1988); Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 *PHIL. & PUB. AFF.* 146, 158-60 (1981).

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their abilities relative to men.¹³² In response, she articulated a feminist, universal political philosophy requiring States to provide individuals with the means through which to develop their full human potential. The capability approach is therefore a foundation of political principles that endorse fundamental guarantees.¹³³ Nussbaum maintains that, at a social minimum, public political arrangements must provide citizens with the means by which to develop “central” capabilities. These functions are essential because engaging in them is a uniquely human (as opposed to animal, or mechanical) mode of existence. Put another way, central capabilities are “a mark of the presence or absence of human life,” and therefore appraise individual quality of life.¹³⁴

Emphasizing that her catalog does not comprise “a complete theory of justice,” Nussbaum enumerates ten capabilities she deems vital to a full human experience: life (the faculty to live one’s full lifespan); bodily health (having good health, including reproductive capability); bodily integrity (freedom of movement and bodily sovereignty); senses, imagination, and thought (cognizing and expressing oneself in a “truly human” way); emotions (loving, grieving and forming associations); practical reason (critical reflection and conscience); affiliation (self-respect, empathy and consideration for others); other species (being able to co-exist with other species and the biosphere); play (the ability to enjoy recreation); and control over one’s political environment (via meaningful participation) and material surroundings (through property ownership and holding employment).¹³⁵

¹³²*Compare, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1997* 39 (1997) (noting that in no single country are women treated as well as men), *with* MILLENNIUM DEVELOPMENT COMPACT *supra* note 105, at 22-23 (noting the continuing gap between women and men across every meaningful category).

¹³³ The requirement is based on States’ desire for legitimacy. As FRANCIS M. DENG, *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996) argues, when states do not adequately protect their citizens, they in turn lose their moral arguments that sustain sovereignty. Nussbaum’s previous, and more Aristotelian, adumbrations of the capability approach include Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 *POLITICAL THEORY* 202 (1992), and Martha C. Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, in *OXFORD STUDIES IN ANCIENT PHILOSOPHY* 145 (Supp. 1988).

¹³⁴ NUSSBAUM, *CAPABILITIES APPROACH* *supra* note 130, at 35, 71.

¹³⁵ *Id.* at 78.

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Central capabilities are separate components, each of which must be provided at a threshold level in order to ensure basic human capability. Because these capabilities are interrelated, a State that provides more than a basic minimum of one feature (for instance, an excellent health system), could not then balance out overall resource distribution by dispensing less of another (e.g., denying women the franchise, or limiting its salience). At the same time, central capabilities are “combined capabilities,” which Nussbaum defines as “internal capabilities *combined with* suitable external conditions for the exercise of the function.”¹³⁶ 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 reproductive health-related.¹³⁷ She concedes that some of the central capabilities include what philosopher John Rawls seminally referred to as “natural goods,” meaning commodities that occur serendipitously, the existence and extent of which States cannot always balance out (such as being born with features that are considered attractive).¹³⁸ Nonetheless, Nussbaum asserts that political principals can fulfill their obligations by leveling out the social bases that underlie the distribution of natural goods. Hence, governments cannot guarantee the emotional health of all women, but they can create an environment conducive to ensuring emotional health through suitable family law, rape prohibition and prosecution, and public safety regulation.¹³⁹

In making these assertions, Nussbaum rejects welfare metrics that assess individual well being through broad-based economic categories usually applied in development studies, such as per capita GNP or the general utility of wealth maximization. Instead, she avers that personalized welfare accounts are more trenchant than those derived from broad, anonymous proxies.¹⁴⁰ This is because 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.¹⁴¹ Accordingly, the capability approach requires that each and every person be treated as an end in herself, rather than as the instrument or

¹³⁶ *Id.* at 84-85 (emphasis added).

¹³⁷ *Id.* at 85.

¹³⁸ RAWLS, *supra* note 94, at 62.

¹³⁹ NUSSBAUM, CAPABILITIES APPROACH *supra* note 130, at 82.

¹⁴⁰ 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.

¹⁴¹ *Id.* at 32-33.

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agency of the ends of others. Put another way, all people are seen as individually worthy of regard, autonomy, and self-fulfillment.¹⁴² The central goal of the capability approach is to provide individuals with the means through which to develop themselves regardless of whether they elect to do so.¹⁴³ For instance, women in a particular country may decline educational opportunity and abide by their nation's traditional norm of home-based care giving. Conversely, sexually healthy women can choose lives of celibacy, but genitally mutilated women cannot select lives of sexual satisfaction. In sum, the practical goal of Nussbaum's political theory is to create agency so that women can choose.¹⁴⁴ Additionally, because the functions set forth as central capabilities are inherently rooted in the human condition, they are supposed universal in nature. Central capabilities are also culturally sensitive because their values, as universal values, do not impose external (sometimes called, foreign) moral imperatives on other nations.¹⁴⁵

Nussbaum concludes that central capabilities "have a very close relationship to human rights."¹⁴⁶ This statement is overly modest, for the capability approach relates in feminist philosophical terms the same objectives as

¹⁴² Ultimately, this tenet is called the "*principle of each person as end.*" *Id.*, at 56 (emphasis in original).

¹⁴³ 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." *Id.* at 74.

¹⁴⁴ 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 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.

¹⁴⁵ 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 that 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).

¹⁴⁶ NUSSBAUM, *CAPABILITIES APPROACH* *supra* note 130, at 97.

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those contained in the human right to development. Her capability scheme, moreover, improves that human rights framework by providing content to its otherwise abstract aspirations of protecting autonomy, ensuring dignity, and developing personal capacity. The remainder of the Article builds on Nussbaum's scholarship while also critiquing it for subordinating the inclusive status of individuals who cannot reach the functional norm required by central capabilities. It starts by demonstrating that combining a revised version of the capabilities approach with the human right to development provides a framework for limning the scope of disability-based, as well as other, human rights.

C. The Disability Human Rights Paradigm

Disability rights advocates can take issue with Nussbaum's list of central capabilities as being over- or under-inclusive.¹⁴⁷ Philosophers, for instance, provide different, usually shorter, rosters of qualities that are essential for human flourishing.¹⁴⁸ Some emphasize dignity.¹⁴⁹ Others focus on basic subsistence needs.¹⁵⁰ Notably, Amartya Sen does not endorse a list at all, despite originating the concept of a capabilities approach.¹⁵¹

¹⁴⁷ As noted in an influential article more than fifty years ago, this is an inevitable criticism of categorization. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949) (observing that "the very idea of classification is inequality").

¹⁴⁸ See, e.g., RAWLS, *supra* note 94, at 62 (providing a list of primary goods); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 300-01 (1981) (advocating an equality of resources analysis that accounts for privately owned, ordinary materials, but not physical or mental powers); DAVID BRAYBROOKE, *MEETING NEEDS* (1987) 36 (addressing both physical and social functioning in his "List of Matters of Needs").

¹⁴⁹ See, e.g., THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckhart Klein eds., 2002); PETER UVIN, *AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA* (1998); JOHN BURTON, *VIOLENCE EXPLAINED: THE SOURCES OF CONFLICT, VIOLENCE AND CRIME, AND THEIR PREVENTION* 2 (1997).

¹⁵⁰ See, e.g., HENRY SHUE, *BASIC RIGHTS: SUBSISTANCE, AFFLUENCE, AND US FOREIGN POLICY* (2d ed. 1980); NOAM CHOMSKY, *FOR REASONS OF STATE* 2 (1973). Philosopher David Braybrooke puts it another way by morally proscribing the distribution of goods to those that people must possess "if they are to continue to live and function." DAVID BRAYBROOKE, *MEETING NEEDS* (1987).

¹⁵¹ 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).

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From a disability human rights perspective, Nussbaum's list can be criticized, and subsequently amended and improved, on three grounds of under-inclusion.¹⁵² First, her list of ten central capabilities does not go far enough to ensure that persons with disabilities are empowered by what political scientist Jacobus tenBroek referred to in another context as a "right to be in the world."¹⁵³ Subsequent commentators have refined this notion to promote "participatory justice," by which they mean the ability of disabled persons to have meaningful contact with the population at large.¹⁵⁴ Undergirding this notion is a prevailing normative assumption that in a just society everyone should have the ability, if they so choose, to interact with and take part in general culture because "individuals cannot flourish without their joining with other humans in some sort of collective activities."¹⁵⁵ Participatory justice parallels the social model's assertions that but for the existence of artificial barriers, people with disabilities would play an equal part in society. It also supercedes that model by asserting that a just society not only removes unneeded obstacles, but also makes participation a moral imperative. Accordingly, tenBroek and these more recent philosophers are arguing that at their core, both civil and human rights are about the elimination of disability-related barriers to equal social participation. This idea animates the Draft Articles. For example, Draft Article 19 requires States parties to "take

¹⁵² Although I take issue with Nussbaum's position, I want to stress my admiration for (and agreement with) the majority of Nussbaum's position on capabilities; I also want to thank her for a willingness to discuss our different perspectives.

¹⁵³ tenBroek, *supra* note 52, at 842. The broader implications of tenBroek's theory, and one that has been picked up on by both disability and feminist scholars, is that societies are created wherein certain types of individuals are presumed unwelcome. One can hear echoes of this assertion, for example, in Vicki Schultz's account of women being characterized as "inauthentic workers." Vicki Schultz, *Life's Work*, 100 COLUM. L.REV. 1881, 1892 (2000).

¹⁵⁴ The case is perhaps best stated by Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217 (2004); *see also* Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990). Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 809-10 (1966) first made this assertion in the context of welfare benefits by arguing that meaningful social participation means not only caring for those who are unable to work through the welfare system, but more importantly, assuring that disabled persons are able to engage society at large.

¹⁵⁵ Anita Silvers, *People with Disabilities*, in OXFORD HANDBOOK OF PRACTICAL ETHICS 300, 318 (Hugh LaFollette ed., 2004).

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effective and appropriate measures to enable persons with disabilities to live and to be fully included as members of the community.”¹⁵⁶

Nussbaum’s central capabilities list includes respect, empathy, and consideration for one’s self and for other persons, as well as the right and ability of meaningful political participation.¹⁵⁷ It does not, however, act sufficiently to ameliorate the worldwide “invisibility” phenomenon to which people with disabilities are subjected.¹⁵⁸ Historically, the disabled have been among the most marginalized, impoverished, and least visible individuals.¹⁵⁹ Many societies have regarded, and many continue to regard, this exclusion through a medical model lens as a natural, if unfortunate, consequence of the inherent inabilities of disabled persons.¹⁶⁰ Increasing social integration provides a significant first step towards raising general social consciousness and affecting norms and beliefs towards people with disabilities.¹⁶¹ Thus, it is necessary to bolster participatory justice norms if the rights of disabled persons are to have meaning.

A second ground on which to question and thereafter alter Nussbaum’s list of central capabilities is that it does not acknowledge the full humanity and equality of individuals who function below her idealized norm, especially those with intellectual disabilities. By logical extension, other people with reduced

¹⁵⁶ See, e.g., Draft Articles, *supra* note 35, at Article 19 (“States Parties shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of their . . . full inclusion and participation in the community.”).

¹⁵⁷ NUSSBAUM, CAPABILITIES APPROACH *supra* note 130, at 78.

¹⁵⁸ “People with disabilities were often virtually invisible citizens of many societies,” and “have been marginalized in nearly all cultures throughout history.” QUINN et al, *supra* note 2, at 23. See also Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1027 (2004) (“deviating from [social norms] as with a discredited condition like a disability often leads to isolation, impaired status and social condemnation.”).

¹⁵⁹ 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).

¹⁶⁰ See *supra* text at notes 50-51; Part II.B.

¹⁶¹ To give a simple example, when an employer encounters disabled people in other areas of social activity -- say at a movie theatre or when riding on public transportation -- she becomes acclimated to the presence of persons from whom she was previously sheltered. This affect, in combination with the educational information contained in human and civil rights statutes, can influence that person to embrace the notion that people with disabilities belong in the mainstream, including the workplace. Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 U. VA. L. REV. 1151, 1181 (2004).

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capacity would be similarly disqualified. Consider, for example, the socially inadapted or the sexually impotent under this definition. Initially, Nussbaum wrote that individuals with intellectual disabilities ought to be valued as members of society on social justice grounds unrelated to a capability approach.¹⁶² This position is contrary to the one maintained by John Rawls and others who subscribe to social contract theory. Those commentators maintain that to justify the distribution of primary goods, recipients themselves need to contribute to society. In other words, the prevailing philosophical belief regarding resource redistribution is reciprocal in nature: a condition precedent for a valid social contract is payment of adequate consideration in the form of functional abilities that in turn contribute to general social welfare. People with intellectual disabilities, as well as some other lower functioning individuals, are thereby excluded from membership in the social contract because they fail to provide adequate consideration in return.¹⁶³

In contrast to this purely reciprocal position, Nussbaum pointed out the parallels that exist between caring for the disabled and caring for the young or elderly, and also noted women's unequal role as caregivers in those contexts.¹⁶⁴ Correspondingly, she maintained that in spite of social contract theory, social justice required enhancing women's capabilities so that they could provide care to those in need.¹⁶⁵ Until recently, Nussbaum left unaddressed the question of whether the capabilities model can or should be applied to those with intellectual disabilities. On the one hand, because the capability approach emphasizes human dignity and values individuals as an end, their inabilities would seem irrelevant. On the other hand, persons with reduced cognitive ability to reason or perform

¹⁶² Martha C. Nussbaum, *Capabilities and Disabilities: Justice for Mentally Disabled Citizens*, 30 PHILOSOPHICAL TOPICS 133 (2002).

¹⁶³ See, e.g., Leon Kass, *Ethical Implications in Pre-Natal Diagnosis of the Human Right to Life*, in ETHICAL ISSUES IN HUMAN GENETICS 185 (B. Hilton et al. eds., 1973) (making the same assertion in the context of health care).

¹⁶⁴ Nussbaum, *supra* note 162. For an extensive treatment of this phenomenon, see JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

¹⁶⁵ 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).

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other social functions may not be embraced under criteria that view these processes as indicative of being “truly human.”¹⁶⁶

In a recent book, Nussbaum strikes a curious and undesirable compromise between these two positions by determining that persons with intellectual disabilities are only indirectly included in the framework.¹⁶⁷ Because the capabilities list is “so normatively fundamental,” she explains, only those individuals who come close to attaining their enumerated functions live a “fully human life” that is “worthy of human dignity.”¹⁶⁸ The remaining population who are unable to reach these “bottom lines,” including some proportion of the intellectually disabled, are “extremely unfortunate” and exist at a level “beneath which a decently dignified life for citizens is not available.”¹⁶⁹ Thus, although a just society mandates that people with intellectual disabilities receive capability resources,¹⁷⁰ the funds must be channeled “through a suitable arrangement of guardianship.”¹⁷¹

In making these assertions, Nussbaum has subtly altered her previous capabilities approach by requiring a minimal level of function as a condition to equal participation. Without achieving the bottom lines, even dignity and justice cannot justify the allocation of resources for human flourishing, hence the source of tragedy. Consequently, Nussbaum’s capabilities framework, which is derived from Sen’s position on poverty alleviation, can apply to poverty but not to certain instances of intellectual disability. This is ironic for two reasons. First is the strong factual and causal interrelationship between poverty and disability that will be discussed below in Part IV.B. Second, and more perplexing, is that Nussbaum’s analysis falls prey to the same error that she correctly identifies in the social contract theory of her fellow philosophers (especially Rawls); namely, the requirement that adequate consideration be provided by recipients of social goods to justify their equal distribution.¹⁷²

¹⁶⁶ NUSSBAUM, CAPABILITIES APPROACH *supra* note 130, at 78.

¹⁶⁷ MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006) [hereinafter FRONTIERS OF JUSTICE].

¹⁶⁸ *Id.* at 181.

¹⁶⁹ *Id.* at 192, 179.

¹⁷⁰ *Id.* at 98-100.

¹⁷¹ *Id.* at 193; *see also id.* at 195-211 (providing domestic and international examples of guardianship that “maximize autonomy”).

¹⁷² I thank Anita Silvers for bringing to my attention the inconsistency in Nussbaum’s take on this topic. Additionally, by conforming to social mores of normalcy in arguing that people with disabilities ought to have the same baseline functions as those without

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The third and most global challenge to Nussbaum's capability approach, and one that further divides it from the disability human rights paradigm, is the dynamic of how capability is measured for the purpose of determining the distribution of State resources. Nussbaum is entirely correct to include care of the intellectually disabled as a matter of social justice, to note how women bear a socially constructed and disparately heavy burden of responsibility as caretakers, and to advocate for consideration of this prevailing common convention when assessing women's capabilities.¹⁷³ At the same time, she maintains that intellectually disabled persons are not directly entitled to capability enhancing resources because they fall below the line of species-typical functioning set forth as central capabilities.¹⁷⁴ Moreover, because it would be "practically dangerous" to amend the capability catalog, "the right course seems to be to harp on the single list as a set of nonnegotiable social entitlements."¹⁷⁵ By assessing the moral right of persons with intellectual disabilities to resources in this manner, Nussbaum establishes a minimum level of functioning as represented by central capabilities. She also measures whether individuals meet each of those standards, and queries whether a distribution of resources (however unevenly or generously allocated) would bring individuals close to the functional baseline. Those who fall below central capability markers, i.e., the tragic cases, are regrettably excluded from direct participation in the social enterprise envisioned by the capability approach.¹⁷⁶

disabilities -- rather than in questioning why those mores ought to govern in the first place (i.e., why this particular vision of the world is divided along a disabled/non-disabled fault line instead of, say, a right-handed/left-handed or a tall/short dichotomy) -- Nussbaum's capability approach further instantiates the type of social conventions that the disability human rights paradigm (and in its earlier atavism, the social model of disability) seeks to obviate. The same is true for the paternalistic compromise that intellectually disabled persons must be cared for, at least in part because they are less human than the rest of "us."

¹⁷³ One American study, for example, found that forty-four percent of working mothers are responsible for family related health decisions as compared to thirty-three percent of working fathers, and that fifty-four percent of female parents are primary caretakers of children. HENRY J. KAISER FAMILY FOUNDATION, WOMEN, WORK, AND FAMILY HEALTH: A BALANCING ACT (April 2003), available at <<http://www.kff.org>>.

¹⁷⁴ NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 167, at 190-94; *see also id.* at 191 (maintaining "an emphasis on the species norm").

¹⁷⁵ *Id.* at 190.

¹⁷⁶ In this respect, Nussbaum is in good company. CHOMSKY, *supra* note 150, at 404, for instance, links "intellectual development" with "[c]ultural achievement, and participation in a free community," and so likewise supports the exclusion of certain developmentally disabled persons from resource redistribution.

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In contrast, the disability human rights paradigm emphasizes the equal dignity of disabled persons and acknowledges their autonomy in directing their own development regardless of whether they reach the levels of species-typical functioning required in each of Nussbaum's ten central capabilities.¹⁷⁷ The disability framework, therefore, continues to focus on the role of personal dignity as a key element in human rights discourse, whereas Nussbaum's amended capability approach makes the degree of their inclusion contingent on functional ability that sufficiently justifies receiving consideration. Put another way, the disability perspective echoes classic human rights theory in asserting that full equality is an intrinsic non-reciprocal good to which everyone is entitled.¹⁷⁸

Conditioning human development on the basis of economic viability rather than inherent dignity is a deeply troubling notion, and one that Nussbaum has rigorously and justifiably criticized in other contexts.¹⁷⁹ It is particularly disconcerting when applied to persons with disabilities because their historical exclusion from mainstream society has largely been justified on the ground that they are not economically viable actors, even when segregation is motivated by other concerns.¹⁸⁰ This economic justification has led to regimes that have systematically barred disabled people from fulfilling their agency as citizens.¹⁸¹

¹⁷⁷ See, e.g., Draft Articles, *supra* note 35, at Preamble (k) (emphasizing "individual autonomy and independence, including the freedom to make their own choices.").

¹⁷⁸ For a general jurisprudential argument along much the same line, see LARRY S. TEMKIN, *INEQUALITY* (1993).

¹⁷⁹ 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 macro economics 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").

¹⁸⁰ 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, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87 (1985).

¹⁸¹ 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

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Emblematic are the many paternalistic, presumably well-intentioned welfare systems that provide subsistence to people with disabilities in lieu of workplace participation.¹⁸²

A stark statement of the perspective that people with disabilities are thought more expensive than the nondisabled, and therefore contribute less to society, is that of neo-Hobbesian social contractarian philosopher David Gauthier. He utilizes this assertion to justify not ministering to the disabled in the same manner as to the elderly. “The problem is not care of the aged, who have paid for their benefits by earlier productive activity,” Gauthier asserts, but rather with the disabled, of whom we speak “euphemistically of enabling them to live productive lives, when the services required exceed any possible products.”¹⁸³ A more nuanced treatment is put forward in the context of ADA accommodations where empirically unsubstantiated efficiency is held out as an economically rational motivation for employers to withhold accommodations from disabled workers.¹⁸⁴

However, ensuring the dignity of disabled people requires an opposite approach. It entails respecting them for their intrinsic value as people and not as a means towards other ends, for example, as being economically useful actors. This dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth, rather than

tolerate in their normal working lives.” DEBORAH A. STONE, *THE DISABLED STATE* 4 (1984).

¹⁸² Theresia Degener, *Disability as a Subject of International Human Rights Law and Comparative Discrimination Law*, in Herr et al., *supra* note 5, at 151, 154, states the case bluntly: “Persons with disabilities are regarded as being incapable of living as autonomous individuals.” *See also* tenBroek & Matson, *supra* note 154, at 809-10 (1966) (“Throughout history the physically handicapped have been regarded as incompetent to aid themselves and therefore permanently dependent upon the charity of others.”).

¹⁸³ DAVID GAUTHIER, *MORALS BY AGREEMENT* 18 (1986).

¹⁸⁴ 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, 369-72 (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).

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according to their significance based on their net marginal product. The disabled must be respected as equal in society because they are an end in and of themselves, not because they are a means to achieving another purpose. Adopting this perspective emphasizes the indivisibility of human rights and also makes the argument that global society cares about the inclusion and subsequent role that all people have in our world. An integrated human rights approach that values each individual for his or her own worth asks what qualities an individual has and in what ways developing her talents can benefit both that individual as well as society.

Talents are more individual-specific than capabilities, and by definition are not universally shared. Accordingly, while Nussbaum focuses on capabilities that are common to human beings, a disability rights framework addresses talents that are crucial for individual human flourishing. Moreover, since a partial distribution of resources that does not increase agency in each of the ten categories is invalid under a capabilities approach, a disability paradigm that focuses on the development of individual talent avoids the all or nothing requirement. In doing so, the framework also offers an alternative response to the prioritization concerns that are common to human rights.

The focus of a disability human rights paradigm is on capability and the desire to allow individuals to achieve their specific talents, rather than on a lack of overall capability as measured against a functional baseline or against relative cost. Utilizing a disability framework allows us to appreciate potential from the bottom up, rather than from the top down, and to consider developing peoples' talents to ensure their flourishing. A disability human rights paradigm maintains that developing one's talents is at the core of being human and that talent needs to be viewed as its own end rather than a means to another end, such as achieving species-typical levels of functioning in each of a list of central capabilities. The development of some talent is a moral imperative owed to every person, and for some it may be less than for others. Thus the disability human rights view of human life is not "only" about individual flourishing, but also about dignity, and so necessitates a greater view of all persons contributing to, and being present in, society.

Considering some of Nussbaum's examples helps illustrate the inclusion difference between a disability human rights paradigm and her capability approach. While arguing for social justice on behalf of caring for (rather than directly empowering) people with intellectual disabilities, Nussbaum describes the lives of three intellectually disabled children. Philosopher Eva Feder Kittay's

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daughter Sesha, has cerebral palsy and is severely intellectually disabled. Jamie, the son of public intellectual Michael Bérubé has Down Syndrome.¹⁸⁵ Nussbaum's nephew, Arthur, has Asperger and Tourette syndromes.¹⁸⁶ Each has distinct personality and needs. Sesha loves pretty dresses, dancing to music in her wheelchair, and returning her parents' hugs.¹⁸⁷ Jamie is a fan of B.B. King, Bob Marley, and the Beatles, and has a clever wit.¹⁸⁸ Arthur deeply understands the theory of relativity and other scientific quandaries, and is politically savvy.¹⁸⁹ None of these children will become sufficiently economically productive to repay society for the resources they use.¹⁹⁰ Sesha and Jamie are unlikely to achieve certain other central capabilities, in particular practical reasoning.¹⁹¹ Arthur has "few social skills" and "seems unable to learn them."¹⁹² Yet each child is endowed with a minimum level of central capabilities related to emotions and play.¹⁹³ And each has talents that can be developed and encouraged. Sesha may not attain gainful employment. However, she certainly expresses emotions and affinity.¹⁹⁴ Jamie and Arthur are likely to be employed and exercise a range of citizenship abilities.¹⁹⁵

Nussbaum's modified capability scheme would distribute resources to develop these children's potential, but only through their respective guardians. This holds true even if the wherewithal required by each child is much greater than what others require. The expense is justified, on her view, because although Sesha, Jamie, and Arthur start off further away from the standard shared by the majority of society, everyone deserves being brought as close as possible to that

¹⁸⁵ Nussbaum, *supra* note 162, at 133-36.

¹⁸⁶ NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 167, at 97.

¹⁸⁷ EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 166, 172, 154-55 (1999); NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 167, at 96, 134.

¹⁸⁸ MICHAEL BÉRUBÉ, *LIFE AS WE KNOW IT: A FATHER, A FAMILY, AND AN EXCEPTIONAL CHILD* 147, 155 (1996); NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 167, at 97, 133.

¹⁸⁹ NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 167, 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.

¹⁹⁰ *Id.* at 128.

¹⁹¹ *Id.* at 94-96.

¹⁹² *Id.* at 96.

¹⁹³ *Id.* at 96-98, 134.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 98-99, 128.

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level. Consequently, Nussbaum's capability approach generally includes persons with intellectual disabilities, but as subsidiary citizens.¹⁹⁶ The deeper difficulty with her analysis lies in the modality of that inclusion and its implications for equality. Because Sessa will not achieve as many central capabilities as Jamie and Arthur (employment and civil participation), and a range is needed to live a "fully human life" that is "worthy of human dignity," two possibilities arise.¹⁹⁷ "Either we say that Sessa has a different form of life altogether, or we say that she will never be able to have a flourishing human life, despite our best efforts."¹⁹⁸ Since Sessa is not vegetative and displays human qualities of affection and affinity, Nussbaum concludes that she is not a different form of life; with a "flourishing human life" out of the question, Nussbaum also concludes that a just society would, if scientifically possible, have genetically removed Sessa's disabilities.¹⁹⁹

Not surprisingly, Eva Kittay (as Sessa's mother) argues that persons with intellectual disabilities ought to be respected for their intrinsic value as human beings, especially for increasing the agency for caring and moral connection of their friends and family.²⁰⁰ She therefore 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.²⁰¹ To conclude, as Nussbaum does, that "Sessa'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 ought to be a moral

¹⁹⁶ *Id.* at 128-34.

¹⁹⁷ *Id.* at 181.

¹⁹⁸ *Id.* at 187.

¹⁹⁹ *Id.* at 192-93.

²⁰⁰ KITTAY, *supra* note 187, also asserts as a factual matter, that Sessa improves with the expenditure of greater resources. *Id.* Interestingly, the MILLENNIUM DEVELOPMENT COMPACT *supra* note 105, at 77 makes the argument on both grounds, averring that "[h]uman development is nourished not only by expanding incomes, schooling, health, empowerment, and a clean environment but also by care" which "is also essential for economic sustainability."

²⁰¹ 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). See generally MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993).

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imperative.²⁰² I agree with Kittay rather than with Nussbaum on this point. The disability human rights paradigm seeks to encourage the talents of these children because their human dignity is equal to that of children without intellectual disabilities, and not because Sesha and Jamie are able to rise to an expected functional level.²⁰³ I likewise reject 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."

Adopting a holistic approach to first and second generation rights as exemplified in the human right to development allows the disability human rights paradigm to avoid the dichotomous (and lopsided) difficulty engendered by both the social model of disability,²⁰⁴ as well as by early feminist scholars who over-emphasized sameness at the expense of difference.²⁰⁵ Moreover, it gains advantage from communitarian notions that recognize the effect of inter-relationships upon individuals' ability to flourish in society.²⁰⁶ As noted by Belden Fields, "[h]uman potentialities are developed within a web of cultural,

²⁰² NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 167, at 192.

²⁰³ In this way, the gap in Nussbaum's capability 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 normal opportunity range 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).

²⁰⁴ On Rawls's insufficiently accounting for interdependence and asymmetrical need, see Eva Feder Kittay, *Human Dependency and Rawlsian Equality*, in *FEMINISTS RETHINK THE SELF* 219 (Diana T. Meyers ed., 1997).

²⁰⁵ For criticisms, see Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 *UNIV. CHI. LEGAL FORUM* 21, 35 ("Despite its appeal, formal equality cannot seriously challenge patriarchy. . . inequality between women and men has not disappeared."); MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY* (1991). Martha Minow broadly illustrates the tension between sameness and difference in MINOW, *supra* note 53.

²⁰⁶ This point is made persuasively by feminist theorist Christine Koggel who avers that equality "asks what moral persons embedded and interacting in relationships of interdependency need to flourish and develop" instead of "limiting itself to an account of what individuals need to flourish as independent autonomous agents." KOGGEL, *supra* note 201, at 6. A more basic argument is Aristotle's observation that people are social animals.

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economic, and social relationships that are both facilitating and constraining.”²⁰⁷ Put another way, we all depend on one another and develop in relation to each other.²⁰⁸ In recognizing this interrelationship, the disability human rights paradigm is not *necessarily* different in kind from the human rights vision of other treaties, and in fact should be viewed as kindred to the CEDAW. However, as will be shown below in Part IV.B., the disability dynamic also has the potential for responding to individual need over group based identity. This is an alternative and more ambitious implication that would create a dramatically different, although not mutually exclusive, perspective.

One could plausibly argue that the general premises underlying human rights theory already embrace much of the disability paradigm, but in practice do not enforce those standards with any efficacy. Supporting this assertion is the fact that many NGOs consider the enforcement of economic, social, and cultural rights either as pragmatically infeasible, or beyond their basic mandate.²⁰⁹ Accordingly, on one level adding disability protections to the existing human rights canon acts “simply” to acknowledge the extent to which attitudes that are thought of as neutral or economically sound manifest in unnecessary and avoidable exclusion. It thereby

²⁰⁷ 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).

²⁰⁸ See also Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. L. & FEM. 7, 12 (1989) (“Relatedness is not, as [the liberal] tradition teaches us, the antithesis of autonomy, but a literal precondition of autonomy, and interdependence a constant component of autonomy.”)

²⁰⁹ 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 HUMAN RIGHTS QUART. 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*, *id.* at 845 (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, *supra* note 109 (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).

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makes clearer the deep necessity of retrenching institutions and the social situations they create and maintain. A disability human rights paradigm manifests the aspirations of the right to development by recognizing the inseparable nature of first and second-generation rights. Yet the right to development, while conceptually very rich and far-reaching, has been subjected to vociferous criticism precisely because of its steadfast linkage of first and second generation rights.²¹⁰ The disability-based framework provides us with a strong example of how important it is to transcend, rather than ask, what type of right has precedence in a development paradigm. This is in large part because the attitudes that motivate disability-based exclusion frequently manifest in the creation of a prohibitive physical environment. Ameliorating such barriers underscores the notion that ensuring equality in any really meaningful sense requires not only the assertion of negative rights, but also a deep reconstruction of our world if we are to value and include every individual's participation. For disability, neither type of right is more important than the other. The fact that they are each integral suggests that international frameworks need to recognize and embrace both equally.²¹¹

In addition to bringing the existing goals of human rights discourse into view, the disability human rights paradigm refocuses these aspirations through the emphasis on individual need. Part IV explores both these potential aspects of extending a disability paradigm, and discusses their respective implications.

IV. EXTENDING THE DISABILITY HUMAN RIGHTS PARADIGM

The disability human rights paradigm can be extended both retrospectively to groups that are already recognized under United Nations instruments (for example, women), as well as prospectively to those people not currently protected under hard instruments (specifically, sexual minorities and the poor). Considering

²¹⁰ 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).

²¹¹ Put another way, SHUE, *supra* note 150, 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.

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these possibilities causes us to rethink the human rights agenda, but in different ways and towards different ends.

A. Retrospectively

Human rights, especially those recognized under the more recent identity-specific instruments like the ICERD and the CRC, are meant to integrate first and second generation rights as a means of protecting targeted populations.²¹² The CEDAW provides a particularly clear example of this human rights model by advancing the concept of a State's obligation to establish equality between men and women. To do so, the treaty calls for parties to eliminate all forms of discrimination against women (itself an enormous and laudably ambitious goal), and also "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."²¹³ The CEDAW defines discrimination as any action that impairs women's full and equal enjoyment of their human rights.²¹⁴ To transform women's role and place in society, it mandates States parties to modify behavior patterns arising from stereotyped notions of either sex being inferior or superior.²¹⁵ As a hard law treaty, the CEDAW is an ambitious attempt to re-work the social geography by interweaving first and second generation rights to effect deep legal, social, and cultural transformation about the role and place of women in society.²¹⁶

²¹² 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 17 at part I, art. 6(1) and (2).

²¹³ Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR. Supp. No. 46, at 193, part I, Art. 1 and Art. 2(d) & (e), U.N.Doc A/34/46 (1981).

²¹⁴ CEDAW, *supra* note 16, at part I, art. 1. *See generally* Renee Holt, *Women's Rights and International Law: The Struggle for Recognition and Enforcement*, 1 COLUMB. J.GENDER & L.117 (1991); NATALIE KAUFMAN HEVENER, *INTERNATIONAL LAW AND THE STATUS OF WOMEN* (1983).

²¹⁵ CEDAW, *supra* note 16, at part I, art. 5.

²¹⁶ *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).

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Nevertheless, rather than invoking both first and second generation rights, assertions of women's rights under the CEDAW have been fractured between them.²¹⁷ This in turn has affected the practice of NGOs and other entities monitoring human rights violations.²¹⁸ Consider, for example, the situation in Afghanistan. Article Three of that country's 2004 Constitution proclaims that "[n]o law can be contrary to the beliefs and provisions of the sacred religion of Islam." Afghan women do not have full public sphere participation, even in the post-Taliban regime. Consequently, the bulk of NGO human rights complaints in Afghanistan have understandably focused on women's exclusion as a result of civil and political discrimination.²¹⁹ While doing so, 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.²²⁰

Practitioners have therefore fallen in step with early feminist scholars who eschewed gender difference by arguing for equal treatment on the basis of sameness, rather than essentializing the significance of difference for understanding women's equality.²²¹ 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

²¹⁷ 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.

²¹⁸ See generally KATARINA TOMASEVSKI, DEVELOPMENT AID AND HUMAN RIGHTS REVISITED 113-14 (1993) (human rights are thought to prevent abuses of people by state power, while development is typically aimed at increasing economic growth and satisfying basic needs).

²¹⁹ The focus is understandable, both in Afghanistan and elsewhere, due to the continued existence of State laws that overtly discriminate against women, for example, statutes that except marital rape from rape prohibitions. 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).

²²⁰ Laura Grenfell, *The Participation of Afghan Women in the Reconstruction Process*, 12 HUM. RTS. BRIEF 22, 22-23 (2004).

²²¹ The point is made by Tracy Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L. J. 89 (1996); ELIZABETH V. SPELLMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

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generation rights into the disability discourse. Ironically, this type of dichotomous perspective is exactly what the CEDAW attempted to forestall by embracing notions of both formal justice (as sameness) and redistributive justice (in the form of difference), thereby avoiding the artificial divide between positive and negative rights theory.²²² 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.”²²³

Under a disability human rights paradigm, the source and type of equality (whether equal treatment or equal opportunity) is irrelevant. Hence, a disability framework provides an exemplar for why and how first and second generation rights can be viewed and implemented holistically.

B. Prospectively

In theory, all humans are equally protected on the basis of being equally human under ecumenical provisions contained in hard laws, such as the ICCPR and the ICESCR.²²⁴ Nevertheless, in reality individuals who are not currently specified under hard law treaties, for example sexual minorities and the poor, need to fall under an additional and recognized identity criterion to receive human rights protection. The premises undergirding the disability human rights paradigm can be applied to both these groups, but in different ways and to different practical and theoretical implications.

Protecting the rights of sexual minorities is congruent with the goal of the disability human rights framework that seeks to break down prejudice based on the social convention about the lesser worth of atypical people. It ensures the

²²² 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 Dallmayer, ed. 1993).

²²³ Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143, 155 (Dorinda Dallmayer, ed. 1993); see also HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000).

²²⁴ See discussion *supra* Part I.A. See also MICHAEL FREEMAN, *HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH* 60 (2002) (civil rights “derive from the laws or customs of particular societies,” whereas human rights are those one has simply by virtue of being human.).

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dignity of that group's members in a traditional identity-based manner. By contrast, granting poor people the right and ability to develop their human agency draws on the paradigm's aspiration of responding to individual, rather than to group-based need. Such an entitlement also creates a bridge between conventional human rights goals and a new approach to which we might aspire. In either case, extending rights protection to these two classifications of individuals, if "only" in theory, causes us to revisit our conceptions about the objectives animating a human rights agenda, even if the two projects yield different normative results.²²⁵

One way to view human rights is to see them as existing along a continuum that slowly extends to individual differences that societies least accept. Treaties and other instruments identify outmoded conventions as contingent social constructions rather than the by-product of inherent limitations of group members, and thereby provide a vehicle through which to remove mistaken justifications for social exclusion.²²⁶ Disability-based human rights, both as existing soft laws and in the evolving Draft Articles, are the most recent international instruments to empower a biologically atypical group with human rights.²²⁷ Prior to addressing the needs of disabled persons, the global community recognized the rights of other socio-economically vulnerable groups through enactment of identity-specific

²²⁵ 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).

²²⁶ 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 complex matrix of interlocking beliefs" based on socially-constructed definitions of "male" and "female"); Kimberle Williams 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).

²²⁷ 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 was amended to include disability. *See* M.A. Stein, *Anti-Discrimination Law and the European Union*, 62 CAM. L. J. 508, 508-09 (2003).

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instruments that went beyond the universal coverage of the ICCPR and the ICESCR. Hard law treaties now protect ethnic minorities via the ICERD, women through the CEDAW, children under the CRC, and itinerant workers and their families by way of the ICPMW. In consequence, actions once taken towards members of these groups based on social convention are now considered morally unacceptable and are legally prohibited.²²⁸

The dynamic of eliminating prejudice can be moved further along the human rights continuum by extending protection to sexual minorities, most typically gays and lesbians, who are subjected to pervasive and systemic discrimination in many countries, if not worldwide.²²⁹ Doing so first requires acknowledging the socially contingent nature of many cultural norms that are otherwise taken for granted as “natural” and hence “normal.”²³⁰ These include, among others, heterosexuality, opposite sex monogamy, and male-female human reproduction.²³¹ Each of these conditions, however, has a strong counterfactual. Consider, for instance, homosexuality, same sex unions, and the increasingly prevalent use of scientifically assisted reproduction.²³² 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 gays and lesbians.²³³

²²⁸ 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 because the new law either 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 Stein, *supra* note 161.

²²⁹ See generally WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

²³⁰ As observed by Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984), “The power exerted by a legal regime consists . . . in its capacity to persuade people that the world described in its images and categories is the only alternative world in which a sane person would want to live.” See also ALAN HYDE, *BODIES OF LAW* 231 (1997) (“Law veils its own power . . . by pretending to find what it in fact makes itself.”).

²³¹ 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).

²³² 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).

²³³ 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

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At the same time, some commentators have argued that although sexual minorities may be the appropriate recipients of negative rights protection to ensure their civil and political agency against social prejudice, the group is an inappropriate target for second generation rights because they are not necessarily economically worse off.²³⁴ Empirical and normative flaws undermine this assertion. It is highly questionable as an empirical matter that gays and lesbians who have been subject to discrimination have not been monetarily harmed by the experience. Sexual minorities, much like other minority group members, will not invest in their own human capital and develop their potential if they are signaled that certain career paths or other opportunities are inappropriate or unattainable.²³⁵ The result is a vicious circle: sexual minorities will not be in position to challenge exclusion from particular prospects if they do not first consider those options viable.²³⁶ However, even if sexual minorities who are

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: PUBLIC POLICY, CIVIL RIGHTS, AND SEXUALITY* 149 (J. D'Emilio et al. eds., 2000) (describing the failure to pass the proposed federal Employment Non-Discrimination Act), and by the defeat in eleven states during the 2004 election of same-sex marriage referenda. See generally Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 15 WM. & MARY BILL OF RTS. J. ____ (forthcoming 2006).

²³⁴ 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: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP*, *supra* note 167, at 178-84.

²³⁵ The desirability of self-investment, and the converse undesirability of under-investment, is a proposition held by a variety of commentators from divergent perspectives. Compare, e.g., Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9 (1962) (praising investment in human capital because it will "improve the physical and mental abilities of people and thereby raise real income prospects"), with Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities under United States Law*, 9 YALE J.L. & FEMINISM 213, 217-20 (1997) ("[T]he United States has not facilitated long-term investment in human capital through social market protection. If our choices were based on a careful study of the experience of other countries rather than unexamined rhetoric, we might make different and more humane choices.").

²³⁶ Like other self-fulfilling prophecies, this is because of 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

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dissuaded from thriving in a particular manner end up, on average, being economically at least as well off as sexual majority members, their individual dignity has been violated and their personal flourishing stymied in the process. This is particularly true if gays and lesbians pursue social advancement by repressing their identities.²³⁷

Under a disability human rights paradigm that values each person for his or her inherent worth as an individual, not as an end for other economic means, the ultimate goal is not overall net-product but the development of individual talent. Consequently, I agree with Nussbaum that gauging well-being through GNP-type measures (whether taken as gross figures or devolved downward as average wealth accumulation),²³⁸ inadequately reveals or accounts for the real life circumstances of individuals.²³⁹ Comparing results published in the United Nations Development Programme's annual Human Development Report series illustrates this point. Without fail one can find countries with substantially identical per capita GNP figures whose rates of female literacy and/or income vary wildly. Yet one would be hard pressed to argue that the women in countries with lower individual literacy and/or income live well in relation to those in higher individual literacy and/or income States, despite the equivalence in average (seemingly gender-neutral) GNP determinants.²⁴⁰

that they will be disadvantaged in the workplace. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1619, 1640 (1991) (“[S]tatistical discrimination encourages minorities to under invest in human capital, which in turn makes statistical discrimination rational.”).

²³⁷ Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002), 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). 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 AND SOC. BEHAV. 38, 39-42 (1995), and JAMES D. WOODS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 74-75 (1993).

²³⁸ The Chicago school of neoclassical economics adheres to this perspective. For a general overview, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2 (5th ed. 1998).

²³⁹ As Nussbaum notes, a mere inquiry into average GNP figures fails to “ask about other constituents of life quality, for example, life expectancy, infant mortality, education, health, and the presence or absence of political liberties that are not always well correlated with GNP per capita.” MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 33 (1999).

²⁴⁰ These are available at <<http://hdr.undp.org/reports/default.cfm>>.

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The theory underlying the disability rights paradigm extends the rights continuum to sexual minorities. This extrapolation is laudable, desirable, and linear. It continues the received notion (and one that I support) that morally sustainable rights arise primarily as a reply to historical and group-based subordination.²⁴¹ The disability human rights framework, without undercutting that position, also promises a much more ambitious reconfiguring of the rights landscape by moving from group-based protection to individualized assessment. This shift is dramatically illustrated when one considers expanding rights protection to people living in impoverished conditions, an idea originally advocated by Nobel Prize economist Amartya Sen.²⁴² Because Sen avoids the language of human rights -- his assertions arise from the field of development economics -- I attempt to add to his powerful assertion by framing a rights-based argument. A disability human rights paradigm, moreover, acts as a bridge between group-based rights discourse, and Sen's progressive vision that responds to individual need.²⁴³

Poverty arises from, and is perpetuated by, multidimensional factors that require systemic responses.²⁴⁴ Beyond an obvious lack of wealth in the immediate

²⁴¹ 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).

²⁴² For representative examples of his enunciation, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Amartya K. Sen, *Development as Capability Expansion*, in HUMAN DEVELOPMENT AND THE INTERNATIONAL DEVELOPMENT STRATEGY FOR THE 1990S 94 (K. Griffin & J. Knight eds., 1990). 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 Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, Part I*, 20 POLITICAL THEORY 584 (1992); David Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, Part II*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 153 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

²⁴³ 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 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).

²⁴⁴ 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).

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sense of material privation, being poor translates instrumentally into diminished health, reduced access to education and other basic social goods, marginalized participation in political processes, as well as an overall lesser ability to develop one's own human capital.²⁴⁵ It is highly appropriate that the primary goal of the United Nations Millennium development projects is poverty alleviation,²⁴⁶ that poverty comprises one of the central metrics in the annual United Nations Development Reports,²⁴⁷ and that the World Bank has vowed to focus on poverty alleviation in addition to its "normal" course of issuing loans to developing nations.²⁴⁸ These international bodies have recognized that long term and effective responses to poverty are inextricably linked to the enhancement of human rights through development-based strategies.²⁴⁹

The seminal treatment of poverty alleviation in the form of an eco-political right is by Sen, and informs his original capability approach theory. Sen argues that income deprivation is capability deprivation in the sense that access to essential goods and services is lacking, rather than the absence of actual income.²⁵⁰ In other words, a redistribution of wealth can enable persons living in impoverished conditions to have the means through which to achieve

²⁴⁵ "Poverty both affects, and is affected by, other human rights violations." SHUE, *supra* note 150, at 298. 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.").

²⁴⁶ 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 Goals*, *supra* note 37.

²⁴⁷ See MILLENNIUM DEVELOPMENT COMPACT *supra* note 105; HUMAN DEVELOPMENT REPORT 1997, *supra* note 132.

²⁴⁸ See II VOICES OF THE POOR: CRYING OUT FOR CHANGE 32 (Deepa Narayan et al. eds, 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.").

²⁴⁹ See Report of the Chairman-Rapporteur, Jose Bengoa, U.N. ESCOR, 54th Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2002/18, Annex III, at 14 (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 (Gerald M. Meier & Joseph E. Stiglitz eds., 2001) ("in evaluating an economy's state or progress, we must focus primarily on how the poorest people are faring.").

²⁵⁰ These arguments are set forth in a chapter entitled "Poverty as Capability Deprivation." SEN, DEVELOPMENT AS FREEDOM, *supra* note 243, at 87-110.

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employment, education, health care, and gender equality. The essence of his argument is that alleviating impoverishment is instrumental, rather than intrinsic.²⁵¹

Sen then takes the capability approach to another level by arguing that poverty differs from traditional group-based need in two ways. First, the effect of poverty must be individually appraised and counter-acted. Second, the needs of a person living in poverty might require a greater allocation to rise to an optimal functional level than would other individuals.²⁵² So, while Nussbaum's capability approach adheres to established norms of functionality, Sen's approach to poverty alleviation does not require a threshold to guide or justify allocations to individuals with different needs. Indeed, allocation of resources for the poor should not be constrained by normative expectations about where the most effective application of resources will be. This latter assertion is consistent with the broad social reconstruction that Nussbaum is attempting, but which she may not achieve because of the flaw in her capability framework, namely that resource distribution is contingent on adequate social reciprocity.²⁵³

Approaching poverty as a category for human rights protection would, however, signify a dramatic shift in the notion of what types of individuals can formally be endowed with identity-based rights. Established hard law treaties that go beyond universal application target particular groups in an effort to ameliorate human rights violations encountered by individuals within those categories. In this respect, human rights theory parallels American civil rights goals.²⁵⁴ As noted

²⁵¹ *Id.* At this point, one could plausibly argue that it is not any inherent limitation of disability, female gender, or particular ethnicity that create capability deprivation, but rather the correlation of these characteristics with the means of accessing goods and services.

²⁵² *Id.*

²⁵³ 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: "poverty 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 psycho-social barriers – a culture of poverty – that perpetuate poverty from generation to generation."

²⁵⁴ The confluence is hardly coincidental when one considers that the form taken by the ICCPR was primarily the result of Cold War era American influence at the United Nations, whereas the ICESCR reflected contemporary Soviet sensibilities. *See* STEINER & ALSTON, *supra*, note 112 at 238 (commenting on the political and ideological aspects

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by Robert Post, the rationale underlying antidiscrimination law compels remedies that “liberate individuals from the thrall” of socially held stereotypes.²⁵⁵ Under this received notion, the stereotypes to be combated are contingent on group identity.²⁵⁶ This is because group membership creates both the stigma at issue through commonly held and devalued traits (for example, the characteristic of African origin may have a particular salience, while speaking Swedish probably will not), and the subordination that arises through the possibility of that stigma being repeated (i.e., the empirically verifiable existence of social bias against persons of African descent, in contrast to the unlikely event of widespread hatred of Swedish language speakers).²⁵⁷ Extending human rights protection to the poor

of the two sets of rights in the Universal Declaration of Human rights as they played out during the Cold War). One could argue that the reasoning in *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970), i.e., that social welfare benefits are intended “to help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community,” militates poverty alleviation, but American civil rights jurisprudence has not developed further in this direction.

²⁵⁵ ROBERT C. POST, ET AL. PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 1 (2001). Post criticizes this theory by asserting that in reality law itself can do no more than “reshape the nature and content” of those conventions. According to Post, a legal regime that vitiates the connection between a person’s appearance and identity is invariably overreaching. *Id.* at 39, 41. The same volume contains responses to Post’s premises. For a thoughtful variation on this theme, see Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, in *Issues in Legal Scholarship*, The Origins and Fate of Antisubordination Theory (2003), available at <<http://www.bepress.com/ils/iss2/art11>> (averring that the normative goals of anticlassification and antisubordination, usually considered in opposition to each other, “are better understood as regulating overlapping groups of practices and that their application shifts over time in response to social contestation and social struggle”).

²⁵⁶ See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-10 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154-55 (1976).

²⁵⁷ For two treatments of the rationale underlying disability status as it relates to the ADA, see Mark Kelman, *Does Disability Status Matter?*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 91 (Leslie Pickering Francis & Anita Silvers eds., 2000) (proposing that norms are best enforced as group, rather than individual, protections because the larger societal benefits stemming from the prevention of market discrimination relate to the incorporation of those groups into the social and economic mainstream); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 422-68 (2000) (arguing that ADA coverage ought to be circumscribed to those individuals whose disability-related stigma subjects them to systematic disadvantage).

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goes against the established trend of elevating group-based characteristics over individual identity. However, protecting individuals regardless of historically targeted group status removes the necessity of determining who is morally worthy and unworthy of receiving this benefit, itself a prudentially difficult (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 can also help accomplish three positive goals. First, it may help to eliminate prejudice in a different manner than is currently perceived. This is because group identity norms almost 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 reinstantiation of negative stereotypes.²⁵⁸

Second, focusing on individual and immediate want, rather than on need as it is devolved down through an identity filter, can encourage the development of individual capacity. This dynamic is in sync both with the human rights emphasis on protecting the individual dignity of each person, and with the capability approach's desire that each person be valued as an end in and of herself. Moreover, as an empirical matter, overlap is likely to exist between the categories,²⁵⁹ including the tremendous prevalence of poverty among people with disabilities,²⁶⁰ and women and ethnic minorities.²⁶¹

²⁵⁸ 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* 75 (Melinda Jones & Lee Ann Bassar Marks eds., 1999).

²⁵⁹ For a discussion of the interface between disability and gender at the international level, see Theresia Degener, *Disabled Women and International Human Rights*, in *III WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 262 (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); MARY JO DEEGAN ET AL., *WOMEN AND DISABILITIES: THE DOUBLE HANDICAP* (1985).

²⁶⁰ 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 Group Social Protection Paper No. 9932, Dec. 1999). See also tenBroek & Matson, *supra* note 154, at 809 ("poverty and disability are historically so intermeshed as to be often indistinguishable."). See also James D. Wolfensohn, *Editorial: Poor, Disabled and Shut Out*, WASH. POST, December 3, 2002, at A25 (statement by president of the World Bank

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Third, by concentrating on individual need that in turn reaches out to group-based need, a prospective disability human rights paradigm will require that human rights be integrated rather than fractured.²⁶² Note, for example, the absence of the word “disability” from each of the respective United Nations Millennium projects relating to poverty, health, and HIV status, when each of those endeavors is factually linked to disability.²⁶³ Recalibrating the aim of 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 function as a capability-based bridge between established norms and a possible future aspiration that attends to individual need and talent development.

CONCLUSION

This Article examined the theoretical implications of adding disability to the existing canon of human rights protection by adopting a disability human rights paradigm. It argued that, because disability rights necessarily invoke both civil and political rights, as well as economic, social, and cultural rights, a disability framework presents a strong exemplar for viewing established human rights protections as being similarly indivisible. Hence, groups whose rights have historically been divided, for example, women, could be strengthened. Moreover,

that “research shows that disabled people are more likely than other people to live in grinding poverty.”).

²⁶¹ Women, for example, constitute some sixty percent of the working poor, as reported by the United Nations International Research and Training Institute for the Advancement of Women, *Women and Poverty: New Challenges*, available at <http://www.un-instraw.org/en/images/stories/Beijing/womenandpoverty.pdf>. 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>.

²⁶² 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).

²⁶³ See sources and citations, *supra* note 36. By contrast, Christopher McCrudden, *Mainstreaming Human Rights*, in *HUMAN RIGHTS IN THE COMMUNITY: RIGHTS AS AGENTS FOR CHANGE* 9 (Colin Harvey ed., 2005), 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.

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utilizing a disability-based perspective could also extend human rights to currently unprotected individuals, including sexual minorities and the poor. Building on and critiquing the feminist political philosophy of Martha Nussbaum, the Article maintained that her capability approach provides a fertile space within which to understand the content of disability-based human rights, and subsequently, the human rights of other groups. It demonstrated that, because a capabilities framework values each person as his or her own end, it could be combined with a disability framework to offer a normative theory of human rights that enables individuals to more completely develop their individual talent.

Each of these arguments requires us to step back and reexamine the bases underlying existing notions of human rights protection. Applying a disability framework retrospectively to women reaffirms the need for a holistic approach to human rights that not only prohibits discrimination, but also reworks social landscapes. Both these dynamics are necessary if hard laws, which to date have been under-utilized, are to be effective. Extending a disability human rights paradigm to sexual minorities and to the poor empowers vulnerable populations, but in very different ways. Sexual minorities as a group have been excluded from social opportunities due to prejudiced social convention. Their protection, therefore, 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, although not mutually exclusive, human rights discourse.

Finally, the assertions in this Article are unique. Instead of advocating in favor of disability-specific protection paralleling that of established human rights instruments, it proffered an initial argument for extending disability-based human rights concepts to other groups. In doing so, the Article staked out a distinct position on human rights law, and advocated for a dramatic shift in perspective.

Considering how the disability paradigm can enrich the rights of already protected groups, rather than analyzing how and whether traditionally accepted norms ought to be applied to the disabled, is a dramatic sea 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 many continue to view) this social exclusion as a “natural” consequence of the inherent inabilities of disabled persons, and hence warranted, even if unfortunate. Adopting a disability human rights model, and then extending it outwards to other groups, repositions disability as a universal and inclusive concept from its current position as an

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outsider or “other” to traditionally recognized groups. As human beings, each of us has strengths and weaknesses, abilities and limitations. A disability human rights framework esteems potential over extant function. It also recognizes the value of every individual for his or her own end, and 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.