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THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: REFLECTIONS ON FOUR FLAWS THAT TARNISH ITS PROMISE

*Lucia A. Silecchia**

INTRODUCTION

On December 13, 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities (“CRPD”).¹ Widely touted as the “first comprehensive human rights treaty of the 21st century,”² and effusively praised for its open negotiation process,³ the CRPD was opened

* Professor of Law, The Catholic University of America, The Columbus School of Law. I am deeply grateful to Ms. Emily Black of the Kathryn DuFour Law Library at Catholic University and Ms. Kara McKenna, Catholic University Law School Class of 2014, for their diligent research assistance, and to Ms. Laurie Fraser for her administrative assistance in preparing this article for publication.

1. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, G.A. Res. 61/106, U.N. Doc. A/RES/61/106.

2. UNITED NATIONS ENABLE WEBSITE, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, <http://www.un.org/disabilities/default.asp?navid=14&pid=150> (last visited Jan. 6, 2014) [hereinafter CRPD WEBSITE]. See also Rachel Heather Hinckley, Note, *Evading Promises: The Promise of Equality Under U.S. Disability Law and How the United Nations Convention on the Rights of Persons with Disabilities Can Help*, 39 GA. J. INT’L & COMP. L. 185, 189 (2010), (calling CRPD “the first comprehensive human rights convention of the twenty-first century.”) and Maria Hasan, *People with Disabilities “Contributors to Resilience, Not Victims,”* U.N. OFFICE FOR DISASTER RISK REDUCTION (Aug. 2, 2013), <https://www.unisdr.org/archive/34220> (calling the CRPD “the only human rights treaty of this millennium”).

3. See Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37, 37 (2007):

[T]he CRPD represents an historic break from a state-centric model of treaty negotiation, in which instruments are negotiated behind closed doors, away from the very people they are intended to benefit. It moves instead to a participatory approach that takes the views and lived experiences of the affected as the principal point of departure.

See also *id.* at 43 (“NGOs . . . became full and active partners in the negotiation process, authorized to make substantive statements on the UN floor following discussions of each draft article, actively lobby state delegations during sessions, receive official documents, and make written and other presentations.”); *id.* (“Member States were formally encouraged by the Ad Hoc Committee to incorporate persons with disabilities and/or other experts on disability into their official delegations at meetings, as well as to consult

for signature on March 30, 2007. The CRPD quickly entered into force on May 3, 2008, enjoying “the highest number of signatories in history to a UN convention on its opening day.”⁴ As it rapidly amassed signatories, the CRPD inspired great hope that its comprehensive approach would do much to overcome the consistent failure to promote the dignity of those with disabilities in meaningfully concrete ways.

Although over five years have passed since the CRPD entered into force—and nearly seven years have passed since its optimistic adoption with “unprecedented early enthusiasm”⁵—two recent events have thrust it into the national and international spotlight again. First, the CRPD was the subject of heated debate in the months leading up to, and following, December 2012, when the United States Senate failed to ratify it by falling six votes

with them at home in the preparatory process in establishing positions and priorities.”); Michael L. Perlin, “*A Change is Gonna Come*”: *The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U. L. REV. 483, 489 (2009) (“One of the hallmarks of the process that led to the publication of the UN convention was the participation of persons with disabilities and the clarion cry, ‘Nothing about us, without us.’”); Hinckley, *supra* note 2, at 199 (“One major theme of the Convention is the inclusion of disabled people in the drafting process.”); and Gerard Quinn, *The United States Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability*, 15 TX. J. CIV. LIB. H. R. 33, 47 (2009):

One reason why bad laws were enacted in the past was the relative invisibility of disability and of persons with disabilities in the political process. . . . This absence of the most important voices from the table meant that these deficiencies could not be readily undone. The framers of the Convention were cognizant of the fact that unless processes are changed, there will be few effective outcomes.

See also id. at 49 (“The convention does not simply impose obligations – it seeks to improve the democratic process by opening it up to voices that were previously excluded or discounted.”) and Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT’L L. & COM. 287, 294 (2007) (noting that the Convention “was the result of unprecedented collective and collaborative action. It is said that the Ad Hoc Committee meetings were the most inclusive in the U.N.’s history.”).

4. CRPD WEBSITE, *supra* note 2. *See also* Quinn, *supra* note 3 (“The speed with which [the Convention] entered into force and the number of ratifications received thus far is something of a record in the United Nations.”).

5. Rosemary Kayess & Phillip French, *Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8:1 HUM. RTS. L. REV. 1, 2 (2008).

short of the number needed for ratification.⁶ Although the United States became a signatory to the CRPD on July 30, 2009,⁷ without Senate ratification,⁸ it is not binding.⁸ Questions were raised about the necessity for the CRPD⁹ in light of the Americans with Disabilities Act,¹⁰ and concerns were also expressed about federalism and sovereignty.¹¹ These concerns

6. See *U.N. Treaty on Disabilities Falls Short in Senate*, CBS NEWS (Dec. 4, 2012), <http://www.cbsnews.com/news/un-treaty-on-disabilities-falls-short-in-senate/> [hereinafter *Treaty Falls Short*] (“A vote to ratify [the Convention] fell short in the Senate Tuesday, with the measure receiving 61 votes, short of the 67 votes needed for ratification. Thirty-eight Republicans voted no.”).

7. See Karem Dale, *Valerie Jarrett & Ambassador Rice at the U.S. Signing of the UN Convention on the Rights of Persons*, OFFICE OF PUB. ENGAGEMENT (July 30, 2009, 7:26 PM), <http://www.whitehouse.gov/blog/Valerie-Jarrett-and-Ambassador-Rice-on-the-UN-Convention-on-the-Rights-of-Persons>. See also Press Release, Office of the Press Secretary, The White House, Remarks by the President on the Signing of U.N. Convention on the Rights of Persons with Disabilities Proclamation (Jul. 24, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-rights-persons-with-disabilities-proclamation-signing>.

8. However, “by signing the Convention or Optional Protocol, States or regional integration organizations indicate their intention to take steps to be bound by the treaty at a later date. Signing also creates an obligation, in the period between signing or consent to be bound to refrain from acts that would defeat the object and purpose of the treaty.” UNITED NATIONS ET AL., FROM EXCLUSION TO EQUALITY: REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES 40 (2007) [hereinafter EXCLUSION TO EQUALITY].

9. See Melish, *supra* note 3, at 46 (explaining the argument that there would be a “lack of value-added in ratification given strong existing U.S. protections for persons with disabilities”); Dick Thornburgh, *Globalizing a Response to Disability Discrimination*, 83 WASH. L. REV. 439, 446 (2008) (“[S]ome have said that because of the United State’s [sic] comprehensive domestic protections, a treaty on disability would have no relevance in our own country.”); Tracy R. Justesen, *An Analysis of the Development and Adoption of the United Nations Convention Recognizing the Rights of Individuals With Disabilities: Why the United States Refuses to Sign this UN Convention*, 14 HUM. RTS. BRIEF 36, 39 (2007) (“[T]he United States points to its numerous domestic laws evidencing its long history of equal treatment of individuals with disabilities.”); *id.* at 40 (“The U.S. commitment to the new Convention would be a gesture without significant meaning for its citizens.”); and *id.* at 41 (“This Convention proposes no measure of increased protections or accessibility than U.S. federal law and policy now provide.”).

10. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006).

11. Justesen, *supra* note 9, at 40 (“For the U.S. to consent to an international Convention that could potentially cause havoc within its sovereign borders [sic] merely to appear deferential to the needs of individuals with disabilities would be disastrous.”) and *Treaty Falls Short*, *supra* note 6:

prevailed over arguments about the symbolic¹² and substantive¹³ advantages to ratification by the United States, and debate about the un-ratified CRPD

Among the opponents of the treaty were former GOP presidential candidate Rick Santorum and Sen. Mike Lee. . . . Lee led opposition among conservative senators to the treaty which he suggested posed a threat to American sovereignty. Santorum argued that the treaty could change U.S. law or be used as a standard in court cases.

See also Sohrab Ahmari, *American Sovereignty and Its Enemies: A Group of Powerful Legal Scholars are Trying to Make an End Run Around the Constitution*, WALL ST. J. (Jul. 19, 2013, 6:26 PM) <http://online.wsj.com/news/articles/SB10001424127887324348504578606493979321554> (quoting former Senator Jon Kyl who observed that conventions such as this “have a lot of loose language that in the hands of the wrong people can demand far more than was ever intended by the American people.”); Press Release, Sen. Orin Hatch, Hatch Statement on the U.N. Disabilities Treaty A Threat to American Sovereignty and Self-Government (Jul. 10, 2013), <http://www.hatch.senate.gov/public/index.cfm/releases?ID=ff066599-6295-4618-a70a-679724327a96> [hereinafter Hatch News Release] (“[T]he cost to American sovereignty and self-government clearly outweighs any concrete benefit to Americans.”); and *id.* (“Ratifying the CRPD would endorse an official ongoing role for the United Nations in evaluating virtually every aspect of American life.”).

12. *See* Thornburgh, *supra* note 9, at 445 (“As a practical matter, the United States will have much more authority worldwide to speak out about discrimination against people with disabilities if we agree to abide by international scrutiny at home.”); *id.* at 446 (“Ratification of the Convention is an opportunity to export to the world the very best we have to offer. . . . This is worthy of our leadership.”); John Kerry, *Disabled Vets Have Earned Access to the World: U.S Must Ratify Treaty that Will Spread American Handicapped Rights Abroad*, U.S.A. TODAY, July 22, 2013, at 6A (“The United States set the gold standard when the ADA broke down barriers to equal opportunity, independent living and economic self-sufficiency. Now we must export that gold standard—and we can’t do it effectively unless the United States ratifies the Disabilities treaty.”); and *id.* (“We’d have greater credibility and leverage to export our disability laws if we join this treaty ourselves.”).

13. *See* Melish, *supra* note 3, at 46, arguing that with respect to protecting the rights of those with disabilities:

[T]here are significant gaps and lacunae that need to be filled in U.S. law, policy, and practice. We are doing well, but we can do better. The national monitoring and periodic reporting procedures under the Convention are designed precisely to routinize an internal process of continual self-awareness and self-reform that will help us become better in our domestic human rights protections.

See also Quinn, *supra* note 3, at 34 (noting that if the United States ratifies the Convention, “it will be empowered to play a full part in the new Conference of State

still generates domestic controversy as efforts to ratify the CRPD continue in the current legislative term.¹⁴

Second, in September 2013, the United Nations hosted a High Level Meeting on Disability and Development to assess the progress made by member states in advancing the goals of the CRPD in light of international development goals.¹⁵ As would be expected, any gathering of the member states to a convention leads to extensive discussions of the convention and its substance, implementation, and efficacy. By now, sufficient time has passed for the representatives of the member states to have concrete experience on which to draw as they plan for the future of the CRPD and, in a particular way, as they evaluate the practicalities of implementing the CRPD's ambitious provisions.¹⁶ Coming on the heels of the July 2013

parties set up under the Convention” and this “will also enable the United States to put forward candidates for election to the new United Nations Committee on the Rights of Persons with Disabilities.”).

14. As this Article was going to press, the United States Senate Committee on Foreign Relations had held new hearings on the ratification of the CRPD, on November 5, 2013 and November 21, 2013. See U.S. SENATE COMM. ON FOREIGN RELATIONS, <http://www.foreign.senate.gov/hearings/convention-on-the-rights-of-persons-with-disabilities> (last visited Jan. 6, 2014). Files from the testimony offered are available at <http://www.foreign.senate.gov/hearings/convention-on-the-rights-of-persons-with-disabilities> (Nov. 5, 2013 hearing) and at <http://www.foreign.senate.gov/hearings/convention-on-the-rights-of-persons-with-disabilities-11-21-2013> (Nov. 21, 2013 hearing). There have been no new Senate votes on the CRPD as this Article went to press.

15. See SECRETARIAT FOR THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, General Assembly High Level Meeting on Disability and Development 23 September 2013 Issue Paper, at 2 (Jan. 29, 2013) [hereinafter Issue Paper]:

As the 2015 deadline for the achievement of the Millennium Development Goals draws near . . . the international community has before it a critical opportunity to ensure the inclusion of disability in the emerging framework. To this end, the General Assembly in 2011 decided to convene a High-level Meeting on Disability and Development, at the level of Heads of States and Governments, on 23 September 2013, to consider the overarching theme “The way forward: a disability-inclusive development agenda towards 2015 and beyond.[”] The 2013 High-level Meeting on Disability and Development will provide a critical opportunity to bring global attention to the situation of persons with disabilities and to adopt an action-oriented outcome document for disability-inclusive development.

16. See Arlene S. Kanter, *The Promise and Challenge*, *supra* note 3, at 314 (noting that “the effect of the Convention will depend in large part on the domestic disability laws in place in the various countries that have signed or will sign the Convention as well

Conference of States Parties, the meeting included much practical discussion of the progress made in implementation of the CRPD's lofty goals.¹⁷ Thus, the September gathering again thrust the CRPD into the international spotlight.

The explicit theme of the September 2013 High Level Meeting was a critical assessment of the intersection, *vel non*, of the CRPD with the United Nations' Millennium Development Goals ("MDGs").¹⁸ Indeed, "there is a striking gap in the MDG's: persons with disabilities . . . are not mentioned in any of the 8 Goals or the attendant 21 Targets or 60 Indicators, nor in the Millennium Declaration."¹⁹ Because the MDGs did not explicitly discuss disabilities, the approaching milestone of 2015 presents an important opportunity to assess the ways in which progress toward respecting those with disabilities is linked to attainment of important development goals.

It was hoped that "the High-Level Meeting [would] result in a concise, action-oriented outcome document in support of the aims of the Convention on the Rights of Persons with Disabilities and the realization of the

as on the will of the governments and its citizens in realizing the Convention's goal of equal rights for all people with disabilities.").

17. *See generally* GENERAL ASSEMBLY, *Despite 132 Convention Ratifications, Millions With Disabilities Still Lack Protections, Conference of States Parties Told*, U.N. Doc. HR/5150 (July 18, 2013), <http://www.un.org/News/Press/docs/2013/hr5150.doc.htm> (reviewing practical difficulties in the implementation of the CRPD).

18. A full discussion of this intersection can be found in UNITED NATIONS, *DISABILITY AND THE MILLENNIUM DEVELOPMENT GOALS*, U.N. Doc. ST/ESA/337, U.N. Sales No. E.11.IV.10 (2011) [hereinafter *DISABILITY AND THE MILLENNIUM DEVELOPMENT GOALS*]. Indeed, as has been pointed out by many, the Millennium Development Goals, as adopted, entirely ignored those with disabilities in its goal-setting. This has been the subject of much critique by many, including the United Nations itself. *See* Issue Paper, *supra* note 15 ("The invisibility of disability in the Millennium Development Goals has . . . represented a tremendous/just missed opportunity, albeit one that may be avoided in terms of the emerging post-2015 development framework."). *See also* Report of the On-Line Consultation for a Disability-Inclusive Development Agenda Toward 2015 and Beyond 6 (Mar. 28-Apr. 5, 2013) [hereinafter *On-Line Consultation*] (on file with the author) ("The Millennium Development Goals did not include persons with disabilities, which should not be repeated in the post-2015 development framework. More recently, persons with disabilities were excluded and not mentioned in the Millennium Development Goals Report 2012."); and Press Release, General Assembly, *Millennium Development Goals Framework Overlooked Disability Issues, Conference of States Parties Told During Panel Discussion*, U.N. Press Release HR/5151 (July 18, 2013) (describing consequences of the failure to integrate disability concerns with economic development concerns).

19. *DISABILITY AND THE MILLENNIUM DEVELOPMENT GOALS*, *supra* note 18, at vii.

Millennium Development Goals and other internationally agreed development goals for persons with disabilities.”²⁰ This, in fact, turned out to be a goal fulfilled as the meeting was, indeed, very practical in its orientation.²¹ Certainly, this new attention will make the interconnection between fulfilling development goals and advancing the rights of those with disabilities more apparent. Admittedly, “[t]he MDG’s are two-thirds of the way through their lifespan, and will conclude in 2015. Realistically, there will be no significant changes made in the overarching Goals, nor in the current Targets or Indicators at this point.”²² Nevertheless, the discussion alone is certain to raise the public profile of the critical issues at stake.

This recent attention—which is both ongoing and new—offers an opportunity to reexamine the CRPD, its promise, and its limitations. This brief reflection does not seek to explore the legal strengths and weaknesses of the CRPD—a task that has been ably and often undertaken by others.²³ It

20. SECRETARIAT FOR THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, Guiding Questions for Consultations and Inputs for Preparatory Work for the High-level Meeting on Disability and Development (Jan. 29, 2013). The work product generated as part of the meeting included the draft resolution called, the Outcome Document of the High-Level Meeting of the General Assembly on the Realization of the Millennium Development Goals and Other Internationally Agreed Development Goals for Persons with Disabilities. U.N. SECRETARY-GENERAL, *The Way Forward, A Disability-Inclusive Development Agenda Towards 2015 and Beyond*, G.A. Res. U.N. Doc. A/68/95 (June 14, 2013) (draft resolution). This document listed the specific tasks to be undertaken by all stakeholders, including legislatures, educators, health care providers, Member States, architects, data collectors, academic institutions, social media participants, development banks and other financial institutions, public, private and civil society partnerships, and the United Nations itself. This meeting was widely commented on. *See, e.g.*, U.N. GENERAL ASSEMBLY, *General Assembly High-Level Meeting Adopts Outcome Document Seeking to Promote Disability-Inclusive Developments*, U.N. Doc. GA/11420 (Sept. 24, 2013), <http://www.un.org/News/Press/docs/2013/ga11420.doc.htm>.

21. High-Level Meeting, *supra* note 20.

22. DISABILITY AND THE MILLENNIUM DEVELOPMENT GOALS, *supra* note 18, at 27.

23. *See generally* Melish, *supra* note 3; Thornburgh, *supra* note 9; Hinckley, *supra* note 2; Quinn, *supra* note 3; Michael Ashley Stein & Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 HUM. RTS. Q. 689 (2010) [hereinafter *Monitoring the Convention*]; Michael Waterstone, *The Significance of the United Nations Convention on the Rights of Persons with Disabilities*, 33 LOY. L.A. INT’L & COMP. L. REV. 1 (2010); Jason Scott Palmer, *The Convention on the Rights of Persons with Disabilities: Will Ratification Lead to a Holistic Approach to Postsecondary Education for Persons with Disabilities?*, 43 SETON HALL L. REV. 551 (2013); Kayess & French, *supra* note 5; Kanter, *The Promise and Challenge*, *supra* note 3; Beth Ribet, *Emergent Disability and*

also does not purport to analyze the pros and cons of U.S. ratification of the CRPD—an issue that is, in many respects, distinct from questions about the merits of the CRPD itself.²⁴ Instead, these reflections suggest that there are four fundamental flaws in the philosophical and anthropological foundations of the CRPD that need to be addressed before the CRPD can truly live up to the high ideals that it sets for itself.

The CRPD is now an important part of international law, and the likelihood of solving these four problems seems discouragingly slim. However, as the world community moves forward under the framework of the CRPD, acknowledging that these four weaknesses exist may better equip advocates and policy-makers to remedy them in ways that will allow the CRPD to achieve its potential to advance and protect the rights of those with disabilities.

I. THE LOFTY PROMISE OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

At first glance, it would seem difficult to find fault with the CRPD. As one commentator noted, “[t]he Convention provides both a moral compass

the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities, 14 YALE HUM. RTS. & DEV. L. J. 155 (2011); Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. L. REV. 527 (2009) [hereinafter *Rights of Elderly People*]; Michael Ashley Stein, *A Quick Overview of the United Nations Convention on the Rights of Persons With Disabilities and its Implications for Americans with Disabilities*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 679 (2007) [hereinafter *Quick Overview*]; Anita Ohanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future*, 34 SYRACUSE J. INT’L. L. & COM. 429 (2007); Anna Lawson, *The United Nations Convention in the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT’L. L. & COM. 563 (2007); Sheila Wildeman, *Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities*, 41 J. L. MED. & ETHICS 48 (2013); Sally Chaffin, *Challenging the United States Position in a United Nations Convention in Disability*, 15 TEMP. POL. & CIV. RTS. L. REV. 121 (2006); and Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007) [hereinafter *Disability Human Rights*]. In addition to this scholarly commentary, useful background on the CRPD can be found in EXCLUSION TO EQUALITY, *supra* note 8.

24. A comprehensive discussion of the issues involved in the question of American ratification of CRPD may be found in Congressional Research Serv., R42749, *The United Nations Convention on the Rights of Persons With Disabilities: Issues in the U.S. Ratification Debate* (Mar. 4, 2013).

for change as well as legal benchmarks against which to measure that change.”²⁵ Its goals and central premise are long overdue²⁶ and the vulnerabilities it seeks to address have been neglected too frequently, by too many actors and for too long a duration.²⁷ Perhaps in recognition of this long delay, the CRPD was “the fastest negotiated human rights treaty ever.”²⁸ Indeed, the Preamble to the CRPD announces with bold clarity what should be clear to all. The CRPD is a clarion call to “recognize the inherent dignity and worth and the equal and inalienable rights of the human family,”²⁹ an overdue admission that “discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,”³⁰ and a stated aim to “promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”³¹ It is a sad commentary on modern times that a convention is necessary to

25. Quinn, *supra* note 3, at 34.

26. See Thornburgh, *supra* note 9, at 441 (“[T]he United Nations has taken an important and long-overdue step toward bringing people with disabilities all over the world into the mainstream of the human-rights movement.”); Perlin, *supra* note 3 (“As recently as fifteen years ago, disability was not broadly acknowledged as a human rights issue.”); Palmer, *supra* note 23, at 552 (calling the CRPD “one of the most far-reaching international documents in history for the protection of marginalized individuals with disabilities”); Justesen, *supra* note 9 (“Human history is scarred by accounts of discrimination against individuals with disabilities.”); and *id.* (“Experts claim disability is regulated to the lowest ebb of consideration by member states of the U.N.”).

27. In fairness, this is not the first time that the international community has turned its attention to the rights of those with disabilities. Indeed, the CRPD “had its genesis in the U.N.’s 1981 Year of Disabled Persons, followed by the Decade of Disabled Persons and the promulgation of the World Programme of Action Concerning Disabled Persons.” Thornburgh, *supra* note 9, at 441. See also Palmer, *supra* note 23, at 553 (noting that the CRPD “evolved from almost a decade of work by the United Nations”). A history of the United Nations’ initiatives in the protection of those with disabilities can be found on the website, UNITED NATIONS ENABLE WEBSITE ON DISABLED PERSONS – THE FIRST FIFTY YEARS, <http://www.un.org/esa/socdev/enable/dis50y00.htm> (last viewed June 21, 2013) [hereinafter THE FIRST FIFTY YEARS WEBSITE].

28. EXCLUSION TO EQUALITY, *supra* note 8, at III.

29. CRPD, Preamble (a). See also Kanter, *The Promise and Challenge*, *supra* note 3, at 289 (“The scope and coverage of the Convention is unprecedented. It recognizes unequivocally the right of people with disabilities to dignity. To live in the community, to exercise their legal capacity, and to ensure their full and equal enjoyment of the rights recognized in the Convention.”).

30. CRPD, Preamble (h).

31. CRPD, Article 1.

articulate what should be known by all. Yet, the CRPD was designed to address and remedy some startling realities as reflected by some troubling (albeit conflicting) statistics:

- “Over 1 billion people, or approximately 15 percent of the world’s population, have disabilities.”³² In addition, this figure “is expected to rise because of factors such as aging populations, increasing potential for accidents, and the predicted rise in extreme weather events.”³³
- “Unemployment among the disabled is as high as 80 per cent [sic] in some countries.”³⁴
- “There are no reliable data on the number of children with disabilities globally. Some estimates put their number at some 200 million world-wide, with around five million children with disabilities living in developing countries. [. . .]

32. UNITED NATIONS ENABLE WEBSITE ON THE UNITED NATIONS AND INDIGENOUS PERSONS WITH DISABILITIES, <http://www.un.org/disabilities/default.asp?id=1605> [hereinafter INDIGENOUS PERSONS WEBSITE]. See also United Nations High Level Meeting of the General Assembly - September 23, 2013 (fact sheet on file with the author) (“More than 1 billion people or 15% of the world’s population are living with disabilities – they constitute the world’s largest and most disadvantaged group.”). But see Int’l Covenant on the Rights of Persons with Disabilities, Some Facts About Persons with Disabilities August 14-25, 2006, <http://www.un.org/disabilities/convention/pdfs/factsheet.pdf> [hereinafter Enable Fact Sheet] (“Around 10 percent of the world’s population, or 650 million people, live with a disability.”) and EXCLUSION TO EQUALITY, *supra* note 8, at 1 (“Over 650 million persons around the world live with disabilities add to that their extended families, and a staggering *two billion* people daily live with disabilities.”).

33. Hasan, *supra* note 2. This potential for substantial increase in the number of people living with disabilities has also been noted in EXCLUSION TO EQUALITY, *supra* note 8, at 2:

As the world’s population grows, so does the number of persons with disabilities. In developing countries, poor medical conditions during pregnancy and at birth, the prevalence of infectious diseases, natural disasters, armed conflict, landmines and small arms proliferation cause injuries, impairment and lasting trauma on a large scale. Traffic accidents, alone, result in millions of injuries and disabilities each year among young people. In developed countries, those born after the Second World War are living longer, which means that many of them will eventually live with a disability later in life.

34. Enable Fact Sheet, *supra* note 32.

However actual numbers are likely to be higher due to wide-scale under-recognition and under-reporting.”³⁵

- “In countries with life expectancies over 70 years, individuals spend on average about 8 years, or 11.5 per cent [sic] of their life span living with disabilities.”³⁶
- “[O]ver 90 percent of children with disabilities in developing countries do not attend school.”³⁷
- “[I]t is estimated [that] some eighty percent of the world’s people with disabilities live” in developing nations of the world.³⁸
- “[I]ndigenous peoples are disproportionately likely to experience disability in comparison to the general population.”³⁹
- “30 per cent of street youth are disabled.”⁴⁰
- “One household in every four contain a disabled member, which means that 2 billion people live with disability on a daily basis.”⁴¹
- “Women and children with disabilities face aggravated forms of discrimination and other forms of obstacles in life.”⁴²
- “The majority of persons with disabilities live in conditions of poverty.”⁴³

35. UNITED NATIONS ENABLE WEBSITE ON THE INTERACTIVE PANEL DISCUSSION ON THE PROMOTION AND PROTECTION OF THE RIGHTS OF CHILDREN WITH DISABILITIES, <http://www.un.org/disabilities/default.asp?id+1573> (last visited June 20, 2013) [hereinafter PANEL DISCUSSION WEBSITE].

36. Enable Fact Sheet, *supra* note 32.

37. PANEL DISCUSSION WEBSITE, *supra* note 35. *See also* Enable Fact Sheet, *supra* note 32 (“The global literacy rate for adults with disabilities is as low as 3 per cent, and 1 per cent for women.”).

38. Thornburgh, *supra* note 9, at 447. *See also* Enable Fact Sheet, *supra* note 32, (indicating that “eighty percent of persons with disabilities live in developing countries.”).

39. INDIGENOUS PERSONS WEBSITE, *supra* note 32.

40. Enable Fact Sheet, *supra* note 32.

41. DISABILITY AND THE MILLENNIUM DEVELOPMENT GOALS, *supra* note 18, at 8.

42. *Seeking to Advance Rights of Persons with Disabilities, UN Treaty Review Starts in New York*, U.N. NEWS CENTER (Sept. 12, 2012), <http://www.un.org/apps/news/printnewsAr.asp?nid=42860> (quoting Martin Grunditz, Permanent Representative of Sweden to the United Nations and President of the 2012 Conference of State Parties) (last visited Sept. 5, 2013). *See also* Enable Fact Sheet, *supra* note 32 (“Women and girls with disabilities are particularly vulnerable to abuse.”).

- “[V]iolence against children with disabilities occurs at annual rates at least 1.7 times greater than for their non-disabled peers.”⁴⁴
- “Twenty percent of the poorest people in the world have disabilities.”⁴⁵
- “Even without a generally agreed upon measure of what it means to have a ‘disability,’ there is some consensus that persons with disabilities account for ten percent of the world’s population, yet comprise twenty percent of those living in poverty.”⁴⁶
- Those with disabilities are “the world’s largest minority group”⁴⁷ and they “remain amongst the most marginalized in every society.”⁴⁸
- “[A]bout 80 per cent of the more than 1 billion people with disabilities around the world are of working age, and face physical, social, economic and cultural challenges in gaining access to education, skills development and employment.”⁴⁹
- “[M]ortality for persons living with disabilities is much higher than any other group in the event of disaster.”⁵⁰
- “Disability is associated with illiteracy, poor nutrition, lack of access to clean water, low rates of immunization against diseases and unhealthy and dangerous working conditions.”⁵¹

Given all of these documented problems, it would seem difficult to criticize a plan to address some of these challenges. Yet, there are some

43. CRPD, Preamble (t). *See also* DISABILITY AND THE MILLENNIUM DEVELOPMENT GOALS, *supra* note 18, at vii (“[P]eople with disabilities and households with disabled members are often significantly poorer, with fewer resources and more brittle support networks, than non-disabled individuals and households with no disabled members.”).

44. Enable Fact Sheet, *supra* note 32.

45. Quinn, *supra* note 3, at 35.

46. Waterstone, *supra* note 23, at 1.

47. *Id.*

48. EXCLUSION TO EQUALITY, *supra* note 8, at III.

49. Press Release, Convention on the Rights of Persons with Disabilities, Conference of States Parties to Focus on Expanding Social Protection, Reducing Poverty for Persons with Disabilities, Their Exclusion from Job Market Reduces Gross Domestic Product, Says ILO Study, U.N. Press Release HR/5149 (July 16, 2013). *See also* Enable Fact Sheet, *supra* note 23 (“20 per cent of the world’s poorest people are disabled, and tend to be regarded by their own communities as the most disadvantaged.”).

50. Hasan, *supra* note 2.

51. EXCLUSION TO EQUALITY, *supra* note 8, at 2.

significant shortcomings embedded in the CRPD—shortcomings that affect its ability to achieve its true goals fully and effectively.

II. FOUR FLAWS IN THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

In the course of analyzing the CRPD, many have weighed in with legal critiques. Certainly, much of the legal commentary has focused on the issues of sovereignty and conflict that have driven some of the resistance to ratification by the United States. Other critiques have centered on practical questions of implementation, inquiring as to how lofty statements of broad principle can be translated into meaningful accomplishment. Still others question the relationship of the CRPD to other laws or the costs—financial and otherwise—of compliance.

However, the reflections here do not seek to question the legal technicalities themselves. Rather, they suggest that there are four fundamental choices that lie at the heart of the CRPD and impair its ability to be as meaningful as it could otherwise be.

A. The Human Rights Model Selected for the CRPD Creates a False Conflict with the Medical and Charitable Models

The approach taken by the CRPD intentionally and clearly moves away from the traditional medical and charity models that dominated past discussions of how best to serve the needs of those with disabilities.⁵² It instead adopts a human rights model in which “disability was accepted as part of human diversity.”⁵³ In brief:

The Convention follows decades of work by the United Nations to change attitudes and approaches to persons with disabilities. It takes to new height the movement from viewing persons with disabilities as “objects” of charity, medical treatment and social protection towards viewing persons with disabilities as “subjects” with rights, who are capable of claiming those rights and making

52. CRPD WEBSITE, *supra* note 2.

53. Press Release, General Assembly, As Conference of States Parties to Disabilities Convention Concludes, President Tells Delegates that Lessons Learned Must be Implemented, U.N. Press Release HR/5152 (July 19, 2013), <https://www.un.org/News/Press/docs/2013/hr5152.doc.htm> (citing observation by Macharia Kamau).

decisions for their lives based on their free and informed consent as well as being active members of society.⁵⁴

Or as articulated by another:

The Convention represents a paradigm shift away from the medical model of disability, which views people with disabilities as sick and in need of a cure. Instead, the Convention adopts a human rights model, which views people with disabilities as rights holders and members of our respective societies who are often more disabled by the physical and attitudinal barriers societies

54. CRPD WEBSITE, *supra* note 2. See also Melish, *supra* note 3, at 37 (“The Convention shifts away from a ‘medical-social welfare’ model of disability that fixates on inability and sorting of impairment as a way to ‘parallel track’ difference and socially justify exceptions to universally-held human rights. It embraces instead a ‘social-human rights’ model that focuses on capability and inclusion – on lifting the environmental and attitudinal barriers that prevent persons with disabilities from full inclusion and equal participation in all aspects of community life.”); *id.* at 44 (“[T]he disability problematic is no longer how to provide for those deemed ‘unable’ to integrate into mainstream society, but rather how to make society accessible to all persons, on an equal, non-separate basis.”); Perlin, *supra* note 3, at 483-84 (“[V]iewing disability as a human rights issue requires us to recognize the inherent equality of all people, regardless of their abilities, disabilities, or differences, and obligates society to remove the attitudinal and physical barriers to equality and inclusion of people with disabilities.”); Hinckley, *supra* note 2, at 189 (explaining that the CRPD “[c]hanges the focus from a ‘charity’ model to a human rights model that focuses on the capabilities and inclusion of disabled individuals.”); Stein & Lord, *Monitoring the Convention*, *supra* note 23, at 700-01 (“[D]rafters recognized that all too often existing legislation was very narrow in scope and reflected a medical/charity model rather than a rights-based approach to disability.”); Kanter, *Rights of Elderly People*, *supra* note 23, at 572 (describing the CRPD’s model as one “that focuses on capability and inclusion and ways to prevent and remove the attitudinal and structural barriers that prevent people with disabilities . . . from becoming members of our communities.”); Hasan, *supra* note 3 (“The Convention confirms persons with disabilities as full and active members of the society rather than mere objects of goodwill and charity. . . . [T]he Convention celebrates each individual’s value and inherent self-worth.”); Stein, *Disability Human Rights*, *supra* note 23, at 86 (“According to the social model, collectively mandated decisions determine what conditions comprise the bodily norm in any given society. Thus, factors external to a disabled person’s limitations are really what determine that individual’s ability to function.”); and DISABILITIES AND THE MILLENNIUM DEVELOPMENT GOALS, *supra* note 18, at viii (“Historically, persons with disabilities have been overlooked in international development and global health circles because they were incorrectly seen as people whose lives are defined by medical and rehabilitative needs . . . or as individuals who were considered to be appropriate recipients of social and economic support.”).

erects [sic] to exclude and stigmatize them than by their own physical or mental condition.⁵⁵

As explained by the CRPD itself, “disability is an evolving concept and . . . disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”⁵⁶ In light of this philosophy, the CRPD thus seeks to change society and the ways in which society adapts to meet the needs of those with disabilities, rather than the other way around. Indeed, this was the approach championed by nearly all of the disability rights advocates who participated in the CRPD negotiations and argued that “prevention language . . . presumptively stigmatized disability as something to be rid of, rather than focusing on structural and social accessibility.”⁵⁷

On the one hand, this is the ultimate affirmation of the dignity of those with disabilities. It does not seek to change individuals with disabilities⁵⁸

55. Kanter, *The Promise and Challenge*, *supra* note 3, at 291. See also CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES – FAQ SHEET (2006), http://www.un.org/disabilities/convention_questions.shtml (last viewed July 23, 2013) [hereinafter FAQ SHEET] (“Disability is an evolving concept and results from the interaction between a person’s impairment and obstacles such as physical barriers and prevailing attitudes that prevent their participation in society. The more obstacles there are the more disabled a person becomes.”).

56. CRPD, Preamble (e). See also DISABILITY AND THE MILLENNIUM DEVELOPMENT GOALS, *supra* note 18, at viii. (“[I]n the CRPD, disability is not defined on an individual basis, but rather through an ecological model in which disability is seen as an evolving concept reflecting the interaction between the individual and social attitudes and the physical, economic, and political environment that hinders the full and equal participation of persons with disability in society.”).

57. Ribet, *supra* note 23, at 158.

58. See Palmer, *supra* note 23, at 555 (noting that the CRPD “no longer focuses on a medical or social welfare model that seeks to remedy or correct an inability or impairment as a way to ‘mainstream’ differences, but rather encompasses a ‘social human rights model’ that desires inclusion and capability as a way to remove environmental and attitude and barriers.”); *id.* at 575 (noting that “[u]nder the medical model, persons with disability were marginalized as the disability was viewed as a medical issue that should be resolved on an individual basis.”); *id.* at 575-76 (explaining that under the traditional medical view, “it was the individual’s disability that was the barrier to equal access, and therefore it was the ‘disabled individual’ who had to ameliorate or eliminate the barrier through appropriate medical treatment.”); and Lawson, *supra* note 23, at 571:

Traditionally disability has been viewed, not as an equality or human rights issue, but as a medical problem located within the particular individual who has

but focuses instead on the all-too-often ignored obligations that their innate dignity imposes on all in state and society.⁵⁹ It adopts the view that it is society that needs to change in important ways in order to ensure that all may participate fully in civil, cultural, political, and economic life without barriers that are often artificial and based wholly or largely on stereotypes that are outdated and paternalistic at best, and prejudicial and demeaning at worst.⁶⁰

The CRPD adopts the view that there is a meaningful difference between an “impairment” and a “disability.” That is, a “disability” exists only when the physical or mental “impairment” results in the individual being separated

the . . . impairment or condition. Unsurprisingly, adherents to this approach who wish to improve the lives of disabled people will seek to do so through measures targeted exclusively at the disabled individual . . . the emphasis of this approach is on adapting the individual so as to enable them to function in the world around them.

59. See Waterstone, *supra* note 23, at 2 (noting that the CRPD “formalizes a move away from treating people with disabilities through a medical lens and as objects of pity. [It] envisions people with disabilities as full citizens seeking to make their own decisions about their lives.”); EXCLUSION TO EQUALITY, *supra* note 8, at 4 (“[t]he drafters of this Convention were clear that disability should be seen as the result of the interaction between a person and his/her environment, that disability is not something that resides in the individual as the result of some impairment.”); and Palmer, *supra* note 23, at 555 (observing that “[r]ather than approach disability-related issues from the perspective of a medical view of disability or from the societal view of a barrier placed before the person with a disability, the [Convention] promotes and protects persons with disabilities by safeguarding the rights of these individuals as basic human rights.”).

60. See Kayess & French, *supra* note 5, at 5:

Historically, persons with disability have been treated as objects of pity and as burdens on their families and societies. According to this view, disability is a “personal tragedy.” Persons with disability are victims of great misfortune who are variously perceived as socially dead or better off dead, as passively coming to terms with a condition that will forever limit their activities, or as bravely and triumphantly overcoming these limitations by great mental or physical effort. The focus is on the “affliction” caused by the particular condition or impairment and the provision of cure, treatment, care and protection to change the person so that they may be assimilated to the social norm.

See also Stein, *Disability Human Rights*, *supra* note 23, at 86 (observing that under the traditional medical model, “people with disabilities are believed incapable of performing social functions because of medical conditions that impair various major life activities. As a consequence of this notion, disabled persons are either systematically excluded from social opportunity—such as receiving social welfare benefits in lieu of employment—or are accorded limited social participation—such as the case of educating disabled children in separate schools.”).

from or deprived of full involvement in social, economic, cultural, and political life. This view was heavily supported by advocates who argued that the impairment itself is not the limitation; rather, it is the way in which society marginalizes those with impairments that leads to the existence of a disability.⁶¹

This approach removes the sole focus on the person with the disability and places the obligation for change and adaptation on society as a whole.⁶² Indeed, the focus on universal design,⁶³ beneficial technology,⁶⁴ and

61. Or, as expressed by one observer, the approach adopted in the CRPD presumes that “collectively mandated decisions determine what conditions comprise the bodily norm in any given society. Thus, factors external to a disabled person’s limitations are really what determine that individual’s ability to function.” Stein, *Disability Human Rights*, *supra* note 23, at 86.

62. See Palmer, *supra* note 23, at 579, observing that, under the CRPD approach: [P]ersons with disabilities are no longer viewed as “objects” of charity . . . but rather as “subjects” with human rights, who are capable of claiming those human rights, making decisions for their lives . . . , and being active members of society. . . . [P]ersons with disabilities will no longer be viewed as objects of charity of social welfare or a burden on society, but rather will be viewed as active members of society with something to contribute in all areas of social, political, and cultural rights and who will have avenues to defend these rights, including complaint mechanism and advocacy groups.

See also Kayess & French, *supra* note 5, at 6 (noting that the traditional medical model “strongly reinforce[s] the idea that it is the impairment itself that causes the limitation, without recognizing the role of the social environment in disabling persons with impairments”) and Kanter, *Rights of Elderly People*, *supra* note 23, at 543 (noting that the traditional social welfare or medical models “portray the person with a disability as an object to whom benefits, treatment, and rehabilitation is provided, rather than a subject of the law’s protection.”).

63. CRPD, Article 2, defines “universal design” as “[t]he design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. [It] shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.” CRPD, Article 4 (1)(f) then obligates member states to “undertake or promote research and development of universally designed goods, services, equipment and facilities . . . which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.”

64. The CRPD suggests that this technology would include “information and communication technologies, mobility aids, devices, and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.” CRPD, Article 4 (g).

improved accessibility⁶⁵ that are championed by the CRPD are undeniably good not just for those with the disability but for all. They are likely to lead to fuller participation by those with disabilities in all aspects of society. Equally important, they are also more likely to lead to that fuller participation alongside those without disabilities rather than in a separately accommodated time, place, or role.

On the other hand, though, this approach means that the CRPD is nearly silent with respect to prevention of, or progress toward ameliorating disabilities. Indeed, “the specific term ‘rehabilitation’ has mostly vanished”⁶⁶ from the CRPD, and “the goal of ‘prevention,’ particularly ‘primary prevention,’ has been distinctly eliminated from the Convention.”⁶⁷ When the statistics show a stunning correlation between disabilities and poverty,⁶⁸ it should be obvious that prevention of avoidable disabilities should also be viewed as a worthy goal. Indeed, as a factual matter:

Much disability could be prevented through measures taken against malnutrition, environmental pollution, poor hygiene, inadequate prenatal and postnatal care, water-borne diseases and accidents of all types. The international community could make a major breakthrough against disabilities caused by poliomyelitis, tetanus, whooping-cough and diphtheria, and to a lesser extent tuberculosis, through a worldwide expansion of programmes of immunization.⁶⁹

65. This would, under the CRPD, include not only physical accessibility but also accessibility in the context of access to information. CRPD, Article 4(h). As explained more fully, this expansive view includes “appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and other communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and rural areas.” CRPD, Article 9 (1).

66. Ribet, *supra* note 23, at 157.

67. *Id.* (noting that the CRPD “emphasize[s] the individual rights of persons with disabilities to equal access to resources and public spaces, and to equal treatment under law, without any interventionist agenda”).

68. See Waterstone, *supra* note 23, at 3 (“[P]eople with disabilities have generally poorer health, lower education achievements, fewer economic opportunities, and higher rates of poverty than people without disabilities.”) and On Line Consultation, *supra* note 18, at 8 (“Addressing the root causes of marginalization, such as institutionalization and poor access to education, are essential long term strategies to ensure disability inclusion in development.”).

69. Ribet, *supra* note 23, at 175 (quoting UNITED NATIONS ENABLE WEBSITE ON WORLD PROGRAMME OF ACTION CONCERNING DISABLED PERSONS, <http://www.un.org/disabilities/default.asp?id=23> (last visited Nov. 24, 2013)).

In spite of this, “while Article 25 of the Convention discusses the healthcare rights of persons with disabilities, all recognition that healthcare access and state investment in healthcare is essential in preventing the origin, exacerbation, or escalation of disability disappears.”⁷⁰ This is unfortunate as it underestimates the value of pursuing treatment and prevention while, at the same time, making society more open to and inclusive of all.

While in the past, the relentless search for a quick fix or “cure” may have had mixed or questionable motives,⁷¹ the negative view of prevention and amelioration fostered by the CRPD seems unwarranted or overstated.⁷² It is an understandable counter-reaction to distorted attitudes of the past. But, by presuming an inherent contradiction between acceptance and amelioration, the CRPD sets up a false conflict that may harm rather than help the progress it desperately and admirably seeks to advance. It has been reported that “[t]he causes of disability vary, but they include social and economic deprivation, malnutrition, violence, and warfare. That is, human rights violations can lead to disability, and having a disability exposes one to a high risk of further human rights violations.”⁷³ In light of this then, while it is true that tackling social, political, cultural, educational and economic barriers is a worthy step toward progress,⁷⁴ it is equally true that tackling the underlying causes of disabilities themselves—including the medical causes—can lessen these same deprivations and barriers. The persistence of the CRPD in maintaining a divide between these two realities limits its true potential.

In a similar vein, the CRPD’s steadfast rejection of the medical/charitable model means that it regrettably fails to provide much guidance on the rights of those whose disabilities are so profound that lifelong care and support are

70. Ribet, *supra* note 23, at 183.

71. See Palmer, *supra* note 23, at 576 (critiquing the medical model as one that “reinforced paternalistic attitudes about those with disabilities.”).

72. Others have previously raised this concern. See Kayess & French, *supra* note 5, at 7 (noting that the modern social model for viewing disabilities “has been critiqued for its failure to recognize and address the genuine issues that individuals face due to impairment, and not disability, in terms of health, well-being and individual capacity.”).

73. Quinn, *supra* note 3, at 35. In addition, as the CRPD points out, there are “difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, color, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age, or other status.” CRPD, Preamble (p).

74. Indeed, CRPD Article 8 is largely devoted to discussion of “awareness-raising” on the theory that this will go a long way towards the elimination of barriers such as these.

required. The CRPD does not speak to these circumstances in any detail. Yet, in reality, the best intentions and the most advanced adaptations may still not be able to eliminate the effects of some physical and mental impairments. Virtually ignoring these scenarios in the CRPD leads to a failure to frame realistically the rights of those least able to protect themselves.

The CRPD considers “disability” in an extremely broad way.⁷⁵ This correctly reflects the reality that there is a wide variety of disabilities. This broad net may make the practical application of the CRPD far more difficult as the needs of people vary a great deal and the efficacy of rights protection varies. This may have been part of an intentional effort to keep the focus away from the individual and on society⁷⁶ since, in the opinion of some:

[T]o include a definition [of disability] would undermine the Convention’s commitment to the social model of disability that places responsibility for eradicating unequal treatment of people with disabilities on society, not on the person with a disability. It was seen as less important to decide who is and is not considered a person with a disability than it was to include language requiring actions by the state to alter its practices to become more inclusive of people with different abilities.⁷⁷

However, the CRPD may be more useful—or more practical to implement—if it recognized that exclusive reliance on the human rights model for protecting those with disabilities may be more beneficial to some than to others.

B. The CRPD Joins the Growing Number of Separate Human Rights Instruments, Thus Undercutting the Notion of “Universal” Rights

Second, the CRPD both reflects and contributes to a modern trend at the United Nations and in international law to develop separate human rights instruments for various subgroups. When the Universal Declaration of

75. See also CRPD WEBSITE, *supra* note 2 (“It adopts a broad categorization of persons with disabilities.”); Issue Paper, *supra* note 15 (acknowledging “wide variance of definitions, standards, and methodologies used to identify the conditions of persons with and without disabilities.”); and Palmer, *supra* note 23, at 574 (“[A] definition of disability was not included within the provisions of the Convention.”).

76. Palmer, *supra* note 23, at 574 (“[D]isability is not limited to the individual’s limitation or impairment, but rather the encompassing umbrella of [the Convention] sweeps into the ambit of disability the environment within which the person lives, works, and socializes.”).

77. Kanter, *Rights of Elderly People*, *supra* note 23, at 551.

Human Rights was promulgated in 1948,⁷⁸ it was, as the name suggests, intended to be an expression of those rights that should apply to all people in all places for all time. Naturally, articulation of universal rights—itsself no easy task—proved to be far easier than their implementation. Nevertheless, the aspiration was clear: the mere fact that one was human gave rise to an inalienable set of rights and “[a]rguably, there should be no need for treaties which seek to protect specific groups.”⁷⁹ This same theory of universality was part of the International Covenant on Civil and Political Rights⁸⁰ and the International Covenant on Economic, Social, and Cultural Rights.⁸¹

However, in recent times, the practical concept of universality has changed. Over the years, racial minorities,⁸² women,⁸³ children,⁸⁴ indigenous people,⁸⁵ and migrant workers,⁸⁶ have been the subject of separate human rights documents. Indeed, the CRPD refers to this history in its Preamble when it recites that it recalls:

The International Convention on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of

78. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

79. Kanter, *Rights of Elderly People*, supra note 23, at 548. *See also id.* at 548-49: The Universal Declaration of Human Rights was adopted in 1948 to protect all people. Arguably, if the Declaration of Human Rights was intended to protect the rights of all people, including the young and old, and those with and without disabilities, why are additional treaties needed. The answer seems obvious: because the Universal Declaration of Human Rights has not provided adequate protection for certain groups, including persons with disabilities.

80. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

81. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

82. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, U.N. GAOR, Supp. No. 14, U.N. Doc. A/6014 (Dec. 12, 1965).

83. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979).

84. Convention on the Rights of the Child, G.A. Res. 44/24, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989).

85. Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, Annex, U.N. DOC. A/RES/61/295 (Sept. 13, 2007).

86. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, Supp. No. 49, U.N. Doc. A/45/49 (Dec. 18, 1990).

Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁸⁷

In some ways, this development makes practical sense. It has long been argued that, ideals notwithstanding, those who are particularly vulnerable have been the least able to effectively assert the basic rights articulated in the Universal Declaration on Human Rights.⁸⁸ Indeed, commentators have

87. CRPD, Preamble (d).

88. See, e.g., Michael Ashley Stein & Janet E. Lord, *Enabling Refugee and IDP Law and Policy: Implications of the U.N. Convention on the Rights of Persons with Disabilities*, 28 *AZ. J. INTL. & COMPL.* 401, 424 (2011):

A core mandate of the CRPD is to clarify and make applicable existing general human rights obligations to the context of the lived experiences of persons with disabilities. This model served as the primary rationale for the drafting of a disability-specific treaty and arose due to the effective invisibility of disability rights, explicitly or programmatically from the protection accorded all persons under the existing international human rights system While in theory applicable to persons with disabilities, these regimes unhelpfully aggregate persons with disabilities amongst a broader group of “vulnerable” or “other” persons in need of protection.

Melish, *supra* note 3, at 44 (“The Convention represents . . . a global consensus that the architecture of the current human rights regime—despite its universal application to persons with disabilities and clear prohibitions of discrimination on the basis of disability—has proved ineffective in ensuring equal rights for persons with disabilities in practice. That is, persons with disabilities experience rights violations not only in the same ways those without disabilities do, but also – most abusively – in ways directly tied to their disabilities or in ways in fact justified by them.”); EXCLUSION TO EQUALITY, *supra* note 8, at III (“While the international human rights framework has changed lives everywhere, persons with disabilities have not reaped the same benefits.”); *id.* at 4 (“The decision to add a universal human rights instrument specific to person with disabilities was borne of the fact that, despite being theoretically entitled to all human rights, persons with disabilities are still, in practice, denied those basic rights and fundamental freedoms that most people take for granted.”); Chaffin, *supra* note 23, at 122-23 (“[A]lthough disabilities are technically covered under other existing conventions . . . disabilities are rarely addressed by either generally or specifically themed treaties. It is in this context that there exists a need for a convention that specifically applies to the human rights of people with disabilities.”); and Kanter, *Rights of Elderly People*, *supra* note 23, at 540 (“The Convention . . . was needed because for decades people with disabilities had been ignored by the international community as well as by their own countries.”).

suggested that it is because “none of the seven core . . . United Nations human rights treaties expressly protected people with disabilities”⁸⁹ that “only a handful of disability-based human rights claims have been asserted under these treaties.”⁹⁰ Thus, in this view, separate declarations *are* needed to focus attention on the gap between ideal and reality for vulnerable groups and to marshal resources, personnel, and—perhaps most importantly—attention,⁹¹ on those who have not had their rights universally protected. Indeed, New Zealand’s Ambassador Don MacKay, who chaired the Ad Hoc Committee that drafted the CRPD, himself expressed this ambivalence:

Theoretically . . . the existing human rights instruments apply to persons with disabilities, in just the same way that they do to everyone else. The reality, unfortunately, has not followed the theory. The existing human rights instruments have fallen far short in their protection of the human rights and fundamental freedoms guaranteed to persons with disabilities. This does not mean that States have deliberately avoided their obligations. But many of the obligations under other instruments are set out in quite a broad and generic way, which can leave grey areas for their practical implementation. . . .⁹²

Yet, in other important ways, promulgating separate declarations of rights for individual groups cuts against the notion of universality. As one commentator suggests: “At one level, there was no need for a new CRPD since the existing normative instruments were certainly capable of being applied in the context of disability.”⁹³ Others observe that the “mandate

89. Stein, *Quick Overview*, *supra* note 23, at 679. *See also* Ohanda, *supra* note 23, at 448 (arguing that the CRPD “was necessary because other human rights conventions and national laws had not addressed the rights of persons with disabilities.”).

90. Stein, *Quick Overview*, *supra* note 23, at 679. *See also* EXCLUSION TO EQUALITY, *supra* note 8, at 12 (observing that “persons with disabilities had underutilized the various protection mechanisms under those treaties.”).

91. *See* Lawson, *supra* note 23, at 583 (“The invisibility of disabled people as subjects of human rights law appears to be the principal explanation for the inability of disabled people to take full advantage of either system.”) and *id.* at 584 (“One of the principal arguments for a disability-specific convention . . . is that it will increase the visibility of disabled people in the human rights arena. It will draw attention to the fact that disabled people are holders of human rights and not merely recipients of welfare or charity.”).

92. U.N. ENABLE WEBSITE, STATEMENTS MADE ON THE ADOPTION OF THE CONVENTION, <http://www.un.org/disabilities/default.asp?id=155#nz> (last visited Nov. 21, 2013).

93. Quinn, *supra* note 3, at 38. *See also* Kayess & French, *supra* note 5, at 13, noting that as an historical matter, the United Nations had previously addressed disability issues

under which the [CRPD] was developed stipulated that the negotiating committee was not to develop any new human rights, but was to apply existing human rights to the particular circumstances of persons with disability.⁹⁴ The paradox, then, is that the creation of the CRPD, along with other conventions in its genre, adopts the view that it is only by creating separate covenants that universal rights can be best protected. A better approach—now no longer possible—might have been to revisit the Universal Declaration and to explore more fully what it means to implement those rights for all rather than to generate periodic and separate statements of rights. The practical reality, thus far, has been the observation that “there was little prospect of this application [to those with disabilities] unless the prodding of a wholly new legal instrument was added to the equation.”⁹⁵

Yet, it is fair to ask whether conceding too much to past experience results in an unintended admission that contradicts the basic premise of universal rights. As an alternative, would it have been wiser in all of these instances to revisit the basic core universal rights and elaborate more fully on how they might be applied more vigorously to all? The fragmented approach that now exists has the advantages of focus and specificity⁹⁶—but the disadvantage of perpetuating the “separate-ness” that lies at the historical root of so many violations of equality and dignity.

“by trying to interpret and apply existing core human rights instruments to persons with disability, and second, by developing a series of lesser policy and programmatic documents focused on the needs and rights of persons with disability.” A similar observation was noted in Lawson, *supra* note 23 (commenting that “[d]espite the general silence of these instruments in the issue of disability, the rights they confer are ‘universal’ in nature. They are rights conferred on all human beings, including those who are disabled, simply by virtue of their humanity.”).

94. Kayess & French, *supra* note 5, at 20. *See also id.* at n.100 (noting that “[t]his point was made repeatedly in the course of negotiations, was a feature of the rhetoric associated with its adoption and opening for signature, and now also permeates formative implementation dialogue and planning.”). *See also* EXCLUSION TO EQUALITY, *supra* note 8, at 5, claiming that the CRPD “does not recognize any new human rights of persons with disabilities, but rather clarifies the obligations and legal duties of states to respect and ensure the equal enjoyment of all human rights by all persons with disabilities.”

95. Quinn, *supra* note 3, at 38-39.

96. These advantages are not to be underestimated. *See* Lawson, *supra* note 23, at 584, who noted that “a disability-specific convention . . . will provide clarity and focus. It will articulate precisely how general rights conferred . . . take concrete form in the context of disability.”

C. The CRPD Does Not Protect Pre-Born Persons With Disabilities From Discriminatory Treatment

Third, and most problematic in a practical rather than theoretical way, the CRPD is deceptive about its defense of the “right to life” for those with disabilities.⁹⁷ This right is boldly stated, without any qualifications, at the start of Article 10, which declares: “[E]very human person has the inherent right to life.”⁹⁸ This would seem to be as clear and unequivocal a statement as it can be. Indeed, such a bold declaration is, unfortunately, much needed because the threats to the lives of those with disabilities are numerous and often fatal:

Evidence suggests that the lives of these people are often not protected or valued to the same degree as those of non-disabled people. There are indications that, in some countries, 90% of disabled people die before they reach the age of 20. This is partly due to factors such as neglect and inadequate medical care. However, deliberate practices (often unofficial), which have the effect of bringing the lives of disabled people to an end, appear to operate in many countries all over the world. These include withholding care or food from a newly born child or an adult unable to communicate and withholding life-saving treatment. Such practices sometimes result from misplaced medical judgments about best interests or quality of life which undervalue the lives of disabled people. Nevertheless, more overtly eugenic arguments often based on the non-personhood of severely disabled people or the best interests of themselves or their families continue to be made.⁹⁹

But, Article 10 then goes on to say that this right to life is to be protected, “to ensure its effective enjoyment by persons with disabilities on an equal basis with others.”¹⁰⁰ Herein lies the heart of the problem.¹⁰¹ In spite of this broad declaration, “there are some pro-abortion advocates who demand that

97. For a thoughtful analysis of this question, with a detailed focus on the “legislative history” of the CRPD’s Article 10, see generally Bret Shaffer, Comment, *The Right to Life, the Convention on the Rights of Persons with Disabilities, and Abortion*, 28 PENN. ST. INT’L L. REV. 265 (2009).

98. CRPD, Article 10.

99. Lawson, *supra* note 23, at 570-71.

100. CRPD, Article 10.

101. One of the most complete and well-researched commentaries on this issue may be found in RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD (2009).

the human rights of children at risk of abortion because of disabilities be dismissed on the grounds that they are not ‘persons.’”¹⁰²

In many nations, the right to life only begins to apply when an individual is safely born, but not before. Thus, while after birth the CRPD correctly protects the rights of those with disabilities, it is silent on this issue with respect to the right to life prior to birth. Yet, it is well known that a prenatal diagnosis of a disability often leads to a decision to abort the unborn child at a far higher rate than those decisions are made with respect to those with no prenatal diagnosis of a disability.¹⁰³ In the CRPD, this particular threat to life—disproportionately and with open discrimination directed at those with disabilities—is left entirely unaddressed. Thus, this continues to allow a prenatal diagnosis of a disability to be a death sentence for one who, once born, might benefit greatly from all that the CRPD promises with respect to full participation in all aspects of society.¹⁰⁴

Indeed, this is the primary reason that the Holy See—long a vocal proponent of the dignity of those with disabilities¹⁰⁵—did not ratify the

102. JOSEPH, *supra* note 101, at 149. *See also id.* (“Regrettably, there is a large and still growing academic literature that has sought pervasively to re-define ‘persons’ in such a way as to reject the unborn child.”).

103. *See* JOSEPH, *supra* note 101, at 144 (“[I]n many countries there is a concerted scheme to remove legal protection from children at risk of abortion because they have detectable disabilities. A global campaign for decriminalization of these and all other abortions is being waged by a number of UN and non-government organizations.”); *id.* at 146 (noting that “in many parts of the world, about 90% of children detected through prenatal testing to have one of these disabilities [Down Syndrome and Spinal Bifida] are aborted”); Jaime L. Natoli, et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995-2011)*, 32 *PRENATAL DIAGNOSIS* 142, 150 (2012) (concluding “that the weighted mean termination rate following a prenatal diagnosis of Down Syndrome was 67%, with a range of 91% - 93%. . . . [T]ermination rates vary according to maternal age and race and gestational age.”); and Lori M. Gauron et al., *An Exploration of Women’s Reasons for Termination Timing in the Setting of Fetal Abnormalities*, 88 *CONTRACEPTION* 109 (2013) (“At least 3% of pregnancies are affected by a structural or genetic fetal abnormality, and greater than 80% of women choose pregnancy termination in this setting.”).

104. *But see* JOSEPH, *supra* note 101, at 143, arguing that the CRPD “has clear application to children at risk of abortion on the grounds of disability.” However, while this may be true as an aspirational matter, in practice this is not the case.

105. *See* Chad Marsen, *The Holy See’s Worldwide Role and International Human Rights: Solely Symbolic?*, 86 *U. DET. MERCY L. REV.* 659, 680 (2009) (“In a special homily on the 25th anniversary of the Declaration on the Rights of the Disabled on December 3, 2000, Pope John Paul II emphasized the rights, equality, and inviolable dignity of disabled persons.”); *id.* at 681 (“[T]he inclusion of the language ‘reproductive

CRPD. In declining to ratify, the Holy See's representative reaffirmed strong support for the goal of the CRPD:

Protecting the rights, dignity, and worth of persons with disabilities remains a major concern for the Holy See. The Holy See has consistently called for disabled individuals to be completely and compassionately integrated into society, convinced that they possess full and inalienable human rights. . . . For far too long, and by far too many, the lives of people with disabilities have been undervalued or thought to be of a diminished dignity and worth.¹⁰⁶

Yet, even with this support stated clearly on the record, the Holy See declined to ratify the CRPD, regretting that “[i]t is surely tragic that, wherever fetal defect is a precondition for offering or employing abortion, the same CRPD created to protect persons with disabilities from all discrimination in the exercise of their rights, may be used to deny the very basic right to life of disabled unborn persons.”¹⁰⁷

Secular commentators have noted this inconsistency as well, observing that Article 10, while proclaiming a “right to life” still “remains silent on genetic science aimed at the elimination of impairment-related human diversity and on pre-birth negative selection of fetus with identified or imputed impairment. The failure of the [CRPD] to speak directly to this and

health’ led the Holy See to decline signing the Convention.”); and H.E. Archbishop Celestino Migliore, Statement to the Ad Hoc Committee on the Protection and Promotion of the Rights of Persons with Disabilities (June 19, 2003), <http://www.holyseemission.org/statements.aspx?id=204>:

The richness of a person with disabilities constantly challenges all of society, calling all people and their political institutions to open themselves to the mystery of life presented by disabilities. The person with disabilities has every right to be a subject and an active agent in the everyday affairs of human existence. These persons are rich in humanity. Each has rights and duties like every other human being.

See also id. (“Solidarity with the disabled will also ensure furthering of the common good. And it is the common good which fosters right relationships amongst all peoples so that true justice may be achieved.”).

106. H.E. Archbishop Celestino Migliore, Address on Intervention by the Holy See at the 76th Plenary Meeting of the General Assembly of the United Nations on Human Rights and Fundamental Freedoms (Dec. 13, 2006), [http://www.Vatican.va/roman_curia/secretariat_state/2006/documents/rc_seg-st_20061213un-rights-persons_\[hereinafter 2006 Migliore Statement\]](http://www.Vatican.va/roman_curia/secretariat_state/2006/documents/rc_seg-st_20061213un-rights-persons_[hereinafter%202006%20Migliore%20Statement].).

107. *Id.* The Holy See’s objection ended by concluding “the positive potential of this Convention will only be realized when national legal provisions and implementation by all parties fully comply with article 10 on the right to life for disabled persons.” *Id.*

some other bioethical issues may come to be regarded as its' greatest failing."¹⁰⁸ As another observed,

A State Party's human rights obligation to provide prenatal care *of the same quality* for children with disabilities is being breached when the State permits "invasive diagnostic tests" that lead in 90% of "positive diagnostic tests" to selective abortion. These children are denied their *right to life, survival and development to the maximum extent possible*. As an intended outcome, selective abortion *per se* is seriously incompatible with prenatal care *of the same quality* for children with disabilities as for children without disabilities.¹⁰⁹

The decision to leave the phrase "right to life" undefined—and, therefore, meaningless as applied to preborn persons with disabilities—was likely an intentional decision.¹¹⁰ Yet, the "'right to life' lacks meaning if it is not clear at what point in life that right begins to apply."¹¹¹

This dichotomy resurfaces again in Article 25 of the CRPD which provides that States Parties are required to: "Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes."¹¹² Yet, this section does not define precisely what is meant by "sexual and reproductive health."¹¹³ This was viewed by many commentators as further evidence that, in those nations that included

108. Kayess & French, *supra* note 5, at 29.

109. JOSEPH, *supra* note 101, at 153 (emphasis in original).

110. Shaffer, *supra* note 97, at 287:

Ultimately, the "right to life" article does not express any opinion on abortion. It simply reflects the uncertainty and compromise of society as a whole. Though this means that the "right to life" article fails to give a precise definition of the "right to life" and what such a right means for abortion, the complexity of the phrase's history within the CRPD urges us to hesitate before grounding practice in assumptions on the meanings of terms of art.

111. Shaffer, *supra* note 97, at 266.

112. CRPD, Article 25 (a).

113. The debate over the meaning of "reproductive health" in this context is discussed more fully in Kanter, *The Promise and Challenge*, *supra* note 3, at 305. In addition, at the time this particular article of the CRPD was being drafted, "[t]he pro-life coalition asked why is 'reproductive health' the only category of health care not specific to disability singled out in this treaty when the expressed purpose is intended to ensure disabled persons rights on an equal basis with others, not to create any new rights?" Jeanne E. Head, *Pro-Life Forces Had Significant Impact on Text of UN Disabilities Treaty*, 33 N.H. RIGHT TO LIFE NEWS, 2006 WLNR 245 17560 (Sept. 1, 2006).

abortion as part of “reproductive health,” there would be no protection for vulnerable unborn persons with disabilities.¹¹⁴ While a number of nations entered interpretations of Article 25(a) to exclude the possibility of creating rights to abortion,¹¹⁵ this was also unaddressed in the final version of the CRPD. Thus, the vulnerability of those with disabilities diagnosed prior to birth remains an enormous, tangible failing of the CRPD.¹¹⁶

In a particularly poignant paragraph in Article 18, the CRPD requires that: “[C]hildren with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.”¹¹⁷ This is poignant because only a slight imagination is needed to understand the circumstances that gave rise to this requirement.¹¹⁸ The vulnerability of newborn infants with disabilities—disabilities that may lead to their parents’ failure to register or name them—exists to a far greater

114. See Head, *supra* note 113 (“[I]n the past, the committees charged with enforcing compliance to other UN Treaties which do not contain the term ‘reproductive health’ have frequently gone beyond their mandate and pressured States Parties to legalize abortion.”).

115. See Shaffer, *supra* note 97, at 269, n.18, indicating that these delegations included those from the Marshall Islands, Egypt, Peru, Iran, Honduras, Nicaragua, Libyan Arab Jamahiriya, Costa Rica, Uganda, the Philippines, El Salvador, and the Holy See, in addition to the United States. The words of the Holy See’s interpretation are typical. In the statement declining to ratify the CRPD, the Holy See representative explained that “the Holy See understands access to reproductive health as being a holistic concept that does not consider abortion or access to abortion as a dimension of those terms.” 2006 Migliore Statement, *supra* note 106.

116. See JOSEPH, *supra* note 101, at 156 (“Abortion is the antithesis of respect for the child’s integrity in the womb. . . . [T]here is no method of aborting a child with disabilities that is consistent with the child’s right to respect for his physical and mental integrity on an equal basis with others i.e., others who are not aborted.”).

117. CRPD, Article 18 (2).

118. While there is very little commentary on this provision in the context of the CRPD, a similar provision is included in the Convention on the Rights of the Child. In the commentary on that provision, it was observed that “Children with disabilities are disproportionately vulnerable to non-registration at birth. . . . Children with disabilities who are not registered at birth are at greater risk of neglect, institutionalization, and even death.” United Nations, *Report of the Committee on the Rights of the Child*, 39 (July 16, 2008) (on file with the author). See also United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HR1/GEN/1/Rev. 8, at 443 (May 8, 2006) (“[C]hildren who are sick or disabled are less likely to be registered in some regions. . . . [A]ll children should be registered at birth, without discrimination of any kind.”)

extent prior to birth. Indeed, the United Nations Enable website itself cites the shocking report that:

Mortality for children with disabilities may be as high as 80 per cent in countries where under-five mortality as a whole has decreased below 20 per cent, says the United Kingdom's Department for International Development, adding that in some cases it seems as if children are being "weeded out."¹¹⁹

As medical science advances, there can be no doubt that the prenatal detection of physical and mental impairments will become ever more efficient, accurate, and early.¹²⁰ Thus, the need to protect those with a prenatal diagnosis of a disability will become ever more urgent. Otherwise, "it is sadly ironic that a treaty aimed at securing recognition of the dignity of some (the disabled) would be written so as to put at jeopardy the dignity of others (the unborn)."¹²¹ Not only is this ironic but it lacks logic in the most tragic of ways. Indeed:

It is the irrational nature of human prejudice that we claim to be able to respect the human rights of those who are 'permitted' to be born with disabilities while at the same time showing contempt for those selected for abortion. Yet this is nonsense. The two concepts, and contempt, are logically incompatible.¹²²

D. The CRPD Offers No Protection for the Religious Freedom of Persons with Disabilities

Fourth, while the CRPD defines a long and seemingly comprehensive list of rights to which a disabled person is entitled, and for which there should be

119. Enable Fact Sheet, *supra* note 32.

120. The development of, and implications of, prenatal diagnosis are explained more fully in Deborah Pergament, *What Does Choice Really Mean?: Prenatal Testing; Disability, and Special Education Without Illusions*, 23 HEALTH MATRIX 55 (2013).

121. Bill Saunders & Stephanie Maloney, *Hidden Abortion Agenda in UN Convention on Disability Rights*, LIFE NEWS.COM, (July 20, 2012), <http://www.lifenews.com/2012/07/20/hidden-abortion-agenda-in-un-CRPD-on-disability-rights> (last viewed June 20, 2013). *See also id.*, arguing that "[d]espite its attractive and seemingly innocuous title, the CRPD represents yet another push to ensconce abortion rights in an international treaty."

122. JOSEPH, *supra* note 101, at 157. *See also* Pergament, *supra* note 120, at 76 (noting that the disability rights critique of abortion "holds that using prenatal genetic tests has pernicious effects on the lives of existing disabled people by expressing a hurtful view of them and reducing human diversity – with the ultimate result of hindering the societal goal of recognizing and promoting equality.").

comprehensive protections,¹²³ the right to protection of freedom of religion is noticeably absent. It is unclear whether this omission was inadvertent or deliberate.¹²⁴

123. See, e.g., CRPD, Article 5 (1) (“States Parties recognize that all persons are equal before and under the law and are entitled without discrimination to the equal protection and equal benefit of the law.”); *id.*, Article 12 (1) (“States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.”); *id.*, Article 12 (2) (“States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”); *id.*, Article 12 (5) (“States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages, and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”); *id.*, Article 13 (“States Parties shall ensure effective access to justice for persons with disabilities.”); *id.*, Article 14 (1) (“States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily. . . .”); *id.*, Article 15 (“No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”); *id.*, Article 16 (“States Parties shall take all appropriate . . . measures to protect persons with disabilities . . . from all forms of exploitation, violence and abuse.”); *id.*, Article 18 (1) (“States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality.”); *id.*, Article 19 (a) (“Persons with disabilities have the opportunity to choose their place of residence and where and with whom they will live on an equal basis with others.”); *id.*, Article 21 (“States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the right to seek, receive, and impart information and ideas on an equal basis with others. . . .”); *id.*, Article 22 (“No person with disabilities . . . shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or any other types of communication or to unlawful attacks on his or her honor or reputation.”); *id.*, Article 23 (1) (a) (“The rights of all persons with disabilities who are of marriageable age to marry and found a family on the same basis of free and full consent of the spouses is recognized.”); *id.*, Article 23 (1) (b) (“The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided.”); *id.*, Article 24 (“States Parties recognize the rights of persons with disabilities to education.”); *id.*, Article 25 (“States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.”); *id.*, Article 27 (“States Parties recognize the right of persons with disabilities to work, on an equal basis with others.”); *id.*, Article 28 (“States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing,

Throughout, the CRPD casts a broad net in articulating rights and it “represents a new model which invokes the inclusion of human, civil and political rights together with social, economic, and cultural rights.”¹²⁵ It was intended to “address the full panoply of civil, political, economic, and social rights through the lens of disability.”¹²⁶ The breadth of the rights articulated by the CRPD has been widely and positively commented on, as observers have called it:

[A] holistic human rights treaty. It combines the type of civil and political rights provided by anti-discrimination legislation . . . with the full spectrum of social, cultural, and economic measures bestowed through equality measures. Broadly stated, first-generation rights are thought to include prohibitions against state interference with rights that include life, movement, thought, expression, association, religion, and political participation Second generation rights focus on standards of living such as the availability of housing and education. These are thought of as “positive rights.”¹²⁷

Certainly, many of the rights included in the listing of basic human rights are fundamental and classic “first generation” human rights that lie at the core of human dignity. Conversely, the CRPD also articulates as rights

and to the continuous improvement of living conditions.”); *id.*, Article 29 (“States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others.”); and *id.*, Article 30 (1) (“States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life.”).

124. However, it has been pointed out by previous observers that, in other contexts, the protection of religious rights has not been without controversy and, in some cases, it has been protected in a lukewarm way. *See generally* Sylvie Langlaude, *Children and Religion Under Article 14 UNCRC: A Critical Analysis*, 16 INT’L J. CHILDREN’S RIGHTS 475 (2008); David R. Hodge, *Advocating for the Forgotten Human Right: Article 18 of the Universal Declaration of Human Rights—Religious Freedom*, 49 INT’L SOC. WORK 431 (2006); M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR*, 17 DUKE J. COMP. INT’L L. 91 (2006); and Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARVARD J. L. PUB. POL. 81 (2003).

125. Kanter, *Rights of Elderly People*, *supra* note 23, at 572. *See also* Stein, *Disability Human Rights*, *supra* note 23, at 77 (“[D]isability based human rights necessarily invoke both civil and political . . . rights, as well as economic, social, and cultural . . . rights to a greater degree than previous human rights paradigms.”).

126. Jennifer W. Reiss, *The Convention on the Rights of Persons with Disabilities in the Post-Lisbon European Union*, 19 HUM. RTS. BRIEF 18, 19 (2012).

127. Stein, *Quick Overview*, *supra* note 23, at 679-80.

many things that would not be considered core elements of a traditional framework of basic rights. For example, rights to such things as museums,¹²⁸ sports,¹²⁹ television and cinema¹³⁰ are specifically mentioned in the CRPD as necessary to fully advance the human dignity of those with disabilities.

In light of this, then, it is unclear why freedom of religion—a classic “first generation” human right—was ignored.¹³¹ Indeed, “[a]lthough ranking human rights is problematic, religious freedom has long been considered one of the most basic rights.”¹³² For example, Article 18 of the International Covenant on Civil and Political Rights frames the right to religious freedom very broadly:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.¹³³

The CRPD does raise concern about circumstances in which someone with a disability is “subject to multiple or aggravated forms of

128. CRPD, Article 30 (1) (c) (stressing the importance of access to “theatres, museums, cinemas, libraries and tourism services”).

129. CRPD, Article 30 (1) (5) (a) (b) and (c) (addressing various aspects of sports and recreational facilities).

130. CRPD, Article 30 (1) (b) (establishing the right of those with disabilities to “[e]njoy access to television, programmes, films, theatre”).

131. While this issue seems not to have been addressed in the scholarly literature, in the analogous contexts of the religious rights of other groups, a similar reticence can be observed. *See e.g.*, Langlaude, *supra* note 124, at 475 (“[T]he religious rights of the child have attracted little attention.”).

132. Hodge, *supra* note 124, at 432. *See also* Hasson, *supra* note 124, at 89 (“Religious freedom is not merely one of many rights, but the prototypical human right.”). For a fuller discussion of religious liberty in international law *see generally* Kendal Davis, Note, *The Veil that Covered France’s Eyes: The Right to Freedom of Religion and Equal Treatment in Immigration and Naturalization Proceedings*, 10 NEV. L. J. 732, 747-761 (2010).

133. International Covenant on Civil and Political Rights, *supra* note 80, Article 18.

discrimination on the basis of race, colour, sex, language, *religion*, political or other opinion, national, ethnic, indigenous, or social origin, property, birth, age, or other status.”¹³⁴ Thus, in this sense, religion is mentioned. There are also references made to the importance of “autonomy and independence”¹³⁵ as well as “the right to freedom of expression and opinion.”¹³⁶ Interpreted broadly, perhaps these can be construed to include religious expression since this is closely related to autonomy, independence and expression.

Yet, it is unclear why such a basic right was otherwise unaddressed fully and clearly. For so many, the freedom of religious exercise—both in public liturgy, private worship, communal prayer, and the living out of faith in everyday life—is a core aspect of their very identity and existence.¹³⁷ Indeed, this “multifaced right”¹³⁸ has been summarized as including: “a) [T]he right to believe, worship and witness; b) the right to change one’s belief or religion and; c) the right to join together and express one’s beliefs.”¹³⁹ This is no less true for those with disabilities than it is for anyone else. Indeed, for many who suffer with that which is unexplainable, it may be their religious faith that is a primary source of strength and solace as it “involves core inner convictions about ultimate metaphysical concerns.”¹⁴⁰ Nowhere in the CRPD, however, are basic rights to pursue religious freedom addressed.¹⁴¹ Many basic questions related to religious exercise go unanswered, including:

134. CRPD, Preamble (p) (emphasis added).

135. CRPD, Preamble (n).

136. CRPD, Article 21.

137. See e.g., Langlaude, *supra* note 124, at 500 (“[R]eligion can be an important element of people’s lives.”); *id.* (“[R]eligion and belief are not irrational “add-ons” to the human condition which the rational state does best to marginalize, but are often core components of the make-up and sense of identity of individuals and the composition of societies of which they form a part.”) (quoting Malcolm Evans); Hodge, *supra* note 124, at 432 (“Violations of religious freedom are often experienced as particularly severe violations of human dignity because they infringe on the most sacred area of a person’s being.”); and Hassan, *supra* note 124, at 91 (“[T]he human desire to seek the truth, and especially religious truth, cannot be overlooked, much less eliminated. Everyone is a religious thinker.”).

138. Hodge, *supra* note 124, at 432.

139. *Id.*

140. *Id.*

141. As was argued in the context of children, “[r]eligious freedom should be much more of an issue and should not be relegated to the side.” Langlaude, *supra* note 124, at 500. See also Hodge, *supra* note 124, at 432 (“[R]eligious freedom has been largely

- The right of those with disabilities to rely on religious beliefs in selecting medical treatment.
- The rights of those with disabilities to insist that a residential or medical facility in which they live offer ample opportunity to participate in religious activities.
- The rights of those with disabilities to select their own religious practices and observances when they differ from those of their families or guardians.
- The rights of those with disabilities to pastoral care as well as medical and other care.

The CRPD speaks at great length about fostering an “attitude of respect”¹⁴² and to “foster respect for the rights and dignity of persons with disabilities.”¹⁴³ While not universally true, in many places it is precisely religious organizations who take the lead in proclaiming the dignity of each human person regardless of disability. Indeed, it is often religious groups and individuals with deep religious convictions who provide loving, selfless day-to-day care for those with disabilities who are unable to completely care for themselves. Yet, disappointingly, the need to protect religious exercise is not mentioned in this landmark document.

CONCLUSION

In many important ways, the CRPD was a call to the conscience of the world. In broad strokes it spelled out a vision of the world in which the inherent dignity of all is respected in a way that, sadly, has not always been the case. Yet, in spite of its high aspirations, the CRPD falls short in four critical ways. In the months to come, the CRPD will be getting renewed attention on both the world stage and domestically. Perhaps during these new turns in the spotlight, the CRPD’s limitations may be examined honestly and openly not only by its critics, but also by those who desperately want to see its lofty promises realized fully, quickly, and well.

ignored in recent years. . . . Indeed, religious freedom has been referred to as the forgotten human right.”).

142. CRPD, Article 8 (2) (b).

143. CRPD, Article 8 (1) (a).