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# THE LAW AND POLITICS OF US PARTICIPATION IN THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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## 1. INTRODUCTION

On July 30, 2009 the United States signed<sup>5</sup> the United Nations Convention on the Rights of Persons with Disabilities (CRPD, or Convention),<sup>6</sup> reversing the Bush administration's eight years of general disengagement with the CRPD.<sup>7</sup> America's self-professed global leadership in the area of disability law<sup>8</sup> – a

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<sup>5</sup> See Press Release, U.S. Dept. of Health and Human Services, Statement by Kathleen G. Sebelius Secretary of Health and Human Services on US Signing of the United Nations Convention on the Rights of Persons with Disabilities (30 July 2009), available at <<http://www.hhs.gov/news/press/2009pres/07/20090730a.html>> (accessed 11 May 2010); UN Applauds Decisions of United States to Join Landmark Disability Pact, UN News Center (31 July 2009), available at <<http://www.un.org/apps/news/story.asp?NewsID=31646&Cr=disab&Cr1=>> (accessed 11 May 2010).

<sup>6</sup> Convention on the Rights of Persons with Disabilities (CRPD), UNGA Res. 61/106 (13 December 2006) UN Doc A/61/611.

<sup>7</sup> See J.E. Lord and M.A. Stein, 'Ratify the UN Disability Treaty', *Foreign Policy in Focus*, 9 July 2009, available at <<http://www.fpif.org/fpiftxt/6247>> (accessed 11 May 2010).

<sup>8</sup> See, e.g., 155 Cong Rec S 8121, 8123 (27 July 2009) (Statement of Senator Tom Harkin on the Senate floor) ('Well, we should take pride in the fact the United States has always been a leader in ensuring the rights of individuals with disabilities.');

26 Weekly Comp. Pres. Doc. 1162 (26 July 1990) (Remarks by President George H.W. Bush upon signing the ADA) (Noting that the ADA 'is the world's first comprehensive declaration of equality for people with disabilities,' whose 'passage has made the United States the international leader on this human rights issue.');

reputation that historically is largely deserved<sup>9</sup> – raises the related questions of how comparable the Convention's terms are to domestic United States disability law, and consequently, the implications of ratifying the treaty. After discussing the concepts that foster but also limit disability-based legal rights in the United States, we offer some thoughts on the substance and consequences of American ratification.<sup>10</sup>

## 2. OVERVIEW OF AMERICAN DISABILITY LAW

Historically, and internationally, disability rights' advocates have argued for a social model of disability<sup>11</sup> that attributes a central role to the constructed environment and the attitudes that it reflects in creating what society labels as 'disability'.<sup>12</sup> This schema is in direct opposition to the medical model of disability that views persons with disabilities as inherently impeded from social participation and equality.<sup>13</sup> According to the social model, factors external to any given person's impairments determine how disabled she or he will be from functioning in society.<sup>14</sup> Disability laws and policies in the United States are

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137 Cong Rec S 10728 (24 July 1991) (remarks by Senator Paul Simon) ('the United States had, by virtue of enacting the ADA, become the world leader in establishing rights and opportunities for persons with disabilities. . . other countries are looking to us for leadership.')

<sup>9</sup> See M.A. Stein and P.J.S. Stein, 'Beyond Disability Civil Rights', 58 *Hastings Law Journal* 6 (2007), 1203.

<sup>10</sup> For a detailed and technical analysis, see National Council on Disability, *Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities (CRPD)*, 12 May 2008, available at <[http://www.ncd.gov/newsroom/publications/2008/pdf/ncd\\_crpd\\_analysis.pdf](http://www.ncd.gov/newsroom/publications/2008/pdf/ncd_crpd_analysis.pdf)> (accessed 11 May 2010).

<sup>11</sup> The framework derives from both British and American disability rights scholars. Some originate the social model theory with M. Oliver, *Social Work with Disabled People*, (Macmillan, 1983). See B.M. Altman, 'Disability Definitions, Models, Classifications, Schemes, and Applications', in G.L. Albrecht *et al.* (eds.), *Handbook of Disability Studies*, (Sage, 2001), 97 at 100 (citing Oliver as one of the disability theorists who proposed the social model).

<sup>12</sup> As explained by one of the American protagonists of the theory, the social model: is based on three major postulates: (1) the primary problems faced by disabled persons stem from social attitudes rather than from functional limitations; (2) all facets of the man-made environment are shaped or molded by public policy; and (3) in a democratic society, public policies represent prevailing public attitudes and values.

H. Hahn, 'Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas', 4 *Southern California Review of Law and Women's Studies* 1 (1994), 97 at 105.

<sup>13</sup> See generally K. Fries, 'Introduction', in K. Fries (ed.), *Staring Back: The Disability Experience From the Inside Out*, (Plume, 1997), at 6-7 (noting that 'this view of disability ... puts the blame squarely on the individual.').

<sup>14</sup> See, e.g., S. Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability*, (Routledge, 1996), at 39 ('the entire physical and social organization of

grounded in the social model,<sup>15</sup> and are expressed in terms of civil rights, within a non-discrimination framework.<sup>16</sup>

## 2.1. THEORETICAL UNDERPINNINGS

The social model is the dominant theme that has been advanced by the American disability rights movement to guide the formulation of disability law, policy and programming.<sup>17</sup> Because disability rights proponents in the United States view discriminatory attitudes toward citizens with disabilities as the central obstacle to mainstream integration,<sup>18</sup> they have expressed the social model of disability through a civil rights prism whose tenets parallel earlier advocacy on behalf of racial minorities and women.<sup>19</sup> Similarly, they have pursued an anti-discrimination approach modelled after previous civil rights statutes, most notably Title VII of the Civil Rights Act of 1964.<sup>20</sup> The most significant result of their advocacy efforts was the 1990 promulgation of the Americans with Disabilities Act (ADA),<sup>21</sup> which signaled the social model's legislative victory in the United States.<sup>22</sup>

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life' has been created with the able-bodied in mind.); A. Silvers, 'Formal Justice', in Anita Silvers *et al.* (eds.), *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy*, (Rowman and Littlefield, 1998), 13 at 75 (arguing that being biologically anomalous is only viewed as abnormal due to unjust social arrangements, most notably the existence of a hostile environment that is 'artificial and remediable' as opposed to 'natural and immutable').

<sup>15</sup> See A.M. Samaha, 'What Good is the Social Model of Disability?', 74 *University of Chicago Law Review* 4 (2007), 1251 at 1251 (noting the social model's 'causation story has been a message of the disability rights movement since the 1970s').

<sup>16</sup> See S.R. Bagenstos, *Law and the Contradictions of the Disability Rights Movement*, (Yale University Press, 2009), at 18-20 (asserting 'the social model had a clear policy payoff for disability rights activists, one that pointed . . . toward civil rights').

<sup>17</sup> See M.A. Stein, 'Disability Human Rights', 95 *California Law Review* (2007), 75 at 90.

<sup>18</sup> See, e.g., S.R. Bagenstos, "'Rational Discrimination", Accommodation, and the Politics of (Disability) Civil Rights', 89 *Virginia Law Review* (2003), 825 (equating, on moral grounds, intentional disability exclusion with other forms of disparate treatment).

<sup>19</sup> See generally J.V. Switzer, *Disabled Rights: American Disability Policy and the Fight for Equality*, (Georgetown University Press, 2003).

<sup>20</sup> See generally R.L. Burgdorf, Jr., "'Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability', 42 *Villanova Law Review* (1997), 409.

<sup>21</sup> 42 U.S.C. §12101 (2000).

<sup>22</sup> R.K. Scotch, 'Making Change: the ADA as an Instrument of Social Reform', in L. Pickering Francis and A. Silvers (eds.), *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions*, (Routledge, 2000), 275. Nevertheless, for strong criticism of the social model as normatively empty, see Samaha, 74 *University of Chicago Law Review* 4 (2007), 1251 at 1251 (averring that the social model 'has no policy implications').

At the time of the adoption of the ADA, Congress was presented with a catalogue of evidence on the historical exclusion of people with disabilities from American society.<sup>23</sup> As a result of that testimony Congress was persuaded that the overall status of Americans with disabilities was dismal, and concluded that the group historically was ‘relegated to a position of political powerlessness in our society’ and ‘continually encounter[ing] various forms of discrimination’.<sup>24</sup> Congress, moreover, stipulated that this exclusion arose from ‘unfair and unnecessary discrimination and prejudice’.<sup>25</sup> Hence, the ADA was premised on the social model’s belief that peoples’ functional limitations are caused by a socially constructed environment, such that the repercussions of having a disability are mutable.<sup>26</sup> To remedy that artificial exclusion, Congress enacted the ADA as a civil rights statute, mandating that persons with disabilities be treated equally to the general population.<sup>27</sup>

## 2.2. PRACTICAL LIMITATIONS

The American disability rights agenda has exerted a powerful influence in revising legal regimes affecting persons with disabilities.<sup>28</sup> Nonetheless, these measures – as expressed in United States law and policy – are limited. American social model advocacy is grounded in rigid formal justice notions that narrowly compel the treatment of similarly situated people as alike.<sup>29</sup> One result of this exclusive focus is the promulgation of civil and political rights through anti-discrimination statutes that do not encompass economic, social and cultural rights.<sup>30</sup> Accordingly, the ADA provides civil rights protection without equality

<sup>23</sup> Congress summarized its conclusions as to this evidence in the ADA’s Findings section. 42 U.S.C. § 12101 (2000).

<sup>24</sup> 42 U.S.C. § 12101 (a)(5) (2000); id. § 12101(a)(7).

<sup>25</sup> 42 U.S.C. § 12101(a)(3) (emphasis added).

<sup>26</sup> See generally H. Hahn, ‘Towards a Politics of Disability: Definitions, Disciplines, and Policies’, 22 *Social Science Journal* 4 (1985), 87.

<sup>27</sup> See M.A. Stein, ‘Same Struggle, Different Difference: ADA Accommodations as Anti-discrimination’, 153 *University of Pennsylvania Law Review* 2 (2004), 579 at 639.

<sup>28</sup> See, e.g., K.C. Heyer, ‘The ADA on the Road: Disability Rights in Germany’, 27 *Law and Social Inquiry* 4 (2002), 723; E. Besner, ‘Employment Legislation for Disabled Individuals: What can France Learn from the Americans with Disabilities Act?’, 16 *Comparative Labor Law and Policy Law Journal* (1995), 399. See also S.R. Bagenstos, ‘Comparative Disability Employment Law From an American Perspective’, 24 *Comparative Labor Law and Policy Journal* 4 (2003), 649 at 655-56 (noting ‘nations throughout the industrialized world are increasingly invoking the ADA as a model’).

<sup>29</sup> For perhaps the earliest exposition of this theory, see Aristotle, *Nicomachean Ethics* 118 § 1131a-b (Martin Ostwald trans., Prentice Hall, 1962) (professing that ‘[t]hings that are alike should be treated alike’).

<sup>30</sup> One scholar has suggested that while this may be the overt case due the way in which the American constitution is written, United States policy attempts to reach these otherwise neglected economic, social and cultural rights through legislative means. See, e.g., F.I. Michelman, ‘The Constitution, Social Rights, and Liberal Political

measures.<sup>31</sup> Put another way, civil rights are directed at ensuring equal treatment but not at equal opportunity, or, more comprehensively, robust substantive equality.<sup>32</sup> As a result, the ADA as well as other American statutory protections cannot bring about disabled citizens' full social inclusion.<sup>33</sup>

The full inclusion of a socially marginalized group requires invoking both negative and positive rights – which, of course are interrelated and interdependent.<sup>34</sup> Clearly – anti-discrimination prohibitions can prospectively prevent prejudicial harm in all spheres – political life, health, adequate standard of living, education, and employment, among others, while substantive equality measures are needed, in all spheres, to remedy inequities that exist due to past practices. Moreover, failing to counteract the unequal position of people with disabilities perpetuates their social stigma and the attitudes that maintain subordination. This is particularly so for the most socially marginalized among people with disabilities – those facing double discrimination (e.g., women and ethnic minorities with disabilities), and persons with intellectual and psychosocial disabilities.<sup>35</sup>

To illustrate the incomplete nature of United States disability policy, consider the effect of the absence of equality measures from the ADA. Title I, which contains strong anti-discrimination provisions, was intended as the most expedient method of bringing about social and economic equality for people

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Justification', 1 *International Journal of Constitutional Law* 1 (2003), 13 at 13-14 (highlighting the debate on whether social rights should be constitutionalized or remain to be seen as 'direct, regulatory legislation').

<sup>31</sup> A clever exception is S.R. Bagenstos, 'The Future of Disability Law', 114 *Yale Law Journal* 1 (2004), 1, which suggested that second generation type provisions be construed as part of the ADA's reasonable accommodation mandate.

<sup>32</sup> G. Quinn *et al.*, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*, (United Nations, 2002), at 20, (distinguishing the formal interpretation of equality which 'presupposes that burdens or benefits should not be invidiously distributed in society' from 'the concept of equality of opportunity which requires the State to play an active role in ensuring genuinely equal opportunities for all'), available at <<http://www.nhri.net/pdf/disability.pdf>> (accessed 11 May 2010).

<sup>33</sup> See Stein and Stein, 58 *Hastings Law Journal* 6 (2007), 1203 at 1212 (noting that since 'the means by which disabled Americans can obtain and keep gainful employment have not been provided ... the ADA cannot adequately ensure the inclusion of people with disabilities').

<sup>34</sup> It should be noted in this regard that the traditional conceptual divide between rights that require inaction (negative rights) and in theory can be relied on immediately with little outlay or necessity for proactive measures and rights that require active measures for implementation (positive rights) is increasingly regarded as outmoded and fundamentally unhelpful in understanding the holistic and interdependent nature of all rights, whether civil, political, economic, social or cultural. A. Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, (Hart Publishers, 2008), at 32.

<sup>35</sup> Economist Richard Burkhauser reached a similar conclusion from a non-legal perspective. See R.V. Burkhauser, 'Post-ADA: Are People with Disabilities Expected to Work?', 549 *The ANNALS of the American Academy of Political and Social Science* (1997), 71.

with disabilities.<sup>36</sup> Nevertheless, it took nearly a decade to adopt initiatives that allowed disabled persons receiving public assistance to maintain health care coverage while transitioning to employment, and then, only at proscribed minimal income levels.<sup>37</sup> During this period, and despite Senator Dole's efforts,<sup>38</sup> a leading proponent of such measures, no job training programmes were promulgated on behalf of disabled persons, although they were developed for other historically disadvantaged groups as part of overall dramatic welfare reforms.<sup>39</sup> Indeed, to date no systemic federal job programme exists on behalf of workers with disabilities to enable their access to the workplace.<sup>40</sup>

Thus, American workers with disabilities are not entitled to sundry accommodations that could achieve equal employment opportunities or to a variety of positive measures, such as vocational training and health care, that could ameliorate historic discrimination.<sup>41</sup> While the ADA forbids employment discrimination, the means by which disabled Americans can obtain and keep gainful employment have not been provided. As a result, the ADA cannot adequately ensure the inclusion of people with disabilities. This is evidenced empirically by the fact that post-ADA disabled Americans continue to experience disproportionately high rates of unemployment and poverty.<sup>42</sup>

<sup>36</sup> See S.R. Bagenstos, 'The Americans with Disabilities Act as Welfare Reform', 44 *William and Mary Law Review* 1 (2003), 921 (disability rights advocates sold the ADA to Congress in large measure as a means of increasing employment and thus decreasing public benefit dependence).

<sup>37</sup> R. Pear, 'Clinton Proposes Aid for Disabled Returning to Work', *N.Y. Times*, 30 November 1998) (highlighting then-President Clinton's proposal 'expanding Medicaid and Medicare to allow tens of thousands of people with various medical disabilities to retain health benefits when they return to work').

<sup>38</sup> B. Dole, 'Are We Keeping America's Promises to People with Disabilities? - Commentary on Blanck', 79 *Iowa Law Review* 4 (1994), 927.

<sup>39</sup> Cf. N.D. Zatz, 'From Welfare to What?', 57 *Hastings Law Journal* (2006), 1131 (questioning the salience of welfare to work initiatives in the absence of a clear understanding of what comprises 'work').

<sup>40</sup> Information on the voucher systems operating under the Ticket to Work and Work Incentives Improvement Act and the Workforce Investment Act, available at <<http://disability.law.uiowa.edu/index.htm>> (accessed 11 May 2010).

<sup>41</sup> See infra Part 3.A. See generally J.D.R. Craig and S.M. Lynk (eds.), *Globalization and the Future of Labor Law*, (Cambridge University Press, 2006).

<sup>42</sup> For example, the Cornell University Rehabilitation and Research Training Center on Disability Demographics and Statistics, 2005 *Disability Status Reports*, indicates that the 2005 employment rate among working age people with disabilities was 38%, and the poverty rate among the same group was 25%, available at <[http://www.ilr.cornell.edu/ped/disabilitystatistics/StatusReports/2005-pdf/2005-StatusReports\\_US.pdf?CFID=13754524&CFTOKEN=34477900](http://www.ilr.cornell.edu/ped/disabilitystatistics/StatusReports/2005-pdf/2005-StatusReports_US.pdf?CFID=13754524&CFTOKEN=34477900)> (accessed 11 May 2010). See also D.C. Stapleton and R.V. Burkhauser (eds.), *The Decline in Employment of People with Disabilities: A Policy Puzzle*, (WE Upjohn Institute for Employment Research, 2003) (collected econometric studies and policy essays).



### 3. CONSEQUENCES OF UNITED STATES RATIFICATION

By considering CRPD ratification, the United States has begun an introspective review of currently prevailing laws, policies, and practices. One result – even absent ratification – ought to be better comprehension of the various disjunctures between federal policies and aspirations. Moreover, even absent ratification, the act of signing the CRPD and commencing the ratification process has triggered dialogue across the federal government that can serve as an impetus for better compliance and policy invigoration.<sup>43</sup> Externally, ratification would signal a return by America to being an active participant in international affairs generally. It also would restore the United States to its leadership role in the field of disability law.

#### 3.1. INTROSPECTIVE REVIEW

The CRPD holistically combines civil and political rights with economic, social, and cultural rights in an effort to manifest the Vienna Declaration's notion that human rights are truly 'indivisible and interrelated and interconnected'.<sup>44</sup> In terms of substance, the Convention's aims are consistent with that of United States disability law and policy. Indeed, the core principles articulated in the CRPD are firmly embedded in American disability law – respect for human dignity, non-discrimination and autonomy, reasonable accommodation, and participation.<sup>45</sup>

Where gaps arise between the two sets of legal mandates, they do so because United States domestic civil rights laws (including those relating to disability) and international human rights laws operate from distinct, although not mutually exclusive perspectives. Thus, as an overall matter United States law can be viewed as either being of a level with the CRPD's mandates, or capable of reaching those levels through more rigorous implementation and/or additional legislative action.<sup>46</sup> To return to the example of employment,<sup>47</sup> an obvious gap exists in coverage between American federal disability law and policy and the CRPD as it relates to the promotion of employment opportunities. Yet there is no reason to believe that by providing measures that support the ADA's strong anti-discrimination prohibitions, the United States could not approximate the CRPD's more comprehensive scheme. These measures might include some combination

<sup>43</sup> For example, the administration of George W. Bush, after initially stepping back from the negotiation process of the CRPD, 'reinitiated active engagement in the substantive drafting' of the treaty under pressure from both domestic constituencies and members of the United States House of Representatives. See T.J. Melish, 'From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies', 34 *Yale Journal of International Law* 2 (2009), 389 at 398.

<sup>44</sup> World Conference on Human Rights, 14-25 June 1993, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (12 July 1993), para. 5.

<sup>45</sup> Many of these themes were first articulated by disability rights advocate and political scientist, Jacobus tenBroek. See M.A. Stein and J.E. Lord, 'Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities', 13 *Texas Journal on Civil Liberties and Civil Rights* 2 (2008), 167.

<sup>46</sup> See National Council on Disability, *Finding the Gaps*.

<sup>47</sup> See supra Part 2.2.

of vocational training, tax subsidies for extra reasonable accommodations, affirmative action, job set-asides, or contract procurement.<sup>48</sup>

Beyond the employment realm of Article 25, there are several areas in which it may be said that United States disability law and policy falls short of the CRPD's mandates.<sup>49</sup> In large part this is because the Convention is aspirational in nature and directed at achieving the full flourishing and potential of all persons with disabilities and in doing so requires measures that exceed the current laws and policies, as implemented, of any individual State.<sup>50</sup> However, the dissonance in American law and policy that deems civil and political rights statutorily appropriate, but economic, cultural and social rights as beyond the ordinary normative realm of legislation,<sup>51</sup> also yields gaps in coverage when the Convention requires equality measures or proactive action. This is the case, for example, in the circumstances of Articles 5 (Equality and non-discrimination);<sup>52</sup> 6 (Women with disabilities);<sup>53</sup> 8 (Awareness-raising);<sup>54</sup> 20 (Personal mobility);<sup>55</sup> 28 (Adequate standard of living and social protection);<sup>56</sup> and 30 (Participation in cultural life, recreation, leisure,

<sup>48</sup> See Stein and Stein, 58 *Hastings Law Journal* 6 (2007), 1203, at 1225-40.

<sup>49</sup> See National Council on Disability, *Finding the Gaps*.

<sup>50</sup> 'A disability human rights paradigm maintains that developing one's talents is at the core of being human, and one must view talent as its own end' and as 'a moral imperative that all societies owe to each of their citizens'. M.A. Stein, 95 *California Law Review* (2007), 75, at 106.

<sup>51</sup> C.R. Sunstein, 'Why Does the American Constitution Lack Social and Economic Guarantees?', 56 *Syracuse Law Review* (2005), 1 at 5, ('while ordinary rights create "negative" checks on government' economic and social rights 'impose "positive" obligations on government').

<sup>52</sup> See, e.g., CRPD, UN Doc A/61/611, at art. 5(3) ('In order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.'). By contrast, the ADA places reasonable accommodation costs on employers; and, although some federal tax incentives are available, these are not well-publicized.

<sup>53</sup> See, e.g., id. at art. 6(2) ('State Parties shall take all appropriate steps to ensure the full development, advancement, and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.'). Conversely, United States civil rights protections guard against discrimination but, like the ADA, do not provide positive equality measures.

<sup>54</sup> 'State Parties undertake to adopt immediate, effective and appropriate measures: to combat stereotypes, prejudices and harmful practices relating to persons with disabilities.' Id. at art. 8.1(b). No required positive undertaking exists in parallel in federal American law and policy.

<sup>55</sup> 'State Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities', id. at art. 20, 'in the manner and at the time of their choice'. Id. at art 20(a). Some United States benefits programmes provide mobility aids, but not at this level, nor in such deference to consumers.

<sup>56</sup> 'State Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families . . . and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the

and sport).<sup>57</sup> For other Articles, current under-enforcement of United States laws creates a gap between legal requirements (that are otherwise adequate) and reality.<sup>58</sup> Instances include Articles 9 (Accessibility);<sup>59</sup> 11 (Situations of risk and humanitarian emergencies);<sup>60</sup> 13 (Access to justice);<sup>61</sup> and 29 (Participation in political and public life).<sup>62</sup> And for still other Articles, because their province lies in state rather than in federal law,<sup>63</sup> there is reason to suspect that those areas are not adequately protected. Articles 12 (Equal recognition before the law);<sup>64</sup> 23 (Respect for home and the family);<sup>65</sup> and 25 (Health)<sup>66</sup> fall into

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basis of disability.’ Id. at art. 28(1). This economic right falls outside of American disability law and policy, and instead, bare subsistence is addressed through benefits programmes that are deemed legislative entitlements and not civil or human rights.

<sup>57</sup> ‘State Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.’ Id. at art. 30(2). Such provision exceeds measures provided by the United States.

<sup>58</sup> See generally M.E. Waterstone, ‘A New Vision of Public Enforcement’, 92 *Minnesota Law Review* 2 (2007), 434 at 451 (stating that ‘government enforcers do not have enough resources to make a difference, [and] that the political nature of civil rights means that public enforcement cannot be trusted’).

<sup>59</sup> ‘State Parties shall take appropriate measures to ensure persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, . . . and to other facilities and services open or provided to the public, both in urban and in rural areas.’ CRPD, UN Doc A/61/611, at art. 9(1).

<sup>60</sup> ‘State Parties shall take . . . all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.’ Id. at art. 11.

<sup>61</sup> ‘State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others. . . .’ Id. at art. 13.

<sup>62</sup> ‘State Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake: [t]o ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others. . . .’ Id. at art. 29(a).

<sup>63</sup> For a challenge to this dichotomy, see M.A. Stein, ‘The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine’, 36 *Boston College Law Review* (1995), 669 at 671 (noting there ‘is a complex and unresolved debate over the proper role of federal courts in adjudicating a substantive area of law traditionally considered within the exclusive purview of state courts’).

<sup>64</sup> ‘State Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ CRPD, UN Doc A/61/611, at art. 12(3).

<sup>65</sup> ‘State Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, . . .’ Id. at art. 23(1).

<sup>66</sup> ‘State Parties shall: provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other

this last group.<sup>67</sup> Finally, and more pertinent to international discourse than to domestic programming, CRPD ratification would require American development aid to abide by Article 32's inclusive development mandate. Currently, USAID encourages but does not require such programming.

It is important to emphasize, however, that each of these gaps is capable of being narrowed or eradicated through either more rigorous implementation of existing United States laws and policies, and/or through Congressional legislative action.

### 3.2. FOSTERING DIALOGUE

There are other internal implications of participation in human rights treaties for the United States, even short of actual ratification. The signing of the CRPD and preparations for its submission to the United States Senate has triggered an intra-and inter-agency process of dialogue review and scrutiny, whereby treaty provisions are assessed and carefully considered as against existing laws, policies and practices.<sup>68</sup> Such dialogue can prompt policy and programmatic shifts in disability laws and policies in anticipation of possible ratification, and in turn can serve to promote and advance specific issues related to disability-based human rights. There are indications that such triggered responses are already occurring. In addition, and at a broader level, the rare signing by the United States of the Convention has energized disability human rights dialogue at the national level.

Concurrent with the CRPD's signing by the United States, President Obama's senior advisor, Valerie Jarrett, announced the creation of a new position, disability human rights advisor, within the Department of State's Bureau of Democracy, Human Rights and Labor, thereby signaling a renewed commitment to ensuring that the human rights foreign policy of the United States is disability inclusive.<sup>69</sup> Two months later, the United States National Council on Disability, an independent federal agency advising the President on disability issues, launched a study to review and assess the extent to which the foreign assistance policy of the United

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persons, including in the area of sexual and reproductive health and population-based public health programmes; . . . ' Id. at art. 25(a).

<sup>67</sup> With regard to Article 12, it seems clear that the progressive nature of a supported decision-making framework requires law and policy reform in most if not all countries around the world. This is a crucial issue, but one that goes beyond the boundaries of this analysis.

<sup>68</sup> See R. Sannerholm, 'Legal, Judicial, and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template', 12 *Journal of Conflict and Security Law* 1 (2007), 65 at 79 (noting that 'human rights treaties are often used as a model for a review and overall assessment of the legal framework' of a country and that they prompt 'interaction and integration of international standards on human rights into the national legal system during a short period of time').

<sup>69</sup> See Press Release, United States Mission to the United Nations, Remarks by Ambassador Susan Rice and White House Senior Advisor Valerie Jarrett at the U.S. Signing of the UN Convention on the Rights of Persons with Disabilities, United Nations Headquarters, USUN 156(09) (30 July 2009), available at <[http://www.archive.usun.state.gov/press\\_releases/20090730\\_156.html](http://www.archive.usun.state.gov/press_releases/20090730_156.html)> (accessed 18 May 2010).

States is disability inclusive and the possible implications of CRPD ratification,<sup>70</sup> especially in the light of Article 32's requirements relating to international cooperation.<sup>71</sup> The President's appointment of a senior advisor on disability issues within the Federal Emergency Management Agency (FEMA), which is part of the Department of Homeland Security, is likewise fostering CRPD-related dialogue inasmuch as FEMA is considering the implications of Article 11 for its international humanitarian and disaster response programming.<sup>72</sup>

The signing of the CRPD by the United States likewise has connected the specific issue of disability human rights to a broader national human rights dialogue. Mainstream human rights conferences are now routinely including disability human rights issues as part of their agenda,<sup>73</sup> and American think tanks are beginning to signal their engagement with disability rights issues within the framework of the CRPD.<sup>74</sup> Finally, both mainstream civil rights<sup>75</sup> and human rights organizations<sup>76</sup> are taking note of the CRPD signing and endeavouring

<sup>70</sup> National Council on Disability, Foreign Policy and Disability: Legislative Strategies and Civil Rights Protections to Ensure Inclusion of People with Disabilities (September 2003), available at <<http://www.ncd.gov/newsroom/publications/2003/foreign03.htm>> (accessed 18 May 2010).

<sup>71</sup> CRPD, UN Doc A/61/611, at art 32(a) ('Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities.').

<sup>72</sup> The President appointed Marcie Roth as Senior Advisor for Disability Issues at FEMA, and she assumed her duties on 1 July 2009. Disability Preparedness, *Monthly Updates—July/August 2009* (2009), available at <[http://www.disabilitypreparedness.gov/bulletins/jul\\_aug\\_09.htm](http://www.disabilitypreparedness.gov/bulletins/jul_aug_09.htm)> (accessed 18 May 2010).

<sup>73</sup> See, e.g., Human Rights Law Institute and University of Connecticut School of Law, *Human Rights in the USA: A Conference at the University of Connecticut, 22-24 Oct., 2009*, available at <<http://web2.uconn.edu/hri/documents/HR%20USA%20Schedule%202009.30.09.pdf>> (accessed 18 May 2010).

<sup>74</sup> See, e.g., N. Langer (Henry L Stimson Center), *The US and the UN Disability Treaty* (30 July 2009), available at <<http://www.stimson.org/pub.cfm?ID=841>> (accessed 18 May 2010).

<sup>75</sup> See, e.g., C. Powell (American Constitution Society), *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* (October 2008), available at <<http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf>> (accessed 18 May 2010). (calling for United States ratification of the CRPD).

<sup>76</sup> For example, Human Rights Watch recently announced the hiring of a disability rights researcher for its reporting work. See Press Release, Human Rights Watch, Full-Time Position Available: Researcher/Advocate on Disability Rights (15 June 2009), available at <[http://www.ndrn.org/jobs/HHR\\_Disability-Rights-Researcher2009-06-10.pdf](http://www.ndrn.org/jobs/HHR_Disability-Rights-Researcher2009-06-10.pdf)> (accessed 18 May 2010). For more on the traditional exclusion of disability rights issues from mainstream human rights practice, see generally J.E. Lord, 'Disability Rights and the human rights Mainstream: Reluctant Gatecrashers?', in C. Bob (ed.), *The International Struggle for New Human Rights* (University of Pennsylvania Press, 2009), 83.

to be more disability inclusive by addressing the historical gap and exclusion of disability issues from their work.<sup>77</sup>

### 3.3. INTERNATIONAL RELATIONS

Following authorization by the General Assembly to consider a specialized disability human rights treaty in December 2001,<sup>78</sup> States representatives debated the necessity of such an instrument.<sup>79</sup> During the first two *Ad Hoc* Sessions, held in July 2002 and June 2003, the United States argued that disability was a matter of domestic rather than international concern.<sup>80</sup> Further, that the ADA's preeminence militated against signing or ratifying an international agreement relating to disability rights.<sup>81</sup>

Consistent with this position the Bush administration sent a skeletal delegation to initial negotiating sessions and did not permit those members in attendance to formally intervene until late in the process. More engaged participation in fact came not at the behest of the American disability rights community, but instead at the prompting of the US right to life movement which strongly opposed references to sexual reproductive rights and freedoms.<sup>82</sup> American disengagement was glaring in view of its extensive experience in the disability rights field, much of which was intrepid at home and highly influential abroad.<sup>83</sup> The Bush administration's aversion to cooperation was also particularly striking due to

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<sup>77</sup> To note a prominent example of such exclusion, Mental Disability Rights International was formed in large part because Human Rights Watch and Amnesty International did not consider the conditions under which persons with disabilities were institutionalized as part of their mandate to report on situations of torture and inhuman treatment. See <<http://www.mdri.org>> (accessed 18 May 2010).

<sup>78</sup> United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UNGA Res 168, UN GAOR, 56th Sess., Supp. No. 168, UN Doc. A/RES/56/168 (2001).

<sup>79</sup> The CRPD's drafting history is posted on the United Nations Enable website, available at <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>> (accessed 18 May 2010).

<sup>80</sup> See Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities (New York, 16 to 27 June 2003) (Statement by Ralph F. Boyd, Assistant Attorney General for Civil Rights) ('the most constructive way to proceed is for each Member State, through action and leadership at home, to pursue within its borders the mission of ensuring that real change and real improvement is brought to their citizens with disabilities.').

<sup>81</sup> Id.

<sup>82</sup> See Seventh Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 16 January - 3 February 2006, List of Participants, p. 12, UN Doc A/AC.265/2006/INF/1 (20 January 2006) (United States representatives).

<sup>83</sup> See Stein and Stein, 58 *Hastings Law Journal* 6 (2007), 1203 at 1203-04 (noting that 'the ADA has played a leading role in developing disability law outside the United States, with more than forty countries adopting formulations of the statute').

references within the CRPD to American disability law (notably, the concept of reasonable accommodation) and its inherent values (such as the emphasis on independence and autonomy).<sup>84</sup> Ultimately, reluctance by the United States to share technical information deprived States' representatives from years of experience in a number of areas ranging from architectural barriers<sup>85</sup> to inclusive education<sup>86</sup> that might have proven useful, particularly to those delegations from countries with no existing disability rights framework.

In contrast, by signing the Convention,<sup>87</sup> voicing support for its ratification,<sup>88</sup> and providing technical assistance within the context of the Conference of States

<sup>84</sup> See CRPD, UN Doc A/61/611, at art. 2 & 3(a) (noting that "[r]easonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms, and that one of the guiding principles of the CRPD was '[r]espect for inherent dignity [and] individual autonomy including the freedom to make one's own choices, and independence of persons').

<sup>85</sup> E.g., Americans with Disabilities Act, at §12101(a)(5) (noting that 'individuals with disabilities continually encounter various forms of discrimination, including ... the discriminatory effects of architectural, transportation, and communication barriers, ... failure to make modifications to existing facilities and practices ...'); Rehabilitation Act, 29 U.S.C. §701, §§701-702 (1998) (establishing a Rehabilitation Services Administration in order to 'empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society') Id. at §701(b)(1); Architectural Barriers Act, 42 U.S.C. §§4151-4156 (1968) (defining the standards for design, construction, and alteration of buildings in order 'to accommodate the physically handicapped').

<sup>86</sup> E.g., Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat 2647 (2004) (reauthorizing the Individuals with Disabilities Education Act); Individuals with Disabilities Education Act, 20 U.S.C. §1400, §1415 (2006) (providing grants for state agencies to establish and maintain procedures 'to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education'); Education for all Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §1400, et seq., as amended) (requiring public schools accepting federal funds to provide equal access to education for children with physical and mental disabilities).

<sup>87</sup> Human Rights Watch, *US: Treaty Signing Signals Policy Shift*, available at <<http://www.hrw.org/en/news/2009/07/24/us-treaty-signing-signals-policy-shift>> (accessed 18 May 2010).

<sup>88</sup> In his proclamation, President Obama emphasized the continued significance of the Americans with Disabilities Act and announced he would sign the Convention. 'I am proud to announce that the United States will sign the United Nations Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly in New York on December 13, 2006. The Convention ... represents a paradigm shift in protecting the human rights of 650 million people with disabilities worldwide. We proudly join the international community in further advancing the rights of people with disabilities.' Proclamation No. 8398 (24 July 2009), available

Parties,<sup>89</sup> the Obama administration has demonstrated the commitment of the United States to rejoining the global community generally,<sup>90</sup> and to continuing American leadership in the area of disability law and policy.<sup>91</sup>

It bears noting that, although the Bush administration was particularly unreceptive to human rights treaties,<sup>92</sup> cultural resistance to these instruments (and indeed international law in general) originates more than half a century earlier.<sup>93</sup> Despite this the United States contributed significantly to the development of the international human rights movement, which included the participation of Eleanor Roosevelt and other Americans.<sup>94</sup> However Senator John W. Bricker of Ohio brought an abrupt end to this pioneering role in the

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at <<http://www.whitehouse.gov/the-press-office/remarks-president-rights-persons-with-disabilities-proclamation-signing>> (accessed 30 May 2010).

<sup>89</sup> UN Enable, *Second Session of the Conference of States Parties List of Side-Events*, available at <<http://www.un.org/disabilities/documents/COP/CSP2-SideEvents1Aug09-Website.doc>> (accessed 18 May 2010). (advertising a side-event in which the United States delegation welcomed NGO's views related to the ratification of the Convention).

<sup>90</sup> See generally G. Ogilvy, 'Belhas v. Ya'alon: The Case for a *Jus Cogens* Exception to the Foreign Sovereign Immunities Act', 8 *Journal of International Business and Law* 1 (2009), 169 at 193-94 (arguing that the positions of Bush and Obama concerning the ICC, to which Bush 'has been openly hostile' reflect the differences in their policies toward human rights abuses).

<sup>91</sup> See <<http://www.whitehouse.gov/issues/disabilities>> (accessed 18 May 2010) (expressing President Obama's commitment to aiding citizens with disabilities, including strengthening access to and improving the quality of health care, promoting access to community living services, protecting civil rights, expanding educational opportunities, and increasing access to employment).

<sup>92</sup> S.L. Cummings and L.G. Trubek, 'Globalizing Public Interest Law', 13 *UCLA Journal of International Law and Foreign Affairs* 1 (2008), 1 at 27 (noting 'a central challenge to the U.S. human rights strategy in the Bush era: how to use the human rights system to exert pressure on a political administration bent on resisting the force of international law.'). J.D. Greenberg, 'Does Power Trump Law?', 55 *Stanford Law Review* 5 (2003), 1789 at 1814-15 ('The administration of President George W. Bush stands out as a uniquely aggressive and extreme proponent of a normative realist paradigm in international affairs.').

<sup>93</sup> See R. Foot, 'Exceptionalism Again: The Bush Administration, the "Global War on Terror" and Human Rights', 26 *Law and History Review* 3 (2008), 707 at 720 ('Unilateralism, of course, has deep roots in the United States and is hardly a feature solely associated with the Bush administration. In the human rights field, this aspect of exceptionalism has long been particularly marked.'). E.M. Bruch, 'Whose Law is It Anyway? The Cultural Legitimacy of International Human Rights in the United States', 73 *Tennessee Law Review* 4 (2006), 669 at 672 and n 13 ('although the United States has often taken the lead globally in advancing international human rights, it has been notoriously reluctant to ratify international human rights agreements or to incorporate those agreements into domestic law').

<sup>94</sup> See generally M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House Trade, 2001).



early 1950s.<sup>95</sup> Couching his rhetoric in terms of national legal sovereignty (while truly seeking to maintain domestic racial apartheid), Senator Bricker proposed an amendment to the United States Constitution that would have made all treaties non-self-executing.<sup>96</sup> Significantly, such a measure would have precluded individuals from invoking human rights treaty provisions in domestic courts absent implementing legislation.<sup>97</sup> President Eisenhower defeated the Bricker Amendment, but success came at a cost, with that administration promising not to accede to any international human rights treaties.<sup>98</sup>

The legacy of Senator Bricker, who saw international human rights as a major threat to the preservation of domestic discrimination – and especially the *de jure* racial discrimination he supported<sup>99</sup> – lives on in enduring United States’ resistance to participating in human rights treaties.<sup>100</sup> Notably, the United States has the poorest ratification record of human rights treaties among all industrialized nations, having ratified only three of twenty-six international human rights

<sup>95</sup> See D.Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower’s Political Leadership*, (Cornell University Press, 1988).

<sup>96</sup> L. Henkin, ‘U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker’, 89 *American Journal of International Law* 2 (1995), 341 at 348 (‘In its principal version, the Bricker Amendment included the following provision: “A treaty shall become effective in the United States only through legislation which would be valid in the absence of treaty”.’).

<sup>97</sup> For a discussion of the processes of national-level adoption, see J.E. Lord and M.A. Stein, ‘The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities’, 83 *Washington Law Review* 3 (2008), 449.

<sup>98</sup> L. Henkin, 89 *American Journal of International Law* 2 (1995), 341 at 348-49.

<sup>99</sup> Id. at 348-49 (explaining that the proposed amendment ‘represented a move by anti-civil-rights and “states’ rights” forces to seek to prevent ... bringing an end to racial discrimination and segregation by international treaty’).

<sup>100</sup> Conservative legal academics have defended this practice by arguing that it is necessitated by the presumed sovereignty of domestic legal norms. See, e.g., J.O. McGinnis and I. Somin, ‘Should International Law Be Our Law?’, 59 *Stanford Law Review* 5 (2007), 1175 at 1239-40 (claiming that often ‘human rights protection is not an international public good’; therefore, ‘it cannot justify the overriding of U.S. law by international law.’); R.P. Alford, ‘Misusing International Sources to Interpret the Constitution’, 98 *American Journal of International Law* 1 (2004), 57 at 58-59 (arguing that using international sources to interpret the U.S. Constitution is ‘inadvisable’ because it ‘could have the unintended consequence of undermining rather than promoting numerous constitutional guarantees’). Other legal academics have disagreed. See, e.g., T.J. Melish, ‘From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies’, 34 *Yale Journal of International Law* 2 (2009), 389 at 444 (arguing against ‘caricaturing human rights law in absolutist terms as contrary to and in direct conflict with U.S. constitutionalism, democracy, and sovereignty’); T.A. Aleinikoff, ‘Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution’, 82 *Texas Law Review* 7 (2004), 1989 at 1994 (arguing that ‘[a]s the products of consensual acts, the impacts of these conventions ought to be seen as the results of an exercise of sovereignty, not as evidence of a lapse of sovereignty’).

treaties.<sup>101</sup> However, unlike other potential human rights treaty ratifications that might garner United States' consideration – the Convention on the Rights of the Child,<sup>102</sup> and the Convention on the Elimination of all Forms of Discrimination Against Women<sup>103</sup> – disability law is an area in which the United States claims a precedence that it can reaffirm.

### 3.4. TRANSATLANTIC DIALOGUE

One significant opportunity for the Obama administration to increase American transnational disability-based dialogue – both to share information, as well as to learn from other States' experiences – is to build on the existing New Transatlantic Agenda established in 1995 between the European Union and the United States.<sup>104</sup> The Transatlantic Declaration on EC-US Relations was adopted in 1990,<sup>105</sup> and amended and expanded by a New Transatlantic Agenda in 1995<sup>106</sup> to include, among other mandates, the promotion of democracy and development agendas and engendering creative solutions to global issues.<sup>107</sup> This linkage is particularly significant given the potential for development assistance to help foster ratification and implementation of the CRPD. Realization of the New Transatlantic Agenda is tasked to a Senior Level Group that meets four to six times annually to assess and report on progress and identify new priorities.

Notably, disability was added as a thematic area in the Senior Level Group's 1998 Report to the US-EU Summit. Subsequently, two transatlantic conferences identified equal and accessible access to information and communication technology (ICT) as a critical issue;<sup>108</sup> and another pair of transatlantic conferences

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<sup>101</sup> A. Pereira, 'Live and Let Live: Healthcare is a Fundamental Human Right', 3 *Connecticut Public Interest Law Journal* 2 (2004), 481 at 488-89 ('[T]he United States has ratified only three of the twenty-six available human rights treaties, the lowest number for any industrialized nation.').

<sup>102</sup> UNGA Res 44/25, UN GAOR, 44th Sess., Supp. No. 49, at 161, UN Doc A/44/49 (1989).

<sup>103</sup> UNGA Res 34/180, UN GAOR, 34th Sess., Supp. No. 46, at 193, UN Doc A/34/46 (1981).

<sup>104</sup> We acknowledge Professor Gerard Quinn and Ms. Aisling de Paor for providing us with essential information on this section. We draw heavily from their policy paper.

<sup>105</sup> Available at <[http://ec.europa.eu/external\\_relations/us/docs/trans\\_declaration\\_90\\_en.pdf](http://ec.europa.eu/external_relations/us/docs/trans_declaration_90_en.pdf)> (accessed 18 May 2010).

<sup>106</sup> Available at: <[http://ec.europa.eu/external\\_relations/us/docs/new\\_transatlantic\\_agenda\\_en.pdf](http://ec.europa.eu/external_relations/us/docs/new_transatlantic_agenda_en.pdf)>.

<sup>107</sup> See also Transatlantic Economic Partnership 1998, available at <[http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc\\_127675.pdf](http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127675.pdf)> (accessed 18 May 2010); EU-US Initiative to Enhance Transatlantic Economic Integration and Growth, 2005, available at <[http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc\\_127675.pdf](http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127675.pdf)> (accessed 18 May 2010).

<sup>108</sup> Harnessing the Information Society to Raise Employment Levels for People with Disabilities (EU-US Conference, Madrid, 26 October, 1998); Access of People with Disabilities to Employment (EU-US Seminar, Brussels, 17 November, 2003).

focused on employment opportunities as essential priorities.<sup>109</sup> These issues are important, both on their own merit, and in terms of the CRPD's agenda. However, as Professor Quinn and Ms. De Paor note, the slate of topics under discussion can also be expanded to education, health care, housing, and transportation, all of which also are core Convention issues.

The New Transatlantic Agenda thus provides an opportunity to foster mutually beneficial and informed US-EU dialogue around the CRPD. It represents one among many opportunities for fostering shared understandings around disability human rights<sup>110</sup> and in that sense reflects the expressive law potential of the CRPD.<sup>111</sup> It also offers promise for advancing implementation through information exchange on good practices and replicable models in key issue areas. Such opportunities for dialogue are essential to help evoke meaningful implementation that is compatible with the principles that underpin the CRPD and to continue the generative process initiated during the CRPD drafting.

#### 4. CONCLUSION

Ratifying the CRPD presents for the United States an opportunity to bring together domestic and international disability rights frameworks, particularly given that much of what the Convention offers was informed by the American disability law experience.<sup>112</sup> It offers the chance for the United States to engage in an introspective review of its prevailing laws, policies, and practices and to consider any resulting shortcomings that require either stronger compliance measures and/or adjustments in law and policy.<sup>113</sup> In addition, the signing of the

<sup>109</sup> Information Exchange on Exploring Employment and Retention Strategies for People with Disabilities (EU-US Conference, Washington DC, 7 February, 2006); Employment of Persons with Disabilities (EU-US Seminar, Brussels, 5 November, 2009).

<sup>110</sup> See generally M.A. Stein, 95 *California Law Review* (2007), 75.

<sup>111</sup> We have written elsewhere about the expressive potential of the CRPD law making process, one that continues post-ratification through the vehicles created by the treaty, such as the Conference of States Parties, and through other dialogue at the national, regional and international levels. See M.A. Stein and J.E. Lord, 'The United Nations Convention on the Rights of Persons with Disabilities as a Vehicle for Social Transformation', in Comisión Nacional de los Derechos Humanos de México, Network of the Americas & Office of the United Nations High Commissioner for Human Rights (eds.) *National Monitoring Mechanisms of the Convention on the Rights of Persons with Disabilities* (2008), 109. For more on expressive law, see M.A. Stein, 'Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA', 90 *Virginia Law Review* 4 (2004), 1151; A. Geisinger, 'A Belief Change Theory of Expressive Law', 88 *Iowa Law Review* 1 (2002), 35.

<sup>112</sup> When President Barack Obama signed the Convention on the Rights of Persons with Disabilities, he noted that it was 'continu[ing] to build on the ADA'. See Proclamation No. 8398, 74 Fed. Reg. 37923 (30 July 2009).

<sup>113</sup> This was acknowledged by President Obama when he signed the CRPD. '[W]e recognize that our country has made great progress .... [d]espite these achievements, much work remains to be done. People with disabilities far too often lack the choice to live in communities of their choosing; their unemployment rate is much higher

CRPD by the United States should prompt a useful – and one hopes – meaningful dialogue both across the federal government and civil society that can serve as an impetus for progressive change. Finally, CRPD ratification provides a clear signal to the international community that the United States is engaged as a progressive actor in human rights foreign policy, particularly in view of its historical leadership in the field of disability law.<sup>114</sup> In the best case scenario, ratification by the United States would represent more cooperation internationally. It would no doubt serve as the impetus for sharing successive strategies and replicable models for disability-inclusive development programming given the shared interest of both the United States and many other donors to make their development programming more inclusive. It would also help to foster meaningful dialogue on disability and human rights issues in both formal and informal international mechanisms, including for example, cross-cultural dialogue on disability issues as most recently supported by the United States Institute of Peace. More specifically, it could generate a progressive development of transatlantic US-EU dialogue, particularly in view of the New Transatlantic Agenda. While neither US or EU ratification is yet a reality, and American ratification requires what may seem an insurmountable hurdle of 67 senatorial votes, it would most surely bring the US back into the global disability rights fold and helpfully unite US-EU interests in encouraging progressive disability rights agendas worldwide.

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than those without disabilities; they are much likelier to live in poverty; health care is out of reach for too many; and too many children with disabilities are denied a world-class education.’ See *Id.*

<sup>114</sup> The American Civil Liberties Union and other progressive groups applauded President Obama’s signing of the CRPD as a ‘reengagement of the United States in international human rights efforts’. See Press Release, American Civil Liberties Union, Obama to Sign International Treaty on the Rights of Persons with Disabilities: ACLU Welcomes Announcement on the ADA’s 19th Anniversary, (24 July 2009), available at <<http://www.commondreams.org/newswire/2009/07/24-4>> (accessed 18 May 2010).