

NOTES

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

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TABLE OF CONTENTS

I.	INTRODUCTION	186
II.	HISTORY OF DISABILITY LAW IN THE UNITED STATES	191
III.	CURRENT STATE OF U.S. DISABILITY LAW	195
IV.	THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD).....	197
V.	DIFFERENCES BETWEEN CURRENT U.S. LEGISLATION AND THE CRPD AND SUGGESTIONS FOR EXPANSION.....	198
	<i>A. Inclusiveness of Persons with Disabilities in the Drafting, Implementation, and Monitoring Process</i>	<i>199</i>
	<i>B. Shift to a Human Rights Model</i>	<i>201</i>
	<i>C. Monitoring and Implementation.....</i>	<i>206</i>
	<i>D. Specific Employment Provisions</i>	<i>209</i>
	1. <i>Job Training and Rehabilitation Programs</i>	<i>210</i>
	2. <i>Affirmative Action Initiative.....</i>	<i>211</i>
	3. <i>Addressing Technical Defects.....</i>	<i>212</i>
VI.	CONCLUSION	213

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I. INTRODUCTION

Former Vice President Hubert Humphrey once remarked that “the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and the handicapped.”¹ This “moral test” echoes an ideal represented within the core of the U.S. legal system: the principal that the government will protect its citizens from prejudice and assure equality and liberty, not only for a select few, but for every individual, whether young or elderly, rich or poor. The Declaration of Independence asserts this principle when it states that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”² Thus, promises of liberty and equality can be found even in the earliest founding documents, expounding the idea that everyone should have the same opportunity to achieve the “American Dream.”

For persons with disabilities, however, these promises have not been realized. Instead, individuals with disabilities have experienced a challenging history of invisibility, indifference, and discrimination. This entire class historically has been labeled the “deserving poor” and has not been afforded the same benefits, services, and opportunities available to non-disabled people.³

Specifically in the realm of employment, persons with disabilities have been unable to secure legislation that will adequately represent and protect their interest in achieving equality in the workforce.⁴ In March 2008, an independent study by Cornell University estimated that the employment rate for disabled, working-age people was as low as 17.7%, while the employment rate for the general working-age population was 79.7%.⁵ Those few who do obtain employment are often limited in the career paths they can

¹ THE YALE BOOK OF QUOTATIONS 376 (Fred R. Shapiro ed., 2006).

² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³ RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 9–10 (2d ed. 2001).

⁴ See RUTH COLKER, THE DISABILITY PENDULUM 19 (Richard Delgado & Sean Stefancic eds., 2005) (“The available empirical data suggest[s] that the unemployment rate for individuals with disabilities has remained relatively unchanged (or has worsened) since the enactment of ADA Title I.”).

⁵ Melissa J. Bjelland et al., *Rehabilitation Research and Training Center on Employment Policy for Persons with Disabilities Report*, in 2008 PROGRESS REPORT ON THE ECONOMIC WELL-BEING OF WORKING-AGE PEOPLE WITH DISABILITIES 5 tbl.2 (2008), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1255&context=edicollect>.

select due to structural barriers and stigmas.⁶ Further, there are few opportunities for career advancement, and individuals with disabilities perpetually find themselves in low-income jobs without many prospects for advancement.⁷

The United States has enacted two major pieces of legislation aimed at closing the gap in the employment rates and divergent quality of jobs of disabled and non-disabled citizens. First, the United States enacted the Rehabilitation Act of 1973 (Rehabilitation Act), which prohibits discrimination in federally funded programs and activities.⁸ Seventeen years later, the United States enacted its second major piece of legislation, the Americans with Disabilities Act of 1990 (ADA).⁹ The ADA prohibits the discrimination of individuals with disabilities in both the public and private sector in a broad range of activities, including employment.¹⁰ Disability rights advocates anticipated the enactment of the ADA and the Rehabilitation Act as a reorganization of federal policy.¹¹ Both pieces of legislation are comprehensive in scope¹² and were intended to make major changes in the legal rights of persons with disabilities.¹³ As a result, many commentators have hailed the United States as the “global vanguard on disability issues.”¹⁴

⁶ See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 23 (2004) (asserting that many disabled individuals face structural barriers such as the lack of personal-assistance services, assistive technology, accessible transportation, and health insurance).

⁷ COLKER, *supra* note 4, at 19.

⁸ Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797 (2006) [hereinafter Rehabilitation Act].

⁹ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006) [hereinafter ADA].

¹⁰ *Id.*

¹¹ Bagenstos, *supra* note 6, at 19.

¹² See ADA, § 12101(b)(1) (providing that one of the purposes of the ADA was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”); see also Paul K. Longmore, *The Disability Rights Moment: Activism in the 1970s and Beyond*, in WHY I BURNED MY BOOK 102, 104 (2003) (stating that the original purpose of the Rehabilitation Act was not to cover all forms of discrimination; however, the broad language of Section 504 of the 1973 Rehabilitation Act, codified as 29 U.S.C. 794, was eventually interpreted by the implementing agency to ban all forms of discrimination in the public sector). Section 794 of the Act states in relevant part that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Rehabilitation Act, § 794(a).

¹³ See COLKER, *supra* note 4, at 4 (contrasting this broad legislation with earlier, more “modest” legislation).

¹⁴ Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. should Ratify*, 14 HUM. RTS. BRIEF 37, 46 (2007); see also Lynn J. Harris, *The Americans with Disabilities Act and Australia’s Disability Discrimination Act: Overcoming the Inadequacies*, 22 LOY. L.A. INT’L & COMP. L. REV. 51, 51–52 (1999) (stating that the

In addition to the ADA and the Rehabilitation Act, the United States has implemented a number of federal programs aimed at providing more specific assistance, as opposed to sweeping fundamental changes, to individuals with disabilities that are seeking to maintain employment, including Section 101 of the Ticket to Work Program (providing disability beneficiaries a "ticket" to obtain vocational rehabilitation or employment services), Work Incentive Grants (offering federal grants to states primarily to provide education on available vocational programs), and various other programs to benefit recipients of Social Security seeking employment.¹⁵ More recent legislation was passed in 2008, with the ADA Amendments Act (ADAAA)¹⁶ that attempts to reform the ADA and redefine the word "disability" to conform to the original intent of Congress when it first enacted the act.¹⁷

Even after the ADAAA, however, U.S. legislation has failed to adopt a new approach to disability rights. The legislation continues to focus on a "welfare" model of disability law, rather than the more modern "human rights" approach.¹⁸ Further, the previous barriers to change still exist as disincentives embedded in the complex systems of Social Security and Medicaid.¹⁹ The lack of data being collected keeps real data and trends from being properly recognized and analyzed.²⁰ The legislation also fails to require affirmative actions from employers in attracting, retaining, and advancing individuals with disabilities in the workplace,²¹ thereby perpetuating the mindset of many U.S. companies that these goals are trivial when compared to the overall objectives of their business.

United States was on the forefront of disability legislation with efforts beginning as early as the 1940s and contrasting Australian laws which were not enacted until the early 1990s).

¹⁵ GINA LIVERMORE & NANETTE GOODMAN, A REVIEW OF RECENT EVALUATION EFFORTS ASSOCIATED WITH PROGRAMS AND POLICIES DESIGNED TO PROMOTE THE EMPLOYMENT OF ADULTS WITH DISABILITIES 13 (2009), available at <http://digitalcommons.ilr.cornell.edu/edicolect/1262/>.

¹⁶ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553, sec. 2 (2008) [hereinafter ADAAA].

¹⁷ JOB ACCOMMODATION NETWORK, THE ADA AMENDMENT ACTS OF 2008, at 3 (2009), available at <http://www.jan.wvu.edu/bulletins/ADAAA.pdf>.

¹⁸ See *infra* Part V.B (arguing that the U.S. should use a human rights model of disability rights as opposed to the traditional "welfare" model approach).

¹⁹ See *infra* Part V.D.3 (arguing that in order for the programs suggested in this Note to be effective, technical defects like the disincentives of the current Social Security and Medicaid systems must be addressed).

²⁰ See *infra* Part V.C (arguing that current data collection efforts are lack luster and arguing for a monitoring plan which would ensure that new legislation would not lose momentum or be forgotten).

²¹ See *infra* Part V.D.2 (arguing for a limited time frame affirmative action initiative).

The results of these initiatives have been gravely disappointing, despite good intentions.²² In a society with stark disparities in the employment rates of individuals with and without disabilities, there should be no dispute about the failure of the legislation.²³ These initiatives have not had the effect of creating rights parallel to those afforded to the rest of society.²⁴ In fact, evidence shows that since the enactment of the ADA, there has been no positive change—the employment rate has remained stagnant or even worsened.²⁵ Likewise, smaller scale initiatives, such as the Ticket to Work Act, are seriously underutilized and, as a result, they too, affected little cognizable change of the status quo.²⁶ Further, even the recent ADAAA effort failed to make the sweeping changes that were needed, instead making only technical changes to existing legislation.²⁷ Congress is taking steps in the right direction; but as of 2010, it has been unable to draft legislation that realizes the promise of equal rights to those with disabilities.

The answer to creating legislation that delivers on that promise may be found in the first comprehensive human rights Convention of the twenty-first century—the U.N. Convention on the Rights of Persons with Disabilities (CRPD or the Convention).²⁸ The CRPD was adopted on December 13, 2006, by the United Nations General Assembly²⁹ for the purpose of “promot[ing], protect[ing] and ensur[ing] the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and . . . promot[ing] respect for their inherent dignity.”³⁰ The CRPD takes a dynamic approach and, as discussed below, differs significantly from U.S. legislation.

First, the Convention calls for active participation from disabled people at all levels of the legislative process.³¹ Second, it changes the focus from a “charity” model to a human rights model that focuses on the capabilities and inclusion of disabled individuals.³² Third, the Convention calls for in-depth

²² See Bagenstos, *supra* note 6, at 3 (“[W]hile the ADA’s achievements must be celebrated, the statute’s limitations have become increasingly apparent.”).

²³ See Bjelland et al., *supra* note 5, at 6–7 (showing unemployment data for both persons with disabilities and persons without disabilities between 1980 and 2007).

²⁴ See COLKER, *supra* note 4, at 19 (The unemployment data “has caused some researchers [] assert that the ADA has been ineffective”).

²⁵ *Id.*

²⁶ LIVERMORE & GOODMAN, *supra* note 15, at 14.

²⁷ JOB ACCOMMODATION NETWORK, *supra* note 17, at 4.

²⁸ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD].

²⁹ *Id.* at Annex I.

³⁰ *Id.* art. 1.

³¹ *Id.* art. 4.

³² *Id.* art. 3.

monitoring procedures to track its implementation.³³ Lastly, it goes one step further than U.S. law by requiring that employers take affirmative steps to include disabled individuals.³⁴

In order to join the global community in recognizing the full spectrum of disability rights, the United States should align its disability legislation with the principles of the Convention. The CRPD covers more ground and takes a bottom-up approach by encouraging fundamental changes in thinking.³⁵ In contrast, U.S. legislation adopts a narrow focus regarding protection from discrimination. It focuses on removing formal obstacles in employment, such as discrimination and job accommodation, rather than modifying stereotypes, removing societal obstacles and enabling disabled people to make equal employment a reality.³⁶ In order to effect real change, the United States should adopt the Convention's human rights approach and amend specific provisions of its current legislation to provide the kinds of rights the Convention contemplated.

Specific changes that the United States should make in order to implement the ideals of the CRPD include, first, taking an inclusive approach to disability law. To accomplish this goal, the United States should adopt comprehensive federal laws that are drafted, monitored, and implemented with the participation of civil society, including persons with disabilities.

Second, the United States should shift away from perceiving individuals as objects of charity and towards a human rights model. Specifically, the United States should enact mandates and incentives that work to educate society, offer incentives for realistic portrayals of individuals with disabilities in the media, and ultimately alter the social norm.

Third, to become consistent with the CRPD, U.S. lawmakers should take affirmative steps to monitor and implement a plan that focuses on concrete results and allows for broader remedies in civil actions to ensure that new legislation does not lose momentum after implementation.

Lastly, the United States should not only refocus the general goals of its legislation, but it should also take a closer look at its specific employment provisions and how they work in practice to benefit individuals with disabilities. The United States should enhance these specific employment provisions so that they are consistent with the CRPD by enacting mandates

³³ *Id.* art. 16.

³⁴ *Id.* art. 27.

³⁵ See Carole J. Petersen, *China's Ratification of the Convention on the Rights of Persons with Disabilities: The Implications for Hong Kong*, 38 H.K. L.J. 611, 612 (2008) (announcing that the convention focuses on a "social and human rights model[] of disability").

³⁶ See Gerard Quinn, Professor of Law, Nat'l Univ. of Ir., Remarks at the Conference of States Parties to the Convention on the Rights of Persons with Disabilities (June 10, 2008) (stating that going beyond simply removing formal obstacles means promoting an egalitarian ideal which animates a large category of economic, social, and cultural rights).

such as training and rehabilitation for individuals with disabilities. Other mandates could create provisions that negate current disincentives in the Social Security and health care systems, and therefore shift the thinking of disabled persons away from dependency and towards self-sufficiency. Finally, the United States should implement a limited time-frame affirmative action initiative and mandate job set-asides.

This Note addresses the shortcomings of current U.S. disability employment legislation and argues that the ideals as set forth in the CRPD provide a framework for a more effective approach to the problem of equality in the workplace. Part II of this Note presents a brief history of U.S. disability law. Part III analyzes the current state of U.S. employment disability law and inadequacies in the employment arena. Part IV provides an introduction to the CRPD and its provisions that relate to the rights of persons with disabilities in employment, discussing the possibility of ratification and the alternative ways that the United States could use the Convention. Part V contrasts current U.S. legislation with the ideals and specific provisions of the CRPD, and offers suggestions for specific changes to current U.S. law and initiatives to usher in a new era of disability rights consistent with the CRPD. These changes should emphasize inclusion and human rights, and thus allow people with disabilities to experience real change.

II. HISTORY OF DISABILITY LAW IN THE UNITED STATES

Individuals with disabilities share a history plagued by indifference and discrimination.³⁷ These individuals were not largely recognized by the government as deserving equal rights and opportunities “until the latter half of the twentieth century.”³⁸ Society used nursing homes, special schools, institutions, and statutes such as “ugly laws” to keep people with disabilities out of the mainstream.³⁹ It was not until the Civil Rights Movement of the 1960s that people with disabilities began to make their presence known and to express dissatisfaction with how their rights were being represented.⁴⁰ With the rise of feminism, racial equality, and other civil rights movements, the disabled population also began to “embrac[e] activism” and to demand

³⁷ See Polly Welch & Chris Palames, *A Brief History of Disability Rights Legislation in the United States*, in STRATEGIES FOR TEACHING UNIVERSAL DESIGN 5, 5–11 (Polly Welch ed., 1995) (discussing U.S. history which tended to overlook disabled individuals until the latter half of the twentieth century).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ SCOTCH, *supra* note 3, at 6.

equal protection and social equality.⁴¹ Even with this momentum, however, the disability movement has yet to become as visible as its counterparts.⁴²

Despite the difficulty of the campaign in finding a voice for disability rights, the U.S. government began to recognize the movement in the late 1960s by enacting legislation and creating various programs.⁴³ While an increase in visibility and legal protections was a victory, many of these programs—like the measures that preceded them—were “premised on notions of charity,” thus “perpetuat[ing] an image of disabled people . . . as incapable of self-sufficiency” and as objects of pity.⁴⁴

Finally, in 1973, the government took a big step towards recognizing the civil rights of disabled people by enacting the Rehabilitation Act of 1973.⁴⁵ This statute was the first federal statute to address the issue of disability discrimination in the employment context and it banned all forms of discrimination for qualified individuals with disabilities in education, employment, public accommodation, and various other settings.⁴⁶

Section 504 of the Rehabilitation Act covers the employment activities of all entities that receive federal financial assistance, including those with significant federal contracts, but does not directly reach private sector businesses.⁴⁷ Section 504 is an overarching provision relating to employment and states that “no otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁴⁸

In order to qualify for protections as a “qualified individual with a disability,” a person must demonstrate a disability satisfies one of three definitions of a disability listed under the three-prong test of the ADA.⁴⁹

⁴¹ *Id.*

⁴² *Id.* at 7. This continued invisibility may be a result “of their separation from the mainstream” by way of “physical and social barriers.” Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT’L L. & COM. 563, 584 (2007). It may also be the result of the movement’s inability to create a cohesive group capable of significant “collective action.” SCOTCH, *supra* note 3, at 7. Scotch argues that although much of the population describes themselves as disabled, beyond small and isolated settings there exists no collective consciousness or real subculture. While they share many characteristics, they remain geographically and socially dispersed and are therefore unable to build a meaningful community. *Id.* at 12.

⁴³ *Id.* at 8–9.

⁴⁴ *Id.* at 9–10.

⁴⁵ *Id.* at 169.

⁴⁶ Rehabilitation Act, 29 U.S.C. §§ 701–797 (2006).

⁴⁷ *Id.* § 794(a).

⁴⁸ *Id.*

⁴⁹ ADA, 42 U.S.C. § 12112(a) (2006).

Under this test, a covered individual is any person who has “a physical or mental impairment that substantially limits one or more major life activities of such individual; [who has] a record of such an impairment; or [who is] regarded as having such an impairment.”⁵⁰

The practical significance of the Rehabilitation Act of 1973 is noteworthy given the variety of services receiving federal funds and the disabled community’s reliance on these public services.⁵¹ Further, the Rehabilitation Act is significant within the context of employment because it creates a requirement of affirmative action by covered entities.⁵² Section 793 requires that covered employers “take affirmative action to employ and advance in employment qualified individuals with disabilities.”⁵³ Individuals may report a complaint to the Office of Federal Contract Compliance Programs (OFCCP), which is responsible for ensuring that covered employers are in compliance.⁵⁴

Despite the broad reach of the Rehabilitation Act and its positive impact on the lives of many individuals with disabilities, the Rehabilitation Act did not include federal discrimination protection for disabled employees in the private sector.⁵⁵ Congress did not respond to this problem until 1990, when it passed the ADA.⁵⁶

The ADA, like the Rehabilitation Act, is an overarching set of federal laws that prohibits discrimination on the basis of disability in a variety of areas, including state and local government, public accommodations, employment, commercial facilities, transportation, and telecommunications.⁵⁷ Significantly, it extends the employment nondiscrimination initiatives found in the Rehabilitation Act from the public sector to the private sector, covering any entity with fifteen or more employees.⁵⁸ The ADA provides that a covered entity cannot discriminate against a qualified individual with a disability “on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge

⁵⁰ *Id.*

⁵¹ RUTH COLKER & ADAM A. MILANI, *EVERYDAY LAW FOR INDIVIDUALS WITH DISABILITIES* 3 (2005). The protections of the Rehabilitation Act include, for example, access to public transportation and government buildings. *Id.* at 2–3.

⁵² Rehabilitation Act, 29 U.S.C. § 793 (2006).

⁵³ *Id.*

⁵⁴ *Office of Federal Contract Compliance Programs (OFCCP): About OFCCP*, U.S. DEP’T OF LAB., <http://www.dol.gov/ofccp/aboutof.html> (last visited Nov. 20, 2010) [hereinafter *OFCCP*].

⁵⁵ *Americans with Disabilities Act*, MOUNTAIN STATE: CENTERS FOR INDEP. LIVING, <http://www.mtstcil.org/skills/ada2-a.html> (last visited Nov. 20, 2010).

⁵⁶ ADA, 42 U.S.C. § 12101 (2006).

⁵⁷ *A Guide to Disability Right Laws*, U.S. DEP’T OF JUSTICE: CIVIL RIGHTS DIVISION (Sept. 2005), <http://www.ada.gov/cguide.htm>.

⁵⁸ *Id.*

of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁵⁹ Employers are required to refrain from discrimination and must also offer reasonable job accommodations to those individuals who require them.⁶⁰ The ADA uses the same three-prong definition of disability as the Rehabilitation Act.⁶¹ Unlike the Rehabilitation Act, the ADA does not require any affirmative duties on employers, but instead focuses on the removal of formal obstacles.⁶² These could include, for example, purchasing a larger computer screen for an individual with limited sight or stopping discriminatory hiring practices. The ADA also does not require affirmative action initiatives, as seen in the Rehabilitation Act.⁶³

After the enactment of the Rehabilitation Act and the ADA, the next significant change in federal law came in 2008 with the ADA Amendments Act of 2008.⁶⁴ The ADAAA made major changes to the technical definition of “disability” shared by the ADA and the Rehabilitation Act.⁶⁵ The definition under the original text of the ADA and the Rehabilitation Act had been interpreted narrowly by courts and did not embody the original purpose of the ADA.⁶⁶ Many individuals bringing suit under the ADA found it difficult to get past the summary judgment stage because they were unable to meet the court’s limited definition of “disability” and “qualified” for employment.⁶⁷ The basic three-prong definition of disability⁶⁸ remains the same after the enactment of the ADAAA, but the meaning of some of the words and the force of those words have been changed.⁶⁹ The practical effects of the ADAAA will be to include more individuals because of a broader definition of “disability,” and to shift the emphasis from whether the

⁵⁹ ADA § 12112(a).

⁶⁰ *Id.*

⁶¹ *Id.* § 12102(1).

⁶² *The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <http://www.eeoc.gov/facts/ada17.html> (last modified Aug. 1, 2010).

⁶³ Compare ADA §§ 12101–12213 (2006) (including no affirmative action requirement), with Rehabilitation Act, 29 U.S.C. § 793 (2006) (outlining an affirmative action requirement).

⁶⁴ *Notice Concerning the Americans with Disabilities Act (ADA) Amendments*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, http://www.eeoc.gov/ada/amendments_notice.html (last visited Nov. 20, 2010).

⁶⁵ JOB ACCOMMODATION NETWORK, *supra* note 17, at 3.

⁶⁶ ADAAA, Pub. L. No. 110-325, 122 Stat. 3553, 3553 (2008). See also *ADA Amendments Act*, ONE MORE WAY, <http://onemoreway.org/ada.htm> (last visited Nov. 20, 2010) (declaring that courts have often ignored the “clear intent” of the statute and narrowed who is included in the definition of an “individual with a disability”).

⁶⁷ See COLKER, *supra* note 4, at 70 (“People are able to benefit from ADA Title I only if they are both ‘disabled’ and ‘qualified’ for employment.”).

⁶⁸ ADA, 42 U.S.C. § 12102(1) (2006).

⁶⁹ JOB ACCOMMODATION NETWORK, *supra* note 17, at 4.

individual is disabled to whether discrimination has occurred.⁷⁰ It will not, however, impose any additional obligations on employers or include any additional protections beyond allowing more individuals to meet the criteria of a “qualified individual with a disability” and therefore take a valid claim of discrimination past the summary judgment stage.⁷¹

In addition to these acts, the federal government has sponsored or established at least twenty-five major initiatives and programs affecting the employment rights of persons with disabilities.⁷² Among these are federal legislation, grants and buy-ins, tax credits for employers, vocational rehabilitation, and planning services.⁷³ These initiatives were implemented to provide assistance to persons with disabilities in finding and maintaining employment and to create concrete incentives for businesses to employ persons with disabilities.⁷⁴

III. CURRENT STATE OF U.S. DISABILITY LAW

Despite the efforts of the United States to create legislation—including the Rehabilitation Act, the ADA, and various initiatives on a smaller scale—that protects the disabled community’s employment rights, people with disabilities still face severe discrimination.⁷⁵ These initiatives, while compelling in theory, have failed to produce the results people anticipated,⁷⁶ and have not significantly changed the status quo.⁷⁷

Concededly, the Rehabilitation Act was a great victory for individuals with disabilities because it imposed much-needed obligations on employers, such as affirmative action, and mandated governmental action in a wide range of services.⁷⁸ Ultimately, however, the Rehabilitation Act failed to improve employment rates and conditions for the vast majority of the disabled community because its affirmative mandates did not reach the

⁷⁰ *Id.* at 3.

⁷¹ ADA § 12112(a) (2006); *Notice Concerning the Americans with Disabilities Act (ADA) Amendments*, *supra* note 64.

⁷² See LIVERMORE & GOODMAN, *supra* note 15 (reviewing the efforts to evaluate the programs and policies designed to improve the employment of working-age individuals with disabilities including, *inter alia*, Medicaid programs, vocational rehabilitation services, Department of Labor grants, tax credits, and programs related to Social Security benefits).

⁷³ *Id.*

⁷⁴ ADA § 12112(a).

⁷⁵ See ADAAA, Pub. L. No. 110-325, 122 Stat. 3553, 3553 (2008) (discussing the failure of the ADA, and stating that even after the enactment of the ADA, individuals with disabilities were precluded from fully participating in society as a result of their disability).

⁷⁶ Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, in *BACKLASH AGAINST THE ADA* 62, 62 (Krieger ed., 2003).

⁷⁷ LIVERMORE & GOODMAN, *supra* note 15, at 14.

⁷⁸ Rehabilitation Act, 29 U.S.C. §§ 701–797 (2006).

largest class of employers: the private sector.⁷⁹ The ADA, and more recently, smaller federal initiatives, made great strides by filling the many gaps in the Rehabilitation Act, with a non-discrimination mandate for both the public and private sector.⁸⁰ But they, too, failed to produce the intended improvements in employment and have been characterized as “lackluster.”⁸¹

A possible reason that the protections afforded in the Rehabilitation Act and ADA have not resulted in the sweeping changes is that these laws do not put enough pressure on either employers or individuals with disabilities to improve employment rates.⁸² Failure to use the few resources afforded by the recent smaller-scale initiatives in a proactive way is further contributing to the disappointing unemployment rate among disabled individuals. The Ticket to Work Program, for example, has only seen 200,000 participants—a little over one percent of the targeted population—and a recent report showed that a Florida program, the Florida Freedom Initiative, had just over thirty-five enrollees.⁸³ Additionally, those few who do obtain employment are typically kept from advancing and perpetually find themselves in low-income jobs.⁸⁴ The weaknesses of current U.S. disability law are illustrated by the stark difference between the unemployment rates of persons with disabilities and those of persons without disabilities.⁸⁵

The ADAAA could have provided an excellent opportunity to reverse the unimpressive trends in employment that followed the enactment of the ADA, producing real changes in the current situation. Instead, these amendments were technical in nature, simply expanding the number of people who could be included in the definition of a “qualified individual with a disability” when bringing a claim under the ADA.⁸⁶ Although the ADAAA creates significant changes, expanding the definition of disability and allowing more plaintiffs to bring disability discrimination claims,⁸⁷ it fails to make the

⁷⁹ *Id.* § 794.

⁸⁰ LIVERMORE & GOODMAN, *supra* note 15, at 13.

⁸¹ *Id.* at 18.

⁸² See *infra* Part V.D (arguing that the “anti-discrimination” measures seen in U.S. legislation do not put affirmative pressure on employers in the form of affirmative action mandates, and further arguing that U.S. legislation does not offer a reasonable alternative and fails to put pressure on employees because it does not require job coaching or assistive technology, nor does it offer an alternative to counter the disincentives be the related to loss of Social Security and health insurance benefits).

⁸³ LIVERMORE & GOODMAN, *supra* note 15, at 17.

⁸⁴ COLKER, *supra* note 4, at 19.

⁸⁵ See Bjelland et al., *supra* note 5, at 6–7 (showing unemployment data for both persons with disabilities and persons without disabilities between 1980 and 2007).

⁸⁶ See JOB ACCOMMODATION NETWORK, *supra* note 17, at 3 (stating that courts have “interpreted the definition of disability so narrowly that hardly anyone could meet it”).

⁸⁷ *Id.* (“Congress fixed the definition of disability to cover more people and as a result, prevent more discrimination.”). See *id.* at 4 (stating that the “definition is exactly the same as

comprehensive changes necessary to go beyond the text of the ADA and address a number of important issues underlying the negative trends and unequal treatment of disabled persons.

In short, it is apparent that this legislation has not accomplished its intended goals, and has ultimately failed to uphold the original ideals embodied in the Declaration of Independence of liberty and equality. Few can argue against the considerable need to reform the current U.S. legislation.⁸⁸

IV. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

On December 13, 2006, the United Nations enacted its first human rights treaty of the twenty-first century.⁸⁹ Drafted in response to a “documented[] worldwide pattern of abuse against people with disabilities,”⁹⁰ the Convention takes aim at all forms of disability discrimination, such as voting, employment, housing, health services, transportation, and education.⁹¹ It was enthusiastically received by the eighty-one states that signed the Convention at its opening ceremony.⁹² Its inception has been praised as a great achievement in the effort to “reframe the needs and concerns of persons with disabilit[ies]”⁹³

The CRPD contains a preamble, articles relating to purpose, definitions, general principles, and obligations, twenty-six articles relating to specific substantive rights, ten articles on monitoring measures, and ten final provisions.⁹⁴ Several of the substantive provisions relate to domestic disability employment law.⁹⁵ Arguably, the most important and notable parts of the CRPD are its overarching themes. Thus, in order for the significance of the CRPD on employment rights to be fully recognized, these provisions cannot be read in isolation.⁹⁶

The Convention could be the key to creating dynamic legislation in the United States and filling the gaps in the promises that the disabled

it was” but that “the meaning of some of the words used in the definition and the way those words are to be applied to individuals” did change).

⁸⁸ *Id.* (stating that “[v]ery few people argue that these changes were not needed”).

⁸⁹ CRPD, *supra* note 28.

⁹⁰ 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, 306 (2007).

⁹¹ CRPD, *supra* note 28.

⁹² Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 2 (2008).

⁹³ *Id.*

⁹⁴ CRPD, *supra* note 28.

⁹⁵ *Id.* arts. 5, 27.

⁹⁶ Melish, *supra* note 14, at 43.

community has been given. On July 30, 2009, the United States became a signatory to the Convention, suggesting its support of the Convention's ideals.⁹⁷ However, the United States has yet to ratify it; therefore, it is not bound by the provisions of the CRPD.⁹⁸ It is unlikely that the United States will ratify the CRPD, judging from its general aversion to ratifying human rights conventions in recent decades.⁹⁹ While the reasons for the United States' failure to ratify the Convention are questionable to some,¹⁰⁰ it is inconsequential as long as the United States incorporates the ideals of the Convention into its laws. History has demonstrated that the United States willingly leads international crusades on behalf of human rights and does not necessarily need a convention to motivate action.¹⁰¹ The CRPD is representative of the global change disabled persons demand, providing a model for the rights that these persons should be afforded. As a country with a history of cutting-edge disability law,¹⁰² the United States should, even in the absence of ratification, use the CRPD to analyze its current approach and create new legislation that will provide functional support to individuals with disabilities.

V. DIFFERENCES BETWEEN CURRENT U.S. LEGISLATION AND THE CRPD AND SUGGESTIONS FOR EXPANSION

The most notable differences in the CRPD and current legislation in the United States—specifically the ADA and the Rehabilitation Act—can be found in the level of inclusiveness and requisite participation in legislation drafting from the community of persons with disabilities, the strong focus on taking a human rights approach, the various monitoring features, and the disparity in specific employment provisions. In order for U.S. legislation to be on par with the requirements of the CRPD, broad changes must be made

⁹⁷ *Convention and Optional Protocol Signatures and Ratifications*, United Nations Enable, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited Nov. 20, 2010).

⁹⁸ *Chapter Four: Becoming a Party to the Convention and the Optional Protocol*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/default.asp?id=231> (last visited Nov. 20, 2010).

⁹⁹ See Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607, 614 (2003) (stating that the Bush administration failed to ratify the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child).

¹⁰⁰ See, e.g., Melish, *supra* note 14, at 46 (arguing that the two standard reasons given for failure to ratify—"lack of value-added in ratification" and constitutional restraints—are not credible because they are not internally consistent). "[T]he question of 'value-added' . . . should be left to the disability community," and constitutional power can be found in section 5 of the 14th Amendment, the Commerce Clause, and Article II treaty power. *Id.*

¹⁰¹ Fain, *supra* note 99, at 611.

¹⁰² Melish, *supra* note 14, at 43.

to the current law. Unlike the changes the ADAAA instituted by simply modifying the statutory language, the United States must comprehensively review it and start with the fundamentals.

A. Inclusiveness of Persons with Disabilities in the Drafting, Implementation, and Monitoring Process

One major theme of the Convention is the inclusion of disabled people in the drafting process.¹⁰³ The CRPD premised its drafting on the overarching principal “nothing about us, without us.”¹⁰⁴ Recognizing that diplomats did not possess the expertise in disability issues necessary to make proper drafting proposals, collaboration was requested by the ad-hoc committee comprised of accredited non-governmental organizations (NGOs), disability experts, and, perhaps most importantly, persons with disabilities in every step of the drafting process.¹⁰⁵

This collaborative approach is echoed throughout the requirements outlined by the CRPD. For example, one of the governing principles is “[f]ull and effective participation and inclusion [of disabled persons] in society.”¹⁰⁶ Specifically, Article 4.3 states, “In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities . . . through their representative organizations.”¹⁰⁷

In contrast, Congress, a body that has not traditionally engaged in dialogue with individuals with disabilities¹⁰⁸ and that is likely unaware of the real issues the disabled community faces, drafts U.S. legislation. Even when Congress is aware of the real issues that need to be tackled, it may have reservations, such as budgetary constraints or concerns about reelection, and may therefore draft lackluster legislation. In the disability law arena, advocates face difficulties getting legislation passed that was promised to them and securing appropriate implementation procedures from the federal government. For example, after the Rehabilitation Act was established, the Department of Health, Education, and Welfare, which is the lead agency

¹⁰³ CRPD, *supra* note 28.

¹⁰⁴ *One Year On – The Convention on the Rights of Persons with Disabilities*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (May 2009), <http://www.ohchr.org/EN/NewsEvents/Pages/1stAnniversaryCRDP.aspx>.

¹⁰⁵ Melish, *supra* note 14, at 43.

¹⁰⁶ CRPD, *supra* note 28, art. 3(c).

¹⁰⁷ *Id.* art. 4(3).

¹⁰⁸ See *infra* text accompanying note 111 (stating that “the panel met behind closed doors and included no disabled members or representatives from the disability organizations”).

responsible for implementation, continually stalled on promulgating any final regulations for over three years.¹⁰⁹ Even after a court ordered the agency to take action, the agency delayed the regulations by asking for more guidance from Congress and creating a review task force to “further study the proposed rule.”¹¹⁰ Further weakening the possibilities of the change promised by the Rehabilitation Act, the panel met behind closed doors and included no disabled members or representatives from the disability organizations.¹¹¹ It was an immense struggle to secure adequate implementation, and it was only after a twenty-five-day sit-in—the longest occupation of a federal building in U.S. history—that activists were able to get the agency to sign the implementing regulations that are currently in place.¹¹²

While the disappointing results of current U.S. legislation can be attributed to numerous factors,¹¹³ it is significant to note that laws with such a large scope are still failing to target the actual barriers that individuals with disabilities face. Viewing this wide net that the ADA and Rehabilitation Act cast versus the insignificant changes that have taken place, especially in the past two decades,¹¹⁴ there is an evident disconnect between the barriers lawmakers thought they should target and the barriers that would significantly change the opportunities of individuals with disabilities. In order for these real barriers to be recognized, understood, incorporated into U.S. law, and appropriately implemented, the disabled community must be included in the legislative process to the same extent that they were in the drafting of the CRPD.

This inclusive approach has been used effectively by other governments and institutions around the globe in a variety of recent initiatives. Specifically, the “nothing about us without us” principle was used recently by the U.N. in its initiatives to garner momentum for implementing the Convention.¹¹⁵ On March 6, 2009, the Human Rights council held an interactive debate for member states and stakeholders to discuss the

¹⁰⁹ Longmore, *supra* note 12, at 106.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 111.

¹¹³ See, e.g., Peter Blanck, “*The Right to Live in the World*”: Disability Yesterday, Today, and Tomorrow, 13 TEX. J. C.L. & C.R. 367, 387–88 (2008) (stating that several reasons exist for continued discrimination in employment, including exclusion and singling out of disabled persons by society and similar ambivalence from judges).

¹¹⁴ See COLKER, *supra* note 4, at 70 (asserting that because one must be “disabled” and “qualify” for employment and because the courts have narrowly interpreted both terms, a plethora of disabled adults remain unprotected by the ADA protection).

¹¹⁵ *Human Rights Council Discussed at the Council*, UNITED NATIONS HUMAN RIGHTS: OFF. OF THE HIGH COMM’R FOR HUMAN RIGHTS (Mar. 2009), <http://www.ohchr.org/EN/NEWSEVENTS/Pages/RightsPersonsDisabilitiesdiscussedCouncil.aspx>.

implications of the Convention and key legal measures to be undertaken in its ratification and implementation.¹¹⁶ The debate began with opening statements from panelists to foster discussions.¹¹⁷ The panelists, who were all experts on disability rights, then answered questions in an open-discussion format.¹¹⁸ In order to further fuel the discussion, a study was ordered that will solicit input from stakeholders, member states, national human rights institutions, and societies of persons with disabilities.¹¹⁹

The U.N. debate is a good example of the interactive component that the United States should incorporate into its legislative process. The door must be opened for all members of society, particularly those with disabilities, to be able to voice their concerns and make specific recommendations in the drafting of legislation. A critical element of the reworking of U.S. law is to allow individuals with disabilities to participate in identifying the fundamental issues to be addressed by new legislation. Further, persons with disabilities and representatives from disability organizations must make up a significant part of the implementation and monitoring committees. This will help to ensure that the legislation does not fall short its goals and does not become a victim of manipulation or deliberate delay, as in the past. This kind of input is the only way that U.S. disability law will be able to target discrimination effectively with a real and lasting effect.

B. Shift to a Human Rights Model

Another important theme in the CRPD is the view of disability-related issues from a “social model” perspective. The CRPD rejects the “welfare model”—where an emphasis is placed on the failure of the individual to adapt to society—and creates a framework for analysis based on human rights, recognizing “that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”¹²⁰

The United Nations Secretariat for the Convention on the Rights of Persons with Disabilities states that the CRPD “marks a[n] [important] ‘paradigm shift’ . . . from viewing persons with disabilities as ‘objects’ of charity, medical treatment[,] and social protection”¹²¹ Instead, the

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ CRPD, *supra* note 28, pmb1., para. e.

¹²¹ *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/default.asp?navid=13&pid=150> (last visited Nov. 20, 2010).

Convention encourages "viewing persons with disabilities as 'subjects' . . . who are capable of claiming [their] rights and making decisions . . . based on their free and informed consent as well as being active members of society."¹²² Further, Human Rights Commissioner Navanethem Pillay calls the Convention a "watershed" and asserts that

in its innovative vision, the Convention recognizes [sic] disability as the result of the interaction between the impairment of the person and outside barriers. Rather than the impairment itself, the Convention identifies in policies, legislation and practices the roots of discrimination, lack of participation or utter exclusion of people with disabilities.¹²³

These notions are echoed throughout the Preamble, Purpose, General Principles, and General Obligations sections of the CRPD.¹²⁴ For example, Article 4 requires parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities."¹²⁵ This provision requires states to take affirmative steps in breaking down stereotypes and promoting the notions of inherent dignity, worth, and "equal and inalienable rights" proclaimed in the Preamble.¹²⁶

This view of human rights is also taken in Article 8. This article requires states to

adopt immediate, effective and appropriate measures . . . [t]o combat stereotypes, prejudices and harmful practices relating to persons with disabilities . . . [including] [i]nitiating and maintaining effective public awareness campaigns . . . [fostering] an attitude of respect for the rights of persons with disabilities . . . [e]ncouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention . . . [and] [p]romoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.¹²⁷

¹²² *Id.*

¹²³ *Id.*

¹²⁴ CRPD, *supra* note 28.

¹²⁵ *Id.* art. 4(1)(b).

¹²⁶ *Id.* pmbl.

¹²⁷ *Id.* art. 8.

Recognizing disability rights as a human rights model has been a struggle in the United States, which has traditionally recognized disability rights as a “welfare” model.¹²⁸ Current U.S. legislation focuses more on removing formal obstacles, rather than trying to mold a society where disabled persons can make equal opportunities a reality.¹²⁹ Some argue that the ADA has helped perpetuate a negative perception of disabled individuals by characterizing them as burdens on the system.¹³⁰ The current legislation has been ineffective in adopting universal human rights ideals that will tackle these negative stereotypes and recent reports have even indicated that this negative stigma towards people with disabilities is on the rise.¹³¹ To increase awareness about these barriers, the U.S. should adopt a campaign aimed at educating society and breaking down stereotypes.

An example of such a campaign can be found in India where, in order to break down barriers built by society, the government created the “Handbook on Employment of Persons with Disabilities in Government of India.”¹³² This handbook responds to basic questions about the implementation of the CRPD and other employment-related laws and also advocates a barrier-free environment.¹³³ A study based on approximately 1,500 cases and legal complaints in India found that “lack of awareness and sensitivity on the part of government functionaries is the key obstacle” in the employment disability arena.¹³⁴ In order to combat this negative mindset, this handbook targets the stereotypes that underlie the Indian government’s negative assessment of persons with disabilities.¹³⁵

The EU took a similar approach to protecting disability rights after it enacted the Employment Equality Directive Mandate in 2000.¹³⁶ In order to battle false and negative stereotypes regarding disability-related issues, the EU launched a campaign aimed at altering stereotypes set forth in the Employment Equality Directive and other similar documents, using various

¹²⁸ Michael Waterstone, *Civil Rights and the Administration of Elections – Toward Secret Ballots and Polling Place Access*, 8 J. GENDER RACE & JUSTICE 101, 103 (2004).

¹²⁹ See, e.g., ADA, 42 U.S.C. §§ 12101–12213 (2006) (providing anti-discrimination measures, but failing to make efforts to educate the public or affect society’s stigmas).

¹³⁰ Blanck, *supra* note 113, at 387.

¹³¹ *Id.* at 388.

¹³² NAT’L HUMAN RIGHTS COMM’N OF INDIA, *ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN PROMOTING AND PROTECTING THE RIGHTS OF PEOPLE WITH DISABILITIES: 12TH ANNUAL MEETING OF APF 3 (2007)* [hereinafter *ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS*], available at <http://www.asiapacificforum.net/about/annual-meetings/12th-australia-2007/downloads/disability-issues/Presentation%20-%20NHRC%20of%20India.pdf>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *About*, EUROPEAN COMM’N: FOR DIVERSITY AGAINST DISCRIMINATION, http://ec.europa.eu/employment_social/fdad/cms/stopdiscrimination/about.html?langid=en (last visited Nov. 20, 2010).

channels of communication.¹³⁷ The campaign aims to “raise awareness of discrimination and increase understanding of the EU laws which exist to protect us all.”¹³⁸ Further, the campaign “also strives to generate debate on the themes of diversity and discrimination and in particular on how people in Europe stand to gain from greater equality.”¹³⁹ Among the materials used to raise awareness are leaflets, fact sheets, images, informational films, posters, presentations, and publications.¹⁴⁰ The initiative also sponsors competitions in journalism¹⁴¹ and photography¹⁴² to increase visibility. In 2007, the campaign teamed up with MTV Networks Europe to broadcast a new television advertisement featuring the three award-winning photographs from their photography competition.¹⁴³

In order to shift the focus of disability law from an individual's shortcomings, as is currently seen in U.S. legislation that embraces the “welfare model,” and to move towards the “social model” featured in the CRPD, the United States should increase awareness of the societal barriers facing disabled people and educate society on the real facts associated with living and working with individuals with disabilities, as in India and the EU. As with the EU's “For Diversity. Against Discrimination” campaign, the United States should target all sectors of society to combat negative stereotypes and, more specifically, target private businesses to reverse stigmas against disabled persons in employment.

One critical component of such a campaign would be to educate the government, and specifically the courts, about disability-related issues, as India did with its “Handbook on Employment of Persons with Disabilities in [the] Government of India.”¹⁴⁴ Considering the hostility that courts have demonstrated against ADA claims,¹⁴⁵ and the drastic effect that courts have had on the success of the legislation,¹⁴⁶ this seems to be an appropriate place

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Resources*, EUROPEAN COMM'N: FOR DIVERSITY AGAINST DISCRIMINATION, http://ec.europa.eu/employment_social/fdad/cms/stopdiscrimination/resources/?langid=en (last visited Nov. 20, 2010).

¹⁴¹ *See EU Journalist Award – Together Against Discrimination!*, EUROPEAN COMM'N: FOR DIVERSITY AGAINST DISCRIMINATION, <http://journalistaward.stop-discrimination.info/2704.0.html> (last visited Nov. 20, 2010) (providing details about the 2010 competition).

¹⁴² *See EUROPEAN COMM'N: FOR DIVERSITY AGAINST DISCRIMINATION, 5 YEARS OF RAISING AWARENESS IN THE EUROPEAN UNION: THE “FOR DIVERSITY. AGAINST DISCRIMINATION.” INFORMATION CAMPAIGN 24*, available at http://ec.europa.eu/employment_social/fdad/cms/stopdiscrimination/downloads/5years08_en.pdf (providing images from competitions in previous years).

¹⁴³ *Id.* at 25.

¹⁴⁴ *ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS*, *supra* note 132.

¹⁴⁵ ADAAA, Pub. L. No. 110-325, 122 Stat. 3553, 3553 (2008).

¹⁴⁶ *See COLKER*, *supra* note 4, at 71 (“Conservative Supreme Court decisions have certainly prevented many plaintiffs from prevailing under the ADA and may have caused employees to become more cautious in even filing charges of discrimination under the ADA.”).

to start. After all, if the courts refuse to zealously enforce them once they are enacted, they will never be effective.

This campaign must reach beyond the courts to significantly impact the governmental mindset in general. If society's perspective is going to be altered, the government must support the campaign at all levels. In order to begin to educate the government, disability sensitivity training should be incorporated in the pre-employment training programs already in place from the local to the federal level. Further, those currently working for the government should be required to attend such training. Individuals with disabilities should be involved in the creation of these training programs and, where possible, should administer the training. This movement will increase the visibility of the disabled population and their campaign, ultimately helping them to overcome the historical struggle that they have endured.¹⁴⁷

Another critical component of this campaign will be to make the message and promotional materials visible to the average American. To make a genuine impact with a high level of visibility, the campaign should target a channel of communication with significant influence on the American people: the media. Considering the emphasis placed upon the media in the American society,¹⁴⁸ this would be an effective way to deliver this important message.

First, the federal government should provide subsidies for members of the media who present disability-related issues in a realistic manner. A distorted view of individuals with disabilities is prevalent in today's media, especially in television and film.¹⁴⁹ Individuals are often viewed as heroes who have bravely overcome their disabilities or as objects to be feared. These practices reduce individuals with disabilities to "mere caricatures of human beings" and do not accurately portray the realities they face.¹⁵⁰ While featuring disability-related issues does increase exposure, featuring them in this way may be a negative reinforcement of the stereotypes that already exist, thus taking a step backwards instead of towards a more realistic representation.

Second, in addition to providing subsidies, the government should sponsor a campaign similar to the "For Diversity. Against Discrimination" EU disability campaign. It could sponsor advertisements via television, print, and electronic media that raise awareness of general disability-related issues. The campaign should, first and foremost, put disability rights in the

¹⁴⁷ SCOTCH, *supra* note 3, at 7.

¹⁴⁸ Lucy Tonic, *How the Media Effects American Society*, ASSOC. CONTENT (July 5, 2007), http://www.associatedcontent.com/article/294192/how_the_media_effects_american_society.html.

¹⁴⁹ See Timothy S. Hall, *Using Film as a Teaching Tool in a Mental Health Seminar*, 5 HOUS. J. HEALTH L. & POL'Y 287, 287 (2005) (stating that films enable a professor to illustrate preconceived notions about individuals with disabilities because of students' significant interaction with this form of media).

¹⁵⁰ *Id.* at 292.

minds of individuals. Then, it should spark interest by creating an interesting and compelling campaign, like the EU disability campaign. Lastly, it should follow up by providing Americans easy access to factual information about individuals with disabilities and their aptitudes.

To target employment issues specifically, the campaign should reach private businesses and provide real statistics, not only about the ability of disabled persons to be productive employees, but also about how employing persons with disabilities may actually benefit businesses. This part of the campaign should confront two prominent misconceptions: first, that disability is equated with lower productivity, and second, that workplace accommodations create an economic burden.¹⁵¹ Contrary to these preconceived notions, studies have shown that developing a diversified workforce has created concrete, economic value for organizations, rather than lowering productivity or increasing healthcare costs.¹⁵² Further, in the aggregate, workplace accommodations can create an economic benefit that outweighs the costs.¹⁵³ The purpose of the overall campaign should be to give the disability movement the voice that it has historically lacked. Bringing to light this kind of information and undertaking an effort to educate the public could represent a significant development, for employers specifically, in the difficult struggle to break down some of the stigmas firmly ingrained in American society.

C. Monitoring and Implementation

Other unique requirements of the CRPD include the monitoring and implementation provisions. CRPD Articles 31 to 40 relate to monitoring the Convention's implementation at both national and international levels.¹⁵⁴ First, a new treaty body is established at the international level.¹⁵⁵ This body will hear complaints about violations of the CRPD.¹⁵⁶ Second, at the national level, parties agree to establish focal points, and to create a coordination mechanism to facilitate related action and implement the CRPD.¹⁵⁷ The practical significance of this agreement is that a specific government office is required to take responsibility for the implementation of the Convention.¹⁵⁸ Further, this office, with input from disabled persons and related organizations, establishes mechanisms for "promotion, protection,

¹⁵¹ Blanck, *supra* note 113, at 392.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ CRPD, *supra* note 28, arts. 31–40.

¹⁵⁵ *Id.* art. 32.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* art. 33.

¹⁵⁸ Lawson, *supra* note 42, at 613.

and monitoring” of the Convention.¹⁵⁹ Article 31 further requires collection and dissemination of statistical information to “facilitate the development and application of implementation policies.”¹⁶⁰ Lastly, the Optional Protocol, if adopted, mandates even greater monitoring measures.¹⁶¹

By contrast, in the United States, most of the critical monitoring of disability-related issues is not administered effectively to produce representative data.¹⁶² Currently, the government does not publish comprehensive studies on disabled employees. Rather, it publishes limited data, such as the general employment rate of disabled people,¹⁶³ and does not break this down into more manageable segments or track other critical data, such as the number of individuals seeking employment or the number of individuals being actively promoted within organizations.¹⁶⁴ Further, the government fails to collect the data necessary to enable private organizations to conduct these critical studies.¹⁶⁵ Instead, the United States leaves collection up to independent organizations, stepping in only when there has been a clear failure in the purpose of the Act.¹⁶⁶

Israel prepared for the Convention’s implementation by rising awareness and engaging civil society illustrates a dynamic implementation strategy.¹⁶⁷ These centers train individuals on the principles of the Convention and how to effectively implement the document.¹⁶⁸ Israel has also begun to develop a quantitative monitoring mechanism that will track the progress of domestic implementation efforts.¹⁶⁹

¹⁵⁹ *Id.* at 613–14.

¹⁶⁰ *Id.* at 614.

¹⁶¹ *Convention and Optional Protocol Signatures and Ratifications*, *supra* note 97.

¹⁶² See LIVERMORE & GOODMAN, *supra* note 15, at 14–18 (declaring that there is a lack of both data and a reliable control group leading to little evidence about the impact of certain measures intended to benefit the disabled).

¹⁶³ *New Monthly Data Series on the Employment Status of People with a Disability*, U.S. DEPT OF LAB., <http://www.bls.gov/cps/cpsdisability.htm> (last modified Aug. 25, 2010).

¹⁶⁴ *Id.*

¹⁶⁵ See LIVERMORE & GOODMAN, *supra* note 15, at 15 (stating that “[t]he general lack of data, in combination with the lack of an adequate comparison or control group . . . are probably the two primary reasons why there is very little solid evidence on the impacts of [current federal initiatives]”).

¹⁶⁶ See, e.g., ADAAA, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553 (2008) (illustrating the government’s failure to intervene for eighteen years after the ADA’s passage, and only then after clear frustration of the initial purpose of the ADA).

¹⁶⁷ Ambassador Daniel Carmon, Deputy Permanent Representative, State of Isr., Statement During the Opening for Signature of the Convention on the Rights of Persons with Disabilities Before the 61st Session of the United Nations General Assembly (Mar. 30, 2007), available at http://www.un.org/esa/socdev/enable/documents/Stat_Conv/Israel%2061st%20SESSION%20OFF%20THE%20GENERAL%20ASSEMBLY.doc.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

The Convention also suggests steps to be taken for implementation.¹⁷⁰ Article 32 outlines "appropriate and effective measures," referring to specific examples of what kinds of implementation measures can be used.¹⁷¹ These include, for example, "[f]acilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices; . . . [f]acilitating cooperation in research and access to scientific and technical knowledge; [and] . . . [p]roviding, as appropriate, technical and economic assistance"¹⁷²

To ensure effectiveness with the adoption of reformed domestic disability legislation, the United States should implement monitoring procedures modeled after Israel's current and the Convention's proposed procedures. Specifically, the United States should appoint a body charged solely with monitoring the Convention. This agency should be comprised of individuals from the disabled community, requiring involvement and open communication with the disabled sector of the population. The agency should not be secretive, meeting behind closed doors and working to limit the scope of the legislation, as it did after the enactment of the Rehabilitation Act.¹⁷³ Instead, it should be a functional, inclusive body whose goals are to effectively avoid making decisions based on minimal requirements or budget constraints, and to make dynamic changes that result in a significant, positive impact for individuals with disabilities.

This body should provide training and information for the private and public sectors on how to implement the new legislation. It should further act as a check against the judiciary and executive agencies, ensuring that the government itself does not backlash against the legislation as occurred with the Rehabilitation Act¹⁷⁴ and ADA.¹⁷⁵ Lastly, this agency should be responsible for making sure that data on all critical factors of the employment cycle are collected, analyzed, and made available to the public.

To provide an extra internal check and monitoring mechanism, the United States should allow for more extensive remedies in cases of failure to comply

¹⁷⁰ CRPD, *supra* note 28, art. 32.

¹⁷¹ *Id.* art. 32(1).

¹⁷² *Id.* art. 32(1)(a)-(d).

¹⁷³ See Longmore, *supra* note 12, at 106 (stating that after the enactment of the Rehabilitation Act, HEW, the agency charged with issuing the regulations associated with section 504, set up a review task force which included no individuals with disabilities or representatives of disability organizations and met secretly behind closed doors).

¹⁷⁴ See *id.* at 105-11 (stating that in order to get Section 504 of the Rehabilitation Act implemented, disability rights activists were forced to engage in a twenty-five-day sit-in- the longest occupation of a federal building in U.S. history).

¹⁷⁵ See COLKER, *supra* note 4, at 6-8 (stating that the enactment of the ADA produced "a public backlash" and resulted in "misleading and sometimes inaccurate new coverage").

with disability legislation. Currently, many individuals are unable to bring discrimination claims to court, and are therefore unable to assert their rights. The EEOC, which is the agency charged with execution of the ADA, is overwhelmed by cases and is only able to take a very limited number of strong claims.¹⁷⁶ Potential plaintiffs who are not selected for litigation by the EEOC are issued a “right to sue” letter and are forced to seek private counsel.¹⁷⁷ Due to the limited remedies available, many are unable to secure private counsel and ultimately have no remedy.¹⁷⁸ In order for the judicial system to work as a check on this legislation and to act as an internal monitoring mechanism, individuals must have the opportunity to bring these claims. Availability of broader remedies would further this objective.

Having a monitoring plan in place will also ensure that the new legislation does not lose momentum and that its purpose is not forgotten. Designating an agency to implement the new legislation, collecting more data on critical factors relating to success, and allowing more extensive remedies will allow the legislation to be a long-term solution for disability discrimination, will make sure that the movement is not forgotten, and will ensure that backlash is minimized.

D. Specific Employment Provisions

In addition to the overarching themes of the Convention, the specific employment provision is Article 27. Among the work and employment provisions of Article 27, are the general rights to work equally with others in all forms of employment and the opportunity to gain a living.¹⁷⁹ Specific provisions include equal pay; safe and healthy working conditions; equal trade union rights; access to technical and vocational guidance programs; placement services and vocational and continuing training programs; promotion of employment opportunities and career advancement; assistance in obtaining employment; promotion of opportunities for self-employment; employment in the public sector; promotion of employment in the private sector (including the possibility of affirmative action programs, incentive and other measures); and rehabilitation, job retention, and return-to-work programs, among others.¹⁸⁰ These requirements go beyond removing formal

¹⁷⁶ *Federal Laws Prohibiting Job Discrimination Questions and Answers*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <http://www.eeoc.gov/facts/qanda.html> (last modified Nov. 21, 2009).

¹⁷⁷ *Id.*

¹⁷⁸ *See id.* (listing the limited remedies).

¹⁷⁹ CRPD, *supra* note 28, art. 27.

¹⁸⁰ *Id.*

obstacles, requiring training and development for individuals with disabilities and affirmative action from employers.

In order for the United States to comply with the CRPD, legislation must be enacted that not only prevents discrimination, but also promotes the disabled population and puts them on equal footing with the non-disabled population. To accomplish this, federal legislation requiring affirmative action, job training, and rehabilitation should be enacted. Further, to ensure that these programs can be successful, technical defects, such as the disincentives innate in the Social Security and health insurance systems must be addressed.

1. Job Training and Rehabilitation Programs

The disabled community should be educated on the opportunities that are available through the CRDP and should be encouraged to take the first step in making these opportunities a reality. Job training and rehabilitation would not only be compliant under Article 27, but would also comport with the theme of moving towards a social model of disability law. Empowering individuals with training in a field of their interest and educating them about the opportunities available to them will encourage a shift of thinking away from dependency and towards self-sufficiency.

There are a great number of Federal and State programs are aimed at providing training, referrals, and other job-related services to qualifying persons with disabilities.¹⁸¹ Recently federal legislation established the Ticket to Work Act, a program that provides a "ticket" for job-related services,¹⁸² and the Workforce Investment Act of 1998, a program that requires states to provide federally funded employment related services through One-Stop Career Centers.¹⁸³ These programs rely heavily on state administration and are both programs that disabled individuals participate in on a voluntary basis.¹⁸⁴ The United States should modify the existing model with these various state and federal initiatives, but should also take the program one step further. The United States could make these successful not only in theory, but also in practice by requiring that those individuals who are reasonably able to seek employment are trained and participate in career services. The program could have an opt out provision for individuals who have been deemed medically unfit to work. For other individuals who do not qualify to opt out, a requisite to receiving federal aid in some form should be to participate in a Federally created standardized program that educates the

¹⁸¹ LIVERMORE & GOODMAN, *supra* note 15, at 52.

¹⁸² *Id.* at 24.

¹⁸³ *Id.* at 28.

¹⁸⁴ *Id.* at 28-29, 32.

individual on their employment opportunities and helps the individual find potential employment. In order to use the structure already in place, the individual could receive “ticket” to be used at any local facility or One-Stop Career Center. By making this a standardized process, much of the confusion arising from the current plethora of State and Federal programs will be eliminated. Further, by making this process mandatory for qualifying individuals, more individuals will participate in the system, achieving greater self-sufficiency and reducing long-term dependence on public programs.

2. *Affirmative Action Initiative*

In the United States, employment legislation—specifically the ADA—is largely based on anti-discrimination measures. These measures do not effectively afford individuals with disabilities an equal foundation to seek and maintain employment. Through the establishment of vocational training and job-assistance programs, individuals would not have to overcome formal obstacles to obtain employment. History has revealed, however, that the formal obstacles built by the system and the limitations of the actual disabilities are not the most significant obstacles to entry into the workforce; it is the negative stereotypes of society that are the most substantial barrier.¹⁸⁵ In time, educational programs, the disability campaign, or the dawn of new societal norms could completely eliminate these barriers, but the disabled community is demanding action now. Decades have passed since the disability campaign has been visible, and since that time, disabled persons have been demanding equality, albeit unsuccessfully. To end their wait, the government should initiate a limited time frame, affirmative action initiative.

This program should be modeled after the Rehabilitation Act, but should cover every employer with fifteen or more employees, not just those within the limited sector of public entities. Each covered employer should be required to track employment data for individuals with disabilities and submit an affirmative action plan to a newly created compliance agency that is similar to the Office of Federal Contract Compliance Programs, which currently reviews the affirmative action plans of employers covered under the Rehabilitation Act.¹⁸⁶ These reports should be made annually and should outline the organization’s problem areas, along with the steps they will take to correct identified inadequacies. This initiative should be limited in time

¹⁸⁵ See Joseph P. Shapiro, *How the Disability Rights Movement is Changing America*, *Epilogue to NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 322, 326 (1994) (discussing the “public’s uninformed stereotypes of disabled life as a sad and pitiable one”).

¹⁸⁶ *OFCCP*, *supra* note 54.

and scope. Once an employer can show a trend of equal treatment of individuals with disabilities and a diversified workforce, the reporting requirement should be lifted. Further, when the annual reports show that society has reached a point where stereotypes and social barriers are no longer a significant source of hardship in employment, these affirmative action initiatives should be removed.

Like the vocational rehabilitation and workplace training initiatives, this affirmative action mandate would simultaneously further several goals identified by the Convention. First, it is consistent with the requirements listed in Article 27, which call for employment on an equal basis and set out affirmative action mandates, as a way to specifically further the goal of “[p]romoting the employment of persons with disabilities in the private sector”¹⁸⁷ Second, it will be consistent with the theme of moving U.S. disability law towards a “human rights” model. Once more disabled individuals are employed, it is likely to increase visibility of disabled individuals in mainstream society and negative stereotypes will be eliminated. With an affirmative action mandate in place, persons with disabilities receive more than a promise of eventual progress; they get a realistic expectation of radical change now.

3. *Addressing Technical Defects*

In order for these suggested programs to be effective, technical defects like the disincentives of the current Social Security and Medicaid systems must be addressed. In a recent study, beneficiaries of governmental aid listed “loss of health insurance” as the largest barrier to returning to work.¹⁸⁸ Many individuals with disabilities receive health and income benefits through the Social Security system, Medicare benefits if they are out of work or have recently been employed, or Supplemental Security Income if they fall below a certain income threshold.¹⁸⁹

Once an individual meets the specified time or income threshold, his or her benefits are abruptly cut off.¹⁹⁰ These benefits are relatively difficult to qualify for, and the individual must prove that he or she is either unable to

¹⁸⁷ CRPD, *supra* note 28, art. 27(1)(h).

¹⁸⁸ NATIONAL COUNCIL ON DISABILITY, THE SOCIAL SECURITY ADMINISTRATION’S EFFORTS TO PROMOTE EMPLOYMENT FOR PEOPLE WITH DISABILITIES: NEW SOLUTIONS FOR OLD PROBLEMS (2005), available at <http://www.ncd.gov/newsroom/publications/2005/ssa-promoteemployment.htm>.

¹⁸⁹ Bagenstos, *supra* note 6, at 32–33.

¹⁹⁰ See *How to Qualify for Social Security Disability Benefits*, SOCIAL SECURITY ONLINE (Jan. 26, 2010), <http://www.ssa.gov/dibplan/dqualify.htm> (stating that an individual qualifies until he or she obtains employment).

work or unable to earn an adequate living.¹⁹¹ Because of the stringent requirements and the significant investment of time and effort to qualify, many individuals develop a psychological investment in the notion that they are unable to work.¹⁹² In many cases, these benefits are a matter of life and death, and many individuals find that the private insurance they receive through their employers does not provide the critical services that they need.¹⁹³ Further, they may not be making enough money at their new job to make up for this deficiency. In many cases, Social Security income along with the health benefits they were getting while unemployed are more favorable than the income and benefits they received once employed, creating a significant disincentive to work.¹⁹⁴ Even where the benefits would not be entirely eliminated, individuals with disabilities have long feared the discontinuation of benefits, and this stigma alone is a significant barrier to returning to or entering the workforce.¹⁹⁵

The government should create a program that will address the disparity between the income and benefits an individual would receive from government funding, and the income and benefits a individual would receive once employed. This discrepancy should be addressed by providing extra Social Security benefits or income to disabled individuals to compensate for any loss that they suffer as a result of becoming employed. The government should not utilize either ceilings or time limitations, like those present in the current system. In each case, an individual should be entitled to receive benefits for the entire span of his employment, either through an employer or through a combination of employer-provided and government-sponsored benefits, which reach or exceed the level of benefits received before returning to work. Education about this initiative should be incorporated in the training and job assistance programs discussed herein, so that the fear of losing benefits is eliminated. The government should also incentivize private businesses to provide better compensation by giving tax breaks to employers that reach a threshold of exceptional benefits for individuals with disabilities.

VI. CONCLUSION

The disabled community has made demands for equal rights, but the current U.S. legislation, despite great efforts, has fallen short. Congress,

¹⁹¹ See Bagenstos, *supra* note 6, at 32–33 (“To receive SSI, applicants must establish both that they have a ‘disability’ and that they earn and own less than a statutory income and resource threshold.”).

¹⁹² *Id.* at 32.

¹⁹³ *Id.* at 26–27.

¹⁹⁴ See *id.* at 27–33 (arguing that private insurance places severe limitations on coverage for individuals with disabilities which force them into the public healthcare system).

¹⁹⁵ *Id.* at 32–33.

working with others, must create dynamic legislation that works, not only in theory, but also in practice. The CRPD could be the answer to the unwavering call for change from a community of Americans who have suffered enough. But, the United States must act now to give these individuals what has been promised to them since the founding of this country, as enumerated in the Declaration of Independence: the promise of liberty and equality to all.¹⁹⁶

¹⁹⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).