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Emergent Disability & the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities

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Emergent Disability and the Limits of Equality:

A Critical Reading of the UN Convention on the Rights of Persons with Disabilities

Beth Ribet¹

ABSTRACT:

The UN Convention on the Rights of Persons with Disabilities marks a shift in international legal relationships to and conceptions of disability. The Convention is the first binding international instrument of its kind related to disability. Its premises differ from the earlier World Programme on Disability, and more closely integrate the frameworks of U.S. domestic equal protection and disability civil rights law. Drawing on critical race and feminist theoretical literature, this paper critically examines the implications of internationalizing a U.S. disability law framework, with particular attention to the problem of "emergent disability", or disability which is specifically produced as a consequence of social inequity or state violence.

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The United Nations Convention on the Rights of Persons with Disabilities (hereinafter “the Convention”) opened for state signatories on March of 2007, following adoption by the General Assembly in December of 2006². The Office of the Joint

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² See United Nations Enable, available at: <http://www.un.org/disabilities/index.asp>, last visited June 23, 2009 [hereinafter Enable], and see Convention on the Rights of Persons with Disabilities [A/Res/61/106],

Secretariat administrating the implementation of the Convention, notes that transnational support, at least as indicated by the number signatories on its opening day, exceeded any previous UN convention³. President Obama initially committed the U.S. as a signatory in July of 2009, although formal implementation still awaits Congressional ratification.⁴ Although there has been no equivalent document in the history of global disability rights, the Convention was certainly not entirely lacking precedent in international legal conceptualization of disability. Namely, the United Nations designated the year 1982 as the “International Year of Disabled Persons”, ultimately leading to the formulation of the “World Programme of Action Concerning Disabled Persons”⁵.

The World Programme is indicative of the type of international legal document that international legal theorists generally typify as “soft” law, in the sense that its provisions are not binding on states or organizations outside of the UN’s own internal bodies. However, as the first major international legal document posing a comprehensive platform which centered disability as a political, medical and social phenomenon, it would be an error to dismiss it as lacking any wider practical import, particularly in anticipating the underlying philosophy of the Convention⁶.

The World Programme largely prioritized the ideal of “equalization of opportunities”, which it defined as follows:

Equalization of opportunities means the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and

available at: <http://www.un.org/disabilities/default.asp?id=61>, last visited June 23, 2009 [hereinafter Convention].

³ See Enable, *supra* note 1.

⁴ See Barack Obama, *Remarks by the President On Signing of U.N. Convention on the Rights of Persons with Disabilities* (July 24, 2009), available at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing/

⁵ See World Programme of Action Concerning Disabled Persons, available at: <http://www.un.org/esa/socdev/enable/diswpa00.htm>, last visited June 23, 2009 [hereinafter Programme].

⁶ The philosophical link to the World Programme is explicitly noted in the preamble to the Convention. Convention, *supra* note 2.

*work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all*⁷.

In addition to this primary goal, it also engendered some discussion of rehabilitation, and particularly of prevention⁸. The latter term is broken down into primary and secondary categorizations. Primary prevention refers to actually preventing “impairment” entirely, while secondary prevention refers to minimizing its consequences, both individually and socially⁹.

The Convention partially parallels the text of the World Programme, mainly in the framing of equality as the primary concern of international legal intervention in the status of persons with disabilities. Although the language of the Convention reflects more contemporary concepts of “universal design”¹⁰ with less emphasis on the term “equalization of opportunity”, its general tenor is mostly consistent with the language both of several other international conventions¹¹, and with conceptions of anti-discrimination and equal protection intrinsic in the U.S. domestic legal system¹². While the specific term “rehabilitation” has mostly vanished from the later document¹³, the Convention recalls many of the goals of earlier rehabilitation language, reframed in terms of “living independently”, “personal mobility”, and to some extent, within the imperative to promote “accessibility”¹⁴. However, the goal of “prevention”, particularly “primary

⁷ Programme, *supra* note 5.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ See Convention *supra* note 1. In Article 2, Universal design is defined as follows: “*“Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.*”

¹¹ *Ibid.* The Preamble to the Convention invokes the seven other primary UN International Conventions as consistent with its intentions.

¹² I note the similarity to U.S. equal protection law here, particularly because at several points emphasis on concepts of non-discrimination is structurally similar to the text of the Americans with Disabilities Act. See Americans with Disabilities Act, available at: <http://www.ada.gov/pubs/ada.htm>, last visited December 2, 2007. [hereinafter ADA]. In particular, note that Article 2 & Article 3 of the Convention adopt several terms which emerged earlier in Sec. 12101 and 12111 of the ADA, such as “reasonable accommodation”.

¹³ See Convention, *supra* note 1. For a limited exception, note item 4, in Article 16.

¹⁴ See Programme, *supra* note 1 and Convention, *supra* note 1. Particularly note Articles 9,19 &20 of the Convention. Many contemporary disability rights advocates would likely approve of this linguistic shift; the term rehabilitation can be understood as stigmatizing in the sense that the disabled person is the object of state intervention (not coincidentally, using language also applied to criminality). \

prevention”, has distinctly been eliminated from Convention, either in its original language as reflected in the World Programme, or in any explicit goal geared towards altering the context in which “impairments” initially occur¹⁵. In this respect the language and agendas represented in the Convention are more closely consistent, for instance, with those embedded in the U.S. domestic statute, the Americans with Disabilities Act (hereinafter ADA), in that they emphasize the individual rights of persons with disabilities to equal access to resources and public spaces, and to equal treatment under law, without any interventionist agenda relative to the emergence or production of disabilities¹⁶.

In this paper, I scrutinize the implications of the elimination of prevention language from the Convention. In taking on this task, I must first acknowledge an objection that some sectors within disability rights movements and advocacy might raise: namely, that obviously the prevention language was eliminated because it presumptively stigmatized disability as something to be rid of, rather than focusing on structural and social accessibility¹⁷. Western disability historians note that in recent decades, disability activists have fought very hard to advance the notion of “disability pride” based on the idea that there is nothing inherently negative about disability, other than the social and political barriers and discrimination engendered by “ableism” or disability oppression¹⁸. In this sense, the elimination of prevention language can be interpreted as simply a

¹⁵ *Ibid.* It should be acknowledged that at least some of the drive to eliminate the term “prevention” from international disability law was likely rooted in controversy over whether the term might implicate selective abortion.

¹⁶ See ADA, *supra* note 12.

¹⁷ It should be acknowledged that the Convention was not solely imposed by the member states of the United Nations; some disability advocates and communities were instrumentally involved in its production. See e.g. Inclusion International, available at: http://www.inclusion-international.org/site_uploads/File/HearOurVoices-Priority%20Web.08.pdf (stating that “Never before in the history of the United Nations have people affected by a Convention been so intimately involved in drafting it.”)

¹⁸ See JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1994) [HEREINAFTER SHAPIRO]; PAUL LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY (2003).

sensible reflection of increasing sensitivity to the concerns and self-definitions produced by disability communities.

I agree with this analysis to a point; my agenda would certainly not be to call for a reframing of the UN Convention based on the goal of “eliminating” or “stopping” disability; both terms evoked by the concept of “prevention”. In multiple respects, I would embrace the critique that the term “prevention” has been inherently problematic for the reasons identified in the previous paragraph. In this one sense, I join the ranks of those scholars and advocates who find the shift welcome and otherwise unremarkable. However, my contention in this paper is more specific: I argue that with the elimination of attention to disability prevention, international law has also simultaneously vacated any analysis of disability which acknowledges its social origins, or enables recognition that power relations have any to do with the production of disabilities (and not just the treatment of people who are for whatever never-specified reason, “impaired”).

In order to make this argument, I will turn first to the fairly recent literature within disability studies that focuses on the concept of “emergent disabilities”. Part I of this paper discusses this literature, and its implications for an analysis of disability and power. The second part of this discussion returns specifically to the language of the Convention, with some continuing analysis relative to the World Programme and to the ADA. In this section, I draw from critical race theories and from feminist legal theories, in order to delineate some of the implications of relying on an “equality” or equal protection framework in advancing international law regarding disability rights. Finally, in the conclusion, I discuss some of the implications of this analysis for disability rights movement discourse, and lay out some very preliminary reflection on potential directions for future legal advocacy, broadly, and relative to the Convention.

Part I: Towards an Analysis of Disabling Oppression and Violence

Western legal conceptions of disability frequently invoke several specific ideological presumptions. First, disability is treated as an objective, determinable medical fact¹⁹. Disability historians have repeatedly documented the construction of illness, deformity, and impairment as contingent, shifting categories indicating the medicalization of gender, sexuality, class, nationality, religion, and race & ethnicity²⁰. However, contemporary court recognition of disability typically presumes a value-neutral scientific basis, underlying admittedly social dynamics of discrimination²¹.

Second, relative to disability discrimination doctrine, or constructs of equality, disability often appears to be without origin. In other words, while disability-based subordination is recognized as a social phenomenon, there is often no integrated political attention to why disability manifests in individuals or particular communities²². As noted earlier, this certainly applies to the text of the Convention. This elision is very noteworthy, because in several states, domestic laws certainly recognize disability as possessing an origin, when the issue is, for instance, workers compensation suits, personal injury law, or medical malpractice. In fact, in these types of claims, the central legal issue revolves around the origin of disability. That is, causing disability is the basis for liability. Although the severity, longevity, meaning or demonstrable life impact of the disability certainly may be very relevant to arguments for civil damages, the presumption that disability in this context is an experience of inflicted harm remains largely unquestioned and un-scrutinized. To clarify my point, disability often appears to function in two regards: a) disability-as-identity, which under the auspices of international human

¹⁹ See CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* (1988).

²⁰ DIANNE POTHIER & RICHARD DEVLIN, EDs., *CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY & LAW* (2006) [HEREINAFTER POTHIER]

²¹ Bradley A. Areheart, *When Disability Isn't 'Just Right': the Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 *Indiana L. J.* (2008); PAISLEY CURRAH, RICHARD M. JUANG & SHANNON PRICE MINTER (EDS), *TRANSSEXUAL RIGHTS* (2006) [HEREINAFTER CURRAH]

²² This is for instance, typified by the ADA, *supra* note 12, which constructs defines disability as the presence of an impairment, and never references cause, origin, or presence.

rights, civil rights, or equal protection doctrine, functions to designate membership in a class of persons protected from discriminatory treatment²³ or as beneficiaries of social welfare programs, and b) disability-as-injury, usually a very individualized basis for a civil legal claim, whether a tort, or a claim grounded in some area of labor or health law²⁴. I further suggest that the two conceptions of disability rarely appear to overlap in law; they are implicitly constructed as distinct.

Third, while disability may function as a central element in the assertion of rights or the establishment of a claim for compensation, it also implicates a long social and legal history of stigma²⁵. To the extent that societies and legal systems conceive of individuals and their rights in terms of political/economic measurable worth, the individual with a disability is understood as damaged, and therefore devalued²⁶. Marta Russell particularly notes that capitalist systems, which conceive of human labor as capital, tend to construct disabled bodies and minds as defective and without economic worth --- an assumption and ideology which then infuses the social treatment of disabled populations²⁷. The disabled individual, rather than having value, becomes a political or economic burden on the state²⁸, or a social imposition on the public²⁹. In courts and legal systems, I suggest that this devaluation often translates into a perceived lack of credibility, or even basic competency to act as a legal agent.

²³ See e.g. ADA, *supra* note 12.

²⁴ There are exceptions to the individualization of this type of civil claim certainly, for instance in class actions where a group of people have been harmed by the negligence or actions of a corporation, be it due to environmental toxins, manifesting harms from pharmaceutical side effects, or any of a number of examples. However, unlike laws meant to address the issue of equality, the issue is never membership in a class as broad as “disabled persons”; at most it encompasses a group of individuals who share a fairly specific context or experience. Michael Waterstone & Michael Stein also note that class actions in disability law, at least in the area of civil rights claims in employment have been drastically underused. See Michael Stein & Michael Evan Waterstone, *Disability, Disparate Impact & Class Actions*, 56 Duke L.J. 861 (2006) [hereinafter Waterstone].

²⁵ See Currah, *supra* note 21.

²⁶ See Marta Russell, *What Disability Civil Rights Cannot Do: Employment & Political Economy*, 17: *Disability & Soc’y* (2002)

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

In this analysis, I propose that the conception of emergent disability constitutes an opportunity to disrupt each of three ideological presumptions detailed here. The term “emergent disability” surfaced in social scientific research as a descriptive of a pattern of burgeoning mental and physical conditions which correlate, often strongly, with poverty and various forms of social and political subordination³⁰. In an analysis of poverty and disability, Jennifer Pokempner and critical race theorist Dorothy Roberts note that while these patterns are not actually new, the recognition of their “emergence” poses a challenge to modes of medicine and policy which systemically ignore the relationships between health and issues of social justice or equity³¹.

For the purposes of this discussion, I conceive of emergent disability as a subset of the broader term “disability”, which refers specifically to physical, cognitive and/or psychological conditions which are wholly or partially caused by social inequity. The basis for inequity may be grounded in class and economics, gender, sexuality, race and/or ethnicity, immigration status, age, or other disabilities, and often occurs at the intersection of several of these demographics simultaneously. And the event(s) which originate disabilities may derive from periods of extreme mass violence, from systemic, “ordinary” dynamics of medical, nutritional, or housing deprivation, from labor exploitation or safety or environmental hazards, from criminal or medical institutionalization, or from interpersonal or domestic violence. The term “emergent” disability is not a catch-all for every disability, in that it does not necessarily include conditions which are solely genetic in origin³², a consequence of relatively normative aging processes, or of accident or circumstance which are not specifically indicative of

³⁰ Katherine Seelman & Sean Sweeney, *The Changing Universe of Disability*, 21 Am. Rehabilitation 2 (1995) [hereinafter Seelman]

³¹ Jennifer Pokempner & Dorothy Roberts, *Poverty Welfare Reform & the Meaning of Disability*, 62 Ohio St. L.J. (2001) [hereinafter Pokempner]

³² I qualify here that even genetic conditions may in some instances be socially determined, for instance where genetic disorders result for instance from radiation or toxin exposure, from pharmaceuticals, or from long-term genetic adaptation to oppressive conditions. My point here is simply to acknowledge that notwithstanding social inequity, certainly diseases and disorders still occur.

subordination. However, it is otherwise a very broad umbrella term designating conditions which --- in the lives of particular individuals or communities --- would not be present, or would not be severe or significant, ‘but-for’ a context of subordination or deprivation.

As already noted, the meaning of disability is often very mutable, and certainly relative, and in fact the Convention acknowledges this fact³³. Without engaging here in a deeper discussion of the social construction of disability, for the purposes of this discussion I am also distinguishing the term emergent disability from the medicalization of social behaviors which are not, in themselves, an impairment or an inherent experience of illness, pain or suffering³⁴. In other words, though the medicalization of deviance is certainly an inter-related issue in any analysis of disability and subordination, my focus here is specifically on disabilities which can be understood as an inflicted experience of physical or mental/emotional harm, suffering, or injury, which may engender, but are not solely indicated by social discrimination (i.e. ableism). Lastly, I make no attempt here to quantify what proportion of people with disabilities may fall within this subset. I know of no literature which does so broadly, though certainly specific studies document incidences of certain conditions or impairments along demographic lines, particularly within broader literatures on health disparities (though disability-framing is not always

³³ See Convention, *supra* note 2.

³⁴ In using the term impairment here and in distinguishing it from the medicalization of deviance, my purpose is certainly not to suggest that “impairments” are immutable, objective experiences which would have comparable impacts regardless of the accessibility or hostility of the context. The premise of universal design, certainly, is that impairments can be as much a reflection of an exclusive or inaccessible structure, as of any other aspect of experience. I acknowledge that experientially, disabilities are complicated, and even with identical conditions, some individuals will locate any experiences of suffering or loss in the social context while others interpret the disability itself as the ‘problem’ or cause of any difficulties. My point here is not to attempt to draw bright lines between “real” and “medicalized” disabilities or to attempt to separate the experience of ableism from the experience of physical or mental disability. I am however, making use of the term “emergent disability”, in this discussion, partly as an indicator of disability which can not solely be understood as the medicalization of social behavior. For an introduction to the sociological study of medicalization and deviance, see PETER CONRAD & JOSEPH M. SCHNEIDER, *DEVIANCE & MEDICALIZATION: FROM BADNESS TO SICKNESS* (1992) [HEREINAFTER CONRAD]. Also see Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 J. Health Care L. & Pol’y 352 (2000), (for comparative discussion of social vs. medical models of disability).

present in these analyses)³⁵. However, my presumption in this paper is that the category emergent disabilities, as defined here, encompasses a very substantial portion of disabled populations --- likely at least a majority of those who are not advanced in years. In other words, I am assuming that many if not most impairments and health conditions which may be defined as disability in young and middle-aged populations are caused, at least in substantial part, by systemic inequity and subordination.

As noted, various theorists have pointed to the utility of the concept of emergent disability in disrupting the traditional notion that health issues can be understood without attention to social justice issues³⁶. I propose that a critical analysis of emergent disability poses a parallel and complex challenge in the area of disability law. As discussed earlier, disability law often operates to deploy and reinforce certain ideological presumptions: a) belief in a reliable, objective medical science, b) the erasure of issues of origin or cause of disability from the discourse when the issue is disability-based discrimination, and the corresponding separation of disability-as-identity from disability-as-injury, and c) the association between disability, and lack of credibility or worth.

Challenging Medical and Scientific Neutrality

Social scientists and disability theorists have repeatedly documented the use of medicine and science in rationalizing and reinforcing subordination³⁷. Even a cursory exploration of the history of eugenics is illustrative of this dynamic³⁸. The subject of emergent disabilities intensifies and adds an additional dimension to this critique.

³⁵ On the latter, see e.g. Vickie M. Mays, Susan D. Cochran & Namdi W. Barnes, *Race, Race-Based Discrimination, and Health Outcomes Among African-Americans*, 58 *Annu. Rev. Psychol.* 201 (2007) [hereinafter Mays] (Discussing the neurological and stress-related consequences of sustained exposure to racist treatment).

³⁶ See Pokempner, *supra* note 31. Also see Melissa J. Mcneil & Thilo Kroll, *Women & Emerging Disabilities*, In BONNIE G. SMITH & BETH HUTCHISON (EDS), *GENDERING DISABILITY* (2004)

³⁷ See Conrad, *supra* note 34; Pothier, *supra* note 20.

³⁸ See SHARON L. SNYDER & DAVID T. MITCHELL, *CULTURAL LOCATIONS OF DISABILITY* (2005) (discussing the intersecting strands of disability, race, class & gender woven into the ideologies of eugenics, and the use of eugenic policies as a form of social control).

Medicine and science can certainly be understood as socially “disabling” in the sense that they rationalize the deprivation of rights to people labeled disabled, where the underlying basis for the label is a stereotype grounded in racial, gender, sexual, class, or religious ideologies³⁹. In this kind of dynamic, medicine plays a role in justifying a violation of rights or a loss of status, by establishing disability as stigma.

Histories of human experimentation (medical and psychiatric)⁴⁰, nuclear testing involving intentional exposure of human beings to radiation⁴¹, medical campaigns intended to sterilize colonized populations (for instance in Puerto Rico)⁴² or use of particular populations of women and girls as ‘guinea pigs’ in reproductive pharmaceutical testing⁴³ are all indicative of a power relationship in which disablement is often the outcome of abuse by a medical or scientific institution. In this dynamic, medicine and science do not simply enable a legal or political abuse; they are the physical cause of disablement.

The increasing centrality of biological weaponry in contemporary military/political discourse also syncs with this analysis. As disability historian Paul Longmore, among others, has noted, the goal of warfare is not framed solely in terms of killing the enemy. The purpose is to “disable” the enemy, with the implicit message that

³⁹ The U.S. Constitutional Law case, *Buck v. Bell* is a classic illustration of this dynamic, wherein the plaintiff, Carrie Buck, was forcibly sterilized based on a diagnosis of retardation. Later interviewers repeatedly noted that she demonstrated normal intelligence. Aside from highlighting the legal negligibility of the reproductive rights of people with disabilities, this case also demonstrates how the nexus of poverty and gender can catalyze a stigmatizing medical diagnosis. See *Buck v. Bell*, 274 U.S. 200 (1927).

⁴⁰ See e.g. HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* (2008) (discussing the politics and medical consequences of racialized human experimentation).

⁴¹ See e.g. SALLY MILLER, *STUDIES IN THE ECONOMIC HISTORY OF THE PACIFIC RIM* (1997); JUDITH V. ROYSTER, *NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS* (2007); ROBERT W. VENABLES, *AMERICAN INDIAN HISTORY: FIVE CENTURIES OF CONFLICT & COEXISTENCE*, VOL. 2 (2004).

⁴² See M. Gonzalez, *La Operacion: an Analysis of Sterilization in a Puerto Rican Community in Connecticut*, In RUTH E. ZAMBRANA, *WORK, FAMILY & HEALTH: LATINA WOMEN IN TRANSITION* (1982); Leon Luz, *Sterilization & Depression: a Study of Puerto Rican Women Living in New York*, Doctoral Dissertation, Fordham University (1996); ANNETTE B. RAMIREZ DE ARELLANO & CONRAD SEIPP, *COLONIALISM, CATHOLICISM, AND CONTRACEPTION: A HISTORY OF BIRTH CONTROL IN PUERTO RICO* (1983).

⁴³ *Ibid.*

disablement, whether interpreted literally or metaphorically, is equivalent to defeat or to being rendered powerless⁴⁴. It makes a kind of sense, therefore, that medicine, which is the recognized basis for defining disability traditionally, should be a tool or weapon used to cause it.

Peter A. Clark has noted that the role of medicine in contemporary incidents of torture in warfare can not considered neutral or passive⁴⁵. In his analysis of the role of military medical professionals in Abu Ghraib and Guantanamo Bay, he argues that the role of medicine in breaking bodies and minds has been integral to the praxis of torture⁴⁶. While chastising the American Medical Association for its complicity in these incidents (out of fear of antagonizing the Bush administration), he contends that the construction of the medical profession as objective and detached serves to mask the active role that medical practitioners play in human rights violations⁴⁷. Scrutinizing the role of medicine relative to emergent disabilities expands the critique beyond the definition of disabilities, to its active production. While the critique of medicalization certainly also poses a challenge to the legal construction of medicine as objective and rightly authoritative, recognizing the role of medicine in creating injury and harm is particularly provocative, in that it reframes a site of neutral expertise as one of perpetration. Consequently, it also raises questions about the meaning and legitimacy of disability law, as an area of doctrine and practice often deeply reliant on medical authority.

Disablement and the Limits of Equal Protection Paradigms

As already stated, the phenomenon of disability as an inflicted harm is both a primary theme in this paper, and a central aspect of an analysis of emergent disability.

⁴⁴ Public Lecture, Inauguration of the UCLA Disability Studies Minor, May 2007, Los Angeles, CA [hereinafter Longmore]

⁴⁵ Peter A. Clark, *Medical Ethics at Guantanamo Bay & Abu Ghraib: the Problem of Dual Loyalty*, 34 J.L. Med. & Ethics 570 (2006).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

Relative to the second aspect of disability law discussed above, namely the elision of the issue of causation or origin from anti-discrimination or equal protection discourse, the question I pose here is: why does this omission matter? After all, one might argue that in various states, numerous areas of law exist to allow civil action against parties responsible for inflicting injurious physical or psychological harm. And certainly, there is a useful purpose in prohibiting certain kinds of civil rights or human rights violations, whatever the origin of various disabilities. So what limitations or problems are actually indicated by the treatment of these areas of disability law as apparently distinct? I pose three responses to this question: a) Where an institution or party is simultaneously responsible both for creating disability, and engendering subsequent difficulties and barriers which further compound that disability, a formalist equal protection or anti-discrimination framework is an inadequate basis from which to generate actual accountability and meaningful remedies, b) The separation of the origin of disability from other areas of disability rights has a de-historicizing and de-politicizing effect, in public and legal discourse, and c) Related to the prior two points, where the social origins of disability are obscured, it becomes very difficult to make claims for reparation which transcend individuals or a single generation. While the psychological and medical consequences of mass events like genocide, slavery, or geographic dislocation may manifest for many generations⁴⁸, “disability rights” are rarely conceived of in comparable collective or trans-generational terms.

To explore the first point, I look to the example of prison systems, and particularly the U.S. prison system⁴⁹. The disproportionate presence of people with

⁴⁸ M. ELENA GARRALDA & JEAN-PHILIPPE REYNAUD, *CULTURE & CONFLICT IN CHILD & ADOLESCENT MENTAL HEALTH* (2008).

⁴⁹ I am focusing on the U.S. here primarily for the reason that I am most familiar with U.S. prison law and systems. However it should also be noted that the U.S. has been strongly critiqued by the United Nations for human rights violations in prisons and jails, and therefore constitutes an appropriate context for this discussion. *See* United Nations Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee* 2005.

disabilities among the incarcerated is acknowledged⁵⁰. This trend is generally attributed to deinstitutionalization, meaning specifically the expulsion of mental health patients from treatment facilities, and the corresponding criminalization of the mentally ill⁵¹. Given the strong correlation between disability and poverty⁵², and between poverty, race and incarceration⁵³, the disproportionate presence of disabled persons in penal institutions is also both intuitive, and initially/minimally documented⁵⁴. Disability advocates have further noted a pattern of dramatic early incarceration of learning disabled urban children and youth of color in juvenile hall facilities, with predictable outcomes in terms of later adult incarceration⁵⁵.

When the Americans with Disabilities Act was passed, several prison officials actively resisted the application of the federal legislation in prison systems, resulting in a series of court battles which were finally resolved by the U.S. Supreme Court in 1998 in the *Yeskey* decision⁵⁶. Since the Supreme Court definitively stated prisons and jails are institutions within the meaning of the ADA⁵⁷, prisoner rights advocates have a new prospect for challenging prison conditions which extends beyond the traditional limitations of Constitutional 8th amendment jurisprudence. Although it would be naïve to suggest that the ADA has or will have any rapidly drastic transformative effect in the prison system given the existence of various barriers to effective prisoner litigation⁵⁸, and

⁵⁰ Laura M. Maruschak & Allen J. Beck, Bureau of Justice Statistics, U.S. Dept. of Justice, NCJ 181644, *Medical Problems of Inmates, 1997* (2001); TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT (1999) [HEREINAFTER KUPERS].

⁵¹ *Ibid.*

⁵² Programme, *supra* note 5.

⁵³ Andrew S. London & Nancy A. Myers, *Race, Incarceration & Health: a Life-Course Approach*, 28 *Research on Aging* 409 (2006).

⁵⁴ Kupers, *supra* note 50. The U.S. Congress also acknowledged the disproportionate incarceration of people with disabilities in the U.S., in the preamble to the Prison Rape Elimination Act (PREA). Prison Rape Elimination Act, Pub. L. 108-79 (2003).

⁵⁵ See Learning Rights Law Center, available at: <http://www.learningrights.org/>, last visited June 23, 2009.

⁵⁶ *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998)

⁵⁷ *Ibid.*

⁵⁸ Aside from issues of economic resources and high rates of illiteracy, prisoners wishing to file ADA claims must still overcome the barriers set by the Prison Litigation Reform Act, which makes it exceptionally difficult for prisoners to engage in litigation, and particularly relative to prison conditions. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134. For analysis of the PLRA, see Cindy

given the limitations on the impact of the ADA in other arenas⁵⁹, the concept of disability civil rights now has some substantive legal foundation relative to prisons, essentially for the first time in U.S. history.

The application of the ADA in prisons primarily manifests around accessibility of existing facilities and resources⁶⁰, and the prohibition of overt and extreme discriminatory treatment⁶¹. However, as disability advocates Marta Russell & Jean Stewart maintain:

The harshness of prison life disables people. Inadequate or absent medical care, poor nutrition, violence, and extremes of heat, cold and noise inside prison, not to mention lack of sensory, emotional, intellectual, and physical stimuli, all lead directly to acute and chronic physical and psychological disabilities. Prison overcrowding accelerates the disabling process. Humans who are packed into spaces designed for one-third the number of people actually residing in them are bound to find themselves in more frequent, and more disabling, violent confrontations⁶².

Although courts have certainly sanctioned certain extreme aspects of prison conditions as “cruel and unusual”, U.S. courts have repeatedly emphasized deference to prison administrations in determining the norms and practices which typify the prison function and structure⁶³. In practice, cruelty, even with permanently disabling or injurious consequences, does not necessarily equate to an 8th amendment violation. The usual or normative practices of the prison may be both lawful domestically, and yet predictably and severely disabling. The Supreme Court has gone so far as to acknowledge the potential infliction of psychiatric disability, or physical confrontation as an acceptable

Chen, *Prison Litigation Reform Act of 1995: Doing Away with More than Just Crunchy Peanut Butter*, St. Johns. L. Rev (2004); John Boston Legal Aid Society, *The Prison Litigation Reform Act* (2004), available at: <http://www.wnyc.net/pb/docs/plra2cir04.pdf>, last visited June 23, 2009.

⁵⁹ See Linda Hamilton Krieger, *Backlash Against the Americans with Disabilities Act: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. of Employment & Labor L. (2001); LINDA HAMILTON KRIEGER, ED., *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* (2003). It should be acknowledged that since the more recent passage of the Amendment to the Americans with Disabilities Act, one part of Krieger’s and her colleagues’ critique – namely the severe restrictions on what constitutes disability for purposes of applying the ADA – has been mitigated. See ADA Amendments Act of 2008, Pub. L. 110-325.

⁶⁰ *Montez v. Romer*, 32 F. Supp.2d 1235 (D.Colo. 1999)

⁶¹ *Ibid.*

⁶² Marta Russell & Jean Stewart, *Disablement, Prison & Historical Segregation*, Monthly Rev. (July, 2001). [hereinafter Russell]

⁶³ *Turner v. Safley*, 482 U.S. 78 (1987)

aspect of punishment⁶⁴. Justice Rehnquist’s dismissal of these forms of disablement is best summed up in his opinion in *Atiyeh v. Capps*: “nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner... likely to avoid confrontations, psychological depression, and the like⁶⁵.”

These illustrations alone could certainly yield the critique that the ADA is not comprehensive enough to address all the needs and concerns which are critical to people with disabilities, since its emphases are on the reception that disability receives when already present, and not on the process of disablement. And, past and recent court decisions make clear that prisoner attempts to utilize the ADA based on any broader conception of rights to health or well-being will fail⁶⁶. Where the issue is a disabling medical condition, courts sometimes appear to be reluctant even to acknowledge the issue of disability for equal protection purposes, reverting instead to the argument that prisoners are not a protected class, and that the issue is the delivery of like treatment with other inmates⁶⁷. In sum, in an extreme context where continuing disablement is a structural norm, where those who are not already disabled become so through exposure to the institution, to try to frame disability rights in terms of “equal treatment” becomes virtually meaningless, because there is no normative basis for positive treatment upon which to ground a discrimination claim. And moreover, there is a particularly troubling implication in thinking that it can be lawful to break or injure people, and the only question is how far one can then lawfully go in discriminating further against the injured as such⁶⁸.

⁶⁴ See *Atiyeh v. Capps*, 449 U.S. 1312, (1981).

⁶⁵ *Ibid* at 1315-1316.

⁶⁶ See e.g. *Benyamini v. Manjuano*, 2007 WL 2580548 E.D. Cal., 2007, (where the court held that the ADA is meant to address “discriminatory” treatment (meaning in this instance, whether disabled inmates are singled out and treated more harshly), and does not extend to any right to be spared further disablement due to prison conditions, or to access medical care to prevent that disablement.)

⁶⁷ See *Dotson v. Wilson*, 477 F. Supp.2d 838, N.D.Ohio, March 12, 2007.

⁶⁸ Of course this point resonates with broader critiques of formalist equal protection doctrine, for instance, as articulated by critical race theorists. See e.g. Derrick Bell, *A Color-Blind Constitutionalism: a Rediscovered Rationale*, In *RACE, RACISM & AMERICAN LAW* (2000) [HEREINAFTER BELL]. My purpose in making the link to critical race scholars such as Bell is not to collapse the issues of disability and race, as

It could be argued that this critique is limited to the context of prisons, and while it may be otherwise worthwhile to argue against human rights violations, the fact that those violations are also disabling is not really a critique of disability law, but rather of the court's interpretation of the 8th amendment, and the poor status of human rights in U.S. prisons. My response to the first point is that while prisons are certainly a comparatively extreme context generating a very high proportion of emergent disabilities, and in this instance, its victims are literally confined by its boundaries, there is nevertheless a broader relationship and analogy to other areas of the state's relationships to individual persons, and to communities. The critical point here is that where the state is already generating disability in systemic ways within particular communities, having some limited right to continue to live or access institutions, after the fact, is not useless, but it poses no fundamental challenge to violent or oppressive disablement, and therefore no meaningful access to equity. This argument can apply for instance, to systemic poverty, to labor exploitation, to gender-based violence, and to the historical and ongoing dynamics endemic to white supremacy and/or imperialism.

To respond to the second argument, I turn to the next part of this analysis. Again, my contention is that treating disability without regard to origin has a de-historicizing and de-politicizing effect in social and legal discourse. In order to explore this contention, it's useful to consider the concept of "reasonable accommodation", which is central to the operation of the Americans with Disabilities Act, and in the language of the Convention,

the legal treatment of the two categories is not identical, particularly relative to the distinction between strict scrutiny and rational basis review, and the more presumptive acceptance of a medical conception of disability as opposed to race (though certainly race can still be medicalized). However, the congruence is also important to note, particularly since a common theme between the two cases becomes evident when considered the emphasis on like treatment, as opposed to substantive equity or freedom from harm. And of course the categories, disability and race, are also not clearly distinct or separable, particularly in prisons where I contend that the dynamics of incarceration involve intense intersectional subordination based on disability and race, often coupled with class, gender, sexuality, and age. *See* Kupers, *supra* note 50 (acknowledging for instance, the mental health consequences of racism in U.S. prisons); Beth Ribet, *Naming Prison Rape as Disablement: a Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 Va. J. Soc. Pol'y & L 281 (2010).

though it was not originally present in the World Programme⁶⁹. The ADA's definition of "reasonable accommodation" is interpreted contingently, relative to the concept of "undue hardship". It has mostly been conceptualized relative to employment in the statute, although its applications have been wider⁷⁰. Undue hardship or 'burden' arguments are assessed based on a multi-factor test considering the nature of the accommodation, economic expense or other impact of the proposed accommodation, the size and nature of the facility or covered entity called upon to accommodate, and its economic resources⁷¹. The reasonableness of an accommodation rests on its relationship to these factors, and the statute acknowledges no others. I note here that the culpability of the employer or entity in the production of the disability itself is certainly not conceived within the terrain of the law, in considering or weighing what its burden should be. So, under the terms of the ADA, employees who are for instance, disabled by working conditions, may nevertheless then be deemed too burdensome to employ, for economic reasons. Of course, employees who are disabled in the workplace may conceivably, where domestic laws allow, pursue a separate action for workers compensation and/or various areas of tort law; again there are other areas of law meant to address disability-as-injury, or disability as an inflicted harm.

What's noteworthy here is that it is not necessarily wrongful or discriminatory termination to disable an employee, and then fire her/him. The critical question is whether accommodating the disability is a hardship, under terms which are not weighted based on, and do not acknowledge, the disability's origin. In a legal system and economic context which could be described as very egalitarian, it could certainly be argued that there is no real problem. In that scenario, labor laws and normative economic practices would guard against careless or casual harm to workers, and thoroughly compensate

⁶⁹ See ADA, *supra* note 12, section 12111; Convention, *supra* note 2, Programme, *supra* note 5.

⁷⁰ See ADA, *supra* note 12, section 12111, 9 & 10.

⁷¹ *Ibid.*

those, who despite an equitable and well-functioning structure, by some aberrant circumstance were still harmed. My contention here, however, is a critique of contemporary disability law within a context historically and continually typified by inequity. The concept of “reasonable accommodation” interpreted essentially within a paradigm of formal equality, frames the responsibilities of states, entities, and institutions as if they only ever begin after disability already exists, or as noted, as if the origin of disability is irrelevant⁷². The history of interaction between the state, or a particular institution, and the communities in which disabilities occur, has no substantive legal bearing on whether accommodation is ‘too expensive’, unduly burdensome, or a hardship. If the accommodation were reframed as a remedy or reparation, it would be easier to argue, even for expensive or dramatic changes, provided they are responsive to emergent disabilities which are comparably drastic or costly in terms of their impact on the individuals who experience them. In contrast, when origin is ignored or treated as irrelevant, the social narrative of disability loses its historical context.

To illustrate the salience of this point a bit further--- it’s helpful to consider a hypothetical company in which employees work under physically demanding and tiring conditions. In this imagined scenario, workplace injuries which are immediately totally incapacitating are rare; in other words, “workplace safety” is relatively high. Given this, there is little legal basis for worker’s compensation claims⁷³. However, over time, employees suffer high rates of heart disease, joint or muscular problems associated with fatigue, and other conditions associated with overwork⁷⁴. As they become increasingly disabled, they must quit or are dismissed based on unfitness or lack of qualification for

⁷² *Ibid.*, (for definitions of “reasonable accommodation”, absent any acknowledgement of how the cause of disability may affect institutional or employer “burden”).

⁷³ A few workers’ rights collectives have attempted to advance worker’s compensation claims based on the health and stress consequences of overwork, though this type of claim is still uncommon in the U.S.. See e.g. Canadian Union of Public Employees, available at: http://cupe.ca/workload/Health_and_safety_an, last visited June 23, 2009.

⁷⁴ JULIET SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1993); JOHN DE GRAAF, *TAKE BACK YOUR TIME: FIGHTING OVERWORK & TIME POVERTY IN AMERICA* (2003).

the work. The odds of successfully mounting an individual or class action essentially for working employees hard, seems very slim to the extent that it exists at all. Under the ADA, employees might for instance, try to make a claim that they should be accommodated by receiving substantially reduced or altered workloads⁷⁵. However, the “undue hardship” argument would be a fairly easy defense here: this kind of accommodation is likely to be costly⁷⁶, and still may not be viable relative to the work. In essence, the company can use up able-bodied workers and throw away the disabled for generations, without running afoul of disability discrimination law, while nevertheless maintaining the semblance of being a non-discriminatory employer. In and out of employment contexts, the framing of disability as a personal diagnosis or experience for which no one (else) is responsible ensures that the communities who disproportionately experience disablement will remain without meaningful recourse. It begs acknowledgement here, again, that emergent disabilities are not, for instance, race, gender, or class neutral⁷⁷. In sum, disability discrimination law is structured in terms which are not likely to either recognize or remedy the histories of racial or ethnic, class, gender, sexual, age, or religious subordination which underlie emergent disabilities.

Lastly, it bears noting that relative to international law, conceiving disability in terms which belie or obscure origin implicitly limits the potential reach of war crimes tribunals and reparations. To explicate this point, it’s critical to comprehend disablement as a communal process, in which psychological and physical trauma, poverty, and even genetic mutations or adaptations consequent to biological warfare become familial legacies. One of the more developed psychiatric literatures in this area specifically

⁷⁵ ADA, *supra* note 11. It bears noting that the ADA text is explicit about the legitimacy of part-time scheduling as a legitimate form of accommodation.

⁷⁶ I am assuming for the purposes of the hypothetical here that employees have some form of medical and/or other benefits--- in which case employer expense is higher whether employees receive full-time wages for less work, or are reduced to part-time, which increases the number of requisite employees receiving benefits. Of course this is not to suggest that benefits are normatively a foregone conclusion within either domestic or transnational economies.

⁷⁷ Pokempner, *supra* note 31.

documents the transmission of trauma and related health issues in children of Holocaust survivors⁷⁸. My own research with daughters of survivors of the Shoah has yielded narratives about increased susceptibility to eating disorders (stemming from parental starvation experiences), inherited post-traumatic stress, depression, and other stress-related conditions⁷⁹. The complexity of “reparation” for the kinds of physically entrenched harm created by genocide, colonization, or slavery is attenuated by the fact that the consequences are only partially predictable, and can play out for centuries.

Although some cultural rights advocates do attempt to frame the issue of reparations based on a trans-temporal understanding of collective harm⁸⁰, the praxis of war crime reparations generally conceives of injury based on the experiences of individuals in a particular historical moment⁸¹. Reparations are allocated and distributed, usually to individuals⁸² based on that initial injury, often without any requisite consciousness or compensation for the consequences of those harms for subsequent generations. Consequently, even where reparations are secured, they may not actually restore or make substantive contributions to ensure health, cultural autonomy, access to resources, or strong communal infrastructures. Again, emergent disabilities often remain personal problems or concerns, exempted from any social accountability or history in either law, or many areas of social discourse. Where medical diagnoses run in families, the chances of recognizing a major social or historical origin is even less likely; genetic or biologically transmitted conditions are presumed to be distinct from social influence⁸³.

To re-cap, a disability civil rights or equal protection paradigm rooted in a formalist notion of equality suffers from at least three problems. First, in treating the

⁷⁸ DINA WARDI, *MEMORIAL CANDLES: CHILDREN OF THE HOLOCAUST* (1992)

⁷⁹ BETH RIBET, *JEWISH DAUGHTERS OF HOLOCAUST SURVIVORS IN THE U.S.: RELATING FAMILY, IDENTITY & VIOLENCE*, DOCTORAL DISSERTATION, UNIVERSITY OF CALIFORNIA-IRVINE (2005).

⁸⁰ JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* (2006)

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ E. Etorre, *A Critical Look at the New Genetics: Conceptualizing the Links Between Reproduction, Gender & Bodies*, 12 *Critical Pub. Health* 237 (2002).

issue of disability's cause or origin as distinct from other attached civil rights, it fails to generate meaningful remedies or hold institutions adequately accountable for violent disablement. Second, it constructs a narrative in which responsibility for the presence of disability is squarely and solely located outside of institutions responsible for accommodation, and thereby frames the marginalization and sacrifice of disabled people as socially and economically reasonable. And, in the process, it obscures the broader racial, gender, class, religious, age and sexual dynamics of subordination which contribute to disablement. Third and finally, it relies on a construct of disability which is individualized, does not transcend time periods or generations well, and does not lend itself to a deeper analysis of communal disablement in the context of warfare, genocide and related mass human rights violations. An implicit issue in this discussion is that emergent disability, by its existence, indicates a victim-perpetrator dynamic which is the basis for and origin of disability. An equal protection paradigm recognizes an aspect of this dynamic, in the sense that individuals with disabilities may be the targets of discrimination or harm on the basis of disability. But as already repeatedly noted, this analysis is very partial and de-historicized. It follows that centering emergent disability also reframes the issue of who individuals with disabilities are, and that this shift has implications for the legal and social stigma attached to disability.

The Challenge of Victim Visibility

The association between disability and incompetence, and disability and unworthiness, is well-documented, and deeply entrenched⁸⁴. Courts have repeatedly indicated strong adherence to both preconceptions⁸⁵. I suggest that acknowledgement of emergent disability implicates a potential to disrupt these stereotypes, though not without risk. Claiming and naming emergent disability means saying that a particular disability is

⁸⁴ Pothier, *supra* note 20.

⁸⁵ *Ibid.*

evidence of some form of oppression, that the disabled person is a victim of that oppression, and that there is/are perpetrator(s) who is/are responsible, to blame, for the victimization and the resulting disability. In other words, one way to understand emergent disability is that it designates a person who has been victimized, and therefore is a victim. To say that such an assertion is loaded or politically charged is likely an understatement.

On the one hand, the association between disability and victimization is fairly synchronous with images and ideas of disability as tragic and pathetic⁸⁶. Disability communities and advocates have reacted to this ideology by working very hard to disassociate disability from any negative experience or schema other than that imposed by structural and psychological disability discrimination⁸⁷. Intentionally asserting that disability is an experience of being damaged by victimization at least apparently runs directly counter to this kind of advocacy, and may easily be used to reinforce mainstream negative associations between disability, damage and weakness, all intersecting evidence of supposed inferiority. In addition, many feminist scholars have explored the perils of the label “victim” in the context of any bid for empowerment or credibility⁸⁸, and the tendency to reduce anyone labeled a victim to a status of total social and politically powerlessness, incompatible with the exercise of agency⁸⁹.

Nevertheless, there are at least two prospective reasons to consider asserting a relationship between disability and victimization more explicitly. First, relative to the previous discussion, from a legal perspective, it appears to be a necessary step in pushing disability advocacy and rights beyond the limits of formalist equal protection doctrine. Naming disability as victimization attributes to institutions and their representatives

⁸⁶ *Ibid.*

⁸⁷ Shapiro, *supra* note 18.

⁸⁸ See e.g. Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship & Colonial Discourses*, In CHANDRA TALPADE MOHANTY, ANN RUSSO & LOURDES TORRES, *THIRD WORLD WOMEN & THE POLITICS OF FEMINISM* (1991) (analyzing the colonizing consequences of western feminists imposing a monolithic victim narrative on non-western women and girls); Elizabeth M. Schneider, *Feminism & the False Dichotomy of Victimization & Agency*, 38 N.Y.L. Sch. L. Rev. 387 (1993) [hereinafter Schneider].

⁸⁹ *Ibid.*

responsibility for a higher degree of reparation or remedy than can be expected under contemporary praxis of “reasonable accommodation”⁹⁰. And as noted, this already happens in areas of law dealing with what I term disability-as-injury. The critical intervention here is an incorporation of analysis of victimization into disability domestic civil rights and international human rights laws. Second, and perhaps most critically from the perspective of shifting ideological discourse, framing disability as the result of a victim-perpetrator dialectic helps to reveal the stake that institutional perpetrators may have in discrediting or devaluing the disabled/victim. In other words, disability stigma (or ideological ableism) may be understood as a form of “victim-blame”. I suggest that as long as disability is taken as evidence of individual unworthiness or weakness, whether the response evoked is pity or contempt, the “blame” for disability, and the shame associated with it, are implicitly located in the disabled. Ideally at least, naming (emergent) disability as victimization or oppression can potentially shift blame back onto the perpetrator, with the effect of de-stigmatizing the status of being a person who has been disabled by violence and oppression.

Of course as noted, advancing this kind of discursive shift is as likely to trigger a whole set of stereotypes associated with oppression and victimization. If, for instance, as noted earlier an ideological goal of warfare is to “disable” the enemy⁹¹, the state party responsible for disablement may freely acknowledge that disabilities are the consequence of violence, but may defend them as deserved or acceptable. Whether disability occurs in any of the intersecting contexts of patriarchal discipline, capitalist profit, or imperial conquest and domination, it can not be presumed that courts or popular discourse will understand the victim as either blameless, or worthy of respect. Even without further examples or exploration, this point can be inferred from the controversies which emerge

⁹⁰ The concept of reasonable accommodation, both in U.S. civil rights praxis, and in the Convention, is conceived as a form of non-discriminatory treatment, rather than as a reparative or remedial measure in which the state is presumed to have already caused harm. See ADA, *supra* note 12; Convention, *supra* note 2.

⁹¹ Longmore, *supra* note 44.

over the meanings of racial, gender, sexual, ethno-religious, age-based, or class-based violence and victimization⁹².

The task of carefully analyzing the factors I have briefly introduced in this section, and weighing them from a strategic perspective, is beyond the scope of discussion. Although this paper certainly argues for the incorporation of emergent disability analysis into legal doctrine, my purpose in this section is primarily to acknowledge that doing so will not be without potential pitfalls, which will have to be navigated with some care. To avoid degenerating into the replication of ableist stereotypes, the process of facilitating emergent disability claims and discourse will require rigorous attention to the meanings we attribute to oppression and victimization, and the interplay between dynamics of class, race & ethnicity, religion, gender, sexuality, age, and of course disability.

Part II: Emergent Disabilities and International Human Rights Law: Applying Feminist and Critical Race Theories

Although the literature on emergent disabilities is growing⁹³, its application in virtually any area of legal theory is still in a nascent stage⁹⁴. For that reason, the first section of this paper is mostly foundational, laying out some initial contributions to what I hope, in time, will be a broader and much better developed legal theoretical literature addressing emergent disability, power, and claims-making. In this section, I apply some of the critical framework I've mapped out to the Convention, looking specifically at the Convention's approach to poverty and race, its similarity to U.S. domestic equal

⁹² Schneider, *supra* note 91; KUM-KUM BHAVNANI, FEMINISM & 'RACE' (2001); LINDA WILLIAMS, PLAYING THE RACE CARD: MELODRAMAS OF BLACK & WHITE FROM UNCLE TOM TO O.J. SIMPSON (2002).

⁹³ The terminology dates back to the 1990s, and is still not widely referenced in either disability studies or public health literatures, much less in law. *See* Seelman, *supra* note 30 (for an initial discussion of the relevance and applicability of the term "emergent disability").

⁹⁴ For one of the very few legal analyses which incorporates the terms, *see* Pokempner, *supra* note 31.

protection doctrine, and again, its variance from its precedent, the World Programme. I argue that the Convention largely syncs with the broader critiques articulated in the previous section, relative to de-historicizing disability, failing to recognize its intersectional nature with other dynamics of subordination, and providing little basis for meaningful challenges to mass violence, in particular moments, or transcending generations.

The World Programme on Disability framed the relationship between poverty and disability in these terms:

Much disability could be prevented through measures taken against malnutrition, environmental pollution, poor hygiene, inadequate prenatal and postnatal care, water-borne diseases and accidents of all types. The international community could make a major breakthrough against disabilities caused by poliomyelitis, tetanus, whooping-cough and diphtheria, and to a lesser extent tuberculosis, through a world-wide expansion of programmes of immunization⁹⁵.

It further goes on to detail a proposed relationship between humanitarian efforts, what it terms “mass disability” as a consequence of warfare, and racism as a cause of warfare.

In many countries, the prerequisites for achieving the purposes of the Programme are economic and social development, extended services provided to the whole population in the humanitarian area, the redistribution of resources and income and an improvement in the living standards of the population. It is necessary to use every effort to prevent wars leading to devastation, catastrophe and poverty, hunger, suffering, diseases and mass disability of people, and therefore to adopt measures at all levels to strengthen international peace and security, to settle all international disputes by peaceful means and to eliminate all forms of racism and racial discrimination in countries where they still exist⁹⁶.

It should be acknowledged that the conception of disability here is in many respects a medical one, both in its presumption about the nature of disability, and the

⁹⁵ Programme, *supra* note 5.

⁹⁶ *Ibid.*

prioritized response to it. And certainly, many race-conscious advocates and scholars will challenge the framing of racism and racial discrimination as in multiple contexts, a past phenomenon, as implicated in the phrasing: “where they still exist”. However, it is also very striking here that the United Nations is acknowledging social origin, if not social construction of disability, and is essentially identifying racism as a cause of disablement, and therefore, anti-racism as a necessary remedy to prevent it. In contrast, the words “race” and “racial” each appear only once in the UN Convention on the Rights of Persons with Disabilities, and are limited to the preamble, rather than to any of the specific planks intended to generate state action or accountability⁹⁷. In considering the disappearance of race and racism from international disability law, it’s helpful to turn to critical race theory, in order to scrutinize both the relationship between race and disability, and the salience of framing in this instance. I also contend that a careful explication of the dynamic requires consideration, as already noted, of class and poverty, and further of gender (and sexuality), in both texts.

Acknowledging Critical Perspectives on Law, Collectivity & Identity

In formulating my comparative critique of the UN Convention and the World Programme, I draw on the critical race feminist conception of “intersectionality”, particularly as embodied in the seminal work of Kimberlé Crenshaw⁹⁸. Crenshaw’s framing of the term has been interpreted, applied and expanded across disciplines, and is often employed primarily as a critique of identity-based essentialism⁹⁹. Although certainly Crenshaw’s work is a strong illustration that simplistic or monolithic identity

⁹⁷ Convention, *supra* note 2.

⁹⁸ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, & Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race & Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory & Antiracist Policies*, U. Chi. Legal F. 139 (1989) [hereinafter Crenshaw]

⁹⁹ See Rangita de Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women & Children with Disabilities within an Interrelated Web of Human Rights*, 18 Pac. Rim. L. & Pol’y J. 293 (2009), (for an example of this kind of partial/anti-essentialist frame, as applied to the issue of disability intersectionality) [hereinafter de Alwis].

categories are inadequate and flawed, I note that a careful reading of her work yields additional critical premises. For instance, in *Demarginalizing the Intersection of Race & Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory & Anti-Racist Politics*, Crenshaw contends that the consequence of intersectional vulnerability results in the specific persecution of identity groups who are experiencing compounded and intersectional subordination – in this analysis, African-American women workers¹⁰⁰. Moreover, her analysis of the attempts of African-American women to obtain class certification for class action litigation reveals a disturbing dynamic. Where identities and experiences of subordination are intersectional, the law does not simply fail to provide adequate remedy, or to enable equitable and appropriate consideration of the circumstances – in the more drastic instances, the experience of subordination simply can not be articulated at all (within the confines of legal process). In other words, intersectional experiences may fall entirely outside legal framing, or may be at best partially cognizable or disjointed, with perilous prospects for advocacy.

Moving for a moment back to the domain of disability legal scholarship, it's striking here that as Waterstone & Stein contend -- class certification is often also unavailable or underutilized in disability law, due to a strict judicial interpretation of group identity, originating in racial class certification interpretations¹⁰¹. When considered in tandem, the two critiques highlight recognition of the frequent incapacity of law to both acknowledge and accommodate difference, while also enabling collective mobilization. Feminist international legal theorist Hilary Charlesworth makes a synchronous point, calling for feminist attention to the “complex structures of domination that affect women differently”, but also acknowledging the frequent challenge of doing so in more than cursory fashion¹⁰². This critique is echoed by Johanna Bond, who

¹⁰⁰ Crenshaw, *supra* note 98.

¹⁰¹ Waterstone, *supra* note 24.

¹⁰² Hilary Charlesworth, *Martha Nussbaum's Feminist Internationalism*, 111 *Ethics* 64 (2000).

contends that international human rights law suffers from an inability to conceive of women's experiences in terms fully cognizant of intersectional harm and vulnerability.¹⁰³ I would intervene in these critiques only to add that even the category "women", in some respects marks a limited conception of female subordination, as it presumes adult subjectivity, and rarely fully conceives of the human rights of girls.

Multiple critical race theorists have also repeatedly and rigorously delineated the subordinating consequences of the fiction of "race-neutral" and/or so-called "colorblind" legal construction¹⁰⁴. Although this dynamic is not simply or always synonymous with the failure to conceive intersectionality, it is certainly an integrated dynamic – in the former instance, demographics including race may be acknowledged, but poorly deployed and constituted relative to the complexity of identities and experience¹⁰⁵, and in the latter race is ignored entirely, or reduced to a formalist conception of discrimination acknowledging subordination only as the recognition of difference¹⁰⁶. In both instances, the possibility for engaging subordination productively through law is deeply compromised, or at times wholly negated.

Equalization and Globalization

In applying the arguments presented above to the construction of the UN Convention, I will advance five points. First, as already repeatedly indicated, I argue that when the text of the Convention and the World Programme are compared, the former is less responsive to at least some of the needs of people with emergent disabilities. In order to make this case, I revisit the meaning of emergent disabilities, and look at the issue of

¹⁰³ Johanna E. Bond, *International Intersectionality: a Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 Emory L.J. 71 (2003).

¹⁰⁴ See e.g. Bell, *supra* note 68; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, In KIMBERLÉ CRENSHAW ET AL, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (2001); RICHARD DELGADO & JEAN STEFANCIC, EDs., *CRITICAL RACE THEORY: AN INTRODUCTION* (2001) [HEREINAFTER DELGADO]

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

torture, warfare, and again, poverty as conceived in both documents. Second, I argue that while some elements of an intersectional frame are present in the Convention, it represents a regression when compared to the World Programme, particularly where intersectionality is not solely conceived as a disruption of essentialist identity constructs. In making this claim, I focus on the issue of gender, age and to some extent poverty. Third, continuing the theme of intersectionality, I contend that the Convention embodies an erosion of race-consciousness from international disability law. Fourth, I submit that all three of these previous points are consistent with the internationalization of a conception of equality most consistent with existing U.S. equal protection frameworks. Fifth, I propose that in a contemporary and historicized context where economic and political globalization represents intensely and relentlessly strenuous incidence of mass disablement of populations, the re-alignment of international disability law with a comparatively western, formalist conception of equality should be alarming to and occasioning more scrutiny from critical disability, critical race, and feminist legal theorists and advocates.

Before delving explicitly into comparative hermeneutics, it is useful to revisit my analysis in Part I. In addition to advancing any precise critique of this moment in international/disability law, or contributing to broader feminist and critical race literatures challenging formalist equality constructs, a central aspect of my analytical and political agenda lies in troubling the meaning of “disability rights”. In part, my task is to move from an anti-discrimination model of disability rights, to a more substantive anti-subordination frame, very much in the tradition of both feminist and critical race theoretical critiques of the precepts of domestic equal protection and constitutional doctrine. However, whether understood as a supplement to, or a part of this anti-subordination frame, my agenda is also explicitly to conceive “disability rights” or social justice for people with disabilities, in terms which are not limited solely to freedom from maltreatment as people with disabilities, but also are historicized and responsive to any

harm or subordination which is in its consequence or manifestation, physically, mentally, or otherwise disabling. In this sense, (emergent) disability rights implicate the needs of any vulnerable or subordinated population, particularly at the intersections of race, gender, class, sexuality, culture, age, ethnicity, and existing disabilities.

I do not, in this paper, attempt to carefully engage the much larger task of thinking how, in doctrine or practice, such a disability legal frame would be constituted, at least in all its specificities. The critical point here is that the needs of people with emergent disabilities are not limited to needs or rights or concerns people have related to the continuing social and legal treatment of existing disability, vis a vis discrimination or even a broader conception of ongoing ableist subordination. I am also framing and implicating at least two other concerns: a) the prospects and components of reparation, remedy, or healing individuals (and communities) have while and after being disabled by violence and/or subordination (currently un- or under-realized in other civil rights or welfare models as they exist), and b) a kind of collective or cultural (disability) right that populations subject to subordination have, not to be harmed in the first place. The latter is particularly different from current conceptions of disability rights which are limited to legal subjects legally constituted as a discrete (disabled) population, and supposedly distinguishable from everyone else¹⁰⁷. Rather, it presupposes a right that all people who are subject to subordination -- whether already disabled or not -- (should) have, to not be broken, damaged, or sickened.

In important respects, this conception relates to Martha Fineman's paradigm of universal vulnerability¹⁰⁸, and more recently, Ani Satz' application of that paradigm to people with disabilities¹⁰⁹, in that it emphasizes that some things about disability should be recognized as a universal concern. Both Satz and Fineman call for a move away from

¹⁰⁷ SAM BAGENSTOS, *LAW & THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009).

¹⁰⁸ Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *Yale J. of L. & Feminism* 1 (2008). [hereinafter Fineman]

¹⁰⁹ Ani Satz, *Disability, Vulnerability and the Limits of Antidiscrimination*, 83 *Wash. L. Rev.* 513 (2008).

civil rights or equal protection laws which focus on discrete populations as supposedly immutably different and therefore vulnerable. My qualifier is that although I think it can be argued that in one way or another, at least at some time, anyone is vulnerable to subordination¹¹⁰, I am also interested in much more specific emphasis on vulnerabilities which are very drastically stratified, and disproportionate, based on racial, economic, gender, sexual, disability, age, ethnic, or religious subordination. In other words, I am not presuming that absolutely everyone is vulnerable to emergent disability (as compared to disability at large), and argue that extreme and compounded vulnerability that occurs at the intersections needs to be more strenuously attended to, whether within or outside the frame of “universal” rights.

A. Impoverishment, Violence and Collective Damage

While legal scholarly discourse even conceptualizing a term like ‘emergent disability’ is almost as new as the Convention, the language and framing in the World Programme in the early 1980s, actually already manifested at least a substantial, albeit flawed, cognizance of what I mean by ‘emergent disability rights’, as I’ve framed them here. To illustrate this point, I return directly to the two texts. I acknowledge again that the ‘rehabilitation’ and ‘prevention’ framing of the World Programme is problematic from a number of important perspectives, as is the over-reliance on a supposedly objective medical model; my critique of the Convention is not meant as an endorsement of its predecessor. Disclaimers aside, on the issue of the relationship between disability, victimization and torture, the Programme has this to say:

With the emergence of "victimology" as a branch of criminology, the true extent of injuries inflicted upon the victims of crime, causing permanent or temporary disablement, is only now becoming generally known.

¹¹⁰ If for instance, age is recognized as a vector of subordination (including both youth, and aging populations), then even people who experience every other demographic basis for social and political privilege have at least a limited experience of vulnerability during the life course.

Victims of torture who have been disabled physically or mentally, not by accident of birth or normal activity, but by the deliberate infliction of injury, form another group of disabled persons¹¹¹.

Several things are salient in this language. First, as noted in Part I of this paper, the relationship between disability and experiences of victimization is implicated, and informs the recognition of disablement. Second, the Programme recognizes that torture produces disability. And third, the Programme designates people who are disabled by torture as a distinct and legally recognizable population. The UN Convention also takes the issue of torture on explicitly, and acknowledges incarceration or state violence broadly, and scientific experimentation, as related issues. The latter two can certainly be recognized as at least in one sense, a positive expansion of the World Programme to more thoroughly acknowledge human rights abuses. However, I contend that the framing of torture is also more limited.

Article 15 of the Convention, titled: “Freedom from torture or cruel, inhuman or degrading treatment or punishment”, reads as follows:

- 1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.*
- 2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment¹¹².*

The first part of the text, in the phrasing “no one”, could be read as an implicit affirmation that people at large have a right not just to be free from torture and violence, but to free from being violently disabled by those experiences. However, this is something of a generous reading, when considered in light of the second part, which emphasizes that “on an equal basis with others”, people with disabilities should not be

¹¹¹ Programme, *supra* note 5.

¹¹² Convention, *supra* note 2.

more vulnerable to or subject to being tortured or abused. I contend that particularly when compared with the World Programme, the UN Convention generally condemns torture, and recognizes disproportionate vulnerability to being tortured can be caused by disability discrimination, but otherwise imposes no obligation on its state signatories to consider disability as a consequence of torture, or to ever consider the specific rights or identities of people who are disabled by torture.

To continue in this vein, I turn next to the issue of the disabling consequences of poverty and warfare. The World Programme, as noted, identifies poverty as a primary cause of disablement, delineating multiple dynamics implicated in the relationship between poverty and disability. First, phenomena such as “malnutrition, infection and neglect” are direct mechanisms of poverty which result in medical harm¹¹³. And second, lack of accessible, affordable healthcare helps to ensure resulting or lasting “impairment”¹¹⁴. Third, the Programme charts out a relationship between warfare, economic devastation, and resource scarcity, as intersecting mechanisms of disablement, phrased as follows:

*In many countries, the prerequisites for achieving the purposes of the Programme are economic and social development, extended services provided to the whole population in the humanitarian area, the redistribution of resources and income and an improvement in the living standards of the population. It is necessary to use every effort to prevent wars leading to devastation, catastrophe and poverty, hunger, suffering, diseases and mass disability of people*¹¹⁵.

The Programme’s framing of the victims of violence in warfare is both generally acknowledged here in the phrasing “mass disability of people”, and further delineated in the designation of war refugees as a specific class of disabled persons.

There are over 10 million refugees and displaced persons in the world today as a result of man-made disasters. Many of them are disabled physically and psychologically as a result of their sufferings from

¹¹³ Programme, *supra* note 5.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

*persecution, violence and hazards. Most are in third-world countries, where services and facilities are extremely limited. Being a refugee is in itself a handicap, and a disabled refugee is doubly handicapped.*¹¹⁶

Here the language parallels the recognition of victims of torture as a specific class of disabled persons, and further acknowledges that refugee status can be both medically/physically disabling, and also that the social and legal treatment of refugees parallels and infuses the treatment of people with disabilities as another kind of “handicap”.

Taken in totality, the Programme implicitly recognizes what I think of as ‘escalating disablement’, which I break down into four components. First, trauma, injury, illness, or impairment originates in a violent event or context and affects one or more classes of persons. Second, the economic and social dislocation in that context further ensure that the disability can not be avoided or adequately remedied (for instance by structural safety and adequate healthcare), and becomes aggravated and/or permanent. Third, the combined stigma and subordination accompanying the disability itself, and the social position of the person (for instance, as a refugee, poor person, or torture survivor), ensure aggravated social and economic marginality, which then are likely to engender more disablement. And fourth, because the process of “mass” disablement is affecting whole communities, the ability of communities or states to take care of or compensate for the increasing needs of individual injured members are simultaneously and increasingly compromised.

It should be noted that the Programme specifically acknowledges the dynamic of reciprocal causation between poverty and disablement, stating:

While the risk of impairment is much greater for the poverty-stricken, the converse is also true. The birth of an impaired child, or the occurrence of disability in the family, often places heavy demands on the limited resources of the family and strains on its morale, thus thrusting it deeper into poverty. The combined effect of these factors results in higher proportions of disabled persons

¹¹⁶ *Ibid.*

*among the poorest strata of society. For this reason, the number of affected families living at the poverty level steadily increases in absolute terms*¹¹⁷.

This passage particularly embodies most of the elements I describe above.

In contrast, the UN Convention, while recognizing the disproportionate rates of poverty among people with disabilities, completely lacks any historicized or socio-structural analysis for the strong correlation between the two. The preamble states:

*Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities*¹¹⁸.

This language is echoed in Article 28, which mandates that people with disabilities (with some attention to females and aging populations specifically, within the category of people with disabilities) should have access to poverty reduction programs¹¹⁹. While I certainly agree that the impact of poverty on persons with disabilities is important, the question of legal right to poverty relief here only appears to come to bear when people are already disabled. The critical point is that as the Programme acknowledges, poverty is in itself medically hazardous to people who are not already legally conceived as persons with disabilities. Disability rights here, implicate the right to become less poor, or not to become more impoverished, only after poverty has already wrought harms to body, psyche, and longevity. This temporal factor – do “disability rights” begin only after disablement, or can they include the right not to be disabled by economic stratification or violence – represents the core ideological and structural difference between the two documents.

Paralleling this point, while Article 25 of the Convention discusses the healthcare rights of persons with disabilities, all of the recognition that healthcare access and state investment in healthcare is important in preventing the origin,

¹¹⁷ *Ibid.*

¹¹⁸ Convention, *supra* note 2.

¹¹⁹ *Ibid.*

exacerbation or escalation of disability disappears. There is certainly no commitment to universal or universally affordable healthcare – the framing in Article 25 emphasizes only that people with disabilities should not experience (comparative) discrimination in healthcare access¹²⁰. Where the reference group for “discrimination” are other members of the population who also have no organic right to healthcare, and may be at high risk of disablement in contexts of warfare or poverty, there is no way, within the parameters of the convention, to name lack of adequate healthcare as inherently a violation of international disability law.

Article 27 of the Convention charts out broad principles related to economic opportunity and non-discrimination in employment, as follows:

*States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities*¹²¹.

The article then goes on to delineate eleven steps state parties should undertake in order to ensure the actualization of the “right to work” for persons with disabilities, including “those who acquire a disability in the course of employment”¹²². In its breadth and expectations relative to the labor rights of people with existing disabilities, this section of the Convention certainly is more developed and more stringent than the Programme, and expands in significant respects beyond the mandates and definitions delineated in U.S. domestic statutes such as the ADA, or the Rehabilitation Act¹²³.

The sole, but I contend very significant loss, is that unlike the Programme it does not recognize economic stratification as a cause of disablement. At best, the brief

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ ADA, *supra* note 12; The Rehabilitation Act of 1973, Pub. L. 93-112

acknowledgement of “those who acquire a disability during the course of employment” might very vaguely suggest some recognition of the fact that work itself can be grueling, exploitative and thereby disabling. However, once again, this is a conceptual stretch, and certainly not explicit in this kind of equal protection framing. I should qualify that the Programme also certainly does not thoroughly confront or name labor exploitation (as opposed to “poverty” at large) as a cause of disablement; my point here is that the recognition of economic crisis as a cause and aggravation of disability at least keeps open the possibility of exploring how specific dimensions of poverty (such as exploitability) manifest as disabling harm. In any case, my ongoing critique applies here too – the right to economic and labor rights begin only after disablement has occurred, and is never explicitly mediated or framed in terms which consider the relevance of disability’s history or origin, to the breadth or depth of individual (or communal) disability rights. This point is made more acute when considering that while the Programme identifies warfare and resulting “mass disability” as a primary concern, the words “war” and “warfare” are entirely absent from the Convention¹²⁴. The global North and the U.S. specifically played a particular role in this excision, in opposition to advocacy from landmine survivor advocacy NGOs and networks, wherein advocates proposed to build remedial and rehabilitative rights related to mine-inflicted injuries/disabilities into the language of the Convention.¹²⁵

B. Gender, Age & Disability Intersectionality

The concept of “disability intersectionality”, to the extent that it exists at all in social and legal discourse, is generally articulated as a fairly mono-dimensional critique

¹²⁴ Programme, *supra* note 5; Convention, *supra* note 2.

¹²⁵ See Landmine Survivors Network, *Disability Negotiations Daily Summaries & Disability Negotiations Bulletins* (2002), available at: <http://www.worldenable.net/rights/adhocmeet.htm> (last visited August 22, 2010).

of identity essentialism¹²⁶. By this I mean that discussions of the intersection of categories such as gender and disability usually do not venture far beyond a basic acknowledgement of compounded vulnerability, based on an “additive” conception of subordination in which vulnerability + vulnerability = lots and lots of bad events and consequences for women (and sometimes as it’s framed, girls) with disabilities. Although the recognition of vulnerability and compounded harm are, I should qualify, very important – my purpose here is to argue that there is at least more to say about how the dynamics of subordination shape, infuse, or constitute one another. In advancing this critique, once again it bears noting that I want to be careful not to hold the World Programme up as a paragon of carefully constructed analysis or legal discourse. Certainly its construction as already discussed, reflects a medical model of disability – reflective of the influence of the World Health Organization in its construction¹²⁷, and further it can easily be argued that to the extent that it conceives of an interaction between gender and disability, or age and disability, the conception is also fairly additive, rather than recognizing complex intersectional erasure or harm. My contention is only that comparatively, the Convention affords even less opportunity to consider what it means to locate disability rights in a context fully cognizant of the gender and age-based politics of subordination.

The World Programme has this to say about the particular status of women:

The consequences of deficiencies and disablement are particularly serious for women. There are a great many countries where women are subjected to social, cultural and economic disadvantages which impede their access to, for example, health care, education, vocational training and

¹²⁶ See e.g. de Alwis, *supra* note 102. I do not mean to discount that the author in question is taking up a substantial challenge in articulating a model of disability intersectionality at all, given a relative theoretical void. My limited critique here is only that the conception of “intersectionality” can extend beyond a critique of essentialism, in order to address the fusion and co-constitution of subordinating institutions and dynamics.

¹²⁷ For an excellent critical discussion of the paternalistic and colonizing premises and praxis of the World Health Organization, see Tanya Titchkosky & Katie Aubrecht, *The Anguish of Power: Remapping Mental Diversity with an Anticolonial Compass*, In A. KEMPF, ED., *BREACHING THE COLONIAL CONTRACT: ANTI-COLONIALISM IN THE U.S. & CANADA* (2009). [HEREINAFTER TITCHKOSKY]

employment. If, in addition, they are physically or mentally disabled, their chances of overcoming their disablement are diminished, which makes it all the more difficult for them to take part in community life. In families, the responsibility for caring for a disabled parent often lies with women, which considerably limits their freedom and their possibilities of taking part in other activities¹²⁸.

Several things about this text merit explication. First, the Programme identifies gender exclusions and subordination as an overall problem. Second, it notes that these same dynamics are a reason why people are less able to ‘overcome’ “disablement”. This statement could be interpreted as a reference to not being able to recover from disabling harm, relative to other sections of the Programme which do explicitly consider possibilities for recuperation after infection or illness¹²⁹. Or it could be more straightforwardly interpreted as referencing the socio-economic discrimination people with disabilities face. In either event, it acknowledges that gender complicates the experience and navigation of disablement. Third, it conceives of disability as a kind of ‘women’s issue’, in terms which are reflective of a more familial or communal conception of gendered care-giving. In other words, it acknowledges that disability is a gender issue, in terms not reducible only to its manifestation in individual women who are identified as disabled.

In contrast, although gender is briefly acknowledged in a few places in the text of the Convention, it is mostly compartmentalized to a very minimal discussion in Article 6, titled “Women with Disabilities”. This article contains two sentences. The first reads as follows:

States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms¹³⁰.

¹²⁸ Programme, *supra* note 5.

¹²⁹ *Ibid.*

¹³⁰ Convention, *supra* note 2.

The phrase “multiple discrimination” constitutes the totality of the Convention’s engagement with the specific disability experiences of women and girls, other than as noted above, acknowledging that poverty reduction programs for people with disabilities should sometimes be gender-specific or targeted, and a note in the preamble acknowledging the combined dynamics of gender/disability-based violence¹³¹. The second sentence in Article 6 is essentially an affirmation of women’s human rights, in terms evocative of the Convention on the Elimination of All Forms of Discrimination Against Women¹³². Read somewhat generously, it can also be interpreted as an acknowledgement of an overall problem of gender subordination with presumably some relationship to disability, though with less specificity than the Programme.

The treatment of age in the two documents is not drastically different, but on this count, I also suggest that the Programme affords more possibilities for conceiving of emergent disabilities. The Programme reads:

For many children, the presence of an impairment leads to rejection or isolation from experiences that are part of normal development. This situation may be exacerbated by faulty family and community attitudes and behaviour during the critical years when children's personalities and self-images are developing¹³³.

This text at least implicitly appears to acknowledge the prospect of some elements of ‘escalating disablement’, as I’ve defined it above, in the sense that it indicates that the social consequences of disability subordination may further impair or damage children or youth. It should be acknowledged that -- as with gender -- the Programme does not go as far here as it does with poverty, warfare, and racism, in terms of acknowledging that the vulnerability and subordination of youth in itself can be disabling, for those who do not have pre-existing disabilities. A more thorough conception of emergent disability would

¹³¹ *Ibid.*

¹³² Available at: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>, last visited June 23, 2009.

¹³³ Programme, *supra* note 4.

certainly also acknowledge that the problems of child abuse and neglect, and the disproportionate impoverishment of children specifically, are a substantial cause or contributing factor to medical disabilities which may emerge later in life¹³⁴.

That said, the Convention is even more minimal, limiting most acknowledgement of youth to Article 7, where it states simply:

*States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children*¹³⁵.

Here again, the conception of disability rights is re-framed as a basic norm of equal treatment, with the primary reference group in this instance being children at large. Though certainly children with disabilities are disproportionately vulnerable to a number of forms of abuse, neglect or discriminatory treatment, the vulnerability of all children to disablement is nowhere even implicitly present in this kind of equal protection paradigm. On the other end of the age spectrum, the Programme acknowledges the specificity of the experiences of aging populations (who make up a large number of the disabled), in terms of needing specific services, prevention programs, or support¹³⁶. The UN Convention is not drastically different in this regard – acknowledging the specific health needs and poverty reduction needs in Articles 25 and 28, respectively, though somewhat more briefly¹³⁷.

Evaluating the two documents relative to their respective capacities to acknowledge “intersectionality” is tricky, and depends in part on how one conceives of the term. If intersectionality is interpreted primarily or solely as a critique of essential identity constructs or as a recognition of compounded vulnerability¹³⁸, then the

¹³⁴ See A.R. El-Ghannam, *The Global Problems of Child Malnutrition & Mortality in Different World Regions*, 16 J. Health Soc. Pol’y 1 (2003).

¹³⁵ Convention, *supra* note 2.

¹³⁶ Programme, *supra* note 5.

¹³⁷ Convention, *supra* note 2.

¹³⁸ I would stress however, that this more limited conception of intersectionality, though not uncommon, poorly reflects the origin of the term as reflected in the works of Kimberlé Crenshaw, who first defined it. Crenshaw was intentional in her articulation not just of severe vulnerability or harm, but in her critique of

Convention accomplishes at the least, surface recognition. This is explicit in section P of the preamble, which reads that state signatories to the Convention are:

*Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status*¹³⁹

I qualify that the recognition is mostly surface-level, since as detailed in the previous examples, any specific explication or consideration of what is aggravated about discrimination is fairly limited to occasional acknowledgement that at the intersections people may be more poor or more abused – with virtually no discussion of why or how, or what population-specific remedies or resources should entail. However, my task in this section, and in the paper at large, is to argue that the recognition of the rights and needs of people with emergent disabilities requires more than an acknowledgement of compounded vulnerability, and begs for more historicization. In this regard, although the UN Convention largely matches at the least the basic acknowledgement of the variety of identities present in the Programme, relative to gender and age, as with poverty it represents an elision of the politics of emergent disability, from international disability law.

C. The Disappearance of Race-Consciousness

The comparison of the two documents relative to race is in some respects, even simpler, given that as noted race has almost disappeared from the Convention. To review the text of the Programme again, the most salient text reads:

institutional abilities to comprehend the workings of intersecting systems of domination. In other words, Crenshaw's conception of intersectionality would likely require attention to systemic dynamics by which people of color and women and girls with disabilities are barred from recognition, recourse, or opportunity, involving a critique of institutional politics. Mere recognition of difference, or even compounded vulnerability would only represent a partial application of an intersectional analysis, within this paradigm. See Crenshaw, *supra* note 98.

¹³⁹ *Ibid.*

It is necessary to use every effort to prevent wars leading to devastation, catastrophe and poverty, hunger, suffering, diseases and mass disability of people, and therefore to adopt measures at all levels to strengthen international peace and security, to settle all international disputes by peaceful means and to eliminate all forms of racism and racial discrimination in countries where they still exist¹⁴⁰.

Though I do not mean to ignore existing critiques of the limitations of UN conceptions of peace and security relative to racial domination¹⁴¹, and again must question the presumption that there are UN member nations where racism is absent, the critical point here is that the Programme acknowledges at least one dynamic by which racism generates collective and mass experiences of disablement. It also uses this premise as the foundation to frame the elimination of racism as critical to a disability rights platform. Further, in acknowledging refugees, victims of torture, and victims of warfare as specific populations who experience disablement, it at least begins to create a conceptual basis for population-specific disability rights claims based on racially disparate violence and subordination. In other words, the Programme is closer to a cultural or collective rights model, when compared to the Convention.

The question of what disability equality means also becomes more pressing, when the two documents are considered through a race-conscious lens. Critical race scholars in law¹⁴², and race-conscious scholars in arenas such as public health and sociology¹⁴³, as well as NGOs and grassroots community organizers¹⁴⁴ have repeatedly made the link between racism, and premature mortality, disproportionate rates of stress or poverty-linked illnesses and diseases, and corresponding constraints on opportunities and quality of life. My task in this

¹⁴⁰ Programme, *supra* note 5.

¹⁴¹ See e.g. JUSSI M. HANHIMAKI, *THE UNITED NATIONS: A VERY SHORT INTRODUCTION* (2008); ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS & UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE & LAND* (2007)

¹⁴² See e.g. Pokempner, *supra* note 31.

¹⁴³ See e.g. Mays, *supra* note 35.

¹⁴⁴ See e.g. Alejandro Reuss, *Cause of Death: Inequality*, Dollars & Sense Mag. (2001), available at: http://www.thirdworldtraveler.com/Health/Cause_Death_Inequality.html, last visited June 23, 2009.

paper is not to establish this basic point: disability and legal scholars who are willing to attend to the issue already have substantial basis to know that racism is destructive to the body and psyche, that where it does not immediately cause death, it hastens it. My intervention here, and in other work¹⁴⁵, is to argue that the silence about how the disabling and gradually fatal consequences of racial subordination bear on the meaning of, and access to disability rights and disability law, and now international disability law, is disturbing and should engender much more critical concern than it has.

Here the Programme's language about primary prevention again merits careful scrutiny. The Programme explicitly states that in addition to preventing warfare and combating racism, some of the mechanisms for combating the creation of new and avoidable impairments include:

*...improvement of the educational, economic and social status of the least privileged groups... introduction of specific intervention measures through better nutritional practices; improvement of health services...prenatal and postnatal care... education regarding environmental hazards; and the fostering of better informed and strengthened families and communities*¹⁴⁶

I don't intend to overstate or romanticize the potential of this type of public health and social welfare agenda, or indeed to read it as more explicitly race-conscious than it in fact is. If anything, I would argue that the links to racial subordination in this section are inadequate – the conception of racism as an origin of the problem of disablement is too limited – when primarily focused on warfare and violent conflict. The Programme's language is in this regard, fairly reflective of the platforms of the World Health Organization¹⁴⁷, and other disability scholars have already taken up the work of addressing the limitations of international public

¹⁴⁵ Beth Ribet, *Surfacing Emergent Disability within a Critical Race Theoretical Paradigm*, presented at the Annual Meetings of the Law & Society Assoc., Montreal, Canada (May, 2008).

¹⁴⁶ Programme, *supra* note 5.

¹⁴⁷ <http://www.who.int/en/>, last visited June 23, 2009 [hereinafter WHO].

health advocacy relative to the mechanics of globalization, and the (de)historicization of colonialism as a disabling force¹⁴⁸. Again, however, my supposition is that the Programme at least suggests that adequate nutrition, a right to adequate healthcare, environmental safety, and an economic and educational rights framework should be understood as part of the project of realizing a disability-related right – not to become unnecessarily sickened or impaired.

Each of these issues – food, healthcare, environment (and environmental racism), and access to quality education and employment – are deeply racialized¹⁴⁹. The “least privileged groups” who experience deprivation and damage are not discrete or singular – disablement occurs at the particular intersections of dynamics of race, class, gender, sexuality, age, religion, and citizenship status, as well as existing disability, and my presumption is also not that race is an isolated, or the only salient dynamic. My contention here is that the Programme is proffering at least a limited and initial basis which at its interpretive best, can be used to argue that a key concern for nations addressing disability rights must be to begin to remedy and dismantle racial subordination. The rights of people who are disabled by, or moreover, who are seeking not to be disabled by racial subordination are limited, in some places only hinted at, but they are at least conceivable.

My critique of the Convention in contrast, extends beyond the point that it virtually never explicitly uses the words “race” or “racism”, though this is certainly very notable. The concrete mechanisms of racial subordination which in practice, create disabilities – economic subordination, deprivation of basic needs, lack of access to information and formal education, environmental destruction –

¹⁴⁸ See Titchkosky, *supra* note 127 (particularly for an analysis of the imposition of colonial norms of mental health, under the guise of public health advocacy).

¹⁴⁹ See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994); EDWARD BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM & THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2006).

could still have been pinpointed in the Convention, (as they are in the Programme), as phenomena which must be combated. The Convention does not do so. It essentially limits its intervention in each of these areas, to the extent that they are acknowledged, to stating that people with disabilities should not be targeted or disenfranchised in a discriminatory fashion, when compared with the presumed reference group – people who do not have disabilities.

Critical disability scholars have already taken up the challenge of dismantling static constructions of disability which presume that any body or psyche is normative or indeed, entirely without disability; I will not engage a broader discussion of the idea of the mutability of disability and normalcy here, other than to acknowledge it¹⁵⁰, and the social constructionist conception of disability which birthed it. However even without a substantial critical or sociological conception of disability – the legal/racial point here has traction. Namely, I argue again that when racism is a mass disabling force, and people of color are disproportionately already disabled, or always in a state of increased jeopardy at the hands of the state – the idea that the totality of “disability rights” can and should be the right to non-discriminatory treatment on the basis of existing disability will not be adequate in addressing the most pressing concerns of people with emergent disabilities.

Moreover, I suggest that the question of what it means to be “discriminated” against on the basis of disability is in itself, a question that must be recognized as racially disparate and infused. The comparative reference group – people who do not have disabilities – could mean several things. Taking people with emergent disabilities (who are disproportionately people of color) as my central concern, is the alternative reference group people who are similarly

¹⁵⁰ For more discussion of the social construction of disability and ability, *see* Pothier, *supra* note 20.

situated except for the presence of a recognized or diagnosed disability? If so, then the right to economic opportunity, the right to healthcare, the right even to be free from torture or violence¹⁵¹, is measured against the treatment of people who are severely vulnerable enough that they are also likely to be disabled, at any moment. If the comparative reference group is constituted as a broader conception of people who do not have disabilities, without the qualifier of similar (racial, economic, gender, spatial, age, national or sexual) situation, then how does one name what forms of discrimination are disability-based? For instance, is it cognizable disability discrimination when we consider the economic status of a person who has suffered multiple and substantial disabling consequences of racism and poverty, and is held to be under- or unemployable based simultaneously on lack of educational attainment, lack of (middle- or upper-class) professional experience, and the barriers multiple disabilities pose both in themselves, and in an inaccessible economic context? Is the contrast point a western, white, middle-class professional who has had the health benefits of class and racial privilege, but is also in so many regards trained and socialized to successfully navigate a racial (and gendered) political economy?

These questions are, as is evident to anyone versed in critical race theory in law, about the nature and problem of racial intersectionality in law,¹⁵² with particular scrutiny here of the relationship between race and disability.¹⁵³ The problem I am attempting to delineate here is more than an acknowledgement of compounded vulnerability (both of which are only elements of an intersectional

¹⁵¹ This point, as noted, is indicated in the Convention relative to the emphasis on equal (i.e. like) treatment, relative to each issue. Convention, *supra* note 2.

¹⁵² See Crenshaw, *supra* note 98.

¹⁵³ Although Crenshaw does not engage disability in her work, my intervention here is an attempt to acknowledge and delineate disability as a dynamic inextricable (along with class, age, sexuality, religion, and citizenship) from the race and gender-based subordination she confronts. *Ibid.*

critique, not its totality).¹⁵⁴ Where race does more than coincide with disability, but is embodied in the praxis by which racism is directly disabling – the prospect of legally naming “disability discrimination” requires recognition that race and disability are intersectional, and also, in the context of imperialism and white supremacy, inextricable. Disability discrimination (this person is too impaired, too limited, too damaged, has too many needs, is too ‘expensive’) can rationalize the subordination of racialized populations, while locating the practice in a presumably objective medical truth which is ostensibly distinct from race. But the right not to be discriminated against on the basis of disability has very limited meaning, absent recognition of the fact that disablement itself is already so often caused by subordination, and the day-to-day mechanics of discriminatory treatment are also always informed by and complicated by an inter-dynamic of race, class, gender, age, citizenship, and sexuality.

It is not (only) disability as a discrete, singular phenomenon which causes people with emergent disabilities to be shut out of access to the resources which inform and constitute both quality of life, and the right to continue to exist. It is rather the same subordinating forces which frequently create disability, that then ensure, in tandem with and through intensified disability subordination once the damage has been done, that projects of racial, gender, and economic destruction will be successful not just in breaking their targets, but in ensuring that the ‘broken’ will remain unrecognized and without social or legal remedy¹⁵⁵. In this sense, disability subordination – encompassing but not limited to the types of legal, social and economic discrimination embodied in equal protection law -- is a

¹⁵⁴ I qualify here that I am not suggesting that the model of intersectionality originating in legal Critical Race Theory, and embodied in Crenshaw’s seminal work is itself limited to an additive analysis or exclusive emphasis on compounded harm, but make this point since I contend that contemporary intersectionality discourse has often been reduced solely to an anti-essentialist identity-focused frame.

¹⁵⁵ Russell & Stewart’s conception of “disablement” is helpful here, in capturing the phenomenon of disability subordination as a process of legal and social constitution. Russell, *supra* note 62.

mechanism deeply entrenched in, reliant on, and in fact driven by white supremacy and colonialism. Disability is not just complicated by, compounded by, or coincident with race, gender, sexuality, class, age, citizenship, or related subordinated statuses. For people with emergent disabilities, disability subordination is also in fact a vehicle or mechanism of supposedly distinct forms of domination. Therefore, I don't hesitate to conclude this piece of my analysis by suggesting that no conception of "disability rights" can be functional, while not also being, among other things, explicitly race-conscious, both in acknowledging race in more than token terms, and in taking the challenge of dismantling racial subordination up as a disability-based project.

Returning to my primary textual focus – it should be acknowledged that neither document, the Programme or the Convention, gets anywhere very near a race-conscious conception of "disability rights" which is as expansive as my theoretical contemplation just above. However, the Programme's prevention language, as flawed and troubling as it also is, contains that one absolutely essential bi-part building block of a conception of international disability law which is accountable to and existing for people with emergent disabilities – the recognition of disablement, and at least a minimal contemplation of related and specific rights.

D. Equality and Emergent Disability

This analysis begs the question implicit in my paper title: what does "equality" mean for people with emergent disabilities? I pose the question both for the purpose of exploring some possible dimensions of the answer from my own perspective as a feminist, critical race/disability theorist, and as a means to re-consider the meaning and implications of the terms "equality" and "equalization of opportunities" as they manifest within international disability law. The section immediately previous contains the

elements of a critique of formalist notions of equality – embodied in anti-discrimination, as contrasted with anti-subordination principles. Both feminist legal and critical race scholars have put painstaking effort into delineating the distinction¹⁵⁶; formalist conceptions of equality suffer from a number of critical problems, relevant to the question of equality in international disability law. Most of these critiques are already present in this paper, but I synthesize them here, in order to consider the implications of disability equality as a human rights model and legal agenda.

First, at least as represented in the Convention, the meaning of equality is premised on a model of like or at least even treatment. Although the Convention makes a few minimal gestures towards basic human rights standards both by affirming its other Conventions, and through explicit language in a few of the articles (e.g. no one should be tortured¹⁵⁷), the Convention does not call on state signatories to uphold such strong standards relative to the right to healthcare, economic well-being, education, housing, or social status, such that “equal” treatment will necessarily actually amount to adequately humane or good treatment. In a sense, the conception of non-discriminatory treatment is particularly evocative of existing critiques of U.S. equal protection paradigms.¹⁵⁸ One element of a broader systemic subordinating structure is acknowledged and condemned, but in the process the validity of naming any of the many inter-related and inextricable elements of subordination is undermined. To make this point more explicit – the construction of disability rights primarily based on a conception of like or even treatment with people who are not disabled reinforces the idea that disability subordination is reducible to (individual) experiences of prejudicial or disparate treatment, and that questions of disablement, or basic collective and individual rights to health and quality of life are not essential to ensuring material and meaningful disability equality. I should

¹⁵⁶ See e.g. Fineman, *supra* note 110; Delgado, *supra* note 106.

¹⁵⁷ Convention, *supra* note 2.

¹⁵⁸ See e.g. Delgado, *supra* note 106; ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS & AND THE RULE OF LAW (2003) [HEREINAFTER WEST].

acknowledge that my critique here adheres to the specific articles of the Convention, and is at least slightly belied in the preamble, and in particular sub-section v, which contains a broader affirmation of the right to access to education and health¹⁵⁹. However, absent any specific commitments or mechanisms which support not just non-discriminatory or comparable degrees of access, but rather an inherent right, my critique holds¹⁶⁰.

Second, as I've argued repeatedly, a conception of meaningful equity or equality for people with emergent disabilities simply can not be temporally limited to the period when overt or manifest disability discrimination is named and present. Building on my first point, if the United Nations had posed the question to communities and populations of people with disabilities – ‘As a person with disability(ies), how are you treated differently than other people, and what are some of the consequences?’ – then one could read the various articles of the Convention as a fairly thoughtful, albeit limited attempt to recognize and remedy various areas of discriminatory or differential treatment. If however, the question were not “how are you treated differently”, but rather involved a more expansive methodology and empirical focus engaging how people with existing disabilities (and particularly, emergent disabilities) experience the world, what needs are most pressing, painful or central, and how whole communities are affected by the presence and dynamics of disablement – I contend that it would become more readily apparent that in this context notions of equality and justice which have no reparative or recuperative agenda are deeply deficient. That is, it is not just the current presence of disabilities, but the personal, political, and collective meanings of its violent infliction which requires legal attention. I make no pretense in this paper to doing any empirical or sociological work extending beyond textual interpretation – and my anticipating or hypothesizing an imagined social scientific project in this regard should not interpreted as

¹⁵⁹ Convention, *supra* 2.

¹⁶⁰ That is, I contend that the Convention does not mandate or even adequately implicate a disability right to be free of disabling harm.

negation of the need for the actual research. Nevertheless, I am taking the legal/analytical liberty here of asserting the hypothetical, in order to unpack some of the presumptions of equality as posited in the Convention.

Returning briefly to Part I of this paper, I suggest that in this context (international) disability law should be taking up the challenging of bridging dislocated conceptions of disability in different areas of law – meaning disability-as-injury or inflicted harm, and disability-as-identity or stigmatized social condition. I must acknowledge that this is not a small challenge and – as momentarily discussed in the introduction to this paper -- it runs afoul of at least some of the popular discourse of disability pride typifying western disability rights movements¹⁶¹. However, the need for re-evaluation and legal reconstruction here is pressing. I am intentionally advancing the argument here that it is not just inadequate, but that it also can be very injurious to elide the collective context of disablement from legal recognition, and then premise the supposed condition of equality as if needs for healing, remedy, or historicized public acknowledgement are irrelevant to its actualization.

Third, in thinking about what ‘equality’ means, it’s helpful to look to the Convention’s definition of disability discrimination, which reads:

*“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.*¹⁶²

To fully comprehend the implications of this phrasing, it’s important to also consider the Convention’s definition of “reasonable accommodation”, which is presented as follows:

¹⁶¹ See Shapiro, *supra* note 18. (for historical analysis of the construction of disability pride, in the U.S. disability rights movement).

¹⁶² Convention, *supra* note 2.

*"Reasonable 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.*¹⁶³

In Part I of this paper, I explored the implications of defining whether accommodation is “reasonable”, based on the burden imposed on an employer or institution. It’s helpful to revisit this argument here, and consider how emergent disability might complicate the question of whether a burden is “disproportionate or undue”.

The Convention does not define the terms explicitly, but it’s noteworthy that the language (which is not used in the Programme), is essentially identical to the terminology of the Americans with Disabilities Act¹⁶⁴. Although it should be acknowledged that individual state interpretations of the meaning of the Convention (and compliance with its tenets) will undoubtedly vary, to the extent that the Convention is interpreted in similar terms to the western civil rights laws which helped to generate it, a few points are salient. First, more than minimal expense will likely be understood as a legitimate defense to disability discrimination, in the sense that accommodations which cost money will be understood as unreasonable¹⁶⁵. Second, to the extent that the Convention is indeed applied similarly to U.S. domestic disability law, the question of employer or institutional liability for generating the disability will not be understood as relevant to the question of whether burden to accommodate is “undue”. In other words, though causing disabling harm may, in theory, generate accountability under some other area of international human rights, or domestic torts, labor, or civil rights law, it is distinguished from disability discrimination. The consequence of this structuring of state accountability leads to my third point, namely that it is not cognizable disability discrimination, or a violation of “disability rights” to, for example, dismiss an employee who has been disabled by exploitative labor conditions.

¹⁶³ *Ibid.*

¹⁶⁴ ADA, *supra* note 12.

¹⁶⁵ *Ibid.*

In considering how this organization of “equality” compares to the Programme, and to my own suppositions, I note the emphasis on the premise that a prerequisite for “achieving the purposes of the Programme” include “an improvement in the living standards of the population.”¹⁶⁶ Although this brief phrasing might appear to be a relatively minor difference, the presumption that disability rights and equity require some universal baseline economic rights or resources is especially notable, particularly in the context of contemporary globalization. Specifically, the Programme’s framing is, I argue, comparatively friendlier to an analysis which pinpoints and critiques mass and transnational economic exploitation, invasive militarization, and destruction of local economies as a cause of disablement. The Convention, in contrast, can readily be interpreted as emphasizing only that those who are (somehow, with virtually no reference to origin) impaired, should not be comparatively disadvantaged relative to those who have yet to be disabled.

Returning to my formative question, the consideration of “equality” for people with emergent disabilities serves to problematize both the structuring of international disability law, and the prospective utility of the term itself. On the first point, the crux of my analysis points to the internationalization of a U.S. domestic conception of (formal) equality as embodied both in Constitutional equal protection frameworks, and in related conceptions of (disability) civil rights as represented in statutes such as the ADA¹⁶⁷. Though I will not engage much more deeply here with the dimensions of a critique already fairly well delineated by existing feminist legal and critical race scholarship, namely the limitations of formalism as compared to substantive notions of equality¹⁶⁸, my contribution to this literature can be synthesized as follows: careful scrutiny of the UN Convention indicates an elision of some of the more substantive elements of an

¹⁶⁶ Programme, *supra* note 5.

¹⁶⁷ ADA, *supra* note 12.

¹⁶⁸ West, *supra* note 157.

“equality” legal paradigm, as compared to the Programme. Further, this move is not mono-dimensionally significant in terms of its impact on disability-specific law; its consequences, when viewed from the perspective of advocacy or consideration of people with emergent disabilities are not ‘neutral’ relative to race, class, age, economy, citizenship, sexuality, or gender.

On the latter point, I acknowledge that the questions of justice implicit in the idea of adequate standard of living, freedom from violence, environmental, cultural and spatial integrity, and rights to information and opportunity are not all inherently or universally understood as the terrain of “equality” or “equalization of opportunities”. Certainly this contention applies to a formalist notion of equality limited to concerns over disparate treatment or overt discrimination. However, it also indicates a legal and philosophical dilemma not at all unique to this context or analysis. That is, can ‘equality’ in a more substantive sense be presumptively coterminous with well-being, collective political integrity, or even mass longevity and survival? Or will laws constructed with equality as a primary or limiting premise necessarily constitute an inadequate basis for the realization of justice or cultural rights? My project in this paper is to echo critical scholars who raise this question¹⁶⁹, and hopefully provoke further consideration of the Convention as a case from which to consider the relationship between equality discourse, international law, and issues of global health and justice.

E. Can International Law Challenge Imperialism or Globalization?

Thus far, I have proceeded through this analysis without acknowledging that some of the meta-issues vexing international legal theorists and policy advocates are necessarily part of the context of this discussion. Specifically, statutes and legal documents are contingently interpreted, and their meanings are manifest through praxis.

¹⁶⁹ *Ibid.*

The text is not separable from the power relations, transnational negotiations, and state agendas which govern international legal discourse, negotiation, and transaction¹⁷⁰.

Although I will not delve at all deeply into a broader literature review here, acknowledging this point is critical to examining some of the reasons for, and not just the import of the differences between the UN Convention and the World Programme. As noted in the introduction, the World Programme, though reflective of the contributions of a range of entities, was never subject to the processes required to create a Convention which binds its voluntary state signatories (i.e. “hard” law). It was also far more reflective of the discourse embodied within the World Health Organization¹⁷¹, whereas the Convention emerged under the auspices of the UN Department of Economic and Social Affairs¹⁷². Without belaboring these particular structural variances, the question I wish to at least minimally engage here is this: Supposing the World Programme’s “prevention” imperatives and language about disablement had been updated in accordance with the critical concerns of disability communities, but not so thoroughly excised from the draft of the Convention presented to the UN General Assembly – would it in fact have been possible to secure its adoption and attract the commitments of member state signatories? Or to get to the heart of this question, what threats, challenges and implications would an alternate UN Convention more sensitized to the rights and concerns of people with emergent disabilities have posed within the schemas of international law?

To unpack this question, it’s helpful to revisit a few of the specific agendas highlighted within the Programme. Though the Programme does not explicitly mandate universal access to healthcare across the board, it does indicate that state responsibility

¹⁷⁰ See BETH A. SIMMONS & RICHARD STEINBERG, EDs., INTERNATIONAL LAW & INTERNATIONAL RELATIONS: AN INTERNATIONAL ORGANIZATION READER (2007) (explicating the point that legal texts must be interpreted contingently relative to the political situations, histories and interests of state powers which interpret and mediate them).

¹⁷¹ WHO, *supra* note 146.

¹⁷² See Enable *supra* note 2; I am indebted to Mark Weber for reminding me of the role of the Department of Economic and Social Affairs in the construction of the Convention.

for improved and expanded healthcare is critical to the achievement of its goals¹⁷³. The Convention is quite careful not to ever indicate that states must at large, take responsibility for healthcare provision, as opposed to monitoring or protecting its comparatively non-discriminatory delivery (a platform which at least on its face, does not ensure that non-discrimination implicates healthcare as an innate economic right).¹⁷⁴ Had the Convention embodied an imperative similar to the Programme, state signatories would have to commit to a standard of state responsibility for social welfare which for instance, currently exceeds the U.S. domestic sphere, as well as that of a number of other UN member states.¹⁷⁵

Similarly, it's provocative to contemplate the prospects for U.S. ratification of the Convention, had it contained recognition that victims of torture have specific disability-based legal rights. Although the contemporary U.S. administration under Barack Obama is in the process of eventual closure of its facilities in Guantanamo Bay, the notorious practices within Guantanamo and similar sites (e.g. Abu Ghraib) are representative both of U.S. insistence that torture can be justifiable (notwithstanding the UN Convention Against Torture¹⁷⁶), and relative to Guantanamo's inmates, that so-called "enemy combatants" exist outside of a range of both domestic and international legal protections.¹⁷⁷ Beyond the direct contradiction a stronger commitment to not engage in torture would entail with existing U.S. practices, for many UN member nations, acknowledging that victims of state violence (also including refugees and victims of warfare) have been concretely damaged to the extent that a new set of legal (disability) rights are invoked could conceivably constitute a stronger discursive/persuasive basis to

¹⁷³ Programme, *supra* note 5.

¹⁷⁴ Convention, *supra* note 2.

¹⁷⁵ See SUSAN C. MAPP, HUMAN RIGHTS & SOCIAL JUSTICE IN A GLOBAL PERSPECTIVE: AN INTRODUCTION TO INTERNATIONAL SOCIAL WORK (2007) (Speaking to the dilemmas of advocacy in states with limited social welfare mandates, and conceiving of the challenges in transnational context).

¹⁷⁶ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at: <http://www.hrweb.org/legal/cat.html>, last visited June 23, 2009.

¹⁷⁷ Muneer Ahmad, Speech, *Preventative Detention, Habeas Corpus, and Guantanamo Bay*, Raoul Wallenberg Human Rights Symposium, N.Y.U. L. Sch., N.Y.C., NY (January, 2006).

pursue reparations claims, or related cultural rights advocacy. In other words, the recognition of emergent disabilities in any specificity inherently invokes the prospect of increased state culpability for human rights violations and macro-level infliction of collective medical and psychological damage. Here, the comparison with the existing Convention is again quite drastic, in that within the Convention, the relationship of states to people with disabilities is primarily to monitor, dispense or protect rights which relate to a status (disability) that, absent any alternate recognition, will be understood solely as a condition inherent in the person, rather than a cognizable social/violent creation.

I could continue in this vein, engaging for instance, more specificity relative to the treatment of poverty and economic rights. However, I believe the over-arching point is evident. The passage of the Convention in its current incarnation, and particularly its differences from the World Programme are not mysterious or terribly surprising, given any minimal acknowledgement of a broader critical human rights discourse acknowledging tensions between individual state economic and political agendas and the obligations imposed within robust (and partially only imagined) human rights legal frameworks¹⁷⁸. What is particularly striking is not that the United Nations and its member states opted not to pass a more substantive disability rights framework imposing significant burdens on states to ensure collective health and well-being, commit to expansive social welfare and community economic development programs¹⁷⁹, and cease all practices which engender disabling violence. Nor is it entirely surprising that those disability communities and advocates who were involved in the Convention advanced it in its current terms, given the imperative to provide at least an initial anti-discrimination framework, as opposed to having nothing. The noteworthy point is that the choice to

¹⁷⁸ See Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 Colum. Hum. Rts. L. Rev. 259 (2004) (discussing the tensions between individual state interests in the U.S. & the west, and humanitarian ideals).

¹⁷⁹ Although the Programme is not entirely developed on these points, it is easily arguable that realization of its goals vis a vis substantially improved health and standard of living would certainly entail such a state burden, if translated into the text of a binding international Convention.

excise recognition of “disablement”, “mass disability”, or emergent disabilities from international disability law has occasioned so little response, even among the cadre of critical scholars who generally occupy an “anti-imperialist” stance relative to the role of the U.S. and western states in the formation of human rights standards and instruments.

Conclusion

In drawing to the close of any kind of critical exploration of something as multi-faceted and contentious as an international Convention, some acknowledgement of the limited scope of my lens and analysis seems merited. In this instance, I want to acknowledge that this paper engages some very under-explored terrain in necessarily – for a single article – unsatisfying depth. The critique I am advancing here of the formalist and conceptual limits of disability law is on its own, a theoretically provocative area. There is still virtually no legal literature on emergent disability¹⁸⁰, and literature in any discipline which gets at the intersections, rather than comparisons between disability and demographics such as race and gender is also severely under-developed.¹⁸¹ Therefore, to critique the UN Convention in terms of the legal constitution and subjectivity of people with emergent disabilities, in some respects I base my critique on a paradigm of law and identity which does not actually exist thoroughly anywhere, including within the World Programme. Further, although I believe it’s essential to advance this argument in terms which are grounded in existing feminist and critical race theories, the notion of intersectional analysis in this area is also half-imagined; I attempted both to presume and argue that race, gender, class, disability, age and sexuality are co-constituted and deployed in terms which make isolated consideration of any one parameter impossible. This presumption not only challenges the framing of international disability law; it also at

¹⁸⁰ For an exception, *see* Pokempner, *supra* note 31.

¹⁸¹ *Ibid.*

least pushes to expand the current articulation of much of existing critical legal theories, both in centering disability (an oft-ignored vector of analysis), and in arguing that racism, patriarchy, and economic exploitation are inherent in disability subordination. Needless to say, to make this set of conceptual leaps, I am implicating a number of substantive questions which I not only don't answer in this paper, but won't attempt to thoroughly explicate in this work.

Notwithstanding, I believe it's productive to at least identify some of those questions further here, not only in anticipation of my own future work, but in hopes that international legal, critical race, disability, and feminist theorists will take some of them up. First, the contemplation of disablement and emergent disability brings up compelling and salient issues both for disability lawyers, legal scholars and advocates, and for scholars and advocates interested in the embodiment of racial, gender, class, sexual, and age-based subordination. I must own again that I have not really begun, in this paper, to chart out carefully or comprehensively what 'rights' or legal claims might attach to emergent disabilities¹⁸², if international and domestic disability laws were to begin to re-define disability and disability rights in relevant terms. However, this paper does maintain that the questions associated with enacting rights or law for people with emergent disabilities should at least be asked, and their significance asserted. Though in some respects, the Convention and its proponents rightly recognized the fluidity of disability and the need to avoid stringent or exclusive definition, a particular meaning of disability is nevertheless reinforced in the Convention, in which disability is a primarily individual experience of difference or impairment; it matters because of the treatment it engenders, and not the treatment which may have engendered it. In this sense, my

¹⁸² The key assertions I have advanced here include the point that existing rights frames which do not consider the role of institutional perpetration or subordination in assessing state or entity burden are inadequate, and also that some framework of rights to recovery or remedy (without as yet, more delineation) should become part of disability rights or disability justice parlance. The mapping of any comprehensive model of what 'emergent disability rights' entails is another project, beyond the scope of this paper.

critique raises a base question which I hope will begin to influence future lawmaking. That question is: “what does disability mean?”, and I assert that historicization, causation or point of origin is part of the answer.

Second, what now? The Convention exists, and many committed, smart and impassioned disability advocates and the organizations and communities they adhere to, worked very hard to ensure that at least such a thing as disability human rights might become part of international legal discourse and praxis. Although my critique in this paper is not mild, it is also not meant to obfuscate that the process of creating transnational legal instruments is dense and virtually mandates compromise. In some respects it is the enervating privilege and luxury of the legal scholar to contemplate what should have been, without solving all of the problems inherent in getting anywhere near an idealized outcome. Notwithstanding my critique of the erasure of emergent disability (with its various racial, gendered, economic, sexual and age implications), the Convention reflects certain productive expansions on the concepts of access, accommodation, and rights, when compared to for instance, the Americans with Disabilities Act. These differences matter, and should be used to accomplish what substantive advocacy can be achieved, for the benefit of people with emergent disabilities – if not relative to disablement, at least relative to the ongoing damage disability subordination inflicts in the aftermath. However, I also think the question of whether there are prospects for shifting international disability law now should also be asked. And while I will not explore it in this paper, as a initial provocation, I will at least note the prospect of creating an expanded platform within the boundaries of international law which engages explicitly and energetically with disablement, emergent disability, and actually improves on the Programme’s invocations of race, poverty, gender, warfare, age, and particularly violently disabled populations. Given the existing textual limits of the Convention, and the challenges of amending a newly enacted international law, such an effort would likely occur as a distinct or new document.

Finally, this analysis highlights not just the intersection of identities, but the intersectional co-constitution of subordinating institutions such that disability is often not only not discrete, but literally created by race, gender, class, sexuality, age, religion citizenship, and nationality. Disability can be, among other things, a (violent) production. I have intentionally and gratefully turned to critical race theory and feminist legal theory in this paper (in an otherwise near-vacuum in the literature in both law, and much of disability studies), in order to draw out some of the resonant dynamics between the erasure of emergent disabilities from legal conception, and the politics of formalist equal protection in domestic law. That said, there is not yet a developed critical vocabulary or discourse which allows for the naming of this particular dynamic, though obviously this paper is an attempt to catalyze dialogue. Is this an effective expansion on the meaning of “intersectionality” as first posited by critical race feminist, Kimberlé Crenshaw¹⁸³? In appreciation of her work, and in hopes of contributing to the underlying anti-subordination agenda which I recognize in the CRT movement, I would be glad to be confident in asserting that it is. However, I believe it’s also productive to use this question as a jumping off point to think more deeply about our representations of the relationships between the universally relentless and constantly specific and targeted dynamics of subordination which drive and motivate critical scholarship. In that vein, I conclude with a compound question continually present and never comprehensively resolved within the totality of this analysis: how is disability produced by subordination, and what should law do about it?

¹⁸³ Crenshaw, *supra* note 98.